

## Third parties and associated entities

### Current arrangements

- 7.1 Many third parties take part in issues based campaigning but some also, both directly and indirectly, advocate for particular political parties and candidates. Consequently it is important to consider the extent to which third party activities in the political sphere can and should be regulated under a funding and disclosure system.
- 7.2 Those favouring lower levels of third party regulation generally base their arguments on protecting the implied freedom of political communication that has been found to exist in the Australian Constitution. In contrast, proponents of reform of third party regulation tend to argue that the potential for third parties to be used as a means by which political parties can circumvent limits justifies the imposition of limitations on their expenditure and gifts, and argue that this can be done without unnecessarily encroaching on the implied freedom of political communication.
- 7.3 While third parties are not explicitly defined in the *Commonwealth Electoral Act 1918* (Electoral Act), section 314AEB provides a definition of 'political expenditure'. Third parties are persons that incur political expenditure above the applicable disclosure threshold for any of the following purposes, by or with his or her own authority:
- (i) The public expression of views on a political party, a candidate in an election or a member of the House of Representatives or the Senate by any means;
  - (ii) The public expression of views on an issue in an election by any means;

- (iii) The printing, production, publication or distribution of any material (not being material referred to in subparagraph (i) or (ii)) that is required under section 328, 328A or 328B to include a name, address or place of business;
- (iv) The broadcast of political matter in relation to which particulars are required to be announced under subclause 4(2) of Schedule 2 to the *Broadcasting Services Act 1992*; or
- (v) The carrying out of an opinion poll, or other research, relating to an election or the voting intentions of electors.<sup>1</sup>

7.4 Certain individuals and organisations who are exempt from the provision are registered political parties, state branches of registered political parties, the Commonwealth (including a Commonwealth Department, an Executive Agency or a Statutory Agency), a member of the House of Representatives or the Senate, and a candidate in an election or a member of a Senate group.

7.5 Some groups that meet the definition of ‘associated entity’ in section 287 of the Electoral Act are also third parties. For example, many trade unions have both associated entity and third party disclosure obligations under the Electoral Act.

7.6 Where a person or group incurs expenditure in the categories defined in section 314AEB(1) of the Electoral Act, it must submit a third party expenditure disclosure return to the Australian Electoral Commission (AEC) within 20 weeks after the end of the financial year.

7.7 Where a third party has received a gift or gifts over the threshold that have been either wholly or partly used to enable the third party to incur expenditure in the defined categories, or to reimburse the person for incurring expenditure, the details must be provided to the AEC by the third party.

7.8 The current approach to regulating the role of third parties in the political process is based on obtaining transparency and accountability through disclosure. There are, as in other areas of the Commonwealth funding and disclosure regime, two key options for reform in relation to third parties:

- amend the current measures to improve the current scheme that governs third parties; or

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1 See *Commonwealth Electoral Act 1918*, s. 314AEB.

- make more substantial changes, such as placing restrictions on third party expenditure and gifts receivable to maintain the integrity of the democratic process, if such a move is deemed necessary.

7.9 The Liberal Party of Australia emphasised the importance of ensuring that third parties were holistically and sufficiently regulated, stating that:

Any reasonable outcome designed to achieve broad consensus must ensure that the issue of third-party activity in election campaigns is adequately dealt with and, in particular, that trade unions are not excluded in any way from third-party requirements.<sup>2</sup>

7.10 *The Electoral Reform Green Paper – Donations, Funding and Expenditure* (first Green Paper) considered whether the appropriate third party regulatory scheme would best be determined once a broader scheme had been designed. For example, where there is a scheme of caps on political party spending and contributions in place, third parties may also need to be more strictly regulated to prevent their use to circumvent caps on political parties and associated entities.<sup>3</sup> As above, this is one of the key arguments supporting increased regulation of third parties.

7.11 Similarly, the AEC also observed that increased regulation of third parties often accompanies substantial reform of political financing arrangements for political parties. It submitted that:

Most jurisdictions that have imposed donation and/or expenditure caps on political parties and candidates have tended to include an extension of those caps in some form to third parties...<sup>4</sup>

7.12 In further discussion on this issue the AEC stressed that:

...third parties must be effectively regulated if they are not to provide opportunities for circumvention of the donation and expenditure caps placed on political parties and candidates.<sup>5</sup>

7.13 The use of third parties to circumvent the broader regulatory scheme was raised as a particular area of concern in the context of the regulation of donations from particular sources, such as the tobacco industry. Ms Anne

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2 Liberal Party of Australia, *Submission 25*, p. 4.

3 Commonwealth of Australia, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, December 2008, p. 55.

4 Australian Electoral Commission, *Submission 19*, p. 7.

5 Australian Electoral Commission, *Submission 19*, p. 8.

Jones OAM from Action on Smoking and Health Australia (ASH) argued that:

...we cannot just stop at saying we are concerned about the tobacco industry donations to political parties, which have come to millions of dollars over the past decade or so. We know that there are third parties that have been set up that the tobacco industry has funded, but that has been largely secret. I am talking about the whole issue of transparency and accountability.<sup>6</sup>

- 7.14 In this chapter, the committee considered options to improve the current regulation of third parties and measures that could be implemented if more substantial reform was deemed necessary. Issues relating to the definition of 'associated entities' are also addressed.

## Improving the current scheme

### Definition of political expenditure

- 7.15 Much of the debate on third parties within the Commonwealth political financing regime relates to the definition of 'political expenditure', which determines which political participants are third parties with a disclosure obligation. This is an issue distinct from the definition of 'electoral expenditure' in section 308 of the Electoral Act, which sets out the nature of expenditure that must be disclosed by candidates and Senate groups in election returns.
- 7.16 The current definition of political expenditure in section 314AEB of the Electoral Act has been the subject of considerable administrative confusion. The need for a clear definition of 'political expenditure' under the Electoral Act is particularly evident in light of the fact that failure to lodge a third party disclosure return is a strict liability offence under section 315. The only defence, if criminal proceedings were undertaken for a breach, would be a 'mistake of fact'.<sup>7</sup>

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6 Ms Anne Jones OAM, Chief Executive Officer, Action on Smoking and Health Australia, *Committee Hansard*, 9 August 2011, p. 20.

7 *Criminal Code (Cth)*, s. 6.1. The Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010 seeks to remove strict liability for offences against Part XX of the Electoral Act.

