22 August 2005

The Secretary
Joint Standing Committee on Electoral Matters
Department of the House of Representatives, Parliament House
Canberra ACT 2600

Dear Sir

Joo-Cheong Tham of Melbourne University and I were invited to appear before the Committee at its 2004 election hearings. I apologise to the Committee that I had prior duties on the day the Committee toured to Brisbane. Also, as you will know, due to lack of funds and a commitment to teach a course to the Clerks-at-the-Table (parliamentary clerks) Association on 25 July, I was unable to attend in Melbourne on the day Joo-Cheong gave evidence.

During Joo-Cheong's appearance, a number of matters were put on notice for him and me. The accompanying document is our response to those matters.

I personally would like also to comment on two matters raised in that evidence:

- **Union versus corporate donations**. Much of the transcript involved debate about the status of unions as compared to corporations. Whilst I agree in principle with Joo-Cheong that unions are democratically structured organisations in a way that corporations are not, he and I disagree over the practical ramifications of that. My position is that any caps or controls on corporate donations ought to equally apply to unions. If they did not, the appearance of formal political equality would suffer. There is significant evidence that a majority of union members are not ALP voters at present, and this has led, eg, the NSW Fabian Society President to support requiring unions to have a separate, opt-in/opt-out levy for political contributions. Finally, as a matter of principle, union 'affiliation fees' to political parties, especially the ALP should be treated and disclosed as donations. In summary, I support caps on both corporate and union donations, and measures to ensure that shareholders or members can vote on whether political donations funds should be established, separate from normal company and union 'treasury' funds.

  Conversely, Senator Brandis's claim that (public) corporations are inherently democratic, because anyone can buy a share in them, is not supportable. Corporations exist to generate profit rather than enhance participation, and are legally structured with an essentially unlimited property franchise (whereas even the limited property franchise has been seen as undemocratic for public elections since the 19th century). There is also the empirical fact, as found in Ramsay and Stapledon's study of Australia's top 500 corporations, that the major and most powerful/wealthy corporations are generally, and to a large degree, part of corporate groups in which they own and control other corporations, and indeed many are owned and controlled themselves by other corporations. There is no room in these corporations for the fiction of control by individual shareholders. (See Ian Ramsay and Geoff Stapledon, *Corporate Groups in Australia* (University of Melbourne 1998)).

- **Attacks on the partisanship of submissions**. I do not think I am misreading the transcript in feeling that Ms Panopoulos MHR made an *ad hominem* attack on Joo-Cheong Tham. He responded by pointing out that he has no formal political affiliations, and like any academic he presents his views and hopes they will be debated on their merits. Ms Panopoulos also made references to Joo-Cheong associating himself with academics of my 'ilk'.

  I am unclear what that meant, but for the record, I know Mr Tham to be a scholar of forceful positions, but above all integrity. Also for the record, I have no political affiliations. To evidence my professional impartiality, this year I have given valuable pro bono electoral law assistance to the following very disparate persons: the Iraqi Constitutional Drafting Group (via the American Bar Association); former Senator Noel Chricton-Browne; Terry Sharples, well-known litigant-in-person, the Victorian Bar Council; and William Bowe (editor of the independent and well-read electoral website, 'Poll Bludger').

Thanks in advance for drawing these comments and responses to the Committee's attention.

Yours sincerely

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RESPONSES TO MATTERS RAISED 'ON NOTICE'
Committee Hansard, 25/7/05, EM 17 – EM 40.
Prepared by Joo-Cheong Tham and Graeme Orr

1. **Senator Mason (EM 18) and Mr Danby (EM 31) asked how the ALP's 2004 policy on post election review of government advertising would be policed and how, generally, government advertising should be policed.**

Graeme Orr refers the Committee to his submission to the Senate Finance and Public Administration Committee inquiry on government advertising. To put it bluntly, governments of all persuasions, state and federal, have not been able to resist dipping into the public kitty for 'campaigns' that are at times PR driven and indeed and spin-doctored. The problem goes beyond the inefficient use of taxpayer money, and threatens to upset the core idea of political equality. It is not as if incumbents do not have enough benefits or media attention relative to their political rivals. Nor of course, do governments mount such campaigns to publicise unpopular legislation or policy measures: which they would do if the guiding principle were public information.

