Submission to the Joint Committee on Electoral Matters
Inquiry into the 2010 Federal Election

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1. General

I appreciate the opportunity to make this submission, which in view of time constraints will focus on the two vital areas for reform: political finance, and enrolment.

My credentials to make this submission include authoring *The Law of Politics: elections, parties and money in Australia* (2010, Federation Press), the first book dedicated to this field of regulation.

I will keep this submission brief, and focused on principles and general recommendations. Much of the argument behind those principles and recommendations is contained not just in my book and literature cited there, but in other sources such as the work of Dr Joo-Cheong Tham and the submissions of organisations such as New Democracy and Get Up!

Along the way I will comment on aspects of contemporary State proposals (NSW and Queensland) where there may be concerns with them, lest those aspects be used as models.

A general and broad-ranging inquiry such as this cannot draft detailed proposals let alone legislation; instead, this or other committees must publicly scrutinise the 'devilish detail' of any bills that emerge.

2. Campaign Finance - Expenditure

Capping expenditure – the demand side – is the most significant reform that needs to be made. It is probably more important in the long term than capping donations. Expenditure, at least on advertising, is public and easier to monitor than donations. A limit needs to be imposed that is *lower* than the average expenditure in the last two electoral cycles. If the limits are set too high initially, they will be purely token.

Like a salary cap in sport, the purposes of expenditure caps are to limit the arms race and to ensure a more equal playing field between incumbent and opposition/minor parties. A by-product, ideally, would be to encourage parties to cheaper, and hopefully more discursive and participatory forms of campaigning, eg door-knocking and engaging use of the internet. There is evidence that electors respect, even value, such campaigning over negative, broadcast advertising.

Whilst the focus of concern about spiralling expenditure and even indebtedness is on the major parties, campaign expenditure by third parties needs also to be addressed. If

that does not occur, the potential for front groups to act as conduits for essentially partisan expenditure is significant. Worse, it risks tying the party's hands whilst leaving wealthy businesses or unions free to advertise at will during an election. A relative strength of our system is the lack of US style third party campaigns: the Westminster tradition is to focus electoral attention on the parties. NSW, the UK and Canada provide models for capping third party expenditure.

Government Advertising. There remains the problem that expenditure on government advertising campaigns remains uncapped. At a minimum, *if* the political expenditure of political parties and civil society is to be capped in the final months of an electoral cycle, any government advertising *campaigns* in that period should be inhibited, eg by requiring approval of the Leader of the Opposition. Campaigns requiring joint approval can be defined by reference to size of expenditure, with an exclusion for any non-contentious/routine expenditures (eg defence force recruitment). The alternative, of a blanket ban, risks inhibiting necessary campaigns (eg public health, emergency).

What is Covered. Expenditure caps must define the *type* of expenditure that will be covered by the capped period. The old, if not tried and true, formula would be to catch expenditure 'intended or likely to affect voting in the federal election'. A less fuzzy alternative is a concept of material 'advocating a position on issues or for or against a federal politician, party or candidate'. Care is needed: consider how advocacy on some issues, eg the WorkChoices and mining tax campaigns, impacted on both State and federal politics.

Relatedly, there is the vital question of the *breadth* of expenditure covered. It would be possible to limit all party expenditure in the period (ie cover administrative expenses). But the intent behind a regulated campaign period is to focus on the idea of a 'campaign'. Advertising/promotional expenditure, including the cost of producing as well as distributing such material is at the heart of such an idea. But increasingly large amounts are spent on the less public activity of opinion polling and market research, expenditure integral to modern campaigning. If the definition is too narrow – and especially if the unlimited-donations-for-'administration' remains – the system will quickly fall into disrepute.

The first campaign limits, from 19th century England, were quite holistic, including candidate travel/accommodation costs. But if one point of capping expenditure is to encourage certain forms of activity and limit others, then there is an argument to keep the definition focused on formal advertising, direct marketing and market research, and not cover incidentals or events (like public meetings) designed to be participatory. The definition can always be renewed in light of practical experience. The overseeing body – a wing of the Australian Electoral Commission, or on the American model, a dedicated body focused only on political finance – can also be given regulatory power to promulgate interpretations of or fill gaps in the definitions, which if followed can be used as a guaranteed defence to any offence.

Regulated Period. In relation to capping expenditure, a common proposal (eg the current Queensland proposal) is to limit expenditure only in 'campaign periods', but to define the period somewhat expansively, beyond the formal campaign. Thus, eg, the current Queensland proposal is for a six-month regulated expenditure period. One

difficulty is when to date this *from*. Obviously a fixed three year term would be preferable, to remove the unfairness of the government having a 'starter's gun' and to provide certainty for campaign planning. Failing that, certainty can be achieved in most circumstances (other than unusually early elections) by setting a fixed period backdated to 'the third anniversary of the previous election'.

3. Campaign Finance – Donations and Resources

Australia's laissez-faire system of campaign finance regulation needs modernisation. Unlimited donations do little for perceptions of clean politics or for the principle of political equality. Our common law cousins in the UK, Canada and NZ acted some years ago on these fronts. In moving to regulate, alongside NSW, the government is to be commended. There remains of course the risk that without a uniform national system, money will move behind the scenes say from Federal to State divisions.

Reasonable people will differ as to the level of any donation cap. I would recommend not setting the cap too high, nor too low. A figure of $10 000 pa to a registered party (including its divisions/branches) and its candidates and MPs seems apposite. Several issues are then apparent:

(i) This should *not* become a cap of $20 000 pa – eg by permitting a small business person to donate as an individual and through their incorporated business. For the purposes of the cap (if not disclosure) a person should be taken to have made a donation if they are a director, executive member or have a controlling interest in any incorporated body.