- 7.17 In this respect, the AEC indicated that it had concerns regarding the operation of requirements for annual returns of political expenditure. It noted:

...[the] uncertainty that exists in relation to the interpretation of this section of the Act. The uncertainty results in it being unlikely that any criminal proceedings could be instituted for an alleged breach of this provision.<sup>8</sup>

- 7.18 The AEC also raised issues regarding the absence of clear parliamentary intent and the need for the application of 'subjective tests' to the current section 314AEB. This was said to cause great difficulties with determining whether a breach has occurred. The AEC advised the committee that:

The advice available to the AEC is that the Parliamentary intention behind some of the requirements contained in subsection 314AEB is not clear and that there are subjective elements that would need to be assessed to establish the intention of the person who incurred the expenditure...this makes it extremely difficult for the AEC to determine whether any breach may have occurred and therefore to apply the section in relation to a particular transaction.<sup>9</sup>

- 7.19 Emeritus Professor Colin Hughes acknowledged the difficulties with devising a definition of 'political expenditure' in the context of, for example, third party advertising that compares different scientist's approaches to an issue. He stated that this unique form of third party advertising has 'become part of the political debate which leads up to a voting decision'.<sup>10</sup> However, the increasingly complex nature of advertising that could be classified as 'political' highlights the need for a coherent and administratively practical definition.

- 7.20 In comparable jurisdictions, generally regulatory schemes involving expenditure caps are accompanied by narrower definitions of the types of expenditure that are subject to the cap. For example, the provisions in the *Canada Elections Act* that operate to cap third party expenditure state:

A third party shall not incur election advertising expenses of a total amount of more than \$150 000 during an election period in relation to a general election.<sup>11</sup>

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8 Australian Electoral Commission, *Supplementary submission 19.1*, p. 6.

9 Australian Electoral Commission, *Supplementary submission 19.1*, p. 6.

10 Emeritus Professor Colin Hughes, Private capacity, *Committee Hansard*, 8 August 2011, p. 17.

11 *Canada Elections Act*, s. 350(1).

7.21 In the *Canada Elections Act* 'election advertising' is defined in section 319 as:

...the transmission to the public by any means during an election period of an advertising message that promotes or opposes a registered party or the election of a candidate, including one that takes a position on an issue with which a registered party or candidate is associated.<sup>12</sup>

7.22 Specific activities are explicitly excluded from the definition of 'election advertising'. These include the transmission of an editorial to the public and the distribution of a book if the book was planned to be made available regardless of the election.

7.23 In Queensland, only advertising that directly or indirectly promotes or opposes a candidate or party or influences voting, is covered by the expenditure cap.

7.24 The NSW legislation also has a narrower definition of expenditure that is subject to the cap in operation. The *NSW Election Funding, Expenditure and Disclosures Act 1981* includes a definition of 'electoral communication expenditure' and a separate definition for 'electoral expenditure'.<sup>13</sup> While electoral expenditure must be disclosed under NSW disclosure laws,<sup>14</sup> only electoral communication expenditure during a state election campaign is subject to the cap.<sup>15</sup>

7.25 Electoral expenditure is defined in the NSW legislation as expenditure 'for or in connection with promoting or opposing, directly or indirectly, a party or the election of a candidate or candidates, or for the purpose of influencing, directly or indirectly, the voting at an election'.<sup>16</sup> Electoral communication expenditure is defined as 'electoral expenditure' of specified types, including television and radio advertisements.<sup>17</sup>

7.26 The same definitions of electoral expenditure and electoral communication expenditure apply to political parties, candidates, groups and third parties. This is distinct from the Commonwealth approach, which applies the definition of 'electoral expenditure' to candidates and Senate groups during an election, while the definition of 'political

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12 *Canada Elections Act*, s. 319.

13 *Election Funding, Expenditure and Disclosures Act 1981* (NSW), s. 87.

14 *Election Funding, Expenditure and Disclosures Act 1981* (NSW), s. 93.

15 See generally *Election Funding, Expenditure and Disclosures Act 1981* (NSW), division 2B.

16 *Election Funding, Expenditure and Disclosures Act 1981* (NSW), s. 87.

17 *Election Funding, Expenditure and Disclosures Act 1981* (NSW), s. 87.

expenditure’ applies only to third parties and on an annual rather than election basis.

- 7.27 The treatment of expenditure by third parties as distinct from expenditure during an election by candidates and Senate groups is one feature that sets the Commonwealth apart from many other jurisdictions.
- 7.28 Calls to amend the definition of political expenditure generally focus on:
- section 314AEB(1)(a)(ii), particularly the lack of clarity regarding the term ‘issue in an election’; and
  - section 314AEC(1)(a)(v) regarding the carrying out of opinion polling or other research and its potential for unintended consequences.

### **An ‘issue in an election’**

- 7.29 The use of the term ‘issue in an election’ in section 314AEB(1)(a)(ii) of the Electoral Act has given rise to considerable administrative difficulties. This is due predominantly to the inherent challenges in prospectively assessing, for the purposes of annual disclosure obligations, which issues will be issues in the next federal election.<sup>18</sup>
- 7.30 The AEC argued that the lack of clarity stemmed from the use of terms, such as ‘the public expression of views on an issue in an election’ that are not seen elsewhere in the Electoral Act, which makes it difficult to determine the precise scope of the section.<sup>19</sup>
- 7.31 The AEC also argued that a contributing factor to the difficulties involved with the matters covered by section 314AEB(1)(a)(ii) was that the other subsections in section 314AEB(1)(a) were clearly defined and outlined material needing authorisation under sections 328, 328A and 328B, such as printed electoral advertising, paid electoral advertisements on the internet, and electoral advertisements on radio and television regulated under the *Broadcasting Services Act 1992*.<sup>20</sup>
- 7.32 The Australian Council of Trade Unions (ACTU) also expressed concern regarding section 314AEB(1)(a)(ii). It highlighted difficulties with defining an ‘issue in an election’. The ACTU raised the question of whether non-partisan attempts to generate public interest and attention around a

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18 Australian Electoral Commission, *Supplementary submission 19.1*, p. 7.

