

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 K. Coghill, Monash University.

The CHAIR — I extend a welcome to the public gallery. Dr Coghill, welcome to the public hearings of the Electoral Matters Committee's inquiries into political donations and disclosure, and voter participation and informal voting. All evidence taken at this hearing is protected by parliamentary privilege as provided under 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 hearing may not be afforded such privilege. Dr Coghill, have you read 'Guide to giving evidence at a public hearing' pamphlet?

Dr COGHILL — Yes, I have.

The CHAIR — I am sure you have. Can you please state your full name and business address?

Dr COGHILL — Kenneth Alastair Coghill. My business address is the Caulfield campus of Monash University at Caulfield.

The CHAIR — If you are representing an organisation, can you please state what your position in that organisation is?

Dr COGHILL — I am speaking in a personal capacity.

The CHAIR — Thank you. 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 COGHILL — Thank you for the opportunity to make a submission and to appear before this public hearing. Can I first confess to a couple of corrections before I proceed? Firstly, it is more of a clarification than a correction, but on page 4 the second full paragraph should more correctly read, 'If directors authorise the donation of funds ...'. The intention of the paragraph is to refer to company donations authorised by directors rather than any personal donations they may wish to make. Secondly, the appendix was intended to be the submission which I made to last year's inquiry. In fact it is an earlier draft, but my intention is that it should be the submission that I made last year. I apologise for that mistake.

In speaking to the submission, the context for me is the very essence of democracy. In other words, the way in which the electoral system operates, the issue of campaign expenditure and donations are all to do with supporting the essence of democracy. As the definition of democracy I take that used by Michael Saward, an eminent British authority in the area. He talks about the essence of democracy as being responsive rule; in other words, governance which responds to what he terms the felt interests of the citizens. In other words, the essence of democracy is that it should reflect the wishes of the electorate and not other interests or other parties.

That leads me to suggest that it is really important that the people seeking to influence the political process should also be the citizens and that there should not be the opportunity for influence by corporations through donations. To me that arises from the fact that corporations are not natural persons; they are not citizens. They represent simply particular institutional interests, and as such should not be equated with citizens or groups of citizens who may have legitimate public interests in particular areas of policy or the administration of policy, the letting of contracts or approvals and what have you.

To me that is a fundamental distinction between corporations and individual citizens, and citizens who might group together for some public interest purpose. It is clear that that then creates a real catch 22 situation for corporations. They cannot speak as citizens. If they do attempt to influence the political process then they are doing that and they can only do that on the basis of its serving the interest of the corporation. That is what directors' duty is about: directors are there to act in the interests of the corporation. So if in the interests of the corporation they then make a donation, they are implicitly saying they are making a donation for the purposes of influencing public policy or a decision taken pursuant to public policy — a planning approval, a contract, whatever it may be.

Conversely, if they are to say that, 'No, this donation is not related to the interests of the corporation', then they are breaching their responsibilities as directors to act in the best interests of the corporation. They are then acting for some purpose other than the purpose of the corporation. That in my view creates a catch 22 situation in which it is not possible for directors to make a donation other than for some corrupt purpose or some purpose which is at variance with their responsibilities as directors. In those circumstances it seems to me that the electoral law, and the law affecting political donations in particular, should mirror corporations law. In other words, it should support the

notion that there is no inherent right for corporations to be authorised by the directors to make donations to political parties.

To me that would then go to particular instances which on the surface may not appear or may not be described as donations, such as the payment of exorbitant fees or charges to attend dinners or conferences, as observers at conferences, or other fund-raising events run either by the political parties or by organisations which in turn contribute those funds to a political party. To me then there are a number of very strong grounds for suggesting that there should be a total ban on corporate donations and that that should extend to anything which is a disguised form of donation such as wildly inflated prices for attending functions organised by or on behalf of political parties.

The next particular point that I wanted to address is that although the terms of reference refer to donations and their disclosure — in other words, to the income side of it for the political parties — in my view that must be complemented by a restriction on expenditure so that there would no longer be the very strong incentive to have ever-increasing levels of expenditure. I think that, in defining expenditure, it is really important to acknowledge that campaign expenditure these days extends to much more than paid advertising; that it relies very heavily on direct mail campaigns and other forms of direct communication with individual electors. That needs to be taken into account in whatever restrictions are placed on expenditure.

