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Senator Linda Reynolds
Chair
Joint Standing Committee on Electoral Matters
Parliament House,
Canberra, ACT, 2600

Dear Senator Reynolds,

Submission to Inquiry into the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017*

Please accept the following as my submission to the Committee's inquiry into the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017*.

I note the particular difficulty involved in assessing the complex set of amendments in this Bill. Normally, to understand the Bill, one would have to read it together with the consolidated primary Act, in this case the *Commonwealth Electoral Act 1918*. This task, difficult as it already is, has been made immeasurably more difficult by the fact that substantial amendments were made to that Act by the *Electoral and Other Legislation Amendment Act 2017*, which have not yet been incorporated in the consolidated version of the primary Act because those amendments have not yet come into effect (which will happen in March 2018).

The consequence is that the only way one can accurately comment on this new Bill is to read it simultaneously with two different Acts, one of which is not yet in effect. For example, the definition of 'political purpose' in the bill refers to s 321D, which does not appear in the *Commonwealth Electoral Act* as it currently exists, but will be there in March 2018. It has taken me many hours to work through these difficulties – far more time than one can justify as an academic when one has many other work commitments to meet.

I point this out to the Committee, not just out of frustration, but for two reasons – the first being that you will probably receive fewer submissions due to the difficulty and significant time-burden involved from those using their holiday-time to analyse the Bill; and the second being that many submissions may not be accurate if those making the submissions do not realise that the Bill takes into account legislation that is not yet in effect and has not been consolidated into the primary Act. It is also an explanation for any errors in my own submission, as I could not justify the time involved in constructing a new consolidation of the primary Act and therefore may have missed some changes that are relevant.

Balancing of issues

As noted, this Bill and the primary Act that it proposes to amend, are extremely complicated. A number of factors, which are not always consistent, need to be managed and balanced. They are as follows:

1. The Act needs to be constitutionally valid. There is no point in making the reforms if they are likely to breach the Constitution. Efforts therefore need to be made to accommodate existing precedents and constitutional principles.
2. The Act needs to be effective. Efforts therefore need to be made to prevent avoidance of the provisions, facilitate the prosecution of breaches and provide strong disincentives for those who would try to exploit or avoid the application of prohibitions.
3. The Act needs to be practical. Efforts therefore need to be made to ensure that the Act does not impose excessive burdens on parties, donors and campaigners. In particular, it should not adversely affect the capacity of charities to fulfil their charitable functions and to advocate for charitable causes.

Foreign donations

The primary purpose of the Bill, as announced to the media, was to restrict foreign donations in order to reduce the risk of foreign influence over the electoral process or the risk or perception of corruption. This is reflected in s 302C of the Bill. The Government initially advised the media that it would ban political donations from ‘foreign bank accounts, non-citizens and foreign entities’ (<https://www.pm.gov.au/sites/default/files/media/protecting-australia-from-foreign-interference-additional-information.pdf>). It said that political donations above \$250 could only be received from voters on the electoral roll, Australian citizens or Australian corporations or entities with a head office or principal place of activity in Australia (email by Cth Dept of Finance to Fairfax Media, 5 December 2017).

A number of academics, including Prof George Williams and me, raised significant concerns about the constitutional validity of the Government’s proposal (see Katharine Murphy, ‘Ban on foreign political donations open to challenge, legal experts say’, *The Guardian*, 7 December 2017; and James Massola and David Wroe, ‘Ex-minister slams link to crackdown’, *The Age*, 6 December 2017). We doubted that a law that banned, for example, Australian permanent residents from making political donations would survive a High Court challenge, given the Court’s previous statements in *Unions NSW v New South Wales* (2013) 252 CLR 530 at [30]. In that case the High Court struck down the validity of a law that provided that only persons on the electoral roll could make political donations, as it had the effect of prohibiting political donations being made by non-citizens, corporations, unions and other entities. The judgment of French CJ, Hayne, Crennan, Kiefel and Bell JJ said that the political communication protected by the Constitution was not a ‘two-way affair between electors and government or candidates’. They acknowledged that those in the community who are not electors but who are governed and affected by decisions of government have a ‘legitimate interest in governmental action and the direction of policy’. According to their Honours, these persons and bodies may contribute to the discourse about matters of politics and government and seek to do so directly or indirectly through supporting a party or candidates.

