

ACTU Submission to Joint Standing Committee on Electoral Matters

*Inquiry into the proposed amendments to the Electoral
Legislation Amendment (Electoral Funding and Disclosure
Reform) Bill 2017*

ACTU Submission, 01 Oct 2018
ACTU D. No 191/2018

1. The Australian Council of Trade Unions ('ACTU') makes the following submission to this inquiry. We note with concern the limited time afforded to affected groups to make a submission, especially given the length, complexity and significant consequences of the proposed laws and amendments. Further, we note that an Explanatory Memorandum to the amended Bill was not released until the evening before submissions were due. This has restricted the time available to analyse the full implications of the proposed legislation.
2. The inquiry concerns the Government's recent amendments to the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017* ('the Bill'). The Bill proposes a range of amendments to the *Commonwealth Electoral Act 1918* ('**Electoral Act**')¹, relating to election funding, political donations and financial disclosure.
3. We continue to rely on our previous submission.² As we noted previously, the original Bill attempted to use the legitimate and stated purpose of preventing foreign interference in Australian elections to also unjustifiably restrict the policy advocacy and democratic participation of unions, NGOs, charities, and other civil society groups. At the same time, the Bill gave a free pass to for-profit companies to influence elections and political debate through their Australian subsidiaries and industry organisations and to foreign-owned corporate media.
4. After what can only be described as an outcry from a wide variety of civil society and community groups, the Bill has been partially amended. Unfortunately, the amendments do not limit the Bill to its legitimate objectives and the above concerns continue to apply. The amended Bill remains a fundamentally unbalanced and heavy-handed interference with the democratic participation of civil society organisations and their internal affairs.
5. We remain concerned that the amended Bill:
 - a. will have a chilling effect on the policy advocacy of civil society groups who receive any international donations;

¹ See

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/proposedamendmentsbill/Additional_Documents.

² See ACTU, Submission No. 102, dated 25 January, 2018 to the Inquiry into the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 referred to the Joint Standing Committee on Electoral Matters on 6 December 2017.

- b. imposes an extra layer of regulatory compliance on the activities of unions (who are already heavily regulated through the *Fair Work (Registered Organisations) Act 2009*) and other civil society groups that, despite the amendments, are still onerous, technical, and inappropriate for non-profit organisations serving a social purpose;
- c. imposes significant penalties for non-compliance without sufficient guarantees against the imposition of penalties for *inadvertent* non-compliance. Most inappropriately, the penalties apply not only to organisations but to *individuals*, placing risk of significant criminal and financial sanction on the shoulders of employees of non-profit and often small and sometimes volunteer-led organisations. The draconian nature of such measures is made only more apparent by the fact that the definition of ‘electoral matter’ is vague and elastic. It requires a judgement call to determine if something is ‘electoral matter’ or not based on a range of legislative factors. Hence, it is impossible for organisations to be sure whether any given element of their policy advocacy is subject to donation and spending restrictions. Not only does this make it impossible for organisations engaged in policy advocacy to monitor compliance, it makes their employees subject to the ever-present threat of criminal sanction and personal financial penalty for making the wrong judgement call on an inherently nebulous question;
- d. places restrictions on organisations deemed ‘political campaigners’ receiving gifts from foreign donors over \$1,000 for *any purpose* even if that purpose has nothing to do with electoral expenditure. The proposed category of ‘political campaigner’ is broad and likely to capture the ACTU and several unions engaged in policy debate as part of their advocacy for working people. The ban on foreign donations is likely to have an impact on, for example, the ACTU receiving development grants from international bodies for the benefit of international organisations in the region or receiving international funds to participate in international forums. It will necessitate burdensome continuous monitoring and administrative processes in order to comply;
- e. creates a broad category of ‘third party’ likely to cover a wide range of unions and civil society groups requires these organisations to continuously monitor all donations to prevent spending any on ‘electoral expenditure’, itself not only widely defined but difficult to determine and subject to a range of factors in the

Bill, and in order to ensure they take 'acceptable action' within a short time period (six weeks) to avoid heavy sanctions;

