



## Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008

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## Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008

**Date introduced:** 15 May 2008

**House:** Senate

**Portfolio:** Special Minister of State

**Commencement:** Sections 1–3 commence on the day the Act receives Royal Assent. Schedule 1 was to have commenced on 1 July 2008; the Bill has been referred to the Joint Standing Committee on Electoral Matters (see below).

**Links:** The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

### Purpose

The main purpose of the Bill is to amend the *Commonwealth Electoral Act 1918* (the Act) so as to:

- reduce the donations disclosure threshold from \$10 900 (current rate, CPI-indexed) to \$1000 and remove CPI indexation
- prohibit foreign and anonymous donations to registered political parties, candidates and members of Senate groups and also prevent the use of foreign and anonymous donations for political expenditure
- limit the potential for ‘donation splitting’
- introduce a claims system for electoral funding and tie funding to electoral expenditure
- introduce a biannual disclosure framework in place of annual returns and reduce timeframes for election returns, and
- introduce new offences and increase penalties for a range of existing offences.

The Bill also contains other provisions such as application and savings provisions.

### Background

#### Basis of policy commitment

In 2006 the Howard Government made a number of changes to the Act including raising the disclosure threshold for political donations (‘gifts’ in the Act) from \$1500 to ‘more

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than \$10,000' (CPI indexed) and raising the limit for anonymous donations from \$1000 to donations exceeding \$10 000 (also indexed).<sup>1</sup> These and other measures were controversial and were opposed by the Australian Labor Party (ALP) (then in Opposition) and by the minor parties.<sup>2</sup> During Senate debate on the Bill introducing the changes Senator Carr stated that:

The opposition's opinion is that this bill should be entirely rejected. It should be withdrawn, and I have moved a second reading amendment to that effect.<sup>3</sup>

In its *National Platform and Constitution 2007* and pre-election policies, the ALP indicated its intention to make further changes to the electoral system. These included reversing the increase in the donation threshold established by the Howard Government and removing tax deductibility for donations.<sup>4</sup> In March 2008 the Special Minister of State announced the introduction of legislation in the 2008 winter sitting and specified some of the measures that would be contained in the legislation.<sup>5</sup>

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1. *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cwlth). Other measures in this Act relating to electoral finance and disclosure included an extension of the definition of 'associated entities' and an increase in the tax deductibility threshold for donations. In 2005 a majority of the Joint Standing Committee on Electoral Matters recommended the introduction of a \$10 000 CPI-indexed disclosure threshold for political donations: Joint Standing Committee on Electoral Matters, *The 2004 Federal Election: Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, Joint Standing Committee on Electoral Matters, Canberra, September 2005, p. 333, <http://www.aph.gov.au/house/committee/em/elect04/report/fullreport.pdf>, accessed on 6 August 2008.
  2. See e.g. 'Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2006', Senate, *Debates*, 16 June 2006, pp. 1–93.
  3. Senator K. Carr, 'Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2006', Senate, *Debates*, 16 June 2006, p. 1.
  4. Australian Labor Party, *National Platform and Constitution 2007*, Australian Labor Party, Canberra, 2007, pp. 181–82, [http://www.alp.org.au/download/now/2007\\_national\\_platform.pdf](http://www.alp.org.au/download/now/2007_national_platform.pdf); Australian Labor Party, *Cleaning up Government*, Australian Labor Party, Canberra, 2007, p. 3, [http://www.alp.org.au/download/now/cleaning\\_up\\_government.pdf](http://www.alp.org.au/download/now/cleaning_up_government.pdf), accessed on 6 August 2008.
  5. J. Faulkner (Special Minister of State), *Electoral Reform*, media release, 28 March 2008, [http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=pressrel&Criteria=CI TATION\\_ID:AD0Q6%3B](http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=pressrel&Criteria=CI TATION_ID:AD0Q6%3B), accessed on 6 August 2008.

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## Opposition and minor party positions

While it has been reported in the media that the Opposition has decided to oppose the legislation, the Opposition has not yet formally indicated its position.<sup>6</sup> Upon introduction of the Bill the Opposition was highly critical of the proposed measures, stating that they were ‘ill-conceived and patchwork’, that there had been no consultation, and that the Government was pre-empting its own Green Paper review process (see below).<sup>7</sup> The Opposition also reiterated its call for the Government to support its motion in the Senate to refer a wide-ranging inquiry to the Joint Standing Committee on Electoral Matters (JSCEM) regarding the 2007 federal election and election finance matters (see below).<sup>8</sup> Prior to the introduction of the Bill the Opposition had expressed concerns regarding consultation on the proposed electoral reform measures and the lack of Government support for the JSCEM reference.<sup>9</sup>

In addition, current and former Liberal MPs have suggested that the proposed disclosure threshold changes will have a disproportionately adverse effect on the Liberal Party donation base due to a reluctance on the part of certain donors, such as individuals and small business, to have donations publicly disclosed. It has been suggested that the lower threshold could lead to intimidation of such donors, whereas the lower threshold would not be an issue for unions.<sup>10</sup> Concern has also been expressed that the eventual effect of

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6. L. Tingle, ‘Early poll plan gains ground’, *Australian Financial Review*, 28 May 2008. At the end of March 2008 it was reported that the Opposition had not decided its position: ‘Nelson: donation plans a diversion’, *Canberra Times*, 31 March 2008. A submission by the Liberal Party of Australia to the Joint Standing Committee on Electoral Matters’ inquiry into the 2007 federal election states that ‘the sensible approach is for the Government to withdraw the current bills and wait until the Green Paper appears’ and that ‘The current system is working and the case for change has not been demonstrated’. Liberal Party of Australia, *Submission by the Liberal Party of Australia To the Joint Standing Committee on Electoral Matters Inquiry into the 2007 Election*, Joint Standing Committee on Electoral Matters, Canberra, p. 2, <http://www.aph.gov.au/house/committee/em/elect07/subs/sub156.pdf>, accessed on 6 August 2008.
  7. R. Ronaldson (Shadow Special Minister of State), *Rudd & Faulkner trying to stack the deck on campaign finance*, media release, 15 May 2008, [http://www.liberal.org.au/info/news/detail/20080515\\_RuddFaulknertryingtostackthedeckoncampaignfinance.php](http://www.liberal.org.au/info/news/detail/20080515_RuddFaulknertryingtostackthedeckoncampaignfinance.php), accessed on 6 August 2008.
  8. *ibid.* The Opposition pursued its concerns at the Senate Estimates hearings in May 2008.
  9. R. Ronaldson (Shadow Special Minister of State), *Coalition support for electoral reform remains—genuine consultation required*, media release, 28 March 2008, [http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=pressrel&Criteria=CI TATION\\_ID:KF0Q6%3B](http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=pressrel&Criteria=CI TATION_ID:KF0Q6%3B), accessed on 6 August 2008.
  10. ‘Nelson: donation plans a diversion’, *Canberra Times*, 31 March 2008; M. Baume, ‘Donations rule one-sided’, *Australian Financial Review*, 17 March 2008; B. Norington and

