Submission to the Joint Committee on Electoral Matters

AMENDMENTS TO THE ELECTORAL LEGISLATION AMENDMENT (ELECTORAL FUNDING AND DISCLOSURE REFORM) BILL 2017

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General: Legislative Complexity and Overall Goals

The government has reined in some of the overreach in the original Bill. This is welcome and shows the value of Committee oversight and public consultation.

It is still the case that the revamping of the Commonwealth Electoral Act adds – in some cases fiendish – complexity to the Act and the Part XX funding/disclosure regime.

Remember that the Act mostly applies to not-for-profit groups, whether they be parties (large and small), registered unions or civil society groups. For-profit corporations only intersect with the Act if they make large donations or – rarely – run campaigns caught by the Act. So the regulatory burden of the Act must balance:

1. The *groups* it falls on. Major parties (and, to a lesser extent, unions and for-profit corporations that donate or campaign over thresholds) are well resourced, professional political players. Small and new parties, and most civil society groups, are not.
2. The *value of its regulatory objects*. The objects of the Commonwealth regime remain modest. Modest both by world standards and compared to the comprehensive New South Wales system. It will still just provide: (i) public funding of parties, (ii) a level of disclosure; and now (iii) some limits on foreign donations.
   The achievement of the Bill is to broaden the disclosure regime, making it more like a law of federal *political finance* disclosure, and not just electoral finance disclosure.
   But disclosure will remain woefully untimely. And there will still be no caps on donations and expenditure. Real-time disclosure is being implemented at State level, whilst caps are commonplace overseas. These are all broader objectives which serious reformers on all sides have advocated for well over a decade.

Overall, the Bill erects as an intricate scaffolding given such modest regulatory objects. In other words, it swallows spiders to catch a few flies.

New Provisions Excluding State Laws

Two provisions have appeared out of the blue: proposed ss 302CA and 314B. Their appearance is remarkable because they do not arise out of the original purposes of the Bill, which focused on foreign donations and increasing transparency of non-party campaigners.

Instead they are aimed to neuter State laws on electoral donations and disclosure. (By leveraging s 109 of the Constitution, which is meant to resolve 'inconsistency' between Commonwealth and State law).

The first provision affects State laws limiting or prohibiting donations. The second affects State laws requiring disclosure of donations. In either case, the State law would be excluded *merely if the donation 'may' be used* for federal electoral expenditure or electoral matter. That is a low if not tenuous connection to federal elections. Parties simply have to encourage (or avoid asking) donors to attach caveats on the use of their gifts.

These provisions seem to be a reaction to State laws in recent years, especially in NSW and Queensland, that have sought to more tightly regulate electoral finance.

For the whole of federation, parties have been organised federally. That is, parties build on State divisions/branches.[1] As entities those divisions/branches have three manifestations: a focus on Commonwealth politics and elections, a focus on State (including local government) politics and elections, and an ongoing administrative and membership focus. That is an inevitable consequence of federalism and history. The integrity of political parties includes the integrity of their State branches as ongoing administrative and membership bodies. Concerns with integrity cannot be simply hived off into 'donations to help federal campaigns' versus 'State campaigns'.

1. The exclusion of State disclosure laws overturns the well-reasoned judgment in *Electoral Commissioner of Queensland v Awabdy* (2018). Justice Jackson effectively held that there was no necessary inconsistency between a higher Commonwealth disclosure threshold and a lower State one. One can easily meet both disclosure requirements. There is no good policy reason for s 314B to so significantly impede State disclosure law, especially the more timely and substantively transparent laws now found in places like Queensland, NSW and South Australia.[2] On the contrary we might welcome the fact that States can experiment: that is 'incubator' or 'competitive' federalism at work.[3]

2. The exclusion of State laws limiting donations are, I guess, aimed at the recent Queensland bans on 'property developer' donations and the older NSW ban on developer, tobacco, liquor and gaming donations. Those laws do not permit such donations to be corralled for purely federal electoral purposes.[4] Presumably the reason is that, if the State parliaments believe such donations taint the State political process then their receipt by State divisions of parties, for whatever purposes, creates at least the appearance of such taint. In any event, State laws do not and cannot stop such donations being given to the national division of a party, to assist the overall federal campaign.

