



Australian Government

Electoral Reform Green Paper

DONATIONS, FUNDING AND EXPENDITURE

December 2008



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Message from the Special Minister of State



Australia is a young nation in an old country – but on a national scale, an old democracy. Democracy has been part of our Australian values since before there was a nation called Australia. Our nation was founded through a process that was orderly, parliamentary and profoundly democratic. Our founding fathers were directly elected by the people of what would become the Commonwealth of Australia. The Constitution they drafted, which created our nation, was adopted by popular vote in every colony.

We are rightly proud of our democratic history, from the introduction of the secret ballot to women’s suffrage and compulsory enrolment, and we rightly value core democratic values: fairness, transparency, political integrity.

Australians also want a healthy political system, with impartial umpires and processes underpinning our electoral system, keeping our campaigning fair and transparent and ensuring our systems are free from corruption and improper influences.

We are justifiably proud of our record at the leading edge of electoral and democratic reform for much of the previous century. But electoral reform is never a finished product. As time passes and technology advances, our laws and policies must also adapt.

Unlike many comparable countries, Australia has yet to address the impact of change on our electoral system. We must ensure we do not fall behind world’s best practice.

Our democracy faces new challenges.

- Spiralling costs of electioneering have created a campaigning ‘arms race’ – heightening the danger that fundraising pressures on political parties and candidates will open the door to donations that might attempt to buy access and influence.
- New media and new technologies raise questions of whether our legislation and regulation remain appropriate and effective.
- ‘Third party’ participants¹ in the electoral process have played an increasing role, influencing the political contest without being subject to the same regulations which apply to political parties, raising concerns about accountability and transparency.
- Australia has overlapping electoral systems, regulating different levels of government, creating uncertainty and confusion.

In Australia, as in other democracies around the world, the potential for large and undisclosed sums of money in election and campaign financing has become more and more a matter of concern to the public. Perceptions of the potentially distorting nature of large donations – either cash or other resources – to political parties will degrade the public’s trust in the integrity of the political process. These perceptions of possible influence need not be only concerns about potential undue influence in the narrow sense of how government decisions are made, but in a broader sense: concerns that parties and politicians dependent on large donors will be if not compliant, then at least receptive, or that large donors may get access that others do not.

¹ Third parties are individuals or organisations that incur political expenditure (as defined under section 314AEB of the *Commonwealth Electoral Act 1918*) but who are not seeking election.

The perception of undue influence can be as damaging to democracy as undue influence itself. It undermines confidence in our processes of government, making it difficult to untangle the motivation behind policy decisions. Electors are left wondering if decisions have been made on their merits.

Restrictions on the use of money in election campaigns and the raising of money by political parties and other political actors enacted in other jurisdictions have as their aim the limitation of the potential political influence exercised by private sources of wealth, by controlling either the supply of, or the demand for, campaign cash – or both. The central priority of this approach is to maintain a degree of fairness between the individual participants in the political process, and equality of opportunity between the candidates and parties contesting the vote.

Many countries have pursued electoral reform to reduce or remove these problems. Limiting or eliminating donations to political parties, limiting spending, increasing public funding and other support and extending electoral regulation to third parties are solutions pursued or proposed elsewhere. These and other remedies are discussed in this Green Paper.

Arguments against such regulatory restrictions often emphasise that the ultimate sanction in the political process is electoral defeat. Two factors must be present for this sanction to be effective. First, the system must allow the electorate to be aware of what is taking place. This requires transparency and the active provision of information about political party funding and conduct. Second, electors must amend their vote to punish the party they perceive as behaving improperly. In Australia, this sanction could be argued to be of limited present value. Voters do not know who has donated in the lead up to an election and how much until well after they have cast their ballot. Given this, and given that all parties accept donations, with the major parties often receiving substantial donations from the same corporations, there can be no certainty that electors can, or will, register any objection to donations at the ballot box.

Laws regulating election campaign spending and private donations are inevitably vulnerable to criticism on the basis of their practicality and usefulness. It can fairly be said that money, like water, will always find a way. Restricting the flow of legitimate money into the political process from one direction may result in less transparent money flows in another. The issues surrounding electoral regulation and the regulation of political financing are ever evolving. Not only do the techniques and technologies of campaigning change continually, but electoral participants can adapt to new rules and may seek to exploit any perceived loopholes.

However, the fact that laws may be evaded by the unscrupulous is not an argument against having those laws. The choice before us is whether to seek to adapt ourselves, or to throw up our hands and allow participants in the political system to do what they want. Given the importance of political financing to the conduct of elections, the structure of our political system, and the operation of political parties and other political actors, it is incumbent on governments to engage with these questions, and to take active steps to ensure that our democracy evolves in ways consistent with the expectations and requirements of citizens.

Changes to political financing have direct effects on election campaigning. Electoral reform intended simply to remedy obvious flaws can have profound and long-reaching impacts, both negative and positive. However, less immediately obvious are the resulting changes to political parties and political culture. Given the importance of political parties to the stability of our democracy, changes to election funding must be considered not only in terms of the administration of elections and the conduct of government, but the make-up of political parties themselves.

The intent of this Green Paper is to raise questions of both the values Australian electoral law ought to serve, and the specific measures taken to pursue those values. As the first part of the Government's consultation process on electoral law reform, it concentrates on donation and disclosure reform and closely related issues such as the public funding of political parties and the possible regulation of campaign expenditure.

In considering reforms to Australia's political finance regime, we must consider first what we wish our democracy to look like, how we want it to operate, and what kind of political parties and candidates we want to have in it.

This Green Paper process is focused on the Commonwealth electoral funding and disclosure system. The Australian Government has sought the cooperation of the states and territories in progressing reforms across all similar systems operating in Australia. I have consulted state and territory ministers in the preparation of this paper and will be consulting them further on your responses to the paper, and the directions that those responses suggest governments should take on the issues it raises.

Your comments on this Green Paper are invited by **23 February 2009**.

Public debate and discussions with the states and territories about these issues are critical, but it is also vital that we attempt to work co-operatively with political parties of all persuasions to progress these issues. We must work within the framework provided by our Constitution and democratic system, and in line with the values of Australian democracy, values which I believe are shared across all parties. I hope that these changes can be achieved with both bipartisan and public support, and with reforms that promote greater transparency and accountability, there should be no reason we cannot achieve this.

A further Green Paper will examine a broader range of issues, aimed at strengthening our national electoral laws. Suggestions for issues that should be examined in Part 2 of the Paper are also welcome, by **23 February 2009**.

I sincerely hope that the Green Paper process will open the debate and lead to the implementation of reforms that will ensure the Australian electoral system is world's best practice.

A handwritten signature in black ink, appearing to read 'John Faulkner', with a large, sweeping flourish at the end.

JOHN FAULKNER
Cabinet Secretary and Special Minister of State



Overview of this paper

The purpose of the Green Paper process is to encourage public debate about options for improving and modernising Australia's federal electoral system. This paper is intended to raise the major issues that need to be considered by the Australian Government in improving and modernising Australia's electoral funding and financial disclosure requirements. Unless otherwise indicated, all references to Australia in the Green Paper relate to the funding and disclosure system at the federal level.

Part 1 of this Green Paper:

- provides background information about the rationale for the establishment of the federal electoral funding and financial disclosure system;
- describes the federal, state and territory systems;
- examines whether the federal system continues to achieve the original objectives of the system; and
- compares the federal system with the systems in some other countries.

Part 2:

- explains the aims of providing public funding for political parties and candidates to contest elections; and
- examines the extent to which the public funding scheme is effective in achieving these aims.

Part 3:

- explains the rationale for requiring political parties, candidates and other participants in the political process to disclose their finances;
- describes the sources of private funding for political parties and candidates, through donations and other sources such as fundraising and functions; and
- examines whether the financial disclosure scheme is effective in regulating the finances of all those involved in the political process.

Part 4:

- outlines the arguments for and against banning or capping private funding, and capping expenditure, with reference to the approaches to regulation in some other countries.

Part 5:

- examines the effectiveness of the enforcement provisions of the federal election funding and financial disclosure system.

Part 6:

- canvasses the different elements of funding and disclosure systems, and considers how they could be used or combined to achieve different objectives.

Part 7:

- presents some closing comments; and
- provides a list of questions for readers to consider as they formulate their response to this Green Paper.

How to make submissions

The Australian Government invites written submissions in response to this paper, which is also available at www.pmc.gov.au. General comments are invited. Interested people are also invited to respond to some or all of the specific issues raised in the paper, and, in particular, some or all of the questions at Chapter 11.

The closing date for submissions is **23 February 2009**. Late submissions may not be considered.

Subject to the following, all submissions will be published on the Internet, after the closing date, at www.pmc.gov.au and therefore will be available to the public. The Australian Government reserves the right not to publish any submission, or part of a submission, which contains offensive language or potentially defamatory material, or which does not comply with the guidelines below.

Important: Please indicate clearly if you want all, or part, of your submission to be treated as confidential or anonymous. All confidential material in the submission should be clearly marked as 'confidential and not for publication'. You may wish to consider including any confidential part of your submission as a separate appendix.

GUIDELINES FOR SUBMISSIONS

Submissions should be clearly marked 'submission'. Correspondence will not be considered a submission unless it is clearly marked as such.

Submissions should preferably be typed. If handwritten, submissions should be clearly legible and written in black ink in order to facilitate publishing on the website.

If your submission is longer than 5 pages, you may wish to consider including a summary of the main points.

Please limit email attachments to 10MB in size (total). Transmission by email is not a secure medium. If you have concerns about using this form or if your submission is sensitive, please send your submission to the postal address below.

If you send your submission by post, you may wish to provide an electronic copy of the submission and any attachments on disk or CD.

Attachments should be in Microsoft Word, Rich Text Format (RTF) or Portable Document Format (PDF).

All submissions require a 'name for publication' (unless anonymity has been requested). This can be an individual, group or organisation. This name will appear with your submission when it is published online.

It is also requested that people lodging a submission provide contact details (your name, postal address, email address (if applicable) and an optional contact telephone number) should further information or clarification be required. We may also contact you to inform you of the policy process relating to electoral reform or seek your views on related matters. These personal contact details (apart from the submitter's name) will only be used for these purposes and will not be published.

If the submission is being submitted on behalf of an organisation, the name of the organisation and the position of the person submitting the submission should be provided.

If you are making a submission as a group or organisation, please include the details of a contact person for the group or organisation.

For ease of publication, it is requested that people provide this information separately by completing a **cover sheet** which should be sent with the submission. The cover sheet is available at the end of this Green Paper (detachable), from the website at www.pmc.gov.au, or by contacting the Electoral Reform Secretariat by email at electoralreformsecretariat@pmc.gov.au or by telephone on (02) 6271 5534.

Additional guidelines may be published on the website at www.pmc.gov.au.

PRIVACY

Your views are being sought for the purpose of informing the Australian Government's policy decisions on the funding and disclosure regime. We may also contact you to inform you of the policy process relating to electoral reform or seek your views on related matters. Personal information that you provide will only be used for these purposes. Personal information may be disclosed to the Cabinet Secretary and Special Minister of State or to officers of the Department of Finance and Deregulation and the Australian Electoral Commission as members of the Electoral Reform Task Force for the purposes outlined above. Contents of your submission may be included in subsequent publications.

WHERE TO SEND YOUR SUBMISSION

You may lodge your submission by email, post or facsimile.

The email address for submissions is:
electoralreformsecretariat@pmc.gov.au

Alternatively, you can post a submission to:
Electoral Reform Secretariat
Department of the Prime Minister and Cabinet
PO Box 6500
CANBERRA ACT 2600

Your submission can also be sent by facsimile to (02) 6271 5776.

You only need to lodge your submission once. If you lodge your submission by email, there is no need to send a separate copy by post or facsimile. Receipt of submissions may be confirmed by contacting the Secretariat.

If you have questions on the Green Paper process, please contact the Secretariat on telephone (02) 6271 5534 or by email to electoralreformsecretariat@pmc.gov.au.

CONFIDENTIALITY STATEMENT

All submissions will be treated as public documents, unless the author of the submission clearly requests otherwise by marking all or part of the submission as 'confidential'. Public submissions may be published in full on the website, including any personal information of authors and/or other third parties contained in the submission. If your submission contains personal information about any person who is not an author of the submission, please indicate on the cover of your submission if the person or persons have **not** consented to the publication of their information.

Any request under the *Freedom of Information Act 1982* for access to a submission marked 'confidential' will be determined in accordance with that Act.



SECOND GREEN PAPER

The Australian Government also welcomes suggestions for the second Green Paper on a broader range of issues to improve national electoral laws.

Your suggestions should be sent by email, post or facsimile to the addresses above by **23 February 2009**.

As these suggestions will not be published, please provide them as a separate document.

The same guidelines, conditions for privacy and confidentiality and details of where to send submissions as set out above also apply for suggestions for the second Green Paper.

Part 1 – Overview of Australia's Funding and Donation Regime

CHAPTER 1. INTRODUCTION

The purpose of this Green Paper is to identify the major issues that need to be considered by the Australian Government in improving and modernising Australia's federal electoral system.

This chapter provides background information about the aims of the federal election funding and financial disclosure system. It explains significant changes in the nature of campaigning and the increasing costs of campaigning, and in that context, raises questions about the effectiveness of our current system.

Chapter 1 also describes the measures the Australian Government has proposed for making immediate improvements to the federal election funding and financial disclosure system.

BACKGROUND

- 1.1 How elections are publicly and privately funded, and the way in which the finances of political parties, candidates and other participants in the electoral process are regulated and controlled is critical to the integrity of Australia's political process.
- 1.2 The current federal election funding and financial disclosure scheme was introduced in 1984,² with the aims of providing political parties and candidates with public funding to assist them in contesting elections, reducing their reliance on private funding, requiring the disclosure of campaign related transactions in the interest of transparency, particularly donations and electoral expenditure, and reducing the risk of corruption.
- 1.3 The scheme has undergone significant change since 1984, particularly with the move away from an election funding related disclosure basis to a more comprehensive annual disclosure regime for political parties. For example, political parties are now required to account for all receipts, expenditure and debts. The question is, however, whether evolution of the scheme has kept pace with the changes in how election campaigns, and electoral activities more generally, are conducted.
- 1.4 It is argued by some commentators that since the introduction of the scheme, the major political parties' approach to campaigning for election has evolved from campaigning in the period immediately before an election to engaging in continuous or permanent campaigning between elections, increasing their campaigning in the year before an election.³
- 1.5 The political parties use a combination of old and new media to maximise the audience for their messages both between elections, and, in particular, in the year before an election, communicating their messages through advertising and commentary in a range of media

² Part XX of the *Commonwealth Electoral Act 1918* was inserted by the *Commonwealth Electoral Legislation Amendment Act 1983* and commenced on 21 February 1984.

³ P Van Onselen and W Errington, 'The Democratic State as a Marketing Tool: The Permanent Campaign in Australia', *Commonwealth & Comparative Politics*, vol. 45, no. 1, 2007, p. 78.

including print, television, radio and Internet sites and applications, such as *FaceBook*, *MySpace* and *YouTube*.⁴

- 1.6 The modern phenomenon of permanent campaigning is expensive and increasingly so. Media advertising remains a major cost, and the major political parties' expenditure on campaigning, principally through advertising, is increasing at rates far in excess of inflation.
- 1.7 Under our current disclosure regime, only very limited itemised information is made publicly available about election expenditure. Such data was available from 1984 to 1996. The following table produced from figures provided by the Australian Electoral Commission (AEC) shows the major categories of electoral expenditure reported by the federal, state and territory branches of the Australian Labor Party (ALP) and the Liberal Party of Australia (Liberal Party) between 1984 and 1996.⁵

Table 1 – Electoral Expenditure of the ALP and the Liberal Party – 1984 to 1996

ALP				
	1984 (\$'000s)	1987 (\$'000s)	1990 (\$'000s)	1996 (\$'000s)
Broadcasting	1,659	4,555	6,842	9,038
Publishing	802	2,213	2,797	840
Display	81	0	0	6
Production	527	782	1,533	0
Printing	904	1,855	2,438	1,188
Opinion Poll	102	185	705	751
TOTAL	4,075	9,590	14,315	11,823

Liberal Party				
	1984 (\$'000s)	1987 (\$'000s)	1990 (\$'000s)	1996 (\$'000s)
Broadcasting	1,817	3,992	3,602	5,322
Publishing	906	2,029	2,975	2,132
Display	11	118	8	36
Production	531	1,133	1,714	0
Printing	810	738	2,516	2,552
Opinion Poll	161	196	384	1,123
TOTAL	4,236	8,206	11,199	11,165

⁴ T Flew, 'Not yet the Internet election: Online media, political commentary and the 2007 Australian federal election', *Media International Australia*, vol. 126, 2008, accessed at <http://eprints.qut.edu.au>.

⁵ The period from 1984 to 1996, except in relation to the 1993 election, is the period in which political parties were required under the *Commonwealth Electoral Act 1918* to lodge returns of electoral expenditure with the AEC. The requirement was originally repealed prior to the 1993 election upon the introduction of more comprehensive annual disclosure requirements for political parties, then reintroduced for the 1996 election before being again removed from the legislation with the result that specific information about political parties' electoral expenditure in the elections after 1996 is not available. The table includes the major categories of expenditure that were required in the relevant years (in 1996, the production costs of advertisements were reported in the context of reporting on broadcasting, publishing and displaying advertising).

- 1.8 On these figures, the ALP's campaign expenditure increased in real terms (that is, after removing the effect of inflation) between 1984 and 1996 by approximately 60 per cent,⁶ and the Liberal Party's by approximately 45 per cent.⁷
- 1.9 As political parties were not required to continue to lodge returns on their electoral expenditure after 1996, amounts after that date are not available. The parties are, however, required to disclose their total yearly expenditures. The difference in the reported total yearly expenditures for the ALP and the Liberal Party for the years 2003-04 (a non-election year) and 2004-05 (an election year) provide estimates of electoral expenditure of approximately \$19.4 million and approximately \$22 million, respectively.
- 1.10 Figures calculated on this basis for the national bodies of the two major parties indicate that between the 1984 and 2004 federal elections,⁸ the ALP's expenditure had increased in real terms by approximately 116 per cent and the Liberal Party had increased in real terms by approximately 136 per cent.⁹ The 2007 election is widely believed to have been considerably more expensive for the major parties than their 2004 campaigns.
- 1.11 The magnitude of campaign expenditure and the rising costs of campaigns place considerable pressures on the resources of political parties. Political parties fund their campaigns through a combination of public and private funding. An analysis by the AEC of relevant party returns from 1999-2000 to 2001-02 indicates that public funding was estimated to constitute only approximately 17 per cent of the total funding of the major political parties (the ALP and the Liberal Party) while private funding provided approximately 83 per cent of the major political parties' funding over the electoral cycle. The reliance on public funding by these two parties had increased to approximately 20 per cent for the 2004 electoral cycle from 2002-03 to

⁶ The AEC's records indicate that the ALP's expenditure on broadcasting, publishing, display, production, printing and opinion polls increased from approximately \$4.1 million in 1984 (or \$7.4 million in 1996 dollar values) to approximately \$11.8 million in 1996.

⁷ The AEC's records indicate that the Liberal Party's expenditure on broadcasting, publishing, display, production, printing and opinion polls increased from approximately \$4.2 million in 1984 (or \$7.7 million in 1996 dollar values) to approximately \$11.2 million in 1996.

⁸ Figures for the 2007 election are not yet available. The returns will be released to the public by the AEC in February 2009.

⁹ The AEC has advised that the calculations are based on the following, using the Reserve Bank of Australia's inflation calculator:

ALP					
1984 Electoral Expenditure (\$'000s)	1984 Adjusted to 2004 Value (\$'000s)	2003-04 Expenditure (\$'000s)	2004-05 Expenditure (net of debt reduction) (\$'000s)	Indicative Increase on 2003-04 (\$'000s)	Percentage Increase on 1984
4,075	8,966	6,625	25,982	19,357	116
Liberal Party					
1984 Electoral Expenditure (\$'000s)	1984 Adjusted to 2004 Value (\$'000s)	2003-04 Expenditure (\$'000s)	2004-05 Expenditure (no reduction in debt) (\$'000s)	Indicative Increase on 2003-04 (\$'000s)	Percentage Increase on 1984
4,237	9,322	5,017	26,977	21,960	136

2004–05. The following table, produced from figures provided by the AEC, illustrates the level of public and private funding for the ALP and the Liberal Party.¹⁰

Table 2 – Public and Private Funding for the ALP and the Liberal Party from 1999–00 to 2004–05

2001 Electoral Cycle (1999–00 to 2001–02)			
Party	Total Receipts (\$m)	Private Funding (%)	Public Funding (%)
ALP	116.9	85	15
Liberal Party	102	82	18

2004 Electoral Cycle (2002–03 to 2004–05)			
Party	Total Receipts (\$m)	Private Funding (%)	Public Funding (%)
ALP	150.8	81	19
Liberal Party	133.4	79	21

- 1.12 Political parties raise private funds through a range of means, including membership and affiliation fees, fundraising activities, donations from organisations and individuals, investments and loans. As donations constitute only about 20 per cent of the major political parties' total funds, some 60 per cent of political parties' total funds comes from private sources other than donations, such as membership fees (including union affiliation fees) and returns on private investments made by each of the major parties.¹¹ At the federal level, donations are required to be fully accounted for by donors as well as recipients, whereas other sources of private funding are not presently subject to any greater transparency than a single line figure in the disclosure return of the recipient.¹²

¹⁰ The AEC has advised that the calculations are based on the following: information from relevant party returns; total receipts exclude detailed receipts disclosing internal party transfers from one party branch to another branch of the same party; the figures do not distinguish between donations, other receipts or amounts received by parties from associated entities; and public funding only relates to transactions from a state or Commonwealth electoral body and does not include any other form of public funding. The AEC also advises that the Northern Territory Country Liberal Party has not been included in the calculations as it is not formally linked to the Liberal Party. The figures for private funding may also include funds which have been given by a party to an associated entity and which have been returned subsequently by the associated entity to the party.

¹¹ In New South Wales, 'donation' is defined to include membership and affiliation fees. This means that membership fees, entry fees to fundraising events and affiliation fees are required to be disclosed in the same way as gifts of money.

¹² The AEC observes that the Electoral Act requires disclosure returns to contain details of the 20 per cent of major political parties' funds that come from donations. By comparison, the Electoral Act only requires disclosure returns to contain a single line figure for the 60 per cent of major political parties' total funds that come from private sources other than donations.

- 1.13 The following table, produced from figures provided by the AEC, illustrates the increase in public funding paid to political parties, candidates and Senate groups with each election since 1984. The jump in payments made at the 1996 election is due to the base rate for public funding being reset in 1995 at \$1.50 per vote for House of Representatives and Senate elections, which was an effective doubling of the indexed rates that existed at that time.

Table 3 – Public Funding Paid Since 1984

1984	1987	1990	1993	1996	1998	2001	2004	2007
\$7.8m	\$10.3m	\$12.9m	\$14.9m	\$32.2m	\$33.8m	\$38.6m	\$41.9m	\$49.0m

- 1.14 The AEC calculates¹³ that the total amount of public funding paid between the 1984 election and the 1996 election increased in real terms by approximately 127 per cent from \$7.8 million in 1984 (or \$14.1 million in 1996 dollar values) to \$32.2 million in 1996. The total amount of public funding paid after each subsequent election has continued to increase, reaching \$49 million for the 2007 election (an increase in real terms of 162 per cent since 1984).
- 1.15 The amount of private funding raised by political parties to contest elections has increased to the extent that critics argue that the public funding and financial disclosure scheme is not effective in reducing political parties' and candidates' reliance on private funding.¹⁴ It would appear that public funding has been integrated into campaign budgets as an additional stream of funding that has in turn helped support expanded and lengthened election campaigns.
- 1.16 The accelerating costs of political campaigning create pressures on our electoral system. Consideration needs to be given to how parties, candidates, and other participants in the electoral process, including associated entities and 'third parties', are funded and how best to ensure those methods of funding are transparent, open and accountable.

