

Submission to Open Government Partnership Australia

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Subject: The development of Australia's first Open Government National Action Plan

Particular matter of interest:

"Commitment 4.1: Confidence in the electoral system and political parties"

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1. Introduction

The details of the funding for the 2016 election are not available from the Australian Electoral Commission yet. I understand they will not be available until February 2017. It is therefore not possible to discuss issues arising from the funding of the 2016 election in this submission. However, given that little has changed in the political landscape in respect to electoral funding matters since the mid 1980's or thereabouts, the following is relevant in respect to how Australia might enhance integrity and confidence in Australia's electoral system.

In the seven years to 2014, there has been a drop of 25% in the proportion of Australians believing it makes a difference who is in power. In 2014, this proportion had dropped to 43%¹.

Evidence shows:-

- ***7% of donors contribute 57% of donations***
The Australian Electoral Commission (AEC) figures indicate that a small percentage of donors to political parties donate most of the funding. For instance, in 2009-2010, a mere 7% of the donors contributed 57% of the donations.²
- ***Many donors donate to both sides of politics***
AEC figures³ show that many donors donate to more than just the one political party. Interpreting the AEC information for the 2013-2014 period, it appears that at least seventy-seven donors donated to both Liberal and Labor.
- ***Large donations come from Australian and foreign individuals***
AEC figures⁴ for the 2013-2014 period show evidence of large donations being made by individuals from both within and outside Australia.
- ***Foreign corporations donate to Australian political parties***
Many of the entities donating to Australian political parties are corporations that have their roots outside Australia. Many more have shareholders who are not Australian nationals. In the US, foreign nationals are prohibited from making contributions that might influence American elections⁵. The impact foreign donations may be having on Australian sovereignty is concerning.

- **Public funding of elections (in its current form) has failed**

The introduction of public funding in 1983 was aimed at reducing the influence of lobby groups and others who were prepared to put substantial sums of money towards campaign funding reserves in order to influence policy decisions by politicians. As the then Minister of State in 1983, Mr Beazley noted:-

“It is simply naive to believe that no big donor is ever likely to want his cut sometime. The price of public funding is a small insurance to pay against the possibility of corruption.” (Mr Beazley – Second Reading speech 2 November 1983)

Using 2007-2008 election year figures as a base, public election funding had grown by 18.53% by the 2013-2014 election year. In the same period, the growth in political party receipts increased by 29.54%. This rate outstripped the public funding increase by 11.01%⁶. Public funding has not curbed the appetite for donors to donate. Even with some improvements to disclosure rules, public funding has made little if any impact on the problems that Mr Beazley spoke of in 1983.

In the light of the evidence, it may be reasonable to conclude that changes to the current system of political donations are required if Australians are to be permitted the right to meaningfully participate in the government of their country.

2. Discussion

How might we change the current system to enhance integrity and confidence in Australia’s electoral system? What form should such a change take?

I propose that Australia moves to a system where disclosure becomes unnecessary. I explain below how this can occur and how such a proposal will also address the concerns currently held regarding the lack of ‘real-time’ disclosure of political donations. My proposal also addresses the issue of how to regulate all of the entities that undertake campaign activities. In explaining how this can be achieved, I address the issues regarding foreign donations as well as other matters relating to the general overhaul of the present system of political donations and the rules controlling political entities so that integrity and confidence can become part of Australia’s political landscape.

First, it is possible to bring about major, meaningful and long-lasting change to this important area of the law. At present, Australian electoral laws are a mixture of laws across the Commonwealth. For a new model to be successful, the model must apply across all jurisdictions in Australia.

There are two ways the new model could become part of Australia’s electoral system. One method is for there to be a ‘referral of powers’ from the States to the Commonwealth over all matters relating to elections and electoral funding. The other method is for there to be a change to Australia’s Constitution.

The preferred course, in my view, is for the change to occur by way of a constitutional referendum. This method would have the benefit of potentially overcoming various legal precedents that may

otherwise obstruct the full implementation of the proposed new framework. It would also provide a more permanent path to follow, especially if a 'Code' encompassing the cornerstones of the new laws is developed and included as part of the changes to the Constitution.

