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**Citation:** Goodman, J. 2018.  
Contesting Accusations of  
'Foreign Interference'; The  
New Agenda for Australian  
Civil Society. *Cosmopolitan Civil  
Societies: an Interdisciplinary  
Journal*. 10(1), 63-84.  
[http://dx.doi.org/10.5130/  
ccs.v10i1.5934](http://dx.doi.org/10.5130/ccs.v10i1.5934)

ISSN 1837-5391 | Published by  
UTSePRESS |  
<http://mcs.epress.lib.uts.edu.au>

REFEREED PAPER

## Contesting Accusations of 'Foreign Interference': The New Agenda for Australian Civil Society

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**DOI:** <http://dx.doi.org/10.5130/ccs.v10i1.5934>

**Article History:** Received 26/02/2018; Revised 14/03/2018; Accepted 16/03/2018; Published 29/03/2018

### Abstract

In 2017 the Australian Government announced a raft of measures designed to combat 'foreign interference' in the Australian political system. The measures propose new constraints on civil society advocacy and threaten to seriously curtail democratic rights. They form part of global trend towards the increased regulation of International Non-Government Organisations (INGOs), driven by fears of 'foreign' political influence. In response to the shrinking 'civic space', NGOs are defining new agendas. Recently in Australia and elsewhere NGO advocates have gained some traction in extending the legitimacy and scope for political advocacy. The new rhetoric of countering 'foreign interference' threatens NGO advocacy, but also creates new political possibilities. This article surveys the international trends and Australian contexts; it analyses recent legislative proposals in Australia to combat 'foreign interference', and outlines the public debate. The double standard for INGOs and multinational corporations is highlighted as a key theme, and the article ends with a concluding discussion about emerging possibilities for new political obligations for corporations in Australia.

### Keywords

**INGOs; Advocacy; NGO Regulation; Democracy; Australia**

**DECLARATION OF CONFLICTING INTEREST** James Goodman is a member of the Editorial Board of the *Cosmopolitan Civil Societies Journal*. He has had no involvement in the review of this submission. **FUNDING** This paper was produced without funding.

## **Introduction**

Non-Government Organisations (NGOs) are the institutional bedrock of civil society, both domestically and internationally. The concept of the NGO as the carrier of democracy, rather than the political party, became established in the 1970s and 1980s through multiple struggles against authoritarianism. This 'third wave' of democratization, as Huntington, the conservative political scientist, called it (1991), unseated autocratic elites in Eastern Europe, South America and East Asia and was in large part driven by mobilisation through NGOs. Subsequently, in the context of globalised corporations and the emergence of new forms of unaccountable political authority at international levels, International NGOs (INGOs), aligned with social and political movements, became established channels for globalization and democratic engagement 'from below' (Steger, Goodman and Wilson 2014). Alliances of INGOs and movements created constituencies, constituted influence and exerted leverage: they exposed and stalled corporate and government initiatives, and established new forms of global governance and regulation (Goodman 2016).

The international and domestic impacts of NGOs did not go unnoticed, and from the 2000s there was a concerted effort to rein-in their power. One important claim was that NGOs exert political influence but are relatively unaccountable. This challenged their democratic legitimacy, presenting NGOs as elitist and self-interested. The challenge came from the 'free market' Right, in the form of 'public choice' theory that asserted a 'free market of ideas' as the precondition for optimal political decision-making, defining NGOs as an illegitimate distortion of formal representative politics (see Staples 2008). A parallel criticism of 'NGO-ism' came from the Left, which defined dominant NGOs and especially 'branded' INGOs as extending elite control against (and parasitic upon) genuinely democratic grassroots social and political movements (see Hirsch 2003). Into the 2000s the critiques from the Right found purchase in government attempts at imposing restrictions on NGO activity, as reflected in several countries, including Australia, where the Government embarked on a multi-faceted effort at 'silencing dissent' (see Hamilton and Madison 2007).

The attempted imposition of new constraints on NGO activity has certainly threatened the vitality of democracy, chilling public advocacy across many countries (see successive reports from CIVICUS, for instance 2016). In several places, including Australia, attempted impositions have politicized the regulation of NGOs and produced a public backlash that in some instances has had the ironic effect of expanding the realm of civil society activity. This is an important lesson in the Australian context, where the Howard Government's efforts to constrain NGOs in the 1990s and early 2000s helped to galvanise the sector, and subsequently forced new commitments from government agencies not to constrain NGO advocacy. The commonplace imposition of a 'gag' order for any NGOs receiving government funds, for instance, was contested across a range of contexts, leading to legislated commitments, including the 2013 'Not-for-profit Sector Freedom to Advocate Act' at the Federal level and various 'social compacts' to respect NGO autonomy at the State level (Butcher 2015). Government attempts to tighten the definition of charitable status, and hence constrain access to tax-deductibility, was likewise highly contested and culminated in a High

Court case that established the public benefit of political advocacy (the ‘AidWatch’ case, discussed below; Staples 2012; *CCS Journal* 3(3S) 2011).

In the current period, the stand-off over NGO regulation has taken a new turn, which again may have unexpected consequences. Following the Global Financial Crisis, and the persistent economic downturn, a wave of openly nationalist political forces have gained power across several countries (Gonzalez-Vicente and Carroll 2017). This has coincided with something of an inter-regnum in geopolitics, with new challengers, principally China, Russia and India, gaining political influence. There has been increased concern about cross-national collaboration between nationalist forces, for instance to secure the exit of Britain from the EU, and to help put Donald Trump into the White House (see Dodd et al 2017; *CCS Journal* 9(2) 2017). In Australia there are rising concerns about the influence of Chinese authorities, channeled through affiliated advocacy NGOs or think-tanks, and through direct donations to political parties – Chinese corporates account for the vast bulk of overseas donations to Australian political parties (Uhlmann 2018; Hamilton 2018). The fear of the rising powers has legitimised a new political concern about ‘foreign political interference’ and a related desire to defend the sanctity of ‘political sovereignty’. This new anti-foreigner sentiment has been recruited, very effectively, to the wider campaign against NGO political advocacy.

