SUBMISSION 16

SUBMISSION TO THE JOINT STANDING COMMITTEE ON ELECTORAL MATTERS COMMONWEALTH PARLIAMENT

INQUIRY INTO THE FUNDING OF POLITICAL PARTIES AND ELECTION CAMPAIGNS 2011

Colin A. Hughes

Preliminary

The matter now before the Joint Standing Committee has a long history, which I have reported in the Democracy Audit of Australia's "Fifty Years of Campaign Finance Study in Australia" and therefore need not repeat here. I presume Committee members can obtain access to it if the Committee so wished. Consequently this submission can be much briefer.

Provisions of the Electoral Act intended to regulate this field should aim for legitimacy in their perception by the principal actors in it. Political parties, groups seeking to exercise political influence on a particular matter or more widely, and electors wishing to play their part in a democratic political party system are obvious actors. I would include media proprietors in that list.

It is possible that provisions may not be enforced effectively or at all, as was the experience of the earliest regulatory system. That may not be so much of a risk today in the light of the degree of independence that has been given to the Australian Electoral Commission (AEC) but, to modify the saying, the price of independence is eternal vigilance. The 1983 amendments effectively wrote "the Minister" out of the Act apart from the duty to report to the Parliament, but the subsequent insertion of the Minister's capacity to intervene in so apparently a routine matter as the location of Divisional Offices is a camel's nose that bears watching. The subject matter of the present Inquiry is especially sensitive to partisan considerations.

It is also possible that provisions in the Act may prove unenforceable or ineffectual. For example, a system that focuses on divisional expenditure and ignores statewide or national expenditure, as did the previous system, will be ineffectual. A system that addresses disclosure, but sets time limits for submission and/or availability which ensure or make it highly likely that much significant evidence will not be available to the electors until *after* the relevant electoral event will be ineffectual. A system which creates offences that may well be committed by persons *abroad* may be ineffectual to the extent that inquiry may be beyond the capacity of the ordinary electoral authorities and imposition of penalties for breaches may prove difficult. A system that ignores any opportunity to secure the best possible information/evidence for identifying breaches will be ineffectual. So too will a system which cannot be invoked promptly to establish "the truth" in a dispute which could have an impact on electors' choices. It will be difficult to prove after the event that this had such an impact so that the initial outcome of the election may be overturned, and either replaced by a different one determined by a court or else returned to the electors for another go. Examining such considerations today has been complicated by at least two pervasive phenomena, globalization and the new social media.

The Inquiry concerns both political parties and election campaigns, but the bulk of this submission will be directed to campaigns. By far the greater part of political expenditure goes to electoral events. Whilst support for the "ordinary" functioning of parliamentary parties has been provided in a number of jurisdictions, it overlaps provision of facilities

etc to Members of Parliament. Australia has had experience of major parties that had inbuilt interest groups, the Labor and Country parties, and also of a major restructuring of a major party to get greater distance from theirs, the transition from the United Australia Party to the present Liberal Party. There have been times when members' annual dues contributed substantially to party maintenance activities, but we are in a period of membership decline and have been for some time. My preference at the present time would be to send the parties back to the drawing board to try to revive branch and similar activities sufficiently to attract members if not to frequent business meetings at least to appropriate activities, and keep them away from complete dependency on the state as long as possible. This will not be easy, as the data in the Hansard Society's *Audit of Political Engagement 8: The 2011 Report* (p.79, Table 24) suggest. Belonging to a political party ranks with belonging to a trade union at the bottom of the list for willingness to get involved. Whilst there were particular reasons, scandal and coalition, for dissatisfaction with parties in Britain, there has been strong Australian evidence of readiness to become involved with non-party political organizations.

Options for campaign finance

The main thrust of my submission is simple. Among the possible options disclosure alone goes to the heart of the matter, the choices made by electors, and it is more effectively enforceable than other forms of regulation. Those other options which are usually mentioned are flawed, seriously so and sometimes fundamentally: caps on amounts expended; exclusion of categories of actors from donations or less often expenditure; and, less often recently, prohibition of privately-raised money and its replacement by public funding.

