

ELECTORAL MATTERS COMMITTEE

Inquiry into voter participation and informal voting

Inquiry into political donations and disclosure

Melbourne — 23 July 2008

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Dr J. Tham, law faculty, Melbourne University.

The CHAIR — Welcome to the public hearings of the Electoral Matters Committee’s inquiry into political donations and disclosure and its inquiry into voter participation and informal voting. All evidence taken by this hearing is protected by parliamentary privilege and as provided by the Constitution Act 1975 and further subject to the provisions of the Parliamentary Committees Act 2003, the Defamation Act 2005 and, where applicable, the provisions of reciprocal legislation in other Australian states and territories. I also wish to advise witnesses that any comments they make outside the hearings may not be afforded such privilege. I take it you have read the ‘Guide to giving evidence at a public hearing’ pamphlet?

Dr THAM — Yes, including the letter, I have.

The CHAIR — Please state your full name and business address.

Dr THAM — Dr Joo-Cheong Tham, law faculty at Melbourne University.

The CHAIR — Will you also state whether you are here in a private capacity or representing an organisation?

Dr THAM — I am appearing in a personal capacity.

The CHAIR — The evidence will be taken down and become public evidence in due course. I now invite you to make a verbal submission, and we will ask you questions at the end of your submission.

Dr THAM — Firstly, I thank the committee for inviting me to give evidence. In essence my position, as reflected in my submission — and my submission to this committee also includes the submission I provided to the federal inquiry into political donations conducted by the Joint Standing Committee on Electoral Matters — is basically there is need for far-reaching change to the Victorian electoral funding machine: firstly, because of problems with transparency; secondly, because of pervasive corruption due to undue influence; thirdly, unfairness in electoral contests; and fourthly, and no less important, the threat that these practices of political funding pose to the health of the party system and the parties themselves.

What I propose as changes that address this series of problems is, firstly, greater measures to enhance transparency, contribution limits for individuals, tailored limits for organisations, expenditure limits and a new scheme of public funding. I should add that if I were to nominate the three most important areas of reform from my perspective I would say they are, firstly, greater transparency in relation to state elections, and secondly, reformed local government political funding, and I think two specific measures are worth mentioning.

The first is a requirement to have disclosure before local council elections are actually held and provisions that in fact can be based on the statute that actually applies in Western Australia. Secondly, an extension of the conflict of interest rules to actually ban or prohibit local councillors from deliberating or voting on matters materially affecting the financiers. This in fact is a recommendation that is similar to one that was actually put forward by the New South Wales Independent Commission Against Corruption and was in fact recently endorsed by the recent New South Wales Legislative Council report on political funding. The third area of priority I would say would be campaign spending limits. These measures are particularly crucial. They can be seen as a sort of regulatory armistice that if properly designed will promote fairness in electoral contests and also take the heat out of competitive extravagance as driving the more unsavoury of fundraising practices.

I should stress the last point. I think with any proposal for reform or proposal for change, it must deal with the demand side of political funding — that is, the factors of the circumstances driving the increasing appetite for campaign funds — in order to tackle the supply-side problems — that is, the problems attending the flow of money into politics. One implication of saying this is that it might well be that if current contribution limits are instituted without effective spending limits they might not have sufficient bite, if you like.

Also, I am opposed to adding contribution limits to treat corporate contributions and trade union affiliation fees in identical fashion, and simply because of the key differences that just stem from the fact that the trade union affiliation fees are membership fees. Because they are membership fees, they are actually accompanied with an open declaration that the trade union subscribes to particular platforms or policies and that gives trade union affiliation fees greater transparency than typically accompanies corporate contributions.

The second point of difference is that because they are membership fees, they actually implicate freedom of party association in a manner that is much more profound than corporate contributions would do. In fact this was the position that was actually adopted by the New South Wales Legislative Council report that I referred to earlier where one of the key recommendations they made was actually a ban on all contributions from organisations. But importantly, for the purpose of this particular point, they actually exempted membership fees from this ban and they expressly said that membership fees would include trade union affiliation fees. What is particularly noteworthy about this report is that the committee only had a minority of ALP members.