The result, in Australia, and replicated in many other countries, is a raft of measures that are ostensibly designed to ‘protect’ democracy from outside interference. The rhetoric subsumes INGOs as potential threats to political democracy, but the effect is to constrain the democratic process by delimiting NGO influence, both domestic and international. In 2017, on introducing ‘foreign interference laws’ in Australia, the Prime Minister referred to the need to criminalise non-disclosure of ‘ties to a foreign principal’, as a ‘disinfectant’ for the political process, along with powers to ban foreign funding and political interference, to ‘surgically’ remove risks to the democratic system (Turnbull 2017). Senator Brandis, Attorney-General and long-time advocate of tighter constraints on NGOs, stated his government was ‘committed to ensuring that our political system is free from foreign interference’, detailing legislation that would extend across all aspects of political life, covering any ‘foreign sources ... seeking to influence Australia's government and political processes’ (Brandis 2017). The heady mix of anti-foreigner rhetoric and democratic sentiment may have unexpected consequences though, in terms of politicising the role of INGOs: there has certainly been a strong backlash in Australia (and elsewhere where similar proposals have been tabled). The backlash reasserts the legitimacy of international links for NGOs, and their importance for the political system. In the process, the assault on INGOs may create the foundations for a stronger challenge to nationalist populism.

This article outlines proposed changes in the political regulation of NGOs in Australia and their implications. The article addresses a range of issues, across charity status, tax deductibility, foreign donations, and foreign influence. All have direct implications for domestic as well as international NGOs. In large part the Australian measures extend parallel initiatives underway in other countries, and this international context is addressed first by way of background to the Australian experience. This is followed by an overview of recent efforts at regulating the political activity of NGOs in Australia, and how they have been

countered, for the most part successfully. Governmental restrictions are found to galvanise the sector, inspiring a 'collective effort to resist the government's agenda' (Crosbie 2017). This has affirmed and in some respects widened 'civic space'. The article then analyses recent government efforts at constraining 'foreign interference', focusing on implications for NGOs in Australia, and outlining, again, how these measures have been very effectively opposed. The article echoes three other papers published in this journal, covering the Russian, Chinese and Indian contexts (sector into see Oleinikova 2017 and Feng 2017; and Talukdar, this issue), in particular their discussion of how the measures have been justified and resisted.

### **An International 'Chill'?**

The globalisation era led to an 'explosion' in INGO activity through the 1990s (Josselin and Wallace 2001, p.1). In 2002 the UNDP stated that twenty percent of the 37, 000 INGOs in place in 2000 had emerged since 1990, and that these had generated more than 20,000 INGO networks, a 'revolution [that] parallels the rapid growth of global business over the same period' (UNDP 2002, p.102). The growth continued into the 2000s, with 56,000 in place by 2010, showing a 'stable consolidated growth pattern' (Kaldor et al. 2012). INGOs drew on their legitimacy as representatives of public opinion in confrontations with corporations and governments, establishing something of a 'pro-NGO norm' (Reimann 2006). Reflecting this, the Globescan global trust survey found that NGOs attract much higher levels of trust than either corporations or government: in 2015 nearly 80 per cent of respondents were found to agree that NGOs would 'operate in the best interests of our society' (Globescan 2015).

Demonstrating their legitimacy, coalitions of INGOs have played a key role in global policymaking, exercising a 'potential to catalyse change' (UNDP 2002). A recent example is the role of INGOs in contesting the United Nations 'Green Economy' agenda at the World Summit on Sustainable Development in 2012 (Goodman and Salleh 2014). More positively, INGOs have become key agents in instigating and encouraging the emergence of inter-state normative and policy regimes (Reimann 2006). INGOs have been key players in a 'new public diplomacy' where governments exercise power with an eye to normative INGO agendas (Vickers 2004). Their activity has especially exposed the close regulatory relations between corporate interests and governments, and the creation of 'private international law' (Goodman 2014).

In recent years an increasing number of countries have introduced specific obligations to rein-in the power of internationally-funded NGOs. There is a variety of preexisting national schemes that regulate the political role of foreign entities: the United States (US), for instance, bans overseas donations to political parties and has had a registration system for 'foreign agents' since the 1930s. The 'Foreign Agents Registration Act' (which in 2018 was set to be more heavily enforced) requires registration for individuals and organisations, including corporates that act 'in a political or quasi-political capacity' and do so 'under the control of' foreign entities (see Jenner and Block 2018). The specific regulation of INGOs, as against political parties, is becoming more commonplace. In 2014 the British Government introduced measures preventing NGOs, dubbed 'third party' organisations, from receiving overseas funding for any spending designed to influence voters during an election campaign

period, and capped their total allowable spending (GoUK 2014). In doing so the UK joined the growing list of countries, mainly low and middle-income countries, which have imposed limitations on INGO political spending. Just three such countries had such limitations in 1993; thirty-nine had restrictions in 2012. Often these are low-income countries motivated by concerns about political interference by INGOs from high-income countries (Dupuy et al. 2016). In contrast, as discussed below, similar initiatives in high-income contexts are in part motivated by concerns about offshore interventions from those self-same middle-income countries, such as Russia or China. All such measures have a ‘chilling effect’ on democracy, including in the UK, where new rules on spending ensure that ‘many NGOs are more cautious about campaigning on politically contentious issues because they fear breaking the law or the reputational risk of vexatious complaints’ (Commission on Civil Society and Democratic Engagement 2014, p.10).