Disclosure

It appears from the contemporary mass media that disclosure of the source of donations is significant political news because of its implication of influence, or even undue influence. Who asked who for money is considered important "news"; whether some benefit moved from the recipient to the donor contemporaneously or ever is even better "news". How a particular donor divided, if at all, their political donations can be "news". The proposition that an even-handed donor may be the public spirited supporter of democracy and fair elections, for which I have a great deal of sympathy as there are such, is rarely accepted. It should also be said that some of this activity has probably become routine, much like tipping the maitre d' without necessarily expecting to be nearer the band or further from the kitchen door. Most recently the cost of "information" campaigns, run mainly but not exclusively by major economic interests outside the formal time limits of an election campaign, has been "news".

Disclosure has been accepted as a legitimate requirement for close to a century, but enforcing it has become more difficult, not least because the amounts involved (expressed in cash) are so much larger. Electors to be contacted are more numerous; the mass media through which they might be contacted have become more numerous, and for some time at least more expensive. Political research and advertising have become more

professionalized and much less dependent on unpaid party/candidate supporters. Dealing with some related matters will be discussed in the next section. For the present, the submission will consider who should make the disclosure, the extent to which the ultimate source of the resources must be disclosed, when they should make the disclosure and when it should be communicated to the public i.e. the electors in particular.

Australia is a much more open place than it once was, open in the sense that activities take place not that they are known to the public. However paper trails are scarcer, and overseas transactions more common. For a variety of very good reasons, more recently terrorism, disclosure of customers' activities by the banking industry has become a substantial issue. Elaborate machinery has been created, and vast amounts of information examined. To digress to the anecdotal, after recently seeing the DVD of "Watch on the Rhine" I was struck by how the heroic figure played by Paul Lukas, the German-born fighter against Nazism and now son-in-law of a U.S. Supreme Court Justice, carried around a suitcase full of currency to distribute to underground organizations in and on the periphery of Germany, and wondered what offences he would have committed under present American legislation. Closer to home, the memoirs of Australian Communist Party members and friends mention Moscow gold in similar transit to this country, though I would repeat something written long ago: they were among the most conscientious observers of the old disclosure system, focused as it was on expenditure rather than sources, perhaps because they were fearful of an unequal enforcement of the existing provisions.

The very recent development and multiplication of social media greatly complicates the task. There was a time when only expenditure by the registered agent in the electoral district was legitimate, but when that became obsolete it was still easy to track the publication or electronic facility that had carried something. The best solution would be one that covers all sorts of messages that may be thought appropriate to regulate. At the minimum the true originator should be knowable, but establishing the cost of particular messages may not be material e.g. sending an E-mail to X thousand electors will be very different from sending the same number of personalised letters by post or even faithful branch member. A telephone message from the candidate or someone endorsing the party/candidate may be despatched from a data haven as cheaply as a local call from a phone bank manned by either partisan supporters or paid staff. A possible start might be to separate communications originating with candidates and party organizations and to require confirmation that others were not from those sources. It might be that interests would wish to be registered for a particular electoral event and undertake the same obligations.

A preliminary question must be how long a period should disclosure cover. Originally campaign finance controls were likely to kick in late in the day, usually after the issue of the writs. However the development of continuous campaigning has brought that into question. At the electoral district level it might be argued it should be when a candidate is officially endorsed by their party, but as most expenditure occurs above that level this would now be inappropriate. Research surveys will be common and useful well before

then, and so on. Continuous coverage between elections is certainly preferable, and possibly essential.

Moreover there is current speculation about the selection of party candidates by something like the American primaries, which are, I think, often covered by legislation. Certainly some leading cases derive from primary contests. It may be early days, but perhaps the Committee should consider whether contests to secure nomination by registered parties should be brought within the larger system. In the great majority of seats securing the nomination of the dominant party is the end of the matter, and interests could be almost as concerned by outcomes in primaries as they are about the general election. On the other hand, there could be a case for waiting to see how the possibility of primaries develops. Note for example a recent story in *The Australian* (21 June 2011) that Governor Perry's possible candidacy for the Republican nomination for the presidential election to be held in November 2012 may be already out of time because of the elaborate and time-fixed preliminary steps to securing the nomination.

