

Options for private funding reform

- 4.1 The current Australian funding and disclosure scheme relies on a disclosure based approach to regulation. An examination of the issues with the current political financing regime as discussed in Chapter 3 raises the question of whether moves to increase limitations on the sources of funding for political parties are warranted.
- 4.2 There are two key proposals that have arisen regarding a move to a broader funding and disclosure scheme: the implementation of caps on contributions to political parties, and bans on contributions from particular sectors of the community, such as corporations or particular industry groups. This chapter contains a discussion of options for limiting donation amounts and types of donors.

Donation caps

- 4.3 The concept of a cap on donations to political parties involves the implementation of a legislative limit on the amount that a single contributor, whether an individual or organisation, can make to a single political party, associated entity, candidate or Senate group. Such proposals generally provide that associated entities are considered 'part of' a political party for the purposes of the cap otherwise a clear opportunity for circumvention arises.¹

¹ See further *Electoral Act 1992* (QLD), s. 204; and *Election Funding, Expenditure and Disclosures Act 1981* (NSW), s. 35(1)(d).

- 4.4 At the federal level, there is currently no limitation on the amount that an individual, corporation or other organisation is able to donate to a political party or associated entity. Similarly, there is no limit on the amount of contributions a political party or associated entity may receive. The only proviso is that donors that give amounts totalling above the applicable threshold must meet their disclosure obligations under Part XX of the *Commonwealth Electoral Act 1918* (Electoral Act), as do all registered political parties and their branches, as well as associated entities.
- 4.5 Political financing regulatory schemes involving caps on donations to political parties have recently been implemented at the state level in New South Wales and Queensland. Canada also currently has a regime in operation that includes donation caps of an indexed figure of \$1 000.
- 4.6 In NSW, donations to registered political parties are capped at \$5 000, while donations to unregistered political parties are capped at \$2 000.² In Queensland, contributions to political parties were initially capped at the same level as NSW, but from 1 July 2011, the applicable cap on donations is calculated according to a legislated formula.³
- 4.7 While donations to political parties have a legitimate place in the Australian political system, some submitters advocated that capping the amount that a political party and its associated entities can receive from a single source could go some way to addressing concerns about the perception of undue influence as a result of political donations.
- 4.8 The Australian Greens also support the introduction of donation caps, stating that:
- ...efforts that we can take to improve the standing in the eyes of the voters is the goal. To put caps on donations to remove the ability for organisations and corporations to make donations to political parties will go a significant way towards improving that perception of voters.⁴
- 4.9 The particular model proposed by the Australian Greens involved a strict cap on donations from individuals (operating against a backdrop of a complete ban on all other donations to political parties and candidates apart from those from bequests) with two key features:
- Tithes imposed on a parliamentarian's salary or parliamentary pension should be exempt from the donations cap applying to parties; and
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2 See *Election Funding, Expenditure and Disclosures Act 1981* (NSW), s. 95A.

3 See *Electoral Act 1992* (Qld), s. 252.

4 Mr Brett Constable, *The Australian Greens, Committee Hansard*, 8 August 2011, p. 41.

- Political parties should not be restricted from donating to their own candidates.⁵
- 4.10 The reason for the exception regarding political parties donating to candidates is the Australian Greens' view that if a party receives all the donations then its candidates may have little to spend unless the party can donate to its candidates.
- 4.11 It was noted during a public hearing for the inquiry that the Australian Greens had received a significant donation of \$1.6 million from a single donor in the lead up to the 2010 federal election. The ensuing discussion revealed that despite the Australian Greens' current policy to '[m]aintain transparency in donor identity by making public at the end of each three month period all donors and the cumulative total of their donations...over the previous twelve month period, where those cumulative totals amount to \$1 500',⁶ it had delayed the disclosure of this donation until after the election 'out of respect to the donor'.⁷
- 4.12 The Australian Greens indicated that their disclosure of the donation had still been in advance of the date at which political party returns covering the period of the 2010 federal election were due.⁸ Mr Maltby stressed the Australian Greens support for donation caps and stated that the donation from Mr Woods had been much discussed within the party.⁹
- 4.13 A number of submitters raised concerns regarding the potential for circumvention of laws imposing caps. For example, Emeritus Professor Colin Hughes commented in his submission that 'options which are usually mentioned are flawed, seriously so and sometimes fundamentally'.¹⁰
- 4.14 Further, the Australian Electoral Commission (AEC) raised a number of issues relating to donation caps and their effectiveness in practice, including the potential for circumvention that exists and the need to design a scheme that minimises that potential.¹¹ The potential for these to cause difficulties depends on the precise design of the cap model in place. The issues highlighted by the AEC were:

