

THE CHILLING EFFECT OF POLITICAL EXPENDITURE LAWS

New laws requiring disclosure of political expenditure discourage debate and political participation, argues **Andrew Norton**

In January I received, in my capacity as editor of *Policy*, a letter from the Chief Legal Officer of the Australian Electoral Commission (AEC). It warned that I may have ‘failed to focus’ on meeting my obligations under section 314AEB of the *Commonwealth Electoral Act 1918*. These were new political expenditure disclosure rules, aimed at the many organisations that run no candidates in elections but may nevertheless influence public opinion.

Being unaware of the rules, I had indeed ‘failed to focus’ on them. These 2006 amendments to the electoral law received very little public attention at the time they were made. Though the amending legislation was controversial, its moves to close the electoral roll earlier than in the past and to disenfranchise prisoners stirred most opposition. Some nonprofit groups objected to the proposed political expenditure rules, but the changes generated little other discussion.

Yet the political expenditure rules could potentially have a ‘chilling effect’ on political expression. This is the famous description by US Supreme Court Justice William J. Brennan of the results of laws that deter speech without prohibiting it. At best, the rules require many organisations to spend time and

resources collecting and reporting information that adds nothing to the integrity of Australian democracy.

The legislation defined ‘political expenditure’ broadly, going well beyond money spent directly campaigning for a party or candidate, to include the costs of publicly expressing views on an election issue, commissioning an opinion poll asking about voting intentions, and commenting on political parties or candidates even without advocating a vote for or against them. If such expenditure totals more than \$10,300, it must be reported to the AEC, which will then publish it on its website. Reaching this spending threshold triggers a requirement to disclose donors whose gifts of \$10,300 or more enabled the organisation’s political expenditure. Their names and addresses will also be published on the AEC website.

Perhaps fearing more paperwork than it could process—there are thousands of organisations and publications that publish some mention of political parties, candidates, or issues over a twelve-month period—the AEC has done its best to interpret the disclosure rules as narrowly as possible. According to the AEC guidelines, the issue commented on has to be one ‘likely to affect the outcome of the

election’—not just any political or policy issue. The ‘primary or dominant’ purpose of the expression determines whether disclosure is necessary. So a political or policy opinion piece in a newspaper would be part of the publication’s normal activity and not subject to spending disclosure, but the expense of publishing the same piece on a website intended to influence the election would require reporting.

Though saving the AEC’s web-servers from gigabytes of irrelevant submissions, the guidelines require the general public to make complex judgments. What is the ‘primary or dominant purpose’ of your expression, in the eyes of the law? Who determines which issues are ‘likely to affect the outcome of an election’? Political scientists argue over the links between issues and voting; if experts do not agree, can the AEC reasonably expect people with no special knowledge to decide? Worse still, because the disclosure requirements operate annually, those engaging in political comment have to report their expenditure on issues of importance to an election that may

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be two years away from being called. The only prudent thing to do is to report anything that has the remotest chance of becoming an election issue. Getting it wrong could result in a conviction and a fine.

The AEC's narrow reading of the legislation also has some odd consequences. It means a modest-sized issue group campaigning on, say, an electorally significant climate change issue, would be caught by the legislation for spending \$11,000 to reach a small number of voters, since its 'primary and dominant purpose' was to influence the election. But a newspaper spending far more to reach hundreds of thousands of voters with opinion on the same subject is exempt, because commentary on political issues is part of its normal business.

In the end, only fifty-one organisations disclosed 'political expenditure' by the AEC's deadline of 1 February 2008. None of them were media outlets; most were unions. It remains to be seen whether the AEC will see this as successfully keeping the number of reports down or as mass noncompliance with the law.

The main danger posed by this legislation is not the extra paperwork, annoying and wasteful as it may be, but the potential consequences for political debate. Organisations that do not have party politics as a major purpose, but engage occasionally with politicians or politically charged issues, may decide that political speech is not worth the effort of having to decide which activities fall within the law and then calculating and reporting the associated expenditure. Their officials may not feel confident in judging which issues are important election issues, their accounting systems probably won't be designed to separate 'political' from other outlays, and they may not be able to afford to divert resources from

their main activities. Silence on all political issues will be the cheaper option for them, but it is costly to the political system as a whole.