   A court challenge to the Queensland laws has been mooted. Proposed s 302CA would cut across any such judicial consideration.

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[1] As were trade unions. There is a history of unintended negative impacts on union administration because of the law treating State registered unions as separate legal entities to State divisions of nationally registered unions (the '*Moore v Doyle*' problem). Regulation of political parties – whose State divisions/branches have to register under both Commonwealth and State electoral acts – should not sleep-walk into analogous problems.

[2] States may, alternately, choose not to require dual disclosure to ease any administrative burden on parties. Eg *Electoral Act 1907* (WA) s 175N(2) exempts, from disclosure via the WA Electoral Commission, any 'gifts made to [a political] party for a purpose related to a federal election'.

[3] National legal leadership is desirable. But political finance law at a national level in Australia has failed to adapt or modernise, making it desirable that States have driven debates by trying out different options: see Graeme Orr, 'Party Finance Law in Australia: Innovation and Enervation' (2016) 15 *Election Law Journal* 58.

[4] Eg compare *Electoral Funding Act 2018* (NSW) ss 5 and 51-52 (prohibited donations) to s 24(2) (which carves out 'federal campaign donations' from the cap of $6100 pa for political donations generally

If s 302CA is just a Commonwealth reaction to overreach in the State property developer etc bans, it should simply cover the narrow field of donations from such sectors, by ensuring they remain open for federal electioneering purposes.

Instead, s 302CA goes much wider and may unpredictably limit legitimate State laws. For instance, recent NSW and Victorian laws about 'foreign' political donations.[5] It may also affect the general NSW donation caps. Those caps explicitly exempt donations paid into 'an account kept exclusively for … federal election campaigns'.[6] But s 302CA is broader and would exclude any State limits on any money that 'may' be used for federal 'electoral expenditure .. or electoral matter'.

If s 302CA becomes law, I imagine the fallback position for the States would be to legislate so that no donations they prohibit can be paid into an account for State (including local government) political advocacy or electioneering. And to erect measures to require that such activity only ever be funded from such a specialised account .

The Commonwealth Parliament may desire a regime where parties (and other campaigners?) are forced to keep separate 'federal' election accounts, distinct from 'state' (including local) accounts, distinct from general party administration accounts. If so, it may also wish the Commonwealth Electoral Act to cover the field in relation to monies explicitly donated into 'federal' electoral accounts.

But it has overreached here by throwing up rules without any apparent prior consultation with all States, or any apparent careful consultation with all political parties. Even if consultation with the States cannot harmonise all policy goals, it is important to avoid unintended cracks opening up between Federal and State laws: cracks in which donations made hide or through which they may seep.

Sections 302CA and 314B should *not* be proceeded with. They should go back to the drawing board, via a COAG process.

Specific Comments on the Bill as Amended

- ***Scope of 'Electoral Matter' and Effect on Tagging Laws***

A narrowed definition of 'electoral matter' is proposed (s 4AA). The longstanding existing definition (and state analogues) covers any material 'intended or likely' to affect voting. The new definition is 'matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote' including by promoting or opposing a federal party, candidate or MP. The narrowing is achieved by the 'dominant purpose' phrase. The reason appears to be to ensnare less civil society campaigning in the complex new nets.

