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INFORMATION ANALYSIS ADVICE

## BILLS DIGEST

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

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**House:** Senate

**Portfolio:** Finance

**Commencement:** Sections 1 to 3 the day of Royal Assent. Schedule 1 Part 1 the earlier of 1 July following Royal Assent or 28 days after Royal Assent. Schedule 1 Part 2 on 1 July after Royal Assent.

**Links:** The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bill's home page, or through the [Australian Parliament website](#).

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the [Federal Register of Legislation website](#).

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## The Bills Digest at a glance

The Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 makes a number of changes to the provisions of Part XX of the *Commonwealth Electoral Act 1918* relating to public funding of election campaigns and the receipt and reporting of donations. It arrives in the midst of allegations about foreign interference in Australian politics by China, the resignation of Sam Dastyari from the Senate due to his alleged involvement with a Chinese donor, and is accompanied by other national security legislation targeting foreign interference in Australian politics. In addition, it follows recommendations of the Joint Standing Committee on Electoral Matters to ban foreign political donations.

Making donations to a political party over \$250 will be restricted to Australian citizens, residents and entities incorporated in Australia or whose head office or principal place of business is Australia. Foreign political entities and foreign public enterprises are specifically banned from donating. Accepting or soliciting donations from non-allowed donors carries substantial criminal and civil penalties. Provisions are provided for all Australian non-citizen residents to be classed as non-allowable donors by disallowable instrument.

Special provisions are made for charities, not-for-profit organisations and registered organisations (which are primarily unions) in relation to donations. Charities and registered organisations will not be able to receive donations from non-Australians for political purposes of over \$250, and any donations they receive from non-allowable donors must be kept in a separate bank account and not used for political expenditure. Any person or entity receiving donations for political purposes must obtain a statutory declaration (or by other means as per regulations) that the donor is an allowable donor.

Additional regulation is imposed on entities that incur political expenditure that are not political entities (that is, not registered parties or candidates), requiring registration with the Australian Electoral Commission (AEC) as either a third party campaigner or a political campaigner, depending on electoral expenditure. Generally, third party campaigners are those that incur political expenditure above the disclosure threshold (\$13,500, indexed) and less than \$100,000 in a year, and political campaigners are those that spend \$100,000 or more. The criteria for an entity to be registered as an associated entity is expanded to include entities that have less direct connection to political parties, and the AEC will maintain a register of associated entities. Substantial penalties may result from not registering when required to do so.

Third party campaigners, political campaigners and associated entities will be required to lodge annual returns with the AEC outlining their total income, total expenditure, and any outstanding debts, and list donors who have donated above the threshold, similar to political parties. They will also be required to declare any memberships of political parties by their senior officers and any money received from the Commonwealth or any state or territory. Returns from political campaigners and political parties must be accompanied by an auditor's report.

The Bill imposes a number of civil, and some criminal, penalties for breaches of the provisions. The penalties imposed are generally much more severe than those currently in the Act.

The payment of public funding for candidates and parties in elections that win at least four per cent of the vote, which is currently provided as an entitlement without any linkage to election spending, will be capped at the amount of expenditure claimed by the party or candidate. The AEC will be responsible for assessing that the claimed amount is election expenditure and the spending was incurred.

The provisions of the Bill, particularly in relation to donations requirements for charities, have drawn a negative response from the charities sector, from Labor and from the Greens. The changes to public funding have been opposed by the Greens.

## Purpose of the Bill

The purpose of the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (the Bill) is to amend the [Commonwealth Electoral Act 1918](#) (the Act) to:

- cap per-vote public funding for elections to the amount spent by the party or candidate campaigning
- restrict political donations over \$250 to Australian citizens, residents and entities incorporated or principally acting in Australia, and ban donations from foreign political entities
- broaden the definition of associated entities of political parties to include more organisations
- create the new category of political campaigner, based on political expenditure, with similar reporting obligations to political parties and
- impose new criminal and civil penalties in relation to contravention of funding and disclosure provisions.

## Structure of the Bill

The Bill is divided into two parts, primarily for the purpose of assigning different commencement dates to the respective parts.

Part 1 contains new or amended definitions to add to the Act, and provides for the registration of associated entities, third party campaigners, and political campaigners. It commences the earlier of the first 1 July on or after Royal Assent, or 28 days after Royal Assent, whichever is earlier.

