



4 November 2020

Professor Anne Twomey
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Ms Sarah Redden
Acting Committee Secretary
Senate Finance and Public Administration Legislation Committee
Parliament House
Canberra, ACT, 2600

Dear Ms Redden,

Commonwealth Electoral Amendment (Banning Dirty Donations) Bill 2020

Please accept this submission for the Committee's inquiry into the above bill. I would like to make the following comments.

Overall, I support efforts to obtain reform to political donations. The perception, or indeed the reality, of corruption caused by the reliance of political parties and candidates upon political donations is corrosive of public trust in the democratic system. I support imposing caps on political donations. This is the best way of undermining the use of donations to buy influence. One person's \$3000 is worth as much as the \$3000 donation of anyone else. If such laws are not circumvented and are effective, the consequence is that great wealth cannot buy great access or influence government decision-making (unless it is applied in other corrupt ways).

Caps on spending as well as donations

In my view, however, a more balanced system is one where expenditure is limited as well as donations. This effectively takes a significant amount of money out of the campaigns, and reduces the pressure on parties to raise more and more in donations. It is not necessary for political parties to flood the airwaves and the internet with advertisements during election periods to get their message across. They only do so out of fear that the other side will spend more. This war ratchets up expenditure in a way that only benefits the commercial organisations that make and run the advertisements. Bombarding the electorate with the same slogans does not make voters better informed and does not, therefore, enhance their exercise of their constitutional role in directly choosing their parliamentary representatives. As we have recently seen, massive spending campaigns by third parties or minor parties can be used to manipulate outcomes and influence government decision-making. Accordingly, I would suggest that, as in New South Wales and some other jurisdictions, caps on political donations should be balanced with caps on political expenditure.

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Doing so also makes it easier to track the money. If campaign expenditure can only come from particular nominated accounts, and the only money that can go into those accounts is from declared and capped political donations, then there is greater clarity of what is being raised and what is being spent in election campaigns. This is also an effective means of preventing leakage of spending across State and Commonwealth campaigns.

Definition of gift

The Bill widens the definition of ‘gift’ to include amounts paid to attend fundraising events. This change in the definition may flow through to affect other provisions in the Act – eg fundraising events held by third party campaigners, such as charities. I have not had time to do the analysis, but care should be taken to ensure that this expansion of the definition of ‘gift’ does not have unintended consequences for third party campaigners, such as charities, that engage in fundraising activities. Query whether it would have an impact upon them with respect to foreign donations or administrative burdens in undertaking annual reporting obligations?

Caps on donations v bans on donors

There is a real question whether there should be bans on particular types of donors in circumstances where there is also a cap on donations. If the donation of a property developer is capped at \$3000, which is the same as the maximum donation of anyone else, then the property developer should not be capable, by making such a donation, of exercising an undue or corrupting influence. This raises a constitutional argument as to whether a ban on donations from certain categories of donors remains ‘proportionate’ and for a ‘legitimate purpose’ of preventing the risk of corruption, if caps are in place.

The High Court accepted in *McCloy* that a ban on donations from property developers was valid, even though caps on donations also applied in New South Wales, but this was based upon a history of well-documented corrupt activity. Queensland’s ban on property developers was also accepted in *Spence* at [94]-[96], on the basis that a State was entitled to act prophylactically and learn lessons from other States. However, there may still be a question about whether the application of bans to other industries can be justified, in the absence of evidence of corruption and in circumstances where relatively low caps are imposed anyway. Questions may also arise as to whether bans on particular categories of industries are more appropriate at the State or federal level, depending upon which level of government has the relevant power to make decisions that favour or disadvantage these industries.

Federalism issue

Care needs to be taken in Bill not to impose Commonwealth restrictions upon gifts that are made for the purpose of State or Territory election campaigns. See the long history of this issue, including *Spence v Queensland* [2019] HCA 15 and the consequential legislative response. According to a majority of the High Court in *Spence*, the Commonwealth power to make laws with respect to elections extends only to federal elections – not State elections. Accordingly, a Commonwealth law could not prohibit a

State branch from receiving donations from property developers, etc, if the donations were made for the purpose of use in State electoral campaigns and not used for federal purposes, and the State law did not prohibit the donation.

