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Diminishing Democracy: The Threat Posed by Political Expenditure Laws

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Electoral law reforms nearing a Senate vote risk making political activists inadvertent lawbreakers, deterring financial supporters of Australia's civil society, and creating unnecessary bureaucratic burdens.

These provisions are included in the *Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009*, which has already passed through the House of Representatives.

Political activists could be convicted and fined for failing to report their political expenditure and donors to the Australian Electoral Commission. They face jail for political expenditure financed from foreign sources or, in some cases, anonymously. Foreign sources include Australian citizens using overseas bank accounts or credit cards.

The proposed reforms modify current rules applying to 'third parties'—non-government organisations that express views on political parties, candidates, or election issues. Which groups must report to the AEC is currently unclear. Organisations that run political campaigns are covered, but the media, universities, charities, think-tanks, and community groups whose staff sometimes comment on political matters could also be caught by the disclosure system.

Political expenditure laws have high red-tape compliance costs. Third parties have more complex obligations than political parties. Third parties are expected to report their spending on election issues even if the election is two or three years in the future. They must itemise political expenditure, while political parties need report only a single lump sum of all payments. If the current bill passes, detailed records will need to be kept and reported on for money-in-a-bucket fundraisers.

Organisations involved in political commentary risk losing donors who do not want their names and address placed on the public record. Under existing rules, donors must be disclosed even if they do not know how their money is being spent.

Currently, no AEC reports are required unless political expenditure reaches $10,900 a year. Enabling donations are also private up to $10,900 a year. This threshold keeps organisations and individuals with minor political activity out of the disclosure system.

The political donations bill would reduce the disclosure thresholds to $1,000 every six months. Minor and incidental political activity will be caught by the law, putting people unfamiliar with political bureaucracy at much greater risk of unintentionally breaking the law.

Political expenditure laws are intended to close loopholes in the political party donations system. But they go way beyond what is required. Most third-party political activity poses no threat to the political system's integrity. To the contrary, third parties play a vital role in monitoring government, raising issues, and providing opportunities for political participation. Laws that sabotage third parties by deterring their donors, placing their activists at risk of prosecution, and wasting their time providing low-value information would diminish Australia's democracy.

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Introduction

Australia's major political parties dominate the nation's parliaments but not the nation's political activity. More people are involved with organisations that support the rights of women, animals or minority groups than join political parties. Members of environmental groups outnumber political party members by more than two to one. Millions more Australians are members or financial supporters of organisations that sometimes engage in politics, including unions, employer associations, charities, and countless other interest and community groups.[1] Although political parties remain the arbiters of what becomes law, much of the political initiative comes from outside the party system.[2]

Some politicians are frustrated by their diminished role. Liberals especially make no secret of their annoyance with these 'third parties.'[3] In a 2005 speech, Senator Eric Abetz, then the minister responsible for electoral law, complained about how much money the Wilderness Society, the Australian Conservation Foundation, the RSPCA, GetUp! and the Australian Council of Trade Unions (ACTU) spent campaigning against the government. He announced that he was considering an 'accountability regime' for these groups.[4] It was passed by federal Parliament in 2006.

Third parties had long been subject to disclosure requirements in campaign periods. Abetz's 'accountability regime,' made disclosure annual.[5] Third parties must now disclose every year their spending and donations relating to comment on political parties or candidates, election advertising, expressing views on election issues, or conducting opinion polls. Third parties are assumed to be in permanent campaign mode.

This change to annual reporting potentially sweeps much of Australian civil society into the political disclosure system. Many organisations, at some point in a three-year election cycle, have cause to comment on political parties or issues that could become 'election issues.' For the most part, this comment is incidental to their main activities. But with few areas left untouched by government regulation or programs, complete abstention from politics may neither be possible nor desirable.

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Another Howard government change, however, reduced the impact of its reform on third parties. Previously, they had to report on 'electoral expenditure' of $200 or more and donations of $1,000 or more. The thresholds for campaign expenditure and donation disclosure were both lifted to an indexed $10,000, matching the new rules for donations to political parties. This change excused small political groups and organisations with minor political activity from the disclosure regime.

The Australian Electoral Commission (AEC) further narrowed the range of third parties required to submit reports. For the 2006–07 disclosure year, it issued a 'guidance note' saying that the laws applied only to activity in which the third party's primary or dominant purpose was to express views on a party, candidate or election issue. Comment on politics that was 'normal activity' for the third party, such as publishing a newspaper, was not included.[6] This guidance note's status has important implications for the many organisations continuing to comment on political parties and election issues but not submitting political expenditure returns to the AEC.

Legislation currently before Parliament—for the second time after a previous rejection—would significantly expand the scope of political expenditure and donation regulation.[7] By lowering the spending and donations disclosure thresholds from more than $10,000 a year to only $1,000 each six months, the government would massively expand the number of organisations and individuals affected by the 'accountability regime.' Groups that raise money using 'anonymous' donations, such as passing around a donations container, would need to keep complex records. Spending and giving would have to be reported twice a year rather than once. Fines for bungled disclosure paperwork would increase from $1,000 to $13,200. Jail sentences would apply for political expenditure financed by unlawfully received anonymous donations or from overseas sources.

The Rudd government's electoral law reforms would diminish Australian democracy. New obstacles, costs, uncertainties, and risks would be put in the way of political activity. The level of third-party political involvement, so critical to providing many Australians

with a political voice, so valuable in delivering feedback to government, and so important to informing politicians and the public on policy issues and solutions, would go into decline.

