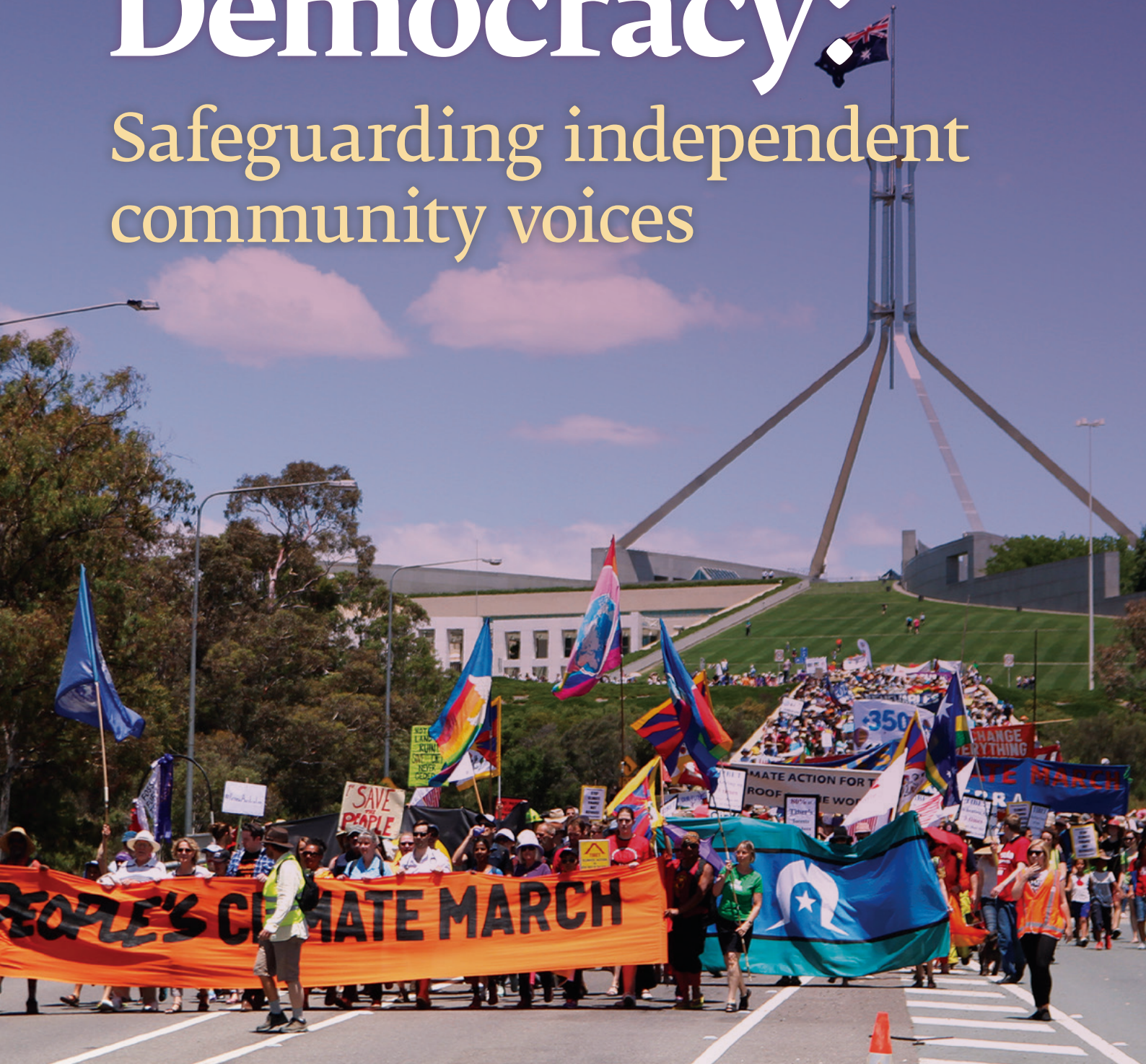


Freedom . Respect . Equality . Dignity . Action

Defending Democracy:

Safeguarding independent
community voices



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Our independent voice at risk

Community organisations inhabit a special place in Australian public life. In many ways Australian governments support the work and contribution of civil society – indeed many community organisations provide services on behalf of the government.