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the changes could be entrenchment of the ALP in government and an erosion of democratic contestability between the two major parties.<sup>11</sup>

It has also been argued from the Liberal side that union affiliation fees and third party (including union) campaign expenditure in favour of the ALP must be brought within the scope of the Government's electoral finance reform.<sup>12</sup> For its part, the Government has indicated that union donations and affiliation fees will be scrutinised (including the possibility of a ban) as part of its broader electoral finance reform process (see below).<sup>13</sup> One national union has reportedly supported the Commonwealth Government's electoral finance reform drive.<sup>14</sup>

In terms of the minor parties, in late March 2008 the Australian Greens endorsed the electoral measures announced by the Government while also calling for further donations reform and an end to preference deals.<sup>15</sup> In late June 2008 Family First signalled its intention to seek a cap on the amounts claimable by political parties for electoral expenditure.<sup>16</sup>

Independent Senator Nick Xenophon has not yet indicated his position on the Bill, but in a May 2008 submission to the JSCEM inquiry, then Senator-elect Xenophon indicated his support for electoral finance reform measures such as continuous online donation disclosure and linking public electoral funding to expenditure and to restrictions on donations.<sup>17</sup>

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J. Hewett, 'Parties with money to spurn' and 'New donation law will leave Liberals broke', *Weekend Australian*, 8 March 2008.

11. M. Baume, *ibid.*; B. Norington and J. Hewett, 'New donation law will leave Liberals broke', *ibid.*; S. Lewis, 'Libs worried on donations', *Herald Sun*, 20 February 2008, and 'Donation reform to help Labor', *Daily Telegraph*, 20 February 2008.
12. 'Nelson: donation plans a diversion', *Canberra Times*, 31 March 2008; M. Baume, *op. cit.*
13. R. Wallace, 'Union donations to face Labor ban', *The Australian*, 30 May 2008; A. Fraser, 'Move to crack down on donations', *Canberra Times*, 29 March 2008; M. Franklin, 'Rudd puts donation caps on the table: Union tap to ALP at risk', *The Australian*, 11 March 2008.
14. R. Wallace, *ibid.*
15. B. Brown, *Electoral reform—Greens call for end to back room deals on Senate preferences*, media release, 28 March 2008, [http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=pressrel&Criteria=CITATION\\_ID:MF0Q6%3B](http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=pressrel&Criteria=CITATION_ID:MF0Q6%3B), accessed on 6 August 2008.
16. S. Fielding, *Stop Rorting Public Funds*, media release, 23 June 2008, [http://www.stevefielding.com.au/html/media/SF329\\_Jun232008.pdf](http://www.stevefielding.com.au/html/media/SF329_Jun232008.pdf), accessed on 6 August 2008.
17. N. Xenophon, *RE: Inquiry into the 2007 Federal Election*, Joint Standing Committee on Electoral Matters, Canberra, May 2008, p. 2,

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## Media commentary

In the lead-up to the introduction of the Bill a range of issues relating to the proposed reforms were raised in the media including:

- the administrative burden that could flow from the proposed lowering of the disclosure threshold.<sup>18</sup>
- the delay that would still occur before disclosures were made public under the proposed biannual reporting framework, and the fact that timely internet-based disclosures are already possible.<sup>19</sup>
- the possibility that proposed changes will have a disproportionately adverse effect on the Liberal Party and related matters (see above).<sup>20</sup>
- the possibility that the proposed funding changes will have a negative impact on the ability of minor parties and independents to financially compete in campaigns due to smaller donation-bases and future difficulties in building up campaign funds under the proposed provisions.<sup>21</sup>

## Referral of the Bill to the JSCEM and further election finance review— JSCEM omnibus inquiry and Green Paper

### Referral of the Bill to the JSCEM

On 18 June 2008 the Bill was referred by the Senate to the JSCEM for inquiry and report on 30 June 2009.<sup>22</sup> During debate on the motion to refer the Bill, it was moved by Senator Fielding that the Committee's reporting date should be changed from 30 June 2009 to 'before November 2008': this was not agreed to by the Senate.<sup>23</sup> On 19 June Senator

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<http://www.aph.gov.au/house/committee/em/elect07/subs/sub139.pdf>, accessed on 6 August 2008. See also S. Maiden, 'Xenophon seeks tougher action on donation laws', *The Australian*, 7 December 2007.

18. Editorial, 'Funds question must be solved', *Australian Financial Review*, 17 March 2008.
19. N. Kelly, 'Steps in the right direction, despite political footwork', *Canberra Times*, 7 April 2008; see also J. Faulkner (Special Minister of State), *Press Conference: Electoral Reform*, Parliament House, Canberra, 28 March 2008, [http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=pressrel&Criteria=CI TATION\\_ID:AU8Q6%3B](http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=pressrel&Criteria=CI TATION_ID:AU8Q6%3B), accessed on 6 August 2008.
20. On this also see M. Steketee, 'Good idea whose time will never come', *The Australian*, 3 April 2008.
21. N. Kelly, op. cit.
22. Australia, Senate, *Journals*, no. 16, pp. 509–18, 2008. The Senate vote on the reference of the Bill to the JSCEM was close: 34 in favour to 32 against.
23. *ibid.*, pp. 517–18.

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Fielding placed on notice a second motion that the JSCEM ‘report by 10 November 2008’; consideration of this motion by the Senate has been postponed until 26 August 2008.<sup>24</sup>

### JSCEM omnibus inquiry

Before the Bill was referred to the JSCEM the Committee had already received references to inquire into the 2007 federal election (referred by the Special Minister of State on 27 February 2008 and by the Senate on 12 March 2008) and the Commonwealth Electoral (Above-the-Line Voting) Amendment Bill 2008 (referred by the Senate on 14 May 2008). The terms of reference for the 2007 federal election element of the JSCEM inquiry are as follows:

All aspects of the 2007 Federal election and matters related thereto, with particular reference to:

- (a) the level of donations, income and expenditure received by political parties, associated entities and third parties at recent local, state and federal elections;
- (b) the extent to which political fundraising and expenditure by third parties is conducted in concert with registered political parties;
- (c) the take up, by whom and by what groups, of current provisions for tax deductibility for political donations as well as other groups with tax deductibility that involve themselves in the political process without disclosing that tax deductible funds are being used;
- (d) the provisions of the Act that relate to disclosure and the activities of associated entities, and third parties not covered by the disclosure provisions;
- (e) the appropriateness of current levels of public funding provided for political parties and candidates contesting federal elections;
- (f) the availability and efficacy of ‘free time’ provided to political parties in relation to federal elections in print and electronic media at local, state and national levels;
- (g) the public funding of candidates whose eligibility is questionable before, during and after an election with the view to ensuring public confidence in the public funding system;
- (h) the relationship between public funding and campaign expenditure; and
- (i) the harmonisation of state and federal laws that relate to political donations, gifts and expenditure.

