

ACTU Submission to Joint Standing Committee on Electoral Matters

Inquiry into the Electoral Legislation Amendment (Electoral
Funding and Disclosure Reform) Bill 2017

25 January, 2018

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Introduction

1. The Australian Council of Trade Unions ('ACTU') is pleased to make a submission to this Inquiry. The ACTU is the peak body representing working Australians through some 43 affiliated Australian unions and trade and labour councils.
2. This inquiry concerns the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017* ('the Bill') which proposes a range of amendments to the Commonwealth Electoral Act 1918 (Cth) ('Electoral Act'), relating to election funding, political donations and financial disclosure.
3. The Explanatory Memorandum to the Bill states that the purpose of the Bill includes:
 - a. reducing the perceived and actual foreign influence on Australian political actors by limiting the capacity of foreign money to finance domestic election campaigns;
 - b. further improving consistency of regulation applying to the financed election campaigns of key political actors; and
 - c. enhancing public confidence in Australia's political processes by increasing accountability and transparency of those involved in political finance, particularly regarding election campaigns.¹
4. Amongst other things, the Bill would:
 - a. create a registration system administered by the Australian Electoral Commission ('AEC') for associated entities, and also for the newly created categories of 'political campaigner' and 'third party campaigner' organisations;²
 - b. require such entities to register as an appropriate type;³

¹ See Explanatory Memorandum, p3.

² See new s287L.

³ See new s287F for political campaigners and s287G for third party campaigners.

- c. place bans and/or restrictions on foreign donations to such entities in certain circumstances, including banning unregistered charities, unions and other participants in public discourse from receiving foreign donations and prohibiting registered unions and charities from using foreign funds for political expenditure;
 - d. impose significant compliance, disclosure and administrative requirements on such organisations, including requiring political campaigner organisations that are also registered charities or registered unions to keep international funds in separate accounts⁴ and require all political campaigner organisations and third party campaigner organisations to disclose details of senior staff and their political party membership;⁵ and
 - e. require political campaigner and third party campaigner organisations to appoint a financial controller⁶ who, along with the organisation, personally bears the risk of significant financial penalties and significant criminal sanctions, including terms of imprisonment, for non-compliance.⁷
5. The ACTU is concerned that the Bill would have the effect of using the legitimate objective of enhancing the integrity of Australia's democratic process by banning foreign financial influence on electoral campaigns to in fact limit the policy advocacy and democratic participation of civil society organisations, including unions, charities, religious bodies, non-government organisations ('NGOs') and activist groups. At the same time as limiting the voice of non-profit public interest groups, it would give a free pass to for-profit foreign companies to influence elections and political debate, including through their Australian subsidiaries, either through direct spending and advocacy, the making of political donations or through lobbying through Australian subsidiaries' membership of industry organisations. It would not prevent media that is foreign owned or controlled from influencing public debate, whilst limiting opposing points of view from civil society. Consequently, and contrary to its stated objective, many of the changes proposed by the Bill would in fact undermine the integrity of the Australian democratic process.

⁴ See new s302F.

⁵ See new s 314AB(2)(b) regarding political campaigner organisations and new s314AEB(1) regarding third party campaigner organisations.

⁶ See new s292E.

⁷ For example, it is an offence for a political campaigner organisation to accept a donation of \$250 or more from a donor who is not an allowable donor, punishable by up to ten years' imprisonment, 600 penalty units (presently \$126,000) or both, as well as civil penalty proceedings of up to 1,000 penalty units (presently \$210,000): new s 302D(2)-(3).