19 Australian Electoral Commission, *Supplementary submission 19.1*, p. 6.

20 Australian Electoral Commission, *Supplementary submission 19.3*, p. 13.

particular issue of concern, that is, expenditure seeking to make a particular issue an issue in an election is captured by the provision.<sup>21</sup>

- 7.33 Mr Andrew Norton focused heavily on the issues regarding third parties in his submission, including the definitional problems with section 314AEB(1)(a). He noted that a number of commentators in the political financing field, including those that support much stricter regulation on campaign finance, have identified issues regarding the clarity of the meaning of section 314AEB(1)(a)(ii).<sup>22</sup>
- 7.34 Mr Norton suggested that the lack of clarity surrounding the term ‘issue in an election’ arose as a result of the ‘carry-over’ of the term from the times when third party disclosure only occurred after an election. He also observed that annual reporting obligations for third parties mean that an ‘issue in an election’ now has to be determined prospectively.<sup>23</sup>
- 7.35 Mr Norton presented three options to address the lack of clarity in the meaning of ‘issue in an election’ in section 314AEB(1)(a)(ii). His preference was that only expenditure advocating a vote ‘for or against’ a political party or candidate be counted towards the disclosure threshold. However, he recommended that if this was not to be implemented, then:
- section 314AEB(1)(a)(ii) be deleted;
  - an exemption be created from section 314AEB(1)(ii) for commentary on issues; or
  - section 314AEB(1)(a)(ii) only apply in election years.<sup>24</sup>
- 7.36 The creation of specific exemptions to section 314AEB(1)(a)(ii), such as commentary on issues, or having the provision only apply in election years do not resolve further interpretative issues that the AEC argued have resulted in administrative confusion, such as the fact that the term ‘issue in an election’ is not used anywhere else in the legislation. The notion of only applying parts of the definition in election years adds an additional layer of complexity to the definition that may result in further administrative difficulties and confusion.
- 7.37 The AEC argued that in reading section 314AEB(1)(a)(ii) in the context of the other types of expenditure that are covered, it was not clear what additional forms of political expenditure it aimed to cover.<sup>25</sup>
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21 Australian Council of Trade Unions, *Submission 9*, p. 6.

22 Mr Andrew Norton, *Submission 20*, p. 16.

23 Mr Andrew Norton, *Submission 20*, p. 16.

24 Mr Andrew Norton, *Submission 20*, p. 3.

## Opinion polls or other research

- 7.38 Another concern raised regarding the definition of political expenditure in the Electoral Act relates to the provision in section 314AEB(1)(a)(v) that a third party disclosure obligation arises where a person or organisation incurs expenditure through ‘the carrying out of an opinion poll, or other research, relating to an election or the voting intentions of electors’ in excess of the threshold.
- 7.39 There are two immediate options for reform of this provision:
- to completely delete section 314AEB(1)(a)(v); or
  - to include a list of exclusions from its terms.
- 7.40 The AEC observed that this disclosure obligation could serve to impede the regular activities of some organisations. It advised that:
- The phrase “carrying out an opinion poll” results in organisations that carry out opinion polling as a part of their day to day business, rather than actively participating in political activity, having an obligation. In addition, the phrase “other research” could result in people who discuss and analyse elections or the voting intentions of electors as part of their day to day business being potentially captured by this section.<sup>26</sup>
- 7.41 For example, Galaxy Research submitted a return of third party political expenditure showing nil expenditure.<sup>27</sup> This is because Galaxy Research is merely paid to carry out the activity, rather than engaging in opinion polling of its own accord as a form of campaigning or political participation.
- 7.42 The AEC also observed that the requirement could potentially catch university students and political scientists. This would result in significant administrative difficulties with ‘no apparent benefits to the financial disclosure scheme’.<sup>28</sup> Accordingly, it suggested in its report on election funding and financial disclosure in relation to the 2010 federal election that section 314AEB(1)(a)(v) be deleted.<sup>29</sup>

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25 Australian Electoral Commission, *Supplementary submission 19.3*, p. 13.

26 Australian Electoral Commission, *Supplementary submission 19.1*, p. 7.

27 See AEC website for a copy of the Galaxy Research Third Party Annual Financial Disclosure Return, < <http://periodicdisclosures.aec.gov.au>Returns/24/OAMT3.pdf>>

28 Australian Electoral Commission, *Supplementary submission 19.1*, p. 7.

29 Australian Electoral Commission, *Report on election funding and financial disclosure in relation to the 2010 federal election*, Commonwealth of Australia, p. 32.

## Conclusion

- 7.43 The phrase ‘issues in an election’ as applied in section 314AEB(1)(ii) causes significant administrative difficulties, due mainly to the difficulties involved with prospectively predicting which issues will be ‘issues in an election’. The phrase was more practical when third party disclosure obligations only arose after an election, rather than annually, as is currently the case.
- 7.44 The matters of the frequency of third party disclosure and the definition of what must be disclosed are inextricably intertwined. If third party disclosure is to remain on an annual basis, an appropriate definition must be devised that will be able to be administered effectively by the AEC and that will capture and release information into the public arena that is informative and conducive to the principles of transparency and accountability that the scheme seeks to uphold.
- 7.45 The committee notes the AEC’s comments that the term ‘issue in an election’ is particularly confusing given that it is not used elsewhere in the Electoral Act, and that section 314AEB(1)(a)(ii) does not, when read in the context of the other paragraphs, cover any form of expenditure that is not covered elsewhere. Accordingly, the most feasible method by which the clarity of the term can be improved is by deleting the requirement from the definition of ‘political expenditure’ in section 314 AEB(1)(a).

## Recommendation 19

- 7.46 **The committee recommends removing the reference to ‘issues in an election’ from the definition of political expenditure, by deleting section 314AEB(1)(a)(ii) of the *Commonwealth Electoral Act 1918*.**
- 7.47 The current definition of ‘political expenditure’ can potentially capture and impose a disclosure obligation on people, groups and organisation that are not actually intending to influence the outcome of an election or enter the political or democratic process. This is particularly in relation to section 314AEB(1)(a)(v) of the Electoral Act.
- 7.48 People or organisations that may be unintentionally captured by the provision could include market research companies paid to carry out opinion polls and authors, academics and individuals that merely aim to provide commentary and analysis on issues. The benefits to transparency of requiring these individuals or groups to disclose their sources of

financing is questionable. In addition, it can potentially result in an increased administrative burden on the Australian Electoral Commission in administering the provisions.

- 7.49 The committee notes that the Canadian approach in this area is to include exceptions in the legislation to the operation of certain electoral advertising provisions. However, the committee recognises the administrative and interpretative difficulties that may arise from diluting and creating exceptions to legislative requirements. The committee believes that the most effective approach in this respect is to delete the requirement.

## **Recommendation 20**

- 7.50 **The committee recommends removing the reference to opinion polls and other research from the definition of political expenditure, by deleting section 314AEB(1)(a)(v) of the *Commonwealth Electoral Act 1918*.**

## **Frequency of third party disclosure**

- 7.51 In 2006, amendments were made to the Electoral Act that changed the third party disclosure obligation from requiring that a disclosure return be lodged after every election, to annually. This is the current requirement in Part XX of the Electoral Act.
- 7.52 The main options for the timing of third party disclosure are:
- Annual disclosure – would need to be accompanied by amendment of definition of ‘political expenditure’, as discussed above, to operate more effectively;
  - Election disclosure (after an election) – could occur with current definition of political expenditure but definition would still require refinement;
  - Contemporaneous disclosure of gifts; or
  - Contemporaneous disclosure of gifts and expenditure.
- 7.53 The issues of the frequency of third party disclosure and the clarity of the definition of expenditure are closely intertwined. For example, in a context where third party activities are increasing on a regular basis there is prima

facie an increasing value in annual disclosure. However, the disclosure obligation will then need to be detached from the linkage to ‘issues in an election’ and become more general so as to ensure that third parties are clear on their obligations.

