

Submission to the inquiry into the conduct of the 2016 Federal Election.

The Committee's second interim report concerned itself with three main grounds for electoral law reform:

- The issue of undue influence possibly acquired by foreign donors to political campaigns, either through parties or other entities;
- The issue of political campaigns by tax-deductible charities, possibly in breach of the Act;
- The arrival of new 'political actors', as well as new campaigning technologies, which appear to escape current regulations.

The first two are important issues, but I wish to focus my submission on the last of them - the question of how to respond to what appear to be new voices in political campaigns and new ways of campaigning.

I am a member of GetUp, and I believe strongly that engagement of citizens in political processes through such organisations is vital for the functioning of our democracy. I hardly need to say there are currently real fears for the survival of democracies, and earnest and necessary debates about the best ways to revive them. No one disagrees, though, that we must encourage more participation, and a diverse and vigorous civil society. I would have wished those concerns to appear in the proposed amendments; but they do not. Instead, the proposals appear to be motivated by perceived threats to incumbent actors - the parties.

The level playing field

The committee's thinking about this issue - regulation of new political actors - appears to revolve around the idea that any person or organisation whose intention is to influence an election outcome should be regulated in the same way, subject only to some disclosure threshold.

"The Committee identified the need to ensure that a level playing field exists between all political actors" any new regulations "must be applicable to all players in a fair, even and impartial manner."¹

The metaphor of the playing field is a useful way to convey this idea. It suggests that the political space is like a football field; political actors are like contending teams; the AEC is an umpire; and new players must accept the rules of the game.

I want to submit to you that this way of seeing things is seriously misleading, inasmuch as it misrepresents the fundamental concept of a participatory democracy. Whether or not it captures the actual conditions of political institutions in Australia is a different question - but not the main one. The essential error, it seems to me, is this:

The fact of popular sovereignty grows from a single potent idea - that each and every citizen is equally entitled to an active role in governing the affairs of their society. Political parties are one way to give effect to that participation - but by no means the only one. In fact, the existence of strong parties can be a serious risk to popular government, as the American founders well knew. Monopolistic parties can be lethal to democracy. So to conceive of a working democracy as an arena of contending parties is not just wrong, but potentially toxic. That potential to acquire dominant political agency is the good reason why parties, particularly as they interact with commercial and other power-holders, need to be well regulated. To transfer that requirement to citizen groups advocating independently, on the grounds that if they can oppose a party, they must be treated like a party, is a grave mistake, of vision and judgement.

Instead of counting the ‘political actors’ as players in a contest between parties, we should rather say that every citizen is a political actor, and any arrangements they make to aggregate or combine, or coalesce, and any competitions they engender by so doing - these are merely derivatives of their foundational role as joint sovereigns. They can never be the main game.

The report cites witnesses warning against inadvertently encouraging a situation like the USA, with super-PACs, and political polarisation. But extreme partisanship, the root of America’s problems, is precisely a consequence of raising the stakes of party loyalty so high that the politics of negotiation, the lifeblood of democracy, becomes impossible.

We should be very careful presenting the political space as a stage for the use of parties, for it is but a small step from there to the much more problematic idea that contenders for electoral success are really in a winner-take-all fight for the prize of executive power, a program monopoly, and the privileges of incumbency - all thoroughly anti-democratic themes.

If the political space is the domain of every enfranchised citizen - each with an equal share in it - and the law-making assembly is the place of deliberation of their duly elected representatives, then the parties are no more than temporary coalitions, formed around nodes of common interest and design, themselves shifting and fading things. Parties cannot contend for sovereign power in a democracy, because that power belongs to the people, not to them. It is not theirs to bestow. And to the extent that politicians and parties are confused about this, their ambitions are undemocratic.

Political actors

The proposed amendments are designed to “capture new political actors” by treating them in the same way as parties. It is nowhere explained, in the Committee report, or the amended Act, why parties and their auxiliaries, which compete for the prize of government, should be in the same regulatory basket as citizen advocacy groups which do not compete at all, but simply canvass and persuade on particular issues of concern, on behalf of members and sympathisers. They, in other words, are in the business of creating public debate, while parties are in the business of pursuing power.

