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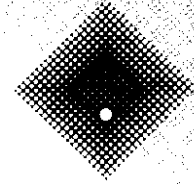
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OF
TECHNOLOGY

6th May 2004

Dr Kathleen Dermody
Parliamentary Joint Committee on
Corporations and Financial Services
Parliament House
Canberra 2600



Dear Dr Dermody

Thank you for your invitation to comment on the CLERPS Bill. I attach my comments on the Bill and do hope that you find it of use.

You will note that these comments are from my expertise, and not meant to represent the views of the University. I would, of course, be happy to engage in any dialog that you think that the Committee may find helpful.

Yours sincerely

Ronald Francis
Professorial Fellow

COMMENTS ON THE CLERP (AUDIT REFORM & CORPORATE DISCLOSURE BILL)

These comments are offered as an expert opinion, and are not intended to represent the views of the University. The responses are to particular issues, and suggestions of related issues that might be considered.

GENERAL

I am very pleased to see the initiatives canvassed here, and look forward to seeing them brought into being: there is much to be admired. The overall issue that is being addressed seems to me to accommodate Lord Acton's dictum on power – power corrupts and absolute power corrupts absolutely. Our containment consists, inter alia, with setting up principles of equity such that conflicts do not occur, and are seen not to occur.

The larger picture of the containment of power might be addressed in other ways too. The most obvious is that of Australian becoming a Republic, with a directly elected President. As has been pointed out, his or her powers would need codification, and might impinge on the powers of a Prime Minister: done properly that may be a good thing.

Separation of powers is a well entrenched and widely accepted doctrine, and one that deserves comment in the light of developing political events. It has been observed widely that Prime Ministers of any party tend to act more presidentially the longer they are in power. Witness, for example, Prime Ministers have the right to appoint and dismiss ministers to portfolios. This puts the give of significant preferment in their hands and ensures that, over time, there is considerable political indebtedness. Such power tends to make Prime Ministers seem to preside over a fiefdom rather than exercise government with the consent of the governed. Specific instances are the decision to go to war without a wide non-party debate; the 'right' to reside in Kirribilli House rather than being obliged to occupy the Prime Minister's residence in Canberra; the 'right' to declare positions and policies knowing that he or she has the power to bring about such changes.

To control such power tendencies the inclusion of items in a referendum would resolve this to the satisfaction of the electorate. The issues of a fixed term with known dates for election should minimise politically engineered election timings; a requirement to live in The Lodge could be required; that a Prime Minister not be allowed to serve more than two terms of office; that Cabinet (and not the Prime Minister) elect to portfolios are all examples of curbs on indiscriminate power.

SPECIFIC

- 1 SECTION 323A states that it is unlawful for '... a company or an officer of a corporation to'. This seems to exclude cases in which an individual makes a contribution. Ordinarily this is fine as it notes that individuals may support whomever they please. There might be a concern where a person is of significant

stature such as to constitute an undue informal influence. This is a problematic issue that has another side to it. Given the trends to oligopolistic control of media the Bill might consider ways in which undue media influence might be contained; recognising that not all influence is a financial political donation.

Section 323A also has the effect of prohibiting donations to 'political organisations'. It would need to be extended to cover independents who have no organisation in the party sense. Recommendation 4.1 notes an extension of the intent to parties, independents, and candidates. I strongly support that.

The sums above which reporting is mandatory (as recommended in 4.1) is a large sum, and would not require many such to buy influence, advertising time etc. That sum seems rather large. Something like \$10K would, I believe, be more appropriate.

Where disclosure is required the forum and means should be specified. Such a place might be Hansard, obligatory notification with the declaration of an election, or some such forum. Unless it is specified it could be done in a manner clearly intended to subvert the intent of Section (eg. publication in small type in the a funeral directors magazine, or in the Whoop-Whoop Gazette).

2 RECOMMENDATION 5.2 (DUAL ALLEGIANCE)

This Recommendation seems to allow for dual allegiance, a principle that I do not favour. Where a person is a political representative of an electorate it is just that the electors know where their allegiance lies (what if a representative had two foreign citizenships, would that make it any different?). I have heard comments on a number of occasions on those in positions of influence who hold allegiance elsewhere. The gist of the adverse comments is that citizens are never certain where the representatives primary allegiance lies. I do not mind that concept of dual citizenship, but am really concerned where those in positions of influence who represent citizens have an allegiance that may be at variance with the best interests of the electorate.