With expenditure above the threshold requiring disclosure of donors, the legislation could have the further effect of discouraging people who want to give money to an organisation, but do not want their

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name and address published. In part, this may just be concern about being contacted by cranks or by fundraisers who pester potential donors. More significantly, it is fear of being disadvantaged by governments. As Australian governments have become more pervasive, with many businesses and organisations potentially affected by legislation or ministerial decisions, the number of people who can operate without fear of negative consequences from the ruling party has diminished. Campaigners for greater disclosure assume that policy is only perverted by governments doing favours for friends, and ignore the possibility that policy can be used to penalise opponents as well. The Liberal Party, particularly, has often said that its supporters, fearing a backlash from Labor governments, prefer privacy. For nervous donors, this legislation threatens to close off a way for them

to express their political views.

When regulating donations to political parties, there is a trade-off to be made between ensuring people can freely participate in politics through financial contributions, and ensuring that government is not corrupted. On balance, the public interest supports disclosure of large donations to political parties because of the possibility of secret and improper influence on decision-makers. But donations to organisations that are not running candidates in elections, and not necessarily even endorsing any candidate or party, are too remote from actual decision-making to be plausible causes of corruption.

The case for disclosing expenditure is even weaker than for disclosing donations. The whole point of political expenditure to promote views about a party, candidate, or issue is to engage in a public act of persuasion. By their very nature, expressed views are automatically disclosed. The only political expenditures actually reported in the media after the AEC released the 2006–07 figures highlight the redundant nature of the provisions. Who would have guessed that the union movement spent many millions of dollars opposing WorkChoices, or that activist group GetUp!'s campaigns cost money? Does the integrity of the system depend on expenditure being itemised to reveal the precise purpose and type of spending? These are more onerous requirements than political parties face.

The political expenditure provisions of the *Commonwealth Electoral Act* seem to have their origins in a strange notion, held by the previous government, that its opponents should be held accountable to it. In a late 2005 speech to the Sydney Institute, foreshadowing the current legislation, then special minister of

state Senator Eric Abetz complained that ‘third parties’ such as the Wilderness Society, the RSPCA, GetUp!, and the ACTU were effectively campaigning in favour of the ALP. ‘Yet none of these groups,’ Abetz said, ‘are required to report annually outside of election periods, and blatantly political campaigns such as those run by GetUp! and the ACTU escape accountability.’

These groups are accountable to their members and supporters for their spending, not to the government. The general public will decide whether the arguments of these third parties are persuasive based on their campaigns at the time, not in hindsight when the few who bother to check the AEC website see how much was spent. Far from improving the quality of Australian democracy, the disclosure provisions represent the former government’s bureaucratic

harassment of its opponents. Of the forty-nine political organisations that submitted returns to the AEC for 2006–07, forty-eight are left-wing (two pollsters submitted returns as well, taking the tally of submissions to fifty-one).

The new government shows some signs of being better-disposed to democratic debate than its predecessor. Deputy Prime Minister Julia Gillard has already said that the new government will remove provisions restricting the public comment of NGOs with government contracts. On the other hand, Labor also favours reducing the threshold of disclosable donations from the current \$10,300 to \$1,000. If the \$1,000 threshold applied to political expenditure provisions as well, thousands of small groups with only an incidental interest in elections or election issues could be caught in the AEC’s bureaucratic net.

After the AEC’s February publication of disclosed political donations and expenditure, the new special minister of state, Senator John Faulkner, was reported in the media as saying there should be a review of the disclosure rules. Changing the political expenditure reporting requirements would, for Labor, be a happy case where democratic principles of free speech coincided with a partisan interest in relieving its friends of bureaucratic burdens. If the Coalition thinks more carefully about what the disclosure rules mean for right-of-centre politics in an era of coast-to-coast Labor governments, it too, I hope, will revert to its former stance in favour of free speech. The Howard government came to power in 1996 rejecting the ‘chilling effects’ of political correctness, and should not have left power presiding over laws that create incentives for silence.

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Has Hayek’s gloomy warning been borne out by events, or has technology become more a force for liberating people from government?

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¹ F. A. von Hayek, *The Constitution of Liberty*, University of Chicago Press, 1978, 216 (paperback edition).

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