1. The old definition clearly caught material that was *either* subjectively intended to affect voters or material that was objectively 'likely' to affect voting. The new definition fudges the subjective/objective aspect. It breaks down to two alternatives: (a) 'matter

[5] *Electoral Act 2002* (Vic) s 217A; *Electoral Funding Act 2018* (NSW) s 46.
[6] *Electoral Funding Act 2018* (NSW) s 24(2).

communicated … for the dominant purpose'. And (b) 'matter intended to be communicated for the dominant purpose' (note the hint of tautology there).
If the legislative aim is to add a 'dominant' *effect* test to restrain the old idea of electoral matter, then proposed s 4AA needs to be reworded. To something like 'matter whose dominant effect, whether measured by intention or likelihood, is influencing …'.
But if the legislative aim is to go further and narrow 'electoral matter' to require only a dominant *subjective* purpose, then s 4AA needs to be reworded. To something like 'matter communicated with the predominant intention of influencing …'

2. **The narrower 'electoral matter' test will reduce the amount of material required to be authorised (ie tagged) under the Electoral Act (s 321D).** This may not be altogether a bad thing. Recall how the AEC required the Labor Government's 'Nation Building' signs outside schools to be authorised (from memory those signs already sported the Commonwealth logo and just lacked the name of the printer).
But it is ironic, for a Bill in large part driven to extend financial 'transparency' to civil society groups that engage in political advocacy, to *reduce* the transparency of the source of advocacy. And to reduce it where it matters most: the point of contact with the public.[7] It is also an odd result since the JSCEM spent considerable time after the 2016 election revamping tagging laws, to address misleading and anonymous material. The idea of tagging is so basic that it goes back over a century and was endorsed by the High Court in *Smith v Oldham* (1912).

- ***Permanent Residents***

It is pleasing that the limits on 'foreign donors' will now explicitly not apply to permanent residents (proposed s 287AA). As I argued in my original submission, letting the Minister exclude permanent residents was bad law. Bad procedurally: matters of principle belong with Parliament. And bad morally: most permanent residents are denied the vote, but they are not 'foreign'. They have real and direct political interests as everyday subjects of Australian law and government action. (Reinforcing that, as the table to my original submission showed, comparable countries that regulate 'foreign' activity do not exclude permanent residents.)

There may be a definitional glitch, however, as many New Zealanders in Australia would appear to be classed as 'foreign' donors. In the proposed s 287(1) definition, Australian 'resident' means 'a person who holds a permanent visa under the Migration Act'. Most post-2001 Kiwis at least are confined' to 'special category visas'.[8] That seems a perverse outcome. Are they really more politically 'foreign' than permanent residents, especially given their rights of open entry and work?

- ***Consultation Time: Infelicities and Unintended Effects***

There is a very short consultation time (8 days for the public to make a submission) given the number of key concepts and complexity of the provisions.

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[7] 'Most' because the broad tagging requirements for broadcast material (covering any 'political' matter broadcast at the request of someone other than the broadcaster, won't change. See Broadcasting Services Act 1992 (Cth) Sch 2. That said, campaigning via TV and radio advertising has declined in relative importance in recent years.
[8] They fall into the technical crack between 'permanent' and 'temporary' visas: *Migration Act 1958* (Cth) s 30.

Hopefully the Committee has lawyers, and the parliamentary counsel are checking the proposed Act in full, to examine any unintended effects and infelicities. The New Zealander issue may be one unintended effect.

A new concept of 'political entity' is defined in s 4 of the Electoral Act as a coverall for Australian parties and candidates. **Yet the same phrase, 'political entity' is already used in s 193(4) of the Act, in the international law sense.** That is, a nation-state or polity.

Another possible glitch is that the new narrowed definition of 'electoral matter' explicitly does not apply to the 'cover the field' provisions discussed above. But that means those provisions use 'electoral matter' as a definition-less term (compare s 4AA and s 302CA and s 314B).

- ***Transparency Register***

The AEC will be able to extend the information that may or must be included in the Register (s 287O(5)-(6)). Is that just for efficiency, so the AEC can make the Register a more useful portal of public information? Or is it intended to give the AEC power to demand more publishable information from those on the Register?

In either case, **is it fair that those people and entities on the Register *will be exposed to liability* for not correcting material on the Register (s 287P) if some of that information may be put on the Register by the AEC on its own volition and under its own regulation?**

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