

Committee Secretary
Joint Standing Committee on Electoral Matters
By email: em@aph.gov.au

23 January 2018

Dear Secretary,

Submission to the inquiry of the Joint Standing Committee on Electoral Matters into the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (Cth)

The key parts of this submission on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (Cth) ('the Bill') are:

- I. Key changes proposed by the Bill;
- II. The governing principles in evaluating the Bill;
- III. An integrated scheme for regulating political expenditure of organisations;
- IV. Measures directed at transparency: registration and disclosure returns; and
- V. Restrictions in relation to 'foreign' political donations.

This submission makes eleven recommendations in relation to the Bill:

Recommendation One: The Bill should be amended so that a person or entity be required to register as a 'third party campaigner' when 'political expenditure' of more than \$100,000 (indexed) in a financial year or in any one of the previous three financial years has been incurred.

Recommendation Two: The Bill should be amended to require a person or entity to register as a 'political campaigner' when 'political expenditure' of more than \$2 million (indexed) in a financial year or in any one of the previous three financial years has been incurred.

Recommendation Three: The Bill should be amended to define 'political expenditure' as expenditure on any of the following:

- (a) the public expression by any means of views on a political party, a candidate in an election or a member of the House of Representatives or the Senate;
- (b) the public expression by any means of views on an issue that is, or is likely to be, before electors in an election (whether or not a writ has been issued for the election);
- (c) the communicating of any electoral matter (not being matter referred to in paragraph (a) or (b)) for which particulars are required to be notified under section 321D;
- (d) the broadcast of political matter (not being matter referred to in paragraph (c)) in relation to which particulars are required to be announced

under subclause 4(2) of Schedule 2 to the *Broadcasting Services Act 1992* ;
(e) the carrying out of an opinion poll, or other research, relating to an election or the voting intentions of electors;
except if:
(f) the sole or predominant purpose of the expression of the views, or the communication, broadcast or research, is the reporting of news, the presenting of current affairs or any editorial content in news media; or
(g) the expression of the views, or the communication, broadcast or research, is solely for genuine satirical, academic or artistic purposes.

Recommendation Four: The Bill should be amended so that the maximum penalty for failure to register is capped at twice the amount of political expenditure incurred during the financial year when registration was required.

Recommendation Five: The Bill should be amended so that:

- a. An entity is required to register as an 'associated entity' only when it is controlled by one or more registered political parties, or operates wholly (or to a significant extent) for the benefit of one or more registered political parties;
- b. An entity is presumed to be an 'associated entity' when the expenditure incurred by or with the authority of the entity during the relevant financial year is wholly or predominantly political expenditure, and that political expenditure is used wholly or predominantly:
 - i. to promote one or more registered political parties, ~~or the policies of one or more registered political parties~~; or
 - ii. to oppose one or more registered political parties, ~~or the policies of one or more registered political parties~~, in a way that benefits one or more other registered political parties; or
 - iii. ~~to promote a candidate in an election who is endorsed by a registered political party; or~~
 - iv. ~~to oppose a candidate in an election in a way that benefits one or more registered political parties.~~
- c. 'Political expenditure' includes the provision of gifts to registered political parties, Senate groups and candidates.

Recommendation Six: The justification for the proposed disclosure requirements relating to 'discretionary benefits' should be provided.

Recommendation Seven: The Bill should be amended so that its disclosure requirements include details of spending on 'lobbying activities' (as defined in federal Lobbying Code of Conduct).

Recommendation Eight: The recommendations in the Joint Standing Committee on Electoral Matters' *Report on the Funding of Political Parties and Election Campaigns* (2011) should be enacted.

Recommendation Nine: The Bill should be amended so that its prohibition relating to gifts from foreign bank accounts:

- a. Extends to:
 - i. gift recipients which are ‘associated entities’ (as defined in Recommendation Five); and
 - ii. gift recipients which are ‘political campaigners’ and ‘third-party campaigners’ registered under the *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) or the *Fair Work Act (Registered Organisations) Act 2009* (Cth) in relation to their political expenditure; and
- b. Does not apply when the gift recipient has adduced evidence to the satisfaction of the Australian Electoral Commission that the named donor is the true source of the funds.

Recommendation Ten: The restrictions in relation to non-allowable donors that are foreign governments under the Bill should be enacted.

Recommendation Eleven: The Bill be amended so as to remove all its restrictions relating to non-allowable donors that are not foreign governments.

I. KEY CHANGES PROPOSED BY THE BILL

The following two tables summarise the key changes proposed by the Bill splitting them into:

- Table 1: Key changes proposed by the Bill (other than restrictions on ‘foreign’ political donations); and
- Table 2: Restrictions on ‘foreign’ political donations proposed by the Bill.

Table 1: Key changes proposed by the Bill (other than restrictions on ‘foreign’ political donations)

Current provisions in the <i>Commonwealth Electoral Act 1918</i> (Cth)	Key changes proposed by the Bill (other than restrictions on ‘foreign’ political donations)
<i>Registration regime for ‘third party campaigners’ and ‘political campaigners’</i>	
No registration regime.	<ul style="list-style-type: none"> • Requirement to register as a ‘political campaigner’ in a financial year when: <ul style="list-style-type: none"> ○ the amount of ‘political expenditure’ during that or any one of the previous three financial years is \$100,000 or more; or ○ the amount of ‘political expenditure’: <ul style="list-style-type: none"> (i) during that financial year is \$50,000 or more; and (ii) during the previous financial year was at least 50% of the person or entity’s ‘allowable amount’ for that year.¹ • Requirement to register as a ‘third party campaigner’ in a financial year when the amount of ‘political expenditure’ during that financial year is more than the disclosure threshold (and not a ‘political campaigner’).² Note: <ul style="list-style-type: none"> ○ ‘Political expenditure’ = ‘expenditure incurred for one or more political purposes’.³ ○ The definition of ‘political purpose’.⁴ • Register of Political Campaigners and Register of Third Party Campaigners to be kept by the Electoral Commissioner⁵ and made public.⁶ • Each ‘political campaigner’ and ‘third party campaigner’ to nominate a financial controller.⁷

¹ Proposed s 287F of the *Commonwealth Electoral Act 1918* (Cth).

² Proposed s 287G of the *Commonwealth Electoral Act 1918* (Cth).

³ Proposed amendment to s 287(1) of the *Commonwealth Electoral Act 1918* (Cth).

⁴ Proposed amendment to s 287(1) of the *Commonwealth Electoral Act 1918* (Cth).

⁵ Proposed s 287N of the *Commonwealth Electoral Act 1918* (Cth).

⁶ Proposed s 287Q of the *Commonwealth Electoral Act 1918* (Cth).

⁷ Proposed s 292E of the *Commonwealth Electoral Act 1918* (Cth).

Current provisions in the <i>Commonwealth Electoral Act 1918</i> (Cth)	Key changes proposed by the Bill (other than restrictions on 'foreign' political donations)
<i>Definition and registration of 'associated entities'</i>	
<ul style="list-style-type: none"> • No requirement to register as an 'associated entity'. • Definition of 'associated entity'.⁸ 	<ul style="list-style-type: none"> • New definition of 'associated entity'; i.e. 'an entity that is registered as an associated entity under s 287L'.⁹ • Requirement to register as an 'associated entity'¹⁰ when: <ul style="list-style-type: none"> ○ one of following in proposed s 287H(1) applies; and ○ deeming provision in proposed s 287H(5) applies. Note: deeming provision in s 287H(5) constitutes a new provision. • Register of Associated Entities to be kept by the Electoral Commissioner¹¹ and made public.¹² • Each 'associated entity' to nominate a financial controller.¹³
<i>Disclosure returns for registered political parties</i>	
<p>Annual disclosure of total amount of receipts, payments and debts and particulars of sums if they exceed disclosure threshold.¹⁴</p>	<ul style="list-style-type: none"> • Annual returns to include details of: <ul style="list-style-type: none"> ○ senior staff; and ○ discretionary benefits.¹⁵ • Annual return to include auditor's report.¹⁶

⁸ *Commonwealth Electoral Act 1918* (Cth) s 287.

⁹ Proposed amendment to s 287(1) of the *Commonwealth Electoral Act 1918* (Cth).

¹⁰ Proposed s 287H of the *Commonwealth Electoral Act 1918* (Cth).

¹¹ Proposed s 287N of the *Commonwealth Electoral Act 1918* (Cth).

¹² Proposed s 287Q of the *Commonwealth Electoral Act 1918* (Cth).

¹³ Proposed s 292E of the *Commonwealth Electoral Act 1918* (Cth).

¹⁴ *Commonwealth Electoral Act 1918* (Cth) ss 314AB–314AC, 314AE.

