

ACTU

ACTU SUBMISSION ON THE ELECTORAL REFORM GREEN PAPER: DONATIONS, FUNDING AND EXPENDITURE

March 2009

Introduction

1. The ACTU welcomes the opportunity to make a brief submission in response to the Australian Government's *Electoral Reform Green Paper: Donations, Funding and Expenditure*.
2. The ACTU supports robust and fair electoral funding and disclosure laws and we welcome the Government's commitment to ensuring Australia's electoral funding and disclosure system promotes fairness, transparency and political integrity.
3. We are concerned, however, that the current disclosure regime is unworkable. In this brief submission, we identify two areas of the existing regime that are particularly problematic: the 'associated entities' and third party 'political expenditure' provisions. We believe Australia's disclosure regime should be reformed so as to achieve an appropriate balance between mandating disclosure of electoral expenditure and ensuring independent third parties maintain the capacity to engage in social dialogue and advocate on issues of particular concern.

Associated entities

4. Section 287 of the *Commonwealth Electoral Act 1918* (the Electoral Act) defines 'associated entities' as entities that are controlled by a registered political party, that operate wholly or to a significant extent for the benefit of a registered political party, or that are, or on whose behalf other persons are, financial members of a registered political party or hold, or on whose behalf other persons hold, voting rights in a registered political party. Under the Electoral Act, 'associated entities' are required to file annual disclosure returns with the Australian Electoral Commission (AEC).¹
5. The current definition of 'associated entity' was introduced by the former Coalition Government through the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006*. This Act introduced a raft of partisan and undesirable

¹ Section 314AB of the Electoral Act.

amendments to Australia's electoral system and was widely condemned by the Australian Labor Party, the Australian Democrats and the Greens.²

6. Prior to 2006, subsection 287(1) of the Electoral Act defined an 'associated entity' as an entity that:

(a) is controlled by one or more registered political parties; or

(b) operates wholly or to a significant extent for the benefit of one or more registered political parties.

7. The 2006 Act broadened the definition of associated entities so as to include entities that are financial members or that have voting rights in a registered party including those whose financial membership or voting rights are held on their behalf by others. It was widely recognised that this amendment was aimed not at improving disclosure but at creating additional difficulties for trade unions.³

8. We note that Dr Joo Cheong Tham from Melbourne University described the proposed 'associated entities' amendment as 'both over and under inclusive'. He explained:

It is over inclusive in that it imposes annual reporting obligations on organisations that do not have significant influence over the party's affairs.

It is under-inclusive because significant influence over a party's position is not confined to financial membership and voting rights. It can result from other forms of affiliation. For instance, sponsorship of the Millennium Forum entitles a company to regular access to key Liberal Party officials. This clearly allows it to influence the party's position.

² See, eg, Commonwealth of Australia, Parliamentary Debates, Senate, 16 June 2006.

³ See, eg, Senator Andrew Murray, Hansard, Chamber, Friday, 16 June 2006, 6 and Dr Joo-Cheong Tham, Submission to the Senate Finance and Public Administration Legislation Committee's *Inquiry into the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2006*, 23 February 2006.

The restricted scope of the proposed change highlights how it fails on the count of political equality. It discriminates against parties that have organisations as its members. The target of such discrimination is clear: of the main parties, only the ALP allows organisations to become members.

It also discriminates against trade unions, organisations that politically participate through formal affiliation to the Labor Party. At the same time, it exempts corporate donors—entities that have no claim to democratic representation—which tend to wield influence through less formal means.⁴

9. The ACTU notes that trade unions are already subject to specific legislation requiring them to present audited accounts every year. If trade unions make donations to candidates or political parties above the threshold amount and/or engage in ‘political expenditure’, they are subject to relevant provisions in the Electoral Act. There is no need for yet another layer of disclosure above and beyond these measures.
10. The ACTU believes that the ‘associated entities’ provisions, as they are currently drafted, are partisan, unnecessary and should be removed.

Third party participation

11. The ACTU recognises that non-party, non-candidate participants are playing an increasing role in electoral contests. We believe these organisations play a legitimate and important role in contributing to public debate, expressing their views on specific issues and advocating for change.
12. Sub-section 314AEB(1) of the Electoral Act requires individuals and organisations that incur ‘political expenditure’ above the disclosure threshold during a financial year to lodge an annual return documenting the total political expenditure and identifying the source and value of donations received from the same source that exceed the threshold where those donations were used to fund political expenditure.