Summary of the ACTU's position

6. In summary, the ACTU:

- a. does not support the Bill in its present form as it would drastically stifle legitimate political participation by non-profit civil society groups at the same time as continuing to allow multi-national profit-based commercial interests, including foreign commercial interests, to direct funds to favoured political beneficiaries.;
- b. supports a ban on donations from foreign governments and government-owned or controlled entities and donations from overseas sources, including foreign bank accounts, to political parties or political candidates;
- c. supports a ban on other 'foreign donations' to political parties/candidates. Foreign donations here are taken to be donations from non-citizens or permanent residents, entities incorporated outside Australia or whose principal place of business or principal source of income is outside Australia, and any of their subsidiaries;
- d. supports further strengthening of disclosure rules to require donors to make real time disclosure to the AEC and to require the authorisation of political advertising to identify foreign funding sources;
- e. opposes the creation of new registries for 'associated entity', 'political campaigner' and 'third party campaigner' organisations;
- f. opposes any ban on 'foreign donations' to entities other than political parties/candidates;
- g. opposes the introduction of the risk of harsh penalties on civil society groups and their employees who receive international funding and engage in policy and political debates, and especially opposes the risk of penalties for these workers of terms of imprisonment; and
- h. instead, would support a package of real and targeted electoral reform that restricts the capacity of certain other categories of donors whose participation would be contrary to the public interest, for example, property developers, gambling and tobacco interests, those with certain criminal convictions, and tax avoiders. The ACTU would also support further

consideration of measures aimed at the lowering of the disclosure threshold and limitations on donations to individual candidates.

Restricting foreign donations to political candidates, parties and controlled entities

7. It is an unfortunate fact that in modern politics, as in so many other facets of life, money buys influence. Those who have money have a greater capacity to influence political processes and they regularly use it to do just that. Donations are a common means by which political ends are sought. Well-resourced private donors bestow financial support directly on candidates and political parties whose policy positions align with their own interests. Large sums of money are also handed over to make it more likely that even if those interests do not immediately align, they do at some later point in time. Millions more are spent on behind-the-scenes influence-peddling through lobby groups, rather than direct donations or public campaigning.
8. However, for the vast majority of individual citizens their capacity to influence political outcomes is more limited. In some cases it consists of small personal contributions of time or money. Most often it is confined to the casting of their vote at election time.
9. The effect of large scale financial contributions can extend well beyond influencing one or other decision, policy or political player. One need only look as far as the most recent presidential election in the United States to appreciate that the democratic process itself can be grotesquely distorted by the election funding process. There, voter choice was essentially reduced to deciding between one of two candidates, both of whom had hundreds of millions of dollars in private campaign funds behind them.
10. The Bill proposes a number of far-reaching changes to the electoral funding system that would exacerbate rather than remedy the imbalance in electoral funding. It does this under the guise of securing the integrity of the system and shielding the election process from interference from foreign entities. Foremost among the proposed changes is a ban on political donations from 'foreign' sources, both government and private.

11. Bans on donations to domestic election campaigns from foreign interests are common internationally. According to the International Institute for Democracy and Electoral Assistance, almost 64% of all countries ban foreign political donations to political parties and 49% ban them to individual candidates.⁸ Australia is not currently among the countries that have implemented a ban.
12. Although there is some evidence to suggest that the amount of foreign-sourced political donations to political parties is small relative to other sources (just over 6% for the 2013 Federal election)⁹, the figure has risen steadily in recent decades. Irrespective of the proportion, the argument for banning donations from foreign governments and government-owned or controlled entities to political parties and candidates seems unassailable. These donations are the clearest case of foreign interference in domestic political affairs and represent an unacceptable risk to national sovereignty and the integrity of the Australian electoral system. A similar objection can be taken to donations emanating from overseas bank accounts.
13. The issue of foreign political donations becomes more complicated when the donor has no connection to a foreign political power (or their commercial offshoots) but nor do they have any obvious or direct connection to the Australian body politic. This could include private citizens of another country and large foreign commercial enterprises. However, the line can be difficult to draw, particularly given the complex international ownership and operational structures of multi-national corporations.
14. On balance, we are of the view that donations to political parties and candidates should be prohibited from persons who are not Australian citizens or Australian permanent residents or which are commercial entities that are:
 - a. incorporated outside Australia; or
 - b. whose principal place of business or principal source of income is outside Australia (and any of their subsidiaries).
15. However, we do not believe that the Bill now being considered would be an effective or fair means by which the regulation of foreign interference in domestic political matters will be achieved. Nor do we support the wide extension of a prohibition on the receipt of donations beyond political parties

⁸ See Institute for Democracy and Electoral Assistance database available at < <https://www.idea.int/data-tools/question-view/527>>, accessed January 2018.