COMMONWEALTH ELECTORAL AMENDMENT (POLITICAL DONATIONS AND OTHER MEASURES) BILL 2008

- 1.17 The Australian Government has acted to address some of these issues by introducing the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008 (the Political Donations Bill) into the Senate on 15 May 2008.
- 1.18 The Political Donations Bill seeks to amend the election funding and financial disclosure provisions of the *Commonwealth Electoral Act 1918* (the Electoral Act) and contains measures to ensure that more donations are publicly reported, that they are reported in a more timely manner, that certain donations are prohibited and that parties and candidates are reimbursed only for genuine campaign expenditure.
- 1.19 Specifically, the Political Donations Bill includes provisions which would:
- reduce the threshold above which donations must be disclosed, from \$10,900 (indexed to the Consumer Price Index annually) to \$1,000 (non-indexed);
 - require people who make donations above the threshold to candidates, and agents of candidates and Senate groups to furnish a return within 8 weeks after polling day;
 - require people who make donations to registered political parties, agents of registered political parties, the financial controller of an associated entity, or people who have incurred political expenditure to furnish a return within 8 weeks after 31 December and 30 June each year rather than following each financial year;

¹³ The AEC's calculations were made using the Reserve Bank of Australia's inflation calculator.

¹⁴ J-C Tham and D Grove, 'Public Funding and Expenditure Regulation of Australian Political Parties: Some Reflections', *Federal Law Review*, vol. 32, no. 3, 2004, p. 411.

- ensure that for the purposes of the \$1,000 threshold and the disclosure of donations, related political parties are treated as the one entity;
- make unlawful the receipt of a donation of foreign property by political parties, candidates and members of a Senate group. It will also be unlawful in some situations for associated entities and people incurring political expenditure to receive a donation of foreign property;
- extend the current prohibition on the receipt of anonymous donations above the threshold to prohibit the receipt of all anonymous donations by registered political parties and candidates. It will also be unlawful in some situations for associated entities and people incurring political expenditure to receive an anonymous gift;
- provide that public funding of election campaigning is limited to declared campaign expenditure incurred by the eligible political party, candidate or Senate group, or the sum payable calculated on the number of first preference votes received where they have satisfied the 4 per cent threshold, whichever is the lesser;
- provide for the recovery of donations of foreign property that are not returned, anonymous donations that are not returned and undisclosed donations; and
- introduce new offences and penalties related to the new measures and increase the penalties for existing offence provisions.

1.20 On introducing the Bill into the Senate on behalf of the Special Minister of State, Senator the Hon John Faulkner, the Minister for Human Services, Senator the Hon Joe Ludwig said:

'The Government is committed to restoring the integrity of our electoral processes and systems. I believe that the reforms contained in this Bill will significantly enhance the transparency and accountability of funding and donations to registered political parties, candidates and the other key political players in Australia. This is the first tranche of electoral reform measures that will restore the integrity of our electoral system and ensure that the health of our Australian democracy is maintained for future generations.'¹⁵

1.21 The Bill was referred by the Senate to the Joint Standing Committee on Electoral Matters (JSCEM). JSCEM tabled its report on 23 October 2008 and recommended two amendments to the Bill.¹⁶ In relation to claims for verified electoral expenditure, JSCEM recommended that the definition of 'electoral expenditure' be expanded to include reasonable costs incurred for the rental of dedicated campaign premises, the hiring and payment of dedicated campaign staff, and office administration. JSCEM's second recommendation related to allowing anonymous donations below \$50 to be received without a disclosure obligation being incurred by the donor and without the recipient being required to forfeit the amount to the Commonwealth.

¹⁵ Senator the Hon Joe Ludwig (Minister for Human Services), *Second Reading Speech, Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008*, Senate, Debates, 15 May 2008, p. 9.

¹⁶ Joint Standing Committee on Electoral Matters, *Advisory report on the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008*, JSCEM, Canberra, October 2008.

OTHER CONTRIBUTIONS TO ELECTORAL REFORM

- 1.22 The purpose of the Green Paper on Electoral Reform as a whole is to invite public debate on possible measures to improve and modernise the Electoral Act. This paper examines issues in relation to:
- public funding of elections;
 - private funding, through donations and other contributions, to political parties, independent candidates and others participating in the political process; and
 - expenditure, particularly on election campaigns.
- 1.23 Part 2 of the Green Paper is intended to consider a wide range of issues relating to other aspects of Australia's electoral system, and will become available in 2009.
- 1.24 The Commonwealth Parliament's JSCEM contributes to the development of modern federal electoral laws by reviewing the federal electoral system after each federal election, and making recommendations for adjustments to the system.¹⁷ The Committee's forthcoming report on its review of the 2007 election will make an important further contribution to the review of the whole of the electoral system in Australia.
- 1.25 A number of the states and territories are also at various stages of reforming their respective donation, funding and disclosure regimes. This includes some jurisdictions which have recently passed amendments to their laws and others which have established committees of inquiry to examine what reforms should be made. These developments are discussed in more detail in Chapter 3, and provide further impetus for change in this area.
- 1.26 The recent experience of other western democracies in considering or implementing changes to regulation of their electoral funding and disclosure requirements is also worthy of examination in the Australian context. This paper therefore refers to the approaches to regulation in Canada, New Zealand, the United States of America and the United Kingdom, which provide a range of alternative approaches for consideration.
- 1.27 Australia's Electoral Act relies almost totally on the strategy of mandating transparency and requiring disclosure of certain transactions and relationships in our electoral system. The Electoral Act, in emphasising the importance of transparency and disclosure of finances, including donations (if over \$10,900), differs from the approach in the other countries, which, in addition to disclosure, impose statutory bans and caps on donations, and statutory caps on expenditure on elections.

¹⁷ JSCEM has in addition published specific reports on the federal election funding and financial disclosure scheme: *Who Pays the Piper Calls The Tune*, Parliamentary Paper 171/1989, JSCEM, Canberra; *Financial Reporting by Political Parties*, Parliamentary Paper 124/1994, JSCEM, Canberra; and *Funding and Disclosure*, Parliamentary Paper 108/2006, JSCEM, Canberra.

DISCUSSION POINTS

- 1.28 This chapter has set out the background to our current federal election funding and disclosure system, identified some of the factors driving modern election campaigning and spending, and described the role of public and private funding in federal elections. In particular, increasing advertising costs have contributed to rising campaign expenditures.
- 1.29 These aspects of our electoral system create the backdrop against which concerns about donations and political influence have developed. The challenge for governments, federal, state and territory is to devise a system of regulation which ensures that the political finance regime – and the election scheme more generally – operates in a fair and transparent manner.
- 1.30 In looking at options for changes to Australia's approach, the Australian Government is aware that any significant change to electoral law may in effect be a change in our political system. It is important to have the views of interested Australians on the implications of these possible changes. The Australian Government invites submissions in response to this paper by **23 February 2009**.

CHAPTER 2. PRINCIPLES

This chapter outlines basic democratic principles that may be considered relevant to consideration of Australia's regulation of electoral funding and disclosure.

PRINCIPLES INFORMING REGULATION OF ELECTORAL FUNDING AND DISCLOSURE

- 2.1 The following principles or values may be considered to be reflected, to varying degrees, in the different approaches to regulation of electoral funding and disclosure in place throughout Australia and in comparable countries internationally.
- Integrity – establishing conditions that minimise the risk or perception of undue influence or corruption in the system.
 - Fairness – establishing, as far as possible, fairness in access to resources for participants in an election.
 - Transparency – providing enough information to citizens about financial transactions of identified participants in the electoral process, including political parties and candidates, to inform their choice of representatives.
 - Privacy – balancing citizens' interests in obtaining information with respect for individuals' right to privacy.
 - Viability – ensuring that political parties and candidates have sufficient financial support to enable them to provide the electorate with a suitable choice of representatives.
 - Participation – encouraging citizens to participate in the political process through a variety of different means.
 - Freedom of political association and freedom of expression – avoiding unnecessary burdens or restrictions on these freedoms.
 - Accountability and enforceability – ensuring participants in the electoral process are accountable for relevant financial information.
 - Fiscal responsibility – ensuring the public costs involved in democratic processes, including election costs and public funding costs, are not unreasonable.
 - Efficiency and effectiveness – ensuring that regulation balances these principles against the costs of compliance and administration.
- 2.2 These principles may provide suitable criteria for evaluation of existing electoral regulation, and evaluation of options for changing the system.

DISCUSSION POINTS

- 2.3 While all these principles express values that are important to the Australian people in the administration of our electoral system, in any regulatory scheme some may come into conflict with each other. People's views on the state of the current law and possible reforms to it may differ depending on which principles are given the most importance.
- 2.4 For example, someone who prioritises transparency may believe that all political donations should be disclosed, whereas someone for whom privacy is more important may argue that only the largest donations should be published. The principle of integrity might imply limiting or rejecting private donations, but the principle of fiscal responsibility suggests restraining public funding. Any reforms to the regulation of electoral funding and disclosure will have to find a balance, and may necessitate prioritising some values ahead of others.
- 2.5 A basic principle of democracy is political fairness – that all citizens have an equal opportunity to participate in the political system. In Australian federal electoral law that value is expressed in universal suffrage, in the one vote-one value principle, and in compulsory electoral enrolment. Changes to electoral law should take this value as a starting point.
- 2.6 The integrity of the electoral system also depends on transparency. Electors cannot exercise their vote meaningfully if crucial information – such as a candidate's or political party's sources of funding – is not transparent. Transparency enhances accountability and enables citizens to be confident that their decisions at election time are based on all the information they consider relevant.
- 2.7 Views will differ on which of these principles should be prioritised in any regulatory scheme. Comments are sought on which of these principles should be promoted, and which principles should be favoured in the case of conflicts. Finally, the list of principles is not intended to be exhaustive – there may be other principles which you believe should be considered when reviewing the political finance, expenditure and disclosure regime.

CHAPTER 3. APPROACHES TO REGULATION

Chapter 3 provides an overview of Australia's federal, state and territory electoral funding and financial disclosure systems and compares the federal system with the systems in a number of other countries.

BACKGROUND

- 3.1 Internationally, the three main approaches to regulating donations to, and expenditure by, participants in elections, are:
 - (a) no regulation;
 - (b) detailed disclosure of financial transactions, but without regulation in the form of limits, caps or bans; and
 - (c) regulation of receipts, expenditure and debt in concert with disclosure requirements.¹⁸
- 3.2 A description of approaches in Australia, and brief descriptions of the approaches in Canada, New Zealand, the United States of America and the United Kingdom, follow.
- 3.3 Some commentators have described Australia's approach as an 'all carrots, no sticks' approach to regulation,¹⁹ because public funding at the federal level is provided to political parties, candidates and Senate groups without requiring proof of matching campaign expenditure, puts no limits on the amount of donations and other contributions (though donors and recipients must disclose donations above a threshold, currently \$10,900), and puts no limits on expenditure on elections. The Political Donations Bill seeks to change public election funding to a reimbursement scheme and reduce the disclosure threshold to \$1,000.
- 3.4 The Electoral Act, in emphasising the importance of transparency and disclosure of finances, including donations, differs from the approach in the other countries which, in addition to disclosure, provide a range of alternative regulatory approaches, including placing statutory bans and caps on donations, and statutory caps on expenditure on elections. These differing approaches could inform a consideration of whether an alternative approach to regulation is appropriate for Australia.

AUSTRALIA – FEDERAL ELECTORAL FUNDING AND FINANCIAL DISCLOSURE SYSTEM

- 3.5 The Commonwealth or national-level electoral system was first legislated for under the *Commonwealth Electoral Act 1902* and in that year the first federal elections were held. **Appendix A** provides background information on the constitutional context of the Commonwealth electoral system. Since 1902, the system has evolved in response to a range of factors, including changing public expectations of the Australian political system, into the electoral law in the Electoral Act. Voting is compulsory under the Electoral Act which establishes the principal requirements of the federal electoral system.
- 3.6 The present federal election funding and financial disclosure system was established by an amendment to the Electoral Act in 1984. This amendment introduced public funding of

¹⁸ International Institute for Democracy and Electoral Assistance, *Funding of Political Parties and Election Campaigns*, Handbook Series, International IDEA, Stockholm, 2003, provides details of international approaches to the funding of political parties.

¹⁹ G Orr, B Mercurio and G Williams, 'Electoral Law Symposium: An Introduction', *Federal Law Review*, vol. 32, no. 3, 2004, p. 360.

Australian political parties. On introducing the amendment bill into the Parliament and in subsequent debate, the then Special Minister of State, the Hon Kim Beazley MP, spoke of a number of purposes of the legislation that might be summarised as follows:

- (a) fair elections: 'different parties offering themselves for election have an equal opportunity to present their policies to the electorate';
- (b) prevention of corruption and undue influence: 'There is no greater duty upon the representatives of the people in a democratic society than the duty to ensure that they serve all members of that society equally. This duty requires government which is free of corruption and undue influence.' and, 'The public is entitled to be assured that parties and candidates which make up the government or opposition of the day are free of undue influence or improper outside influence'; and
- (c) transparency in the finances of participants in federal elections: 'The whole process of political funding needs to be out in the open ... Australians deserve to know who is giving money to political parties and how much'.²⁰

3.7 The expressed aims of introducing public funding were to:

- provide registered political parties and independent candidates with equal opportunity to contest elections;
- promote fairness in the electoral system, as between political parties and candidates contesting elections; and
- promote the integrity of the electoral system, by reducing political parties' and candidates' reliance on donations, which could compromise their ability to represent their electorates properly.

3.8 The expressed aim of introducing financial disclosure requirements was to promote the transparency of donations to political parties and candidates contesting elections.

3.9 These aims are reflected in Part XX of the Electoral Act. In summary, the current system:

- provides for the public funding of political parties, candidates and Senate groups that obtain at least 4 per cent of the formal first preference vote;
- prevents political parties, candidates and Senate groups receiving anonymous donations above a threshold;
- otherwise puts no limit on the amount of private funding and donations that contestants may receive;
- requires the disclosure of donations over the prescribed threshold that are made to contestants and other participants in the political process (the disclosure obligations apply to political parties, associated entities, third parties, candidates, Senate groups and donors to candidates and political parties. Australia is the only country considered in this paper that requires both donors and recipients to disclose donations); and
- puts no limit on expenditure on elections.

3.10 A number of aspects of the current system would be changed by the Political Donations Bill presently before the Commonwealth Parliament. For example, the Political Donations Bill seeks to reduce the disclosure threshold and ban overseas and anonymous donations.

3.11 The following paragraphs provide an overview of the current election funding and financial disclosure laws that apply to the various categories of participants in the political process, as defined by the Electoral Act, with regard to election funding and financial disclosure.

²⁰ Hon Kim Beazley MP (Minister for Aviation, Special Minister of State and Minister Assisting the Minister for Defence), *Second Reading Speech, Commonwealth Electoral Legislation Amendment Bill 1983*, House of Representatives, *Debates*, 2 November 1983, pp. 2213–2216.

Political parties

- 3.12 A 'political party' is an organisation with the object or activity of promoting candidates for election to the House of Representatives or Senate.²¹
- 3.13 A 'registered political party' is a political party with either a member in the Commonwealth Parliament or 500 members, which has been registered under Part XI of the Electoral Act.
- 3.14 The Electoral Act requires registered political parties to lodge annual disclosure returns documenting the total of all receipts, expenditure and debts,²² identifying the source and value of receipts above the threshold (currently \$10,900),²³ identifying the source and value of debts from the same source that total to more than the threshold,²⁴ and documenting details of loans from sources other than financial institutions.²⁵ The Electoral Act requires each state and territory branch of a registered political party to lodge a return.²⁶ The returns consolidate the financial transactions of all the administrative units of the party, such as local branches and committees.

Associated entities

- 3.15 Section 287 of the Electoral Act defines 'associated entities' to mean entities that are controlled by a registered political party, that operate wholly or to a significant extent for the benefit of a registered political party, or that are, or on whose behalf other persons are, financial members of a registered political party or hold, or on whose behalf other persons hold, voting rights in a registered political party. The Electoral Act defines 'entities' to mean incorporated or unincorporated bodies or the trustee of a trust.
- 3.16 The common forms of associated entities include:
- entities that conduct fundraising activities for a political party (such as the Free Enterprise Foundation on behalf of the Liberal Party);
 - entities that conduct the business activities of a political party (such as John Curtin House on behalf of the ALP); and
 - entities that are 'members' of political parties (for example, trade unions that are affiliated with the ALP or businesses that are affiliated with the National Party of Australia).
- 3.17 The Electoral Act requires associated entities to lodge annual disclosure returns that contain the same information as those of political parties, except details of loans from sources other than financial institutions.²⁷ In addition, the Electoral Act requires associated entities to list the sources of capital deposits received that were used to generate funds donated to a political party.

²¹ Electoral Act, section 4.

²² *ibid.*, section 314AB.

²³ *ibid.*, section 314AC.

²⁴ *ibid.*, section 314AE.

²⁵ *ibid.*, Part XX, Division 5A. Political parties do not lodge separate returns after each election (election returns); their electoral transactions are incorporated into their annual returns but are not separately identified.

²⁶ *ibid.*, section 314AB.

²⁷ *ibid.*

Candidates and Senate groups

- 3.18 A candidate is an Australian citizen over the age of 18 years who is nominated for election.²⁸
- 3.19 The Electoral Act requires candidates to lodge election disclosure returns documenting the total number and value of donations received, identifying the source and value of donations received from the same source that total above the threshold (currently \$10,900),²⁹ and documenting total electoral expenditure. Electoral expenditure includes:
- broadcasting and publishing advertisements, including production costs;
 - displaying advertisements at a theatre or other place of entertainment, including production costs;
 - costs of campaign material where the name and address of the author, or the authorising person, is required;
 - direct mailing; and
 - opinion polling or other research relating to the election.³⁰
- 3.20 A Senate group consists of two or more candidates for a Senate election who request to be grouped on the Senate ballot paper.³¹ Senate groups have a box 'above the line' on the Senate ballot paper, and are treated as a single entity for election funding and some financial disclosure purposes.
- 3.21 The Electoral Act requires Senate groups to lodge election disclosure returns that contain the same information as candidates' returns (with the exception of groups endorsed by a single party the disclosures of which are included in the annual return of the party).³²

Donors

- 3.22 A donor is a person who makes a donation to a registered political party, a candidate or a Senate group that totals above the threshold (currently \$10,900).³³ Donors who make donations to a person, but with the intention of benefiting a political party, are taken to have made that donation direct to the political party and assume the annual disclosure obligation.
- 3.23 The Electoral Act requires donors to political parties to lodge annual disclosure returns that list all donations made where those donations to a single political party total above the threshold, and that identify the source and value of donations received from the same source that total above the threshold where those donations were used to fund donations made to parties.³⁴
- 3.24 The Electoral Act requires donors to candidates or Senate groups to lodge election disclosure returns after each election listing all donations made where those donations to a single candidate or group total above the threshold, and identifying the source and value of donations received from the same source that total above the threshold where those donations were used to fund donations made to candidates.

²⁸ *ibid.*, sections 162 and 163.

²⁹ *ibid.*, section 304.

³⁰ *ibid.*, subsection 308(1).

³¹ *ibid.*, sections 168 and 287.

³² *ibid.*, section 304.

³³ *ibid.*, sections 305A and 305B.

³⁴ *ibid.*, section 305A.

Third parties

- 3.25 The Electoral Act does not define 'third parties'; rather, the Electoral Act requires individuals and organisations that incur 'political expenditure' to disclose political expenditure above the threshold (currently \$10,900).³⁵
- 3.26 Paragraph 314AEB(1)(a) of the Electoral Act defines 'political expenditure' to mean expenditure on:
- the public expression of views on a political party, a candidate in an election or a member of the House of Representatives or the Senate by any means;
 - the public expression of views on an issue in an election by any means;
 - the printing, production, publication or distribution of any material (not being material referred to in subparagraph (i) or (ii)) that is required under section 328 or 328A of the Electoral Act to include a name, address or place of business;
 - the broadcast of any political matter in relation to which particulars are required to be announced under subclause 4(2) of Schedule 2 to the *Broadcasting Services Act 1992*; and
 - the carrying out of an opinion poll, or other research, relating to an election or the voting intentions of electors.
- 3.27 The types of organisations currently caught by these 'third party' provisions if they engage in expenditure in connection with an election campaign include issue-oriented groups, such as Greenpeace or groups advocating on behalf of public education, or broad political or policy-oriented groups such as GetUp. Some media organisations may also be caught under the current provisions, if they provide electoral opinion material or conduct opinion polling.
- 3.28 The Electoral Act requires third parties to lodge annual disclosure returns documenting the total of political expenditure where that expenditure amounted to more than the threshold and identifying the source and value of donations received from the same source that exceed the threshold where those donations were used to fund political expenditure.
- 3.29 From 1984 to mid-2006, third parties were required to disclose electoral expenditure that had been incurred during an election period.³⁶ The returns were lodged after each election. Following amendment of the Electoral Act in June 2006, the disclosure requirement for third parties moved to an annual basis with the expenditure which was required to be disclosed changed to that set out at paragraph 3.26. Disclosure of electoral expenditure by candidates and Senate groups continues to be required to be provided after each election.

³⁵ *ibid.*, section 314AEB.

³⁶ 'Electoral expenditure' is defined at section 308 of the Electoral Act. Section 287 of the Electoral Act defines 'election period' as 'the period commencing on the day of issue of the writ for the election and ending at the latest time on polling day at which an elector in Australia could enter a polling booth for the purpose of casting a vote in the election'.

AUSTRALIA – STATE AND TERRITORY ELECTION FUNDING AND FINANCIAL DISCLOSURE SYSTEMS

- 3.30 Public funding and financial disclosure schemes operate not only at the Commonwealth level, but in many of the states and territories. These schemes have all largely developed by reference to each other and consequently are broadly quite similar in objectives and approaches. Nevertheless, there are some significant differences that have evolved independently of each other in response to local factors. An important point of difference arises in the disclosure thresholds that apply, with the major deviation being in the federal scheme's current threshold of \$10,900 which is many times higher than that applying in any of the state or territory schemes.
- 3.31 The Commonwealth is committed to working with the states and territories to achieve harmonisation of Australia's electoral systems. Harmonisation of the Commonwealth, state and territory schemes could, for example, enable participants in the political process to lodge a single disclosure return, rather than lodging separate and sometimes different federal, state and territory disclosure returns. Ultimately, harmonisation could enable the establishment of a single authority to administer a national disclosure system.
- 3.32 The following overview of relevant aspects of the state and territory systems is intended to broadly illustrate the similarities and differences between the systems. **Appendix B** is a table produced from information provided by the AEC which provides a direct comparison of the major features of the federal, state and territory election funding and financial disclosure systems.

Public Funding

- 3.33 New South Wales, Victoria, Queensland, Western Australia and the Australian Capital Territory (ACT) provide public funding for elections. With the exception of the ACT which has a direct entitlement scheme equivalent to the current federal scheme, these funding schemes directly reimburse political parties and candidates for their campaign expenditure up to the maximum of their entitlement. In each of these schemes the entitlement to public funding is calculated on the number of first preference votes received once a candidate or group has qualified by obtaining at least 4 per cent of the total formal first preference votes cast. While Queensland has had a reimbursement system in place to date, it amended its legislation in September 2008 to maintain consistency with the scheme proposed in the Commonwealth Political Donations Bill.
- 3.34 New South Wales operates a scheme that is different from elsewhere. In New South Wales, a pool of public funds is determined on the basis of the number of electors with one-third of the fund being applied to Legislative Assembly candidates and two-thirds applied to Legislative Council candidates. Candidates qualify for funds either by obtaining the 4 per cent threshold or by being elected. A further fund operates in New South Wales for those who have qualified for funding at Legislative Assembly elections. This fund provides annual funding at the rate of the cost of a postage stamp per vote received at the election and is to be used exclusively for the purpose of political education.
- 3.35 New South Wales also regulates the use of public funding by political parties, groups and candidates in order to prevent participants from making a financial gain by standing for office. New rules that apply to campaign accounts mean that public funding may only be used for certain purposes, including 'electoral expenditure'.
- 3.36 South Australia, Tasmania and the Northern Territory do not provide public funding.

