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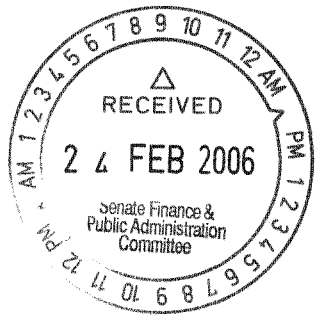

Alistair Sands, Committee Secretary
Senate Finance and Public Administration Committee
Department of the Senate
Parliament House
Canberra ACT 2600

By email: fpa.sen@aph.gov.au

Dear Committee members,

Inquiry into the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005*

The National Roundtable of Nonprofit Organisations welcomes the opportunity to comment on the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005* ("the Bill").

The Nonprofit Roundtable is an independent, non-political organisation dedicated to enhancing the extraordinary work and effort undertaken by nonprofit organisations in Australia and increasing the capacity of the sector to deliver important economic and social contributions to Australia and beyond. The Roundtable includes representatives of 17 nonprofit organisations, including research, sector financing and development bodies and a large spectrum of sector peak bodies. These organisations in turn represent, in various ways, thousands of Australian nonprofit organisations. (For more information, see http://nfproundtable.org.au.)

Our comments relate to the proposed shift from post-election disclosures by third parties to an annual disclosure regime. According to the Report of the Joint Standing Committee on Electoral Matters Inquiry into the 2004 Federal Election, the shift to an annual disclosure system was proposed "in the interests of transparency and consistency."

The Nonprofit Roundtable fully supports the goal of transparency in the electoral process, including by for-profit and nonprofit organisations that incur electoral expenditure. However, some provisions of the Bill as it now stands would unintentionally detract from the goal of transparency and would have other adverse collateral consequences for governments, government-funded programs, and nonprofit organisations.

In particular, we are concerned that the proposed requirements would (1) require disclosure of expenditures that bear no reasonable relationship to elections, politics or government; (2) fail to provide clear guidance on compliance obligations; and (3) undermine the timeliness, relevance and transparency of third party electoral disclosures.

1. ***The proposed disclosure requirements are overly broad, encompassing expenditures that bear no reasonable relationship to elections, politics or government.***

The goal of transparency in the electoral process implies appropriate disclosure of expenditures on materials that reasonably relate to elections. However, the proposed annual disclosure of "political expenditure" as currently drafted extends to a vast range of material that bears no relationship to elections or even politics or government generally.

The difficulty arises from the definition of the term "electoral matter". Under section 4 of the *Commonwealth Electoral Act* as it now stands, "electoral matter" is defined as "matter which is intended or likely to affect voting in an election." Under section 4(9), however, that is deemed to include automatically all matter that "contains an express or implicit reference to, or comment on:

(a) the election;

(b) the Government, the Opposition, a previous Government or a previous Opposition;

(c) the Government or Opposition, or a previous Government or Opposition, of a State or Territory;

(d) a member or former member of the Parliament of the Commonwealth or a State or of the legislature of a Territory;

(e) a political party, a branch or division of a political party or a candidate or group of candidates in the election; or

(f) an issue submitted to, or otherwise before, the electors in connection with the election."

The breadth of this deeming provision is counterbalanced by the fact that the current expenditure disclosure rules applies only to material published in the few weeks immediately preceding a federal election. In effect, the current definition of "electoral matter" reflects a judgment that material that refers to politicians, parties or governments *during the weeks immediately preceding an election* is highly likely to have some electoral relevance.

The definition, though defensible as the basis for a disclosure requirement that pertains to a narrow pre-election period, is completely unsuitable as the basis for an ongoing annual disclosure requirement.

The proposed section 314AEB of the Bill would require an annual disclosure of expenditure on, amongst other things, "production or publication of electoral matter by any means". As defined above, this means that any publication that contains any reference to a government or a parliamentarian, even well outside of any electoral context, would be deemed to be "electoral matter".

A practical example of how this could work illustrates the difficulties of this approach:

> A philanthropic trust makes a $1 million grant to a charity dedicated to education in developing countries, leveraging a $100,000 AusAID grant to the charity. The charity uses the funds to open two schools in Tanzania, and as required to produce a report on the project.
>
> The charity utilises $20,000 of the grant funds to produce the report which has an introduction by a former Minister of Education and – as required by the terms of its funding agreements with the trust and AusAID – acknowledges the financial support of the trust and the Commonwealth Government. It is released a year before the next federal election.
>
> The report would be deemed to be "electoral matter" under the Bill, because it refers to a former State Minister and the Commonwealth Government. The context in which those references are made (including the timing and character, purpose and likely effect of the report) is immaterial. The charity must therefore file a return with the AEC, disclosing the $20,000 spent on the report as "electoral matter". Further, the full $1 million grant from the philanthropic trust and the $100,000 AusAID grant may also have to be disclosed to the AEC as "gifts" supporting the publication of "electoral matter".

