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1 February 2011

Committee Secretary  
Joint Standing Committee on Electoral Matters  
Parliament House  
Canberra ACT 2600

Dear Secretary

## **INQUIRY INTO THE CONDUCT OF THE 2010 FEDERAL ELECTION AND MATTERS RELATED THERETO**

I make the following points based upon my earlier submissions to the first and second Electoral Reform Green Papers.

### **Donations, Funding and Expenditure**

At present, there are a myriad of problems that corrode public confidence in the political system and in those who serve in parliament. I support a comprehensive overhaul of electoral law as it relates to donations, funding and expenditure. Importantly, the reforms in each of these areas must reinforce each other to produce a system that operates in the best interests of Australian democracy and the Australian people. Electoral reform is needed to bring about a more effective and fair electoral system. The long term strength of Australian democracy depends upon such reforms.

Reforms should be founded on the principle of transparency and disclosure and should include caps on donations and expenditure. Combined with restrictions on the use of funds for purposes like electronic advertising, this might mean that the current level of public funding will be sufficient, or near to sufficient.

It is important that reforms are undertaken in a holistic manner. There is no point, for example, in capping donations if the expenditure side of the equation is not also dealt with. It is also important that the reforms do not merely amount to changes in legal regulation, but also have an impact upon the culture within political organisations. Australia needs to develop a system

that has clear rules that direct political campaigning into more useful and appropriate channels, but these rules by themselves will not be adequate unless they are backed by a clear understanding and recognition of their worth on the part of participants in the political process.

When it comes to donations, non-residents should not be entitled to make monetary contributions to Australian political parties. Their involvement in this way has the capacity to distort the Australian electoral system and to provide an inappropriate outside influence on democratic decision making in Australia. I also favour placing a cap on donations, and perhaps even preventing donations from anyone other than individuals, but only on the basis of adequate public funding of political campaigning and expenditure caps on campaigning.

I support a cap on the expenditure of funds on campaigning by political parties, candidates and other participants both in and outside of the formal election period. Proven expenditure should be the only basis upon which a person or party can receive public funding. It should be made clear that taxpayers' funds relating to political campaigning can only be received where they can be matched to actual expenditure.

One major concern lies in the demand for money in order to undertake electronic and other forms of advertising. An attempt to limit such advertising was struck down in 1992 by the High Court in *Australian Capital Television*. The idea of limiting electronic advertising should be revisited. That High Court decision struck down a particular scheme that was found to be deficient in light of a freedom of political communication then implied from the Constitution. That was not an implication that was taken into account in the drafting of the legislation because at the time the law was drafted the implication had not yet been recognised.

I believe that it would be possible to design a new scheme to limit electronic advertising that would be consistent with the constitutional implication. It is not, for example, clear (as is stated in para 10.20 of the first Electoral Reform Green Paper) that 'a complete ban on election advertising would likely be unconstitutional'. This was not the finding of the High Court, and any judicial assessment would depend on matters such as the nature of the ban and the other avenues still available for political campaigning.

Reform of electronic advertising should be undertaken because any cap on donations or expenditure is unlikely to be effective unless the demand for funds by political parties and candidates is also reduced. Other nations with more stringent limitations on freedom of speech and related political freedoms have proven capable of enacting limitations on advertising (and hence the demand of money) within the political system. They have recognised the clear imperative of regulating matters such as electronic advertising in order to produce a fair and open electoral contest that is not distorted by money. It is time that Australia again sought to go down this path.

In regard to reforms already proposed, I have strongly supported the measures set out in the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008. These changes are essential reforms that should help pave the way for larger reforms to bring about a fairer electoral system for Australia.

### **The Franchise**

The franchise should be fashioned around the concept of citizenship. I support removing the right to vote in federal elections from 'British subjects' and extending the right to vote further when it comes to expatriate Australian citizens.

British subjects should lose their right to vote in Australian elections.<sup>1</sup> British subjects on the electoral roll should be given a final chance to become Australian citizens. If they decide not to take up the invitation, they should lose their Australian voting rights.

The report into the 2007 federal election by the Federal Parliament's Joint Standing Committee on Electoral Matters did not take a position on whether British subjects who are not Australian citizens should still be able to vote. This was addressed in supplementary remarks by the chair of the committee, Daryl Melham MP. Melham noted that British subjects eligible to vote in Australian federal elections come from 48 Commonwealth and former Commonwealth countries, such as the United Kingdom, India, Malaysia, New Zealand, Jamaica and Zimbabwe. Collectively, they make up 1.2% of the Australian electoral roll. Wakefield, a seat in South Australia, has nearly 4,000 British subjects enrolled. Many other seats, including several marginal seats, also have a high number of such voters.

It no longer makes sense to preserve the Australian voting rights of British subjects. Since their voting rights were frozen in 1984, Australia has severed its final legal ties to the United Kingdom by enacting the Australia Acts of 1986 (though, it must be said, we have yet to sever our final symbolic ties to the British Empire as represented by our head of state being the monarch of the United Kingdom). In *Sue v Hill* (1999) 199 CLR 462, the High Court even found British citizens to be ineligible to stand for election to Federal Parliament because they owe allegiance to a 'foreign power'.

There are now no sound arguments for granting a select group of foreign citizens the right to vote for Australian representatives and law-makers. The fact that British subjects have voted in the past is not a good reason for them to continue to do so when they have the option to signal their commitment to the nation by adopting Australian citizenship. Changes made in 2002 mean that, under Australian law, foreign citizens can take up Australian citizenship without giving up their citizenship of another nation.<sup>2</sup> They should be welcomed if they take up citizenship, but if they choose not to do so it is time that they ceased to be able to vote for members of the Australian Parliament.

