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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

EXPOSURE DRAFT

**ELECTORAL LEGISLATION AMENDMENT (ELECTORAL FUNDING
AND DISCLOSURE REFORM) BILL 2017**

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be moved on behalf of the Government

(Circulated by authority of the Minister for Finance and the Public Service,
Senator the Hon Mathias Cormann)

Contents

GENERAL OUTLINE	3
NOTES ON CLAUSES	6
Chapter 1: Definitional amendments	7
Changes to definitions of political expenditure and political purpose	7
Changes to electoral expenditure definition	7
Changes to definition of electoral matter	11
Exceptions to electoral matter	15
Other definitional changes	19
Chapter 2: Registration amendments	24
Simplified outline	24
Requirement to register	24
The registration process	25
Administration of the Transparency Register	26
Anti-avoidance	27
Chapter 3: Agents and financial controllers amendments	31
Simplified outline	31
Nominating a financial controller	31
Chapter 4: Public election funding amendments	32
Simplified outline	32
Indexation of the public funding rate	32
Automatic Payment of election funding of \$10,000	33
Claims for election funding	33
Chapter 5: Foreign donation restrictions amendments	35
Donations to political entities and political campaigners	36
Donations to third parties	39
Gifts provided for the purposes of incurring electoral expenditure	42
False affirmation or information that donor is a not a foreign donor	44
Anti-avoidance	45
Appropriate Donor Information	47
Debts due to the Commonwealth	48
Chapter 6: Disclosure amendments	49
Amnesty for historical non-compliance with third party obligations	49
Division 4 - Disclosure of donations	49
Division 5 - Disclosure of electoral expenditure	51
Division 5A - Annual returns	52
Relationship between Electoral Act and State and Territory disclosure laws	55
Chapter 7: Miscellaneous	57
Investigation	57
Record keeping	57
Amendment of claims and returns	57
Indexation	58
Adjustments to authorisation provisions	58
Chapter 8: Commencement, application and transitional	59
Initial reference period for political campaigner registration requirements	59
Application of electoral expenditure definition for third parties in 2018-19	60
Transitional registration of associated entities	61
Transitional arrangements for the Transparency Register	61
Other transitional arrangements	62
<i>Referendum (Machinery Provisions) Act 1984</i>	64

AMENDMENTS TO THE ELECTORAL LEGISLATION AMENDMENT (ELECTORAL FUNDING AND DISCLOSURE REFORM) BILL 2017

(Government)

GENERAL OUTLINE

1. Amendments address the recommendations made by the Joint Standing Committee on Electoral Matters (JSCEM) in its *Advisory report on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017*. Accordingly, amendments seek to reduce the Bill's regulatory burden while ensuring the Bill is still effective at achieving its goal of ensuring that only those with a meaningful connection to Australia are able to influence Australian politics and elections through political donations.
2. In the interests of certainty, and to remove the possibility of loopholes, amendments also clarify the interaction of state and Commonwealth electoral funding and disclosure schemes, and make other consequential and implementation-focussed changes.

JSCEM recommendations 1 & 2: Definition of political expenditure

3. Amendments replace the definition of political expenditure with a new definition – *electoral expenditure*. The definition of *electoral matter* feeds into this new definition, and is based on intent to influence the way electors vote in a federal election, including by promoting or opposing parties, candidates, groups, or parliamentarians. These definitional changes streamline and simplify the concepts in Part XX of the *Commonwealth Electoral Act 1918* (Electoral Act), while also ensuring non-political, issues based advocacy is not captured.
4. The definition does not capture general issue-based advocacy. There are also clear carve-outs for communications with parliamentary committees, parliamentarians, other Commonwealth officials, political parties or candidates for federal elected office. Carve-outs also apply to private communications, news and editorial content, and for satirical, academic, educative, and artistic purposes.

JSCEM recommendations 3 & 4: The transparency register and disclosure obligations

5. Registration processes are streamlined and simplified by the introduction of a single *Transparency Register*. The number of people and entities required to register is reduced through higher thresholds for political campaigners, and removal of registration requirements for third parties. However, any person or entity not required to register may choose to register voluntarily.
6. Disclosure obligations are made more commensurate with levels of expenditure. Disclosure obligations are reduced for third parties, who will no longer be required to report non-financial particulars. Independent audit requirements are removed.
7. The threshold for Political Campaigners is increased to cover those who incur electoral expenditure of \$500,000 or more in the current or past three financial years (or where they spend more than \$100,000 on electoral expenditure and electoral expenditure was at least two-thirds of revenue in the previous year).

JSCEM recommendation 6: Associated entities

8. New elements of the definition of associated entity are removed, and transitional arrangements introduced for automatic associated entity registration to reduce the regulatory burden experienced by associated entities during implementation.

JSCEM recommendations 8-11: Foreign donations

9. A definition of foreign donor is added to the Bill. Whereas the Bill bans political campaigners from receiving gifts from foreign donors *and* foreign bank accounts, the draft amendments only ban gifts from foreign donors. While third parties are prohibited from financing electoral campaigning with foreign money, they no longer need to keep foreign funds for their other activities in separate bank accounts.

10. The amendments remove the need for statutory declarations and simplify obligations with respect to foreign donations to:

- a) prohibit the giving and knowing receipt of all gifts from foreign donors, where the donor intends the gift to be used for electoral expenditure and apply penalties to donors who make prohibited gifts or false or misleading statements to recipients;
- b) require donors to affirm to political campaigners, political parties and candidates that they are not foreign for gifts between \$1,000 and the disclosure threshold (\$13,800 in 2018-19), for instance a check box on a donation form; and
- c) require all covered recipients to verify that donors are not foreign for gifts above the disclosure threshold (\$13,800) (a menu of alternative forms of proof is listed, to help recipients check a donor's status).

11. Aggregation of donations is generally removed and anti-avoidance rules are included in the amendments. Anti-avoidance rules address the movement of foreign funds between organisations. As part of the anti-avoidance rules the Electoral Commissioner can require an organisation that is part of a scheme to report as a political campaigner or associated entity, or can order that people stop a scheme or not participate in it.

12. As noted above, in response to recommendations 1 and 2, non-partisan issue advocacy is no longer captured.

JSCEM recommendation 12: Public election funding

13. To assist with the cash flow of independent candidates and smaller parties after an election, amendments provide for the automatic payment of the first \$10,000 of public election funding to eligible claimants.

JSCEM recommendation 13: Penalties

14. Penalties are reduced, and, where it is possible to determine the amount involved in a contravention, linked to this amount. Per day penalties and imprisonment are removed. Apart from penalties that are made proportionate to the amount involved in a breach, the amendments reduce the maximum penalty for the most serious types of other breaches from 1,000 penalty units to 200 penalty units (reducing the highest penalty from \$210,000 to \$42,000).

15. For third parties, obligations are transferred from the financial controller to the entity.

Other JSCEM recommendations

16. Several JSCEM recommendations are being addressed outside of these amendments. Recommendation 5, which relates to the review of political party registration, will be considered after the JSCEM hands down its final report on its inquiry into the 2016 federal election.

17. Consistent with recommendations 7 and 15, the Australian Electoral Commission (AEC) was provided with funding of \$56.5 million through the 2017-18 MYEFO measure *Electoral Integrity Reforms* to implement the Bill, allowing it to inform the public about the changes. To avoid any concern that the AEC might focus on previous noncompliance by third parties with disclosure obligations, the amendments forgive past failure to comply. This allows the AEC to focus on dealing with future compliance risks, including risks of foreign interference in federal elections.

18. Recommendation 14 is being considered by the Government as part of wider reforms to deductible gift rules.

Other measures to reduce regulatory burden

19. The period during which Part XX applies to a candidate or Senate group has been standardised to reduce compliance burdens for these groups.

20. Consequential amendments are made to the authorisation regime. Greater flexibility is provided in relation to the location required to be disclosed by natural persons to protect individual privacy and decrease regulatory burden associated with the authorisation regime.

NOTES ON CLAUSES

Glossary

- 1 The following abbreviations and acronyms are used throughout this explanatory memorandum:

<i>Abbreviation</i>	<i>Definition</i>
AEC	Australian Electoral Commission
Bill	Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017
Criminal Code	<i>Criminal Code Act 1995</i>
Electoral Act	<i>Commonwealth Electoral Act 1918</i>
Regulatory Powers Act	<i>Regulatory Powers (Standard Provisions) Act 2014</i>
the Act	The Bill, as enacted.

Chapter 1: Definitional amendments

Changes to definitions of political expenditure and political purpose

Amendments 11, 12, 79, 24 & 3: Definition of electoral expenditure

- 2 These amendments give effect to recommendations 1 and 2 of the Advisory Report. Specifically:
- amendments 11 and 12 remove the definitions *political expenditure* and *political purpose* from the Bill;
 - amendment 79 removes the definition of *electoral expenditure* from section 308 of the Act; and
 - amendment 24 (new section 287AB) inserts a new definition of *electoral expenditure*, that is, generally, expenditure incurred to create or communicate electoral matter;
 - amendment 3 (new item 1E) replaces the definition of *electoral matter*, while new item 1D repeals the deeming section that operated in relation to this definition.

Changes to electoral expenditure definition

3 Subject to applicable exceptions, new section 287AB provides *electoral expenditure* is expenditure incurred for the dominant purpose of creating or communicating electoral matter. Where expenditure is incurred to create or communicate electoral matter, in addition to other reasons, the dominant purpose of the expenditure must be considered. Where the dominant purpose is the creation or communication of electoral matter, the expenditure is electoral expenditure.

4 Note 1 under subsection (1) alerts readers that expenditure incurred in relation to the communication of electoral matter for which particulars are required to be notified under section 321D is electoral expenditure. See *Interaction of Parts XX and XXA*, later in this Chapter.

5 Note 2 under subsection (1) alerts readers that expenditure by a person who creates matter that is not electoral matter because of the operation of an exception in subsection 4AA(5) is not electoral expenditure. However, note 2 further clarifies that, as each creation or communication of matter is treated as separate matter under subsection 4AA(2), expenditure incurred by another person who communicates the same matter for the dominant purpose referred to in subsection 4AA(1) may be electoral expenditure. See *Exceptions to electoral matter*, later in this Chapter.

6 Note 3 under subsection (1) alerts readers that some electoral expenditure of political campaigners may be deemed under section 287J of the Bill.

The dominant purpose of expenditure

Example 1

Kerrie is the Chief Executive Officer of a not-for-profit organisation that encourages healthy eating. The organisation occasionally issues material to influence how electors vote, but Kerrie's primary role involves organising the delivery of healthy eating programs in schools and workplaces. As the dominant purpose of employing Kerrie is not for her to create or communicate electoral matter, her salary is not electoral expenditure.

Example 2

A registered political party hires Andrew as a full time receptionist. His employer is constantly working towards the next federal election. The cost of Andrew's employment is an integral part of the overheads associated with supporting the election of its candidates. Subsection 287AB(3) clarifies that, as the costs of the registered political party in relation to the next election are electoral expenditure, the costs of Andrew's employment are electoral expenditure.

Example 3

A community group decides to support a candidate who is running for election against a sitting member of parliament. The group contracts a temporary employment agency to provide 80 people to door-knock in the member's electorate. The script the temporary employees are given to assist them in talking to residents has a dominant purpose that makes it electoral matter, even though it contains some content relevant to the usual business of the community group. As the community group's dominant purpose in signing the contract engaging the temporary staff is to communicate electoral matter, the money the agency charges the community group is electoral expenditure incurred by the group.

Example 4

A local progress association is formed by a group of local businesses to champion proposals for the urban renewal of the town centre and surrounds. The association decides to campaign in the federal election to call for the handover of former Defence land, to allow for construction of a business park. They hire a campaign manager, open a campaign shop front, coordinate volunteers, rent phone lines and issue a voting guide indicating preferred candidates. Although the election campaign is a short-term activity and the association has wider purposes, the dominant purpose of these campaign-related expenses make these electoral expenditure. The dominant purpose of the association (urban renewal) does not determine the dominant purpose of the expenditure.

Example 5

Haziq owns an office block, and leases the space to a range of corporate clients. One of Haziq's tenants is a registered political party, who uses the office space for a call centre that routinely communicates electoral matter. Any expenditure Haziq incurs in relation to his tenants, including the registered political party, is not electoral expenditure because Haziq's dominant purpose is commercial (profiting from his investment in his office block). However, the rent paid by the registered political party is electoral expenditure.

287AB(1)(a) Exception for parliamentary work expenses

7 New paragraph 287AB(1)(a) provides an exception to the definition of electoral expenditure in relation to costs claimable under the parliamentary expenses framework. This exception clarifies that such costs are not electoral expenditure.

8 Under the parliamentary expenses framework, the Commonwealth covers certain work expenses of Ministers, Senators and Members of the House of Representatives. Ministers have access to these work expenses by virtue of appointment as Ministers. Senators and Members of the House of Representatives have access to these work expenses by virtue of being elected, or filling a Senate casual vacancy. Such claimable costs include, but are not limited to:

- a) remuneration for members of the House of Representatives, Senators and Ministers;
- b) office accommodation, office resources and office expenses, such as postage costs;
- c) work vehicles;
- d) insurance for members and Senators; and

- e) legal assistance to Ministers and Parliamentary Secretaries.

9 This exception is necessary as, without it, someone recontesting their seat may be able to ‘double dip’. That is, without the exception, it may be possible to claim two payments from the Commonwealth in relation to a single expense: once from the parliamentary work expenses framework, and again in relation to Division 3 of Part XX of the Electoral Act.

10 For the avoidance of doubt, paragraph 287AB(1)(a) provides that election funding, payable in relation to candidates in relation to Division 3 of Part XX of the Electoral Act, is not covered by the parliamentary work expenses exception. This is because Division 3 funding, although provided to Senators and Members of the House of Representatives, is provided to these persons in relation to votes they received in their capacity as candidates. It would also create a circularity as Division 3 funding is provided on the basis of electoral expenditure incurred and claimed in relation to a candidate.

287AB(1)(b) Exception for businesses providing a service

11 Paragraph (1)(b) clarifies that service providers incurring expenditure to create or communicate electoral matter do not incur electoral expenditure. While such commercial arrangements will have a commercial purpose, rather than a dominant purpose related to electoral matter, this exception is included to avoid doubt that businesses providing such services are not intended to be captured by Part XX. This exception is intended to encompass (but not be limited to):

- a) printers printing electoral matter as paid work for clients;
- b) communication and internet service providers whose networks are used to communicate electoral matter;
- c) social media companies whose platforms are used to communicate electoral matter;
- d) polling companies undertaking research on public opinion for paying clients;
- e) self-employed communications professionals managing candidate campaigns on a fee-for-service basis; and
- f) marketing agencies developing advertising campaigns containing electoral matter for paying clients.

12 This exception does not extend to the clients of these businesses, nor does it exempt businesses creating or communicating electoral matter for non-commercial reasons. Where electoral matter is created or communicated by a business on behalf of a client, the fees charged by the business are electoral expenditure incurred by the client.

Service provider exemption and creating electoral matter

Example 1a

A campaign group engages an advertising agency to develop a campaign containing electoral matter. The advertising agency subcontracts the production work associated with the campaign to a number of other firms. The expenditure incurred by the advertising agency in subcontracting the production of electoral matter is not electoral expenditure because the agency was engaged on a commercial basis to create the electoral matter. However, the costs passed on to the campaign group are electoral expenditure incurred by the group.

Example 1b

On being approached by the advocacy group, the advertising agency decides to waive its normal fees and develop the campaign containing electoral matter on a pro bono basis. As the advertising agency has not been engaged on a commercial basis, the service provider exemption does not apply.

The value of the fees not charged under the pro bono arrangement constitute a gift for the purposes of Part XX, and disclosure and foreign donations obligations may apply, subject to the value of the gift and other relevant factors.