Political expenditure laws are bad for the AEC as well. Processing expenditure returns containing little useful information is a poor use of its resources. Worse, the third-party political expenditure and disclosure regime turns the AEC from impartial election organisers into political police, monitoring political activity with often trivial connections to elections. Though the Centre for Independent Studies is a non-partisan organisation that does not seek to influence election outcomes, in my capacity as editor of its journal *Policy* I received a letter from the AEC asking me to review my 'possible reporting obligations.' AEC letters in the mail, or knocks on the door if they decide to investigate further, will become a routine experience for Australians active in politics, making it a resented rather than an admired body.

Is there any need for third-party disclosure laws?

Promoting the integrity of government decision-making

There is a clear if modest rationale for donations disclosure for political parties and election candidates. Politicians are elected as representatives of their constituencies, but political office brings with it the power to promote their own interests or those of their friends and cronies. Donations disclosure is part of a package of measures, including the register of MPs' interests and ministerial declarations of interests, designed to minimise conflicts between the public interest and the personal or other non-public interests of politicians.[8] As a general principle, aiming to align the interests of MPs and the public is uncontroversial.

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In practice, this principle is difficult to apply except for politicians' direct pecuniary interests. There is no sharp distinction between the personal interests of groups or categories of Australians and broader public policy goals. Almost every government decision affects somebody's private interests. The same policy can be seen very differently depending on a person's situation, prior beliefs, experiences, and concerns. One person's industry policy is another person's rent-seeking. One person's family support package is another person's vote buying. One person's policy for workplace fairness is another person's cosy deal with the unions. Democratic politics is in part a continuous argument over how to define the public interest.

Because the public interest is not a concept that exists undisputed outside the democratic process, donations regulation focuses on informing that process rather than prejudging it (though there are proposals to prejudge it through proposals to limit or otherwise control donations[9]). Knowing who financially supports political parties or candidates, and how much they give, can help us judge whether the policies parties announce or the decisions they take might have been improperly influenced by money. The recent Utegate issue is an example. A Brisbane car dealer, John Grant, who had donated a vehicle to Kevin Rudd's campaign, stood to benefit from a government policy to provide finance to car dealers. It was alleged that the government did him favours. However, a Newspoll survey found that only a quarter of its respondents believed that Grant received preferential treatment due to his association with the Prime Minister.[10] In this case, the public does not believe that the line between private and public interest was crossed.

Though disclosure of donors' names may provide useful information, the importance of this should not be over-stated. Generally, government decisions themselves reveal whether or not any individual, group or organisation is being favoured. We don't need to look at the AEC's website to know whether the government's motor vehicle industry policy favours the industry or whether its industrial relations legislation shifts power in favour of the unions (for the record, car unions but not car companies are ALP donors; the ALP receives significant funding from the union movement).

Donations are one aspect of government decisions that the Opposition, media, expert commentators, non-government organisations, and rival interest groups may highlight. But the absence of donations will not redeem a bad decision, and the presence of donations will not condemn a good decision. This may be why declared political donations are only occasionally mentioned in policy debate (John Grant has no disclosed donations in the last decade).[11] There are stronger arguments against most policies than the identities of political donors and, unsurprisingly, critics focus on the arguments that best advance their cause.

Perhaps the main reason—or at least the most legitimate reason—for third-party disclosure rules is to close a loophole that would otherwise exist in the broader disclosure regime. Without third-party regulation, donors may evade the political party donation laws by using third parties to do their partisan political work. The existing rules on 'associated entities,' which include not just organisations legally linked with parties but also those that operate wholly or to a significant extent for the benefit of a political party, are designed to avoid this outcome. On this logic, the third-party provisions extend existing associated entity rules to cover looser and less systematic connections between political parties and their financial supporters.

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The difficulty with the third-party laws as they stand, and even more so with the third-party laws as Labor plans to amend them, is that they predominantly cover political activity that has nothing to do with seeking improper influence over government decisions. Most third parties are non-partisan organisations based on promoting particular groups, interests, perspectives, or issues—and donors support them for those reasons. Even among third parties that try to influence election outcomes, donors' intentions are ambiguous. GetUp! was strongly opposed to the previous Coalition government, and possibly some of its donors wanted to assist Labor. Or perhaps they only wanted to support GetUp!'s campaigns on climate change, gay marriage, or a range of other issues on which GetUp! differs from Labor. The disclosure system cannot distinguish between financing campaigns that are a normal and healthy part of the democratic process and donations intended to indirectly win favours from a political party.

Third-party 'accountability' and 'scrutiny'

The Howard government's reforms, however, clearly had a larger third-party agenda than simply closing loopholes in the disclosure system for political parties. An 'accountability regime' (Eric Abetz's phrase) is quite different to a system for limiting the possibility of improper influence on government decisions. Similar language keeps appearing in the statements of Liberal officials and politicians. After the 2007 federal election, Liberal Party federal director Brian Loughnane told the National Press Club that the intervention of a 'third external force' with 'resources greater than either of the major political parties' was an 'extremely unhealthy development.' He thought that this 'external force,' the ACTU, should have to publish a report setting out how its campaign money was spent. Similarly, he thought that the 'well resourced' activist group GetUp! should be 'subject to proper levels of scrutiny.'[12] Some Liberal MPs think that Labor's already far-reaching proposed extension of the Coalition's political expenditure laws doesn't go far enough. Jamie Briggs, Alexander Downer's replacement as the member for Mayo, thinks that unless addressed, third-party spending would turn into a 'growing cancer on our democracy' and suggests capping expenditure as a possibility.[13]