Disclosure Requirements

- 3.37 Victoria and South Australia do not operate annual or election based disclosure schemes, although Victoria does require federally registered political parties to lodge copies of their federal returns as a means of checking whether they have observed that state's cap of \$50,000 on donations from casino and gaming licensees. Tasmania requires Legislative Council candidates to lodge returns of electoral expenditure in relation to a campaign expenditure limit that applies,³⁷ but otherwise does not operate a disclosure scheme.
- 3.38 The ACT and the Northern Territory require political parties and associated entities to lodge annual disclosure returns documenting their total receipts, expenditure and debt, similar to the federal scheme. Western Australia also requires annual disclosures but limits reporting to donations received. The Northern Territory applies a \$1,500 threshold (the same as applied federally until 2006) while the ACT has dropped its threshold from 1 July 2008 to \$1,000 (in anticipation of a federal move to a \$1,000 threshold with passage of the Political Donations Bill).
- 3.39 The closeness of the schemes is evidenced by Western Australia and the Northern Territory accepting copies of federal disclosure returns from political parties in substitution of state disclosure returns. The ACT accepted federal disclosure returns but discontinued this practice from 1 July 2008 in response to the increased threshold that has applied in the federal scheme since 2006.
- 3.40 From 1 July 2008, New South Wales requires political parties to lodge six-monthly disclosure returns targeted to donations, fundraising activities, membership subscriptions and campaign expenditure. The move to biannual reporting was designed to match the proposed federal initiatives contained in the Political Donations Bill. New South Wales does not require associated entities to lodge disclosure returns.
- 3.41 The disclosure threshold and reporting frequency were changed in Queensland with the passage of legislation in September 2008. With effect from 1 July 2008, the threshold was reduced from \$1,500 to \$1,000 and biannual returns of donations received and electoral expenditure incurred must be lodged by political parties and associated entities. Queensland has also introduced more frequent reporting requirements for donations of \$100,000 or more (discussed at paragraph 3.46 below).
- 3.42 Queensland, Western Australia, the ACT and the Northern Territory require candidates and, where applicable, groups of candidates, to lodge election disclosure returns, documenting donations received and electoral expenditure, in a manner similar to the federal scheme. The thresholds that apply vary between jurisdictions but universally are set at modest levels, ranging from \$200 through to \$1,800.
- 3.43 From 1 August 2008, New South Wales requires candidates and groups to register with the Election Funding Authority before being able to accept donations. They are also required to appoint and register an official agent and must have a campaign account before receiving or spending \$1,000 or more for an election. New South Wales has also increased the frequency of disclosure by parties, groups, elected members and candidates from once every four years to once every six months. New South Wales additionally requires disclosure of contributions received at fundraising activities and details of advertising expenditure from candidates.
- 3.44 New South Wales has also introduced requirements for the mandatory disclosure of loans and has prohibited certain 'in kind' contributions over \$1,000.

³⁷ The expenditure limit for 2008 is \$11,500, with annual increments of \$500. Source: Tasmanian Electoral Commission, *Tasmanian Legislative Council Election Information for Candidates*, February 2007, p. 15; available at <http://www.electoral.tas.gov.au/pages/ElectoralInformationMain.html>.

Donor Disclosure

- 3.45 The ACT and the Northern Territory require donors to political parties to lodge annual disclosure returns documenting donations above a set threshold (\$1,500 or more in the Northern Territory and \$1,000 or more in the ACT). The Political Donations Bill seeks to bring the federal scheme closer into line with the schemes in the above states and territories, by reducing the threshold for disclosure of donations from sums of \$10,900 or more to sums of \$1,000 or more.
- 3.46 From 1 July 2008, New South Wales requires all 'major' donors, that is those who donate \$1,000 or more, to lodge a return with the Election Funding Authority every six months rather than annually. In addition, all people who incur electoral expenditure of \$1,000 or more are required to lodge six-monthly returns regardless of whether or not they also make donations.
- 3.47 Queensland also requires biannual disclosure by donors of donations of \$1,000 or more to political parties, with effect from 1 July 2008. In addition, Queensland has also introduced special reporting requirements for donations totalling \$100,000 or more from a single donor to a registered political party or associated entity of that party. These donations must be disclosed by the donor and the recipient of the donation, within 14 days after the \$100,000 is reached. The Electoral Commission of Queensland must publish these returns on its website within ten business days.
- 3.48 The ACT additionally requires annual disclosures by members of the Legislative Assembly (MLAs) in similar detail to that required of political parties, but limited to their duties as MLAs. Donors to MLAs are also required to lodge annual disclosure returns. This approach has also been adopted by New South Wales which, from 1 July 2008, has introduced a requirement for biannual disclosures by members of the New South Wales Parliament of political donations and electoral expenditure. Donors to New South Wales members of parliament (MPs) are also required to lodge disclosure returns.
- 3.49 New South Wales, Queensland, the ACT and the Northern Territory require donors to candidates and, where applicable, to groups, to lodge election disclosure returns documenting donations, in a manner similar to the federal scheme. In all cases donors must disclose donations they have received and which have been used to make donations.
- 3.50 Western Australia does not require donors to political parties or to candidates to lodge disclosure returns.

'Third Party' Disclosure

- 3.51 Queensland, Western Australia, the ACT and the Northern Territory require third parties to lodge election disclosure returns documenting electoral expenditure along with donations received. New South Wales also requires disclosure from third parties, but from 1 July 2008 these disclosures will need to be made biannually. In all cases, including federally where annual disclosures of political expenditure is required, there is a recognition that participation in election campaigns is not limited to only political parties and candidates directly seeking election and that campaigns run by other groups can be influential and therefore these activities also require disclosure if the public is to be more fully informed.

Advertising Returns

- 3.52 Queensland, the ACT and the Northern Territory require publishers and broadcasters to report on electoral advertisements after each election. In these returns, broadcasters and publishers are required to list details of the electoral advertising placed with them during the period of the election, including identifying who placed the advertisement and on whose behalf the advertisement was placed. They also identify whether any advertising was charged at commercial rates and, therefore, whether any donations were made. An identical disclosure requirement existed federally until 2006.

Candidate Financial Controls

- 3.53 In addition to disclosure requirements, from 1 August 2008, New South Wales also introduced measures to more directly regulate the management of campaign finances of elected members and candidates for state and local government elections. These changes include members and candidates being restricted from having personal campaign accounts or direct involvement in the receipt of political donations. Party agents and official agents must successfully complete an online training program.

AUSTRALIA – STATE AND TERRITORY ELECTION FUNDING AND FINANCIAL DISCLOSURE REFORM PROPOSALS

- 3.54 New South Wales enacted legislation in June 2008 that, inter alia, sets a universal disclosure threshold of \$1,000 for parties, groups and candidates, provides for six-monthly disclosure of donations and expenditure, introduces new rules for the management of campaign finances, and extends disclosure obligations to MPs.³⁸ On 27 June 2007, the New South Wales Legislative Council established the Select Committee on Electoral and Political Party Funding to inquire into and report on electoral and political party funding. The Committee's report was tabled on 19 June 2008 and contained 47 recommendations for reform. The New South Wales Government is currently preparing a response to the report.
- 3.55 On 16 April 2008, the Victorian Legislative Council's Electoral Matters Committee received terms of reference from the Legislative Council to inquire into whether electoral legislation should be amended to introduce a system of political donations disclosure and/or restrictions on political donations. The Committee was also asked to consider the outcome of similar reforms introduced in Canada, the United Kingdom and other relevant jurisdictions. The Committee is due to report by 30 April 2009.
- 3.56 In Western Australia, legislation was introduced into the Legislative Assembly on 14 May 2008 to, among other reforms, change the disclosure threshold after the next state election to \$1,000 or more.³⁹ The legislation lapsed with the prorogation of the Western Australian Parliament for the state election on 6 September 2008.
- 3.57 On 29 July 2008, the South Australian Legislative Council did not agree to a private member's Bill that sought to require disclosure of donations made to political parties that accompany large development applications.⁴⁰
- 3.58 Changes to the disclosure threshold, which was lowered to \$1,000 or more (from \$1,500 or more), came into effect in the ACT on 1 July 2008.⁴¹ On 31 October 2008, following the ACT election, the Leader of the Australian Labor Party, ACT Branch, Mr Jon Stanhope MLA, and the Parliamentary Convenor of the ACT Greens, Ms Meredith Hunter MLA, signed a parliamentary agreement which includes a commitment to the passage of legislation which will require all political donations to be disclosed within one month of receipt and in an election period, on a weekly basis.⁴²

³⁸ *Election Funding Amendment (Political Donations and Expenditure) Act 2008* (NSW) commenced by proclamation on 10 July 2008.

³⁹ Electoral Amendment Bill (No. 2) 2008 (WA).

⁴⁰ The Development (Political Donations) Amendment Bill 2008 (SA) was first introduced into the Legislative Council on 9 April 2008 by the Hon Mark Parnell MLC.

⁴¹ *Electoral Legislation Amendment Act 2008* (ACT).

⁴² 'Parliamentary Agreement for the 7th Legislative Assembly for the ACT', 31 October 2008, available at <http://www.act.greens.org.au/documents/alp-greens-agreement.pdf>.

- 3.59 On 1 April 2008, consideration of the enactment of Tasmanian law requiring the disclosure of political donations was referred to the Working Arrangements of the Parliament Committee, a joint select committee. A report date has not been set.⁴³
- 3.60 On 9 September 2008, the Queensland Parliament passed legislation that reduces the disclosure threshold to \$1,000, introduces twice-yearly disclosure, bans donations of foreign property and requires verification of candidates' electoral spending, in line with the provisions in the Commonwealth Political Donations Bill. The legislation also introduces a requirement for the reporting of donations each time donations from any single donor reach \$100,000 within a half-year period. The report must be made within 14 days after \$100,000 is reached.⁴⁴
- 3.61 The Queensland Parliament's Legal, Constitutional and Administrative Review Committee is conducting an inquiry on Queensland electoral law reform and is due to report by March 2009.
- 3.62 As this outline of state regulatory regimes demonstrates, not only the Commonwealth but also a majority of the Australian states and territories are already reforming their electoral laws or examining the issues of political funding, expenditure and disclosure reforms. This presents a challenge in terms of co-ordinating changes, but also provides an opportunity to try to move towards a more harmonised, or at least more consistent, federal, state and territory regime.
- 3.63 A harmonised or more consistent scheme could eliminate some of the overlapping requirements which differ across the various regimes, making it complex and potentially confusing for national parties participating in more than one jurisdiction to comply with differing sets of rules. More consistent regimes would make it easier for all participants in the political system – from political parties through to individual donors – to understand and comply with their obligations.
- 3.64 The Commonwealth and the States and Territories have already embarked upon a process of reform, first meeting in May 2008 to discuss these issues, with ongoing consultations about the reform process.

SELECTED OVERSEAS ELECTORAL FUNDING AND FINANCIAL DISCLOSURE SYSTEMS

- 3.65 The recent experience of other western democracies in considering or implementing changes to regulation of their electoral funding and disclosure requirements is worthy of examination in the Australian context. This paper therefore refers to the approaches to regulation in Canada, New Zealand, the United States of America (USA) and the United Kingdom (UK), which provide a range of alternative approaches for consideration.
- 3.66 **Appendix C** is a table produced from information provided by the AEC which provides a summary of the election funding and financial disclosure laws for national elections in Canada, New Zealand, the USA and the UK.

Canada

- 3.67 Canada has the strictest regulation of the selected countries and is based on an approach of encouraging small donations from a large number of donors. The scheme aims to limit funding going into political parties and also caps expenditure by political parties. It is also the only one of the selected countries that provides public funding on a quarterly basis in addition to public funding for elections on the basis of reimbursement of political parties and candidates subject to proof of their expenditure. In 2007-08, Elections Canada provided approximately C\$28.2 million in public funding in this way.

⁴³ Parliament of Tasmania, House of Assembly, *Votes and Proceedings*, 1 April 2008, item 23.

⁴⁴ *Electoral Amendment Act 2008* (Qld).

- 3.68 Bans apply to donations from corporations, unions, associations and groups. Caps apply to donations to, and expenditure by, political parties and candidates. Specifically, donors are allowed to give up to C\$1,100 in a calendar year to political parties and candidates, while expenditure limits are set according to the number of voters in each electorate. At the 2006 Canadian election, the expenditure limit averaged C\$81,159 across electorates. Donors cannot make cash donations above C\$20 and must obtain receipts for donations above that amount.
- 3.69 Canada requires political parties and candidates to lodge annual returns detailing their receipts within four months of an election. The returns are made public within a year of the election.
- 3.70 The outcome of the Canadian approach – which can be described as imposing systemic caps on the overall political finance system – is that the amount of money flowing into, as well as being spent by, political parties in Canada has been significantly reduced.

New Zealand

- 3.71 New Zealand has adopted a model which utilises a variety of different regulatory tools. For example, to reduce the pressure on candidates and parties to raise money through donations, election expenditure is capped, with political parties able to spend up to NZ\$1 million, plus an additional NZ\$20,000 per candidate. Candidates also have a separate limit of NZ\$20,000. The period for which the cap applies extends from 1 January in the year in which an election is due until polling day when a general election is held in the third year of the electoral cycle, although expenditure outside this period may also be captured.
- 3.72 This is supplemented by television advertising which is paid for by the Government. At 15 October 2008, the Government allocated NZ\$3.2 million for the 2008 election (with the Labour Party and the National Party receiving NZ\$1 million each and the Maori, Green and NZ First Parties each receiving NZ\$240,000, with the remainder divided between a range of smaller groups).⁴⁵
- 3.73 The New Zealand system allows anonymous and overseas donations of up to \$1,000. For anonymous donations of more than \$1,000, the donor can give this money to a registered political party or third party through the New Zealand Electoral Commission. Limits apply to the amounts that can be donated from a single source and received by a party or a third party using this approach. This mechanism is not available to candidates who must forfeit to the Government the balance of any anonymous donation in excess of NZ\$1,000.
- 3.74 People or organisations proposing to engage in the political process by placing advertisements encouraging or persuading electors to vote for or against a party, a candidate or type of candidate or party, are required to register with the Electoral Commission as third parties if their expenditure on electoral advertisements will exceed NZ\$12,000 for a party (or NZ\$1,000 where the campaign relates to a candidate). The maximum amount that can be spent by third parties is NZ\$120,000 (or NZ\$4,000 for a candidate). Third parties are listed on the Elections New Zealand website.
- 3.75 Political parties are required to lodge annual returns detailing donations in excess of NZ\$10,000 received in a calendar year. The returns must be lodged by 30 April of the following year. An auditor's report of the return is also required. Parties must disclose donations from the same donor totalling more than \$20,000 in a twelve month period, within 10 working days of receipt of the donation.

⁴⁵ Elections New Zealand, 'Broadcasting allocation 2008 – revised final allocation decision', 15 October 2008, Elections New Zealand website at <http://www.elections.org.nz/rules/advertising/broadcasting-allocation-2008-initial-allocation-decision.html>.

3.76 Candidates are required to disclose details of donations received above NZ\$1,000; while third parties must disclose donations above NZ\$5,000. These returns must be lodged within 70 working days (or 14 weeks) after polling day, and are made public within three days of lodgement. Returns of election expenditure must also be lodged by parties (within 50 working days after polling day), candidates and third parties (within 70 working days after polling day). Auditors' reports are also required for the political parties' expenditure returns and may be required for third parties' expenditure returns depending upon the amount that is spent.

United Kingdom

3.77 While some form of limitation on candidates' spending has been in place in the UK since 1883, the regulatory scheme introduced in 2000 is the newest of the schemes in the selected countries, being less than a decade old. One of the major goals of the new system is to attempt to limit the escalating 'arms race' of campaign expenditure which has led to pressure on political parties and candidates to raise increasing amounts of money through large political donations.

3.78 In a similar way to New Zealand, the UK has attempted to do this by capping the expenditure allowed by parties and candidates in the 12 months before an election. This amounts to £810,000 in England, £120,000 in Scotland and £60,000 in Wales, or £30,000 per constituency contested at parliamentary general elections, whichever is the greater.⁴⁶

3.79 The United Kingdom does not provide public funding for elections; however, political parties receive support from public funds through benefits in kind in the form of free party political broadcasts and free election postage, which amounts to approximately £121 million in a general election year.⁴⁷ Television advertising outside these broadcasts is banned, thereby restricting fundraising demands on parties even further.

3.80 A key part of the UK system is that caps also apply to expenditure by third parties, which have to register with the Electoral Commission where they intend to spend more than £10,000 in England (or £5,000 in Scotland, Wales or Northern Ireland).

3.81 A ban applies to anonymous donations of more than £200, however no caps apply to permissible donations. A unique feature of the UK system is that they also apply specific restrictions on some types of organisations before they are allowed to make political donations. Corporations must obtain the four-yearly approval of shareholders before they can make a donation, while trade unions must ballot their members every ten years in order to raise and contribute funds.

3.82 The UK also adopts much stricter reporting obligations than Australia with quarterly returns by political parties of donations and loans required normally, and weekly returns during election campaigns. Members of political parties and members of parliament must disclose donations and loans made to each other.

⁴⁶ UK Electoral Commission, 'Party campaign expenditure' at the following site: <http://www.electoralcommission.org.uk/elections/election-spending/party-campaign-expenditure>.

⁴⁷ A Tyrie MP, *Clean Politics*, 2006 p. 36, cited in United Kingdom Ministry of Justice's White Paper, *Party finance and expenditure in the United Kingdom: The Government's proposals*, June 2008, p. 51.

United States of America

- 3.83 The United States (US) has a range of campaign finance systems across its states. At the federal level, the US has primarily attempted to regulate the 'supply-side' of the political finance equation, with strict controls on political donations.
- 3.84 Bans have been imposed on all anonymous and overseas donations, and to donations from corporations, banks, unions and federal government contractors. The United States has also imposed relatively low caps on donations from individuals, of up to US\$2,300 to a candidate for election (for each of the primaries and general elections), and up to US\$28,500 to a national party committee during any one year. Individuals are also subject to a biennial contributions limit for donations to federal candidates, party committees and political action committees (PACs).⁴⁸
- 3.85 The United States also has a system under which political parties and candidates can agree to limit their expenditure in exchange for receiving funding for their campaigns. The funding is paid subject to proof of expenditure. However, candidates are free to reject public funding, and therefore raise and spend substantially more money than candidates relying on public funding. This system has evolved because of constitutional restrictions on the ability to impose expenditure caps arising from the right to free speech.
- 3.86 There is also significant regulation of third party activity, such as PACs, which must register before engaging in political expenditure. However, this regulation has not prevented a proliferation of this type of organisation or negated their influence on political campaigns.
- 3.87 The United States requires political parties and their associated entities, and candidates, to lodge annual returns detailing their receipts 12 days before an election and within 30 days (or 20 days in some circumstances) of an election. The returns are made public within 48 hours of lodgement.
- 3.88 Overall, while the United States has imposed low donation caps, an opt-in system of public funding and significant restrictions on third party involvement, it has by far the most expensive campaigns in the world, with spiralling costs and an abundance of groups involved in election campaigns.

DISCUSSION POINTS

- 3.89 The wide range of jurisdictions discussed in this chapter shows the variability of approaches to regulation in this area. Within Australia, the regulatory regimes differ between the Commonwealth, states and territories, and although recent changes suggest a move towards greater consistency, there is not currently a single national approach on disclosure requirements, the treatment of third parties, or even the provision of public funding. Issues remain as to what disclosure should be required, how often it should occur, what periods it should cover, and whether we need 'double disclosure' by both the recipient and the donor for each disclosable contribution.
- 3.90 The issue of how third parties should be regulated presents particular challenges. The calls to regulate donations coming into, and the campaign-like expenditure coming out of, third party political players who are neither parties nor candidates reflects concerns about the potential and growing influence of such entities, and the need to ensure that election funds are not channelled or diverted to third parties who can promote and advertise in support of a party, overcoming regulatory restrictions or obligations that would apply if the party itself received or used the funds.

⁴⁸ The 2007–08 limit is US\$108,200. Source: 'The Biennial Contribution Limit', US Federal Election Commission's brochure, available at <http://www.fec.gov/pages/brochures/biennial.shtml>.

- 3.91 It could also be argued, however, that the current disclosure obligations on third parties are onerous, catching entities that are not promoting a political position, such as the media, or imposing greater requirements than are necessary to ensure that third parties are not used as avoidance mechanisms. Ultimately, the extent to which 'third parties' ought to be regulated may depend on the other elements in any regulatory scheme, such as whether donation or expenditure caps are imposed.
- 3.92 Looking more broadly to the regulatory regimes in other countries, quite different approaches have been adopted. Canada allows donations only from individuals, and caps those donations. The UK and New Zealand place caps on election expenditure and provide government support for electoral advertising, as well as capping the expenditure of third parties.
- 3.93 These differing approaches have their own strengths and weaknesses. Reforms to Australia's electoral laws should draw on the experiences – and learn from the mistakes – of others.
- 3.94 The regulatory burden of overlapping, inconsistent requirements is also a consideration. Regulation that is complex and onerous can lead to inadvertent infractions, diverting the efforts of enforcement bodies while larger and deliberate violations go undetected. Complex regulation and strict penalties can also act as a disincentive for non-professionals to assume positions of responsibility in political parties and other entities, or lead to greater centralisation of campaign financing controls.
- 3.95 Changing the regulatory scheme can also have the effect of changing donation patterns, with flow-on effects to political party organisation and operation that must be taken into account. Changes which encourage donors to direct funds and support to individual candidates, or conversely to central party officers, would inevitably affect the dependency or otherwise of candidates on the party 'machine', changing the dynamics within the party – with possible consequences for the operations of political parties and their parliamentary representatives.
- 3.96 Because of the significant potential effects of changing our regulatory schemes, careful thought needs to be given to identifying the most effective and appropriate scheme which would maintain the best aspects of our Australian political system and ensure the ongoing strength of our democracy, while introducing the appropriate regulation that eliminates both any opportunities for, and any perceptions of, inappropriate and non-transparent influence in our systems. This paper seeks your views on these issues.

Part 2 – Public Funding

CHAPTER 4. PUBLIC FUNDING

This chapter discusses the rationale for providing public funding for political parties and candidates to contest elections. It also raises the question of the extent to which the current public funding scheme is effective to achieve these aims.

BACKGROUND

- 4.1 Part XX of the Electoral Act provides for public funding for registered political parties and their state branches, candidates and Senate groups that obtain at least 4 per cent of the formal first preference vote. The funding rate for the six months from 1 July 2008 is \$2.18940 for each formal first preference vote received.⁴⁹
- 4.2 The states and territories that provide public funding also use the 4 per cent threshold, with funding rates ranging from a low of \$1.37460 in Victoria to a high of \$2.69 in New South Wales.⁵⁰
- 4.3 The public funding scheme introduced in 1984 was a reimbursement scheme. The entitlement to funding was calculated according to the number of formal first preference votes received. Funding was limited to reimbursing parties, candidates and Senate groups for their actual documented expenditure up to the maximum of the entitlement.
- 4.4 In 1995, a new direct entitlement scheme was introduced under which political parties and candidates received public funding based solely on the number of formal first preference votes they received without a requirement to substantiate matching campaign expenditure.
- 4.5 The Political Donations Bill seeks to reintroduce a reimbursement scheme in order to eliminate any opportunity for persons to receive a greater sum in public funding than they actually spent on their election campaign.
- 4.6 The Political Donations Bill seeks to tie public funding to ‘electoral expenditure’, being the expenditure which is currently required to be disclosed by candidates and Senate groups, namely:
 - the broadcast during the election period of advertisements relating to the election;
 - the publishing during the election period of advertisements relating to the election;
 - the display in cinemas and theatres during the election period of advertisements relating to the election;
 - the production of advertisements used in the above three categories;
 - the production of any material during the election period requiring authorisation;

⁴⁹ Section 321 of the Electoral Act specifies the formula for calculating public funding.

⁵⁰ The current public funding rates for the following states and territories which adopt the 4 per cent threshold are: Victoria – \$1.37460; ACT – \$1.41711; Queensland – \$1.54737; Western Australia – \$1.56888; and New South Wales – \$2.69 for its 2007 election. Details of the public funding pool arrangement for New South Wales (which differs from the other states) are set out at paragraph 3.34.

- the production of electoral matter during the election period that is addressed directly to particular persons or organisations; and
 - the carrying out, during the election period, of opinion polling or other research.
- 4.7 The Electoral Act currently defines ‘election period’ as ‘the period commencing on the day of issue of the writ for the election and ending at the latest time on polling day at which an elector in Australia could enter a polling booth for the purpose of casting a vote in the election’. Given the move to parties’ campaigns for the next election commencing many months before the writs have been issued, the existing time period covering campaign expenditure may no longer be appropriate for meeting the objective of reimbursing specified campaign expenditures. It might prove difficult, however, to define a starting point to the election period that would apply as uniformly and decisively as the issue of the writ.
- 4.8 All of the selected comparable countries, except the United Kingdom, provide public funding for political parties and candidates for elections, either wholly or in part by reference to the number of votes contestants received in elections.
- 4.9 It has been suggested that the current definition of ‘electoral expenditure’ should be reviewed. Consideration could be given to capturing additional campaign expenses such as additional staffing or travel costs.

