AUSTRALIAN CONSERVATION FOUNDATION

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13 April 2018

Mr Gerry McInally
Committee Secretary
Senate Select Committee into the Political Influence of Donations
PO Box 6100, Parliament House
CANBERRA ACT 2600

Submitted via email: politicaldonations.sen@aph.gov.au

Dear Secretary,

Regulation of third parties – political funding and disclosure

We refer to your letter of 28 March 2018, and respond to the questions therein as follows. Please note that the below represents some suggestions on reform to the *Commonwealth Electoral Act 1918* ('Electoral Act') that would result in a better and fairer system of elections in Australia. They are not detailed proposals for reform. Indeed, detailed proposals for reform should be subject to thorough consultation. A detailed Regulatory Impact Statement should be prepared and published.

As is evident from the proposal of the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017* ('Foreign Donations Bill') and the significant concern generated by it, amendments to the *Commonwealth Electoral Act 1918* can have far reaching and unintended consequences.

There are two competing considerations when considering regulation of third party activity in this realm. Principles of fairness and political integrity point to stricter regulation, whereas, the democratic importance of political freedoms and political participation points to less. This is especially if the proposed regulatory burden is considerable. The challenge lies in developing a workable regime that balances these considerations in the context where third parties have purposes other than political advocacy, such as charitable purposes. It must also be taken in to account that one strong objective of these laws is to protect our political system from corruption. In this sense, politicians and political parties represent a much higher corruption risk than third parties. Third parties can only advocate for government (or voters) to take particular action. Politicians themselves stand to end up in positions where they control the levers of power. As such, the most urgent priority for reform of the Electoral Act should be placing appropriate restrictions on politicians and political parties. Overall, third parties should be subject to less stringent requirements, because the level of risk of corruption is also less.

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The adequacy of current laws governing third parties and their political expenditure

Overall, election laws are inadequate to protect the integrity of representative government and to promote fairness in politics. ACF supports stricter provisions for political parties, associated entities and third parties, including:

- effective transparency of political funding,
- caps on election spending,
- caps on political donations,
- a fair system of public funding of political parties and candidates,
- a ban on overseas-sourced donations and donations from foreign governments, and
- more effective regulation of lobbyists.

Ideally these reforms, if drafted appropriately and carefully, could and should cover the *relevant activities* of third parties.

It is important to note here that third parties under electoral laws should be characterised as 'third parties', not as 'political campaigners', as is suggested by the Foreign Donations Bill. Simply because a third party conducts some activities that are (and ought to be) captured by Electoral laws does not mean it is, in its character, a political campaigning organisation akin to a political party. As a registered charity in Australia, with a public interest environmental protection purpose, ACF strenuously opposes this classification. Charities exist to pursue a charitable purpose in the public interest, whether that be preventing dangerous climate change, closing the gap for Indigenous Australians, or providing legal services to people suffering with a mental illness. Political parties exist to campaign for the election of candidates to the Parliament of Australia. The two should not be conflated and ACF does not support any reform which seeks to do this.

The most appropriate means, if any, of further regulating third party actors to improve the integrity of political decision-making, including the possibility of caps on political expenditure, caps on political donations, and restrictions regarding foreign donations

As above, stricter disclosure requirements, caps on political expenditure, caps on political donations (with some exceptions) and restrictions regarding foreign donations that apply across the board to all political players would represent an improvement to the integrity of elections but only if they can be done without silencing third party voices.

To achieve this, the following must occur:

1. The definition of 'political expenditure' as it relates to third parties is imprecise and must be reformed. At present, 'political expenditure' includes 'the public expression of views on an issue in an election by any means'. This is too broad and imprecise, and potentially captures the issues-based campaigning of some charities and NGOs. The definition of 'political expenditure' should seek to capture expenditure that is

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intended to affect electoral contests, not expenditure for campaigning promoting an issue in the general sense.

We recommend the Committee look at more precise definitions. For example, the definition in the UK *Political Parties, Elections and Referendum Act 2000* is informative: "Spending on publicly-available material that can reasonably be regarded as intended to promote or procure electoral success for a party of candidate". Alternatively, expenditure could be defined as "expenditure incurred for the dominant purpose of promoting or opposing a political party or a candidate for political office", which would bring the definition in line with the *Charities Act 2013*.

Such a definition, on the face of it, would potentially allow purely issues-based campaigning to continue unimpeded and allow charities to advocate in pursuit of their charitable purpose, without these activities being caught by the Electoral Act.