¹⁵ Proposed s 314AB(b) of the *Commonwealth Electoral Act 1918* (Cth). Note 'senior staff' defined in proposed amendment to s 287(1) of the Act.

¹⁶ Proposed s 314AB(c) of the *Commonwealth Electoral Act 1918* (Cth) (see proposed s 314ABA for requirements for auditor's report).

Current provisions in the <i>Commonwealth Electoral Act 1918</i> (Cth)	Key changes proposed by the Bill (other than restrictions on ‘foreign’ political donations)
<i>Disclosure returns for ‘associated entities’</i>	
Annual disclosure of total amount of receipts, payments and debts and particulars of sums if exceed disclosure threshold — identical to obligations for registered political parties. ¹⁷	<ul style="list-style-type: none"> • Annual returns to include details of: <ul style="list-style-type: none"> ○ senior staff; and ○ discretionary benefits.¹⁸
<i>Disclosure returns for candidates and members of groups</i>	
<ul style="list-style-type: none"> • Post-election returns of gifts received.¹⁹ • Post-election returns of electoral expenditure.²⁰ 	Post-election returns of gifts to include disclosure of details of: <ul style="list-style-type: none"> ○ senior staff; and ○ discretionary benefits.²¹
<i>Disclosure returns for donors</i>	
Annual returns to disclose details of gifts above the disclosure threshold to registered political parties. ²²	Annual returns to include gifts to ‘political campaigners’. ²³
Post-election return of gifts to candidates and groups of candidates if the total value exceeds disclosure threshold. ²⁴	No substantive change.
<i>Disclosure returns for ‘political campaigners’ and ‘third party campaigners’</i>	
<ul style="list-style-type: none"> • Annual returns relating to political expenditure.²⁵ 	<ul style="list-style-type: none"> • For ‘political campaigners’, obligations relating to annual returns of registered political parties apply.²⁷

¹⁷ *Commonwealth Electoral Act 1918* (Cth) ss 314AEA.

¹⁸ Proposed s 314AEA(a)(d) of the *Commonwealth Electoral Act 1918* (Cth). Note ‘senior staff’ defined in proposed amendment to s 287(1) of the Act.

¹⁹ *Commonwealth Electoral Act 1918* (Cth) s 304.

²⁰ *Commonwealth Electoral Act 1918* (Cth) s 309.

²¹ Proposed s 304(3AA) of the *Commonwealth Electoral Act 1918* (Cth). Note ‘senior staff’ defined in proposed amendment to s 287(1) of the Act.

²² *Commonwealth Electoral Act 1918* (Cth) s 305B.

²³ Proposed amendment of ss 305B(1)–(2) of the *Commonwealth Electoral Act 1918* (Cth).

²⁴ *Commonwealth Electoral Act 1918* (Cth) s 305A.

²⁵ *Commonwealth Electoral Act 1918* (Cth) s 314AEB.

Current provisions in the <i>Commonwealth Electoral Act 1918</i> (Cth)	Key changes proposed by the Bill (other than restrictions on 'foreign' political donations)
<ul style="list-style-type: none"> Annual returns relating to gifts received for political expenditure.²⁶ <p>Note: 'political expenditure' restricted to expenditure stipulated in s 314AEB(1)(a).</p>	<ul style="list-style-type: none"> For 'political campaigners' that are registered under <i>Australian Charities and Not-for-Profits Commission Act 2012</i> (Cth) or the <i>Fair Work Act (Registered Organisations) Act 2009</i> (Cth), annual returns to include signed statement by financial controller of compliance with ss 302E and 302F.²⁸ For 'third party campaigners', returns to include disclosure of details of: <ul style="list-style-type: none"> senior staff; and discretionary benefits.²⁹
<i>Election funding of political parties</i>	
<p>Amount of entitlement set out in s 294 based on formal first preference votes received.</p>	<ul style="list-style-type: none"> Amount of entitlement to be the lesser of the amount based on formal first preference votes received or 'electoral expenditure'.³⁰ 'Electoral expenditure' has the meaning given by sub-s 308(1).³¹ <p>Note: the sub-s 308(1) definition of 'electoral expenditure' already exists for application to returns of 'electoral expenditure' by unendorsed candidates and groups under s 309.</p>

²⁷ Proposed s 314AB of the *Commonwealth Electoral Act 1918* (Cth). Note 'senior staff' defined in proposed amendment to s 287(1) of the Act.

²⁶ *Commonwealth Electoral Act 1918* (Cth) s 314AEC.

²⁸ Proposed s 314AB(2)(d) of the *Commonwealth Electoral Act 1918* (Cth). Note 'senior staff' defined in proposed amendment to s 287(1) of the Act.

²⁹ Proposed amendment of s 314AEB(2) of the *Commonwealth Electoral Act 1918* (Cth).

³⁰ Proposed ss 293 (registered political parties), 294 (unendorsed candidates), 295 (unendorsed groups) of the *Commonwealth Electoral Act 1918* (Cth).

³¹ Proposed amendment to s 287(1) of the *Commonwealth Electoral Act 1918* (Cth).

Table 2: Restrictions on ‘foreign’ political donations proposed by the Bill

Note: There are no such restrictions under the current Act.

<p><i>General</i></p>	<ul style="list-style-type: none"> • Object of provisions.³² • Definition of ‘allowable donor’ in proposed s 287AA. • Certain gifts taken to be made by allowable donors.³³
<p><i>Prohibitions relating to registered political parties</i></p>	<ul style="list-style-type: none"> • An agent of registered political parties, candidates and Senate groups is liable if registered political parties receive: <ul style="list-style-type: none"> ○ a gift from foreign bank accounts;³⁴ or ○ a gift of at least \$250 from donor that is not an ‘allowable donor’;³⁵ or ○ a gift of at least \$250 from donor without ‘appropriate donor information’ for donations.³⁶ Note the proposed s 302P defines ‘appropriate donor information’. • Prohibition on any person soliciting gifts from non-allowable donors to be transferred to registered political parties.³⁷ • Prohibition on any person receiving gifts from non-allowable donors in order to transfer the gifts to registered political parties.³⁸
<p><i>Prohibitions relating to ‘political campaigners’ not registered under the Australian Charities and Not-for-Profits Commission</i></p>	<ul style="list-style-type: none"> • A financial controller of ‘political campaigner’ is liable if a ‘political campaigner’ receives: <ul style="list-style-type: none"> ○ a gift from foreign bank accounts;³⁹ or ○ a gift of at least \$250 from donor that is not an ‘allowable donor’;⁴⁰ or ○ a gift of at least \$250 from donor without ‘appropriate donor information’ for donations.⁴¹ Note the proposed s 302P defines ‘appropriate donor information’.

³² Proposed s 302C of the *Commonwealth Electoral Act 1918* (Cth).
³³ Proposed s 287(9) of the *Commonwealth Electoral Act 1918* (Cth).
³⁴ Proposed s 302K of the *Commonwealth Electoral Act 1918* (Cth).
³⁵ Proposed s 302D of the *Commonwealth Electoral Act 1918* (Cth).
³⁶ Proposed s 302L of the *Commonwealth Electoral Act 1918* (Cth).
³⁷ Proposed s 302G of the *Commonwealth Electoral Act 1918* (Cth).
³⁸ Proposed s 302H of the *Commonwealth Electoral Act 1918* (Cth).
³⁹ Proposed s 302K of the *Commonwealth Electoral Act 1918* (Cth).
⁴⁰ Proposed s 302D of the *Commonwealth Electoral Act 1918* (Cth).
⁴¹ Proposed s 302L of the *Commonwealth Electoral Act 1918* (Cth).

