

PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

Second interim report on the inquiry into the conduct of the 2016 federal election: Foreign Donations

Joint Standing Committee on Electoral Matters

March 2017
CANBERRA

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Chair's Foreword

This report addresses the issue of foreign donations in accordance with the second term of reference:

The extent of donations and contributions from foreign sources, persons, entities and foreign-owned subsidiaries to political parties, associated entities and other third parties and entities undertaking campaign activities, and the options available to Parliament to regulate these.¹

This report recommends that foreign donations to political actors be banned. It also recommends banning foreign donations to both political actors who are currently regulated by the AEC under the *Commonwealth Electoral Act 1918* (the Act) and those who are not.

Underpinning the deliberations of the Committee on this inquiry is the principle of national sovereignty, that is, only Australians should have the power to influence Australian politics and elections.

It should be of great concern to all Australians that, in the absence of bans on foreign donations, so many voters share the belief that the views and decisions of our political parties could be influenced by donations from foreign sources. These perceptions reflect negatively on the reputation of Australia's elected representatives and our democracy itself and these perceptions must be addressed through reform.

¹ Joint Standing Committee on Electoral Matters, 'Terms of Reference', <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/2016Electi on/Terms_of_Reference> viewed 9 March 2017.

The Act currently regulates donation and disclosure requirements for three main categories of political actors in Australia - political parties, associated entities and third parties, which are defined in Chapter One of this report. The Act currently does not differentiate between foreign and domestically sourced donations and does not ban foreign donations.

Evidence presented to this inquiry demonstrated that additional political actors have emerged in the Australian political landscape who are incurring increasing amounts of electoral expenditure that currently falls outside of the current scope of The Act. Therefore the funding of this expenditure is unregulated by the Australian Electoral Commission (AEC) and largely invisible to Australians.

Evidence presented to this inquiry also suggested that these unregulated electoral actors are receiving significant funding, in part, from foreign sources that are not currently publically disclosed in AEC Third Party Returns. This evidence, while relevant in terms of any foreign sourced donations, raises issues that go well beyond the scope of this inquiry and will be examined further by the Committee in its broader inquiry into donations and disclosure.

From evidence to this inquiry, it is also clear that technological developments and campaigning techniques have evolved past current AEC provisions, particularly in relation to the categorisation and regulation of all political actors. Consequently, regulation must evolve to apply to all individuals and organisations who are engaging in the Australian political system.

The two provisions in the Act that deal with the transparency of electoral expenditure incurred by third parties are sections 314AEB and 314AEC. Currently, under these sections the regulation of third parties is less than other participants in the electoral process, particularly in relation to the identification and involvement of donors, both domestic and foreign. The fact that donors to many third parties do not currently attract a disclosure obligation also obscures from the elector the source of funds being used by a third party to incur electoral expenditure.

This situation runs counter to the key principle of 'transparency' in electoral activity and creates a significant loophole in current legislation for electoral expenditure to be channelled through electorally unregulated third parties, instead of political parties and associated entities who are subject to greater degrees of regulation and transparency.

If this loophole is not addressed in legislation, the likely consequence of a ban on foreign donations that did not cover currently unregulated third parties, would be for foreign (and domestic) actors to channel additional electoral expenditure funding through these unregulated third parties. This has the very real potential to create a United States like Political Action Committee environment in Australia, which would in all likelihood further exacerbate voter distrust in the Australian electoral system.

Therefore, a more effective, but not burdensome, form of regulation must be introduced for third parties to ensure all political actors in Australia are subject to the same foreign donation bans and transparency standards. Importantly, this must not impose unnecessary burdens or restrictions on the majority of non-government organisations and charities that use both domestic and foreign funds to undertake charitable work and policy advocacy in accordance with their deductible gift recipient status.

The challenge for government and the Parliament is how to implement a ban on foreign donations that respects Australia's constitutional and democratic freedoms and does not create exploitable loopholes. This would be a complex constitutional and technical challenge for lawmakers. The definition of 'foreign donation' is a key challenge for lawmakers overseas and will be an equally challenging one here in Australia. A key consideration when crafting this definition is to do so without disenfranchising Australians abroad, dual citizens, and permanent residents.

The four principles outlined in the Executive Summary have guided the Committee's consideration of recommendations for this report and have been provided to inform consideration on how to ban foreign donations.

While the Committee as a whole was unable to reach consensus on the final report recommendations, I thank all Committee members for their good will, engagement and deep commitment to ensuring Australia has the strongest possible electoral laws that respect the constitutional and democratic rights of all Australians.

On behalf of the Committee, I thank the Committee Secretariat: Julia Agostino, David Monk, Andrew Gaczol, Nick Parsons, Charlotte Corbyn and Katrina Gillogly for their professionalism, advice and support to the Committee.

Lastly, my sincere thanks to Andrew Giles MP, Deputy Chair of the Committee, for his support and engagement and also to the participating Committee members for their significant contributions to, and engagement with, this inquiry.

Senator Linda Reynolds CSC

Chair

Executive Summary

This report explicitly reviews foreign political donations. This is an interim report which is part of a broader inquiry by the Committee into the conduct of 2016 Federal Election and matters related thereto.

Underpinning all Committee deliberations on foreign donations is the principle of national sovereignty – that only those with a direct standing interest participate in Australian democracy.

The Committee received evidence that the current political donations regime and, in particular, the ability for foreigners to donate to Australian political actors, does not reflect community expectations. The Committee identified the following four principles as fundamental to a trusted system for political donations:

- **Transparency**, via visible, timely disclosure of donations and donors;
- **Clarity**, about what is required and by whom;
- **Consistency** of regulations, so that they capture all participants and support a level playing field; and
- **Compliance**, through enforceable regulations with minimal, practicable compliance burdens.

In accordance with these principles of a trusted political donation regime, the Committee's recommendations are as follows:

Recommendation 1

The Joint Standing Committee on Electoral Matters recommends that any donation reform of the *Commonwealth Electoral Act 1918* be in accordance with Australia's sovereign interests.

Recommendation 2

The Joint Standing Committee on Electoral Matters recommends that any donation reform of the *Commonwealth Electoral Act 1918* be consistent with the four principles of transparency, clarity, consistency and compliance as identified by the Committee in this interim report.

Recommendation 3

The Joint Standing Committee on Electoral Matters recommends a prohibition on donations from foreign citizens and foreign entities to Australian registered political parties, associated entities and third parties. This ban would not apply to dual Australian citizens either in Australia or overseas, or to non-Australian permanent residents in Australia.

Recommendation 4

The committee recommends that the Joint Standing Committee on Electoral Matters, in its wider inquiry into donations and disclosure, further examines the requirement to extend a foreign donations ban to all other political actors. The key issue to be considered is how to prevent foreign funds being channelled through organisations engaging in political activities and who are not subject to regulation under the *Commonwealth Electoral Act 1918*. This new inquiry would also examine related issues that have arisen in this inquiry which are outside the current terms of reference, including tax deductibility for gifts.

Recommendation 5

The Joint Standing Committee on Electoral Matters recommends that the penalties in relation to offences in the *Commonwealth Electoral Act 1918* are significantly strengthened to include stricter penalties for non-compliance.

1. Introduction

- 1.1 Since 1983, each Parliament has created a Joint Committee on Electoral Matters (the Committee) to review the previous election. This Committee was similarly created in September 2016, following the election for the 45th Parliament on 2 July 2016.
- 1.2 Traditionally, the terms of reference for the Committee's election inquiries allow the Committee to inquire into any aspect of the previous election. This inquiry is different because the Terms of Reference provided by the Special Minister of State include a range of specific, additional topics, including: authorisation of voter communication, the donations and disclosure regime, and regulation of third parties.
- 1.3 The Committee has also been asked to provide interim reports on two topics which were the subject of substantial media coverage and community debate in 2016:
 - authorisation of voter communication, by 1 December 2016; and
 - foreign donations, by 3 March 2017.
- 1.4 On 30 November 2016, the Special Minister of State agreed to an extension for the report on authorisation of voter communication. The unanimous report was tabled on 9 December 2016.
- 1.5 This report considers foreign donations, consistent with the request by the Special Minister of State for an early report on this topic. On 1 March 2017, the Special Minister of State agreed to an extension for this report to Friday 10 March 2017.

Context

- 1.6 In 2016, the issue of foreign donations was subject to substantial media coverage and community debate.
- 1.7 The Committee identified ongoing community concern that there is potential for foreign actors to use donations to influence domestic policy decision making and electoral outcomes.
- 1.8 For example, Mr Paul Erickson from the Australian Labor Party (ALP) commented:

We would see it simply as a question of whether the source of the funds is someone who has a direct interest or standing to participate in Australian democracy. We think that that is in one sense a community standard, if you will, which we have seen fairly forcefully articulated in some of the debates about the role of foreign money in Australian politics that have flared up over the last decade. It is the ALP's view that is a community standard and a sentiment that the parliament needs to be mindful of in establishing electoral law and regulating the role of money in elections in a manner that maintains the confidence of the public in our political system.¹

- 1.9 Mr Erickson went on to indicate that people have an expectation that the right to influence Australian domestic policy does not extend to foreign players:

That standard, in my view, is that people have an expectation that, for foreign money from foreign actors—large foreign bodies, as Mr Buchholz described them earlier—that is not connected to an individual or an organisation, that is a participant in public life in Australia or has an interest in the operations of Australian law, the law essentially should not facilitate a role for that money in influencing public affairs.²

- 1.10 Similarly, Mr Tony Nutt from the Liberal Party (LP) commented:

¹ Mr Paul Erickson, Acting National Secretary, Australian Labor Party, *Committee Hansard*, Canberra, 15 February 2017, p. 5.

² Mr Paul Erickson, Acting National Secretary, Australian Labor Party, *Committee Hansard*, Canberra, 15 February 2017, p. 5.

I think that that is a very important issue, and I think a lot of Australians would be very uncomfortable about the idea that, if you have a lazy \$20 million and you happen to be a resident in New York, you can pump that into Australia through some force or another and very significantly affect public policy in Australia or very significantly affect elections.

At the very least we need to know, have it disclosed and be able to quantify and deal with that, but, as a general principle, people would be concerned about the level of resources that people now have to run for issues which may reflect the desires of foreigners in some foreign countries who have some perspectives—religious perspectives, political perspectives or whatever it may be—to very significantly affect decisions in Australia.³

- 1.11 This concern, that foreign players may influence Australian elections and political decision making, is at the heart of the Committee’s report on the issue of foreign political donations. It suggests a significant unease in the community about foreign donations, and the potential for the community to lose trust in our political system through the interference of foreign actors in Australian democratic processes.
- 1.12 Evidence provided to the Committee indicated that Australia lags behind other established democracies in regulating foreign political donations.
- 1.13 The *Commonwealth Electoral Act 1918* (the Act) regulates gifts to political parties, candidates and third parties in Australia. However, the Act does not distinguish between donors who are in Australia or overseas, or between donors who are Australian citizens, dual citizens or non-citizens. Nor does the Act distinguish between legal or natural persons, except in the case of a donation made by a corporation that subsequently becomes insolvent.⁴

Definitions

- 1.14 Discussion of political parties, associated entities, third parties and other political actors occurs throughout this report. Definitions for these organisations are provided by the Australian Electoral Commission (AEC) and the Act.

