THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE HOUSE OF REPRESENTATIVES

ELECTORAL LEGISLATION AMENDMENT (ELECTORAL FUNDING AND DISCLOSURE REFORM) BILL 2018

REVISED EXPLANATORY MEMORANDUM

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY THE SENATE TO THE BILL AS INTRODUCED

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

GENERAL OUTLINE ............................................................................................................. 4

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS ........................................ 6

NOTES ON CLAUSES....................................................................................................... 9
Schedule 1 – Electoral funding and disclosure reform .......................................................... 10
Chapter 1: Interpretation and definitions ........................................................................ 10
  Definitions ..................................................................................................................... 10
  Definition and interpretation of electoral expenditure .................................................... 15
  Definition and interpretation of electoral matter ............................................................ 19
  Exceptions to electoral matter ....................................................................................... 25
  Other general interpretational provisions Simplified outline of Part XX ......................... 29
Chapter 2: The Transparency Register .......................................................................... 31
  Simplified outline ......................................................................................................... 31
  Objects ......................................................................................................................... 31
  Requirement to register ............................................................................................... 31
  Administration of the Registers .................................................................................... 34
Chapter 3: Agents and financial controllers .................................................................. 39
  Simplified outline ......................................................................................................... 39
  Appointing an agent ..................................................................................................... 39
  Nominating a financial controller ................................................................................ 40
  Requirements for, and process of, appointment or nomination ..................................... 41
Chapter 4: Public election funding ................................................................................ 42
  Simplified Outline ......................................................................................................... 42
  Election funding entitlements ......................................................................................... 42
  Claims for election funding .......................................................................................... 44
  Payment of election funding ......................................................................................... 49
  Miscellaneous ................................................................................................................. 49
Chapter 5: Foreign donation restrictions ...................................................................... 50
  Simplified outline ......................................................................................................... 50
  Interpretation ................................................................................................................. 50
  Object ............................................................................................................................. 50
  Relationship with State and Territory laws ................................................................... 51
  Key political actors ....................................................................................................... 53
  Third parties .................................................................................................................. 56
  Gifts provided for the purposes of incurring electoral expenditure ............................... 58
  False affirmation or information that donor is a not a foreign donor .............................. 60
  Anti-avoidance ............................................................................................................. 61
  Appropriate donor information ...................................................................................... 62
  Appropriate donor information ...................................................................................... 64
  Physical elements of offences ....................................................................................... 64
Chapter 6: Disclosure ..................................................................................................... 65
  Amnesty for historical non-compliance with third party obligations ............................ 65
  Relationship with State and Territory laws ................................................................... 65
  Disclosure of donations ............................................................................................... 67
  Election returns ............................................................................................................. 72
  Annual returns .............................................................................................................. 73
  Third party returns ....................................................................................................... 75
  Relationship between Electoral Act and State and Territory disclosure laws ................. 76
Chapter 7: Miscellaneous .................................................................................................................................................. 80
Offences ............................................................................................................................................................................ 80
Recovery of payments ..................................................................................................................................................... 80
Investigation ...................................................................................................................................................................... 80
Record keeping ................................................................................................................................................................. 81
Inability to complete returns ........................................................................................................................................... 81
Amendment of claims and returns ................................................................................................................................. 82
Publication of election funding determinations, refusal notices and returns ............................................................ 82
Indexation .......................................................................................................................................................................... 82
Part XXA: Authorisation regime ................................................................................................................................... 83
Prosecution of offences .................................................................................................................................................... 83
Application of Regulatory Powers Act .......................................................................................................................... 84
Chapter 8: Application and transitional .......................................................................................................................... 85
Application and transitional .............................................................................................................................................. 85
Initial reference period for political campaigner registration requirements ............................................................ 85
Application of electoral expenditure definition for third parties in 2018-19 ......................................................... 86
Transitional registration of associated entities ............................................................................................................... 87
Transitional arrangements for the Transparency Register ......................................................................................... 87

Referendum (Machinery Provisions) Act 1984 .................................................................................................................. 90
1. The integrity, real and perceived, of Australia’s electoral system is critical to our system of government. However, Australia’s regulatory approach to political finance has not kept pace with international and domestic developments.

2. Election campaigning has radically changed through the professionalisation of politics and the proliferation of media advertising. New political actors neither endorse candidates nor seek to form government, yet actively seek to influence the outcome of elections. While a positive indicator of the strength of Australian civil society and civic engagement, these new actors lack the public accountabilities of more traditional actors, such as registered political parties or parliamentarians.

3. Internationally, media reports increasingly document foreign attempts to influence elections around the world. This is problematic, because the real and perceived integrity and fairness of elections is critical to peaceful democratic government.

4. The Joint Standing Committee on Electoral Matters (JSCEM) considered this issue in its Second interim report on the inquiry into the conduct of the 2016 federal election: Foreign Donations (the second interim report). The JSCEM made the following recommendations:
   
a) donation reform should be aligned with Australia’s sovereign interests;

b) donation reform should be transparent, clear, consistent and enforceable;

c) donations from foreign citizens and foreign entities to political parties and their associated entities and third parties should be banned;

d) an extension of the foreign ban to prevent ‘channelling’ should be considered as part of JSCEM’s broader inquiry into donations and disclosure; and

e) penalties for non-compliance should be increased.

5. Public confidence in Australia’s political processes can be enhanced by increasing the accountability and transparency of those involved in political finance, particularly in relation to election campaigns. The Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (the Bill) builds on the Electoral and Other Legislation Amendment Act 2017 to improve the consistency of regulation applying to the financed election campaigns of key political actors. The Bill will also reduce perceived and actual foreign influence on Australian political actors by restricting the ability of foreign money to finance domestic election campaigns, and reduce opportunities for election funding to be used for private gain.

6. Amendments were made in the Senate to address the recommendations made by the JSCEM in its:

   a) Advisory report on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (first report); and


7. Accordingly, the amendments sought to reduce the Bill’s regulatory burden while ensuring the Bill is still effective at achieving its goal of ensuring that only those with a meaningful connection to Australia are able to influence Australian politics and elections through political donations.
8. In the interests of certainty, and to remove the possibility of loopholes, amendments also clarify the interaction of state and Commonwealth electoral funding and disclosure schemes, and make other consequential and implementation-focused changes.

9. In summary, the Bill:

   a) establishes the Transparency Register as the central repository for information disclosed under Part XX of the Electoral Act;

   - This includes a requirement for those with large amounts of electoral expenditure (political campaigners) to register with the Australian Electoral Commission, and comply with similar disclosure obligations as political parties.

   b) clarifies the key definition in Part XX of the Electoral Act (electoral expenditure);

   c) enhances the current financial disclosure scheme in the Commonwealth Electoral Act 1918 (the Electoral Act) by requiring discretionary government benefits to be reported;

   d) prevents foreign individuals and entities from influencing the outcomes of elections by:

      i. prohibiting the giving and knowing receipt of gifts above $100 from foreign donors the donor intends to be used for electoral expenditure;

      ii. for gifts between $1,000 and the disclosure threshold received by key political actors, requiring donor certification they are not foreign;

      iii. for gifts above the disclosure threshold received by key political actors and third parties, requiring donor verification they are not foreign;

      iv. introducing penalties for donors making false or misleading statements to recipients as part of certification or verification;

   e) limits public election funding to demonstrated electoral spending, without creating cash flow issues for smaller parties and independent candidates;

   f) modernises the enforcement and compliance regime for political finance regulation;

   g) enables the Electoral Commissioner to prescribe certain matters by legislative instrument; and

   h) makes consequential and implementation-focused changes to the authorisation regime in Part XXA of the Electoral Act.

Financial impact statement

10. The Australian Electoral Commission was provided $56.5 million through the 2017-18 Mid-Year Economic and Fiscal Outlook measure ‘Electoral Integrity Reforms’ to implement the Bill over the forward estimates.

Statement of compatibility with human rights

11. A Statement of Compatibility with Human Rights has been completed in relation to the amendments in this Bill and assesses that the amendments are compatible with Australia’s human rights obligations.
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Bill

2. The Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (the Bill) amends the funding and disclosure provisions of the Commonwealth Electoral Act 1918 (the Electoral Act). The Bill introduces new measures to improve transparency and accountability in relation to political donations.

3. In summary, the Bill:

   a) establishes the Transparency Register as the central repository for information disclosed under Part XX of the Electoral Act;

      - This includes a requirement for those with large amounts of electoral expenditure (political campaigners) to register with the Australian Electoral Commission, and comply with similar disclosure obligations as political parties.

   b) clarifies the key definition in Part XX of the Electoral Act (electoral expenditure);

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      iii. for gifts above the disclosure threshold received by key political actors and third parties, requiring donor verification they are not foreign;

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   e) limits public election funding to demonstrated electoral spending, without creating cash flow issues for smaller parties and independent candidates;

   f) modernises the enforcement and compliance regime for political finance regulation;

   g) enables the Electoral Commissioner to prescribe certain matters by legislative instrument; and

   h) makes consequential and implementation-focussed changes to the authorisation regime in Part XXA of the Electoral Act.
Human rights implications

4. The Bill engages the following rights as provided for in the International Covenant on Civil and Political Rights (ICCPR):

   a) the right of citizens to take part in public affairs and elections, as contained in article 25;

   b) the right to freedom of opinion and expression, as contained in article 19;

   c) the prohibition on interference with privacy and attacks on reputation, as contained in article 17; and

   d) the right to freedom of association with others, as contained in article 22.

5. The Bill’s requirements, addressed in turn in the below sections, are objective, legitimate and proportional because they:

   a) are provided for by law;

   b) serve a genuine public interest by protecting:

      i. the free, fair and informed voting essential to Australia’s system of representative government;

      ii. national security; and

   c) apply to an objectively defined group of entities who freely choose to play a prominent role in political debate, or provide financial or administrative support to those who do.

Registration of key non-party political actors

6. Registration of key non-party political actors promotes the rights of citizens to participate meaningfully in elections by assisting them to understand the source of political communication. These key non-party actors are already required to identify themselves in political communications with the public under the Electoral and Other Legislation Amendment Act 2017 (Authorisation Amendment Act). Registration will complement the Authorisation Amendment Act’s transparency reforms by:

   a) allowing voters to distinguish between political opinions popular because of their merits, and those that are common in public debate because their promoters incurred significant expenditure;

   b) allowing voters to form a view on the effect that political expenditure is having on the promotion of a particular political opinion, as opposed to opinions that are being debated without financial backing; and

   c) discouraging corruption and activities that may pose a threat to national security.

7. Internationally, it is relatively common for liberal democracies to require those with significant electoral expenditure to publically register with the electoral management body prior to committing significant campaign funds. Registration facilitates a compliance approach based on education rather than enforcement, allowing electoral laws governing the campaign period to be implemented in the least rights-restrictive way possible.

8. Registration of key non-party political actors also engages the right to privacy, as it may require personal information to be published. Registration, however, is required only in a limited regulatory context, and only those with a direct involvement with elections will be required to
register. The Bill allows the Electoral Commissioner to determine, by legislative instrument, additional information to be published on the registers. However, this legislative instrument is subject to mandatory prior consultation with the Privacy Commissioner.

*Foreign donations restrictions*

9. Genuine freedom to vote at elections requires freedom from undue influence or interference. Foreign-sourced political funds amount to undue influence in a domestic public political debate, particularly in the context of an election. Therefore, it is appropriate to require political donors to have a meaningful connection to Australia, and to make it unlawful to knowingly retain or use foreign donations to finance political expenditure in Australia.

10. The offences are necessary for protecting public order. Public order encompasses the rules which ensure the peaceful and effective functioning of society, or the set of fundamental principles on which society is founded. Accepting foreign donations creates a conflict of interest, or the perception thereof, among key figures in electoral debate and campaigning and can therefore undermine democracy. Elections serve not only to select the winner but also to convince the unsuccessful candidates and their supporters that they lost fairly. Therefore, perceptions of fairness, integrity and accuracy are as important as the reality for elections to result in peaceful transitions of power in democracies. As Kofi Annan stated in *Deepening Democracy* (2012) ‘legitimacy is the crucial currency of government in our democratic age… victory without legitimacy is no victory at all.’

11. The right to take part in public affairs by donating to key political actors must be balanced against the need for transparency and accountability in the political system and the overarching importance of public confidence in, and the integrity of, political institutions and the democratic system.

*Limitation of public election funding*

12. This measure does not engage human rights.

*Changes to the compliance and enforcement regime*

13. The Bill decriminalises many existing offences in Part XX of the Electoral Act. The new civil penalty provisions do not constitute criminal penalties for the purposes of human rights law as they are not classified as criminal under Australian law and are restricted to people in a specific regulatory context.

14. In these circumstances the relevant provisions are not unreasonable within the meaning of article 25 and therefore do not offend the right to take part in public affairs. The relevant provisions do not subject political actors to arbitrary or unlawful interference with their privacy, and therefore do not offend the prohibition on interference with privacy.

*Conclusion*

15. The Bill is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.
NOTES ON CLAUSES

Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

Glossary

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

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Definition</th>
</tr>
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<tbody>
<tr>
<td>AEC</td>
<td>Australian Electoral Commission</td>
</tr>
<tr>
<td>Authorisation Amendment Act</td>
<td>Electoral and Other Legislation Amendment Act 2017</td>
</tr>
<tr>
<td>Electoral Act</td>
<td>Commonwealth Electoral Act 1918</td>
</tr>
<tr>
<td>JSCEM</td>
<td>The Joint Standing Committee on Electoral Matters</td>
</tr>
<tr>
<td>the Act</td>
<td>Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2017</td>
</tr>
</tbody>
</table>

Clause 1 – Short title

This clause provides that the short title of the Bill, when enacted, will be Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2017 (the Act).

Clause 2 – Commencement

This clause sets out the commencement provisions for the Act, in accordance with the table in subclause 2(1) (the commencement table).

Item 1 of the commencement table provides that sections 1 to 3 of the Act and anything in this Act not covered elsewhere by this table commence the day the Act receives the Royal Assent.

Item 2 of the commencement table provides that Schedule 1, Part 1 of the Act commences on the day after this Act receives the Royal Assent.

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

A note is included under the commencement table to clarify that it relates only to the provisions of the Act as originally enacted, and will not be amended to deal with later amendments of the Act.

Subclause 2(2) provides that any information in column 3 of the commencement table is not part of the Act. Information may be inserted in column 3, or information in it may be edited, in any published version of the Act.

Clause 3 – Schedules

Clause 3 is an enabling provision which provides that legislation specified in a Schedule to the Act is amended or repealed as set out in the applicable items in the Schedule. Any other item in a Schedule to this Act has effect according to its terms. Notably, these terms include application and transition provisions in Division 2 of Parts 1 and 2 of Schedule 1 (see Chapter 8).
Chapter 1: Interpretation and definitions

Division 1 – Amendments

Commonwealth Electoral Act 1918

Part 1 – Registration of political campaigners, third parties and associated entities:

Item 1-1C – Subsection 4(1)
Item 1D – Subsection 4(9)
Item 1E – After section 4
Item 1F – Section 5 (definition of electoral matters)
Items 1G & 1H – Paragraphs 7(1)(b) and (c)
Item 1J – Paragraphs 7(1)(d) and (e)
Item 1K – Paragraphs 91A(1A)(aa) and (2)(aa)
Item 1L – Subsection 120(2) (at the end of the table)
Item 1M – Section 125
Item 1N – At the end of section 125
Item 1P – Paragraphs 189B(4)(b) and (5)(b)
Item 1Q – Subsection 193(4) (definition of Commonwealth country)
Item 3 – Subsection 287(1) (definition of associated entity)
Item 4 – Subsection 287(1)
Items 5 & 6 – Subsection 287(1) (definition of gift)
Item 6A – Subsection 287(1) (at the end of the definition of group)
Item 7 – Subsection 287(1)
Item 12 – Section 314AA (definition of amount)

Note: Unless otherwise indicated, items 11-13 are dealt with in Chapters 2 & 8

Part 2 – Other Amendments:

Item 14 – Subsection 17A(1)
Item 15 – Before section 287
Items 16, 16A & 18B – Subsection 287(1) (definitions of designated federal party, disclosure period, eligible vote, entitlement, federal party, State or Territory law and State or Territory purpose)
Items 17 & 18 – Subsection 287(1) (definition of financial controller)
Item 18A – Subsection 287(1) (definition of Liberal Party)
Item 18C – Subsection 287B
Item 72 – Paragraph 306A(8) (definitions of credit card and loan)

Definitions

These items insert defined terms into subsection 4(1) and section 287 to assist with interpretation of new provisions. Consolidating defined terms with other definitions for general application will assist readers and make Part XX easier to navigate.

Amount

Item 12 amends the definition of amount specific to Division 5A to exclude bequests as a consequential amendment of item 5 (see definition of gift).

Associated entity

Item 3 inserts the defined term associated entity into Part XX’s dictionary, to mean an entity that is registered as an associated entity under new section 287L. A note alerts readers to new section
287H, which sets out the circumstances in which a person or entity must register as an associated entity.

**Australian resident**

13 Item 4 inserts the defined term *Australian resident* into Part XX’s dictionary to mean a permanent resident of Australia. Permanent residents hold permanent visas under the *Migration Act 1958*.

**Candidate**

14 This amendments inserts the term *candidate* into Part XX’s dictionary to alert readers that *candidate* has a meaning affected by subsection 287(9).

