AUSTRALIAN CONSERVATION FOUNDATION

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Joint Standing Committee on Electoral Matters
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25 January 2018

Submission to Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

SUMMARY:

- This Bill lands at a time of concerted attack on the right of Australian charities and non-profit organisations to advocate in Australia.
- The Bill fundamentally redefines non-partisan, independent, issues-based advocacy as political campaigning and in doing so subjects Australian charities to many of the restrictions in the Electoral Act designed and intended for political parties.
- Immediately, many groups will face a prohibition on receiving international philanthropic funding.
- Further, the Bill builds infrastructure into the Electoral Act which would allow future amendments to further restrict advocacy of groups, reforms that should be expected imminently given the government's track record in silencing advocacy.
- The Bill will create a 'chilling effect' on political expression.
- There has been no consultation on the Bill and no Regulatory Impact Statement.
- The Committee should look to the impacts of recently reformed electoral laws in Queensland and South Australia for how the best intentions to create strict election laws results in civil society voices being silenced.

RECOMMENDATION:

Consultation has been so poor and the Bill is so complex that it cannot proceed in its current form. The Bill must be redrafted after extensive consultation with those impacted.

Thank you for the opportunity to provide a submission in relation to the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017.

The Australian Conservation Foundation (ACF) is Australia's oldest national environmental organisation, founded in the mid-1960s with the support of eminent Australians, the Australian community and the Australian government. Since that time, ACF has committed itself to promoting conservation causes throughout Australia and to the promotion of sustainable living, and has been honoured and privileged to be supported in its activities by eminent persons such as HRH Prince Philip, Malcolm Fraser, Gough Whitlam and Sir Garfield Barwick.

ACF has been, since its creation some 50 years ago, the leading national advocate for the environment. ACF protects, restores and sustains Australia's environment through research, consultation, education, partnerships and advocacy. ACF is strictly non-partisan and we are proud of our political independence. Over the past 50 years our independent advocacy has helped drive extraordinary commitments from governments of all political persuasions as well as from business and communities.

ACF is a charity registered with the Australian Charities and Not-for-profits Commission (ACNC) and has been a deductible gift recipient (DGR) since 1966. ACF is governed by a Board and guided by a group of democratically elected Councillors. ACF is supported by approximately 12,000 members, 54,000 donors and nearly 500,000 active supporters.

Comment on Bill context

According to the Explanatory Memorandum the purpose of the Bill is to improve the integrity and fairness (real and perceived) of Australia's electoral system and in particular to stamp out foreign attempts to influence elections in Australia. It states that these measures are critical to peaceful democratic government and to ensure public confidence in Australia's political processes.

ACF is concerned that in attempting to achieve this, the Bill fundamentally redefines non-partisan, independent, issues-based advocacy as political campaigning. Further, it subjects groups that do this work to many of the restrictions in the Electoral Act designed and intended (and appropriate) for political parties. Some groups will be banned from receiving foreign philanthropic donations for their work. For many groups who rely on this income, this will threaten their existence. The Bill builds infrastructure in to the Electoral Act which would allow future amendments to further restrict the advocacy of these groups, such as via donation caps, caps on expenditure, or even more onerous reporting.

It is critical to note that this Bill lands at a time of concerted attack on the right of Australian charities and non-profit organisations (collectively called 'civil society organisations' in this submission) to advocate in Australia. In the last few years the ability of our organisations to engage in activism and advocacy work has been threatened by new laws and practices which are slowly but surely eroding the rights of charities to pursue their mission.

Whether through gag clauses in government funding agreements, defunding, or threats to remove deductible gift recipient status, the message to civil society is clear: if you speak up, your future as an organisation is under threat.

Sadly, while this Bill is dressed up as an attempt to improve the integrity of democracy in Australia, this Bill is in fact the next chapter in these attacks.

ACF supports transparent, accountable, free and fair elections

ACF strongly supports moves to fix the broken federal donations regime including: effective transparency of political funding, caps on election spending by political parties, caps on political donations to political parties, a fair system of public funding of political parties and candidates, a ban on overseas-sourced donations and donations from foreign governments to political parties and more effective regulation of lobbyists.

