



## Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010

Brenton Holmes, Nicholas Horne  
Politics and Public Administration Section  
Diane Spooner  
Law and Bills Digest Section

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## Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010

**Date introduced:** 20 October 2010

**House:** House of Representatives

**Portfolio:** Special Minister of State

**Commencement:** Sections 1–3 commence on the day the Act receives Royal Assent. Schedule 1 commences on 1 July 2011.

**Links:** The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bills home page, or through <http://www.aph.gov.au/bills/>. When bills have been passed they can be found at the ComLaw website, 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 \$11 500 (current rate, CPI-indexed) to \$1 000 and remove CPI indexation
- prohibit foreign donations to registered political parties, candidates and members of Senate groups and also prevent the use of foreign donations for political expenditure
- prohibit anonymous donations above \$50 to registered political parties, candidates and members of Senate groups and also prevent the use of anonymous donations above \$50 for political expenditure
- permit anonymous donations of \$50 or less in certain circumstances
- limit the potential for 'donation splitting'
- introduce a claims system for electoral funding and link funding to electoral expenditure
- extend the range of electoral expenditure that can be claimed and prevent existing members of Parliament from claiming electoral expenditure that has been met from their parliamentary entitlements, allowances and benefits
- 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 is a slightly revised version of the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009. In the Second Reading speech it is stated that the ‘measures contained in the Bill are not new’ and that the Bill ‘is in substantially the same form as that introduced in March 2009’.<sup>1</sup>

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

## Background

### The previous Bills—the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008 and the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009

The current Bill is the third political donations reform bill to be introduced by the Government.

The Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008 was introduced in the Senate on 15 May 2008. On 18 June 2008 the Senate referred the Bill to the Joint Standing Committee on Electoral Matters (JSCEM) for inquiry and report.<sup>2</sup> The JSCEM concluded its inquiry in October 2008, and a majority of the Committee recommended that the Senate support the proposals in the Bill relating to electoral funding, the donations disclosure threshold, reporting periods and the biannual framework, donation splitting, foreign and anonymous donations, and penalties, offences and compliance.<sup>3</sup> A majority of the JSCEM also recommended two changes to the Bill:

- a broadening of the definition of ‘electoral expenditure’ in section 308 of the Act to ‘include reasonable costs incurred for the rental of dedicated campaign premises, the hiring and payment of dedicated campaign staff, and office administration’, and
- an amendment of the proposals in the Bill relating to anonymous donations so as to allow for anonymous donations of under \$50 to be received ‘without a disclosure obligation being incurred by the donor, and without the recipient being required to forfeit the donation or donations to the Commonwealth’.<sup>4</sup>

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1. G Gray (Special Minister of State), ‘Second reading speech: Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010’, House of Representatives, *Debates*, 20 October 2010, p. 7, viewed 5 November 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2010-10-20%2F0034%22>

2. Australia, Senate, *Journals*, no. 16, 2008, pp. 509–18, viewed 10 November 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fjournals%2F2008-06-18%2F0004%22>

3. Joint Standing Committee on Electoral Matters (JSCEM), *Advisory report on the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008*, JSCEM, Canberra, October 2008, pp. xiii–xvii, viewed 2 November 2010, <http://www.aph.gov.au/house/committee/em/taxlawbill%202/report/fullreport.pdf>

4. *Ibid.*, pp. xiv, xvi.

In December 2008 the Government introduced amendments to the Bill partly in response to the JSCEM's recommended changes. Ultimately the Bill was defeated in the Senate on 11 March 2009 with the Government, the Australian Greens and independent Senator Nick Xenophon voting in favour of the Bill and the Coalition and Family First parties voting against the Bill.<sup>5</sup>

The Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009, which retained the measures in the 2008 Bill and contained some additional material including the government amendments to the 2008 Bill, was introduced in the House of Representatives on 12 March 2009. The Bill was opposed by the Coalition but passed the House on 16 March 2009.<sup>6</sup> The Bill was introduced into the Senate on 17 March 2009 and lapsed with the conclusion of the 42<sup>nd</sup> Parliament in July 2010.