³ Mr Tony Nutt, Federal Director, Liberal Party of Australia, *Committee Hansard*, Canberra, 15 February 2017, p. 29.

⁴ Section 306B of the *Commonwealth Electoral Act (1918)*

- 1.15 **Political Party** means an organisation, the object or activity, or one of the objects or activities, of which is the promotion of the election to the Senate or to the House of Representatives of a candidate or candidates endorsed by it.⁵
- 1.16 An **Associated Entity** under the Act (s287) means an entity:
- that is controlled by one or more registered political parties; or
 - that operates wholly or to a significant extent for the benefit of one or more registered political parties; or
 - that is a financial member of a registered political party; or
 - on whose behalf another person is a financial member of a registered political party; or
 - that has voting rights in a registered political party; or
 - on whose behalf another person has voting rights in a registered political party.
- 1.17 Examples of associated entities include '500 clubs', 'think tanks', registered clubs, service companies, trade unions and corporate party members.
- 1.18 Associated entities are required to lodge an Associated Entity Disclosure Return by 20 October each year.⁶
- 1.19 **Third Parties** are people or organisations (other than registered political parties, candidates and Federal government agencies) who incur political expenditure as defined in the Act. Political expenditure is expenditure incurred by a person or organisation, or with their authority, on:
- public expression of views on a political party, candidate in an election or member of the Commonwealth Parliament by any means;
 - public expression of views on an issue in an election by any means;

⁵ *Commonwealth Electoral Act (1918)*, Section 4, Number 4, 'Interpretation'.

⁶ AEC, 'Associated entities' website, http://www.aec.gov.au/parties_and_representatives/financial_disclosure/guides/associated-entities/index.htm viewed 27 February 2017.

- printing, production, publication, or distribution of any material that is required under s328, s328A or s328B of the Act to include a name, address or place of business;
- broadcast of political matter in relation to which particulars are required to be announced under sub-clause 4(2) of schedule 2 to the *Broadcasting Services Act 1992*; and
- opinion polling and other research relating to an election or the voting intention of electors.

1.20 Other expenditure (for example, on administration or travel) is not political expenditure for reporting purposes.

1.21 Where political expenditure reaches the disclosure threshold third parties are required to lodge an annual Third Party Return of political expenditure by 17 November each year.⁷

1.22 **Other Political Actors** are individuals or organisations who engage in political campaigning but are not regulated by the Act.

Acknowledgement

1.23 To date, the Committee has accepted over 140 submissions and conducted 12 public hearings as part of its inquiry into the conduct of the last election.

1.24 All transcripts and submissions are available on the Committee website. A full list of submissions and public hearings will be included in the final report of the Committee.

1.25 The Committee wishes to sincerely thank all submitters and witnesses who have provided evidence for its consideration as part of this inquiry.

⁷ AEC, 'Third parties incurring political expenditure' website, <http://www.aec.gov.au/Parties_and_Representatives/financial_disclosure/guides/third-parties/index.htm>, viewed 27 February 2017.

2. Political donations

Introduction

- 2.1 The topic of foreign donations is closely linked with the broader issue of political donations. The Committee has taken significant evidence in relation to political donations. However, the focus of this report explicitly addresses foreign donations. This report also flags issues that the Committee will consider further in the main report on the outcomes of the 2016 election.
- 2.2 Donations are a legitimate form of participation in Australia's political process and the High Court of Australia has ruled that political donations are included in the implied constitutional freedom of political expression.¹
- 2.3 The topic of political donations evokes strong public reactions in all modern democracies, including Australia. Submitters and witnesses discussed a community perception in Australia that individuals and organisations who make political donations do so to influence public debate, policies and decisions of parties and candidates.
- 2.4 Therefore the challenge for government and the Parliament is how to respect Australia's constitutional freedoms while removing the influence of foreign donations.
- 2.5 Thus, much of the public concern about political donations appears to stem from a lack of trust in the system and the motives of those donating.

¹ Professor Anne Twomey, *Submission 24*, p. 1.

- 2.6 The ability, or perceived ability, of organisations and individuals to buy influence through donations – particularly large donations – results in the perception of an ‘uneven playing field’ where a wealthy few can influence results that affect all Australians.
- 2.7 The Committee considered that the principles of a trusted system for political donations should sufficiently reflect what Australians require to allow them to have more faith in the pillars of Australian democracy. The Committee identified four ‘First Principles’ that would guide future reforms of the Act:
- **Transparency** via visible, timely disclosure of donations and donors;
 - **Clarity** about what is required and by whom;
 - **Consistency** of regulations so that they capture all participants and support an equitable and level playing field; and
 - **Compliance** through enforceable regulations with minimal, practicable compliance burdens.²
- 2.8 However, others take the view that not all political donations are acceptable in an Australian political context and that disclosure does not necessarily mitigate the risk of undue influence.
- 2.9 The Committee believes these four first principles should guide any discussion and decision making to do with political donations, both domestic and foreign. Associate Professor Joo-Cheong Tham stated that one of the key first principles is:
- ... if democracy is government by the people, for the people and of the people, then it may be said that foreigners who are not of the people should not be able to influence the political process – including through political contributions.³
- 2.10 With regard to the banning or regulation of foreign donations, the International Institute for Democracy and Electoral Assistance (International IDEA) states in its submission:

² AEC, *Submission 66 (11)*, pp. 6-7.

³ Associate Professor Joo-Cheong Tham, *Committee Hansard*, Canberra, 16 February 2017, p. 1.

The rationale for banning or regulating donations from foreign sources is principally to prevent undue influence by foreign interests in domestic political affairs, or to phrase it differently to protect the principle of self-determination. Foreign donations to political parties also risk diluting the impact of domestic donors. A party that receives a significant amount of its funds from overseas may be less reliant on generating funds at home, thus weakening the ties between it and the citizens it should represent.⁴

The Political Actors

- 2.11 The Committee identified that there is an issue with regard to the existing donation rules potentially being circumvented. Despite the various restrictions on political donations that have been introduced, there are still loopholes available to those who seek to avoid disclosure for both foreign and domestic donations.

Associated entities

- 2.12 In addition to donating directly to political parties, foreign and domestic donors are also able to provide finance through 'associated entities' which are organisations with links to a political party, such as unions, think tanks, or dedicated fundraising groups. These entities accept donations and pass them on to their associated party or undertake campaigns in support of the associated party's campaign.
- 2.13 As well as giving donors another avenue to stay below the current \$13,200 cap, they are generally subject to less scrutiny than the parties themselves. Although the AEC does publish details of donations to associated entities, they are not available in a single list — which makes it more difficult to track the flow of money.⁵ It is also difficult for Australians to ascertain which party they are associated with.

⁴ International IDEA, *Submission 140*, p. 2.

⁵ Mr Tim Leslie, 'Political donations: Here's what the latest data doesn't tell us', *ABC News*, 1 February 2016, <<http://www.abc.net.au/news/2016-02-01/heres-what-the-latest-political-donations-data-doesnt-tell-us/7130126>>, viewed 20 February 2017.

Third parties

2.14 The issue of third parties also presented itself in evidence to the Committee. Third parties are another avenue for foreign and domestic donors to seek to influence the Australian political system.

2.15 Avenues for this to occur include:

- A foreign or domestic donor having another individual or organisation make a donation to a candidate, political party, associated entity or other third party without disclosing the original donor's identity;
- A foreign or domestic donor making a donation to a third party organisation which undertakes campaigning without disclosing the donor's identity; or
- A foreign or domestic donor funds an entirely separate organisation, possibly listed as a charitable organisation, which engages in political campaigning without being subject to the same disclosure laws as a political party or associated entity. In some cases, this organisation may have originally been set up by a political party or other third party with this specific purpose.

2.16 In its submission to the Committee's 2011 inquiry into the funding of political parties and election campaigns, the AEC discussed this issue:

... if political parties and candidates are limited in their campaigning through expenditure caps, then it leaves the revised system vulnerable to having campaigns overwhelmed by third parties that are not similarly constrained. This could have the potential to relegate the primary players in an election campaign – political parties and candidates seeking to win seats and possibly form government – to second tier status in terms of the volume and reach of campaigning behind bigger spending third parties. Secondly there is a concern that third parties may be used by the primary players themselves to circumvent the donation and expenditure caps imposed on political parties and candidates.⁶

2.17 The AEC also commented that introducing legislation intended to circumvent donation and expenditure caps may not be effective and indeed may even be counter-productive:

⁶ AEC, *Submission 19*, (2011 Inquiry), p. 6.

A registration scheme for third parties seems to also carry the implication that it will in some way admit only certain participants to an election campaign while weeding out those created to circumvent restrictions placed on other participants or disguise the real identities of those behind a campaign. The experience of the United States of America with Political Action Committees [PACs] and the like is illustrative of how a scheme of caps and bans can become effete when the operations of third parties cannot also be curtailed.⁷

- 2.18 The Committee notes that third parties have increased their election expenditure in recent years. According to the release of disclosure returns, one third party spent more than \$10 million in 2015/16.⁸
- 2.19 The Committee notes that any ban on political donations from foreign citizens and entities which does not extend to third parties will be ineffective at restricting foreign donations.
- 2.20 The Committee notes that unlike other nations such as Canada, New Zealand or the United Kingdom, Australia does not limit expenditure or require registration from third parties in election campaigns.

Other political actors

- 2.21 The Committee has received evidence that some campaign activities, or 'other political actors' are unregulated and thus outside the AEC's compliance framework and powers.
- 2.22 'Other political actors' are emerging in Australia. In practice, they are third parties not subject to third party returns due to their deductible gift recipient (DGR) status. They do not self-identify their activities as political campaigning and thus operate outside the current disclosure regime. This allows both foreign and domestic donors to contribute funds in support of domestic campaigns with little or no transparency.

⁷ AEC, *Submission 19*, (2011 Inquiry), p. 7.

⁸ AEC, 'Political Expenditure Return - 2015-16, Get Up Limited', <<http://periodicdisclosures.aec.gov.au/PoliticalExpenditure.aspx?SubmissionId=60&ClientId=30343>>, viewed 2 March 2017.

A level playing field

2.23 The Committee identified the need to ensure that a level playing field exists between all political actors. Many submitters to this inquiry agreed that whatever new guidelines or laws are implemented, they must be applied to all players in a fair, even and impartial manner, as well as being readily implementable.