As this example shows, material that is far removed from any political context may nevertheless be technically within the ambit of the annual political expenditure provisions proposed in section 314AEB. This means the following types of communications that nonprofit organisations commonly engage in could be deemed to be "electoral matter":

- Communications that commend governments on positive actions they have taken;
- Material that informs constituents and the public about government programs and recent legal and administrative developments;
- Guidance materials for individuals and organisation that advise them how best to engage with governments (eg, newsletters advising recipients of upcoming inquiries or government grant programs);
- Material that acknowledges the support of governments; and
- Material that quotes ministers or representatives, even outside of any political or electoral context.

It would of course be misleading if organisations had to report what are in substance non-political publications as expenditure on "electoral matter", and we expect that a rule compelling such disclosures would dissuade donors from supporting charities and would give the public a false impression of partisan political activities where there are none.

To avoid triggering the disclosure requirements, some organisations would choose to avoid such non-political communications, even to the extend of removing discussion of

constructive relationships with governments from their materials. Where disclosure of government funds is required, organisations may be compelled by the donor disclosure provision to identify government agencies as the source of funding for "electoral matter". In this case, the efficacy of government grant programs would be eroded because of the additional administrative burden on collecting and disclosing this information.

If the requirements are taken literally, tens of thousands of for-profit and nonprofit organisations in Australia might have to file returns, since a great many organisations publish material that in some way mentions a government or politician, albeit not necessarily in an electoral context. Very few of those returns, in our view, would add meaningfully to electoral transparency. Indeed, if the new disclosure laws resulted in large numbers of returns that had little actual relevance to elections, the result could be to obscure the few returns that do relate to election-related expenditures.

Thus, it is doubtful that the new system would enhance transparency, though it would certainly entail substantial administrative burdens upon government-funded programs and for-profit and nonprofit organisations generally, at a time when the government is seeking to reduce such burdens.

Finally, it is likely that many organisations would inadvertently and unknowingly trigger the disclosure requirements without being aware of their obligations, by publishing materials refer to politicians or governments in what are clearly non-partisan contexts. As a result, substantial under-compliance with the letter of the disclosure requirements can be expected, and there are serious questions about the practicality of consistent and even-handed enforcement.

2. ***The disclosure requirements do not provide clear guidance on compliance obligations.***

There are at least two substantial ambiguities in the proposed section 314AEB, aside from the aforementioned over-inclusive definition of "electoral matter".

The first is that the application of the expenditure threshold is unclear. According to section 314AEB(1)(b), the obligation to file a return is triggered if "the amount of the expenditure incurred was more than $10,000." It is unclear whether this $10,000 threshold applies to individual transactions, or to all expenditures in the aggregate.

It is also not clear what must be disclosed once the requirement to file a return has been triggered. Section 314AEB(2) states that the return must set out "details of the expenditure incurred", but does this refer only to expenditures above $10,000, or to all expenditures on the relevant matters?

The second difficulty relates to the categories of "political" expenditure, which are set out in section 314AEB(1)(a) as follows:

(i) the production or publication of electoral matter by any means (including radio, television or the Internet);

(ii) the public expression of views on an issue in an election by any means;

(iii) the printing, production, publication or distribution of any material (not being material referred to in 3 subparagraph (i) or (ii)) that is required under section 328 or 328A to include a name, address or place of business;

(iv) the production or distribution of electoral matter that is addressed to particular persons or organisations;

(v) the carrying out of an opinion poll, or other research, relating to an election or the voting intentions of electors; ...

The distinctions between these categories are unclear, and some of them plainly overlap or are even entirely redundant. Item (ii), for example, refers to the "expression of views on an issue in an election". That is nearly identical to an aspect of the current definition of "electoral matter", being material that refers to "an issue submitted to, or otherwise before, the electors in connection with the election."

Similarly, item (iii) refers to material that is required to have an authorisation statement under section 328 or 328A. However, those sections cover electoral advertisements, which are in turn defined as advertisements that contain "electoral matter", which are in turn covered by item (i). Logically, item (iii) includes nothing that is not already included in item (i).

Item (iv) is also redundant. The reference to "production" of a certain class of electoral matter in item (iv) duplicates the reference to "production" of electoral matter generally in item (i). Again, item (iv) would appear to be simply a subset of item (i).