Part 2 contains the remaining provisions of the Bill, including restrictions on allowable donors, reporting requirements, and the changes to public funding. These provisions commence on the first 1 July following Royal Assent.

## Background

### *Chinese political donations*

The resignation of Labor Senator Sam Dastyari was a significant escalation in the debate about foreign involvement in Australian politics. Following the disclosure that he received money from Chinese-born Australian resident Mr Huang Xiangmo, Senator Dastyari resigned from his front-bench positions.<sup>1</sup> After some time, Senator Dastyari was restored to a number of positions.<sup>2</sup> He was then again forced to resign from his positions, and eventually from the Senate, due to statements he had given to Chinese-language media coming to light and for allegedly informing Mr Huang that he might be under surveillance.<sup>3</sup>

In announcing the Bill as part of a package of bills focusing on foreign interference in Australian politics, the Prime Minister specifically highlighted China, whilst noting that the reforms were not purely about China.

We have recently seen disturbing reports about Chinese influence. I take those reports, as do my colleagues, very seriously. But these reforms are not about any one country. Foreign interference is a global issue. For example, we are all familiar and I know you're all very familiar, with very credible reports that Russia sought to actively undermine the United States election, undermine the integrity of the US election and seek to influence it.<sup>4</sup>

The Prime Minister also linked the circumstances involving Senator Dastyari to the broader purposes of the package of legislation.

Well, Senator Dastyari solicited money from a Chinese national, apparently from a company that he owned and in return for that, did a U-turn on the Australian Labor Party's policy on the South China Sea. It was about as blatant an act of political interference that you could imagine...

Bill Shorten is keeping Dastyari there, when he knows that Dastyari sold out Australia's national interest in return for having his debts paid, in return for a personal benefit.

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1. J Cadzow, '[Why? Dastyari opens up](#)', *The Age* 16 September 2016, p. 5.
  2. M Koziol, '[Displaced Dastyari begins new chapter](#)', *The Age*, 5 December 2016, p. 9.
  3. N Evans, '[All eyes on Bennelong as Dastyari quits Senate](#)', *The West Australian*, 13 December 2017, p. 4.
  4. M Turnbull (Prime Minister), '[Transcript of joint press conference](#)', transcript, 5 December 2017, p. 2.

Then of course, went on to give counter-surveillance advice to a Chinese national who he suspected may have been being watched by ASIO.<sup>5</sup>

The exercise of what has been termed Chinese ‘sharp power’ in relation to the politics of other countries is not unique to Australia. A recent report cites examples of Chinese influence being exerted in Australia, New Zealand, Norway and Germany.<sup>6</sup> However in terms of interference in elections via political donations, these other countries either ban or restrict political donations from foreign nationals.<sup>7</sup> In international terms, Australia is unusual in having no restrictions on the size or source of political donations.<sup>8</sup>

The Second interim report on the inquiry into the conduct of the 2016 federal election by the Joint Standing Committee on Electoral Matters (JSCEM) focused on the topic of foreign donations, including to third party campaigners (who incur electoral expenditure but are not running candidates in an election). The Committee’s recommendations included:

a prohibition on donations from foreign citizens and foreign entities to Australian registered political parties, associated entities and third parties. This ban would not apply to dual Australian citizens either in Australia or overseas, or to non-Australian permanent residents in Australia.<sup>9</sup>

The Committee also recommended that it further examine extending the ban to other political actors, and that penalties for non-compliance be significantly strengthened. The report included a dissenting report by Labor members and senators supporting a ban on foreign donations, but not supporting extending the scope of the current funding and disclosure regulatory scheme to other political campaigners due to the likely unintended consequences on not-for-profit organisations.<sup>10</sup> Separate dissenting reports were also lodged by Senator Leyonhjelm and the Greens.<sup>11</sup> While the Bill is not explicitly a response to the report, it is cited by the Government in the Explanatory Memorandum and the Minister’s second reading speech.<sup>12</sup>

An Essential poll in December 2017 found that there was strong community support for banning foreign political donations, with 67 per cent of respondents supporting a ban. The ban was supported across party lines, with 66 per cent of Labor voters, 74 per cent of Coalition voters, and 68 per cent of Greens voters supporting a ban.<sup>13</sup>

