

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

24 June 2020

Dear Secretary,

Submission to inquiry into the Electoral Legislation Amendment (Miscellaneous Measures) Bill 2020 (Cth)

I provide a submission to the inquiry of the Committee into the Electoral Legislation Amendment (Miscellaneous Measures) Bill 2020 (Cth) ('the Bill'). My submission is directed to the provisions that seek to replace sections 302CA and 314B of the *Commonwealth Electoral Act 1918* (Cth) ('CEA').

I recommend that:

- these provisions be taken out of the Bill; and
- sections 302CA and 314B of the CEA be repealed.

I do so for two reasons.

- 1. If enacted, these provisions will mean that Commonwealth political funding laws will override State and Territory political funding laws without proper justification**

In the Bill's Second Reading Speech, Senator Cormann explained the Government's rationale for these provisions in the following way:

The Bill includes necessary amendments in response to the High Court decision in *Spence vs State of Queensland* to better clarify the interaction between federal and State electoral laws. These amendments narrow the operation of provisions that were passed in the last Parliament, to reflect the High Court's findings about the exact limits of the Commonwealth's legislative power.

The revised provisions ensure that federal law only applies exclusively to donations that are expressly for federal purposes, while fully respecting the application of state laws to amounts used for state purposes. The new rules do not purport to apply federal law

exclusively to amounts that are 'untied', namely donations that are not specifically pledged to either a federal or state purpose.¹

What is critical to appreciate about section 302CA of the CEA — which was struck down by the High Court in *Spence v Queensland*² — and section 314B, as well as their proposed replacements, is the unprecedented way in which they seek to have Commonwealth political funding laws 'cover the field'.

Prior to sections 302CA and 314AB being inserted into the CEA by the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth),³ it was apparent that the Commonwealth political funding laws operated alongside the State and Territory schemes. In *Electoral Commission of Queensland v Awabdy*,⁴ the Queensland Supreme Court held that disclosure provisions applying to political parties registered under the *Electoral Act 1992* (Qld) were not inconsistent with the disclosure provisions applying to political parties registered under the CEA, within the meaning of section 109 of the *Commonwealth Constitution*.⁵ This was the case even though many political parties were registered under both Acts.

The natural conclusion therefore was that Commonwealth and State disclosure schemes operated alongside each other. The reasoning underlying the decision in *Awabdy* that the CEA disclosure provisions did not indicate either an express intention to exclude State laws in relation to gifts for Commonwealth electoral purposes or a negative implication to that effect,⁶ would further seem broadly applicable to other regulatory measures such as bans and limits on political donations.

Current sections 302CA and 314AB and their replacement provisions in the Bill seek a radical shift from this position of concurrent operation by having Commonwealth provisions 'cover the field'.

This requires proper justification, not least because it will limit the operation of State and Territory laws, decisions of elected legislatures. Respect for the democratic

¹ Commonwealth, *Parliamentary Debates*, Senate, 11 June 2020, 69 (Mathias Cormann, Minister for Finance).

² *Spence v Queensland* [2019] HCA 15; (2019) 367 ALR 587 ('*Spence*').

³ For analysis of these sections, see my submission at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/proposedamendmentsbill/Submissions

⁴ *Electoral Commission of Queensland v Awabdy* [2018] QSC 33; (2018) 330 FLR 384 ('*Awabdy*').

⁵ Section 109 of the *Commonwealth Constitution* provides that:
When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

⁶ *Awabdy* [2018] QSC 33; (2018) 330 FLR 384, 400 [85]–[86] (Jackson J).

legitimacy of these legislatures calls for such justification; as does the principle of federalism.

The same point can be made in different terms. In *Spence*, the High Court held that section 51(xxxvi) of the *Commonwealth Constitution* authorised Commonwealth laws that excluded State laws when ‘the giving, receipt and retention of a gift (is) earmarked from the outset to be used in creating or communicating matter intended to be communicated for the dominant purpose of influencing voting at a federal election’.⁷ That such power is available does not necessarily mean that it should be exercised — the constitutionality of a law is not the same as its desirability.

Whilst the replacement provisions for sections 302CA and 314AB appear to adequately respond to the High Court’s decision in *Spence* by tying their operation to a ‘federal purpose’, there does not seem to be a proper justification beyond this technical point.

These provisions are unlikely to result in greater clarity in terms of complying with Commonwealth, State, and Territory political funding laws. Before the enactment of current sections 302CA and 314AB, these laws operated alongside each other. Even if the Bill’s replacement provisions for these sections are enacted, political parties and organisations coming within the scope of Commonwealth, State, and Territory political funding laws will have to comply with all these laws and *additionally* mediate their application through the concept of a ‘federal purpose’.