Community organisations also make vital contributions to public debate. Australian charity law and High Court decisions have confirmed a strong legal basis for charities to engage in advocacy on issues that align with their purpose – stronger than most countries around the world.¹

However, despite the close ties with government and the strong legal position, in the last few years the ability of these organisations to engage in activism and advocacy work has been threatened by new laws and practices which are slowly but surely eroding their independent voice.

Across Australia governments are putting financial pressure on community organisations that deters them from engaging in public debate. Some government funding agreements prohibit funded organisations from speaking publicly on political issues, whilst others are simply told not to spend government money on advocacy. Environmental groups that engage in public activism are resisting a considerable push to remove their deductible gift recipient status – a move that would seriously damage their fundraising ability. Some government members have suggested a need to ban foreign donations to non-government organisations, reflecting an international trend in silencing civil society. Meanwhile, some of the most outspoken peak civil society bodies have been defunded.

The message to our community is clear: if you speak out, your financial livelihood could be at risk.

This trend threatens to silence a sector that has much to contribute to Australian public debate and policy making at a time when their expertise and advocacy is needed more than ever. A sector that has rich experience working with people, communities and constituencies that are often marginalised and

disadvantaged and who use public services – people experiencing homelessness, people with disabilities, refugees and asylum seekers, older people and more. It also threatens robust advocacy on behalf of the environment, which clearly cannot speak for itself.

The trend is also damaging basic democratic freedoms in Australia, by creating a climate that deters critically important speech on matters of public interest. A 2015 survey conducted by Pro Bono Australia of the not-for-profit sector showed that nine out of ten respondents considered recognition of their advocacy role as the most important factor in developing the sector.²

The financial threats to community organisations must be seen in light of a wider trend of attacks on individuals who speak out critically against government policies, such as Gillian Triggs, President of the Australian Human Rights Commission³ or audience and panel members on ABC's Q&A who have faced personal attacks from politicians.

Some threats must also be seen as a reflection of the power and influence of vested business interests.

We must work together to protect our independent, vibrant, robust and strong tradition of free speech and community advocacy.

It is time to take stock of these worrying developments and form a clear plan of action. This report identifies some of the challenges we face as a sector and makes recommendations to defend the space in which we as civil society are free to contribute and speak out on the matters we know and care deeply about.

We must work together to protect our independent, vibrant, robust and strong tradition of free speech and community advocacy.

What we can do

AUSTRALIAN PROGRESS. PHOTOGRAPHER: JARRA MCGRATH

Introduce law reform to protect independent community voices

1. The *Not-for-profit Freedom to Advocate Act 2013* (Cth) should be strengthened to prevent the Australian Government from using funding as a lever to stifle advocacy by community organisations, including by:
 - introducing a statement of principles into the Act which articulates, among other things, the importance of advocacy work by not-for-profit organisations and its contribution to effective and informed government policy-making; and
 - establishing means to oblige government to adopt policies which are consistent with this statement of principles and which enable community organisations to undertake advocacy consistent with their mission.
2. State and territory governments should follow the lead of South Australia and adopt similar laws to the *Not-for-Profit Sector Freedom to Advocate Act 2013* (Cth).

Amend funding agreements to enable and encourage advocacy

3. Federal and state governments should remove any clauses from funding agreements with NGOs including community legal centres that prevent government funding being used for law reform, policy and advocacy work.
4. Standard terms should be introduced into federal and state funding agreements with NGOs including community legal centres to clarify that organisations receiving government funding are not prevented from entering into public debate or criticising governments.

Make civil society advocacy a public service value

5. The Australian Government should enshrine the importance of civil society advocacy and the freedom to advocate in statements of public service values and codes of conduct.

Make tax and charity laws work to encourage civil society to speak out

6. The Australian Government should progressively widen the scope of gift deductibility to include all endorsed charitable institutions and funds, as recommended by the Productivity Commission.
7. The Australian Government should reject any recommendations of the House of Representatives Environment Committee to restrict the eligibility of environmental organisations for DGR status and introduce tax-related sanctions for protest activities.