⁴ Dr Joo-Cheong Tham, Submission to the Senate Finance and Public Administration Legislation Committee’s *Inquiry into the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2006*, 23 February 2006.

13. 'Political expenditure' is defined in subsection 314AEB of the Electoral Act as follows:

(1) A person must provide a return for a financial year in accordance with this section if:

(a) the person incurred expenditure for any of the following purposes during the year, by or with his or her own authority:

- (i) the public expression of views on a political party, a candidate in an election or a member of the House of Representatives or the Senate by any means;
- (ii) the public expression of views on an issue in an election by any means;
- (iii) the printing, production, publication or distribution of any material (not being material referred to in subparagraph (i) or (ii)) that is required under section 328 or 328A to include a name, address or place of business;
- (iv) the 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*;
- (v) the carrying out of an opinion poll, or other research, relating to an election or the voting intentions of electors; and ...

14. The ACTU recognises the public policy rationale for imposing disclosure requirements on third parties that incur electoral expenditure. These obligations help ensure that the voting public knows where political parties get their financial support and thus can make informed decisions in an election.

15. However, we have concerns with the existing definition of ‘political expenditure’. As these provisions are currently drafted and interpreted by the AEC, they are difficult to understand and difficult to apply in practice. This is particularly the case for organisations, such as trade unions and community groups, which, as a core function, advocate for social change and seek to influence the direction of public policy. It is virtually impossible for such organisations to determine the line between expenditure incurred as a legitimate part of an organisation’s everyday functions and ‘political expenditure’.

16. During the last election period, the ACTU and affiliates found it very difficult to distinguish those elements of our campaign that related to policy debate/advocacy from those elements of our campaign that constituted political or electoral expenditure. We sought advice from the AEC several times and found that the AEC took a very broad interpretation of what constituted election material. To further complicate matters, when we approached the AEC for assistance on several different occasions, we received conflicting advice.

17. The following examples illustrate just some of the difficulties the ACTU and affiliates encountered when seeking to comply with sub-section 314AEB(1)(a)(ii), under which a person must provide a return detailing expenditure incurred for ‘the public expression of views on an issue in an election by any means’:

- When precisely does a subject becomes ‘an issue in an election’? During the last election period, one of our affiliates produced material promoting increased public funding of public schools. Was the level of public funding for schools an issue in the last election? At the time, media commentators were widely observing that education was *not* an election issue. So does this mean that this expenditure need not be reported?
- What if the purpose of expenditure is not to express views ‘on an issue in an election’ but a non-partisan attempt to generate public interest and attention around a particular issue of concern: that is, expenditure seeking to make a

particular issue an issue in an election? Does this type of expenditure need to be reported?

- What precisely does the phrase ‘in an election’ mean? Is this just expenditure incurred after an election has been called? This is not clear from the statutory provisions.
- What if a person produces material that falls within 314AEB(1)(a)(ii) or (iii), but this material forms part of a broader set of materials that does not fall within the subsection (e.g. an article within a union journal or newsletter)? Do we report the cost of production for the entire material (e.g. the journal or newsletter) or do we apportion a percentage of the cost, based on the percentage of relevant material (e.g. just the article)?

18. The ACTU would welcome reforms that clarify which activities constitute ‘political expenditure’ and thus must be disclosed and which activities are not subject to the disclosure requirements. Any amendments to the existing definition should ensure that disclosure obligations do not inhibit the capacity of third parties such as trade unions and community groups to fulfill their important social functions.

Conclusion

19. The ACTU welcomes the Government’s commitment to ensuring Australia’s electoral funding and disclosure system promotes fairness, transparency and political integrity.

20. The ACTU believes that there are a number of areas of the existing Electoral Act which warrant reform: in particular, those provisions dealing with ‘associated entities’ and third party ‘political expenditure’.

21. The ACTU understands that this first Green Paper is intended to open debate and that a second Green Paper and proposed legislative reforms will follow in due course. We look forward to engaging in further consultations with Government on these issues.