## 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 \$1 500 to 'more than \$10 000' (CPI-indexed) and raising the limit for anonymous donations from \$1 000 to donations exceeding \$10 000 (also indexed).<sup>7</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>8</sup> During Senate debate on the Bill introducing these changes Senator Carr stated that:

The [ALP] 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>9</sup>

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5. Australia, Senate, *Journals*, no. 61, 2009, pp. 1666–67, viewed 10 November 2010, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fjournals%2F20090311\\_SJ061%2F0006%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fjournals%2F20090311_SJ061%2F0006%22)
  6. Australia, House of Representatives, *Votes and Proceedings*, vol. 84, 2008–09, pp. 936–37, viewed 10 November 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fvotes%2F2009-03-16%2F0012%22>
  7. *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth). 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 JSCEM had recommended the introduction of a \$10 000 CPI-indexed disclosure threshold for political donations: JSCEM, *The 2004 Federal Election: Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, JSCEM, Canberra, September 2005, p. 333, viewed 10 November 2010, <http://www.aph.gov.au/house/committee/em/elect04/report/fullreport.pdf>
  8. See e.g. 'Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2006', Senate, *Debates*, 16 June 2006, pp. 1–93, viewed 10 November 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F2006-06-16%2F0004%22>
  9. K Carr, 'Second reading speech: Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2006', Senate, *Debates*, 16 June 2006, p. 1, viewed 10 November 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F2006-06-16%2F0006%22>

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In its *National Platform and Constitution 2007* the ALP had 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>10</sup> The ALP *National Platform and Constitution 2009* broadly reiterated those commitments in the following terms:

Labor will improve the integrity of the electoral system and, most urgently, restore transparency, openness and accountability to the funding and disclosure regime ... [and] introduce a new scheme for the regulation of political financing, including donations, other revenues, expenditures, and record keeping.<sup>11</sup>

Further impetus for the current Bill has arisen from the various agreements entered into by the ALP with the Australian Greens and the independent MPs; the Government has stated that the Bill 'gives effect to the Government's recent commitment to the Australian Greens and the independent members to seek immediate reform of donation, disclosure and funding laws for political parties and election campaigns'.<sup>12</sup> The September 2010 agreement between the ALP and the Australian Greens commits both parties to:

... Seek immediate reform of funding of political parties and election campaigns by legislating to lower the donation disclosure threshold from an indexed \$11,500 to \$1,000; to prevent donation splitting between different branches of political parties; to ban foreign donations; to ban anonymous donations over \$50; to increase timeliness and frequency of donation disclosure; to tie public funding to genuine campaign expenditure and to create a 'truth in advertising' offence in the Commonwealth Electoral Act.<sup>13</sup>

These measures, with the exception of the truth in advertising offence, were elements of the 2008 and 2009 Bills. The parties have also agreed to:

... Seek further reform of funding of political parties and election campaigns by having a truly representative committee of the Parliament conduct a national inquiry into a range of options

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10. Australian Labor Party (ALP), *National Platform and Constitution 2007*, ALP, Canberra, 2007, pp. 181–82, viewed 10 November 2010, <http://pandora.nla.gov.au/pan/22093/20071124-0102/www.alp.org.au/platform/index.html>; ALP, *Cleaning up Government*, ALP, Canberra, 2007, p. 3, viewed 10 November 2010, <http://pandora.nla.gov.au/pan/22093/20071124-0102/www.alp.org.au/media/0807/msfinpaa080.html>
  11. ALP, *National Platform and Constitution 2009*, ALP, Canberra, 2009, p. 6, viewed 10 November 2010, <http://www.alp.org.au/getattachment/2337e801-5793-43fd-b3e7-583a0b246f3a/our-platform/>.
  12. G Gray (Special Minister of State), *Government Moves to Increase Transparency in Political Donations*, media release, 20 October 2010, p. 2, viewed 10 November 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F328958%22>
  13. J Gillard, W Swan, B Brown, C Milne, A Bandt, *The Australian Greens & The Australian Labor Party ('The Parties')—Agreement*, 1 September 2010, p. 1, viewed 10 November 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F165017%22>

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with the final report to be received no later than 1 October 2011, enabling any legislative reform to be dealt with in 2012.<sup>14</sup>

The agreement between the ALP and independent MPs Windsor and Oakeshott contains essentially the same terms regarding electoral finance reform.<sup>15</sup> A further agreement between the ALP and independent Andrew Wilkie MP declares that the parties ‘acknowledge specifically that reform proposals are being developed on ... [f]unding of political parties and election campaigns’.<sup>16</sup>

## Broader electoral reform agenda

The Bill is part of the Government’s broader electoral reform agenda. In December 2008 the Government issued a green paper examining electoral finance reform followed by a second green paper in September 2009 examining broader electoral reform issues.<sup>17</sup> The two green papers canvass various reform options.