Concerns about the impact of new INGO obligations on the democratic process have been voiced for some time, including at the United Nations. In 2013 the United Nations Human Rights Council approved a resolution on ‘Protecting Human Right Defenders’ that stated ‘no law should criminalize or delegitimize activities in defence of human rights on account of the origin of funding...’ (Human Rights Council 2013, para 9b). In a commentary on the resolution, Human Rights Watch asked ‘why is it wrong for NGOs to solicit financial support from foreign friends?’, and pointed to a double standard: ‘Bolstered by foreign funds, governments routinely advance their political agendas. Militaries and businesses do the same. Why should NGOs be singled out for restriction?’ (Human Rights Watch 2013). Since 2013, a wide range of agencies have taken up the issue. The *Economist* reported on the trend in 2014 as follows: ‘More and more autocrats are stifling criticism by barring non-governmental organisations from taking foreign cash’, citing Hungary, Egypt, Azerbaijan, Mexico, Pakistan, Russia, Sudan and Venezuela (Economist 2014). In 2015 the Carnegie Foundation reported that: ‘Just in the past two years, China, India, and Russia, along with many smaller countries – such as Cambodia, Hungary, and Uganda – spanning all ideological, economic, and cultural lines, are stepping up efforts to block foreign support for domestic civil society organizations’ (Carothers 2015).

Numerous international organisations have raised concerns at the growing impacts on ‘civic space’, including (ironically enough) the corporate-led World Economic Forum, which in its 2017 ‘Global Risk Report’, referred to the emerging global double standard for businesses and NGOs, asserting that ‘In some countries, for example, businesses and civil society actors have different reporting requirements – for example, civil society actors may be prohibited from receiving foreign donations, while businesses are encouraged to seek foreign investment’ (World Economic Forum 2017, para 2.2). CIVICUS made a similar point in its 2016 ‘Civic Space: Rights in Retreat’ report, citing Israel, India and Russia as key examples in the ‘onslaught on foreign funding’. Like the WEF, it highlighted ‘considerable hypocrisy’ where ‘governments that decry foreign support for CSOs are more than happy to accept foreign funding themselves, including support from donors for their national budgets, or by courting foreign direct investment in the private sector; indeed, the restriction of civic

space can in part arise because a government sees CSOs as competitors for resources' (CIVICUS 2016, p.5).

Despite these concerns, the trend has been extended and deepened, and appears to be in danger of become self-reinforcing. An ostensible concern about 'foreign' interference in domestic political affairs has in the process become a proxy for restricting the power and influence of the non-government sector more generally. The danger of an emergent 'anti-NGO' norm is clear, but it is also opening up new debates, about double standards especially, for corporates as against NGOs. The new constraints, and contestation over them, has the potential to become the vehicle for new political forces and agendas. One very good example is in India, where the government's arbitrary attack on environmentalists has served to both delegitimize the government and highlight environmental concerns (Talukdar, this Issue). The backlash in Australia, as noted, is having a similar impact. The recent history of failed attempts to constrain NGO advocacy in Australia, as outlined in the following section, suggests the government is surprisingly vulnerable on this issue.

### **Australian Contexts**

In the Australian context non-corporate NGOs are regulated in a variety of ways. Membership-based associations can be created informally, but to enter into contracts, including to be insured for as an organisation for public events or as an employer, they need to become a legal entity. For this, associations apply for status as a 'cooperative' or as an 'incorporated body'. This does not come with limitations on political expression, though it does require organisations to be accountable to a membership, and report on finances to the Office for Fair Trading. One issue for incorporated bodies is that while Board members are not individually liable for debts they remain exposed to vexatious and politically-driven allegations of wrong-doing, such as defamation and libel. To minimise this, some organisations choose instead to be constituted as not-for-profit companies – which can offer greater protection for Board members in terms of liability, but can also prevent Boards from being challenged by, and being accountable to, any formal membership. Not-for-profit companies pay some forms of tax, but, as discussed below, are free from the widening range of governmental constraints being imposed on NGOs.

Limitations on political expression are indeed much more explicit for NGOs that seek status as charitable organisations, whether as incorporated bodies or not-for-profits (NfP). Charitable status exempts an NGO or NfP from income tax and fringe benefits tax, and from tax on sales and investments; there is also a range of exemptions from State taxes. Charitable status can also be very important for organisations that rely on grants from charitable foundations and other tax-deductible trust funds. Until recently, charities in Australia were required to demonstrate, under the British-based common law of charities, that they did not have a 'dominant political purpose'. A disqualifying dominant political purpose could be determined from an organisation's practices as well as from its constitution, the rationale being that a dominant political purpose was by definition non-charitable.

The common law requirement was lifted with the 2010 AidWatch case (see *CCS Journal* 3(3S) 2011). The case established that, under Australian constitutional law, charities

could have a dominant purpose of influencing and engaging in public "agitation" for legislative and political changes' (High Court 2010, para 45). The decision applied the right to freedom of political communication in Australia, which the Australian High Court had previously defined as a constitutional precondition for representative democracy. In the *Aid/Watch* case the Court found that 'the generation by lawful means of public debate ... itself is a purpose beneficial to the community', adding that 'in Australia there is no general doctrine which excludes from charitable purposes "political objects"' (High Court 2010, paras 47 and 48).

The judgement was later expressed in the 2013 Charities Act, which recognises that any charity with aims 'beneficial to the general public' can have a sole purpose of: 'promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country' (CoA 2013, s.12.1.1). Under the Act charities may not have 'the purpose of engaging in, or promoting activities that are unlawful or contrary to public policy' (public policy here refers to the constitutional system and the rule of law). Nor can charities have a 'purpose of promoting or opposing' political parties or candidates for office, though they may distribute information and advance debate through assessments, critiques and policy rankings (CoA 2013, s.11.a+b).

At the time of the 2013 Act the 'Australian Charities and Not-for-profits Commission' (ACNC) was established to oversee the sector. Since 2014, the ACNC has had responsibility for disqualifying organisations that fail to comply with the political regulations, and has a 'compliance' team that actively investigates complaints from the public about specific charities. The ACNC itself is known to have received politically-driven complaints about specific charitable bodies, and in 2016, arising from twenty-seven such complaints, officially initiated seven investigations, all of them into support for political candidates (ACNC 2017). This is a very small proportion of the 54,000 charitable organisations, but the threat of investigation alone produces compliance, and the ACNC is seeking the right to disclose targets of investigation to strengthen that effect (Knaus 2017). Yet, still, to date no organisation has been disqualified for breach of the political disqualifier, although there is political pressure to test the grey areas. In this respect a key issue may be whether 'promoting... unlawful' civil disobedience, or support for a political party or candidate can be imputed as a 'purpose' under the 2013 Act, as against simply an activity.