The provisions in this Bill need to be read in conjunction with the *Electoral Legislation Amendment (Miscellaneous Measures) Act 2020*, and the amendments it makes to the *Commonwealth Electoral Act 1918*.

On the face of it, proposed s 314AJ defines a ‘political donation’ as including a gift made to a State branch of a political party, without excluding gifts made for the purpose of State electoral campaigns. Proposed s 314AK then makes it unlawful for a prohibited donor to make a political donation. Some of the categories of donor that are prohibited are not prohibited in any State, and some others are prohibited in some States. In some cases, the category of industry involved is not particularly relevant to a risk of corruption at the State level. For example, as the defence power is exercised by the Commonwealth, rather than the States, it is unlikely that there is a significant risk of corruption of State elections by donations from defence industry entities.

In any case, as noted above, the reasoning of the majority judgment in the *Spence* case suggests that the Commonwealth has no power to prohibit donations being made to a political party for State electoral purposes. Accordingly, unless there is some other provision in the Act or some definitional qualification elsewhere that would cause s 314AJ to apply only in relation to donations for the purposes of Commonwealth elections, it would need to be amended to ensure constitutional validity.

The same applies in relation to the capping of political donations. Imposing such a cap upon donations to a State branch of a political party that were made (and used) for State electoral purposes is likely to be constitutionally invalid.

Note, there appears to be a minor drafting error in proposed s 314AJ(3) – I think it should refer to paragraph (2)(a), rather than paragraph (5)(a). There is also a typo in proposed s 314AL(7) – the word ‘in’ should be ‘if’.

Offences

If the Commonwealth Integrity Commission were to be established, the offences listed in proposed Division 5B (as well as other offences in the *Commonwealth Electoral Act*) should be listed for the purposes of determining corruption. As currently proposed, the list of offences is extremely limited and does not pick up corruption with respect to electoral matters.

Application of definition of ‘political donation’

Proposed s 314AJ(1) applies a definition of ‘political donation’ for the ‘purposes of this Division’ – i.e. Division 5B regarding prohibited donations. But the term is also used in proposed Division 5C regarding the capping of donations. Is it intended that the same definition applies? If so, this would need to be said.

Caps on donations to political campaigners

Proposed s 314AQ caps a ‘political donation’ that is made to a political campaigner. Assuming that the definition of ‘political donation’ in proposed s 314AJ is intended to apply, it simply refers to a ‘gift made to or for the benefit of a political campaigner’, without any qualification that limits it to donations made for the purposes of political campaigning. The definition of ‘gift’ in proposed s 287AAA does not appear to include such a constraint either. It therefore seems, unless I’m missing something that appears in the rest of the Act (and I haven’t had time to look), that any donation made to a political campaigner is capped, regardless of whether or not it is made for some other purpose – eg to fund its charitable works, business activities or non-political advocacy roles. This does not seem to be appropriate.

Registered political campaigners, as listed on the AEC’s register, include: Advance Australia, Animals Australia Federation, Australian Automobile Association, Australian Council of Trade Unions, Australian Education Union, Australian Municipal Administrative Clerical and Services Union, Australian Nursing and Midwifery Federation, Business Council of Australia, Construction, Forestry, Maritime, Mining and Energy Union, Dick Smith, GetUp Ltd, LET Australia Ltd, Minerals Council of Australia, NSW Nurses and Midwives’ Association, Australian Chamber of Commerce and Industry, United Workers Union and Universities Australia. Is it really intended that none of these bodies could receive donations over three years above \$3000 from a single donor?

I noted that proposed s 314AR(6) provides that the aggregation of political donations excludes gifts made for a purpose that does not involve election expenditure. But why does this qualification only apply with respect to the calculation of the aggregation of donations, and not to the making of political donations themselves?

I hope these comments are of assistance to the Committee.

Yours sincerely,

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