Section 302D of the Bill makes it an offence for the agent of a political entity or the financial controller of a political campaigner to receive a gift from a person who is not an ‘allowable donor’ in the amount of \$250 or more (or which cumulatively amounts to at least \$250 during the financial

year) and it is also an offence under s 302L to receive such a gift if appropriate donor information establishing that it is from an allowable donor is not received within 6 weeks or acceptable action taken. ‘Allowable donor’ is defined in s 287AA in a manner that is quite different from what the Government had earlier announced, as set out above. It provides that ‘allowable donors’ include electors (not all of whom are Australian citizens), Australian citizens (not all of whom are electors) and Australian residents (meaning persons who hold a permanent visa under the *Migration Act 1958*), unless a determination is made by the Minister that ‘Australian residents are not allowable donors’. Hence, permanent residents who are citizens of foreign countries will continue to be able to make political donations under the Bill.

Much of the controversy that gave rise to the Bill, and the Commonwealth Government’s justification for it, concerned the relationship between then Senator Dastyari and Mr Huang Xiangmo who has made donations to both major political parties. According to the media, Mr Huang Xiangmo is a permanent resident of Australia. If so, he would be able to continue to donate as much money as he wished to candidates and political parties in Australia under this proposed legislation, as long as he was making the donations through an Australian bank account. In contrast, an Australian citizen and voter who happened to be living overseas could not make a political donation if he or she only had a foreign bank account (s 302K). No doubt the Government only included permanent residents within the definition of allowable donors at the last moment because of the likely constitutional risks of excluding permanent residents. It was prudent to do so. However, the result exposes the fact that the bill is ineffective at achieving its claimed primary aim of preventing foreign influence.

This is reinforced by the application of the definition of ‘allowable donor’ to entities, such as corporations. An entity is an allowable donor under proposed s 287AA(1)(b) if it is incorporated in Australia, or, where a body is not incorporated, if its head office or principal place of activity is in Australia. Many foreign corporations have wholly owned subsidiaries that are incorporated in Australia. Bodies may be incorporated in Australia, even though they have owners who are foreign nationals. For example, political donations made by Mr Huang Xiangmo to both the Labor Party and the Liberal Party in the period from 2014 to 2016 (see <http://www.abc.net.au/news/2017-12-12/huang-xiangmos-development-linked-to-greater-sydney-commission/9247860>) were made through four corporations (Yuhu Group (Australia) Pty Ltd, Chaoshen No 1 Pty Ltd, Jade Fisheries Pty Ltd and Mandarin International Investments Pty Ltd), all of which, according to ASIC, are ‘Australian proprietary companies, limited by shares’. Hence, this provision is most unlikely, in any meaningful way, to prevent potential foreign influence in relation to elections through donations and certainly would not have prevented the donations which formed part of the controversy that sparked the Bill.

The Commonwealth may rightly argue that it is constrained by the constitutionally implied freedom of political communication and the High Court’s interpretation of its application from effectively banning foreign donations. However, if it genuinely wished to reduce foreign influence in Australian elections, it could instead have introduced caps on donations and expenditure, as exist in New South Wales. We know that such a system would survive constitutional scrutiny, as it has already been upheld by the High Court in *McCloy v New South Wales* (2015) 257 CLR 178. This would mean that permanent residents and corporations owned by foreigners would only be able to make relatively small donations, diluting their ability to influence. Their donations would be no greater and no more significant than the donations of thousands of others, rendering them no threat to the Australian electoral system.

In my view, this is the only way by which foreign influence through political donations in Australia can be effectively dealt with. The current bill is so easily avoidable (by the making of donations through permanent residents or foreign owned entities incorporated in Australia) that any foreign country determined to influence federal elections or political decision-making at the Commonwealth level through the making of large political donations will still find it extremely easy to do so at the Commonwealth level. While s 302J makes it an offence for a person to participate in the formation of a body corporate in Australia if the person does so solely or predominantly for the purpose of making unlawful political donations, it will be extremely difficult to establish this, as there will normally be many legitimate reasons for establishing a corporation in Australia.

Political influence and access is obtained not through the fact of making a political donation, but through the size of the donation (or cumulative donations) in comparison to those of others. A donor from a foreign country is not going to achieve any political influence in Australia by making a \$50 donation to a political party, but is likely to do so by making a \$500,000 donation through a company incorporated in Australia. As this Bill places no limits at all on the size of donations that are permitted, it will not achieve its claimed aim of preventing foreign influence in relation to Australian elections.