ISSUES

- 4.10 The aims of introducing a public funding scheme were to provide a greater equality in the opportunity to present policies to the electorate and to reduce the risk of corruption and undue influence.
- 4.11 The question is whether the public funding scheme is effective in achieving the aims of the scheme.
- 4.12 A consideration of the effectiveness of the public funding scheme, and of whether the formula for calculating the amount of public funding leads to an amount of public funding that is a reasonable use of taxpayers’ money, follows.

The case for and against public funding

- 4.13 In 1983, the Joint Select Committee on Electoral Reform articulated the following arguments in favour of providing public funding for elections:⁵¹
- ‘It removes the necessity or temptation to seek funds that may come with conditions imposed or implied.
 - It helps parties to meet the increasing cost of election campaigning.
 - It helps new parties or interest groups to compete effectively in elections.
 - It may relieve parties from the ‘constant round of fund raising’ so that they can concentrate on policy problems and solutions.
 - It ensures that no participant in the political process is hindered in its appeal to electors nor influenced in its subsequent actions by lack of access to adequate funds.’

⁵¹ Joint Select Committee on Electoral Reform, *First Report*, September 1983, Joint Select Committee on Electoral Reform, Canberra, pp. 153–155.

- 4.14 Critics of public funding argue that providing public funding poses the following risks:⁵²
- 'it can undermine the independence of the parties and make them dependent upon the state.
 - it can lead them to ignore their members and broader civil society.
 - decisions about the amount and allocation of funding may be unfair to smaller, newer and/or opposition parties.
 - it can entrench the position of the major parties and ossify the party system.
 - opinion polls indicate that public funding can be very unpopular with ordinary citizens who may view it as a political hand-out or rort.
 - citizens may not agree that political parties are a high priority in terms of public expenditure.'

The effectiveness of public funding

- 4.15 If public funding were to be withdrawn, it would have a significant impact on the conduct of election campaigns, especially for the major political parties.
- 4.16 The following table illustrates the share of public funding that is paid to the two major political parties.⁵³

Table 4 – Public Funding Paid to the ALP and the Liberal Party for the 2004 and 2007 Federal Elections

Election year	Total public funding paid (\$m)	Public funding paid to the ALP and the Liberal Party (\$m)
2004	41.9	34.7 (82.8%)
2007	49	40.2 (82%)

- 4.17 Public funding represents a significant proportion of the money received by political parties during election years. For example, in 2004–05, the Federal ALP received almost \$30.1 million overall, of which approximately \$16.8 million was in the form of public funding. Similarly, the Federal Liberal Party received approximately \$29.9 million, including almost \$18 million through public funding.⁵⁴
- 4.18 If public funding is to continue, its reach and operation warrant examination. In particular, consideration could be given to whether public funding has made established political parties any less dependent on private funding and whether the position of new and small parties has been made more difficult by the advent of public funding.

⁵² S Young, 'Public funding of political parties' in S Young and J-C Tham, *Political finance in Australia: a skewed and secret system*, Democratic Audit of Australia, Report No. 7, Australian National University, Canberra, 2006, p. 47.

⁵³ If the public funding payments made to the National Party, the Country Liberal Party and the Australian Greens are added into these figures the share of public funding paid to 'major' parties increases to approximately \$41.1 million or 98 per cent in 2004 and approximately \$47.9 million or 97.8 per cent in 2007.

⁵⁴ These figures are not comprehensive, as they do not include the receipts of the various state branches of each party, which may also have spent money on the 2004 federal election. However, they do indicate that public funding contributes a significant proportion to national election campaigns.

The formula for calculating public funding

- 4.19 An important aim of the current public funding scheme is to promote fairness between political parties and candidates contesting elections. Some commentators argue that the current formula for calculating entitlements to public funding is not fair for the following reasons:⁵⁵
- the methodology favours existing over new contestants, because funding is paid on the basis of past electoral support; and
 - the methodology favours major parties in comparison with minor parties and independent candidates, because minor parties and independent candidates can attract significant electoral support without passing the 4 per cent threshold for receiving public funding.
- 4.20 Some commentators have argued that fairness could be achieved by replacing the 4 per cent threshold with either a lower threshold, such as a 2 per cent threshold, or with pro-rata public funding.⁵⁶ An alternative proposal for achieving fairness is to introduce a sliding scale of public funding, with the payment rate per vote decreasing according to the number of first preference votes.⁵⁷ An alternative view is that the threshold level for public funding should be set at a level where such funding only supports parties that have a reasonable level of support in the community.
- 4.21 The AEC advises that if a 2 per cent threshold had applied in the 2007 election, 128 more candidates would have qualified for public funding (115 candidates endorsed by minor political parties and 13 independent candidates); and that total public funding entitlements would have increased by almost \$967,000, from approximately \$49 million to almost \$50 million.
- 4.22 The AEC advises that if a 5 per cent threshold had applied in the 2007 election, 34 fewer candidates would have qualified for public funding (31 candidates endorsed by minor political parties and 3 independent candidates); and that total public funding entitlements would have decreased by approximately \$482,000 from approximately \$49 million to approximately \$48.5 million.
- 4.23 Public funding is available for candidates for the United States presidential elections, subject to various eligibility requirements including campaign spending limits.⁵⁸ Matching payments are available to eligible candidates seeking nomination by a political party to the office of President, subject to conditions relating to the level of public support, donations raised and limits on campaign spending. The presidential nominee of a major party may be eligible for a public grant, on condition that spending is limited to the amount of the grant and private donations are not accepted. A threshold of 5 per cent applies for partial public funding of minor party candidates (who received between 5 and 25 per cent of the total popular vote at the preceding presidential election) and new party candidates (who receive at least 5 per cent of the popular vote at the current election) for their general election campaigns. Public funding is also available to national political parties for their nominating presidential conventions.

⁵⁵ J-C Tham and D Grove, *op cit.*, p. 413.

⁵⁶ *ibid.*

⁵⁷ J-C Tham, submission number 154 to the New South Wales Legislative Council's Select Committee on Electoral and Political Party Funding Inquiry on Electoral and Political Party Funding, February 2008.

⁵⁸ The brochure, 'Public Funding of Presidential Elections' provides details about public funding of US presidential elections. The brochure is available at the US Federal Election Commission's website at http://www.fec.gov/pages/brochures/public_funding_brochure.pdf. The brochure also provides details of the spending limits for public funding for the 2008 presidential election.

- 4.24 For the 2004 presidential election, public funding paid to presidential candidates and to the Democratic and Republican party tickets totalled approximately US\$155 million. In addition, approximately US\$30 million was paid to the two major parties for their presidential nominating conventions.⁵⁹
- 4.25 Canada uses different thresholds for public funding, ranging from 2 per cent to 10 per cent. Registered political parties are entitled to reimbursement of 50 per cent of expenses for general elections if they received at least 2 per cent of votes cast nationally or 5 per cent of valid votes cast in electoral districts in which they endorsed candidates. Parties also receive a quarterly allowance, annually adjusted for inflation, once proper reports have been lodged and the minimum threshold of valid votes has been obtained. Candidates who are either elected or receive at least 10 per cent of valid votes cast in their electoral district, and subject to reporting requirements, are entitled to a reimbursement of 60 per cent of election and personal expenses, with a maximum limit.⁶⁰ As at August 2008, a total of more than C\$52.6 million had been paid in public funding for the 2006 general election, including audit subsidies. The payments have not yet been finalised as some claims remain under consideration.
- 4.26 New Zealand differs from the other selected countries in providing public funding in the form of broadcasting time, and in calculating the entitlement to public funding by reference to measures of public support beyond votes, including a party's number of members and number of members of parliament, and the results of public opinion polls in the lead up to the election period.⁶¹ The New Zealand methodology, while complicated, is arguably less vulnerable to criticisms of favouring major parties in comparison with minor parties and independent candidates.

The amount of public funding

- 4.27 A fundamental aim of introducing the public funding scheme was to ensure the viability of the electoral system. The questions are what amount of public funding is necessary to ensure the viability of the electoral system and whether the amount of public funding currently being allocated is a reasonable use of taxpayers' money.
- 4.28 Details of the public funding that has been paid to political parties since 1984 are set out at Table 3 in Chapter 1. That table shows that the amount of public funding paid to political parties is increasing with each election.
- 4.29 Public funding increases automatically for each election through six monthly indexation of the funding rate. In real terms, however, the public funding paid increases at a greater pace because of the growing voter base. The AEC advises that since the introduction of public funding in 1984, the amount of public funding has increased in real terms by approximately 162 per cent, reaching \$49 million in 2007.⁶² Public funding has not significantly reduced the reliance of political parties on private funding.

⁵⁹ The US Federal Election Commission's media release of 26 June 2007, 'Both Major Parties to Receive Public Funding for 2008 Conventions', provides details of these payments since the 1976 presidential election. The media release is available at the US Federal Election Commission's website at: <http://www.fec.gov/press/press2007/20070626conventions.shtml>.

⁶⁰ Information about the Canadian funding and disclosure system is available at the Elections Canada website at <http://www.elections.ca>.

⁶¹ Information about the New Zealand approach is available on the Elections New Zealand website: <http://www.elections.org.nz>.

⁶² The AEC advises that in 2007, the cost of public funding per elector was \$3.59, which has been calculated by dividing the total amount of public funding by the total number of electors who were enrolled for the 2007 election (that is, \$49,002,638 divided by 13,646,539 electors).

- 4.30 Critics argue that the increase in public funding is contributing to the increase in expenditure on elections.⁶³ The AEC estimates that between 1984 and 1996, the ALP's electoral expenditure increased in real terms by approximately 60 per cent, and the Liberal Party's electoral expenditure increased in real terms by approximately 45 per cent.
- 4.31 An alternative view is that factors other than public funding are driving campaign expenditure, such as the increased use of media advertising and rising advertising costs.
- 4.32 Chapter 8 considers the case for capping expenditure on elections.

The reimbursement scheme

- 4.33 A reimbursement scheme exists in all the selected countries except in the Australian federal election system, and in all of the Australian states and territories that provide public funding, except the ACT.
- 4.34 When first introduced, federal election funding operated as a reimbursement scheme capping payments to the lesser of the calculated funding entitlement or proven campaign expenditure. The scheme was changed to a direct entitlement scheme to help guarantee more timely payments. Previously, the timing of payments was uncertain due to the administrative requirements of collating claims and supporting vouchers, despatch to the AEC in Canberra and verification of claimed expenditure before payments were made. At the time, this process could result in delays of days, weeks or even months. The direct entitlement scheme introduced certainty into payments by requiring entitlements to be calculated as at the 20th day after polling day and for at least 95 per cent of that entitlement to be paid as soon as possible. The balance of entitlements is paid upon finalisation of the vote count.
- 4.35 The government's rationale for seeking to reintroduce a reimbursement scheme as set out in the Political Donations Bill for the Australian federal election system is to remove the possibility of candidates and parties receiving more in public funding than they spent on the campaign, that is, to prevent participants from making a financial gain by standing for office. The Bill also includes provisions to allow parties and candidates to be reimbursed as closely as possible to the timing of the current system, thereby addressing criticisms of the earlier reimbursement approach.

Election funding versus annual funding for ongoing expenses

- 4.36 Australia, like all of the selected countries except Canada, only provides election campaign funding. Canada provides annual funding for the ongoing expenses of political parties and candidates.
- 4.37 Canada has the strictest approach to regulation, banning all donations except donations from natural persons who are citizens or permanent residents, and capping the amount of donations. The strict limits on private sources of funding are balanced by the provision of public funding for the ongoing expenses of political parties and candidates, which is based on the vote received in the previous election and is paid quarterly. These payments are adjusted annually for inflation on 1 April and currently total approximately C\$7.1 million per quarter.
- 4.38 A move to providing ongoing public funding to political parties in Australia would require consideration of what the objectives of the scheme should be, the grounds on which parties would qualify for funding, how entitlements should be calculated, when funding should be paid and what balance should be struck between the proportions of private and public funding. It also raises issues of accountability of those funds, such as whether, and how best, to tie the expenditure of public funds to specified activities or outcomes.

⁶³ J-C Tham and D Grove, op cit., p. 413.

DISCUSSION POINTS

- 4.39 Any change to the current public funding system raises immediate and significant questions concerning the conduct of elections in Australia – not least because public funding and the regulation of private donations are inextricably intertwined in the consideration of electoral reform.
- 4.40 Public funding was intended to ‘level the playing field’ and to remove the potentially corrupting and undue influence of ‘big money’ from the electoral process. Whether it has achieved either – or can achieve either in the absence of other regulation – is difficult to answer with a resounding affirmative.
- 4.41 In considering the possible continuation, reform, restriction or extension of public funding, a range of questions arise. A threshold consideration must be whether the initial aims of the current public funding regime remain appropriate. If we conclude that political fairness and the limitation of perceptions of potential ‘influence peddling’ and perceptions of possible corruption of the political process remain valuable aims in electoral regulation, further questions of equity and fairness in the administration of public funding must be addressed, as well as the interaction between public funding models and possible donation and disclosure regimes.
- 4.42 Some would argue for the elimination of public funding, as an unwarranted use of public funds. Others might see public funding as the ‘least worst’ option. Without adequate public funding, the pressure on political parties and candidates to seek donations and raise revenue will remain. Public funding was intended to alleviate this pressure, although experience suggests that additional regulation of donations and/or spending might be necessary to enhance the effect. Alternatively, public funding could be used as an instrument of change to political culture and practice, by tying eligibility for public funds to desired political behaviours such as options for voluntary limitation of election spending.
- 4.43 The existing public funding model at a federal level in Australia, based on the percentage of the vote received at the last election, has been portrayed as ‘stacking the deck’ against new entrants into the political contest and in favour of the election winner. It is suggested by some commentators that advantages of incumbency are combined with a greater slice of the public funding pie. While this has not been proved a significant impediment to participation in the past, given the prevalence and availability of private sources of funding and resources, any consideration of reform to the regulation of private funding (covered later in this paper) immediately raises questions of equity and fairness in access to public funding.
- 4.44 Looking to other jurisdictions reveals models for allocating public resources (other than public campaign finance) based on other measures of party support, which are perhaps less difficult for new entrants. Among a range of criteria used by New Zealand, for example, in allocating funds, free time or both, for election broadcasts by registered parties is any indication of public support such as the results of public opinion polls and the number of party members.⁶⁴ However, in determining the initial allocations for parties for the 2008 New Zealand election, Elections New Zealand stated that ‘[A]s opinion poll results are becoming less reliable as an indication of the views of the whole population, they were given a lesser weighting than has been the case in previous allocation decisions’.⁶⁵
- 4.45 These systems are arguably still less-than-perfect. On the other hand, also arguably less-than-perfect is the situation in which the capacity to attract private funding determines which new entrants and minor parties get a chance to participate and present themselves for election.

⁶⁴ Section 75 of the *Broadcasting Act 1989* (NZ) specifies the criteria to be used for determining the broadcasting allocation for registered parties.

⁶⁵ Elections New Zealand, ‘Broadcasting allocation 2008 – initial allocation decision’, 19 May 2008, available at <http://www.elections.org.nz/files/2008-initial-allocation.pdf>.

- 4.46 Later chapters of this paper canvass options involving limiting or eliminating private funding. Such proposals must assume an extended and more central role for public funding – without it, political parties will not be able to continue to carry out their functions. Extension of public funding, however, carries a range of potential unintended consequences. While potentially offering scope to free political parties from the need to raise money through private donations and from the perception of improper influence by donors, public funding carries with it an arguable dependence on the state which may or may not be perceived as a threat to the integrity of the political process. Moreover, it is argued that the greater the proportion of finance that comes from public funding, the less incentive parties have to engage with the community to solicit support.
- 4.47 While private donations remain uncapped, experience suggests that public funding will remain a supplement to other sources of funding. The ‘arms race’ between political parties in campaign expenditure is one reason for this focus on private funding. Another is that the current public funding regime runs in concert with the electoral cycle, while political parties need ongoing funds to function. The Canadian approach to public funding addresses this issue by providing for party administration costs between elections. Changes to the public funding formula might also take into account the benefits of a formula which made the outcome less uncertain for political parties, in order to permit forward planning of both administrative costs and campaigns.
- 4.48 If we wish public funding to assume a more central role in campaign funding, reducing the reliance on private money, addressing both the question of the ‘arms race’ and the real financial demands on political parties must be part of the solution.
- 4.49 In considering the interaction between public and private funding, the level of public funding as well as the allocation of that funding is a key issue. Setting higher public funding levels may well contribute to the campaign spending ‘arms race’ while setting them at an unrealistically low level which does not recognise the current costs of political activities, would leave political parties and candidates still needing to ‘chase’ higher levels of private funding.
- 4.50 Public acceptance of additional public funding might be enhanced if community concerns about escalating donations and campaign costs were addressed simultaneously. The fairness of the allocation and administration of public funding can also be argued to be key to public acceptance of increased public funding, and public confidence in the use of such funding for electoral purposes rather than for profit.

Part 3 – Private Funding – Donations and Other Contributions

CHAPTER 5. SOURCES OF PRIVATE FUNDING

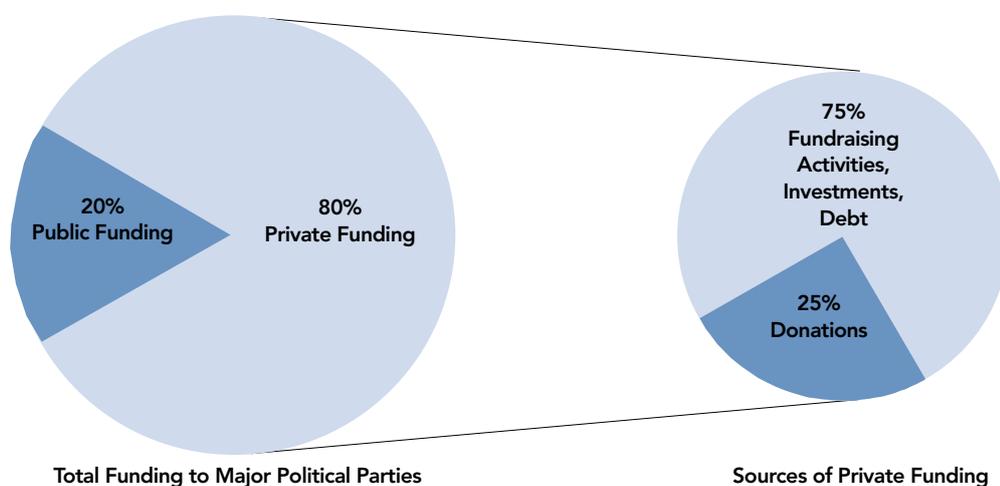
This chapter:

- explains the rationale for permitting political parties and candidates to raise funds from private sources;
- describes the sources of private funding for political parties and candidates, including donations;
- explains the aims of requiring political parties and candidates to disclose donations; and
- raises the question whether the financial disclosure scheme is effective in regulating disclosure of political parties' and candidates' sources of private funding to contest elections.

BACKGROUND

- 5.1 Australia permits political parties and candidates to raise funds from private sources, including in the form of donations, on the basis that such donations and other contributions from private sources are a legitimate exercise of the freedom of political association and expression in Australia.
- 5.2 Approximately 80 per cent of the major political parties' funds come from private sources.⁶⁶ Approximately three-quarters of major political parties' funds from private sources come from fundraising activities, investments and debt.

Chart 1 – Major Political Parties' Sources of Funding



⁶⁶ See Chapter 1 and J-C Tham and D Grove, *op cit.*, p. 401.

- 5.3 Approximately one-quarter of major political parties' funds from private sources comes from donations. The annual returns of the major political parties' federal, state and territory branches in the 2004–05 financial year indicate that over 80 per cent of the amount raised by donations came from donations of \$10,000 or more. Approximately 60 per cent of the money raised through donations came from donations of \$40,000 or more, and 45 per cent came from donations of at least \$100,000. This shows the importance of large donations to the major parties.
- 5.4 In 2004–05, 16 donations to the ALP were for \$100,000 or more, and 21 donations to the Liberal Party were at \$100,000 or above.
- 5.5 Analysis of political parties' annual returns for the three financial years from 1999–2000 to 2001–02 indicated that corporate donations comprised the major source of funding for the major parties. During this period, the ALP received almost 19 per cent of its funding from corporate donations, while the Liberal Party received almost 28 per cent from this source.⁶⁷
- 5.6 A study of donations by Australian corporations to the major political parties in the 1995–96, 1996–97 and 1997–98 financial years considers corporations' motivations for making donations to political parties, and analyses the kinds of corporations, and the industries, from which donations were made in that three year period.⁶⁸
- 5.7 The study notes the lack of evidence of corporations' motivation for making donations to political parties, and speculates that the motivations range from altruism or a sense of social responsibility, to the hope of access to the party that wins government, to a desire to maximise their profits.
- 5.8 The study states that in the period of the study, total corporate donations were \$29 million, and of that amount:
- approximately \$18.5 million was donated to the Liberal Party (64 per cent); approximately \$7 million was donated to the ALP (23 per cent), just under \$3.5 million was donated to the National Party of Australia (National Party);
 - over \$17 million was donated by public companies (63 per cent of which was donated to the Liberal Party; 29 per cent of which was donated to the ALP);
 - over \$11.6 million was donated by private companies (65 per cent of which was donated to the Liberal Party; 15.5 per cent of which was donated to the ALP);
 - professional firms donated approximately \$250,000 to the Liberal Party, just over \$73,000 to the ALP, and approximately \$9,000 to the National Party;
 - lobby groups donated over \$11 million to the Liberal Party, approximately \$9 million to the ALP and \$2.7 million to the National Party;⁶⁹ and
 - nine of the top ten Australian Stock Exchange (ASX) listed corporate donors made donations to more than one party,⁷⁰ comprising approximately 25 per cent of the total corporate donations made during that period.⁷¹

⁶⁷ J-C Tham and D Grove, *op cit.*, pp. 401–402.

⁶⁸ I Ramsay, G Stapledon and J Vernon, 'Political Donations by Australian Companies' in *Federal Law Review*, vol. 29, 2001, pp. 177–218. A copy of the article is available at <http://www.austlii.edu.au/au/journals/FedLRev/2001/8.html>. The article contains tables that illustrate corporate donations between 1995 and 1998, donations by listed companies by industry group, total donations by industry, average corporate donations by industry, industry corporate donations by party and top 10 ASX listed company donors.

⁶⁹ *ibid.*, p. 199.

⁷⁰ *ibid.*, pp. 201–202.

⁷¹ *ibid.*, Table F at p. 218. The top ten ASX listed companies donated more than \$7.3 million from 1995–96 to 1997–98.

5.9 The study summarises the situation as follows:⁷²

‘In summary, over the three years of the study, the ALP received most of its corporate money from public companies, while the Liberal Party received significant sums from both the public and proprietary company sectors. The National Party’s figures varied too widely to generalise, but tended to the proprietary company sector. The Liberal Party received substantially more than the other parties from professional firms. Finally, the Liberal Party and the ALP both received significant amounts from lobby groups.’

5.10 The study ranks the amount of donations by industry sectors and notes that in the period of the study, the largest amount of donations were from the banking and finance sectors (just under \$3 million), the tourism and leisure sector (approximately \$1.7 million), the developers and contractors sector (\$1.4 million) and the diversified industrial sector (approximately \$1.05 million).⁷³

5.11 The authors of the study refer to the total amount of donations in the period of the study of \$29 million and observe that ‘although the figure of \$29 million over three years seems relatively small in contrast to the value of the corporate sector, it would be considered a much more significant sum when compared to the budget of the political parties’.⁷⁴

ISSUES

The extent to which the Electoral Act requires disclosure of sources of private funding

5.12 The aim of introducing the financial disclosure scheme was to promote the transparency of donations to political parties and candidates.

5.13 The Electoral Act currently applies only to the one quarter of major political parties’ funds from private sources that comes from donations (and therefore applies only to 20 per cent of the major political parties’ total funds from both public and private sources). The Electoral Act does not apply to the three-quarters of major political parties’ funds from private sources other than donations (and therefore does not apply to 60 per cent of the major political parties’ total funds from both public and private sources).

5.14 The fact that approximately 60 per cent of the major political parties’ total funds from both public and private sources come from sources other than donations must lead to consideration of whether the Electoral Act should apply to such private sources of funds and, if so, to which sources.

