

Committee Secretariat
Senate Finance & Public Administration Committees
PO Box 6100
Parliament House
Canberra ACT 2600

5 November 2020

Commonwealth Electoral Amendment (Banning Dirty Donations) Bill 2020

This submission responds to the Committees' invitation to comment on the *Commonwealth Electoral Amendment (Banning Dirty Donations) Bill 2020* (Cth). It follows the 26 June 2020 submission regarding the *Commonwealth Electoral Amendment (Donation Reform and Other Measures) Bill 2020* (Cth).

Summary

Private electoral funding of parties and politicians has become the crack cocaine of Australian politics. It is time to start detoxing the system at the national, state/territory and local government levels.

The Bill represents a positive effort to address matters of increasing community concern, evident in studies that demonstrate widespread public distrust of politicians, political parties and government. That distrust is unsurprising given the performance of politicians at the national and state/territory levels alongside systemic failures highlighted by the Australian National Audit Office.

Australia's political machines have chosen not to effectively self-regulate, for example by refusing donations from corporations in the tobacco sector that result in public harm. Regulation under statute, underpinned by timely scrutiny from an independent national integrity watchdog that operates transparently and covers politicians, is necessary to address a deepening democratic deficit.

The Bill is consistent with community expectation and is permissible under the national Constitution.

Basis

The submission is independent of any political party or advocacy body. It reflects my teaching of law as an Asst Professor at Canberra Law School (University of Canberra) and complements submissions to other parliamentary inquiries at the national/state level regarding integrity and interference in political processes. It reflects research on foreign/domestic interference in Australian politics.

The submission does not represent what would be reasonably construed as a substantive conflict of interest.

Dr Bruce Baer Arnold
Canberra Law School
University of Canberra

Senate Finance & Public Administration Committees' inquiry into the *Commonwealth Electoral Amendment (Banning Dirty Donations) Bill 2020 (Cth)*

In a submission to the Committees' inquiry regarding the *Commonwealth Electoral Amendment (Donation Reform and Other Measures) Bill 2020 (Cth)* I commented that sunlight is the best disinfectant for corruption, inefficiency and fears. That statement was true over one hundred years ago during a time when members of the public were disquieted about the self-seeking nature of politicians and the activity of political machines. It remains relevant today. The *Commonwealth Electoral Amendment (Donation Reform and Other Measures) Bill 2020 (Cth)* under consideration by the Senate Finance & Public Administration Committees is a necessary step forward to providing greater transparency and thereby rebuilding trust in both Australian politicians and political processes.

The Bill seeks to address problems reinforced by the *Electoral Legislation Amendment (Miscellaneous Measures) Act 2020 (Cth)* – in other words the subversion of legitimate restrictions – and by the unwillingness of the major political parties to avoid the US experience in which politicians are hamsters on a wheel chasing money.

This submission, made on an independent basis, discusses why the Bill should be supported and addresses specific criticisms. Those criticisms lack substance.

Context

The Bill is under consideration at a time where there are weekly reports regarding –

- branch stacking,
- corruption at the state and local government levels,
- questions about the integrity of leading federal MPs,
- controversy over the behaviour of figures such as Clive Palmer (proprietor of what one analyst persuasively described as a sham party) and the influence of Rupert Murdoch,
- unashamed exploitation by politicians of regulatory exemptions in the *Spam Act 2003 (Cth)* and *Privacy Act 1988 (Cth)*,
- egregious disregard of the Federal Court by Commonwealth Ministers,
- an increasingly politicised bureaucracy,
- incapacitation of watchdogs such as the Australian National Audit Office and NSW Independent Commission Against Corruption, and
- opposition to an effective national integrity commission, in other words one that covers politicians and operates transparently.

It is also under consideration at a time where voters have seen large-scale failures in public administration (notably RoboDebt and inadequate supervision by the TGA of joint, pelvic and other implants) for which there has been no accountability, alongside a succession of damning reports by the Australian National Audit Office (for example *Management of the Australian Government's Lobbying Code of Conduct: Follow-up Audit and Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999*).

There is increasing empirical data regarding responses by Australians to the ‘Canberra Bubble’ (and corresponding problems with the Macquarie Street Bubble, Spring Street Bubble and other governments). The 2019 Australian National University *2019 Australian Election Study* for example reported that satisfaction with democracy is at its lowest level since the constitutional crisis of the 1970s, with trust in government having reached its lowest level on record.

Just 25% of Australians believe people in government can be trusted, 56% believe government is run for ‘a few big interests’ and only 12% believe the government is run for ‘all the people’. That disquiet is increasing, with for example a 27% decline since 2007 in stated satisfaction with how Australia’s democracy is working. Overall trust in government has declined by nearly 20% since 2007; three quarters believe that people in government are looking after themselves.

There is disenchantment with infighting at the state/territory and national level within political parties, exemplified by popular disquiet about the replacement of leaders, instances in which leaders ignore corruption among colleagues, and what MPs in NSW and Victoria say about each other.

There is no single and immediate solution to an increasing democratic deficit, in which people respond by disengaging from conventional politics and the justice system (evident in the re-emergence of extremist fringe parties across the globe) and wealthy individuals try to ‘buy’ the election.