- 7.54 In relation to contemporaneous disclosure, the AEC argued that if it is introduced for donations to political parties then it must extend to third party disclosure, stating that:

...the objective of contemporaneous disclosure to electors could be easily frustrated if it didn’t extend to third parties who potentially could be used as vehicles to delay disclosure until after an election. That is, there appears to be a loophole in the operation of the current disclosure requirements contained in the Electoral Act that could be abused so as to circumvent the current reporting and disclosure regime.<sup>30</sup>

## Conclusion

- 7.55 In the current climate of continuous election campaigning, third parties are also major participants, and so it is desirable to at least maintain the current annual disclosure requirements for third parties rather than returning to solely election disclosure. However, to operate effectively, the annual disclosure of third parties must be accompanied by the proposed definitional changes outlined above.
- 7.56 It is important that third party regulation is designed to complement the regulatory approaches to political parties, candidates and groups, so as not to allow them to be used as a means to circumvent the broader scheme.

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### Recommendation 21

- 7.57 **The committee recommends that the frequency of disclosure reporting obligations for third parties under the *Commonwealth Electoral Act 1918* align with the frequency with which political party disclosure takes place, to minimise the potential for circumvention of requirements.**

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30 Australian Electoral Commission, *Supplementary submission 19.3*, pp. 13-14.

## Partisan connections of third parties

7.58 In relation to the disclosure obligations of third parties, the Electoral Act currently only requires that the details of expenditure incurred in excess of the threshold in the five categories set out in section 314AEB(1)(a) be disclosed.

7.59 Mr Andrew Norton expressed concern regarding the fact that the Electoral Act currently does not require third parties to disclose the party or candidate, or the issue that they are campaigning on. He argued that:

...the current federal disclosure system is poorly designed to identify undue third party influence. While third parties must categorise their political expenditure in various ways, there is no requirement or formal opportunity to disclose which party, politician, or issue the spending was directed towards.<sup>31</sup>

7.60 Mr Norton's argument is that the associated entity rules should result in third parties campaigning on purely issues based grounds being 'free' from regulation. Any third party that is campaigning or acting 'wholly or to a significant extent' on behalf of a political party should, Mr Norton argued, be covered by associated entity provisions. He submitted that:

The undue influence case for regulating third parties is an incidental one. This is that if political parties are regulated but third parties are not, donors who want to remain secret will shift their gifts to partisan third parties. However, in Australia this possibility is already covered by the 'associated entity' rules, which cover third parties controlled by a political party or operating wholly or to a significant benefit of one or more political parties.<sup>32</sup>

7.61 It is arguably these 'partisan' third parties in which there is interest in awareness of funding sources. The solution that Mr Norton proposed to rectify this shortcoming with the current arrangements is to remove regulation of 'issues based' third parties from the Electoral Act and only require disclosure of political expenditure under section 314AEB of the Electoral Act from associated entities (or, according to his argument, partisan third parties). He recommended that section 314AEB of the Electoral Act should only apply to associated entities.<sup>33</sup>

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31 Mr Andrew Norton, *Submission 20*, p. 7.

32 Mr Andrew Norton, *Submission 20*, p. 6.

33 Mr Andrew Norton, *Submission 20*, p. 3.

- 7.62 A similar issue was raised in the submission from Senator Eric Abetz with respect to GetUp. In relation to third parties that might be partisan he also indicated support for:

...tightening the definition of Associated Entity in the [Electoral Act] or preventing Third Parties from claiming to be independent. If a Third Party is incurring electoral expenditure it is *ipso facto* not being independent...the neatest solution is to amend the [Electoral Act] to prevent Third Parties which incur electoral expenditure from claiming to be independent, non-partisan, impartial or not to back any particular party...<sup>34</sup>

## Conclusion

- 7.63 Any third party regulatory scheme must also allow third parties to effectively communicate with their supporters and the public, and complement arrangements in place for political parties and other groups, to minimise the possibility of third parties being used to circumvent the wider disclosure requirements. The circumstances of the Australian political party democratic system warrant a third party regulatory scheme that is legislatively distinct from the laws governing associated entities.

## Disclosure threshold for third parties

- 7.64 Under the current disclosure scheme third parties are subject to the same disclosure threshold as political parties, associated entities and donors for each financial year.
- 7.65 Mr Andrew Norton proposed in his submission that third parties be subject to a separate, higher disclosure threshold than other participants in the democratic process to ensure that their freedom of political communication was not stifled. He recommended:
- That the threshold for third parties entering the disclosure system be increased to at least \$50 000;
  - That the threshold for disclosable donations to third parties remain at \$11 900.<sup>35</sup>

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34 Senator Eric Abetz, Commonwealth Senator for Tasmania, *Submission 5*, p. 3.

35 Mr Andrew Norton, *Submission 20*, p. 3.

## Conclusion

- 7.66 Making third parties subject to a higher level of regulation than political parties and other groups is not merited or appropriate, and could be seen as an unreasonable restriction of their right to political expression. However, a lesser level of regulation including a lower disclosure threshold may increase the potential for third parties to play a role in circumventing caps applicable to political parties or other groups. In addition, a higher threshold solely for third parties could be seen as tipping the balance in favour of third parties and running the risk of third parties overwhelming the process.
- 7.67 In the interests of ensuring clarity, equality between participants in the political and democratic process, and balance, the disclosure threshold for third parties should remain in line with those applicable to political parties and other groups. There is no justification under the current system to apply a separate disclosure threshold to third parties.