2.24 At a hearing in Canberra on 15 February 2017, Mr Paul Erickson, ALP, made the following comment:

Our view would be that we should have a principles-driven approach that ensures that there is a level playing field. Obviously, political parties, associated entities or other third parties and entities that undertake campaign activities are treated differently by the law, have different interactions with the commission and have different rights and responsibilities. I think what we are grasping at here is that it is not as simple as simply enforcing one rule for all, because not every actor is engaging in the system from the same position, so the rules that apply to them obviously need to be practical and applicable.⁹

2.25 Similarly, Mr Tony Nutt, LP, commented:

I think that if you go back to first principles, you have just said it perfectly. We have a democratic political society. There are rules, and rules should be set in such a way as to capture all the participants and to ensure that they meet the obligations that society, through the parliament, imposes on everyone. If we need to revise those rules to capture new players, or new mechanisms or new tactics then we should do so, just to ensure that it is a level playing field. As a matter of principle, the Liberal Party would support a level playing field—as a general principle. Adjustments need to be made so that people who are now aggregating and deploying very significant resources are covered in the same way, or in an appropriate way, as political parties are. I think you encapsulated well the level playing field that captures all the participants with a regime that ensures that things are done correctly.¹⁰

⁹ Mr Paul Erickson, Assistant National Secretary, Australian Labor Party, *Committee Hansard*, Canberra, 15 February 2017, p. 4.

¹⁰ Mr Tony Nutt, Federal Director, Liberal Party of Australia, *Committee Hansard*, Canberra, 15 February 2017, pp. 31-32.

2.26 The Committee heard evidence indicating that particular groups are not operating on a level playing field, but appear to be circumventing the system. This includes some environmental groups that are registered as charitable organisations.

2.27 The Minerals Council of Australia (MCA) made specific mention to the fact that a number of environmental groups were actively participating in political campaigning but were still registered as charitable organisations, thus allowing them to avoid declaring the source of their foreign and domestic funding. The MCA stated:

... there is evidence that a number of environmental groups that receive tax concessions are engaging in partisan political advocacy – in defiance of clear regulatory restrictions. Registered environmental organisations are endorsed by the Australian Tax Office to receive tax-deductible gifts and contributions, but only for the principal purpose of protecting the natural environment, or undertaking related education or research. Moreover, registered environmental organisations must not act as a conduit for the donation of money or property to other entities, although they may pay other bodies to undertake natural conservation work.

The MCA is not questioning the right of environment groups to pursue political objectives or to raise money for this purpose. However, these groups should not be exempt from reasonable disclosure obligations that help maintain public confidence in Australia's political system.¹¹

2.28 In addition, there is evidence that a number of organisations that receive tax concessions are engaging in activities in defiance of clear regulatory restrictions.¹² The MCA provided some examples:

- Greenpeace Australia Pacific, 350.org Australia and the Wilderness Society (Australia) participated in a pre-election rally against Prime Minister Malcolm Turnbull in June 2016, along with the Australian Labor Party, the NSW Greens and GetUp!

¹¹ Minerals Council of Australia, *Submission 138*, p. 2.

¹² Guidelines can be found on the Australian Charities and Not-for-Profits Commission webpage: 'Political campaigning and advocacy by registered charities – what you need to know', <https://www.acnc.gov.au/ACNC/Reg/Charities_elections_and_advocacy_.aspx>, viewed 23 February 2017.

- The Australian Conservation Foundation hired a truck to drive through Minister Josh Frydenberg's electorate during the 2016 election campaign, which displayed a banner criticising the minister for refusing to sign the Foundation's environment pledge.
- In October 2016, the Australian Marine Conservation Society attacked the Queensland Labor Government's dealings with Adani by staging protests at Labor's state conference.
- The Wilderness Society (Queensland) authorised campaign material during the 2015 Queensland state election urging voters to 'Put the LNP last'.
- On 14 August 2015, the Australian Conservation Foundation authorised a one-page advertisement against Minister Hunt. The advertisement included the logos of five other entities that are both registered environmental organisations and registered charities.
- Friends of the Earth Australia passed on a donation of \$262,000 from Graeme Wood to the political group GetUp!¹³

2.29 As explained by the MCA above, the Committee notes that registered environmental organisations are endorsed by the Australian Tax Office (ATO) to receive tax-deductible gifts and contributions, but only for the principal purpose of protecting the natural environment, or undertaking related education or research.

2.30 Moreover, registered environmental organisations must not act as a conduit for the donation of money or property to other entities, although they may pay other bodies to undertake natural conservation work.

2.31 The World Wildlife Fund (WWF) agrees with this position. Drawing on the work of Transparency International,¹⁴ WWF's submission states:

¹³ Minerals Council of Australia, *Submission 138*, pp. 8-9. Further examples, and the sources of information, are provided within that document and its associated footnotes.

¹⁴ Transparency International, *Political Finance and Donations*, Position Paper 7, January 2016, <<http://transparency.org.au/wp-content/uploads/2016/01/PP7-Political-Finance-Transparency-International-Australia-Jan-2016.pdf>>, viewed 17 February 2017.

‘Associated entities’ (eg entities that are controlled by a political party or that operate solely for the benefit of a political party) and third party donors should be subject to the same disclosure provisions as political parties.¹⁵

2.32 In 2016, the House of Representatives Standing Committee on the Environment looked into the issue of environmental groups being entitled to receive deductible gift recipient (DGR) status during its *Inquiry into the Register of Environmental Organisations*. The evidence gathered from both that inquiry and this Committee’s inquiry are consistent with respect to environmental organisations and their participation in political campaigning.¹⁶

2.33 The Environment Committee stated in its report:

The Committee heard examples of environmental DGRs campaigning in recent state and federal elections, through activities including door knocking in marginal seats, lobbying candidates, and distributing scorecards evaluating or ranking the policies of various political parties.

Stakeholders expressed concerns about a lack of guidance on the extent to which political activity is both consistent with the purpose of the Register and a legitimate application of tax-deductible donations, and also about a lack of transparency in relation to the political expenditure of environmental DGRs.¹⁷

2.34 The Committee is of the opinion that political entities, be they parties, associated entities, third parties or other actors should all be subject to the same rules. In particular, third parties that engage in activities in contravention of their DGR status.

2.35 The differing standard for different actors provides an avenue for rules to be circumvented as discussed earlier in this chapter.

¹⁵ World Wildlife Fund (WWF), *Submission 94*, p. 2.

¹⁶ House of Representatives Standing Committee on the Environment, *Inquiry into the Register of Environmental Organisations* Report, <http://www.aph.gov.au/Parliamentary_Business/Committees/House/Environment/REO/Report>, viewed 23 February 2017. (Hereafter referred to as ‘The Report’).

¹⁷ House of Representatives Standing Committee on the Environment, *Inquiry into the Register of Environmental Organisations*, April 2016, p. 58.

Practicalities and striking a balance in regulation

2.36 Finally, the Committee identified a need to strike an appropriate balance between new regulations and the practicalities of implementation and enforcement. The Committee heard evidence that whatever new regulations are created, they must avoid both unintended consequences and being impractical or burdensome to implement.

2.37 For example, Mr Samuel Jones, from International IDEA, acknowledged that regulations must be carefully written. He commented:

As with many regulatory measures, including for political finance, the devil is often in the detail. So a good principle in regulating political finance is, of course, for any regulation to be extremely clear, unambiguous and implementable.¹⁸

2.38 Mr Nutt provided an example of unintended consequences:

America is a perfect example of a nation which has gone through wave after wave of campaign finance reform and where the unintended consequences of a number of the changes have made the system worse. There is a lot of literature in the States, which I will not attempt to go through here, from impeccable sources, demonstrating all the harm that has been done by the unintended consequences of well-intentioned regimes. You cut off donations to parties or you limit those in some way, and then you have Super PACs [Political Action Committees] develop. You make other changes that affect the capacity of parties to manage their own internal affairs and respond properly to the legislative regime, and then you find other mechanisms of basically dark money or money that is largely hidden.¹⁹

2.39 Further, Mr Nutt advocated a measured set of regulations that were not counter-productive. He commented:

It is very important that we do not impose excessive new obligations on the vast majority of donors and other participants in the political system who are not now and will never be captured by foreign prohibitions, and whose rights

¹⁸ Mr Samuel Jones, Program Officer, International IDEA, *Committee Hansard*, Canberra, 16 February 2017, p. 25.

¹⁹ Mr Tony Nutt, Federal Director, Liberal Party of Australia, *Committee Hansard*, Canberra, 15 February 2017, p. 32.

to participate should not be excessively burdened and their opportunities to contribute inhibited by a huge regime designed to identify and prevent a small number of cases. As always, the compliance needs to be proportionate and needs to be sensible, and a combination of some kind of declaration and AEC compliance would deal with those matters.²⁰

- 2.40 The Committee is of the view that whatever regulation is in place, it should ensure not just a level playing field, but should not be so burdensome that it becomes ineffective. In other words, it should be practicable to implement.

²⁰ Mr Tony Nutt, Federal Director, Liberal Party of Australia, *Committee Hansard*, Canberra, 15 February 2017, p. 26.

3. Foreign donations

- 3.1 Foreign donations are donations received from overseas entities or individuals. Many democracies ban foreign donations on the basis that foreign donors should not be able to – or have a right to - influence domestic policy. The two common approaches to regulation in this area are to ban donations from foreigners or donations of foreign property.
- 3.2 This chapter focuses on three key issues regarding foreign donations:
- Sovereignty – only Australians can influence domestic policy and elections;
 - Compliance – ensuring foreigners and domestic political actors are prevented from circumventing donation regulations; and
 - Transparency – public confidence that regulations are working effectively.

Sovereignty

- 3.3 The sovereignty of Australia is entrenched within the Constitution and must be protected from outside influence at all times. Only Australians should have the power to influence elections.
- 3.4 Mr Tony Nutt, LP questioned why domestic policy should be influenced by foreign entities, and reinforced the ideal of a level playing field:

I think that, as the chair indicated earlier, it should be a level playing field, so, if parties have to disclose according to law, other people should have to disclose. If we are talking about foreign activities properly defined, as we were talking about earlier, then I am not sure why Australian public policy should be impacted or significantly impacted by genuine foreigners pumping money into this country for their own purposes, be that a state purpose or a quasi-state purpose, as against Australians—whatever their politics, whatever their views, whatever their social activism—being able to participate in the system.¹

- 3.5 A number of other submitters and witnesses to the inquiry raised concerns about perceived intentions and expectations behind political donations generally, and from foreign sources in particular. The Committee notes these concerns add to the argument that foreign donations are problematic for Australia's political system because they can affect its reputation by creating perceptions of undue influence.
- 3.6 In light of the concerns about foreign donations and that they could lead to undue influence on domestic policy, many submitters and witnesses suggested that such donations be banned from the Australian political landscape. For example, the Australian Greens recommended a ban on donations from overseas residents:

We maintain our view that the current laws on political donations are unfair and counterproductive to the democratic process. We continue to advocate for significant reforms to the current electoral funding system including bans on donations from individuals resident overseas.²

- 3.7 Further, Dr Martin Drum of the University of Notre Dame Australia commented in his submission that while political donations are a legitimate form of political participation, donations from foreign sources raised concerns:

What is less desirable is the influx of foreign money within election campaigns. There are naturally concerns about the national interest when such donations occur. There are also significant issues around transparency; whilst we have the ability to investigate political donors who are based in Australia it

¹ Mr Tony Nutt, Federal Director Liberal Party of Australia, *Committee Hansard*, Canberra, 15 February 2017, pp. 31-32.

