Supplementary submission to the inquiry into the funding of political parties and election campaigns

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Mr Daryl Melham MP
Chair of the Joint Standing Committee on Electoral Matters
Parliament House
CANBERRA ACT 2600

Dear Mr Melham,

I appreciate the opportunity you gave me to submit a supplementary submission to the current inquiry into electoral funding reform.

This submission deals with two major problems with the recent reforms in NSW I discovered at a workshop on electoral matters at the University of Melbourne Law School in July. I am bringing them to the committee's attention as I believe any reform at the federal level must ensure these loopholes are avoided.

Reportable Political Donations Received by the Political Donor

Prior to 1 January 2001 all donors were required to list on their return to the NSW Election Funding Authority (EFA) all reportable contributions other entities made that were used for the donors' political contribution. However, this requirement was abolished in 2011 as part of the NSW reforms.

The following email I received from the EFA on 1 August 2011 explains the changes:

"The legislation as it stands from 1 January 2011 does not require donors to disclose donations they receive.

As you are probably aware we have now moved to financial year disclosures to be in line with the Commonwealth. This means that for the first six months of the reporting period we were working under the previous version of the legislation which required donors to disclose donations received.

Therefore the disclosure form for this transitional period (from the old legislation to the new) does ask donors to disclose donations received. Disclosure forms for future reporting periods will not ask donors to disclose donations received."

The work of our Democracy4Sale research team has found that various donors do receive money from other individuals and companies that is included in their contributions to a political party.

For example, Tenko Management Pty Ltd made a $10,708 contribution to Tony Abbott's Warringah FEC on 6 September 2004. This money included a total of $10,250 comprised of donations each over the NSW disclosure threshold current at the time from Gary Cohen using IBA Health's Sydney address, John Roth using the address of Henroth Pty Ltd, Les Taylor of Manly, Mark Lochtenberg of Mosman and RC Corbett of Mosman.

These individuals did not submit donors' returns to the EFA. This may not have been required at the time. I'm currently checking with the EFA, but most likely will not have an answer until after 12 September.

Had this information not been given by Tenko Management we would not have known that these individuals had contributed money to the Warringah FEC by buying auction items at a fundraising event.

While there is no suggestion that these individuals were attempting to avoid disclosure of their support for Mr Abbott's 2004 election campaign, it does show how individuals could funnel money into parties' coffers and never be identified.

The AEC requirement for associated entities and donors to disclose who made significant donations to them must be maintained and the federal disclosure threshold substantially reduced from the current $11,500.

An even better example of this loophole in the NSW legislation is The Warringah Club. Under NSW law the Club is considered a donor while under federal law it is an associated entity.

During the course of our research we found that many donors maintained in their returns to the EFA that they had contributed money exceeding the NSW disclosure threshold to The Warringah Club. Yet, when the Club submitted returns they listed no contributions from individuals or corporations.

On 10 May 2010 Lee Rhiannon and I asked the EFA to investigate The Warringah Club for possible multiple breaches of the NSW Election Funding Act 1981 and Election Funding and Disclosures Act 1981 (as the current Act was formerly known).

We also enquired about the AEC investigating possible breaches of federal law. The Warringah Club had submitted associated entity returns to the Australian Electoral Commission (AEC) from 2000-01 through 2008-09. Yet on no occasion did they disclose any donors to this associated entity. It appears on at least two occasions prior to the increase of the federal disclosure threshold effective 8 December 2005 they were required to have done so. However, it was legally too late to make a complaint to the AEC.

On 29 October 2010 we received a letter from Mr Brian DeCelis of the EFA stating they had investigated The Warringah Club (see attached letter).

First, the Club had failed to lodge the required return for the NSW disclosure period ending 31 December 2008. The EFA referred the Club to the NSW Crown Solicitor because of this failure, but the EFA "will not comment on matters which are referred to the NSW Crown Solicitor for prosecution."