**Civil penalty order**

15 Item 1 inserts the defined term *civil penalty order* into subsection 4(1), providing that the term has the meaning given by subsection 82(4) of the *Regulatory Powers Act* each time it appears in the Electoral Act.

**Credit card**

16 Items 72 and 4 move the defined term *credit card* from its current location in section 306A of the Electoral Act into Part XX’s interpretation section. This amendment reflects that the term *credit card* is used by the Bill more broadly than in section 306A, and does not change the meaning of credit card outside of Part XX.

**Disclosure threshold**

17 Item 4 inserts the defined term *disclosure threshold* into subsection 287(1) of the Electoral Act, to mean $13,800. A note is included to explain this amount is indexed under section 321A of the Electoral Act.

**Disclosure period**

18 Item 16 repeals the definition of *disclosure period*. This concept is made redundant by new subsection 287(9) (see ‘When a person is a candidate or part of a group’ in *Other general interpretational provisions*).

**Election and ballot matters**

19 Item 1A inserts the defined term *election and ballot matters* into subsection 4(1), to mean matters relating to Parliamentary elections, elections, ballots under the *Fair Work Act 2009* or the *Fair Work (Registered Organisations) Act 2009*, and referendums. This definition was used in Part II of the Electoral Act, but used in relation to the term *electoral matters*. This situation lead to interpretation issues, as:

- a) the singular electoral matter was defined in section 4 of the Electoral Act, and the plural electoral matters defined differently in section 5 of the same Act; and

- b) section 23 of the Acts Interpretation Act 1901 provides that the singular includes the plural, and vice versa.

20 Consequently, the term *electoral matters* is repealed by Item 1F and replaced by *election and ballot matters*, wherever it occurs in the Act (new items 1G, 1H, 1J, 1K and 1P). An exception to this is in the heading of section 387 (item 138A, where *electoral papers* replaces electoral matters to reflect the content of this section).
Electoral expenditure

21 Item 9 inserts new section 287AB, which defines electoral expenditure. See next section (Definition and application of electoral expenditure) for an explanation of the changes to this definition.

22 Item 11A repeals section 308, which provided for the superseded definition of electoral expenditure.

Federal Party

23 Item 16A inserts the defined term federal party into Part XX’s dictionary, to mean a registered political party that has a federal branch and two or more State branches. This definition replaces the definition of designated federal party in old section 287B, which is repealed by item 18B.

Financial controller

24 Items 17 and 18 amend the definition of financial controller to reflect that persons who do not meet Part XX’s definition of an entity may have a financial controller. A person must meet this definition to be nominated as a financial controller under new section 292F.

Foreign donor

25 Item 9 inserts new section 287AA, which provides a foreign donor is each of the following:

   a) a body politic of a foreign country, or part of such a body politic;
   b) a body politic of a part of a foreign country, or part of such a body politic;
   c) a foreign public enterprise;

   - Foreign public enterprise is defined in item 4 of the Bill.

   d) an entity (whether or not incorporated) to which none of the following conditions apply:

      i. the entity is incorporated in Australia;
      ii. the entity’s head office is in Australia;

      - Head office is defined in item 7 of the Bill (see below).
      iii. the principal place of activity of the entity is, or is in, Australia;

      - Determining an entity’s principal place of activity requires a comparison between the extent of the activities conducted in Australia and the extent of the activities conducted overseas. The principal place of activity is the place at which the entity conducts the chief part of its activity. For example, a church or charity might engage in significant activity both in a place in Australia as well as a place overseas. To work out whether its principal place of activity is in the place in Australia or the place overseas, relevant considerations include the number of employees or volunteers of the entity engaging in activities in the different locations, as well as the scale or volume of the activities and the place where the entity derives most of its revenue.

      iv. an individual who is neither a Commonwealth elector, nor an Australian citizen, nor an Australian permanent resident, nor a holder of Special Category Visa subclass 444.
- **Elector** is defined in section 4 of the Electoral Act.
- **Australian resident** is defined in item 4 of the Bill.
- Under Special Category Visa subclass 444 (or equivalent if this reference ceases to exist), New Zealand citizens are able stay and work indefinitely in Australia. This visa category is applied for on arrival in Australia, and is subject to the visa holder meeting health and character requirements.

**Foreign public enterprise**

26 Item 4 inserts the defined term *foreign public enterprise* into subsection 287(1) of the Electoral Act, to have the same meaning as in section 70.1 of the Criminal Code. This term is used in relation to the definition of *foreign donor*.

**Gift**

27 Item 5 expands the definition of *gift* to include bequests.

28 Item 6 amends the definition of *gift* in Part XX’s dictionary to exclude any visit, experience or activity provided for the purposes of a political exchange program. These exchange programs, for example, the programs administered by the Australian Political Exchange Council, are similar to student exchange programs and aim to develop Australia’s future generations of political leaders.

**Group**

29 Item 6A inserts a note after the definition of *group* in Part XX’s dictionary to alert readers that *group* has a meaning affected by subsection 287(9).

**Head office**

30 Item 7 inserts the defined term *head office* into Part XX’s dictionary to mean the place of business where central management and control of the entity are exercised. Head office is used in the definition of foreign donor in section 287AA, and is most relevant to unincorporated associations, as the place of incorporation is intended to determine whether an incorporated association is an allowable donor. Central management and control is the control and direction of an entity’s operations. The key element in determining the ‘head office’ is the location where high-level decisions are made that set the entity’s mission, general policies, and determine the direction of its operations and the type of activities in which it will engage.

31 Merely because a person has the power to appoint those who control and direct an entity’s operations, does not by itself mean the person controls and directs the entity’s operations and activities.

**Liberal Party**

32 Item 18A repeals the old definition of *Liberal Party* in Part XX’s dictionary. This definition has been made redundant by amendments to Division 3 (see Chapter 5).

**Loan**

33 Items 72 and 7 move the definition of *loan* from existing section 306A to Part XX’s dictionary. A *loan* continues to mean any of the following financial arrangements:

   a) an advance of money;

   b) a provision of credit or any other form of financial accommodation;

   c) a payment of an amount for, on account of, on behalf of or at the request of, a beneficiary, if there is an express or implied obligation to repay the amount; or
d) a transaction (whatever its terms or form) which in substance effects a loan of money.

34 Loans made on non-commercial terms, for example, at a non-market interest rate, are not simply loans for the purposes of the Electoral Act. Instead, the interest foregone on non-commercial loans is a gift, and the borrowed money is a loan. Similarly, only money can be loaned. Borrowed equipment or real-estate is not a loan where the beneficiary does not pay the owner for its use (that is, the equipment or real-estate is not rented), it is a gift.

35 A note underneath the definition of loan alerts readers to new subsection 287(10), which has been moved from existing subsection 306A(7). New subsection (10) treats each transaction on a credit card as a separate loan for the purposes of Part XX.

**Political campaigner**

36 Item 7 inserts the defined term political campaigner into Part XX’s dictionary, to mean a person or entity that is registered as a political campaigner under new section 287L. Note 1 alerts readers to new subsection 287(8), which clarifies that a political campaigner that has branches is to be treated as a single political campaigner, and new section 287C (political campaigners and third parties that are not incorporated). Note 2 alerts readers to new section 287F, which sets out the circumstances in which a person or entity must register as a political campaigner.

**Political entity**

37 Item 1C inserts the defined term political entity into subsection 4(1), to mean a person who is any of the following:

   a) a registered political party;
   b) a State branch of a registered political party;
   c) a candidate in an election (including a by-election); or
   d) a member of a group.

38 A note is included under subsection 4(1) to refer readers to subsection 287(9) for definitions on candidates and groups.

**Scheme**

39 Item 7 inserts the defined term scheme into Part XX’s dictionary, to mean any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings and any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

**State or Territory electoral law**

40 Item 18B inserts the defined term State or Territory electoral law into section 287 to mean a law of a State or Territory that deals with electoral matters (within the ordinary meaning of the expression).

**State or Territory electoral purpose**

41 Item 18B inserts the defined term State or Territory electoral purpose into section 287 to mean a purpose relating to a State, Territory or local government election (and, to avoid doubt, does not include the purpose of incurring electoral expenditure or creating or communicating electoral matter).

42 This new definition is used in sections clarifying the relationship between State and Territory and Commonwealth law (see sections 302CA and 314B).
**Third party**

43 Item 7 inserts the defined term *third party* into subsection 287(1) of the Electoral Act. Unless a person or entity is a political entity or a member of the House of Representatives or the Senate, they are a *third party* if:

a) the amount of electoral expenditure incurred by or with the authority of the person or entity during the financial year is more than the disclosure threshold; and

b) the person or entity is not required to be, and is not, registered as a political campaigner under section 287F for the year.

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

**Transparency register**

45 Item 7 inserts the defined term *transparency register* into Part XX’s dictionary, to mean the Register of that name established and maintained under section 287N.

**Definition and interpretation of electoral expenditure**

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

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

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

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

**The dominant purpose of expenditure**

**Example 1**

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

**Example 2**

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

Example 3

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

Example 4

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

Example 5

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

Example 6

A registered political party prepares a television advertisement and tests it with a focus group. The advertisement is never shown, as it tests poorly with the focus group. Test advertisements are a key part of the party’s process for creating an effective campaign, because they help it to develop and select the best series of advertisements for dissemination. As the advertisement was prepared by a political party, it is more likely to be electoral matter. As the advertisement was intended to be shown to the public, it is also more likely to be electoral matter. This is the case even if the advertisement is not shown. The dominant purpose of creating the advertisements was to influence voting at an election, so the advertisements were electoral matter and any expenditure creating the advertisements is electoral expenditure.

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

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

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

a) remuneration for members of the House of Representatives, Senators and Ministers;
b) office accommodation, office resources and office expenses, such as postage costs;

c) work vehicles;

d) insurance for members and Senators; and

e) legal assistance to Ministers and Parliamentary Secretaries.

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

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

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

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

a) printers printing electoral matter as paid work for clients;

b) communication and internet service providers whose networks are used to communicate electoral matter;

c) social media companies whose platforms are used to communicate electoral matter;

d) polling companies undertaking research on public opinion for paying clients;

e) self-employed communications professionals managing candidate campaigns on a fee-for-service basis; and

f) marketing agencies developing advertising campaigns containing electoral matter for paying clients.

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

Service provider exemption and electoral matter

Example 1a

A campaign group engages an advertising agency to develop a campaign containing electoral matter. The advertising agency subcontracts the production work associated with the campaign to a number of other firms. The expenditure incurred by the advertising agency in subcontracting the production of electoral matter is not electoral expenditure because the agency was engaged on a commercial basis to create the electoral matter. However, the costs passed on to the campaign group are electoral expenditure incurred by the group.
Example 1b

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

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

Example 2

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

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

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

Expenditure incurred to create electoral matter generally

Example

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

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

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

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

For the avoidance of doubt, subsection (3) clarifies that the parliamentary work expenses framework exception, as set out in paragraph (1)(a), applies to this subsection (see 287AB(1)(a) Exception for parliamentary work expenses).
Expenditure incurred by a party in relation to an election

Example 1

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

Example 2

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

287AC - Implied freedom of political communication

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

Definition and interpretation of electoral matter

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

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

a) a political entity, to the extent that the matter relates to a federal election;

- A political entity is a registered political party (including a State branch thereof), candidate or Senate group.

b) a member of the House of Representatives; or

c) a Senator.

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

a) the order in which a voter indicates their preferences on their ballot paper; and

b) a voter’s choice of whether to cast a formal ballot paper.

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

65 A communication is not electoral matter if its dominant purpose is not to influence the way electors vote. Communications whose dominant purpose is to educate their audience on a public policy issue, or to raise awareness of, or encourage debate on, a public policy issue is not for the dominant purpose of influencing the way electors vote in an election as there can be only one
dominant purpose for any given communication. Whether the communication or intended communication includes express or implicit comment on a political party or candidate will assist in determining whether or not the dominant purpose is to influence the way electors vote in an election, but other matters may also be relevant.

66 A note under subsection (1) clarifies that communication is not electoral matter if its dominant purpose is not to influence the way electors vote. As set out in the note, communications whose dominant purpose is to educate their audience on a public policy issue, or to raise awareness of, or encourage debate on, a public policy issue is not for the dominant purpose of influencing the way electors vote in an election as there can be only one dominant purpose for any given communication. Whether the communication or intended communication includes express or implicit comment on a political party or candidate will assist in determining whether or not the dominant purpose is to influence the way electors vote in an election, but other matters may also be relevant.

**Example 1**

As part of the budget, the Government announces a package of public policies intended to address homelessness. A national peak body for homelessness organisations issues a media release which welcomes some of the proposals, but also outlines concerns with some of them. The media release states that the package as a whole won’t be enough to make significant progress addressing the problem of homelessness in Australia. The media release also states a number of public policies which the peak body would like the Government to adopt. The CEO of the peak body reiterates these points in a professionally-produced video interview. The media release and a link to the video interview are shared on social media and distributed to the peak body’s members in a weekly email newsletter. These communications (the media release, the interview, the social media post and the newsletter) are not likely to be electoral matter, as their dominant purpose is not to influence the way electors vote in an election. Rather, the dominant purpose is to educate the public, raise awareness and encourage debate on a public policy issue.

**Example 2**

Two candidates are contesting a seat in the upcoming election. Candidate A’s flagship policy is charging entry fees for users of interstate highways. Candidate B is firmly opposed to this policy proposal, and campaigns against charging entry fees.

An advocacy group focussed on public fiscal sustainability supports Candidate A’s proposal, as it would further their mission of ensuring future generations are not subject to public debt. The advocacy group conducts a public education campaign seeking to educate the public about the role resource charging can play in fiscal sustainability.

The factors in subsection 4AA(4) must be considered in determining whether the advocacy group’s campaign is, or is not, electoral matter. The key question that must be answered, using these factors and any other relevant matters (such as a statement of intent, or program logic) is: is the advocacy group’s dominant purpose in conducting the campaign to educate the public, or to influence voters so that a candidate more favourable to their policy position on the issue is elected?

Subsection 4AA(4) factors relevant to answering this question include the following (factors not mentioned here, but included under subsection (4), do not help distinguish between the two possible dominant purposes behind the campaign in this example):

Paragraph (b): Is the advocacy group a registered political entity or campaigner?
Paragraph (c): Did any of the campaign materials contain an express of implicit comment on one of the candidates, or their parties?
Paragraph (d): Were campaign materials received by electors near a polling place?
Paragraph (e): How soon before the election (including pre-polling, if pre-polling is prevalent in that seat, in that election) were campaign materials distributed?
Paragraph (f): Did campaign material distribution stop after the election?
More affirmative answers to these questions would make it more likely the campaign’s dominant purpose is to influence the way electors vote in an election.

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

67 Subsection (2) provides that each creation, recreation, communication or recommunication of matter is to be treated separately for the purposes of determining whether matter is electoral matter. That is, whether matter was created to be electoral matter should not prejudice whether its subsequent communication is, or is not, electoral matter. Similarly, where someone recommunicates matter, the communicator’s intent does not necessarily determine the re-communicator’s intent. Only the creator or communicator’s intent at the time they create or communicate the electoral matter is relevant to determining their predominant purpose. Subsequent events or decisions, whether within or outside of the control of the creator or communicator, are irrelevant, ensuring no matter can retrospectively become electoral matter.

Example 1

A university professor publishes a book on negative campaign techniques employed by a registered political party in the previous election (first act of creation and communication). Taking into account the dominant purpose of the professor’s other communications, it is reasonable to conclude his dominant purpose in communicating the book is academic, rather than political. The academic purposes exception in paragraph 5(b) applies to the book.

The same university professor accepts the invitation of a rival political party to present a booklet containing his findings at their campaign launch (second act of creation and communication). The dominant purpose of his other communications suggests his dominant purpose may be educative, rather than political. However, the context of his other educative communications was markedly different; his other audiences were either students in a classroom setting, or the general public in the context of opinion pieces he wrote.

Despite the professor’s academic and educative bodies of work, the academic and educative purposes exceptions may not apply to the professor’s booklet presented at the rival party’s campaign launch (his second act of creation and communication). However, this does not impact his dominant purpose in undertaking his original research and analysis (first act of creation), or in communicating his research in publishing the book (first act of communication).

The rival political party uses excerpts from the professor’s booklet extensively in its campaign materials. The rival political party’s intentions in creating and communicating campaign material using the excerpts from the professor’s booklet are irrelevant in determining the professor’s dominant purpose in any of his acts of creation or communication.

Example 2

A novel public policy issue emerges. To assist it in forming a policy position, an industry association commissions a think tank to conduct research and write a report on the issue. As the dominant purpose of the industry association in commissioning the report is not to influence the way electors vote in an election, the research report is not electoral matter.

The think tank’s purposes in accepting the commission are two-fold: 1) to inform public debate on the issue; and 2) commercial gain (the think tank is paid to write the report). As the dominant purpose of the think tank is not to influence the way electors vote in an election, at no point during the creation of the report and its transmission to the client (the industry association) is the research report electoral matter.

The dominant purpose of the creation and communication of campaign materials subsequently derived from the research report is not impacted by the intent of: 1) the industry association in commissioning the report; nor 2) the think tank in creating and transmitting the report.

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

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

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

70 The rebuttable presumption provides greater certainty as to the application of section 4AA in instances of explicit promotion of or opposition to clearly defined regulatory categories. Greater regulatory certainty can be expected to reduce regulatory burden for regulated entities, reduce administrative costs for the regulator (the Australian Electoral Commission), and result in higher rates of compliance. This greater regulatory certainty is especially important in the compressed timeframes experienced during an election campaign.