² The Australian Greens, *Submission 89*, p. 1.

can be much more difficult to understand and analyse those who are based overseas ... As a principle we should proceed on the basis that foreign donations have the potential to undermine our democratic process and should be banned.³

- 3.8 In her submission, Professor Anne Twomey supported the case for banning foreign donations:

There appear to be good policy grounds for the banning of foreign political donations. It is not appropriate that other countries should be able to use donations as a means of influencing the outcome of elections within Australia. This is consistent with the spirit of s 44(i) of the Constitution, which disqualifies from Parliament any person who has an allegiance to a foreign power.⁴

- 3.9 The Uniting Church in Australia referred in their submission to a 2016 Organisation for Economic Co-operation and Development (OECD) report comparing political funding arrangements and commented that many other OECD countries ban political donations from foreign sources:

Australia should join the 68 per cent of OECD countries that ban donations from foreign interests to political parties and the 56 per cent that ban such donations to candidates.⁵

- 3.10 The Liberal Democrats commented that differentiating between domestic and foreign donations was not necessary:

It is the position of the Liberal Democrats that donations and contributions from foreign sources should be treated no differently from those obtained domestically. As long as the source of the donation is sufficiently identifiable, voters will be able to use the information to create an informed opinion on which candidates and parties they would choose to support.⁶

³ Dr Martin Drum, *Submission 108*, pp. 1-2.

⁴ Professor Anne Twomey, *Submission 24*, p. 1.

⁵ Cited in The Uniting Church in Australia, *Submission 78*, p. 3.

⁶ Liberal Democratic Party, *Submission 42*, p. 3.

Compliance and transparency

3.11 The Committee identified a need to provide the public with confidence that donations are being regulated effectively, through timely and accessible disclosure of donations, and visible compliance by political actors with the donation regulations.

3.12 Associate Professor Tham commented that the main drivers for reform are sovereignty risks posed by donations by foreign governments and compliance risks around donations from foreign sources:

When you consider the 'what' in terms of what foreign donations are, it closely connects to the 'why'. With foreign governments I would argue there is a compelling case to restrict donations. I think we all treat it as illegitimate for countries to influence the domestic politics of other countries through political money. They should respect the autonomy of those polities and pursue their agenda through regular diplomatic channels.

With donations coming from overseas or foreign sourced donations, I think the concern is a bit different. It is less about interference with sovereignty and more about concerns about compliance, and enforcing Australia's electoral laws overseas is all but impossible. I think this supplies another compelling rationale to severely restrict donations from overseas.⁷

3.13 The Act does not have extra-territorial application, limiting the ability of the Australian Electoral Commission (AEC) to enforce compliance with introduced regulations covering foreign donations in Australia. In these circumstances it is sensible that Australian regulation should focus the onus of compliance on the recipients of donations to prevent acceptance of donations from foreign sources:

... while the AEC can seek voluntary compliance with the disclosure requirements, overseas donors cannot be compelled to comply with Australian law.⁸

⁷ Associate Professor Joo-Cheong Tham, *Committee Hansard*, Canberra, 16 February 2017, pp. 1-2.

⁸ Australian Electoral Commission, *Submission 66 (11)*, p. 9.

- 3.14 The mechanisms used to facilitate significant donations without disclosing the identity of donors discussed in Chapter Two are applicable to foreign donations.
- 3.15 Establishing and addressing non-compliance is also problematic for donations from foreign sources:
- Organisations operating internationally and in Australia can transfer funding into Australia and between different parts of their Australian operations, making it difficult to link funding for political purposes to a foreign or domestic source;
 - Some foreign individuals and organisations have what in the Australian context are vast resources at their disposal, and the capacity to quickly and significantly influence Australia's political process with (to them) relatively little expense; and
 - The AEC cannot compel foreign entities to comply with Australian political donation regulations.

Overseas regulations

- 3.16 Many countries have regulated to ban or limit the influence of foreign donations on the outcomes of elections and decisions of government. The forms of regulation vary significantly across countries.
- 3.17 The AEC commented on the different regulatory schemes in Australian jurisdictions and internationally:

There is a vast array of different political funding and disclosure schemes within Australian and international jurisdictions. Some of these schemes are highly regulated, including bans on various categories of donation and punitive sanctions, whilst other schemes are less prescriptive. There are also significant differences, even between Australian jurisdictions.⁹

- 3.18 New Zealand, Canada, the United Kingdom and the United States all have legislative bans or limits on foreign donations as follows:

⁹ Australian Electoral Commission, *Submission 66 (11)*, p. 6.

- New Zealand bans donations from foreign donors to political parties and candidates exceeding NZ\$1,500 (A\$1400)¹⁰ in aggregate from one source;
- Canada bans donations from foreign donors by only allowing natural persons that are Canadian citizens or permanent residents to make political donations;
- In the United Kingdom a donation to a political party is defined as a contribution exceeding £500 (A\$800).¹¹ Donations from foreign donors are effectively banned because foreigners are not included in the defined list of 'permissible donors', except where they support international travel, accommodation or subsistence by party officers. Donations to candidates largely follow the same rules as to political parties. Contributions to candidates below £50 (A\$80)¹² are not considered as donations and can therefore be made by foreign interests; and
- The United States bans direct and indirect donations by foreigners of cash or other things of value, as well as promised or implied donations.¹³

3.19 Many OECD countries have experienced similar social concerns with respect to foreign donations and consequently most OECD countries ban foreign donations to political parties and candidates.¹⁴ Banning foreign donations is clearly considered to be an important step in safeguarding domestic policy from the influences of those not directly involved.

3.20 Dr Colleen Lewis commented that other countries have acted on concerns about foreign donations in a definitive way by simply banning them:

¹⁰ Approximate value at 1 March 2017 exchange rate.

¹¹ Approximate value at 1 March 2017 exchange rate.

¹² Approximate value at 1 March 2017 exchange rate.

¹³ International Institute for Democracy and Electoral Assistance, 'Political Finance Database', <<http://www.idea.int/data-tools/data/political-finance-database>>, viewed 2 February 2017.

¹⁴ The Uniting Church in Australia, *Submission 78*, p. 3.

A lot of countries around the world do not allow foreign donations because they do not feel it appropriate that somebody who is not a citizen of the country can have an influence.¹⁵

- 3.21 In providing an international comparative perspective on foreign donations, Mr Samuel Jones of International IDEA, an organisation that works to support sustainable democracy around the world, commented:

... I think it is fair to say that a ban on foreign donations to political parties and/or candidates or other electoral actors is one of the most common political finance regulatory measures. International IDEA's political finance database shows that almost two-thirds of countries have a ban on donations to political parties from foreign interests, while almost half have a ban on foreign donations to candidates. Among those established democracies that do not have a ban, most place a limit on the amount that a foreign entity can contribute, as a measure to curb undue influence. This is the case, for example, in Germany, Spain and New Zealand.

When you put those two together, it is very common that donations from foreign sources are either banned or regulated in some way. The rationale is quite simply to prevent undue influence by foreign interests in domestic political affairs or, to phrase it differently, to protect the principle of self-determination and national sovereignty. While there are no global standards or guidelines on political finance, the European guidelines that we do have—from both the Council of Europe and the Organization for Security and Co-operation in Europe, the OSCE—are very clear that foreign donations should be either banned or regulated.¹⁶

- 3.22 This evidence demonstrates that many countries do not believe that it is appropriate to allow unfettered access to foreign donations, and that it is important to take steps to safeguard a nation's political system.
- 3.23 The Committee notes concerns that foreign players should not be able to influence domestic policy by virtue of making donations to political actors.
- 3.24 The Committee further notes that many submitters and witnesses to this inquiry believe that banning foreign donations is an appropriate way of

¹⁵ Dr Colleen Lewis, *Committee Hansard*, Canberra, 15 February 2017, p. 18.

¹⁶ Mr Samuel Jones, Program Officer, International IDEA, *Committee Hansard*, Canberra, 16 February 2017, p. 25.

managing the risks associated with foreign donations, and is consistent with the approach of other countries.

Current Australian regulation

- 3.25 The Act does not prevent foreign citizens or corporations from making political donations.
- 3.26 While the Act does not currently limit foreign donations, relevant legislation has been implemented in New South Wales and Queensland.
- 3.27 Section 96D of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) requires that donors must be resident, operating a business, or otherwise demonstrating some connection to Australia, to the satisfaction of the NSW Electoral Commissioner, before a political donation can be accepted:

It also provides that the objects of the section are to create certainty about who is making a political donations by ensuring the donor is properly identified and 'to remove a perception that certain foreign donors could exert influence over the Australian political process, by requiring a donor to have a legitimate link with Australia, either through residence of the donor or its officer or by being registered in Australia.'¹⁷

- 3.28 Section 270 of the *Electoral Act 1992* (Queensland) *Gifts of foreign property—when unlawful for political party, candidate etc. to receive gift* prohibits political parties and candidates from receiving foreign property:

It is unlawful for an entity to receive a gift of foreign property in any of the following circumstances—

(a) the gift is received by a registered political party (or by a person acting on behalf of a registered political party);(b) the gift is received by a candidate (or by a person acting on behalf of a candidate) during the candidacy period.¹⁸

- 3.29 The definition of foreign property in the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2017 tabled by

¹⁷ Professor Anne Twomey, *Submission 24*, p. 2.

¹⁸ *Electoral Act 1992 (QLD)*, s. 270, 'Gifts of foreign property—when unlawful for political party, candidate etc. to receive gift'.

the Australian Labor Party (ALP) on 13 February 2017 is effectively the same as the definition in the *Electoral Act 1992* (Qld):

foreign property means:

- (a) money standing to the credit of an account kept outside Australia; or
- (b) other money (for example, cash) that is located outside Australia; or
- (c) property, other than money, that is located outside Australia.¹⁹

Regulation issues

- 3.30 Constitutional validity and the defining of foreign donations are the two key factors to be considered when regulating foreign donations in Australia. These factors are examined further below.

Constitutional validity

- 3.31 There are two main constitutional considerations in relation to foreign donations: the implied freedom of political communication, and the spirit of s 44(i) of the Australian Constitution disqualifying a person with allegiance to a foreign power from Parliament.