What would such a 'Code' look like? The *Code* should include the 'nuts and bolts' of the new proposal. It should contain rules that address many of the concerns that have already been identified by many Australians. It should provide for a coherent and workable system that delivers the outcomes that are required for our democracy to allow equal participation by all Australians.

To this end, the new system will need to include the following provisions:

- The *Code* shall formally declare that the terms of the *Code* shall not infringe upon the rights of Australian citizens in respect to their rights to freedom of speech, of expression, of association, of political communication, and the right and freedom to equally partake with other Australians in the election of Australian citizens to positions of public office in Australia. The *Code* shall ensure that such rights shall be upheld and that the provisions of the *Code* in respect to political donations, political expenditure and the associated matters, share the objective of respecting, protecting and upholding such rights;
- The system would apply to all levels of government and to all jurisdictions across Australia. It would also apply to by-elections, to pre-selection or nomination processes relating to a potential candidate, to any election or by-election in respect to any position within a political party, associated entity or third party, and it would relate to any poll in respect to any referendum or plebiscite;
- Only 'eligible voters' shall be permitted to make political donations;
- 'Eligible voters' shall only be Australian citizens;
- Corporations, unions and any other entities shall NOT be permitted to make political donations;
- Foreign persons or entities shall NOT be permitted to make political donations;
- Political donations shall be subject to a yearly cap;
- Political donations shall need to be carefully defined⁷;
- Political donations made in accordance with the yearly cap shall be the total amount an eligible voter may donate towards any political expenditure (including expenditure on elections) in Australia in any one year. This means that the donation might be applied in total or in part to a local council election, a State or Territory election or a federal election, to an associated entity, or to a third party, but the total of all such donations shall not exceed the yearly cap;

- The yearly donation cap for each eligible voter shall be tied to the median average weekly wage for a full time worker in Australia for the particular year. The ability for those on lower incomes to afford discretionary spending (such as the making of a political donation) is more restricted than it for those on higher incomes. Therefore it will be important for some accurate modelling to be carried out to ascertain what proportion of the median average weekly wage would be an appropriate proportion that would allow for an equal opportunity for the making of maximum donations by all eligible voters. My current thoughts on where the proportion might best be set, is around five per cent (5%). So if the median average weekly wage for a full time worker in Australia was say \$1,500.00, then the donation cap for that particular year would be \$75.00;
- Political expenditure shall be subject to a yearly cap;
- Political expenditure shall need to be carefully defined⁸;
- The yearly expenditure cap shall be calculated on a 'per-candidate' basis and may be set at a figure equal to the median average annual wage for a full time worker in Australia for the particular year. Modelling should however be carried out to ensure that the 'expenditure cap' is realistic. The result of the modelling may indicate that the 'cap' should either be a proportion of, or some multiple of, the median average annual wage. The reference to a '*per-candidate*' basis must be defined to preclude a political party from endorsing more than one (1) candidate for any single position that is the subject of an election, and candidates for election at any elections other than Commonwealth, State or Territory elections shall be excluded from the calculations when determining the yearly expenditure cap;
- A candidate who is not endorsed by a political party shall be permitted to make valid donations towards his or her own political expenditure in excess of the yearly donation cap applicable to an eligible voter but only to the extent that the yearly political expenditure cap is not exceeded;
- All political donations shall be made through the Australian Electoral Commission;
- Political expenditure shall only be engaged in by a registered candidate, political party, associated entity or a third party. If a candidate, political party, associated entity or third party is not registered with the Australian Electoral Commission then he, she or it shall not be permitted to engage in political expenditure or in the electoral process generally;
- The *Code* shall deem a lobbyist as a 'third party' even if the lobbyist identifies an association with a candidate, political party, associated entity or another third party.
- When political expenditure is engaged in, it shall be through the Australian Electoral Commission;
- The Australian Electoral Commission shall enrol every eligible voter and, at the same time, set up a unique trust account for each eligible voter;