Should disclosure cover both receipt of donations and expenditure on campaign activities, especially purchase of time or space in the mass media? Whilst it is donations that go to the heart of undue or improper influence, it is still necessary to continue to identify the source of messages for the elector to be best served. Moreover, it is necessary to have a fairly complete knowledge of both income and expenditure to have the complete picture. For example, the party/candidate may have a line of credit with an accommodating bank or other source of funds, and the money to put them back in the black will come in only after the election. The net should be cast as widely as possible. It might be argued that this would create a burden for incumbents: must all their activities throughout their term be catalogued and expenditure paid for by the incumbent or their party separated from that paid for by parliamentary allowances? The first will be regularly exposed to public gaze via the AEC, the second will be more difficult to secure – which may not be to the incumbents' advantage if recent British experience is relevant. It may be that the accounting capacity of members' offices should be enhanced, but if so it should be provided by a centralized service.

Whilst income is likely to be in the hands of a very few party officials (and the involvement of candidates should be kept to a minimum), expenditure may be incurred much more widely. The real campaign period is likely to differ sharply from ordinary life in the member's office. This makes record-keeping and prompt and frequent production of prescribed returns of expenditure more of a burden on either the over-worked with experience or the under-skilled lacking experience. When there was public funding to be paid on proof of actual expenditure, and the party/candidate was in need of funds urgently to settle an overdraft, problems arose and continue to arise. In one recent celebrated case, it appeared that the funding formula delivered much larger sums than had actually been expended, bringing not only the principle of public funding but also the wider system of campaign finance regulation into disrepute. Just as it is preferable for electors to know about donations as quickly as possible and as close to the last minute as is administratively practicable, so they need to know if there is a suspect budgetary gap that warrants further inquiry.

There are likely to be two lions in the path of what I think to be the best solution. The parties will argue that their best people have better things to do at this time. The mass media proprietors will argue that this is an unwarranted imposition, but possibly the disclosure of varying scales of charges e.g. between parties and regular commercial customers, or between a party editorially backed and one not so supported, may be a consideration. On occasion in the past obligations have been imposed and subsequently deleted.

Technological changes in the accountancy sphere ought to have made such obligations less severe, just as they ought to have made speedier disclosure possible. American experience is usually cited at this point, and if the Committee were minded to go down this path up-to-date information about the best current American arrangements should be readily available.

Caps

Setting a maximum to permissible expenditure in total had to be abandoned, though setting a per capita figure for a reasonable campaign was still thought possible in 1983 and financial assistance provisions set accordingly. The Committee will no doubt have before it statistics from the AEC that show a steep upward curve of expenditure in total and per capita. A formula link to the number of electors is possible, but a sliding formula which can be predetermined to respond to changes in campaigning will be difficult. If a ceiling is set for expenditure, then I would fear a Gresham's Law on campaign advertising will operate and bad ads concentrating on slogans and ignoring substance will drive out the good. The old British model of pushing campaign expenditure towards one virtuous, dull statement of policies universally delivered had its merits, but would now fail on a number of points e.g. rapid changes during the campaign up to the last minute, and electors' expectations based on their experience of commercial advertising.

Moreover imposing a ceiling will encounter difficulties. Enforcement against a party/candidate will be easy, enforcement against somebody supporting a party/candidate operating overseas will be difficult. Printed matter can be mailed, E-mails can be sent, and telephone calls can be made overseas and quite possibly more cheaply. The difficulties with regulating analogous activities conducted overseas are reported regularly in the business pages. Whilst imposing an obligation to report *receipt* of money from overseas is practicable, one to report the *appearance* of support from overseas is probably not. Any ceiling is likely to be ignored and breached, that this has happened will be soon known, and the system of regulation brought into disrepute. Moreover driving such activities overseas to escape the ceiling will make more difficult control of content in campaign messages by litigation.

Exclusion from making donations

A number of possible starters for prohibition would include persons or interests overseas, artificial persons especially large corporations and trade unions, and what might be

termed "politically noxious trades" like property developers, tobacco manufacturers and facilitators of gambling. But if they may not contribute directly to a party/candidate, may they not advertise in explicit support of a party/candidate, thereby becoming a "third party", or advertise advocating a position taken by one party/candidate and opposed by the other(s)? "Advertise" is the most likely form of activity, but there can be others like deploying employees in campaign activities. A post mortem of the 1949 federal election might suggest the main possibilities; the role of "Mr Cube" in the British 1950 election illustrates the universality of what has been happening in Australia recently. American grappling with problems in this area encouraged the development of the PACs, Political Action Committees, with the consequent existence of a much larger number of bodies to keep an eye on, and from the party/candidate point of view bodies that may deviate inconveniently from the official line(s).