<p>Act 2012 (Cth) or the Fair Work Act (Registered Organisations) Act 2009 (Cth) — identical to those applying to registered political parties</p>	<ul style="list-style-type: none"> • Prohibition on soliciting gifts from non-allowable donors to be transferred to ‘political campaigners’ not registered under the <i>Australian Charities and Not-for-Profits Commission Act 2012</i> (Cth) or the <i>Fair Work Act (Registered Organisations) Act 2009</i> (Cth).⁴² • Prohibition on receiving gifts from non-allowable donors in order to transfer the gifts to ‘political campaigners’ not registered under the <i>Australian Charities and Not-for-Profits Commission Act 2012</i> (Cth) or the <i>Fair Work Act (Registered Organisations) Act 2009</i> (Cth).⁴³
<p><i>Prohibitions relating to ‘political campaigners’ registered under the Australian Charities and Not-for-Profits Commission Act 2012 (Cth) or the Fair Work Act (Registered Organisations) Act 2009 (Cth)</i></p>	<ul style="list-style-type: none"> • A financial controller of a ‘political campaigner’ registered under the <i>Australian Charities and Not-for-Profits Commission Act 2012</i> (Cth) or the <i>Fair Work Act (Registered Organisations) Act 2009</i> (Cth) is liable if they received gifts from a donor that is not an ‘allowable donor’ when: <ul style="list-style-type: none"> ○ the total of ‘political expenditure’ and gifts made exceeds the ‘allowable amount’; or ○ a gift of at least \$250 in a financial year is made expressly for one or more political purposes.⁴⁴ • A financial controller of a political campaigner registered under the <i>Australian Charities and Not-for-Profits Commission Act 2012</i> (Cth) or the <i>Fair Work Act (Registered Organisations) Act 2009</i> (Cth) is liable when: <ul style="list-style-type: none"> ○ gifts from donors that are not ‘allowable donors’ are paid into an account; and ○ ‘political expenditure’ is made from the account.⁴⁵ <p>Note: the following do not apply to ‘political campaigners’ and ‘third party campaigners’ registered under the <i>Australian Charities and Not-for-Profits Commission Act 2012</i> (Cth) or the <i>Fair Work Act (Registered Organisations) Act 2009</i> (Cth).</p> <ul style="list-style-type: none"> • Prohibition re: donations from foreign bank accounts.⁴⁶ • Requirement to seek appropriate donor information for donations of at least \$250.⁴⁷ • Prohibition on soliciting gifts from non-allowable donors to be transferred to ‘political campaigners’ registered under the <i>Australian Charities and Not-for-Profits Commission Act 2012</i> (Cth) or the <i>Fair Work Act (Registered Organisations) Act 2009</i> (Cth).⁴⁸ • Prohibition on receiving gifts from non-allowable donors in order to transfer the gifts to ‘political campaigners’ registered under the <i>Australian Charities and Not-for-Profits Commission Act 2012</i> (Cth) or the <i>Fair Work Act (Registered Organisations) Act 2009</i> (Cth).⁴⁹

⁴² Proposed s 302G of the *Commonwealth Electoral Act 1918* (Cth).

⁴³ Proposed s 302H of the *Commonwealth Electoral Act 1918* (Cth).

⁴⁴ Proposed s 302E of the *Commonwealth Electoral Act 1918* (Cth).

⁴⁵ Proposed s 302F of the *Commonwealth Electoral Act 1918* (Cth).

⁴⁶ Proposed s 302K of the *Commonwealth Electoral Act 1918* (Cth).

⁴⁷ Proposed s 302L of the *Commonwealth Electoral Act 1918* (Cth).

⁴⁸ Proposed s 302G of the *Commonwealth Electoral Act 1918* (Cth).

<p><i>Prohibition relating to 'third party campaigners'</i></p>	<ul style="list-style-type: none"> • A financial controller of a third party campaigner is liable if they received gifts from a donor that is not an 'allowable donor' when: <ul style="list-style-type: none"> ○ the total of 'political expenditure' and gifts made exceeds the 'allowable amount'; or ○ a gift of at least \$250 in a financial year is made expressly for one or more political purposes.⁵⁰ • Prohibition on soliciting gifts from non-allowable donors to be transferred to 'third party campaigners' not registered under the <i>Australian Charities and Not-for-Profits Commission Act 2012</i> (Cth) or the <i>Fair Work Act (Registered Organisations) Act 2009</i> (Cth).⁵¹ • Prohibition on receiving gifts from non-allowable donors in order to transfer the gifts to 'third party campaigners' not registered under the <i>Australian Charities and Not-for-Profits Commission Act 2012</i> (Cth) or the <i>Fair Work Act (Registered Organisations) Act 2009</i> (Cth).⁵² Note: the following do not apply to 'third party campaigners': <ul style="list-style-type: none"> • Prohibition re donations from foreign bank accounts etc.⁵³ • Requirement to seek appropriate donor information for donations of at least \$250.⁵⁴ • Prohibition on soliciting gifts from non-allowable donors.⁵⁵ • A financial controller of a political campaigner registered under the <i>Australian Charities and Not-for-Profits Commission Act 2012</i> (Cth) or the <i>Fair Work Act (Registered Organisations) Act 2009</i> (Cth) is liable when: <ul style="list-style-type: none"> ○ Gifts from donors that are not 'allowable donors' are paid into an account; and ○ Political expenditure is made from the account.⁵⁶
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⁴⁹ Proposed s 302H of the *Commonwealth Electoral Act 1918* (Cth).

⁵⁰ Proposed s 302E of the *Commonwealth Electoral Act 1918* (Cth).

⁵¹ Proposed s 302G of the *Commonwealth Electoral Act 1918* (Cth).

⁵² Proposed s 302H of the *Commonwealth Electoral Act 1918* (Cth).

⁵³ Proposed s 302K of the *Commonwealth Electoral Act 1918* (Cth).

⁵⁴ Proposed s 302L of the *Commonwealth Electoral Act 1918* (Cth).

⁵⁵ Proposed s 302G of the *Commonwealth Electoral Act 1918* (Cth).

⁵⁶ Proposed s 302F of the *Commonwealth Electoral Act 1918* (Cth).

II. THE GOVERNING PRINCIPLES IN EVALUATING THE BILL

A principles-based approach towards public policy is essential to ensuring that public policy is directed towards the public interest — especially in a vexed and controversial area such as the funding of politics. To be sure, no set of principles will resolve all disagreement or yield answers to all questions; and the principles themselves will be subject to different interpretations and applications. A principles-based approach will, however, enable the scope of disagreement to be narrowed; identify what is significant (and what is not); and provide a rough-and-ready compass to the way forward.

Four democratic principles inform this submission:

- 1) Protecting the integrity of representative government (including preventing corruption);
- 2) Promoting fairness in politics;
- 3) Supporting political parties to discharge their democratic functions; and
- 4) Respecting political freedoms (in particular, freedom of political expression and freedom of political association).

These are principles I proposed in my book, *Money and Politics: The Democracy we Can't Afford*⁵⁷ and also in a 2010 report I wrote for the New South Wales Electoral Commission, *Towards a More Democratic Political Funding Regime*.⁵⁸ These principles were endorsed by the then New South Wales Electoral Commissioner⁵⁹ and also recommended by the New South Wales Joint Standing Committee on Electoral Matters to form the objects clause of New South Wales electoral funding legislation.⁶⁰ Elements of these principles are reflected in section 4A of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) which was inserted in 2014. This provision provides that:

The objects of this Act are as follows:

- (a) to establish a fair and transparent election funding, expenditure and disclosure scheme,
- (b) to facilitate public awareness of political donations,
- (c) to help prevent corruption and undue influence in the government of the State or in local government,
- (d) to provide for the effective administration of public funding of elections, recognising the importance of the appropriate use of public revenue for that purpose,

⁵⁷ Joo-Cheong Tham, *Money and Politics: The Democracy we Can't Afford* (2010) ch 1.

⁵⁸ Joo-Cheong Tham, *Political Funding Regime in New South Wales: A Report Prepared for the New South Wales Electoral Commission* (February 2010) <https://www.efa.nsw.gov.au/__data/assets/pdf_file/0005/128714/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf> ch 2.

⁵⁹ Joint Standing Committee on Electoral Matters, Parliament of New South Wales, *Public Funding of Election Campaigns* (2010) 58–60.

⁶⁰ *Ibid* 3.

- (e) to promote compliance by parties, elected members, candidates, groups, agents, third-party campaigners and donors with the requirements of the election funding, expenditure and disclosure scheme.

These principles are congruent with the ‘four principles (identified) as fundamental to a trusted system for political donations’ by this Committee in its *Second Interim Report on the Inquiry into the Conduct of the 2016 Federal Election: Foreign Donations*:

- **Transparency**, via visible, timely disclosure of donations and donors;
- **Clarity**, about what is required and by whom;
- **Consistency** of regulations, so that they capture all participants and support a level playing field; and
- **Compliance**, through enforceable regulations with minimal, practicable compliance burdens.⁶¹

The principle of transparency is a key way in which the integrity of representative government is protected. Consistency, as defined by the Committee, is an aspect of fairness. The principles of clarity and compliance are not only general principles of effective legislation but also have particular salience for respecting political freedoms — the regulatory burden on political actors will be shaped by the extent to which these principles are met.

⁶¹ Commonwealth Joint Standing Committee on Electoral Matters, *Second Interim Report on the Inquiry into the Conduct of the 2016 Federal Election: Foreign Donations* (2017) xiii.

III. AN INTEGRATED SCHEME FOR REGULATING POLITICAL EXPENDITURE OF ORGANISATIONS

Besides the democratic principles outlined above, assessment of the Bill should have been regard to how Australian political funding laws (including the Bill) regulates political organisations — the different categories it establishes based on the various activities of political organisations and the implications of these categories of the level of regulation (especially as compared to political parties).