What exactly disclosure of spending or donors adds to existing 'accountability' or 'scrutiny' has never been explained. Except for conducting opinion polls, every activity requiring a political expenditure disclosure is, by legal definition, already public: the public expression of views on a candidate or party; the public expression of views on an election issue; the printing, production, publication, or distribution of an election advertisement, handbill, pamphlet, poster, or notice (materials that require the 'written and authorised' statement); and the broadcast of political matter on TV or radio (materials that require the 'spoken and authorised' statement).[14]

Because the third-party activity covered by the legislation is predominantly public, any arguments or campaigns by third parties already have the most powerful form of 'accountability' and 'scrutiny,' which is critical examination by others and the countervailing influence of contrary arguments and campaigns. For the disclosure laws to add value, subsequent revelation of donors (up to 12 months later now, up to six months later under the proposed amendments) must be capable of changing how third-party arguments or campaigns are judged.[15]

Experience suggests that the information published as a result of disclosure rules is unlikely to be very useful. The two years of political expenditure donations data currently on the AEC website have generated little media or other public interest. Apart from news reports in the 24 hours after the AEC's annual donations publication, media coverage is negligible. The February 2008 release, the first under the new rules, was so forgettable that Jamie Briggs was in December 2008 calling for disclosure of information about GetUp! that had already been on the AEC's website for nearly a year. The February 2009 release was widely reported but only for revealing the specific amounts spent by trade unions on campaigning. This was just detail on a fact that was already common knowledge: that the unions had spent millions of dollars campaigning against WorkChoices. Nothing was added to the substantive debates on WorkChoices or Labor's replacement industrial relations legislation.

The danger of improper donor influence on government must be weighed against the danger of improper use by government of donor information.

The nature of the political expenditure disclosure requirement also works against generating useful information. Third parties must report how much they spent in the various categories, such as expressing views on a party or an election issue. But they don't have to say which party or which issue. We know which political parties and issues high-profile third parties like the ACTU are interested in. For other third parties, we can only guess. My online research failed to turn up any information on which political parties or causes were supported or opposed by several companies and individuals that reported political expenditure in 2007–08. Without this starting point, it is impossible to say whether their 2007 election spending raises any questions.

The effect of political expenditure laws is not to make third parties any more accountable for their arguments than otherwise. Critical scrutiny and debate performs that role. The effect of political expenditure laws is narrower. It is to make third party donors accountable for their political beliefs and actions. The identity of donors is the only significant new information these laws can produce. The political activity itself is already public, but the donors are usually private.

This is the trouble with disclosure systems. The danger of improper donor influence on government must be weighed against the danger of improper use by government of donor information. If we are to believe that politicians would favour $1,000-donors to their party, then surely we must also believe that politicians would disfavour $1,000 donors to other parties or third-party opponents. The disclosure regime creates opportunities for improper behaviour that would not otherwise exist.

A parliamentary committee that examined the government's political donations legislation acknowledged concern about donors being penalised for their actions, but claimed that electoral law already prohibits it.[16] It is true that there is a law against intimidating, coercing, or otherwise subjecting a donor to detriment, but only to donors supporting political parties or candidates.[17] Donors to third parties are unprotected.[18] In any case, there is little chance of proving beyond reasonable doubt—this is a criminal offence—that a politician punished an opponent's donor. Few government decisions are announced with more than superficial explanation, and none with admission of vindictive motives.

Nobody knows what risks donors really face. But we do have information on perceived risks. A 2004 survey of non-government organisations (NGOs) found that many believed that their financial relationship with government was jeopardised by their political activity. Ninety percent believed that dissenting organisations risked having their government funding cut, and three-fourths thought that NGOs were pressured to

bring their statements in line with government policy.[19] The Liberals accuse Labor of trying to intimidate business.[20] Whatever the actual risk, concern about state retribution is not irrational. As government becomes ever more pervasive in society, through both regulation and contract, more and more people will feel that they have something to lose by publicly supporting a political or third party opposed to the government or some aspect of government policy.

Ironically, neither current nor proposed political expenditure laws fully cover the corporate political funding that most concerns activists.[21] The legislation only requires that donations (or 'gifts,' as they are called in the legislation) be disclosed. So companies or other interested organisations can avoid disclosure simply by paying third parties, including third parties they have set up themselves, to run campaigns. Direct payment for specific services in return provides 'consideration,' putting the transaction outside the *Commonwealth Electoral Act's* definition of a 'gift.'[22] Spending still needs to be reported but not who paid for it. The campaign funding sources with most reason to conceal their identities can avoid the disclosure rules.

Additional accountability and scrutiny does not justify third-party expenditure and disclosure provisions. The main form of accountability comes from criticism and debate, and this accountability process will be diminished rather than enhanced if third-party donors are intimidated. Only closing loopholes in the political party disclosure system stands as a justification for third-party disclosure.

Specific problems with current and proposed regulation

Rule of law concerns

A basic principle of the rule of law is that citizens should be able to understand the law and their obligations under it. This is not the case with Australia's political expenditure laws.

One trigger for disclosing expenditure and donations is 'the public expression of views on an issue in an election by any means.'[23] This requirement was carried over from earlier disclosure laws that applied only to the official campaign period. In its original context, this provision caused no significant rule of law problems. The question of what constituted an 'issue in an election' could be answered in retrospect, as disclosure was not required until after the election was over. All that the third parties needed to do was check whether their issues had been a subject of dispute between parties or candidates.

Third parties must disclose spending and donors for future election issues.