The final comment that I wanted to make was around the manner of disclosure. At the moment the disclosure occurs long after the event, and it is not possible for the voters to know what forms and what extent of donation may have been made available during the election campaign which could have had some effect on the conduct of the campaign and therefore on the way in which people might cast their vote. With the technology that is available to virtually any political candidate and certainly every political party in Australia and in Victoria, real-time disclosure is something which is technically very simple. It would be a very simple matter for the receipt of donations to be disclosed on the same working day or the next working day on which they were deposited in the account of the political candidate or the political party. Again, in the sort of political system that we have in Australia now, all such funds are almost certainly going to pass through bank accounts. It is very, very unlikely that there will be great wads of cash being carried by candidates and party officials and paid to the suppliers of direct mailing services or advertising or anything else.

So it seems to me that there is a very strong case to be made for immediate disclosure by donors and immediate disclosure by the recipients of donations, and for that information to be available on a public website. Most of these processes could be very simply automated, and it is difficult to conceive of any reason why there should not be such immediate disclosure. That, in summary, is the oral evidence that I would like to give in support of my submission.

Mr O'BRIEN — Dr Coghill, I have a few questions, particularly about your proposals in relation to corporations. The interests of a corporation could be widely defined, could they not? Corporations probably by their nature would be interested in a stable political environment. They would be interested in a country with a strong economy. Why can't those corporations support their interest by donating to a political party or parties that in the corporation's view will best promote those interests? What is wrong with that?

Dr COGHILL — I suppose the first and most fundamental point is that they are not natural persons and moreover they are not citizens; they are a social construct, they are simply an institution which exists under provisions created by law whereas the essence of democracy is that it should reflect the felt interests and the expressed interests of the citizens. Corporations fail that test and can never meet that test. They are not natural persons, they are not citizens.

Secondly, it is, I would think, a fairly broad and unusual interpretation of directors' duties to say that in exercising those duties as board members or directors of a corporation, that they should take into account general social issues, general policy questions beyond the particular concerns of the corporation.

In my view the first point is the most important — they are not natural persons, they are not citizens. The second point is that the interests of directors are primarily the particular interests of the individual corporation, rather than general social or other environmental interests.

Mr O'BRIEN — I am not suggesting that corporations should be voting in state or federal elections, but corporations are subject to laws, they are influenced by the decisions of the government of the day, particularly in

relation to economic matters. You do not think it is a legitimate interest of corporations to seek to influence the economic circumstances by supporting a party or parties that it thinks will best grow the economy?

Dr COGHILL — I come back to my central point in addition to the natural persons and citizens one, which is that if they are going to seek to influence, they either have to do it in a way which is in the direct interests of that corporation — their responsibility is not on behalf of all corporations, it is on behalf of a single corporation of which they are board members, whether it is a subsidiary of another corporation or it is a stand-alone corporation — so if they are to authorise a donation, they have to do it in a way which is relevant and beneficial to the particular interests of the individual corporation. To my mind that is the essential thing.

If they confine themselves to that, then that is inherently corrupt because they are seeking to influence a decision to the particular benefit of that corporation as distinct from its competitors or other corporations operating in the same market. That really is the central point I am making.

Mr O'BRIEN — In relation to your proposal for instantaneous disclosure, I am wondering how practical it would be. I can understand it when you are dealing with your 500 clubs or your progressive businesses — they are relatively professionally run outfits, but presumably this would apply to all parts of the political party, and I am sure the Labor Party, the Liberal Party, The Nationals, the Greens and the Democrats all have their sausage sizzles, their lamington drives, their chook raffles. They are run by volunteers.

Often you have branch members who are the president and secretary and treasurer because it is hard to find someone willing to take on all those jobs. Is it practical to suggest that, let's face it, a bunch of volunteers who are not necessarily elected into those offices for their accounting skills should be required within 24 hours to work out exactly what the profit for a particular sausage sizzle is and put it up on the net?

