POLICY PAPER

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Let Money Speak

THE CENTRE FOR INDEPENDENT STUDIES

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TARGET30
REDUCING THE BURDEN FOR FUTURE GENERATIONS

THE CENTRE FOR INDEPENDENT STUDIES

POLICY Paper 2

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Let money speak

The government has proposed the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (the Bill) to improve the "integrity… of Australia's electoral system" by adding "public accountabilities" to civil society.[1]

The Bill aims to do two things: radically restrict foreign donations and add significant new transparency obligations and donation limits to 'non-party political actors'.[2]

The Bill was referred to the Joint Standing Committee on Electoral Matters (JSCEM) for review and comment. JSCEM released its advisory report (the Report) in April 2018, which "agrees in-principal to the passage of this Bill, subject to the government addressing the report's 15 recommendations."[3] It goes on to observe that the recommendations "provide greater clarity for charities and align definitions as closely as possible with the intent and principles of the Bill, while ensuring regulatory and compliance burdens are minimised". [4]

While the Report addresses some of the concerns with the Bill, it doesn't go far enough: the Bill is based on several misconceptions, imposes undue limits on free speech, and is likely to have significant undesirable and unappreciated consequences, it should be substantially revised or withdrawn.

Free speech and foreign political donations

The Bill is flawed in the way it seeks to unreasonably restrict and regulate essential democratic rights like free speech. In 2010, the US Supreme Court found in *Citizens United v FEC* that, in relation to the US First Amendment, limits on certain types of third party expenditure were a ban on free speech and therefore unconstitutional.[5]

Australia doesn't have a bill of rights; so no constitutional protection exists in the form the US has with its Bill of Rights. However, in 2013 the High Court of Australia looked at NSW legislation that purported to ban donations unless "the donor is an individual who is enrolled on the roll of electors for State elections."[6]

A previous case, Lange v Australian Broadcasting Corporation, confirmed that the Australian Constitution does provide for an implied freedom of political communications despite the absence of an explicit protection for free speech.[7] Consequently, in *Unions NSW v New South Wales*, the High Court found that these restrictions on donations impermissibly burdens this implied freedom of political communications.[8]

Two things should be noted here. First, it is not clear if this constitutional protection extends to

foreign citizens. Second, this implied freedom is not unlimited and can be limited in certain ways that are constitutionally permissible.

Consequently, this means that certain restrictions (potentially including those in the Bill) may be constitutionally valid. However, this is not the end of the story. The principle of free speech is not, and should not be, limited to Australia's meagre constitutional protection. Nor does the fact that something is constitutionally permissible mean that it is the right course of action.

The principle of free speech should not be burdened without very significant cause. The reasons advanced in respect of the Bill do not constitute that cause. The Bill limits free speech in two substantive ways, both of which should be resisted.

Free speech and foreign donations

The first is the banning of foreign donations. There is little evidence that foreign money has systemically unduly influenced Australian politicians in ways that mean existing protections against corruption are insufficient. Though they have occurred, demonstrated instances where foreigners have corruptly influenced the course of public policy in a direction contrary to Australia's interests, or indeed even attempts to do so, have been rare. It is a problem that is often asserted without being substantiated by evidence.

Despite this paucity of evidence, the Report opens with the contentious statement "most would agree that only Australians should have the power to influence our election outcomes".[9] This may be true — though no evidence is presented to support the contention — but there is a difference between improperly influencing the outcome of an election (e.g.: through fraud or corruption) and honest participation in debate over ideas.

Indeed, even should it be conceded that donations to political parties and candidates by foreign parties are problematic, the reason for this is that it may corruptly influence behaviour of those politicians once elected. It should not be about rendering all ideas presented by those with foreign backing, however limited, as tainted. Any ban should not extend to contributions to public debate by those outside of politics, where the merits of the ideas being discussed still need to convince the voting public and chance for corruption is limited.

Nor should it be assumed that all contributions to Australian public policy by foreigners are contrary to Australia's interests. A company that seeks to invest large sums of money in Australia, creating jobs and benefiting the economy, might seek to advocate for certainty in business approvals or for government to enter into a free trade agreement with their home country. A foreign business might commit to a significant new investment if proposed tax rate changes are passed. These sort of contributions should not be restricted. The ordinary course of public policy debate should resolve the issue in Australia's favour.

Free speech and non-party political actors

The second way the Bill restricts free speech is the imposition of unreasonable burdens on participation in public debate. There are two elements of this. The first comes from the chilling effective of imposing compliance regulation on non-political entities. The cost and complexity of the registration and donation regime proposed in the Bill may cause not-for-profits to reconsider participating in the exchange of ideas on public policy. There is no good reason to do this.