The CHAIR — Dr Tham, was this a New South Wales upper house inquiry?

Dr THAM — That is right; it was an upper house inquiry. The report was handed down in June this year, it was chaired by Reverend Fred Nile. The point I was going to make was that it was particularly noteworthy because of the composition of this particular inquiry; you only had two ALP members, and the majority of the committee were in fact not ALP members, including members of the Liberal Party.

Finally, let me make several observations. There seems to be less public disquiet about political funding in Victoria compared to the situation in New South Wales. Perhaps the principal reason is that there has been no Victorian equivalent to the scandal that has engulfed the Wollongong City Council. It is perhaps easy in this context to become complacent about the current state of affairs, but in my view there is no good reason to be so self-satisfied. It might well be that such a corruption as has occurred or has been alleged in relation to the Wollongong City Council has not come to light because of inadequate scrutiny. One observation or comment that is always made is that unlike New South Wales, in Victoria there is no independent commission against corruption.

A broader point that this leads me to is that, if you like, as a general weakness in terms of regulation of political funding in Victoria, an example would be simply that this is one of the few states which does not have its own disclosure regime in relation to state elections where really the main sort of regulatory measure is busy piggybacking upon the Commonwealth Electoral Act. A weakness of regulation should be seen in the context of this ominous warning that was actually given by the Victorian Ombudsman in a report handed down in March this year where, referring to local councils, he said:

... many councils have practices that, at best, lead to a lack of transparency and, at worst, allow opportunities for corrupt conduct ...

Another reason why there is really no strong foundation to be complacent about the state of affairs in Victoria is that the structural features that rendered the New South Wales system unfair and ripe for corruption in its various guises are also present in Victoria. Firstly, the escalating campaign costs driving more aggressive fundraising practices, and secondly — a good example is the *Age* reports in the past few weeks — where there is significant reliance on contributions from businesses in what has been described as ‘regulation high areas’ — for example, companies bidding for government contracts, property developers and gaming and alcohol interests. In this context I urge the committee to adopt what was the key message of the New South Wales committee’s report that ‘There must be significant reform of the electoral funding scheme’.

The CHAIR — Thank you, Dr Tham. We appear to be one of the least regulated jurisdictions in the Western world in terms of campaign finance. Would you agree with that?

Dr THAM — My knowledge extends to English-speaking liberal democracies, and that is true.

The CHAIR — Why would you say that is?

Dr THAM — It is hard, but I suppose one thing people say is that you need a good scandal to drive a reform agenda and perhaps we are fortunate, at least at a federal level, that there have not actually been any major scandals.

Ms BROAD — Thank you for your submission. I think that in the interests of transparency, which is underpinning a great deal of what we are considering here, I should indicate that I did have responsibility in a former role for the Local Government Act and for instituting changes to strengthen the disclosure requirements under that legislation.

One of the matters I wanted to raise is this: some of the most contentious issues which arise in the local government area relate to matters where the community may well consider that there is a conflict of interest; however, in a statutory, legal or fiduciary sense there is no technical conflict of interest, so it might relate to overlapping

membership of organisations or political interests which do not constitute in that legal or statutory sense a conflict of interest, and I wanted to ask if you had given any consideration to how you might better deal with those matters.

Secondly, you have referred in your submission and in your remarks today to the overlapping commonwealth, state and local government requirements. Could you elaborate on whether you have given any consideration to how those three levels of government, in the interests of both efficiency and not inadvertently causing people — whether it is people making donations, candidates, political parties or other organisations — to find themselves having to make overlapping disclosures, might manage and achieve the objectives that you have outlined in your submission?