In that submission, Graeme comments favourably on the ALP policy to the extent that it would put the onus on the governing parties to ensure that the content of ads fell well within the Auditor-General guidelines. But he has serious doubts about the efficacy of a post-election Tribunal: (i) it is locking the door after the horse has bolted; (ii) the Tribunal could prove costly and legalistic, and (iii) most of all, it could prove ineffectual – a legalistic Tribunal would be loathe to find after the event that a campaign breached the guidelines, since that would lead to seemingly punitive consequences (loss of election funding) and be politically controversial.

The conceptual problem of focusing only on the content of individual campaigns is that such a focus fails to appreciate that the problem of government advertising in the past decade or more, under governments of both persuasions, is one of size and the 'spiking' of expenditure in election years. It is one of the cumulative effect of, in particular, large scale campaigns designed in part often to mollify discontent with

governments or paint them in a good light, more than to systematically inform citizens of rights and obligations.

Graeme Orr's submission is that Parliament should cap the government advertising budget at what Parliament considers a reasonable level in each year. This would create a bright-line rule, leaving some discretion to government to mount campaigns outside run-of-the-mill expenditure on recruiting ads etc.

Within that cap on appropriations for advertising, a consensus style mechanism should be considered – eg an all party committee – to ensure advertising campaigns over a certain limit meet the current Auditor-General rules. In saying this, he would distinguish campaigns authorised by essentially autonomous government agencies.

2. **The Chair (Mr Smith) asked about the experience of caps on political donations elsewhere, especially Canada (EM 34-35).**

Canada

Canada in 2003 strengthened its election finance regime considerably. The earlier regime was already less laissez-faire than Australia's: Canada had spending limits (which Australia did not) as well as moderate public funding, and disclosure laws. The new regime adds, amongst other things such as restrictions on election advertising generally, rules that allow only individuals to make contributions to parties and all but bans contributions to candidates from unions, corporations and other organisations. The new regime is now found in *Canada Elections Act 2000* Part 18: http://www.canlii.org/ca/sta/e-2.01/ It is described in Lisa Young, 'Regulating Campaign Finance in Canada: Strengths and Weaknesses' (2004) 3 *Election Law Journal* 444, especially at 456-460. Obviously the contribution bans are too new to evaluate their enforcement.

Ontario was the first province to institute donation limits in 1975. Presumably those limits are susceptible of enforcement, or the Canadian federal Parliament would not have adopted the donation bans they did. Of course such enforcement may as much rest on self-enforcement – eg a culture of electoral restraint – as on formal auditing and penalties. It is important to note that the *Canada Elections Act* has adopted restrictions on the size of 'third party' campaigns (i.e. campaigns by others than

parties and candidates). This measure is important: (a) out of fairness to parties (if party funds are restricted by capping donations, it is important that third parties do not swamp the campaign); and (b) to minimise problems of unions or corporations seeking favour and influence not by donating money, but by campaigning in support of, and in co-ordination with, the party campaigns.

We are happy to supply more detail of the Canadian limits if any member desires.

United States

The US has had caps on donations in the form of *bans* on corporate and union donations and electioneering for the past century, in federal election law. Corporations and unions are only permitted to use their 'treasury' funds to electioneer to restricted classes of persons – eg their own members and families, or shareholders.