5.15 Although the Electoral Act requires disclosure by both the recipient of private funding and the provider of donations, there remains the scope for major contributions to a political party or candidate to remain undisclosed if contributions do not come within the scope of matters requiring disclosure under the legislation. If the public has no way of being aware of major contributions by way of, for example, purchases at fundraising events, there is an argument that one of the major purposes of the disclosure system established in 1984 has not been met.

5.16 An alternative view would be that such contributions are not entirely private in the way that direct funding is. Fundraising events, after all, often attract considerable publicity.

⁷² *ibid.*, p. 199.

⁷³ *ibid.*, p. 213.

⁷⁴ *ibid.*, p. 202.

- 5.17 If the current disclosure scheme is considered inadequate, an alternative might be the New South Wales model that requires political parties, groups and candidates, to disclose details of each fundraising activity or function and requires donors attending fundraising functions to disclose details of the purchases of entry tickets, raffle tickets, auction items or other memorabilia.
- 5.18 The benefits of additional transparency from disclosure of each contribution would need to be weighed against the administrative burden to parties of ensuring that full and accurate records were kept.
- 5.19 The AEC advises that none of the selected comparable countries attempts to regulate such contributions.

The effectiveness of the provisions in the Electoral Act that require disclosure of ‘gifts’ or donations as sources of private funding

- 5.20 The Electoral Act requires donors and recipients to disclose ‘gifts’ or donations above a threshold (currently \$10,900).
- 5.21 Section 287 of the Electoral Act defines a ‘gift’ to mean a disposition of property made without consideration or without adequate consideration, and includes the provision of a service (though does not include the provision of volunteer services).
- 5.22 The definition raises questions about the scope of what is to be regarded as a ‘gift’, ‘property’, ‘consideration’ and ‘adequate consideration’. There are also questions raised about whether the definition is adequate to regulate the increasingly sophisticated means by which parties raise funds for their campaigns.
- 5.23 In a number of common areas of fundraising, there can be difficulty in determining where a commercial transaction ends and a donation begins. For example, a fundraising auction might see bids for items below, at or above commercial value. The donation element of such transactions is currently not easily defined, and is naturally more difficult still when the item being auctioned does not have a market value.
- 5.24 This is illustrative of a range of contributions to political parties that are not necessarily classed as gifts or donations. They can encompass gifts in kind, attendance at party functions (for example, at dinners where the amount paid to attend exceeds the cost of the ‘tangible’ aspects of the functions such as food, drink and venue hire) and donations made indirectly to a political party.
- 5.25 In contrast with the federal scheme, New South Wales requires political parties, groups and candidates to disclose details of each fundraising activity or function; and requires donors attending fundraising functions to disclose details of the purchase of entry tickets, raffle tickets, auction items or other memorabilia.⁷⁵
- 5.26 Another private funding source for political parties, which needs to be addressed in any comprehensive approach to regulation, is the question of how returns on commercial investments are dealt with. Under current legislation, revenue from commercial investments is included in parties’ returns as part of the total of all receipts, but there is no requirement for this revenue to be distinguished from other receipts, including gifts.

⁷⁵ Election Funding Authority, *Election Funding Guide for Parties for State Elections*, March 2007; Election Funding Authority, *Election Funding Guide for Candidates and Groups for State Elections*, March 2007; Election Funding Authority, *Election Funding Guide for Political Donors*, March 2007; all cited in the New South Wales Legislative Council’s Select Committee on Electoral and Political Party Funding Report: *Electoral and Political Party Funding in New South Wales*, June 2008, p. 146.

- 5.27 Consideration needs to be given to whether receipts, including commercial investment revenue, should be separately disclosed to distinguish such sources of revenue from other sources such as donations or fundraising activities. Some political parties also receive revenues from third party entities making commercial investments, and providing some or all of the returns to the party. Consideration also needs to be given as to how such transactions should be treated in any new scheme of regulation of parties' funding sources.

The case for specific legislative provisions relating to disclosure of donations from corporations and trade unions

- 5.28 The Electoral Act does not distinguish between corporate and other donations, nor does the *Corporations Act 2001* contain specific provisions relating to the disclosure of donations to political parties.
- 5.29 As corporations are major donors to the major political parties, an issue to be addressed is whether specific provisions relating to donations by corporations are necessary, desirable and potentially more effective as regulatory controls over donations.
- 5.30 The United Kingdom provides an example of such provisions. The *Political Parties, Elections and Referendums Act 2000* (UK) amended the *Companies Act 1985* (UK) to require shareholders' approval of donation policies of public companies and require full donations disclosure in a public company's annual report.
- 5.31 Australia could consider introducing similar provisions in order to enhance the transparency of corporate donations to political parties.
- 5.32 The United Kingdom applies provisions similar to the 'companies' provisions to trade unions. The *Trade Union and Labour Relations (Consolidation) Act 1992* (UK) requires union members' approval of political expenditure, including contributions, whether in cash or in kind, to political parties, and political activity that could influence the vote for or against a political party. In Australia, the *Workplace Relations Act 1996* does not contain specific provisions relating to political donations or expenditure by trade unions.
- 5.33 As a comparison, Canada bans donations from anyone other than natural persons who are citizens or permanent residents. The United States prohibits donations from corporations, banks and unions. Bodies incorporated in New Zealand and unincorporated bodies that have their headquarters or main place of business in New Zealand are able to donate above the threshold of NZ\$1,000 to candidates, political parties or third parties.
- 5.34 This is a significant matter for consideration in the Australian context. The introduction of a statutory basis for shareholders and union members to have a say in the political donations policies of their respective companies or unions, could have both advantages and disadvantages. It would address claims that such practices are neither democratic nor ethical.⁷⁶ On the other hand, it could be seen as an inappropriate intervention in the internal operations of companies and unions that could result in diminished funding. It might be considered more appropriate for shareholder and union members to present their views on election funding directly to companies and unions.
- 5.35 Chapter 7 considers the case for banning or capping donations, including donations from corporations and trade unions.

⁷⁶ Senator Andrew Murray, Australian Democrats, 'Supplementary remarks' in 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. 418; and Senator Andrew Murray, Australian Democrats, 'Dissenting Report' in JSCEM, *Funding and Disclosure: Inquiry into disclosure of donations to political parties and candidates*, JSCEM, Canberra, March 2006, p. 40.

DISCUSSION POINTS

- 5.36 The question of which kinds of support for political parties and candidates are permitted and which are covered by disclosure regulations is at least as important as the requirements for disclosure themselves.
- 5.37 Currently, it is possible for political parties and candidates to receive significant support and financial contributions through avenues not covered by the statutory disclosure regime. Extending the reach of regulation may increase transparency, but will inevitably also increase complexity and administration.
- 5.38 Questions about the place of donations and private funding in our electoral system are fundamental in any reconsideration of our regulatory scheme. The size of some political donations, their source, and the degree to which election campaigning is dependent on private funding, are all subjects of public concern. Corporate donations comprise a very significant proportion of political funding, including a number of relatively large donations.
- 5.39 In considering the sources of private funding to political parties, applying the value of political fairness raises questions about what kinds of support should be allowed, and under what conditions, to make sure all Australians have the same right to support the party or policy of their choice. The question of limiting or ‘capping’ donations will be addressed in later chapters, but the kind of contribution permissible, the degree to which contributions must be disclosed, and who is an appropriate contributor, are also questions on which comments are sought in responding to this Green Paper.

CHAPTER 6. DISCLOSURE – WHICH INFORMATION SHOULD BE DISCLOSED, AND BY WHOM?

This chapter raises issues as to whether the current disclosure scheme is sufficiently comprehensive to provide the transparency necessary to meet the original aims of the scheme.

The chapter discusses in turn whether the disclosures currently required of the various participants in the political process achieve appropriate coverage in terms of both who has disclosure obligations and the extent of those disclosures.

Finally, the chapter examines the timeliness of disclosures being made and released to public scrutiny.

BACKGROUND

- 6.1 Australia, like other western democracies, seeks to enhance transparency and mitigate the risk of undue influence or corruption by requiring disclosure of finances in the interests of openness and accountability. Disclosure is founded on the principle that the public has a right to know the extent and nature of the financial involvement of political parties, independent candidates and other participants in the political process.
- 6.2 As pointed out in Chapter 5, approximately 80 per cent of the major political parties' funding comes from private sources. However, more than 75 per cent of this private funding comes from sources other than those currently reported by the parties as donations or gifts. These other sources include membership and affiliation fees, fundraising functions and interest from investments.
- 6.3 The Electoral Act imposes disclosure obligations on political parties, associated entities, third parties, candidates and Senate groups. Uniquely among the countries compared in this paper, Australia also requires disclosure from donors to political parties and candidates. However, the Electoral Act does not require disclosure of contributions over the threshold that do not fall within the definition of 'gift' which encompasses donations.

DISCLOSURE OBLIGATIONS

- 6.4 Details of the current disclosure obligations for participants in the political process are set out at Chapter 3 at paragraphs 3.14 to 3.29. These are discussed below.

Donors

- 6.5 Donors must disclose donations to political parties and candidates where the sum of the donation to each political party or candidate is above the threshold. Donations to a state branch of a registered political party are currently treated as separate donations. Provisions in the Political Donations Bill will remove this distinction and treat the donation as having been made to the same party.
- 6.6 Details of any donations in excess of the threshold that have been received by the donor and which are then donated by the donor, in whole or in part, for the purpose of benefiting a party must also be disclosed.

- 6.7 Disclosure by donors of donations to political parties is required to be made annually. Returns must be lodged with the AEC within 16 weeks of the end of each financial year. The returns are made public on the first working day in February in the calendar year after lodgement.
- 6.8 Disclosure of donations made to candidates must be made after an election (election returns) and cover donations made in the period from 31 days after the previous federal election until 30 days after polling day. Similar disclosure obligations apply for donations that are received from another person and which are then used, in whole or in part, to make a donation to a candidate.
- 6.9 Election returns must be lodged within 15 weeks of polling day, with returns being made public 24 weeks after polling day.

Political parties

- 6.10 Registered political parties must lodge annual disclosure returns documenting the total of all receipts, expenditure and debts. Political parties must identify the source and value of receipts above the threshold, identify the source and value of debts from the same source that total to more than the threshold, and document details of loans from sources other than financial institutions. Each state and territory branch of a registered political party must lodge a return. The returns consolidate the financial transactions of all the administrative units of the party, such as local branches and committees, including campaign committees.
- 6.11 The annual returns must be lodged with the AEC within 16 weeks of the end of each financial year. The returns are made public on the first working day in February in the calendar year after lodgement.
- 6.12 Political parties are not required to lodge election returns as the information is incorporated, though not separately identified, in their annual return. For this reason, it is not possible to clearly identify what a party spent on an election campaign.

Associated entities

- 6.13 As set out at paragraph 3.15, the Electoral Act defines ‘associated entities’ to mean entities that are controlled by a registered political party, that operate wholly or to a significant extent for the benefit of a registered political party, or that are, or on whose behalf other persons are, financial members of a registered political party or hold, or on whose behalf other persons hold, voting rights in a registered political party. The Electoral Act defines ‘entities’ to mean incorporated or unincorporated bodies or the trustee of a trust.
- 6.14 Associated entities must lodge annual returns with the same information as that required of political parties, apart from details of loans from sources other than financial institutions. Associated entities must also list the sources of capital deposits received that were used to generate funds that were donated to a political party.
- 6.15 The timeframe within which associated entities must lodge their annual returns and when they are made available to the public are the same as those for political parties’ annual returns.
- 6.16 Where associated entities incur political expenditure, they are also required to lodge annual returns of political expenditure as third parties. Discussion of third party returns follows at paragraphs 6.27 to 6.29 below.

Candidates and Senate groups

- 6.17 Candidates are required to lodge returns after each election with details of donations received, including gifts-in-kind, and the amount spent on specified electoral expenditure (election returns). Electoral expenditure includes advertisements, campaign material, mail-outs, polling and research relating to the election.
- 6.18 Election returns must be lodged within 15 weeks of polling day, with returns being made available to the public 24 weeks after polling day.
- 6.19 Candidates must provide details of the total number and value of donations received (irrespective of the threshold), the source and value of donations received from the same source that total above the threshold, and the total electoral expenditure where the total is above the threshold.
- 6.20 Candidates who are endorsed by a registered political party must disclose personal donations or expenditure to their own personal benefit. Donations received or expenditure incurred by the endorsed candidate through a campaign committee on behalf of, or with the authority of the party, must be disclosed by the party rather than by the candidate.
- 6.21 A Senate group consists of two or more candidates for a Senate election who request to be grouped on the Senate ballot paper and thereby are entitled to have a box 'above the line' on that ballot paper. Senate groups may be endorsed by one or more political parties (jointly endorsed if the latter applies). Senate groups are treated as a single entity for election funding and some financial disclosure purposes.
- 6.22 Senate groups (Independent and jointly endorsed groups) are required to lodge election returns that contain the same information as candidates' returns, with the exception of groups endorsed by a single party. For these endorsed groups, the disclosures are included in the party's annual return.
- 6.23 The disclosure period for donations received by candidates differs for new and previous candidates and Senate groups. For candidates who have contested recent elections, the disclosure period commences 31 days after the previous federal election they contested within the past four years (House of Representatives) or seven years (Senate). If the person did not contest an election during that period, the candidate disclosure period commences from the earlier of the date the candidate nominated for the election he or she is contesting, or the date the candidate declared his or her candidacy. For a person who was appointed to a casual Senate vacancy, the disclosure period commences on the date of that appointment.
- 6.24 For Senate groups, the disclosure period for donations received commences on the date that the AEC receives a group's request to be grouped on the ballot paper.
- 6.25 In relation to the disclosure of donations received by candidates and Senate groups, the disclosure period ends 30 days after polling day.
- 6.26 In relation to electoral expenditure, the disclosure period for candidates and Senate groups commences on the date of the issue of the writ for the election and ends at the close of polling.

Third parties

- 6.27 Individuals and organisations (third parties) that incur political expenditure during a financial year must lodge an annual return documenting the total amount of expenditure where that expenditure totalled above the threshold. The returns report single line sums against each of the following categories of political expenditure:
- the public expression of views on a political party, a candidate in an election or a member of the House of Representatives or the Senate by any means;
 - the public expression of views on an issue in an election by any means;
 - the printing, production, publication or distribution of any material (not being material referred to in subparagraph (i) or (ii)) that is required under section 328 or 328A to include a name, address or place of business;
 - the broadcast of any political matter in relation to which particulars are required to be announced under subclause 4(2) of Schedule 2 to the *Broadcasting Services Act 1992*; and
 - the carrying out of an opinion poll, or other research, relating to an election or the voting intentions of electors.
- 6.28 Third parties are also required to identify the source and value of donations received from the same source that total above the threshold where those donations were used to fund political expenditure.
- 6.29 Third party returns must be lodged with the AEC 20 weeks after the end of the financial year. The returns are made public on the first working day in February in the calendar year after lodgement.

ISSUES

Thresholds for disclosure

- 6.30 The current disclosure threshold is \$10,900. The Political Donations Bill would reduce this threshold to \$1,000 or more. The Bill seeks to bring the Commonwealth threshold closer into line with the existing thresholds in the states and territories (New South Wales, Queensland and the ACT: \$1,000; the Northern Territory: \$1,500; and Western Australia: \$1,800). While Tasmania does not have any requirement for the disclosure of donations received or made, candidates for election to the Legislative Council are required to disclose campaign expenditure. No disclosure requirements exist in Victoria or South Australia.
- 6.31 Coordinating disclosure thresholds between the Commonwealth and the states and territories would be an important factor in achieving harmonisation of the schemes and would simplify compliance for those that may have disclosure obligations.

Disclosure by donors and other contributors

- 6.32 Australia is the only one of the selected comparable countries that requires donors in addition to recipients to disclose donations. The purpose of the apparent double reporting by donors and recipients to disclose donations is to provide checks in the system.
- 6.33 Different reporting requirements exist for political parties and their donors. Political parties are currently required to disclose details of all individual receipts that exceed the threshold. These single line disclosures of total receipts from a person may be a combination of donations and other sources of receipts. In comparison, donors are required to disclose when the sum of donations to a political party is more than the threshold. This comprehensive accounting of donations by donors prevents a donor from avoiding identification by breaking total donations into individual donations each below the threshold.

- 6.34 The AEC observes, however, that the different reporting requirements for political parties and donors can lead to discrepancies between the amounts of donations that donors disclose in comparison with the amounts the recipient political parties disclose. Indeed, the AEC is aware of instances in which donors disclose donations which fail to appear on parties' returns (for example, this could occur in a case where the donor made three separate donations of \$5,000 each). Requiring identical information from both donors and recipients might enhance the transparency of the system, but would raise the question of the need for a fully duplicated system.
- 6.35 Donors must also disclose details of donations they received and then used to make their donations to political parties and candidates. This traces funds back to their original source and prevents avoidance of disclosure of the identity of the true donor.
- 6.36 The Political Donations Bill would require donors to account for donations made across related party groups, which would ensure that donors could not avoid disclosure by engaging in 'donation splitting' across related party groups, such as by donating to separate state bodies of a political party.
- 6.37 If disclosure by donors is accepted as necessary then there are questions as to whether such forms of disclosure should be extended beyond current requirements.
- 6.38 Disclosure by donors is currently limited to donations to political parties and candidates. Donors are not required to disclose donations to Senate groups, associated entities or third parties. Nor is there a requirement for the disclosure of donations made to MPs in their capacity as MPs. The relationship of donors with political parties and candidates on the one hand, and with Senate groups, associated entities, third parties and MPs on the other hand, is one that could be made more transparent by the extension of donor disclosure requirements to all donations made.
- 6.39 Data indicates that extending donor disclosures would substantially increase the amount of information available to the public. For example, for the 2006-07 financial year, 216 donor returns for donations to political parties were lodged, and associated entities and third parties identified 101 donors in their returns.⁷⁷ Lowering the threshold for the disclosure of donations, as well as extending the range of donations which are captured, would shed significantly more light on where the money 'flows' to, and from, in Australia's political system.
- 6.40 Of the comparative countries discussed in this paper, given that Australia is on its own in requiring disclosure by donors, there is the obvious question of whether adequate requirements around disclosure by recipients could be enacted if disclosure requirements by donors were to be altered or no longer required and whether that would be a preferable course.
- 6.41 An important consideration in regulating the requirement for donors to disclose their donations is to achieve balance between citizens' right to know about donations and other contributions to political parties and candidates on the one hand, and individuals' right to privacy on the other hand.
- 6.42 Australia attempts to achieve that balance by requiring donors to disclose their personal details only in relation to donations that exceed the threshold, which means that individuals who wish to remain anonymous can do so by making donations that total below the threshold.
- 6.43 Since donations account for only one quarter of the private funding received by political parties, it may be arguable that the principles of transparency that support disclosure by donors apply equally to requiring disclosure of other sources of private funding. Consideration should also be given to whether disclosure equivalent to that made by donors should be extended to other contributors of private funding.

⁷⁷ Associated entities are asked to identify which of their detailed receipts are donations, however, as with political parties, providing that information is voluntary.

DISCLOSURE BY RECIPIENTS (POLITICAL PARTIES, ASSOCIATED ENTITIES, CANDIDATES, AND SENATE GROUPS)

Political parties

- 6.44 There are a number of issues relating to the application of disclosure requirements to political parties.
- 6.45 The existing regulatory requirement does not require political parties to identify their associated entities. Requiring parties to identify their associated entities could be expected to contribute to the transparency of the system by ensuring that all entities are known and disclosure returns sought from them as, and when, they are due. But it is debatable whether this is a necessary step, including whether the current definition of associated entities is adequate to capture those organisations who should disclose or whether it inappropriately applies to some organisations which should not have to be identified.
- 6.46 People are generally not aware that the major avenues for the private funding of political parties do not fall within the scope of donations. This can result in people misinterpreting disclosure obligations, for instance mistaking the receipt of debt funding from a bank to have been a donation by that financial institution, but also failing to recognise what in fact does require disclosure as a donation. Another question is whether the system should require a distinction to be made between donations and other receipts in disclosure returns, in the interest of transparency. This question is particularly pertinent as more than three-quarters of private funding to political parties comes from sources other than donations.
- 6.47 The system does not require political parties to publish a balance sheet which would enable members of the public to assess their financial health. The question arises whether such a requirement would enhance the transparency of the system.
- 6.48 Since 1998, political parties have not been required to provide a detailed breakdown of their expenditure in their annual returns. The question is whether the transparency of the operations of political parties would be enhanced if they were required to detail individual expenditures that exceeded the disclosure threshold.
- 6.49 Political parties and their state and territory branches are required to lodge returns but not their respective administrative units. While details for these units are incorporated in the returns, they are not separately identified. Consideration could be given to whether Australia should follow the example of Canada and the United Kingdom and require the administrative units of political parties to lodge returns. Requiring separate disclosure from each accounting unit of a political party would provide enhanced transparency as to where throughout a party's structure transactions were occurring. For instance, requiring campaign committees to lodge separate disclosure returns would identify which donations were received for individual campaigns and also the expenditures that were undertaken at that level.
- 6.50 On the other hand, requiring individual branches of a party to lodge returns may impose a substantial and unnecessary administrative burden on these groups, one that may be beyond their capacity to comply. It could also be seen as discouraging grassroots participation, particularly by supporting the increased centralisation of financial transactions within political parties.
- 6.51 In addition to requiring registered political parties to complete financial disclosure returns, it may also be appropriate to require unregistered political parties – which may not stand candidates for office but which are involved in election campaigns and political debate – to complete financial returns, in the interests of enhancing the transparency of the overall political system.

Associated entities

- 6.52 As disclosures by associated entities are nearly identical to those of political parties, most of these issues apply equally to their disclosures. Consideration also needs to be given to whether those disclosures are appropriate in all instances and whether the definition of associated entity (at paragraph 3.15) is operating to capture all, and only, those entities from which disclosure is in the public interest.
- 6.53 One question is whether the definition of associated entities is wide enough to cover all who engage in activities that involve them in the political process. For example, the definition does not cover entities that are associated with participants in the political process other than political parties such as candidates, parliamentarians and other associated entities. Nor does it apply to entities that operate to the detriment of political parties (an example is The Australians for Honest Politics Trust which operated to challenge the Queensland state registration of Pauline Hanson's One Nation).
- 6.54 A further question arises about whether the definition erroneously applies to entities without enough of an association with a political party to justify regulation, such as trade unions that are affiliated with the ALP or businesses that have corporate memberships with the National Party of Australia.
- 6.55 In the case of an entity that meets the Electoral Act's definition for having membership or voting rights in a political party, where that association has come about for little financial consideration, the question must be asked whether it is appropriate that an entity's annual finances be detailed in a disclosure return where there is no material financial relationship. Would it be more appropriate in such instances to limit disclosure to requiring the memberships and affiliations of entities to be listed for public scrutiny?
- 6.56 Like political parties, associated entities are not required to provide a detailed breakdown of their expenditure in their annual returns. The transparency of their operations would be enhanced if they were required to detail individual expenditures that exceeded the disclosure threshold.

Candidates and Senate groups

- 6.57 In their election returns, candidates and Senate groups are not required to disclose any receipts that are not considered by the Electoral Act to be donations. An issue is whether the object of the Act would be better served if all candidates and Senate groups were required to disclose the details of all receipts above the threshold, and not just donations?
- 6.58 This then leads to consideration of whether personal debts held by candidates should also be disclosed by them. It could be argued that debt has the potential to be used as undue influence or leverage against political parties and candidates. Accordingly, there may be a case for requiring all candidates for election to disclose their debts. As this disclosure would be of limited value without requiring candidates to list all personal debt, not just campaign related debt, consideration would need to be given to the intrusion of such a requirement and the potential for it to act as a discouragement to people standing for election.
- 6.59 Senate groups in which all the members are endorsed by the same political party and the campaign committees of endorsed candidates do not lodge disclosure returns, but have their transactions incorporated into the annual returns of the respective political parties. The transparency of the financing of election campaigns would be enhanced by requiring the campaign committees of endorsed candidates and Senate groups to lodge separate election returns of their donations and expenditure.