71 Express means ‘clearly indicated; distinctly stated (rather than implied); definite; explicit; plain’. In an electoral context, express promotion of, or opposition to a regulated entity includes explicit directions to vote for, or not vote for (or otherwise support/oppose), a candidate, sitting parliamentarian or party.

72 Mere support or opposition to a policy of an entity, short of suggesting to voters how they should vote, is likely to be implicit support/opposition, in which case subsection 4AA(3) would not apply. However, expressions of overall support or opposition to a party in relation to a federal election could be covered by 4AA(3), whether the basis for the express statement is policy-based or otherwise.

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

73 To assist in interpreting subsection (1), subsection (4) sets out a non-exhaustive list of matters that must be considered in determining whether matter is electoral matter. Subsection (4) is not a deeming provision (by itself, one of the factors in subsection (4) does not determine whether the dominant purpose is to influence voting). Instead section 4AA must be considered in its entirety, and in the context of subsection (1), in determining whether matter is electoral matter. For example, where a communication clearly seeks to secure a policy outcome other than by influencing the way electors vote in an election, subsection (1) does not apply, and so the factors in subsection (4) do not need to be considered.

74 These factors are not intended to be considered in a simple summative manner. The context of the communication determines the relevant weight of the factors in using them to interpret whether the dominant purpose of the communication, or intended communication is consistent with subsection (1). Even where these factors indicate that matter is electoral matter, the exceptions to electoral matter in subsection (5) apply (see Exceptions to electoral matter, next section). For example, where a communication is directed at influencing a decision-maker, or raising awareness of a public policy issue among political entities, the exceptions in subsection (5) may apply.

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

a) the accessibility of communicated matter (paragraph (a));

   - Where matter is communicated publicly, whether universally to the public or a section of the public, it is more likely to be electoral matter.
b) the source of communicated matter (paragraph (b));

- Where matter is communicated publicly by a political entity or political campaigner, it is more likely to be electoral matter.

c) the content of the communication (paragraph (c));

- Where matter contains an express or implicit comment on one of the categories mentioned in subsection (1), it is more likely to be electoral matter.

d) the intended audience of the communication (paragraphs (d) and (e)); and

- Where the intended audience of a communication is electors, it is more likely to be electoral matter. In determining the intended audience of a communication, paragraphs (d) and (e) clarify that the temporal and spatial proximity of the communication’s audience to citizens acting in their capacity as electors is relevant. For example, where a communication targets adults entering a polling place on polling day, it is more likely to be electoral matter.

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

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

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

**Example 1**

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

**Example 2**

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

**Example 3**

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

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

**Example**

A political campaigner posts content on their social media account. As the post is a communication from a political campaigner, it is more likely to be electoral matter.
Paragraph (c): Communications containing an express or implicit comment on a political entity, member of the House of Representatives, or a Senator

Example 1

A public health advocacy group designs a pamphlet assessing the policies of different parties, regarding subsidies of expensive medicines. The pamphlet summarises how much money each party has committed to spend on drugs and summarises each party’s policies on limits to patent periods to indicate how closely aligned each party is to the priorities of the group. The pamphlet includes a smiley face next to some parties and a frowning face next to other parties. The symbols represent support for some parties and opposition towards others, makes this an implicit comment promoting or opposing political parties. Hence this is more likely to be electoral matter.

Example 2

An association of retired economists distributes posters and flyers during an election campaign, with the headline “Stop this madness”, criticising a policy that is a signature part of the legacy of a political party when it was in government. This is more likely to be electoral matter because the communication includes implicit opposition to a party that is running for election and the materials are headlined with a call to action that implies that the voters should do something (“Stop this madness”).

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

Example

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

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

Example

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

Paragraph (f): Unsolicited communication

Example 1a

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

Example 1b

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

Example

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

Exceptions to electoral matter

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

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

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

Example

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

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

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

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

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

Predominantly satirical purposes

Example 1

It has become a tradition at a university for the law students to satirise an issue in contemporary culture. One year, the students choose to create a video satirising a group of Commonwealth Senators. The students publish the video on a popular video streaming service. As the law students’ dominant purpose in creating and publishing the video is satirical, the satirical purposes exception applies.
Example 2

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

Predominantly academic purposes

Example

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

Predominantly educative purposes

Example 1

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

Example 2

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

Predominantly artistic purposes

Example 1

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

Example 2

Miro, a prominent Australian actor, appears in a video published online stating that arts in Australia is under attack by the current government and asks for viewers’ support of a particular political party for an upcoming federal election. Despite the dominant purpose of Miro’s other communications being mostly artistic or commercial, it is not reasonable to conclude Miro’s dominant purpose in the video is artistic. Therefore, the artistic purposes exception does not apply to the video.
Example 3

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

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

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

Private communications

Example 1a

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

Example 1b

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

Example 1c

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

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

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

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

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

Example

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

After the meeting, the group holds a press conference, where the group explains why it has met with the Senators and why it is concerned with the Bill. They urge all Senators who may be watching the press conference to vote against the Bill. A professionally produced video is shared on social media by the group. The statements in the press conference and the social media posts are not likely to be electoral matter as their dominant purpose is not to influence how people vote. The dominant purpose of the press conference and social media posts is to demonstrate the group’s action in support of their mission to their supporters and to influence Senators to vote against the Bill.

Private communications to a political entity on public policy

Example 1a

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

Example 1b

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

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

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

Participation in a parliamentary process

Example

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

Interaction of Parts XX and XXA

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

Other general interpretational provisions

Simplified outline of Part XX

85 Item 15 inserts new section 286A, which provides a simplified outline of Part XX. This simplified outline is designed to give readers an overview of, and introduce important concepts in, Part XX of the Electoral Act.

Entities that are not incorporated

86 Item 10 inserts the new section 287C at the end of Division 1 of Part XX of the Electoral Act. This section clarifies the application of the Electoral Act and Regulatory Powers Act to entities that are not legal persons.

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

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

89 A note under the section alerts readers to section 287(8), which deals with political campaigners and third parties that have branches.

Annual reports by the Electoral Commissioner

90 Item 14 updates the references to offences in existing subsection 17A(1) to reflect the new civil penalty provisions introduced by this Bill. This has the effect that the Electoral Commissioner can include information in his or her annual report relating to the new civil penalty provisions, as well as the existing offences under the Electoral Act.
When a person is a candidate or part of a group

91 Item 8 inserts new subsection 287(9), which standardises and clarifies when a person is a candidate or part of a group. Under the Bill and the Electoral Act, the period during which Part XX applied to candidates and Senate groups varied across measures, and across types of candidates. For example, the period during which candidates must disclose electoral expenditure is different from when they must disclose receipted gifts. Adding to this complexity, these periods differ depending on whether the candidate stood in the previous election, irrespective of whether they were elected.

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

a) a person begins to be a candidate on the day they publicly announced they would be a candidate in the election, or the day they formally nominated as a candidate (whichever occurs first); and

b) a person ceases to be a candidate 30 days after polling day in the election.

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

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

a) a group begins to be a group on the day the members of the group make a request under section 168 for their names to be grouped in the ballot papers for the election; and

b) a group ceases to be a group 30 days after the polling day in the election.
Chapter 2: The Transparency Register

Item 1M – Section 125
Item 1N – At the end of section 125
Item 11 – After Division 1 of Part XX

95 Item 11 inserts new Division 1A (Registration of political campaigners and associated entities and the Transparency Register) after Division 1 of Part XX of the Electoral Act.

Simplified outline

Subdivision A – Simplified outline of this Division

96 New section 287D provides a simplified outline of new registration requirements, designed to give readers an overview of, and introduce important concepts in, new Division 1A.

Objects

97 New section 287E specifies that the objects of the new registration requirements are, by providing for the registration of key participants in election campaigns on the Transparency Register, to support the transparency of:

   a) the foreign donations restrictions established by new Division 3A of Part XX;
   b) the financial disclosure scheme under Part XX; and
   c) requirements relating to the authorisation of electoral matter under Part XXA, as amended by the Authorisation Amendment Act.

Requirement to register

Subdivision B – Requirement to register as a political campaigner or associated entity

287F Requirement to register as a political campaigner

98 New section 287F requires a person or entity to be registered for a financial year as a political campaigner if they fall into one of the two categories provided:

   a) their electoral expenditure during the current, or in any of the previous three, financial years was $500,000 or more; or
   b) their electoral expenditure during that financial year was $100,000 or more, and during the previous financial year their electoral expenditure was at least two-thirds of their revenue for that year.

99 A note alerts readers that those who fail to register as a political campaigner may have their electoral expenditure deemed under section 287J.

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

101 Subsection (3) provides that, subject to the 90-day grace period set out in subsection (2), incurring further electoral expenditure without being registered is subject to a maximum civil penalty of the higher of the following amounts:

   a) 200 penalty units; or
b) if there is sufficient evidence for the court to determine or estimate the amount incurred by the political campaigner in contravention of section 287F(1) – three times that amount.

102 A note is included in subsection 287F(3) to remind the reader that, under section 287C, a member, agent or officer of the entity may contravene this subsection if the entity is not legal person.

### Requirement to register as a political campaigner

#### Example

Joseph’s electoral expenditure in 2017-18 was $30,000 and his revenue was $40,000. This was the first year in which he incurred electoral expenditure.

Joseph plans to spend $20,000 per month in electoral expenditure in 2018-19. Joseph must register as a political campaigner for 2018-19 once he incurs $100,000. According to his expectation of his spending pattern, this will occur in November 2018.

Given the 90 day grace period for registration in subsection 287F(2), Joseph will need to register as a political campaigner no later than 90 days after this time, which is likely to be in early March 2019.

### 287H Requirement to register as an associated entity

103 Except for political entities, new section 287H requires entities to be registered as an associated entity for a financial year if any of the following apply:

- a) the entity is controlled by one or more registered political parties;
- b) the entity operates wholly, or to a significant extent, for the benefit of one or more registered political parties;
- c) the entity is a financial member of a registered political party;
- d) another person is a financial member of a registered political party on behalf of the entity;
- e) the entity has voting rights in a registered political party;
- f) another person has voting rights in a registered political party on behalf of the entity.

104 These criteria replicate the existing definition of an associated entity in subsection 287(1) of the Electoral Act, which is repealed by Item 3.

105 Subsection (3) provides that, subject to the 90-day grace period set out in subsection (2), incurring any electoral expenditure without being registered is subject to a maximum civil penalty of the higher of the following amounts:

- a) 200 penalty units; or
- b) if the court can determine or estimate the amount of electoral expenditure incurred by the associated entity in contravention of this subsection – three times that amount.

106 A note is included to remind the reader that, under section 287C, a member, agent or officer of the entity may contravene this subsection if the entity is not a legal person.

### 287J Expenditure incurred by persons and entities that are not registered when required to be so

107 New section 287J is a deeming provision. It is intended to ensure that failure to register does not absolve a person or entity of its other obligations under Part XX, which are a consequence of
registration. Subsection (1) provides that a person or entity is taken to have incurred an amount of electoral expenditure in a financial year (the current financial year) if:

a) the person or entity incurred that amount of electoral expenditure in a previous financial year (paragraph (a)); and

b) as a result of incurring that electoral expenditure, the person or entity was required to be registered as a political campaigner in the previous financial year (paragraph (b)); and

c) the person or entity was not so registered:
   i. in the previous financial year (subparagraph (c)(i)); or
   ii. if the person or entity was required to be registered as a political campaigner and the 90-day grace period ended after the end of the previous financial year—by the end of the grace period (subparagraph (c)(ii)).

108 Subsection (2) provides that subsection (1) ceases to apply at the end of the financial year in which they register, so that entities that cease to meet the applicable registration criteria do not continue to trigger this deeming provision.

The registration process

287K Application for registration

109 New section 287K allows a person or entity to apply to the Electoral Commissioner to be registered as a political campaigner or an associated entity. Subsection (2) requires that the application must:

a) be in the form approved by the Electoral Commissioner;

b) identify the entity or person’s financial controller; and

c) for applications for registration as an associated entity, identify any associations with registered political parties.

287L Determining an application for registration

110 New section 287L requires the Electoral Commissioner to register an entity within a reasonable period of time if certain conditions are satisfied. Generally, if the application complies with subsection 287K(2) and does not trigger subsection (4), the Electoral Commissioner must register an entity as soon as practicable after receiving the application.

111 New subsection (2) clarifies that voluntary or early registration is possible; an entity does not have to be required to be registered under new sections 287F or 287H to register.

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**Example 1**
Josh is planning on raising at least $500,000 to spend on his best friend’s election campaign. He’s not sure if he will actually raise this money, or how much of it he will spend in this year versus the next financial year, so he applies to be registered as a political campaigner with the AEC just in case.

**Example 2**
A group of university students decide to door-knock on an issue they learn about in class. They do not, or plan to, incur any electoral expenditure. However, they wish to, and can, register as a political campaigner so there is a public record of their activity.
Refusing registration

112 The Electoral Commissioner must refuse to register an applicant under new subsection (4) in certain, specified circumstances. If the Electoral Commissioner would be required to refuse the registration if it was made in relation to a registered political party, the Electoral Commissioner cannot register the entity as a political campaigner or associated entity. This provision is intended to protect the object of transparency, as confusing registran names would run counter to the objects of this Division.

113 An exception to this rule applies in relation to registran names longer than six words. This is given effect by the reference to subsection 129(1)(a), which operates in relation to a registran’s name longer than six words. This requirement applies to registration of registered political party names, and is necessary for practical reasons related to ballot printing. As the length of name is not impractical for the new register, this is not included as grounds for the Electoral Commissioner to refuse registration under new section 287L.

114 New subsection (5) allows for applications under this Division to be varied in the same way as applications for registration as a registered political party (see section 131 of the Electoral Act).

115 New subsection (6) provides that decisions regarding registration are reviewable by the Administrative Appeals Tribunal under section 141 of the Electoral Act.

287M Applications for deregistration

116 New section 287M provides that a registran may apply to the Electoral Commissioner to be deregistered. If the application is in an approved form, the Electoral Commissioner must deregister the person or entity as a political campaigner or an associated entity.

Administration of the Registers
Subdivision C—Transparency Register

287N Transparency Register

125 Register of Political Parties

117 New section 287N requires the Electoral Commissioner to establish and maintain a Transparency Register.

118 New subsection (2) sets out the content of the Transparency Register. The Transparency Register will contain, but is not limited to the following information:

   - the name of each person or entity registered as a political campaigner or associated entity under section 287L, and the name of their financial controllers;

   - For each associated entity, the Transparency Register will also specify the name of any registered political parties with which the person or entity is associated.

   - the name of each person or entity that has provided a return under section 314AEB (annual returns by third parties) for that or any of the previous 3 financial years;

   - the name of each political entity;

   - any determination, notice or return published under section 320; and

   - any enforceable undertaking published under section 384A(2A).

119 A note under subsection 287N(2) alerts readers that the Transparency Register may include the Register of Political Parties. New items 1M and 1N insert new subsection 125(2), which empower the Electoral Commissioner to incorporate the Register of Political Parties into the Transparency Register.
**287P Obligation to notify Electoral Commissioner of changes to information on Transparency Register**

120 Except for political entities, new section 287P requires a person or entity whose name appears on the Transparency Register to notify the Electoral Commissioner within 90 days if any of their information on the Register ceases to be correct or complete. Failure to notify is subject to a civil penalty of 60 penalty units. For example, if an entity’s financial controller changes, the entity must notify the Electoral Commissioner of the change within 90 days of the old financial controller ceasing their duties.

121 Subsection (3) provides that subsection 93(2) of the Regulatory Powers Act does not apply in relation to a contravention of subsection (2). This means that failure to meet the obligations in subsection (2) by the deadline is a single contravention, rather than each day after the deadline being a separate contravention. However, subsection 93(1) of the Regulatory Powers Act continues to apply. This means that even though failure to notify a correction to the Register is a single contravention, the obligation to notify continues until it has been done.

**287Q Transparency Register to be made public etc.**

122 New section 287Q allows the Register to be maintained electronically, and requires the Register to be made publicly available. The publication requirement is expected to be met by publishing the Register on the AEC’s website and mobile applications, allowing the public easy access to the most up-to-date information.

**287R Entry in Transparency Register prima facie evidence of information**

123 Section 287R provides that an entry in the Register is prima facie evidence of the information contained in the entry. This is similar to other provisions in the Electoral Act, such as current subsection 391(2), and assists with efficient administration.

**287S Anti-avoidance**

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

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

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

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

a) one or more persons or entities enter into, begin to carry out or carry out a scheme; and

b) there are reasonable grounds to conclude that those mentioned in paragraph (a) did so for the sole or dominant purpose of avoiding the requirement to register the relevant person as a political campaigner or associated entity; and

c) as a result of the scheme, the relevant person was not required to be registered; and

d) for avoiding registration requirements as a political campaigner, the scheme involved:

i. expenditure splitting: that is, the scheme involved reducing the amount of
electoral expenditure incurred by or with the authority of the relevant person to either:

- below $500,000 in a financial year to avoid the threshold in paragraph 287F(1)(a);
- below $100,000 in a financial year to avoid the threshold in subparagraph 287F(1)(b)(i); or
- to decrease the ratio between electoral expenditure and revenue to avoid the threshold in subparagraph 287F(1)(b)(ii);

ii. revenue inflation: that is, the scheme involved artificially inflating revenue to decrease the ratio between electoral expenditure and revenue to avoid the threshold in subparagraph 287F(1)(b)(ii).

e) for avoiding registration requirements as an associated entity, the scheme involved:

i. indirect control: that is, the scheme involved making the relevant person subject to the control of another person or entity that controls, or is controlled by, a registered political party to avoid the application of paragraph (a) of the definition of associated entity; or

ii. indirect benefit: that is, the scheme involved the relevant person operating wholly, or to a significant extent, for the benefit of another person or entity that controls, or is controlled by, a registered political party to avoid the application of paragraph (b) of the definition of associated entity.