In Parliament the Opposition's Liberal-National Coalition had opposed both the 2013 Act and the creation of the ACNC. When it came to power under Prime Minister (PM) Tony Abbott the Coalition sought to abolish the ACNC, but a hard-fought public campaign led by the charitable sector ensured abolition was blocked in the Federal Senate (Crosbie 2017). The Government opted instead to change the ACNC 'from within', and in late 2017 it appointed Gary Johns as its new Commissioner. Gary Johns had made a career of challenging the legitimacy of advocacy NGOs. Formerly of the neoliberal think-tank, the Institute of Public Affairs, where he set up 'NGOWatch', Johns frequently criticised the charitable sector, including in his 2014 book, *The Charity Ball*, self-described as an attack on 'political activism by state-funded charities' (Johns 2014). He has also made specific demands that the

Government delete advocacy from the definition of public benefit under the 2013 Charities Act (which would violate the High Court position).

Soon after the appointment of the new Commissioner the ACNC embarked on its five-yearly independent review. In its submission to the review the ACNC Commissioner recommended two new purposes for the ACNC, namely to 'promote the effective use of the resources of not-for-profit entities', and to 'enhance the accountability of not-for-profit entities to donors, beneficiaries and the public' (ACNC 2018). These would be in addition to the existing three purposes, namely to maintain 'public trust' in the sector, to 'support and sustain' it, and to reduce regulatory 'red tape'. No evidence was presented by the ACNC that the charitable sector was failing to effectively use its resources, nor that it was unaccountable, or that the existing purposes did not adequately cover the two proposed additional responsibilities. Peak sector organisations condemned the proposal as 'bizarre overreach', suggesting the ACNC was planning to regulate against what it may deem 'ineffective' use of resources, namely political advocacy (Karp 2018b).

At the same time, with the question of charitable status relatively settled, attempts to undermine NGO advocacy had shifted into the field of 'Deductible Gift Recipient' (DGR) status. DGR status allows an organisation, usually a charity, to collect tax-deductible donations from the general public. Tax-deductible donations are an important source of revenue for the NGO sector. 28,000 organisations are registered, and DGR donations reduce tax revenue by a total of about \$1.3 billion (Treasury 2017). Organisations apply to be placed on a DGR register relevant to their sector and must comply with its particular conditions. The five registers are held in variety of Federal Departments, and from mid-2019, were to be transferred to the ACNC, which in December 2017 was granted additional funding to 'improve governance, reduce complexity and boost integrity' of DGR (Michael 2017, p.1).

Leading up to this decision there was a series of reviews of DGR status. In 2015 the Environment Minister established an Inquiry into the Register of Environmental Organisations (REO) under the Government-controlled House of Representatives Standing Committee on the Environment. The inquiry was focused on the definition of 'environmental organisation' in the REO and whether or not there should be a requirement to engage in 'on-ground environmental works'. It received 685 submissions and held a number of public hearings, including one in Sydney in October 2015, where a lively public demonstration was held by about 500 people to highlight the impacts on advocacy. The Inquiry recommended the Register be transferred to the Tax Office, that organisations be required to submit annual reviews, and undertake a quarter of their expenditure on 'environmental remediation work' (rather than advocacy); further, it recommended that organisations on the REO should be made responsible for the unlawful activities of members and 'others without formal connections to the organisation' (CoA 2016).

In early 2017 Treasury initiated its own inquiry into DGR status, issuing a discussion paper on 'Tax Deductible Gift Recipient Reform Opportunities' (Treasury 2017). The paper made a bid to bring DGR registers into the Tax Office (which has a prime responsibility for maximizing revenues), and to more closely police access to DGR, including to delimit the

scope for advocacy, especially under the Register for Environmental Organisations. There are already indirect political restrictions embedded in a number of DGR registers, which require organisations to be engaged in direct provision as their predominant purpose. This is the case for the register of 'Public Benevolent Institutions', held at the ATO and later at the ACNC, which requires a PBI to 'have benevolent relief as its main purpose': PBI's may only be engaged in 'ancillary or incidental' advocacy (ACNC 2016). This means that welfare advocacy organisations, for instance, cannot claim DGR status under the PBI. In this case, DGR status assists in addressing the symptoms of poverty, not its causes. The PBI is probably the most restrictive of the several DGR funds, although others have specific limitations. The 'Overseas Aid Gift Deduction Scheme', for instance, which falls under the Department of Foreign Affairs and Trade, requires that organisations deliver 'overseas aid activities' (DFAT 2016). Under the scheme, aid can be used to address the causes of poverty, in the form of development assistance, as well as its symptoms, through direct humanitarian relief, and aid may flow to overseas advocacy organisations with the proviso they not be agents of political parties.

The Treasury paper proposed a specific revision to the DGR REO. For an organisation to be on the REO it must be engaged in 'the protection of the environment', which may include 'the provision of information or education, or the carrying on of research' (Treasury 2017). Advocacy for policy change, as it relates to the environment, is not explicitly defined as a purpose, but neither is it ruled out. In its paper, the Treasury floated the proposal from the Standing Committee on the Environment that environmental organisations be required to engage in 'environmental works' in order to be eligible for DGR status (Treasury 2017). Its effect would have been to disqualify organisations from accessing DGR that had a predominant or sole purpose of engaging in political advocacy, and was widely criticized by a range of NGOs. Treasury also suggested that there should be new requirements for DGR recipients to report to the ACNC to ensure their advocacy activities did not fall foul of the Charities Act.