There is an enormous literature on campaign finance law in the United States. At the risk of over-simplification, the bans per se work in the sense that they are relatively well understood, accepted and abided by. One reason for this may be that in the more fluid, cacophonous campaign environment of the US - and as guaranteed by the first amendment - unions and corporations are fully entitled to (and often do) set up their own Political Action Committees (PACs). These committees can raise money and expend it on electioneering or contributions. (Also, certain non-profit advocacy corporations have been found to be not subject to the bans). US federal election law also places contribution limits on other participants, ie non corporate/union donors to federal candidates or party committees.

The US differs from Australia in having a much stronger, well resourced and established enforcement regime for campaign finance law. The Federal Elections Commission does not run elections as such, and focuses on enforcing campaign finance law. Whilst its bi-partisan make-up would not fit the Australian ethos, in other respects it should be studied as a potential model for a more serious Australian enforcement regime. The FEC's powers and roles are formally described at its website ; for an academic account of its enforcement regime, see Lisa Klein, 'Sanctions for Violations of Federal Campaign Finance Laws in the USA' in Keith

Ewing and Navraj Ghaleigh, *The Challenge of Party Political Funding: Comparative Perspectives* (CLUEB, University of Bologna, 2001).

Of course to a certain extent campaign finance regulation is a 'cat and mouse' game in the US. The central problem for US electoral law is that federal jurisdiction is limited (indeed Congress does not have power over its own elections). A second issue is the power of the Supreme Court to re-shape electoral law under the first amendment. And thirdly, until recently, the laws were not structured carefully enough to avoid problems arising from excessive 'soft money' ('soft money' was money raised, quite lawfully, in excess of federal law caps – eg money raised for voter registration, or state races, but which was used equally to promote). Much of the 'soft money' issues have been repressed by the McCain-Feingold 'Bipartisan Campaign Finance Reform Act' of 2003.

Australia does not face the federal problem, since our campaign finance laws and political parties are structured so that state branches fall within the federal system. Caps could be enacted, like disclosure obligations, on donations to all federally registered parties including branches. Further, by way of reinforcement, the High Court could use the corporations power to regulate corporate donations, and the incidental power to regulate at least federal union donations. In addition, Australia does not have a first amendment law, and there is no reason to believe that caps on donations, and reasonable limits on electoral expenditure, would offend the implied freedom of political communication.

3. In response to questions by Senator Brandis, Mr Tham volunteered to prepare a supplementary submission detailing provisions of industrial statutes requiring trade unions to be organised on a democratic footing (EM 21).

The key provisions are found in Schedule 1B of the *Workplace Relations Act 1996* (Cth). A key object of the Schedule is to 'provide for the *democratic* functioning and control of organisations' (*Workplace Relations Act 1996* (Cth) Schedule 1B, s 5(d) (emphasis added)). Among others, clauses of this Schedule oblige trade unions to have rules providing for democratic, Australian Electoral Commission run elections of their office-bearers and the control of the committees of trade unions by their

members (*Workplace Relations Act 1996* (Cth) Schedule 1B, cl 141(1)(iv), 143-4, s 182)

Similar provisions can be found in state industrial statutes. See, for example, *Industrial Relations Act 1996* (NSW) ss 237(1)(i), 238, 240; *Industrial Relations Act 1999* (Qld) ss 429(1)(g), 444-458, 711; *Industrial Relations Act 1979* (WA) ss 55(4)(e), 56-7.

4. **Senator Murray sought confirmation that the *Corporations Law* does not refer to the words 'democracy' or 'democratic' (EM 34).**

A computer word search of the *Corporations Law Act 2001* (Cth) on http://www.scaleplus.law.gov.au for the words, 'democracy' and 'democratic', revealed no mention of these words in this statute.

5. **Senator Murray asked whether a general anti-avoidance provision, by analogy with tax law, would be useful, eg in fighting donations made with 'strings attached' (EM 35-36).**

While we would, in principle, support such a provision, we note, as Joo-Cheong observed during the public hearings, the difficulties with establishing the 'state of mind' element of such an offence. We understand that this has been the central difficulty with section 177D, Part IVA of the *Income Tax Assessment Act 1936* (Cth), the general anti-avoidance provision of tax law.