Resist a push to ban foreign donations to non-government organisations

8. The Australian Government should not restrict foreign donations to a not-for-profit organisation on the basis that they are engaging in “political activity”, provided that activity is in accordance with the organisation’s charitable purposes.

Protect civil society participation in election campaigns

9. The Australian Government should respect that charities with DGR status can actively participate in election campaigns in accordance with their charitable purposes.

Push to restore funding to peak civil society bodies

10. The Australian Government should restore and ensure funding to peak sector bodies that undertake advocacy work on behalf of their sectors, including to the Refugee Council of Australia, the National Congress of Australia’s First Peoples and peak bodies in the housing, legal, homelessness, consumer protection and environment sectors.

Community organisations: a vital role in democratic societies

The activism and engagement of Australia's civil society and community sector has driven much of Australia's success as a leading democracy. Behind many of the rights, laws and policies that make Australia great lie years of hard work campaigning, organising and advocating for reform.

Civil society activism has ensured that fairness guides Australia's progress and its effects have been long-lasting and deeply felt. From the work of unions to secure the eight-hour work day and ensure workplace safety, to environmental groups protecting the Franklin River and ending whaling, and to the many advances secured by community advocates in areas ranging from disability rights and family violence to consumer protection.

Community organisations are the experts in the lived experience of many of Australia's most vulnerable social groups. They are the organisations that are on the ground running the homeless shelters, women's refuges, childcare centres, disability support services, social housing, health and countless other services that so many Australians rely upon. These organisations are inherently well placed to speak on behalf of, and to give a platform to, vulnerable groups and to contribute to law and policy reform. And in a time of considerable social and political upheaval across the globe, the voice of community organisations and civil society is more valuable than ever.



PHOTO: ACROSS



PHOTO: ACROSS

Funding agreements should not prevent or discourage organisations from engaging in public debate

The trend

In recent years the Australian Government and some state governments have used funding agreements to prohibit or deter advocacy by community organisations.

Perhaps the most egregious example of this trend was the use of gag clauses by the former Queensland Government in Health Department funding agreements that prohibited advocacy by the funded organisation. In 2015 when the Palaszczuk government removed the gag clauses, the Health Minister described them as “an outrageous attempt to control public debate”.⁴

Less direct methods of prohibiting advocacy continue to be used in other contexts. The funding agreements for community legal centres (CLCs) also discourage those centres from speaking out. Since 2015, the National Partnership Agreement on Legal Assistance Services (NPA) which governs CLC funding has expressly prohibited Commonwealth funding from being used to undertake law reform, policy or advocacy work including lobbying government or engaging in public campaigns, with very narrow exceptions.⁵ The Attorney-General has expressed the view that funding is more appropriately spent on immediate frontline services and stated that the Government should only fund services that are “actually helping a flesh and blood individual”.⁶ The New South

Wales Government imposed similar restrictions on its CLC funding.⁷

In another worrying development, in 2015 it was reported that the Department of Immigration and Border Protection was seeking to control the public comments made by organisations working in offshore immigration detention facilities (including NGOs like Save the Children) by requiring them to pay performance bonds of up to \$2 million that might be forfeited if they spoke out against government policy.⁸

The problem

Imposing conditions on funding to limit advocacy sends the wrong message to civil society. It suggests that its views are unwanted and unwelcome and it creates a dangerous environment where organisations are more likely to self-censor for fear of losing funding.

The solution

It is critical that we resist the trend towards restrictive funding agreements that discourage advocacy. There is plenty of evidence of the enormous benefits derived from the advocacy and policy work by community organisations.⁹ In 2010, the High Court recognised that advocacy by community organisations is a vital part of the political communications that in turn are an “indispensable incident” of Australia’s constitutional system and that contribute to public welfare.¹⁰

The 2013 *Not-For-Profit Sector Freedom to Advocate Act 2013 (Cth) (NFP Act)* went part of the way towards protecting civil society advocacy by preventing the Australian Government from inserting express gag clauses into community sector funding agreements. Unfortunately, the NFP Act does not prevent the kinds of indirect prohibitions found in the 2015 NPA for CLC funding. Law and policy reform could prevent this manipulation of funding conditions and ensure that community voices are encouraged to continue debating political issues.