Implied freedom of political communication

- 3.32 Professor Anne Twomey commented that the High Court has upheld an implied freedom of political communication under the Australian Constitution that extends to participating in the electoral process through making political donations:

In *Unions NSW v New South Wales* (2013), the High Court struck down the NSW Government's attempts to confine political donations to persons on the electoral roll (including a ban on donations from corporations, unions, charities and the like). The High Court noted that there 'are many in the community who are not electors but who are governed and are affected by decisions of government'. They have 'a legitimate interest in governmental action and the direction of policy' and 'may seek to influence the ultimate choice of the people as to who should govern' by, for example, making

¹⁹ *Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2017*, s. 306, 'Interpretation'.

political donations. This applies both to individuals and entities, such as corporations and unions.²⁰

3.33 Professor Twomey also commented on how the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) works with the High Court ruling:

The New South Wales provision, in section 96D of the act, works on the basis that you can make a political donation if you are on the electoral roll—that is fine—or if you are a permanent resident, or even any kind of resident, so if you live here. The reason for that is the High Court's decision in *Unions New South Wales* suggested you could not confine it just to people on the electoral roll. The people who live here are affected by the rules of government and therefore should have a say in the way governments operate, even if they do not have a vote. So we have to include them. So there is provision to allow people to provide identification of their residential address to the Electoral Commissioner and therefore be put on a list of people who are allowed to donate. Then, when it comes to corporations, it is about looking at whether you have some kind of identifying number in Australia—so an ABN or any other kind of identification through ASIC. So you are recognised as a company that operates in Australia.²¹

3.34 Associate Professor Tham commented on the main constitutional issues:

I think the main constitutional issue stems from the implied freedom, but freedom of political communication is implied in the Commonwealth Constitution and specifically the High Court decision in *Unions New South Wales v New South Wales*. In that particular case there were two provisions being challenged, but the provision of particular concern to us was the provision that restricted the ability to make political donations in New South Wales to those on the electoral rolls. The clear justification for that—it is clear in the sense that it comes from the second reading speech that then Premier Barry O'Farrell made—and the argument was that only those that had the right to vote should have the right to make political donations. I think it is fair to say—and you see that extracted in terms of the dictum I have on page 10 of the notes that I have circulated—that what the High Court rejects is the view that, simply because persons do not have the right to vote, they do not have a legitimate interest in the political process.

²⁰ Professor Anne Twomey, *Submission 24*, pp. 1-2.

²¹ Professor Anne Twomey, *Committee Hansard*, Sydney, 16 November 2016, pp. 53-54.

What does that mean in terms of regulation in this particular area? It proceeds, I think it is fair to say, that if you have a provision that is basically cast in the same way as the New South Wales provision—for example, calls that the political donation be restricted to those on electoral rolls—that is basically replicating the invalidated provision in *Unions New South Wales*. So I would say it is extremely probable that that would be unconstitutional. Secondly, I would say this: if there are provisions that are motivated and the features reflect the idea that, simply because you do not have the right to vote, you therefore do not have a legitimate interest, I think those provisions too would be highly problematic.

However, if there are different rationale for restrictions—for example, when I discuss the narrow meaning of ‘foreign’ in the sense of donations coming from overseas, the argument is not that these people do not have a legitimate interest in the political process; the argument there is one of compliance. If the money is coming from overseas, it is extremely difficult to ensure that whatever disclosure is made in relation to the money is made with proper integrity. I will expand on that point. The Queensland provisions are not like the New South Wales provisions. They ban ‘gifts of foreign property’—that is, gifts that come from money outside the territory of Australia. I would have thought that a ban like that would not fall foul of the High Court’s decision.²²

- 3.35 It is useful to note that the *Electoral Act 1992 (Qld)* is consistent with the High Court ruling by banning donations of foreign property rather than banning donations from foreign sources.

Section 44(i)

The purpose of section 44 of the Constitution is to protect the parliamentary system by disqualifying candidates and Members of Parliament who are at risk of allowing conflicts of loyalty to affect their performance.²³

- 3.36 Section 44(i) of the Constitution disqualifies from Parliament any person with allegiance to a foreign power:

Any person who:

²² Associate Professor Joo-Cheong Tham, *Committee Hansard*, Canberra, 16 February 2017, p. 3.

²³ The Australian Electoral Commission, ‘Electoral Backgrounder: Parliamentary report on Section 44 of the Constitution’, <http://www.aec.gov.au/About_AEC/Publications/backgrounders/s44-constitution.htm>, viewed 27 February 2017.

(i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; or ...

... shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.²⁴

Defining foreign donations

3.37 The extent of foreign donations is currently difficult to measure because there is no requirement for donations to be identified as foreign under the current funding and disclosure regulations, and no agreed definition of what constitutes a foreign donation.

3.38 Analysis provided to this inquiry based on the addresses of donors from disclosure returns published by the AEC suggests the value of foreign donations is increasing.²⁵

3.39 In evidence given to the Committee, Associate Professor Tham suggested that consideration should be given to the meaning of ‘foreign political donations’ and why they pose a democratic risk. Only once these questions are answered can Australia deal with the issue of foreign political donations:

In this context, “foreign” seems to have three possible meanings: a narrow one, which refers to overseas-based donors; and a broad one, which extends to all non-citizens who donate to political parties, whether or not they are residing in Australia. The third understanding is more complex: it refers to individuals born overseas who are now Australian citizens or permanent residents and who, while they are closely involved in business activities in their country of adoption, nevertheless retain close government and business connections in their country of origin. Indeed, their implicit “foreignness” devolves from the fact that they may hold citizenship (or permanent residence status) in Australia and in another country.²⁶

3.40 While noting the potential conflict of interest for Australian citizens and permanent residents with citizenship, government and business connections

²⁴ *Commonwealth of Australia Constitution Act*, s. 44(i), ‘Disqualification’.

²⁵ Associate Professor Joo-Cheong Tham, *Submission 25 (C)*, p. 3.

²⁶ Associate Professor Joo-Cheong Tham, *Submission 25 (C)*, p. 2.

in other countries, the Committee does not support banning Australians with dual citizenship from political donations.

- 3.41 Associate Professor Tham also commented there was an additional fourth category of Australian citizens living overseas who would also be prevented from donating foreign property if this was used as the basis for banning foreign donations:

Because I support a ban on foreign sourced donations, because of the issues of compliance, I would in fact—if that donation has been made by an Australian citizen directly from overseas, they would be caught by the ban that I support. So for those particular citizens, what they need to do is make the donation from moneys that are sourced from within Australia. I would have thought that for people with proper connections to this country that should not be a difficult thing.²⁷

- 3.42 Thus, before any regulation is made, the Committee supports a clear definition of what constitutes a foreign donation.
- 3.43 While the Committee has not made a recommendation on such a definition, it believes this issue should be addressed as a priority ensuring the four categories of foreign donations described by Associate Professor Tham are considered and captured in the legislation.

Regulating foreign donations

- 3.44 The Committee considered the key question of how a ban on foreign donations should be regulated. The main approaches taken internationally and in current Australian regulations are bans on donations by foreign donors or bans on donations of foreign property.
- 3.45 As discussed above, the existing state regulations on foreign donations address the issue, without explicitly defining what constitutes foreign donations, by requiring donors to demonstrate a connection to Australia in NSW or by banning donations of foreign property in Queensland.
- 3.46 The Committee notes that there are unintended consequences from a blanket ban on donations of foreign property. As noted in the Bills Digest for

²⁷ Associate Professor Joo-Cheong Tham, *Committee Hansard*, Canberra, 16 February 2017, p. 4.

legislation introduced in 2010,²⁸ there is a very real risk that a ban on donations of foreign property could encapsulate Australian citizens or Australian entities if they use money from their personal or organisation's overseas bank account.

- 3.47 In his address to the Press Club, Mr Tony Nutt, LP commented on the potential for unintended consequences of banning foreign political donations, and questioned how donations from Australians with dual citizenship might be treated:

They are citizens who have houses and businesses and activities in Australia, family in Australia but also in, for instance, some other countries, China, other parts of Asia, Europe, America, are they permitted as citizens to make donations or not?²⁹

Broader funding and disclosure reform

- 3.48 Regulation of political donations is a complex and multi-dimensional challenge. Witnesses and submitters supported regulation of foreign donations as part of broader reform to Australia's system for political donations.

- 3.49 In evidence to the Committee, Associate Professor Tham supported a suite of measures to improve the integrity and trust in Australia's system for political donations, and commented:

A workable and effective political finance law or set of finance laws need to rely on a suite of measures. I would include in that suite of measures a ban on foreign sourced donations as well as low caps on political donations and caps on election spending.³⁰

- 3.50 Mr Paul Erickson, ALP commented that the ALP also supports reform on foreign donations as part of broader reform on political donations:

²⁸ Bills Digest No. 43, *Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010*, November 2010, p. 20.

²⁹ Australian Financial Review, 'Tony Nutt protests Labor's cold-blooded lie', <<http://www.afr.com/news/politics/tony-nutt-protests-labors-coldblooded-lie-20160922-grlv16>>, viewed 9 February 2017.

³⁰ Associate Professor Joo-Cheong Tham, *Committee Hansard*, Canberra, 16 February 2017, p. 6.

From the ALP's perspective, we welcome any examination of the legal framework applying to foreign donations. It has been our position for some time that foreign political donations should be addressed as part of a broader reform that strengthens the Commonwealth Electoral Act... and increasing existing penalties for abuses of the disclosure regime.

... As part of that package of reforms, we advocate a prohibition on the receipt of foreign donations.³¹

3.51 The Committee is of the view that support broadly exists for reforms but that any such reforms should be practicable and not add to the burden already carried by political parties in disclosing donations.

3.52 In considering reforms, the report examines in more detail the four principles identified in Chapter One of this report.

Principle 1 – Transparency

3.53 A transparent political donations regime provides voters with clear, timely and accessible information on donations and donors.³² The Committee received evidence from submitters and witnesses that the current political donations regime does not meet community expectations of transparency.

3.54 Dr Belinda Edwards gave evidence based on her analysis of donation returns from political parties published by the AEC and noted a number of issues with the data which limit the transparency of political donations:

...on the extent of the transparency problems: my analysis of the disclosure data found that for the last financial year only 13 per cent of the Liberal Party's and 21 per cent of the Labor Party's privately sourced incomes were transparently attributed to political donors, but 20 to 30 per cent of their incomes fell into the grey areas of 'affiliates' and 'other receipts'; and that the sources of 66 per cent of the Liberal Party's income and 49 per cent of the Labor Party's income went entirely undisclosed. This is an amount of some \$70 million worth of income which we have no information about. I suggest that this combines with the delayed release of the disclosure information to

³¹ Mr Paul Erickson, Assistant National Secretary, Australian Labor Party, *Committee Hansard*, Canberra, 15 February 2017, p. 1.