- The Australian Electoral Commission shall register and, at the same time, set up unique trust accounts, for every candidate, political party, associated entity and third party who qualifies for registration under the *Code*;
- The Australian Electoral Commission shall manage each unique trust account by receiving instructions in writing and applying the terms of the *Code* to each transaction in real time;
- Registered associated entities and third parties would only be permitted to obtain their funding from eligible voters – and the same capped donation sum that applies to political donations made by eligible voters would apply to associated entities and third parties too. So, if an eligible voter has a yearly donation cap for the current year of say \$75.00, then the eligible voter can decide how he or she wants to spend that donation. It may go all to an associated entity, or to a third party, or to a candidate, or to a political party, but it may be split between more than one of these. However, in no case shall an eligible voter donate more than the capped amount of \$75.00 for that year;
- To qualify to receive political donations and to engage in political expenditure, an associated entity or a third party must only receive its funding from eligible voters and such funding must only be received under the terms set out in the *Code*. If an associated entity or a third party receives or intends to receive funding from sources that are not limited to eligible voters, or from eligible voters, but in amounts that breach the *Code*, then the relevant associated entity or third party shall not be permitted to either receive political donations or to engage in political expenditure;
- The numbers of persons required to nominate candidates shall be capped. For the House of Representatives and the Senate, the cap may be between 100 and 200. For State and Territory elections, the cap may be between 50 and 100. For local council elections, the cap may be between 5 and 20. For any pre-selection or nomination process or ballot in respect to the selection of a potential candidate, the cap may be between 2 and 5. For any election process within or in respect to a political party, associated entity or third party, the cap may be between 2 and 5;
- The registration fees payable by candidates, political parties, associated entities and third parties to the Australian Electoral Commission shall be capped. For a candidate in a federal House of Representatives or Senate election, or a State or Territory election, the cap may be a sum equal to the median average weekly wage for a full time worker in Australia. In a local council election and in any other election, the cap may be five percent (5%) of the median average weekly wage for a full time worker in Australia ;
- A political donation made by an eligible voter **shall not** be part of the public record nor shall the donor's name be made known to the recipient of the donation. The donor details of a valid donation should not be part of the public record. This would have the benefit of denying a person or entity the opportunity of checking if one of their employees, members or contractors has made a donation. In turn, this may provide a disincentive for a person or

an entity to give an employee, member or a contractor money on the basis that that employee, member or contractor is to use the money to make a donation to a particular political party, candidate, associated entity or third party;

- Candidates, political parties, associated entities and third parties shall all make such disclosures as would be expected by a reasonable person to be required by the Australian Electoral Commission so that the Australian Electoral Commission may make an assessment that the *Code* is being complied with;
- Public funding for elections shall continue, but in a modified form. Public funding payments to candidates and or their political parties shall cease altogether. The public funding shall instead be provided to the Australian Electoral Office to assist that office in defraying the increased obligations it will incur as a result of the changes referred to in the *Code*;
- The Australian Electoral Commission shall disseminate a reasonable amount of election material for all candidates, free of any charge to the candidate or to the candidate's political party. Subject to the other provisions of the *Code*, all candidates would continue to be permitted to directly deliver their own election material to eligible voters;
- The *Code* shall establish a 'Commonwealth Independent Commission Against Corruption'. Its powers and functions shall not be any less than are currently exercised by the New South Wales Independent Commission Against Corruption;
- An independent 'Commonwealth Electoral Disputes Arbitration Commission' shall determine disputes arising under the *Code* at no cost to an applicant, and subject always to the right of appeal to the High Court;
- The operation of the *Code* shall be subject to periodic and random audits by an independent Commonwealth audit office;
- The *Code* shall establish a standard set of *model rules* that must be adopted by any political party so as to ensure all voting shall be by secret ballot, all members have an equal opportunity to contribute to policy development, all members have an equal opportunity to nominate office bearers and candidates, where processes are in place to ensure the integrity of the membership (and thus avoid 'branch stacking'), and where the office bearers of such parties must adhere to similar obligations (where relevant) that apply to office bearers of public corporations in Australia;
- The *Code* shall ensure Commonwealth departments and public servants are protected from the possibility of political interference;
- The *Code* shall include offence provisions providing for disqualification from involvement in politics, substantial financial penalties and imprisonment for offenders;