## Recommendation 22

- 7.68 **The committee recommends that third parties be subject to the same disclosure threshold as political parties, Independents candidates, Senate groups, associated entities and donors.**

## Disclosure rules for donors to third parties

- 7.69 Donors to third parties do not have a separate disclosure obligation. The Electoral Act requires a third party to disclose in its return details of donors that give an amount exceeding the disclosure threshold for that financial year.
- 7.70 A number of submitters to the inquiry raised the issue of the impact of any changes to disclosure laws on donors to third parties. Mr Norton described 'donor names' in his submission as 'the only substantive new information that the third party disclosure system can produce', stating:
- Though not relevant to an influence disclosure rationale for campaign finance law, knowledge of third party funding sources could help evaluate the credibility of some third party messages...While knowledge of funding sources does not provide

any conclusive evidence on the merits of an argument, it does alert people to possible biases in sources that otherwise seem credible.<sup>36</sup>

- 7.71 Similar to his approach on other issues pertaining to third parties, Mr Norton supported a reduction in the regulation of donors as a source of funding for third parties partly because donors may stop participating in the political process. He commented that:

People financially support third parties partly because they don't have the time, skills or opportunity to articulate their views in public places. 'Accountability' for donors in this context means suffering some penalty for the views they hold, and fear of such penalties is a deterrent to political participation. The possible value of donor information in a limited number of cases needs to be balanced against donors being intimidated into not expressing their views.<sup>37</sup>

- 7.72 Mr Norton raised donor fears of retribution as an argument against imposing limitations on donations to third parties, as it may discourage a legitimate form of political participation.<sup>38</sup>

- 7.73 Mr Norton also observed that the only protection from retribution given to donors to third parties under the current laws was the high disclosure threshold. He stated that the 'donors that pose the least threat to the integrity of the political process have the weakest legal protection'.<sup>39</sup>

- 7.74 Additionally, a recurring theme throughout preceding chapters has been the need to effectively regulate third parties to prevent them from being used as a means of circumventing stricter requirements on political parties. If donors to third parties are subject to 'weaker' requirements regarding disclosure than donors to associated entities and political parties, this increases the potential for circumvention of restrictions on other political actors.

- 7.75 In support of increased regulation of donors to third parties, the AEC highlighted the difference in requirements for donors to political parties and candidates and donors to third parties. The former must disclose donors of any sums they have received which are used wholly or partly to make their donation. The AEC submitted that:

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36 Mr Andrew Norton, *Submission 20*, p. 8.

37 Mr Andrew Norton, *Submission 20*, p. 9.

38 Mr Andrew Norton, *Submission 20*, p. 9.

39 Mr Andrew Norton, *Submission 20*, p. 9.

This, importantly, establishes an audit trail back to the source of the funds, something that cannot be achieved for third parties where the only disclosure is on the third party's return showing donations received. In such circumstances, a third party could disclose receiving funds from a private foundation or trust and there would be no public record of where that entity may have originally received its funds from.<sup>40</sup>

- 7.76 The AEC used this as the basis for its support for donors to third parties being subject to the same requirements as donors to political parties. In NSW, 'major political donors' have an obligation to disclose 'political donations' equal to or greater than \$1 000 to political parties, members, groups, candidates or third party campaigners. These are referred to as 'reportable political donations', which is a blanket term for donations to all political actors.
- 7.77 One issue that may arise in relation to imposing a disclosure obligation on donors to third parties is the possibility that a donor may donate to a third party in support of its campaign on a particular issue, but not its campaigns in other areas. That is, the donation is made on the basis of support for a single issue, rather than the group as a whole. If a disclosure obligation was to exist, an individual or group would potentially be publically revealed as a 'supporter' of a group campaigning on an issue, without necessarily agreeing with its approach in all areas.
- 7.78 Mr Norton explained a similar issue in the context of tax deductibility of donations in his appearance before the committee, where an actual intention to participate in the political process through donating to a third party may not be present. He stated that:
- The difficulty is the multipurposes of third parties. For example, the RSPCA ads about the live export issue. You might want to give to the RSPCA because you like their shelters for lost animals, and that is probably a legitimate deductible thing. But then you find your money ends up going to these particular campaigns. So it is very hard to manage the different purposes of the third parties.<sup>41</sup>
- 7.79 However, these types of issues can be overcome in the design of the third party donor obligation, for example, providing donors with room on an applicable form to provide details of their support if they wish. Additionally, it is arguable that a similar issue exists under the current arrangements with donor names and details provided by a third party on

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40 Australian Electoral Commission, *Supplementary submission 19.3*, p. 14.

41 Mr Andrew Norton, Private capacity, *Committee Hansard*, 10 August 2011, p. 22.

its disclosure form. A separate donor disclosure requirement for donors to third parties could, depending on its design, actually result in rectifying some of these issues and providing a clear trail back to the original source of funds.

## Conclusion

- 7.80 The transparency and accountability achievable in a political financing system is dependent on its ability to reveal the source of funds. In devising appropriate disclosure laws regarding donors to third parties, a balance must be obtained between transparency and accountability and ensuring donors to third parties are not discouraged from political participation because of the requirements or fear of retribution. This balance can be achieved if disclosure obligations for donors to third parties were to be strengthened to match those of donors to political parties.
- 7.81 The fear of retribution by some donors should not prevent them from participating in the political process through making donations. The committee believes that requirements akin to those recommended in Chapter 3 could be implemented in relation to the disclosure obligations of individual third parties.

## Recommendation 23

- 7.82 **The committee recommends that the *Commonwealth Electoral Act 1918* be amended, as necessary, to impose a disclosure obligation on donors to third parties. Amendments should be worded so that only the name, suburb, state and postcode of individual donors are required to be made public.**

## Further reform options

- 7.83 Discussions in relation to significant changes to the current approach to regulating the political finances of third parties generally involve proposals for caps on the donations that can be received by third parties, and caps on the expenditure that they can incur. However, there are a number of issues that need to be considered before such changes could occur.

## Caps on third party expenditure

- 7.84 There are currently no limits on the amount of political expenditure by third parties. However, when expenditure is incurred in excess of the disclosure threshold in one or more of the five legislatively defined categories, the third party must meet its annual disclosure obligation.
- 7.85 Proposals supporting the implementation of caps on third party expenditure are generally linked to proposals for caps on spending by political parties as a measure to curtail spiralling levels of election spending. The broader issues relating to implementing caps as part of political financing schemes are discussed in detail in Chapter 4. In this chapter the issues specific to the imposition of caps on third party expenditure are discussed.
- 7.86 A number of submitters to the inquiry expressed support for caps on expenditure, including caps on the expenditure of third parties. In line with general approaches in the area, the majority of proposals accompanied related calls for caps on political party expenditure. For example, the Australian Labor Party expressed support for the capping of third party expenditure to prevent the circumvention of caps on political parties through the use of ‘soft-money’ through other groups.<sup>42</sup> Similarly, the Australian Greens stated:

A cap on campaign expenditure removes the excessive dependence on donations funding...Donation and expenditure restrictions should also apply to third parties...[This] would ensure that third party advertising could not be used to circumvent [other measures].<sup>43</sup>

- 7.87 The AEC also raised the related concern that if caps on political parties and candidates are in operation, where third parties are not subject to similar constraints on their actions, there is the potential that third parties could come to dominate public debate to the disadvantage of the ‘primary players’ in election campaigns; political parties and candidates. The AEC submitted:

...there is a concern that if political parties and candidates are limited in their campaigning through expenditure caps, then it leaves the revised system vulnerable to having campaigns overwhelmed by third parties that are not similarly constrained. This could have the potential to relegate the primary players in an

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42 Australian Labor Party, *Submission 21*, p. 3.