³² Australian Electoral Commission, *Submission 66 (11)*, pp. 6-7.

make Australia's financial disclosure system more or less a farce—that it is actually extremely problematic.³³

- 3.55 The Committee notes that the disclosure requirements are different for parties, associated entities and third parties, providing at best a partial picture of total donations, and adding to the paucity of information about foreign sourced donations.
- 3.56 The Committee also received evidence about third parties with access to considerable foreign resources campaigning in concert without being captured by the current disclosure regime (see Principle 2).
- 3.57 The Committee supports improvements to the coverage and timeliness of disclosure regulations to improve transparency.

Principle 2 – Clarity

- 3.58 Clarity in a political donations regime provides the public and participants in the political process with simple, unambiguous regulations addressing all aspects of participants' financial dealings for the whole electoral cycle.³⁴
- 3.59 The Committee heard evidence from witnesses and submitters that there was a lack of clarity and confusion around who needs to disclose information about donations, how the information should be broken down into categories for reporting, and how the information can be meaningfully interpreted.
- 3.60 In their submission, the Minerals Council of Australia (MCA) commented that advocacy groups were undertaking what appeared to be political campaigning without being required to disclose information about the donations they receive:

All these examples highlight the importance of ensuring that all organisations engaged in political advocacy are subject to the same rules of transparency. While political parties are obliged to disclose the source of donations more than \$13,200, environmental organisations like the Sunrise Project, Greenpeace

³³ Dr Belinda Edwards, *Committee Hansard*, Canberra, 15 February 2017, p. 11.

³⁴ The Australian Electoral Commission, *Submission 66 (11)*, p. 7.

and WWF-Australia can spend millions of dollars every year without having to disclose the identities or locations of their donors. In particular, the case of the Sunrise Project exposes the risk to Australia's sovereignty of permitting foreign entities to fund – in secret – activities intended to shut down a key Australian export industry.³⁵

- 3.61 Associate Professor Tham highlighted the importance of clarity on what constitutes a foreign donation, however this is defined in regulations:

When we delve deeper in terms of the countries that have actually banned foreign political donations, we in fact encounter quite dramatic regulatory diversity and complexity. We see, for example—and the provisions are extracted in the appendix of my note—bans on foreign donations in Queensland, Canada, New Zealand, United Kingdom and the United States, but these bans operate in quite different ways with quite different scopes with quite different quanta. Really this diversity raises more foundational questions. What do we mean by 'foreign political donations' and why do these contributions pose democratic risk? My strong point at this juncture is that these questions need to be addressed before we determine how to deal with foreign political donations, whether through a ban or otherwise.³⁶

- 3.62 The Committee notes the link between improving transparency through coverage and timeliness, and providing clarity to donors and recipients about requirements for accepting and disclosing donations under a foreign donations ban.

Principle 3 – Consistency

- 3.63 Consistency in a political donations regime is important in ensuring a level playing field for participants in the political process. The Committee heard evidence that the Act has not kept pace with changing campaign communication techniques.³⁷ Similarly, the nature of organisations engaging in political campaigns is evolving faster than the Act itself.

³⁵ Minerals Council of Australia, *Submission 138*, p. 2.

³⁶ Associate Professor Joo-Cheong Tham, *Committee Hansard*, Canberra, 16 February 2017, p. 1.

³⁷ Joint Standing Committee on Electoral Matters, *The 2016 Federal Election: Interim Report on the authorisation of voter communication*, December 2016, Canberra.

- 3.64 While there was broad support for a level playing field for political donations, submissions and evidence from witnesses revealed divergent perspectives.
- 3.65 Mr Nutt commented that the Liberal Party supports a level playing field for political donations which includes capturing new players, new mechanisms and new tactics:

We have a democratic political society. There are rules, and rules should be set in such a way as to capture all the participants and to ensure that they meet the obligations that society, through the parliament, imposes on everyone. If we need to revise those rules to capture new players, or new mechanisms or new tactics then we should do so, just to ensure that it is a level playing field. As a matter of principle, the Liberal Party would support a level playing field—as a general principle. Adjustments need to be made so that people who are now aggregating and deploying very significant resources are covered in the same way, or in an appropriate way, as political parties are.³⁸

- 3.66 Mr Erickson commented that the ALP supports regulation of all participants but suggested in his evidence that applying the same rules to third parties may not be appropriate:

We would obviously support an approach where the principles that inform the requirements that we place upon our parties and their associated entities are also in place when it comes to—the reference uses this phrase, I think—third parties and entities that are undertaking campaign activities. I suppose the point I am making is that third parties and entities that undertake campaign activities but are not political parties or associated entities do not enjoy many of the other rights of parties such as access to the electoral roll and whatnot. So they are in a slightly different position. I cannot say that I have thought this through to its absolute endpoint, but I am not sure that it would be entirely feasible simply to pick up the regulatory approach that applies to parties and apply it to any third party ...

Our view would be that we should have a principles-driven approach that ensures that there is a level playing field. Obviously, political parties, associated entities or other third parties and entities that undertake campaign activities are treated differently by the law, have different interactions with the

³⁸ Mr Tony Nutt, Federal Director of the Liberal Party of Australia, *Committee Hansard*, Canberra, 15 February 2017, p. 28.

commission and have different rights and responsibilities. I think what we are grasping at here is that it is not as simple as simply enforcing one rule for all, because not every actor is engaging in the system from the same position, so the rules that apply to them obviously need to be practical and applicable.³⁹

- 3.67 Mr Jonathan Hawkes from the MCA commented that advocacy groups were undertaking what appeared to be political activities without being covered by the current disclosure requirements:

It is a complex area, and obviously there are different parts of legislation that cover different parts of their activity. I think there probably needs to be a definition or an improved definition of what an electoral matter or electoral activity is under the Commonwealth Electoral Act. I think that would help identify what is a political activity that needs to be disclosed and what these groups are undertaking which they claim are not political activities. I think there needs to be some further transparency in the Commonwealth Electoral Act in that regard.⁴⁰

... there are certainly examples of activity and materials either during or before elections that could be considered election material. There is a very grey area around whether that has to be authorised or not, because essentially the public want to know who is doing it, who is behind it, who is carrying it out and for what reason. I think anything that can clarify that is very worthwhile. Again, you can assess that against whether it is political activity or not. That is very important in terms of trust in the system, and that goes to donations and the source of donations as well.⁴¹

- 3.68 The Committee supports a level playing field which ensures all participants are included and opportunities to circumvent the intent of regulations banning foreign donations are effectively managed by focusing on the electoral activity being undertaken rather than the status of the participant.

³⁹ Mr Paul Erickson, Assistant National Secretary, Australian Labor Party, *Committee Hansard*, Canberra, 15 February 2017, p. 7.

⁴⁰ Mr Jonathan Hawkes, Director of Public Affairs, Minerals Council of Australia, *Committee Hansard*, Canberra, 16 February 2017, p. 10.

⁴¹ Mr Jonathan Hawkes, Director of Public Affairs, Minerals Council of Australia, *Committee Hansard*, Canberra, 16 February 2017, p. 11.

Principle 4 – Compliance

3.69 Compliance in an effective political donations regime involves monitoring to ensure the requirements are met, coupled with appropriate and proportionate sanctions for non-compliance.

3.70 Mr Erickson, ALP commented on the need to consider managing non-compliance and circumvention in reforms:

...a necessary corollary of the approach that we are advocating would be that the parliament would need to take a very good look at whether any additional legislation or regulation would be required to ensure that the law contemplates scenarios where foreign money is brought into the country via third parties that operate within Australia and are used, essentially, to mask a gift of foreign property.⁴²

Our view would be that it is very important, in order for the public to have confidence in our political system, for there to be transparency, and the disclosure regime essentially seeks to provide that transparency. The disclosure regime is then administered and enforced by the AEC. One of the issues with the two categories of donor or gift that, we are advocating, require attention and prohibition—those being donations of foreign property and anonymous gifts—is that, by definition, donations of foreign property coming from what I think Mr Buchholz described earlier as large foreign bodies are beyond the remit of the commission to enforce the disclosure regime, so in a sense they pose a direct challenge to the settled approach to regulating private money in politics.⁴³

3.71 While acknowledging the risks around foreign donations and the need for reform, Mr Nutt, LP urged caution against imposing a disproportionate compliance burden on donors and participants in the interests of addressing these risks, and commented:

When it comes to compliance, it is very important that we do not impose excessive new obligations on the vast majority of donors and other

⁴² Mr Paul Erickson, Assistant National Secretary of the Australian Labor Party, *Committee Hansard*, Canberra, 15 February 2017, p. 3.

⁴³ Mr Paul Erickson, Assistant National Secretary, Australian Labor Party, *Committee Hansard*, Canberra, 15 February 2017, p. 4.

participants in the political system who are not now and will never be captured by foreign prohibitions, and whose rights to participate should not be excessively burdened and their opportunities to contribute inhibited by a huge regime designed to identify and prevent a small number of cases. As always, the compliance needs to be proportionate and needs to be sensible, and a combination of some kind of declaration and AEC compliance would deal with those matters.⁴⁴

- 3.72 The Committee supports a sensible, proportionate regulation response to the risk of foreigners influencing the Australian political process, via a ban on appropriately defined foreign donations.

Recommendations

Recommendation 1

- 3.73 The Joint Standing Committee on Electoral Matters recommends that any donation reform of the *Commonwealth Electoral Act 1918* be in accordance with Australia's sovereign interests.

Recommendation 2

- 3.74 The Joint Standing Committee on Electoral Matters recommends that any donation reform of the *Commonwealth Electoral Act 1918* be consistent with the four principles of transparency, clarity, consistency and compliance as identified by the Committee in this interim report.

Recommendation 3

- 3.75 The Joint Standing Committee on Electoral Matters recommends a prohibition on donations from foreign citizens and foreign entities to Australian registered political parties, associated entities and third parties. This ban would not apply to dual Australian citizens either in Australia or overseas, or to non-Australian permanent residents in Australia.

⁴⁴ Mr Tony Nutt, Federal Director of the Liberal Party of Australia, *Committee Hansard*, Canberra, 15 February 2017, p. 26.

Recommendation 4

- 3.76** The committee recommends that the Joint Standing Committee on Electoral Matters, in its wider inquiry into donations and disclosure, further examines the requirement to extend a foreign donations ban to all other political actors. The key issue to be considered is how to prevent foreign funds being channelled through organisations engaging in political activities and who are not subject to regulation under the *Commonwealth Electoral Act 1918*. This new inquiry would also examine related issues that have arisen in this inquiry which are outside the current terms of reference, including tax deductibility for gifts.

Recommendation 5

- 3.77** The Joint Standing Committee on Electoral Matters recommends that the penalties in relation to offences in the *Commonwealth Electoral Act 1918* are significantly strengthened to include stricter penalties for non-compliance.

Senator Linda Reynolds CSC
Chair

Dissenting Report 1 - Senator David Leyonhjelm

Senator David Leyonhjelm, Leader of the Liberal Democratic Party, dissents from recommendation 3, which proposes a ban on foreign donations.