In 2010 a raft of changes were made to electoral law including lowering the age of provisional enrolment from 17 to 16 years, increasing authorisation requirements for how-to-vote cards, and limiting the number of election candidates that can be endorsed by a political party in an electoral division.<sup>18</sup> Other legislative changes including setting the seventh day after the issue of election writs for the closure of the electoral rolls were not successful.<sup>19</sup>

However, In July 2010 a challenge to the current rolls closure provisions in the Act was mounted in the High Court of Australia, and on 6 August 2010 the Court declared these provisions to be invalid.<sup>20</sup>

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14. Ibid., p. 2. The agreement between the ALP and the Australian Greens also notes that the Greens ‘are predisposed to a system of full public funding for elections as in Canada’.
  15. J Gillard, W Swan, R Oakeshott, T Windsor, *The Australian Labor Party & the Independent Members (Mr Tony Windsor and Mr Rob Oakeshott) (‘the Parties’)—Agreement*, 7 September 2010, p. 1, viewed 29 October 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fjrnart%2F218795%22>
  16. J Gillard, A Wilkie, *The Hon Julia Gillard & Mr Andrew Wilkie (‘the Parties’)—Agreement*, 2 September 2010, p. 1, viewed 10 November 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F176826%22>
  17. Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, Australian Government, Canberra, 2008, viewed 10 November 2010, [http://www.dpmc.gov.au/consultation/elect\\_reform/docs/electoral\\_reform\\_green\\_paper.pdf](http://www.dpmc.gov.au/consultation/elect_reform/docs/electoral_reform_green_paper.pdf); Australian Government, *Electoral Reform Green Paper: Strengthening Australia’s Democracy*, Australian Government, September 2009, viewed 10 November 2010, [http://www.dpmc.gov.au/consultation/elect\\_reform/strengthening\\_democracy/docs/strengthening\\_australias\\_democracy.pdf](http://www.dpmc.gov.au/consultation/elect_reform/strengthening_democracy/docs/strengthening_australias_democracy.pdf)
  18. *Electoral and Referendum Amendment (Modernisation and Other Measures) Act 2010; Electoral and Referendum Amendment (How-to-Vote Cards and Other Measures) Act 2010; Electoral and Referendum Amendment (Pre-poll Voting and Other Measures) Act 2010*.
  19. Electoral and Referendum Amendment (Close of Rolls and Other Measures) Bill 2010; Electoral and Referendum Amendment (Close of Rolls and Other Measures) (No. 2) Bill 2010.
  20. High Court of Australia, *Rowe & Anor v Electoral Commissioner & Anor*, media release, 6 August 2010, viewed 10 November 2010, <http://www.highcourt.gov.au/media/rowe.pdf>

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This decision led to the enrolment of an additional 57 732 voters for the 2010 general election.<sup>21</sup> The Government may still pursue its legislative programme in relation to rolls closure and other areas in the future.

## Media commentary

There has been little media commentary on the measures contained in the Bill. Extant commentary has focused on the broad thrust of the proposed measures and has coincided with coverage of electoral finance reforms proposed by the NSW and Queensland state governments.<sup>22</sup> On 28 October 2010 the NSW Premier, Kristina Keneally, introduced to the NSW Parliament ‘a bill that implements groundbreaking reforms to political donations including bans, caps and other restrictions on political donations, and increased public funding of election campaigns’.<sup>23</sup> This Bill has passed the NSW Parliament.

On 6 August 2009 the Queensland government released a discussion paper, *Integrity and Accountability in Queensland*, to facilitate public discussion on issues including political donations, and subsequently committed to ‘reform electoral donation laws if the Commonwealth has not acted by July 2010’.<sup>24</sup> The Integrity Reform (Miscellaneous Amendments) Bill 2010 was introduced by the government in May 2010, but did not include measures capping political donations. Legislation giving effect to such reforms has reportedly been delayed until later in 2010.<sup>25</sup> A private member’s bill, the Electoral (Truth in Advertising) Amendment Bill 2010, was introduced into the Queensland parliament in May 2010.

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21. A further 40 408 voters had their enrolment details updated. Australian Electoral Commission, *Updated figures on Australians enrolled to vote for 2010 election*, media release, 18 August 2010, viewed 12 November 2010, [http://www.aec.gov.au/About\\_AEC/Media\\_releases/e2010/18-08b.htm](http://www.aec.gov.au/About_AEC/Media_releases/e2010/18-08b.htm)
  22. S Vogler, ‘Call to cap donations: Bligh wants Gillard to follow lead and scrap cash for access’, *Courier-Mail*, 5 July 2010, viewed 10 November 2010, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FWO7X6%22; AAP, ‘Greens and NSW Govt seal deal on campaign finance’, \*Canberra Times\*, 29 October 2010, viewed 10 November 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F320145%22>](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FWO7X6%22;AAP,%20Greens%20and%20NSW%20Govt%20seal%20deal%20on%20campaign%20finance%20)
  23. K Keneally (Premier), ‘Agreement in Principle speech’, Election Funding and Disclosures Amendment Bill 2010, New South Wales, New South Wales Legislative Assembly, *Debates*, 28 October 2010, p. 27 168, viewed 10 November 2010, <http://www.parliament.nsw.gov.au/Prod/parlment/hanstrans.nsf/V3ByKey/LA20101028>
  24. Queensland Government, *Response to Integrity and Accountability in Queensland*, Queensland Government, Brisbane, November 2009, p. 18, viewed 10 November 2010, <http://www.premiers.qld.gov.au/community-issues/open-transparent-gov/integrity-and-accountability-review.aspx>
  25. S Wardill, ‘Bligh Bills go soft on political donations’, *Courier-Mail*, 2 August 2010, viewed 10 November 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FF1X6%22>

