

NOTES on COMMONWEALTH ELECTORAL AMENDMENT (POLITICAL DONATIONS & OTHER MEASURES) BILL 2008

Broadly

- We support the Bill's thrust towards greater disclosure/transparency, which accords with previous Democratic Audit submissions
- The Government's desire to reduce the \$10 000 disclosure threshold before this financial year was understandable. But there is something to be said for rolling this bill into the legislation that emerges from the Green Paper process, and debating them as a whole. Campaign finance has been marred by ad hocery since 1983. A systematic approach is important to constructing a regime that, from ground up, balances the principled goals of campaign finance regulation – political equality, political participation, adequate party funding and openness/accountability.

Particular measures

1. Lowering the disclosure threshold to \$1000pa. We support this.

1.1 Removing indexation has the educational benefit of keeping the figure at a memorably round number. \$1000 is fairly low. Given the vested interests of the parties and JSCEM's regular inspection inquiries, one would expect the figure to be kept under review.

1.2 Moving to bi-annual rather than annual reporting periods for party and associated entity donations is commendable. And the reduction in the time allowed to file post-election and post-reporting period returns, from 15 weeks to 8 weeks, is superficially attractive. But neither of these measures addresses a key failing of the disclosure regime since its inception: the absence of regular disclosure, especially automatic disclosure of large donations. This is particularly galling in the internet age.

1.3 Under the present Bill, disclosure by candidates and groups will still take place after the election and give electors/the media no idea of the donor base at the critical time, namely during the campaign. Disclosure to parties will occur twice rather than once a year. But such disclosure will not be timely:

- (i) disclosure will be between 8 and 2 months stale; and
- (ii) the whims of the electoral cycle will determine whether any of that stale disclosure falls during an election period. (Given the quasi-convention in recent times for October-November federal elections, there will be party disclosure at the end of August covering the first half of the final year of the election cycle, but no disclosure of donations in the lead-up to the election until the end of February following the election).

- A system of continuous disclosure along the lines of the New York Local Elections Board, as advocated by Professor Costar, is an ideal alternative to the current unreliable and uninformative regime.

- Alternatively, consideration could be given to having a single public clearing house, run by the AEC, for all donations above the threshold to registered parties and their MPs, officials and candidates. This would ease the paperwork obligation of disclosure on both donors and parties. It would permit almost instantaneous disclosure (subject to suitable checks – eg clearance of donations by cheque, to avoid bogus ‘donations’ to embarrass a party).

1.4 Proposed new sections 305B(2) and (3A) ostensibly require a donor who intends to benefit a party, to disclose that contribution, regardless of whether it passes through intermediaries. The intention behind this reform is welcome, given the ease through which trust funds, corporate vehicles or even lawyers’ accounts (as in New Zealand) can and have been used to channel and disguise donations. However on its own, placing an obligation of honesty on donors and intermediaries may not be enough. There will need to be strong auditing and enforcement/prosecution of the provision.

- From a legislative point of view, there should also be a positive obligation on party and candidate agents to inquire into and be satisfied as to the true source of donations. Absent this, sections 305B(2) and (3A) may be no more than a vain hope for self-regulation.

1.5 The amendments to disclosure by third-party political expenders may be problematic. It is reasonable to put large scale political expenders such as lobby and business groups and major activist groups like Get Up! on the same six month reporting timetable as parties. But lowering the threshold from \$10 000 expenditure in a financial year, to just \$1000 in the (six month) reporting period, potentially catches a lot of small-scale groups in a net with enhanced penalties.

2. **Public funding by way of reimbursement only.** The sight of an essentially celebrity candidate like Ms Hanson earning funding without doing much campaigning is unattractive. But as Professor Sawyer argues, this proposal may significantly disadvantage genuine minor parties and independents. That will further weaken the political equality purpose of public funding, a purpose already limited by:

- (i) the arbitrary 4% threshold, and
- (ii) the fact that, in planning their campaigns, the established parties can ‘bank’ on receiving public funding – and hence, eg, secure overdrafts – in ways that minor parties cannot).