5 See generally The Australian Greens, *Submission 12*.

6 The Australian Greens, *Australian Greens Internal Policy on Donations*, <http://greens.org.au/donations_policy> viewed 31 October 2011.

7 Mr Brett Constable, The Australian Greens, *Committee Hansard*, 8 August 2011, p. 42.

8 Mr Chris Maltby, The Greens NSW, *Committee Hansard*, 9 August 2011, p. 6.

9 Mr Chris Maltby, The Greens NSW, *Committee Hansard*, 9 August 2011, p. 6.

10 Emeritus Professor Colin Hughes, *Submission 16*, p. 3.

11 See Australian Electoral Commission, *Submission 19*.

- The need to effectively and appropriately regulate third parties to prevent them from overwhelming the political sphere in a system of donation or expenditure caps;
 - ⇒ The difficulties with regulating third parties, including devising a registration scheme were noted;
- The existence of overseas third parties and internet and social media – these make enforcement of all caps difficult;
- The ability to self-fund campaign expenditure – this complicates the issue of determining the true source of funds;
- The potential for the enactment of coordinated campaigns to circumvent caps between political parties, candidates and third parties. These were said to be difficult to prove, even where they were suspected to exist; and
- The need for a more timely disclosure system to ensure electors are aware of any breaches of caps before election day.¹²

4.15 In relation to circumvention of applicable caps, the Australian Greens identified the potential for party membership fees to be used as a mechanism to avoid donation caps. To address this issue, the Australian Greens recommended that political party membership fees be capped at a strict level, with \$500 the suggested amount.

4.16 The Australian Greens also stressed the need for organisation affiliation fees paid to political parties to be capped at approximately \$2 000 for a similar reason. The Australian Greens argued that this was a fair amount in light of the fact that organisations could still campaign as third parties.

4.17 The Australian Greens believe that individual donations should be subject to caps for donations to each political party, including that party's candidates. This will prevent a donor from circumventing caps by donating to many candidates from a single party.

4.18 The AEC stressed the importance of any donation cap scheme being accompanied by an effective enforcement scheme.

4.19 Other submitters focused on the effect that the implied freedom of political communication that exists in the Australian Constitution would have on proposals for caps on donations made by individuals to political parties. Professor Anne Twomey observed that:

12 See generally Australian Electoral Commission, *Submission 19*.

When it comes to individuals, there are issues about putting your money where your mouth is – your use of money as a form of political expression.¹³

4.20 In contrast, the United States has an explicit right to free speech, which has affected its ability at the federal level to impose limits on campaign expenditure.¹⁴ However, strict donations caps are in place, with bans on donations from corporations, banks, unions and federal government contractors. The political circumstances in the United States appear to mean that the expenditure for the expression of views bears a greater relationship with free speech than the making of donations, which is seen in Australia as a method of free speech itself.

4.21 In addition to the complex question of whether the Commonwealth possesses sufficient constitutional power to legislate to implement bans on donations from particular sectors, Professor Anne Twomey raised federalism issues in the context of both donation caps and bans on donations from particular sources. She stated:

I note that in the tobacco bill the proposal does not require particular Commonwealth political campaigns to be set up. So the ban in this proposed [tobacco] bill would apply to all the states and state political party branches with respect to their funding of state campaigns. That is when you start getting into trouble when your Commonwealth legislation is impinging on state elections...¹⁵

4.22 Accordingly there are a number of pertinent issues that require detailed consideration when assessing the necessity, feasibility and possibility of capping donations as part of wider reforms.

Conclusion

4.23 Any move to a system of donation caps must follow a holistic consideration of options for public funding and caps on expenditure.

