WESTERN SYDNEY
UNIVERSITY

Dr Luke Beck
School of Law

8 October 2017

Submission to the Select Committee into the Political Influence of Donations

This submission deals with the following matters:

1. Political donations, including caps on donations and sources of donations,
2. Election campaigning by non-political party entities, and
3. The need for a better regime for the disclosure of political donations.

1 Political donations

Restrictions on political donations have the effect of reducing the funds available to candidates and parties to be spent for political communication. For this reason, the High Court in *McCloy v New South Wales* (2015) 325 ALR 15 held that restrictions on political donations, such as caps on the value of donations a donor may make or restrictions on the sources of political donations, constitute burdens on the freedom of political communication implied by the terms of the *Australian Constitution*. It follows that there are constitutional limits on the scope of Parliament's power to restrict political donations.

Caps on donations are constitutionally valid

In *McCloy*, High Court held that appropriate caps on the value of donations a donor may make are not inconsistent with the implied freedom of political communication because they are appropriate and adapted to the purposes of (i) preventing corruption and undue influence in the administration of government, (ii) preventing perceptions of corruption and undue influence, and (ii) preventing wealthy donors having an unequal opportunity to participate in the political process. The High Court considers that these purposes are consistent with the maintenance of the system of representative and responsible government prescribed by the *Australian Constitution*.

Capping the maximum total value of donations a donor may make to all candidates and parties is a good idea. **The *Commonwealth Electoral Act* should be amended to provide that a donor may only make donations to candidates, political parties and third parties engaged in election advertising to a maximum value of $5,000.**

I believe this amount appropriately balances the benefits of limiting the influence of money in elections and a donor's potential desire to make a single large donation or a number of smaller donations to multiple recipients.

Restricting the source of donations can be constitutionally valid

In *Unions NSW v New South Wales* (2013) 304 ALR 266, the High Court held that a provision in New South Wales legislation prohibiting political donations unless made a person whose name appeared on the electoral role was invalid as being inconsistent with the implied freedom of political communication. Limiting the source of political donations to individuals on the electoral roll at the Commonwealth level would also be inconsistent with the implied freedom of political communication.

However, in *McCloy*, the High Court upheld a NSW ban on 'property developers' making any political donations. In broad terms, prohibiting a class of donor from making political donations will be valid where there is something 'sufficiently distinct' about that class of donor to 'warrant specific regulation' especially in light of the nature of the public powers that class of donor may seek to influence in their interest.

Foreign entities and individuals are in a distinct category. They may be considered 'sufficiently distinct' from other classes of donor. The self-interest pursued by foreign donors in making political donations to Australian candidates and parties is likely to qualitatively different to the self-interest pursued by Australian donors. The implied freedom of political communication arises partly from sections 7 and 24 of the *Australian Constitution* requiring that Senators and members of the House of Representatives be chosen by 'the people of the State[s]' and 'the people of the Commonwealth' respectively. Section 44 of the *Australian Constitution* also forbids foreign nationals (including indeed dual citizens) from being elected to Parliament. The implied freedom is not an individual right: there is no question of any individual's 'right' to political communication being burdened. However, the textual source of the implied freedom of political communication puts foreigners in a different category to Australians. The purpose of ensuring the 'Australianness' (for want of a better word) of the Australian electoral process is likely to be considered compatible with the system of government prescribed by the *Australian Constitution*.

The next question is whether an outright ban on foreign donations is reasonably capable of being seen as appropriate and adapted to serving that purpose. Answering that question involves a three step test. The outright ban must be:

- *suitable* — as having a rational connection to the purpose of the provision
- *necessary* — in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;
- *adequate in its balance* — a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.

In my view, an outright ban on foreign donations would pass each of these tests. **A ban on foreign donations (ie, that is from a source that is not an Australian citizen or resident or an entity registered in or operating in Australia) is likely to be constitutionally valid and a ban on foreign donations should be legislated.**

As a practical matter, a ban on foreign donations might be circumvented by funnelling the donation through an Australian citizen or entity. However, the risk of this happening and the risks posed in an actual case of circumvention are marginal if there are caps on donations and proper disclosure rules.

2 Political campaigning by non-political party entities

It is well known that political campaigning by entities that are not political parties can influence election outcomes or government policy. There are many examples including the campaign against the mining tax run by the mining companies and the activities of GetUp. Such activities are, of course, perfectly legitimate.

There is a need to ensure transparency in respect of these entities for many of the same reasons that apply in the case of transparency in respect of political parties.

The *Commonwealth Electoral Act* should be amended to require any entity that expends funds in excess of $5,000 in a year on material or advertising that requires an 'authorised by' notice under section 385A of the *Commonwealth Electoral Act 1918* be subject to the same donations disclosure regime that applies to political parties. A threshold of, say, $5,000 serves the purpose of ensuring that smaller community groups that engage in political activities are not unduly burden by the administrative issues connected with a disclosure regime.

This would reduce the risk of what the Americans call 'dark money' influencing election outcomes and government policy in Australia.

3 A better regime for the disclosure of political donations

The present cap for disclosure is far too high and the current disclosure timeline is far too long. **All political donations over the value of $500 should be disclosed and the information made public in as close to 'real-time' as is technologically feasible.**

A threshold of $500 represents an appropriate balance between avoiding the need to disclose raffle ticket fundraisers and the need to ensure that donations of a value that have the potential to ingratiate a donor to the recipient are disclosed.

The current 18 month delay before information about donations is made public frustrates the purposes of transparency and the avoidance of improper influence underlying a disclosure regime. Those purposes are promoted by real-time reporting.

I trust this submission of assistance to the Committee.

Yours sincerely

Dr Luke Beck