Dr COGHILL — That money should be disclosed at the time of banking. That is really the crucial point to me. If any political party is to conform with the existing provisions of the law, then it does have to record those receipts and expenditures, and they have to be reported through the party to the electoral commission, as things stand now.

As I am sure the committee is aware, there are reports that some parties have had difficulty meeting that provision simply due to the reasons you have outlined — dealing with a whole lot of volunteers, some of whom may not have either experience or skills in accounting and reporting. But those requirements already exist. What I am simply suggesting is that they should be made transparent — that at the time of banking, in other words crediting the political party, at that point the disclosure should become public rather than be kept concealed for many months, as is the current provision.

Mr O'BRIEN — I have one last question. Why do you believe that corporations are less representative of institutional interests than trade unions? Because at point 7 of your proposal you basically give 'collective organisations', which I take to mean trade unions, the same treatment as individuals but it is a far different threshold for corporations. Trade unions are fictional legal identities the same as corporations are. Why should they get benefits that companies do not?

Dr COGHILL — Firstly, in my reference there to collective organisations I was really picking up the argument that your next witness has put in another place, and that is that they would include a whole lot of social organisations, which represent particular "policy communities", if you like by which I mean groups of people and organisations sharing interests in policy. Trade unions would certainly be one of those but they would quite conceivably include a whole lot of other non-government organisations, not-for-profit organisations, for example — although I do not suggest they would make donations; but bodies like the Brotherhood of St Laurence or St Vincent de Paul — those sorts of organisations and ones which are perhaps more likely to be active in the political process, like the Australian Conservation Foundation and such bodies. But to come back to your central point, the distinction really is the distinction which Dr Tham has made in his paper — that is, that these organisations are representing a broad social interest of citizens. They are representing citizens' interests rather than special corporate interests.

Mr O'BRIEN — A corporation is just made up of shareholders and ultimately shareholders are people at the end of the day.

Dr COGHILL — Those shareholders personally do not have equal rights within the organisation. As we are all well aware it is based on the number of shares held. Secondly, they may not be citizens and, in the case of many of the larger corporations which have been making extensive donations in Australia, they are either not domestically domiciled — but most of them are — or quite a number of them are not broadly held within the community but rather are quite narrowly held either by private companies. In other words, they are not tradeable shares; or they are companies in which the shareholding is held disproportionately by other institutions and other bodies rather than being broadly spread amongst citizens.

Mr O'BRIEN — But the fact is that George Soros provided so much money to MoveOn.org in the US. MoveOn.org is not a political party but it is an activist group with very much a liberal democratic bent. The fact that one individual could provide so much money to a collective organisation does not give you the same concerns that a particular shareholder may have more control over a company than another shareholder?

Dr COGHILL — I think that there are legitimate grounds for concern when one wealthy individual bankrolls an organisation. I think that is a legitimate concern that needs to be further examined — and examined more fully than I have.

Ms BROAD — Thanks for your submission, Ken. I follow up with three points. The first relates to a ban on corporate donations which we have been discussing. I certainly understand the reasoning that you have followed in putting forward that recommendation. I am sure you will recall — I certainly do — the High Court decision in 1992 in the lead-up to the 1992 Victorian state election and the impact that that had. I wanted to ask whether you have given any thought to what the current view might be on banning donations as opposed to limiting them as a proportionate response to a perceived problem and impact on our democratic institutions.

Secondly, in relation to your recommendation 7 on collective organisations, could you elaborate on what you consider to be adequate restrictions on donations by individuals, whether you think current restrictions are adequate or whether they should be further limited? In relation to campaign expenditure, do you have a view about what those limits should be, the scope of limits on campaign expenditure?

Dr COGHILL — I hope I have understood your point correctly. To my mind, the issue of a ban rather than some limitation on corporate donations comes back to the catch-22 which directors find themselves in: that if they are to make a donation, then it has to be in the interests of that individual corporation, not of corporations generally, so that in doing so they are either saying, 'It is in our interests to influence the political process', which becomes a corrupt activity; or they make that donation knowing or expressing the view at least that it is not in the particular interests of the corporation, in which case they have breached the Corporations Law on responsibilities of directors. To my mind, it is as clear-cut as that and that should be reflected in the law reflecting political donations. It should be a mirror image of that provision.