In the event, with over 2,500 submissions to the Inquiry, the status quo was maintained. In late 2017 the Government announced it would not 'mandate a level of remediation by environmental organisations', and instead of transferring administration of DGR registers to the Tax Office, it placed them under the ACNC. Further, rather than seek to directly police forms of advocacy, it announced the ACNC would simply report political expenditure by charities to the Australian Electoral Commission (AEC). In another climb-down, the Government revoked earlier legislation that would have limited overseas expenditure by charities (the 'in Australia' rule) (O'Dwyer 2017).

The debate exposed the need to more clearly entrench the advocacy as a public benefit and charitable purpose in the DGR registers. Arguably, any requirement to limit activities to the direct provision of services undermines debate for 'legislative and political changes', chills democracy, and is potentially unconstitutional. It would be possible to simply carry across the Charity Law provisions into the various DGR Registers, as part of the 'unfinished business' of establishing the specifically Australian constitutional right to freedom of political communication in the regulation of DGR status. Indeed, given the public benefit of

all charities, extending access to DGR status to the whole sector would by definition be in the public interest (this was proposed by some agencies at the time). This would dramatically cut 'red tape', a key responsibility of the ACNC. Such a tax cut for donors to the charitable sector would arguably be of much greater economic benefit than the Government's proposed (much larger) tax cut to corporations. The impacts in terms of lost revenue would likely be more-than compensated-for through a resultant expansion in economic activity associated with the charitable sector. The impacts in terms of enhanced community well-being would be extensive.

### **The 'Foreign Interference' Legislation**

In 2017 the Australian Government introduced a raft of proposals to curtail 'foreign interference' in the Australian political system; these dovetail with on-going measures to curtail public advocacy by domestic NGOs. The foreign influence legislation comes in three forms. First, there is proposed legislation requiring organisations that seek to exert 'political or government influence', and which also have any links with overseas political organisations, to register their interests and report publicly any donations or communication (CoA 2017b). Second, under 'Electoral Legislation', there is a proposed direct ban on any overseas funding to NGOs engaged in 'political activities', ostensibly to prevent foreign funders influencing electoral outcomes (CoA 2017a). And third, there is a series of changes to 'National Security' legislation which seek to ban 'foreign interference' directly (CoA 2017c). These proposals, and the debate around them, are discussed in turn.

#### *(i) Naming Agents of Foreign Influence*

The question of 'foreign interference' in Australian politics has opened up a new front in the battle for and against advocacy NGOs. As noted, the current period of great-power rivalry, set in the context of an unprecedented interlocking of informational systems under globalisation, facilitates new forms of consensual paranoid nationalism. Not unlike the mobilisation of anti-Communist states against their internal 'fifth column', the 'enemy within', the current political hysteria over political interference could enable a whole new raft of limitations on the democratic process. In interesting ways this is an instance of 'geopolitics as usual', a conflict between global elites, vying for influence. The political dynamic can be unstable. There are, not least, deep contradictions, with would-be nationalists creating new alliances of convenience, for instance, between Russia and the Brexit campaign.

In Australia the debate about foreign interference came into focus after the 2016 election on the issue of electoral donations. Following concerns at the manipulation of the 2016 US election, a political consensus emerged about the need to revisit the issue of political interference in Australian elections. This was manifest most clearly at the Federal Joint Standing Committee on Electoral Matters, which in September 2016 established an Inquiry into 'all aspects of the conduct of the 2016 Federal Election its inquiry into issues arising from the conduct of the 2016 Federal Election'. The Inquiry quickly became focused on the issue of political donations and in March 2017 released an 'Interim Report' on foreign political donations (CoA 2017d). This Report, and the ensuing legislation on regulating 'foreign donations' are discussed in the next section.

At the same time as seeking to regulate donations the Government introduced legislation designed to make transparent 'foreign influence'. The proposals have received relatively little public scrutiny, possibly because they entail 'political transparency' rather than a direct prohibition or limitation on political activity. The Inquiry into the proposed legislation, under the Joint Committee on Intelligence and Security received only 64 submissions, and little media exposure. Yet the legislation proposed a major change in the regulation of political activity in Australia, which is likely to have a range of unanticipated effects. Like many of the schemes in other parts of the world, notably in Russia and the US for instance, the proposed legislation would require individuals and organisations to disclose international political relationships. Such relationships would be 'registered', with details of the activities made public.

The legislation is remarkably broad (see CoA 2017b). It requires any individual or organisation undertaking activities 'on behalf of a foreign principal', to register as an agent of 'foreign influence'. Acting 'on behalf of' encompasses any joint arrangement, including collaboration or funding. A 'foreign principal' is defined as anybody who is not an Australian citizen or permanent resident. A 'registrable arrangement' may include any kind of arrangement, written or unwritten, and may or may not entail any activity. The political activity itself may be to influence a section of the public, not simply the government. All activities must be reported to the registry, and may be released to the public. Non-compliance carries a heavy prison term, which could conceivably be imposed, for instance, 'on a person seeking a meeting without registering as an agent of foreign influence' (ACFID 2018).

The upshot is that all organisations with any international linkages will either cease those undertakings or register as the agent of a 'foreign principal'. Such a designation clearly carries with it a range of negative associations, what the Australian Council for International Development calls an 'inherent reputational risk', which directly undermines the legitimacy of organization or individual (ACFID 2018). The ACNC raised similar concerns, suggesting it is possible that: '...where a charity is part of a wider family of charities... which has links to an international grouping of entities, the charity may be required to register... should the group all decide to draw attention to the same transboundary issue, for example wealth and income inequality, or global environmental issues' (ACNC 2018, p.3). As a result of these and other pressures, the ACNC stated that 'it is likely charities will be less inclined to engage in public discourse which is an important element of charitable activity and purpose' (ACNC 2018, p.1). Stressing that foreign ties should generally be encouraged, not penalized, the Law Council of Australia recommended a focus on the 'recipients of foreign influence', rather than on those said to be agents of it (Law Council 2018); it also emphasized the failings of the US approach under the Foreign Agents Registration Act, which was cited as the model for the broader Australian approach.