4.24 The use of donations as a form of political expression is an essential element of participatory democracy.

4.25 A system of donation caps must be accompanied by changes to the timing of disclosure, effective penalties that will act as a deterrent to breach of the laws, increased investigative powers for the AEC, and consideration of a

13 Professor Anne Twomey, Private capacity, *Committee Hansard*, 9 August 2011, p. 39.

14 See further *Citizens United v Federal Election Commission* 558 US 08-205 (2010).

15 Professor Anne Twomey, Private capacity, *Committee Hansard*, 9 August 2011, p. 38.

move to a proactive enforcement scheme (as discussed in detail in Chapter 8).

- 4.26 The committee does not believe that the difficulties associated with implementing and monitoring donation caps are insurmountable. The level of caps can be appropriately set to effectively maintain the freedom of political communication and act as a measure to curtail election spending (in concert with caps on expenditure discussed in Chapter 5).
- 4.27 However, the committee does not support caps on donations to political parties at the current time, given the potential that exists for circumvention. A disclosure scheme – with a lower disclosure threshold and detailed disclosure – provides an effective forum through which information about the movement of funds in the political system can be made public.

Bans on types of donations

- 4.28 The introduction of bans as part of a disclosure scheme is not a matter to be taken lightly. A key consideration is whether it is a necessary and effective means by which the integrity of the democratic process can be maintained.
- 4.29 The Electoral Act already places limited financing restrictions on political parties, candidates and Senate groups, in that they are not permitted to receive anonymous donations above the applicable disclosure threshold.
- 4.30 Aside from this, individuals and corporations are able to freely make political donations in Australia. However, once they do, they must meet their disclosure obligations under Part XX of the Electoral Act. For administrative purposes, the AEC provides separate approved forms for organisational and individual donors but there is no legislative distinction between the two. Organisational (including corporate) and individual donors are both subject to the same disclosure rules and both corporations and individuals from all industries and sectors of the community are able to freely make political donations.
- 4.31 Some jurisdictions have much stricter controls on individuals. For example, under the *Canada Elections Act* individuals must be Canadian citizens or permanent residents to make donations to political parties. The *NSW Election Funding, Expenditure and Disclosures Act 1981* also states that people that wish to make political donations must appear on the state or federal electoral roll and prevents certain sectors such as the tobacco

industry and property developers from making political donations. The Victorian *Electoral Act 2002* bans donations above a prescribed amount from the for-profit alcohol industry.

- 4.32 A number of countries have banned categories of donations. The *Canadian Elections Act* bans all corporations (and anyone apart from individuals that are citizens or permanent residents of Canada) from donating to political parties. The United States banned anonymous and overseas donations and donations from corporations, banks and unions. The United Kingdom bans anonymous donations. The Australian Greens expressed support for the implementation of this measure in Australia.¹⁶
- 4.33 In her appearance before the committee, constitutional lawyer Professor Anne Twomey explained the test that must be satisfied to prevent a successful constitutional challenge of legislation to ban donations from particular sectors. The questions to be asked are:
- ...is there a legitimate interest involved and is the law reasonably appropriate and adapted to achieve that legitimate interest in a manner that is consistent with the system of representative and responsible government?¹⁷
- 4.34 Any attempts to legislate in this area must take the constitutional validity test into account as a prime consideration.

Corporate donations

- 4.35 The issue of donations to political parties and associated entities from corporations has historically been at the centre of discussions regarding undue influence on the political process and actors in the process.
- 4.36 The *Electoral Reform Green Paper – Donations, Funding and Expenditure* (first Green Paper) made reference to a study conducted in 2001 that claimed that during the period it was conducted approximately ten years ago, the total corporate donations were \$29 million.¹⁸ The study found that:
- ...although the figure of \$29 million over three years seems relatively small in contrast to the value of the corporate sector, it

16 The Australian Greens, *Submission 12*, p. 4.

17 Professor Anne Twomey, *Private capacity*, *Committee Hansard*, 9 August 2011, p. 41.

18 I Ramsay, G Stapledon and J Vernon, *Political Donations by Australian Companies*, in *Federal Law Review*, Vol. 29, 2001, pp. 201 – 202, cited in Commonwealth of Australia, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, December 2008, p. 42.