Example 2

A social media company's business model is to allow users to communicate without expense in an online public forum. The company collects revenue from advertisers. During election periods, the public forum is used extensively to communicate electoral matter and at other times users comment instead on a wide range of unrelated topics ranging from local events, to entertainment news. The social media company does not use the platform to push a political agenda of its own and runs the venture as a profit-making activity. As the social media company is merely providing a communication platform to create or communicate electoral matter, the service provider exemption applies to any expenditure incurred by the social media company.

287AB(2) Expenditure may be incurred to create general electoral matter

13 Subsection (2) provides that expenditure may be electoral expenditure whether the expenditure relates to the creation or communication of particular electoral matter or electoral matter generally.

Expenditure incurred to create electoral matter generally**Example**

A bilingual education company is campaigning for increased Commonwealth investment in school language programs. Their campaign strategy is to support candidates who pledge to increase funding for school language programs. The company buys campaign software, public relations training for staff and general creative content for the campaign, such as image libraries.

Subsection 287AB(2) clarifies that the purchase of the software, training and creative content is electoral expenditure. The purchase is made to create and communicate electoral matter generally, rather than being intended or used exclusively for a specific communication of electoral matter.

287AB(3) Expenditure incurred in relation to an election

14 Subsection (3) provides that expenditure incurred by or with the authority of a political entity, member of the House of Representatives or a Senator in relation to an election is electoral expenditure. These entities have in common an aim of promoting the election of a candidate. For example, in order to register as a political party, an organisation must be established on the basis of a written constitution that sets out the aims of the party (see sections 123 and 126 of the Electoral Act). One of these aims must be that the party intends to promote the election of candidates endorsed by it.

15 Given this direct connection between these entities and the promotion of candidates, it is appropriate that their expenditure is electoral expenditure where it relates to an election.

16 For the avoidance of doubt, subsection (3) clarifies that election funding, payable in relation to candidates in relation to Division 3 of Part XX of the Electoral Act, is not covered by this subsection.

Expenditure incurred by a party in relation to an election

Example 1

A regional branch of a registered political party hires a bus to send delegates from the branch to the party's annual national conference. One of the purposes of the national conference is to agree the party's policy platform in the upcoming election. As the bus is hired by a registered political party in relation to an election, the cost of the bus hire is electoral expenditure.

Example 2

A registered political party invites its members to a book club night, to discuss recent political biographies. As the dinner is a 'social club' activity of the party and unrelated to an election, the cost of the dinner is not electoral expenditure.

Changes to definition of electoral matter

Amendment 3: Definition of electoral expenditure

17 In the Electoral Act, electoral matter was defined in subsection 4(1), accompanied by a deeming provision in subsection 4(9). New item [1D] repeals subsection 4(9). New items [1B] and [1C] replace the definition of electoral matter with a new definition, set out in new section 4AA.

18 New paragraph 4AA(1)(a) provides that, except in sections 302CA and 314B, **electoral matter** means matter where the dominant purpose of the communication of the matter is, or is intended to be, influencing the way electors vote in an election (a **federal election**) of a member of the House of Representatives or of Senators for a State or Territory by promoting or opposing:

- a) a political entity, to the extent that the matter relates to a federal election;
 - A **political entity** is a registered political party (including a State branch thereof), candidate or Senate group.
- b) a member of the House of Representatives; or
- c) a Senator.

19 The dominant purpose of 'influencing the way electors vote in an election' is intended to capture content that seeks to influence voters' formation of political judgement in relation to the act of voting, and includes matter seeking to influence:

- a) the order in which a voter indicates their preferences on their ballot paper; and
- b) a voter's choice of whether to cast a formal ballot paper.

20 'The way electors vote in an election' is not intended to be limited to the act of recording or expressing a political judgment made by an elector, that is, the physical act of indicating preferences by marking a ballot paper. A misleading suggestion about how people can validly vote (that is, a contravention of section 329 of the Electoral Act) is also electoral matter under section 4AA. For example, material that instructed readers to cross out a candidate's name on their ballot paper is electoral matter.

4AA(2) Each act of creation or communication to be treated separately

21 Subsection (2) provides that each creation, recreation, communication or recommunication of matter is to be treated separately for the purposes of determining whether matter is electoral matter. That is, whether matter was created to be electoral matter should not prejudice whether its subsequent

communication is, or is not, electoral matter. Similarly, where someone recommunicates matter, the communicator's intent does not necessarily determine the re-communicator's intent. Several of the exception examples provided in relation to paragraph (5)(b) (below) illustrate the intended operation of subsection (2).

22 A note under subsection (2) provides an example of the operation of subsection (2). That is, matter that is covered by an exception under subsection (5) when originally communicated may constitute electoral matter when recommunicated for the dominant purpose referred to in subsection (1). The reverse is also true.

4AA(3) Expressly promoting or opposing a political entity, member of the House or Senator

23 New subsection (3) clarifies the application of section 4AA in relation to communications that explicitly promote or oppose a political entity, member of the House of Representatives or Senator. For such communications, the dominant purpose of the communication of the matter is presumed to be influencing the way electors vote in a federal election unless the contrary is proved. This means that communications that explicitly promote or oppose one of the categories in subsection (1) are electoral matter unless it can be demonstrated they are not.

4AA(4) Matters to be taken into account in determining whether matter is electoral matter

24 To assist in interpreting subsection (1), subsection (4) sets out a non-exhaustive list of matters that must be considered in determining whether matter is electoral matter. Subsection (4) is not a deeming provision (by itself, one of the factors in subsection (4) does not determine whether the dominant purpose is to influence voting). Instead section 4AA must be considered in its entirety in determining whether matter is electoral matter.

25 These factors are not intended to be considered in a simple summative manner. The context of the communication determines the relevant weight of the factors in using them to interpret whether the dominant purpose of the communication, or intended communication is consistent with subsection (1).

26 Subsection (4) captures key elements of the context of the way electoral matter is intended to be communicated, or is communicated. Where the answer to a question in paragraphs (4)(a), (b), (c), (d) or (f) is yes, or to (e) is soon, then the matter is more likely to be electoral matter. These contextual elements include, but are not limited to:

- a) the accessibility of communicated matter (paragraph (a));
 - Where matter is communicated publicly, whether universally to the public or a section of the public, it is more likely to be electoral matter.
- b) the source of communicated matter (paragraph (b));
 - Where matter is communicated publicly by a political entity or political campaigner, it is more likely to be electoral matter.
- c) the content of the communication (paragraph (c));
 - Where matter contains an express or implicit comment on one of the categories mentioned in subsection (1), it is more likely to be electoral matter.
- d) the intended audience of the communication (paragraphs (d) and (e)); and
 - Where the intended audience of a communication is electors, it is more likely to be electoral matter. In determining the intended audience of a communication, paragraphs (d) and (e) clarify that the temporal and spatial proximity of the communication's audience to citizens

acting in their capacity as electors is relevant. For example, where a communication targets adults entering a polling place on polling day, it is more likely to be electoral matter.

e) the audience's consent (paragraph (f)).

- Where a recipient or intended recipient of a communication has not requested or otherwise invited the communication, that is, it is unsolicited, it is more likely to be electoral matter.

Paragraph (a): Communications to the public, or a section of the public

Example 1

A peak policy advocacy group sends a copy of a technical policy discussion paper to other groups that are subscribed members, seeking feedback from the members. The confined nature of the communication makes this less likely to be electoral matter.

Example 2

A policy advocacy group maintains a large email list and social media following, including all people who have ever signed one of their petitions, anyone who has ever made a donation to the group and anyone who has ever 'liked' or 'followed' the group on social media. The group sends content to this distribution list to inform them about the group's views on political parties. Given that the audience is a section of the public, the content they send the list is more likely to be electoral matter.

Example 3

A political party sends a comedic video to its members, blaming older Australians for mistakes of the past and making the case for younger people to be put into leadership positions across the country. In distributing the video, the party asks its members to post it on their social media accounts and to ask their friends to share. As the video was intended to be viewed beyond the party membership when it was created, it is more likely to be electoral matter as the intended audience is the public.

Paragraph (b): Communications by a political entity or political campaigner

Example

A political campaigner posts content on their social media account. As the post is a communication from a political campaigner, it is more likely to be electoral matter.

Paragraph (c): Communications containing an express or implicit comment on a political entity, member of the House of Representatives, or a Senator

Example 1

Following the release of a controversial documentary on loopholes in planning laws, a community group decides to campaign for local residents to vote on major development proposals. They make t-shirts saying 'This election, take back control of planning'. There has been no media coverage of debate between candidates about planning-related issues, and it is not apparent how the issue relates to federal politics.

As members of the public do not see an imputed party recommendation in the t-shirts, they are unlikely to constitute an implicit comment. Therefore they are less likely to be electoral matter.

Example 2

A public health advocacy group designs a pamphlet assessing the policies of different parties, regarding subsidies of expensive medicines. The pamphlet summarises how much money each party has committed to spend on drugs and summarises each party's policies on limits to patent periods to indicate how closely aligned each party is to the priorities of the group. The pamphlet includes a smiley face next to some parties and a frowning face next to other parties. The indication of favourability towards some parties and disfavour towards others based on their policy positions, makes this express comment promoting or opposing political parties. Hence this is more likely to be electoral matter.

Example 3

A recreational group funds billboards before an election highlighting the negative consequences from a proposal to construct a race-track in an electorate. As some candidates running in the electorate have well known positions for or against the race-track, the billboards implicitly comment against some candidates and for others, making the billboards more likely to be electoral matter.

Example 4

An association of retired economists distributes posters and flyers during an election campaign criticising a policy that is a signature part of the legacy of a political party when it was in government. This is more likely to be electoral matter because the communication includes implicit opposition to a party that is running for election.

Paragraph (d): Communication received by electors near a polling place**Example**

A registered political party sets up screens alongside a footpath on an approach to a pre-polling centre. While the pre-polling centre is open, the screens display a looping video clip of a candidate from another party making an offensive comment several decades previously. The fact that electors receive the matter on immediate approach to a polling place during polling makes it more likely that the video clip is electoral matter.

Paragraph (e): Communication received soon before a federal election**Example**

An advocacy group sends a bulk SMS text message the day before polling day, and again one week after the close of polls. The text message sent before polling day is more likely to constitute electoral matter than the one sent after the close of polls because a federal election will be held sooner (in one week, in comparison to approximately three years away).

Paragraph (f): Unsolicited communication**Example 1a**

An advocacy group robocalls people who have signed a petition about an issue, urging them to vote for a candidate. The signatures were collected from the public. As the robocall is unsolicited, it is more likely to be electoral matter.

Example 1b

The advocacy group robocalls its members who requested communications from the group when they sign up as members on an annual subscription. The call informed members about an issue that the group thought had been neglected by incumbent Senators. As the robocall is solicited as a membership service, it is less likely to be electoral matter.

Other relevant matters**Example**

An industry peak body states to the media and on their website that the focus of their activities in the lead-up to the next federal election will be encouraging voters to vote for parties and candidates with policies favourable to the industry. Although subsection (4) does not require consideration of an organisation's aims, the statement is nonetheless highly relevant to subsection (1). As subsection (4) does not limit the factors to be considered, the stated aim of the peak industry body make it more likely that communications it has created and communicated in the lead up to the election constitute electoral matter.

Exceptions to electoral matter

27 New subsection 4AA(5) provides a number of exceptions to electoral matter.

4AA(5)(a) News and editorial content

28 Paragraph (a) provides that matter that forms, or would form in the case of an intended communication, part of the reporting of news, the presenting of current affairs or any genuine editorial content in news media is not electoral matter. The word 'genuine' is included in relation to editorial content to distinguish editorial content produced under conditions of journalistic freedom from advertorials.

Example

Fergus is the editor of a weekly regional newspaper. He writes an excoriating editorial against the candidacy of the local federal member of parliament, urging voters to put the member last on their ballot papers.

The next week, Morag, a local businesswoman, pays for an advertorial column to recommend a vote for another candidate in the same electorate.

The editorial written by Fergus is genuine editorial content and therefore qualifies for the exception from electoral matter under paragraph (5)(a). The advertorial written by Morag may look like editorial content, but does not qualify for the exception from electoral matter in paragraph (5)(a).

4AA(5)(b) Communications for satirical, academic, educative or artistic purposes

29 Paragraph (b) provides matter is not electoral matter if it is communicated (including by being performed or presented) by a person predominantly for a satirical, academic, educative or artistic purpose. 'Would be' is included for the case of an intended communication. Paragraph (b) clarifies that any relevant consideration, including the dominant purpose of any other communications of matter by the person, must be taken into account in determining the dominant purpose of the matter. This exemption extends existing exemptions for similar purposes, and clarifies that a person's body of work can be used to establish whether the exception applies.

Predominantly satirical purposes

Example 1

It has become a tradition at a university for the law students to satirise an issue in contemporary culture. One year, the students choose to create a video satirising a group of Commonwealth Senators. The students publish the video on a popular video streaming service. As the law students' dominant purpose in creating and publishing the video is satirical, the satirical purposes exception applies.

Example 2

A registered political party embeds the students' video on their website. Taking into account the dominant purpose of other communications of the registered political party, it is reasonable to conclude the party's dominant purpose in communicating the video is more likely to be political than satirical. Therefore, the satirical purposes exception is unlikely to apply to the embedded video. The students' dominant purpose in creating and communicating the video is not relevant in determining the party's dominant purpose in communicating the video by embedding it on its website.

Predominantly academic purposes

Example

A university professor publishes a journal article on negative campaign techniques employed by a registered political party in the previous election. As this is an easily recognisable form of academic work by a member of an academic profession, it is reasonable to conclude his dominant purpose in communicating the article is academic, rather than political. The academic purposes exception in paragraph 4(b) applies to the article.

Predominantly educative purposes

Example 1

Elve teaches high school economics. In the lead up to an election, Elve designs and delivers lesson plans requiring students to evaluate the economic policies of major political parties contesting the election. Taking into account the dominant purpose of Elve's other communications and the context in which her lessons are delivered (that is, the classroom), it is reasonable to conclude her dominant purpose is educative, rather than political. The educative purposes exception applies to Elve's lessons.

Example 2

A business peak body releases a video online criticising the economic policies of a major political party contesting an upcoming election through the framework of commonly taught economic theory. Given the dominant purpose of the peak body's other communications, it is reasonable to conclude the peak body's dominant purpose is political, rather than educative. The educative purposes exception does not apply to the video.

Predominantly artistic purposes

Example 1

Kate, a contemporary playwright, receives a grant from a state arts funding agency to develop a modern Australian play. Kate's play is a commentary on the vaccination debate in Australia. Policies and politicians are featured in the play. The play is produced and performed by a theatre company that regularly presents theatrical work to the public. Given the dominant purpose of Kate and the theatre company's other communications, it is more likely their dominant purposes are artistic. The artistic purposes exception applies to both Kate's creation of the play and the theatre company's performance.

Example 2

Miro, a prominent Australian actor, appears in a video published online stating that arts in Australia is under attack by the current government and asks for viewers' support of a particular political party for an upcoming federal election. Despite the dominant purpose of Miro's other communications being mostly artistic or commercial, it is not reasonable to conclude Miro's dominant purpose in the video is artistic. Therefore, the artistic purposes exception does not apply to the video.

Example 3

Lowanna, an Australian artist, creates a series of paintings for an exhibition. The paintings focus on criticising Australia's contemporary management of Indigenous affairs and past treatment of Indigenous Australians following European settlement. The works are exhibited at international and Australian galleries. As the paintings are predominantly for artistic purposes, the artistic purposes exception applies to Lowanna and her works.

4AA(5)(c) Private communications to known persons

30 Paragraph (c) provides that matter is not electoral matter if it is communicated privately to a person known to the communicator. 'Would be' is included for the case of an intended communication.