ACF does not support reform which significantly harms the ability of charities and public interest organisations to speak out about the work they do, whether it's protecting the environment, helping the disadvantaged or asking for better human rights protections for all. It cannot support reform which delegitimises civil society groups by likening them to political party lobbyists.

Why the Bill must not proceed to become law

The Bill in its current form poses a significant threat to all charities engaging in issues based advocacy in the public interest. **The Bill does not merely make 'political actors' more transparent and accountable**. Unprecedented restrictions on commentary and advocacy on public issues by Australian charities and non-profit organisations are being proposed.

The Bill:

- Will mean that charities that spend over a modest threshold expressing views on certain matters of public interest will be required to register as "political campaigners" and will be treated, in many respects, as if they are political parties.
- "Political campaigners" will be required to submit a detailed annual return to the Australian Electoral Commission in the same way as political parties. The return must include detailed financial information, political affiliations of senior staff, personal information about donors and an auditor's report. This reporting obligation is in addition to existing and significant ACNC reporting obligations. The severe impacts on donor privacy are obvious, as are the impacts of red tape on charities that already have limited resources with which to achieve their aims.
- Australian donors to NFPs and registered charities that are classed as "political campaigners" will be required to submit annual returns in the same way as donors to political parties. The same severe impacts on donor privacy apply here.
- Charities that are "political campaigners" will be (in effect) banned from accepting gifts over $250 from foreign donors.
- Charities engaged in advocacy will need to nominate a "financial controller" who, despite in many cases being a volunteer, may be subject to significant penalties if the entity does not comply with the complex administrative requirements imposed by the Bill (including a potential prison term or hundreds of thousands of dollars in fines).
- The above, and lack of clarity about the meaning of "political expenditure" will make it extremely difficult for charities to ensure compliance with a very complex piece of legislation (which has serious penalties for non-compliance). This will result in a 'chilling effect' on political expression.

This Bill would fundamentally and negatively alter our electoral system, and result in excluding the voices of non-political-party actors in Australia – both during an election period and outside of it. This reform is a radical departure from the current legal position.

These proposed changes, in particular the two new classes of "political campaigner" and "third party campaigner" are so deeply embedded in this draft legislation that it is difficult to see how it could be amended into a workable piece of public policy.

While ACF supports the objectives of the reform in part, we cannot support the Bill because it seeks to do so much more than ban the influence of foreign money in Australian elections. Rather than improving and cleaning up democratic elections in Australia, it in fact delivers a significant blow to democracy.

Therefore, ACF submits that the Bill should not proceed, but a new bill should be introduced which constrains itself to addressing the issue of foreign interference in Australian elections without the negative further implications of this Bill, at a future date.

New categories of 'political campaigner' and 'third party campaigner' are fundamentally flawed

The introduction in the Bill of the two new categories of "political campaigner" and "third party campaigner", along with the broadened definition of "political expenditure" together have the effect of redefining public interest advocacy by independent, non-partisan groups as "political campaigning". This, in practice, will characterise the everyday advocacy activities of charities concerning the issue they work on as "political campaigning". It will include nearly all of the activities of some charities who use advocacy as their primary strategy to prevent harm and provide systemic lasting solutions on their issue.

This would mean that if an organisation providing housing for victims of domestic violence asks its members to call the Prime Minister and ask for law reform to improve the circumstances of women and children, that organisation will be a "political campaigner" under the Commonwealth Electoral Act.

If an environment group holds an event to raise awareness about pollution of a river, and to put pressure on their local member to change the law to protect that river, the group will be a "political campaigner" under the Commonwealth Electoral Act.

If a welfare group puts up posters asking people to email the Prime Minister about fairer provisions for people with disabilities, it is a "political campaigner" under the Commonwealth Electoral Act.

This is fundamentally a misrepresentation of those activities and those groups. Charities exist to pursue a charitable purpose in the public interest, whether that be preventing dangerous climate change, closing the gap for Indigenous Australians, or providing legal services to people suffering with a mental illness. Political parties exist to campaign for the election of candidates to the Parliament of Australia.