43 The Australian Greens, *Submission 12*, p. 5.

election campaign – political parties and candidates seeking to win seats and possibly form government – to second tier status in terms of the volume and reach of campaigning behind bigger spending third parties.<sup>44</sup>

- 7.88 As with general caps on expenditure, the AEC identified the period during which caps on third party expenditure are to apply as a key challenge relating to the implementation of the measure.<sup>45</sup> Other challenges include the nature and design of any third party registration scheme,<sup>46</sup> and the difficulties relating to devising effective penalties for offences against political financing laws committed by third parties, given that their motivations for engaging in the political process is less clear than parties and candidates.<sup>47</sup>
- 7.89 Mr Norton suggested that the implementation of third party expenditure caps could result in the limitation of opposition to government, particularly given that some forms of government advertising were unlikely to be subject to the cap if current models were followed.<sup>48</sup>
- 7.90 However, Professor Sawyer noted in a research paper critiquing Mr Norton's submission that despite the drop in corporate involvement in elections in Canada since the implementation of spending limits, the overall number of third parties has risen from 50 to 64 over the past four general elections that have been held in Canada since limitations on third parties were introduced. She also stated that none of the third parties had spent anything near the maximum amount allowed. This would seem to suggest that in the Canadian context, third parties have not been unduly constrained by having their particular expenditure cap model in place.<sup>49</sup>

## Constitutional issues

- 7.91 Arguments opposing the imposition of a cap on expenditure by third parties incurring political expenditure generally focus on its potential to stifle the implied constitutional freedom of political communication.

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44 Australian Electoral Commission, *Submission 19*, pp. 6-7.

45 Australian Electoral Commission, *Submission 19*, p. 8.

46 Australian Electoral Commission, *Submission 19*, p. 7.

47 Australian Electoral Commission, *Submission 19*, p. 5.

48 Mr Andrew Norton, *Submission 20*, p. 20.

49 Professor M. Sawyer, 'Third Party Regulation – A Question of Balance?', p. 2, <<http://democraticaudit.org.au/wp-content/uploads/2011/08/sawer2.pdf>> viewed 3 November 2011. This is a discussion paper on Mr Andrew Norton's Submission 20 to this inquiry, prepared for the Challenges of Electoral Democracy Workshop, University of Melbourne, July 2011.

7.92 Professor Anne Twomey indicated that one of the key considerations in relation to a cap on third party expenditure would be the precise level at which the cap was set. She indicated in her appearance before the committee that:

...[in the United States] the courts have been more concerned that expenditure caps prevent political parties or third parties from expressing their views in election campaigns. So if you make the cap too low and you impede that form of political communication without very good reason then you are vulnerable to constitutional problems.<sup>50</sup>

7.93 In Canada, since 2000, third parties have been required to register with Elections Canada once they spend more than CAD\$500 in election advertising. Third parties in Canada must also disclose the source of donations of more than CAD\$200 during the six months before the issue of the writs and are limited to total expenditure of \$150 000 (indexed) or \$3 000 per electoral district.

7.94 In 2000 the National Citizens Coalition challenged this legislation in the Harper case, in which it was found that third party regulation was a restriction on freedom of expression. However, the Court held that the restriction was reasonable for 'electoral fairness'. The Court accepted that the purpose of third party spending limits was to promote equality and that this purpose was pressing and substantial. The restrictions were necessary to provide equal opportunity to participate in the electoral process and to prevent wealthy voices from overwhelming others. That is, the spending limits enabled citizens to be better informed by preventing domination of the discussion by a wealthy few and enabling opposing voices to be heard.<sup>51</sup>

## Caps on donations to third parties

7.95 Third parties that incur political expenditure in the categories defined in section 314AEB of the Electoral Act are entitled to receive gifts that can be used wholly or partly to incur that expenditure. There are currently no limits on the amounts that may be contributed to third parties. The only proviso is that third parties must disclose in its annual returns gifts received above the threshold and used wholly or partly to incur political expenditure.

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50 Professor Anne Twomey, Private capacity, *Committee Hansard*, 9 August 2011, p. 39.

51 See *Harper v Canada (Attorney General)* [2004] 1 S.C.R. 827, 2004 SCC 33.

- 7.96 Any consideration of caps on third party expenditure must necessarily involve consideration of caps on incoming finances. The option to cap donations to third parties must be considered in the context of the wider scheme. If donations on political parties are capped, an individual seeking to circumvent these could donate to third parties acting on the political party's behalf. Political parties could also potentially set up third parties for this purpose, if they so wished.
- 7.97 Concerns were raised in submissions that the combined effect of limiting third party sources of funding and expenditure, given that the two measures generally accompany one another, could result in an unfair limitation on their capacity to undertake political communication.
- 7.98 The arguments against caps on donations to third parties are along the same lines as the broader arguments relating to caps on donations, which are addressed in detail in Chapter 3, and are largely based on protecting the implied freedom of political communication issues.
- 7.99 Mr Andrew Norton dealt specifically with the issue of caps on donations to third parties, and cautioned that there could potentially be unintended consequences. He argued that:
- As with expenditure caps, donation caps exacerbate rather than mitigate a power imbalance between third parties and political parties, especially with the governing political party that is often in an adversary position with a third party...The donation caps, in conjunction with other campaign finance measures, look very much like a cynical attempt by political parties to suppress the political activity of their critics and opponents.<sup>52</sup>
- 7.100 In addition, Mr Norton highlighted the risk that caps on donations to third parties to have an 'unequal' effect on third party participants and thus a detrimental effect on the ability for such third parties to effectively participate in the democratic process. He submitted that:
- Donation caps also have unequal consequences between third parties. Third parties that rely on donations are disadvantaged relative to third parties that can fund their own campaigns. Ironically from the perspective of justifications for campaign finance law, traditional vested interests such as unions and business can carry on much as before under donations caps.<sup>53</sup>

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52 Mr Andrew Norton, *Submission 20*, p. 24.