Private communications

Example 1a

Amal is a candidate in an upcoming election. As part of her campaign she hosts a 'meet the candidate' dinner party with 50 of her friends including a mixture of people from work, her sports team and her old university residence. The private communications exemption applies to Amal's communications at her dinner party as it involves private communication to people she knows.

Example 1b

Amal holds a 'meet the candidate' street party for all the neighbours in her street, to try to convince them to vote for her. 50 neighbours attend. Amal only knew five of them beforehand, but gets to know the rest at the event. The private communications exemption does not apply to her communications at the event, as these are not exclusively private communications to people she knows.

Example 1c

Amal and Jenny are next door neighbours, and know each other well. Jenny is the conductor of a local choir and writes down phone numbers for 50 choristers so that Amal can call them seeking their votes. Even though Amal tells each person on the phone list that Jenny is a mutual friend, the private communications exemption does not apply as Amal had no prior relationship with these individuals.

4AA(5)(d) Communications by or to Commonwealth public officials

4AA(5)(e) Public policy and administration communications to political entities

31 Paragraph (d) provides that matter is not electoral matter if it is communicated by or to a person acting in their capacity as a Commonwealth public official (within the meaning of the Criminal Code). This includes communications by or to Commonwealth parliamentarians and public servants. Paragraph (e) provides a similar exemption for private communications to a political entity in relation to public policy or public administration. If a person or entity attempts to influence one of the persons specified in paragraph (e) through the medium of public opinion by a public communication, the exemption from electoral matter in paragraph (e) does not apply. Matter intended to influence an election through mass communication is not prevented from being electoral matter by the mere fact that it may be received by a

Commonwealth public official (as well as by the general public or a part thereof). ‘Would be’ is included in both paragraphs for the case of an intended communication.

32 These exemptions are intended to clarify that attempts to influence the legislative or executive arms of government by communicating matter directly to a person acting in their capacity as a representative of the Australian Government (or potential representative, in the case of a candidate) does not constitute electoral matter. These exemptions from electoral matter do not influence the application of other disclosure regimes, such as the Australian Government’s *Register of Lobbyists*, or the *Foreign Influence Transparency Scheme*.

Communications by or to a Commonwealth public official

Example

A human rights group is opposed to a Bill before the Commonwealth Senate. The group meets with several Senators to convince them to vote against the Bill. The conversations are not for the dominant purpose of influencing voting at an election, so they are not electoral matter. In any case, for avoidance of any doubt the exemption in subsection (5)(d) makes clear that this activity does not constitute electoral matter.

The group also hosts a breakfast for Senators and their parliamentary staff as part of lobbying against the Bill. They post photographs on social media of the breakfast, with captions showing that they are lobbying the Senate on issues raised by the Bill. The social media posts are not electoral matter as the dominant purpose is not to influence how people vote. The dominant purpose of the posts is to demonstrate the group’s action in support of their mission to supporters and followers of the group.

Private communications to a political entity on public policy

Example 1a

A pro-cycling registered political party sends paying observers to the conference of another registered political party. The conference is closed to members of the public and the media. Representatives from the pro-cycling party speak on a panel observed by the hosting party’s members who attend the conference. They speak in favour of cyclist friendly policies and make positive observations about the willingness of the party to adopt some of their proposals. Although their voices may be heard by hundreds of attendees, the communication is not electoral matter as it is a private communication by and to a political entity on a matter of public policy.

Example 1b

The bus drivers’ union holds a protest outside the same conference, objecting to a proposal to turn bus lanes into cycle lanes that the media has reported will be pitched by the pro-cycling party at the conference. The protest and materials distributed by the union are promoted to the public at large and are thus not exempted under paragraph (5)(e).

4AA(5)(f) Participation in parliamentary processes

33 Paragraph (f) provides matter is not electoral matter if matter is communicated in the House of Representatives, the Senate or a parliamentary committee. This exception clarifies that Part XX of the Electoral Act is not intended to cover any matter covered by parliamentary privilege, or other core parts of the legislative process, such as participation in parliamentary committees. ‘Would be’ is included for the case of an intended communication.

Participation in a parliamentary process

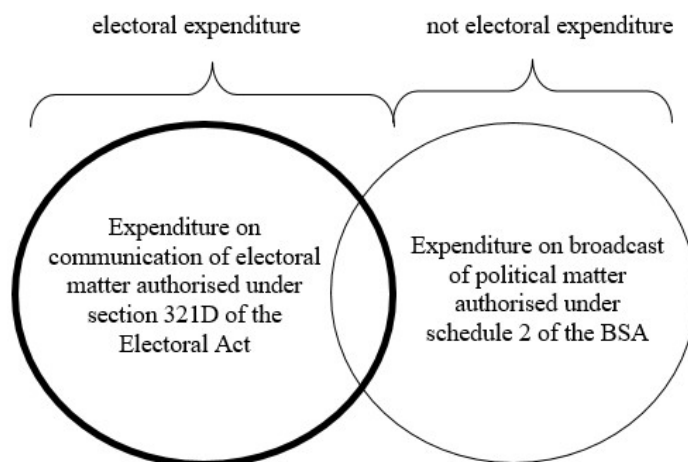
Example

A university professor makes a public submission to a parliamentary committee and is subsequently invited to appear before the committee as a witness. As both his submission and appearance are communications to a parliamentary committee, neither of these communications constitute electoral matter because the exemption in paragraph (5)(f) applies.

Interaction of Parts XX and XXA

34 Communications of electoral matter may be required to be authorised under Part XXA of the Electoral Act. Expenditure on such communications of electoral matter are **electoral expenditure** for the purposes of Part XX of the Electoral Act.

35 Broadcasts of **political matter** may be required to be authorised under schedule 2 of the *Broadcasting Service Act 1992* (BSA). The BSA broadly defines political matter to mean any political matter, including the policy launch of a political party. Spending on authorised broadcasts is not **electoral expenditure** unless the broadcasts contain **electoral matter**. Expenditure on communications required to be authorised under both the Electoral Act and the BSA is **electoral expenditure** (see below diagram). The question whether any expenditure on a broadcast constitutes electoral expenditure under the Act must simply be answered by reference to the provisions of the Electoral Act, irrespective of the position under the BSA.



Amendments 34, 41, 45, 46, 47, 50, 166, 176, 189, 191, 193, 212 & 220: Definition of electoral expenditure

36 These amendments replace the term political expenditure with electoral expenditure.

Amendment 80: Definition of electoral expenditure

37 This amendment repeals paragraphs 321D(4)(a) and (b). Paragraphs 321D(4)(a) and (b) contain exceptions from the authorisation regime in Part XXA of the Electoral Act for the reporting of news and communications for satirical, academic and artistic purposes. These exceptions are no longer needed in section 321D because they have been included as exceptions to electoral matter by amendment 3. Other definitional changes

Election and ballot matters

Amendments 3 & 217: Definition of electoral expenditure

38 These amendments insert new item 1A, which defines **election and ballot matters** to mean matters relating to Parliamentary elections, elections, ballots under the *Fair Work Act 2009* or the *Fair*

Work (Registered Organisations) Act 2009 and referendums. This definition was used in Part 2 of the Electoral Act, but used in relation to the term **electoral matters**. This situation leads to interpretation issues, as:

- a) the singular **electoral matter** was defined in section 4 of the Electoral Act, and the plural **electoral matters** was defined differently in section 5 of the same Act; and
- b) paragraph 23(b) of the *Acts Interpretation Act 1901* provides that the singular includes the plural, and vice versa.

39 Consequentially, **electoral matters** is replaced by **election and ballot matters**, wherever it occurs in the Act (amendment 3, new items 1G, 1H, 1J & 1P). An exception to this is in the heading of section 387 (amendment 217), where **electoral papers** replaces electoral matters to reflect the content of this section.

Amendment 16: Anti-avoidance

40 This amendment inserts the defined term **scheme** into Part XX's dictionary. **Scheme** is used in the new anti-avoidance provisions (sections 287S and 302H), and, except in section 287E, means:

- a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings; and
- b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

Amendment 17: Registration of third party campaigners

41 This amendment replaces the definition of **third party campaigner** with **third party**. Specifically, unless a person or entity is a political entity or a member of the House of Representatives or the Senate, they are a **third party** if:

- a) the amount of electoral expenditure incurred by or with the authority of the person or entity during the financial year is more than the disclosure threshold; and
- b) the person or entity is not required to be, and is not, registered as a political campaigner under section 287F for the year.

42 A note is included under the definition of third party to alert readers to subsection 287(8) and 287C, which clarify the operation of Part XX in relation to entities that have branches or are unincorporated.

Amendments 19-21, 27, 165, 183-185, 190, 196, 199- 201, 211, 220: Third party campaigners

43 These amendments replace the term 'third party campaigner' with 'third party'.

Amendment 17: Transparency Register

44 This amendment inserts the defined term **transparency register** into Part XX's dictionary, to mean the Register of that name established and maintained under section 287N. The **transparency register** replaces the register of associated entities, the register of political campaigners and the register of third party campaigners in the Bill. Accordingly, amendments [8] to [10] remove these definitions from the Bill.

Amendment 23: Candidates and groups; allowable amount

45 This amendment replaces subsection 287(9). This amendment removes the Bill's definition of **allowable amount**. As the term is no longer used in Division 3A, the term has been replaced by the simpler and more commonly used concept of revenue.

287(9) When a person is a candidate or part of a group

46 New subsection 287(9) standardises and clarifies when a person is a candidate or part of a group. Under the Bill and the Electoral Act, the period during which Part XX applied to candidates and Senate groups varied across measures, and across types of candidates. For example, the period during which candidates must disclose electoral expenditure is different from when they must disclose received gifts. Adding to this complexity, these periods differ depending on whether the candidate stood in the previous election, irrespective of whether they were elected.

47 To facilitate compliance and reduce regulatory burden experienced by these groups, new subsection (9) standardises the regulatory period applicable to candidates and Senate groups across Part XX. Specifically, new subsection (9) provides that:

- a) a person begins to be a candidate on the day they publicly announce they will be a candidate in the election, or the day they formally nominate as a candidate (whichever occurs first); and
- b) a person ceases to be a candidate 30 days after polling day in the election.

48 For a candidate endorsed by a registered political party, the announcement day referred to in subparagraph (9)(a)(i) is likely to be the day the party endorses or preselects the person to be the candidate.

49 For Senate groups, new subsection (9) provides that:

- a) a group begins to be a group on the day the members of the group make a request under section 168 for their names to be grouped on the ballot papers for the election; and
- b) a group ceases to be a group 30 days after the polling day in the election.

Amendment 5: Candidates and groups

50 This amendment inserts the term *candidate* into Part XX's dictionary to alert readers that *candidate* has a meaning affected by subsection 287(9) (see above).

Amendment 8: Candidates and groups

51 This amendment inserts a note after the definition of *group* in Part XX's dictionary to alert readers that *group* has a meaning affected by subsection 287(9) (see above).

Amendment 24: Definition of electoral expenditure; foreign donors; implied freedom of political communication

287AA - Meaning of foreign donor

52 This amendment gives effect to recommendation 8 of the Advisory Report by replacing the Bill's definition of *allowable donor* with a new definition of foreign donor. Specifically, this amendment inserts new section 287AA, which provides that a *foreign donor* is each of the following:

- a) a body politic of a foreign country, or part of such a body politic;
- b) a body politic of a part of a foreign country, or part of such a body politic;
- c) a foreign public enterprise;
- d) an entity (whether or not incorporated) that does not meet any of the following conditions:
 - the entity is incorporated in Australia;

- the entity’s head office is in Australia;
 - **Head office** is defined in item 7 of the Bill to mean the place of business where central management and control of the entity are exercised. An entity’s head office can be identified by working out where the high level officers who direct, control and coordinate the entity’s business are based. That is, the head office will be the office or place of business from which the senior managers of the entity (for example, its committee of management) make decisions, give instructions and exercise control over the business of the entity.
- the principal place of activity of the entity is, or is in, Australia;
 - Determining an entity’s principal place of activity requires a comparison between the extent of the activities conducted in Australia and the extent of the activities conducted overseas. The principal place of activity is the place at which the entity conducts the chief part of its activity. For example, a church or charity might engage in significant activity both in a place in Australia as well as a place overseas. To work out whether its principal place of activity is in the place in Australia or the place overseas, relevant considerations include the number of employees or volunteers of the entity engaging in activities in the different locations, as well as the scale or volume of the activities and the place where the entity derives most of its revenue.
- e) an individual who is neither a Commonwealth elector, nor an Australian citizen, nor an Australian permanent resident.
 - **Elector** is defined in section 4 of the Electoral Act.
 - **Australian resident** is defined in item 4 of the Bill.

287AC - Implied freedom of political communication

53 This amendment also inserts new section 287AC, which provides that Part XX does not apply to a person or entity to the extent that any constitutional doctrine of implied freedom of political communication, as it relates to the person or entity, would be infringed.

Amendments 26 & 9: Entities that are not legal persons

54 Amendment 26 replaces paragraph 287C(b) with two new paragraphs that clarify who is taken to have committed a contravention of Part XX in the case that an entity that is not a legal person would otherwise have committed the contravention.

55 New paragraph (b) provides that, for political campaigners, the financial controller is taken to have committed the contravention.

56 New paragraph (c) provides that, for entities that are neither political campaigners nor political entities, each member, agent or officer (however described) of the entity who, acting in that person’s actual or apparent authority, engaged in any conduct or made any omission contributing to the contravention is taken to have committed the contravention. This provision mirrors the arrangements in the authorisation regime in subsection 321D(6).

57 Amendment 9 updates note 1 under the definition of political campaigner to reflect the changes made to section 287C.

Amendment 84: Disclosure period; definition of electoral expenditure; election funding

58 This amendment replaces item 16. Item 16 defined electoral expenditure, and has been replaced by new section 287AB. Item 16, as amended, now repeals redundant definitions from subsection 287(1).

59 This amendment also inserts into subsection 287(1) the defined term *federal party*, to mean a registered political party that has a federal branch and two or more State branches.

Amendment 85: Election funding

60 This amendment inserts new item 18A, which repeals the redundant definition of *Liberal Party*.

61 This amendment also inserts new item 18B, which repeals section 287B. Section 287B has been replaced by the new definition of federal party introduced by amendment 84.

Chapter 2: Registration amendments

Simplified outline

Amendments 28 and 29: Definition of electoral matter; registration of third party campaigners; Transparency Register

62 These amendments replace the title and simplified outline of Division 1A: Registration of political campaigners, third party campaigners and associated entities to reflect the changes set out in this chapter.

Requirement to register

Subdivision B – Adjustments to the requirements to register

Amendments 32 & 34: Registration requirements for political campaigners

63 Along with other amendments, particularly amendments to third party registration and disclosure requirements, these amendments give effect to recommendation 3 of the Advisory Report.

64 Amendment 32 replaces subsection 287F(1). New subsection (1) increases and simplifies the monetary thresholds for registration as a political campaigner in subsection (1). Specifically:

- a) the absolute threshold in paragraph (a) is increased from \$100,000 to \$500,000; and
- b) the percentage threshold in paragraph (b) is increased:
 - from \$50,000 representing at least 50 per cent of the domestic revenue proxy;
 - to \$100,000 representing at least two-thirds of the person or entity's revenue.

65 Political entities, members of the House of Representatives and Senators are not required to register as a political campaigner, irrespective of whether the monetary thresholds in subsection (1) would otherwise apply to them. These people and entities are specifically covered in their capacities as a political entity by Part XX.

Amendments 33, 35 & 36: Registration requirements for political campaigners

66 Along with similar amendments for other penalty provisions, these amendments give effect to recommendation 13 of the Advisory Report.