Under the current disclosure regime, the question of what is an 'issue in an election' has to be determined prospectively. Due to annual reporting (every six months, if Labor's reforms pass), third parties must disclose spending and donors for *future* election issues. Only once in the three-year election cycle will third parties clearly know whether they have obligations under the law. At other times, the law requires them to guess which issues will be election issues in two or three years' time. Maybe third parties should employ futurists or astrologists as well as lawyers in determining their legal obligations. The move to annual disclosure seriously undermines the law's certainty.

As not submitting an expenditure return or submitting an incomplete return is a strict liability offence, the absence of any intent to break the law is not a legally valid defence.[24] Fear of media ridicule may deter the AEC and the Director of Public Prosecutions (DPP) from pursuing cases of unintentional breach. But the most prudent strategy for third parties is to defensively declare anything with a chance of becoming an election issue. This, however, expands the bureaucratic burden on third parties.

The AEC has added to the legal confusion on when disclosure is needed. Prior to the submission date for the first set of declarations under the Howard government's amendments, the AEC issued what it called a 'funding and disclosure guidance note.' It said that disclosure was required only when the 'primary and dominant' purpose was to express views on an election issue, and gave the following example:

> Expenditure on the publication of a political or policy opinion piece in a newspaper may be an adjunct to your normal activity of reporting and commenting on the news and issues and so is not political expenditure. The publication of that same opinion piece in a journal or website whose objective is to see the election of a particular government, or to further a particular policy line, may well give rise to reportable expenditure.

The guidance note went on to offer another example distinguishing between the same article published in a trade union journal as part of the union's normal reporting and commenting on issues to its members, and as part of some special journal that may be reportable expenditure.[25] Not surprisingly, the ACTU says that it is 'virtually impossible' to make these subtle distinctions in an organisation routinely involved in advocacy. According to the ACTU, it received conflicting advice on the subject from the AEC.[26] If the AEC itself can't work out what the law means in practice, it is hard to see how ordinary citizens, people without legal qualifications or experience in electoral matters, can be expected to do so.

Though the AEC failed to come up with a workable distinction between disclosable and non-disclosable issue expenditure, its decision to read the statute narrowly was understandable. Without it, every organisation that ever reports or comments on politicians, parties or issues is covered by the law. Newspapers, magazines, radio and TV stations, publishers, churches, universities, think-tanks, writers' festivals, charities, state governments—the list could go on and on. This was organisational self-defence by the AEC, avoiding a massive task in collating reports and monitoring compliance.

The problem for third parties—in this case potentially almost every institution in civil society—is that it is not clear whether a court would accept the AEC's 'guidance note' interpretation. The statute's actual words make no mention of a primary or dominant purpose test. There are no stated exemptions other than for political parties, the federal government, federal politicians, and candidates in federal election (all of whom are subject to other disclosure provisions). In defending a case, lawyers may argue that the main intention of the law was to cover groups that were clearly acting to remove a particular political party from office, such as the ACTU or GetUp! Yet the plain words of the statute are consistent with a much broader meaning. Submissions from both major newspaper publishers, News Ltd and Fairfax, calling for a specific exemption for media reporting suggests that their lawyers are also concerned that the AEC's reading would not be accepted by a court.[27]

Third parties need certainty about what they need to report to the AEC.

Adding to concerns about the guidance note's interpretation of the law, the AEC itself may have backed away from it. For the 2007–08 disclosure year, it provided a *Funding and Disclosure Handbook for Third Parties Incurring Political Expenditure* to help third parties understand their obligations rather than the guidance note (though it is still on the AEC website for 2006–07). The handbook just summarises the statute without providing any advice on what the law means in practice. An e-mail inquiry to the AEC noted the breadth of the relevant statutory section and recommended a 'prudent approach.'

With two reporting deadlines already in the past, it is too late for a 'prudent approach' to 2006–07 and 2007–08 spending on 'election issues.' No newspaper, magazine, radio or TV station, publisher, church, university, think-tank, writer's festival, charity, or state government has disclosed anything even though employees in all categories have offered public views on election issues, though not necessarily with the intent of influencing votes. Non-disclosure has not prompted any reported prosecutions. Perhaps the AEC, backed by the DPP, stands by its narrow reading of expressing views on election issues. Or maybe it just doesn't have the resources to monitor the millions of words spoken and published on 'election issues,' much less to launch prosecutions against a large section of Australia's civil society. Whatever the explanation, third parties need certainty about what they need to report to the AEC.

Disclosure of apolitical donors

Donors to political parties know that they are acting politically. With third parties, donors' political intentions are not so plain. For the many organisations only incidentally involved in politics, it is unlikely their donors see their financial contributions as political. Yet under the political expenditure laws they could find their names and addresses on the AEC website, linking them to political activity they may neither know about nor support.

Many churches and charities, for example, have 'social justice' or other political research and advocacy units that comment on election issues. The research and policy unit of the Anglican charity the Brotherhood of St Laurence, for instance, works on controversial election issues such as climate change (along with more obvious concerns for a charity such as 'social inclusion') and claims that it has influence on government.[28] Except for the AEC's guidance note dominant purpose test, the Brotherhood should have submitted a political expenditure return for its research and policy work.

If the Brotherhood had submitted an expenditure return, it would also have been required to disclose the source, date and amount of donations of $10,500 or more in 2007–08 that enabled the incurring of political expenditure. Correspondence from the AEC states that the intent of the donor 'has no relevance.'[29] Most donors to the Brotherhood of St Laurence probably think that they are helping the poor rather than sponsoring policy work on climate change. Yet under these laws, they could nevertheless be subject to 'scrutiny' and perhaps 'accountability.'