Table 3 summarises the key categories, the activity that forms the main basis for regulating organisations that fall within each category and the level of regulation applying to each category of organization as compared to that which applies to registered political parties.

Table 3: Categories of political organisations under Australian political finance laws

Category of political organization	Activity providing rationale for regulation	Level of regulation as compared to that applying to political parties
Political parties	Standing for office – including to form government	
Associated entities	De facto extension of political party	Same
Political campaigner	Influence through political expenditure comparable to established political parties with parliamentary representation	Similar
Third party campaigner	Influence through significant political expenditure	Less

IV. MEASURES DIRECTED AT TRANSPARENCY: REGISTRATION AND DISCLOSURE RETURNS

1. *Transparency, fairness and the regulation of third party spending*

Transparency in terms of political funding protects the integrity of representative government in two main ways: it promotes informed voting, and it prevents corruption (of various kinds). Such transparency also assists in terms of fairness in politics as it allows the identification of funding imbalances that threaten to undermine fairness — especially in elections.

These general considerations clearly apply to those standing for office — political parties in particular. While the anti-corruption rationale applies less strongly to third parties (political actors that incur political expenditure which are not standing for office), the rationales of informed voting and fairness similarly apply. It is these reasons that underpin the principle of consistency identified by Committee in its *Second Interim Report on the Inquiry into the Conduct of the 2016 Federal Election: Foreign Donations*.⁶²

This principle explains why blanket exemptions for third party spending are problematic. This is all the more so when the principle of supporting political parties to discharge their democratic functions is foregrounded — regulating political parties but not third parties will necessarily undermine the central role of political parties, detracting from the strength of Australia’s democracy.

Accepting that third parties should not necessarily be exempt from the regulation of political finance does not however resolve the questions of *which* third parties should be regulated and *how* they should be regulated — it is these questions that come to the fore with the Bill.

The democratic principles outlined above, particularly fairness in politics and respect for political freedoms, imply that any regulation of third parties should take into account that salient differences exist between these organisations and political parties — and to fundamentally recognize that consistency does not mean identical treatment.

In the 2012 report I wrote for the New South Wales Electoral Commission, *Establishing a Sustainable Framework for Election Funding and Spending Laws in New South Wales* (*‘Sustainable Framework’*)⁶³ I identified the following differences between political parties and third parties:

⁶² Commonwealth Joint Standing Committee on Electoral Matters, *Second interim report on the inquiry into the conduct of the 2016 federal election: Foreign Donations* (2017) xiii.

⁶³ Available at
<https://www.elections.nsw.gov.au/publications/reports/commissioned_reports/20121113_Joo-Cheong_Tham_-_Establishing_A_Sustainable_Framework_for_Election_Funding_and_Spending_Laws_in_New_South_Wales_final_report.pdf>.

- Political parties (or more accurately their candidates) stand for office but not third parties;
- Political parties are wholly political organisations whereas third parties tend not to be;
- Political parties tend to rely upon donations to fund their campaigns whereas third parties have more varied sources of income;
- The campaigns of political parties are invariably electoral campaigns (campaigns directly aimed at influencing voters and electoral outcomes) whereas third parties tend to engage in electoral and non-electoral campaigns;
- The electoral campaigns of political parties tend to be based on express party and candidate advocacy whereas the electoral campaigns of third parties tend not to take such a character but rather comprise provision of electoral information and/or issue advocacy; and
- Because of their multiple organizational purposes, varied sources of income, and the fluid and multi-dimensional character of their campaigns, third parties tend to face a more acute challenge of identifying which funds and spending which are regulated by political funding laws.⁶⁴

These salient differences have implications in terms of which third parties are regulated and how. Unlike political parties, not all third parties are to be regulated. This takes into account the differences between the two categories of organisations. Adopting a blanket approach to regulating third parties would, on the other hand, be unfair to third parties that do not have a meaningful impact upon politics and especially elections, and also unduly burden political freedoms as the regulatory burden on less-resourced organisations might result in a ‘chilling’ effect on political engagement. Only third parties that incur significant political expenditure should be regulated. As the current Special Minister of State puts it, ‘it is appropriate that *all* participants who choose to expend *significant amounts of political expenditure* are subject to transparency’.⁶⁵ The statutory definition of ‘political expenditure’ should also be adequately defined so that it does not capture organisations whose spending do not result in a significant impact upon politics and also to enable ease of compliance. And in terms of level of regulation, the general approach should be to apply to third parties subject to political finance laws to a level of regulation less stringent than those applying to political parties (as indicated in Table 3).

2. *The proposed registration scheme*

The Bill proposes a registration scheme for ‘political campaigners’ and ‘third party campaigners’ (see Table 1). I broadly support this proposal. As I noted in the *Sustainable Framework* report, registration schemes have two purposes: they enable the regulatory authorities to more effectively administer the legislation as they identify the entities and individuals that would be subject to such laws. Secondly, by

⁶⁴ Ibid 75–81.

⁶⁵ Commonwealth, *Parliamentary Debates*, Senate, Senator Mathias Cormann, Minister for Finance and Deputy Leader of the Government in the Senate, 7 December 2017, 10099 (emphasis added).

being made public, registers provide information to the general public, in particular voters, as to who are the main participants in elections. This may lead to more informed voting decisions, a consequence that protects the integrity of representative government through more effective electoral accountability.⁶⁶

What I do not support are the proposed definitions of ‘third party campaigner’ and ‘political campaigner’ - these definitions set the thresholds way too low in terms of the level of ‘political expenditure’, presenting problems of unfairness as well placing an undue burden on political freedoms.

While there is a clearly a range of reasonable choices in terms of where the thresholds should be set, three considerations should be at the forefront:

- the organizational character of the entity to be regulated;
- the significance of the level of political expenditure (especially when compared to major political parties); and
- the stringency of obligations that are to be imposed (when compared to those applying to political parties).

The Bill proposes that any person or entity that incurring ‘political expenditure’ more than the indexed disclosure threshold (presently \$13,500)⁶⁷ in a financial year be required to register.⁶⁸ Reliance on the disclosure threshold in this context, however, involves a conceptual error. In the main, the disclosure threshold is meant to identify contributions that are subject to the obligation to provide particulars (e.g. name and address of contributor) — *not to identify the persons and organisations to be regulated*. The result of this error is a threshold that is exceedingly low with entities that have spent a relatively small amount of ‘political expenditure’ subject to serious legal obligations. This disproportionate regulatory burden is unfair to these organisations (which will tend not to be wholly political organisations) and also potentially discourages political engagement.

As I argued earlier (consistently with the statements made by the Special Minister of State), third parties should be regulated when they incur significant ‘political expenditure’. An indexed threshold set at \$100,000 of political expenditure per financial year (or in any one of the previous three financial years) is much more reasonably seen as significant political expenditure. It should be noted that even when persons and entities are *not* required to register as a ‘third party campaigner’, they will be subject to the authorisation requirements if they publish electoral advertisements.⁶⁹

Similarly, the definition of ‘political campaigner’ proposed by the Bill is set too low. To illustrate: 34 out of the 55 organisations which lodged political expenditure returns for 2015/2016 (a federal election year) would be ‘political campaigners’ if the Bill is enacted as they spent more than \$100,000 in that year. These 34

⁶⁶ *Sustainable Framework*, 83.

⁶⁷ See <http://www.aec.gov.au/Parties_and_Representatives/public_funding/threshold.htm>.

⁶⁸ Proposed s 287G of the *Commonwealth Electoral Act 1918* (Cth).

⁶⁹ *Commonwealth Electoral Act 1918* ss 328–328A.

organisations which are to be regulated *like political parties* include the SA Road Transport Association and the Royal Australian College of General Practitioners.⁷⁰

Given that varying organisational character of ‘political campaigners’ and that they are to be regulated in a similar way to political parties, the level of their expenditure should be comparable to established political parties with parliamentary representation (see Table 3). Table 4 below provides guidance as to what this level might be by detailing the amount of payments made in 2015/2016 by political parties currently represented in the Senate based on the returns they lodged with the Australian Electoral Commission.⁷¹ These payments being made in a federal election year are a reasonable proxy for the amount of campaign expenditure incurred by these parties.