The Bill proposes to define ‘federal purpose’ as ‘the purpose of incurring electoral expenditure, or creating or communicating electoral matter’ through an amendment to section 287 of the CEA. ‘Federal purpose’, therefore, turns on two other concepts, ‘electoral expenditure’ and ‘electoral matter’. A brief perusal of sections 4AA and 287AB of the CEA (extracted in the Appendix) — which respectively define ‘electoral matter’ and ‘electoral expenditure’ — clearly indicates that these are far from simple concepts. These sections run to nearly four pages and have eight separate sub-sections.

There is a good case for saying that enactment of the Bill in its current form will further complicate the task of complying with political funding laws.

⁷ *Spence v Queensland* [2019] HCA 15; (2019) 367 ALR 587, 603–4 [55] (Kiefel CJ, Bell, Gageler and Keane JJ).

2. If enacted, these provisions will result in weaker regulation of political funding

The absence of a proper justification for the proposed provisions is perhaps best highlighted by the fact that their enactment will result in weaker regulation of political funding in Australia.

This arises from the fact that the Commonwealth disclosure scheme is weaker than the disclosure schemes in many States and Territories.⁸ It also results from a number of jurisdictions having caps and bans on political contributions, and caps on electoral expenditure, which do not feature under the Commonwealth scheme. The table below indicates some of the State and Territory regulatory measures that will not apply to gifts (sought, received, or used) with a ‘federal purpose’ should the Bill be enacted.

<i>Election Funding Act 2018 (NSW)</i>	<i>Electoral Act 2002 (Vic)</i>	<i>Electoral Act 1992 (ACT)</i>
Caps on political donations	Caps on political donations	Caps on electoral expenditure
Ban on donations from property developers, tobacco, liquor and gambling industries		
Caps on electoral expenditure		

Alongside the direct effect is the indirect effect of broadening the scope for regulatory arbitrage of political funding laws. A fundamental point is that gifts can *simultaneously* be for a ‘federal purpose’ *and* in support of State and Territory election campaigns. Money is fungible, therefore, contributions earmarked for a ‘federal purpose’ could easily free up resources for State and Territory elections (including money from public funding payments and investment income) and in that way, support State and Territory election campaigns.

These ‘hydraulics’ of political funding⁹ mean that property developers can make contributions for a ‘federal purpose’ to the New South Wales branches of the Australian Labor Party and the Liberal Party that would be exempt from the ban applying to such developers under the *Election Funding Act 2018 (NSW)* under the Bill *while* still supporting the State election campaigns of these branches. Similarly,

⁸ Damon Muller, ‘Election Funding and Disclosure in Australian States and Territories: A Quick Guide’ (Parliamentary Library, Research Paper Series 2018–19, 28 November 2018).

⁹ Samuel Issacharoff and Pamela S Karlan, ‘The Hydraulics of Campaign Finance Reform’ (1999) 77 *Texas Law Review* 1705.

monied interests can give large contributions to the Victorian branches of these parties for a 'federal purpose' that would be exempt from the caps on political donations under the *Electoral Act 2002* (Vic) under the Bill while still supporting the State election campaigns of these branches. These practical ways of circumventing State regulation of political funding threaten to undermine their entire operation.

I conclude by reiterating my recommendation that:

- these provisions be taken out of the Bill; and
- sections 302CA and 314B of the CEA be repealed.

Adoption of this recommendation will mean that Commonwealth, State and Territory political funding schemes will operate alongside each other.

I hope this submission will be of assistance to the Committee.

Thank you.

Yours sincerely,

Professor Joo-Cheong Tham
Melbourne Law School

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Appendix:

Sections 4AA and 287AB of the *Commonwealth Electoral Act 1918*

4AA Meaning of *electoral matter*

(1) ***Electoral matter*** means matter [communicated](#) or intended to be [communicated](#) for the dominant purpose of influencing the way [electors](#) vote in an [election](#) (a ***federal election***) of a member of the House of Representatives or of Senators for a State or [Territory](#), including by promoting or opposing:

(a) a [political entity](#), to the extent that the matter relates to a federal [election](#); or

(b) a member of the House of Representatives or a Senator.

Note: Communications whose dominant purpose is to educate their audience on a public policy issue, or to raise awareness of, or encourage debate on, a public policy issue, are not for the dominant purpose of influencing the way [electors](#) vote in an [election](#) (as there can be only one dominant purpose for any given communication).

(2) For the purposes of [subsection](#) (1), each creation, recreation, communication or recommunication of matter is to be treated separately for the purposes of determining whether matter is [electoral matter](#).