Most individual third-party donors give less than $10,500 a year, limiting the number of people unwittingly exposing themselves to disclosure requirements. The current government, however, wants to reduce the disclosure threshold to $1,000 every six months. This will significantly increase the potential number of disclosable donors. For the 2006–07 financial year, the Australian Taxation Office reported 12,420 deductible gift claims exceeding $10,000 but 227,850 deductible gift claims exceeding $1,000.[30] Though not all of these gifts were to organisations with political activity, the numbers suggest that the lower threshold could trigger a very large increase in the number of disclosable donors.

The number of disclosed figures will depend on whether all donors over the threshold need to be declared. Donations in excess of the political expenditure do not enable it because it is already enabled. But as money is fungible and intentions are irrelevant, there is no basis for choosing between donors. The third party could omit a donor who did intend the money to be used for political expenditure, and claim that the political expenditure was financed entirely from donations smaller than $10,500 (or $1,000, if Labor's amendments pass).

People should not be publicly listed as supporting political expenditure when that was not their intention.

Whatever the statute's correct interpretation, people should not be publicly listed as supporting political expenditure when that was not their intention. Unlike donations to political parties, donations to third parties with multiple activities provide no clear evidence of political intent. Though donors to largely non-political third parties are less likely to worry about retribution from government than donors to political third parties, they may have other reasons for keeping their giving private and consequently reduce their giving to below the disclosure threshold. The fundraising efforts of Australian civil society should not be jeopardised to produce near-worthless information: names, addresses and donation amounts that tell us neither whether donors had any political intent nor which cause or party their money was spent on.

Foreign donations

While domestic donors are only deterred from giving to third parties with political expenditure over the threshold, overseas donations will be banned if the government's amendment passes.[31] This is not quite a ban on foreign donors. Foreigners will be allowed to donate if they draw on funds within Australia, so most foreign residents and companies in Australia would be unaffected.[32] It is enough, however, to require international political organisations such as Greenpeace and the World Wildlife Fund to be very careful when

operating in Australia (Greenpeace already declares political expenditure). The legality of internal transfers within international organisations may turn on complex legal arguments.[33]

Australians will also be banned from giving if they draw on funds located outside Australia, meaning that the Australian diaspora, estimated at more than 800,000 people, could lose an important political right unless they have maintained an Australian bank account.[34]

Though stopping short of fully excluding foreigners, the parochial politics behind this amendment seems anachronistic. We live in an era of global issues and movements. Most major social, environmental and economic reforms in Australia over the last few decades are local versions of changes also occurring in other Western countries. Why assume that foreigners seeking to start or support political activity in Australia will detract from Australian democracy rather than adding interesting or useful ideas to local debate? 'Made in Australia' is no more a guarantee of quality in politics than in any other field.

Australians will be banned from giving if they draw on funds located outside Australia.

We encourage foreigners to study, work and invest in Australia, and cannot reasonably deny them the capacity to defend their interests. In commercial contexts, political expenditure laws pose no major obstacle provided there are no gifts to third parties. Foreigners could pay, on commercial terms, a third party to campaign on their behalf. They could pay Australian media outlets to run advertising. They could pay lobbyists to make representations to politicians. But foreigners without significant domestic support who receive donations from home would be caught by the ban. The Indian students who recently protested against bashings and other mistreatment are a possible example. It seems odd to target vulnerable groups or donors concerned with public interest issues in Australia with a ban while letting the corporate sector carry on almost as before.

Fortunately, the intention of foreign donors would be relevant to whether the ban operates.[35] Foreigners would only be banned from giving if their main purpose was to finance political expenditure. When donors are principally concerned with the core non-political activities of third parties—for example their charitable, religious, or educational functions—giving could continue. However, donors do not typically declare their intentions. Donors to third parties engaging in political expenditure may need to specify which activities they wish to support. Accounting systems would need modifying to match donors' intentions and spending. Third parties would lose flexibility in the way they allocate resources.

Two layers of penalties apply for accepting a foreign donation. The first is that the political expenditure financed by the foreign donation must be paid to the Commonwealth.[36] The second is that the person spending the foreign donation is subject to a fine of up $26,400 or 12 months jail or both.[37] These are draconian penalties for what ought to be part of normal political activity in a globally open society like Australia.

Anonymous donations

Unlike political parties and candidates, third parties would not be generally prohibited under the government's donations reform legislation from receiving anonymous gifts. However, it would be unlawful for third parties to use anonymous gifts in excess of $50 per person to finance political expenditure over the threshold ($1,000 every six months, if the legislation passes).[38] Anonymous gifts of less than $50 per person to enable political expenditure could only be collected according to complex bureaucratic procedures. For example, third parties running a private political fundraising event would need to record the date, location and nature of the event; the number of people who attended the event; the names and addresses of people collecting or receiving donations; and the total amount of money received. If donors at one these functions wanted to give more than $50 but preserve their privacy, they could give up to $999 but the third party would need to keep a record of it. If the donors gave again in the same six-month reporting period, their name, address, and total donation amount would need to be disclosed to the AEC.[39]

There would be four layers of penalty associated with anonymous donations to third parties. If the total amount raised at an event exceeded the number of people at the event times $50, the surplus would need to be either returned to the donors or paid to the Commonwealth.[40] If a third party failed to submit a required report or submitted an incomplete report, the maximum penalty would be a fine of $13,200.[41] If the event organiser knowingly made a false or misleading record of the event, the maximum penalties would be a fine of $13,200 or 12 months in jail, or both.[42] If the third party used the money to finance political expenditure, the maximum penalties would be a fine of $26,400 or 12 months jail, or both.[43]

The main purpose of the anonymous donations provision is to close a loophole that would otherwise exist in the disclosure regime. Without it, foreign-source donors or domestic donors who do not want their names publicised may use anonymous gifts to get around the law. However, genuinely anonymous donations pose low risks to the integrity of government decision-making. Politicians cannot make decisions biased in favour of unknown donors. For just this reason, one proposed alternative to increased disclosure is complete anonymity. Donors could only give to blind trusts, which would distribute donations to the intended parties in lump sums without revealing names or amounts.[44] The flaw in this scheme is the difficulty in preventing donors from telling parties about their gifts, though their claims would be unverifiable and possibly therefore less influential. Anonymous donations would also undermine the more sinister goal of the disclosure regime: to deter or otherwise hold 'accountable' supporters of non-governing political parties and third parties opposing the government on particular issues.