The exemptions in the proposed legislation are themselves highly revealing. The proposed legislation is principally targeted at NGOs and individuals (though some NGOs are exempted, such as in the aid, humanitarian, legal, media and religious sectors). Unlike its US counterpart, the Australian model creates a blanket exemption for business entities registered in Australia, including wholly-owned subsidiaries of multinational companies, thereby

rendering it largely ineffectual. Australian-based companies with international commercial dealings are also exempted provided the international relationship is business-related (although some 'sensitive' business dealings are not exempted, such as in public infrastructure, defence and national security). In its submission to the Inquiry, the Community Council drew attention to these imbalances in the application of 'transparency', highlighting the escape-clause for corporations, noting it would allow 'any foreign company to engage in any activity in support of their international commercial interests, but seeks to restrict most others' (Community Council 2018, p.5). This likely discriminatory impact reflects the underlying political drivers of the overall 'foreign interference' package (and may be its undoing).

### *(ii) Banning Foreign Political Donations*

The issue of political donations raises the question of who or what is defined as a political actor in the electoral process, and how their role is distinguished, if at all. The key recommendation in the Committee on Electoral Matters Inquiry's Interim Report was the implementation of an across-the-board blanket 'prohibition on donations from foreign citizens and foreign entities to Australian registered political parties, associated entities and third parties' (CoA 2017d, Recommendation 3). This approach stemmed from opinion, not evidence: as the Committee stated, it was 'of the opinion political entities, be they parties, associated entities, third parties or other actors should all be subject to the same rules'. The problem with this 'level playing field' approach is that the three sets of 'players' are quite different entities and by definition 'play by their own rules'. As Staples has pointed out, 'politicians and their parties form governments, and governments have the executive power to enact legislation that materially advantages or disadvantages organisations and individuals; she adds that, in contrast, civil society cannot pass legislation... it is the engine of ideas in our democracy' (Staples 2017). A consortium of 'peak' charitable NGOs, in responding to the Interim Report, made a similar point, stating 'there is a categorical difference between political parties and charities', from 'a risk mitigation perspective, there is no argument for applying the same restrictions to charities as are applied to political parties' (Charities Consortium 2017). Imposing the ban across the board has the effect of writing 'rules' for political parties and extending these across civil society as a whole. This does not reflect the ways in which these organisations are treated currently, as distinct entities with distinct purposes and responsibilities. Nor does it reflect their purposes.

The Australian Electoral Commission defines the three sets of entities – political parties, their affiliates and third parties – as potential 'participants in the electoral process', but does not suggest they should be treated the same (AEC 2018). Within liberal democracy, political parties have a very particular role. Donations to political parties can enable them to gain access to political power and, hence, can have a corrupting influence. Reflecting this, they are subject to specific forms of regulation, for instance as regards transparency, that reflect the role of political parties in the political process. There is considerable debate about whether or how to 'keep money out of politics', or simply to ensure the public can find out where political parties source their funds. Counter to this is the strong incentive for party political donors to conceal their donations, for instance by channeling them via obscured

‘associated entities’ (see *Guardian* 2018). The debate about party political funding reflects the particular role of parties in the system, as representative bodies seeking to win elections and form government. Yet, increasingly it spills over into debates about the regulation of party affiliates, and wider NGO players, defined as ‘third party’ participants by the AEC.

Expenditure by affiliates of political parties may be used to garner votes for the affiliated party – but also may not. This hinges on the definition of ‘affiliation’: some trade unions for instance are officially ‘affiliated’ to the ALP, but that does not mean that all their political activity, and all their income, for instance in the form of membership dues, is directed at promoting the electoral prospects of the ALP. Affiliated non-party organisations have multiple purposes, and it may be difficult to distinguish party-political purposes, and this reflects the fact that they are not solely or largely devoted to electoral gain. They are, as such, distinct types of organization, different from political parties.

When it comes to ‘third-party’ political players, the scope of interference in the electoral process is even less clear. There is no necessary link to the political process as reflected in an affiliation for instance. Yet clearly there are many ‘third party’ bodies which spend considerable amounts of money, both during and outside elections, to influence voters. Expenditure by business associations is a good example. Such associations do not support all political parties equally and they do regularly mount public campaigns, for or against specific government agendas, and are funded to do so from corporate donations. The resulting expenditure is often directly ‘political’ and has a bearing on the electoral process. Yet these ‘third party’ players have a distinct role where they act as ‘political entities’; crucially they do not seek votes as parties do, nor do they declare a particular affiliation.

As noted, third party organisations and affiliated bodies are variously constituted as incorporated bodies, charities, cooperatives, not-for-profit companies, mutuals or for-profit companies. Each of these types of entity has distinct characteristics and purposes, and often its own regulatory frameworks. All are fundamentally different from political parties. Charitable organisations are a good example. As noted, charities have a specific regulatory regime under the ACNC, through the 2013 Charities Act. Importantly, the Act recognizes that engagement of charities in the political process to influence legislative outcomes is in itself a public benefit. Foreign donations that help charities advance their political advocacy, and thus advance public benefit, should be obviously be welcomed, and certainly not restricted.

The Federal Inquiry’s insistence that all political players should be treated equally flies in the face of their very different roles and responsibilities. Most important, while there may be concerns about the influence of overseas donations on political parties, with anecdotal evidence to support such concerns, there is no in-principle reason why such donations to ‘third party’ organisations such as charities should be curtailed. The Inquiry heard some anecdotal evidence of violation of requirements on political activity, for instance as presented by the Minerals Council of Australia in relation to environmental charities, issues which already which come under the ACNC remit (MCA 2017). There was no sector-wide evidence offered, nor provided, and no claim that any current disqualifying activity could not be dealt-with by the ACNC. Despite this, the Committee took the view that foreign funding of

political activity in Australia, including charitable advocacy, by definition undermines national sovereignty: it stated simply that ‘only those with a direct standing interest [should] participate in Australian democracy’. The problem for the Committee was that political advocacy is already recognised as having a public benefit, and that there is no reason why such advocacy cannot be funded by overseas donations. In fact, insofar as foreign donations advance public benefit, they should be encouraged, not banned or otherwise restricted.