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

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

130 Subsection (4) provides that section 287S applies whether or not the scheme is entered into, begun to be carried out or is carried out in Australia, outside Australia, or a combination thereof.

Application of section 287S to associated entity registration requirements

131 The Bill and the Electoral Act contemplate three ways in which an entity may be an associated entity of a registered political party (see below diagram):

a) the registered political party may control the entity (paragraph 287H(1)(a));

b) the entity may operate wholly, or to a significant extent, for the party’s benefit (paragraph 287H(1)(b));

c) the entity may be a financial member of, or have voting rights in, the party (paragraphs 287H(1)(c) and (e)).

132 Additionally, an entity may be a financial member of, or have voting rights indirectly, that is, via ‘another person’ (paragraphs 287H(1)(d) and (f); see below diagram).
Broadly, the anti-avoidance provisions in new subparagraphs 287S(1)(c)(iv) and (v) apply to situations where ‘another person’ controls, or is controlled by a registered political party in a relationship of control or benefit.

### Avoiding registration as a political campaigner

#### Example 1: Expenditure splitting scheme to avoid registration as a political campaigner

Abeytu is independently wealthy and politically active. She already reports annually to the AEC as a third party, but is keen to avoid having to register as a political campaigner. As an election approaches, she wants to buy prime time television advertising for one of her favourite causes. Her accountant advises her this would mean she had incurred more than $500,000 in electoral expenditure in a financial year.

Abeytu concocts a plan to obtain the television advertising without incurring electoral expenditure. Her plan involves buying the building that the television station leases, then setting the station’s rent at $1,000 per year. In exchange, the television station agrees to charge her $1,000 for the prime time advertising space she wants for her cause. The rent is clearly below the market rate and the advertising fee is substantially below the market rate.

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

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

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

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

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

**Avoiding registration as an associated entity**

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

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

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

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

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

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

120 – *Internal Review*

134 New item 1L provides that a decision to issue a notice under section 287S is a *reviewable decision* under Part X of the Electoral Act. A note is included under section 287S(1) to alert the reader to the relevant person’s right to review under section 120.
Chapter 3: Agents and financial controllers

Part 2 – Other Amendments

Note: Items 14-18 are dealt with in Chapter 1: Interpretation and Definitions

Item 19 – Division 2 of Part XX (heading)
Item 20 – Before section 288

Simplified outline

Subdivision A – Simplified outline of this Division

135 Item 19 expands the title of Division 2 to reflect that financial controllers are covered by this Division. Item 20 provides for new section 287V, which provides a simplified outline of this Division, designed to give readers an overview of, and introduce important concepts in this Division.

Appointing an agent

Item 21 – Section 288A to 290
Subdivision B – Appointment of agents

Existing section 288A Principal agents

136 Item 21 repeals section 288A, which set out the appointment of agents for the Australian Democrats. This provision has ceased to have any practical effect as the Australian Democrats are no longer a registered political party.

Section 289 Appointment of agents by candidates and groups

137 Item 21 replaces the existing provisions governing the appointment of agents for candidates and groups with new section 289. New section 289 requires these entities to have agents. This does not impact candidate’s ability to act as their own agent.

138 The deeming provisions for candidates and Senate groups operate in parallel. This means that candidates in Senate groups will have an agent for the purposes of their candidature, and an agent for their Senate group. A note is included under new subsection 289(1) to alert readers to this. The agent of a Senate candidate and their Senate group may be the same person. Persons who become agents by virtue of the deeming provisions in subsections (2) and (4) do not need to provide a notice, signed form of consent, or declaration under section 292F.

Existing section 290 Requisites for appointment

139 Item 21 repeals existing section 290. Item 26 moves key elements of this existing provision into new Subdivision D.

Item 22 – Paragraphs 292(2)(b) and (3)(b)

140 This item updates the references to the requisites for appointment in section 292 to reflect the amendment made by items 21 and 26.

Item 23 – Section 292B(a)

141 This item adds new Division 3A to the list of divisions under which an agent bears an obligation, in order to clarify what happens when that office becomes vacant.

Item 24 – Subsection 292(4)

142 This item updates references to the requisites for appointment in section 292 to reflect the amendment made by items 21 and 26.
Item 25 – Section 292D

143 This item amends section 292D to separate the requirements relating to action that must be taken following the death or resignation of an agent of a candidate or group. Agent vacancy for registered political parties is dealt with in section 292B.

144 New subsection (1) does provide that, where a candidate agent or group agent dies, the candidate or a group member must, without delay, notify the Electoral Commission in writing of the death. This is the current requirement.

145 New subsection (2) provides that, where a candidate agent or group agent resigns, the resigning agent must, without delay, notify the Electoral Commission in writing of their resignation.

Nominating a financial controller

Subdivision C – Nomination of financial controllers

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

146 This item inserts new Subdivisions C and D into Division 2 to establish requirements for political campaigners and associated parties to nominate and/or appoint a financial controller.

Section 292E Financial controllers of political campaigners and associated entities

147 New section 292E requires political campaigners and associated entities to nominate a financial controller. If the campaigner or entity is an individual, he or she may nominate him or herself as the financial controller. If the campaigner or entity is not a legal person, an individual acting on behalf of the campaigner or entity must nominate the financial controller of the campaigner or entity. Subsection 287(1) provides that a person or entity’s financial controller is:

   a) in the case of a company – the secretary of the company;

   b) in the case of the trustee of a trust – the trustee; and

   c) in other cases – the person responsible for maintaining the financial records of the entity.

148 The financial controller is a matter of fact. Nominating someone to be the financial controller, when that person is not the secretary, trustee, or responsible for maintaining financial records (as relevant), does not make them the financial controller. Rather, nominating a financial controller assists entities to meet their obligations, and the AEC to effectively administer Part XX, by making the financial controller known to the AEC for education and compliance activities. In practice, it is expected that nomination of a financial controller will occur during registration, or updating of changed registration details, under new Division 1A.

Example

Ben is the Chairperson of a unincorporated political campaigner, while Humphrey is the Treasurer. As Chairperson, part of Ben’s role is to approve the electoral communications of the political campaigner, including associated expenses. As Treasurer, Humphrey’s role is to keep the group’s books up-to-date, and to advise Ben as to whether the group has sufficient funds for a proposed activity.

Humphrey is the financial controller of the political campaigner, and must be nominated as such under new subsection 289A.
If Ben was incorrectly nominated as the financial controller, Humphrey would still be responsible for meeting the obligations of a financial controller.

Requirements for, and process of, appointment or nomination

Subdivision D – Requirements for appointment or nomination

149 New section 292F expands the requisites for appointment of an agent or nomination of a financial controller. Unless a person has been deemed to be an agent or financial controller under subsection 289(2) or (4), an appointment or nomination must meet the following conditions:

a) the person appointed or nominated must:
   i. be an individual who is at least 18 years old (paragraph (1)(a)). Individuals younger than 18 cannot be appointed or nominated;
   ii. not be someone convicted of a criminal offence under Part XX (subsection (4)), which includes persons convicted of any Part XX contravention prior to commencement, and persons convicted of a Division 3A offence after commencement;
   iii. have signed a form of consent and declaration of eligibility (paragraph (1)(d));

b) the Electoral Commission must be notified in writing of the nomination or appointment (paragraph (1)(b)). These notices must include the appointee/nominee’s name and full street address and suburb or locality (paragraph (1)(c)), and be given by the person with the relevant authority (paragraph (1)(b)), that is:
   i. for an appointment made by a registered political party or a State branch of a registered political party, the notice must be given by the party or branch making the appointment;
   ii. for an appointment made by a candidate, the candidate; and
   iii. for an appointment made by a Senate group, each member of the group.

150 Persons deemed to be an agent under subsection 289(2) or (4) do not have to meet the requirements in subsection (1).
Chapter 4: Public election funding

Item 27 – Sections 294 & 297

151 This item replaces old sections 294 and 297 with new subdivisions relating to the amount of public election funding to which a candidate or party is entitled, and the new claim process.

Simplified Outline

Subdivision A – Simplified outline of this Division

Section 292G Simplified outline of this Division

152 New section 292G provides a simplified outline of the public election funding arrangement, designed to give readers an overview of, and introduce important concepts in, new Division 3.

Election funding entitlements

Subdivision B – Election funding

Section 293 Election funding for registered political parties

153 New section 293 outlines the election funding payable to a registered political party for amounts above the automatic $10,000 payment provided by new section 296.

154 Subsection (1) contains the requirements in existing section 297, as applied to registered political parties. That is, it provides that public election funding is payable in relation to a registered political party where the total number of formal first preference votes for candidates it has endorsed is at least four per cent of the overall total of formal first preference votes cast in the election (paragraph (1)(a)). Where the endorsed candidates are part of a Senate group, the four per cent threshold applies in relation to above and below the line votes cast for the all the candidates in the group, whether or not it is a joint Senate group (paragraph (1)(b)).

155 The note at the end of subsection (1) alerts readers that a claim under this subsection must be made in order for funding of greater than $10,000 to be paid.

156 Subsection (2) establishes that the amount payable under this section to a political party in respect of all elections held on the relevant day is the lesser of:

   a) where more than the amount paid under 296, the sum of:

      i. $2.73454 for each formal first preference vote given for a candidate in relation to whom paragraph (1)(a) is satisfied; and

      ii. $2.73454 for each formal first preference group vote in respect of a group in relation to which paragraph (1)(b) is satisfied; and

   b) the amount of electoral expenditure that is claimed in respect of the registered political party for all elections held that day, and accepted by the Electoral Commission under section 298C.

157 A note under subsection (2) alerts the reader that the amounts specified in subsection 2 are indexed under section 321.

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

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

Joint Senate groups

160 Joint Senate group funding is payable through the participating political parties. Different claims must not include the same expenditure, although splitting an incurred cost across parties is possible if this reflects how the cost was incurred.

<table>
<thead>
<tr>
<th>Election funding for joint Senate groups</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Example 1</strong></td>
</tr>
<tr>
<td>Parties A, B and C endorse candidates in a joint Senate group. The Senate group receives ten per cent of formal first preference votes cast in the election, and so is eligible for public election funding.</td>
</tr>
<tr>
<td>Parties A, B and C agreed the cost of producing and distributing the group’s how-to-vote cards would be met by Party A. Party A should include the costs of the how-to-vote cards in their claim. Parties B and C should not include these costs in their claims.</td>
</tr>
<tr>
<td><strong>Example 2</strong></td>
</tr>
<tr>
<td>Parties A, B and C agreed the cost of producing and distributing the group’s how-to-vote cards would be split, with Party A paying for 60 per cent, and Parties B and C paying for 20 per cent each. Party A should include 60 per cent of the how-to-vote card costs in their claim, and Parties B and C should each include 20 per cent of the costs in their claims.</td>
</tr>
</tbody>
</table>

Section 294 Election funding for unendorsed candidates

161 New section 294 outlines the election funding payable to an unendorsed candidate, who is not a member of a Senate group, for amounts above the automatic $10,000 payment provided by new section 296.

162 Subsection (1) contains the requirements in existing section 297, as applied to unendorsed candidates that are not part of a Senate group. That is, it provides that public election funding is payable in relation to such a candidate where the total number of formal first preference votes received is at least four per cent of the overall total of formal first preference votes cast in the election (paragraph (1)(a)).

163 The note at the end of subsection (1) alerts readers that a claim under this subsection must be made in order for funding greater than $10,000 to be paid.

164 Subsection (2) establishes that the amount payable under this section is the lesser of:

a) $2.73454 for each formal first preference vote given to the candidate; and

b) the amount of electoral expenditure that is claimed, and accepted by the Electoral Commission under section 298C

165 A note under subsection (2) alerts the reader that the amounts specified in subsection (2) are indexed under section 321. The progress of indexation is not impacted by the Bill.

166 Subsection (3) outlines, for payments made under new section 296 and for claimed amounts accepted under 298C, when the first preference votes are taken for the purposes of calculating the amount under subsection (2)(a). New paragraph (3)(b) specifies that, for payments made in relation to a claim, first preference votes counted as at the day of the determination of the claim are to be used to calculate the amount under paragraph (2)(a).
New paragraph (3)(a) reflects section 296, specifying the progress of the count for the purposes of calculating whether someone is eligible under subsection (1) to receive an automatic payment under new section 296. It specifies that, for payments made under section 296, first preference votes counted as at the day 20 days after polling day are to be used to calculate the amount under paragraph (2)(a).

Section 295 Election funding for unendorsed groups

New section 295 outlines the election funding payable to an unendorsed group. A note alerts readers that a claim must be made in order for funding to be paid. For this section to apply:

- none of the group’s members can have been endorsed by a registered political party (paragraph (1)(a)); and
- the total number of formal first preference votes for the group is at least four per cent of the overall total of formal first preference votes cast in the Senate election.

Subsection (2) provides that once an unendorsed group meets the threshold requirements in subsection (1), the amount of the public election funding that can be paid is the lesser of:

- $2.73454 for each formal first preference vote given for the candidate in the Senate election, based on formal first preference votes and formal first preference group votes counted as at the day a determination on the group’s interim claim or final claim for election funding is made by the Electoral Commission; and
- the amount of electoral expenditure claimed in respect of the group for the Senate election and accepted by the Electoral Commission under section 298C.

The note under subsection (2) alerts the reader that the public funding rate is indexed under section 321. The progress of indexation will not be impacted by the Bill.

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

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

Claims for election funding

Subdivision BA – Automatic payment of election funding of $10,000

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

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

Subsection (1) provides that the Electoral Commission must pay $10,000 in relation to each eligible registered political party, candidate, or Senate group, as soon as practicable after 20 days after the polling day for an election. To be eligible under subsection (2) in sections 293, 294 or 295, the relevant candidate or Senate group must receive at least four per cent of formal first preference votes cast in the election and must wish to receive election funding. A registered political party may elect not to receive election funding under paragraph 126(2)(d) of the Electoral Act.
Note 1 at the end of subsection (1) that the $10,000 amount mentioned in this subsection is indexed under section 321.

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

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

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

**Example**

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

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

a) the federal secretariat $20,000; and
b) the Victorian branch $10,000.

Subdivision C – Claims for election funding of more than $10,000

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

New section 297 requires an agent to lodge a claim with the Electoral Commission prior to payment of election funding. Subsection (1) requires a claim to be made for election funding in excess of the automatic payment provided for in section 296 to be paid.

Subsection (1) provides that claims must be made by the agent of the registered political party, unendorsed candidate or unendorsed group. Like in subsection 296(2), an exception to this rule occurs in relation to a federal party (defined in subsection 287(1)). For registered political parties with federated organisational structures, only the agent of the federal party can make a claim. Alternatively, the agent of the federal party may consent to a State branch making a claim. This consent must be provided to the AEC to have effect, and should specify whether the consent relates to the interim claim, final claim, or both.

Subsection (2) provides that an agent may make an interim claim, a final claim, or both. A note underneath subsection (2) points readers to subsections 298C(3) and (4), in the instance that only an interim claim is made.

Subsection (3) provides that a final claim for public election funding must specify all of the electoral expenditure against which the claim is to be assessed, even if some or all of it has been included in an interim claim. However, subsection (4) provides that a final claim is able to incorporate, by reference, electoral expenditure that has been included in the interim claim.

In order to streamline administration of public funding payments, subsection (5) provides that only one interim and one final claim can be made.

**Section 298 Electoral expenditure incurred**

New section 298 requires claims to specify electoral expenditure incurred for which public
election funding is sought. Subsections (1) and (1A) deal with registered political party claims, section (2) with candidate claims, and subsection (3) with Senate group claims.

185 Subsection (1) provides that a claim made by the agent of a registered political party must specify, in relation to all elections held on the same day, electoral expenditure covered by subsection (1A) for which election funding is sought.

186 Subsection (1A) provides that this claimed electoral expenditure must have been incurred, in relation to the elections, by:

a) for claims made by State branches with the consent of the federal party to lodge their own claim under paragraph 297(1)(a), or for registered parties that are not federal parties:
   i. the party or its endorsed candidates;

b) for claims made by federal parties on behalf of their state branches under paragraph 297(1)(aa):
   i. the State branch;
   ii. the federal party; or
   iii. candidates endorsed by either the State branch or federal party.

Section 298A Form of claim

187 New section 298A requires a claim to:

a) specify whether the claim is an interim claim or final claim (paragraph (a));

b) be in the form approved by the Electoral Commissioner (paragraph (b));

c) specify the person or persons to whom the election funding is payable (paragraph (c)), and where the election funding is payable to more than one person, specify the percentages in which the election funding is payable to each person (paragraph (d)). This option to specify percentages is expected to be most relevant in the case of joint Senate groups and political parties with federated structures who wish to share funding amongst branches. It replaces existing section 299, and significantly simplifies payment arrangements and provides flexibility for future intra-party governance arrangements; and

d) provide all the information and be accompanied by any documents, required by the form.