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The reforms advanced by the NSW and Queensland governments have prompted some media discussion of limiting donations and campaign expenditure, which are not matters that the Commonwealth Bill addresses.<sup>26</sup>

It has also been suggested in the media that the Bill has little prospect of success in the Senate prior to July 2011.<sup>27</sup>

## Positions of the Coalition, non-government parties, and independents

In line with its stance on the 2008 and 2009 bills, the Coalition has stated that it will oppose the Bill:

The bill is a deliberate attempt to advantage the Labor Party and the Greens and to entrench that financial advantage. It will disadvantage permanently the coalition, the Independents and the smaller parties like Family First. So once again I say: we opposed the previous bills and we will continue to oppose this bill.<sup>28</sup>

In September 2010 the Coalition, together with the ALP and the independent members, formulated an agreement for parliamentary and governmental reform.<sup>29</sup> While the agreement is concerned mainly with parliamentary reforms, it also states that 'It is expected, through the life of this Parliament ... that there will be further steps taken to improve Government' in a number of areas including 'Electoral Funding Improvements' and 'Truth in Political Advertising improvements'.<sup>30</sup> In October 2010 it was reported that the Coalition was reconsidering its support for electoral finance reform due to concerns over third party donations.<sup>31</sup>

The Australian Greens and independent MPs Windsor and Oakeshott are likely to support the bill given their respective agreements with the ALP. Andrew Wilkie MP may support the Bill given the recognition of the reform measures in his agreement with the ALP.

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26. See e.g. N Berkovic, 'Overhaul flagged for political donations' *Australian*, 28 September 2010, viewed 10 November 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F244537%22>
  27. J Saulwick, 'Donations to parties may be outlawed', *Sydney Morning Herald*, 9 September 2010, viewed 10 November 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F180848%22>
  28. B Bishop, 'Second reading speech: Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010', House of Representatives, *Debates* (Proof), 16 November 2010, p. 75, viewed 17 November 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2010-11-16%2F0118%22>
  29. C Pyne, *Agreement for Better Parliament*, media release, 7 September 2010, viewed 12 November 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F202239%22>
  30. *Ibid.*, p. 9.
  31. M Priest, 'Coalition retreats from donation reform', *Australian Financial Review*, 14 October 2010, viewed 15 November 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F285142%22>

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It is likely that independent Senator Nick Xenophon will vote in favour of the Bill in the Senate given his support for the original 2008 Bill. In March 2009 Senator Xenophon indicated that he was 'supportive of the measures' in that Bill and stated that 'we need to get on with these particular amendments ... but we also need to look at the big picture in terms of comprehensive reforms'.<sup>32</sup> It has been reported that Senator Xenophon favours monthly donations disclosure together with immediate disclosure during election campaigns.<sup>33</sup>

Assuming a consistent voting pattern in the Senate for the Coalition, the Australian Greens, and Senator Xenophon, Family First's vote will decide the fate of the Bill in the Senate until 30 June 2011. Family First opposed the original 2008 Bill on the basis that it did not limit electoral funding for political parties to \$10 million per party,<sup>34</sup> and so Senator Fielding will presumably oppose the current Bill unless an agreement is reached with the Government.

From 1 July 2011 the Australian Greens will have the balance of power in the Senate in their own right; if the Bill has not passed the Senate by this date and is still before the Parliament it will almost certainly pass the Senate after 1 July 2011 with the Greens' support.