In late December 2017, the Inquiry’s recommendations surfaced in the proposed Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill (CoA 2017a). The Inquiry’s remit was extended to address the proposals and through this process considerable evidence has been provided on the likely impact of the proposed ban on foreign donations, especially for ‘third parties’. The sector has used the political process to digest and publicise what is proposed, and the Committee’s hearing and submission process have become a lightning-rod for concerns. In late 2017, for instance, a range of ‘peak’ organisations, including the Australian Council for International Development (ACFID), the Australian Council for Social Service, the Human Rights Law Centre and the Community Council, established a ‘Save Our Charities’ campaign ‘united in opposing the Federal Government’s attempt to undermine the benefits many Australians receive from philanthropy and to silence their voices’ (ACFID 2017b; Slezak 2017). Even the ACNC, under its new Commissioner, raised serious concerns about the ‘unnecessary regulatory burden’, stating the penalties for non-compliance would discourage qualified staff and Directors; it also cited legislative ‘inconsistencies’, in terms of constraining ‘allowable political activity’ under charities law, ‘reducing the avenues available for them to achieve their charitable purpose’ (ACNC 2018b, pp.1-2)

The proposed legislative arrangement is indeed highly complex, and backed by extensive sanctions. The key point is that under it foreign funding for any ‘political purpose’ will be criminalized (with a penalty of up to ten years in jail for the financial controllers of organisations). ‘Political purpose’ is broadly defined to include ‘public expression... of views on an issue that is, or is likely to be before electors in an election’ (replicating the definition for the reporting of ‘political expenditure’ to the AEC, as previously expanded under 2017 legislation). As it cannot be predicted what issues will arise in an election, this essentially covers any and all forms of political advocacy. Organisations with such political purposes are required to register as ‘political campaigners’ if their ‘political expenditure’ is over \$100,000 annually, or if they are charities, as ‘third party campaigners’ with ‘political expenditure’ above \$13,500.

Designation as a ‘campaigner’ may have serious consequences for an organisation, in terms of ‘delegitimizing’ political comment (compounded by the requirement to disclose the party-political affiliations of senior staff; see HRLC 2018, p.8). Further, the legislation proposes to widen the AEC’s definition of ‘associated entity’ to any organization that spends funds predominantly to oppose the policies of a registered political party or to ‘benefit’ another party (and, interestingly, any association can be ‘inferred from negative campaign techniques’) (CoA 2017, p.14; CoAe 2017, p.21). Depending on how this is implemented (and tested in the courts), many advocacy NGOs could find themselves linked to a political

party. The AEC does not currently have powers to infer party political association: AEC designation of an NGO or INGO as having a party political association would have a direct and probably negative impact. Importantly, the Bill shifts the burden of proof on these issues: organisations have to prove they do not have political purposes as defined by the Act in order not to be registered.

Perhaps most important, under the Act's foreign funding rules, it will become imperative for all 'third party' organisations that are in any way involved in public advocacy to distinguish between Australian and non-Australian donations. Political campaigners will not be permitted to receive foreign donations; charities, unions and 'third party' campaigners will have to 'ring-fence' foreign donations to ensure they are not used for 'political purposes'. Under the legislation all donors giving more than \$250 annually to a 'third party' involved in advocacy will have to produce a statutory declaration or otherwise establish their status as an 'allowable donor'. For large donations, above \$13,500, details of the donors will be published by the AEC, including names and addresses of trustees.

The effect of this (and it is highly likely this is the intended effect) is that third party organisations involved in political advocacy will be forced to either cease seeking public donations or vacate the political field. In either case, in aggregate, as the ACNC points out, 'It is likely that there will be less funds available for charities to undertake advocacy work' (ACNC 017b, p.7). This does not just apply to charities but to any organisation seeking to be engaged in the political process: as the Human Rights Law Centre points out, organisations will have to 'choose between political advocacy and international funding' (Karp 2018a; see also ACFID 2017a). Choosing political advocacy will incur a wide range of funding and disclosure obligations that are not only onerous but will bring with them the significant risk of imprisonment or the imposition of large fines. The legislation thereby creates new incentives, one might say imperatives, to keep out of politics and to exit civil society. In the process the Australian democratic process would be dramatically circumscribed.

By February 2018, some of the Government's key allies were publicly denigrating the proposed legislation. As noted, the ACNC itself had been critical. Ironically enough, the Institute for Public Affairs condemned the legislation in late January 2018 as a 'dangerous restriction on freedom of speech' (Koziol 2018). The Federal Parliamentary Library observed in February that 'the perception in the not-for-profit community is that the end result of the provisions will be to make it difficult for not-for-profit organisations to advocate on issues that are subject to political debate', adding, 'it appears that the Bill will struggle to gain the support of the broader community' (Muller 2018, p.28). In this context, political debate became focused on whether or not the legislation could be successfully amended. Regardless of the outcome, the episode demonstrates how the threat of 'foreign interference' is being recruited into the political struggle over political advocacy in Australia. This is already having unanticipated impacts, in terms of the political backlash, and may have further to run in terms of the emergence of new political agendas.

*(iii) Criminalising Foreign Political Influence*

Finally, and briefly, the third tranche of proposed ‘foreign interference’ legislation proposed to create a new class of criminal offences related to foreign intimidation and ‘threats’. These appeared as part of a wider strengthening of offences in relations to ‘treason, espionage...and related offenses’, thereby conflating ‘foreign interference’, including ‘collaboration’, with much more serious offenses of spying and treason.