Dr THAM — On your question relating to conflicts of interest, I think there are three points. The first point actually emerges very strongly from the Victorian Ombudsman's report. One of the key conclusions he reaches is in fact that even when the provisions of the Local Government Act as they currently stand are taken as given, they are not actually properly enforced or implemented at local council level, and that actually gave rise to the conclusion that I referred to earlier on in my opening statement. So I think the first problem there is actually enforcement of government provisions.

I think conflict of interest can be dealt with in two ways, if you like, in terms of stringency of regulation. One is that we might say that there are particular interests, and all that is required of local councillors is that they disclose those interests. They can still participate and they can still deliberate on decisions. So long as there is transparency in relation to what that interest and that conflict with their public duties are, then that is okay. But we might say about councillors with certain conflicts of interest that are serious or acute that in fact a ban should be instituted in terms of their participating in the decision-making process.

It seems to me that in the context of local councillors where the budgets for the campaigns are in fact in the order of four digits — the 2004 Geelong election is a good example, and it is documented in the report that you commissioned from Merv Whelan — that if there are financiers who actually give them money in the order of thousands and so on and so forth, I think that the conflicts of interest that arise from those contributions are serious enough to warrant a ban or prohibition on them participating in the decision-making process.

In terms of harmonisation I think it is a good idea, generally speaking, but I would put two caveats on that: one, I think local government elections should be treated quite separately from state and federal elections. They are clearly more candidate centred — and in fact there is a great chapter in the New South Wales Legislative Council report dealing with the question of local government — whereas what we find with state and federal elections is that the party system is much stronger at those levels and so on, which means that what we need to think about in terms of the obligations needs to be tailored to that difference in terms of the political context.

Two, while harmonisation is a good idea, the question is: what are you harmonising to? Are we levelling up or are we levelling down? While I think in principle it is a good idea, I would reserve judgement until there is substance in terms of what the regime organisation is.

Ms BROAD — But do you have a view, if you are seeking to harmonise requirements, about what you should be harmonising to?

Dr THAM — Yes. My view would be what I sort of set out in my submission to the Joint Standing Committee on Electoral Matters. Basically there are various recommendations in terms of a regime for political funding.

The CHAIR — Just on the matter of local councils, there is a view that planning should be taken away from local councils and that that would fix a lot of the problems. What would you say to that?

Dr THAM — The response that one of the local councillors, Genia McCaffrey, gave to this particular suggestion before the New South Wales inquiry was I think the most convincing responsive I have heard so far. If the suggestion is to have panels where you might have so-called experts in planning development to decide those issues, what she pointed out was that these are not independent panels. These people tend to be working for the development companies that actually have an interest in planning decisions, so I think that is the first point.

The second thing is that, as Ms Broad pointed out, what we should be thinking about is how do we help the political process — the democratic process — to operate with greater integrity. We should not be thinking about

holding out or carving out decisions from that process. I think it sort of demeans the idea of democratic decision-making to actually do that.

The CHAIR — If I could just take you back to not banning union affiliation fees to the Australian Labor Party: you argue that they are in fact membership fees; capitation, I think, is the terminology.

Dr THAM — I think that is probably Professor Costar's and Dr Young's submission, not mine.

The CHAIR — Could the corporations argue or could it be argued on the other side — I am playing devil's advocate here — that corporations may be able to contribute to either the Liberal Party or the Labor Party and argue that they are also membership fees?

Dr THAM — It applies. I will take a more likely example: if there was an association of farmers that decided to affiliate as a collective to the National Party, I would apply that same reasoning, I would apply the trade union affiliation fees.

The CHAIR — Most people, perhaps not most people but some people will argue that affiliation fees are in fact donations via other means?

Dr THAM — They are a form of political funding, but what is important is how the political funding is actually channelled. The contrast I drew in the submission is this: if you think, for example, business is paying thousands of dollars to see a minister through Progressive Business, the Victorian ALP's fundraising arm, they pay the money; the details of the meeting are secret; we do not know what matters are being discussed; the company does not have to say, 'We support ALP policies'.