67 Amendments 35 and 36 reduce the severity of, and introduce proportionality into, the maximum civil penalty associated with failure to meet the obligations set out in section 287F. Amendment 33 extends the grace period for registration from 28 days to 90 days. Amendment 35 reduces the maximum pecuniary penalty from 240 penalty units to 200 penalty units, or, if a Court can determine the quantum of electoral expenditure incurred in contravention of section 287F, or estimate the quantum, three times that amount. Amendment 35 also reframes the penalty to make failure to report by the end of the grace period a single contravention, rather than each day the failure exists representing a separate contravention (see subsection 287F(4) of the Bill, omitted by amendment 36).

Amendments 31 and 37: Registration of third party campaigners

68 These amendments remove the requirement to register as a third party campaigner and make a consequential amendment to the title of Division 1A.

69 However, those:

- a) with political expenditure in excess of the disclosure threshold; but
- b) who are not required to register as a political campaigner under section 287F

will still meet the definition of *third party* (see Chapter 1: Interpretation and definitions). Third parties will still be required to lodge annual returns with the AEC, just as those with certain amounts of ‘political expenditure’ were required to report under the previous law (see Chapter 6: Disclosure). The AEC will add third parties who have submitted an annual return to the Transparency Register (see 287N Establishment of the Registers). Third parties will remain on the Transparency Register for three years following a financial year relating to which they report (see also 287P Obligation to notify Electoral Commission of changes to the Transparency Register).

Amendments 38-44: Registration requirements for associated entities

70 These amendments:

- a) remove subsection 287H(5), the deeming provision introduced by the Bill that operated in relation to paragraph 287H(1)(b);
- b) clarify that political entities, in particular Senate groups, are not required to register as an associated entity;
- c) replace the definition of political expenditure with electoral expenditure;
- d) reduce the severity of the maximum civil penalty amount associated with failure to meet the obligations set out in section 287H in the same way amendment 35 amends 287F (see Requirement to register as a political campaigner, above); and
- e) update the note under subsection 287H(3) to reflect changes to section 287C.

71 Transitional arrangements for registration of associated entities are introduced by amendments to item 13 of the Bill (see Chapter 8).

The registration process

Amendments 45-51: Definition of electoral expenditure; registration of third party campaigners

287J and 287K Expenditure incurred when not registered & Application for registration

72 These amendments to sections 287J and 287K are consequential to other amendments. Amendments 47, 48 and 51 are consequential to the removal of the requirement to register as a third party campaigner (see amendments 31 and 37). Amendment 49 is consequential to the extension of the grace period to register as a political campaigner (see *Requirement to register as a political campaigner*). Other amendments replace the definition of *political expenditure* with *electoral expenditure*.

Amendments 53-62: Registration of third party campaigners

287L & 287M Applications for deregistration & Determining an application for registration

73 Amendments to 287L and 287M are consequential to the removal of the requirement to register as a third party campaigner (see amendments 31 and 37).

Amendments 63-67 & 214: Registration of third party campaigners; Transparency Register

287N Establishment of the Registers

74 Amendments to 287N (amendments 63 to 67) require the Electoral Commissioner to establish and maintain a Transparency Register. The Transparency Register is intended to be the new ‘one-stop-shop’ for publicly available information relating to Part XX of the Electoral Act. To achieve this goal:

- a) the Transparency Register replaces the Bill’s Register of Political Campaigners and the Register of Third Party Campaigners;
 - i. The ability of the Electoral Commissioner to determine, via legislative instrument, additional information to be included on the Registers is updated in subsections (5) to (7) to apply to the Transparency Register.
- b) the Electoral Commissioner is required to keep the Transparency Register up-to-date (subsection (3)); and
- c) historical data may be included on the Transparency Register (subsection (4) — see also amendment 223 in Chapter 8).

75 Subsection 287N(2) provides the Transparency Register must include, but is not limited to, the following information;

- d) the name of:
 - i. each registered political campaigner or associated entity;
 - ii. each person or entity that has provided a return under section 314AEB (annual returns by third parties) for that or any of the previous three financial years; and
 - iii. each political entity;
- e) for political campaigners and associated entities—the name of the financial controller of the person or entity;
- f) for associated entities—the name of any registered political parties with which the person or entity is associated;
- g) any determination, notice or return published under section 320; and
- h) any enforceable undertaking published under subsection 384A(2A).

384A Application of Regulatory Powers Act

76 Amendment 214 inserts new subsection 384A(2A). This subsection empowers the Electoral Commissioner to publish enforceable undertakings accepted under section 114 of the Regulatory Powers Act on the Transparency Register. This amendment enhances the transparency of compliance action taken by the Electoral Commissioner. It may also streamline administration, by reducing duplicative public complaints about the same or similar behaviour.

125 Register of Political Parties

77 Amendment 3 inserts new items [1M] and [1N]. These items create new subsection 125(2), which empower the Electoral Commissioner to incorporate the Register of Political Parties into the Transparency Register.

78 A note under subsection 287N(2) alerts readers that the Transparency Register may include the Register of Political Parties.

Amendment 68 & 69: Transparency Register; Registration of third party campaigners Amendments 70-72: Obligation to notify of changes to information on register; continuing contraventions

287P Obligation to notify Electoral Commissioner of changes to information on register

79 Amendments 68 and 69 are consequential to the establishment of the Transparency Register.

80 Like equivalent amendments for other penalty provisions, amendments 70 to 72 reduce the severity of the maximum civil penalty associated with failure to meet the obligations set out in section 287P. Amendment 70 extends the grace period for notification of a change to the Transparency Register from 28 days to 90 days.

81 Amendment 72 inserts new subsection 287P(3), which provides that subsection 93(2) of the Regulatory Powers Act does not apply in relation to a contravention of subsection 287P(2). This means that failure to meet the obligations in subsection (2) by the deadline is a single contravention, rather than each day after the deadline being a separate contravention.

82 However, subsection 93(2) of the Regulatory Powers Act continues to apply. This means that even though failure to notify a correction to the Register is a single contravention, the obligation to notify continues until it has been done.

83 Amendment 71 omits the note that appeared alerting readers to the fact that section 93 of the Regulatory Powers Act may apply to the obligations in section 287P. This note is no longer necessary given the clarification of the application of the Regulatory Powers Act to section 287P in new subsection 287P(3).

Amendments 73-77: Transparency Register

287Q & 287R Registers to be made public etc. & Entry in Registers prima facie evidence of information

84 Amendments to 287Q and 287R (amendments 73 to 77) are consequential to the establishment of the Transparency Register (see *287N Establishment of the Registers*).

Anti-avoidance

Amendment 78: Anti-avoidance

287S Anti-avoidance

85 Amendment 78 inserts new section 287S. New section 287S contains a general anti-avoidance rule applicable to the registration requirements in sections 287F and 287H. It is intended to protect the integrity of Part XX by prohibiting arrangements that have been contrived to avoid the registration requirements. As other obligations in Part XX and Part XXA are based on registration requirements, it also operates to protect the integrity of these Parts more broadly.

86 Section 287S focuses on the substance of what has been done, and is intended to be applied in a practical way.

87 Subsections (1) and (2) empower the Electoral Commissioner to issue a notice requiring a person (the **relevant person**) to register for a financial year as a political campaigner or associated entity. The relevant person does not need to be a party to the scheme for a notice to be issued in relation to the relevant person (paragraph (1)(a)).

88 Subsection (1) specifies the circumstances in which a notice can be issued, that is:

- a) one or more persons or entities enter into, begin to carry out or carry out a scheme; and
- b) there are reasonable grounds to conclude that those mentioned in paragraph (a) did so for the sole or dominant purpose of avoiding the requirement to register the relevant person as a political campaigner or associated entity; and
- c) as a result of the scheme, the relevant person was not required to be registered; and
- d) for avoiding registration requirements as a political campaigner, the scheme involved:
 - i. **expenditure splitting**: that is, the scheme involved reducing the amount of electoral expenditure incurred by or with the authority of the relevant person to either:
 - below \$500,000 in a financial year to avoid the threshold in paragraph 287F(1)(a);
 - below \$100,000 in a financial year to avoid the threshold in subparagraph 287F(1)(b)(i); or
 - to decrease the ratio between electoral expenditure and revenue to avoid the threshold in subparagraph 287F(1)(b)(ii);
 - ii. **revenue inflation**: that is, the scheme involved artificially inflating revenue to decrease the ratio between electoral expenditure and revenue to avoid the threshold in subparagraph 287F(1)(b)(ii).
- e) for avoiding registration requirements as an associated entity, the scheme involved:
 - i. **indirect control**: that is, the scheme involved making the relevant person subject to the control of another person or entity that controls, or is controlled by, a registered political party to avoid the application of paragraph (a) of the definition of associated entity; or
 - ii. **indirect benefit**: that is, the scheme involved the relevant person operating wholly, or to a significant extent, for the benefit of another person or entity that controls, or is controlled by, a registered political party to avoid the application of paragraph (b) of the definition of associated entity.

89 Note 2 is included under section 287S(1) to alert the reader that **scheme** is a defined term.

90 Subsection (2) provides that the notice must specify the date from which the person is taken to be required to be registered. Thus, the notice overrides the scheme from the date specified in the notice, and the person must be registered by the date specified in the notice. To ensure a notice does not create a retrospective obligation, subsection (3) provides that a date specified in a notice cannot be earlier than the date the notice is issued. It is intended that a notice should allow a reasonable period for registration, as failing to provide sufficient time to register in a notice may be a relevant consideration in a review of a decision to issue a notice under Part X of the Electoral Act.

On reaching an agreement with the station, Abeytu has entered into a scheme and is the relevant person for the purposes of subsection 287S(1). The Electoral Commissioner could issue Abeytu with a notice under section 287S requiring her to register as a political campaigner.

Example 2: Revenue inflation scheme to avoid registration as a political campaigner

Care-sumerism is a non-profit organisation that operates a number of retail shops. Care-sumerism donates their profits to other non-profit organisations.

One of the recipients of Care-sumerism's donations approaches Care-sumerism and asks them to amalgamate on paper. The recipient explains that the amalgamation will mean the recipient doesn't have to register as a political campaigner, meaning more of Care-sumerism's donations could be put to the recipient's non-profit activities. The recipient further explains that this is the case because the proposed amalgamated entity's electoral expenditure (incurred entirely by the former recipient) would be less than two-thirds of its revenue (earned entirely by Care-sumerism). Thus, the threshold in subparagraph 287F(1)(b)(ii) would not apply to the amalgamated entity.

Should Care-sumerism agree to the amalgamation, the entities have entered into a scheme and are the relevant person for the purposes of subsection 287S(1). The Electoral Commissioner could issue the amalgamated entity with a notice under section 287S requiring it to register as a political campaigner.

Avoiding registration as an associated entity

Example 3: Indirect control scheme to avoid registration as an associated entity

A registered political party buys a controlling interest in a company that operates several rural radio stations. The party doesn't want the company to be registered as its associated entity, so transfers the controlling interest to one of the trusts that manages the party's assets. The party argues that it is the trust that now has the controlling interest, not the party.

The party has carried out a scheme in relation to the company. The company is the relevant person for the purposes of subsection 287S(1). The Electoral Commissioner could issue the company with a notice under section 287S requiring it to register as an associated entity of the party

Example 4: Indirect benefit scheme to avoid registration as an associated entity

Our Party Youth is controlled by Our Party, a registered political party. Our Party Youth creates a sub-group with an ambiguous name to conduct their more aggressive negative campaigning in support of Our Party. The sub-group argues that they operate for the benefit of Our Party Youth, not Our Party, and are therefore not an associated entity of Our Party.

Our Party Youth has carried out a scheme in relation to the sub-group. The sub-group is the relevant person for the purposes of subsection 287S(1). The Electoral Commissioner could issue the sub-group with a notice under section 287S requiring it to register as an associated entity of Our Party.

Amendment 3: Anti-avoidance

120 – Internal Review

95 This amendment inserts new item [1L], which provides that a decision to issue a notice under section 287S is a **reviewable decision** under Part X of the Electoral Act. A note is included under section 287S(1) to alert the reader to the relevant person's right to review under section 120.

Chapter 3: Agents and financial controllers amendments

Simplified outline

Subdivision A – Adjustments to the simplified outline of Division 2

96 Amendment 86 replaces the simplified outline of Division 2: Agents and financial controllers to reflect the changes set out in this chapter.

Item 26 – At the end of Division 2 of Part XX

Nominating a financial controller

Subdivision C – Adjustments to the nomination of financial controllers

97 Amendments 87 to 92 remove third parties from the requirements to nominate a financial controller. This reflects that the financial controllers will no longer bear responsibility for contraventions of the Bill's penalty provisions in relation to their third parties (see amendment 26).

Chapter 4: Public election funding amendments

Simplified outline

Amendment 93 & 94 – Election Funding

Section 292G - Simplified outline of this Division

98 These amendments adjust the simplified outline of Division 3 to reflect the changes set out in this chapter.

Indexation of the public funding rate

Amendment 95 & 96 – Election funding

Section 293 - Election funding for registered political parties

99 These amendments replace subsection 293(2), and introduce new subsection (3).

100 In new paragraph (2)(a), the election funding rate is indexed under section 321. This indexation aligns the funding rate specified in the Bill with the current funding rate in the Electoral Act.

101 New paragraph (2)(b) is adjusted as a consequence of new section 296, which provides for the automatic payment of \$10,000 in election funding to eligible recipients. New paragraph (2)(b) continues to provide that the amount of election funding that will be paid is the lesser of the amount calculated under paragraph (2)(a) and the claimed amount accepted by the Electoral Commissioner.

102 Similarly, the note under subsection 293(1) is updated to reflect new section 296.

103 New subsection (3) outlines, for payments made under new section 296 and for claimed amounts accepted under 298C, when the first preference votes are taken for the purposes of calculating the amount under subsection (2)(a). New paragraph (3)(b) has been moved for paragraph (2)(a) in the Bill. It specifies that, for payments made in relation to a claim, first preference votes counted as at the day of the determination of the claim are to be used to calculate the amount under paragraph (2)(a).

104 New paragraph (3)(a) reflects new section 296, specifying the progress of the count for the purposes of calculating whether someone is eligible under subsection (1) to receive an automatic payment under new section 296. It specifies that, for payments made under section 296, first preference votes counted as at 20 days after polling day are to be used to calculate the amount under paragraph (2)(a).

Amendment 97 – 100 – Election funding

Section 294 – Election funding for unendorsed candidates

Section 295 – Election funding for unendorsed groups

105 These amendments make the same changes to sections 294 and 295 as amendments 95 and 96 make to section 293.

Automatic Payment of election funding of \$10,000

Amendment 101 – Election funding

Section 296 – Automatic payment of election funding of \$10,000

106 This amendment inserts new Subdivision BA, which requires the Electoral Commission to pay \$10,000 to each eligible and willing recipient as soon as practicable 20 days after polling. The subdivision contains a single section (new section 296).

107 Subsection (1) provides that the Electoral Commission must pay \$10,000 in relation to each eligible registered political party, candidate, or Senate group, as soon as practicable after 20 days after the polling day for an election. To be eligible under subsection (1) in sections 293, 294 or 295, the relevant candidate or Senate group must receive at least four per cent of formal first preference votes cast in the election and must wish to receive election funding. A registered political party may elect not to receive election funding under paragraph 126(2)(d) of the Electoral Act.

108 Note 1 at the end of subsection (1) that the \$10,000 amount mentioned in this subsection is indexed under section 321.

109 Note 2 at the end of subsection (1) alerts the reader that, under paragraph 126(2)(d), a registered political party may state that it does not wish to receive election funding.

110 Subsection (2) sets out to whom the \$10,000 mentioned in subsection (1) will be paid, and broadly mirrors old section 299 of the Electoral Act. Specifically, subsection (2) provides that the \$10,000 will be paid to the agent of the registered political party, unendorsed candidate or unendorsed group.

111 An exception to this rule occurs in relation to a federal party (defined in subsection 287(1)). For federal parties, the agent of the federal party will receive the \$10,000, unless that agent has consented to the State branch receiving the amount. In this case, paragraph (2)(a) provides that the funding will be paid to the agent of the State branch.