The Explanatory Memorandum to the Bill states that: "New political actors neither endorse candidates nor seek to form government, yet actively seek to influence the outcome of elections … these new actors lack the public accountabilities of more traditional actors, such as registered political parties or parliamentarians." This is false. It is already the case that a registered charity with the Australian Charities and Non-Profit Commission (ACNC) has to meet the test in the *Charities Act 2013* to become endorsed as a charity and then comply with the conditions of that endorsement. Charities are also regulated by the *Income Tax Assessment Act 1997* through which they receive

deductible gift recipiency status. Registered Charities sit on a public register held by the ACNC and regularly report financials and activities. Under this regime Charities cannot act with a politically-partisan purpose. They risk their charitable and deductible gift recipiency status if they do.[1] The Bill is unnecessary and represents an over-reach in its attempts to regulate the "political" activities of civil society groups through Election Law.

Under the Bill, the definition of political expenditure applies to any issue that is or is likely to be before electors, regardless of whether a writ has been issued for the election. In reality, any subject of public interest fits this definition. The breadth of the phrase includes not just campaigning via advertising and the media, but also activities like producing a submission and giving evidence to a parliamentary inquiry, or engaging with elected representatives in any way, or producing a research paper.

Whilst it is true that charities affected by the Bill would only be required to register as a "political campaigner" if during the current or any of the previous three years incurred "'political expenditure'" of $100,000 or more, because of the broad definition of "political expenditure", nearly all of the activities of advocacy charities will be captured, so this bar will easily be reached.

Charities should be able to rely on international philanthropy for non-partisan issues-based advocacy

The consequences of charities falling into the new class of "political campaigner" include a prohibition on receiving international funding, along with requirements to keep records to ensure donations of more than $250 are from "allowable donors" (Australian citizens or residents, and not foreign entities). For donations from non-citizens or non-residents, charities would have to set up special accounts to keep revenue separate from other sources and ensure it will not fund political advocacy.

ACF agrees that the question of foreign influence in Australian politics is a significant public policy issue and we support moves to ban foreign donations to Australian political parties. However, this should not extend to non-partisan, independent, charitable third parties.

Charities have completely different access to and influence over the political process compared with political parties. A foreign donation to an Australian charity cannot corrupt the political process because that charity cannot at law act with a political purpose. It must use that donation in pursuit of its charitable purpose; whether that be feeding the homeless, stopping dangerous climate change or advocating for disadvantaged youth.

Even when regulating or banning donations to political parties, there is a trade-off to be made between ensuring people can freely participate in politics through financial contributions, and ensuring that government is not corrupted. On balance, the public interest supports regulating (and in the case of foreign funds, banning) donations to political parties because of the possibility of

[1] The *Charities Act 2013* provides that "the purpose of promoting or opposing a political party or a candidate for political office" would disqualify an organisation from charitable purpose.

covert and inappropriate influence on decision-makers. But donations to organisations that are not running candidates in elections, and not necessarily even endorsing any candidate or party, are too remote from actual decision-making to be plausible causes of corruption.

International philanthropy to Australia boosts the impact of domestic giving in alleviating hardship, gives voice to those who may otherwise not be heard, protects the environment, and contributes to a better future for many Australians. Rather than creating barriers to international philanthropy, this is a time Government and the charitable sector should be working together to maximise it.

A note about advocacy and democracy

ACF activities involve advocacy. By 'advocacy' we simply mean influencing decision-making in the interests of conservation and sustainability. These activities inevitably involve generating public awareness and debate over an issue and through that, encouraging legislative and/or policy change to protect the environment and the people, plants and animals that depend upon it. Indeed, while on-the-ground activities such as tree planting and the conservation of national parks are of course also of value to the environment, advocacy is fundamental to our success in driving large scale positive impacts to protect the environment.