Mr DeCelis further stated, "The Club has advised their understanding was that their disclosure obligation did not include disclosing reportable political donations received and this lead to their failure to disclose political donations received by the Club. The Club gave an undertaking to amend their operations to ensure their future reporting complies with the Act.

Section 96H of the Act states that a person who makes a statement in a declaration that the person knows is false or that the person does not reasonably believe is true is guilty of an offence.

It is not able to be established that the Warringah Club knowingly made a false statement in the declaration for the period ending 31 December 2009 nor that it reasonably believed that a statement in the declaration was not true. The inability to establish these matters will prevent any successful prosecution."

It is very surprising that the Club did not understand they were required to disclose reportable political donations received since this is clearly stated on the donor's form provided by the EFA.

The following is on the EFA form that all donors were required to submit for the period April 2004 – December 2008:

"Did the political donor receive any reportable political donations of $1,000 or more during the disclosure period that were used or were intended to be used in whole or in part by the political donor to make political donations or to incur electoral expenditure (this includes multiple donations of less than $1,000 from the same source during a financial year)? Yes/No

If yes, write the date each political donation was received by the political donor, the name and address of each person or entity that made a donation to the political donor and the amount or value of each donation made to the donor."

When The Warringah Club finally submitted their required returns it reported 34 donors had made contributions totalling almost $105,000 for the period from late April 2004 through December 2008. Two of these contributions should have been reported to the AEC but were not.

On their NSW return for the last six months of 2009 the Club listed 21 contributions. None of the individuals contributing to the Club submitted donors' returns although the aggregated amounts for each individual exceeded the disclosure threshold.

Summary: Political Donations Received by the Political Donor

The change in the NSW law effective 1 January 2011 means that donors to political parties can avoid being publically identified by funnelling their contributions through other donors, including units within political parties such as The Warringah Club. This is an especially damaging loophole since it raises the possibility of banned donors contributing to political parties.

Expenditure Caps in Electorates

During various discussions at the University of Melbourne workshop, several attendees began to think that the expenditure caps for candidates in each NSW electorate could potentially be breached without the EFA or public being aware of this. In addition to a lower house candidate spending up to the cap of $100,000 on his/her campaign, the head office of the party can spend $50,000 on that electorate. If the party spends more than this amount for the electorate in breach of the law, it could avoid detection by including this money in its overall expenditure disclosure as there is no requirement to specifically disclose that it was spent on this electorate.

I contacted the EFA about this matter. This is the response I received on 19 July 2011:

As you are aware some of the parties lodge 'nil' disclosures on behalf of their candidates and elected members as the parties say all expenses and donations go through the party. At the time of a state general election a candidate can only receive public funding if they disclose electoral communication expenditure. In order to receive the funding the party invoices the candidate for expenditure the party incurred on the candidate's behalf. The candidate has no legal obligation to pay the invoice as permitted under section 84(7) of the EFED Act. The party will only invoice the candidate up to the candidate's expenditure cap so as to protect the candidate from breaching the cap.

Perhaps it is best to use concrete examples to illustrate this issue.

The Sydney Morning Herald reported that Steve Whan accused the man who ousted him from Parliament of breaching a cap on campaign spending by nearly $100,000.[1]

As you can see from this SMH story, Mr Whan formally complained to the NSW Electoral Commission alleging that Nationals MP John Barilaro breached the combined party and candidate $150,000 limit by $96,000. The independent candidates Peter Draper from Tamworth and Peter Besseling from Port Macquarie have also made complaints to the Electoral Funding Authority in relation to their electorates.

Mr Tony Windsor also believes the National Party may have breached the expenditure caps in some seats in the 2011 NSW election.[2] Mr Windsor said the Nationals funded huge television advertising campaigns in some Independent-held seats. "There probably needs to be some review of whether there's been a breach of spending requirements in relation to state seats, There's caps on spending now, and (from) my knowledge of election campaigns- I wouldn't be surprised if they spent four or five times the actual cap."

Without a legal requirement for parties to disclose expenditure by individual electorates, it could be difficult and perhaps impossible to ascertain if a party has breached its electorate expenditure cap. In order for it to be adequately monitored there must be reporting of party expenditure by each electorate if you have caps by electorate.