53 Mr Andrew Norton, *Submission 20*, p. 24.

- 7.101 Mr Norton argued that if donations caps were to be put into practice, they should apply only to funds raised to advocate a vote for or against a political party or candidate. He stated that the recent reforms in Queensland had successfully implemented similar provisions in relation to caps on donations to third parties. Mr Norton's proposal involved narrowing the definition of 'political expenditure' that donations could be used to fund in order for a scheme involving caps on donations to third parties to operate effectively.<sup>54</sup>

## Conclusion

- 7.102 The imposition of caps on donations to, and expenditure by, third parties requires further consideration before any moves in this direction can be taken. In particular, a cap on expenditure presents significant difficulties in relation to enforcement.
- 7.103 However, legitimate concerns have been expressed about the increased spending and the potential influence of third parties engaged in the political sphere. The committee does not seek to unduly hamper third parties campaigning on its core issues, but in cases where third parties are campaigning on key election issues or advocating for or against particular candidates or parties, third parties should not be permitted to overwhelm public debate by means of large expenditure that is not appropriately regulated.
- 7.104 Accordingly, further investigation should be undertaken into the feasibility of imposing caps on political expenditure by third parties. This must involve consideration of an appropriate period during which caps are to apply in relation to the election date. The aim would be to ensure that third parties do not exert undue influence close to an election by high spending levels, but still allow these groups to engage the community on relevant issues and participate in the political process.

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54 Mr Andrew Norton, *Submission 20*, p. 24.

## **Recommendation 24**

7.105 The committee recommends that the Australian Government investigate options for:

- restricting or capping third party political expenditure; and
- setting a reasonable period relevant to the election date around which this restriction would apply.

### **A third party registration scheme**

7.106 There is no requirement currently in the Electoral Act regarding the registration of third parties before they can incur political expenditure. While party registration schemes are usually aimed at facilitating the administration of a more extensive regulatory system that involves expenditure caps, the AEC indicated its support for the introduction of party registration as part of the current system. It stated:

The AEC is aware that the overseas experience is that all third parties must be registered with the relevant electoral management body before they are able to incur electoral expenditure. In some jurisdictions there is also a requirement for specific campaign accounts to be established accompanied by proof that the organisation has formally agreed to use the funds in such an account for electoral purposes. This would obviate the need for the auditing and reporting of all other amounts of expenditure (i.e. non-political expenditure) incurred by a third party.<sup>55</sup>

7.107 Additionally, a third party registration scheme could play a similar role to that played by the political party registration scheme within the current regulatory scheme, in that it can assist with tracking disclosure obligations.

7.108 In the context of discussing schemes involving caps on expenditure, the Australian Labor Party advocated that:

- Participation by Third Parties in public election campaigning should be conditional upon registration with the AEC. The ALP believes there should be a high threshold for the registration of

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55 Australian Electoral Commission, *Supplementary submission 19.3*, p. 14.

a Third Party...which should include provisions similar to that required for the registration of political parties.

- Third parties should be required to demonstrate that they are a *bona fide* community of interest prior to registration.<sup>56</sup>

- 7.109 The AEC stated in its submission that a major aim of third party registration schemes is to publicly disclose in advance the identities of people and organisations – aside from political parties and candidates – that intend to be active in an election.<sup>57</sup>
- 7.110 An additional aim of such a scheme appears to be to ‘weed out’ the ‘illegitimate’ third parties. However, criteria for what might constitute a ‘legitimate’ third party could be difficult to objectively determine.
- 7.111 The Australian Labor Party proposed in its submission that the criteria for third party registration should be premised on that which currently exists for political parties. ‘Eligible political parties’ as defined in section 123 of the Electoral Act may be registered under Part XI if they meet the requirements in section 126(2). An ‘eligible political party’ is one that has at least 500 members or has the support of a sitting member or Senator.
- 7.112 Section 126(2) of the Electoral Act provides that an application for registration from an eligible political party must set out the party’s name, abbreviation (if it wishes to have one), registered officer, a list of the names of the 500 members relied upon for registration, state whether the party wishes to receive election funding, set out names and addresses of the requisite ten members that are making the application (one of whom must be the secretary), include a copy of the party constitution and include the \$500 fee.
- 7.113 Clearly some of these requirements would not be directly relevant to a third party registration scheme, but the concept of requiring a minimum number of members, the requirement to provide a party constitution and the requirement to provide certain office bearer details could legitimately form part of the criteria for the registration of third parties.
- 7.114 The United Kingdom political financing regime includes a third party registration scheme by which a third party that intends to incur above a set threshold in campaign expenditure must first register with the relevant electoral administration body. Domestically, similar requirements exist under the NSW and Queensland schemes that have recently been implemented.

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56 Australian Labor Party, *Submission 21*, pp. 3-4.

57 Australian Electoral Commission, *Submission 19*, p. 7.

- 7.115 Each of these schemes is premised heavily on an ‘intention’ to incur political expenditure in excess of a certain defined amount. Under the NSW scheme, registered third parties are subject to a higher expenditure cap than unregistered third parties. The registration of third parties with an intention to incur political expenditure would be of assistance in keeping track of which third parties have disclosure obligations, but the benefits outside this are unclear.

## **Conclusion**

- 7.116 The committee does not believe there is currently enough evidence to demonstrate that a third party registration scheme would significantly enhance transparency and accountability in the Commonwealth scheme. While the AEC sees value in third party registration in terms of helping to track third party disclosure obligations, evidence to the inquiry indicates that it would be most useful in a system where caps on the political expenditure of third parties were in place. On balance, if there are to be no restrictions on expenditure, a system of third party registration under the current arrangements would be seen as an unnecessary burden on third parties and the AEC.

## **Definition of associated entity**

- 7.117 Prior to the amendments to the Electoral Act in 2006, an associated entity of a political party was defined simply as an entity controlled by one or more registered parties, or that operates wholly or to a significant extent for the benefit of one or more registered political parties. The amendments inserted in 2006 effectively broadened the range of entities that could be classified as ‘associated entities’ for the purposes of Part XX.
- 7.118 Currently, an associated entity is defined in section 287(1) of the Electoral Act as:
- An entity that is controlled by one or more registered political parties; or
  - An entity that operates wholly or to a significant extent for the benefit of one or more registered political parties; or
  - An entity that is a financial member of a registered political party; or
  - An entity on whose behalf another person is a financial member of a registered political party; or
  - An entity that has voting rights in a registered political party; or
  - An entity on whose behalf another person has voting rights in a registered political party.