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Advocacy by DGR groups should be protected

The trend

There has been a worrying trend in political debate of some politicians and industry bodies asserting that Deductible Gift Recipient status (**DGR status**) should be radically changed and not be available to charities conducting advocacy.¹¹ DGR status is a tax classification that is critical to attracting support for Australia's charities. It is an essential tool in growing philanthropy in Australia. Environmental charities that engage in advocacy have been facing off against threats to strip them of their DGR status.

In May 2016 a majority of the House of Representatives Environment Committee recommended that in order to be eligible for DGR status, an environmental organisation be required to spend no less than 25% of its annual expenditure on environmental remediation work, such as planting trees or land management¹² (opposition members issued a dissenting report and one government member opposed this recommendation). Committee members found that "practical environmental work in the community" should be the purpose of extending DGR status to environmental charities.¹³ This arbitrary definition undervalues the contribution that strong advocacy has made to conserving iconic Australian places of great environmental value, including our national parks, marine reserves, rivers and wetlands.¹⁴

The majority of the Environment Committee also recommended

that the Australian Tax Office impose administrative sanctions on environmental organisations that support, promote, or endorse illegal or unlawful acts such as blocking access, trespass, destruction of property and acts of civil disobedience.¹⁵ Again, this recommendation was rejected by opposition members and one government member. The right of community organisations to engage in peaceful protest is fundamental to our democracy, and is a major feature that distinguishes countries like Australia from authoritarian regimes.

The problem

For many years, laws and regulation around DGR status have been overly complex, inconsistent and difficult to navigate. This has prevented tax concessions from flowing to many charities that provide significant public benefit, as well as increasing uncertainty for DGR entities conducting advocacy.

Qualification for DGR status currently requires falling into one of numerous "categories", each with their own definition, structural and reporting requirements, and often opaque application and decision-making process. Groups which work across issues or at their intersection, or those that provide general infrastructure or shared services to strengthen the community sector, find 'fitting' into DGR categories particularly

challenging. The route of naming entities in the Tax Act for DGR listing purposes lacks a sufficient publically advertised process or independent review mechanism.

The attack on the DGR status of environmental organisations that conduct advocacy is a particularly worrying example of government using financial levers in an attempt to weaken and silence potential critics. It is made worse because this move is closely linked to lobbying by the fossil fuel industry, in what has been described as a "spectacular display of political capture."¹⁶

The solution

Instead of stripping DGR status from environmental organisations, the government should extend DGR status to all endorsed charities, as endorsed by the Australian Charities and Not-for-Profits Commission. In 2010 the Productivity Commission recommended that the scope of DGR status be progressively widened to include all endorsed charitable institutions and funds.¹⁷ This was supported in 2013 by the Not-For-Profit Sector Tax Concession Working Group.¹⁸ The Australian Council of Social Service has argued that extending DGR status would reduce complexity and regulatory costs, improve community organisations' ability to access non-government money and foster a strong, independent and diverse sector.¹⁹

Foreign funding sources going to Australian NGOs should not be cut off

The trend

In March 2017, a parliamentary committee inquiring into the 2016 Federal Election raised the spectre of yet another ground for restricting the political participation of community organisations – banning foreign donations to Australian not-for-profits.