That in conducting the review the committee undertake hearings in all capital cities and major regional centres and call for submissions.<sup>25</sup>

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24. Australia, Senate, *Journals*, no. 17, p. 537, 2008; Australia, Senate, *Journals*, no. 21, p. 641, 2008.

25. Australia, Senate, *Journals*, no. 5, pp. 210–11, 2008.

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The JSCEM has resolved to conduct a single inquiry encompassing its multiple references.<sup>26</sup> In addition to its 30 June 2009 reporting date for the Bill, the JSCEM has been asked to report on the Commonwealth Electoral (Above-the-Line Voting) Amendment Bill 2008 ‘not before June 2009’ (the 2007 federal election element of the inquiry has no set reporting date).<sup>27</sup>

Senator Fielding’s notice of motion to amend the 30 June 2009 reporting date for the Committee’s consideration of the donations Bill to be ‘by 10 November 2008’ indicates that the matter may come before the newly-constituted Senate for consideration in the near future. The JSCEM’s current Resolution of Appointment may in any event enable the JSCEM to ignore the reporting date and report on a date of its choosing. The Resolution, which is authoritative for the operations of the Committee, states that the Committee ‘may report from time to time’.<sup>28</sup> Certainly 30 June 2009 would seem to be a long timeframe for consideration of the Bill.

### Green Paper

The Bill is the first element in a broad electoral reform agenda being pursued by the Government. On 28 March 2008 the Special Minister of State announced that the Government would be producing a Green Paper on wider electoral reform.<sup>29</sup> The Green Paper will be released for discussion in two parts; the first part was to have been released in July 2008 (but has not yet appeared), and the second part is scheduled for release in October 2008. The first part of the Green Paper will examine disclosure, funding and expenditure issues and the second part will examine broader matters such as enrolment processes, roll closures, and the harmonisation of Commonwealth, state and territory electoral laws.<sup>30</sup>

The Government will ask the JSCEM to consider the Green Paper and will seek the participation of the state and territory governments in the reform process.<sup>31</sup> The Green Paper will be prepared by the Australian Electoral Commission (AEC), the Department of Prime Minister and Cabinet, and the Department of Finance and Deregulation.

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26. Committee website, <http://www.aph.gov.au/house/committee/em/elect07/index.htm>, accessed on 6 August 2008.

27. Australia, Senate, *Journals*, no. 12, p. 390, 2008.

28. Australia, House of Representatives, *Votes and Proceedings*, no. 1, pp. 31–32, 2008; Australia, Senate, *Journals*, no. 3, p. 156, 2008. The Resolution of Appointment is also set out on the Committee website, <http://www.aph.gov.au/house/committee/em/resolution.htm>.

29. J. Faulkner (Special Minister of State), *Electoral Reform*, media release, and *Press Conference: Electoral Reform*, op. cit.

30. *ibid.*

31. *ibid.*

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## Summary of key measures in the Bill

As noted above, the abolition of tax deductibility for donations was part of the Government's platform and pre-election policy. Proposed measures to abolish tax deductibility for donations are contained in a separate bill, the Tax Laws Amendment (2008 Measures No. 1) Bill 2008.<sup>32</sup> That Bill, which contains a wide range of tax measures, was defeated in the Senate on 26 June 2008.

## Electoral funding

Currently under the Act candidates and Senate groups are entitled to indexed funding for each first preference vote received once a minimum of four per cent of first preference votes are attained. In the case of party-endorsed candidates and Senate groups the funding entitlement is paid to the relevant registered political party. In the case of unendorsed candidates and Senate groups the funding entitlement is paid directly to the candidate or group (or to their agent).

In its 2005 inquiry report on the 2004 federal election the JSCEM acknowledged concerns relating to potential profiteering by candidates under the current system. A majority of the Committee concluded that instituting a campaign expenditure reimbursement system (which had operated between 1983 and 1995) would not be viable due to the administrative burden and the potential for unjustified expenditure to still be claimed. It was suggested, however, that raising the first preference vote threshold to five per cent or instituting separate thresholds for House of Representatives and Senate candidates could be potential solutions to the profiteering issue.<sup>33</sup> In an earlier (2000) election inquiry report a majority of the JSCEM had expressed the view that returning to a campaign expense reimbursement system 'would realise little if any savings but would simply reimpose another layer of administration and cost and also delay the payment of funding entitlements compared to the present system'.<sup>34</sup>

The Bill seeks to introduce a claims-based funding framework that returns to the principle of tying electoral funding to electoral expenditure; the substance of the existing definition of 'electoral expenditure' in the Act would not be changed by the Bill. In the Second Reading speech on the Bill it was stated that the new measures:

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32. See L. Nielson, 'Tax Laws Amendment (2008 Measures No. 1) Bill 2008', *Bills Digest*, no. 62, Parliamentary Library, Canberra, 2007-08, <http://www.aph.gov.au/library/pubs/bd/2007-08/08bd062.pdf>, accessed on 6 August 2008.
  33. Joint Standing Committee on Electoral Matters, *op. cit.*, pp. 325–28.
  34. Joint Standing Committee on Electoral Matters, *The 1998 Federal Election: Report of the Inquiry into the conduct of the 1998 Federal Election and matters related thereto*, Joint Standing Committee on Electoral Matters, Canberra, June 2000, p. 126, <http://www.aph.gov.au/house/committee/em/elect98/wholereport.pdf>, accessed on 6 August 2008.

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... are aimed at addressing the possibility that some candidates and other groups may obtain a windfall payment of election funding as a result of running for office ... The policy intention behind these measures is that candidates, registered political parties and Senate groups should only receive the lesser amount of either the electoral expenditure that was actually incurred in an election campaign, or the amount awarded per vote ... provided at least 4% of first preference votes have been won.<sup>35</sup>

The Bill seeks to achieve these aims by:

- introducing new electoral funding entitlement provisions for registered political parties, unendorsed candidates, unendorsed Senate groups, and joint Senate groups. A new base funding rate of \$2.1894 (CPI-indexed) would be introduced, and the funding entitlement would either be this rate per first preference vote received or the amount of electoral expenditure claimed and accepted by the AEC, whichever is the lesser. Funding would be contingent on attaining at least four per cent of first preference votes.
  - registered political parties would be entitled to funding in respect of party-endorsed candidates (endorsed candidates for the House of Representatives, endorsed ungrouped Senate candidates, and endorsed candidates in a Senate group) who met the four per cent threshold. Special requirements would apply in the case of joint Senate groups (see below).
  - unendorsed candidates (candidates not endorsed by a registered political party or members of a Senate group) who met the four per cent threshold would be entitled to funding.
  - unendorsed Senate groups (groups comprised of candidates who are not endorsed by any registered political party) meeting the four per cent threshold would be entitled to funding.
  - for joint Senate groups (groups comprised of candidates endorsed by two or more registered political parties), the Bill would require the agents of one of the political parties to submit the signed agreement between the parties setting out the division of first preference votes to the Electoral Commissioner before polling day for the Senate election. Compliance with this requirement would mean that the first preference group votes would be divided according to the agreement; non compliance would mean that division of first preference votes would be determined by the AEC.