## Financial implications

The Government has indicated that the proposed provisions may result in increased costs for the Australian Electoral Commission (AEC); it is stated that 'the exact magnitude is difficult to quantify'.<sup>35</sup> 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>36</sup>

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32. N Xenophon, 'Second reading speech: Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008 [2009]', Senate, *Debates*, 11 March 2009, p. 1260, viewed 10 November 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F2009-03-11%2F0020%22>

33. D Guest, 'Union gave \$1.2m to GetUp!', *The Australian*, 15 November 2010, viewed 15 November 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F360872%22>

34. S Fielding, 'Second reading speech: Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008 [2009]', Senate, *Debates*, 11 March 2009, pp. 1261–62, viewed 10 November 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F2009-03-11%2F0021%22>. On 3 February 2009 Senator Fielding had moved an equivalent amendment to the Tax Laws Amendment (Political Contributions and Gifts) Bill 2008, which was negatived: Australia, Senate, *Journals*, no. 53, p. 1520, 2008–09, viewed 10 November 2010, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fjournals%2F20090203\\_SJ053%2F0051%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fjournals%2F20090203_SJ053%2F0051%22)

35. Explanatory Memorandum, p. 1.

36. *Ibid.*

In October 2008 a majority of the JSCEM recommended that the Government provide the AEC with appropriate resources with respect to administration of the proposed measures in the original 2008 Bill and other matters.<sup>37</sup> In evidence to the JSCEM, the Australian Electoral Commission stated that:

... if introduced the new measures will result in a significant workload increase for the funding and disclosure section of the AEC. We have estimated at this stage that workload increase to be at least threefold. Information technology costings are still being negotiated with the Department of Finance and Deregulation, through the budget process ...<sup>38</sup>

## Summary of key measures in the Bill

As noted above, the Bill substantially reproduces the provisions of the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009.

### 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>39</sup>

In an earlier (2000) inquiry report on the 1998 election a majority of the JSCEM had expressed the view that returning to a campaign expense reimbursement system 'would realise little if any savings

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37. JSCEM, *Advisory report on the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008*, op. cit., pp. xv–xvii.

38. P Dacey, 'Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008', Joint Standing Committee on Electoral Matters, *Debates*, 26 September 2008, p. 2, viewed 10 November 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommbill%2F11248%2F0001%22>

39. JSCEM, *The 2004 Federal Election: Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, op. cit., pp. 325–28.

but would simply reimpose another layer of administration and cost and also delay the payment of funding entitlements compared to the present system'.<sup>40</sup>

The Government has acknowledged that the measures in the 2010 Bill 'add to administrative processes for political parties and candidates', but has stated that 'it is not the intention of the Government to burden parties and candidates, but to increase the transparency and integrity of the electoral system'.<sup>41</sup>

The Bill seeks, among other things, to introduce a claims-based funding framework informed by the principle of linking public electoral funding to actual electoral expenditure incurred. In the Second Reading speech on the Bill it was stated that the new measures:

... will prevent candidates, or any political party, from making financial gain from the electoral public funding system. Public funding will continue to be paid to registered political parties, unendorsed candidates and unendorsed Senate groups who receive at least four per cent of the formal first preference votes at an election. Under the Bill, they will receive the **lesser** amount of either the electoral expenditure that was actually incurred in an election period between the issuing of the writs and the end of polling day, or the amount awarded per vote.<sup>42</sup>

The Bill proposes that registered political parties, unendorsed candidates, unendorsed Senate groups, and joint Senate groups would receive the lesser amount of *either* the election expenditure actually incurred *or* a set amount per first preference vote received (\$2.31191 per eligible vote to be CPI-indexed).

Special rules would apply to 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 to the AEC before polling day the signed agreement between the parties setting out how they have agreed to divide the first preference group votes. Under the measures in the Bill failure to do so would mean that the AEC would determine how the first preference votes would be divided.

## A new claims process

A major change proposed by the Bill is that, in order to be paid public election funding, the agent of the party, candidate or group would need to make a claim. Agents would be able to make an interim claim, or a final claim, or both (one of each only). A final claim 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).

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40. JSCEM, *The 1998 Federal Election: Report of the Inquiry into the conduct of the 1998 Federal Election and matters related thereto*, JSCEM, Canberra, June 2000, p. 126, viewed 10 November 2010, <http://www.aph.gov.au/house/committee/em/elect98/wholereport.pdf>

41. G Gray (Special Minister of State), 'Second reading speech: Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010', op. cit., p. 8.

42. Ibid.

- claims would be required to specify 'electoral expenditure' (see below) as defined in subsection 287(1), but would need only specify that expenditure 'that is to be claimed against which the entitlement to public funding is to be calculated'.<sup>43</sup> If a party made a single claim it would have to specify the electoral expenditure claimed by its branches and candidates in relation to all elections held on the same day.
- 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, and would not attract any public election funding.
- the AEC would be required to decide the claim and pay the applicable funding entitlement within 20 days of receipt. 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 was the lesser. It is not clear what would happen to the remaining five per cent of the entitlement, although 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>44</sup> Where an acceptable interim claim was lodged but no final claim was lodged, the Explanatory Memorandum indicates that the interim claim would be 'deemed to be the final claim. This process will finalise any claim for public election funding'.<sup>45</sup>
- 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 was 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.

