Electoral Act Review Interim Report

Tasmanian Greens' Submission - Addendum

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I write on behalf of the Tasmanian Greens to present an addendum to our response to the Interim Report of the Electoral Act review in light of the High Court decision in relation to section 29(10) of the *Electoral Funding Act 2018 (NSW)*.

We will also take the opportunity to, more broadly, discuss our recommendations in regards to the implied freedom of political communication on governmental and political matters, implied and protected by the Australian *Constitution*.

The matters canvassed in our submission are political expenditure caps, donation caps, regulation of third parties and banning donations for certain entities.

The implied freedom of political communication set out in *Lange v Australian Broadcasting Corporation* is not a particularly difficult test.

If a law does burden freedom of communication about government or political matters, the questions becomes -

"Is the law reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government…"[1]

In addition to being a legitimate purpose it must be considered whether the burden imposed is justified, meaning reasonably appropriate and adapted, or proportionate in the means chosen to advance that purpose.

Expenditure Caps

Political expenditure caps and donation caps have yet to be directly tested in the High Court. Constitutional law expert Professor Anne Twomey has argued that such laws would *"…most likely survive, if challenged…"*[2]

[1] Leanne Griffiths, The Implied Freedom Of Political Communication: The State Of The Law Post Coleman And Mulholland, James Cook University Law Review, Volume 12, 2005, pp. 94-95.

It is strongly argued that avoiding the risk or perception of corruption and undue influence as well as enhancing the prospects of a level playing field would counter balance burdens on political communication.

A threat of a High Court challenge on this matter is no reason for inaction, particularly given that expenditure and donation caps exist unassailed in jurisdictions across the country, and in the case of expenditure caps, in Tasmania as well.

Third Parties

In relation to regulation of third parties, our position is that a regulatory regime governing third parties should as far as is practicable reflect the same rules governing political candidates. For the sake of clarity, our position is that expenditure caps on third parties should be the same as our proposed expenditure cap for political parties. This would address one of the key considerations in the High Court decision in relation to section 29(10) of the *Electoral Funding Act 2018 (NSW).*

Further to this, the imposition of the same set of rules (including expenditure caps) as political candidates on third parties would serve the legitimate end of limiting message saturation and disproportionately presenting the views of a select group of people. This is not only compatible with the maintenance of the Constitutionally prescribed system of representative and responsible government, but actively contributes towards such an end.

In terms of whether or not the burden is justified, imposing the same rules on third parties as on political parties is an appropriate and proportionate means of pursuing the purpose as it provides for a level playing field.

Prohibitions on Certain Donations

On the matter of banning certain donations, our principal position is that all corporate donations should be banned. This serves two purposes; first by limiting the ability of vested interests to inappropriately influence policy, and secondly, by ensuring that corporate interests are not able to wield more influence than other individuals. Both are legitimate ends that are compatible with the maintenance of the Constitutionally prescribed system of representative and responsible government.

Corporate directors or officers generally must act in the best interests of the corporation, which has been interpreted to mean the shareholders as a collective.[3] In essence, as a corporate director or officer will not be aware of the broader interests or views of shareholders, in this context it is the future returns to shareholders that are the consideration. A corporation is unlikely to make political donations unless they expect the long term financial gain to outweigh the donation.

This rationale is further evidenced by the sheer number of corporate donors that hedge their bets by donating to both major parties, a practice unlikely to occur to any significant extent

[2] Lenny Roth, *The High Court's decision in the electoral funding law case*, NSW Parliamentary Research Service, 2014, *Page 5.*

[3] Patricia Dermansky, *Should Australia Replace Section 181 Of the Corporations Act 2001 (Cth) With Wording Similar to Section 172 of the companies Act 2006 (UK)?*, page 7.

in individual donations, and which common sense dictates can only be in an attempt to influence policy or to curry favour with major parties. This is in essence buying preferential or special treatment.

The limitation on political communication can be justified as there is a clear rationale, limiting the purchase of policy or favourable treatment (corruption), it is universal in scope and not arbitrary or selective in application as is captures all corporate interests, and it does not restrict any individual.

In terms of the relative burden on political communication and whether that burden is justified, corporate officers and shareholders will still be able to express a political view - one way or another - through donations. As such, the law would not make any individual less capable of expressing a political view than any other individual. The universal nature of the ban and the fact that individuals would not be hampered in their ability to donate relative to other individuals would contribute to a level playing field.

It is arguable that by forgoing corporate donations, the money will be returned to shareholders who will each individually be able to express a political view through donations, rather than a corporate officer making an executive decision on behalf of the best interests of the shareholders as a collective. In this sense, a ban on corporate donations also contributes to enhancing freedom of political communication by encouraging a broader diversity of views to be represented.

Corporations have other means to influence the political process not available to ordinary citizens, for example access to the media to comment on proposed policy. In this sense, even if they are banned from donating, they still have more access to political speech than the average person.

We will be brief in regard to a specific ban on donations from property developers, tobacco, liquor and gaming industries as this is a secondary position. Firstly, all of these specific prohibitions currently exist in New South Wales. Of these, the ban on donations from property developers has been unsuccessfully challenged.

Prohibitions on political donations from tobacco, liquor and gaming interests can all be strongly argued from a standpoint of both protecting public health and limiting corruption. These are both legitimate ends, compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

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On behalf of the Tasmanian Greens