Genuinely anonymous donations pose low risks to the integrity of government decision-making.

Though the AEC may turn a blind eye to minor breaches, cumulatively the government's reforms would create a ridiculous situation. In theory, the organisers of a community group that spent $1,000 in six months on a local issue that subsequently became an election issue in their seat, financed by an unreported fundraiser in which anonymous donations were placed in container, face hefty fines and a jail sentence. The threat this kind of activity poses to the integrity of government is nil. The value to public debate of a report on precisely how much was spent and the event at which the money was raised is nil. The only thing that is not nil is the challenge these laws pose to democratic freedoms and the just treatment of citizen activists.

Excessive bureaucracy and compliance costs

Though excessive bureaucracy and compliance costs are not the most serious problem with third-party disclosure regimes, they are its most widespread effect. Every Australian political activist or group will need a working knowledge of the political expenditure laws. If they don't know them, spending as little as $1,000 over six months will, if the government's legislation passes, put them at risk of conviction unless they can correctly itemise expenditure, file reports on fundraisers, and list donors. Since activists cannot always predict whether more than $1,000 will eventually be spent, or whether the issues involved will be 'election issues,' a prudent approach would be to start compliance measures at the same time as any campaign. At the close of the political expenditure reporting period, campaigners could then decide whether an AEC submission was needed.

If a political expenditure return is required, third parties must disclose how much they spent in five categories:

1) public expression of views by any means on a political party or a federal election candidate;
2) public expression of views by any means on an election issue;
3) printing, production, publication or distribution of an election advertisement, handbill, pamphlet, poster or notice (materials that require the 'written and authorised' statement);
4) broadcast of political matter on TV or radio (materials that require the 'spoken and authorised' statement);
5) opinion polls or other research relating to election or voting intentions.[45]

These requirements are more onerous than those applying to political parties. While political parties need only submit a single sum for total payments during the year, third parties must produce itemised spending accounts. Third parties must also use the accrual accounting method, recording the cost of goods and services used during the year regardless of when payment was made, whereas political parties can use simpler cash accounting methods.[46]

Filling in the AEC political expenditure return is likely to strain third-party accounting systems. While specific election advertising would have invoices that enable exact calculation of expenditure, other public expression of views on parties, candidates, and election issues could be incidental to non-disclosable activities. This was the problem that ACTU had in separating its election advocacy from the normal advocacy it conducts on behalf of union members. The AEC's original guidance note offered some understanding of the problem when it accepted that determining political expenditure 'may require estimation and allocation of expenses.'[47] The *Funding and Disclosure Handbook* made available for the 2007–08 returns took a tougher line: 'third parties should consider the financial recording systems and procedures necessary to enable the return forms to be properly completed.'[48] Putting in new accounting systems to generate information that is irrelevant other than for filling in an AEC form would add significantly to compliance costs.

The law will cover many third parties that are run and financed by volunteers without the time or skills needed to comply.

These reporting provisions assume that third parties have professional staff who know election law and can meet complex disclosure requirements. But this assumption is not safe, especially if the thresholds for disclosure are lowered to $1,000. The law will cover many third parties that are run and financed by volunteers without the time or skills needed to comply. Legal political activity should not be restricted to those with the literacy skills to understand sometimes unclear AEC advice or the accounting skills to classify expenditure between years and categories.

Conclusion

Published donations rarely allow more than adverse inference from the interests or donors being supported by government decisions. The **www.democracy4sale.org** website regularly publishes insinuations along these lines. By the same style of analysis, political expenditure and donations laws appear to be motivated by how disclosure laws can promote partisan political advantage, rather than the public interest in an effectively functioning democracy. Statements by Liberal MPs and officials support the view that they are trying to undermine their third-party opponents with political expenditure laws. Arguably Labor's interest in deterring Liberal donors is behind their plans to lower the disclosure threshold to $1,000. Labor's expansion of corporate favours and handouts will make the Liberals' traditional business supporters all the more reluctant to be revealed as Opposition supporters.[49] Third parties are collateral damage from the lower threshold.

Whatever the motives of those responsible for electoral law, it should be assessed on its merits. There is a plausible argument that it would be preferable to prevent large donors side-stepping the political party donations disclosure rules by using third parties as fronts. The practical difficulty with this is that the overwhelming majority of third-party donors caught by the disclosure system will have no such intention. Indeed, they may not realise they are supporting political activity. In practice, lowering the threshold to $1,000 will make it more rather than less difficult to isolate donors who may be seeking indirect, improper influence. Their names will be lost among those of the thousands of innocuous donors who support Australia's civil society.

Apart from the potential to reveal improper influence on government, my research had not been able to identify a compelling in-principle argument in favour of disclosing third-party expenditure and donors. It is hard to see how itemised political expenditure on unspecified political activities helps the public evaluate third parties. While publishing donors' names may generate or confirm suspicion that a third party is a front for another group, the corporate interests most likely to want to avoid being revealed can use commercial relationships to disguise their connection.