Section 298B Lodging of claim

188 New section 298B sets out the time period during which a claim can be made, that is:

a) no earlier than 20 days after polling day; and

b) no later than six months after polling day.

189 Claims lodged outside of these time periods will not be considered by the Electoral Commission, and no election funding will be paid.

Section 298C Determination of claim

190 New section 298C sets out rules relating to the Electoral Commission’s decision on claims for public election funding. New section 298H provides for application for external review of this decision by the Administrative Appeals Tribunal, as is available for reviewable decisions under
section 141.

191 Subsection (1) provides that the Electoral Commission must decide whether to accept, in whole or in part, a claim for public election funding within 20 days of receiving the claim. To the extent that the Electoral Commission accepts the claim, the amount required by sections 298D or 298E must also be paid within this time period.

192 Subsection (2) provides that, in deciding whether or not to accept the claim, the Electoral Commission must only have regard to the following matters. These are:

a) whether expenditure claimed meets the definition of electoral expenditure, as prescribed by the Electoral Act and applicable regulations (if any);

b) where expenditure is electoral expenditure, whether:
   
   i. the claimed electoral expenditure was actually incurred; and
   
   ii. any duplication with another claim, that is, whether the electoral expenditure has been specified in a claim made by another agent.

193 Subsections (3) and (4) provide that, where only an interim claim is lodged, the interim claim will be deemed to be the final claim and no further funding will be payable. If the interim claim was accepted in part or refused, the refused part of the claim will be deemed to be a refused final claim refused, triggering:

a) the provision of reasons for the refused part of the claim under section 298F;

b) the opportunity for the agent to apply for reconsideration of the decision under 298G and 298H.

194 The process under subsections (3) and (4) will finalise any claim for public election funding.

195 However, if the Electoral Commission becomes satisfied that there was an overpayment and decides to vary the decision under subsection 301(1), the excess funds paid may be recovered as a debt to the Commonwealth under subsection 301(3). This decision is also subject to sections 298F, 298G and 298H.

196 If the interim claim is taken to be the final claim under subsection (3), section 141 will apply to the interim claim as if it were the final claim.

197 Subsection (5) clarifies that, where an interim claim is deemed to be a final claim under subsection (3), the public funding rate amount does not need to be recalculated to reflect the progress of the count as at the day the deeming occurs.

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

198 New section 298D clarifies that the amount paid in relation to a claim is to be reduced by the amount paid under section 296. As clarified by new subsection 297(3), claims will continue to set out all electoral expenditure for which funding is sought. However, as by the time the claim is made, $10,000 (indexed) may have already been paid under section 296, new subsection 298D(2) provides that the amount paid in relation to a claim is to be reduced by the amount paid under section 296. The amount must be paid in accordance with paragraphs 298A(c) and (d).

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

199 Section 298E provides that in relation to a final claim, the Electoral Commission must pay the public funding rate amount, as set out in sections 293 to 295 reduced by any amount that has been paid in accordance with section 296 or 298D, within 20 days of receiving the claim. In other words, the balance of the funding will be paid at this point, provided that the amount of accepted
electoral expenditure is equal to, or greater than, the entitlement.

200 If the Electoral Commission becomes satisfied that there was an overpayment based on the interim claim, that is, the final payment is a negative number once it has been reduced by the amount paid in relation to the interim claim, the Electoral Commission may rely on the variation power in new section 301 to recover the excess funds paid.

201 A note alerts readers to a claim’s ability to specify to whom the funding is paid, including the ability to specify percentages (see section 298A). If the specified person is the agent of a registered political party, another note alerts readers to section 299A.

Section 298F Refusing a final claim

202 New section 298F provides that if a final claim is refused, in whole or in part, the Electoral Commission must notify the agent that the claim has been refused and provide reasons for the refusal to the agent. The intent of this provision is to ensure that only the decision on a final claim attracts review rights and facilitates the exercise of those rights through the provision of reasons for a refusal to pay an amount claimed in a final claim.

203 However, it is important to note that an interim claim will be taken to be a final claim in some instances under paragraph 298C(3)(b). If an interim claim is taken to be a final claim, refusal of the claim will be accompanied by reasons under new section 298F, and attract review rights, as if it had been lodged as a final claim.

Section 298G Application for reconsideration of decision to refuse a final claim

204 New section 298G provides for the reconsideration of decisions made by the Electoral Commission on a final claim for public election funding. Reconsideration will be undertaken by the Electoral Commission in a review process that is similar to the review of other administrative decisions made under the Electoral Act.

205 Subsection (1) provides that where a final claim has been refused, the agent (and only the agent) may apply to the Electoral Commission for reconsideration of the decision. This is not affected by someone other than the agent being specified by a claim to receive the election funding under paragraph 298A(c).

206 Subsection (2) provides that an application for a reconsideration of a decision on a final claim must be in writing and set out the reasons for the application.

207 Subsection (3) provides that an application for reconsideration must be made within 28 days of the agent being notified of the delegate’s decision, unless an extension has been granted by the Electoral Commission.

Section 298H Reconsideration by Electoral Commission

208 New section 298H sets out how the Electoral Commission is to deal with an application for the reconsideration of a decision on a final claim.

209 Subsection (1) provides that the Electoral Commission is to reconsider the delegate’s decision that refused all or part of a final claim for public election funding and has the power to affirm, vary, or set aside and replace that decision with another decision.

210 Subsection (2) provides that the Electoral Commission is required to give the agent written reasons for its decision on the application. Subsection (3) provides that if the Electoral Commission’s decision results in any additional payment of public election funding, that payment must be made within 20 days of its decision.

211 Subsection (4) provides that the Electoral Commission is unable to delegate its power to undertake a reconsideration of a final claim for public election funding if it has received an
application under subsection (1).

212 Subsection (5) provides that subsections 141(5) to (6A) apply in relation to a decision under this section in the same way as those subsections apply to a reviewable decision made by the Electoral Commission under subsections 141(2) or (4). This means that application can be made to the Administration Appeals Tribunal to review the Electoral Commission’s decision, but that the standard composition of the Tribunal is not applicable. Instead, the Tribunal is to have three members, at least one of whom must be a Judge of the Federal Court.

Payment of election funding

Subdivision D – Payments of election funding

Item 28 – Section 299

213 This item repeals and substitutes existing section 299 to reflect the new system of claims for public election funding. New section 299 provides that election funding paid to a person not entitled to receive it, in whole or in part, is recovered by the Commonwealth as a debt due to the Commonwealth by action against the person in a court of competent jurisdiction.

Item 29 – Subsections 299A(1)
Item 31 – Subsections 299A(8)

214 These items remove the references to section 299 and “or principal agent”, to reflect the repeal of existing sections 299 and 288A.

Item 30 – At the end of subsection 299A(1)

215 This item inserts a note under subsection 299A(1) to alert readers that funding will no longer be paid automatically to agents. Instead, funding will be paid based on an accepted claim, and will be paid to the person or persons specified in that claim.

Miscellaneous

Subdivision E – Miscellaneous

Item 32 – Sections 300 and 301

216 Item 32 repeals sections 300 and 301, substituting new sections to reflect the new claims process. The new provisions also simplify the process for paying funds with respect to a deceased candidate and provide for varying a decision on an accepted claim.

Section 300 Death of candidates or group members

217 New section 300 sets out how payments of public election funding are to be made if a candidate dies.
Chapter 5: Foreign donation restrictions

Item 33 – After Division 3 of Part XX

218 This item inserts new Division 3A of Part XX titled ‘Requirements relating to donations’.

Simplified outline

Subdivision A – Interpretation

219 Section 302A provides a simplified outline of the new foreign donations restrictions, designed to give readers an overview of, and introduce important concepts in, new Division 3A.

Interpretation

Section 302B Interpretation

220 Subsection 302B(1) defines the terms acceptable action and appropriate donor information, which are specific to Division 3A. Acceptable action applies in relation to a gift that would otherwise contravene this Division. If a recipient is unable to satisfy themselves that a gift complies with this Division, acceptable action means to relinquish it (or an amount of equivalent value), by either returning it to the donor, the person who made the gift, or transferring it to the Commonwealth. Appropriate donor information has the meaning given by new section 302P.

Object

Section 302C Objects of this Division

221 New section 302C specifies the object of new Division 3A and how the provision aims to achieve that object. The object is to secure and promote the actual and perceived integrity of the Australian electoral process. Perceptions of fairness, integrity and accuracy are as important as the reality for elections to result in peaceful transitions of power in democracies. This is because elections serve not only to select the winner but also to convince the unsuccessful candidates and their supporters that they lost fairly.

222 The object is operationalised through the offences and civil penalty provisions contained in Subdivisions B and C of Division 3A. These provisions have been designed to recognise that while generally the basis of democratic participation in Australia is individual citizens, the right to participate through donating is broader than the right to vote and should encompass Australian-based organisations. Donating to a participant in public debate is an indirect and valuable way of participating in public affairs for Australian electors and organisations, as it allows for the aggregation of political opinion, a critical function in a democratic system of government.

223 Organisations incorporated in Australia, or with a head office or principal place of activity in Australia have a legitimate interest in the direction of public policy in Australia, as their activities are subject to Australian law. However, as submissions to the Joint Standing Committee on Electoral Matters and public debate on domestic and overseas incidents have repeatedly demonstrated, the public expects that those with no legitimate connection to Australian public affairs be prevented from influencing their course through political finance.
Relationship with State and Territory laws

302CA Relationship with State and Territory laws

New section 302CA clarifies the interaction between similar State and Territory and Commonwealth electoral funding schemes. Broadly speaking, these State and Territory electoral laws will be invalidated to the extent that they would detract from the right to give, accept or use a donation under the Electoral Act for Commonwealth electoral purposes.

In summary, new section 302CA ensures that provisions of State and Territory laws that relate to political donations cannot:

a) restrict the use of a gift for Commonwealth electoral purposes; or

b) restrict the giving, receiving or retaining of donations that could be used for Commonwealth electoral purposes, unless the donation is directed to a purpose relating to a State, Territory or local government election.

To implement recommendation 10 of the JSCEM’s second advisory report, subsection 302CA(1) does not apply if a gift is kept separately to be used for a State or Territory electoral purpose. Also, section 302CA does not override State laws dealing with the use of political donations for State electoral purposes.

Giving, receiving or retaining gifts

In more detail, new subsection 302CA(1) clarifies that, apart from situations outlined in the foreign donations restrictions in new Division 3A and apart from where amounts are kept or identified for a state or territory purpose:

a) a person or entity may give a gift to or for the benefit of a political entity, political campaigner or a third party;

b) a political entity, political campaigner or third party can receive, retain or use a gift; or

c) a person or entity can receive, retain or use a gift on behalf of a political entity, political campaigner or third party.

The immunity in subsection 302CA(1) is subject to the gift (or part of the gift) being required to be, or being able to be, used for the purpose of incurring federal electoral expenditure or creating or communicating federal electoral matter (paragraph (e)). That is, section 302CA will only apply where the gift is able to be used for these purposes. It will not apply in relation to gifts that are only able to be used for exclusively State electoral purposes (as clarified in paragraph 302CA(3)(a)).

Subsection (2) explains the circumstances in which a gift, or part of a gift, is required to be, or may be, used for the purpose of incurring federal electoral expenditure or creating or communicating federal electoral matter (for the purposes of paragraph 302CA(1)(e)).

a) a gift or part of a gift is ‘required to be used’ for that purpose if any terms set by the person or entity providing the gift explicitly require it to be used for that purpose (whether or not those terms are enforceable)

b) a gift or part of a gift ‘may be used’ for that purpose if the terms set by the person or entity providing the gift explicitly allow the gift to be used for that purpose, or if the person or entity providing the gift does not set terms relating to the purpose for which the gift or part can be used.
However, paragraph (3)(b) acknowledges that section 302CA does not prevent the States or Territories from regulating gifts that are kept or identified separately to be used exclusively for a State or Territory electoral purpose. States and Territories, or gift recipients, could ensure that subsection 302CA(1) does not apply to a gift by:

a) in the case of the States and Territories, requiring gifts for State or Territory electoral purposes to be kept separately (along the lines of NSW electoral law, for example); or

b) in the case of gift recipients, keeping gifts for State or Territory electoral purposes separately.

Without limiting paragraph (3)(b), subsection (6) sets out how an amount relating to a gift can be kept separately. Keeping a gift separately might be achieved by, for example:

a) using a bank accounts exclusively for State or Territory electoral purposes; or

b) identifying or earmarking financial transactions according to the level of government campaign (through, for example, the use of cost centres).

Subsection (3) does not limit when subsection (1) does not apply. This is intended to make clear that subsection (3) does not purport to limit what a State or Territory law could do to regulate the giving, receipt, retention or use of gifts for exclusively State or Territory electoral purposes.

Using gifts

Subsection 302CA(4) states that, apart from situations outlined in the prohibitions found in the amended Division 3A and irrespective of any State or Territory electoral law, a gift recipient may use (or authorise the use of) a gift for the purposes of incurring electoral expenditure, or creating or communicating electoral matter.

However, subsection 302CA(5) ensures that subsection (4) would not have the effect of overriding State or Territory laws that require amounts kept separately for State or Territory electoral purposes to be used for such State or Territory electoral purposes.

Subsection (5) does not limit when subsection (4) does not apply. This is intended to make clear that subsection (5) does not purport to limit what a State or Territory law could do to regulate the use of gifts for exclusively State or Territory electoral purposes.

Example 1: Subsection 302CA(1) applies

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

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

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

As Nian Zhen lawfully makes the gift to a political campaigner under Division 3A of Part XX of the Electoral Act, and the gift may be used by the political campaigner to incur federal electoral expenditure within the terms of the Electoral Act, the State law does not apply to Nian Zhen’ gift.
However, if the relevant State electoral law regulated the giving, receipt, retention or use of gifts for exclusively State electoral purposes, then the State law would apply. For example, if the gift were kept in an account dedicated to State election campaigns pursuant to the State law, and the State law provided that amounts standing to the credit of such accounts may only be applied for State electoral expenditure, the State law would control the application of Nian Zhen’s gift.

**Example 2: Subsection 302CA(1) does not apply**

A donor makes a gift to a Western Australian-based political party active in state and federal elections. The donor does not specify whether the gift should be used for state or federal purposes. The party is prohibited from receiving donations from the donor under Western Australian law, so the party initially identifies the gift for federal purposes.

However, the party runs short of funds during its Western Australian state campaign, so decides to use the gift for its Western Australian state election campaign. The party transfers it to its state campaign account, and uses it to pay for how-to-vote cards.

The party has broken state law. Section 302CA does not apply, and so does not protect the party from state prosecution.

**Key political actors**

*302D Donations to political entities and political campaigners*

Section 302D prohibits registered political parties, candidates, Senate groups and political campaigners from receiving gifts from foreign donors. Subsection (1) provides that an agent of a political entity, or a financial controller of a political campaigner (see Chapter 3: Agents and financial controllers), will contravene this section if:

a) a gift is made to, or for the benefit of, the political entity or political campaigner;
   - The inclusion of the words ‘for the benefit of’ are intended to capture more indirect forms of making gifts, for example, through fundraising events or bodies. In these cases, the donor’s intent for the gift to benefit the recipient is relevant.

b) the gift is made by, or on behalf of, a foreign donor;
   - The inclusion of the words ‘or on behalf of’ are intended to capture circumstances where a person attempts to channel a gift through an allowable donor.

c) the amount or value of the gift is at least $1,000 at the time the gift is made;
   - These thresholds are intended to allow the receipt of small, anonymous gifts, which may or may not be from allowable donors.

d) acceptable action has not been taken in relation to the gift before the end of six weeks after the gift is made. Acceptable action is defined in new subsection 302B(1).

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

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

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

a) for gifts over $1,000, the donor affirms in writing that they are not a foreign donor.
within 6 weeks of providing the gift – this could for instance be indicated by a tick box on a form; or

b) before the end of 6 weeks after a gift is made, recipients do not contravene section (1) for gifts equal to or above the disclosure threshold if either of the following occurs:

i. the recipient obtains appropriate donor information in accordance with amended section 302P, establishing that the donor is not a foreign donor; or

ii. alternatively, the recipient took other reasonable steps (such as cross referencing identification provided by the recipient with the Electoral Roll or a Register of the Australian Securities and Investment Commission) to verify that the donor was not a foreign donor.

Donor affirms not a foreign donor in writing

Example

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

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

Recipient obtains appropriate donor information

Example

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

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

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

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

241 Note 2 is included under subsection (1A) to alert readers that a person who makes a false affirmation or provides false donor information may be liable to a penalty as found in new section 302G.
New subsection (1B) introduces an exception whereby recipients do not contravene the section if the gift was made in a private capacity to the recipient with the intent being for his or her personal use. This exception is broadly akin to the exception contained in section 302N of the Bill.

**Gifts made in a private capacity**

**Example**

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

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

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

**Using the gift for a purpose inconsistent with its terms**

**Example 1**

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

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

**Example 2**

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

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

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

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

Penalties

246 Parallel criminal and civil pecuniary penalties apply to contraventions of section 302D. A third party who contravenes subsection (1) and is convicted of a criminal offence will be subject to a maximum penalty of 100 penalty units under subsection (3). Third parties who contravene subsection (1) are also liable for a civil penalty of 200 penalty units, or if a Court can determine or estimate the value of the gift received in contravention, three times that amount, under subsection 3(b). Subsection (4) clarifies that a contravention is not a continuing offence or civil penalty under section 4K of the Crimes Act 1914 or section 93 of the Regulatory Powers Act.