In the last resort if a businessman in a proscribed category may not donate, a spouse, a child, a friend can be found to put their name to the transaction. The outcome of such measures is likely to be "smurfing", the multiplication of activists, after which electors will be as far, if not further, from the truth

It might be thought that at the very least requiring the rank-and-file members of an organization to endorse formally and in advance taking political action in their name should be required, but if this is confined to cash donations whilst ignoring independent action e.g. by direct advertising, or encouraging donations at the individual level, its effect must be limited. It may satisfy minorities in unions or companies, but it also may encourage the more militant in the majorities to press for more substantial contributions to their preferred cause.

Public funding

Public funding was originally, I think, a plausible idea. It might exclude, or at least reduce the influence of, unwelcome interests. It should lower the level of expenditure and bring it to more acceptable levels. This has not happened, and overall I think its contribution to high standards in political life has been slight. It may have been seed grain for emergent small parties, and may have encouraged minor parties and independents with the hope of passing the threshold, thereby enriching the otherwise limited options open for electors. The total cost to the nation is very small, but I suspect raising amounts to a level at which the original intentions might be achieved is impossible.

Australian political parties and candidates already receive a great benefit from the state: compulsory voting. They do not have to expend effort and resources on getting turnout. The 2008 presidential campaign in the United States shows that some good can come from efforts to mobilize the electorate, but the amounts reported as spent still suggest a disturbing advantage for the extremely rich and those able to access that source. If it is to be retained, then I think restoration of the requirement for proof of actual expenditure is advisable. The present situation brings discredit to the wider process by allowing the occasional abuse.

Items of particular interest in the Terms of Reference

It may be of assistance to the Committee if I respond briefly to all the items in this list although no specific suggestions requiring action will be made

(a) Overall the Green Paper is an admirable resource for the Committee, and the set of Principles useful and in no need of expansion in this submission.

(b) It would be difficult to set restrictions on the appearance or activities of third parties in a single-member electoral district system. It would be impossible to hamper the emergence of third parties in a multi-member PR system without seriously infringing electors' rights to chose whoever they wanted. The easiest reinforcement of a two-party system in the legislature would be to set a threshold for participation in distribution of subsequent preferences under the STV system used for the Senate, but it would be so intrusive of electors' rights as to be highly unpopular. I certainly would not recommend it.

The Australian political system has seen the emergence of four significant third parties: the Country Party which survived by entering a more or less permanent coalition with the larger party of the right; the Democratic Labor Party which, apart from a modest presence in one state, did not survive its founding fathers and their relatively narrow set of issues; the Democratic Party which did not survive though the reasons are still somewhat unclear; and the Greens who are the first such party to seem to be part of a wider international political movement, though the initial component in Tasmania was more clearly the product of local spontaneous germination. We have to learn to live with such phenomena which may, or may not, have some impact on existing constitutional and political practices. Different countries make different accommodations.

(c) Any regime managing or constraining funding activities should maximize ready access to data it collects, and it would be desirable for the AEC to initiate appropriate research publications of its own as well as assisting recognized scholars.

(d) The rising cost of elections is driven by factors beyond the control of legislation or administrative control by the AEC or another body. Attempts to reverse the process will lead to evasion of the controls, and a consequent loss of transparency. In particular, the cost of elections is a source of income to the proprietors who are certain to challenge the constitutionality of such legislation as happened with ACTV v Commonwealth (1992). Unanticipated consequences are likely to follow as happened then.

(e) Obviously it is desirable that Commonwealth and state legislation resemble each other as much as possible, and also that the existence of one jurisdiction not be used to evade another's requirements. So far as I am aware, existing consultation among the various electoral authorities is sufficient to identify problems, though standardization of legislation and arrangements is likely to depend on the extent to which the problem addressed by any change is relatively common or relatively unique.

(f) International evidence is of use mainly to show what didn't work and ought not to be tried elsewhere. It also reveals broad trends such as declining party memberships, fragmentation of existing party systems, or the impact of new media or the professionalisation of campaigning that ought to discourage action predicated on what is thought to be a unique problem that appears to have arisen here. Recently the United Kingdom has been borrowing greatly from Australian experience in administrative matters. Contacts among electoral administration authorities and academics in the field are healthy, and are further promoted and reinforced by specialized international agencies like International IDEA. Whilst there may be nuts or bolts which could be borrowed usefully, like speedy availability of data, in general it is preferable for Australia to look inward for possible improvements in existing arrangements.