An analysis of Australian Electoral Commission donation data by University of Melbourne researchers found that although foreign donations make up less than two per cent of donations on average each financial year, almost 80 per cent of the foreign donations were linked to China. Between 2000 and 2016, over \$12.6m was donated to Australian political parties by Chinese nationals or entities. While traditionally Labor has been favoured by Chinese donors, since the 2013 election the amount being donated to the Coalition has increased.<sup>14</sup>

The recent attention on Chinese and other foreign political donations belies a long history of the question of foreign political donation policy. A Bill was introduced, but not passed, by the Labor Government in 2008 which would have banned donations of foreign property to political parties and candidates, amongst other measures.<sup>15</sup> Bans on foreign donors were also discussed in the Government’s 2008 funding and disclosure Electoral Reform

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5. Ibid., p. 5.

6. ‘Sharp power’, *The Economist*, 16 December 2017, p. 9; ‘At the sharp end’, *The Economist*, 16 December 2017, pp. 17–19.

7. International IDEA, ‘Is there a ban on donations from foreign interests to political parties?’ International IDEA website.

8. D Muller, ‘Foreign political donations’ FlagPost, Parliamentary Library blog, 6 September 2016.

9. Joint Standing Committee on Electoral Matters, [Second interim report on the inquiry into the conduct of the 2016 federal election: foreign donations](#), Canberra, March 2017, p. xiv.

10. Labor Members and Senators, [Dissenting report](#), Joint Standing Committee on Electoral Matters, *Second interim report on the inquiry into the conduct of the 2016 federal election: foreign donations*, Canberra, March 2017.

11. Senator David Leyonhjelm, [Dissenting report](#), Joint Standing Committee on Electoral Matters, *Second interim report on the inquiry into the conduct of the 2016 federal election: foreign donations*, Canberra, March 2017; The Australian Greens, [Dissenting report](#), Joint Standing Committee on Electoral Matters, *Second interim report on the inquiry into the conduct of the 2016 federal election: foreign donations*, Canberra, March 2017.

12. [Explanatory Memorandum](#), Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017, p. 3; M Cormann, ‘[Second reading speech: Electoral Legislation Amendment \(Electoral Funding and Disclosure Reform\) Bill 2017](#)’, Senate, *Debates*, 7 December 2017, p. 10102.

13. Essential Research, ‘[Political donations](#)’, *Essential Report*, 19 December 2017.

14. L Henriques Gomes, ‘[Nearly 80 per cent of foreign political donations come from China, data shows](#)’, *The New Daily*, 10 December 2017.

15. Parliament of Australia, ‘[Commonwealth Electoral Amendment \(Political Donations and Other Measures\) Bill 2008 \[2009\] homepage](#)’, Australian Parliament website.

Green Paper.<sup>16</sup> Labor currently has an Opposition Bill before the Senate, discussed below, which also aims to ban foreign donations.<sup>17</sup>

### **Third-party political campaigners**

The Bill has been largely reported in the media as banning foreign donations, however this is a relatively minor part of the Bill, much of which is focused on increasing the regulation of political campaigners other than parties and candidates. This follows recent suggestions that the AEC has requested that campaigning organisation GetUp! file returns with the AEC as an associated entity,<sup>18</sup> a move strongly supported by the Coalition.<sup>19</sup> The AEC has twice in the past considered whether GetUp! should be classed as an associated entity due to referrals by the Coalition, in 2005 and 2010, and concluded both times that GetUp! was not an associated entity.<sup>20</sup> Freedom of Information documents released by the AEC indicate that the AEC was again formulating a position on whether GetUp! should be regarded as an associated entity in May 2017.<sup>21</sup> While GetUp! states that it does not receive money from or coordinate its campaigns with the ALP or the Greens, Bill Shorten was an early board member and GetUp! has received donations from unions.<sup>22</sup>

Campaigning by environmental organisations has also been an issue of interest to the current Government. In March 2015 the Minister for the Environment wrote to the House of Representatives Standing Committee on the Environment to ask the Committee to inquire into the administration and transparency of the Register of Environmental Organisations.<sup>23</sup> The Terms of Reference specifically made reference to, amongst other issues:

- activities undertaken by organisations currently listed on the Register and the extent to which these activities involve on-ground environmental works and
- reporting requirements for organisations to disclose donations and activities funded by donations.<sup>24</sup>