The actual measures broaden offences and create enhanced penalties if they are committed ‘in collaboration with a Foreign Principal’ (CoA 2017c). The definition of ‘sabotage’, for instance, is extended to include actions directed at public infrastructure, including any ‘facility’ that provides or relates to providing the public with utilities...of any kind’ (whether privately or publicly owned). Collaborating with a foreign principal to interfere with such infrastructure, that ‘limits or prevents access to it or any part of it by persons who are ordinarily entitled to access it’, carries a maximum penalty of 20 years (CoA 2017c, pp.6-10) This means, for example, that an individual engaged in blockading a coal-fired power station, seeking to close it down perhaps in collaboration with INGOs on an international day of action on climate change, can be imprisoned for the equivalent standard non-parole imprisonment period for committing murder.

The new specific proposed offences for foreign interference were no less punitive. Covert, deceptive or threatening behaviour to exert political influence ‘in collaboration with a foreign principal’ carries a penalty of 20 years; seeking to influence another person, described as ‘the target’, in the exercise of their political rights or duties, while failing to disclose ‘collaboration with a foreign principal’ carries a penalty of 15 years (CoA 2017:32-36).

Surprisingly, this legislation, which is much more extensive than the provisions on foreign funding, has received little public attention. There were thirty-eight submissions to the Joint Committee on Intelligence and Security, and minimal media attention beyond the possible impacts on journalism and wider ‘free speech’. Of the submissions that were received, there was a tendency to focus on one or other aspect, rather than the whole package. The Australian Human Rights Law Centre and the Australian Human Rights Commission, for instance, both focused on secrecy provisions; the Law Council did offer a series of recommendations across the board, including measures to lessen the impact of the ‘foreign interference’ provisions, stating it did ‘not support’ the new set of offences in their current form (Law Society 2018b: 50).

**Concluding: Shifting the Focus to Corporates?**

The recent history of attempts to delimit political advocacy in Australia has established a pattern of contestation that in some respects has expanded the field. Some rights to advocacy have been strengthened – though of course in other respects civil and political rights have dramatically narrowed (for instance in relation to ‘terror’ offences). Central to this has been the political agency of NGOs, both international and domestic, in defending and expanding Australia’s ‘civic space’. As with previous attempts to restrict political activity by NGOs in Australia, we may yet see new demands coming onto the political table as a result of the

recent ‘foreign interference’ proposals, which are increasingly looking like another instance of political overreach. Reflecting the international debate on this issue and the self-evident drivers and bias of the proposed legislation, the issues are most likely to centre on the question of corporate political activity.

The attempt to impose new tighter regulations on NGOs has served to highlight the absence of obligations for corporations, which are in large part free of any limitations on political activity or indeed ‘interference’. It is often argued that charities are subjected to specific regulations, around political activity for instance, by virtue of their special tax-exempt status. Corporations also have special tax-exempt status, in terms of limited liability for instance, but it is noteworthy that there are no blanket requirements around political activity for corporations. Some very narrow exceptions exist – for instance for property developers in NSW, which are not permitted to donate to political parties. This restriction was upheld by the High Court in 2015, in the McCloy case, as a reasonable and proportionate limitation on the constitutional requirement for freedom of political communication. In its judgement, the High Court emphasised that ‘equality of opportunity to participate in the exercise of political sovereignty is an aspect of the representative democracy guaranteed by our Constitution’, adding, ‘the risk to equal participation posed by the uncontrolled use of wealth may warrant legislative action to ensure, or even enhance, the practical enjoyment of popular sovereignty’ (High Court 2015, para 45).

Such restrictions could be justifiably extended, for instance to mining, pharmaceutical or tobacco companies, where abuses are already self-evident. Beyond this, there is a need for corporate-wide obligations, similar to those required by the High Court for charities, given considerable evidence that corporations are choosing to use their revenues to influence the electoral process, either directly or via industry associations. As noted, the recent proposals on regulating foreign interference have noticeably sought to exempt corporations, yet internationally-networked corporations regularly seek to influence the political process and are no less ‘political actors’ than the charitable sector. The Minerals Council of Australia (MCA), for instance, plays a major role in influencing Australian political outcomes, not least with its 2010 campaign to defeat PM Kevin Rudd’s proposed Resource Super Profit Tax. The MCA’s ‘Keep Mining Strong’ media campaign reportedly cost \$22m (though in that year the MCA only reported \$4m in political expenditure to the AEC) (ABC 2010). The resources tax subsequently agreed by PM Gillard saved the largely foreign-owned sector \$35b over ten years. Corporate players in Australia appeared to learn the lessons, with a subsequent spate of corporate-funded public campaigns targeting legislative proposals, often led by overseas-owned companies (Cook 2013).

Clearly, regulating political expenditure by civil society would have a serious dampening effect on democratic life; combining this with the existing ‘open cheque’ policy for business would further skew the political process. Political regulations are already in place for political parties, affiliated bodies and for charities. Given the special status of corporations, and their recent demonstrated capacity to influence the political process, it is reasonable to require corporations to adhere (at minimum) to the same standards on political interference as charities – that is, corporations should not be permitted to directly support or

oppose political parties or candidates for office, including through donations. As for charities, should they wish not to abide by such standards then their corporate status should be 'disqualified'. The raft of 'foreign interference' legislation inadvertently lays the groundwork for the development of political claims of this sort in Australia, that may address the prevailing and intensifying 'risk to equal participation posed by the uncontrolled use of wealth' (High Court 2015, para 45).

### Acknowledgement

I wish to acknowledge the formative impact that involvement in AidWatch, a small Australia-based NGO, has had on this research. Since 1998, I have been a member of the Management Committee of the organization, and was directly involved as Chair in its challenge to the revocation of charitable status, which was successful in the High Court in 2010. This role has been supported by my Faculty at the University of Technology Sydney. The article also draws indirectly on submissions I have made to the Senate Inquiry into Environmental DGR, the Treasury Inquiry into DGR and, in two instances, to the Joint Standing Committee on Electoral Matters, and from related appearances at hearings.

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