3 RECOMMENDATION 6.3 (PROHIBITION OF INACCURATE OR MISLEADING ADVERTISING).

This is an issue that seems more contentious than it need be. The most obvious instance is that of the political promise – one of the election time national jokes. It is not suggested that in a robust democracy there should not be aspirational statements, and statements of ambit claim and intent. What does need to be done is distinguish those statements from ones which are clear, unambiguous, and are subjective to processes to ensure that they will be kept. Such a process would have the advantages of reassuring the electorate, remove some of the odium that currently attaches to political statements, and lift the moral tone of the political process.

To that end a copy of a recent relevant article is enclosed. This contains an account of the merits of formal political promises, and canvasses some of the ways in which the issue might be approached.

It is hoped that these comments will be of use to the Committee, and I would be happy to add further comment should the Committee invite.

Ronald Francis
Melbourne
5th May 2004

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Editorial

Andrew Alex

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Promises, Politics and Perversity

Ronald Francis and Anona Armstrong

Victoria University

I. Introduction

In the robust Western democracies there is a vigorous and sometimes heated exchange between parties vying for public support at election time. In the course of such interchanges there is claim, counterclaim, and verbal extravagance.

The strong interchange at election time may involve assertions of intent (promises and quasi-promises) of what the speaker would do or not do were they in power. One of the difficulties of these assertions is that it is often difficult to distinguish the rhetoric from the serious intent. It is not the intent of this paper to argue that robust interchange should cease, or that broad aspirational statement should not be made. It is partly because of this confusion between aspirational statement and genuine promise that the idea is abroad that political promises are empty. The formalisation of an exact promise, and a legal and procedural means of requiring political parties to keep formal promises, would overcome the sometimes accurate claims of political hypocrisy.

Here it is argued that political promises should be separately and clearly identified as such, and that a means be devised to ensure that they are honoured. The breaking of a political promise is often justified on the grounds of changed circumstances. As we argue in this paper, if political promises are required to be realistic, made explicitly to be kept, and of Parliamentary priority, that justification would lose any force. Where company prospectuses are issued there are severe penalties for misleading information. It is true that company prospectuses contain information that must be accurate, but some also contain promises; for example, that they will trade in a particular commodity, that they will keep to a risk limitation strategy, that they will not pay the directors more than \$X per annum, etc. That proscription on misleading should be as true for the political process as it is for the commercial one. A company that solicits public support must accurately inform and make sustainable promises. Although this requirement is one set by the legislature, that same legislature does not have a process that makes the same demands on it when seeking re-election.

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II. The nature of lying

A broken promise may be seen as a kind of lie - differing from a conventional lie in that it is a deception of intent rather than an assertion of an untruth. In Parliament there is a convention that members may not attribute lying to fellow members (not always honoured in the observance). There are ways around this: Churchill, for example, was required to withdraw a Parliamentary statement he made about another member being a liar. Churchill's response was to withdraw and then describe the other member as committing terminological inexactitudes. One might use terms such as dissembling or approximating reality as other options. It is this casuistical approach that is part of the problem.

It is possible to appear to be observing the ethical conventions while deliberately flouting them. Thus an airline required to provide half the aircraft seats as non-smoking could make the righthand side smoking and the lefthand side non-smoking (as though the smoke could read signs). The letter of the requirement would be fulfilled but the intention subverted (lest the reader think this far-fetched, it actually happened in Australia some years ago). Clearly then promises need to be well-intentioned, and not subverted, itself a kind of lie.

One recognises the diplomatic obfuscation designed to avoid hurt (as in the attribution of lofty rather than base motives): one recognises the diplomatic statement ('What an interesting and provocative view you have just expressed'). One also recognises the barbed truth of ambiguity ('I can't wait to read your manuscript'); the shielded putdown ('I like your dress, I always have'); and the party bore saying to a guest 'you really must come to tea sometime soon' and getting the reply 'I would love to but I am busy that day'.

There are totally clear cases of dangerous deceptions. The falsification of research data, embezzlement, lies used by con-men, and the use of agents provocateur for entrapment are instances. Somewhat more ambiguous are cases of sales hyperbole and the controlled 'leaking' of information. Some forms of non-verbal communication (eg, false smiles and approving gestures) may be deceitful. There are worldly instances of such ambiguities in the use of military camouflage, spying for one's own country, and the seeming social distance that professionals adopt when dealing with clients.

The same deception may have different connotations in different contexts. Thus for someone to conceal their age in social situations is regarded as something personal and acceptable, but to conceal the truth of age when completing an insurance form is deliberate deception.