The High Court of Australia in the *Aid/Watch Incorporated v Commissioner of Taxation*[2] (**Aid/Watch**) left no doubt that advocacy activities aimed at policy or legislative change may be charitable as they are, in themselves, activities beneficial to the community. The High Court held that activities by which entities 'agitate' for legislative or policy change support the operation of the Constitution of the Commonwealth of Australia, which mandates a system of representative and responsible government.

The role played by civil society organisations is invaluable in maintaining the health of democracy in Australia. As also noted by the High Court in Aid/Watch:

> "The provisions of the *Constitution* mandate a system of representative and responsible government with a universal adult franchise… Communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics is "an indispensable incident" of that constitution system."[3]

Increasingly charitable organisations focus their efforts on advocacy, because advocacy is fundamental to their success in driving large scale positive change for the issue that they care about. This contribution enriches public debate in Australia and contributes to good policy-making by both government and business. Civil society groups uniquely placed to support long term goals or policy, as opposed to a Government that reacts to a three or four year electoral cycle, or a business which considers how policy decisions impact its immediate bottom line. Civil society organisations have the ability to take a considered long-term approach in formulating policy asks and desired outcomes which is indisputably in the public interest.

Any reform limiting the advocacy activities of civil society rejects Australia's long-held model of democracy in which many voices contribute to public policy.

[2] *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42.
[3] *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42 at [44].

For more reading on the critical role of civil society in democracy, we recommend the work of Dr Joan Staples, which can be accessed through her website.

The Government's track record on silencing civil society

Minister Corman claims that: "This Bill simply seeks to keep foreign billionaires and foreign governments out of Australia's elections." As mentioned, this is not the sole purpose of this Bill. By creating new definitions and amending existing ones the Bill lays the foundations to further progress the Government's agenda to silence civil society.

The Abbott and Turnbull Governments have been targeting the advocacy role of Australia's environmental NGOs for over five years. We attach at Appendix 1 a chronology detailing these events. We also recommend the Human Rights Law Centre Publication Defending Democracy which evidences that the attacks are not limited to environmental charities but are widespread across civil society.

ACF is very concerned that once the Government is successful at defining civil society organisations as "political campaigners" in the Commonwealth Electoral Act it will allow them to make further amendments to further restrict the advocacy activities of civil society. This could include caps on donations or caps on expenditure, aimed at political parties, associated entities and the new definition of "political campaigners." This could be done under the cover of 'levelling the playing field' or 'cleaning up money in politics' but would actually amount to silencing civil society and would prevent many charities from effectively pursuing their missions.

The chilling effect

This Bill, and in particular the ban on foreign philanthropic donations to charities that conduct advocacy, is in danger of creating a 'chilling effect' on political expression. That is, the Commonwealth Electoral Act will deter speech without expressly prohibiting it.

At best, the legislation will require organisations to spend time and resources collecting and reporting information that adds nothing to the integrity of Australian democracy.

At worst, organisations that would otherwise make contributions to a range of democratic processes, including making policy submissions or engaging in dialogue with Members of Parliament, will be reluctant to do so. The uncertainty in determining whether their activities should now be defined as "political campaigning" or "third party campaigning", and facing donation bans and onerous reporting requirements if they are, will act as a significant deterrent to participation and speaking out.

Furthermore, contravening the new law may constitute a criminal offence, with harsh penalties likely to cause financial controllers within organisations to err on the side of caution, resulting in organisations avoiding to voice their views on any matter publicly so that those activities definitely could not constitute "political expenditure'".

Removing independent third party voices from debate is a disastrous blow for democracy, not the other way around, as claimed in the Explanatory Memorandum for the Bill.

Amended definition of "Associated Entities"

Clause 287H of the Bill proposes to broaden the definition of "associated entity" to include:

i. organisations where a person in authority of that organisation has said, publicly or privately, that the organisation is to operate to cause a detriment to a political party or its candidates, *whether or not policy reasons form the basis for opposing the party or candidate, not party politics*; and
ii. organisations that spend most of their money on campaigning to oppose a political party's policies or oppose a candidate in an election, if they oppose their policies.