Third party campaigners and donations

At the press conference on 5 December outlining the proposed legislation, the Minister for Finance said:

‘If you are involved in political campaigning, then you can only rely on political donations from Australian citizens, from Australian businesses and Australian organisations. This is the intent of this reform and this is deliberately the intent of this legislation’.

The Finance Minister was further quoted on 12 January 2018 as saying that only a ‘very small number of charities’ participated in elections and would be affected. He added:

Nothing in the government’s reforms restricts or limits charities’ legitimate activities. This bill simply seeks to keep foreign billionaires and foreign governments out of Australia’s elections. (Paul Karp, ‘Foreign donation and charity law changes “likely” to face high court challenge’, *The Guardian*, 12 January 2018)

However, due to a change in the definition of political expenditure, it is likely that a far wider range of charities and other bodies will be affected. Under s 314AEB of the existing Act, persons or entities must submit an annual return if they spend more than \$10,000 on political expenditure, being (i) the public expression of views on political parties, candidates or parliamentarians; (ii) ‘the public expression of views on an issue in an election’; (iii) the publication of electoral material that is required to be authorised with a name and address; (iv) the broadcast of political material which requires a particular announcement; and (v) the carrying on of opinion polls and other research relating to the election or voting intentions of elections. Under the Bill, political expenditure is defined in s 287, as expenditure for ‘political purposes’ which is then defined to pick up the above categories. The second category, however, is expanded to cover ‘the public expression by any means of views on an issue that is, or is likely to be, before electors in an election (whether or not a writ has been issued for the election)’. As all kinds of political issues, such as Indigenous constitutional recognition, climate policy, fracking, refugees, discrimination, housing policy and the

tax mix, are ‘likely’ to be issues before electors at the next election, any entity or person that expends sufficient money on the public expression of views about these issues at any time, regardless of when the next election is to be held, is likely to be affected by this Bill.

The Bill creates two categories of campaigners outside of ‘political entities’ (which are registered political parties, candidates and members of groups running for the Senate). A ‘political campaigner’ is defined in s 287F as a person or entity whose political expenditure is \$100,000 or more in any one of the previous 3 financial years or is \$50,000 or more in the relevant financial year and at least 50% of the person’s or entity’s ‘allowable amount’ for that year. It defines ‘third party campaigner’ in s 287G as a person or entity whose political expenditure in the financial year is more than the disclosure threshold (currently \$13,500), but who is not required to be, and is not, registered as a political campaigner.

This means that many large corporations are likely to be classified as political campaigners and will therefore be subject to the administrative and reporting burdens imposed by the Act. For example, all mining corporations that spent more than \$100,000 on political expenditure such as advertisements concerning the benefits of mining, opposition to mining taxes and opposition to climate change strategies, would be caught. All corporations that have spent more than \$100,000 in supporting social causes, such as Indigenous constitutional recognition, would be caught. Entities, such as sporting leagues, that had spent more than \$100,000 supporting campaigns concerning bullying, sexual harassment, domestic violence or racism, would be caught, as all these matters are potentially issues that may be before electors in an election and therefore involve ‘political expenditure’. Corporate political expenditure in Australia is extensive, as has been evidenced by advertising by Qantas, banks and other major corporations in relation to same-sex marriage.

While these corporations might object to the additional red-tape and reporting obligations involved in being classified as political campaigners or third-party campaigners, the effect upon them is likely to be less significant than on bodies such as charities, which receive donations or ‘gifts’ from persons and bodies within Australia and overseas. It is possible, however, that corporate and industry bodies, such as the Minerals Council of Australia (which under the current law declared spending more than \$750,000 on political expenditure in the 2015-6 financial year) and the Business Council of Australia (which declared spending more than \$2.5m on political expenditure in the 2015-6 financial year), if they are funded by donations by member corporations, would be more seriously affected in terms of the administrative burden of establishing that each donation came from an allowable donor, and would be particularly affected if those donations came from corporations that were not incorporated in Australia (eg mining corporations that are incorporated outside Australia).