The indexation of the base rate would commence on 1 January 2009.

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35. Senator J. Faulkner, 'Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008: Second Reading', Senate, *Debates*, 15 May 2008, p. 9. See also Explanatory Memorandum, p. 5.

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- introducing a new claims process for electoral funding whereby making a claim would be necessary in order to receive the funding entitlement. Under the provisions in the Bill the proposed claims process would have the following elements:
  - agents of registered political parties, candidates or groups would need to make a claim for funding. Agents would be able to make interim claims, or final claims, or both (one of each only). Final claims would need to specify all electoral expenditure for which funding is sought, including expenditure specified in an interim claim (final claims would be able to do this by making reference to the interim claim).
  - claims would need to specify electoral expenditure incurred by the parties (or party-endorsed candidates), candidates, or groups (or candidate members of groups) for which funding was sought.<sup>36</sup>
  - interim claims would need to be lodged with the AEC between the 20<sup>th</sup> day after polling day and six months after polling day. Final claims for a single election would need to be lodged with the AEC between the day on which the election writ was returned and six months after polling day; final claims relating to two or more elections (presumably to account for by-elections and separate Senate elections) would need to be lodged with the AEC between the day on which the election writs were returned and six months after polling day, or, where election writs were returned on different days, between the last day of writs being returned and six months after polling day. Claims lodged outside the periods specified would be invalid.
  - the AEC would have to accept or refuse the claim and pay the applicable funding entitlement within 20 days of receiving a claim. The only consideration for the AEC in determining a claim would be whether the claimed expenditure was electoral expenditure and whether it was actually incurred.
  - for accepted interim claims, the AEC would have to pay 95 per cent of the relevant entitlement for first preference votes calculated as at the 20<sup>th</sup> day after polling day or the amount of accepted electoral expenditure, whichever is the lesser. Where an acceptable interim claim was lodged but no final claim was lodged, no further election funding would be payable and the interim claim would be taken to be a final claim by the AEC. This presumably means that the remaining five per cent of the entitlement would be forfeited; yet the Explanatory Memorandum states that the intention here is similar to an existing subsection in the Act which provides for paying the entitlement balance as soon as possible after the full entitlement is known.<sup>37</sup>

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36. Claims would need to contain all the information required, specify whether they were interim or final, and be in the approved form.

37. Explanatory Memorandum, p. 10; see also subsection 299(5D) of the Act, which would be repealed by the Bill.

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- for accepted final claims, the AEC would have to pay 100 per cent of the relevant entitlement for first preference votes or the amount of accepted electoral expenditure, whichever is the lesser. Amounts already paid under interim claims would be deducted from the final payment.
- where a final claim was refused the AEC would be obliged to serve a notice on the relevant agent stating that the claim had been refused together with reasons for the refusal. Agents would be able to apply for reconsideration of refused claims and the Bill provides for a reconsideration process to be followed by the AEC.
- election funding entitlements in respect of candidates may still be payable in the event of a candidate's death.

Importantly, under the new framework the AEC would have the power to revisit and vary a decision to accept a final claim for electoral expenditure where the AEC became satisfied that the amount of expenditure should not have been accepted or that only a lesser amount of expenditure should have been accepted. In cases where a variation decision was made after a funding entitlement had been paid and the total payment exceeded what should have been paid, the excess amount would be an overpayment and would be recoverable as a debt due to the Commonwealth. The reconsideration process for refused claims would also be available in relation to variation decisions.

The Bill also proposes to ensure that electoral expenditure incurred by divisions of state and territory branches of political parties (or on their behalf) is treated as having been incurred by the branch, thus enabling state and territory branches to lodge returns and claims for divisional funding and expenditure.

## Disclosure thresholds

Currently under the *Commonwealth Electoral Act 1918* the disclosure threshold for donations is donations totalling more than \$10 900 (CPI-indexed). The Bill proposes to lower the disclosure threshold to donations totalling \$1000 or more and to remove indexation. Reversal of the threshold increase introduced by the Howard Government in 2006 has been ALP policy since before the 2007 federal election (see above). The Second Reading speech on the Bill indicated that the main rationale for these measures is:

... to provide transparency and accountability in the donations and expenditure received or incurred by key participants in the political process ... a flat rate of \$1,000 greatly extends the transparency of our system and ensures that the scope for any undisclosed gifts will be reduced.<sup>38</sup>

The Bill also seeks to limit the potential for 'donation splitting' (making multiple donations under the disclosure threshold to different branches of a political party in order

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38. Senator J. Faulkner, 'Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008: Second Reading', Senate, *Debates*, 15 May 2008, p. 8.

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to avoid disclosure). Currently under the Act the upper limits of donations that can be made without disclosure by using donation splitting are high (e.g. a total of \$87 200 from an individual donor making eight separate donations of \$10 900 to the state and territory branches of a major political party). The Bill seeks to limit the potential for donation splitting by:

- inserting a definition of ‘related’ into the Act which would apply to the whole Act and thus the funding and disclosure provisions in Part XX.<sup>39</sup> This would provide that a political party is related to another political party if one of the parties is part of the other party or if both parties are parts of the same political party.
- inserting provisions which would provide that donations made to related political parties are treated for disclosure purposes as donations made to the single political party as one entity, thereby triggering the disclosure requirements for donations totalling \$1000 or more to related parties.

While these measures would greatly lower the amount that could be donated without disclosure by means of donation splitting, they would not prohibit the practice outright. Under the proposed rules it would still be possible to utilise donation splitting and avoid disclosure for donations totalling \$999 or less (e.g. eight separate donations of \$124.87 to the state and territory branches of a party).

The Bill also proposes to bring donations made to political parties via intermediaries into the disclosure regime by treating such donations as donations made directly to the political party, and by requiring the disclosure of donations of \$1000 or more which are received by intermediaries and then used to fund donations to parties. In addition, the Bill proposes to ensure that donations of \$1000 or more which are made to political parties which are not registered are also brought within the disclosure requirements.

The Bill further proposes to lower the threshold for lawful loans to political parties, state or territory party branches, candidates, members of Senate groups, or persons acting on behalf of parties, branches, candidates or Senate groups from the current level of \$10 900 (CPI-indexed) to \$1000 (unindexed).

## Disclosure timeframes and reporting periods

Currently under the Act donation and expenditure returns for elections must be submitted within 15 weeks after polling day, and annual returns must be submitted once per year within 16 or 20 weeks after the end of financial year depending on circumstances.