What this clause does in practice is expand the definition to include third parties that - through no coordination or agreement - happen to have policy alignment with a political party, or cause a detriment to a party's opponents. This expansion is not appropriate. "Associated entities" are entities that provide *direct* support to political parties and the definition should remain as such.

The Bill fails to address significant sources of corruption in Australian politics

This Bill's focus on charities is a distraction from the sources of corruption in Australian politics that operate via a broken political donations regime.

Political donations are also an indicator of a broader industry strategy of political influence. With the majority of political donations and political expenditure hidden, and industry influence likely extending into the realm of personal and financial relationships, the public currently has little knowledge of how industry is influencing our policy decisions. The implications of this influence was demonstrated in NSW by anti-corruption investigations called Operation Jasper and Operation Acacia. The NSW anticorruption commission (NSW ICAC) found that a complex web of personal relationships, favours, and mutual financial interests resulted in the issuing of mining licenses without any proper process".[4]

The mining industry exerts substantial influence over Australia's political process by making donations to political parties directly and through their associated entities. Research by the Australia Institute supported by the ACF and WWF Australia found that the mining industry has donated $16.6 million to major political parties over the last ten years, with peaks in funding correlating with policy changes advantageous to the sector.

> "...[the] mining industry spends millions of dollars on political donations, and can scale up their donations at important times as they did in 2010-11. The timing, scale and political

[4] Ibid

leanings of these donations can be linked with election campaigns, leadership changes and important debates on policies such as the mining tax and carbon price".[5]

A report by University of NSW researcher Dr Belinda Edwards found that in "the 2013 federal election the two major parties declared less than 25% of their privately raised income as donations to the Australian Electoral Commission. Approximately half of those donations came from party fundraising bodies like the Free Enterprise Foundation or Labor Holdings. As a result, only 12-15% of the parties' incomes can be clearly and easily attributed to specific political donors".[6]

What is it that these undisclosed donors receive in return when a political party wins power?

A new Bill focused on shining a light on the dark sources of political donations and supported by an independent federal corruption watchdog is required.

Electoral law in Queensland and South Australia – cautionary tales

Both Queensland and South Australia provide helpful examples of how the best intentions to create strict election laws results in civil society voices being silenced.

Queensland

The *Electoral Act 1992 (Qld)* sets out a strict regime for the conduct of elections and in particular for transparency around donations for "political expenditure'". The definition of "political expenditure" is very broad, and the "real time" disclosure of donations used for political expenditure is required via an online portal. These disclosure requirements are not confined to the formal election period (that is, once the election has been called and the writs have been issued), but are applicable all year round. Unfortunately for civil society groups, these requirements were not limited to political parties and associated entities. Any group that publicly expressed views on an "issue in the election" were required to disclose the names and home addresses of their donors, if that donation was spent on a Queensland issue. The problem is, an issue of public interest – for example nature conservation, homelessness, poverty, housing, cruelty to animals – would be considered, by virtue of its public interest, an "issue in the election". For some groups, the majority of their activities were caught by the definition and they found themselves in the curious situation of having to disclose the names and addresses of their donors to the Queensland Electoral Commission. One can imagine the very strange conversation that a charity must have with a very private philanthropist who (rightly) thought he was donating to protect the Great Barrier Reef but learns his home address must be provided on a public register for his donation to a Queensland election campaign.

When faced with this red tape, well-resourced organisations like ACF with professional financial and legal staff employed must spend considerable resources and time on compliance activities when we would rather spend funds on protecting nature and the environment, which is our purpose. Other organisations are not so fortunate. Many groups chose not to speak out on their issue in Queensland

[5] http://www.tai.org.au/sites/defualt/files/P339%20Tip%20of%20the%20iceberg.pdf
[6] http://cdn.getup.org.au/1969-Dark_Money.pdf

so as to not be required to breach the confidentiality and trust of their donors by publishing their names on a public record. Others may have risked non-compliance with the Queensland laws and now face enforcement action against them as a result.