He endorses recommendations 1, 2 and 4 of the majority report. He has no view on recommendation 5.

Senator Leyonhjelm believes foreign donations should only be regulated if there is a problem specific to foreign donations, if the regulation would solve the problem, if the costs of the regulation don't outweigh the benefits, and if no other solution does a better job.

The Committee heard no evidence to support the specific prohibition of foreign donations.

1. The committee has not established a problem specific to foreign donations

The Committee recommends banning foreign donations because of 'ongoing community concern that there is potential for foreign actors to use donations to influence domestic policy'. However, no evidence was submitted to the Committee to indicate that such a concern is widely held. The Committee may be conflating concern about Senator Dastyari using a foreign source to pay a private bill with the separate issue of foreign donations to political parties.

Even if there were widespread community concern about foreign donors exerting influence, imagining mischief does not make it a reality.

No witness cited an instance where foreign players have used donations to influence domestic policy.

No witness outlined how foreign donations could influence domestic policy.

Foreign donations are a negligible component of funding for Australian political activity.

No reasoning was provided to suggest that foreign donations could be problematic in the future where they have not been in the past.

Witnesses and submitters left numerous gaps in the argument to ban foreign donations, and the committee has not ventured to fill those gaps.

a. Whether donations could influence domestic policy

Several witnesses argued that a substantial foreign donation may have a detrimental effect on Australia's democracy, were it to occur. However, no witness was able to indicate how this effect might be manifested. Apart from assertions that major donors secure privileged access to senior members of the government and opposition, no witness could point to specific benefits that a donor might receive.

Whether such access would be sufficient to influence government policy could not be answered.

Whether the same concerns apply to minor parties and others which are never likely to form government was not considered.

The committee did not explore the distinction between a foreigner donating to a party so as to amplify the party's longstanding and strongly-held policies, and a foreigner donating to a party in an attempt to change the party's policies.

The former motivation may be the predominant one, and may be of little concern to the Australian community. Many Australians care about American politics and may consider it acceptable to have donated to either the Hillary Clinton or Donald

Trump campaigns. If this is the case, they may also consider it acceptable for a foreigner to take a similar, arms-length interest in Australian politics.

b. Whether foreign donations are non-negligible

Data on the level of foreign donations is difficult to obtain. The AEC does not seek to identify foreign donors either in declarations by parties and candidates, or in its auditing processes.

The sole submission to the Inquiry that sought to quantify the level of foreign donations claimed they represent a very small proportion of overall donations.

TABLE 1: Foreign-sourced donations to Australian political parties, 1998–99 to 2014–15¹

Financial year	Dollars	Percentage of total donations
1998-99 (1998 Federal Election)	15,250	0.03
2001-02 (2001 Federal Election)	163,234	0.38
2004-05 (2004 Federal Election)	1,366,344	2.61
2007-08 (2007 Federal Election)	1,705,521	2.37
2010-11 (2010 Federal Election)	958,548	1.38
2013-14 (2013 Federal Election)	5,119,430	6.13

Sources: Australian Electoral Commission annual returns; authors' calculations

This submission argues:

At the 2013 federal election, foreign-sourced donations constituted more than 6 per cent of all donations (calculated using returns for the 2013–14 financial year).

¹ 'Taking Xenophobia Out Of The Political Donation Debate', *Inside Story*, Joo-Cheong Tham and Malcolm Anderson, 20 October 2016.

In the previous financial year – thanks to a large transfer of \$3.6 million from Zhongfu Investment Group to the Labor Party’s Victorian branch – foreign donations were a tad under 10 per cent. The PRC and Hong Kong are the main countries of origin for these donations: in fact, over the past sixteen financial years, over 83 per cent of all foreign-sourced donations were sourced from those two places. The next biggest contributor was Britain, which accounted for just over 10 per cent of all foreign-sourced donations.

Both the major parties benefit from foreign-sourced donations, but Labor received nearly 60 per cent of the total from 1998–99 to 2014–15, with the Coalition receiving nearly 40 per cent. Of donations from China and Hong Kong, just over 68 per cent went to Labor.

These figures suggest there is substantial year to year fluctuation in foreign donations but no clear upward trend, as other witnesses have asserted.

Furthermore, in the context of combined donations and public funding, their contribution is miniscule.

Before any ban on foreign donations is considered, it would be logical to require parties and candidates to at least provide information on foreign donations to the AEC.

c. Whether the unenforceability of legal obligations on foreign donors poses a problem

Some witnesses suggested that foreign donations should be banned because legal obligations on foreign donors cannot be enforced. However, the only legal obligation imposed on any donor currently (if above the disclosure threshold) is to disclose their name, address, the recipient parties, and the total donations.

No evidence was provided of any instance where a foreign donor has failed to comply with disclosure obligations. The Electoral Commission learns of these money flows irrespective of foreign donor disclosures, as parties need to disclose this information themselves.

Even if the unenforceability of obligations on foreign donors was deemed to be a problem, this could be solved by prohibiting a party from accepting foreign donations if ever the donor fails to provide the relevant information.

2. Any problem with donations does not relate specifically to foreign donations

Some witnesses cast foreign donations as a problem because donations should not be made by those who do not have the right to directly participate in Australian elections. If this characterisation of the problem were correct, a more relevant solution would be to ban donations from all who are ineligible to vote, including corporations, not-for-profit organisations, children, adults who choose not to enrol, and prisoners. However, the High Court has ruled this is contrary to the Constitution on the grounds that the electoral process is relevant to these people as well as enrolled voters.

Witnesses who argued that foreign donors could influence domestic policy did not suggest that donations from a domestic source would be any less effective at influencing domestic policy. Their argument implies there is a threat to democracy from all donations, and the more relevant solution would be to ban them all.

By raising the possibility that donations facilitate access to senior members of the government and opposition, and by not distinguishing between access enjoyed by a donor and access enjoyed by a non donor, some witnesses implied that access is the key element in achieving favourable policy.

On this basis, any access to senior members of government and the opposition would be a problem, and the more relevant solution would be to limit all access to senior members of the government and opposition.

This argument relies on the assumption that those with access are infinitely persuasive, and that senior government members are incapable of resisting such persuasion. There is neither an empirical nor theoretical basis for this.

Some witnesses raised the spectre of a foreigner with millions of dollars donating large amounts in order to influence Australian politics. If this is a problem, it applies to the size of donations rather than the source. On that basis, the most relevant solution would be the capping of donations.

Some witnesses raised concerns about the possibility that foreign governments could make donations. This could be countered by specifically banning donations from foreign governments. It is noted that the risk of foreign governments funnelling donations via private entities into Australian politics would

nevertheless arise, irrespective of whether the ultimate donor to an Australian party was a domestic or foreign resident.

3. Banning foreign donations has not reduced political corruption elsewhere

Mr Samuel Jones, Program Officer for International IDEA, a group that monitors political transparency issues internationally, confirmed in evidence that many countries restrict or prohibit foreign donations.

However, he also acknowledged a lack of correlation between political corruption and regulation of foreign donations:

“there is a general picture which, maybe contrary to expectation, does not always show that those that regulate donations or political finance in general more have less corruption... some of the most highly regulated countries when it comes to both donations and political finance in general—former communist countries in Eastern Europe are generally very highly regulated; I would say some of them are over-regulated, but they generally have very high levels of corruption. In Scandinavia, the Nordic countries have been traditionally either completely unregulated—Sweden just had its first political finance bill in 2014, for the first time ever; before then, it was basically completely unregulated, and the same in Denmark, Norway and Finland, who just introduced regulations in the last few years, but there were very few problems when it came to political finance and corruption...”

Put simply, the evidence does not show that restricting foreign donations reduces corruption.

While there were a number of references by witnesses to the highly regulated donations regime in NSW, no witness was willing to argue that democracy in that state is less corrupt or otherwise any better for it.

4. Banning foreign donations has adverse consequences

While there is little sympathy for a foreigner who might be denied the ability to donate to Australian politics, it should be remembered that foreign donations benefit the Australians who receive them, including candidates and parties who are yet to break into parliament and who receive no public funding. Banning foreign donations would hurt these Australians, reducing their ability to have their voice heard and to make an impact on public life.

Most of those seeking to regulate or prohibit political donations prefer public funding of political parties. Support for increased public funding is inherent in arguments to restrict avenues for private donations.

However, the committee heard neither a theoretical argument for suggesting democracy is enhanced by public funding, nor empirical evidence confirming such an outcome is achieved.

Moreover, the committee failed to explore the non-level playing field involved in public funding, where a taxpayer's vote delivers public funding to their party of choice if that party receives four per cent or more of first preferences, but delivers no public funding if their party of choice receives less than four per cent of first preferences.

This consolidates power in the incumbent major parties. It is thus more detrimental to democracy than foreign donations. Banning foreign donations and increasing reliance on public funding will hurt democracy overall.

Some witnesses pointed out that any attempt to regulate foreign donations has the potential to inflict substantial unintended consequences on parties and candidates.

One problem is defining the meaning of a foreign donation. The Committee has considered two options - defining it as a donation of foreign property, which would mostly apply to donations originating from a foreign bank account, or defining it as originating from a foreign individual or entity.

The former definition has the potential to prevent donations by expatriate Australian citizens who have not retained a local bank account, but would not inhibit donations by foreigners temporarily resident in Australia or by local subsidiaries of foreign-owned companies.

The latter definition, defining a foreign donation as one originating from a foreign individual (excluding dual Australian citizens and permanent residents) or foreign entity, would bring into question the status of domestic subsidiaries of foreign-owned companies, and companies with mixed domestic and foreign ownership. The Committee did not address this question, but nonetheless favours this definition.

Compliance was also raised as a potential problem. Who would verify the status of a donor? If this was delegated to a party or candidate, by what mechanism could it

be achieved? Is it something that a single independent candidate could handle, or a micro-party run exclusively by volunteers?

Avoidance would also be an issue. What would prevent a foreign donor from utilising a domestic ally to make the donation?

While the Committee recommends that political parties, associated entities and currently regulated third parties should be covered by a foreign donations ban, the Committee has not arrived at a final view regarding how to extend the ban to all other political actors. If the ban only covers candidates, political parties, associated entities and currently regulated third parties, then businesses, industry bodies, unions, charities, universities, etc. may be able to campaign for particular electoral outcomes with the assistance of foreign donations. If the ban covered businesses, industry bodies, unions, charities, universities, etc., the ban would presumably need to be limited to allow foreign funding of the normal operations of these groups. This includes efforts to influence public opinion, such as efforts to build awareness and support for the group, and to promote the group's brand, products and goals. Defining such a limit would seem fraught with difficulty.

The committee has recommended banning foreign donations without specifying what this means and whether it could be implemented and enforced without generating costs in excess of any benefits. It is naïve and irresponsible to conclude that foreign donations should be banned before these issues are resolved.