Because s 302D not only prohibits political entities and political campaigners (other than registered charities and registered unions and employer associations) from receiving gifts of \$250 or more from persons or entities that are not allowable donors, but also applies where the amount of the gift and all gifts previously given by that donor during the financial year is at least \$250 – this means that they will have to keep track of the identities of all donors, no matter how small the amount, lest the small donations of a donor be cumulatively greater than \$250 in a financial year and that donor may not be an allowable donor. While the provision is sensible from an anti-avoidance point of view, as it prevents people from exploiting the constraint by making many donations under the \$250 threshold, it would appear in practice to be extremely administratively burdensome, because it would prevent collecting anonymous donations under \$250 for things such as raffle tickets, trivia nights, etc, and instead require that full records of a donor’s status be recorded to ensure that the

cumulative \$250 amount is not breached. Presumably this will be a problem also for political parties and candidates as well as political campaigners. (Perhaps this problem is avoided by some other provision in the Bill or Acts which I haven't noticed – but if not, it is a practical problem that should be addressed.)

The administrative burden is slightly ameliorated for third party campaigners and those political campaigners that are registered charities or registered unions or employer associations, but it remains significant. The prohibition on receiving donations from persons who are not allowable donors only applies where the sum of the body's political expenditure and its own political donations to other persons or entities is greater than the sum of its domestic income and allowable donations. It does not, therefore, have to identify every non-allowable donation, as long as it can establish that what it has spent on political expenditure and political donations falls squarely within money from domestic sources that do not include non-allowable donations. This appears to be a reasonable compromise. However, if a gift from a non-allowable donor is made expressly for a political purpose and the gift is at least \$250, or all gifts previously made in the financial year by that non-allowable donor amount to a least \$250, then it is an offence to receive the donation. Again, this places an effective burden on such bodies either to account for every donation, no matter how small, or to decline to receive donations for political purposes unless it can be established that the donation is from an allowable donor.

This makes critical the question of how a recipient is to establish that a donor is an 'allowable donor'. Section 302P suggests that this is done by obtaining a statutory declaration from the donor declaring that he or she is an allowable donor. This seems to be extraordinarily impractical and burdensome when it comes to fund-raising, as such forms will have to be signed before an authorised witness, such as a doctor, lawyer or JP (see the *Statutory Declarations Act 1959*) who needs to check the identity of the person and to the extent possible that he or she is competent to make the statutory declaration. There is a facility in s 302P for regulations to be made for other means of obtaining the relevant information. The Committee should inquire whether this is intended to provide more practical and flexible ways of satisfying the requirements of the Act.

Section 302F also requires that registered charities that are political campaigners shall not make political donations or political expenditure out of bank accounts into which donations from non-allowable donors have been deposited. The practical effect is that charities will have to have separate accounts, one in which donations of uncertain provenance or foreign donations are to be paid, which cannot be used for political expenditure or political donations, and another into which other domestic income and donations from verified allowable donors are paid, which can be used for political donations and expenditure. Such a system already operates in New South Wales (see *Election Funding, Expenditure and Disclosures Act 1981 (NSW)*, s 95B(4) and 96AA(2)).

When all these administrative burdens are considered together, it is arguable that this law would have a chilling effect on third parties engaging in political communication. Many bodies, such as charities, will have to make a decision about whether they can justify paying the financial cost of the administrative burden from their financial resources to fund political advocacy concerning their charitable causes. Many may also be concerned that potential donors will be deterred from donating if they have to engage in the hassle of providing a statutory declaration as to their status as an allowable donor. The likely effect would be to reduce significantly participation in political communication by third parties. This may mean that the High Court would regard it as burdening the implied freedom of political communication. If so, then the next question, as reformulated in *Brown v Tasmania* [2017] HCA 43 at [104] and [277], is whether the purpose of the law is

legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? If so, then the final question is whether the law is reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? It may be difficult to argue that the law, as amended by this Bill, is sufficiently appropriate and adapted to advance a legitimate object.

Public Funding

It appears that the bill will require that public funding be capped at the amount of actual expenditure incurred by the candidate or party. This is a great improvement, as it will prevent profiteering from the public funding scheme, which in the past has drawn the public funding scheme into disrepute.