- The *Code* shall provide for transitional provisions to allow a period of between one (1) and two (2) years for compliance, with transactions after the end of the transitional period being overseen by the Australian Electoral Commission; and
- The *Code* shall also provide for further safeguards, including anti-avoidance provisions that are general and specific in nature, and where the test in respect to particular conduct is not the intention of the person involved, but rather what the view of a reasonable person might be in respect to what has occurred. Some of the specific anti-avoidance provisions include:-
 - Disclosure by a candidate or a candidate's relations of any financial or other relevant interests, where '*a candidate's relations*' include (apart from close relatives) business partners, accountants, solicitors, stock or share brokers, financial advisers, political advisers, bankers, fund managers, and any other professional advisers or assistants of the candidate where such assistance has been provided within four (4) years prior to an election, or within four (4) years after an election;
 - Making it mandatory for all members of public office to keep an up-to-date diary of who they communicate with while they hold public office and to make that diary available for public access on the Internet free of charge within twenty-four (24) hours after the end of each day;
 - Preventing the use of confidentiality agreements in respect to certain court and other settlements;
 - The re-direction of any award sums regarding the reputation of a candidate or a candidate's relations to the Commonwealth for payment to one or more registered charities (of the Commonwealth's choosing);
 - Except for reasons of national or domestic security, prevent the use of confidentiality clauses or agreements where the expenditure of public monies is involved in the award of any tender;
 - Preventing situations where a conflict of interest may arise between a candidate's duties of public office and his or her private interests;
 - Preventing the payment of inducements;
 - The review, and the clawing back, of any payments or other advantages of any kind that a candidate may have received during the period of fifteen (15) years before he or she commenced to hold a public office where such payments may be related to how he or she might conduct his or her responsibilities when or if he or she occupies public office;

- Preventing candidates from receiving payments of any kind for a period of fifteen (15) years after they cease to hold public office where such payments may be related to how they conducted their responsibilities while they occupied public office;
- The deeming as corrupt behaviour the holding of foreign accounts by a candidate where there is no just reason for doing so – and disqualifying the minimisation of tax or other similar payments as being just reasons;
- The cancellation, without compensation, of a contract to expend public money where a candidate corruptly influenced the award of that contract; and
- Causing candidates guilty of corrupt behaviour to be personally responsible for appropriate compensation.

3. Conclusion

Much can be done by Parliament if it has the will to address the grave problems impacting on the integrity and confidence in Australia's electoral system. Of course, the Parliament will require the support of the electorate. However, if the Parliament is prepared to embrace meaningful reform, then I would expect that the electorate will support it.

4. References

- 1 *ANU-SRC Poll: Changing views of governance: Results from the ANU poll, 2008 and 2014, Professor Ian McAllister, ANU College of Arts and Social Sciences, Report No. 17, August 2014 at page 8: politicsir.cass.anu.edu.au*
- 2 *Australian Electoral Commission Funding and Disclosure Report – Federal Election 2010 at page 30 - http://www.aec.gov.au/about_aec/Publications/Reports_On_Federal_Electoral_Events/2010/index.htm*
- 3 *Australian Electoral Commission Analyse Donor Returns – 2013-2014 – <http://periodicdisclosures.aec.gov.au/AnalysisDonor.aspx>*
- 4 *Australian Electoral Commission Election Returns – 2013-2014 – <http://periodicdisclosures.aec.gov.au/AnalysisDonor.aspx>*
- 5 *Federal Election Campaign Act summary published by the Federal Election Commission – July 2003*
- 6 *Neil A. Freestone, 'Political Donations & Safeguards Code', published on 3 June 2016 [ISBN: 9780994606969 (loose-leaf); ISBN 9780994606952 ebook version] at page 64*
- 7 *A definition has been developed and included in the publication referred to in 6 above at pages 18 to 21*
- 8 *A definition has been developed and included in the publication referred to in 6 above at pages 22 to 23*