In its interim report, the Electoral Committee recommended that foreign citizens be banned from donating to Australian registered political parties.²⁰ The Committee fell short of recommending a ban on not-for-profits, but did recommend that its wider inquiry further examine “extending a foreign donations ban to all other political actors”, in particular environmental organisations engaging in political activity.²¹ The Committee also sought for the issue of the tax deductibility of gifts to be included,²² reinforcing that the foreign donations question is part of a broader examination into the role of not-for-profit organisations in advocacy work. The proposal has so far been opposed by the Australian Labor Party and the Australian Greens.²³

The problem

A foreign donation ban on NGOs is clearly a step in the wrong direction. Autocratic governments around the world are stifling criticism by banning foreign donors from giving money to local non-government organisations.²⁴ Further, a ban on foreign donations has the potential to disadvantage some community groups who are working for social good whilst not capturing other groups such as the Minerals Council of Australia which are funded by large membership fees (technically not donations), from companies that are completely or largely foreign-owned.²⁵

The solution

The political activities of charities are already well protected in Australian law. It is perfectly legitimate for a registered charity to undertake advocacy and engage in election debates, so long as they do so in furtherance of their charitable purposes.²⁶ In fact, the High Court of Australia has recognised the benefits of the contribution made by charitable organisations to public discussion, which informs voters and policymakers.²⁷ Advocacy presents no basis on which to ban foreign donations.



Ensuring a community voice in election debate

The trend

Elections are not just a platform for politicians. Over the past election cycles, and particularly since the 2016 federal election, a number of individual politicians have commented negatively on the increasingly active participation of civil society organisations in election campaigns – frequently arguing that civil society organisations have a lesser “right” to engage in election campaigns than political parties and candidates.²⁸ This trend has recently manifested in the majority of the Joint Select Committee on Electoral Matters making recommendations which suggest a willingness to move towards reducing the capacity of civil society organisations to engage in elections.²⁹

The problem

Elections serve an important and unique function in our democratic society – they are the space where many important policy decisions are made, with long-lasting consequences for our nation. This also often makes them the space where advocacy groups have the most to lose – and gain – on the issues they work on. Recent moves to shut civil society out of election activities pose a serious threat to the ability of not-for-profit organisations to represent vulnerable groups and contribute to law and policy.

The solution

Again, current Australian law and regulation makes it clear that charities can engage in political activity. Charities cannot promote or oppose political parties or candidates for office, but they can distribute materials that analyse those players’ policies and activities.³⁰ It is critical that the right to actively and directly participate in election campaigns for all civil society organisations, including DGR-status charities, is respected. Monitoring by the Australian Electoral Commission of civil society continues to protect the integrity of our elections, and assess whether specific organisations are an associated entity of a political party for the purposes of the Electoral Act.



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Government should fund peak civil society bodies that speak on behalf of sector interests

The trend

Peak bodies are entrusted with the responsibility of representing different community sectors. In the last few years, the Australian Government has made it increasingly difficult for peak bodies to effectively represent their sectors. First, the Government has made widespread funding cuts to publicly funded “peak bodies” that represent different community sectors. For example, the peak bodies in the housing and homelessness sector lost all of their Commonwealth funding, leading Homelessness Australia to close its office and function on a voluntary basis. Similar cuts were made to the Refugee Council of Australia, the peak body for refugee and asylum seeker support agencies in Australia, and the Government also cut operational funding to the National Congress of Australia’s First Peoples, the representative body of Aboriginal and Torres Strait Islander peoples.

Another factor which is adversely impacting the ability of peak bodies to undertake their work is a general lack of transparency and public communication around funding agreements for the individual community organisations these peak bodies represent. For example, contract negotiations between community organisations and government may be required to be “commercial in confidence” which means that at times peak bodies do not have insight into what goes into those funding agreements.

The problem

The defunding of peak bodies disproportionately adversely impacts vulnerable people. Most community organisations do not have the time or resources to engage in extensive advocacy work or policy and law reform activities. Peak bodies have the important responsibility of speaking collectively on behalf of their sector, members and client groups. Defunding these peak bodies leaves these constituents without a strong voice at the table. It also suggests a willingness to defund bodies that are critical of government. For example, the move to defund the Refugee Council was criticised as an attempt by the government to silence its critics in the refugee and asylum seeker sector.³¹ In addition, peak bodies are further hindered in protecting the interests of the groups they represent by the general lack of transparency around the relationship between community organisations and government funding entities.