⁹ See Joo-Cheong Tham and Malcolm Anderson, 'Taking Xenophobia out of the Political Donation Debate', *Inside Story*, 20 October 2016 (Inquiry into and Report on all aspects of the Conduct of the 2016 Federal Election and matters related thereto, Submission 25 - Attachment 3).

and candidates to all associated entities or other entities that might be involved to varying degrees in political campaigning.

Foreign donations to unions and civil society should not be restricted

16. Under the Bill as currently drafted, the ACTU itself, as an unregistered voluntary association of trade unions, may, depending on the level of its political expenditure, come within the definition of 'political campaigner'. Unlike the registered trade unions it represents, the ACTU would thus be banned from receiving any foreign funds, whether or not they were used for a political purpose.¹⁰ There is any number of legitimate reasons why the ACTU might receive funds from foreign sources, for example, payments from related international trade union federations and bodies or funds from the International Labour Organisation to attend or host international events or international payments to the ACTU to conduct aid programs in neighbouring developing countries. The ACTU's humanitarian aid agency, APHEDA, may be similarly affected. Other trade unions that do not have federal registration may fall into the same category. A ban on receipt of these funds would be an unnecessary interference in the internal affairs of these bodies and would mean valuable international work would not be able to be undertaken.
17. Further, for federally registered unions (and registered charities) the registration and administration requirements for third party campaigners are onerous and the penalties for non-compliance, even inadvertent non-compliance, are excessive. Unions are already heavily regulated through the *Fair Work (Registered Organisations) Act 2009* and have significant reporting, disclosure and governance obligations which are overseen by the Registered Organisations Commission. These changes would add a further layer to an already onerous regulatory regime.
18. Unions and charities that receive international funds will have to separate their funds and ensure that their 'political' work; that is, their policy and advocacy work, is not funded from these sources.¹¹ Many charities that operate as Australian branches of larger international bodies and receive funding from the parent body abroad may opt to try to determine which aspect of their work is 'political' and refrain from that work to avoid the registration and reporting regime. This is the case because the proposed penalties on organisations for non-compliance are so harsh and, alarmingly, include significant terms of imprisonment for individuals. It is insupportable that workers in non-

¹⁰ See new s302D.

¹¹ See new s302E and s302F.

profit civil society organisations, including unions, charities and activist groups, would bear the risk of imprisonment for failing to comply with the proposed foreign donation compliance scheme.

19. Given the width of the definition of 'political expenditure' and the relatively low monetary threshold to become a 'political campaigner', the prohibition on receipt of foreign donations is likely to extend to a wide range of civil society groups, including international bodies and those whose interests are confined to one or two issues about which they actively campaign, but who otherwise do not pursue a broad political, let alone party-political, agenda. This will have the effect of stifling political debate and public discourse not just at election time, but throughout the election cycle because 'political expenditure' can be incurred whether or not a writ has been issued for an election.
20. The proposed definition of 'political expenditure' is so broad that it includes, amongst other things, the 'public expression by any means of views on any issue that is, or is likely to be, before electors in an election (whether or not a writ has been issued for the election),¹² which is likely to cover a wide range of the necessary policy and issues-based advocacy at the core of civil society groups' work and impose indefensible restrictions and disincentives on such groups engaging in that work.
21. The proposed definition of 'associated entity', which is similar but not identical to the current definition, is not an appropriate basis on which to extend a complete ban of foreign donations as has been suggested in earlier committee reports. This is because the definition captures a range of bodies from those that are controlled by or operate wholly for the benefit of a registered political party to those that just have some voting rights within a party. Whilst a ban might be justified in the former case, many unions, whilst maintaining an affiliation with a political party, operate completely independently of that party and party activity represents only a very small fraction of their work. These bodies should not be treated in the same way as political parties.
22. The ACTU is not an associated entity of any political party and to label it a 'political campaigner' because of the advocacy it engages in on behalf of workers and their unions is to conflate advocacy with partisan politics. It is difficult to avoid the conclusion that the Bill is designed to undermine the public perception of the independence and legitimacy of civil society organisations and to limit the public interest advocacy work that they do.
23. The restrictions that the Bill places on the democratic participation of unions, charities and civil society groups are likely to be in breach of the implied right to freedom of political communication in the Australian Constitution. In *Unions NSW v New South Wales*, the High Court struck down an