Example

Party A has a Western Australian branch, a Queensland branch, a Victorian branch, and a federal secretariat. Party A is therefore a federal party. All four branches are registered political parties. However, in practice, only the three state branches endorse candidates while the federal secretariat plays a coordinating role.

The federal secretariat provides its consent to the AEC for the Victorian branch to receive the \$10,000 payment. In compliance with section 296, the AEC pays the agent of the federal secretariat and the agent of the Victorian branch \$10,000 each as soon as practicable after 20 days after polling day.

Claims for election funding

Amendments 102 & 103 – Election funding

112 These amendments add ‘of more than \$10,000’ at the end of the title of subdivision C and section 298 to reflect new section 296 (see amendment 101).

Amendment 104 to 107 – Election funding

Section 297 – Need for a claim for election funding of more than \$10,000

113 These amendments are consequential to new section 296.

114 Amendment 105 replaces paragraph 297(1)(a), and adds new paragraph (aa). These new paragraphs reflect the consent process outlined in subsection 296(2) for claims. Specifically, these new paragraphs provide that a claim will be made by the agent of the federal party, unless this agent has consented to the agent of a State branch making a claim.

115 A note alerts readers that the \$10,000 in subsection (1) is indexed under section 321.

Amendment 108 – Election funding

298D – Payment to be made following acceptance of an interim claim

116 Amendment 108 replaces subsection 298D(2) to clarify that the amount paid in relation to a claim is to be reduced by the amount paid under section 296. As clarified by new subsection 297(3), claims will continue to set out all electoral expenditure for which funding is sought. However, as by the time the claim is made, \$10,000 (indexed) may have already been paid under section 296, new subsection 298D(2) provides that the amount paid in relation to a claim is to be reduced by the amount paid under section 296.

Amendment 109 – Election funding

298E – Payment to be made following acceptance of a final claim

117 This amendment makes the same changes to subsection 298E(2) as amendment 108 makes to subsection 298D(2).

Chapter 5: Foreign donation restrictions amendments

Amendment 110: donations

302A Simplified outline of this Division

118 This amendment replaces the simplified outline of Division 3A: Requirements relating to donations to reflect the changes set out in this chapter.

Amendment 111: Candidates and groups

302B Definitions

119 This amendment renames the title of section 302B to reflect the omission of subsection (2).

Amendment 112 and 113: Candidate and groups

120 These amendments omit subsection (2), which has been relocated to new subsection 287(9) (see Chapter 1).

Amendment 114: Relationship with State and Territory laws

302CA Relationship with State and Territory laws

121 New section 302CA clarifies the interaction between similar State and Territory and Commonwealth electoral funding schemes. New section 302CA ensures that provisions of State and Territory laws that relate to political donations cannot restrict the making or receipt of donations that could be used for Commonwealth electoral purposes.

122 These State and Territory laws dealing with electoral laws will be invalidated to the extent that they would detract from the right to give or accept a donation under the Electoral Act. That is, if Division 3A of the Electoral Act does not prohibit the making of a gift to, or the receipt or use of a gift by, a political entity, a political campaigner or a third party, then this cannot be prohibited by State or Territory law if the gift could be used for Commonwealth electoral purposes. Here, electoral matters has its ordinary meaning, that is, matters relating to a federal election, and does not have the meaning specified in section 4 of the Electoral Act. State and Territory laws remain otherwise effective in regulating donations that are given for purposes of State and Territory elections.

123 New section 302CA states that, apart from situations outlined in the prohibitions found in the amended Division 3A and irrespective of any law of a State or Territory dealing with electoral matters:

- a) a person or entity may give a gift to or for the benefit of a political entity, political campaigner or a third party;
- b) a political entity, political campaigner or third party can receive, retain or use a gift;
or
- c) a person or entity can receive, retain or use a gift on behalf of a political entity, political campaigner or third party.

124 The immunity in section 302CA is subject to the gift being required to be, or being able to be, used for the purpose of incurring electoral expenditure or creating or communicating electoral matter (paragraph (e)). That is, section 302CA will only apply where the gift is able to be used for these purposes. It will not apply in relation to gifts that are only able to be used for exclusively State electoral purposes.

Example 1: Gifts not prohibited by foreign donations restrictions

Nian Zhen is an Australian citizen and member of the Australian Defence Force (ADF).

Nian Zhen makes a gift to a registered political campaigner, which has as its objects influencing the way electors vote at both State and federal elections. Nian Zhen does not place or agree to any condition on his gift, so it is available to be used for state or federal purposes. As Nian Zhen is an Australian citizen, he is not a foreign donor, and so is not prohibited from making a gift to a political campaigner under Division 3A of Part XX of the Electoral Act.

Electoral law in the state Nian Zhen lives in prohibits members of the ADF making gifts to anyone who incurs, or who has incurred, expenditure in relation to a State election.

As Nian Zhen lawfully makes the gift to a political campaigner under Division 3A of Part XX of the Electoral Act, and the gift may be used by the political campaigner to incur electoral expenditure within the terms of the Electoral Act, the state law does not apply to Nian Zhen's gift.

Donations to political entities and political campaigners

Amendment 115 & 116: Donations to political entities and political campaigners

302D Donations to political entities and political campaigners

125 These amendments update the title of section 302D and paragraph (1)(d) to reflect the replacement of the concept of *allowable donor* with the new concept of *foreign donor* (see Chapter 1).

126 The fault element that applies to the relevant physical element of section 302D (the circumstance that the donor is a foreign donor, see paragraph (1)(d)) is recklessness. As recklessness can be established by proving intention, knowledge or recklessness, a person will commit the offence in section 302D if it could be proved that the person knew that the donor was a foreign donor (assuming the other elements of the offence were also made out). However, the person will also commit the offence in section 302D if it could be proved that the person was reckless with respect to the circumstance. That is, they were aware of a substantial risk that the donor was a foreign donor and, having regard to the circumstances known to the person, it was unjustifiable to take the risk.

127 As is generally true, the civil penalty and criminal offence differ with respect to the state of mind required for a conviction (in the case of an offence) or liability to a civil penalty order (in the case of a civil penalty provision). In the case of proceedings for a civil penalty order against a person, it is not necessary to prove that the person had a particular state of mind such as knowledge or recklessness, however the person may be able to rely on the 'mistake of fact' defence in section 95 of the Regulatory Powers Act. Under the 'mistake of fact' defence, a person will not be liable to have a civil penalty order made against them if, broadly speaking, the person had considered whether or not (relevantly) the donor was a foreign donor and was under a mistaken but reasonable belief that the donor was not a foreign donor.

Amendment 117: Donations to political entities and political campaigners

128 This amendment omits paragraphs 302D(1)(e) to (g), substituting these with new paragraphs (1)(e) and (1)(f). This amendment:

- a) increases the materiality threshold at which gifts to political entities and political campaigners are subject to the foreign donations restrictions from \$250 to \$1,000;
- b) makes the threshold non-cumulative (the threshold applies to single gifts, noting that there are also anti-avoidance rules to provide a safeguard) and
- c) removes the exception for registered charities and organisations that are also registered political campaigners.

Amendment 118: Donations to political entities and political campaigners

129 This amendment omits note 1 under subsection 302D(1). Section 302M is omitted by amendment 131.

Amendment 119: Donations to political entities and political campaigners

302D(1A) Exception – obtaining information about foreign donor status

130 This amendment inserts new subsection 302D(1A), which provides defences to recipient actions that would otherwise contravene subsection (1). Specifically, new subsection (1A) provides that recipients do not contravene section (1) if:

- a) for gifts over \$1,000, the donor affirms in writing that they are not a foreign donor within 6 weeks of providing the gift – this could for instance be indicated by a tick box on a form;
- b) before the end of 6 weeks after a gift is made, recipients do not contravene section (1) for gifts equal to or above the disclosure threshold if either of the following occurs:
 - i. the recipient obtains appropriate donor information in accordance with amended section 302P, establishing that the donor is not a foreign donor; or
 - ii. alternatively, the recipient took other reasonable steps (such as cross referencing identification provided by the recipient with the Electoral Roll or a Register of the Australian Securities and Investment Commission) to verify that the donor was not a foreign donor.

Donor affirms not foreign donor in writing

Example

Jean-Paul is not a foreign donor. He wishes to make a \$1,500 donation to a registered political party via its website. Prior to entering his credit card details into the payment system, he is required to read and then tick a box on the webpage form affirming that he is not a foreign donor under the Electoral Act.

By ticking the box on the party's website, Jean-Paul affirms in writing he is not a foreign donor and the party can rely on this representation.

Recipient obtains appropriate donor information

Example

Winston makes a \$15,000 donation to a registered political party. He provides his full name (including his middle name) and his residential address to the party, so he can be matched on the Electoral Roll. The political party uses the AEC's online tool for checking enrolments, to cross reference Winston's details with those on the Electoral Roll and confirm he is an elector.

The party has obtained appropriate donor information in relation to Winston, as it has checked his particulars set out in the roll.

131 To rely on one of the defenses in paragraphs (a) or (b), paragraph (c) requires that the recipient must not know, or have reasonable grounds to believe, that the donor was a foreign donor during the six week period. Paragraph (c) is included so that recipients who reasonably rely on authenticating information provided by donors about their status as not foreign donors do not contravene section 302D. However, where a recipient has reliable information that a donor is a foreign donor despite information or verification from paragraphs (a) or (b), the recipient cannot rely on the exception. This exception is broadly akin to the exception contained in section 302M of the Bill.

132 New subsections (1A), (1B) and (1C) have notes that alert readers that a person or entity who wishes to rely on this subsection bears an evidential burden in relation to the matters in this subsection under subsection 13.3(3) of the Criminal Code and section 96 of the Regulatory Powers Act.

133 Note 2 is included under subsection (1A) to alert readers that a person who makes a false affirmation or provides false donor information may be liable to a penalty as found in new section 302G.

302D(1B) Exception – private capacity

134 New subsection (1B) introduces an exception whereby recipients do not contravene the section if the gift was made in a private capacity to the recipient with the intention for his or her personal use. This exception is broadly akin to the exception contained in section 302N of the Bill.

Gifts made in a private capacity

Example

Sieux gives \$1,100 to her grandson, Lee, for his birthday. Lee is a candidate in an upcoming federal election.

Although Sieux is a foreign donor, the gift is made to Lee in a private capacity for his personal use and is thus exempt under new subsection 1B.

302D(1C) Exception – donations given on terms inconsistent with incurring electoral expenditure etc.

135 New subsection (1C) introduces an exception under which recipients do not contravene the section if using the gift for the purposes of incurring electoral expenditure, or creating or communicating electoral matter, would be inconsistent with the terms of the gift. The purpose of this exemption is to allow recipients to receive foreign donations intended to be used for purposes unrelated to federal elections.

Using the gift for a purpose inconsistent with its terms

Example 1

A Uruguayan company gives \$20,000 to Party X as part of Party X's campaign to raise funds for an upcoming state election. Party X is a registered political party at both the Commonwealth and state levels of government.

Using the gift for Commonwealth electoral purposes (that is, to incur electoral expenditure, or to create or communicate electoral matter) would be inconsistent with the terms of the gift as the fundraising campaign was explicitly for state electoral purposes. The exception in subsection (1C) applies, so Party X does not contravene subsection (1).

Example 2

An Icelandic trust gives an Australian not-for-profit organisation \$120 million to plant trees as part of an environmental remediation project. The not-for-profit organisation is a registered political campaigner.

Using the gift to incur electoral expenditure, or to create or communicate electoral matter would be inconsistent with the terms of the gift. The exception in subsection (1C) applies, so the not-for-profit organisation does not contravene subsection (1).

Amendment 120 & 121: Penalties

302D(2) Offence; 302D(3) Civil penalty

136 Like equivalent amendments for other penalty provisions, these amendments reduce the maximum:

- a) criminal penalty associated with section 302D from 600 to 200 penalty units, and remove the option for a custodial sentence;
- b) civil penalty from 1,000 penalty units 200 penalty units, or, if a Court can determine or estimate the value of the gift received in contravention of section 302D, three times that amount.

Amendment 122: Continuing contraventions

302D(4) Provision not continuing offence or civil penalty

137 Subsection 302D(4) clarifies that, in contrast to the Bill, contraventions of section 302D are not continuing contraventions. Specifically, new subsection (4) provides that section 4K of the *Crimes Act 1914* does not apply to an offence against subsection (2), and subsection 93(2) of the Regulatory Powers Act does not apply in relation to a contravention of subsection (3). This means that retaining a gift from a foreign donor is a single contravention, rather than each day after the six week period during which acceptable action can be taken being a separate contravention.

Donations to third parties

Amendment 123: Donations to third party campaigners

302E Donations to third party by foreign donors

138 This amendment updates the title of section 302E to reflect changes made to the section.

Amendment 124: Donation to third party campaigners

139 This amendment omits subsections (1) and (2), substituting these with a new subsection (1). New subsection (1) sets out the circumstances in which a third party receives a prohibited gift:

- a) the gift is made to, or for the benefit of, the third party;
 - The inclusion of the words ‘for the benefit of’ are intended to capture more indirect forms of making gifts, for example, through fundraising events or bodies.
- b) the gift is made by, or on behalf of, a foreign donor
 - The inclusion of the words ‘on behalf of’ are intended to capture attempts to channel a gift through a non-foreign donor, complementing the anti-avoidance arrangements in section 302H.
- c) at the time the gift is made, the amount or value of the gift is at least equal to the disclosure threshold;
- d) the third party uses the gift to incur electoral expenditure, or for the dominant purpose of creating or communicating electoral matter; and
- e) within 6 weeks of the gift being made, the third party has not undertaken acceptable action, that is, returned the gift or transferred it to the Commonwealth.

140 The fault element that applies to the physical element in section 302E(1)(d) (the circumstance that the donor is a foreign donor) is the same as in relation to section 302D(1)(d) (see *302D Donations to political entities and political campaigners*).

Gifts made to a third party

Example

A yacht club receives regular membership fees and gifts from a range of sources, which it uses to manage a marina and run social events. The club becomes a third party after it incurs electoral expenditure becoming publicly vocal after yachting is banned in the vicinity of a section of coastline where dolphins congregate.

As part of their opposition to the yachting ban, the club receives two donations over the disclosure threshold (\$13,800 in 2018-19) from members to print how-to-vote cards to distribute in the upcoming federal election.

Under section 302E, within six weeks of receiving the donations, the club will need to obtain appropriate donor information, or take reasonable steps to verify, the two donors are not foreign donors.

The club finds the first donor on the Electoral Roll, thus, as an elector, the first donor is not a foreign donor. The club must report the Australian donation under section 314AEC at the end of the financial year, but can use the first donation to incur electoral expenditure.

The club can't find the second donor on the electoral roll, and, when they contact the donor, the donor confirms he is a foreign donor within the meaning of 287AA. The club cannot use the second donation to communicate electoral matter (that is, to create and distribute the how-to-vote cards), but may use the donation for other expenses (for example, to manage the marina). The club does not need to report this second donation, as it is not used, in whole or in part, to incur electoral expenditure.

141 Note 1 under subsection (1) alerts readers that the amount or value of the gift may be a debt due to the Commonwealth under section 302Q if a Court determines that the gift contravened section 302E.

142 Note 2 alerts readers that, in accordance with section 302R, the physical elements of an offence against subsection (3) are set out in subsection (1).

302E(2) Exception— obtaining information about foreign donor status

143 New subsection (2) introduces an exception, which provides a defence to recipient actions that would otherwise contravene subsection (1). Specifically, new subsection (2) provides that recipients do not contravene section (1) if:

- a) the donor affirms in writing that they are not a foreign donor within 6 weeks of providing the gift; and
- b) before the end of 6 weeks after a gift is made, either of the following occurs:
 - i. the recipient obtains appropriate donor information in accordance with amended section 302P, establishing that the donor is not a foreign donor; or
 - ii. alternatively, the recipient took reasonable steps (such as cross referencing identification provided by the recipient with the Electoral Roll or a Register of the Australian Securities and Investment Commission) to verify that the donor was not a foreign donor.