For election returns, the Bill proposes to shorten the disclosure timeframe by requiring that election returns must be submitted within eight weeks after polling day. In place of the

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39. The current definition of ‘related’ in subsection 123(2) of the Act only applies to Part XI dealing with party registration.

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current annual return framework, the Bill proposes to introduce a new biannual framework involving two 'reporting periods', one being the first six months of the financial year and the other being the full financial year, and a requirement to submit returns after each period. These returns would need to be submitted within eight weeks after the end of each reporting period.

In the Second Reading speech on the Bill it was stated that the proposed changes:

... will ensure that the Australian Electoral Commission has in its possession details of gifts, revenues and political expenditure that are both timely and up-to-date. The publication of this information will also be more timely and will enable the Australian community to fully examine the financial dealings of the main players involved in the political process and to scrutinise the sources of any donations that have been received.<sup>40</sup>

### For donors

For donors, under the Bill's provisions biannual returns would need to be submitted if donations of \$1000 or more are made to the same political party in both reporting periods (i.e. within the first six months of a financial year and again during the remainder of the financial year). Such returns would need to be submitted within eight weeks of the end of each reporting period.

- the new framework would not apply to donations returned within six weeks of receipt. However, the framework *would* apply to any foreign or anonymous donations of \$1000 or more, whether or not such donations were returned or paid within six weeks (see below for new foreign and anonymous donation measures).
- under the definition of 'related' (see above) donations to two or more related parties would be treated as donations to the same registered political party if at least one of the parties is registered.
- donations made to persons or bodies with the intention of benefiting a political party would also be treated as donations made directly to the party for the purposes of this system.
- to avoid duplication, donors who make donations of \$1000 or more in the first six months of a financial year and submit the necessary return would not be required to submit a second return for the full financial year if no further donations were made in the remainder of the financial year. Also, donor returns submitted for a full financial year would not need to disclose donations that were made during the first six months of the financial year and disclosed separately for that reporting period.

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40. Senator J. Faulkner, 'Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008: Second Reading', *op. cit.*, p. 9.

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### For political parties, associated entities and those incurring political expenditure

For political parties, associated entities, and those incurring political expenditure who are subject to the current disclosure requirements in the Act, the Bill would apply the new biannual reporting framework, \$1000 donations threshold, dual reporting periods, and eight week disclosure timeframe. Returns would need to be submitted biannually after the end of each reporting period without exception.

For political parties and associated entities the following additional features would also apply:

- the new framework would not apply to donations returned within six weeks of receipt. However, the framework *would* apply to any foreign or anonymous donations of \$1000 or more, whether or not such donations were returned or paid within six weeks (see below for new foreign and anonymous donation measures).
- all donations would need to be included when calculating whether particulars of donations would need to be disclosed.
- the disclosure threshold for outstanding debts would be reduced to \$1000.

While the proposed shortened disclosure timeframes and biannual framework would reduce the current delays before disclosures are made public, it is important to note that some delay would still occur. The Government has indicated that disclosures made under the biannual framework would be publicly available within three months of the end of a reporting period.<sup>41</sup> The more timely mechanism of posting disclosures on the internet as they are made has been flagged as a possible matter for consideration by the forthcoming Green Paper.<sup>42</sup>

The Bill also proposes to change the requirements for additional returns that must be submitted in respect of donations received which enable or reimburse political expenditure. Additional returns would need to be submitted for each donation of \$1000 or more received from a donor (defined as a ‘major donor’) in a reporting period that had the purpose of enabling or reimbursing political expenditure.

In addition, the Bill proposes to change the current provisions in the Act governing public inspection or perusal of returns and claims so that they may be inspected or perused as soon as is reasonably practicable after lodgement.

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41. J. Faulkner (Special Minister of State), *Press Conference: Electoral Reform*, *ibid*.

42. *ibid*.

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## Foreign and anonymous donations

### Foreign donations

Currently the Act places no restrictions on foreign donations. In its 2005 inquiry report on the 2004 federal election a majority of the JSCEM noted foreign donations as an issue, but concluded that banning donations from particular sources could lead to inequities and that, more generally, reform was not required as there was no evidence of corruption or undue influence.<sup>43</sup> There have been calls in the past, for example from former Democrats Senator Andrew Murray, for foreign donations to be banned.<sup>44</sup> The issue of foreign donations achieved some recent prominence with the disclosure in early 2006 of a donation of \$1 million to the Liberal Party made by British peer Lord Ashcroft in 2004.<sup>45</sup>

In essence, the Bill proposes to prohibit all foreign donations to registered political parties, candidates and members of Senate groups and to prevent the use of foreign donations for political expenditure. In the Second Reading speech on the Bill it was stated that:

There has been concern that large overseas companies may be able to exert influence through the making of significant and often unreported gifts and donations ... The policy intent is to ensure that the source of all funds that are used for political purposes are clearly identified, to enable the AEC to have jurisdiction over those donations, and to enable the Australian public to scrutinise any possible impact that such donations may have on political decision-making.<sup>46</sup>

The Bill seeks to achieve these aims by:

- making it unlawful for registered political parties, state or territory party branches, or persons acting on behalf of a party or branch to receive donations of foreign property.
- making it unlawful for candidates, members of Senate groups, or persons acting on behalf of candidates or Senate groups to receive donations of foreign property during

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43. Joint Standing Committee on Electoral Matters, *The 2004 Federal Election*, op. cit., pp. 292, 321–23, 335, 337.

44. A. Murray, *Ban Foreign Donations*, media release, 1 February 2006, [http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=pressrel&Criteria=CI TATION\\_ID:VSMI6%3B](http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=pressrel&Criteria=CI TATION_ID:VSMI6%3B), accessed on 6 August 2008. See also Joint Standing Committee on Electoral Matters, *The 2004 Federal Election*, op. cit., pp. 417–18.

45. See e.g. N. Adlam, 'Stone defends \$1m foreign donation', *Northern Territory News*, 6 February 2006; Editorial, 'A blizzard of numbers: Donations list needs clarity', *Sydney Morning Herald*, 3 February 2006; P. Wilson, 'A Lord rich in influence', *The Australian*, 3 February 2006; A. Fraser, 'Tory Lord tops list with \$1m donation to Libs', *Canberra Times*, 2 February 2006;

46. Senator J. Faulkner, 'Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008: Second Reading', Senate, *Debates*, 15 May 2008, p. 9.

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the candidacy or group period (the period beginning with the announcement or nomination of a person's candidacy or with Senate candidates' request to have their names grouped and ending 30 days after polling day).