The company does not say after the particular meeting, 'Look, we are here advocating and supporting a particular policy', and so on and so forth. Contrast that with New South Wales, for example, where the New South Wales unions are opposing privatisation of the electricity industry. Their ability to oppose in a state conference comes by virtue of the fact that they have paid affiliation fees to the New South Wales branch. It is true that there is a commonality in terms of it being money paid to a party, but what you have is that positions are public and it is known by citizens, and so on and so forth.

Ms CAMPBELL — Your last comment, the fact that trade unions are actually members of the ALP, could you expand on that? What I was going to ask prior to your answer to the previous question was if, for argument's sake, doctors joined their union, the AMA, and farmers joined their union, the Victorian Farmers Federation, do you put the AMA and the VFF in the same category as trade unions?

Dr THAM — For the purpose of these arguments, yes.

Ms CAMPBELL — All right, that is clear then. Can you go back to expanding on what you outlined to the Chair, where the unions are actually members of the ALP? How relevant is that, and if a union is not a member of the ALP, should there be different criteria?

Dr THAM — If they are seen as members of the ALP and that money comes as membership fees, then when we think about corruption — it is undue influence, and this is the position I drew out in my submission. The same would apply if, for example, a group of farmers joined the National Party or so on and so forth, because a public element attends that contribution. In a sense there is a public declaration of their support and the participation within the parties themselves is public. For my part I would not say that it is corruption; it is undue influence, whereas you can contrast that situation with the example of Progressive Business, for instance.

The other broader point I draw in the submission is simply that if we think about democratic politics, one of the most important things about democratic politics is that it be diverse and pluralistic. One way in which this pluralism is sustained is that parties have different structures. For example, the Liberal Party might say, 'We are only going to receive members who are natural persons'. That is fine and is an example of what in the literature are called direct parties. But some parties might say, 'We are going to have members who are natural persons but also members who are collective organisations, so they are mixed parties. This is a diversity that I think should be recognised as being legitimate.

The CHAIR — This might happen in the ALP or the Liberal Party, but let us use the Liberal Party as an example. What if you had corporations buying into the Liberal Party? That is hypothetical.

Mr O'BRIEN — Thank you, Chair!

The CHAIR — With membership fees of \$500 000 a year, for example, for the Victorian Liberal Party, a corporation gets voting rights or they get delegates. I am not sure what the structure of the Liberal Party is, but they get a say in the internal processes. Would you say that is comparable to the way unions work in Victoria and it is therefore open and transparent?

Dr THAM — For my part I would think through this particular situation through two true principles, if you like. One is the idea that corruption is undue influence. For my part in both situations it would be hard to say that corruption is undue influence because of the public nature accompanying the membership fees, whether it be trade unions or companies.

But the second principle or the lens through which I look at it is basically through the question of fairness. What I point out in the submission I made to the Joint Standing Committee on Electoral Matters is that we can still treat commercial corporations in a different way simply because by virtue of their capital they have a greater capacity to influence the political process through their wealth. That does not mean we start banning those kinds of membership fees that you are thinking about, but what I would suggest is that what you need are spending limits that level the playing field and do not allow wealth to have, if you like, a distorting influence on electoral contests.

Ms CAMPBELL — You do not specify in your submission what that limit is.

Dr THAM — No, I do not specify it.

Ms CAMPBELL — That is convenient. If you were pushed to give some indication, what would you say?

Dr THAM — I should say in my defence that that was the position taken by the Legislative Council in New South Wales too, where it passed the buck to the Auditor-General.

The CHAIR — Yes, they did too. The UK has 35 000, I think, per electorate.

Dr THAM — I am not aware of particular figures, but I do have particular views about the design features. I think expenditure limits — let us talk about Victorian state elections. I think they should operate on a statewide basis, firstly, and they should operate also at a constituency level. I think that they should generally be calibrated according to the number of electors or voters in a particular contest.