Table 4: Amount of payments by political parties represented in the Senate in 2015/2016

Party	Amount
Liberal Party	\$66.7 million
Australian Labor Party	\$49.2 million
Australian Greens	\$14.5 million
National Party of Australia	\$10.4 million
Liberal Democratic Party	\$1.5 million
Xenophon Team	\$706,205
Pauline Hanson’s One Nation	\$294,870
Derryn Hinch’s Justice Party	\$91,392

The threshold for being required to register as a ‘political campaigner’ should be somewhere between the spending of Liberal Democratic Party and the National Party. An indexed threshold set at \$2 million of political expenditure per financial year (or in any one of the previous three financial years) would be appropriate in this context. If this higher threshold were to be applied to the 2015/2016 political expenditure returns, the following five organisations will be required to register as ‘political campaigners’: GetUp Limited; Business Council of Australia; Australian Education Union; Australian Council of Trade Unions and ACA Low Emissions Technologies Ltd.

Recommendation One: The Bill should be amended so that a person or entity be required to register as a ‘third party campaigner’ when ‘political expenditure’ of more than \$100,000 (indexed) in a financial year or in any one of the previous three financial years has been incurred.

⁷⁰ The returns lodged with Australian Electoral Commission are available at <http://periodicdisclosures.aec.gov.au>.

⁷¹ For the parties represented in the Senate see https://www.aph.gov.au/Senators_and_Members/Senators/Senate_composition. The returns lodged with Australian Electoral Commission are available at <http://periodicdisclosures.aec.gov.au>. No return was lodged for 2015/2016 by the Australian Conservatives.

Recommendation Two: The Bill should be amended to require a person or entity to register as a 'political campaigner' when 'political expenditure' of more than \$2 million (indexed) in a financial year or in any one of the previous three financial years has been incurred.

The definition of 'political expenditure' should also be tightened up. The Bill proposes to define 'political expenditure' as 'expenditure incurred for one or more political purposes'.⁷² It further proposes that 'political purpose' be defined as:

any of the following purposes:

- (a) the public expression by any means of views on a political party, a candidate in an election or a member of the House of Representatives or the Senate;
 - (b) the public expression by any means of views on an issue that is, or is likely to be, before electors in an election (whether or not a writ has been issued for the election);
 - (c) the communicating of any electoral matter (not being matter referred to in paragraph (a) or (b)) for which particulars are required to be notified under section 321D;
 - (d) the broadcast of political matter (not being matter referred to in paragraph (c)) in relation to which particulars are required to be announced under subclause 4(2) of Schedule 2 to the *Broadcasting Services Act 1992* ;
 - (e) the carrying out of an opinion poll, or other research, relating to an election or the voting intentions of electors;
- except if:
- (f) the sole or predominant purpose of the expression of the views, or the communication, broadcast or research, is the reporting of news, the presenting of current affairs or any editorial content in news media; or
 - (g) the expression of the views, or the communication, broadcast or research, is solely for genuine satirical, academic or artistic purposes.

This definition is both too broad and imprecise for two related reasons. It is, firstly, based on the purposes of the expenditure, which can often raise complicated questions as to the motivations underlying the spending. Secondly, 'for' (in the definition of 'political expenditure') admits of various degrees of connection with the activities stipulated in the definition of 'political purpose'. This raises complicated questions of a different kind: Is rent for buildings that house organisations that engage in public campaigning 'political expenditure'? What about general organizational support such as human resource services?.

An approach that helps avoid these difficulties is to have a definition that is based on the *subject matter* of the spending. Section 87(2) of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) adopts this approach in its definition of 'electoral communication expenditure' by providing that:

"electoral communication expenditure" is electoral expenditure of any of the following kinds:
(a) expenditure on advertisements in radio, television, the Internet, cinemas, newspapers, billboards, posters, brochures, how-to-vote cards and other election material,

⁷² Proposed amendment to section 287(1) of the *Commonwealth Electoral Act 1918* (Cth).

- (b) expenditure on the production and distribution of election material,
- (c) expenditure on the Internet, telecommunications, stationery and postage,
- (d) expenditure incurred in employing staff engaged in election campaigns,
- (e) expenditure incurred for office accommodation for any such staff and candidates (other than for the campaign headquarters of a party or for the electorate office of an elected member),
- (e1) expenditure on travel and travel accommodation for candidates and staff engaged in electoral campaigning,
- (e2) expenditure on research associated with election campaigns (other than in-house research),
- (f) such other expenditure as may be prescribed by the regulations as electoral communication expenditure, but is not electoral expenditure of the following kinds:
 - (g), (h) (Repealed)
 - (i) expenditure incurred in raising funds for an election or in auditing campaign accounts,
 - (j) such other expenditure as may be prescribed by the regulations as not being electoral communication expenditure.

One way in which an approach based on subject matter of spending (rather than its underlying purposes) could be applied to the Bill is to have 'political expenditure' defined as expenditure *on* the items presently stipulated in the definition of 'political purpose'.

Recommendation Three: The Bill should be amended to define 'political expenditure' as expenditure on any of the following:

- (a) the public expression by any means of views on a political party, a candidate in an election or a member of the House of Representatives or the Senate;
 - (b) the public expression by any means of views on an issue that is, or is likely to be, before electors in an election (whether or not a writ has been issued for the election);
 - (c) the communicating of any electoral matter (not being matter referred to in paragraph (a) or (b)) for which particulars are required to be notified under section 321D;
 - (d) the broadcast of political matter (not being matter referred to in paragraph (c)) in relation to which particulars are required to be announced under subclause 4(2) of Schedule 2 to the *Broadcasting Services Act 1992* ;
 - (e) the carrying out of an opinion poll, or other research, relating to an election or the voting intentions of electors;
- except if:
- (f) the sole or predominant purpose of the expression of the views, or the communication, broadcast or research, is the reporting of news, the presenting of current affairs or any editorial content in news media; or
 - (g) the expression of the views, or the communication, broadcast or research, is solely for genuine satirical, academic or artistic purposes.

In my 2016 submission to the Senate inquiry into the Commonwealth legislative provisions relating to oversight of associated entities of political parties, I identified low penalties as a significant shortcoming of current federal election funding laws.⁷³ In this spirit, I broadly welcome the increase in penalties being proposed by the Bill — they clearly strengthen the deterrence effect of the penalties, thereby promoting compliance.

These proposed penalties as they relate to registration, however, suffer from a lack of proportionality. This is *not* because these proposed penalties are based on separate contraventions being committed for each day a person or entity fails to register after the 28-day grace period.⁷⁴ It is because there is a lack of any relationship between the maximum penalty and the amount of political expenditure incurred by a person or entity which has failed to register after the grace period. Consider the case of an organization which has spent \$14 000 in political expenditure in a financial year and failed to register 60 days after the grace period: the maximum penalty for failure to register in these circumstances would be around \$1.5 million (60 x 120 penalty units x \$210). Such a maximum penalty is clearly disproportionate to the circumstances, being more than 100 times the amount of political expenditure. I propose capping the maximum penalty for failure to register to twice the amount of political expenditure incurred during the financial year when registration is required — this would provide adequate deterrence whilst being proportionate.

Recommendation Four: The Bill should be amended so that the maximum penalty for failure to register is capped at twice the amount of political expenditure incurred during the financial year when registration was required.

3. *Proposed changes to the definition of ‘associated entity’*

Section 287 of the *Commonwealth Electoral Act 1918* (Cth) presently defines ‘associated entity’ as:

- (a) an entity that is controlled by one or more registered political parties; or
- (b) an entity that operates wholly, or to a significant extent, for the benefit of one or more registered political parties; or
- (c) an entity that is a financial member of a registered political party; or
- (d) an entity on whose behalf another person is a financial member of a registered political party; or
- (e) an entity that has voting rights in a registered political party; or
- (f) an entity on whose behalf another person has voting rights in a registered political party.

⁷³ The submission is available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/legislative_provisions/Submissions.

⁷⁴ See proposed ss 287F(4) and 287G(4) of the *Commonwealth Electoral Act 1918* (Cth).

As it is, the definition of ‘associated entity’ is too broad. As noted earlier (see Table 3), the rationale of the ‘associated entity’ provisions is to capture organisations that are de facto extensions of the political party. Sub-sections (a) and (b) of the present definition are consistent with this rationale but not so sub-sections (c)–(f) which extend to organizational members of a political party. Members of a political party — whether individuals or organisations — participate in the political party *but are not extensions of the political party*. Members of a political party typically do not act on its behalf; neither are they usually controlled by a political party or operate wholly or to a significant extent for the benefit of the party.