Third parties

Section 302E Donations to third parties by foreign donors

247 Section 302E prohibits third parties from using gifts from foreign donors to incur electoral expenditure. Specifically, subsection (1) provides that a third party will contravene this section if:

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

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

**Example**

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

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

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

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

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

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

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

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

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

- a) the donor affirms in writing that they are not a foreign donor within 6 weeks of providing the gift; and

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

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

253 Note 1 alerts readers that a person or entity who wishes to rely on this subsection bears an evidential burden in relation to the matters in this subsection under subsection 13.3(3) of the Criminal Code and section 96 of the Regulatory Powers Act. This is appropriate, as the knowledge of the defendant is particularly within the knowledge of the defendant. It would be significantly more difficult and costly for the prosecution, or applicant in a civil case, to seek to prove the defendant does not meet the exemption than for the defendant to provide evidence that they do.

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

Penalties

255 Parallel criminal and civil pecuniary penalties apply to contraventions of section 302E. A third party who contravenes subsection (1) and is convicted of a criminal offence will be subject to a maximum penalty of 50 penalty units under subsection (3). Third parties who contravene subsection (1) are also liable for a civil penalty of 100 penalty units, or if a Court can determine or estimate the value of the gift received in contravention, three times that amount, under subsection (4). Subsection (5) clarifies that a contravention is not a continuing offence or civil penalty under section 4K of the Crimes Act 1914 or section 93 of the Regulatory Powers Act.

Gifts provided for the purposes of incurring electoral expenditure

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

256 New section 302F introduces penalties for:

a) agents of political entities, financial controllers of political campaigners and third parties who receive a gift from a foreign donor:
   i. intending to use the gift for electoral expenditure; or
   ii. knowing that the donor intends the gift to be used for electoral expenditure;

b) foreign donors who make prohibited gifts.

257 The fault element that applies paragraph 302F(1)(c) is specified in the provision to be knowledge. That is, a person or entity will only commit the offence in subsection 302F(1) if (among other things) they know that the donor is a foreign donor. Similarly, a person or entity will only contravene the civil penalty provision if the person or entity knows that the donor is a foreign donor.

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

259 A person has intent with respect to:

a) conduct if he or she means to engage in that conduct;
b) a circumstance if he or she believes that it exists or will exist; and

c) a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

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

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

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

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

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

a) a gift is made to, or for the benefit of, the political entity, political campaigner or third party;

b) the gift is made by a foreign donor;

c) the relevant person knows that the donor is a foreign donor;

d) the amount or value of the gift is at least $100;

e) either:

i. knowledge of intent: the relevant person knows that the foreign donor intends the gift to be used to incur electoral expenditure, or for the dominant purpose of creating or communicating electoral matter; or

ii. acceptance with intent: the relevant person accepted the gift intending to use the gift to incur electoral expenditure, or for the dominant purpose of creating or communicating electoral matter; and

f) within six weeks of the gift being made, acceptable action has not been taken, that is, the gift has either been returned to the donor or transferred to the Commonwealth.

<table>
<thead>
<tr>
<th>Gifts from foreign donors earmarked for electoral expenditure</th>
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<tbody>
<tr>
<td>Example 1</td>
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<tr>
<td>Dana is the agent for Kym, a candidate in the upcoming election. The Canadian Woodchipper’s</td>
</tr>
</tbody>
</table>
Association donates $200,000 to Kym’s campaign to help Kym publicise her policy of removing tariffs on timber imports. The Association also offers to send one of their senior communications officers to Australia to work for Kym during her campaign. Kym accepts the Association’s offer. The commercial value of the communication officer’s work is a gift from the Association to Kym.

Example 1a

Six weeks after the gifts are made, Dana contravenes subsection 302F(1) as:
- the gift value is greater than $100, and she knows:
  - the Association is a foreign donor:
    - the Association intends the money to be used for Kym to incur electoral expenditure;
    - the Association intends the professional services of the communications officer to be used to create and communicate electoral matter.

Example 1b

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

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

302F(2) Offence by a foreign donor

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

a) they make a gift to, or for the benefit of, a political entity, political campaigner or third party (the recipient);

b) if they make a gift to a third party:
   i. the donor intends the gift to be used to incur electoral expenditure, or for the dominant purpose of creating or communicating electoral matter; or
   ii. the donor knows that the recipient accepts the gift intending to use the gift to incur electoral expenditure, or for the dominant purpose of creating or communicating electoral matter; and

c) within six weeks of the gift being made, the third party has not undertaken acceptable action, that is, returned the gift or transferred it to the Commonwealth.

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

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

265 New section 302G introduces penalties for those who knowingly make a false affirmation or provide false appropriate donor information in relation to sections 302D or 302E. These penalties are designed to protect the integrity of the processes recipients undertake to check they are not receiving prohibited foreign gifts.

266 Subsections (2) and (4) set out parallel criminal and civil penalties for contraventions of section 302G of 100 and 200 penalty units, respectively. Like with other penalties, where a Court is able to determine or estimate the amount involved in the contravention, the maximum penalty is three times that amount, and not the specified penalty units.
Subsections (3) and (5) clarify that these penalties apply extra-territorially due to the nature of the contraventions and the parties involved. Foreign donors are, by definition, foreign, and are likely to be overseas when committing a contravention and during enforcement proceedings. Thus, subsection (3) applies section 15.4 of the Criminal Code (extended geographical jurisdiction – category D) to the criminal offence. Mirroring the arrangements for the criminal offence, subsection (5) specifies the civil penalty applies whether or not the conduct or its result occurs in Australia.

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

Anti-avoidance

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

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

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

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

a) the relevant person (whether alone or with one or more persons) enters into, begins to carry out or carries out a scheme (paragraph (1)(a));

b) there are reasonable grounds to conclude that the relevant person did so for the sole or dominant purpose of avoiding the application of sections 302D, 302E or 302F (paragraph (1)(b));

- ‘In particular circumstances’ refers to the other elements of sections 302D, 302E and 302F, for example, that the recipient must have knowledge of the donor’s intent in 302F, or the six weeks for acceptable action in sections 302D and 302E.

c) as a result of the scheme or part thereof, the provision does not prohibit the making, receipt, retention or use of the gift (paragraph (1)(d)); and

- In other words, the scheme avoids the application of a foreign donation restriction.

d) either the scheme involved:

- **donation splitting**: that is, the scheme involved the foreign donor avoiding a monetary threshold that operates in relation to a gift by giving multiple gifts below the monetary threshold; or

- **conduit corporations**: that is, the scheme involves the foreign donor forming, or participating in the formation of, a body corporate in Australia in order to channel gifts through an allowable donor;

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

273 Notes are included under subsection (1) to alert readers that:

a) the Electoral Commissioner’s decision to issue a notice under section 302H is a reviewable decision under Part X of the Electoral Act; and

b) scheme is defined in subsection 287(1).

274 Subsection (2) sets outs requirements for notices issued under subsection (1).
A notice must specify the conduct constituting the scheme (paragraph (2)(a)) and require the relevant person not to enter into or carry out the scheme (paragraph (2)(b)).

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

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

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<th>Anti-avoidance</th>
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**Example**

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

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

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

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<th>Appropriate donor information</th>
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**Subdivision D – Other provisions relating to offences and civil penalty provisions**

**Section 302P - Information relating to foreign donor status**

277 Appropriate donor information or reasonable steps are required for gifts above the disclosure threshold under sections 302D and 302E ($13,800 in 2018-19). Section 302P sets out a range of forms of proof that are optional and satisfactory. This list is not definitive and does not restrict the recipient from using another appropriate form of proof as an alternative, as this would constitute reasonable steps. As clarified in the note under the table in subsection (1), a person or entity who obtains appropriate donor information may not contravene subsections 302D(1A) or 302E(2). Subsection (1) provides that where someone obtains information or a document specified
in column 2 of the table in subsection (1) for the relevant type of donor, they have obtained appropriate donor information. Column 2 specifies different types of appropriate donor information for individuals (item 1), Australian corporations (item 2) and other types of entities (item 3).

278 For individuals and Australian corporations, any one of the types of information specified in column 2 at items 1 and 2 is sufficient. However, entities relying on documents evidencing decisions under item 3 must, in general, provide at least three documents evidencing three different kinds of decisions. An exception to this occurs in relation to paragraph (c), under which an entity that is a trust or foundation can provide a single document evidencing the location of the entity’s governing law, head office or principal place of activity.

279 Subsection (3) clarifies that for item 3 of the table, information may be omitted, redacted or deleted from the minutes, documents or information to avoid disclosing information that is not relevant to whether the donor is foreign.

### Appropriate donor information

#### Example 1

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

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

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

#### Example 2

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

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

Yay Brisbane provides copies of the minutes of their last three meetings as appropriate donor information. The minutes show the meetings were held at the bowls club, and that at the meetings:
- officers were appointed (the Treasurer and Spokesperson for the new year);
- high-level financial decisions were made (the group decided to donate a quarter of the group’s funds to a candidate); and
- decisions setting the operational policies of the group were made (the group decided that only the Spokesperson would give comments on behalf of the group to the media).

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

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

280 Note 1 under the table in subsection (1) alerts readers that a person who obtains appropriate donor information may not commit an offence or contravene a civil penalty provision in the Division.

281 Note 2 alerts readers that, in 2018, trust deeds or other governing documents of entities registered under the *Australian Charities and Not-for-profits Commission Act 2012* were generally
available on the Australian Charities and Not-for-profits Register as a governing document (see https://www.acnc.gov.au/findacharity).

Appropriate donor information

Section 302Q Debts due to the Commonwealth

282 New section 302Q specifies that the amount or value of a gift (determined at the time the gift is made) that is unlawful due to contravention of sections 302D to 302L (except 302J dealing with incorporating a body corporate) is payable to the Commonwealth by the gift recipient and may be recovered by the Commonwealth as a debt due to the Commonwealth by action in a court of competent jurisdiction. This ensures that unlawful gifts made under Division 3A cannot be retained by their recipients as a windfall gain, and operates in addition to any pecuniary penalty.

Physical elements of offences

Section 302R Physical elements of offences

283 New section 302R provides that for the purposes of applying Chapter 2 of the Criminal Code, which concerns the general principles of criminal responsibility, to the offences in Division 3A, the physical elements of the offence are set out in the relevant provision.
Chapter 6: Disclosure

Amnesty for historical non-compliance with third party obligations

Amnesty

Item 143(14) – Commencement

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

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

Relationship with State and Territory laws

314B Relationship with State and Territory laws

Item 106 – Section 314A

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

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

Limit on State and Territory power—information on amounts provided

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

Limit on State and Territory power—information on amounts received

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

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

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

**Interpretation**

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

   a) the provider’s terms explicitly require or allow the amount to be used for that purpose; or

   b) the provider does not set terms in relation to the purpose for which the amount can be used.

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

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

   a) a total amount that includes the specific amount;

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

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

**Example 1: Section 314B does not apply**

A donor makes a gift to a political party active in Northern Territory and federal elections. The donor does not specify whether the gift should be used for state or federal purposes.

The party directs the gift to a campaign account dedicated to the upcoming Northern Territory local government elections.

Northern Territory electoral law applies to the gift. For example, if Northern Territory electoral law requires the gift to be disclosed, the party must disclose it in the required manner.

Section 314B does not protect the party from state prosecution.
Example 2: Section 314B applies to a gift

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

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

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

Example 3: Section 314B applies to part of a gift

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

_I’ve included a bit extra this time to help you out at the upcoming state election._

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

Disclosure of donations

302V Simplified outline of this Division

Item 34 – Before section 303

295 This item inserts new section 302V, which provides a simplified outline of the gift disclosure provisions in Division 4.

303 Interpretation

Item 35 – At the end of section 303

296 This item inserts a note after section 303, which alerts readers that certain particulars furnished to the Electoral Commission under subsection 318(2) may be taken as a return under subsection 318(2A).

Introduction of term ‘disclosure threshold’

Item 41 – Subparagraph 304(5)(b)(ii)
Item 42 – Paragraph 304(5)(c)
Item 43 – Subsection 304(5) (note)
Item 44 – Paragraph 304(6)(b) and (e)
Item 45 – Subsection 304(6) (note)
Item 47 – Subparagraph 305A(1)(b)(ii)
Item 49 – Subsection 305A(1) (note)
Item 51 – Subparagraph 305A(1A)(b)(ii)
Item 53 – Subsection 305A(1A) (note)
Item 67 – Subsection 306A(2)
297 These items are consequential to the inclusion of disclosure threshold as a defined term in subsection 287(1) (see Chapter 1, definition of disclosure threshold). Accordingly, these items replace the dollar amounts relating to the disclosure of gifts, and related notes, with ‘disclosure threshold’.

304 Disclosure of gifts

Items 36 & 36A – Subsection 304(2)
Item 37 – At the end of subsection 304(2)
Items 38 & 38A – Subsection 304(3)
Item 39 – At the end of subsection 304(3)

298 These items amend subsections 304(2) and (3), which require candidates and Senate groups to disclose gifts they receive above the disclosure threshold, to:

   a) specify that all requirements in section 304 must be complied with in furnishing a candidate or Senate group election return; and

   b) replace the repealed term ‘disclosure period’ with a reference to candidates and Senate groups, which now have a standardised temporal period specified in subsection 287(11).

299 These items also decriminalise section 304, providing that failure to comply with subsection (2) is subject to a maximum civil penalty of 60 penalty units, or, if a Court can determine or estimate the unreported amount, three times that amount.

Item 45A – Subsection 304(9)

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

301 However, subsection 93(1) of the Regulatory Powers Act continues to apply. This means that even though failure to disclose gifts under section 304 is a single contravention, the obligation to disclose continues until it has been done.

305A Gifts to candidates etc.

Item 45B – Subsection 305A(1)
Item 46 – Paragraph 305A(1)(a)
Item 47 – Subparagraph 305A(1)(b)(ii)
Item 49 – Subsection 305A(1) (note)
Item 54 – Subsection 305(A)2
Item 55 – Paragraph 305(A)(2)(b)

302 This item inserts references to by-election in paragraph 305A(1)(a) so that a person or
entity must provide a return if they make relevant gifts during the disclosure period in relation to a by-election to any candidate in the by-election or a member of a group. This ensures that relevant gifts in relation to a by-election are treated in the same way as gifts to candidates in a general election, and enhances transparency for the public in relation to by-elections.

**Item 48 – Paragraph 305A(1)(c)**

303 This item amends paragraph 305A(1)(c) to refer to a political entity and associated entity as being excluded, in accordance with the definitions in subsection 287(1), rather than referring to each type of entity in turn. The same types of entities are covered by the exclusion in the provision, as amended.

**Item 49A – Subsection 305A(1A)**

**Item 50 – Paragraph 305A(1A)(a)**

304 These items broaden section 305A to entities, and inserts a reference to by-election in paragraph 305A(1)(a) so that a person or entity must provide a return if they receive a gift during the disclosure period in relation to a by-election. This ensures that relevant gifts in relation to a by-election are treated in the same way as gifts in a general election, enhancing transparency in relation to by-elections.

**Item 52 – Subparagraph 305A(1A)(c)**

305 This item amends paragraph 305A(1A)(c) to refer to a political entity and associated entity as being excluded, in accordance with the definitions in subsection 287(1), rather than referring to each type of entity in turn. The same types of entities are covered by the exclusion in the provision, as amended. The item also reflects that 305A applies to entities, as well as to persons.

**Item 51 – Subsection 305A(1A)(b)(ii)**

**Item 54 – Subsection 305A(2)**

**Item 54A – Subsection 302A(2)(a)**

**Item 55 – Subsection 305A(2)(b)**

**Item 56 – Subsection 305A(2) (note)**

306 These items amend subsection 305A(2) concerning the provision of returns to the Electoral Commission in respect of gifts to candidates under subsection 305A(1), other persons or bodies specified in a legislative instrument under subsection 305A(1A) and gifts received and used to enable the person to make, or reimburse the person for making relevant gifts. The amendments:

a) specify that all requirements in section 305A must be complied with in furnishing a return under subsection (2);

b) omit a reference to the dollar amount relating to disclosure and substitute a reference to disclosure threshold, which is a defined term in subsection 287(1), as amended, and repeals a related note; and

c) decriminalise section 305A, providing that failure to comply with subsection (2) is subject to a maximum civil penalty of 60 penalty units, or, if a Court can determine or estimate the unreported amount, three times that amount.

**Item 57 – Subsection 305A(2A)**

**Item 58 – Subsection 305A(3)(a)**

**Item 58A – Paragraph 305A(4)(c)**

307 These items amend subsection 305A(2A) and paragraph 305A(3)(a), to:
a) refer to by-elections, in addition to elections;

b) broaden and standardise the subsections’ application to entities; and

c) replace the repealed term ‘disclosure period’ with a reference to candidates and Senate groups, which now have a standardised temporal period specified in subsection 287(11).

Item 59 – Subsection 305A(5)

308 This item repeals and replaces subsection 305A(5), which specified that section 305A did not apply to gifts made before 1 July 1992, as it is no longer required.

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

310 However, subsection 93(1) of the Regulatory Powers Act continues to apply. This means that even though failure to disclose gifts under section 305A(2) is a single contravention, the obligation to disclose continues until it has been done.