- f. requires all political campaigners, associated entities and third parties that are required to file annual returns to declare the political membership of their senior staff. Many unions and trades and labour councils are likely to fall within one of these categories. This proposal is a clear and unjustified breach of privacy and serves no legitimate legislative regulatory purpose. It is likely to breach fundamental human rights standards, particularly the right to hold opinions without interference and the right to freedom of expression under Article 19 of the International Covenant on Civil and Political Rights. It is both unnecessary and indefensible. It is difficult to avoid the conclusion, as we submitted earlier, that features like this in the Bill are simply designed to undermine the public perception of the independence of civil society organisations and limit the public interest advocacy work they perform;
- g. at the same time, would seem to allow multinational corporations to influence political debate to further their political interests. Whilst the Bill prevents foreign corporations making certain gifts, it appears not to restrict Australian subsidiaries expending their own funds directly or indirectly on electoral expenditure/communications in furtherance of the commercial interests of their parent companies, either of their own volition or at the direction of their foreign parent companies. News media are also exempt from the ban, even if they are foreign owned. Hence, the Bill is profoundly unbalanced: foreign companies can easily circumnavigate the ban to influence political debate whilst civil society actors are restricted in their ability to present an opposing point of view; and
- h. as we submitted previously, the reforms fail to address the influence of the most corrupting domestic interests in our electoral processes such as property developers, tobacco companies, gambling interests and corporate tax avoiders. Worse, as Professor Joo-Cheong Tham of the University of Melbourne has submitted to this inquiry, the amendments will undermine those state electoral laws that do exist to protect against some of these interests, such as the recent ban on donations by property developers in NSW to be found in the *Electoral*

Funding Act 2018 (NSW).³ The proposed amendments (contained in s302A and 314B of the amended Bill) do so by granting donors immunity against state electoral laws where the donation is unconditional or not exclusively tied to Commonwealth electoral purposes. Professor Graeme Orr of the University of Queensland agrees and has indicated that, under the amendments, “all the parties need to do is to make sure their donors don’t specify they want their donation spent for state purposes or national purposes” in order to enliven the proposed Federal exemption from state law.⁴

6. Whilst we continue to support the central objective of the legislation to both avoid foreign interference and ensure transparency in Australian elections, we cannot support the Bill until the above issues are adequately addressed. Accordingly, we urge the Committee not to support the Bill in its current form.
7. We bring to the Committee’s attention the fact that there appears to be a drafting error in s287AA(e) of the amended Bill. As the section currently reads, all unincorporated entities, such as the ACTU, for example, would be automatically deemed foreign donors, which is clearly not the drafters’ intention. We presume section 287AA should read:

287AA Meaning of foreign donor

*Each of the following is a **foreign donor**:*

- (a) a body politic of a foreign country;*
- (b) a body politic of a part of a foreign country;*
- (c) a part of a body politic mentioned in paragraph (a) or (b);*
- (d) a foreign public enterprise;*
- (e) an entity (whether or not incorporated) that does not meet **any at least one** of the following conditions:*
 - (i) the entity is incorporated in Australia;*
 - (ii) the entity’s head office is in Australia;*
 - (iii) the entity’s principal place of activity is, or is in, Australia;*
- (f) an individual who is none of the following:*
 - (i) an elector;*

³ See Submission 4, 25 September 2018; Paul Karp, ‘Coalition’s changes to Finance bill would override state bans on political donations’, *The Guardian*, 28 September 2018, <https://www.theguardian.com/australia-news/2018/sep/28/coalitions-changes-to-finance-bill-would-override-state-bans-on-political-donations>.

⁴ Paul Karp, ‘Coalition’s changes to Finance bill would override state bans on political donations’, *The Guardian*, 28 September 2018.

- (ii) an Australian citizen;
- (iii) an Australian resident.

8. Finally, we note that in our previous submission, we outlined a number of alternative methods for preventing both foreign interference and ensuring transparency in Australian elections in a manner that avoids the above issues, which we respectfully refer to the Committee's attention.

ACTU 2018.

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