Note: For example, matter that is covered by an exception under [subsection](#) (5) when originally [communicated](#) may become [electoral matter](#) if recommunicated for the dominant purpose referred to in [subsection](#) (1).

Rebuttable presumption for matter that expressly promotes or opposes political entities etc.

(3) Without limiting [subsection](#) (1), the dominant purpose of the communication or intended communication of matter that expressly promotes or opposes:

(a) a [political entity](#), to the extent that the matter relates to a federal [election](#); or

(b) a member of the House of Representatives or a Senator, to the extent that the matter relates to a federal [election](#);

is presumed to be the purpose referred to in [subsection](#) (1), unless the contrary is proved.

Matters to be taken into account

- (4) Without limiting [subsection](#) (1), the following matters must be taken into account in determining the dominant purpose of the communication or intended communication of matter:
- (a) whether the communication or intended communication is or would be to the public or a section of the public;
 - (b) whether the communication or intended communication is or would be by a [political entity](#) or [political campaigner](#) (within the meaning of [Part XX](#));
 - (c) whether the matter contains an express or implicit comment on a [political entity](#), a member of the House of Representatives or a Senator;
 - (d) whether the communication or intended communication is or would be received by [electors](#) near a [polling place](#);
 - (e) how soon a federal [election](#) is to be held after the creation or communication of the matter;
 - (f) whether the communication or intended communication is or would be unsolicited.

Exceptions

- (5) Despite [subsections](#) (1) and (3), matter is not [electoral matter](#) if the communication or intended communication of the matter:
- (a) forms or would form [part](#) of the reporting of news, the presenting of current affairs or any genuine editorial content in news media; or
 - (b) is or would be by a person for a dominant purpose that is a satirical, academic, educative or artistic purpose, taking into account any relevant consideration including the dominant purpose of any other communication of matter by the person; or

- (c) is or would be a private communication by a person to another person who is known to the first person; or
- (d) is or would be by or to a person who is a Commonwealth public official (within the meaning of the *Criminal Code*) in that person's capacity as such an official; or
- (e) is or would be a private communication to a [political entity](#) (who is not a Commonwealth public official) in relation to public policy or public administration; or
- (f) occurs or would occur in the House of Representatives or the Senate, or is or would be to a parliamentary committee.

Note: A person who wishes to rely on this [subsection](#) bears an evidential burden in relation to the matters in this [subsection](#) (see [subsection](#) 13.3(3) of the *Criminal Code* and section 96 of the Regulatory Powers Act).

287AB Meaning of *electoral expenditure*

Dominant purpose of creating or communicating [electoral matter](#)

- (1) [Electoral expenditure](#) means expenditure incurred for the dominant purpose of creating or communicating [electoral matter](#), except to the extent that:
 - (a) the expenditure is, or is to be, paid or reimbursed by the Commonwealth (except under [Division](#) 3 (election funding)) to or in relation to a person who is or was a member of the House of Representatives, a Senator or a Minister, because that person is or was such a member, Senator or Minister; or
 - (b) the expenditure is incurred by a person or [entity](#) (the **service provider**):
 - (i) in providing a communication service or communication platform that is used to create or [communicate electoral matter](#); or

- (ii) in providing a service for another person or [entity](#) that engaged the service provider, on a commercial basis, to create or [communicate electoral matter](#).

Note 1: For example, expenditure incurred in relation to the communication of [electoral matter](#) for which [particulars](#) are required to be notified under section 321D is [electoral expenditure](#).

Note 2: Expenditure by a person who creates matter that is covered by an exception under [subsection 4AA\(5\)](#) is not [electoral expenditure](#). However, as each creation or communication of matter is treated as separate matter under [subsection 4AA\(2\)](#), expenditure incurred by another person who [communicates](#) the same matter for the dominant purpose referred to in [subsection 4AA\(1\)](#) may be [electoral expenditure](#).

Note 3: For deemed [electoral expenditure](#) for [political campaigners](#), see section 287J.

- (2) Expenditure may be [electoral expenditure](#) whether the expenditure is incurred for the dominant purpose of creating or communicating [particular electoral matter](#) or [electoral matter](#) generally.

Expenditure in relation to an [election](#)

- (3) In addition, any expenditure incurred by or with the authority of a [political entity](#), a member of the House of Representatives or a Senator in relation to an [election](#) is [electoral expenditure](#), except to the extent that the expenditure is, or is to be, paid or reimbursed by the Commonwealth (except under [Division 3](#) (election funding)) to or in relation to a person who is or was a member of the House of Representatives, a Senator or a Minister, because that person is or was such a member, Senator or Minister.