Ms BROAD — And you do not think the High Court would have difficulty with an outright ban?

Dr COGHILL — That would remain to be tested. The High Court is a little difficult to predict. No, broadly, I do not, but I think it would need to be tested and clearly would be tested.

On your second point on the restrictions on individuals, I am basically very attracted to the Canadian model and so suggest that there should be a restriction on individuals of, say, \$1000 per individual, some quite low level where it is not going to give disproportionate influence to particularly wealthy individuals, particularly wealthy individuals who may be able to donate very large sums. For most Victorians, for most people, I would think that \$1000 would be a very generous donation. It is not the sort of donation that people would commonly make to other institutions so why should political parties be any different to that?

As to the levels of campaign expenditure, I have not made estimates of what would be a reasonable limit there except to say that in principle it should be close to the level of public funding provided to political parties. That would be my starting principle: that if it was not equal to the amount of public funding that they were entitled to, then it should be something close to it.

The CHAIR — Therefore you expect public funding to increase to compensate?

Dr COGHILL — Not necessarily. The Canadians managed to put a cap on corporate donations and to introduce a level of public funding which is comparable to or perhaps lower than the current Australian level of public funding.

The CHAIR — Parties at the moment get \$1.26 for every vote.

Dr COGHILL — In Australia?

The CHAIR — In Victoria. It is \$1.96 in Australia in the federal system, but in Victoria it is \$1.26 for every vote. That is a one-off payment after every election. You would advocate to maintain that level?

Dr COGHILL — I think that level would provide a very adequate amount of funds for parties to communicate effectively with the electorate.

The CHAIR — When you say ‘capping election expenditure’, is that for the whole four years or just during the election campaign period?

Dr COGHILL — The campaign expenditure?

The CHAIR — Yes.

Dr COGHILL — That would be for the entire four-year period.

The CHAIR — What about in terms of the organisational wing of the parties, the administrative side? What would you advocate there? Clearly at \$1.26 you probably will not have enough money to run an effective party.

Dr COGHILL — Again, I think the Canadian model is worth having a look at. I have not detailed it in this paper, but there is a base level of funding for political party organisations. From memory, it is paid quarterly. I just do not recall the precise detail of how it operates, but I would strongly encourage the committee to have a look at that as a way of maintaining political parties. One of the important things would be that it not have some sort of a threshold of political support which would tend to deny the opportunity for smaller political parties to exist.

Ms CAMPBELL — Dr Coghill, you made an offhand reference like ‘I do not think we will have cash payments in Australia’ — one might hope. If it is your expectation that people probably will not be making cash donations — hypothetically they may —

Dr COGHILL — I am sorry; perhaps if can I clarify that. There may be donations made in cash but the receipt will be recorded and banked by the party political organisations and political candidates.

Ms CAMPBELL — A lot of what you have based your submission on is both income and expenditure, which I think is really helpful. Have you got any comment to make on how to verify expenditure? For argument’s sake, should it be a requirement that anybody who does direct mail or advertising or printing must be paid in non-cash — EFTPOS or cheque or something.

Dr COGHILL — In other words, to pick up the in-kind donations. Ultimately, there has to be a very strong sanction on political parties to the extent that in extreme cases political parties can be deregistered if they have seriously breached their obligations to disclosure or other important factors relevant to the integrity of the political process. Whether it is an in-kind donation of time or of printing or of distribution or something like that, or an actual cash payment to an organisation to do that, in either case there should be a disclosure and a record of it.

Mr SCOTT — I have a couple of questions. In terms of in-kind donations, I take it you would not be including, say, voluntary labour by natural persons, because that is very much part and parcel of any political campaign or process — so someone who went letterboxing or doorknocking or handing out pamphlets. Do you see that being caught in any disclosure system?

Dr COGHILL — No, I think there has to be a level of what is reasonable to include and what is not reasonable to catch in such a provision. But if there was an organisation which was providing services which would normally be paid for, then that is what I would seek to have included in the disclosure regime.

Mr SCOTT — When you say ‘normally paid for’, for instance, it is very common for people to letterbox election material, including direct mail letters on a voluntary basis as volunteers or members of parties who are supporting a particular candidate. Would you foresee that being included in the disclosure regime, because you could pay for it?