The Bill also provides for single claims made by related registered parties covering the electoral expenditure of a party's federal branch and at least one state branch. Under the proposed rules parties making a single claim would be entitled to the lesser of the funding rate per first preference

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43. Explanatory Memorandum, p. 11.

44. Explanatory Memorandum, p. 13.

45. Explanatory Memorandum, p. 12.

vote received or the electoral expenditure claimed and accepted by the AEC. The Explanatory Memorandum states that ‘In this way, the electoral expenditure of the federal branch may be included in a claim for electoral expenditure even though it might not have endorsed any candidates’.<sup>46</sup>

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.

## Electoral expenditure

The Bill proposes to insert a definition of ‘electoral expenditure’ into subsection 287(1) of the Act. The Explanatory Memorandum notes that the definition will constitute ‘an exhaustive list of the types of expenditure that can be claimed to obtain election funding’ under the provisions of the Bill.<sup>47</sup>

The new definition would retain the substance of the current definition of ‘electoral expenditure’ in section 308 while relocating it to subsection 287(1) and adding the following elements:

- the inclusion of 5 new categories of expenditure incurred during the election period in relation to election campaigns, and
- the exclusion from the definition of any expenditure incurred by existing members of Parliament under subsection 287(1) and met by their parliamentary entitlements, allowances (except remuneration), or benefits.

The Explanatory Memorandum states that the last-mentioned provision is ‘intended to prevent “double dipping”’, and that:

As sitting members of Parliament may be able to meet some electoral expenditure by way of allowances, entitlements or benefits paid by the Commonwealth in some circumstances, it is not appropriate that his electoral expenditure is claimed for public election funding purposes.<sup>48</sup>

The proposed 5 new categories of electoral expenditure are:

- the rent of any house, building or premises used for the primary purpose of conducting an election campaign

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46. Explanatory Memorandum, p. 5.

47. Explanatory Memorandum, p. 3.

48. Explanatory Memorandum, p. 4.

- paying additional staff employed, or a person contracted, for the primary purpose of conducting an election campaign
- office equipment purchased, leased or hired for the primary purpose of conducting an election campaign
- the costs of running or maintaining that office equipment, and
- expenditure incurred on travel, or on travel and associated accommodation, to the extent that the expenditure could reasonably be expected to have been incurred for the primary purpose of conducting an election campaign.

The Bill also seeks to amend subsection 287(1) so as to insert a new definition of 'office equipment' for defining 'electoral expenditure' (telephones, faxes, computers, communication equipment, photocopiers etc.), and to repeal section 308 of the Act given the relocation of the definition of 'electoral expenditure' from section 308 to subsection 287(1).

## Disclosure thresholds

Currently under the Act the disclosure threshold for donations is donations totalling more than \$11 500 (CPI-indexed). The Bill proposes to lower the disclosure threshold to donations totalling \$1 000 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). In the Second Reading speech on the original 2008 Bill, the Government indicated that the main rationale for reversing the 2006 measures was:

... 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>49</sup>

The current 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 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 \$92 000 from an individual donor making eight separate donations of \$11 500 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>50</sup> This would provide that a political party is related

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49. J Ludwig (then Minister for Human Services), 'Second reading speech: Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008', Senate, *Debates*, 15 May 2008, p. 1964, viewed 10 November 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F2008-05-15%2F0043%22>

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

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 \$1 000 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 \$1 000 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 \$1 000 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 \$11 500 (CPI-indexed) to \$1 000 (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 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 original 2008 Bill the Government 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>51</sup>

## For donors

For donors, under the Bill's provisions biannual returns would need to be submitted if donations of \$1 000 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 \$1 000 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 \$1 000 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.

## 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, \$1 000 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 \$1 000 or more, whether

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51. J Ludwig (then Minister for Human Services), 'Second reading speech: Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008', op. cit.

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 \$1 000.

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. In March 2008 the Government indicated that disclosures made under the biannual framework would be publicly available within three months of the end of a reporting period.<sup>52</sup> The Government's 2008 *Green Paper* on electoral finance reform observes that it is a 'considerable logistical exercise for political parties in Australia to prepare their disclosure returns', and that 'there is a practical limit on how short reporting periods can be for comprehensive disclosures'.<sup>53</sup>

The timely mechanism of reporting disclosures on the internet has been noted by commentators, one example being the practice of the New York State Board of Elections which requires regular filing of transactions related to a campaign (including within 24 hours during the period immediately prior to polling days).<sup>54</sup> The *Green Paper* notes that the introduction of this type of reporting in Australia would necessitate the introduction of 'mandatory electronic record keeping and lodgement' requirements.<sup>55</sup> In September 2010 it was reported that the Special Minister of State, the Hon Gary Gray MP, was seeking to reduce the timeframe for political parties' disclosure of donations to being "'within days'" of receipt, 'possibly on a website'.<sup>56</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 \$1 000 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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52. J Faulkner (then Special Minister of State), *Electoral Reform, Parliament House, Canberra*, media release, Canberra, 28 March 2008, p. 5, viewed 10 November 2010,

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FAU806%22>

53. Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, op. cit., p. 55.