Senior staff

‘Senior staff’ is defined in s 287(1) as meaning an entity’s directors, or if it does not have directors, any person who makes or participates in making decisions that affect the whole or a substantial part of the operations of the entity. It is unclear why it is necessary to identify senior staff engaged by political campaigners and third party campaigners and declare any membership of any registered political party (see, eg, s 314AB). The Explanatory Memorandum contends that while there is an impact upon the privacy of senior staff, this is justifiable on the basis that it promotes transparency of the electoral system. However, forcing individuals to publicly declare their political affiliations opens them up to the kind of discrimination and vilification that is normally prohibited in human rights instruments. (See, eg, Commonwealth legislation dealing with discrimination in employment on the ground of political opinion: *Australian Human Rights Commission Act 1986*; and *Fair Work Act 2009*, s 153, 195 and 351.)

Interestingly, proposed s 314AEB(1) appears to accept that an entity might be a third party campaigner while being ‘the Commonwealth’, including a Department of the Commonwealth, an executive agency or a statutory agency. Under this particular section, in its proposed new form, the Commonwealth would be excluded from an obligation to provide a return submitting the political affiliations of its senior staff. However, if Commonwealth departments or agencies could, under the Act, be regarded as third-party campaigners, it would also appear likely that they would be regarded as political campaigners if they spend more than \$100,000 on political expenditure, such as the broadcasting of advertisements on any ‘issue that is, or is likely to be, before electors in an election’. Many Departments would be likely to fall within this category. If so, they would have to declare any membership of a political party by their senior staff under s 314AB. Query whether this is appropriate?

It is also likely, as noted above, to affect many of the major corporations in Australia. If they are political campaigners they will all have to declare whether their senior staff, such as their directors, belong to any political parties. Should the board of Qantas or the boards of Australia’s banks and mining corporations be forced to reveal their political affiliations? They might regard this as unnecessarily intrusive and unlikely to achieve the declared aims of the bill.

Associated entities

Under the definition of an associated entity, an entity can be an associated entity of a party even if it has no relationship with that party, other than the fact that it opposes some of the opponents of those

parties – s 287H. This could lead to peculiar outcomes. For example, an anti-fracking body which campaigns against any candidate that supports fracking, may be regarded as being an ‘associated entity’ of candidates that oppose fracking, and thus their registered political parties, even though in other electorates it opposes candidates from the same parties, who may take a different position on fracking. Similarly, a group that supported an Australian republic could target and oppose in an election those candidates who oppose Australia becoming a republic, even though they may come from quite different registered political parties. It might well be that some entities would have to be registered as ‘associated entities’ of all major political parties simultaneously. If this is not intended, some consideration may need to be given to redrafting the definitions.

Federalism issues and interaction with State electoral laws and campaigns

Unlike the equivalent NSW legislation, which confines itself to controlling donations used for political expenditure with respect to State (not Commonwealth) elections (see *Election Funding, Expenditure and Disclosures Act 1981* (NSW), s 83, s 87(3)(a) and s 95B(2)), this Commonwealth Bill does not seek to confine itself to dealing with political expenditure concerning Commonwealth elections. Under s 302D it is a breach of the Bill for the agent of a State branch of a registered political party to receive a gift of at least \$250 if it is from a donor who is not an allowable donor. This is so, even if the gift is for the purpose of running a State election campaign. Further, political campaigners and third party campaigners have to register and become subject to the requirements set out in this Bill if they spend more than certain amounts on ‘political expenditure’, which is not confined to expenditure in relation to Commonwealth elections. For example, expenditure by a third party on an advertisement attacking the Australian Labor Party in a State election will still amount to ‘political expenditure’ for the purposes of this Bill because it is expenditure incurred for the political purpose of the public expression by any means of views on a political party.

The consequence is that this law will affect campaigning in State elections and give rise to inconsistencies with State laws. For example, in NSW donations may be made by persons on the electoral roll, persons with an Australian residential address who have provided sufficient identification to the Commissioner and companies with an ABN or other form of Australian registered number or identification, which may include foreign companies operating in Australia that have not been incorporated in Australia. In NSW foreign influence is diluted to the point of ineffectiveness through the application of relatively low levels of caps (eg \$6100 per year to registered political parties) on political donations, unlike at the Commonwealth level where it is proposed that foreign owned corporations, if incorporated in Australia, can make millions of dollars’ worth of donations and obtain as much political influence as they wish, without any legislative impediment. There are also different laws regarding the keeping of separate bank accounts and the reporting of donations.