Third parties

- 6.60 Third party disclosure requirements as set out at paragraphs 6.27 to 6.29, only require the disclosure of a single figure for the total expenditure for each of the expenditure categories to be disclosed. Given the minimum detail currently provided by third parties, consideration could be given to whether requiring further detail, such as disclosing details of people to whom sums totalling above the threshold were paid, would contribute to the transparency of the system.
- 6.61 The coverage of political expenditure appears wide, however, issues arise in relation to the effectiveness of the provisions because of:
- the subjective nature of the test of whether expenditure is for the purpose of public expression of views on a political party, MP, candidate, Senate group, or an issue in an election by any means;
 - the range of legislative definitions relevant to defining publication or broadcasting of material requiring authorisation; and
 - the fact that the polling and research provisions can erroneously apply to academics and journalists who are conducting such research for purposes other than political commentary or campaigning.
- 6.62 New Zealand, the United States and the United Kingdom require third parties to register before engaging in political expenditure above a threshold, and to disclose their expenditure.
- 6.63 A system of registration of third parties wishing to engage in political expenditure of more than a predetermined expenditure threshold could assist in ensuring that all significant participants were clearly and correctly identified to the public at the time of their expenditure, while retaining the ability of individuals and small groups to make contributions to public debate, involving expenditure less than the threshold, without having to register.

TIMELINESS OF PUBLIC DISCLOSURE

- 6.64 Timeliness of disclosure is important for transparency. Different timing provisions apply for the lodgement and public release of disclosure returns. Annual returns by political parties and associated entities must be lodged with the AEC 16 weeks after the end of the financial year; while those by donors to political parties and returns by third parties must be lodged 20 weeks after the financial year. The annual returns are made available to the public in the first working day in February in the calendar year after lodgement. Election returns by candidates, Senate groups and donors to candidates must be lodged 15 weeks after polling day, with public availability occurring nine weeks after that, or 24 weeks after polling day. The Political Donations Bill introduces a six-monthly reporting requirement, with biannual returns to be lodged eight weeks after 30 June and 31 December, and election returns to be lodged eight weeks after polling day. The returns will be made available to the public as soon as is reasonably practicable after lodgement.
- 6.65 The effect of the current timeframes is a lag between transactions being entered into and their disclosure which raises a question over their transparency. The public release dates for disclosures relating to the 24 November 2007 federal election are 12 May 2008 for election returns (for candidates, Senate groups and donors) and 2 February 2009 for annual returns (which cover political parties, associated entities, third parties and donors). Clearly the major point of public disclosure, particularly in the absence of comprehensive regulation through bans or caps on financial activities, is to allow the public to form judgements about political parties and candidates and to apply that knowledge in exercising their franchise at the ballot box. However, these considerable time lags do not allow the voting public to be informed of election campaign finances at the end point of those campaigns when casting their votes.

- 6.66 The timeframes for disclosure are generally lengthier in Australia than in other countries. Of particular note are the United Kingdom and the United States. In the United Kingdom, political parties are required to lodge quarterly financial disclosure returns within 30 days, with weekly disclosures being made during elections. In the United States, participants are required to report expenditures on a daily basis and donations on a monthly basis during elections.
- 6.67 Given the considerable logistical exercise for political parties in Australia to prepare their disclosure returns, sometimes needing to be consolidated with hundreds of branches across the state or territory, there is a practical limit on how short reporting time periods can be for comprehensive disclosures. However, an alternative to more frequent comprehensive disclosures is to require more timely disclosures of transactions considered significant, such as any receipt, expense or new loan that exceeded a set threshold. Such limited disclosures could be required more frequently, for example on a monthly basis coming down to weekly or daily disclosures during an election campaign.
- 6.68 The United States and the United Kingdom are able to obtain and publish returns in a timely manner because of their systems of mandatory electronic record keeping and lodgement. Any move to such timely reporting in Australia would necessarily need to be underpinned by similar requirements.

DISCUSSION POINTS

- 6.69 The donation disclosure regime underpins the transparency of the electoral system. The question to be addressed is whether the existing regime remains sturdy enough to provide a strong base for the integrity of the electoral and political system – and if not, how it can be improved.
- 6.70 The principle behind disclosure of donations is that electors have the right to know where political parties get their support – financial and in kind. The wider the net cast by the donation disclosure requirements, the more extensive the information available to Australians when deciding for whom to vote.
- 6.71 In modern campaigning, where political parties often have associated entities and third parties exerting influence on electoral outcomes, it is arguable that transparency in the electoral process requires donation disclosure requirements of these entities as well. Defining exactly what connection to a political party, or what participation in the political process, would require disclosure, is a subject that requires some discussion.
- 6.72 Lack of disclosure by third parties potentially circumvents the requirements for transparency placed upon candidates and parties. A principle concern is to ensure electors know who has donated to a candidate or party and know who has contributed resources on that candidate's or party's behalf.
- 6.73 Arguments against more intrusive disclosure regimes include the right of privacy – that people have the right to support a political party without their names being made public – sometimes constructed as a corollary of the right to vote secretly. This argument, like many others surrounding donations, equates the vote with the right to donate. In addition, opponents of more comprehensive disclosure regimes suggest that many donors would be 'scared off' from donating, driving parties further into the arms of those few donors who are not put off by possible publicity. Alternatively, some people would argue it is inappropriate to compare the right to vote, which can be exercised by all adults equally, with the right to donate, where different people will have different capacities to donate, from large amounts, to small amounts, or no money at all.

- 6.74 On any view, there is an arguable public interest in knowing who donates and how much, which must be weighed in assessing the right to privacy in donations.
- 6.75 A system which required greater levels of disclosure would potentially impose extensive administrative burdens on parties, candidates, and non-party entities. In considering these burdens, the question of both technical systems to make disclosure easy and accurate, and the question of ‘threshold’ (at which point as disclosure becomes significant enough to be declared) must be weighed. The timeliness of disclosures is also a key factor. If the intent behind disclosure regimes is to inform electors, then this purpose is defeated if disclosure is not timely. The approach adopted by some countries, including the United Kingdom, where political parties report donations before elections, appears more likely to influence people’s approach to this issue than others which do not disclose until after the relevant election.

Part 4 – Bans and Caps

CHAPTER 7. BANS OR CAPS ON PRIVATE FUNDING

This chapter outlines arguments for and against banning or capping private funding, with reference to the approaches to regulation of election funding in a number of other countries.

BACKGROUND

- 7.1 Australia currently focuses its regulation of electoral financing on transparency through public disclosure.
- 7.2 Limited financing restrictions currently apply. The Electoral Act bans political parties, candidates and Senate groups from receiving anonymous donations above a threshold.⁷⁸ The prohibition does not extend to anonymous donations to associated entities and third parties.
- 7.3 The Political Donations Bill seeks to remove the threshold and extend the ban on anonymous donations to all participants in the political process, and to ban the receipt by all participants of donations from overseas.
- 7.4 A number of the selected countries ban categories of donations. Canada bans donations from corporations, unions, associations and groups. The United States bans anonymous and overseas donations, and donations from corporations, banks and unions. The United Kingdom bans anonymous donations.
- 7.5 Canada and the United States cap donations. Canada caps donations from a single source at approximately C\$1,100. The United States caps donations from a single source at approximately US\$28,500 to parties and US\$2,300 to candidates.
- 7.6 Chapter 8 discusses capping campaign expenditure.

ISSUES

Permitting donations

- 7.7 Australia does not currently limit the amount individuals and organisations can contribute to political parties, candidates and others in the political process, on the basis that such support is a legitimate exercise of the right to freedom of political association and expression.
- 7.8 A criticism of that approach is that permitting donations of any amount, from any local source, risks making the recipients of the donations potentially dependent on a small number of large donors, and vulnerable to possible undue influence or corruption.
- 7.9 Other western democracies, including the United States, Canada and the United Kingdom, seek to balance the individual right to freedom of political association and expression against the public interest in minimising the risk of undue influence or corruption in their electoral systems, by limiting the amount individuals and organisations can donate to political parties, independent candidates and others in the political process.

⁷⁸ Electoral Act, section 306.

- 7.10 Banning or capping private funding could assist in addressing concerns about the effectiveness of Australia's federal public funding and financial disclosure scheme to achieve the aim of reducing political parties' and candidates' reliance on donations and other private sources of funding for contesting elections. The public funding and financial disclosure scheme was introduced in 1984 with the aim of providing political parties and candidates with adequate funding to contest elections, and reducing their reliance on donations and other private sources of funding. However, since the introduction of the scheme the amount of private funds political parties raise to supplement their public funding for contesting elections has, in fact, increased considerably.
- 7.11 Any consideration of bans or caps on political donations needs to recognise that donations now account for only one-quarter of private funding for political parties. Based on overseas experience, a ban or cap would be ineffective if it resulted in donors making a financial contribution by another, potentially less transparent means, such as fees for attendance at functions, fundraising activities or through payment of membership fees. Similarly, the provision of debt support needs to be considered given the potential influence resulting from debt holders' conditions on financing of debt incurred by political participants.
- 7.12 One impact of caps, depending upon the level at which they are set and the breadth of their application, might be the encouragement of political parties to seek funding from a larger number of smaller donations, or an increased volume of membership fees. It is argued that if political parties become dependent on multiple small donations, the pressures for increased fundraising efforts may expand 'grassroots' participation, but may also divert the efforts and energies of the parties into endless fundraising.
- 7.13 A critical issue is the level at which any cap would be set. The Canadian model adopts a low cap at C\$1,100, while the US has caps of US\$2,300 to candidates and US\$28,500 to parties. Views will differ on where any cap on donations should be set, if such a cap were to be introduced.
- 7.14 A low cap, such as \$1,000, may greatly increase the pressure on parties and candidates to expand their number of donors. A significantly higher cap, such as \$100,000 may not effectively eliminate the perception that donations are a source of undue political influence and access.

Possible application of bans or caps on private contributions to specific categories of donors

- 7.15 Suggestions have also been made that Australia should consider banning private contributions from particular types of donors, such as:
- donors seeking a particular decision from, or a contract with, government, including corporations, unions, lobbyists and property developers;
 - donors from industries that some people may consider have a negative impact on public health or welfare, such as donors from the tobacco, gaming, racing and liquor industries; and
 - trusts.
- 7.16 Bans could also be considered on:
- all private contributions other than from individuals; and/or
 - the provision of debt funding, credit underwriting and guarantees by non-Australian sources.
- 7.17 There has been recent public discussion about whether donations from anyone other than an individual – encompassing corporations, trade unions and even community groups – should be controlled or even banned. This could involve adopting a Canadian-style approach whereby donations are only allowed from citizens, and could even be restricted to donations from adults who are on the electoral roll.

- 7.18 An argument in favour of this approach is that the Government is elected by individuals and is there to represent the will of its citizens, rather than organisational interests. In that case, individuals should be encouraged to contribute to those running for office by allowing them to give donations to their party of choice, whereas organisations should not be allowed to influence candidates or parties running for office. Banning donations from organisations is argued to have the added advantage of preventing wealthy individuals from donating to political parties and candidates through a range of different corporations or organisations, thereby undermining any caps on donations which may be in place.
- 7.19 An argument against banning donations from organisations is that different types of organisations play a variety of important roles in modern society – corporations have legitimate interests in government decisions; trade unions exist to represent the interests of their membership base; while community groups can be formed around important social or environmental issues.
- 7.20 Caps on private contributions can operate either in concert with or instead of bans. While bans narrow the base from which private contributions can be raised, caps limit the potential financial influence across the spectrum of contributions. Capping is an option to be considered as an attempt to prevent the exertion of undue influence, as well as possibly establishing more even campaign budgets.
- 7.21 In considering the arguments around bans on private contributions, it is important to consider the extent of disclosure that currently exists and would exist with a broader definition of matters requiring disclosure under the Electoral Act. A relatively strong and comprehensive system of transparency might make bans unnecessary. That is something to be weighed against the goal of reducing the scope for undue influence.
- 7.22 Similarly, there are arguments both for and against banning contributions from particular types of donors. On the one hand, the judgment of what is harmful can be subjective and therefore determining who can be prohibited from donating is a fraught exercise. On the other hand, some types of donors may be deemed to be more likely to be seeking to influence a particular government decision, or to be working against the broader public good, such as community health or welfare, and therefore that any suggestions of influence through donations should be removed by banning those donations.
- 7.23 Consideration of issues surrounding donations from corporations and trade unions is discussed at Chapter 5.

Considerations of constitutional law

- 7.24 Imposing caps or bans on private funding also raises constitutional issues. The power to make laws with respect to elections to the Senate and the House of Representatives is subject to the express requirement of sections 7 and 24 of the Constitution that Senators and members of the House of Representatives be ‘directly chosen by the people’, and to the implied freedom of political communication derived from those and other provisions of the Constitution, identified by the High Court of Australia in a series of cases.⁷⁹
- 7.25 In one case, *Roach v Electoral Commissioner*,⁸⁰ which involved consideration of the words ‘directly chosen by the people’, Gummow, Kirby and Crennan JJ said that those words required a ‘substantial reason’ for denying a member of the Australian community ‘a voice in the selection of ... legislators’. A ‘substantial reason’ was said to be a reason that is ‘reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government’.

⁷⁹ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

⁸⁰ *Roach v Electoral Commissioner* (2007) 233 CLR 162.

- 7.26 In another case, *Lange v Australian Broadcasting Corporation*, the High Court found that freedom of communication on matters of government and politics was an ‘indispensable incident’ of the system of representative and responsible government which is established by sections 7 and 24 of the Constitution.⁸¹
- 7.27 The Court found that the freedom of political communication is not an individual right, rather it is a limit on the power of the Commonwealth to enact legislation that infringes the freedom of political communication. Furthermore, the Court found that the freedom of political communication is not absolute: the freedom is limited to the extent necessary for the effective operation of the system of representative and responsible government in Australia.
- 7.28 A two-part test for determining whether a law infringes the implied freedom of political communication was outlined by a full bench of the High Court in *Lange v Australian Broadcasting Corporation* and refined by McHugh J, supported by Gummow, Hayne and Kirby JJ, in *Coleman v Power*⁸² as follows. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?⁸³
- 7.29 In the case of *Australian Capital Television Pty Ltd v Commonwealth*⁸⁴ the Court found that the *Political Broadcasts and Political Disclosures Act 1991*, which banned political advertising during election campaigns and introduced mandatory free radio and television political advertising time, was invalid for breaching the implied freedom of political communication, because ‘there were other less drastic means by which the objectives of the law could be achieved’.⁸⁵
- 7.30 These limits will be relevant to any proposal to ban or cap donations and would need to be considered carefully. The identification of a broad statutory objective – for example, to require political parties to engage with their members to achieve their support to finance their campaigns, to promote fair competition for election by minimising the difference in financial resources between contestants, and to avoid contestants for election becoming dependent on a small number of large contributors, and vulnerable to undue influence or corruption – will not necessarily resolve all of the constitutional issues.

Implications of bans or caps on private funding for public funding

- 7.31 A ban or cap on private funding could substantially reduce political parties’ campaign funds, and potentially reduce their expenditure on campaigning. It could affect their current scope and scale of operations. This could mean that parties are unable to effectively participate in the election processes. The impact of caps or bans on public funding and the extent to which any adjustment to the amount of public funding would be necessary to political parties to ensure their viability would need to be considered.

⁸¹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

⁸² *Coleman v Power* (2004) 220 CLR 1.

⁸³ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567; *Coleman v Power* (2004) 220 CLR 1 at paragraphs 95–96, 195–196, and 211.

⁸⁴ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

⁸⁵ The High Court’s explanation of the decision in *Australian Capital Television Pty Ltd v Commonwealth* case in their judgment in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

DISCUSSION POINTS

- 7.32 Capping private funding to political parties is an approach taken by some jurisdictions seeking to create a more level playing field and to reduce the reliance by political parties on significant financial donations from private sources. Some extend their restrictions to other participants in the political process, such as associated entities and ‘third parties’.
- 7.33 Caps attempt to ‘level the playing field’ by removing the advantage that wealthy individuals, or candidates who are favoured by wealthy individuals or corporations, have in comparison to others less financially favoured.
- 7.34 None of the other selected jurisdictions completely ban donations from private sources, suggesting that some reliance on private funding is widely accepted, although Canada and the USA ban donations from corporations.
- 7.35 In the Australian federal electoral system, no restrictions on donations currently exist. It has been argued that this could result in a situation where influence and access can be ‘purchased’, or attempts made to purchase them. When considering caps or bans on private funding, the question must be not only the effect of acting, but the result of not acting, which perpetuates a system where the perception is that financial contributions can deliver political advantage.
- 7.36 Capping or banning private donations raises additional definitional questions, such as whether the existing definition of ‘gift’, which excludes many sources of funding including fees paid for dinners with politicians, and membership or affiliation fees, is adequate.
- 7.37 Eliminating or reducing private funding with bans or caps would address concerns about undue influence. It is argued that both bans and caps go towards ensuring that all citizens have equal opportunity to participate in the political process – either by reducing the level of permissible donations to that affordable by a larger number of people through a cap, or with a complete ban, by eliminating private funding altogether. It is suggested that in such a situation, political participation and support for the political party of choice would then be limited for all to the level of volunteer involvement and party activism.
- 7.38 An important consideration in capping donations is that, given the differing sizes and resources of political parties, the size of the donation which might be perceived as ‘influencing’ could vary. Setting any cap either too high or too low risks undermining the potential effects and value of such a reform, in eliminating perceptions of undue influence but maintaining a lifeline of access to campaign funds for parties and candidates.
- 7.39 Some may argue that capping or banning donations may be unnecessary if other provisions, such as capping expenditure, are introduced. This is the case in the UK. In addition to expenditure caps, New Zealand places caps on anonymous donations made via the New Zealand Electoral Commission and places a limit on the amount parties can receive in this way as a percentage of the expenditure cap. On the other hand, Canada has introduced caps on both, likely seeing them as being complementary measures (reducing both the size of moneys coming in and going out of political parties).
- 7.40 Bans or caps do undeniably prevent some individuals from making contributions of the kind or level they would prefer. Some argue that the restraint of individual liberty involved in limiting or banning private donations must be weighed against intended gains, which may include fairness, integrity in the system, and changes in the behaviour of political parties. One potential change from capping donations is the possibility that such regulation might lead political parties to engage with a broader sector of the community in order to finance campaigns from many small donations. A potential change from banning private donations might be to remove any remaining incentive for political parties to engage with the community except as ‘consumers’ of a campaign message.

- 7.41 Banning donations arguably carries risks. Removing a significant part of parties' ongoing funding could seriously impair parties' operations between election periods unless the public funding system was also overhauled to provide ongoing, rather than periodic, funding. Capping donations may also have such an effect. Limiting the income of political parties could significantly affect current political campaigning and party structures. Alternatively, it is argued that it could provide a strong incentive for parties to engage more effectively with a wider group of their supporters and members.

CHAPTER 8. CAPS ON EXPENDITURE

This chapter outlines arguments for capping expenditure, with reference to the approaches to regulation of election expenditure in a number of other countries.

BACKGROUND

- 8.1 Prior to 1980, Australia, like other western democracies, put limits on expenditure on elections. The limits applied to candidates' expenditure rather than political parties' expenditure. The *Commonwealth Electoral Act 1902* contained a limit on candidates' electoral expenses of £250 for a Senate candidate and £100 for a House of Representatives candidate, and required candidates to lodge returns detailing their expenses. The *Commonwealth Electoral Act 1918* added a requirement for newspaper proprietors, and for 'every trade union ... organisation, association, league, or body of persons' incurring expenses on behalf of, or in the interests of, any candidate or political party, to lodge returns detailing their expenses.
- 6.2 The *Commonwealth Electoral Act 1946* increased the caps on electoral expenses to £500 for a Senate candidate and £250 for a House of Representatives candidate. In 1966, with the introduction of decimal currency, the caps on electoral expenses were converted to \$1,000 for a Senate candidate and \$500 for a House of Representatives candidate.
- 8.3 The *Commonwealth Electoral Amendment Act 1980* repealed the caps on candidates' electoral expenses on the basis that such limits imposed a constraint on the nature of candidates' campaigns, and were hard to enforce.⁸⁶
- 8.4 Canada, New Zealand, and the United Kingdom limit expenditure on elections with a set cap. Canada caps expenditure by reference to the number of enrolled electors. The United States has a system under which political parties and candidates can agree to limit their expenditure in exchange for receiving public funding for their campaigns. The funding is paid subject to proof of their expenditure.

ISSUES

Caps on expenditure

- 8.5 Capping political campaign expenditure, in a similar manner to banning or capping donations, could assist in addressing concerns about the effectiveness of Australia's federal public funding and financial disclosure scheme. Capping political campaign expenditure could achieve the aim of reducing the reliance of political parties and candidates on donations and other private sources of funding to contest elections, by reducing the need for campaign funding, and could even out the campaign budgets of participants.
- 8.6 The academic literature cites arguments for and against capping expenditure.⁸⁷

⁸⁶ Hon John McLeay MP (Minister for Administrative Services), *Second Reading Speech, Commonwealth Electoral Amendment Bill 1980*, House of Representatives, *Debates*, 15 May 1980, p. 2848-2850.

⁸⁷ S Young, 'Party Expenditure' in S Young and J-C Tham, op cit., p. 93.

- 8.7 The arguments for capping expenditure include:
- caps mean there is no real advantage in one candidate or party having access to greater financial resources as there is a limit on how much they can spend;
 - caps create a level of financial equality between candidates at an election;
 - caps reduce the level of election finance needed, meaning that more candidates (including less wealthy candidates) may compete at elections;
 - caps help to contain overall election costs which, in turn, reduces reliance on donations and the associated problem of private donors using donations to influence candidates or parties' policies;
 - the absence of caps encourages excessive television and other advertising; and
 - many overseas jurisdictions place limits on election expenditure.
- 8.8 The literature cites the following arguments against capping expenditure:⁸⁸
- expenditure caps are too difficult to enforce;
 - candidates should be free to campaign in whatever manner they see fit (so long as they comply with bribery and corruption laws);
 - modern electioneering practices mean that individual candidate spending is not as relevant as the spending incurred by centralised party organisations;
 - caps on party expenditure need to extend to third parties, which may cause problems; and
 - it is difficult to set realistic spending caps due to the changing costs of media access and electioneering techniques as well as inflation and the need to keep closing administrative loopholes once these are discovered.

Constitutional law considerations

- 8.9 Similar constitutional law considerations apply as those in the context of the discussion of banning donations as outlined at Chapter 7.
- 8.10 One argument might be that a particular law that caps expenditure may not directly burden freedom of political communication 'because the immediate impact is on the spending of money'. On the other hand, the law might be said by others to indirectly burden freedom of political communication 'because the lion's share of such expenditure is spent on communicating political matters ...'.⁸⁹
- 8.11 From another point of view it might be argued that the purpose of introducing a cap on expenditure (namely to promote a 'level playing field' between contestants for election, to contain the increasing cost of elections and to minimise the risk of undue influence or corruption), is 'a legitimate end ... compatible with the maintenance of the ... system of representative and responsible government'.
- 8.12 As has been discussed earlier, if Australia were to consider introducing a cap on political parties' and candidates' expenditure on elections, a key question would be whether a means exists of implementing the cap that is 'reasonably appropriate and adapted' to serve that end.⁹⁰

⁸⁸ *ibid.*, p. 95.

⁸⁹ J-C Tham and G Orr, Submission to the JSCEM Inquiry into disclosure of donations to political parties and candidates, 2004, p. 40. The submission is available at <http://www.aph.gov.au/house/committee/em/donations/subs.htm>.

⁹⁰ D Cass and S Burrows, 'Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits', *Sydney Law Review*, vol. 22, 2000, p. 490.