In his second reading speech, Senator Cormann told the Senate that the bill “will improve the consistency of the regulatory treatment of all political actors. This includes political actors that have emerged in the Australian political landscape, who neither endorse candidates nor seek to form government, yet actively seek to influence the outcome of elections through their campaigning activities.”²

The Minister’s language and conceptual framing creates or implies a distinct category of ‘political actors’ - but what and who are they? What makes them different from the rest of us? What could the citizens of a democratic nation possibly be if not political actors? Each and every one of them. Distinguishing agents who “participate in Australian elections” in this way would appear to deny two founding notions of democratic citizenship;

- That each and every citizen is political by definition, since they are the ultimate and only source of the government’s authority, and their participation is mandatory for a well-functioning state; and
- That choosing candidates in elections is merely one of a vast range of legitimate political actions open to, or incumbent upon citizens, whether they are organised or not, or howsoever they organise.

Of course, groups like GetUp should be accountable for public statements about policy, specially during elections; and of course their political expenditure should be transparent - but

the law already requires these strictures, and there has never been an issue about the law's effect, or a proven instance of non-compliance. Nor is there anything novel about organised citizens advocating or opposing policies or parties or candidates during elections. What appears to have impressed the Committee more than novelty is success.

GetUp is said to have spent \$10 million during the election year, and the group is generally credited with at least some influence on significant swings against some coalition sitting candidates. Success like that - proven ability to selectively alter election outcomes - can be interpreted as an invasion. To anyone who thinks parties are rightful participants in electoral contest, effective non-party campaigners will look like usurpers.

At several points in his second reading speech, Senator Cormann says the spending of significant amounts of money by third party campaigners justifies new regulations. But big spending by larger industry groups never elicited this concern before. It looks very much as if the Committee sees organised citizens as somehow threatening to an established pattern of doing politics - where parties own the political sphere, their contests are the sole preoccupation of political actors, and citizens are hardly more than voters.

This vision of politics has been likened to a market - one in which the terms of competition are pre-arranged, and the customers (the voters) can and must be suborned by any available means, including deception and subterfuge. It is a very prevalent vision. It is utterly opposed to participatory democracy, and it would be a very great shame if by passing this bill, the Australian Parliament were to advance its polity another step towards a hollow, apathetic pseudo-democracy, run jointly by commercial and political interests for their own benefit.

Lobbyists as political actors

For an Electoral Act review which claims to be concerned about levelling the field, it is a glaring omission that it says nothing at all about professional lobbying. For without a doubt, this is by far the biggest intrusion of under-regulated campaigners into our political system.

In a transparent system of accounting for access and influence in Canberra, there would be a fool-proof and inclusive register of paid lobbyists, of all kinds, a clear and current record of meetings, and in the absence of a ban on donations by interested parties, an open record of donations and an inflexible cap, to limit the purchase of access and favours.

As things stand, the register is notoriously inadequate; both the number of lobbyists and their expenditure is unknown, and there are no available records of exactly how much and what kind of interactions occur between elected officials, their staffs and advisors, and lobbyists. Conservative estimates, however, put the scale of the lobbying enterprise in a different league to the "political campaigners" supposed to be captured by the amendments - perhaps two orders of magnitude greater. And their influence on policy formation is greater too, as their transparency is less.

The Minerals Council of Australia (or Mining Council, as it was then) declared expenditures of \$17.5 million on a single successful policy campaign in 2010, without provoking any anxiety about regulation, or the state of the playing field. To this day, industry associations like the Council are not registered as lobbyists, so the extent of their power and influence over policy is completely unknown - except to those who receive their attention. The size of this problem has been recognised in other jurisdictions (Canada is an instance) and if we are serious about transparency, it should be recognised here.

Our law makers must decide, on this occasion, if they really mean to support the kind of level playing field which is open to all and any citizens, acting for the sovereign body of our inclusive democracy, or if they want to clear the field of interlopers, so parties and their corporate allies can have the game to themselves.

Citizens and voters

It will not do to say that citizens get their voice at election time and therefore reign over politicians and parties. At the present time, a voter is a quasi-commercial product - the creation of political organisations and their marketing professionals. A consumer of slogans; a commodity; a unit of political capital. On the other hand, a democratic citizen is a self-determined arbiter of political choices, and an agent enabling collective decisions. In the words of Sheldon Wolin:

“Unlike the democratic citizen, who, through the experiences of participation, grows into a political being, the voter is a response system, engineered by public opinion surveys, pollster strategies, and media advertising that first stimulates voters to vote, and afterwards encourages them to relapse into their accustomed apathy.”³

The issue here is not so much about the freedom of voters to choose, as it is about the freedom of democratic citizens to do much more than occasionally choose between parties. If we want expansive freedom, and a creative and engaged citizenry, we ought to be asking: how should we encourage and guarantee that freedom, and in how many ways can it be exercised - and why should it matter? It has often been observed that the freedom of voters is like the freedom of consumers: lots of valuable information is effectively out of reach, while selected and controlled information is “marketed” in volume, so that voter behaviour is (to about the same degree as consumer behaviour) predictable and exploitable by information providers.