South Australia

Similarly to Queensland, under the South Australian *Electoral Act 1985* charities and other civil society organisations can qualify as "third party campaigners" for merely going about their business of advocating on their issue. In South Australia, only organisations that spend $10,000 or more on "political expenditure" (expenditure incurred for the purposes of the "public expression of views on an issue in an election by any means") face disclosure and reporting requirements. In the case of South Australia, once that limit has been exceeded, a return must be lodged with the SA Electoral Commission. These returns must contain full financial reports (income and debts) and the names and addresses of all donors who made donations greater than $5000. The reporting requirements are ongoing. Once the election is over returns must be lodged every six months until the next election.

Most bizarrely, as a "third party campaigner" one must disclose the names of *all* its donors who donated $5000 or more, whether or not those donations were used for "political expenditure" relevant to South Australia.

For instance, the situation could arise when a private philanthropist makes a donation of $20,000 to ACF with the wish that it is spent on efforts to conserve Tasmanian old growth forests. The donor then finds that his name and address has been provided to a public record sitting in the South Australian Electoral Commission with the insinuation that the donation has been used for "political expenditure" in the South Australian election.

As a result of this, many civil society groups have drastically scaled back their planned issues-based advocacy activities in the current lead up to the South Australian State election in March 2018 so as to not breach the $10,000 cap. ACF has had to reconsider the work we do in promoting things like clean energy, safe energy production and environmental flows to the Murray River, because we take our compliance obligations very seriously. We also give great weight to our donors' right to privacy. For groups that rely on the generosity of individuals to do their important public interest work, the risk of breaching the trust with their donors and jeopardising future donations is untenable.

The outcome will be very few independent, third party voices heard in South Australia in February and March this year.

These two case studies represent the dangers in conflating issues-based advocacy organisations with political parties under Electoral laws. It results in the silence of democratic debate and independent third party voices in critical democratic processes like elections.

A Regulatory Impact Statement is needed

The government has written a short-form regulatory impact statement on the Bill, which is a cabinet document and not publicly available.

There was no consultation on the Bill and given the scope of proposed changes, a detailed Regulatory Impact Statement should have been prepared and published.

Necessary amendments if the Bill does proceed

ACF's position is the Bill should not proceed.

If any version of the Bill does proceed, consultation on a new or reformed draft Bill must be extensive to avoid the very negative and undemocratic impacts of it in its current form. The Bill is complex and amendments must be scrutinised to ensure they do not have unintended consequences. As we have learned from the experience in SA and QLD, these unintended consequences of strict electoral law are very likely, and will be potentially grave for civil society and democracy.

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The Australian Conservation Foundation is Australia's national environment organisation. We stand up, speak out and act for a world where reefs, rivers, forests and wildlife thrive.
www.acf.org.au

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APPENDIX 1

Chronology - attacks to silence civil society

The Abbott and Turnbull Governments have been targeting the advocacy role of Australia's environmental NGOs for over five years. The government's attempts seek to change Australia's long-held idea of democracy – one in which many voices join in public debate. Instead, they speak of democracy as a market in which NGOs "interfere". Below is a chronology detailing these concerted attacks.

2014 pressure on Government from Minerals Council of Australia, Institute of Public Affairs and others to silence Environment groups

- Federal Council of the Liberal Party motion moved by Andrew Nikolic MP to strip environmental charities of their DGR status.
- Coalition MP George Christensen sets his sights on green political activists
- Calls from the Minerals Council of Australia and the Institute of Public Affairs (See 'A Critique of the Coal Divestment Campaign') for removal of the tax deductibility status of environment groups.
- Calls for changes to the Competition and Consumer Act to restrict the advocacy of environment groups.
- Calls for changes to the Corporations Act[7] to restrict the advocacy of environment groups.

March 2015 – House of Representatives Standing Committee on the Environment Inquiry in to the Register of Environmental Organisations.

House of Representatives Standing Committee on the Environment Inquiry into the Register of Environmental Organisations 2015/16 (TOR here). During one inquiry hearing, Queensland Liberal MP George Christensen tweeted about cancelling DGR status: "Time to get the donations in. I can't see it continuing longer once we report".