(ii) Some will argue that in a large jurisdiction, $10 000 may be too small to buy undue influence of a party, if not a candidate or MP. That may be true. The purpose of a lowish limit however is to respect political equality: few electors can afford what amounts to ~$200 per week to support their ideological cause.

(iii) The amount should not be indexed annually, but kept at a round and hence memorable figure, legislated to increase say $1000 every 3 years.

A flaw, to be avoided in the current Queensland proposal ('Reforming Queensland's Electoral System') is that donations will only be capped if they are to be used in campaign expenditure, as opposed say to party administration. This undermines the very objectives of capping donations, namely enhancing political equality and minimising the appearance of corruption. It also raises enforcement and transparency problems.

Union Contributions

For some time, the issue of capping donations has been bedevilled by an impasse surrounding union contributions. This has led to a partisan standoff, even though there is broad cross-party agreement that large donations reek. Some argue, not without principled grounds, that either freedom of association, arguments for unions as democratic exceptions, or political tradition entitle union financial contributions to parties and candidates to be treated differently to those of other organisations. I disagree on several grounds.

The most obvious and telling is the 'sniff it' test. If unions can directly contribute significant sums of money to one side of politics, but donations of other corporate bodies are capped, the regulation will face public disrepute. Relatedly, such regulation will face rule of law problems: if unions can affiliate with (invariably) the ALP on the basis of their membership, how can a loophole not be opened for other forms of organisational affiliation to be devised by rival parties? Restricting union affiliation fees is not a breach of political party freedom of association any more than restricting other organisational donations. Unions/the ALP will still be fully entitled to construct their rules to permit affiliation for internal decision-making; and unions will still be entitled to encourage individual members to support the ALP through their labour. In terms of unions' freedom, it would be no bad thing for unions, rather than channelling money into ALP campaigns, craft their own campaigns. Those campaigns would, by definition, be within each union's control, and would be more accountable to their members than the present affiliation fee system.

That said, I disagree with complaints of some on the non-Labor side of politics that permitting unions to run third-party campaigns up to the same capped expenditure limit as for other third parties, somehow gives the Labor side of politics a free kick. Unions, amongst themselves, are distinct and often rivalrous bodies. Unions are not unaccountable front-groups, but ongoing bodies highly regulated through industrial registration laws. Unions are also well-known public entities, and through existing authorisation/tagging laws, audiences can make their own minds up about the objectivity or motivation of union campaigns. (If anything, people err on the side of falsely assuming that all unions affiliate with the ALP when that is not the case). Provided such expenditure is not co-ordinated with the ALP's, there is no objection.

Public Funding/Resources. Capping donations, even with well-tailored expenditure limits to rein in the campaign arms-race, will lead to a pinching of the budgets of the major parties. It is to be hoped that large corporate/union contributions will be replaced, over time, by a more vital system of smaller scale doning by individual supporters. But such cultural change will take time to occur. Capping donations inevitably means revamping public funding. The present system of funding per first preference vote is transparent, democratic and simple. It only applies after elections, however, so some system of annual funding, targeted to administrative support of recognised parties, should be considered alongside that.

A second aspect of public funding which we should implement is some form of free campaign airtime across the broadcast spectrum (and not merely as present limited to the two public broadcasters). Broadcast licences are a public good, indeed their limited issue bestows a privilege on the licensee: public mandate of some air-time, at a discounted rate to be paid by the Crown, fits within each broadcaster's public service obligations. New Zealand has managed a workable system of allocating airtime between the parties, despite having a more catholic array of parties than Australia. Its system balances factors from recent history (vote share at last election, level of MPs) with current factors (eg opinion polling).

4. Integrity *for Donors*

An overlooked issue (since at least the 1980s Burke affair in WA) is the lack of any clear law to *protect donors*. Currently a party or candidate can apply donations to any

purpose, including non political purposes. As the Brian Burke criminal case of 1997 showed, accusations of impropriety can be lost in arcane arguments about breach of trust and theft.

Statutory law should require that any donation to a party, or to a candidate in that capacity must be applied only to *proper* – political or administrative – purposes, and if not, to be returned to the donor or, impractical, to consolidated revenue. An example of a law prohibiting conversion of political donations to improper/non-political uses is US Code, Title 2, section 439a.

5. Disclosure Reform

The big problem in current arrangements is less the disclosure threshold, than the un-timeliness of disclosure. The government has sought to lower the threshold and to move to more regular disclosure. (Just as Queensland recently improved disclosure by lower thresholds and bi-annual returns). However we live in an internet age and for disclosure to be meaningful – then all sizeable donations should be subject to something approaching real-time disclosure.

6. Enrolment

Automatic enrolment is a must. Our system has been built, since 1911, on compulsory enrolment and then compulsory voting. All sides of politics support the egalitarian value behind this, and the aim of a comprehensive roll. Only the most comprehensive roll possible has true integrity.

For too long the debate about the roll has been side-tracked into a singular focus on integrity as guarding against fraud, which has led us down the path of erecting higher barriers to enrolment. The much bigger problem is the millions missing from the roll, and the legal constraints on using modern data techniques to automatically enrol eligible citizens. Indeed it took a Federal Court case to pull the law in the direction of on-line enrolment.

Some political observers point to the potential fine for not enrolling in a timely manner, as if that should be the key tool to ensuring comprehensive enrolment. That approach conflates an early 20th century means (and an inefficient one at that) with the end of a fully comprehensive roll. New South Wales, and to a lesser extent Queensland and Victoria, are leading the way in enrolment reform. The Commonwealth must follow, not least as splintering joint roll arrangements risks significant confusion, with some electors assuming their automatic state enrolment means they can exercise their Commonwealth franchise.

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