The solution

It is critical that funding be restored and ensured to peak bodies and that the Government continues to support these organisations to enable them to advocate on behalf of the people and communities with whom they work.



CLIMATE ACTION NETWORK AUSTRALIA



1. *Charities Act 2013* (Cth); *Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539, 556 [44].
2. Pro Bono Australia, *Sector Survey Report* (2015) available at https://probonoaustralia.com.au/wp-content/uploads/2016/01/2015_sector_survey.pdf (accessed 22 May 2017). The survey was answered by 1100 people from not-for profit organisations.
3. Then senior ministers questioned Gillian Triggs' impartiality and judgement and sought to procure her resignation. See Patrick Begley, "Gillian Triggs refused to resign in face of 'personal attacks' from Abbott government," *Sydney Morning Herald* (online) 12 June 2015, available at <http://www.smh.com.au/federal-politics/political-news/gillian-triggs-refuses-to-resign-in-face-of-personal-attacks-from-abbott-government-20150611-ghm56b.html> (accessed 22 May 2017); Michelle Grattan, "Brandis censured by Senate over Triggs attacks," *The Conversation*, 2 March 2015, available at <http://theconversation.com/brandis-censured-by-senate-over-triggs-attacks-38231> (accessed 22 May 2017); Jared Owens, "Police clear George Brandis of Gillian Triggs resign inducement," *The Australian* (online), 27 May 2015, available at <http://www.theaustralian.com.au/national-affairs/police-clear-george-brandis-of-gillian-triggs-resign-inducement/story-fn59nix-1227370367868> (accessed 22 May 2017).
4. The funding agreements said that "where the organisation receives 50% or more of its total funding from Queensland Health and other Queensland Government agencies, the organisation must not advocate for state or federal legislative change." See clause 4.3 of standard agreement set out in statement by Health Minister: Cameron Dick, "Palaszczuk Government abolishes LNP's gag clause," 24 May 2015, available at <http://statements.qld.gov.au/Statement/2015/5/24/palaszczuk-government-abolishes-lmps-gag-clause> (accessed 22 May 2017).
5. The exceptions are for providing community legal education or "where a legal assistance service provider makes a submission to a government or parliamentary body to provide factual information and/or advice with a focus on systemic issues affecting access to justice": see Council of Australian Governments, *National Partnership Agreement on Legal Services* (2015), General Principle B7, available at <https://www.ag.gov.au/LegalSystem/Legalaidprogrammes/Documents/NationalPartnershipAgreementOnLegalServices.pdf> (accessed 22 May 2017).
6. Commonwealth, Legal and Constitutional Affairs Legislation Committee, Senate, 24 February 2014, 52.
7. This applies to all NSW legal assistance services funded by legal aid and public purpose funding: *Principles for Funding of Legal Assistance Services NSW*, principle 3, available at http://www.naclc.org.au/cb_pages/files/Principles%20for%20Funding%20of%20Legal%20Assistance%20Services.pdf (accessed 22 May 2017).
8. Adam Morton, "Buying silence? Immigration asked charities for multimillion-dollar bond," *Sydney Morning Herald* (online) 30 October 2015, available at <http://www.smh.com.au/federal-politics/political-news/buying-silence-immigration-asked-charities-for-multimillion-dollar-bond-20151030-gkmsp.html> (accessed 22 May 2017).
9. See e.g. comments by the Senate Legal and Constitutional Affairs Committee that community organisations are "an invaluable source of information for government to make informed and balanced policy decisions": Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice* (2004), [11.58]; see further the Productivity Commission's 2010 report which similarly identified the importance of community organisations in contributing to government policy-making: Productivity Commission, *Contribution of the Not-for-Profit Sector*, Research Report, 2010.
10. *Aid/Watch Incorporated v Commissioner of Taxation* [2010] 241 CLR 539.