Finally, the differences in how the relevant expenditures in each category are described are anomalous. Item (i) refers to "production or publication" of material, (ii) covers "public expression" of material, (iii) applies more broadly to "printing, production, publication or distribution", while (iv) is narrower again with references only to "production or distribution". These unexplained differences reflect the lack of considered attention to detail, consistency and clarity throughout this section of the Bill.

3. *The shift to an annual disclosure requirement would undermine the provision of timely, relevant and transparent information about electoral expenditures in the post-election period.*

Under section 209 of the current *Commonwealth Electoral Act*, filing of a third-party return of electoral expenditure is required within 15 weeks after the polling day.

The Bill would repeal the post-election requirement, and replace it with an annual filing due within 20 weeks of the end of each financial year. One effect of this shift to an annual filing requirement is that information about electoral expenditures would not be publicly available until as much as a year or more after the relevant election.

For example, if a federal election occurs on 31 October of a given year, and a third party expends $50,000 in October on electoral publications, currently that expenditure would have to be disclosed no later than 13 February of the following year. Under the Bill, the

expenditure would have been incurred in the financial year ending the following June 30, with the effect that the corresponding disclosure statement would not be due until mid-November – more than a full year after the election to which such expenditure related. The usefulness of the information at that late date is certainly much less than if it was provided within weeks of the election.

It is therefore arguable that the annual disclosure regime, far from promoting the provision of timely, relevant and transparent information about electoral expenditures, actually undermines those goals. This is an inescapable consequence of shifting away from a targeted and specific post-election campaign filing requirement.

We note that the timing consequences of the shift to an annual disclosure system were not explored in the report of the inquiry into the 2004 election. This is not to criticise the drafters of that report, but merely to suggest that it does not appear to have been raised in any of the submissions on this aspect of electoral reform to that inquiry.

4. Recommendations and Conclusion

In light of the above concerns, the desirability of moving to an annual third-party electoral disclosure requirement should carefully reconsidered. If the purpose of the disclosure provisions of the Electoral Act is to ensure timely and transparent provision of information about expenditures related to federal elections, it makes more sense to retain and improve post-election disclosures than to use annual returns, which will in effect delay the provision of useful information and bury it in a sea of irrelevant returns.

If the Committee nevertheless determines that a shift to an annual disclosure system is warranted, it would be more consistent with the goals of transparency to:

- Delete section 4(9) of the current Commonwealth Electoral Act, leaving the definition of "electoral matter" simply as "matter which is intended or likely to affect voting in an election"; and

- Improve the drafting of section 314AEB to provide certainty on the expenditure thresholds and disclosure requirements, and to rationalise, simplify and clarify the relevant categories of expenditure.

A proposed revision of these sections of the Act is attached as Annex 1 to this letter.

The Nonprofit Roundtable fully supports efforts to improve transparency in regard to elections. However, disclosure requirements should be tailored to the regulatory aim, should minimise compliance costs, and should provide clarity on an organisation's obligations. We do not believe the current draft of the Bill achieves these standards.

We would be pleased to appear before the Committee to discuss the issues outlined in this submission and the concerns of the nonprofit sector. Please feel free to contact Rosemary Nairn on 0438 429 224 in this regard.

Yours sincerely

Rosemary Nairn for Elizabeth Cham Chair

Elizabeth Cham

Chair

Annex 1

Draft of proposed third party electoral expenditure provisions in the *Commonwealth Electoral Act 1918*

4 Interpretation

(1) In this Act unless the contrary intention appears:

..."electoral matter" means matter which is intended or likely to affect voting in an election.

...(9) [section deleted]

314AEB Annual returns relating to political expenditure

(1) A person must provide a return for a financial year in accordance with this section if:

(a) the person incurred expenditure for any of the following purposes during the year, by or with his or her own authority:

(i) the production, publication or distribution of electoral matter by any means (including radio, television or the Internet);

(ii) the carrying out of an opinion poll, or other research, relating to an election or the voting intentions of electors; and

(b) the aggregate amount of all such expenditures incurred was more than $10,000; and

(c) at the time the person gave the authority the person was not:

(i) a registered political party; or

(ii) a State branch of a registered political party; or

(iii) an associated entity; or

(iv) a candidate in an election; or

(v) a member of a group.

Note: The dollar amount mentioned in this subsection is indexed under section 321A.

(2) The person must provide to the Electoral Commission a return for the financial year setting out details of all such expenditure incurred.

(3) The return must:

(a) be provided before the end of 20 weeks after the end of the financial year; and

(b) be in the approved form.