5. If there were a problem, there are better solutions

Both domestic and foreign donations matter only if they have an impact on democracy. Since this is determined by voters, the only valid concern is to ensure voters are aware of donations, so they can take them into account when casting their vote.

If voters are indifferent to donations, either in general or in particular, voting outcomes will not be affected and the fact of the donation is irrelevant. If voters disapprove of any particular source or type of donations, they can take this into account when they vote.

It is supremely arrogant, and reflects nanny state thinking, for governments to assume voters are incapable of deciding for themselves whether a recipient of a donation deserves their support.

It is also inherently anti-democratic. If voters are assumed to lack the competence to form a judgement about foreign donations, it follows that they must also lack the competence to form a judgement about party policies generally.

What democracy requires is for voters to be adequately informed. This simply means that disclosure of donations should occur at an appropriate time prior to voters casting their vote. It is immaterial whether this is immediate/real time or not, provided it is in sufficient time for voters to take it into account when casting their vote.

The only regulation that would assist this is to prohibit donations made so close to the poll that they cannot be disclosed in time. This approach could apply irrespective of the source or disclosure threshold.

6. Conclusion

Prohibition of foreign donations is a solution in search of a problem. There is no reason to believe regulation will achieve anything of benefit to Australian democracy, while there are grounds to believe it will have unintended consequences and harm democracy.

7. Recommendations

- 1 That the Government regulate foreign donations the same as domestic donations.**
- 2 That the AEC have the power to require the location of the donor to be provided in disclosure returns.**
- 3 That it be a requirement for all donations (above an agreed threshold) to be disclosed to voters prior to a relevant ballot.**
- 4 That donations made so close to a ballot that voters cannot be made aware of them before voting be prohibited.**

Senator David Leyonhjelm

Dissenting Report 2 - Labor Members and Senators

Labor members of the Committee believe Australian elections should be determined by the Australian people.

Labor members also recognise legitimate concerns about the interference of foreign actors in the electoral affairs of sovereign nations; a concern which features heavily in contemporary political discourse, both in Australia and around the world.

Labor members therefore agree that foreign citizens and foreign entities should be banned from making donations to Australian registered political parties and that this ban should be extended to the associated entities of registered political parties, within the meaning of section 287(1) of the *Commonwealth Electoral Act* (Electoral Act). This is a proposal which has been, in effect, before the Parliament for nearly eight years. The case for this change has long been made out, and recent examples of interference in other electoral systems make action urgent. We note that no argument has been advanced in opposition to this proposal, nor evidence adduced contrary to the prohibition being given effect to through the mechanism of banning donations of foreign property.

However, Labor members of the Committee cannot support the Coalition proposal to extend the fundraising and financial disclosure obligations imposed by the Electoral Act to capture all third parties that are in any way involved in public campaigning.

This proposal would represent a dramatic extension of scope of the current regulatory scheme under the Act.

We acknowledge that concerns have been raised in this regard but there is scant evidence before the Committee to support any such proposal. Indeed, the rationale for it is unclear. When it comes to foreign influence on political parties, the risk to our system of government is clearly identifiable. This simply isn't so when it comes to applying the same framework to groups whose electoral involvement may well be incidental. This is far from a level playing field.

Labor members believe this Committee has more work to do. The proper course of action would be to properly consider any further prohibitions or restrictions through a further inquiry. This would enable all considerations to be balanced, and the case for change to be tested: weighing the concerns apparently motivating Coalition members of this Committee against the interests of the full range of affected parties, considering legal and constitutional questions which might be applicable, and recognising the critical importance of an active civil society to Australian democracy.

There are, of course, other proposals to reform political donations and disclosures which are relevant to this matter. We believe these should be considered in working through a response to those concerns.

The Coalition proposal has a very wide ambit and Labor members of the Committee are concerned that it may lead to unfortunate, presumably unintended, consequences in terms of imposing wide-ranging restrictions on the capacity of not-for-profit organisations to draw attention to their causes. These causes could very well cover the field of Australian public discourse - from overseas aid, to indigenous advancement. What sort of government would seek to shut down, or monopolise, these conversations?

This is in circumstances where many such organisations would have had no idea that significant findings affecting them found have been made in this interim report.

Labor members have worked hard to deliver a consensus report and have been willing to compromise to do so – in keeping with the bipartisan practice of JSCEM and the importance of rebuilding trust and confidence in the operation of our political institutions. This challenge should go beyond partisanship.

We have not taken this step, of providing a dissenting report, lightly. But Labor will always defend the key tenets of Australian democracy. Labor believes in a robust civil society, which can speak truth to power and hold governments, parties and politicians to account. We do not believe that politics should be the sole preserve of politicians.

Today, too many Australians have little faith in politics, parties or our democratic institutions. We are committed to restoring faith: starting with a straightforward proposition, to prevent foreign interests influencing Australian electoral politics.

This is an important step, but there is more to be done. And it should be done, and seen to be done, properly.

Mr Andrew Giles MP – Deputy Chair

Senator Chris Ketter

Senator Carol Brown

Mr Milton Dick MP

Dissenting Report 3 - The Australian Greens

Introduction

Electoral funding reform at the federal level is long overdue. Below, the Greens set out our vision for how the federal government should restore public confidence in the democratic process. Our suggested reforms are far reaching. They include strict caps or bans on donations and expenditure. We recognise that such reforms will most likely be introduced gradually. Changes should address greater transparency of political donations and election expenditure.

While we welcome the ban on political parties and their associated entities from accepting overseas donations, a concerning aspect of the Second Interim Report of JSCEM is the recommendation that this should also apply permanently to organisations which are not registered political parties or their associated entities.

If such a law was enacted it would drastically curtail the role of civil society in Australia. This is a highly partisan approach by the Liberal-National parties that would disadvantage some community groups working for the social good while not capturing groups such as the Minerals Council of Australia which is funded by large membership fees, which are not technically donations, from companies that are completely or largely foreign owned.

A more responsible approach would be to ban political parties and their associated entities from accepting donations from overseas citizens and overseas entities, and

banning third parties from using donations from overseas citizens and overseas entities for election campaigning once the writs for an election are issued.

While a ban on foreign donations to political parties is welcome, it is minor in comparison to the excessive donations from domestic sources which damage the credibility of our democracy.

The Greens vision for electoral funding

(The issue of overseas donations is dealt with in the final section of this report.)

The Australian Greens believe that changes to the rules governing overseas property or money from overseas sources donated for the purpose of election campaigning in Australia should be part of a suite of changes to Australia's electoral funding laws. These reforms should include caps on election expenditure, caps and bans on political donations and speedy and transparent public disclosure of donations to allow voters to have access to full information about the source of funding of political parties.

Recommendation 1

- **A ban on donations from for profit organisations.**
- **A low cap on the amount of money individuals and not-for-profit organisations can donate each year to a political party or candidates.**
- **Modest caps on election expenditure by political parties, candidates and third parties.**
- **Adequate public funding for political parties and independents including both funding for election campaigning and for administrative work of the party.**
- **Continuous disclosure of all political donations above \$500, within two weeks of all donations being made.**

Interim steps towards full reform

While the Australian Greens support comprehensive reforms to the electoral funding system there are a number of interim steps that should be implemented to increase transparency and public trust in the electoral funding system.

Common funding rules for Commonwealth, State and territory elections

Electoral funding rules vary enormously between the Commonwealth and the various states and territories. This is a serious issue when it comes to the disclosure of donations and expenditure. Efforts at a state level to regulate money in politics have been undermined by the ability of donors to funnel money into party federal election accounts which are not under the jurisdiction of state election funding laws.

Recommendation 2

- **The federal government to initiate discussions between states and the Commonwealth in regard to political donation disclosure thresholds, time periods for disclosures, and the definitions of donations and other incomes that must be disclosed with a view to developing uniform laws within two years.**

Detailed disclosure of electoral expenditure

Political parties are now required to provide an overall amount of expenditure by the party in their annual return to the Australian Electoral Commission, yet there is no requirement for details on how parties spend their campaign funds. More information will assist the assessment of appropriate levels of expenditure caps.

Recommendation 3

- **Political parties be required to disclose how much was spent during the election period on each type of expenditure, such as wages, polling, advertising and printing.**

Donation disclosure

Transparency of the political process was set back enormously when the disclosure threshold was raised to \$10,000 indexed to the Consumer Price Index. A much lower threshold is needed and the loopholes that allow donation splitting between related political parties removed. These measures will help restore public confidence in the political process.

Recommendation 4

- **Reduce the threshold for the disclosure of political donations to \$500 with no indexation and all related political parties to be treated as one body for the purpose of the disclosure level.**

Third parties and elections

The Second Interim Report of JSCEM recommends that the proposed ban on overseas donations be extended beyond registered political parties. The analysis presented in paragraphs 2.26 to 2.34 on pages 13-15 of the Report make a number of assumptions about third parties that are not supported by the evidence presented to the Inquiry. Paragraph 2.26 states that “particular groups are not operating on a level playing field”.

This assertion is not explained and it is not acknowledged that responsibility for “the playing field” lies with the federal government and not with the third parties that engage in election activities.

The partisan nature of the Report is revealed in relying on evidence from the Minerals Council of Australia that sets out a number of examples that the Report labels as “partisan political advocacy”. The Report fails to analyse the MCA’s own reliance on funding from overseas sources. As of February 2017 the MCA had 47 full members. Of these:

- 20 are foreign owned (43 per cent)
- Three are at least partially foreign owned (e.g. Rio Tinto and BHP)
- 24 are Australia-based companies (51 per cent). Of the Australia-based companies, three quarters (18) are ASX listed and therefore may be owned by shareholders from anywhere in the world.

It is reasonable to conclude that a significant proportion of the MCA's revenue is sourced and probably controlled from overseas.

Despite the fact that the MCA is an active political third party none of its overseas sourced funds would be curtailed under the JSCEM recommendations if adopted.

A ban on overseas donations to third parties would drastically curtail the role of civil society in Australia and would make the playing field less rather than more equal.

International philanthropy should not be blocked from funding projects or campaigns in Australia or projects run by Australian organisations.

Political campaigning takes many forms and completely blocking the receipt and use of overseas donations by third parties is anti-democratic. Australian non-government organisations using overseas funding make a huge contribution to our society through a range of programs including projects for Aboriginal and Torres Strait Islander peoples, health services, marine conservation and other environmental issues.

Third parties should not be subjected to the same laws that apply to political parties. It is only the latter that can have representatives elected to parliament and therefore be in a position to directly influence the workings and decisions of government. A ban on third parties using overseas donations for election campaigning during an election period would be an appropriate compromise.

Recommendation 5

- **Political parties and their associated entities should be banned from accepting donations from overseas citizens and overseas entities. Organisations which are not registered political parties or associated entities to be banned from using donations from overseas citizens and overseas entities for election campaigning once the writs for an election are issued.**

Senator Lee Rhiannon