11. See e.g. Conor Duffy, "Government MP steps up campaign against eco-charity tax concessions" *ABC News* (online) 10 April 2015, available at <http://www.abc.net.au/news/2015-04-10/environment-groups-could-lose-tax-concession-status/6384554> (accessed 22 May 2017); Jamie Smyth, "Australian miners campaign for NGOs to lose tax benefits" *Financial Times* (online) 15 June 2015 available at <https://www.ft.com/content/31e62df4-0b51-11e5-994d-00144feabdc0> (accessed 22 May 2017).
12. Environment Committee, *Report into the Register of Environmental Organisations*, May 2016, Recommendation 5.
13. Environment Committee, *Report into the Register of Environmental Organisations*, May 2016, [4.79].
14. Remediation work includes revegetation, wildlife rehabilitation, plant and animal pest control, land management and covenanting, but not advocacy, research, education, legal services and overseas activities: Environment Committee, *Report into the Register of Environmental Organisations* May 2016, [4.82]-[4.83].
15. Environment Committee, *Report into the Register of Environmental Organisations*, May 2016, [5.95]-[5.102].
16. Dr Helen Szoke, "Human Rights in an Age of Rapidly Rising Inequality," Speech to the Castan Centre for Human Rights Law, 24 July 2015.
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19. Australian Council of Social Service, *Not-for profit sector tax concession working group Discussion Paper*, December 2012, available at http://www.treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/Consultations/2012/Tax%20concessions%20for%20the%20not-for-profit%20sector/Submissions/PDF/070_Australian_Council_of_Social_Service.ashx (accessed 22 May 2017).
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21. Joint Standing Committee on Electoral Matters, *Second interim report on the inquiry into the conduct of the 2016 federal election: Foreign Donations*, March 2017, Recommendation 4. For the specific discussion on environmental groups see also [2.28].
22. Joint Standing Committee on Electoral Matters, *Second interim report on the inquiry into the conduct of the 2016 federal election: Foreign Donations*, March 2017, Recommendation 4; see also [2.33] - [2.34].
23. See e.g. Alexandra Beech and Stephanie Anderson, "Political donations: Parliamentary committee recommends banning foreign contributions" *ABC* (online) 10 March 2017 available at <http://www.abc.net.au/news/2017-03-10/political-donation-reform-parliamentary-committee-suggests-ban/8342982> (accessed 22 May 2017).
24. See e.g. The Economist, "Foreign Funding of NGOs- Donors: keep out" *The Economist* (online) 12 September 2014, available at <http://www.economist.com/news/international/21616969-more-and-more-autocrats-are-stifling-criticism-barring-non-governmental-organisations> (accessed 22 May 2017).
25. Joint Standing Committee on Electoral Matters, *Second interim report on the inquiry into the conduct of the 2016 federal election: Foreign Donations*, Dissenting Report of Australian Greens, March 2017, 55.
26. Australian Charities and Not-for-Profits Commission, *Submission to the House of Representatives Inquiry into the Register of Environmental Organisations*, 7.
27. *Aid/Watch v Commissioner of Taxation* (2010) 241 CLR 539.
28. See e.g. Rick Wallace, "Federal election 2016: GetUp! army spurs call for conservative foil" *The Australian* (online) 6 July 2016 available at <http://www.theaustralian.com.au/federal-election-2016/federal-election-2016-getup-army-spurs-call-for-conservative-foil/news-story/6bfb03af075cd28bc65de5fcd047392> (accessed 22 May 2017); Sarah Martin, "Right outspent by \$121m by left" *The Australian* (online) 22 May 2017 available at <http://www.theaustralian.com.au/national-affairs/right-outspent-by-121m-by-left/news-story/229cdb0976653f36a2ccd1dab2438a0a?login=1> (accessed 22 May 2017).
29. Joint Standing Committee on Electoral Matters, *Second interim report on the inquiry into the conduct of the 2016 federal election: Foreign Donations*, March 2017, Recommendation 4, [3.76].
30. See Australian Charities and Not-for-Profits Commission, *Advocacy by Charities* http://www.acnc.gov.au/ACNC/Register_my_charity/Who_can_register/What_char_purp/ACNC/Reg/Advocacy.aspx (accessed 22 May 2017).
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Defending Democracy

Safeguarding independent community voices

This report is a collaborative effort of, and is endorsed by, the following organisations:

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