144 To rely on the defense in paragraphs (a) and (b), paragraph (c) requires that the recipient must not know, or have reasonable grounds to believe, that the donor was a foreign donor during the six week period. Paragraph (c) is included so that recipients who reasonably rely on authenticating information provided by donors about their status as not foreign donors do not contravene section 302E. However, where a recipient has reliable information that a donor is a foreign donor despite information and verification in accordance with paragraphs (a) and (b), the recipient cannot rely on the exception. This exception is broadly akin to the exception contained in section 302M of the Bill.

145 Note 1 alerts readers that a person or entity who wishes to rely on this subsection bears an evidential burden in relation to the matters in this subsection under subsection 13.3(3) of the Criminal Code and section 96 of the Regulatory Powers Act.

146 Note 2 alerts readers that a person who makes a false affirmation or provides false donor information to a recipient may contravene new section 302G.

Amendments 125 & 127: Donations to third party campaigners

147 These amendments update subsections (3) and (4) in recognition that a third party may be a person or entity. Entity is defined in subsection 287(1).

Amendments 126 & 128: Penalties

302E(3) Offence; 302E(4) Civil penalty

148 Like equivalent amendments for other penalty provisions, these amendments reduce the maximum:

- a) criminal penalty associated with section 302E from 600 to 50 penalty units, and remove the option for a custodial sentence;
- b) civil penalty from 1,000 penalty units to 100 penalty units, or, if a Court can determine or estimate the value of the gift received in contravention of section 302E, three times that amount.

Amendment 129: Continuing contraventions

302E(5) Provision not continuing offence or civil penalty

149 Subsection 302E(5) clarifies that, in contrast to the Bill, contraventions of section 302D are not continuing contraventions. Specifically, new subsection (5) provides that section 4K of the *Crimes Act 1914* does not apply to an offence against subsection (3), and subsection 93(2) of the Regulatory Powers Act does not apply in relation to a contravention of subsection (4). This means that retaining a gift from a foreign donor is a single contravention, rather than each day after the six week period during which acceptable action can be taken being a separate contravention.

Gifts provided for the purposes of incurring electoral expenditure

Amendment 130: Gifts by foreign donors

302F Gifts provided for the purposes of incurring electoral expenditure etc.

150 This amendment omits sections 302F to 302J, and introduces new section 302F. New section 302F introduces penalties for:

- a) gift recipients who knowingly receive a gift from a foreign donor:
 - i. intending to use the gift for electoral expenditure; or
 - ii. knowing that the donor intends the gift to be used for electoral expenditure;
- b) foreign donors who make prohibited gifts.

151 A person has knowledge of a circumstance or a result if he or she is aware that it will occur in the ordinary course of events. This fault element includes knowledge of what will exist in a future and hypothetical state of events.

152 A person has intention with respect to:

- a) conduct if he or she means to engage in that conduct;
- b) a circumstance if he or she believes that it exists or will exist; and
- c) a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

153 The fault element that applies to the physical element in section 302F(1)(c) (the circumstance that the gift is made by a foreign donor) is the same as in relation to section 302D(1)(d) (see *302D Donations to political entities and political campaigners*).

154 Subsections (3) and (5) set out parallel criminal and civil penalties for contraventions of section 302F. Third parties who contravene subsection (1) are subject to lower maximum penalties (50 and 100 penalty units for the criminal offence and civil penalty, respectively) than other contraveners (100 and 200 penalty units for the criminal offence and civil penalty, respectively). Like with other penalties, where a Court is able to determine or estimate the amount involved in the contravention, the maximum penalty is three times that amount, and not the specified penalty units.

155 Subsection (6) clarifies that these penalties apply extra-territorially due to the nature of the contraventions and the parties involved. Foreign donors are, by definition, foreign, and are likely to be overseas when committing a contravention and during enforcement proceedings. Thus, subsection (4) applies section 15.4 of the Criminal Code (extended geographical jurisdiction – category D) to the criminal offence. Mirroring the arrangements for the criminal offence, subsection (6) specifies the civil penalty applies whether or not the conduct or its result occurs in Australia.

156 Notes under subsections (1) and (2) alert readers that, in accordance with section 302R, the physical elements of an offence against subsection (3) are set out in subsections (1) and (2).

302F(1) Offence by a gift recipient etc.

157 New subsection (1) sets out circumstances in which gift recipients receive a prohibited gift of any amount or value. Specifically, the agent of a political entity, the financial controller of a political campaigner, or a third party (the *relevant person*) will contravene subsection (1) if:

- a) a gift is made to, or for the benefit of, the political entity, political campaigner or third party;
- b) the gift is made by a foreign donor;
- c) either:
 - i. **knowledge of intent:** the relevant person knows that the foreign donor intends the gift to be used to incur electoral expenditure, or for the dominant purpose of creating or communicating electoral matter; or
 - ii. **acceptance with intent:** the relevant person accepted the gift intending to use the gift to incur electoral expenditure, or for the dominant purpose of creating or communicating electoral matter; and
- d) within six weeks of the gift being made, acceptable action has not been taken, that is, the gift has either been returned to the donor or transferred to the Commonwealth.

Gifts from foreign donors earmarked for electoral expenditure

Example 1a

Dana is the agent for Kym, a candidate in the upcoming election. The Canadian Woodchipper's Association donates \$200,000 to Kym's campaign to help Kym publicise her policy of removing tariffs on timber imports. The Association also offers to send one of their senior communications officers to Australia to work for Kym during her campaign. Kym accepts the Association's offer. The commercial value of the communication officer's work is a gift from the Association to Kym.

Six weeks after the gifts are made, Dana contravenes subsection 302F(1) as she knows the Association intends:

- the money to be used for Kym to incur electoral expenditure; and
- the professional services of the communications officer to be used to create and communicate electoral matter.

Example 1b

Two weeks after the gifts are made, Dana realises the gifts contravene section 302F. She returns the money to the Association, and arranges to pay the Association the commercial value of the communication officer's work.

Dana has taken acceptable action, and so she does not contravene section 302F.

302F(2) Offence by a foreign donor

158 New subsection (2) sets out circumstances in which penalties apply to foreign donors who make prohibited gifts. Specifically, a person or entity who is a foreign donor (the **donor**) will contravene subsection (2) if:

- a) they make a gift to, or for the benefit of, a political entity, political campaigner or third party (the recipient);
- b) if they make a gift to a third party:
 - i. the donor intends the gift to be used to incur electoral expenditure, or for the dominant purpose of creating or communicating electoral matter; or
 - ii. the donor knows that the recipient accepts the gift intending to use the gift to incur electoral expenditure, or for the dominant purpose of creating or communicating electoral matter; and
- c) within six weeks of the gift being made, the third party has not undertaken acceptable action, that is, returned the gift or transferred it to the Commonwealth.

False affirmation or information that donor is a not a foreign donor

Amendment 130: False information about foreign donor status

302G False affirmation or information that donor is not a foreign donor

159 This amendment inserts new section 302G. New section 302G introduces penalties for those who knowingly make a false affirmation or provide false appropriate donor information. These penalties are designed to protect the integrity of the processes recipients undertake to check they are not receiving prohibited foreign gifts.

160 Subsections (2) and (4) set out parallel criminal and civil penalties for contraventions of section 302G of 100 and 200 penalty units, respectively. Like with other penalties, where a Court is able to determine or estimate the amount involved in the contravention, the maximum penalty is three times that amount, and not the specified penalty units.

161 Subsections (3) and (5) clarify that these penalties apply extra-territorially due to the nature of the contraventions and the parties involved. Foreign donors are, by definition, foreign, and are likely to be overseas when committing a contravention and during enforcement proceedings. Thus, subsection (3) applies section 15.4 of the Criminal Code (extended geographical jurisdiction – category D) to the criminal offence. Mirroring the arrangements for the criminal offence, subsection (5) specifies the civil penalty applies whether or not the conduct or its result occurs in Australia.

162 A note under subsections (1) alerts readers that, in accordance with section 302R, the physical elements of an offence against subsection (2) are set out in subsection (1).

Anti-avoidance

Amendment 130: Anti-avoidance

302H Anti-avoidance

83 This amendment inserts new section 302H. New section 302H introduces an offence to protect the integrity of Division 3A by introducing a mechanism to stop arrangements that have been contrived to avoid the foreign donations restrictions.

84 Section 302H focuses on the substance of what has been done, and is intended to be applied in a practical way.

85 The offence is preceded by a notice scheme. Subsections (1) and (2) empower the Electoral Commissioner to issue a notice requiring a person (the *relevant person*) to not enter, begin to carry out, or cease carrying out, a scheme.

86 Subsection (1) specifies the circumstances in which a notice can be issued, that is:

- a) the relevant person (whether alone or with one or more persons) enters into, begins to carry out or carries out a scheme (paragraph (1)(a));
- b) the Electoral Commissioner has reasonable grounds to conclude that the relevant person did so for the sole or dominant purpose of avoiding the application of Division 3A (paragraph (1)(b));
- c) as a result of the scheme or part, the provision prohibit the making of the gift in those circumstances (paragraph (1)(d)); and
- d) either the scheme involved:
 - **donation splitting:** that is, the scheme involved the foreign donor avoiding a monetary threshold that operates in relation to a gift by giving multiple gifts below the monetary threshold; or
 - **conduit corporations:** that is, the scheme involves the foreign donor forming, or participating in the formation of, a body corporate in Australia in order to channel gifts through an allowable donor;

- **an unspecified avoidance scheme:** that is, the scheme does not involve donation splitting or shell corporations, but otherwise facilitates a foreign donor making an otherwise prohibited gift.

163 A note is included under subsection (1) to alert the reader that scheme is a defined term.

164 Subsection (2) sets out requirements for notices issued under subsection (1). A notice must specify the conduct constituting the scheme (paragraph (2)(a)) and require the relevant person to cease to engage in the specified conduct (paragraph (2)(b)).

165 Subsection (3) provides that a person or entity commits a criminal offence with a penalty of 200 penalty units for failure to comply with a notice issued under subsection (1). Subsection (5) introduces a parallel civil penalty for failure to comply with a notice issued under subsection (1). The civil penalty amount is 200 penalty units, or if there is sufficient evidence for the court to determine the value of the gift at the time the gift is made, the civil penalty is 3 times that amount or value of the gift.

166 As in sections 302F and 302G, subsections (4) and (6) clarify that the penalties for section 302H apply extra-territorially due to the nature of the contraventions and the parties involved. Thus, subsection (4) applies section 15.4 of the Criminal Code (extended geographical jurisdiction – category D) to the criminal offence. Mirroring the arrangements for the criminal offence, subsection (6) specifies the civil penalty applies whether or not the conduct or its result occurs in Australia.

Anti-avoidance

Example

Aarav, a British political campaigner sets up a regular international money transfer of \$15,000 a month to his Australian friend Alinta's personal account. Aarav asks Alinta to set up a direct debit every month to transfer the \$15,000 to a registered political party aligned with his political campaign.

The AEC discovers Aarav's scheme and issues Alinta a written notice. This written notice instructs Alinta to stop the direct debit.

Alinta forgets about the notice and continues the arrangement to transfer the \$15,000 from Aarev to the registered political party via Alinta's personal account. Alinta contravenes section 302H.

Amendments 131-133: Other offences and civil penalty provisions; exceptions to offences and civil penalty provisions

167 In order to simplify the foreign donations restrictions, these amendments omit Subdivision C.

168 These amendments also omit sections 302M and 302N, and update the title to subdivision D accordingly. The exceptions contained in former sections 302M and 302N have been incorporated into new sections 302D and 302E.

Amendment 134: Information relating to foreign donor status

302P Information relating to foreign donor status

169 This amendment inserts new subsection 302P, which sets out when someone obtains **appropriate donor information**. Appropriate donor information is required for gifts above the disclosure threshold under sections 302D and 302E. As clarified in the note under the table in subsection (1), a person or entity who obtains appropriate donor information may not contravene subsections 302D(1A) or 302E(2).

170 Subsection (1) provides that where someone obtains information or a document specified in column 2 of the table in subsection (1) for the relevant type of donor, they have obtained appropriate donor information. Column 2 specifies different types of appropriate donor information for individuals (item 1), Australian corporations (item 2) and other types of entities (item 3).

171 For individuals and Australian corporations, any one of the types of information specified in column 2 at items 1 and 2 is sufficient. However, entities relying on documents evidencing decisions under item 3 must provide at least three documents evidencing three different kinds of decisions.

172 Subsection (3) clarifies that for item 3 of the table, information may be omitted, redacted or deleted from the minutes, documents or information to avoid disclosing sensitive material.

Appropriate donor information

Example 1

The Tjapukai Snack Company makes a gift above the disclosure threshold to a registered political party.

The registered political party looks up the company on the Australian Securities and Investments Commission website. The listing shows the company is incorporated in Cairns.

The registered political party has obtained appropriate donor information in relation to the Tjapukai Snack Company.

Example 2

Yay Brisbane is a local community group, and an unincorporated association. The group meets at a local bowls club every first Wednesday in the month.

They make a gift above the disclosure threshold to the campaign of one of their members who is running as a candidate in a federal election.

Yay Brisbane provides copies of the minutes of their last three meetings as appropriate donor information. The minutes show the meetings were held at the bowls club, and that at the meetings:

- officers were appointed (the Treasurer and Spokesperson for the new year);
- high-level financial decisions were made (the group decided to donate a quarter of the group's funds to a candidate); and
- decisions setting the operational policies of the group were made (the group decided that only the Spokesperson would give comments on behalf of the group to the media).

Yay Brisbane redacts the names of the appointed persons and the amounts of money from the copies of the minutes they provide the candidate.

The candidate has obtained appropriate donor information in relation to Yay Brisbane.

173 A note is included under the table in subsection (1) to alert readers that a person who obtains appropriate donor information may not commit an offence or contravene a civil penalty provision in the Division.

Debts due to the Commonwealth

Amendment 135

302Q Debts due to the Commonwealth

174 This amendment updates references in section 302Q to reflect changes to penalty provisions, as outlined in this Chapter.

Chapter 6: Disclosure amendments

Amnesty for historical non-compliance with third party obligations

Amendment 221 – Commencement

Amnesty

175 This amendment inserts new subitem 143(14), which creates an amnesty for historical non-compliance with third party disclosure obligations. During evidence to the JSCEM inquiry into the Bill, representatives from the not-for-profit sector indicated that there has been widespread inadvertent non-compliance with these obligations in their sector. As the focus of these amendments and the Bill is to maximise future compliance, an amnesty for historical non-compliance is provided for in new subitem (14).

176 Specifically, new subitem (14) provides that no action, suit or proceeding lies against any person for failing to comply with section 314AEB or 314AEC of the Electoral Act in relation to any financial year that ends before the commencement of this item. A note clarifies that, prior to commencement, section 314AEB dealt with annual returns relating to political expenditure, while section 314AEC dealt with annual returns relating to gifts received for political expenditure.

Division 4 - Disclosure of donations

Amendment 136 & 137 - Candidates and groups; Transparency Register

302V Simplified outline of this Division

177 These amendments are consequential to the introduction of new subsection 287(11) (see Chapter 1), and new paragraph 287N(2)(d) (see Chapter 2, *287N Establishment of the Registers*).

Amendment 138 & 140 – Candidates and groups

304 Disclosure of gifts

178 These amendments are consequential to the introduction of new subsection 287(11) (see Chapter 1). Specifically, the repealed term ‘disclosure period’ (one of the temporal concepts that operated in Part XX in relation to candidates and Senate groups) is replaced by references to candidates and Senate groups, which now have a standardised temporal period specified in subsection 287(11).