would be considered a much more significant sum when compared to the budget of the political parties.¹⁹

- 4.37 The concern underlying the issues raised with corporations donating to political parties appears to relate to their motivations for doing so. The first Green Paper also made reference to comments in the study identifying a gap in evidence on the issue.²⁰
- 4.38 Associate Professor Ken Coghill from the Accountability Round Table queried the link between the well-being of corporations and the making of political donations, thus raising the question of the precise motivations for corporations making political donations. He stated that:
- My understanding of how directors' duties operate is that they must take action which is in the best interests of the corporation of which they are directors. To my mind, it is drawing an extraordinarily long bow to suggest that the welfare of an individual corporation is a product of the financial wellbeing of a political party, in terms of its campaign funding.²¹
- 4.39 A further complication is that many measures to address the issue of perceived or actual undue influence by corporations on political parties can potentially give rise to complex issues in relation to individual rights. The reason for this is that effectively regulating in relation to corporations and their role in the democratic process can impact on individuals.
- 4.40 There are three proposals that arose in relation to corporations in the context of discussions regarding bans and each is addressed separately:
- complete bans on corporations;
 - bans on 'foreign' corporations making political donations; and
 - bans on particular industry groups making political donations.

19 I Ramsay, G Stapledon and J Vernon, *Political Donations by Australian Companies*, in *Federal Law Review*, Vol. 29, 2001, p. 202, cited in Commonwealth of Australia, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, December 2008, p. 43.

20 I Ramsay, G Stapledon and J Vernon, *Political Donations by Australian Companies*, in *Federal Law Review*, Vol. 29, 2001, cited in Commonwealth of Australia, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, December 2008, p. 42.

21 Associate Professor Ken Coghill, Accountability Round Table, *Committee Hansard*, 10 August 2011, p. 3.

Complete ban on corporate donations

- 4.41 In its submission to the first Green Paper, the Australian Greens drew on the figures cited therein to express support for a complete ban on donations from corporations to political parties. The Australian Greens concluded that:

There is general acknowledgement of the serious problems of corruption and undue influence caused to the Australian electoral process by the current system of reliance on private funding through donations and other measures. The evidence provided in the Green paper illustrates clearly the extensive amount of corporate donations received by the major parties, and note that this accounts for 20 per cent of the private funding they receive. To address this in part, the Australian Greens support a ban on donations from corporations.²²

- 4.42 As above, this may present even further issues at the Commonwealth level in relation to impinging on individual rights which are likely to be afforded significance by Australian courts.

- 4.43 Professor Anne Twomey highlighted the fact that while implied constitutional freedoms such as the freedom of political communication and the freedom of expression are likely to be afforded less value by courts where participation by corporations in the political process was concerned, the 'rights' of individuals were still likely to be treated with great importance. Professor Twomey concluded that:

You would be far more vulnerable to a successful constitutional challenge if you took away the rights of individuals, especially if they were Australian people who were on the electoral roll, people who have a right to vote. If you removed their right to donate to political parties, I think you would have real problems. If it is... removing the capacity of corporations, unions or associations to [donate], I think it would be a much more diminished risk.²³

- 4.44 In a context where bans on donations from corporations are in place, the potential for circumvention through the use of individuals and setting up third party interest groups is evident. This situation is said to have occurred in the US. The practice, commonly referred to as 'smurfing', involves the set-up of third party groups to make donations in order to avert a ban or circumvent a cap.

22 The Australian Greens, *Submission 32 to the Electoral Reform Green Paper – Donations, Funding and Expenditure*, p. 1.