Two possibilities arise as to how the differences between the Commonwealth and State laws will be accommodated by the courts. The first is that s 109 of the Constitution will operate so that the Commonwealth law will prevail to the extent of the inconsistency, resulting in a potentially difficult analysis for parties, political campaigners and third-party campaigners as to whether there is a direct inconsistency with the Commonwealth law, or whether the field has been covered by the Commonwealth law with respect to particular matters, and if so the extent of the field, and how much of the State laws survive.

The second possibility is that the Commonwealth has no power to interfere with State elections or State electoral laws dealing with political donations. This is potentially for two reasons. First, the

Commonwealth's head of legislative power to make laws with respect to elections, including the power to enact the *Commonwealth Electoral Act*, derives from a combination of ss 9, 31 and 51(xxxvi) (and see also with regard to the qualification of electors, ss 8, 30 and 51(xxxvi)). It is confined, however, to a power to make laws with respect to election to the House of Representatives and the Senate. It does not, as pointed out by Brennan CJ in *McGinty v Western Australia* (1996) 186 CLR 140, 175, extend to a power with respect to State elections or electoral matters. Brennan CJ pointed out that ss 7, 8, 9 and 10 were directed 'only to elections for the Senate', ss 24, 25, 29 and 30 related only to elections for the House of Representatives, and all these provisions were contained in Ch I of the Constitution, whereas it is Chapter V which deals with the States and their Constitutions. He concluded that 'the structure of the Constitution is opposed to the notion that the provisions of Ch I might affect the Constitutions of the States to which Ch V is directed'. If the Commonwealth cannot rely on its powers with respect to Commonwealth elections to make laws with respect to political donations affecting State elections, then it is confined to using a hotch-potch of limited powers. It could, for example, impose constraints upon trading, financial and foreign corporations with respect to the making of political donations under s 51(xx), but it is doubtful that its laws could extend to individuals or non-corporate entities.

Even if the Commonwealth's heads of legislative did extend to making laws about political donations for the purposes of State elections, there is a second reason why such laws may be invalid. This is due to a constitutional implication known as the *Melbourne Corporation* principle. This principle provides that the Commonwealth may not legislate to destroy or curtail the continued existence of the States, or restrict or burden them in the exercise of their constitutional powers. The Commonwealth, therefore, is limited in its power to interfere in the 'constitutional and electoral processes of the States' (*Australian Capital Television Pty Ltd v Commonwealth* ('ACTV'), (1992) 177 CLR 106, 242 (McHugh J)). In *ACTV*, Brennan J added at 163 that 'representative government in the states is a characteristic of their respective Constitutions, and the legislative power of the Commonwealth cannot be exercised substantially to impair' that representative government. In *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272, French CJ confirmed at [19] that 'no law of the Commonwealth could impair or affect the Constitution of a State'.

There must, therefore, be some doubt as to whether the Commonwealth can legislate to affect State elections, including the enactment of laws controlling or prohibiting the making of political donations with respect to State elections. It was for the equivalent reason (i.e. that a State has no legislative power to make laws affecting Commonwealth elections or to control or prohibit the making of political donations with respect to Commonwealth elections) that the NSW laws capping political donations were confined to donations to fund expenditure on State electoral campaigns.

One unfortunate consequence of these constraints derived from federalism is that where one jurisdiction seeks to prevent corruption or influence-peddling by controlling political donations, the same effect is achieved through funnelling money into the same political parties, through other jurisdictions. This indicates the need for a co-operative scheme agreed between the Commonwealth, the States and the Territories to deal with political donations in an effective manner, through the capping of both expenditure and donations. Otherwise, each jurisdiction needs to legislate to control its own elections and election financing laws, but at the risk of overall effectiveness.

Conclusion

The constitutional doubts that arise in relation to this Bill, concerning the application of the implied freedom of political communication and federalism constraints can only be resolved by the High Court if the law is challenged. But Parliament can, if conscious of the potential problems, ameliorate the risks involved by ensuring that third parties are not unduly or disproportionately constrained from engaging in political communications and Commonwealth laws do not affect State elections without the agreement of the States and implementation through co-operative legislation or a reference under s 51(xxxvii) of the Constitution.

Apart from the constitutional issues, it is incumbent on the Parliament to ensure that such legislation is effective and practical in its application. Consideration should be given to the operation of State legislation as a guide in relation to both the problems that have arisen and options for overcoming them.

Yours sincerely,

Anne Twomey
Professor of Constitutional Law