The Bill proposes to change and broaden the definition of ‘associated entity’. An ‘associated entity’ is to be defined as ‘an entity that is registered as an associated entity under section 287L’.⁷⁵ Proposed section 287H picks up on the current definition of ‘associated entity’ and places a requirement to register as an ‘associated entity’ when any of the sub-sections apply. The crucial change proposed by the Bill in this context is proposed section 287H(5) which provides as follows:

Without limiting paragraph (1)(b), an entity is, for the purposes of this Part, taken to be an entity that operates wholly, or to a significant extent, for the benefit of one or more registered political parties if:

- (a) the entity, or an officer of the entity acting in his or her actual or apparent authority, has stated (in any form and whether publicly or privately) that the entity is to operate:
 - (i) for the benefit of one or more registered political parties; or
 - (ii) to the detriment of one or more registered political parties in a way that benefits one or more other registered political parties; or
 - (iii) for the benefit of a candidate in an election who is endorsed by a registered political party; or
 - (iv) to the detriment of a candidate in an election in a way that benefits one or more registered political parties; or
- (b) the expenditure incurred by or with the authority of the entity during the relevant financial year is wholly or predominantly political expenditure, and that political expenditure is used wholly or predominantly:
 - (i) to promote one or more registered political parties, or the policies of one or more registered political parties; or
 - (ii) to oppose one or more registered political parties, or the policies of one or more registered political parties, in a way that benefits one or more other registered political parties; or
 - (iii) to promote a candidate in an election who is endorsed by a registered political party; or
 - (iv) to oppose a candidate in an election in a way that benefits one or more registered political parties.

Proposed section 287H(5)(b) is a useful clarification of what is meant by ‘an entity that operates wholly, or to a significant extent, for the benefit of one or more registered political parties’ insofar as it deals with promoting and opposing one or more registered political parties. When these circumstances are present, it is

⁷⁵ Proposed amendment to s 287(1) of the *Commonwealth Electoral Act 1918* (Cth).

reasonable to infer that an organization is an ‘associated entity’ because it is a de facto extension of the party. That said, such an inference would not be reasonable when there is evidence to rebut such a conclusion. The upshot is that these circumstances should give rise to a presumption and not function as a deeming provision.

The proposed sub-section is also too narrow in that it fails to capture fund-raising vehicles whose activities mainly involve the receipt and provision of gifts to political parties and candidates as ‘political expenditure’ does not expressly include such activity.⁷⁶

The main vices of the proposed sub-section, however, lie with its breadth. Proposed sub-section 287H(5)(a) represents a stark departure from the rationale of the ‘associated entity’ provisions - a statement that falls within this proposed sub-section does not render the organization in question an *extension* of the political party or candidate. Statements of this kind are regularly made by organisations independent of political parties, organisations which are more appropriately regulated as ‘third party campaigners’ and ‘political campaigners’. Proposed sub-section 287H(5)(b) is also over-broad by deeming an entity through its promotion or opposition of the *policies* and *candidates* of one or more registered political party (as distinct from promoting or opposing the parties themselves) – such activities themselves do not reasonably give rise to a conclusion that the organization is a de facto extension of the political party.

Recommendation Five: The Bill should be amended so that:

- d. An entity is required to register as an ‘associated entity’ only when it is controlled by one or more registered political parties, or operates wholly (or to a significant extent) for the benefit of one or more registered political parties;
- e. An entity is presumed to be an ‘associated entity’ when the expenditure incurred by or with the authority of the entity during the relevant financial year is wholly or predominantly political expenditure, and that political expenditure is used wholly or predominantly:
 - i. to promote one or more registered political parties, ~~or the policies of one or more registered political parties;~~ or
 - ii. to oppose one or more registered political parties, ~~or the policies of one or more registered political parties,~~ in a way that benefits one or more other registered political parties; or
 - iii. ~~to promote a candidate in an election who is endorsed by a registered political party; or~~
 - iv. ~~to oppose a candidate in an election in a way that benefits one or more registered political parties.~~

⁷⁶ Proposed amendment to s 287(1) of the *Commonwealth Electoral Act 1918* (Cth).

- f. 'Political expenditure' includes the provision of gifts to registered political parties, Senate groups and candidates.

4. *Proposed changes to disclosure returns*

The Bill proposes disclosure requirements in relation to 'senior staff' and 'discretionary benefits' (see Table 1). The proposed requirements relating to 'senior staff' should be supported as they will provide information relevant to ascertaining political affiliations of key political actors. The requirements relating to 'discretionary benefits', however, require further explanation — it is not clear what the justification for these proposed changes are from on the face of the Bill, its Second Reading Speech, or its Explanatory Memorandum.

There is also one item of political expenditure that should be disclosed by key political actors that is not addressed — spending on lobbying. This is a significant omission as paid lobbying is one of the main ways in which money influences the political process in this country.⁷⁷ Disclosure requirements should include details of spending on 'lobbying activities' as defined in federal Lobbying Code of Conduct.⁷⁸

Recommendation Six: The justification for the proposed disclosure requirements relating to 'discretionary benefits' should be provided.

Recommendation Seven: The Bill should be amended so that its disclosure requirements include details of spending on 'lobbying activities' (as defined in federal Lobbying Code of Conduct).

5. *Failure to address main deficiencies of disclosure scheme*

The Bill is noteworthy for what it proposes — *and what it fails to propose*. It fails to address pressing problems with the federal disclosure scheme, problems that increasingly result in being a scheme of non-disclosure. These problems — mainly relating to the high disclosure threshold and the lack of timeliness — have been carefully examined by the Joint Standing Committee on Electoral Matters' *Report on the Funding of Political Parties and Election Campaigns* (2011) with the Committee making a series of recommendations that will significantly enhance the transparency of political funding in this country.⁷⁹

Recommendation Eight: The recommendations in Joint Standing Committee on Electoral Matters' *Report on the Funding of Political Parties and Election Campaigns* (2011) should be enacted.

⁷⁷ Joo-Cheong Tham, *Money and Politics: The Democracy We Can't Afford* (2010) chs 8–9.

⁷⁸ Australian Government, *Lobbying Code of Conduct*, clause 3.4 (available at <http://lobbyists.pmc.gov.au/conduct_code.cfm>).

⁷⁹ The report is available at <https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=em/political%20funding/report.htm>.

V. RESTRICTIONS IN RELATION TO 'FOREIGN' POLITICAL DONATIONS

The Bill proposes a range of restrictions in relation to 'foreign' political donations. As I have argued, most recently in an article published in the *King's Law Journal*,⁸⁰ it is essential to be clear as to what we mean by 'foreign' as different meanings give rise to different rationales. Specifically, there are three main meanings of 'foreign' political donations:

- 1) Donations originating from overseas sources;
- 2) Donations from foreign governments; and
- 3) Donations from those seen as lacking a legitimate basis for influencing the political process.

I will discuss the restrictions proposed by the Bill according to these three meanings. Meaning 1) corresponds to the restrictions relating to gifts from foreign bank accounts; Meaning 2) to the restrictions relating to non-allowable donors that are foreign governments; and Meaning 3) to the restrictions relating to other non-allowable donors.

1. *Restrictions relating to gifts from foreign bank accounts*

In the *King's Law Journal* article, I argued that:

The principal reason for restricting foreign-sourced donations relates to compliance: enforcing domestic laws overseas is extremely difficult, if impossible, in most situations. The concern then is that foreign-sourced donations will easily act as an avenue for evading political finance regulation with domestically-sourced donations being transferred outside the country and then transferred back in again, with the actual identity of donors concealed through this process of laundering. Insofar as foreign-sourced donations threaten self-determination and sovereignty in this way, it does so only in the limited sense of undermining the efficacy of political finance laws.⁸¹

For these reasons, I broadly support s 302K as proposed by the Bill. I would, however, both broaden and narrow its scope. First, the prohibition should be extended to gift recipients which are 'associated entities' (as defined in Recommendation Four); and also to 'political campaigners' and 'third-party campaigners' registered under the *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) or the *Fair Work Act (Registered Organisations) Act 2009* (Cth) in relation to their political expenditure, as the risk of laundering through foreign-sourced political donations also applies to these organisations.⁸² Second, the prohibition should not apply when the gift recipient has adduced evidence to the satisfaction of the Australian Electoral Commission that the named donor is the true source of the funds. This measure will allow the risk of laundering to be effectively

⁸⁰ Joo-Cheong Tham, 'Of Aliens, Money and Politics: Should Foreign Political Donations be Banned?' (2017) 28(2) *King's Law Journal* 262.

⁸¹ *Ibid* 265.

⁸² Cf proposed s 302K(1)(e) of the *Commonwealth Electoral Act 1918* (Cth).

addressed while allowing political organisations to still receive foreign-sourced donations.