23 Professor Anne Twomey, *Private capacity, Committee Hansard*, 9 August 2011, p. 41.

- 4.45 An additional area that would need to be considered to prevent circumvention of any bans, including those on corporations, is loans from non financial institutions. Primarily these are loans made mostly to small and medium sized parties and the usual arrangement is the provision of funds that they then do not charge interest on and do not demand repayment of either until election funding comes through or when the party is in a strong enough financial position to repay.
- 4.46 While, strictly speaking, only the interest foregone is a donation under the current scheme (unless and until the loan is forgiven), as these 'loans' can remain unpaid for many years, consideration should be given to whether these should be treated as donations to close a potential loophole in a system that involves bans on particular donations. In the context of caps, perhaps such arrangements would need to be considered as being subject to a separate cap.
- 4.47 Section 96GC of the NSW *Election Funding, Expenditure and Disclosures Act 1981* attempts to overcome this potential loophole by providing that loans other than those from a financial institution that would have been 'political donations' if they were gifts, are to be treated as political donations for the purposes of the legislation and thus must be disclosed in accordance with the legislation. The potential for circumvention remains to be seen as the legislation has only recently come into operation.
- 4.48 In the United Kingdom when revised political financing laws were passed, the major parties took out loans to circumvent the new disclosure obligations for the 2005 election. Accordingly, an amendment was passed so that the same reporting obligations apply to loans as to donations.²⁴
- 4.49 Similarly, attempts to ban corporate donations in the United States have resulted in an uprising of Political Action Committees funded and run by corporations as a means of exerting influence on the political process.
- 4.50 The task of comprehensively legislating to minimise and eliminate the potential for loopholes and opportunities for circumvention of bans in the area of political financing is challenging, with possible constitutional issues and the need to minimise opportunities to circumvent any laws being prime considerations.

24 See further Law Library of Congress website, <<http://www.loc.gov/law/help/campaign-finance/uk.php>> viewed 7 October 2011.

Ban on donations from 'foreign' corporations

- 4.51 There are currently no limitations in the Electoral Act that prevent corporations or individuals located overseas or whose primary business location is overseas from making donations to political parties in Australia. Some jurisdictions, such as Queensland, have already implemented a ban on gifts of foreign property.²⁵
- 4.52 The Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010 (the Bill) which is currently before Parliament defines 'foreign property' as:
- (a) Money standing to the credit of an account kept outside Australia; or
 - (b) Other money (for example cash) that is located outside Australia; or
 - (c) Property, other than money, that is located outside Australia.²⁶
- 4.53 The appropriateness of foreign corporations making donations to Australian political parties was raised by the Democratic Audit of Australia as an area of concern and in need of further regulation. However, the difficulties of legislating to implement such a ban were also acknowledged, with the Democratic Audit stating that:
- Consideration could be given, on sovereignty grounds, to banning donations from foreign 'state-owned' corporations, though problems of definition would need to be carefully addressed.²⁷
- 4.54 The Australian Greens also expressed support for this measure.²⁸ The Democratic Audit indicated that devising an appropriate definition of 'foreign' posed a significant difficulty when attempting to legislate in this area.²⁹ The definition of 'foreign property' that is used in the Bill is able to be circumvented by corporations with primary business overseas having Australian bank accounts and property.
- 4.55 The counter argument to this position is that there is no benefit to a corporation maintaining an Australian bank account if it does not have legitimate interests in Australia. Thus, the aims of the legislation seem to be met by defining foreign property in the manner attempted in the Bill.
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25 See *Electoral Act 1992 (QLD)*, s. 267.

26 Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010, item 51.

27 Democratic Audit of Australia, *Submission 2*, p. 6.

28 The Australian Greens, *Submission 12*, p. 4.

29 Democratic Audit of Australia, *Submission 2*, p. 6.

- 4.56 Some members of the committee expressed concerns in this regard that businesses with legitimate interests in Australia and its political processes would effectively be prevented from participating in the democratic process by giving political donations.