The Report notes the difficulties of the regime being imposed and recommends that changes be made, specifically recommending the removal of the potential requirement to get a statutory declaration for all donations, no matter how small, and removing the aggregation measures of amounts under $250.[10]

In addition, requiring the public disclosure of details of those making relatively minor contributions (less than $15,000), may cause individuals to reduce their contributions. It is increasingly clear that the promotion of certain views, especially centre-right views, opens individuals to personal attack. In some cases, businesses have been targeted because their owners have 'unpopular' viewpoints.

A greater concern is the potential targeting of individuals on the basis of religion or ethnicity: for example, publishing the identity of significant donors to Jewish causes could open those individuals to the risk of violence.

At a minimum, business figures have increasingly had to factor blowback to their business interests from their public comment.[11] The transparency provisions in this Bill will only make these risks greater. Business figures should not have to risk their livelihoods in order to support free debate on contested ideas.

Supporting ideas you think are important with your money is a principle worth defending. Regulation of donations — particularly caps and supposed transparency requirements — are often justified on the basis of levelling the playing field. However it is not inherently unfair that one person is in a position to afford a greater contribution than someone else. We do not seek to limit the time someone can donate to a cause just because some others have less time available to donate.

Moreover, social media, microfinancing initiatives and the internet have made it easier than ever to gather coalitions of like-minded individuals and collectively act. Civil society thrives by groups of citizens joining together to promote causes they believe are in the public interest. We should not seek to limit this; and no compelling rationale has been provided to do so.

Increase in public funding for elections

This Bill is also likely to lead to several unintended consequences. One significantly problematic one is that — by restricting and regulating private funding — it will likely lead to calls for greater public funding of politics and policy. Organisations that can secure replacement funding from government will seek to do so rather than diminish their activities, as has been seen clearly by the way the political class has grown and professionalised as public funding has increased.

At the 2016 election, nearly $63 million in public funding was paid to political parties (see Figure 1).[12] Private donations in 2015-16 were just over $188 million.[13] It is not clear what proportion of these funds came from foreign sources, nor is it clear how the changed donation rules would impact the funding for organisations that would be caught by provisions like these for the first time.

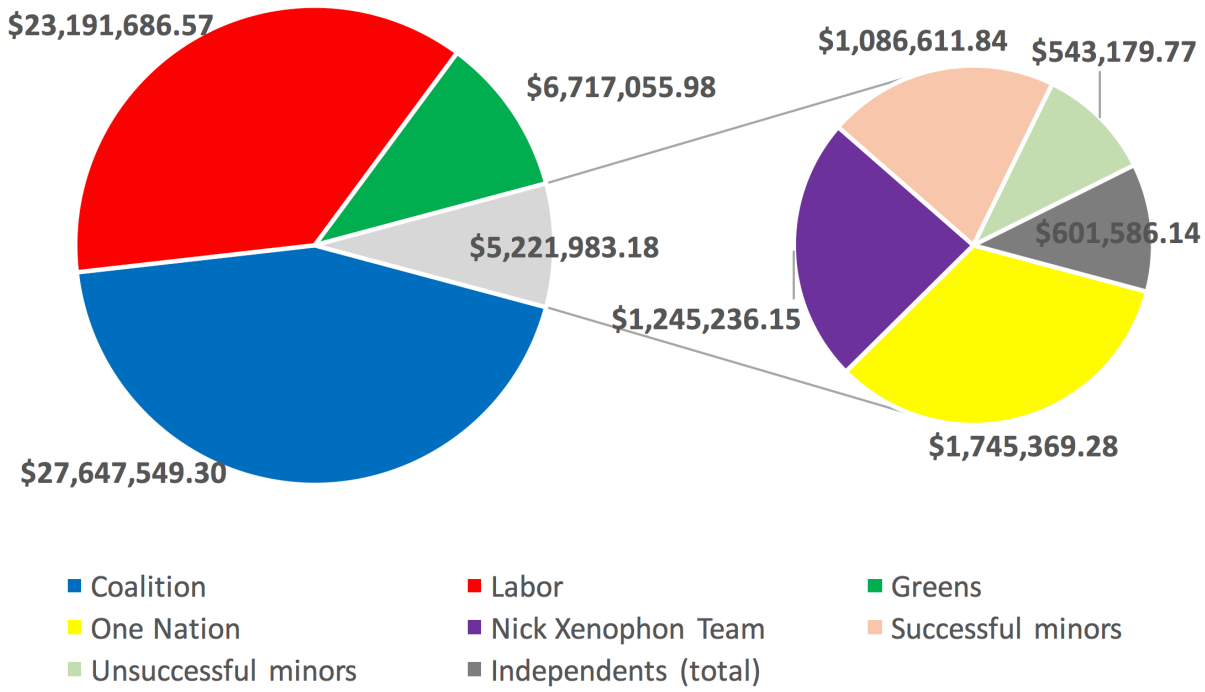
However, what is clear is that if government funding replaces private funding, even a 20% reduction in private funding as a result of these provisions could result in a demand for a 50% increase in government funding.