Things we regard as not-lying are those where we expect to be presented with a gloss version (as in well-tailored clothes, or the use of cosmetics); we are invited to suspend belief (as in going to the theatre). We do not regard statements of belief as lies ('I think that Mozart is the world's most eminent composer'); we do not think that a psychiatric patient who believes he is Christ or she is the Virgin

Mary is lying in the conventional sense; someone lying under threat of torture is not conventionally seen as a liar, and card players are not regarded as liars if they dissimulate with non-verbal communication.

We do expect there to be truth in sworn statements, in formal audits, in company prospectuses, and in contracts - and so it should be with formal promises.

III. The nature of political promises

Among the famous political promises is that of Chamberlain after visiting Hitler - 'Peace in our time'. It was the statement not only of intent but also of what Chamberlain believed to be achievement. It was designed to signify honest efforts that had a desirable outcome. One could not regard this as a strict promise.

Another kind of promise is the admirable aspirational one that 'No child will live in poverty by date X'. Because this wholly admirable aspiration is not tied to explicit definition, to measurable outcomes, or to a major policy shift, it would not qualify as a promise. Promises made without the intention of being kept amount to lies. As we well know there are two kinds of lies: *suggestio falsi* - statements factually wrong; and *suppressio veri* - the suppression of relevant information designed to conceal the truth.

An example of *suggestio falsi* is presentation of inaccurate budget figures to Parliament: an example of *suppressio veri* is failing to reveal a financial obligation when preparing budget figures.

The statement that there will never ever be a GST is one that ought to be able to be taken as strictly true. For a government to assert later that it meant 'Not in the life of this Parliament' is to put a construction on plain language that it will not bear. 'Never ever' should mean just that. Since political promises are statements of intent they should be not only intended when they are made but also intended to be kept. A broken promise cannot be excused on the grounds that it was 'non-core'. There is no such thing as a 'core' or a 'non-core' promise - there are simply promises. The unease that we rightly feel here is not only that a promise was broken but also the subsequent pretence that it was not intended to be kept.

To give broken promises a new name, that attempts to excuse, is casuistry in just the same way that the assertion that there are no new taxes when there are, but they are called levies.

Sometimes the notion of promises becomes really convoluted. In promising to introduce a GST under certain conditions a concern is that the rate will be raised. A politician with aspirations to introduce a GST promised that it would not be raised above 10%. If it were to be raised (ie, if the promise were broken) the politician promised to resign. The logic of this is that a broken promise would be redeemed by someone who is demonstrably a promise-breaker: having broken one promise the unredeemed promiser asks us to believe that a new promise will be kept. That would require a stretch of credulity that few discerning voters could approve.

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IV. A concrete proposal

In applying this analysis to the political process we might say that it is desirable to foster honesty in the political process. This is not to say that we should not have political rhetoric but, rather, that electoral promises should be clearly labelled, formally registered, and meant to be kept. There are some promises that should not be recorded as such. Among these are ones dangerous to the state (eg, 'We will never go to war'); those promises incapable of being kept (eg, 'No child will live in poverty by date X'); and those too vague to be meaningful (eg, 'We will restore the dignity of Parliament').

In addition to these types of proscriptions there is the issue of multiple promises.

Clearly the promises made by one party must be consistent: inconsistent promises are not capable of being kept, and therefore not redeemable. There may be multiple, and not inconsistent promises. Here the electorate is asked to consider the range of promises.

Under such conditions the electors would have to decide, on balance, which party to support. It might be seen that a straightforward promissory statement might be ambiguous, or not be sufficiently detailed. For this a draft Bill might be needed. Realistically, the electorate is unlikely to get that, but would need a statement of intent of such clarity and conciseness as to make rational choice possible.

Promises may be either positive or negative. A positive promise is an undertaking to do something. Examples are: 'We will make private health fund contributions tax deductible for those whose incomes are below \$30,000 p.a. and indexed for inflation at CPI rates, as at June 30th 2003'; or 'Federal legislation will preserve the rights of all citizens to have access to the Supreme Court of their own state in all matters, without exception'.

A negative promise may be an undertaking to desist from a course of action (eg, 'We will not introduce any goods and services tax during the life of the next Parliament'); or it may be of the banning kind (eg, 'We will introduce legislation banning from public office any person who holds citizenship of any other country - including dual citizenship'.).