Bans on donations from particular industries

- 4.57 The implementation of bans on donations from particular industries is geared towards minimising the capacity of specified industries to exert influence or appear to exert influence over the political process and its key actors. A number of jurisdictions have taken this step, with NSW banning donations from the tobacco industry and property developers. Victoria also has bans in place on donations from the 'for-profit' alcohol industry.
- 4.58 Discourse surrounding bans on donations from particular industry sectors generally involved significant focus on the tobacco industry. Some political parties have already implemented self-imposed bans on receiving funding from, specifically, the tobacco industry.
- 4.59 The Australian Labor Party has had a policy in place since 2004 not to accept donations from the tobacco industry. The ALP Constitution provides that:
- Under no circumstances will the Labor Party or any of its endorsed candidates accept donations from the tobacco industry.³⁰
- 4.60 Similarly, the Australian Greens do not accept donations from the tobacco industry. However, the Australian Greens are now seeking to go further, with the introduction by Greens Senator Bob Brown on 15 June 2011, of the Commonwealth Electoral Amendment (Tobacco Industry Donations) Bill 2011. This bill proposes to amend the Electoral Act to create offences to prohibit political parties or candidates from receiving donations from manufacturers or wholesalers of tobacco products.
- 4.61 The issue of industry bans, focussing on banning the tobacco industry from making political donations, was addressed in a number of submissions to the inquiry. Major arguments in this respect were premised on three elements:
- Tobacco has negative effects on public health and is responsible for a significant number of deaths, even when used as directed;

30 Australian Labor Party, 'ALP Code of Conduct for Fundraising (decision of the 1994 Conference)' in the *National Platform and Constitution 2009*, p. 30.

- Due to this negative societal effect, tobacco companies are held in low esteem among Australians; and
 - The negative impact tobacco has had on society coupled with its low regard by electors renders any attempts by tobacco companies to gain influence in the political spectrum ‘inappropriate’ and detrimental to the integrity of the democratic process.
- 4.62 The primary arguments that arose against imposing bans on particular industries related to potential problems with banning companies conducting activities that are currently legal from participating in the political process. Issues also arose regarding the implied constitutional freedoms to political communication that have been found to exist in the Australian Constitution, particularly the scope for a resulting impingement on individual rights.
- 4.63 In addition to the federalism issues discussed in Chapter 9, Professor Twomey pointed out that the current bill proposing to ban donations from tobacco companies does not apply to Independent members of parliament. The terminology of ‘candidate’ that is used does not cover the situation because ‘candidacy’ is only for a defined period of time.
- 4.64 The AEC indicated in its fourth supplementary submission to the inquiry that administrative issues may arise regarding the definitional issues in the tobacco bill that were also raised by Professor Twomey. It stated:
- ...the AEC anticipates that there may be some administrative issues in establishing how far the term ‘agent of a manufacturer or wholesaler of tobacco products’ would extend...The AEC is of the view that it would be much clearer if a definition of ‘agent of a manufacturer or wholesaler of tobacco products’ was included in the bill.³¹
- 4.65 During hearings, the committee queried whether laws imposing bans would extend to preventing members of Parliament from speaking to representatives of a tobacco company, highlighting the difficulties with legislating clearly and appropriately in the area.³²
- 4.66 Professor Twomey identified the overlap between the regulation of corporations and individuals in the context of legislating to implement bans on tobacco companies, stating that:

31 Australian Electoral Commission, *Supplementary submission 19.4*, pp. 1-2.

32 Joint Standing Committee on Electoral Matters, *Committee Hansard*, 8 August 2011, p. 32.

If [legislation] goes so far as to mean that a director of a tobacco company using his or her own money cannot then pay money to attend a fundraiser or something, then potentially you are heading into that land of unconstitutionality.³³

- 4.67 The NSW *Election Funding, Expenditure and Disclosures Act 1981* contains provisions stating that ‘close associates’ of corporations banned from making political donations. A ‘close associate’ is defined to include a director or officer of the corporation, or the spouse of a director of officer.³⁴
- 4.68 To date, there has not been a constitutional challenge to these provisions, but the potential issues were noted by some constitutional lawyers, as above. It has also been stated that bans on corporations only are less likely to be constitutionally invalid, given that implied constitutional freedoms are afforded less value in this context.³⁵

Conclusion

- 4.69 In Australia individuals donating to political parties is seen to be a genuine expression of freedom of political communication, expression and association.
- 4.70 Banning certain categories of donors or donations could potentially be an infringement of individual rights to use political donations as a means of participating in the democratic process, as it may affect the rights of individuals working for corporations.
- 4.71 Legislating to implement bans on donations from particular sources and adequately addressing the potential for circumvention of any laws presents considerable difficulties.
- 4.72 There may be a number of factors motivating corporations to make political donations. Corporations may not necessarily only donate to political parties to obtain an ‘advantage’. It can be in their interests to more generally support democracy that provides for a safe and profitable trading environment. Accordingly, the committee does not believe there is enough evidence to warrant the implementation of a blanket ban on donations from corporations.