2.1 A reimbursement only rule is doubly problematic given the restricted definition of claimable ‘electoral expenditure’ (item 5 of Bill). Few minor parties or independents are able to afford much advertising, let alone opinion polling: the item 5 definition leaves them *only* able to claim production of signs and leaflets (sub-paragraphs (e) and (f) in the definition). Yet such candidates may have considerable expenditure on office expenses, travel, web design and

advocacy to the media: expenditure that MPs, ministers and party leaders may cover from their taxpayer funded offices and allowances.

2.2 The length and complexity of the redraft of Division 3 'Election Funding' tends to support Professor Sawyer's argument that the proposals are a sledgehammer to crack the Hanson nut. (Currently, the public funding provisions form one of the few simple regimes in Part XX of the Commonwealth Electoral Act).

- An alternative to expenditure reimbursement is to see public funding as akin to a 'voucher' that should automatically follow each voter's choice. With a relatively high threshold like 4%, and the system of deposits, there is already considerable disincentive to undue candidatures.
- A fairer and administratively easier option to the Bill would be Professor Hughes' proposal that full funding be paid on proof of a %ge of expenditure (eg receipts worth 50% of funding; with actual reimbursement of receipts less than that).
- The definition of 'electoral expenditure' needs to be broadened for the purposes of receipting claims to public funding.

3. **A ban on foreign property donations.** We support this. Some parties may be ideologically or organisationally linked to global movements – eg socialist and environmental parties. But as long as Australia forms a single, sovereign electoral system and is not part of a supra-national electoral system like the EU, the principle that foreign interests should have no say is valid.

3.1 The structure of the proposals is clever. There is no attempt to control all 'foreign' donations. For example, a non-national like a backpacker working in Australia will still be able to attend a party fundraiser and make a contribution in Australian dollars, without the party having to take the administratively difficult step of identifying and refusing or forfeiting the contribution.

3.2 One effect of the ban however will be to divide donations by Australian citizens either resident overseas, or with property overseas, into two categories:

- (i) donations using accounts/property kept in Australia, which remain lawful, and
 - (ii) donations using money/property kept outside Australia, which become unlawful.
- A simpler solution might be to legislate a secondary ban against on donations by non-residents, but exempt non-residents who are eligible overseas electors from either the ban on foreign property or non-resident donors.
 - An alternative would be to exempt all Australian citizens from the foreign property ban, although this might weaken the enforceability of that ban, by Australian citizens abroad being used as conduits

(even allowing for the anti-conduit provisions of proposed s 305AB(2) and (3)).

- We note that there may be difficulties in the tracing and enforcement of donations from people/property offshore. The resourcing and expertise of the AEC in such matters needs to be considered.

4. **The ban on anonymous donations** is also supported, being largely a tightening of existing rules.

- However, it seems odd that the ban applies to all 'gifts', however small. A scrupulous party fund-raiser, shaking a tin or selling raffle tickets, will be required to demand and record the names and addresses of every contributor, or refuse or forfeit the contribution to the Commonwealth. It may be sensible to legislate a low threshold, say \$50. If so, regular contributions under the threshold would still have to be covered by the anti-anonymity rule (eg direct debits, cheques or other financial transfers) since such contributions could otherwise be used to make cumulatively substantial donations.

5. **Penalties.** We welcome the strengthening of penalties, which were originally set low and had become risible over the decades. However, setting higher maximum fines may on its own do little, given:

- (i) the absence of strict liability for most offences (indeed reference to 'strict liability' has been removed from the s 315 offences of 'failing to furnish a return' and 'furnishing a .. return that is incomplete).
- (ii) the historical lack of prosecutions.
- (iii) the absence of civil and political penalties. For example, Corporations Act style provisions for a party agent or candidate to be disbarred from holding office in a registered party, or nominating for Parliament, if found to have been involved in serious offences or those involving mens rea. Currently the burden is placed almost solely on party and candidate agents – people who in minor parties and independent candidatures will be volunteers. What is lacking is any liability reaching up to the party leaderships and candidates, who after all are the beneficiaries of political donations.