- preventing the use of foreign property donations for political expenditure by making it unlawful for a person to incur political expenditure if the person:
  - is not and has not been a candidate or member of a group and is not an associated entity
  - was enabled to incur the expenditure by means of a foreign donation
  - is required to provide a return regarding the expenditure, and
  - if the donor's main purpose in making the foreign donation was to enable the recipient to incur the expenditure.
- preventing the use of foreign property donations for political expenditure by making it unlawful for current or former candidates, or members of groups, to incur political expenditure where they were enabled to incur the expenditure by means of a foreign donation, and where the donor's main purpose in making the donation was to enable the recipient to incur the expenditure.
- preventing the use of foreign property donations for political expenditure by making it unlawful for associated entities to receive foreign donations if the donor's main purpose in making the donation was to enable the entity to incur the expenditure.

The Bill defines 'foreign property' as money standing to the credit of an account kept outside Australia, other money located outside Australia, or property other than money located outside Australia ('Australian property' is defined with the same categories of property being kept or located in Australia). The Bill also contains provisions to prevent the use of intermediaries for donating foreign property and provisions for determining whether a donation or transfer is of Australian or foreign property.

One potential effect of the drafting of the Bill's foreign donation measures is that it could be unlawful to receive, or incur political expenditure on the basis of, donations made by Australian citizens but sourced from overseas accounts.

The Bill specifies that the new provisions governing foreign donations would not apply if a donation was returned within 6 weeks of receipt. In the event of an unlawful donation not being returned within 6 weeks, the Bill would make the amount of the donation payable to the Commonwealth and sets out liability and debt recovery arrangements. The Bill would also ensure, however, that the Commonwealth would not be able to recover the amount or value of a donation twice.<sup>47</sup>

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47. E.g. in the case of an unlawful donation being both anonymous and from a foreign source, the Commonwealth would only be able to recover the donation amount or value once.

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## **Anonymous donations**

Currently under the Act it is unlawful for a political party, state or territory party branch, candidate or Senate group or persons acting on behalf of a party, branch, candidate or Senate group to receive donations of more than \$10 900 (CPI-indexed) from anonymous donors.

In essence, the Bill proposes to prohibit all anonymous donations to registered political parties, candidates and members of Senate groups and to prevent the use of anonymous donations for political expenditure by:

- making it unlawful for registered political parties, state or territory party branches, or persons acting on behalf of a party or branch to receive anonymous donations.
- making it unlawful for candidates, members of Senate groups, or persons acting on behalf of candidates or Senate groups to receive anonymous donations during the candidacy or group period (the period beginning with the announcement or nomination of a person's candidacy or with Senate candidates' request to have their names grouped and ending 30 days after polling day).
- preventing anonymous donations via intermediaries by making it unlawful for donations to be received by the persons or entities set out above from a donor where an anonymous gift received by the donor enabled the donor to make the donation.
- making it unlawful for a person to incur political expenditure if the person is not and has not been a candidate or member of a group, was enabled to incur the expenditure by means of an anonymous donation, and is required to provide a return regarding the expenditure. The Bill would also make it unlawful for current or former candidates or members of groups to incur political expenditure where they were enabled to incur the expenditure by means of an anonymous donation.

In a similar vein to the treatment of foreign donations, the Bill specifies that the new provisions governing anonymous donations would not apply if an anonymous donation was returned within 6 weeks of receipt or, if return is not possible or practicable, the amount of the donation was paid to the Commonwealth within the 6 week period. In the event of an unlawful donation not being returned/paid to the Commonwealth within 6 weeks, the Bill would make the amount of the donation payable to the Commonwealth and sets out liability and debt recovery arrangements. As noted above, however, the Bill would also ensure that the Commonwealth would not be able to recover the amount or value of a donation twice.

## **Penalties, offences and compliance**

The Bill proposes to increase penalties for some existing offences in Part XX of the Act and introduce some new offences. In the Second Reading speech on the Bill it was indicated that the rationale for the changes was to 'ensure that the AEC can implement and

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enforce' the provisions introduced by the Bill. It was also stated that 'existing penalties in the Electoral Act have largely remained the same as when introduced in 1983', and that:

In relation to claims for election funding, the levels of penalties have been substantially increased to reflect the seriousness of the crimes and the amount of public funds that are paid following an election.<sup>48</sup>

Penalties would be increased for the offences of:

- failure to furnish a return
- furnishing an incomplete return
- failure to retain records
- lodging a claim or return that is known to be false or misleading in a material particular
- providing information to another that is false or misleading in a material particular in relation to the making a claim or the furnishing of a return, and
- failure or refusal to comply with notices relating to AEC-authorized investigations and knowingly giving false or misleading evidence required for such investigations.

For the offences relating to false or misleading information and failure or refusal to comply with notices, the Bill would also introduce imprisonment as a possible penalty and would repeal the current 'reasonable excuse' defence for the non-compliance offences. Failure to furnish a return, furnishing an incomplete return, failure to retain records, and failure to comply with a notice would no longer be offences of strict liability as they are currently under the Act.

New offences would be created for the unlawful receipt of foreign or anonymous donations and the unlawful incurring of political expenditure in relation to foreign or anonymous donations (see above). Penalties for these offences would be imprisonment for 12 months or 240 penalty units or both.<sup>49</sup> Liability arrangements are set out for entities that are not bodies corporate; exclusions from liability are specified here where there is no knowledge of the circumstances making the donation unlawful or where all reasonable steps have been taken to avoid these circumstances.

The Bill also proposes to create new arrangements for the recovery of undisclosed donations. Under the new arrangements a donation would be undisclosed where details of the donation were required to be included in election and biannual returns, but were not, or

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48. Senator J. Faulkner, 'Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008: Second Reading', Senate, *Debates*, 15 May 2008, p. 9.

49. The term 'penalty unit' will have the same meaning given by section 4AA of the *Crimes Act 1914*. That amount is currently \$110.

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where the return was not furnished within the time required. The amount or value of undisclosed donations would be payable to the Commonwealth and the Bill sets out liability and debt recovery arrangements. The Bill would also provide an extension of time mechanism so that relevant donation details could still be furnished so as to avoid donations becoming undisclosed.

Further, the Bill also seeks to broaden the investigatory scope of AEC-authorized officers in relation to Part XX compliance by extending the list of persons who may be required, by notice, to produce documents or other evidence (for example candidates and their agents, members of Senate groups and their agents, and those acting on behalf of registered political parties, party branches, candidates, groups, and associated entities would be added to the list).

## Financial implications

The Government has indicated that the amendments may result in increased costs for the AEC. Public funding may be reduced due to the electoral funding reforms and there may be additional revenue from the recovery of unlawful or undisclosed donations.<sup>50</sup>

## Main provisions

### Definition amendments

**Item 1** inserts into the definition section of the *Commonwealth Electoral Act 1918* (the Act), section 4, a definition of when a political party is **related** to another political party, which is when one of the parties is part of the other, or when both parties are parts of the same political party. This amendment is necessary as the current definition of ‘related’ political parties is located in Part XI of the Act which provides for the registration of political parties. The definition is being placed in the general definition section of the Act by this Bill so that it will apply across the whole of the Act, but in particular to Parts XI and XX. Part XX of the Act deals with election funding and financial disclosures, which are the principle features being dealt with by this Bill.