305B Gifts to political parties

Item 60 – Section 305B (heading)

Item 61 – Subsections 305B(1) and (2)

Item 62 – Paragraph 305B(3)(c)

311 These items repeal and substitute subsections 305B(1), (2) and (3A) and amend paragraph 305B(3)(c) so that the requirements concerning donor annual returns apply to relevant gifts made to, or for the benefit of, political campaigners, in addition to registered political parties and State branches of registered political parties. The heading to section 305B is updated to reflect this change, and the provision broadened to apply to persons and entities.

312 These items also decriminalise failure to provide donor annual returns under subsection 305B(1). Failure to comply with subsection (1) is subject to a maximum civil penalty of 60 penalty units, or, if a Court can determine or estimate the unreported amount, three times that amount.

Item 63 – Subsection 305B(3A)

313 This item repeals and substitutes subsection 305B(3A) to improve presentation and apply it to gifts made to political campaigners. It also updates a reference to the dollar amount relating to disclosure and substitutes it with a reference to disclosure threshold which is a defined term in subsection 287(1), as amended.

Item 63A – Paragraph 305B(3B)(e)

314 This item extends paragraph 305B(3B)(e) to persons and entities.

Item 64 – Subsection 305B(5)

315 This item amends subsection 305B(5), and inserts new subsection (6) and (7).

316 Subsection (5) now refers to gifts made by a political entity and associated entity as being excluded, in accordance with the definitions in subsection 287(1), rather than referring to each type of entity in turn. The same types of entities are covered by the exclusion in the provision, as
amended.

317 New subsection (6) exempts donors to charities registered under the *Australian Charities and Not-for-profits Commission Act 2012* (registered charities) from disclosing certain donations above the disclosure threshold. Specifically, donors to registered charities that are also political campaigners are exempted from disclosing donations above the disclosure threshold where none of the donation was used:

a) to incur electoral expenditure;

b) to create or communicate electoral matter; or

c) to reimburse the registered charity for one of these activities.

318 The anonymity of donations covered by this subsection is further protected by a similar provision in new subsection 314AC(4) (see item 92A).

319 New subsection 305B(7) to provide that subsection 93(2) of the Regulatory Powers Act does not apply in relation to a contravention of subsection 305B(1). This means that failure to meet the obligations in subsection (1) by the deadline is a single contravention, rather than each day after the deadline being a separate contravention.

320 However, subsection 93(1) of the Regulatory Powers Act continues to apply. This means that even though failure to disclose gifts under section 305B is a single contravention, the obligation to disclose continues until it has been done.

**306 Certain gifts not to be received**

**Item 65 – Section 306**

321 This item repeals section 306, which made it unlawful for political parties, state branches of political parties, candidates, members of Senate groups, or persons acting on behalf of one of these entities to receive donations without knowing or obtaining the name and address of the person giving the gift. This is no longer required in the context of new Division 3A.

**306A Certain loans not to be received**

**Items 66-68 – Subsection 306A(1) and (2)**

322 These items repeal and substitutes subsection 306A(1), which makes it unlawful to receive loans unless certain details are recorded in accordance with subsection 306A(3), to improve clarity and apply it to gifts made to political campaigners. It also updates references to the dollar amount relating to disclosure, substituting the reference to *disclosure threshold* and deleting the redundant note.

**Item 69 – Subsection 306A(3)**

323 This item repeals and substitutes subsection 306A(3) to improve clarity and clarify that the different requirements around keeping information in relation to a loan in paragraph 306A(4)(b) will be as the relevant case requires, and that a record of the terms and conditions of the loan will need to be kept in all cases.

**Item 70 – Subsection 306A(4) and (5)**

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

**Item 71 – Paragraph 306A(6)(a)**

325 This item repeals and substitutes paragraph 306A(6)(a) concerning unlawful loans to improve presentation and apply it to loans for the benefit of political campaigners and their financial controllers.

**Note:** Item 72 is dealt with in Chapter 1 (see definitions of credit card and loan).

306B Repayment of gifts where corporations wound up etc.

**Item 73 – Section 306B**

326 This item repeals and substitutes section 306B, concerning the repayment of gifts from a corporation which is wound up in insolvency, or by the court on other grounds, so that it applies to political campaigners. This application is in addition to registered political parties, candidates and members of a Senate group. This ensures that political campaigners are subject to consistent requirements with respect to the repayment of these gifts. The item also revises the section for clarity and refers to the disclosure threshold, reflecting its inclusion in subsection 287(1) as a defined term, and omits a related note. A note concerning the commencement of the section is also omitted, as it is no longer required.

Election returns

**Item 74 – Before section 308**

327 This item inserts new section 307A, which provides a simplified outline of the disclosure requirements following elections (election returns) in Division 4.

**Note:** Section 308 is repealed by item 11A (see Chapter 1, definition of electoral expenditure)

309 Returns of electoral expenditure

**Item 77 & 78 – Subsection 309(2)**

**Item 79 & 80 – Subsection 309(3)**

328 These items decriminalise the returns of electoral expenditure that candidates and Senate groups are required to provide under current section 309. Failure to comply is subject to a maximum civil penalty of 60 penalty units, or, if a Court can determine or estimate the unreported amount of electoral expenditure, three times that amount.

**Item 81 – At the end of subsection 309**

329 This item inserts subsection 309(4) which includes additional details that must be disclosed in returns of electoral expenditure lodged in respect of candidates under subsection 309(2), Senate groups under subsection 309(3).

330 Discretionary benefits received from the Commonwealth, a State or a Territory during the period of 12 months before polling day must also be included in these returns. Discretionary benefits include grants, contracts, payments and other benefits requiring the exercise of discretion by the Commonwealth or State or Territory, and do not include statutory entitlements.

331 This item inserts subsection 309(5), which provides that subsection 93(2) of the Regulatory Powers Act does not apply in relation to a contravention of section 309. This means
that failure to submit a return by the deadline is a single contravention, rather than each day after the deadline being a separate contravention.

332 However, subsection 93(1) of the Regulatory Powers Act continues to apply. This means that even though failure to comply with this section is a single contravention, the obligation to disclose continues until it has been done.

Item 82 – Subsection 311A(2)
Item 83 – Subsection 311A(2) (note)

333 These items update a reference to the dollar amounts relating to disclosure and repeal a related note. This reference and note are updated or repealed due to the inclusion of disclosure threshold as a defined term in subsection 287(1).

Annual returns

314AAA Simplified outline of this Division

Item 84 – Before section 314AA

334 This item inserts new section 314AAA, which provides a simplified outline of the annual disclosure requirements (annual returns) in Division 5A.

314AA Interpretation

Item 85 – Section 314AA
Item 86 – At the end of section 314AA

335 These items amend section 314AA to clarify that where a person becomes, or ceases to be, a registered political party, political campaigner or third party during a financial year, they are required to provide a return under Division 5A in relation to the whole financial year. A note is inserted at the end of section 314AA alerting readers to subsection 318(2A) which indicates that certain particulars provided under subsection 318(2) may be taken as a return under Division 5A.

314AB Political party and political campaigner returns

Item 87 – Section 314AB

336 This item repeals and substitutes section 314AB, which required agents of registered political parties to file annual returns, with new requirements applicable to both registered political parties and political campaigners. In addition to the information currently required of political parties in their annual returns, these new requirements include discretionary benefits received from the Commonwealth, a State or a Territory during the period of 12 months before polling day being included in these returns.

- Discretionary benefits include grants, contracts, payments and other benefits requiring the exercise of discretion by the Commonwealth or State or Territory. Discretionary benefits contrast with statutory entitlements, which are provided automatically if specified criteria are met.

337 One point of difference between the annual returns of registered political parties and political campaigners is the inclusion of electoral expenditure. New paragraph (2)(iv) requires political campaigners to include the total amount of electoral expenditure incurred by, or with the authority of, the campaigner in their annual returns. Registered political parties may have already disclosed their electoral expenditure in their claim for public election funding under Division 3.

338 Failure to provide an annual return in accordance with subsection 314AB(1) is decriminalised, and instead subject to a maximum civil penalty of the higher of 120 civil penalty
units or, if a Court can determine or estimate the unreported amount – three times that amount.

339 New subsection 314AB(3) specifies that where a political expenditure is taken to have been incurred giving rise to a need for a return, it is to be provided as a separate return in respect of the relevant financial year, rather than being consolidated into a single return.

340 New subsection (4) provides that subsection 93(2) of the Regulatory Powers Act does not apply in relation to a contravention of subsection (1). This means that failure to provide an annual return by the deadline is a single contravention, rather than each day after the deadline being a separate contravention.

341 However, subsection 93(1) of the Regulatory Powers Act continues to apply. This means that even though failure to lodge an annual return under section 314AB is a single contravention, the obligation to lodge continues until it has been done.

314AC Amounts received
314AE Outstanding amounts

**Item 88-90 – Subsection 314AC(1)**

**Item 91 & 92 – Subsection 314AC(2)**

**Item 93-95 – Subsection 314AE(1)**

342 These items amend sections 314AC and 314AE to:

a) reflect the inclusion of disclosure threshold as a defined term in subsection 287(1); and

b) reflect that political campaigners will now also need to lodge annual returns, consistent with the requirements for registered political parties.

**Item 92A – At the end of section 314AC**

343 This item inserts new subsection 314AC(4), which exempts charities registered as a political campaigner and under the Australian Charities and Not-for-profits Commission Act 2012 (registered charities) from disclosing donations. Specifically, new subsection 314AC(4) exempts registered charities that are also political campaigners from the requirement in subsection (1) to disclose donations above the disclosure threshold. To be covered by this exemption, the registered charity must not have used any party of the donation:

a) to incur electoral expenditure;

b) to create or communicate electoral matter; or

c) to reimburse the registered charity for one of these activities.

344 The anonymity of donations covered by this subsection is further protected by a similar provision in new subsection 305B(6) (see item 6).

314AEA Annual returns by associated entities

**Item 96 & 97 – Subsection 314AEA(1)**

**Item 98 – Subsection 314AEA(5)**

**Item 99 – At the end of section 314AEA**

345 These items amend section 314AEA, concerning annual returns by associated entities, to specify new requirements including discretionary benefits received from the Commonwealth, a State or a Territory during the financial year.
Discretionary benefits include grants, contracts, payments and other benefits requiring the exercise of discretion by the Commonwealth or State or Territory. Discretionary benefits contrast with statutory entitlements, which are provided automatically if specified criteria are met.

New subsection 314AEA(6) provides that a return is not required to be provided by an associated entity for a financial year if the entity lodged an annual return as a political campaigner under section 314AB for the same year.

Failure of the financial controller of an associated entity to provide an annual return in accordance with subsection 314AEA(1) is decriminalised, and instead subject to a maximum civil penalty of the higher amount of 60 penalty units or, if a Court can determine or estimate the unreported amount – three times that amount.

Subsection 93(2) of the Regulatory Powers Act does not apply in relation to a contravention of subsection (1). This means that failure to lodge an annual return by the deadline is a single contravention, rather than each day after the deadline being a separate contravention.

However, subsection 93(1) of the Regulatory Powers Act continues to apply. This means that even though failure to lodge under section 314AEA is a single contravention, the obligation to lodge a return continues until it has been done.

Note: Item 143(14) - Amnesty - is dealt with in Chapter 6: Disclosure

Third party returns

314AEB Annual returns by third parties

Item 100 – Section 314AEB (heading)

This item updates the heading to section 314AEB to reflect the introduction of the term ‘third party’, to which the section applies (see Chapter 1, definition of third party).

Item 101 – Subsections 314AEB(1) and (2)

This item replaces subsections 314AEB(1) and (2). Reporting arrangements for third parties are substantively maintained, but with simpler drafting reflecting the introduction of the term ‘third party’ (see Chapter 1, definition of third party).

New subsection (1) requires third parties to lodge an annual return.

New subsection (2) sets out the information that must be included in a third party return. Third party returns must include the amount of electoral expenditure incurred in the financial year, and a signed statement of compliance with the foreign donations restrictions in section 302E. Third party may also be required to report under section 314AEC.

Failure to comply with subsection 314AEB(1) is decriminalised and replaced with a maximum civil penalty of the higher amount of 60 civil penalty units or, if a Court can determine or estimate the unreported amount – three times that amount.

Item 102 – At the end of subsection 314AEB(3)

New paragraph 314AEB(3)(c) provides that if the campaigner is required to provide a return under section 314AEC relating to gifts received for political expenditure, they are required to include that return in their annual return, and not as a separate return. This ensures that there is no duplication of penalties relating to annual returns.
**Item 103 – At the end of section 314AEB**

356 This item introduces subsection 314AEB(4), which provides that subsection 93(2) of the Regulatory Powers Act does not apply in relation to a contravention of subsections 314AEB. This means that failure to lodge a third party return by the deadline is a single contravention, rather than each day after the deadline being a separate contravention.

357 However, subsection 93(1) of the Regulatory Powers Act continues to apply. This means that even though failure to lodge a third party return under section 314AEB is a single contravention, the obligation to lodge continues until it has been done.

**Item 104 – Section 314AEC**

358 This item repeals and substitutes section 314AEC so that it applies to third parties, reflects the amendments to section 314AEB, and improves its presentation and clarity. Specifically, new section 314AEC:

a) reflects the inclusion of disclosure threshold as a defined term in subsection 287(1); and

b) clarifies that where the total amount of all gifts received from at least one single person during the financial year is more than the disclosure threshold, an entity must provide a return under section 314AEB.

- This provision was previously located in subsection 314AEC(4).

359 A note is inserted under subsection (1) alerting readers that a return under section 314AEC must be included in the return provided under section 314AEB, and not as a separate return.

**314AG Regulations**

**Item 105 – Subsection 314AG(2)**

360 This item makes a consequential amendment subsection 314AG(2) to update a reference, given the amendments to subsection 314AB.

**Relationship between Electoral Act and State and Territory disclosure laws**

**Item 106 – Section 314A**

**314B Relationship with State and Territory laws**

361 This amendment inserts new section 314B. New section 314B clarifies the interaction between electoral disclosure regimes operating at the Commonwealth and other levels of government. The provision is intended to ensure (among other things) that State or Territory laws do not discourage persons or entities from making or receiving small donations for federal electoral purposes, where such donations are not required to be reported under Part XX of the Electoral Act. It is also intended to ensure that, where a person or entity is required to report an amount under Part XX, the person or entity is not subject to duplicative reporting requirements under State or Territory law. The section only applies where, broadly speaking, the donation or amount is, or may be used for Commonwealth electoral purposes. State and Territory laws dealing with disclosure of donations that can only be used for State and Territory electoral purposes are not affected by this section.
Subsection (1) clarifies that a person or entity who gives or receives an amount (or who acts on behalf of the person or entity who gives or receives an amount) is not required to disclose the amount under a State or Territory law if:

- the amount is provided to or for the benefit of a political entity, political campaigner, third party or associated entity, and
- either:
  - the amount is required to be used for the purposes of incurring federal electoral expenditure or creating or communicating federal electoral matter, or
  - the amount may be used for those purposes, and has not been used for a State or Territory electoral purpose before the end of the period during which the amount is required to be disclosed under the State or Territory electoral law. That is, where an amount may be, but is not required to be, used for the purposes of incurring federal electoral expenditure or creating or communicating federal electoral matter, section 314B(1) is ‘switched off’ by subparagraph (1)(c)(ii) if the amount is used for a State or Territory electoral purpose before an applicable State of Territory disclosure deadline.

Furthermore, providers are not required to disclose information relating to that amount (in the relevant circumstances above), such as their name, organisation, or details relating to the transaction, under a State or Territory electoral law. Amount includes a gift or loan.

It is important to note that in this subsection, and in section 314B more broadly, not being required to disclose under a State or Territory law because of the operation of section 314B does not prevent a person or entity from voluntarily disclosing an amount.

Subsection (2) clarifies what amounts are covered by subsection 314B(1). Specifically, subsection (2) clarifies that an amount is required to be, or may be, used for a purpose of incurring electoral expenditure, or creating or communicating electoral matter (within the meaning of paragraph (1)(c)) if:

- the provider’s terms explicitly require or allow the amount to be used for that purpose (whether or not those terms are enforceable); or
- the provider does not set terms in relation to the purpose for which the amount can be used.

As clarified in paragraph (6)(a), subsection 314B(1) does not apply in relation to an amount if any terms set by the person or entity providing the amount explicitly require the amount to be used only for a State or Territory electoral purpose.

Subsection (3) makes similar provision in relation to expenditure, as well as debts not otherwise covered by subsection (1). It provides that a person or entity (referred to as the debtor) that is a political entity, political campaigner, third party or associated entity is not required by State or Territory law to disclose an amount, or information relating to an amount, of expenditure that is electoral expenditure, or of a relevant debt incurred for the purposes of incurring electoral expenditure or creating or communicating electoral matter. 
Interpretation

368 Subsection (4) clarifies that, in this section, a person is not required to disclose under a State or Territory electoral law an amount, or information relating to an amount, both where the amount or information is required to be, and where it is not required to be, included in a return submitted under Part XX. In other words, section 314B operates both in circumstances where the relevant amount or information is not required to be disclosed under Part XX, and in circumstances where the relevant amount or information is required to be disclosed under Part XX.

369 Subsection (5) further clarifies that, if an amount (or information relating to an amount) is not required to be disclosed under a State or Territory law, then a total amount (or information relating to a total amount) that is required to be disclosed under the State or Territory electoral law is not required to include the amount that is not required to be disclosed.

