Joint Standing Committee on Electoral Matters

Inquiry Into the Commonwealth Electoral Amendment (Miscellaneous Measures) Bill 2020

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Overview

The bill is said to be a potpourri of 'technical' amendments (Senator Cormann).[1] That is true, except in one respect: the provisions affecting state donation limits and disclosure laws. These are said to be 'necessary'. In relation to weakening disclosure, that is not the case. Section 314B should be repealed and not replaced.

Otherwise the government is to be commended, particularly for the simplification measures that reduce some unnecessary prescription in the law and delegate flexibility to the AEC.

Overriding State Law on Donations

Proposed new sections 302CA and 314B concern state donation limits and donation disclosure, respectively. These sections are not completely new, but replace provisions that were considered by the High Court in 2019. Existing section 302CA was held to be an unconstitutional overreach of Commonwealth power.[2] As a result doubt was also cast on the reach of existing section 314B.

New section 302CA is unobjectionable. NSW donation limits, the first in Australia, exempted 'federal campaign donations' anyway.[3] Victoria's recent regime does similarly.[4] To the extent that Queensland or NSW registered parties will now be able to take property developer donations for 'federal purposes', this may go against the perceived spirit of those state's schemes. (Many citizens won't appreciate distinctions between a federal, state and administrative account held by the same state division of a party). But developer donations are mostly a concern at state and local level, where planning decisions are made. Many of us want to see comprehensive donation caps. But they should be brought about in a uniform way for Commonwealth elections and politicking and apply to *all* private sources of money.

New section 314B however should not be supported, any more than existing section 314B deserves support. Contrary to the Explanatory Memorandum, section 314B is not the 'equivalent' of addressing the donation cap issue.[5] It actively *undermines* disclosure. There is no natural right to give political donations secretly or anonymously. On the contrary. Disclosure is the bare minimum in any legal system to help address integrity problems with money in politics.[6]

Unlike those state donation limits that do not allow exemptions for federal purposes, state disclosure laws do not tangibly affect the interests of either campaign actors or donors. Complying with a lower disclosure law in one jurisdiction over another is relatively costless.

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[1] Senator Cormann, Second Reading Speech to this Bill (Australian Senate, *Hansard*, 11/6/20, 69).
[2] *Spence v Queensland* [2019] HCA 15. Only section 302CA was explicitly held to be invalid, by 4 Justices to 3. Only Justice Edelman, in dissent, discussed section 314B directly.
[3] See now *Electoral Funding Act 2018* (NSW) s 24(2).
[4] *Electoral Act 2002* (Vic) s 206 (definition of 'gift', item (ja)).
[5] Explanatory Memorandum to this Bill, 4.
[6] Keith Ewing, 'Political Party Finance: Themes in International Context', in Joo-Cheong Tham et al (eds), *Electoral Democracy: Australian Prospects* (Melbourne, 2011).

Disclosure aims to enhance political integrity, by allowing the media and others to question the source of political money and links of influence or worse. Section 314B undermines the integrity-through-disclosure schemes of several states when it comes to political parties. This includes states like NSW and Victoria that fairly exempted their donation caps from federal campaign purposes, yet deliberately intended their disclosure schemes to apply to all moneys received by divisions of parties in their states.

Parties remain the key actors in our electoral system. Donations to them pose a greater concern than the source of third party campaign monies, since parties actually wield power in government and parliament. Section 314B (both new and existing versions) delays – and raises the threshold of – the disclosure that otherwise applies to parties in much of Australia. Various states have led the way in providing for more relevant disclosure schemes than the laggard Commonwealth scheme. Undermining them is especially problematic given how untimely Commonwealth disclosure is.

We will have less sunshine; and for what? As a general rule, the more disclosure, the better. Having stronger disclosure laws in one part of Australia to another doesn't create any significant practical disuniformity. What it means is that the laws in each jurisdiction apply to actors in that jurisdiction, and some shine a greater light than others.

The existing section 314B should be repealed and not replaced.

Simplification instead of Prescription

In several welcome areas, the Bill simplifies unduly prescriptive aspects of the Act. One involves voting implements; another Antarctic voters; and a third flexibility in the questions to be asked of voters.

Last year, Michael Maley and I published a discussion paper on getting the balance right between prescription and flexibility in electoral legislation.[7] The paper even discussed the voting implement ('pencils are mandatory') and Antarctic voting issues as choice examples.[8] The Electoral Act has accreted over time, to become obsessive and unwieldy in places. This is understandable for a few reasons. The last major rewrite was in 1983. Parties, MPs and this committee – even some academics – all have an interest in tinkering with this fascinating area of law. And the AEC does not want to be a law-maker; its impartial position depends on that.

However there are good practical reasons to delegate detailed rule-making to independent electoral commissions, where suitable and subject to suitable legislative guidelines. This is obvious in areas of evolving voting technologies. The COVID-19 contagion has also made it clear in relation to unforeseen situations and emergencies.[9]

The bill could go further to simplify Antarctic voting provisions. The Bill still leaves an entire Part of the Act – 17 sections – covering this supremely bespoke matter. Why not delegate power to the AEC to make arrangements for Antarctic voting, with the Act setting basic principled requirements? Our paper suggested replacing Part XVII of the Act with a single section:

> The AEC must establish procedures to enable Antarctic electors to vote, and have their votes counted, in as secret and timely a manner as is reasonably possible. It is an offence punishable by 0.5 penalty units to breach any such ballot secrecy procedures.

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[7] Michael Maley and Graeme Orr, *Developing a Legislative Framework for a Complex and Dynamic Electoral Environment* (Electoral Research Regulation Network, April 2019).
[8] Ibid paras 3.5-3.7.
[9] Graeme Orr, 'Polling in a Pandemic: Electoral Administration, Dynamics and Law' (2020) 34(2) *Australasian Parliamentary Review* 54.

The section could also require the AEC to consult with the Australian Antarctic Division or equivalent. If Parliament felt a need to have a veto over such procedures, the AEC could be required to publish them in a disallowable legislative instrument.

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