Amendment 142 - Returns of candidates and groups

179 This amendment omits item 40 from the Bill. Item 40 required election returns to include non-financial particulars.

Amendments 139 & 141 – Continuing contraventions; penalties

180 Like equivalent amendments for other penalty provisions, amendments 116 and 141 reduce the severity of the maximum civil penalty associated with failure to meet the obligations set out in section 304. Amendment 139 reduces the maximum pecuniary penalty applicable to the agent of a candidate who fails to disclose a gift in their election return from 180 penalty units to 60 penalty units, or, if a Court can determine or estimate the unreported amount, three times that amount. Amendment 141 makes the same changes as amendment

139, but applies to the agents of Senate groups instead of the agents of candidates.

Amendment 143 – Continuing contraventions

181 This amendment inserts new subsection 304(9), which provides that subsection 93(2) of the Regulatory Powers Act does not apply in relation to a contravention of subsections 304(2) or (3). This means that failure to meet the obligations in subsections (2) and (3) by the deadline is a single contravention, rather than each day after the deadline being a separate contravention.

182 However, subsection 93(2) of the Regulatory Powers Act continues to apply. This means that even though failure to disclose gifts under section 304 is a single contravention, the obligation to disclose continues until it has been done.

Amendments 144-149 – Gifts to candidates etc.

305A Gifts to candidates etc.

183 These amendments make several consequential and technical amendments to section 305A, which requires donors to candidates to disclose details of gifts above the disclosure threshold. Specifically, these amendments:

- a) clarify that section 305A applies to persons and entities; and
- b) reflect the standardised temporal period for candidates and Senate groups in new subsection 287(11).

Amendment 150 – Continuing contraventions; penalties

184 Similarly to amendments to other penalty provisions, this amendment introduces a multiplier element to the specified penalty amount. If a Court can determine or estimate the value of the unreported gift that contravenes sections 305A, the maximum civil penalty is three times the gift value, rather than the 60 penalty units otherwise specified.

Amendment 151 – Candidates and groups

185 This amendment is consequential to the introduction of new subsection 287(11) (see Chapter 1). Specifically, the repealed term ‘disclosure period’ (one of the temporal concepts that operated in Part XX in relation to candidates and Senate groups) is replaced by references to candidates and Senate groups, which now have a standardised temporal period specified in subsection 287(11).

Amendment 152 – Continuing contraventions

186 This amendment replaces subsection 305A(5). Old subsection 305A(5) applied to gifts made before 1 July 1992, and no longer has any effect.

187 New subsection 305A(5) provides that subsection 93(2) of the Regulatory Powers Act does not apply in relation to a contravention of subsection 305A(2). This means that failure to meet the obligations in subsection (2) by the deadline is a single contravention, rather than each day after the deadline being a separate contravention.

188 However, subsection 93(2) of the Regulatory Powers Act continues to apply. This means that even though failure to disclose gifts under section 305A is a single contravention, the obligation to disclose continues until it has been done.

Amendments 153-155 – Continuing contraventions; penalties; gifts to political parties

305B Gifts to political parties

189 These amendments clarify that section 305B applies to persons and entities.

190 This amendment also, similarly to amendments to other penalty provisions, introduces a multiplier element to the specified penalty amount. If a Court can determine or estimate the value of the unreported gift that contravenes sections 305A, the maximum civil penalty is three times the gift value, rather than the 60 penalty units otherwise specified.

Amendment 156 – Continuing contraventions

191 This amendment inserts subsection 305A(6), which provides that subsection 93(2) of the Regulatory Powers Act does not apply in relation to a contravention of subsection 305B(1). This means that failure to meet the obligations in subsection (1) by the deadline is a single contravention, rather than each day after the deadline being a separate contravention.

192 However, subsection 93(2) of the Regulatory Powers Act continues to apply. This means that even though failure to disclose gifts under section 305B is a single contravention, the obligation to disclose continues until it has been done.

Amendment 157 – Candidates and groups

306A Certain loans not to be received

193 This amendment is consequential to the introduction of new subsection 287(11) (see Chapter 1). The standardised temporal periods specified in new subsection 287(11) make the specification of temporal periods for candidates and groups in subsections 306A(4) and (5) redundant. Hence this amendment repeals subsections 306A(4) and (5).

Amendments 158 & 159 – Registration of political campaigners

194 These amendments are consequential to the exception provided from the requirement to register as a political campaigner for registered charities and organisations in new subsection 287F(1A) (see Chapter 2).

Division 5 - Disclosure of electoral expenditure

Amendment 160 - Transparency Register

307A Simplified outline of this Division

195 This amendment is consequential to new paragraph 287N(2)(d) (see Chapter 2, *287N Establishment of the Registers*).

Amendment 161 - Definition of electoral expenditure

196 This amendment is consequential to amendment 79. Amendment 79 repeals section 308. Amendment 161 omits items 75 and 76 from the Bill, which amended section 308.

Amendments 162 & 163 - Continuing contraventions; penalties

Returns of electoral expenditure

197 Like equivalent amendments for other penalty provisions, amendments 162 and 163 reduce the severity of the maximum civil penalty associated with failure to meet the

obligations set out in section 309. Amendment 162 reduces the maximum pecuniary penalty applicable to the agent of a candidate who fails to lodge an election return within 15 weeks of polling day from 180 penalty units to 60 penalty units, or, if a Court can determine or estimate the unreported amount, three times that amount. Amendment 163 makes the same changes as amendment 162, but applies to the agents of Senate groups instead of candidates.

Amendments 164 - Continuing contraventions

198 This amendment inserts new subsection 309(5). New subsection 309(5) provides that subsection 93(2) of the Regulatory Powers Act does not apply in relation to a contravention of subsections 309(2) and (3). This means that failure to meet the obligations in subsections (2) or (3) by the deadline is a single contravention, rather than each day after the deadline being a separate contravention.

199 However, subsection 93(2) of the Regulatory Powers Act continues to apply. This means that even though failure to disclose gifts under section 309 is a single contravention, the obligation to disclose continues until it has been done.

Division 5A - Annual returns

Amendment 168 – Transparency Register

314AAA Simplified outline of this Division

200 This amendment is consequential to new paragraph 287N(2)(d) (see Chapter 2, *287N Establishment of the Registers*).

Amendment 167 - Annual returns by third party campaigners

201 This amendment updates the simplified outline of *Division 5A: Annual returns by political parties and other persons* to reflect amendments to this Division.

Amendment 169 – Registration of associated entities

202 This amendment corrects an error in subsection 314AA, as inserted by the Bill. Subsection 314AEA(2) of the Electoral Act provides that associated entities only need to include amounts received or paid for the times they were an associated entity. For example, if an associated entity was an associated entity between October and January in a financial year, they would only need to include the information set out in subsection 314AEA(1) between October and January, rather than in the entire financial year.

203 Subsection 314AA(2) of the Bill provided that certain persons and entities, including associated entities, were required to provide an annual return in relation to an entire financial year. For associated entities, this provision conflicted with subsection 314AEA(2).

204 Amendment 169 omits associated entities from subsection 314AA of the Bill to correct this conflict. Subsection 314AEA(2) of the Electoral Act continues to apply to the annual returns of associated entities.

Amendment 170 – Penalties

Annual returns by registered political parties and political campaigners

205 Like equivalent amendments for other penalty provisions, this amendment reduces the maximum civil penalty associated with failure to meet the obligations set out in section 314AB. Amendment 170 reduces the maximum pecuniary penalty applicable to the agent of a registered political party, or the financial controller of a political campaigner, who fails to

lodge an annual return within 16 weeks after the end of a financial year from 360 penalty units to 120 penalty units. Alternatively, if a Court can determine or estimate the unreported amount, the maximum pecuniary penalty is three times that amount.

Amendments 171 & 172 - Returns of political campaigners

206 These amendments insert new paragraph 314AB(2)(iv), which requires political campaigners to include the total amount of electoral expenditure incurred by, or with the authority of, the campaigner in their annual returns. This closes a reporting gap, as, in the absence of the amendment, comparable disclosure entities, such as third parties and registered political parties, would be required to report electoral expenditure, but political campaigners would not.

Amendments 173 & 178 - Auditor's report in annual returns by registered parties etc.

207 This amendment repeals the requirement for the annual returns of political parties and political campaigners to include an auditor's report prepared in accordance with section 314ABA. Amendment 178 omits the requirements for an auditor's report in section 314ABA as a consequential amendment.

Amendments 174 & 175 – Registration of political campaigners

208 These amendments are consequential to the exception provided from the requirement to register as a political campaigner for registered charities and organisations in new subsection 287F(1A) (see Chapter 2).

Amendment 177 - Registration of third party campaigners; continuing contraventions

209 This amendment inserts new subsection 314AB(4). New subsection 314AB(4) provides that subsection 93(2) of the Regulatory Powers Act does not apply in relation to a contravention of subsections 314AB(1). This means that failure to meet the obligations in subsection (1) by the deadline is a single contravention, rather than each day after the deadline being a separate contravention.

210 However, subsection 93(2) of the Regulatory Powers Act continues to apply. This means that even though failure to disclose gifts under section 314AB is a single contravention, the obligation to disclose continues until it has been done.

Amendments 179, 180 & 182 – Continuing contraventions

Associated entity returns

211 Amendment 182 inserts new subsection 314AEA(7). New subsection 314AEA(7) provides that subsection 93(2) of the Regulatory Powers Act does not apply in relation to a contravention of subsections 314AEA(1). This means that failure to meet the obligations in subsection (1) by the deadline is a single contravention, rather than each day after the deadline being a separate contravention.

212 However, subsection 93(2) of the Regulatory Powers Act continues to apply. This means that even though failure to disclose gifts under section 314AEA is a single contravention, the obligation to disclose continues until it has been done.

213 Amendments 179 and 180 make changes to the notes under subsection 314AEA(1) as a consequence to amendment 182.

Amendment 181 - Penalties

214 Like equivalent amendments for other penalty provisions, this amendment reduces the severity of the maximum civil penalty associated with failure to meet the obligations set out in section 314AEA. Amendment 181 reduces the maximum pecuniary penalty applicable to the financial controller of an associated entity who fails to lodge an annual return within 16 weeks after the end of a financial year from 180 penalty units to 60 penalty units. Alternatively, if a Court can determine or estimate the unreported amount, the maximum pecuniary penalty is three times that amount.

Amendment 183 & 184 – Returns by third party campaigners

Annual returns by third parties

215 These amendments update the title of section 314AEB, and omit the paragraphs 314AEB(1) from the Bill. The paragraphs in 314AEB are omitted as a consequence to the new definition of third party (see Chapter 1, *Other definitional changes*).

Amendment 185 – Continuing contraventions; penalties

216 Like equivalent amendments for other penalty provisions, this amendment reduces the severity of the maximum civil penalty associated with failure to meet the obligations set out in section 314AEB. Amendment 187 reduces the maximum pecuniary penalty applicable to third parties who fail to lodge an annual return within 16 weeks after the end of a financial year from 180 penalty units to 60 penalty units. Alternatively, if a Court can determine or estimate the unreported amount, the maximum pecuniary penalty is three times that amount.

Amendment 186 - Annual returns by third party campaigners

217 This amendment removes the requirement for third parties to report non-financial particulars in their annual returns (subparagraphs 314AEB(2)(a)(ii) and (iii)).

218 This amendment also changes the person required to sign the foreign donations compliance statement from the financial controller to the members, agents or officers (however described) of the campaigner who have responsibility for ensuring that the campaigner complies with this Division. This aspect of amendment 186 reflects that financial controllers will no longer bear responsibility for contraventions of the Bill's penalty provisions in relation to their third parties.

Amendment 188 - Registration of third party campaigners; continuing contraventions

219 This amendment replaces subsection 314AEB(4). Old subsection (4) is no longer required given the omission of the requirement to register as a third party campaigner (see Chapter 2).

220 New subsection (4) provides that subsection 93(2) of the Regulatory Powers Act does not apply in relation to a contravention of subsections 314AEB. This means that failure to meet the obligations in section 314AEB by the deadline is a single contravention, rather than each day after the deadline being a separate contravention.

221 However, subsection 93(2) of the Regulatory Powers Act continues to apply. This means that even though failure to disclose gifts under section 314AEB is a single contravention, the obligation to disclose continues until it has been done.

Amendment 192 - Relationship with State and Territory laws

222 This amendment inserts new section 314B. New section 314B clarifies the interaction between electoral disclosure regimes operating at the Commonwealth and other levels of government. The provision is intended to ensure (among other things) that State or Territory laws do not discourage persons or entities from making or receiving small donations for federal electoral purposes, where such donations are not required to be reported under Part XX of the Electoral Act. It is also intended to ensure that, where a person or entity is required to report an amount under Part XX, the person or entity is not subject to duplicative reporting requirements under State or Territory law. The section only applies where, broadly speaking, the donation or amount is, or may be used for Commonwealth electoral purposes. State and Territory laws dealing with disclosure of donations that can only be used for State and Territory electoral purposes are not affected by this section.

223 Subsection (1) delineates the intended scope of section 314B. Subsection (1) clarifies that 314B only applies in relation to a law of a State or Territory that deals with electoral laws. Here, electoral matters has its ordinary meaning, that is, matters relating to an election, and does not have the meaning specified in section 4 of the Electoral Act.

Limit on State and Territory power—information on amounts provided

224 Subsection (2) clarifies that a person or entity (referred to as a **provider**) that provides an amount to or for the benefit of a political entity, political campaigner, third party or associated entity that is required to be, or may be, used for the purposes of incurring electoral expenditure or creating or communicating electoral matter is not required to disclose the amount under a State or Territory law. Furthermore, providers are not required to disclose information relating to that amount, such as their name, organisation, or details relating to the transaction, under a State or Territory electoral law. **Amount** includes a gift or loan.

Limit on State and Territory power—information on amounts received

225 Subsection (3) applies to recipients of amounts in the same way that subsection (2) applies to providers of amounts. It only applies to recipients that have a disclosure obligation under Part XX, that is, a political entity, political campaigner, third party or associated entity.

Limit on State and Territory power—information on expenditure and debts

226 Subsection (4) makes similar provision in relation to expenditure, as well as debts not otherwise covered by subsection (2). It provides that a person or entity (referred to as the **debtor**) that is a political entity, political campaigner, third party or associated entity is not required by State or Territory law to disclose an amount, or information relating to an amount, of expenditure that is electoral expenditure, or of a relevant debt incurred for the purposes of incurring electoral expenditure or creating or communicating electoral matter.

Interpretation

227 Subsection (5) clarifies what amounts are covered by section 314B. Specifically, subsection (5) clarifies that an amount is required to be, or may be, used for a purpose (within the meaning of paragraphs (2)(b) and (3)(c)) if:

- a) the provider's terms explicitly require or allow the amount to be used for that purpose; or
- b) the provider does not set terms in relation to the purpose for which the amount can be used.

228 Subsection (6) clarifies that, in this section, a reference to a law not requiring an amount, or information relating to an amount, to be disclosed (which appears in the opening words of subsections (2), (3) and (4)) applies both where the amount or information is required to be, and where it is not required to be, included in a return submitted under Part XX. In other words, section 314B operates both in circumstances where the relevant amount or information is not required to be disclosed under Part XX, and in circumstances where the relevant amount or information is required to be disclosed under Part XX.

229 Subsection (7) clarifies that a reference in this section to a law not requiring an amount, or information relating to an amount, (the *specific amount*) to be disclosed includes a reference to the law not requiring the following to be disclosed:

- a) a total amount that includes the specific amount;
- b) information relating to the specific amount as it is included in a total amount.

230 Subsection (8) provides that this section applies irrespective of whether a person or entity is required to disclose an amount, or whether someone else is required to disclose the amount on their behalf.