Public funding is not superior to private funding. Unfortunately this Bill continues the trend of treating all private funding of political parties and public policy institutions as inherently suspicious, as if the ideas being promoted are invariably tainted by their source. Yet the public sector is no less biased or self-interested than the private sector. To treat funding from one source as suspicious and the other virtuous is to tilt the balance further in favour of government-funded organisations and groups.

This leads to a self-perpetuating cycle whereby organisations that favour government largesse towards not-for-profits (NFPs) have an ongoing advantage in both resources and influence. At a minimum, this Bill further advantages organisations in favour of larger government over those who believe in small government. To the extent that NFPs who favour government funding and are active in public policy debate have other similar ideological alignments, this Bill also advantages those viewpoints.

Voices that are independent of government play an important role in public policy debate, as non-

Figure 1: Public funding for political parties from the 2016 election



Source: Australian Electoral Commission[14]

government sources are free to criticise government and call for cuts to spending and services. Those speaking out on behalf of taxpayers are already in the minority, facing stern opposition from vested interests. The government should not seek to further curtail these voices.

Nor is it at all clear why taxpayers should have to foot the bill for political and policy debate when private individuals are willing and able to do so. This is not a case of supposed market failure.

Dependency of NFPs on government funding

The fact that this Bill is likely to increase the requirements for public funding for participants in public debate is not just a problem for taxpayers, it is also a problem for the NFP, which is already far too dependent on government funding. The Productivity Commission found in 2010 that government funding of NFPs outweighed philanthropic contributions by a ratio of nearly 4:1.[15]

This dependency on government is contrary to the purpose of NFPs, and civil society in general, who should be a vibrant and diverse alternative to government. They should not be a pale, publicly funded arm of government. It is not in the interest of the NFP to seek to put additional barriers in the way of those seeking to provide philanthropic contributions.

The regulations governing charities already limit political advocacy. If they are inadequate, they should be reformed — but the impact of any potential reform should be thoroughly investigated prior to their introduction.

Problems with the definition of political purpose

In the new section 287(1) of the Bill, a number of new definitions are added.[16] One new definition is political expenditure, which is defined to include "expenditure incurred for one or more political purposes."[17]
A political purpose is also defined as "any of the following purposes:

(a) the public expression by any means of views on a political party, a candidate in an election or a member of the House of Representatives or the Senate;

(b) 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);

(c) the communicating of any electoral matter (not being matter referred to in paragraph (a) or (b)) for which particulars are required to be notified under section 321D;

(d) the broadcast of political matter (not being matter referred to in paragraph (c)) in relation to which particulars are required to be announced under subclause 4(2) of Schedule 2 to the Broadcasting Services Act 1992;

(e) the carrying out of an opinion poll, or other research, relating to an election or the voting intentions of electors;

except if:

(f) the sole or predominant purpose of the expression of the views, or the communication, broadcast or research, is the reporting of news, the presenting of current affairs or any editorial content in news media; or

(g) the expression of the views, or the communication, broadcast or research, is solely for genuine satirical, academic or artistic purposes."[18]

This wording reflects changes that were made by a previous amending act in 2017.[19] There are significant flaws in this definition, which may result in the inappropriate imposition of a substantial compliance burden on organisations that participate in the public policy debate.

A big problem is that the section purports to define "purpose" — a term that connotes the reasons why something is done — yet lists five actions without any reference to their rationale other than in relation to certain, limited exceptions.[20]

The Report cites a submission by the Law Council of Australia that also noted this problem, observing that the definition had "a fundamental drafting issue as paragraphs (a) to (e) are not purposes but are activities."[21]

In effect, the Bill wrongly seeks to define political purpose by reference to what is not a political purpose, rather than by what is a political purpose. It fails at this task primarily because the exceptions are far too narrow. There are many valid reasons to comment on public policy that are not driven by a political purpose, but most of these do not categorise easily into the characterisation given in the Bill. Examples include religious motivations, public interest and amenity concerns, business interests or even non-partisan advocacy.