¹² See new s287(1) and s314AEB.

amendment to the NSW electoral laws on the basis that it restricted the free flow of political communication.¹³ The changes proposed by the Bill are also likely to be in breach of international human rights standards, particularly, Article 19 of the International Covenant on Civil and Political Rights, which deals with the right to hold opinions without interference and the right to freedom of expression.¹⁴

An Alternative Approach

24. Restricting political donations from certain foreign sources will not eradicate the influence of foreign interests from the political process. It would still be open for foreign corporations to be directly involved in political campaigning, either themselves or through their Australian subsidiaries, rather than through a third party. All media interests, including those that are foreign owned and/or controlled are free to engage in any form of political commentary, editorialising and electioneering given the broad exemption of what constitutes a publication for political purposes.
25. The Bill would also not prevent foreign companies from influencing Australian elections and policy through their Australian subsidiaries' membership of industry organisations and lobby groups as membership fees would not appear to qualify as 'gifts' under s287(1) of the Electoral Act. For example, on the one hand, the Bill would have the effect of restricting the activities and foreign funding of environmental organisations who engage in activism aimed at abating carbon emissions to avoid climate change. On the other hand the Bill would not compromise the Minerals Council of Australia's ('MCA') capacity to receive foreign funds through membership fees from multinational companies with vested commercial interests and use the fees to promote those interests through political campaigning. The membership fees the MCA receives from multinational corporations with foreign sources of funding can be substantial and in some cases in the order of millions of dollars per annum per member.¹⁵
26. It may not be possible to remove the influence of overseas political actors from electioneering. This Bill would not achieve its stated objective and would significantly undermine important democratic rights in the process. In that case, the preferred approach would be refocus electoral reform thinking to strengthen the disclosure rules to ensure that voters are aware of the source of the campaign funds (and the political message) during the campaign itself. This would include

¹³ See *Unions NSW v New South Wales* [2013] HCA 58 (18 December 2013).

¹⁴ See *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976).

¹⁵ *Ibid.*

requiring donors to make real-time disclosure to the AEC and, in the case of political expenditure by 'foreign' entities, lowering the disclosure threshold and requiring an additional authorisation element that indicates the source of the funding for the election material as being an external or 'foreign' entity.

27. The lack of timely, up-to-date information on political donations and election spending prevents adequate public scrutiny. Due to the delay in reporting requirements, often information about the source of political expenditure is not available until after an election. Given current technology, it is not unreasonable to require political campaign organisations to electronically record the spending and receipt of funds and to publish and transmit that information to the AEC immediately and for this information to be published instantly. Hence, online real time disclosure of donations to political candidates, political parties and associated entities should be introduced.

Conclusion

28. There is much in the Bill that would compromise the ability of unions and other civil society groups to advocate in the public interest and to fulfil their role as important actors in the democratic process. The integrity of Australian democracy depends on supporting the role of civil society to defend the public interest, and sometimes, against powerful corporate interests. The Bill will only shift the balance further in favour of corporate interests by continuing to allow foreign corporations to influence domestic public debate and leaving civil society less able to respond to corporate media and vested interests in the form of the direct intervention in public debate by corporations themselves.

29. Any reforms should instead be limited to preserving the integrity of the electoral system by banning certain foreign donations to political candidates, parties and entities controlled by political parties and, if this is not possible, enhancing disclosure rules and capping donations to individual political candidates. Further consideration should be given to restricting the influence of corrupting domestic interests (such as those with certain criminal contraventions, property developers, tobacco, gambling interests and tax avoiders).

30. The Committee should recommend that the Bill not be passed.

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