For the most part, we already have a good system for exposing bad arguments—through public debate and discussion. A six- or 12-months-later list of donors will only occasionally serve to weaken third-party credibility. Against this limited benefit has to be weighed the risk that third-party donors will be deterred from giving for fear that they will be held 'accountable' for their views. Depriving third parties of resources by reducing donations and diverting effort weakens their capacity to provide critical scrutiny of government and other third parties. Though donor disclosure may have scrutiny benefits in individual cases, its effect at the systemic level will be negative. The proposed outright ban on foreign-sourced donations would exacerbate the problem, especially for issues with a global dimension.

Messy implementation of the current third-party disclosure regime suggests that policymakers did not think it through with sufficient care. Third parties have to say how much they have spent on election issues long before the elections in which those issues will be determined. On the AEC's interpretation of the legislation, third parties need to make distinctions between routine and election comment, distinctions that according to the ACTU the AEC itself cannot make in a consistent way. Corporate donors intending to influence government can get around the disclosure laws by using commercial transactions, while third-party donors who don't intend to sponsor political activity at all get disclosed.

It is hard to see how itemised political expenditure on unspecified political activities helps the public evaluate third parties.

If the Coalition didn't think through the administrative side of their laws, Labor isn't thinking through the potential injustices that could flow from their reforms. Threatening someone with jail for an unreported $1,000 campaign financed by a money-in-a-bucket fundraiser imposes an excessive penalty on a victimless crime. Criminal penalties for financing otherwise legal political activity from foreign sources are out of proportion to the doubtful harm the law is designed to prevent. The AEC and DPP would probably be sensitive enough to the political consequences to ignore most breaches. But ignoring some violations makes it more difficult to enforce the law against other third parties that also break the rules.

We should also be concerned about the implications of these laws for the AEC. To enforce laws covering the whole three years between elections, they need to monitor all political discussion. This is a huge task. If the third-party laws were interpreted strictly with a $1,000 threshold, the AEC would have to process thousands of returns and possibly tens of thousands of donors. Like monitoring political discussion, this would be a very poor use of its resources. The AEC would come to be resented by third parties as the enforcer of red-tape requirements and as an unjust persecutor of political activists. Selective prosecutions for breaching the laws would expose the AEC to claims of political bias in its advice to the DPP. The political expenditure laws put the AEC in an invidious position.

Third-party political expenditure and disclosure laws, both current and proposed, should be scrapped. There are other options if the government wants to persist with closing off third-party fronts for or allies with electoral contenders. Existing 'associated entity' provisions could be modified to cover looser associations between political parties and other organisations. There could be more revealing information associated with the political material that already requires the 'written and authorised' or 'spoken and authorised' messages. Either of these options could target the perceived problem more effectively than putting thousands of organisations under threat of AEC prosecution.

Labor's political expenditure law reforms would spray poison across a whole garden to kill a few weeds. Third parties are a vital part of Australia's democratic political ecology. They raise issues, offer advice, conduct research, and provide forums for discussion. Most politically active Australians work through third parties rather than political parties. Some people in the main parties may not like the competition. But in a democracy, it is for the citizens rather than rulers to decide whose views they listen to.

Labor's political expenditure law reforms would spray poison across a garden to kill a few weeds.

Appendix A: Survey evidence on political involvement (%)

Organisation type	**Year of survey**	**Member**	**Active member**	**Office holder**	**Total membership**
Lobby group seeking to chance specific policy	2005	2.3	0.7	0.4	3.4
Political party	2005	3.2	0.8	0.1	4.1
Group that promotes rights, eg women, refugees	2005	3.4	0.8	0.5	4.7
Environmental group	2005	7	0.8	0.2	8
Aid organisation	2005	9.9	1.3	0.4	11.6
Union	2005	15.3	2.5	0.4	18.2
Neigbourhood or community group	2003	13.7	4.5	1.9	20.1
Organisation type	**Year of survey**	**Active member**	**Inactive member**	**Total membership**	
Business or employers' association	2007	7.2	6.8	14	
Farmers' assocatiation	2007	1.5	2.5	4	
Charitable organisation	2007	16.8	12.3	29.1	
Different forms political and social action	**Year of survey**	**In past year**	**In more distant past**	**Total**	
Contacted or appeared in media to express views	2005	5.2	9.2	14.4	
Attended a political meeting or rally	2005	5.2	16.9	22.1	
Donated money or raised funds	2005	25.1	17.4	42.5	
Signed a petition	2005	41.5	40.9	82.4	