Dr COGHILL — If it was just the party members and people who had approached the party to act in a voluntary capacity, I think that would not be required to be disclosed. Inevitably there are going to be grey areas. Who is to say that a group of six people who walked in the door to do letterboxing did not happen to come from a particular organisation? To my mind, they would be very much at the fringe. What would be really important would be the big levels of cost, whether provided in kind or by payments for advertising, for printing, for that sort of thing.

The CHAIR — Can I butt in there? So a union mobilising its workforce to doorknock a particular area, would you consider that to be in-kind?

Dr COGHILL — That is one of the ones that comes in the grey area. An argument could be made that it is in-kind and, because of the scale of it, it should be disclosed. It is one of those grey areas that I think requires a fair bit of consideration before deciding exactly what is in and what is out. The important thing is to establish the principle that there should be disclosure of all significant expenditure and in-kind services.

Mr SCOTT — The second thing I wanted to touch upon was the issue you raised about the director’s duties or duties of anyone who held a position of financial trust within a corporation. I am sure that is more than directors; there would be other financial officers who would have a position in which to give donations within corporations. Is the gist of your argument that there is a duty to the shareholders within a corporation and therefore there can be no broader public interest which intrudes beyond the subjective interests of the corporation and the decisions that are made?

Dr COGHILL — I take a slightly different view about directors’ duties and the duties of officers of companies — that their responsibility is to the institution primarily, and secondarily to the shareholders.

The CHAIR — That has been tested, has it?

Dr COGHILL — My argument rests on the responsibility of directors and officers to the corporation.

Mr SCOTT — By shareholders, I mean indirectly through their holdings of shares and to maximise profits is the way I was framing it. Yes, I understand the distinction you are making. Therefore, because of that situation, any corporate donation is in effect — and must be unless the directors are breaching their local obligations — for the interests of the corporation.

Dr COGHILL — Yes, that is right.

Mr SCOTT — The other issue is in terms of contribution limits. You touched upon the New Zealand, Canadian and English models. Is that the way in which you would see such limits existing within our society?

Dr COGHILL — Yes. I am particularly attracted to the Canadian model which I have studied more closely than the others, and it strikes me that what we should be aspiring to here, as in other democracies, is best practice, and for the moment the Canadians appear to have best practice. No doubt that will get improved upon by someone else in due course.

Ms CAMPBELL — Can I build on what Robin has been raising? The focus of what you have been outlining to me is very much about what limits should be put on what disclosures. If you flip it the other way and you say, ‘If we are going to accept your recommendations’, it seems to me the only way the political parties will be able to run campaigns is if they have broadly based, active political members of their party. In any of the models you have examined, such as the Canadian model, have you been able to identify where restrictions are put in that so there has been a more active participation by the citizens of a nation or of a state as a result of provisions implemented?

Dr COGHILL — No, I have not found anything which informs me either way of that, but I think it is also important to remember that we have compulsory voting here, which completely changes the dynamics of campaigning. But the emphasis of campaigning in other jurisdictions where there is not political campaigning is to

get the vote out, and that requires a lot more effort to mobilise party support than we commonly see in Australia. So in considering the other models, I think it is very important to keep that context in mind.

Ms CAMPBELL — Even accepting the context that the voters are going to come out, if you are the candidate you want them to vote for you.

Dr COGHILL — Yes.

Ms CAMPBELL — So you have to communicate with them, and you either have volunteers who letterbox or you pay to have it done. I would be interested in where there has been vibrant participation by the citizens as a result of measures implemented.

Dr COGHILL — I just have not seen evidence that informs me one way or the other.

Ms BROAD — I have one follow-up question on the matter of cash transactions which can arise on both the income and expenditure side of political parties and candidates. There are other submissions which essentially propose a prohibition on any transactions in cash as a further protective mechanism. Have you got a view about that?

Dr COGHILL — I think on the face of it that that is a highly desirable move. Presumably that does not extend to writing out a cheque for \$5 at a barbecue. Presumably there is some sort of threshold there.

The CHAIR — Thank you, Dr Coghill.

Witness withdrew.