Summary: Expenditure Caps in Electorates

[1] Philip Thomson, 17 April 2011 Outed MP says rival overspent by $100,000 Sydney Morning Herald http://www.smh.com.au/nsw/ousted-mp-says-rival-overspent-by-100000-20110416-1dily.html

[2] Tony Windsor, 28 March 2011 Nationals election ad blitz exceeded cap: Windsor ABC Mid North Coast http://www.abc.net.au/news/stories/2011/03/28/3175061.htm?site=midnorthcoast

This is a very complex issue that needs further attention from the NSW government. Once all returns to the NSW EFA covering the year to 30 June 2011 are made public we will see if any breach of expenditure caps in individual electorates can potentially be detected.

The point I want to make here is that if the committee recommends expenditure caps for the federal electoral funding system there must be adequate methods included to ensure compliance with the laws.

Parliamentary Entitlements and Expenditure Caps

Associate Professor Joo-Cheong has an important discussion of parliamentary entitlements being used for campaign purposes.[3] Based on this discussion, he makes the following recommendation in his submission to the current JSCEM inquiry:

Recommendation 15:

• The rules governing federal parliamentary entitlements should:
be made accessible and transparent; and clearly limit the use of such entitlements to the discharge of parliamentary duties and prevent their use for electioneering.
• The amount of federal parliamentary entitlements should not be such so as to confer an unfair electoral advantage on federal parliamentarians.

I want to discuss the second part of his recommendation in the context of expenditure caps in individual electorates. In order to illustrate the potential problem I will again use a concrete example.

In NSW members of the Legislative Council are often "Duty MLC" for electorates held by a member of another party or independent. Duty MLCs perform the following tasks:

- are the key contact between the government and local constituents
- assist Ministers or Shadow Ministers dealing with government initiatives and attending local events in that electorate
- support people who believe they are not getting service or assistance from their local member

For example, former MLC Meredith Burgmann for a number of years was the Labor Duty MLC for the NSW seat in which I live – Sydney, which is held by independent MP Clover Moore. I understand that many community members

[3] Dr Joo-Cheong Tham, Submission to JSCEM's inquiry into 2010 federal election. http://www.aph.gov.au/house/committee/em/elect10/subs/090%20Sub.pdf

often asked for Ms Burgmann's help on issues, especially since Ms Moore was both the local MP and Lord Mayor of Sydney.

During the 2011 NSW election in the hotly contested seat of Coogee held by Labor MP Paul Pearce, the Liberal Duty MLC for Coogee Don Harwin had an expensive flyer produced and distributed throughout the electorate (see attached flyer).

As you can see, the front of the flyer is devoted to the decision by the Minister of Planning to take the Coogee Bay Hotel development out of the hands of the local council and give it to the Minister's department for determination. Laws that were introduced by the Labor government allow the Minister to do this under Part 3A.

Mr Harwin is pictured standing next to the Liberal candidate for Coogee, Bruce Notley-Smith, holding a copy of the petition asking that this development be rejected.

The back of the flyer lists four of the major Liberal "positive and practical plans to improve our community". These were commitments the NSW Liberals taking to the March 2011 election.

The flyer was dated in February just before the early March issue of the writs for the fixed date 26 March 2011 state election; it clearly was election campaigning on behalf of the Liberal party using parliamentary entitlements. Many residents in the seat of Coogee reported receiving a copy of the flyer just before the NSW election.

While this is valid communication by Mr Harwin to residents in the area for which he was Duty MLC, should this have been paid from his parliamentary entitlements and distributed in the midst of an election campaign? If the Liberal campaign spent the combined total of $150,000, is this flyer, which is not considered electoral expenditure, giving the Liberals an unfair advantage over other candidates running in the seat of Coogee?

I believe this committee needs to give close attention to Professor Tham's Recommendation 15 above if you recommend expenditure caps in your final report.

Sincerely,

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