The Report also notes submissions that the definition of "before electors" is vague, but cites AEC guidance on its interpretation.[22] While this guidance is comforting, it is hardly a substitute for a well-drafted legislative provision.

The definition of political purpose in the context of Australia's political system, should include reference to an intention to benefit a politician, political party or grouping, or damage the same. It also includes campaigning for or against an individual or party. The key characteristic of a political purpose is that the action has a partisan nature.

The Report concludes that the key connection is an intent to influence voters, which is somewhat broader than the concept of a partisan act (which, in the context of issues before a voter in an election, must by necessity include an intent to influence voters).[23] While it would be better than the current scenario, it is still problematic: there is nothing wrong with seeking to better inform the public when voting (nor is this inherently political).

The failure to properly limit "political purpose" to actions undertaken in furtherance of a partisan agenda extends the concept well beyond what an ordinary person understands to be a political purpose. In effect, it operates to characterise the motivations of every participant in the public policy debate as inherently political unless they can demonstrate they fall within a number of narrow exceptions.

Many situations fall outside these exceptions. Arguably, speaking about phonics at an open parent and teacher meeting at a school would be defined as a political purpose. A grieving parent urging tougher parole laws for gang members would also be deemed a political actor. A clergyman preaching on the need to support and protect religious education might even be caught under this categorisation.

This does not mean these groups would be required to register under the Bill: additional factors are required to engage the compliance provisions of the Bill. However, the mere fact actions such as these could be deemed, *ipso facto*, as having a political purpose should give government cause to take the Report's recommendation to redraft this definition.

Research and commentary on important matters of public policy is not an inherently political or partisan act. By failing to define 'political purpose' correctly, in effect it deems all commentary and research as inherently partisan. Advocating for a particular policy, on the basis of careful research and evidence, is a function of civil society. And while it may also be a political action, it should not be deemed to be a political act by definition.

Nor are the exceptions broad enough to solve the problems identified here. The exception for news and current affairs coverage in subsection (f), while it covers opinion in the form of editorials, seems to cover neither opinion pieces by external contributors or by journalists themselves. This may lead to the rather odd construction that a journalist could write an exempt piece as an editorial but the same piece in their own name would be caught. Such a construction can surely not be intended.

Even more problematic is the exception 'solely' for academic purposes in subsection (g). It's not clear what this means but if 'academic purposes' include advocating for public policy change on the basis of research, the exception may be broad enough that the underlying provision becomes meaningless. Does it include advocacy but limit it to those employed as professors at government approved universities?

It is more likely interpretation — given the use of the word 'solely' — is that the exemption is intended to be limited to academic publication, discussion and debate; not public policy advocacy, mainstream publication or promotion of the ideas in the media.

This means that an academic doing ground-breaking research on a public health issue would be free to publish their findings in a specialist journal — where very few people would read it — but if they published their findings in a national newspaper this would be caught by the definition of political purpose. Farcically, a journalist could write a news story covering the research (which would be exempt from the definition of political purpose) but the expert would be caught for writing exactly the same piece.

The Report seeks to clarify the exemption for academic comment by recommending that "academic opinions and information published and provided to parliamentary committees" be specifically exempt. However, it's not at all clear why the opinion of a tenured academic on a particular public policy issue should not be a political purpose when the same opinion by an interested lay person would be.[24] Or for that matter, why an academic who uses their position to make political interventions should be exempt as a result only of their status.

Without further clarification it is easy to foresee practical problems that may arise: for example a public health researcher may have to think twice about writing an article debunking the flawed case for a sugar tax, unless of course they are employed by a government funded NGO (whose political purpose is apparently not relevant).

Legitimising *ad hominem*

There are also more fundamental principles at stake. The marketplace of ideas, like all markets, functions best with minimal government interference. The robust competition for ideas is the best way of determining which ideas are worth following and implementing and those that should fall away.

However this Bill legitimises *ad hominem* attack. It seeks to knock out ideas and contributions from people based on who they are funded by. It deems ideas backed by foreign donations to be impermissible, and many others in need of regulation, not on the basis of the content of those ideas but by the very nature of those contributing them.

Neither the Bill nor the Report acknowledge that this is even an issue. Indeed, both proceed on the basis that regulation of the participants in debate is *ipso facto* a good thing.

This approach is already too prevalent in public discourse. There is too much tribalism and too little thinking; with people deciding their position on the basis of loyalty. This is one factor that is making it impossible to implement complex reforms. If you find it impossible to decide whether you support or oppose an idea without first knowing who proposed it, the problem isn't a lack of transparency —it's a lack of critical thinking.