54. Further information can be found at the New York State Board of Elections website:

<http://www.elections.state.ny.us/Candidate.html>

55. Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, op. cit., p. 55.

56. A Probyn, 'Divulge party donors much sooner: Gray', *West Australian*, 29 September 2010, viewed 15 November 2010,

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F251186%22>; see also N Berkovic, 'Overhaul flagged for political donations', *The Australian*, 28 September 2010, viewed 15

## 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>57</sup> There have been calls in the past, for example from former Australian Democrats Senator Andrew Murray, for foreign donations to be banned.<sup>58</sup> The issue of foreign donations achieved some prominence in 2006 with the disclosure of a 2004 donation of \$1 million to the Liberal Party made by British peer Lord Ashcroft.<sup>59</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 the prohibition will help 'remove a perception that foreign donors could exert influence over the Australian political process'.<sup>60</sup>

The Bill seeks to achieve the Government's 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 the candidacy or group period (the period beginning with the announcement or nomination of a person's candidacy or with Senate candidates' requests 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

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November 2010,

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F244537%22>

57. JSCEM, *The 2004 Federal Election: Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, op. cit., pp. 292, 321–23, 335, 337.

58. A Murray, *Ban Foreign Donations*, media release, 1 February 2006, viewed 10 November 2010, [http://parlinfo.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=pressrel&Criteria=CITATION\\_ID:VSMI6%3B](http://parlinfo.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=pressrel&Criteria=CITATION_ID:VSMI6%3B). See also A Murray, Supplementary remarks, JSCEM, *The 2004 Federal Election: Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, op. cit., pp. 417–18.

59. 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.

60. G Gray (Special Minister of State), 'Second reading speech: Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010', op. cit., p. 8.

- 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 that 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>61</sup>

## 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 \$11 500 (CPI-indexed) from anonymous donors.

In essence, the Bill proposes to prohibit anonymous donations of more than \$50 to registered political parties, candidates and members of Senate groups and to prevent the use of anonymous donations for political expenditure by:

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61. 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: Explanatory Memorandum, p. 7.

- 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, and
- 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.

The Bill also proposes to exempt the receipt of anonymous money donations of \$50 or less made in certain circumstances from being unlawful. In the Second Reading speech on the Bill it was stated that:

The Bill extends [the] ban on anonymous donations to all anonymous donations **except** where the donation is \$50 or less and has been received at a 'general public activity' (such as a fete where people may place money in a bucket) or at a 'private event' (such as a dinner, dance, or quiz night where people might donate small sums of money).<sup>62</sup>

Anonymous money donations of \$50 or less received by registered political parties, candidates and Senate groups would be permitted where the donation was received at either:

- a general public activity (an activity conducted in a public place or in a place to which members of the public have ready access)—for example street and fete stalls, or
- a private event (a function, meeting or other event that is not a general public activity).

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62. G Gray (Special Minister of State), 'Second reading speech: Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010', op. cit., p. 8.

Under the changes proposed by the Bill, it would be lawful to incur political expenditure that was enabled by permitted anonymous donations. In each circumstance a person involved in the organisation of the activity/event would be required to make a record of the date, location and nature of the activity/event; the details of people involved in the collection or receipt of donations at the activity/event; and the total amount of anonymous donations received by/on behalf of the recipient at the activity/event.

For private events, a record would also need to be made of the number of people attending the event, and, if the total amount of donations received at a private event exceeded the total of \$50 multiplied by the number of attendees, the donation would only remain a permitted anonymous donation if the excess was returned within 6 weeks or else paid to the Commonwealth if a return was not possible or practicable.

Provisions in the Bill would also ensure that, where an individual made multiple donations at an activity/event totalling more than \$50, and a person involved in the collection or receipt of donations was aware that the donations totalled more than \$50 and were from the same individual, the excess would not be a permitted anonymous donation.

The Bill would also impose disclosure obligations on registered political parties, candidates, Senate groups, and those incurring political expenditure regarding permitted anonymous donations received during the disclosure/reporting period and the associated activities/events.