A government majority of that Committee recommended in **May 2016** that:

- the advocacy activities of these groups be limited and the efforts of these groups be focused on 'on ground' environmental remediation work [Recommendation 5]
- the Australian Tax Office impose administrative sanctions on environmental organisations that support, promote, or endorse illegal or unlawful acts such as blocking access, trespass, destruction of property and acts of civil disobedience [[5.95]-[5.102].
- Note dissenting report by Mr Jason Wood MP.

August 2015 – EPBC Act Standing Bill

Inquiry into repeal of s487 of the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (see here)

- Government majority of the Committee reported **18 November 2015** recommended repeal so that the (standing) rights of environment groups to challenge the legality of Ministerial decisions be taken away

[7] Sinclair Davidson for Minerals Council of Australia 'A Critique of the Coal Divestment Campaign' (2014) (http://www.minerals.org.au/file_upload/files/reports/A_critique_of_the_coal_divestment_campaign_Sinclair_Davidson_Jun_2014.pdf

September 2016 – Joint Standing Committee on Electoral Matters
Joint Standing Committee on Electoral Matters - Inquiry into and report on all aspects of the conduct of the 2016 Federal Election and matters related thereto (Terms of Reference)
First Interim Report (9 December 2016)
Second Interim Report (March 2017) - recommended that foreign citizens be banned from donating to Australian registered political parties. The Committee also considered whether that ban should be extended to prevent foreign citizens donating to Australian not-for-profits. The Committee fell short of making that recommendation but recent media comments by one of the backbenchers, as well as private discussions with government MPs, made it clear that such a move was being actively considered.
Third Interim Report (June 2017)

7 December 2017 – 'Foreign Donations' Bill
Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 introduced and read the first time. The Bill fundamentally redefines non-partisan, independent, issues based advocacy as political campaigning and bans Australian charities from receiving foreign philanthropic funds to do their critical work.

August 2017 – Treasury Paper on Tax Deductible Gift Recipient Reform Opportunities
Treasury Discussion Paper - Tax Deductible Gift Recipient Reform Opportunities, containing a variety of proposed recommendations to restrict the advocacy activities of environment groups. Submissions closed 4 August 2017, and 2500 submissions were received. On 5 December 2017 the Minister for Revenue and Social Services Kelly O'Dwyer announced it will reform the administration and oversight of organisations with Deductible Gift Recipient (DGR) status, although a final report from the Treasury Inquiry has still not been received so the details of that reform are unknown.

Threats to the ACNC's independence
2012 - ACNC and a statutory definition of 'charity' created by Labor Government
2014 - Government moves to abolish the ACNC (here and here) – repeal bill 1
2016 - Government opts to keep the ACNC (here)
2017 - Mandatory 5 year review of the Charities Act commences
2017 - announcement that Susan Pascoe will not be re-appointed. See open letter to government from charities resisting this.
2017 - Peter Hogan (chairman of Carbon Energy) is appointed to the ACNC's advisory board.
2018 - Dr Gary Johns is appointed the new Commissioner of the ACNC, to the shock of the sector. Johns has been proactive in criticising the public advocacy of NGOs, their legitimacy and their worth. For example, he has called for compulsory contraception for welfare recipients, opposed international development aid as giving money to 'Third World kleptomaniacs', questioned whether there was any public benefit in environmental charities and described Indigenous women on welfare as 'cash cows'.

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APPENDIX 2
Debunking myths about this reform

There has been abundant misinformation disseminated publicly regarding the intents and impacts of the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017.* Below are some statements corrected.

Banning donations to third parties as well as political parties might seem harsh but it is necessary to truly clean up elections from foreign influence.

This is false. Charities have completely different access to and influence over the political process compared with political parties. A foreign donation to an Australian charity cannot corrupt the political process because that charity can not at law act with a political purpose. It must use that donation in pursuit of its charitable purpose. The public interest supports regulating (and in the case of foreign funds, banning) donations to political parties because of the possibility of covert and inappropriate influence on decision-makers. But donations to organisations that are not running candidates in elections, and not necessarily even endorsing any candidate or party, are too remote from actual decision-making to be plausible causes of corruption.