Example 1: Relationship between different disclosure thresholds

Jane makes a gift of \$2,000 to a registered political party.

She does not have to disclose this amount under Commonwealth law because Commonwealth law only requires the disclosure of donations to the registered political party above the disclosure threshold. At the time Jane makes the gift, the Commonwealth disclosure threshold is \$13,800.

She also does not have to disclose this amount under a state law that would have otherwise required disclosure of the amount (eg a state law that requires disclosure of all gifts to the registered political party, irrespective of amount).

Example 2: Gifts that may be used to incur electoral expenditure

Fei Hung makes a regular gift to the state branch of a registered political party via cheque. He normally doesn't specify if the state branch should use the gift for its state or federal electoral activities. However, on one occasion, he writes on the back of the cheque:

I've included a bit extra this time to help you out at the upcoming state election.

Section 314B protects Fei Hung and the party from having to disclose Fei Hung's regular gift under state electoral law. However, the additional amount Fei Hung includes to assist with the state election campaign is not covered by section 314B. State electoral law can require disclosure of the difference between the higher amount given on this occasion and the regular amount because Fei Hung requires this amount to be used for state electoral purposes.

Chapter 7: Miscellaneous

Investigation

Amendments 193-200 - Liability of third party campaigners; third party campaigners; investigation powers

231 These amendments make consequential amendments to subsection 316(2A). Subsection 316(2A) sets out the scope of notices to produce documents or other things, or appear to give evidence, that can be given by an authorised officer of the AEC. Specifically, this amendment broadens subsection 2A in relation to:

- a) third parties, to whom a notice can be served from the financial controller to the entity (see Amendment 26 and Chapter 3);
- b) the compliance matters to which a notice can relate:
 - i. from Part XX of the Electoral Act;
 - ii. to also include the Criminal Code (to the extent that it relates to Part XX);
 - For example, a notice may be used to investigate whether a person or entity has made a false or misleading statement to the AEC in relation to their compliance with Part XX of the Electoral Act (see Part 7.4 of the Criminal Code).
- c) the new anti-avoidance provisions in sections 287S and 302H, in determining whether a notice under those schemes is to be issued.

Record keeping

Amendment 201 - Penalties

232 Like equivalent amendments for other penalty provisions, this amendment reduces the severity of the maximum civil penalty associated with failure to keep records as required by section 317 from 1,000 penalty units to 200 penalty units.

Amendment of claims and returns

Amendment 202 – Amendment of claims

233 To facilitate administration of the new claim process set out in amendments to Division 3, this amendment removes the reference to claims in section 319A. This means that claims will no longer be able to be amended under section 319A.

Amendments 203 & 204 – Transparency Register

234 Amendment 203 specifies that the information set out in the table below subsection 320(1) must be published on the Transparency Register. This amendment is consequential to amendments to section 287N (see Chapter 2).

235 Amendment 204 makes a similar consequential change to the table heading in section 320.

Indexation

Amendments 205 & 206 – Election funding; candidates and groups

236 Amendment 205 updates the section references in the definition of *relevant amount* in section 321 to ensure the public funding rate continues to be indexed as it would have in the absence of the Bill.

237 Amendment 206 inserts new item 129A, and limits the application of item 129 to subsection 321A(2). New item 129 replaces subsection 321A(3) to reflect the standardised temporal period for candidates and Senate groups in new subsection 287(11). Subsection 321A(3) ensures the disclosure threshold remains constant for a period covered by a candidate or Senate group election return.

Adjustments to authorisation provisions

Amendment 207-211 – Definition of disclosure entity

238 These amendments update the definition of disclosure entity in section 321B to reflect changes to disclosure requirements for those formerly required to report under section 314AEB. Specifically, the reference to those required to submit a return under section 314AEB in paragraph (g) of the definition is replaced by new paragraphs (paragraphs (aa) and (ab)) referring to political campaigners and third parties. The note under the definition is replaced to reflect these changes, and the reference to political expenditure is updated to electoral expenditure.

Amendment 213 – Authorisations

239 This amendment inserts new items 132A, 132B, 132C and 132D.

240 New item 132A replaces the definition of *relevant town or city* in section 321B in order to broaden the definition's application to natural persons, as well as entities. This is necessary because item 132D replaces the geographic required particular for natural persons in items 4 and 8 of the table in subsection 321D(5) from 'the town or city in which the person lives' to 'the relevant town or city of the person'. This amendment standardises the required particulars for authorisation purposes, and allows natural persons to use a business address instead of their residential address.

241 New items 132B and 132C provide additional exceptions to those listed in subsection 321(4).

242 New item 132B exempts promotional items (such as a balloon, pen, mug, tote bag or marquee) that contain only the name, logo, or other identifying feature of the notifying entity. For example, a tote bag with a candidate's name, or a pen, mug or marquee in party colours featuring the party's logo would be exempt under new item 132B. Similarly, a balloon with a cartoon drawing of the candidate, who is the notifying entity of the balloon, would be exempt. This new class of promotional items does not extend to items specified in the table in subsection 321D(5), such as stickers, fridge magnets, flyers and pamphlets.

243 New item 132C exempts letters and cards that bear the name and address of the notifying entity from authorisation requirements. This exemption was provided for in historical authorisation provisions, and is justified on the basis that these items achieve the objects of Part XXA in the absence of the authorisation regime.

Chapter 8: Commencement, application and transitional

Amendment 1: Commencement

244 This amendment replaces items 2 and 3 of the commencement table in subclause 2(1).

245 New item 2 of the commencement table provides that Schedule 1, Part 1 of the Act (that is, the Bill as enacted, see *Glossary*) commences on the day after the Act receives the Royal Assent.

246 New item 3 of the commencement table provides that Schedule 1, Part 2 of the Act commences on a single day to be fixed by proclamation. New item 3 also provides that if the Part 2 does not commence within 6 months from Royal Assent, then the provisions will commence at the end of that period. Commencement on proclamation allows for commencement as soon as possible, while allowing some flexibility to ensure the AEC is ready to implement the provisions.

Amendment 81: Commencement; registration requirements

Registrants to have 90 days from Royal Assent

247 This amendment inserts a note under subitem 13(1) clarifying its effect. Specifically, the note clarifies that subsections 287F(2) and 287H(2) interact with subitem (1) so that a person or entity required to be registered as a political campaigner or associated entity has until the end of 90 days after Royal Assent to register.

Amendment 82: Commencement; registration requirements

248 This amendment substitutes subitems (2) and (3) with new subitems (2) to (8). The omission of former subitems (2) and (3) is a consequential amendment to the omission of sections 302G and 302J (see Amendment 130).

Initial reference period for political campaigner registration requirements

Amendment 82: Commencement; registration requirements

249 New subitem (2) clarifies the reference period for determining whether a person or entity needs to register as a political campaigner where the reference period precedes commencement of the Act.

250 For political campaigners, new subitem (2) clarifies that a person or entity is required to be registered under section 287F as if a reference to ‘electoral expenditure’ in that section was a reference to expenditure disclosed under section 314AEB in relation to the period from 1 July 2015 to 30 June 2018, or that would be required to be disclosed from 1 July 2018 to commencement. Thus, in determining whether they meet the registration requirements in subsection 287F(1), a person or entity:

- a) uses the expenditure they have previously reported rather than needing to apply the new definition of electoral expenditure to historical expenditure; and
- b) for the period 1 July 2018 to commencement, expenditure that would have had to have been disclosed under section 314AEB in the absence of the Act is to be treated as electoral expenditure. This means that, for the 2018-19 financial year, expenditure covered by section 314AEB from 1 July 2018 to commencement will be summed with electoral expenditure from commencement to 30 June 2019.

Initial reference period for political campaigner registration

Example

Turtle Voices reported the following amounts to the AEC under section 314AEB of the Electoral Act:

- \$15,000 in 2015-16;
- \$550,000 in 2016-17; and
- \$30,000 in 2017-18.

The Act commences on 1 October 2018. Between 1 July and 30 September 2018, Turtle Voices incurs \$20,000 in expenditure reportable under old section 314AEB of the Electoral Act. Between 1 October 2018 and 30 June 2019, Turtle Voices incurs \$25,000 in electoral expenditure.

For the purposes of subsection 287F(1), Turtle Voice's electoral expenditure is:

- \$15,000 in 2015-16;
- \$550,000 in 2016-17;
- \$30,000 in 2017-18; and
- \$45,000 in 2018-19.

Turtle Voices must register as a political campaigner for 2018-19 before 1 January 2019 (90 after commencement) because they meet the conditions in paragraph 287F(1)(a), as applied by subitem 13(2) of the Act. That is, Turtle Voices is taken to have incurred more than \$500,000 in electoral expenditure in one of the previous three financial years (in 2016-17).

Application of electoral expenditure definition for third parties in 2018-19

Amendment 82: Commencement; registration requirements

251 New subitem (2) also clarifies how a person or entity will determine whether they meet the definition of third party in 2018-19, and, where they meet this definition, what expenditure to include in their annual disclosure for this financial year.

252 For the period 1 July 2018 to commencement, expenditure that would have had to have been disclosed under section 314AEB in the absence of the Act is to be treated as electoral expenditure. In terms of the foreign donations restrictions, this means that Division 3A will apply to a person or entity from the time that they are required to lodge an annual return in relation to section 314AEB for 2018-19.

253 In terms of disclosure, this means that, for the 2018-19 financial year, expenditure covered by section 314AEB from 1 July 2018 to commencement will be summed with electoral expenditure from commencement to 30 June 2019.

254 This provision will also be used by the AEC to determine whom to include as a third party on the Transparency Register for the first three years of the Act's operation.

Application of electoral expenditure definition for third parties in 2018-19

Example

Mila is vehemently opposed to an election promise from Judy, her member of the House of Representatives, to build an interstate freeway through Mila's suburb. In the last 6 months of 2018, she spends over \$20,000 campaigning against Judy. As this \$20,000 was incurred to publicly express views on a member of the House of Representatives, Mila would have had to disclose this sum under 314AEB (as it stood prior to commencement of these amendments).

The Act commences on 1 January 2019. Mila immediately meets the definition of third party because she has incurred more electoral expenditure (the \$20,000 previously required to be reported under section 314AEB) than the disclosure threshold (\$13,800 in 2018-19). This means she needs to comply with the foreign donations restrictions applicable to third parties from 1 January 2019.

At the end of the 2018-19 financial year, Mila must disclose the \$20,000 she incurred in the first 6 months of 2018-19 in addition to any electoral expenditure (as newly defined) that she incurred in the last 6 months.

Transitional registration of associated entities

Amendment 82: Commencement; registration requirements

Part 1, Item 13 – Application and transition provision

255 New subitems 13(3) to (5) provide transitional arrangements for associated entities. New subitem (3) provides for the automatic registration of all associated entities that report under section 314AEA for the 2017-18 financial year. This means that associated entities that report for the 2017-18 financial year will not need to take any further action in order to meet their new registration obligations under section 287H on commencement. This is true irrespective of whether an associated entity lodges its 2017-18 return before or after commencement.

256 However, if an associated entity reports under section 314AEA for the 2017-18 financial year but is not required to register under section 287H, new subitem (4) requires the entity to notify the Australian Electoral Commission that their automatic registration is incorrect under section 287P within 90 days of:

- a) if the entity provided a 2017-18 return before commencement, commencement; or otherwise
- b) the day the entity provided a 2017-18 return.

257 New subitem (5) clarifies that the transitional registration arrangements for associated entities provided for in new subitems (3) and (4) do not limit the normal operation of sections 287H or 287P.

Transitional arrangements for the Transparency Register

Amendment 82: Commencement; registration requirements

Part 1, Item 13 – Application and transition provision

258 New subitems 13(6) and (7) provide transitional arrangements for the AEC and those listed on the Transparency Register

259 Subitem (6) provides that the AEC must publish the Transparency Register in accordance with its obligations under sections 287N and 287Q as soon as practicable, and no later than 90 days, after commencement.

260 Subitem (7) clarifies that the requirement in section 287P to keep information up to date on the Transparency Register applies from the day the AEC first publishes the Transparency Register. Similarly, the 90 day grace period that operates in relation to 287P applies from the day the AEC first publishes the Transparency Register.

Amendment 221: Commencement

Part 2, Item 143 – Application of amendments

261 This amendment inserts new subitems 143(10A) to (10C), which clarify the interaction of new sections 287N, 320 and 287Q.

262 New paragraph 287N(2)(d) requires the Transparency Register to include any determination, notice or return published under section 320 (see amendment 65). New section 287Q, as applied by subitem 13(6), requires the Transparency Register to be made public as soon as practicable, and no later than 90 days after, commencement.

263 New section 320 required the Electoral Commission to publish determinations made, notices given and returns provided under Part XX. Old section 320 required the Electoral Commission to keep these documents at its principal office in Canberra, and entitled any person to peruse these documents at this office.

264 New subitem (10A) clarifies that new section 320 applies to determinations made, notices given and returns provided under Part XX from the time the Transparency Register first becomes available under section 287Q. In other words, the Transparency Register will include information made by, or provided to, the Electoral Commission after the Transparency Register becomes public.

265 New subitem (10B) clarifies that the Transparency Register may, but is not required to, include historical claims and returns. However, if a historical claim or return is not included on the Transparency Register, subitem (10C) requires the historical claim or return to continue to be kept at the Electoral Commission's principal office and available for perusal until such time as the document is published on the Transparency Register.

Other transitional arrangements

Amendments 220 and 221: Commencement

266 These amendments omit and insert a series of new subitems under item 143.

Gifts and loans

267 New subitem (3) provides that, except in section 305B, the foreign donations restrictions (Division 3A, see Chapter 5) and donation disclosure obligations (Division 4, see Chapter 6), as inserted or made by this Part, apply in relation to gifts and loans made after the commencement. Subitem (4) applies to section 305B, because, unlike other provisions relating to returns in Division 4, section 305B applies in relation to financial years, not in relation to elections.

Annual returns

268 New subitem (4) provides that the amendments of section 305B, and Division 5A of Part XX apply in relation to the financial year in which this item commences and later financial years. This clarifies that, for the purposes of submitting an annual return or an annual donor return, the definition of electoral expenditure will apply from 1 July 2018.

269 New subitem (5) clarifies the operation of disclosure obligations that operate in relation to financial years if commencement does not occur at the beginning of a financial year. Specifically, subitem (5) provides that, in this case, the amendments of section 305B, and Division 5A of Part XX apply in relation to the financial year in which that commencement occurs as if:

- a) the following obligations applied only from that commencement:

- i. the obligation to disclose gifts to political campaigners under section 305B;
 - ii. the obligation to disclose discretionary benefits and senior staff under paragraphs 314AB(2)(b) and 314AEA(1)(d) of the Electoral Act;
 - iii. the obligation in paragraph 314AEA(2)(b) of the Electoral Act to confirm compliance with section 302E of the Electoral Act; and
- b) a reference in section 314AEB to electoral expenditure incurred or authorised by a person or entity, for the period beginning on 1 July in that financial year and ending immediately before that commencement, were a reference to expenditure covered by section 314AEB incurred or authorised by the person or entity during that period.

Indexation

270 These amendments replace item (11) and introduce item (12). These amendments are necessary to ensure indexation of the public funding rate and disclosure threshold, as set out in sections 321 and 321A of the Electoral Act respectively, continues as it would have in the absence of the Act.

Authorisation of certain electoral matter

271 These amendments introduce new item (13), which provides that amendments made to the electoral communication authorisation regime apply in relation to any communications made after the commencement (See Chapter 7, *Adjustments to authorisation provisions*).

Referendum (Machinery Provisions) Act 1984

Amendments 216-217 – Definition of *disclosure entity*; definition of electoral expenditure

272 These amendments make the same changes to the definition of *disclosure entity* in section 110A of the *Referendum (Machinery Provisions) Act 1984* as amendments 207-211 make to the definition of disclosure entity in the Electoral Act.