Recommendation Nine: The Bill should be amended so that its prohibition relating to gifts from foreign bank accounts:

- c. Extends to:
 - i. gift recipients which are ‘associated entities’ (as defined in Recommendation Five); and
 - ii. gift recipients which are ‘political campaigners’ and ‘third-party campaigners’ registered under the *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) or the *Fair Work Act (Registered Organisations) Act 2009* (Cth) in relation to their political expenditure; and
 - d. Does not apply when the gift recipient has adduced evidence to the satisfaction of the Australian Electoral Commission that the named donor is the true source of the funds.
2. *Restrictions relating to non-allowable donors that are foreign governments*

These proposed restrictions directly stem from the Bill proposing that foreign political entities be considered to be non-allowable donors.⁸³ I support this proposed prohibition. As I argued in the *King’s Law Journal* article:

(T)he underlying principle seems to be that nation-states are – should be – oriented towards the distinct interests of their own political communities. Crucial to this orientation towards the ‘national interest’ are the processes of forming government, specifically elections. The essential point here is that respect for national sovereignty and self-determination by nation-states implies non-interference in their electoral processes. The point is not that foreign governments should have no influence over domestic political processes, they clearly do in foreign relations. Such influence, however, occurs in the context of interactions *between governments* – and after governments are formed.⁸⁴

These points apply to *all* foreign governments. As the Prime Minister put it in the Second Reading Speech to the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, ‘interference is unacceptable from any country whether you might think of it as friend, foe or ally’.⁸⁵

⁸³ Proposed s 287AA(3) of the *Commonwealth Electoral Act 1918* (Cth).

⁸⁴ Joo-Cheong Tham, ‘Of Aliens, Money and Politics: Should Foreign Political Donations be Banned?’ (2017) 28(2) *King’s Law Journal* 262, 268.

⁸⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, Malcolm Turnbull, Prime Minister, 7 December 2017, 13 145.

Recommendation Ten: The restrictions in relation to non-allowable donors that are foreign governments under the Bill should be enacted.

3. *Restrictions relating to non-allowable donors other than foreign governments*

Unlike the restrictions relating to donations from foreign bank accounts and foreign governments, I strongly oppose the restrictions relating to non-allowable donors other than foreign governments because:

- They are not justified on the basis of publicised cases of donors with alleged links to the Chinese Communist Party government;
- The justification based on ‘meaningful connection to Australia’ is based on an excessively narrow understanding of such connection and in some respects, constitutionally suspect;
- The complexity and onerousness of these restrictions will place a disproportionate compliance burden (especially on smaller organisations) posing constitutional risks;
- There are doubts as to the compatibility of these restrictions with implied freedom of political communication; and
- The problems relating to ‘foreign’ political donations are better addressed through general measures such as caps on political donations and election spending.

(a) Not justified by publicized cases of donors with alleged links to the Chinese Communist Party government

There is no doubt that the problems arising from publicised cases of donors with alleged links to the Chinese Communist Party government motivated the restrictions relating to non-allowable donors. As the current Special Minister of State put it in the Second Reading Speech to the Bill:

There has been growing concern amongst the community about foreign interference with our domestic political landscape. Media reports of foreign donations to parties, candidates and third parties have affected the perceived integrity of elections, which is critical to our peaceful democratic government.⁸⁶

Consider, however, the two donors at the centre of this concern: Chau Chak Wing and Huang Xiang Mo. *Neither of them will be banned from making political donations by the Bill — Chau has been an Australian citizen for decades and Huang is a permanent resident.*⁸⁷ Indeed, some of the businesses owned by these donors will likely fall outside these restrictions. Take, for example, Huang’s company, Yuhu Group Australia:⁸⁸ these restrictions will very likely *not* apply to this business

⁸⁶ Commonwealth, *Parliamentary Debates*, Senate, Senator Mathias Cormann, Minister for Finance and Deputy Leader of the Government in the Senate, 7 December 2017, 10100.

⁸⁷ <http://www.abc.net.au/news/2017-06-05/asio-warns-political-parties-over-foreign-donations/8590162>

⁸⁸ See <https://www.yuhugroup.com.au/about/>

because it is likely to be incorporated in Australia or even if not, its principal place of activity is in Australia.⁸⁹ Hence, whatever the justification is for the restrictions relating to non-allowable donors, it is not to be found in ‘growing concern amongst the community about foreign interference with our domestic political landscape’.

(b) An excessively narrow and problematic understanding of ‘meaningful connection to Australia’

Another justification for the restrictions relating to non-allowable donors is, according to the current Special Minister of State in the Second Reading Speech to the Bill:

to support the integrity of Australia's electoral system, and Australia's sovereignty, by ensuring that only those with a meaningful connection to Australia are able to influence Australian politics and elections through political donations.⁹⁰

Basing the justification on ‘a meaningful connection to Australia’ is not problematic in itself. The difficulties arise because the Bill reflects an understanding of ‘meaningful connection to Australia’ that is far too narrow in terms of its definition of ‘allowable donor’. The Bill proposes a new s 287AA of the *Commonwealth Electoral Act 1918* (Cth) which provides that:

287AA Meaning of allowable donor

- (1) A person or entity is an allowable donor if:
- (a) for an individual who makes a gift—the individual:
 - (i) is an elector; or
 - (ii) is an Australian citizen; or
 - (iii) is an Australian resident, unless a determination is in force under subsection (2) determining that Australian residents are not allowable donors; or
 - (b) for an entity that makes a gift:
 - (i) the entity is incorporated in Australia; or
 - (ii) for an entity that is not incorporated—the entity’s head office or principal place of activity is in Australia; or
 - (c) for a person or entity that is a trustee of an unincorporated trust fund or unincorporated foundation, out of which a gift is made—the person or entity is an allowable donor within the meaning of paragraph (a), (b) or (d); or
 - (d) the person or entity is in a class of persons or entities prescribed by the regulations for the purposes of this paragraph.

Australian residents

- (2) For the purposes of subparagraph (1)(a)(iii), the Minister may, by legislative instrument, determine that Australian residents are not allowable donors.

Foreign political entities

⁸⁹ Proposed section 287AA(1)(b).

⁹⁰ Commonwealth, *Parliamentary Debates*, Senate, Senator Mathias Cormann, Minister for Finance and Deputy Leader of the Government in the Senate, 7 December 2017, 10099.

- (3) Despite subsection (1), an entity is not an allowable donor if the entity is:
- (a) a body politic of a foreign country; or
 - (b) a body politic of a part of a foreign country; or
 - (c) a part of a body politic mentioned in paragraph (a) or (b); or
 - (d) a foreign public enterprise.

This definition excludes many persons resident in Australia who should be entitled to influence its political process. Specifically, it fails to properly reflect the broader meaning of ‘people of the Commonwealth’ as operationalised under the second paragraph of s 24 of the *Commonwealth Constitution*. The paragraph provides that:

The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:

- (i) a quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators;
- (ii) the number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

The Commonwealth Parliament has ‘otherwise provide(d)’, by legislating a method of calculating the number of ‘the people of the Commonwealth’ in a manner that closely conforms to the default method spelled out in s 24 by using the ‘latest statistics of the Commonwealth’ as the basis of calculations.⁹¹ The Australian Bureau of Statistics (ABS), in turn, determines the population of Australia by reference to the concept of ‘usual residence’ based on the 12-month rule (a person is considered to have Australia as its ‘usual residence’ if s/he has stayed in Australia for at least 12 months or intends to do so).⁹²

The key point to be made here is that those considered ‘people of the Commonwealth’ under this approach extends beyond Australian citizens or electors. As the ABS puts it, the estimated population based on this method ‘refers to all people, *regardless of nationality or citizenship*, who usually live in Australia’ and captures ‘permanent residents and long-term visitors from overseas (including students)’.⁹³

On the contrary, the definition of ‘allowable donors’ excludes long-term residents on temporary visas (including international students and workers on temporary skilled

⁹¹ *Commonwealth Electoral Act 1918* (Cth) ss 46–7.

⁹² See B Pink, *Information Paper: Population Concepts* (Australian Bureau of Statistics, 2008), cat. no. 3107.0.55.006; P Harper, *Population Estimates: Concepts, Sources and Methods* (Australian Bureau of Statistics, 2009), cat. no. 3228.0.55.001.

⁹³ B Pink, *Information Paper: Population Concepts* (Australian Bureau of Statistics, 2008), cat. no. 3107.0.55.006 (emphasis added). See also A Reilly and T Torresi, ‘Voting Rights of Permanent Residents’ (2016) 39(1) *University of New South Wales Law Journal* 401.

visas). It also places permanent residents in the precarious position of being denied the ability to make political donations through a legislative instrument made by the Special Minister of State.⁹⁴ Such executive fiat contradicts the view expressed by this Committee in the *Second interim report on the inquiry into the conduct of the 2016 federal election: Foreign Donations* (2017). Whilst the Committee recommended ‘a prohibition on donations from foreign citizens and foreign entities to Australian registered political parties, associated entities and third parties’, it expressly stated that ‘(t)his ban would not apply to dual Australian citizens either in Australia or overseas, or to *non-Australian permanent residents in Australia*’.⁹⁵

(c) The disproportionate compliance burden

The weakness of the justifications for the restrictions suggest that any improvements brought about the restrictions relating to non-allowable donors other than foreign governments will be marginal. Worse, these restrictions will place an onerous compliance burden — especially on smaller organisations.