**Item 2** inserts a new definition of **reporting period** for the purposes of the Act which will be either the first six months of a financial year or a full financial year. The definition is related to new biannual disclosure requirements in **item 37** and also to **items 54-57, items 60-67, 70-77, item 80** and **item 104** which are discussed below.

### Electoral funding amendments

The proposed amendments reflect the policy decision to tighten the electoral laws so that candidates and other groups can no longer obtain a ‘windfall’ payment for running for

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50. Explanatory Memorandum, p. 1.

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office. The proposed amendments will have the effect that candidates, registered political parties and Senate groups should only receive the *lesser* amount of either the electoral expenditure that was actually incurred in the campaign or the amount awarded per vote, provided at least four per cent of first preference votes have been won.

**Item 16** repeals sections 294 and 297 entirely and creates **new Subdivision A** and **new sections 293, 294, 295 and 296** in Part XX of the Act which deals with election funding and financial disclosure.

### Entitlement to electoral funding

**New section 293** applies to candidates in the House of Representatives and the Senate belonging to a registered political party whose total number of formal first preference votes is at least four per cent of the total number of such votes cast in the election.

For an endorsed candidate in the House or the Senate (and who is not a member of a group), **new paragraphs 293(2)(a)(i) and (b)** provide that the registered political party is entitled to the *lesser* amount of \$2.1894 for each formal first preference vote or the amount of actual electoral expenditure claimed and accepted by the Australian Electoral Commission (AEC).

For a candidate in a Senate election who is a member of a group the same choice will also apply, except if **new section 296** applies. **New section 296** makes provision for the event that two or more political parties endorse candidates who are members of a group in a Senate election. One of the agents of the parties must provide a signed agreement to the AEC of how the parties agree to divide the formal first preference votes before polling day. If this is done, then the agreement will prevail. If a copy of an agreement is not provided, the formal first preference votes are divided ‘in whatever way’ the AEC determines (**new subsection 296(5)**).<sup>51</sup>

Entitlements of unendorsed candidates and unendorsed groups who have received the threshold percentage of votes, are similarly limited to the lesser amount of the amount per vote given or the amount actually incurred and accepted by the AEC (**new sections 294 and 295**).

### Making a claim for electoral funding

**New Subdivision B, new sections 297 – 298H** are the machinery provisions of how to make a claim for election funding to the AEC.

An agent can make:

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51. The Explanatory Memorandum (p. 7) explains that this subsection reflects a number of provisions in existing subsection 299(4) that require the Commission to determine the shares of electoral funding in the absence of any agreement.

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- an interim claim,
- both an interim and final claim, or
- just a final claim (**new subsection 297(2)**).

If an interim claim is made it must be made between the 20<sup>th</sup> day after polling day and six months after the polling day (**new subsection 298B(1)**).

A final claim for only one election must be lodged between the day on which the writ is returned and six months after the polling day (**new paragraphs 298B(2)(a)(i) and (b)**). A final claim relating to two or more elections must be lodged on the days on which the writs are returned (or if the writs are returned on different days, the last of those days) and ending six months after the polling day for the election or elections (**new paragraphs 298B(2)(a)(ii) and (b)**). The Explanatory Memorandum does not explain these provisions regarding two or more elections but, as noted above, it is presumably in place to cover circumstances of a by-election or a Senate election occurring on a different date to a general election.

A claim made outside the times set in subsections 298B(1) and (2) will not be valid and:

... [w]ill not be processed by the Commission or attract any election funding.<sup>52</sup>

**New sections 298D and 298E** mandate that the AEC must pay the lesser amount between the amount calculated under new **paragraphs 293(2)(a), 294(2)(a) or 295(2)(a)** or the amount actually expended ('accepted') (However, note that under **new paragraph 298D(2)(a)** for interim claims, the amount is 95 per cent of the amount calculated, see p.12 of this Digest, above ).

If a claim is refused, the AEC must serve a notice of the refusal and the reasons for the refusal on the agent of the appropriate party, person or group (**new section 298F**), and the agent can apply to the AEC for a reconsideration of the refusal (**new section 298H**).

The *Administrative Appeals Tribunal Act 1975* (the AAT Act) provides for review of decisions made under an enactment to be reviewable by the Administrative Appeals Tribunal (AAT) if the enactment provides that an application can be made. For example, section 121 of the *Commonwealth Electoral Act 1918* currently provides that certain decisions made by an Australian Electoral Officer or a Divisional Returning Officer can be reviewed by the AAT if an application is made to it. Section 141 of the Act allows an application to be made to the AAT for review of decisions made by the AEC in relation to the registration or refusal to register a political party. However, none of these are relevant to any decision by the AEC about a claim for electoral funding. No other provision of the Act or the Bill enables for review by the AAT.

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52. Explanatory Memorandum, p. 9. **Subsection 298(B)(3)**.

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However a decision by the AEC refusing to refund an amount under the Act or a dispute as to quantum would be reviewable under the *Administrative Decisions (Judicial Review) Act 1977* before the Federal Court of Australia.<sup>53</sup> The review would be restricted to whether the AEC made an error of law in its decision, as opposed to ‘merits review’ under the AAT Act.

### Payment of electoral funding

**Items 17 – 20** make amendments in **new Subdivision C** relating to payments of election funding. Subsections 299(2) to (5) are repealed and replaced with **new subsections 299(2) and (3)** to provide that any payment made in respect of an unendorsed candidate (that is, not within subsection 299(1)), or in respect of a Senate group is to be made to the candidate’s or group’s agent.

Section 299(1) remains substantially unamended in relation to payment of election funding for endorsed candidates.

### Miscellaneous

**Item 20** repeals and substitutes **sections 300 and 301** which deal with payments in the event of the death of a candidate or the death of a candidate is a member of a group. **New subsections 300(1) – (4)** collapses the two provisions into one provision with no substantive change to the existing provisions.<sup>54</sup>

**New section 301** will allow the AEC to vary a decision<sup>55</sup> made under section 298C to accept an amount of electoral expenditure. If under the varied decision an overpayment had been made, the excess amount may be recovered by the Commonwealth as a debt due to the Commonwealth by way of court action (**new subsection 301(3)**). This effectively replaces subsection 299(6) which will be repealed (**item 19**).

### Disclosure threshold amendments

The decision to reduce the disclosure threshold for donors, registered political parties, candidates and others involving in incurring political expenditure from the current level of donations over \$10 900 (CPI-indexed) to the **proposed level of \$1 000** or more (unindexed) is dealt with in **items 23, 24, 26, 27, 30, 32, 34, 41, 43, 45, 50, 57, 60, 67, 76 and 78**. **Item 102** repeals **section 321A** of the Act which provides for the indexation of money amounts in certain provisions of the Act and, in particular, the provisions dealing with disclosure of donations. As a consequence of this proposed repeal, all of the notes to

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53. *Administrative Decisions (Judicial Review) Act 1977*, section 5.