Ms CAMPBELL — With all due respect, though, if you are in a safe seat, there is minimal expenditure compared with a marginal seat, and I think we have to have a fair degree of political reality in our deliberations. The aim of elections is to win government, and in order to win government you want to convey your message. If you are in a safe seat, that message tends to be understood, or people are locked-on voters to one party or another. Would you make any comment in relation to marginal seats versus non-marginal seats?

Dr THAM — The point I make is simply that expenditure limits are important but that functions simply as a ceiling.

The CHAIR — Sorry?

Dr THAM — That functions simply as a ceiling in terms of expenditure. They seek to promote fairness, in a way, by basically preventing excessive spending. So that kind of variation in terms of spending, in terms of saving marginals, that is up to the parties to decide how they want to channel their campaign funds.

The second point I make is that why it is so important to have limits at a constitutional level is that it prevents particular marginal seats being subjected to unfairness in the result from excessive spending. This is a problem that is currently being talked about in the UK context.

Ms CAMPBELL — So I take it that your limit is across every seat?

Dr THAM — There would be two tiers. There would be an overall spending limit on a statewide basis, applying for example to a particular party. There would also be consistency level limits. In fact the UK system is basically like that, a two-tiered system.

Mr SCOTT — In terms of your limits and the issues you are raising about expenditure, implicitly in what you were say it seemed to me that you consider expenditure limits are just as important, if not more important, than limits on contributions. So it is the demand side. Would that be a fair representation of your position?

Dr THAM — That would be correct, yes.

The CHAIR — Otherwise it is an arms build-up, isn't it, really?

Dr THAM — Yes, and what you see in some ways, your system — I am being a bit simplistic here but it is actually a good example where there are no spending limits but there are contribution limits and there are issues around that. One way to drive parties to actually stick to, to evade or have a narrow interpretation of contribution limits is the increasing appetite for funds.

The CHAIR — It depends on the particular candidate, too. A lot of candidates get candidatitis, which means they just keep wanting material.

Mr O'BRIEN — Thanks for your submission. Could I just pick up on a point that the Chair asked you in his question — that is, would you accept that some people might see that with a union or a corporation that donates money which is disclosed, so that is on the public record, that instance is less likely to tend to corrupt the process than a corporation or a trade union that both donates money and as a consequence through — call it membership fees — then has the voting power to threaten a member's preselection? One simply provides a donation to the party which is publicly disclosed. The other one not only provides funding to the party but also places that entity in a position to threaten the political future of one or more MPs. Would you agree that that could have a greater tendency to corrupt the process than just a donation?

Dr THAM — No, I strongly disagree. As I outlined in my submission, parties play a participatory function. They are supposed to be vehicles of political participation. They can be vehicles of political participation most directly through members actually participating in the organisations, whether it be the Liberal Party or the ALP, so I cannot see that. To characterise that kind of conduct as corrupt is to basically say that is a form of political participation that should be encouraged. In fact if membership declines across the various parties it is somewhat limiting.

Mr O'BRIEN — Giving an entity the power to threaten a particular MP's preselection for not toeing the interests of that entity, be it a union or a business, is that not more likely to corrupt than just a simple donation?

Dr THAM — I would not say it is corruption. Some people might see it as undesirable. If, for example, they are citizens who believe the unions actually exercise excessive influence within the Labor Party, I do not see that as undemocratic or corrupt, but some people might say, 'Because of that we don't think the ALP is fit to be elected as the government'. That is something to be decided by the voters in the election. I strongly resist characterisation of that conduct as being corrupt. People might see it as undesirable, and I can accept that, or not good policy and so on and so forth.

Mr O'BRIEN — Part of the reason why when the Liberal Party was founded it had different structures to its predecessors was the fact that the old United Australia Party, in my understanding, did have business interests directly as membership. That was seen within the party and outside the party as corrupting the process and that businesses were picking individual candidates. That was not seen as being desirable; that was seen as being a corruption of the process, which why the Liberal Party moved to the individual membership structure that it still has today. Would you accept that you can have a legitimate difference of opinion about whether or not the presence of institutions within political parties could have a greater tendency to corrupt than just mere donations?