At present there is no obligation for electoral promises to be kept. The present proposal is for such an obligation to be introduced. It is suggested that electoral promises be separated from rhetoric, and made in explicit written form. These formal promises may be either positive or negative but must be achievable, objectively verifiable, precise, and not dangerous to the state. They should be set out formally by the leader of the party making them, and recorded as such by the Electoral Commissioner. If the promise is a negative one (not to legislate for something) then it would need to be a formal rule that such legislation may not be introduced in the life of that Parliament.

A major issue is to set in train a process that requires the fulfillment of positive promises. Although sanctions for broken promises are possible, that solution is not seen as the preferred one. Formal Parliamentary rules that govern the treatment of electoral promises are more likely to work. It could be a rule of Parliament that an electoral promise must have this automatically placed on the political agenda, and debated within six months of taking office. It could be set down that the winning party would be required to introduce their promises as formal legislation, accompanied by a rule that the winning party is obliged to vote for it. As an extra safeguard the vote should be along party lines and not a conscience vote.

Where there is more than one political promise, these must not be contradictory, and all would be required to be instituted in the same time frame already mentioned. If the winning party does not control the upper house, in addition to persuasive debate, it should be a requirement that winning-party members in that Chamber must vote for the legislation. Unless formal rules, requirements and procedures are in place it is likely that the process would be subverted. We do know that while media reporting helps to alert voters, that is no guarantee of promises being kept, no matter what the adverse publicity.

V. Difficulties and benefits

One of the major difficulties here is setting in train the formal requirement that identifies formal promises, and ensuring that they are kept. Even if such promises were kept, the proposal could be diluted in such a way as to make it ineffective. Governments are, as we know, interested in power (*inter alia*), and thus reluctant to support measures that they perceive as weakening it. It is commonplace to hear that a party with a majority in the lower house feels frustrated by the curbs placed upon it by the upper house ('frustrating the democratically elected government from proceeding with the mandate given them by the electorate') - as though the upper house is not part of the political process.

Perhaps one way of overcoming the difficulty of implementation is by using Section 329 of the *Commonwealth Electoral Act*. That section of the Act deals with misleading or deceptive publications, and holds: 'A person shall not, during the relevant period in relation to an election under this Act, print, publish or distribute, or cause, permit or authorize to be printed, published or distributed, any matter, or thing that is likely to mislead or deceive an elector in relation to the casting of a vote'.

It could be held that the strict interpretation of 'casting a vote' means in the immediate act of casting a vote. A wider reading could be that deceptive promises are designed to mislead or deceive. One wonders could it be counter argued that a sophisticated electorate is not deceived in that politician's promises are never believed.

That, however, is precisely the point of this article. Strict and precise promises should be made in good faith - and believed. As mentioned before, this would be a poor argument to apply to company prospectuses.

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We would have to recognise that sometimes promises may not be those which can be kept. For example, suppose a government were to promise that Medicare would have increased funding of 20% but, upon taking office, there was 'found' to be an unrevealed budget deficit. The incoming government could then claim that it made its promise on the expectation that the figures they used were the basis for the proposal. This issue of there 'not being the funds available' could be widely used to abandon a promise. On the other hand, one could argue that such a promise should not be a conditional one. It is curious that there is always money for a war but never enough for health or education. Given that economic resources are finite, perhaps we could then argue that, as a promise, the money would have to come from elsewhere - the promise meaning that it would be funded as a priority item. Here it is proposed that a promise to do something that is funding based would imply that it would be honoured, and financial priorities adjusted accordingly. Without such a safeguard those promises would be unlikely to be kept.

The benefits of this general proposal are that it would end the anomaly of it being an offence to mislead Parliament, but not an offence to mislead the electorate - when both should be offences. If this proposal were adopted, electors would make rational choices; political stability would be enhanced, as would be the dignity of Parliament; more people of principle would be attracted to Parliamentary careers; and an end would be put to the hypocrisy of requiring business prospectuses to be honest while not requiring electoral prospectuses to be so.

VI. Conclusion

The proposal put forward here is that of a requirement to ethical behaviour. It would be admirable if it were done from principle and goodwill, but that seems unlikely.

Notwithstanding, setting a formal framework requiring various improvements has been successful. The political standards that obtain in Western liberal democracies have been largely hard-won, and are now admired. This modest proposal should be no different.

It is suggested that the general idea has much to commend it as a significant improvement to the Parliamentary process, to honesty in public life, and to an observable attempt to raise the ethical standards of the whole political process.