We, however, make two observations. First, the difficulties involved in establishing the requisite 'state of mind' will largely depend upon how this element is framed in the provision. For example, section 177D of *Income Tax Assessment Act 1936* (Cth) requires that a scheme have, as its *dominant purpose*, the minimisation of tax. This provision can be compared with section 177EA of the same Act that applies to schemes relating to franking credits where the scheme need only have '*a purpose (whether or not the dominant purpose but not including an incidental purpose)* of enabling the relevant taxpayer to obtain an imputation credit' (emphasis added). Our understanding is that this provision has been applied much more effectively than the general anti-avoidance clause. Second, these enforcement difficulties aside, there may

still be value in having a broad anti-avoidance clause if it deters donations with 'strings attached'.

Obviously the definition of that concept – eg access, favours – should be clear in any legislation. But in principle, if protection of the revenue is justification for Part IVA of the tax act, it is worthwhile considering such a regulatory scheme to deter improper political donations. The analogy however may break down in practice, as Part IVA works, within a scheme of self-assessment, where the Commissioner of Taxation can rule a scheme to be invalid, forcing the taxpayer to challenge the ruling. Would any such administrative power be able to be vested in the Australian Electoral Commission to deem a donation to have sought an undue benefit, and hence subject to forfeiture (perhaps double forfeiture)? If not, the advantage of Part IVA, namely the encouragement of conservative measures by those with money and their advisers, may be lost.

Lastly, we draw the Committee's attention to page 43 of our submission to the Committee's inquiry into political donations where we support the Australian Electoral Commission's recommendation that an arrangement entered into which has the effect of reducing or negating a disclosure obligation be deemed as if it had not been entered into (Australian Electoral Commission, *Submission to the Joint Standing Committee on Electoral Matters Inquiry into Electoral Funding and Disclosure* (2001) para 2.1.15). A provision enacting this recommendation is also an anti-avoidance provision of sorts, albeit specifically confined to disclosure obligations.

8. In response to questions by Ms Panopoulos, Mr Tham volunteered to provide her with a list of his publications (EM 36).

Mr Tham has sent that list to Ms Panopolous and is happy to provide a copy to any other interested member of the Committee: j.tham@unimelb.edu.au

7. Ms Panopoulos impugned a claim that public resources have been used to maintain databases for partisan advantage. Ms Panopoulos asserted that this claim was referenced to a specious media article (EM 38-39).

The reference in question is at p 5 of Graeme Orr's submission on government advertising. That reference is to an article published in a scholarly journal,

Australian Journal of Political Science, by academics Peter van Onselen and Wayne Errington. It is *not* a media/newspaper article; indeed van Onselen and Errington themselves do not rely on any media reports. They rely on their own experience as parliamentary staffers, state and federal, and on information collected by interviewing.

Van Onselen and Errington argued the undeniable point that party owned databases such as Electrac serve the dual purposes of enhancing constituency communications, and also of assisting parties and candidates in targeting their campaigns. They reasoned that such databases are maintained through public resources – e.g. the collection of information on constituent opinions/concerns generated through, eg MPs newsletters to constituents and contacts recorded by staffers. We know of no arguments on the public record denying or disproving these claims; but would be glad to hear otherwise. The point, in any event, was tangential to an indisputable claim made in Graeme Orr's government advertising, that incumbents generally enjoy institutional and other benefits over their challengers by virtue of their incumbency.

8. Mr Melham asked if we would favour parliamentary entitlements (for communications, postage allowance etc) cutting out once an election is called, for the duration of the campaign (EM 40).

Definitely, although on its own, this worthy reform will not stop members bombarding electorates in any 'phoney' campaign prior to the writs being issued. But it is a simple application of the caretaker convention, and the reality that with Parliament prorogued, members concentrate on the partisan activity of campaigning and the campaign period proper is the focal point for uncommitted voters.