Dr THAM — I would not agree. It just depends how it operates.

Mr O'BRIEN — That's fine. In your submission you make a number of references to fairness and you talk about the 'competitive extravagance of parties that seek to outbid each other by spending excessive amounts in campaigning'. It is pretty difficult to define objectively what is excessive. What is excessive to you may not be excessive to me.

Dr THAM — Sure, yes.

Mr O'BRIEN — I apologise if this is not entirely accurate — I am sure you will correct me — but you seem to be arguing basically to compress the level of spending so that perhaps smaller parties or parties with fewer resources are better able to compete with the larger parties. Is it not fair that parties with larger membership bases that therefore receive more membership fees and more donations and have policies that appeal to unions and business should have more resources than parties like, for example, One Nation, that might appeal to a fairly small number of people? And why is it fair to hold back or to not let those parties with larger membership bases exercise the benefits that that brings?

Dr THAM — I accept what you are saying in terms of the last part, but it does not correspond in terms of the funding patterns of the parties. Corporate money for both the Liberal Party and the ALP is a significant source of their money, so it is not about a broad membership base that is getting these increasing funds to actually spend. Of course the problems of the major parties are not solely a consequence of political funding. It is because of various other factors, but I want to focus on that particular factor.

In terms of excessive and escalating expenditure, if you look at page 21 of the submission to the JSCEM inquiry and you look at table 3, we can infer — more clearly with the ALP but also to some extent the Liberal Party — that the amount of campaign spending that is occurring with each ensuing state election is actually increasing quite dramatically. I should advocate for it because with campaign expenditure disclosure requirements being scrapped a few years ago we do not know the precise figures in terms of what is actually spent. However, if one makes an assumption that during a state election year most of the spending will actually be campaign spending then we can see the pattern. So I do not think that observation is ungrounded.

Mr O'BRIEN — Finally, can I ask if you did have campaign expenditure limits on political parties, would that not lead to the rise of third-party actors in political campaigning? I am thinking of the US example: you have political action committees and you have the notorious Swift Vets and POWs for Truth running some fairly highly damaging campaigns against Senator Kerry in his election bid. Would you not just see no real difference in the amount of money that is spent; you would just see it channelled through different and arguably less accountable forces than political parties?

The CHAIR — Yes. WorkChoices in 2006 was pretty close to home, as I recall.

Dr THAM — Yes. The first thing I will say is that often the third-party issue seems to, for example, invoke the political action committees and I always felt that this actually was an inappropriate example. If you bear with me I will explain why. The reason for PACs is a consequence of the regulatory structure in the US where there are bans on trade unions and corporations contributing directly to parties and candidates. But the ban does not extend to them forming these organisations which can then solicit money and use some of their Treasury funds to administer these PACs, and then solicit money and channel it to various parties and candidates. Third-party spending is an example. But, for example, with the ACTU that is not how it occurs. The ACTU goes out, say, with Your Rights at Work and spends money directly. It is not through an intermediary vehicle and so on and so forth. Sorry, that is an elaborate sort of thing but I think it is quite important that examples of comparisons with the US actually be not made in a misleading manner.

Mr O'BRIEN — Perhaps what I am suggesting is that if you change the law it would change the practice.

Dr THAM — No, I agree. That is why this is directly addressed in my submission to JSCEM. The first point I make is that if you have spending limits on parties alone, without applying them to third parties, the law risks irrelevance because money gets pushed to third parties. Secondly, I am a strong supporter of a democratic process based on party politics, which means that you do not start privileging, if you like, third parties that usually run on topical issues or particular issues and so forth.

Anyway that is a long way to answer the question in the sense that this is saying the upshot is that there need to be third-party spending limits, and the position I put to the New South Wales inquiry was simply that those limits — and this is based on my preference for privileging party activity over third-party activity — should be lower than the limits that actually apply to the parties and candidates.

The CHAIR — Thank you very much, Dr Tham.

Witness withdrew.