This burden stems, firstly, from the complexity of the restrictions. This complexity can be brought out by comparing them to those relating to foreign governments and foreign bank accounts. In these two latter cases, recipients of gifts will know from the transactions involving the gifts whether or not they have complied with the restrictions — it will be reasonably clear from these transactions whether the gifts come from a foreign government or a foreign bank account. By contrast, the restrictions relating to non-allowable donors other than foreign governments are based on the *status of the donor* that will not be *apparent from the donation itself*. The consequence is that those required to comply with the restrictions will not know from the donation itself whether they have complied with the restrictions; they will not, for example, know from the transactions themselves whether the donor is an Australian citizen or permanent resident. As such, they will have to institute additional processes to ascertain the status of the donor; and, as the New South Wales experience testifies, these processes are often resource-intensive, resulting in a disproportionate impact on smaller political parties and organisations.⁹⁶

All these difficulties are highlighted by s 302L of the *Commonwealth Electoral Act 1918* (Cth) proposed by the Bill which requires registered political parties, Senate groups, candidates and ‘political campaigners’ not registered under *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) or the *Fair Work Act (Registered Organisations) Act 2009* (Cth) to obtain ‘appropriate donor information’ when a gift of at least \$250 is made in a financial year. Proposed s 302P defines ‘appropriate donor information’ as a statutory declaration from the donor declaring that the donor is an allowable donor or if regulations are made, information stipulated by these regulations.

⁹⁴ Proposed s 287AA(2) of the *Commonwealth Electoral Act 1918* (Cth).

⁹⁵ Commonwealth Joint Standing Committee on Electoral Matters, *Second Interim Report on the Inquiry into the Conduct of the 2016 Federal Election: Foreign Donations* (2017) xiv (Recommendation 3) (emphasis added).

⁹⁶ *Sustainable Framework* report, 134–7.

Assuming that ‘appropriate donor information’ requires a relevant statutory declaration, this would clearly have disproportionate impact on smaller organisations that may not have the resources to establish processes to obtain such a declaration. Such a requirement would also discourage donors who find the making of such a declaration to be bothersome.

The compliance burden placed by the restrictions is, therefore, disproportionate in two ways: the burden far exceeds any public benefits resulting from the restrictions and the burden falls unevenly upon smaller organisations.

(d) *Doubts as to the compatibility of these restrictions with implied freedom of political communication*

The main constitutional issue concerning the restrictions relating to non-allowable donors concerns its compatibility with the implied freedom of political communication. The present test for this freedom is found in the joint judgment in *McCloy v New South Wales* where French CJ, Kiefel, Bell and Keane JJ stated that:

The question whether an impugned law infringes the freedom requires application of the following propositions derived from previous decisions of this Court and particularly *Lange v Australian Broadcasting Corporation* and *Coleman v Power*:

- A. The freedom under the *Australian Constitution* is a qualified limitation on legislative power implied in order to ensure that the people of the Commonwealth may ‘exercise a free and informed choice as electors’. It is not an absolute freedom. It may be subject to legislative restrictions serving a legitimate purpose compatible with the system of representative government for which the *Constitution* provides, where the extent of the burden can be justified as suitable, necessary and adequate, having regard to the purpose of those restrictions.
- B. The question whether a law exceeds the implied limitation depends upon the answers to the following questions, reflecting those propounded in *Lange* as modified in *Coleman v Power*:
 1. Does the law effectively burden the freedom in its terms, operation or effect?

If ‘no’, then the law does not exceed the implied limitation and the enquiry as to validity ends.
 2. If ‘yes’ to question 1, are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government? This question reflects what is referred to in these reasons as ‘compatibility testing’.

The answer to that question will be in the affirmative if the purpose of the law and the means adopted are identified and are compatible

with the constitutionally prescribed system in the sense that they do not adversely impinge upon the functioning of the system of representative government.

If the answer to question 2 is 'no', then the law exceeds the implied limitation and the enquiry as to validity ends.

3. If 'yes' to question 2, is the law reasonably appropriate and adapted to advance that legitimate object? This question involves what is referred to in these reasons as 'proportionality testing' to determine whether the restriction which the provision imposes on the freedom is justified.

The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test – these are the enquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:

suitable — as having a rational connection to the purpose of the provision;

necessary — in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;

adequate in its balance — a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.

If the measure does not meet these criteria of proportionality testing, then the answer to question 3 will be 'no' and the measure will exceed the implied limitation on legislative power.⁹⁷

Applying this test, it can be concluded that the compatibility of these restrictions with the implied freedom is moot: whilst they are not clearly in breach of the freedom, there are doubts as to certain aspects of the restrictions.

On the one hand, the restrictions are much narrower in scope than the measure struck down by the High Court in *Unions NSW*.⁹⁸ That measure restricted the ability to donate to those on the electoral rolls⁹⁹ whereas the restrictions relating to non-allowable donors allow citizens ineligible to vote, permanent residents (notionally) and various organisations to make political donations. And unlike the struck down measure, the Bill has a clear statement as to the purposes of the restrictions in proposed section 302C:

⁹⁷ *McCloy v NSW* (2015) 89 ALJR 857, 862–3 [2] (citations omitted).

⁹⁸ *Unions NSW v NSW* (2013) 252 CLR 530.

⁹⁹ For the struck down provision, see *Unions NSW v NSW* (2013) 252 CLR 530, 546.

- (1) The object of the Division is to secure and promote the actual and perceived integrity of the Australian electoral process by reducing the risk of foreign persons and entities exerting (or being perceived to exert) undue or improper influence in the outcomes of elections.
- (2) This Division aims to achieve this object by restricting the receipt and use of political donations made by foreign persons or entities that do not have a legitimate connection to Australia.

On the other hand, the proposed restrictions relating to non-allowable donors deny long-term residents on temporary visas the ability to make political donations as well as provides for the possibility of permanent residents being denied this ability by legislative instrument. These aspects of the restrictions pose constitutional difficulties in terms of the implied freedom of political communication under the *Commonwealth Constitution*. In *Unions NSW*, it was clearly recognized that individuals resident in this country might be entitled to influence the political process because they are affected by its outcomes. In that case, the Court stated that:

Political communication may be undertaken legitimately to influence others to a political viewpoint. It is not simply a two-way affair between electors and government or candidates. *There are many in the community who are not electors but who are governed and are affected by decisions of government*

....

it may be acknowledged that such persons and entities have a legitimate interest in governmental action and the direction of policy.

The point to be made is that they, as well as electors, may seek to influence the ultimate choice of the people as to who should govern.¹⁰⁰

Further, as noted earlier, the compliance burden placed by the restrictions is disproportionate in two ways: the burden far exceeds any public benefits resulting from the restrictions and the burden falls unevenly upon smaller organisations. Both kinds of disproportionality are of significance to proportionality testing under the *McCloy* test. Specifically, they raise questions as to whether the restrictions relating to non-allowable donors other than foreign governments are necessary and adequate in their balance.

(e) *A better way: general measures such as caps on political donations and election spending*

The problems highlighted by the controversies concerning ‘foreign’ political donations are best dealt with by general measures such as caps on political donations and election spending.¹⁰¹ As I argued in my submission to the inquiry by

¹⁰⁰ *Unions NSW v NSW* (2013) 252 CLR 530, 551–2 (emphasis added).

¹⁰¹ See the following opinion pieces:

<https://theconversation.com/better-regulation-of-all-political-finance-would-help-control-foreign-donations-64597>

this Committee into the 2016 federal election, there should be fundamental reform of Commonwealth political finance laws, specifically:

- Enhanced disclosure obligations;
- Limits on election campaign spending;
- Limits on political contributions; and
- A reconfigured public funding scheme.¹⁰²

Recommendation Eleven: The Bill be amended so as to remove all its restrictions relating to non-allowable donors that are not foreign governments.

I hope this submission has been of assistance to the Committee.

Thank you.

Yours sincerely,

Professor Joo-Cheong Tham
Melbourne Law School

<http://www.abc.net.au/news/2016-09-01/better-regulation-of-all-political-finance-would-help-control-it/7805806>

<https://theconversation.com/eight-ways-to-clean-up-money-in-australian-politics-59453>.

¹⁰² Joo-Cheong Tham, *Submission to the Inquiry of the Joint Standing Committee on Electoral Matters into the 2016 Federal Election* (2016) 1 (available at:

<https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/2016Election/Submissions>).