Source: Australian Survey of Social Attitudes

Endnotes

1 See Appendix A for survey research on political involvement.
2 For a survey of these trends, see Andrew Norton, 'Prospects for the Two-party System in a Pluralising Political World,' *Australian Journal of Public Administration*, 61:2 (2002), 33–50.
3 This is the terminology used in electoral regulation, so I will use it here.
4 Eric Abetz, 'Electoral Reform: The Howard Government's Agenda,' *The Sydney Papers* (Summer 2006), 67–68. The speech was given on 4 October 2005.
5 *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006*.
6 Australian Electoral Commission, 'Funding and Disclosure Guidance Note: Annual Return Relating to Political Expenditure.'
7 *Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009*.
8 See Department of Prime Minister and Cabinet, *Cabinet Handbook: Fifth Edition* (Canberra: DPMC, 2004), 7; Australian Parliament, *House of Representatives Practice: Fifth Edition*, section 5.
9 See Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure* (December 2008), part 4.
10 Newspoll conducted for the Australian over 26–28 June 2009, www.newspoll.com.au.
11 Based on an electronic check of donors going back to 1998–99, http://periodicdisclosures.aec.gov.au/DonorSearch.aspx. One exception to the lack of use of information about large donations is the scrutiny given to ethanol producers the Manildra Group. Favourable government decisions for the company are almost invariably accompanied by reminders of its donations record: e.g. Shaun Carney, 'The good oil on government,' *The Age* (16 August 2003) on Coalition favours; Greg Roberts, 'Sweet ethanol deal for big donor,' *The Australian* (2 January 2009) on Labor favours.
12 Brian Loughnane, 'The 2007 federal election,' address to the National Press Club (19 December 2007).
13 Michelle Grattan, 'MP calls for funding openness,' *The Age* (26 December 2008).
14 *Commonwealth Electoral Act 1918*, section 314AEB and *Broadcasting Services Act 1992*, schedule 2, subclause 4(2). 'Political matter' in this legislation has a broader meaning than 'issue in an election,' so the extent of the disclosure requirement depends partly on what form of media is used.
15 The Coalition's reforms reduced opportunities for quick examination of campaign spending, by switching the disclosure date to a set annual time with no link to election timing.
16 Joint Standing Committee on Electoral Matters, *Advisory Report on the* Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill, 73–75.
17 *Commonwealth Electoral Act 1918*, section 327(2).
18 In the unlikely event that a third party could prove discrimination, there may be a possible action under anti-discrimination law. However, the Howard government reforms did give third parties one added legal protection—laws against hindering or interfering with the performance of any political right or duty relevant to an election under the Act now apply continuously. However, this provision also highlights the anomalous penalties in the *Commonwealth Electoral Act 1918* with far more severe penalties applying for incorrect paperwork for peaceful and legal political activity than for illegal interference by others with that political activity.
19 Sarah Maddison and Clive Hamilton, 'Non-government organisations,' in Sarah Maddison and Clive Hamilton (eds), *Silencing Dissent: How the Australian Government is Controlling Public Opinion and Stifling Debate* (Sydney: Allen & Unwin, 2007).
20 Scott Morrison, Liberal member for Cook in the House of Representatives, *Hansard* (16 March 2009).
21 For example, Joo-Cheong Tham, 'Submission on Electoral Reform Green Paper: Donations, Funding and Expenditure' (2009), submission 11, www.dpmc.gov.au/consultation/elect_reform/submissions.cfm#submissions; Katharine Wilson, 'Grassroots versus astroturf,' *Overland* (Winter 2006).
22 *Commonwealth Electoral Act 1918*, sections 287 and 314AEC.
23 As above, section 314AEB(1)(ii).
24 As above, section 315.

25 Australian Electoral Commission, 'Funding and Disclosure Guidance Note: Annual Return Relating to Political Expenditure' (no date but downloaded in early 2008), 3.
26 ACTU, 'ACTU Submission on the Electoral Reform Green Paper: Donations, Funding and Expenditure,' submission 50 (March 2009), 5, www.dpmc.gov.au/consultation/elect_reform/submissions.cfm#submissions.
27 Available at www.dpmc.gov.au/consultation/elect_reform/submissions.cfm#submissions, submissions 24 and 49.
28 Brotherhood of St Laurence, *Research and Policy Centre Annual Report 2008*, www.bsl.org.
29 This is the most natural reading of section 314AEC(1)(b) of the *Commonwealth Electoral Act 1918*. However, the heading of the section reads 'Annual returns relating to gifts received for political expenditure.' The expression 'received *for* political expenditure' (emphasis added) could be read as implying intention by the donor.
30 Australian Taxation Office, *Taxation Statistics 2006–07*, 'Charitable and deductible gifts,' table 2, www.ato.gov.au.
31 *Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009*, section 306AD.
32 As above, sections 306 and 306AB.
33 For example, international organisations may be able to argue that they are one 'person' rather than two under the Act or argue that they are engaging in a commercial transaction.
34 Graeme Hugo, Dianne Rudd, and Kevin Harris, *Australia's Diaspora: Its Size, Nature and Policy Implications* (Committee for Economic Development of Australia, 2003).
35 Their intention will still be irrelevant in the declaration of donors, but they will not be prohibited.
36 *Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009*, section 306AD(5).
37 As above, section 315(10E).
38 As above, section 306AJ(1).
39 There are also similar provisions for public events but without the requirement to count people present. As above, section 306AF(1).
40 As above, section 306AF(4).
41 *Commonwealth Electoral Act 1918*, section 315(1) and (2). The current penalty is $1,000. If amended by the *Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009*, the penalty would be $13,200. As with other reporting requirements, this is a strict liability offence.
42 *Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009*, section 315(4C).
43 As above, section 315(10E).
44 Andrew Leigh, 'Blind trusts for political gifts are a surer bet than trusting blindly,' *The Sydney Morning Herald* (7 October 2004).
45 *Commonwealth Electoral Act 1918*, section 314AEB.
46 Compare the AEC 'Third Party Return of Political Expenditure Financial Year 2007–2008,' item 1, with AEC 'Political Party Disclosure Return Financial Year 2007–2008,' item 3. Cash accounting is generally easier because it avoids the need to keep additional records of when comment on political matters occurred.
47 AEC, *Funding and Disclosure Handbook for Third Parties Incurring Political Expenditure*, 7.
48 *Commonwealth Electoral Act 1918*, sections 4, 328, and 328A; *Broadcasting Services Act 1992*, Schedule 2, subclause 4(2).
49 Forecasts for the scale of these favours and handouts were included in the Productivity Commission's *Trade and Assistance Review 2007–08* (Canberra: Productivity Commission, 2009).

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