It would be important in practice for this to be accompanied by a good and clear guidance document from the Australian Electoral Commission. This definition is crucial to the whole operation of the Electoral Act and so it must be consulted on thoroughly so that the full range of impacts are understood.

2. There should be finite and set period when the relevant disclosures and caps apply to third parties (e.g. three-six months out from polling day, rather than year around).

3. It is crucial that clarity is provided around what is included and excluded from political expenditure (i.e. staff and office costs should be excluded for third parties).

4. For donation disclosures and caps, only donations made with the intention (of the donor) to be spent on 'political expenditure' should be captured. When there is no nexus between a 'gift' and 'political expenditure', that gift should fall outside the regime. Philanthropic donations (that are a tax deductible 'gift' under Division 30 of the *Income Tax Assessment Act 1997*) to third parties should not be captured, unless such a donation is given to a third party specifically to be directed to political expenditure.

5. Only third parties that incur significant political expenditure should be regulated. If the 'political expenditure' of a third party exceeds $100,000 per annum, the third party should be subject to the coverage under the Act.

Whether third party actors would accept further regulation if it were part of a comprehensive reform of the political funding and disclosure regime

ACF would accept further regulation on the conditions detailed above, and if adequate consultation occurs on the details of the reform.

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Whether all types of third parties should be treated equally in relation to regulation of their political expenditure

Yes. What is critical here is that the definition of 'political expenditure' is refined so that the everyday public interest advocacy activities of charities and NGOs fall outside of the scheme.

How additional third party regulation might impact charities in their ability to fulfil their purpose under the ACNC Act

ACF's charitable purpose is advancing the natural environment. In pursuing this purpose ACF's goal is to ultimately achieve multi-partisanship around environmental policy because it understands that solving systemic threats like climate change will take longer than a term of government and therefore requires leadership from all major political parties. This involves educating and advocating to current and future decision makers on the issues ACF has prioritised in pursuit of its environmental purpose to encourage policy commitments that will ensure a positive environmental outcome. ACF is at all times strictly non-partisan, in that it does not promote or oppose political parties or candidates.

Increasingly charitable organisations focus their efforts on advocacy, because advocacy is fundamental to driving large scale positive change for the issues that they care about. Advocacy is not only consistent with ACF's charitable purpose, but without advocacy, which creates a 'race to the top' on environmental policy, it is in fact very difficult for ACF to achieve its charitable purposes.

Badly thought-out or hasty reform to the Electoral Act is in danger of creating a 'chilling effect' on advocacy by charities. That is, it will deter speech without expressly prohibiting it. This is at the heart of the criticism of the Foreign Donations Bill.

By way of illustration, the electoral regulation in South Australia provides an example of how the best intentions to create strict election laws results in charitable voices being silenced.

South Australia Case Study

Under the South Australian *Electoral Act 1985* charities and other civil society organisations can qualify as "third party campaigners" for merely going about their business of advocating on their issue. In South Australia, organisations that spend $10,000 or more on 'political expenditure' (expenditure incurred for the purposes of the "public expression of views on an issue in an election by any means") face disclosure and reporting requirements. In the case of South Australia, once that limit has been exceeded, a return must be lodged with the SA Electoral Commission. These returns must contain full financial reports (income and debts) and the names and addresses of all donors who made donations greater than $5000.

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The reporting requirements are ongoing. Once the election is over returns must be lodged every six months until the next election. Most bizarrely, as a 'third party campaigner' one must disclose the names of all its donors who donated $5000 or more, whether or not those donations were used for 'political expenditure' relevant to South Australia.

As a result of this, many civil society groups drastically scaled back their planned issues-based advocacy activities in the lead up to the South Australian state election in March 2018 so as to not breach the $10,000 cap. ACF was forced to reconsider the work it does in promoting things like clean energy, safe energy production and environmental flows to the Murray River, because we take our compliance obligations very seriously. We also gave great weight to our donors' right to privacy. For groups that rely on the generosity of individuals to do their important public interest work, the risk of breaching the trust with their donors and jeopardising future donations is untenable. The outcome was that very few independent, third party voices were heard in South Australia in February and March this year.

In closing, I reiterate the importance of thorough consultation on any draft Bill that reforms the political funding and disclosure regime

Yours sincerely

Kelly O'Shanassy
Chief Executive Officer

cc: seniorclerk.committees.sen@aph.gov.au