Amounts for State or Territory electoral purposes

370 Subsections (6) and (7) acknowledge that subsection 314B(1) does not prevent the States or Territories from regulating the disclosure of donations that are available to be used exclusively in connection with State or Territory elections. States and Territories, or gift recipients, could ensure that subsection 314B(1) does not apply to a gift by:

a) in the case of the States and Territories, requiring gifts for State or Territory electoral purposes to be kept separately; or

b) in the case of gift recipients, keeping gifts for State or Territory electoral purposes separately.

371 Keeping a gift separately might be achieved by, for example, requiring the use of separate bank accounts for different election campaigns at different levels of government, or identifying or earmarking financial transactions according to the level of government campaign (through, for example, the use of cost centres).

372 Subsection (6) does not limit when subsection 314B(1) does not apply. This is intended to make clear that subsection (6) does not purport to limit what a State or Territory law could do to regulate the disclosure of amounts given or received for exclusively State or Territory electoral purposes.

Example 1: Relationship between different disclosure thresholds

Jane makes a gift of $2,000 to a registered political party without specifying what the gift may be used for. The registered political party does not use the gift for a State electoral purpose within the applicable State disclosure period or keep the gift separately for a State electoral purpose.

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

She also does not have to disclose this amount under a state law that would have otherwise required disclosure of the amount (for example, a state law that requires disclosure of all gifts to the registered political party, irrespective of amount and irrespective of whether the gift has been made exclusively for State electoral purposes).
Example 2: Gifts that may be used to incur electoral expenditure

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

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

Section 314B protects Fei Hung and the party from having to disclose Fei Hung’s regular gift under state electoral law. However, the additional amount Fei Hung includes to assist with the state election campaign is not covered by section 314B. State electoral law can require disclosure of the difference between the higher amount given on this occasion and the regular amount because Fei Hung requires this amount to be used for state electoral purposes.
Chapter 7: Miscellaneous

Item 106 – Section 314A

373 This item replaces the current interpretation section in Division 6 with a simplified outline of this Division, designed to give readers an overview of, and introduce important concepts in, this Division.

Note: Section 314B is dealt with in Chapter 6: Disclosure (see Relationship with State and Territory laws)

Offences

Item 107 – Section 315

374 This item repeals and substitutes section 315, which previously contained certain offences relevant to the requirements of Divisions 3, 4, 5 and 5A of Part XX, and requirements around requirements to refund payments under Division 3. As the criminal offences have been replaced with civil penalties located in the relevant provisions, these offences are no longer necessary.

375 The capacity for a court of competent jurisdiction to order a person subject to a conviction under section 137.1 or a civil penalty order to refund amounts wrongfully obtained under Division 3 has been retained in section 315, and its application has been expanded to the amount or value of any gift made in contravention of Part XX. This ensures that amounts wrongfully obtained cannot be retained as a windfall gain.

Recovery of payments

Item 108 – Subsection 315A(1)

376 This item amends subsection 315A(1), which specifies that actions in a court to recover an amount due to the Commonwealth may be brought in the name of the Commonwealth by the Electoral Commissioner. This subsection is updated to refer to amounts due to the Commonwealth under section 299 (election funding to be recovered) or 302Q (debts due to the Commonwealth) or under a civil penalty order made in relation to a contravention of a civil penalty provision in Part XX.

Investigation

Item 109 & 110– Subsection 316(2A)
Item 111 – Subsection 316(2B)
Item 112 – Subsection 316(3)
Item 113 & 114– Paragraph 316(3A)(a) and (b)
Item 115 – Paragraph 316(7)(a)
Item 116 – Paragraphs 316(8)(b) and (11)(a)

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

a) third parties, to whom a notice can be served from the financial controller to the entity (see Amendment 26 and Chapter 3);

b) the compliance matters to which a notice can relate:

i. from Part XX of the Electoral Act;
ii. to also include the Criminal Code (to the extent that it relates to Part XX);

iii. For example, a notice may be used to investigate whether a person has made a false or misleading statement to the AEC in relation to their compliance with Part XX of the Electoral Act (see Part 7.4 of the Criminal Code).

c) the new anti-avoidance provisions in sections 287S and 302H, in determining whether a notice under those schemes is to be issued. allow agents and financial controllers to attend proceedings under subsection (2A), or nominate persons to attend on their behalf, where an officer of their entity is required to appear (subsection (2B));

d) allow an authorised officer to serve a notice requiring particular action by any person where the authorised officer has reasonable grounds to believe that the person is capable of producing a document or other things, or giving evidence, relating to a contravention of Part XX (subsection (3));

e) allow an authorised officer to serve a notice requiring particular action by a financial controller or past financial controller of a political campaigner, third party or associated entity. The authorised officer must have reasonable grounds to believe that the person is capable of producing documents or other things, or giving evidence, relating to whether an entity is or was a political campaigner, third party or associated entity (subsection (3A)). This expands the operation beyond financial controllers of associated entities which was previously provided for, consistent with the new arrangements for political campaigners and third parties; and

f) expand the provisions around the applications for, and issuing of, warrants in certain circumstances relating to evidence in of contraventions of civil penalty provisions in, or a criminal offence against, Part XX (subsections 316(7), 316(8) and 316(11)). This reflects the expanded use of civil penalties in Part XX, as amended.

Record keeping

**Item 117 – Section 317**

378 This item repeals and substitutes section 317 to provide for new record keeping provisions for those persons who are subject to civil penalty provisions in Part XX. Records will be required to kept for five years following the end of a reporting period, polling day for a claim for election funding and or relevant gifts being made. The Electoral Commissioner may determine, by legislative instrument, certain records relating to compliance within Division 3A, and record keeping requirements in relation to compliance with the Part more generally, and records must be kept in accordance with such a determination.

379 The period of five years is consistent with arrangements under similar Commonwealth schemes, and ensures that the relevant period extends beyond the typical timeframe for an election cycle. Failure to keep records is subject to a civil penalty of 200 penalty units.

Inability to complete returns

**Item 118 – Subsection 318(1)**
**Item 119 – After subsection 318(2)**
**Item 120 – Subsection 318(3A)**

380 These items amend section 318 which deals with particular circumstances where a person is unable to obtain particulars required for the preparation of a return. Consequential amendments are made to remove references to offences that were previously under subsection 315(2) and refer to Part XX more generally.
New subsection 318(2A) specifies that particulars that were not provided in a return under Division 4, 5 or 5A of Part XX, but were provided to the Electoral Commission following the issuing of a notice under subsection 318(2), are taken to be a return under the relevant Division.

Amendment of claims and returns

Item 120B – Subsection 319A(2)
Item 121 – Subsection 319A(2A)
Item 122 – Paragraph 319A(2A)(b)
Item 123 – Paragraph 319A(9)

These items amend section 319A which deals with the amendment of claims and returns. Amendments to claims are now only possible for formal errors under subsection (1).

Requests to make amendments to returns can be made by the nominated financial controller of a political campaigner or associated entity, or any person with authority to lodge a return for a third party. Amending a return has no effect on whether a civil penalty order can be made against a person.

Publication of election funding determinations, refusal notices and returns

Item 124 – Section 320

This item repeals and substitutes section 320 to modernise requirements relating to the publishing of annual returns, election returns and claims. Publication by the Electoral Commission must be via the Transparency Register, and in accordance with the timeframes specified in subsection (1). A person may not peruse or obtain a copy of a determination, notice or return referred to in subsection (1) before the determination, notice or return is published.

Indexation

Item 125 – Subsection 321(1) (definition of relevant amount)
Item 126 – Subsection 321(1) (definition of relevant period)

These items amend the definitions of relevant amount and relevant period in subsection 321(1) to ensure the public funding rate specified in sections 293-295 continues to be indexed as would have occurred in the absence of the Bill.

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

Item 127 – Section 321A (heading)
Item 128 – Subsection 321A(1)
Item 129 – Subsections 321A(2)
Item 130 – Subsection 321A(7) (definition of indexation year)

These items reflect the replacement of the amount $10,000 with the new term disclosure threshold (see Chapter 1). Accordingly, item 127 amends the title of section 321A to ‘Indexation of disclosure threshold’. As with the amendments to section 321 in relation to the public funding rate, new section 321A will continue to index the disclosure threshold as would have occurred in the absence of the Bill.

Item 129A – Subsection 321A(3)

This item replaces subsection 321A(3) to reflect the standardised temporal period for candidates and Senate groups in new subsection 287(11) (see Chapter 1).
Part XXA: Authorisation regime

Item 12A – Paragraphs 321D(4)(a) and (b)

389 This item contained exceptions from the authorisation regime in Part XXA of the Electoral Act for the reporting of news and communications for satirical, academic and artistic purposes. These section are no longer needed as these exemptions are now covered by exemptions to electoral matter in new subsection 4AA(5) (see Chapter 1).

Item 130A – Section 321B (after paragraph (a) of the definition of disclosure entity)
Item 131 – Section 321B (paragraphs (g) and (h) of the definition of disclosure entity)
Item 132 – Section 321B (note at the end of the definition of disclosure entity)

389 These items amend the definition of disclosure entity, as introduced by the Authorisation Amendment Act, to reflect the changes to section 314AEB and the introduction of the terms electoral expenditure, political campaigner and third party.

Item 132A – Section 321B (definition of relevant town or city)
Item 132B – At the end of subsection 321D(4)
Item 132C – Subsection 321D(5) (table items 4 and 8)

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

392 New items 132B and 132C provide additional exceptions to those listed in subsection 321(4). New item 132B exempts promotional items (such as a balloon, pen, mug, tote bag or marquee) that contain only the name, logo, or other identifying feature of the notifying entity. For example, a tote bag with a candidate’s name, or a pen, mug or marquee in party colours featuring the party’s logo would be exempt under new item 132B. Similarly, a balloon with a cartoon drawing of the candidate, who is the notifying entity of the balloon, would be exempt. This new class of promotional items does not extend to items specified in the table in subsection 321D(5), such as stickers, fridge magnets, flyers and pamphlets.

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

Prosecution of offences

Item 133 – Subsection 384(1)
Item 134 – Subsection 384(2)
Item 135 – Subsection 384(3)

394 These items amend section 384, which allows a court of summary jurisdiction to hear and determine certain proceedings that would generally be indictable offences. The amendments remove references to a criminal offence against subsection 315(3), which is omitted, and limits the application of section 384 to a criminal offence against section 326 for bribery.

395 Consistent with current drafting practice, the pecuniary penalty in subsection 384(3) is updated to be expressed in penalty units.
Application of Regulatory Powers Act

**Item 136 – Subsection 384A(1)**
**Item 137 – Subsection 384A(2)**
**Item 138 – At the end of section 384A**

396 These items amend section 384A to provide that all civil penalty provisions under the Act are enforceable under Parts 4 and 6 of the Regulatory Powers Act.

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

398 New subsections 384A(3) and (4) allow the Electoral Commissioner to delegate his or her powers and functions as an authorised applicant and authorised person for the purposes of Parts 4 and 6 of the Regulatory Powers Act to an SES employee, or acting SES employee, of the Electoral Commission. A person exercising the Electoral Commissioner’s powers under the delegation must comply with any directions of the Electoral Commissioner. Allowing the Electoral Commissioner to delegate his or her powers and functions in this manner will allow for more efficient administration of civil penalty provisions.
Chapter 8: Application and transitional

Application and transitional

Division 2 – Application and transitional provisions

Item 13 – Application and transitional provisions

399 Except where otherwise specified in the item, subitem 13(1) provides that the amendments to the Electoral Act made by this Part apply on and after the commencement of this item. These provisions interact with the commencement table in clause 2 to allow the Transparency Register to be established prior to the commencement of the requirement to register. This ‘soft start’ will assist in implementation.

400 The note under subitem (1) clarifies that subsections 287F(2) and 287H(2) interact with subitem (1) so that a person or entity required to be registered as a political campaigner or associated entity has until the end of 90 days after Royal Assent to register.

Initial reference period for political campaigner registration requirements

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

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

a) uses the expenditure they have previously reported rather than needing to apply the new definition of electoral expenditure to historical expenditure; and

b) for the period 1 July 2018 to commencement, expenditure that would have had to have been disclosed under section 314AEB in the absence of this Act is to be treated as electoral expenditure. This means that, for the 2018-19 financial year, expenditure covered by section 314AEB from 1 July 2018 to commencement will be summed with electoral expenditure from commencement to 30 June 2019 (see also subitem 143(5), below).

Example

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

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

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

For the purposes of subsection 287F(1), Turtle Voice’s electoral expenditure is:
- $15,000 in 2015-16;
- $550,000 in 2016-17;
- $30,000 in 2017-18; and
- $45,000 in 2018-19.

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

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

Subitem 13(2) also clarifies how a person or entity will determine whether they meet the definition of third party in 2018-19, and, where they meet this definition, what expenditure to include in their annual disclosure for this financial year.

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

In terms of disclosure, this means that, for the 2018-19 financial year, expenditure covered by section 314AEB from 1 July 2018 to commencement will be summed with electoral expenditure from commencement to 30 June 2019 (see also subitem 143(5), below).

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

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

Example

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

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

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

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

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

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

b) the day the entity provided a 2017-18 return.

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

Transitional arrangements for the Transparency Register

Subitems 13(6) and (7) provide transitional arrangements for the AEC and those listed on the Transparency Register.

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

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

Part 2, Item 143 – Application of amendments

Item 143 – Application of amendments

Death and resignation of agents

Subitem 143(1) provides that the amendments to section 292D apply to resignations after commencement.

Appointment of financial controllers and requirement to publish determinations, notices and returns

Subitem (2) provides sections 292E and 320 of the Electoral Act, as inserted by this Part, apply on and after the commencement of this item.

Gifts and loans

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

**Annual returns**

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

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

a) the following obligations applied only from that commencement:

i. the obligation to disclose gifts to political campaigners under section 305B;

ii. the obligation to disclose discretionary benefits under paragraphs 314AB(2)(b) and 314AEA(1)(d);

iii. the obligation in paragraph 314AEA(2)(b) to confirm compliance with section 302E; and

b) a reference in section 314AEB and 314AEC to electoral expenditure incurred or authorised by a person or entity, for the period beginning on 1 July in that financial year and ending immediately before that commencement, were a reference to expenditure covered by section 314AEB incurred or authorised by the person or entity during that period.

**Disclosure of electoral expenditure**

418 Subitem (7) provides that the amendments of Division 5 of Part XX, which relate to the disclosure of electoral expenditure, apply in relation to returns provided after commencement.

**Requirement to refund payments**

419 Subitem (8) provides that new section 315 applies in relation to penalties imposed, or civil penalty orders made after commencement.

**Keeping records**

420 Subitem (9) provides that new section 317 applies in relation to records made after commencement.

421 Subitem (10) provides that, despite the repeal of section 317, that section, as in force immediately before its repeal, continues to apply after the commencement of this item in relation to records made before that commencement.
Requirement to publish determinations, notices and returns

422 Subitems (10A) to (10C) clarify the interaction of new sections 287N, 320 and 287Q.

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

424 Old section 320 required the Electoral Commission to keep these documents at its principal office in Canberra, and entitled any person to peruse these documents at this office.

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

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

Indexation

427 Subitems (11) and (12) ensure indexation of the public funding rate and disclosure threshold, as set out in sections 321 and 321A of the Electoral Act respectively, continues as it would have in the absence of the Act. Subitem (11) provides section 321 of the Electoral Act, as amended by this Part, applies from 1 January 2019. Subitem (12) provides section 321A, as amended by this Part, applies from 1 July 2019.

Note: Subitem 143(14) (Amnesty) is dealt with in Chapter 6.

Item 144 – Transitional – notices given under subsection 290(1)

428 This item provides that a notice of an appointment of an agent of a political party, candidate or group that is in force immediately before the first 1 July that occurs on or after the day on which this Act receives the Royal Assent will be taken to be in force under new subsection 292F(1). This will allow existing appointments to continue following commencement without additional written notice being provided.
Referendum (Machinery Provisions) Act 1984

Item 139 – Section 110A (paragraphs (c) and (d) of the definition of disclosure entity)
Item 140 – Section 110A (paragraph (e) of the definition of disclosure entity)
Item 141 – Section 110A (note at the end of the definition of disclosure entity)

429 These items amend the definition of disclosure entity, which is used in relation to the authorisation of certain referendum matter. The amendments:

a) make consequential changes to the definition and related note to reflect amendments to section 314AEB;

b) ensure, as far as appropriate, authorisation requirements for elections and referenda are the same (see Chapter 7, Part X: Authorisation Regime); and

c) refer to the disclosure threshold within the meaning of Part XX of the Electoral Act to reflect its inclusion as a defined term in subsection 287(1), as amended.

Item 142 – At the end of section 140AAA

430 This item inserts new subsections 140AAA(3) and (4) which allow the Electoral Commissioner to delegate his or her powers and functions as an authorised applicant and authorised person for the purposes of Parts 4 and 6 of the Regulatory Powers Act to an SES employee, or acting SES employee, of the Electoral Commission. A person exercising the Electoral Commissioner’s powers under the delegation must comply with any directions of the Electoral Commissioner. Section 110C, which is enforceable under Parts 4 and 6 of the Regulatory Powers Act concerns the authorisation of certain referendum matter. Allowing the Electoral Commissioner to delegate his or her powers and functions in this manner will allow for more efficient administration of enforcement of section 110C.