33 Professor Anne Twomey, Private capacity, *Committee Hansard*, 9 August 2011, p. 39.

34 *Election Funding, Expenditure and Disclosures Act 1981* (NSW), s. 96GB(3).

35 Professor Anne Twomey, Private capacity, *Committee Hansard*, 9 August 2011, p. 41.

- 4.73 However, corporations that are primarily located overseas being permitted to make political donations is likely to add to the perception of undue influence and negatively impact on the integrity of the Australian electoral and democratic system.

Recommendation 10

- 4.74 **The committee recommends that the *Commonwealth Electoral Act 1918* be amended to ban political parties, Independent candidates, associated entities and third parties from receiving 'gifts of foreign property'.**

- 4.75 A number of arguments were made regarding the negative effect tobacco has had on society. Some political parties already have policies and practices in place that prohibit the acceptance of any donations from the tobacco industry.

- 4.76 However, legislative attempts to ban political parties from receiving donations from the tobacco industry may also impact on individuals that work for tobacco companies. There is a risk that such laws may be interpreted by Australian courts as an unwarranted encroachment on individual rights.

- 4.77 The committee does not support imposing bans on donations from the tobacco industry. Concerns regarding the acceptance of political donations from the tobacco industry can be addressed through the self-regulation mechanisms currently employed by political parties. However, if such a ban is to be pursued, appropriate legal advice should be sought on how best to frame the legislation to minimise potential constitutional issues.

Anonymous donations

- 4.78 Sections 306 and 306B of the Electoral Act ban anonymous donations and loans that exceed the applicable disclosure threshold to political parties, candidates, Senate groups, or persons acting on their behalf.
- 4.79 The Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010 (2010 bill) proposes to prohibit all anonymous donations of more than \$50 to political parties, candidates and Senate groups, as well as to prevent the use of anonymous donations to incur political expenditure.

- 4.80 Where an anonymous donation is returned, or paid to the Commonwealth within six weeks where return is not possible or practicable, the provisions seeking to govern anonymous donations will not apply. This is the approach taken in the 2010 bill in relation to foreign donations.
- 4.81 Anonymous donations of \$50 or less made are allowed if they were received at a 'general public activity' or 'private event'. Political expenditure that has been enabled by permitted anonymous donations is allowable. Disclosure obligations are imposed regarding permitted anonymous donations received during the disclosure period and the associated activities or events.
- 4.82 GetUp expressed its support for the notion of banning anonymous donations in certain circumstances. The group envisaged a scheme for donation reporting of:
- Small anonymous donations;
 - Donations above the anonymous threshold but below the transparency threshold (transparency threshold is the normally applicable disclosure threshold for that financial year); and
 - Donations above the transparency threshold up to the top of the donations cap.³⁶
- 4.83 GetUp argued that it should be unlawful for anonymous donations to be made or received above the low threshold of \$50. Recipients should keep records of the number of donations received and the amount collected by anonymous donations. GetUp stated that these figures must be regularly reported to the national campaign finance authority.³⁷
- 4.84 GetUp proposed that where donations are received between the anonymous donations threshold (\$50) and the transparency threshold (which GetUp believes should be set at \$500 or \$1000), recipients should be forced to collect and retain donor details to ensure the integrity of the donations cap is not breached, and for audit purposes.³⁸
- 4.85 GetUp argued that donations at this level should be reported individually by value to the national campaign finance authority, but donor names need not be disclosed.
- 4.86 The NSW *Election Funding, Expenditure and Disclosures Act 1981* prohibits 'reportable political donations' being received from an unknown source.
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36 GetUp!, *Submission 23*, p. 2.