- 8.13 The United States, Canada and the United Kingdom all enacted legislation to cap campaign expenditure which was the subject of judicial consideration of whether the legislation was in breach of the right to freedom of political communication.⁹¹
- 8.14 The United States' first attempt to enact such legislation was found invalid for infringing freedom of communication. Their solution was to enact legislation for a system under which political parties and candidates can agree to limit their expenditure in exchange for receiving public funding for their campaigns.
- 8.15 The legislation in Canada and the United Kingdom was found valid, on the basis that though the legislation was an infringement of the right to freedom of political expression, the legislation was for the legitimate purpose of establishing a level playing field for elections.
- 8.16 Australia could seek to rely on similar arguments to support the introduction of legislation to cap expenditure, and could consider a model similar to that in the United Kingdom, which is the most modern of the schemes in the other countries.
- 8.17 The United Kingdom's scheme was enacted in the *Political Parties, Elections and Referendums Act 2000* (UK) (the PPERA). The PPERA limits expenditure by political parties and third parties.
- 8.18 The PPERA applies to the following eight items of 'campaign expenditure' which is incurred for 'election purposes':
- party political broadcasts;
 - advertising;
 - unsolicited material addressed to electors, such as leaflets and handbills;
 - any manifesto or other document setting out the party's policies;
 - market research or canvassing 'conducted for the purpose of ascertaining polling intentions';
 - the provision of any services or facilities in connection with press conferences or other dealings with the media;
 - the transport of people (such as party leaders) to any place or places 'with a view to obtaining publicity in connection with an election campaign'; and
 - rallies and public meetings organized to obtain publicity in connection with an election campaign.
- 8.19 The PPERA does not apply to expenses incurred in respect of the remuneration or allowances payable to any member of the staff of the party, whether permanent or temporary.
- 8.20 The PPERA limits expenditure in the year before an election to £20 million. The formula for calculating the limit on political parties' expenditure is £30,000 multiplied by the number of seats which the party contests. The maximum possible under the formula at the next general election is £19.5 million.⁹² The United Kingdom is considering a proposal to reduce the limit to £15 million, in which case the maximum possible under the formula at the next general election would be £14.95 million.⁹³

⁹¹ The information that follows is from an article by K D Ewing, 'Promoting Political Equality: Spending Limits in British Electoral Law', *Election Law Journal*, vol. 2, no. 4, 2003, pp. 499–524. The article contains an analysis of the case law in the United States (*Buckley v Valeo* 424 US 1 (1976)); Canada (*Libman v Quebec* (1998) 151 DLR (4th) 385); and the United Kingdom (*R v Jones* [1999] 2 Cr App R 253).

⁹² United Kingdom Ministry of Justice, White Paper, *Party finance and expenditure in the United Kingdom: The Government's proposals*, June 2008, p. 40. The White Paper is available at <http://www.official-documents.gov.uk/document/cm73/7329/7329.pdf>.

⁹³ *ibid.*

- 8.21 The PPERA imposes criminal penalties on party officials and on the party for breaches of the limits.
- 8.22 The PPERA limits third parties' expenditure in the year before an election (including expenditure by corporations and unions) to £10,000 in England and £5,000 for each of Scotland, Wales and Northern Ireland. Third parties wishing to donate above that limit must register with the Electoral Commission, after which the limits increase to £793,500 in England, £108,000 in Scotland, £60,000 in Wales and £27,000 in Northern Ireland.
- 8.23 The United Kingdom's Ministry of Justice published a White Paper entitled *Party finance and expenditure in the United Kingdom: The Government's proposals* in June 2008.⁹⁴ The White Paper examines the effectiveness of the PPERA and concludes that the PPERA has not been completely effective in reducing expenditure on elections.⁹⁵
- 8.24 The White Paper considers that one reason that the PPERA is not completely effective in reducing expenditure on elections is because the definition of 'campaign expenditure' is not wide enough. The White Paper considers the case for replacing the definition of 'campaign expenditure' with a definition of expenditure which is *not* campaign expenditure, including:
- contributions to party employees' pension funds to make up for past shortfalls;
 - interest on debt and repayments of debt;
 - legal expenses;
 - costs of compliance with electoral law;
 - expenditure on trading activities and income generation;
 - accounting units' expenditure on social functions for members of the party; and
 - intra-party transfers.⁹⁶
- 8.25 Legislation introduced into the UK Parliament in July 2008, proposes to re-introduce a 'trigger' at which point the limits on candidate spending would apply for a parliamentary general election. The 'trigger' would apply to electoral expenses used by a person prior to the dissolution of parliament or a person's formal nomination or declaration as a candidate, provided the expenses are incurred for the purposes of the candidate's election.⁹⁷ The aim of the legislation is 'to curb the spending 'arms race' which drives demand for large donations to parties'.⁹⁸
- 8.26 With these considerations in mind, the United Kingdom's scheme may provide a model which could be adapted to apply in Australia.
- 8.27 Alternatively, Australia could consider a scheme like that in the United States, under which parties and candidates can agree to cap their expenditure in exchange for receiving public funding for their campaigns.

⁹⁴ *ibid.*

⁹⁵ *ibid.*, p. 35.

⁹⁶ *ibid.*, p. 36.

⁹⁷ Political Parties and Elections Bill 2007–08 [Bill 141] (UK), Explanatory Notes [Bill 141 – EN], p. 7, available at <http://www.services.parliament.uk/bills/2007–08/politicalpartiesandelections.html>.

⁹⁸ Rt Hon Jack Straw MP, Secretary of State for Justice and Lord Chancellor, 'Funding reforms will tackle spending 'arms race' Straw says', press release, 16 June 2008 at <http://www.justice.gov.uk/news/newsrelease160608a.htm>.

DISCUSSION POINTS

- 8.28 With or without matching caps on private donations, capping expenditure has the potential to minimise the ‘arms race’ between major parties in election campaigning. By imposing an upper limit on election spending, the need for and advantages in attracting large donations and other financial support would be removed, and the incentive for any political party to chase dollars and potentially trade benefits or access for funding would be minimised.
- 8.29 Any attempts to cap expenditure would require a clear and broadly accepted definition of ‘election’ or ‘campaign’ spending. This could prove a difficult exercise, although examples from the UK, Canada and New Zealand provide useful starting points.
- 8.30 Overseas jurisdictions which have grappled with this issue have been more successful where election terms are fixed and precise dates can be set for the beginning of the campaign period. Without fixed terms, spending during an election period can only be clearly defined by the calling of an election. In the current climate of ‘continuous campaigning’, significant expenditure can occur quite some time before this. Approaches to this conundrum might include expecting political parties, candidates and other participants to plan their expenditure according to the anticipated date, or, alternately, applying a cap to certain kinds of expenditure across the entire election cycle.
- 8.31 Overseas experience also indicates that where parties’ spending is restrained, similar restraints must be imposed on other participants in the political process, or funding could divert to other avenues. This raises definitional issues – what spending by a corporation, union, interest group, or other organisation should be defined as ‘election spending’?
- 8.32 Another issue of concern is that spending limits will unquestionably limit the ability of the best resourced political participants to communicate with the electorate. This restraint might be characterised by some as interference in the right to free speech or interference in the marketplace of ideas, the robust conduct of which is essential to a free society arriving at the best possible answers. However, such characterisation assumes all speakers in the political arena start from the same equal footing, which clearly is not the case. At one extreme, if one political party can afford to purchase every vacant TV advertising slot in the week before an election, can this really be characterised as beneficial to robust public debate?
- 8.33 The effect of spending caps on new entrants, smaller parties and independents is also relevant. Such caps advantage those players at the expense of the larger, well-established parties, by reducing their capacity to outspend their smaller opponents. After the introduction of spending caps in Canada, electoral volatility remains high, indicating that spending caps do not act as a barrier to new entrants in the political process. Instead, it is argued that incumbents are prevented from exploiting their fundraising advantages. While undoubtedly an imperfect instrument, spending caps in Canada are seen as having achieved significant successes in controlling costs and levelling the campaign playing field.
- 8.34 From a different viewpoint, higher campaign spending may strengthen the connection between community and candidate by allowing more material to be produced and more information to be provided to voters. However, given the changes in campaigning seen in recent years, it is also arguable that spending caps would not significantly impede the ability of political parties to communicate with voters via technologies such as email, desktop publishing, YouTube and FaceBook etc.

Part 5 – Enforcement of the Funding and Financial Disclosure System

CHAPTER 9. OFFENCES AND PENALTIES

This chapter raises issues about the effectiveness of the enforcement provisions of the federal election funding and financial disclosure system.

BACKGROUND

- 9.1 The effectiveness of the funding and financial disclosure system relies on compliance by the participants in the electoral process.
- 9.2 Commentators have argued that ‘poor compliance by the parties probably represents one of the most serious challenges for Australia’s party finance laws’⁹⁹ and that ‘two decades after the disclosure scheme was introduced and nearly ten years after annual returns were introduced, some Australian political parties are flouting their disclosure obligations’.¹⁰⁰
- 9.3 If participants fail to comply, the Electoral Act establishes a system of offences and penalties.
- 9.4 Offences include failing to lodge a return, submitting an incomplete return or submitting a false or misleading return.¹⁰¹
- 9.5 The offences apply to persons (individuals or corporate entities) or, in the case of political parties, to the agent of the party. The penalties currently range from \$1,000 to \$10,000. The Political Donations Bill proposes an increase in the amount of the penalties and introduces the penalty of imprisonment for serious offences.¹⁰² On recording a conviction, the courts would also be able to order the reimbursement of wrongfully obtained payments to the Commonwealth.

⁹⁹ J-C Tham and G Orr, op cit., p. 42; available at <http://www.aph.gov.au/house/committee/em/donations/subs.htm>.

¹⁰⁰ *ibid.*, p. 43; and J-C Tham, ‘Private funding of political parties’ in S Young and J-C Tham, op cit., p.18.

¹⁰¹ There are other related offences in the Electoral Act and the *Criminal Code Act 1995* (Criminal Code Act). For example, sections 325A, 326 and 327 of the Electoral Act provide that it is a criminal offence to engage in certain activities with the intention of influencing the votes of electors or interfering with the exercise of a person’s political rights or duties relating to elections. Part 7.6 of the Criminal Code Act creates an offence for bribery of public officials (including members of parliament).

¹⁰² The Political Donations Bill seeks to increase the penalties for:

- lesser offences (for example, failing to furnish a return or furnishing incomplete returns) to amounts up to 120 penalty units (\$13,200); and
- intentional offences (for example, providing false or misleading information) to amounts up to 240 penalty units (\$26,400) or imprisonment for up to two years.

ISSUES

Effectiveness of the penalties

- 9.6 The number of successful prosecutions in relation to offences under the Electoral Act is small, which raises the question of whether the current offence provisions are effective to enforce compliance with the Electoral Act.
- 9.7 Other countries have established penalty regimes for campaign financing that differentiate between ‘corrupt practices’ which warrant criminal sanctions and ‘illegal practices’ which are dealt with by other means.
- 9.8 Canada modified its enforcement regime to include a range of administrative options which are based on the proposition that most participants in the electoral process want to comply with the law and will react to correct their behaviour to ensure conformity with the law.¹⁰³ Canada continues to have criminal penalties for serious offences; however, it has also established a range of ‘administrative incentives’ to encourage compliance. These include the power to:
- withhold election funding where reporting requirements are not met;
 - suspend registered political parties that fail to provide an annual return;
 - enter into compliance agreements with individuals or organisations to require certain action to be undertaken in order to avoid prosecution; and
 - seek an injunction during an election period to prevent any person from doing any act that is prohibited by Canadian electoral legislation or to do any act required by that legislation.
- 9.9 Australia could consider adding similar arrangements to the Electoral Act, which could enhance compliance with the Electoral Act and potentially prevent serious offences from occurring. For example, administrative penalties may be more appropriate than criminal penalties for dealing with offences such as failure to lodge a disclosure return by the due date.

Application of the penalties to the right participants

- 9.10 Although political parties are the primary participants in Australia’s electoral system, the offence provisions do not apply to political parties, in recognition of the fact that many political parties are not legal entities. Political parties in Australia are generally categorised as voluntary associations made up of members who have agreed to the internal rules of that association.
- 9.11 Australia could consider the following options for applying the offences in the Electoral Act to political parties.
- (a) **Continue to permit parties to maintain their preferred status and to require parties to have agents**
- 9.12 The Electoral Act requires registered political parties to appoint an agent who submits the party’s declarations and returns, and, nominally, receives the party’s election funding (in practice a party’s funding is generally deposited directly into a bank account in the name of the party). The party’s agent can be prosecuted for offences under the Electoral Act.

¹⁰³ R Landry, ‘Enforcement of *Canada Elections Act*’, *Electoral Insight*, vol. 5 no. 1, March 2003, pp. 2–6, available at http://www.elections.ca/eca/eim/article_search/issue.asp?issue=7&textonly=false&lang=e.

- 9.13 There are several disadvantages in prosecuting the party's agent rather than the political party:
- the party agent may be liable to repay overpayments or prohibited donations out of his or her own pocket (i.e. the political party that committed the offence has no obligation to support the agent); and
 - the party agent may legitimately claim not to know about the offences that have been committed.
- 9.14 Prosecutions of party agents that have occurred since 1983 have been largely unsuccessful. An issue is whether the application of the offences to a party's agent deters political parties from infringing the funding and disclosure rules.

(b) Require political parties to incorporate

- 9.15 Political parties could be required to incorporate, either as an incorporated association under state or territory legislation or as a company under the *Corporations Act 2001* in order to be, or continue to be, registered. An incorporated political party would be a legal entity that would be responsible for the actions of its members and office bearers. It would be required to keep financial records and could be subject to legal action.
- 9.16 An alternative arrangement could be for the Electoral Act to include a provision that specifically gives a registered political party (or state branch) standing before a Court for prosecution and recovery purposes.
- 9.17 One possible model would be to provide that on registration as a political party a party is deemed to be a body corporate with perpetual succession with the power to own property and to sue and be sued.
- 9.18 However, the effectiveness of establishing such an arrangement in the Electoral Act could be compromised by the fact that most registered political parties do not hold assets in their own name and may not have the means to pay the sums sought for recovery. While action could be taken to deregister a political party, fines and penalties may not be able to be enforced because the party holds no assets.

Information/resources required to enforce the laws

- 9.19 A further issue which is considered elsewhere in this paper is whether participants disclose sufficient information to enable compliance to be properly monitored (for example, disclosure of expenditure details). Other jurisdictions require additional funding and expenditure information to be disclosed. Canada, New Zealand and the United Kingdom also require returns to be accompanied by an auditor's report vouching for their accuracy.

DISCUSSION POINTS

- 9.20 Australia's electoral laws provide the framework for free and fair elections and protect the integrity of the electoral system and the faith Australians have in the process of democratically electing their government. Deliberate contravention of those laws strikes at the heart of democracy, and by undermining the legitimacy of the elected government, undermines governance itself. Such breaches must be acted on and penalised.
- 9.21 Moreover, it is unrealistic to expect that all parties and other participants in the electoral process will comply with a purely voluntary code.
- 9.22 To achieve real change in political practice, electoral reforms must be backed by an effective regulatory and enforcement regime, including penalties that those involved in the political system will take seriously, and which will penalise those involved in practices that breach electoral regulations.
- 9.23 Any consideration of an enforcement and penalty regime must take into account both existing practices in political parties and politically active organisations, and the changes likely to arise from any proposed changes to electoral law. For example, where the conduct of political campaigns and the decisions concerning that conduct are concentrated in the hands of professional party operatives, penalties directed at candidates (who might have little or no role in decisions concerning spending and fundraising) would be both ineffective and unfair.
- 9.24 While the general question of a penalty regime raises issues of appropriate penalty and proportionality, the specific question of penalising political parties must grapple with the fact that political parties in Australia are not legal entities, but rather categorised as voluntary associations. Requiring political parties to incorporate might solve some of these issues, but would also have far-reaching consequences for internal party practices.

Part 6 – Alternative Approaches to Election Finance Regulation

CHAPTER 10. OPTIONS FOR THE FUTURE

This chapter presents a number of possible elements and approaches for consideration as options for a future funding and financial disclosure system.

- 10.1 Consideration of the preferred system of donations, funding and expenditure for the future could encompass a variety of approaches, from the introduction of a range of new regulatory measures to no change at all from the current system.
- 10.2 In this chapter, a number of different possible approaches to reform, not intended to be exhaustive, are set out. The different models concentrate on different forms of funding, expenditure or disclosure regulation explored in previous chapters.
- 10.3 No one set of changes affecting one element of regulation should be seen in isolation; changes to any one element need to be viewed for their impact on other elements of the system. As a result, each approach described, with the exception of the option of no change, does not necessarily stand alone but could be combined in part or full with other approaches.
- 10.4 The case for any option should therefore be viewed against the weight put on each of the principles highlighted in Chapter 2. The approaches discussed also target different concerns about the system of political finance and reflect different objectives. Some focus on reforms to who can donate and how much can be donated or spent, while others emphasise enhanced disclosure requirements.

POSSIBLE MODELS

Expenditure restraint

- 10.5 Under this option, expenditure caps would be imposed on candidates and political parties. The primary objective of this model is to address the rising costs of election campaigns which in turn place increasing pressure on participants to seek substantial amounts of funding from political donations.
- 10.6 One of the challenges of this model is determining the appropriate level of any cap. Setting a cap around the current levels of election campaign costs, or even higher, may not have a significant impact on the pressures on parties and candidates to raise funds. On the other hand, setting a cap at a much lower level may attract criticism about how participants in election campaigns can successfully communicate their message to the electorate.
- 10.7 The outcomes of this model should include:
 - lower campaign costs;
 - reduced fundraising demands on candidates and political parties.

10.8 Other considerations:

- the effect of the caps would be undermined if the expenditure of 'third parties' and other pressure groups was not also capped. Even if 'third parties' were capped, there may be a proliferation of third parties such that the same amount of expenditure is spread across these groups;
- the possibility that there could be constitutional difficulties in relation to the maintenance of the constitutionally prescribed system of representative and responsible government, although a carefully crafted scheme may be possible.

Donation restraint

10.9 Under this option, caps would be imposed on donations to candidates and political parties. The aim of this model is to remove large donations from the system which may be seen as purchasing access or influence with participants. It would also reduce the amount of money available to parties and candidates and therefore have the effect of limiting the growing costs of campaigns.

10.10 The level of cap which is imposed could be determined according to the level at which a donation may be considered large enough to obtain access or influence. For example, some people may argue that donations of \$10,000 – or even \$1,000 – are sufficient for the donor to expect something in return, while others may believe that much larger donations, for example up to \$100,000, can be made without attracting such an expectation.

10.11 Alternatively, the level at which caps are set may reflect other reasons for imposing restrictions on the size of donations. For example, some support the introduction of caps at a very low level – such as \$100, \$200 or \$500 – in order to force parties to seek a much larger number of donations from a wider range of people, rather than being able to rely on a small number of substantial donations.

10.12 The outcomes of this approach should include:

- a significant reduction in the amount of funding that candidates and political parties have available for campaigns;
- potentially a lowered perception or risk of improper influence being obtained through donations; and
- greater political participation through fundraising with parties and candidates needing to increase their number of individual supporters in order to raise money.

10.13 Other considerations:

- parties might be unable to conduct adequate campaigns due to their inability to obtain large donations;
- there would likely be pressure for increased public funding to make up for any shortfall in the amount of money available to political parties and candidates. This could include public funding to sustain parties between elections;
- caps only on donations as currently defined could be expected to lead to greater emphasis on other forms of fundraising, such as functions, auctions, or events, which fall outside this definition; and
- the effect of the caps would be undermined if donations to 'third parties' and other pressure groups were not also capped. As with the previous model, even if caps were applied there could be a proliferation in the number of third parties involved in campaigning, as donations could be made to multiple groups, each below the cap.

Systemic caps

- 10.14 Under this option caps would be imposed on both expenditure and donations. The aim of this model is to reduce pressure on both ends of the political finance system with less money being donated, and less financing required for less expensive campaigns as a result of the expenditure cap.
- 10.15 The outcomes of this approach should include:
- significant reductions in campaign costs, which leads to reduced pressure on candidates and political parties to raise substantial amounts of money from donations;
 - a potential for reduced perception or practice of undue influence; and
 - possibly the participation of more candidates and parties, because of reduced campaign costs.
- 10.16 Other considerations:
- increase in regulatory burden as a result of greater reporting obligations and enforcement of both donation and expenditure caps;
 - reduced opportunity for political parties to campaign, and for electors to receive information, at election time. Therefore, there may be an increased need for public funding due to donation caps, although this may be balanced somewhat by reduced pressure for fundraising as a result of expenditure caps;
 - there may be some difficulty for parties in meeting administrative expenditure, including between elections;
 - caps only on donations as currently defined could be expected to lead to greater emphasis on other forms of fundraising, if they remain unrestricted;
 - the effect of the caps would be undermined if donations to ‘third parties’ and other pressure groups were not also capped; and
 - the possibility of constitutional difficulties in relation to the maintenance of the constitutionally prescribed system of representative and responsible government, although a scheme which is carefully constructed could be within power.

Complete donation ban and increased public subsidisation

- 10.17 Under this option all donations would be banned. The aim of this model would be to completely remove any possibility of undue influence arising through political donations. In order to compensate political parties and candidates for this loss of revenue, public funding for election campaigns would need to be substantially increased, although the exact level would depend on other goals for the system – for example, if the amount of public funding provided is lower, there could be a reduction in the overall costs of campaigns.
- 10.18 The outcomes of this approach should include:
- the elimination of any perception or risk of undue influence;
 - possibly easier entry for new parties into the electoral process, subject to the level and scheme adopted for public funding.
- 10.19 Other considerations:
- this approach requires a much higher level of Government intervention in and funding of the political process;
 - an increased cost to government and hence the taxpayer;
 - a reduced incentive for parties to seek and maintain a broad-based membership;

- the possibility of constitutional difficulties in relation to the maintenance of the constitutionally prescribed system of representative and responsible government, although once again a carefully crafted scheme may be possible.

Advertising regulation

10.20 Under this option, limits would be imposed on the amount of television advertising expenditure allowed during election campaigns (noting that a complete ban on election advertising would likely be unconstitutional). This could be supplemented or replaced by Government-funded advertising during campaigns, as occurs in New Zealand. The aim of this model is to directly target one of the largest, and growing, elements of campaign expenditure – television advertising – while allowing parties and candidates to retain maximum flexibility to campaign in other ways.

10.21 The outcomes should include:

- overall lowering of campaign costs, with the restraint on spending on the TV advertising component; and
- reduced pressure on parties to raise substantial amounts to meet the high cost of advertising.

10.22 Other considerations:

- there may be an increase in expenditure on non-television advertising, or a shift in expenditure from television advertising to other media, including an increased emphasis on internet campaigning which may not be accessible by all parts of the electorate;
- an increased cost to government and hence the taxpayer (if Government funding or support was provided for television commercials);
- political parties and individual candidates could consider it unfair if their freedom to advertise was restrained, but funds were not provided to them for advertising; and
- potential constitutional difficulties in relation to the maintenance of the constitutionally prescribed system of representative and responsible government, although again it is possible these could be avoided depending on the exact nature of the scheme.

Citizen-based

10.23 Under this option, a ban would be imposed on political donations from anyone other than individual donors. The aim of this model is to restrict the ability of corporations and organisations to seek to influence the political process, while retaining the ability for individuals to make donations as part of the democratic process. The Canadian approach to regulation adopts this model, in combination with low donation caps.

10.24 The outcomes should include:

- removal of any perception of companies or organisations purchasing access or influence through political donations; and
- possible expansion in the number of members and supporters of political parties as political parties need to obtain donations from a greater number of people.

10.25 Other considerations:

- there would need to be a significant increase in the resources and time spent by parties and candidates in securing donations from individuals;
- there is likely to be a potentially significant reduction in the revenue of candidates and political parties;
- pressure for an increase in public funding; and

- the effect of the bans would be undermined if corporate donations to ‘third parties’ and other pressure groups were not also prohibited.

Specific donor regulation

10.26 Under this option a ban would be imposed on donations from specified donors, such as:

- property developers;
- tobacco, alcohol and gaming companies;
- organisations that obtain or seek Government contracts; or
- lobbying firms.

10.27 The aim of this model is to specifically target those donations which appear to cause the most concern, while retaining the other basic elements of the current system.

10.28 Outcomes of this approach should include:

- potential influence from interests of concern to sections of the community would be removed.

10.29 Other considerations:

- value judgments about which particular donors cause concern are likely to be contentious; and
- some donations may cause contention at one level of government but not others (for example, some may argue for a prohibition on donations from property developers at local or state government level, while these donations may be uncontroversial in the federal sphere).

Enhanced disclosure

10.30 Under this option quicker reporting of donations would be required, for example, 1, 3 or 6 monthly reporting to the Australian Electoral Commission and donations over a specified amount would need to be reported immediately. The rationale for this model is that the fundamental approach of the current system is correct, but that disclosure could be made more effective if it covered more donations and was more timely. In particular, substantial donations – which are a source of possible concern – could then be made subject to public scrutiny prior to the relevant election.

10.31 Outcomes should include:

- minimal change to the current system with no restrictions on the freedom of organisations and individuals to donate to candidates and parties, or on the freedom of candidates and parties to spend on political communications; and
- a more immediate public awareness of the source of donations, which might be of particular interest in the period immediately before an election.