## 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 original 2008 Bill it was indicated that the rationale for the changes was to 'ensure that the AEC can implement and 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>63</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

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63. J Ludwig (then Minister for Human Services), 'Second reading speech: Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008', op. cit., p. 1965.

- 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). Maximum penalties for these offences would be imprisonment for 12 months or 240 penalty units or both.<sup>64</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.

In relation to permitted anonymous donations, the Bill would also create a new offence for making a record in relation to a general public activity or private event where it was known that the record was false or misleading in a material particular or omitted a matter or thing without which the record would be misleading in a material particular. The maximum penalty for this offence would be imprisonment for 12 months or 120 penalty units or both.

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 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.

Finally, the Bill 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.

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64. Under section 4AA of the *Crimes Act 1914* (Cth) a 'penalty unit' is currently \$110, thus the maximum fine here would be \$26 400.

## Key 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.

**Item 7** relocates the existing definition of ‘electoral expenditure’ from section 308 to subsection 287(1) and inserts 5 new categories of electoral expenditure into the definition. These categories are electoral expenditure incurred during the election period on:

- the rent of any house, building or premises used for the primary purpose of conducting an election campaign
- paying additional staff employed, or a person contracted, for the primary purpose of conducting an election campaign
- office equipment purchased, leased or hired for the primary purpose of conducting an election campaign
- the costs of running or maintaining that office equipment

(See **proposed subparagraphs 287(1)(b)(i)-(iv)**).

- travel, or on travel and associated accommodation, to the extent that the expenditure could reasonably be expected to have been incurred for the primary purpose of conducting an election campaign

(See **proposed subparagraphs 287(1)(c)(i)-(ii)**).

**Item 7** also excludes from the definition of ‘electoral expenditure’ any expenditure incurred by existing members of Parliament under subsection 287(1) and met by their parliamentary entitlements, allowances (except remuneration) or benefits (**proposed paragraphs 287(1)(d) and (e)**).

**Item 12** inserts a definition of ‘office equipment’ into subsection 287(1) further to item 5.

**Item 15** inserts a definition of ‘single claim’ into subsection 287(1) to mean a claim made by registered political parties that are related to each other and for electoral expenditure that covers



both the federal and one or more State branches of the registered political parties. Thus federal branch expenditure on an election may be claimed even though it might not have endorsed any candidates.

## Entitlement to electoral funding

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 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 23** 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.

**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 \$2.31191 for each formal first preference vote or the amount of actual electoral expenditure claimed and accepted by the 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)**).

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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- 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)**).

A claim made outside the times set in subsections 298B(1) and (2) will not be valid and ‘will not be processed by the Electoral Commission or attract any public election funding’.<sup>65</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.

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**).

## Payment of electoral funding

**Items 24-26** 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 27** 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.

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65. Explanatory Memorandum, p. 12.

**New section 301** will allow the AEC to vary a decision 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 26**).

## Disclosure thresholds and reporting

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 \$11 500 (CPI-indexed) to the **proposed level of \$1 000** or more (unindexed) is dealt with in **items 34, 35, 37, 38, 41, 43, 45, 72 and 76**. **Item 118** 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 the sections amended referring to indexation under section 321A are also repealed.

**Item 28** 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 29**).

**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. (**Item 40**)

**Items 41-47** 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 48** 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 48** requires returns to be provided biannually instead of once every twelve months. For example, currently donations over \$11 500 (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 48** 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 return will not be required (**new subsections 305B(2A) and (2B)**). **Item 48** 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 49** 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'.

## Foreign and anonymous donations amendments

**Item 51** 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 Australia, 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. In relation to candidates and members of groups, the prohibition applies 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 306AH** provides that it is unlawful for a registered 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 is the case for foreign donations, **new section 306AJ** 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 306AG** 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 306AG(b)**).

## Penalties and offences

**Item 98** repeals subsection 315(1) to (4) and substitutes **new subsections 315 (1) to (4C)**.

**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 maximum penalty is increased to 120 penalty units (\$13 200).

**Item 98** 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), (4B) and (4C)** provide for offences 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; or makes a record about an activity connected with permitted anonymous gifts and knows that the record is false or misleading. The penalty will be 2 years imprisonment or 240 penalty units (or both) for a false or misleading claim conviction, or 12 months imprisonment or 120 penalty units (or both) for a false or misleading particulars offence.

**Item 100** provides for 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 maximum penalty is increased from \$1 000 to imprisonment for 2 years or 240 penalty units (or both).

Offences are created (**Item 102**) 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 306AJ(1) or (2) [new subsection 315(10E)]**. These carry the penalty of imprisonment of 12 months or 240 penalty units, or both.

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