### **Enrolment and Participation**

The 'free and fair' nature of Australian elections is underpinned by the 'participation principle', which requires that all citizens enjoy an equal opportunity to participate in the electoral process and to access the ballot box.<sup>3</sup> The fact that 1.2 million eligible Australians are not on the electoral roll is unsatisfactory.

An eligible elector should be added to the electoral roll or an elector's enrolment details should be updated based on data obtained from other reliable government sources, subject of course to a rigorous quality assurance process. A system of automatic enrolment is consistent with the legal requirement of compulsory enrolment.

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<sup>1</sup> See George Williams, 'Time to take away their right to vote', *Sydney Morning Herald*, 30 June 2009.

<sup>2</sup> *Australian Citizenship Legislation Amendment Act 2002* (Cth).

<sup>3</sup> Bryan Mercurio and George Williams, 'Australian Electoral Law: Free and Fair?' (2004) 32 *Federal Law Review* 365.

People should be entitled to ‘opt out’ of automatic enrolment. The converse, an ‘opt in’ system, would be counter-productive in terms of maximising voter enrolment because many of the people who currently do not enrol would be the same people who would not take the necessary steps to ‘opt in’ to the new system. A right to ‘opt out’ strikes the right balance between maximising participation and safeguarding privacy and other rights.

### **Eligibility for Federal Parliament**

The purpose behind section 44 of the Australian Constitution is obscure and anachronistic. Moreover, the provision has been interpreted in such a way that hampers Australian democracy. The leading High Court decision on ss 44(i) and (iv) is *Sykes v Cleary* (1992) 176 CLR 77. It demonstrates that both ss 44(i) and (iv) should be amended. Of course, s 44 can only be altered by way of a referendum held in accordance with s 128 of the Constitution.

#### ***Section 44(i): ‘allegiance to a foreign power’***

The operation of s 44(i) lacks clarity and precision. For example, the wording of the provision does not make it clear that it is insufficient that prospective candidates go through an Australian citizenship ceremony. In fact, a person is incapable of being chosen unless he or she also takes the further step of divesting him or herself of nationality under the law of the other country. While there are some important policy reasons for a provision such as s 44(i), it, like s 44(iv), has a potentially draconian impact that should be remedied. Given that almost one in four Australians were born overseas, s 44(i) prevents almost five million Australians from being a candidate for Federal Parliament. Either the wording of s 44(i) should be amended to make its scope more clear, or it should allow persons to stand for Parliament where they have gone through an Australian citizenship ceremony.

#### ***Section 44(iv): ‘office of profit under the Crown’***

The operation of s 44(iv) is unsatisfactory in that it discriminates against the ability of public servants and other public officials to run for public office. In order to do so, such people must resign their position before any indication of whether they have been successful in the ballot. While there are strong policy reasons for a sitting member of Parliament not holding ‘an office of profit under the Crown’, this should not operate to force candidates out of public sector employment before their actual election. Resignation by public servants should be required at the time of the declaration of the poll, rather than at the point of nomination. Section 44(iv) cuts in too early.<sup>4</sup> The words ‘of being chosen or’ in s 44 should be deleted.<sup>5</sup>

### **Truth in Political Advertising**

There is relatively little regulation of campaign advertising in Australia. False political advertising should be better regulated. The provision of accurate information to voters goes to the heart of the ‘knowledge principle’ which underpins ‘free and fair’ elections in Australia.<sup>6</sup>

Even though there is not a high likelihood of many prosecutions under any such a provision, it would stand as a clear statement that the law does not tolerate campaigning of this type. The

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<sup>4</sup> *Sykes v Cleary* (1992) 176 CLR 77.

<sup>5</sup> Note that this change will apply to s 44(i)-(v).

<sup>6</sup> Bryan Mercurio and George Williams, ‘Australian Electoral Law: Free and Fair?’ (2004) 32 *Federal Law Review* 365.

provision would be useful as a deterrent, and might help to curb the cynicism of the electorate towards the political process. It should also be seen as part of improving ethical standards in electioneering.

Legislation restricting political advertising will need to be carefully drafted so as not to fall foul of the implied constitutional freedom of political communication. The High Court has stated that there is no absolute right to engage in political speech, including political advertising. Accordingly, political advertising might be regulated on the basis of meeting some other significant public interest. The public interest of proscribing false political advertising would be such an interest.

The boundaries of what is ‘political advertising’ are obviously imprecise. Nevertheless, it would be possible to draft a definition capable of encompassing most forms of political advertising, and not other advertising such as commercial advertising. Such a definition might focus upon the purpose of political advertising, that is, that the advertising is directed at influencing a voter as to how he or she should cast his or her vote at an election.<sup>7</sup> The definition might be further restricted to only encompass advertising occurring during an election period.

In imposing any restriction, Parliament should err on the side of caution and draft a narrower rather than a broader restriction. The law should proscribe political advertising that makes an assertion of fact that can be proven to be false.

It should also be a defence if the person:

1. Was unaware of the falsity of the material published;
2. Did not publish the material recklessly, that is, not caring whether the material was true or false; and
3. The publication was reasonable in the circumstances.

There should be no sanctions imposed on third party publishers unless it can be shown that such a publisher was itself aware that the political advertisement was false. A third party publisher should not be required to undertake onerous enquiries as to the truth or falsity of any political advertisement.

Where a breach occurs, there should be the possibility of a significant fine. Consistent with the public interest, the law should also provide for the withdrawal of advertisements, injunctions and the publication of corrections.

Yours sincerely

George Williams

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<sup>7</sup> See the definitions of ‘political advertisement’ and ‘political matter’ in *Political Broadcasts and Political Disclosures Act 1991* (Cth), ss 95B, 95C, and 95D.