Candidates, MPs and parties have not engaged in self-regulation – a regrettable lack of the leadership that is sought by voters – and more effective regulation is therefore necessary, alongside a strengthening of integrity mechanisms.

Both the *Commonwealth Electoral Amendment (Banning Dirty Donations) Bill 2020* (Cth) and *Commonwealth Electoral Amendment (Donation Reform and Other Measures) Bill 2020* (Cth) are steps forward and should be supported on that basis.

We do however need to go further by progressively replacing private funding with public funding alongside

- spending limits on campaigns, in particular advertising
- restrictions on indirect and direct support, for example one entity serving as the funder of a ‘sham party’ that is intended to gain influence for the funder rather than become a Government
- prohibition on the misuse of administrative resources
- enforcement of requirements for timely, accurate and comprehensive reports
- meaningful sanctions to address abuses of the regulatory framework.

The Bill

The principle that all Australians are equal before the law is belied by the reality that some Australians are more equal than others because of their scope for influencing policymakers through donations and ability to buy expertise in dealing with policymakers.

Parties have chosen to accept gifts, and thereby be influenced, by corporations that pay little if any tax, employ few Australians but make substantial profits through the sale of harmful products such as cigarettes. Overseas-based tobacco group Philip Morris for example donated \$56,500 to the Nationals and \$40,000 to the Liberal Democrats. That generosity

was presumably not out of altruism, given responsibilities under Australian corporations law.

Influence at the national, state/territory and local government levels is not solely a matter of multinational corporations. I referred above to what expert John Wanna characterised as a 'sham party', in this instance the United Australia Party –

- that is funded through millions of dollars by a property and mining entrepreneur who is being prosecuted for dishonest use of position as a director and for contravening section 408C(1)(d) of the *Criminal Code Act 1899* (Qld)
- whose candidates in this month's Queensland state election were predominantly family members and associates
- that recurrently engaged in unsubstantiated claims regarding a Death Tax
- can be reasonably viewed as established primarily to advance its funder's personal interests.

Anyone without a legal disability is entitled to vote, form a political party and face the judgment of the Australian people by standing as a candidate for election. That entitlement is different to legitimate and coherent restrictions on the funding of the party and the candidate.

Constitutionality

In the preceding submission regarding the *Commonwealth Electoral Amendment (Donation Reform and Other Measures) Bill 2020* (Cth) I referred to the implied freedom of political communication under the national Constitution.

That freedom does not preclude proportionate regulation on funding of political parties and candidates, whether for election campaigns or for the ongoing operation of those parties. It is axiomatic that such regulation should be welcomed by political entities in the national interest.

International Obligations

The Bill is congruent with Australia's obligations under international human rights frameworks. The Universal Declaration of Human Rights and associated Conventions for example do not provide corporations with an entitlement to buy elections. It is worth noting that in Australia corporations do not have human rights and that we appropriately bound their activity in a wide range of ways that are endorsed by the Australian community.

The international agreements accommodate requirements for the disclosure of interests by officials, candidates and legislators. They also accommodate restrictions on electoral practice, including campaign advertising and a prohibition on making payments or other rewards to voters. It is worth recalling that English elections for more than two centuries were a matter of what we would now characterise as bribery: barrels of beer, haunches of beef, buckets of gin for electors who turned up to the polls and voted the right way. We have moved beyond that and should continue to do so.

International law does not prohibit placing a cap on donations.

It does not prohibit a restriction on donations by foreign and/or domestic interests.

Scope

The Bill seeks to do two things that are of value for democracy and for the legitimacy of political processes in an environment where the community correctly understands that money – especially big money – buys influence.

Capping donations

The Bill seeks to impose a cumulative limit on donations from any source of \$3,000 per election term. That cap may be bad news for digital platforms, broadcasters and suppliers of corflutes on the basis that aggregate funding may be smaller. The cap does however serve to sanitise an increasingly unhealthy electoral process.

The Bill sensibly addresses expectations about entities subverting restrictions by using proxies. It thus extends the definition of “gift” to include subscription and membership fees over \$1000, tickets or entry fees for attendance at fundraising events, interest-free loans and provision of a service for free or less than market-value.

Sectoral Coverage

The Bill appropriately and proportionately seeks to restrict political donations from specific sectors –

- property development
- tobacco
- banking
- alcohol
- gambling
- pharmaceuticals
- mining.

That restriction encompasses representative organisations for these sectors.

The proposed restriction does **not** stop businesses in those sectors from operating. It does not extend to sectors such as aged care and pathology services, other notably generous donors, and the digital platforms that are the subject of major inquiries in Australia and overseas about their anti-competitive activity.

The proposed restriction does **not** stop businesses in those sectors, their representative organisations or individuals from communicating.

Their freedom to advocate and otherwise communicate will thus **not** be impermissibly restricted. They will not be silenced. They will not be prevented from meeting with Ministers, MPs, officials and journalists. They will not be prevented from contributing to industry consultations and public inquiries.

They will however not be able to buy influence.

That restriction is good for democracy, for government and ultimately for political parties.