10.32 Other considerations:

- large donations would still be allowed and, although subject to scrutiny earlier in the election cycle, could still create perceptions of undue access or influence; and
- there would be no limit on the increasing costs of election campaigns.

No change

10.33 This option calls for a view to be formed on the relative strengths and weaknesses of the current system, and whether it is preferable to any or all of the above options.

CONCLUSION

- 10.34 As indicated, these models are presented, not as an exhaustive set of options, but to encourage consideration of the different elements of regulation which are available to government, including the different aims involved in, and the possible consequences arising from, adopting each option.
- 10.35 There are, of course, many different ways of combining these tools or strategies to build a cohesive regulatory approach. For example, an enhanced disclosure regime could be combined with limits on donations and increased public funding to fill any shortfall from a drop in financial contributions.
- 10.36 How these strategies can be assembled, and especially how they interact, are important considerations in determining the framework and the detail of a cohesive and effective scheme of donation, funding, expenditure and disclosure regulation.

Part 7 – Conclusion

CHAPTER 11. ISSUES FOR DISCUSSION AND COMMENT

- 11.1 The issues raised in this Green Paper indicate the complex nature of electoral reform. Attempts to achieve changes which promote greater harmonisation between the federal scheme and the various state and territory approaches heighten this challenge. Any reforms to our current system also depend on an evaluation of how well our current system works, and on the objectives underlying any changes to the existing regime.
- 11.2 The complexity of the issues is exacerbated by the fact that changes to the public funding regime, to donation and contribution regulations, and to disclosure requirements, inevitably interact, with the potential for unintended as well as desired consequences. Moreover, other aspects of election campaigning and the administration and conduct of elections not directly addressed by such reforms may nonetheless be affected by them as political parties adjust their structures and processes in response. Such changes may not be undesirable, but it is important they not be unforeseen, and that proposals for reforms are considered holistically.
- 11.3 This Green Paper has canvassed a broad range of issues and identified a variety of potential changes which could be made in the area of donations, funding, expenditure and disclosure. The Government believes that reform in this area – to create a system with greater fairness, integrity and transparency – is critically important, and that it warrants public debate. As a result, we are seeking comments on all of the issues raised in this paper.
- 11.4 In preparing your comments, you may wish to consider the following questions:
- 1. Public funding and support:**
- » Are the original principles which underpin the current public funding regime still relevant and appropriate?
 - » Is the current public funding regime meeting its aims and objectives effectively and efficiently? Is it effectively facilitating fair elections, ensuring adequate transparency and assisting political parties to contribute to the political process?
 - » Has public funding of political parties fuelled the increase in the costs of campaign expenditure? Would the withdrawal of public funding reduce campaign spending pressures?
 - » Should political parties and/or candidates receive public funding and support for elections?
 - » At what level should such support be set? Why?
 - » What should public funding comprise (financial assistance, material assistance, subsidised advertising etc)?
 - » Should public funding be limited to specific expenses by political parties and candidates? If so, what should those expenses be?
 - » At which point or points in the electoral cycle should public funding be provided?
 - » Should the formula for the entitlement to public funding (a threshold of 4 per cent of the formal first vote) be changed? If so, why and what are the alternatives?

- » Does the current formula for calculating public funding achieve an equitable outcome between major parties, minor parties and candidates? If not, what are the options for resolving the situation?
- » Does the current public funding formula provide recipients with an adequate and equitable amount of public funding? What is the case for increasing or decreasing the amount of public funding?
- » Are the current eligibility requirements for public funding adequate to facilitate political equality of access, including for new participants in the political process? Are there alternative approaches which provide fairer access?

2. Private funding:

- » Should political parties and/or candidates or other participants in the political process be able to receive private funding and support?
- » If so, what restrictions, if any, should be placed on the kind of funding or support they can receive?
- » Should electoral laws ban private funding from specified categories of persons and organisations? If so, which categories of persons or organisations?
- » Should corporations or organisations be treated differently from individuals?
- » Is the introduction of specific provisions relating to a requirement for shareholders' or members' approval for all political expenditure by companies and unions necessary or desirable?
- » Should Australia cap donations or private funding? If so, at what level?
- » Should Australia ban, cap or restrict loans made to political parties and other participants in the electoral process? If so, at what level?
- » Should certain transactions be exempt from a ban or cap on private funding? If so, which ones?
- » Is the current Electoral Act definition of 'gifts' wide enough to include all forms of financial and in kind support for political parties and candidates that should be regulated?
- » If not, what other kinds of contributions should the definition be expanded to apply to?
- » Should Australia make public funding of political parties and candidates contingent on compliance with bans or caps on private funding?
- » If private funding is limited, how should this be reflected in public funding?
- » Are there other matters that need to be considered on the issues of capping or banning private financial contributions?

3. Donation disclosure:

- » What kinds of private contributions should be covered by disclosure requirements?
- » What level of private contribution ought to trigger disclosure obligations?
- » Should payment at political party fundraisers be deemed to be gifts and donations? Who should bear responsibility for such disclosure – the contributor or the recipient? Or both?
- » Does the present disclosure scheme place too much reliance on self-declaration? Can this be addressed by a better definition of 'gift' in the Electoral Act?
- » What kind of penalties would be appropriate for breaching the disclosure requirements, and who should be liable?
- » Are the current disclosure requirements extensive enough to ensure transparency?

- » Should the disclosure requirements that apply to donations made to political parties and candidates, be extended to donations made to associated entities, Senate groups and third parties? Would extending the disclosure requirements enhance the transparency of the system? What would be the practical effect of such requirements?
- » Should disclosure take place more often than the current post-financial year and post-election cycles? If so, how often?
- » Should a different disclosure requirement apply to donations over a certain amount? If so, what should the amount be, when should the donation be disclosed and when should the disclosure return be published?
- » In addition, should different reporting timeframes be applied to different participants in the political process and should those timeframes be varied during election periods?
- » Should electronic lodgement of returns be facilitated and made mandatory to enable returns to be published more quickly?
- » What should the timing be for the publication and release of the disclosure returns to the public?

4. Expenditure:

- » Should Australia cap election expenditure? By what means?
- » Should expenditure caps apply to all participants in the political process?
- » If so, what level of expenditure cap would be appropriate? Should different caps apply to different types of participants?
- » What types of campaign expenditure should be included in the cap?
- » Over what time period should the caps apply (for example, during the formal election period, 12 months preceding an election, or over the entire election cycle)?
- » Should expenditure by political parties and candidates be subject to disclosure requirements? If so, how much detail should be disclosed?
- » When should expenditure disclosure be required to be made?
- » What level of expenditure should be caught by such requirements?
- » Should Australia make public funding of political parties and candidates contingent on compliance with caps on campaign expenditure?
- » Are there other matters that need to be considered on the issues of capping political expenditure?

5. Third parties:

- » Should non-party, non-candidate participants in the political process be subject to donation, disclosure and expenditure regulation?
- » How might such third-party participants be appropriately defined?
- » Should there be a registration system for third parties engaging in election related expenditure over a set limit?
- » If third parties are subject to regulation, should they be subject to the same requirements, similar requirements, or quite different requirements to political parties and candidates? What level of detail should be disclosed?
- » If disclosure obligations are to continue to apply to expenditure by third parties, does the current definition of 'political expenditure' require clarification?

6. Political parties:

- » Should the laws and regulations covering political parties and the way they administer and organise themselves be changed? If so, in what way?
- » Should registered political parties be required to disclose their associated entities?
- » Should political parties be required to disclose their balance sheets?
- » Should individual party units, such as local branches of political parties and campaign committees, be required to lodge returns separate from the central party accounts? Would the benefit of making that information available to the public outweigh the cost to political parties of complying with the requirement?
- » Should disclosure requirements be extended to unregistered political parties?

7. Associated entities:

- » Is the definition of 'associated entities' wide enough to include all organisations through which donations are made to political parties and candidates? If not, how should the definition be expanded?
- » Does the definition of 'associated entities' apply to entities without a sufficient association with a political party to justify regulation?
- » Should associated entities provide detailed disclosures of their expenditure? Should they be required to disclose their balance sheets?

8. Creating an overall regulatory regime:

- » What kind of overall regulatory regime should we establish for Australia?
- » What regulatory elements (such as disclosure rules, donor rules, donation caps or expenditure caps) should be part of our system? How should the elements of a scheme be combined?
- » How do we create an electoral system which meets our objectives?
- » What flow-through effects might it have on other aspects of Australia's electoral system?

Glossary

Associated entity	An associated entity is an entity that is controlled by a ‘registered political party’ (see below), that operates wholly or to a significant extent for the benefit of a registered political party, that is, or on whose behalf another person is, a financial member of a registered political party, or that holds, or on whose behalf another person holds, voting rights in a registered political party (section 287 of the <i>Commonwealth Electoral Act 1918</i> ; the ‘Electoral Act’, below).
Australian Electoral Commission	The Australian Electoral Commission (AEC) is the statutory body responsible for administering the Electoral Act.
Candidate	A candidate is an Australian citizen above the age of 18 years who is eligible to vote and who is nominated to contest a House of Representatives or a Senate election (sections 162 and 163 of the Electoral Act).
Donation	A donation, described as a ‘gift’ in the Electoral Act, is a disposition of property made without consideration or without adequate consideration, and includes the provision of a service (section 287 of the Electoral Act).
Donor	A person who makes a donation to a political party or a candidate.
Election period	The period commencing on the day of issue of the writ for the election and ending at the latest time on polling day at which an elector in Australia could enter a polling booth for the purpose of casting a vote in the election (section 287 of the Electoral Act).
Electoral Act	<i>Commonwealth Electoral Act 1918</i> .
Endorsed candidate	A candidate for a House of Representatives or Senate election endorsed by a registered political party.
Political expenditure	Paragraph 314AEB(1)(a) of the Electoral Act defines political expenditure to mean expenditure on: <ul style="list-style-type: none"> • the public expression of views on a political party, a candidate in an election or a member of the House of Representatives or the Senate by any means; • the public expression of views on an issue in an election by any means; • the printing, production, publication or distribution of any material (not being material referred to in subparagraph (i) or (ii)) that is required under section 328 or 328A to include a name, address or place of business; • the broadcast of any political matter in relation to which particulars are required to be announced under subclause 4(2) of Schedule 2 to the <i>Broadcasting Services Act 1992</i>; and • the carrying out of an opinion poll, or other research, relating to an election or the voting intentions of electors.

Political party	A political party is an organisation with the object or activity of promoting candidates for election to the House of Representatives or Senate (section 4 of the Electoral Act). Also see 'registered political party'.
Private funding	Political parties, organisations and other persons involved in the political process primarily fund their activities from private sources. Private funding may be through self-funding from personal resources, receiving donations, conducting fundraisers (e.g. auctions or raffles), charging for attendance at functions, membership/affiliation fees, investment income or by way of debt.
Public funding	Where a candidate or Senate group obtains at least 4 per cent of the formal first preference vote in an election, a funding rate is applied to each of those votes. The funding rate is indexed every six months to increases in inflation and the rate currently applying to the period up until 31 December 2008 is \$2.18940.
Registered political party	A registered political party is a political party with either a member in the Commonwealth Parliament or 500 members which has become registered under Part XI of the Electoral Act.
Senate group	Two or more candidates for a Senate election who request to be grouped on the Senate ballot paper. Senate groups are treated as a single entity for election funding and some financial disclosure purposes.
State branch of a registered political party	A state branch of a registered political party means a branch or division of a registered political party that is organised on the basis of a particular state or territory that is not registered in its own right.
Third party	Third parties are individuals or organisations that incur 'political expenditure' (above) but who are not seeking election.

Appendix A – The Constitutional Context of the Commonwealth Electoral System

The Australian Constitution establishes a system of representative government. The Constitution establishes the Australian Parliament, prescribes the constitution of the Parliament, and defines the powers of the Parliament. The Constitution establishes the system by which citizens elect representatives to make decisions on their behalf in the Parliament, the decision-making body of the Australian Government.

An understanding of the relevant provisions of the Constitution is important in understanding the context within which to assess the existing electoral system and to examine options for reform of the electoral system.

The Parliament consists of two houses, the House of Representatives and the Senate. The House of Representatives consists of members from each of the States in numbers that are in proportion to the voting populations of the States. The Senate consists of members in numbers that represent the States equally (currently 12 for each State, and at least 2 for the ACT and the Northern Territory). The Constitution requires that the number of members of the House of Representatives is, as near as possible, twice that of the number of members of the Senate.

The House of Representatives has a maximum term of 3 years. Senators are elected for a term of 6 years; with half of the Senate becoming vacant every 3 years (ACT and NT senators serve one term of the House of Representatives). The Constitution contemplates an election roughly every 3 years for the whole of the House of Representatives and for half the Senate.

The Constitution prescribes the process for conducting elections, starting with the issuing of the writs for an election, and defining who can nominate for election. The Constitution does not make voting compulsory; however, voting is compulsory under the *Commonwealth Electoral Act 1918* which establishes the principal requirements of the electoral system.

Appendix B – Comparison of Commonwealth, State and Territory Election Funding and Disclosure Systems¹⁰⁴

South Australia has no election funding or financial disclosure scheme.

Victoria has a reimbursement scheme (with parties and candidates providing election expenditure returns) but no disclosure scheme although political parties are required to provide a copy of the return they lodge with the AEC. Victoria prohibits donations above \$50,000 from holders of casino and gambling licences, including related companies, being made to a registered political party in a financial year.¹⁰⁵

Tasmania has no election funding scheme or a requirement for the disclosure of donations made or received. There is, however, a requirement for candidates for Legislative Council elections, with some exceptions, to disclose all items of expenditure and provide receipts for items above \$20. Election expenditure is capped for candidates (\$11,500 for 2008)¹⁰⁶ and political parties are prohibited from incurring election expenditure for Legislative Council elections.¹⁰⁷

	Commonwealth	Queensland	New South Wales	Western Australia	ACT	NT
Public Funding	Yes – a direct entitlement scheme. 4% threshold of first preference votes cast. (The Political Donations Bill seeks to reintroduce a reimbursement scheme).	Yes – reimbursement scheme. 4% threshold of first preference votes cast.	Yes – reimbursement scheme. 4% threshold of first preference votes cast or being elected.	Yes – reimbursement scheme. 4% threshold of first preference votes cast.	Yes – a direct entitlement scheme as currently operates in the Commonwealth. 4% threshold of first preference votes cast.	None.

¹⁰⁴ Appendix B was produced from information provided by the AEC.

¹⁰⁵ *Electoral Act 2002* (Vic), section 216.

¹⁰⁶ Tasmanian Electoral Commission, *Tasmanian Legislative Council Election Information for Candidates*, February 2007, p. 15.

¹⁰⁷ *Electoral Act 2004* (Tas), section 162.

Financial Disclosure	Commonwealth	Queensland	New South Wales	Western Australia	ACT	NT
Political parties	Yes. Registered parties and their State branches report annually on total receipts, expenditure and debts, and details of receipts and debts of \$10,900 or more.	Yes. Report every six months on total receipts, expenditure and debts, and details of receipts, expenditure and debts of \$1,000 or more. Report after every election totals of specified electoral expenditure for which election funding is sought. Report donations from any single donor which reach \$100,000 within a half-year period. Report to be made within 14 days after \$100,000 is reached. Returns published by the Queensland Electoral Commission within 10 business days.	Yes. Report every six months on the total value of 'small donations' (those valued at less than \$1,000) and the total number of people who made small donations. Report every six months on the details of 'reportable donations' (those valued at \$1,000 or more). 'Donation' includes subscription and membership fees, and entry fees to fundraising events. Mandatory reporting of loans.	Yes. Report annually on number and value of donations below \$1,800, details of donations of \$1,800 or more, and sum of income from other sources. Report after every election totals of specified electoral expenditures. Accepts copies of disclosure returns lodged with the AEC.	Yes. Report annually on total receipts, expenditure and debts, and details of receipts and debts of \$1,000 or more.	Yes. Report annually on total receipts, expenditure and debts, and details of receipts and debts of \$1,500 or more. Accepts copies of disclosure returns lodged with the AEC.

Financial Disclosure	Commonwealth	Queensland	New South Wales	Western Australia	ACT	NT
Candidates	Yes. Report after every election on total donations, details of all donations of more than \$10,900; and sums expended on specified electoral expenditure.	Yes. Report after every election on donations and loans of \$1,000 or more and on sums of specified electoral expenditure.	Yes. Report every six months on the total value of 'small donations' (those valued at less than \$1,000) and the total number of people who made small donations. Report every six months on the details of 'reportable donations' (those valued at \$1,000 or more). 'Donation' includes subscription and membership fees, and entry fees to fundraising events.	Yes. Report after every election on number and value of donations below \$1,800, details of donations of \$1,800 or more, sums expended on specified electoral expenditure.	Yes. Report after every election on total receipts, expenditure and debt, and details of receipts and debts of \$1,000 or more. In addition to election returns, MLAs report annually on these details.	Yes. Report after every election on total number and value of donations, details of donations of \$200 or more, sums expended on specified electoral expenditure.

Financial Disclosure	Commonwealth	Queensland	New South Wales	Western Australia	ACT	NT
Groups (e.g. Senate groups)	Yes. Report after every election on total donations, details of donations of more than \$10,900, and sums expended on specified electoral expenditure.	Not applicable.	Yes. Report every six months on total number and value of contributions of \$1,000 or more (including from fundraising events), details of contributions of \$1,000 or more (including from fundraising events), and sums of specified electoral expenditure, along with details of advertising expenditure.	Yes. Report after every election on number and value of donations below \$1,800, details of donations of \$1,800 or more, sums expended on specified electoral expenditure.	Not applicable.	Not applicable.
Associated entities	Yes. Report annually as for political parties plus details of capital contributions used to generate funds donated to a political party.	Yes. Report every six months as for political parties.	No.	Yes. Report annually as for political parties.	Yes. Report annually as for political parties except that no threshold applies – all amounts are to show individual details.	Yes. Report annually as for political parties, plus details of capital contributions used to generate funds donated to a political party.

Financial Disclosure	Commonwealth	Queensland	New South Wales	Western Australia	ACT	NT
Donors to political parties	Yes. Report annually on donations above \$10,900.	Yes. Report every six months on donations of \$1,000 or more. Report donations which reach \$100,000 within a half-year period. Report to be made within 14 days after \$100,000 is reached. Returns published by the Queensland Electoral Commission within 10 business days.	Yes. Report every six months on donations of \$1,000 or more.	No.	Yes. Report annually on donations of \$1,000 or more.	Yes. Report annually on donations of \$1,500 or more.
Donors to candidates	Yes. Report after every election on donations above \$10,900.	Yes. Report after every election on donations of \$1,000 or more.	Yes. Report every six months on donations of \$1,000 or more.	No.	Yes. Report after every election on donations of \$1,000 or more made to candidates and groups. Report annually on donations made to MLAs of \$1,000 or more.	Yes. Report on donations totalling above \$200 to a candidate or \$1,000 to an organisation.

Financial Disclosure	Commonwealth	Queensland	New South Wales	Western Australia	ACT	NT
'Third parties' (people who incur expenditure)	Yes. Report annually where they have incurred political expenditure of above \$10,900. Disclose donations received.	Yes. Report after every election where they have incurred \$200 or more of specified electoral expenditure. Disclose donations received of \$1,000 or more.	Yes. Report every six months where they have incurred \$1,000 or more of specified electoral expenditure. Disclose donations received.	Yes. Report after every election on sums of specified electoral expenditure where the total is \$200 or more. Disclose donations received.	Yes. Report after every election on sums of specified electoral expenditure where the total is \$1,000 or more. Disclose donations received.	Yes. Report after every election on sums of specified electoral expenditure where the total is \$200 or more. Disclose donations received.
Publishers and broadcasters	No.	Yes. Publishers report after every election on electoral advertisements with a value of \$1,000 or more. Broadcasters report on electoral advertisements after every election.	No.	No.	Yes. Report on electoral advertisements after every election.	Yes. Report on electoral advertisements after every election.

Appendix C – Comparison of Selected Overseas Election Funding and Disclosure Systems¹⁰⁸

	New Zealand	Canada	United States	United Kingdom
Election funding	Yes. Political parties can apply for funds for election advertising.	Yes. Candidates claim reimbursement where they receive in excess of 10 per cent of the vote. Political parties receive quarterly payments where they receive in excess of 2 per cent of the vote.	Yes. Presidential candidates and party convention committees are eligible in certain circumstances to receive public funding to match private funding.	No. However, political parties receive support from public funds through benefits in kind in the form of free party political broadcasts and free election postage, which amounts to approximately £121 million in a general election year.
Caps on donations	There are no general caps; however limits apply to donations from a single source above NZ\$1,000 made to a political party or third party via the Electoral Commission where the donor wishes to remain anonymous to the party and the public (protected donations). Limits also apply to the amounts that parties can receive as protected donations.	Yes.	Yes.	No.

¹⁰⁸ Appendix C was produced from information provided by the AEC.

	New Zealand	Canada	United States	United Kingdom
Bans on donations	Yes. Anonymous donations directly to a political party or candidate above NZ\$1,000. Anonymous donations can be made above NZ\$1,000 to a political party, but not to a candidate, as protected donations (see Caps on donations above).	Yes. Donations from non-resident non-citizens, corporations, and trade unions; and anonymous donations are prohibited.	Yes. Bans on anonymous donations and donations from corporations (since 1907) and unions (since 1943).	Yes. Bans on anonymous donations.
Caps on expenditure	Yes.	Yes, and limits on the provision of television time.	Yes.	Yes.
Financial disclosure requirements of political parties	Yes. Report every year on donations above NZ\$10,000, donations from overseas above NZ\$1,000, and anonymous donations above NZ\$1,000.	Yes, including registered electorate associations, similar to branches of a political party. Donations totalling above C\$200 per quarter.	Yes. Party campaign committees must detail all contributions from other political committees, all loans, and donations above US\$200 for an election.	Yes. Donations and loans to the party above £5,000 each quarter, donations and loans to a branch of the party above £1,000 each quarter.
Financial disclosure requirements of candidates	Yes. Report every year on donations above NZ\$1,000, including anonymous donations.	Yes, candidates for pre-selection and election. Donations totalling above C\$200 for an election.	Yes, candidates for Congress. Donations totalling above US\$50 for an election.	Yes. Donations totalling above £50 for an election.

	New Zealand	Canada	United States	United Kingdom
Financial disclosure requirements of third parties	Yes, registered third parties. Donations to above NZ\$5,000, donations from overseas above NZ\$1,000.	No.	Yes. Committees, including Political Action Committees (that enable corporations and unions to campaign) – donations above US\$50.	Yes. Donations totalling £5,000 for an election. In relation to ‘regulated donees’, such as an association of members of political parties or holders of elective office: donations and loans to an association of members of a political party totalling above £5,000 for an election, donations and loans to members of a political party or holders of elective office.

Appendix D – Submission Form

Electoral Reform Green Paper: Donations, Funding and Expenditure

Please include this form with your submission. If completing by hand, please ensure your writing is clear and legible.

PUBLICATION DETAILS	
So that your submission can be published on the website, www.pmc.gov.au , we need you to provide a name for publication that you are happy to have appear with your submission. If you are submitting on behalf of a group or organisation, this may be your group's or organisation's name.	
Individual name/group name/organisation name for publication on the website	
CONTACT DETAILS	
We need to collect some personal information in case we need to contact you should further information or clarification be required. We may also contact you to inform you of the policy process relating to electoral reform or seek your views on related matters. Personal information that you provide will only be used for these purposes. The personal information may be disclosed to the Cabinet Secretary and Special Minister of State or to officers of the Department of Finance and Deregulation and the Australian Electoral Commission as members of the Electoral Reform Task Force for the purposes outlined above.	
Please provide the information for one member of your group or organisation if you are making a submission for a group or organisation. Please provide at least one contact address; a telephone number is optional.	
Title	First Name
Surname/Family Name	
Postal Address	
Email Address	
Telephone Number	
ANONYMITY <i>Please tick if applicable</i>	
I want my submission to be treated as anonymous so that my submission will be published but without my name or contact details.	
CONFIDENTIALITY <i>Please tick if applicable</i>	
My submission contains confidential information. I do not wish to have any of my submission/part of my submission (delete or strike out that which is not applicable) published on the Internet.	
THIRD PARTY PERSONAL INFORMATION <i>Please tick if applicable</i>	
My submission contains personal information of third party individuals. The third party individual consents/does not consent (delete or strike out that which is not applicable) to the publication of their information.	