The point of public policy debate is the competition of ideas, not the worthiness of the people presenting them. This is not the same as saying that corruption or illegal interference in the political process is acceptable. We must diligently combat this interference, but we must also differentiate between illegal corruption and legitimate persuasion through the force of ideas.

The approach taken by this Bill betrays a lack of confidence in the ability of the electorate to determine for themselves whether certain ideas are good or bad.

There is no good reason to assume that the electorate as a whole is no longer capable of making informed decisions on public policy. Little evidence has been provided that the unregulated contribution of the NFP sector is distorting electoral outcomes. Unless and until such evidence is provided, the approach taken by the Bill is, at a minimum, premature.

Instead, the correct approach in a mature democracy is to open up the public space to as many competing ideas as possible and confront bad ideas as ideas, not to seek to restrict contributions in fear that people will find them persuasive. It also prevents bad ideas spreading underground where they go unchallenged.

As the US Supreme Court noted in a ruling cited in *Unions NSW v New South Wales*, *Buckley v Valeo*, protections for free speech exist because of the importance of "unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[25]

Conclusion

The Bill is a flawed and rash proposal that would undermine democracy. It purports to 'protect' the public from unsubstantiated threats to democracy from foreign donations and unregulated contributions to public debate. It is not clear that either of these threats are significant risks to the health of Australian democracy. At a minimum, little evidence has been provided to support these assertions.

However, even if such evidence was presented, the government's proposed solution itself is a significant threat to the health of Australian democracy because it unduly burdens free speech and the right to freedom of political communication. It will lead to calls for greater public funding, and may hinder participation in public policy by organisations that rely on private funding instead of the taxpayer.

At a minimum, the softening approach taken by the Report to the registration and compliance requirements should be considered, together with the need to redraft the definition of political purpose which is currently far too wide.

However even these proposals may be second best. The better solution is to open debate up to as many ideas as possible so the competition of those ideas can sort out the best policies and thereby strengthen democracy. The government should abandon this Bill and consider repealing recent changes to the Electoral Act as well as removing restrictions that limit private funding.

Endnotes

1 Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

2 Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

3 Joint Standing Committee on Electoral Matters, *Advisory report on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017,* Parliament of the Commonwealth of Australia, April 2018

4 Joint Standing Committee on Electoral Matters, *Advisory report on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017,* Parliament of the Commonwealth of Australia, April 2018

5 Citizens United v Federal Election Commission 558 U.S 310 (2010)

6 Unions NSW v New South Wales [2013] HCA 58 (2013)

7 Lange v Australian Broadcasting Corporation [1997] HCA 25

8 Unions NSW v New South Wales [2013] HCA 58 (2013)

9 Joint Standing Committee on Electoral Matters, *Advisory report on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017,* Parliament of the Commonwealth of Australia, April 2018

10 Joint Standing Committee on Electoral Matters, *Advisory report on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017,* Parliament of the Commonwealth of Australia, April 2018

11 See for example, David Taylor, *Myer faces backlash over disability levy comments,* ABC News, 2 May 2013

12 Australian Electoral Commission, *Final 2016 federal election payment to political parties and candidates,* AEC Media Release updated 17 August 2016

13 Dr Damon Muller, *Election funding and disclosure in Australia: a quick guide to recent reforms and current issues*, Politics and Public Administration Section, Parliamentary Library, 10 July 2017

14 Australian Electoral Commission, *Final 2016 federal election payment to political parties and candidates,* AEC Media Release updated 17 August 2016

15 Productivity Commission, *Contribution of the Not-For-Profit Sector,* Research Report, Canberra 2010

16 Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

17 Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

18 Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

19 Electoral and Other Legislation Amendment Act 2017

20 See for example English Oxford Living Dictionary at https://en.oxforddictionaries.com/definition/purpose

21 Joint Standing Committee on Electoral Matters, *Advisory report on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017,* Parliament of the Commonwealth of Australia, April 2018

22 Joint Standing Committee on Electoral Matters, *Advisory report on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017,* Parliament of the Commonwealth of Australia, April 2018

23 Joint Standing Committee on Electoral Matters, *Advisory report on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017,* Parliament of the Commonwealth of Australia, April 2018

24 Joint Standing Committee on Electoral Matters, *Advisory report on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017,* Parliament of the Commonwealth of Australia, April 2018

25 Unions NSW v New South Wales [2013] HCA 58 (2013)

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He has published a number of reports on welfare policy and has also written on government industry policy, defence and regulation. He has appeared before the parliamentary committees on a number of occasions discussing topics including the budget, tax, health policy, and Constitutional issues.

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