- 7.119 The first Green Paper identified three types of associated entities:
- entities that conduct fundraising activities for a political party;
  - entities that conduct the business activities of a political party; and
  - entities that are ‘members’ of political parties (for example, trade unions that are affiliated with the ALP or businesses affiliated with the National Party of Australia).<sup>58</sup>
- 7.120 As associated entities can be sources of funding for political parties, a number of submitters suggested that there should be changes to the way in which associated entities are regulated under the Electoral Act. There were two major strands of arguments in the submissions that addressed issues surrounding associated entities, and these related primarily to increasing the transparency with which associated entities operate. The key issues raised were:
- Whether the definition of ‘associated entity’ in section 287 of the Electoral Act should be revised; and
  - Whether there should be a change in the disclosure rules regarding associated entities. This is addressed in Chapters 3 and 4.
- 7.121 The definition of ‘associated entity’ in the Electoral Act has been the source of significant difficulties both before its broadening through the 2006 amendments and currently. An analysis of submissions to the inquiry indicated that there are three main themes in relation to perceived definitional weaknesses of associated entities:
- it does not capture all groups and organisations that it should (under-inclusive);
  - it captures groups and organisations that do not have an influence over political party affairs (over-inclusive); and
  - it results in inconsistencies with some groups and organisations being classified as associated entities, with similar groups and organisations escaping the disclosure obligations.
- 7.122 The AEC advised that it had ‘taken the view’ that ‘significant’ in the definition of an associated entity’ is ‘a degree once removed from wholly’. In relation to administrative challenges the definition gives rise to, the AEC stated that:

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58 Commonwealth of Australia, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, December 2008, p. 21.

...imprecision in the second arm of the definition – ‘*an entity that operates wholly, or to a significant extent, for the benefit of one or more registered political parties*’ – complicates its administration. It is also the case that the AEC’s interpretation of its practical application opens a potential loophole whereby an entity need only prove that a comparatively small proportion of its operations benefit someone other than a political party for it to escape having a disclosure obligation.<sup>59</sup>

7.123 This indicates that the definition of ‘associated entity’ as it currently stands may run the risk of being over inclusive, that is, unintentionally capturing groups and organisations that may not need to be captured, as these groups are unlikely to have any significant influence on party affairs.<sup>60</sup>

7.124 The ACTU also noted Dr Tham’s argument that in other respects, the definition omitted some relevant players, restating that:

...[the definition of associated entity] is under-inclusive because significant influence over a party’s position is not confined to financial membership and voting rights. It can result from other forms of affiliation.<sup>61</sup>

7.125 The NSW Greens Political Donation Research Project also expressed concerns about the issue of sponsorship of some associated entities by companies, which provides an entitlement to access to party officials, and recommended that:

The definition of Associated Entities should be rewritten in order that they are clear and include all organisations that operate wholly, or to a significant extent, for the benefit of political parties – including companies or incorporated associations, trusts, charitable foundations, and unincorporated associations, societies, groups or clubs that actively participate in business, industrial or fundraising activities, or passively hold assets (including intellectual property) or liabilities of the political parties.<sup>62</sup>

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59 Australian Electoral Commission, *Supplementary submission 19.1*, p. 8.

60 Australian Council of Trade Unions, *Submission 9*, p. 3.

61 Dr Joo-Cheong Tham, Submission to the Senate Finance and Public Administration Legislation Committee’s *Inquiry into the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2006*, 23 February 2006, cited in Australian Council of Trade Unions, *Submission 9*, p. 3.

62 NSW Greens Political Donation Research Project, *Submission 17*, pp. 2-3.

7.126 The NSW Greens Political Donation Research Project went on to detail in its submission a number of specific cases in which organisations that appeared to meet the definition of ‘associated entity’ in the Electoral Act had not been classified as such by the AEC. For example, the question was posed:

Why is the Progressive Business Association in Victoria a Labor associated entity when NSW Labor’s Business Dialogue [is] not? They both charge substantial amounts for membership packages which include considerable access to politicians.<sup>63</sup>

7.127 While a number of submissions raised the issue of the definition of associated entities under the Electoral Act, few proposed solutions to the identified weaknesses under the current system.

7.128 In its funding and disclosure report relating to the 2010 federal election, the AEC recommended that three elements of the definition of ‘associated entity’ in the Electoral Act be clarified, and also recommended the manner in which the clarification should take place. It made the following suggestions:

- ‘controlled’ – define as the right of a party to appoint a majority of directors, trustees or office bearers,
- ‘to a significant extent’ – define as the receipt by a political party of more than 50% of the distributed funds, entitlements or benefits enjoyed and/or services provided by the associated entity in a financial year, and
- ‘benefit’ – define as the receipt of favourable, non-commercial arrangements where the party or its members ultimately receives the benefit.<sup>64</sup>

7.129 Section 197 of the Queensland *Electoral Act 1992* defines an associated entity along the lines of the pre-2006 definition at the Commonwealth level, that is, operating wholly or to a significant extent for the benefit of a political party. This definition was inserted into the Queensland legislation based on that in the Commonwealth Electoral Act.

7.130 A clarification of some of the terms used in the definition may negate some of the issues that have been identified, as was inferred by the AEC.<sup>65</sup> This would reduce the administrative uncertainty that has resulted in the provisions regarding associated entities not operating as intended.

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63 NSW Greens Political Donation Research Project, *Submission 17*, p. 8.

64 Australian Electoral Commission, *Election Funding and Disclosure Report: Federal Election 2010*, Commonwealth of Australia, p. 29.

65 Australian Electoral Commission, *Supplementary submission 19.1*, pp. 7-8.

## Conclusion

- 7.131 There is a lack of clarity in the definition of associated entity in the Electoral Act that could potentially result in its aims not being met and an inconsistent application.
- 7.132 The amendments to the definition that were implemented in 2006 to effectively broaden its scope resulted in a stronger disclosure scheme and reduced the potential for organisations or groups that are potentially 'associated entities' to go unnoticed.
- 7.133 The committee believes that persisting concerns can be overcome by providing legislative clarification regarding the definition. While the details of the clarification require in-depth consideration, there are some key issues that can be dealt with as a starting point.

## Recommendation 25

- 7.134 **The committee recommends that the *Commonwealth Electoral Act 1918* be amended to improve the clarity of the definition of 'Associated Entity'. Particular steps that could be taken might include the following:**
- **Defining 'controlled' as used in section 287(1)(a) to include the right of a party to appoint a majority of directors, trustees or office bearers;**
  - **Defining 'to a significant extent' as used in section 287(1)(b) to include the receipt of a political party of more than 50 per cent of the distributed funds, entitlements or benefits enjoyed and/or services provided by the associated entity in a financial year; and**
  - **Defining 'benefit' as used in section 287(1)(b) to include the receipt of favourable, non-commercial arrangements where the party or its members ultimately receives the benefit.**