If I am not mistaken, the draft bill entails more than a hint of that stunted view of citizenship deplored by Wolin. It seems to me the Minister has to make up his mind whether he really approves effective citizen lobbying as a “positive indicator of the strength of Australian civil society and civic engagement”, or not.⁴ Because in the same sentence as he approved it, he promised to rein it in, just as if these citizens had been “more traditional” political actors, like parties. In saying so, he has forgotten that citizens are the original political actors, the ones with sovereign power - all of it - and the focus of our democratic faith. Parties are the usurpers. It is they who ought to be restrained.

Associated entities: the ‘GetUp clause’

The foregoing arguments can be read as a preamble to the one that follows: an objection to the expanded definition of “associated entity” proposed in the amendments. [Section 287H (5)]

The amended definition provides that a group will be deemed an associated entity of a party if:

- anyone at all, acting on behalf of the group says or publishes anything that could benefit the party, or hinder another party (detriment to one implies benefit to the other);
- anyone, on behalf of a group says or publishes anything to benefit a registered party’s candidate, or oppose another party’s candidate;
- the group spends a significant proportion of its funds supporting a party or any of its policies or candidates, or opposing another party or any of its policies or candidates.

As drafted, the amendment would effectively extinguish the category of independent political campaigner. It would establish a legal principle that, by opposing something which happens to be some party’s policy, one automatically joins another party by association. It posits that any campaigns whatsoever must be partisan - the only exception being a campaign issue on which

none of the registered parties has a policy or position. It claims the entire field of political agency for the parties. It is precisely intended to exclude non-partisans - by legal extinction.

In this way, the sub-clause gives expression to a vivid idea of the political world, a vision of a binary moral politics of Manichaeic opposites. To participate, according to this view, is to take a side. Every weighty question is to be the subject of an orthodoxy; none can ever be decided by careful deliberation of its merits, or by comparing multiple perspectives, or by pragmatic assessments, or by judicious negotiation (not the freighted bargaining that is its substitute today). And political activity is not about discovering and navigating the paths to human fulfilment, but warfare - naked or disguised.

GetUp claims to be independent. What does this mean? It means GetUp neither gives nor receives money from parties, and it doesn't campaign on behalf of parties. It has no organisational links or affiliations with any party. The group is free to do something parties do - that is, advocate for a particular view, or policy, or future direction, explicitly or otherwise opposing other views or policies - but it does not do the main thing parties do, which is to seek executive office by getting their candidates elected. Being independent in this sense, GetUp nevertheless intends to affect election outcomes, since that is the democratic means of carrying members' wishes to the place where laws are made.

Being independent also means GetUp's positions, the causes that animate campaigns, are derived from its underlying motivation - its vision of political choices - and not from binding organisational mandates. There is no agenda except the concerns of members. There is no suite of policies; no platform. There is, instead, a set of defensible demands on the actual political players - the candidates for elected office - all of them designed to support the ambition of a fairer, more equitable and just Australian society. To see GetUp as a direct competitor for electoral success - a party auxiliary - is to deny the very possibility of this independence.

In closing this submission I want to emphasise that the proposals to regulate 'new political actors' bring with them grave implications for Australian democracy. It would be one thing if the bill had addressed its concern that "these new actors lack the public accountability of more traditional actors,"⁵ but as well, it seeks to constrain or eliminate the very thing our democracy needs most - the active, informed, motivated and organised participation of its citizens. It does this for spurious reasons. At their core is a desire to preserve the sphere of political action for inter-party contests. Any democracy that allows this prejudice to prevail long enough will be transformed - not by a strengthening civil society, but by unmanageable power monopolies, impatience with democratic process, a dejected citizenry, and fitful or negligible participation.

This is our choice.

John Price

¹ Parliament of Australia; March 2017. Joint Standing Committee on Electoral Matters: Second interim report on the inquiry into the conduct of the 2016 federal election: foreign donations.

² Senate, Thursday December 7th, 2017

³ Wolin, S, 2008. *Democracy Incorporated*; Princeton University Press. 189

⁴ Senate, Thursday, December 7th, 2017. Senator Cormann.

⁵ Explanatory Memorandum, p3