37 GetUp!, *Submission 23*, p. 2.

38 GetUp!, *Submission 23*, p. 2.

Reportable political donations are donations about the \$1000 threshold to political parties, members, groups, candidates or third party campaigners. In Queensland, under section 271 of the *Electoral Act 1992*, anonymous donations of \$200 or more are prohibited. The prohibition of anonymous donations, including for third parties incurring political expenditure, is thus an emerging trend in political financing.

Conclusion

- 4.87 It is important to pursue transparency and accountability in the political financing regime by ensuring details of donors are retained, and that political parties and third parties themselves are aware of their sources of funding.
- 4.88 The measures proposed in the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010 and those employed in NSW and Queensland are reasonably clear and straightforward. The approach proposed by GetUp, while containing certain merits, adds an additional level of complexity, which may impact on the capacity of people affected to comply.
- 4.89 The committee supports the implementation of a ban on anonymous donations above \$50, except in the circumstances at general public activities or private events as outlined in the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010.

Recommendation 11

- 4.90 **The committee recommends that a ban be imposed on anonymous donations above \$50 to political parties, associated entities, third parties, Independent candidates and Senate groups.**

Limits on donations from individuals

- 4.91 There are currently no limits on individuals making political donations. The only legal requirement is that where the donations made reaches the disclosure threshold the individual must meet their disclosure obligation.
- 4.92 A number of other jurisdictions do impose limits on the individuals that are able to make political donations. The Canadian scheme bans donations from all sources apart from Canadian citizens and permanent

residents. Under the NSW scheme, individuals must appear on the federal, state or local government electoral rolls to be able to make donations.³⁹

- 4.93 Calls for changes to the disclosure scheme where individuals making political donations are concerned generally focus on banning those that are outside the country from participating through the financing regime. This is based on a view that those outside the country could not have a legitimate interest in participating in the Australian political process and thus should not be afforded any degree of the Australian Constitution's freedom of political communication.
- 4.94 There are three ways in which a ban on donations from individuals that are not resident in Australia could operate:
- a ban on donations from non-citizens, such as permanent residents, of Australia that are located abroad;
 - a ban on donations from Australian citizens living abroad; or
 - a ban on donations from both these sources.
- 4.95 Professor George Williams suggested that individuals also should be resident in Australia to be able to make donations to political parties.⁴⁰ This means that Australians living overseas would be prohibited from making political donations. He wrote:
- 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.⁴¹
- 4.96 The Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010 proposes to ban all gifts of foreign property, which would impact on non-residents donating to Australian political parties, unless they had an Australian bank account from which they could continue to donate.
- 4.97 The Democratic Audit of Australia identified this clear loophole in laws purporting to ban donations from non-residents to Australian political parties, stating that:

39 *Election Funding, Expenditure and Disclosures Act 1981* (NSW), s. 96D.

40 Professor George Williams, *Submission 3*, p. 2.

41 Professor George Williams, *Submission 3*, p. 2.

There appears to be public support for not allowing non-citizens who are resident abroad to make campaign donations (as is the case in the US), but it should be recognised that any such prohibition could be easily circumvented by the use of local agents.⁴²

- 4.98 As above, there is an argument that the potential for circumvention of the ban through use of a 'local agent' or Australian bank account still ensures the aims of maintaining the integrity of the system are achieved because only those with legitimate 'links' to Australia would maintain a bank account within the country.

Conclusion

- 4.99 In Australia individuals donating to political parties is seen to be a genuine expression of freedom of political communication, expression and association. However, donations from individuals outside of Australia have the capacity to negatively impact on the integrity of the Australian political spectrum.
- 4.100 As indicated by Professor Anne Twomey, legislation that may potentially infringe the implied constitutional freedoms is likely to be afforded less significance where non-residents of Australia are concerned.
- 4.101 The committee supports the measure in the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010 to impose a blanket prohibition on gifts of foreign property. Further, because such a ban can be circumvented consideration should be given to administrative and/or legislative measures to curtail the potential for this to occur.

Recommendation 12

- 4.102 **The committee recommends that in addition to the measure to prohibit gifts of foreign property being implemented, methods to curb the potential for circumvention be examined and solutions devised.**

42 Democratic Audit of Australia, *Submission 2*, p. 6.