Most civil society groups in Australia don't rely on Foreign Donations. What's the big deal?

This Bill impacts a great number of groups. For the groups who will be banned from receiving foreign philanthropic donations for their work, and who rely on this income, this will threaten their existence. For the remaining groups, the Bill builds infrastructure in to the Electoral Act which allows future amendments to further restrict advocacy of these groups, such as via donation caps, caps on expenditure, or even more onerous reporting. Further, the reform will result in a chilling effect. The lack of clarity about the meaning of "political expenditure" will make it extremely difficult for charities to ensure compliance with a very complex piece of legislation (which has serious penalties for non-compliance), and so they will err on the side of caution and not speak out. The Commonwealth Electoral Act will deter speech without expressly prohibiting it.

The Bill "does not prevent charities from advocating in any way shape or form" (Mattias Corman, The Guardian, 12 January)

In practice, this is untrue and a disingenuous statement. The consequences of charities falling into the new class of "political campaigner" include a prohibition on receiving international funding for advocacy work. This is a built-in deterrent to advocacy. For a broader group of charities, the chilling effect explained in the body of this submission will result in significant selfcensorship. Charities will choose to be silent rather than attempting to comply with the complex and ill-defined new requirements which would accompany advocacy activities, as well as the harsh penalties for any potential failure to comply. International examples of similar regimes, such as in Canada, demonstrate this playing out in practice.

Only a "very small number of charities" participate in elections and would be caught by the Bill's provisions (Mattias Corman, The Guardian, 12 January)

This is false. Under the Bill, the definition of political expenditure applies to *any issue that is or is likely to be before electors*, regardless of whether a writ has been issued for the election. In reality, any subject of public interest fits this definition. It will include nearly all of the activities of some

charities who use advocacy as their primary strategy to prevent harm and to provide systemic lasting solutions on their issue. The lack of clarity in the new definitions means that even charities which may not in fact be captured are likely to self censor to protect their organisations.

But aren't groups exaggerating the impact of these changes? Only groups that spend $100,000 per year will be captured by the new "political campaigner" definition.

Whilst it is true that charities affected by the Bill would only be required to register as a 'political campaigner' if during the current or any of the previous three years incurred 'political expenditure' of $100,000 or more, because of the broad definition of 'political expenditure', nearly all of the activities of advocacy charities will be captured. For example, the breadth of the phrase means it will include not just campaigning via advertising and the media, but also activities like producing a submission and giving evidence to a parliamentary inquiry, or engaging with elected representatives in any way, or producing a research paper. For many groups the $100,000 per year will be easily reached.

"Nothing in the government's reforms restricts or limits charities' legitimate activities" (Mattias Corman, The Guardian, 12 January)

Any activities that are lawful that are in pursuit of a charities purposes are legitimate and appropriate. Advocacy is legitimate and appropriate, as decided by the High Court of Australia in the *Aid/Watch Incorporated v Commissioner of Taxation*[8] and enshrined in the *Charities Act 2013*. The Bill restricts and limits advocacy by banning the use of foreign philanthropic funds on this purpose. Furthermore, without expressly limiting speech, the Bill will in fact deter speech, as explained above.

"This bill simply seeks to keep foreign billionaires and foreign governments out of Australia's elections." (Mattias Corman, The Guardian, 12 January)

The Bill does not merely attempt to stamp out foreign attempts to influence elections in Australia. The Bill fundamentally redefines non-partisan, independent, issues based advocacy as political campaigning. Further, it subjects groups that do this work to many of the restrictions in the Electoral Act designed and intended (and appropriate) for political parties. It is critical to note that this Bill lands at a time of concerted attack on the right of Australian charities and non-profit organisations to advocate in Australia. In the last few years the ability of these groups to engage in activism and advocacy work has been threatened by new laws and practices which are slowly but surely eroding their independent voice. Sadly, while this Bill is dressed up as an attempt to improve the integrity of democracy in Australia, this Bill is in fact the next chapter in these attacks.

[8] *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42.