54. See also Explanatory Memorandum, p. 13.

55. The reconsideration and review mechanisms discussed above also apply to new section 301.

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the sections amended referring to indexation under section 321A are also repealed (for example, **items 25, 28, 31, 33, and 35 etc.**).

## Disclosure timeframe amendments

**Item 21** inserts **new section 303A** which will have the effect that donations that are returned within six weeks of receipt will not come within Division 4 (which covers disclosure of donations). However, foreign and anonymous donations will **not** be exempted from the disclosure provisions and will come within Division 4 of the Act (**new subsections 303A(2) – (5)**).

Election disclosure returns will have to be returned within **eight weeks**, down from 15 weeks (**item 22**).

**Items 23, 24, 26 and 27** will reduce the disclosure threshold from over \$10 900 (current, CPI-indexed) to \$1 000 or more in existing section 304.

**New subsections 304(9) and (10)** will require a ‘nil return’ to be put in, to the effect that no donations of a kind required to be disclosed were received, regardless of whether any donations have been received.<sup>56</sup>

**Items 30 – 36** amend **section 305A** to reduce the disclosure threshold to \$1 000 or more for donations to candidates or a member of a group, and the time an election return must be provided to the AEC from 15 weeks to eight weeks.

**Item 37** makes amendments to **section 305B** to insert **new subsections (1), (1A), (2), (2A) and (2B)** in order to introduce biannual returns requirements; to deem that donations made to a related political party will be made to one political party; and also to bring donations made to a person with the intention of benefiting a party into the disclosure regime. **Item 37** requires returns to be provided biannually instead of once every twelve months.<sup>57</sup> For example, currently donations over \$10 900 (CPI-indexed) to a political party must be disclosed to the AEC within 20 weeks after the end of the financial year (subsection 305B(1)). **Item 37** repeals this provision and will have the effect (in part) that a donation of \$1 000 or more must be disclosed to the AEC within eight weeks ‘after the end of the reporting period’ (**new subsection 305B(1)**). There are exceptions to avoid duplication, for example if a return has been already furnished in the first six months of the financial year, and there are no further donations for the remainder of the financial year, a second

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56. These provisions substantially replicate section 307 which is repealed by **item 47**. The Explanatory Memorandum explains that due to the creation of **new Division 4A** dealing with unlawful gifts and other gifts and loans, the provision is ‘better placed’ in section 304. Explanatory Memorandum, p. 15.

57. Hon. Senator John Faulkner, Special Minister of State, ‘Second reading speech: Commonwealth Electoral Amendment (Political Donations and other Measures) Bill 2008’, Senate, *Debates*, 15 May 2008.

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return will not be required (**new subsections 305B(2A) and (2B)**). **Item 37** also provides that if two or more political parties are related to each other and at least one is registered, then the parties are in effect deemed to be a single registered political party and a donation to any of the parties will be a donation to the single registered party (**new subsection 305B(1A)**).

Note that **item 38** will amend **paragraph 305B(3)(c)** to reflect that for each donation made the return must set out the amount of the donation, the date it was made, and the name and address of the ‘political party that received the gift’. The amendment deletes the word ‘registered’ from the paragraph, despite **new subsection 305B(1A)(d)** expressly referring to the ‘single *registered* political party referred to in paragraph (c)’ (italics added).

### Foreign and anonymous donations amendments

**Item 40** repeals section 306 and substitutes **new Division 4A Subdivision A, new sections 306, 306AA, 306AB, 306AC, 306AD** to make rules in relation to donations of foreign property. ‘Foreign property’ is defined to be money in an account outside Australian, other money outside Australia, or property that is located outside Australia.

**New section 306AC** will make it unlawful for a registered political party, State branch of a registered political party, a candidate or a member of a group, or a person acting for any such party or person to receive a donation of foreign property. The prohibition will only apply to candidates and members of groups during the candidacy or group period (the period beginning with the announcement or nomination of a person’s candidacy or with Senate candidates’ request to have their names grouped and ending 30 days after polling day).

**New section 306AD** will make it unlawful for a person to incur political expenditure in certain circumstances where the expenditure is enabled by a foreign donation. Under section 314AEB(1)(a) of the Act ‘political expenditure’ is expenditure for the purposes of:

- the public expression of views on a political party, or a candidate by any means
- the public expression of views on an issue in an election by any means
- the printing, production, publication or distribution of any material that is required to include a name and address
- the broadcast of any political matter required to be announced under the *Broadcasting Services Act 1992*
- the carrying out of an opinion poll or other research relating to an election or the voting intentions of electors.

**New subdivision B new sections 306AE to 306AI** will make it unlawful to receive an anonymous donation. **New section 306AG** provides that it is unlawful for a registered

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political party, a State branch of a registered political party, candidate or a member of a group to receive an anonymous donation (the prohibition on candidates and members of groups will only apply during the candidacy or group period). As for foreign donations, **new section 306AI** will make it unlawful for a person to incur political expenditure in certain circumstances where the expenditure is enabled by an anonymous donation.

Both **new sections 306AA** and **306AF** clarify that donations of anonymous or foreign property returned within six weeks after receipt will not incur an offence or penalty. If it is not possible or practicable to return an anonymous gift, the amount or value of the gift can be paid to the Commonwealth (**new paragraph 306AF(b)**).

## Penalties and offences

**Item 82** repeals subsection 315(1) to (4) and substitutes **new subsections 315 (1) to (4B)**.

**New subsections 315 (1) to (4)** provide that a person will commit an offence for failure to furnish a return, furnishing a return that is incomplete or failing to keep records as required under section 317. The penalty is increased to 120 penalty points (\$23 000). **Item 82** repeals the provisions that applied strict liability to the offences, which means that all elements of the offences have to be proved, potentially making prosecutions more difficult.

**New subsections 315 (4A) and (4B)** recast existing subsections 315(3) and (4) where a person furnishes a claim or a return that the person knows is false or misleading in a material particular or knows the claim or return has an omission that makes the claim or return false or misleading. The penalty will be 2 years imprisonment or 240 penalty points (or both) for a false or misleading claim conviction, or 12 months imprisonment or 120 penalty points (or both) for a false or misleading particulars offence. Currently the penalties are \$10 000 or \$5 000 respectively.

Similarly, there is a significant increase in the penalty for an offence against **subsection 315(6A)** where a person gives false or misleading information to another person making a claim under Division 3. The penalty is increased from \$1 000 to imprisonment for 2 years or 240 penalty points (or both).

Offences are created for the unlawful receipt of a donation in **new subsections 315(10A), (10B) and (10D)**, and also for incurring unlawful expenditure under **new subsections 306AD(1) or (2) or 306AI(1) or (2) (new subsection 315(10E))**. These carry the penalty of imprisonment of 12 months or 240 penalty points, or both.

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