The Committee reported that many environmental organisations carried out a policy advocacy and representation role, and that 'some stakeholders also submitted that advocacy is, in some cases, a more efficient method of achieving environmental outcomes than remediation'.<sup>25</sup> However it also reported concern about inaccurate or misleading information in environmental organisation campaigns and adverse economic and social impacts on some, particularly regional, communities from some campaigns. The Committee reported that some environmental organisations campaigned in recent state and federal elections and there was concern as to whether such campaigning was 'a legitimate application of tax-deductible donations'.<sup>26</sup>

The Committee recommended that environmental organisations only be eligible for tax deductible gift status if at least 25 per cent of the organisation's annual expenditure was on environmental remediation work, however dissenting reports suggested that for some organisations this would be inappropriate or difficult to prove.<sup>27</sup> Labor's dissenting report asserted that the Government was attempting to 'constrain the capacity of environmental organisations to engage in advocacy work'.<sup>28</sup>

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16. Australian Government, [Electoral reform: donations, funding and expenditure](#), Green paper, December 2008.

17. Parliament of Australia, [Commonwealth Electoral Amendment \(Donation Reform and Transparency\) Bill 2016 homepage](#), Australian Parliament website.

18. Subsection 287(1) of the Act defines an associated entity as an entity that is controlled or operated wholly or to a significant extent for the benefit of one or more political parties, is a member of a political party, or that has voting rights in a political party.

19. J Kelly, ['GetUp! bites the hand that fed it'](#), *The Australian*, 26 October 2017, p. 1.

20. Australian Electoral Commission (AEC), ['GetUp Limited'](#), AEC website, 23 December 2010.

21. AEC, ['Freedom of information \(FOI\) disclosure log 2017: FOI Request LS6199'](#), AEC website, 3 October 2017.

22. J Massola, A Patty, N Toscano, ['AFP raid union in probe of GetUp!'](#), *The Age*, 25 October 2017, p. 1; J Hewett, ['GetUp! gets busy getting Coalition MPs'](#), *The Australian Financial Review*, 5 December 2017, p. 2.

23. Organisations on the Register can receive tax-deductible donations.

24. House of Representatives Standing Committee on the Environment, [Inquiry into the Register of Environmental Organisations](#), Report, Commonwealth of Australia, Canberra, April 2016, p. ix.

25. *Ibid.*, p. 38.

26. *Ibid.*, p. 58.

27. *Ibid.*, p. 46.

28. *Ibid.*, p. 90.

In June 2017 Treasury published a discussion paper seeking feedback on the requirement that charities spend between 25 and 50 per cent on environmental remediation, and according to a media report the Government abandoned the changes due to negative feedback.<sup>29</sup>

Reports such as the report by the Standing Committee on the Environment have led to a perception in the not-for-profit community that the government was seeking to restrict advocacy. A recent report on advocacy by not-for-profit organisations for Pro Bono Australia and the Human Rights Law Centre found:

Australian not-for-profit organisations are on a path of quiet advocacy. The relentless pressure of the last few decades means that, to a greater or lesser degree, civil society organisations are now engaging in various forms of what we have called “self-silencing” – treading very carefully in their advocacy work to avoid the risk of financial security and political retribution.

Comments from respondents revealed they are erring on the side of caution, with organisations indicating they were, for example, “a benign organisation and not politically active” or suggesting that they are “not into lobbying in potentially controversial areas”. Twelve per cent of respondents perceived internal pressure (from the board or management) to “do things quietly”, with concern about the implied repercussions (from within or outside the organisation) stemming from fears of government funding cuts or loss of deductible gift recipient (DGR) status.<sup>30</sup>

Campaigning by environmental groups with tax deductible status was specifically referenced in the aforementioned JSCEM report into foreign political donations. The JSCEM expressed the view that environmental organisations that also politically campaign should be regulated in the same way as other political actors.<sup>31</sup>

The Senate has also formed a Select Committee into the Political Influence of Donations. The Committee has invited submissions and held public hearings and is due to report on 28 March 2018.<sup>32</sup>

### ***The constitutional precedent: Unions NSW v NSW***

This Bill is not the first attempt by an Australian government to legislate to prevent foreign political donations. In 2012 the NSW Parliament passed the *Election Funding, Expenditure and Disclosures Amendment Act 2012 No. 1* (NSW) which, amongst other things, amended the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (*EFED Act*) to prohibit political donations for NSW state political purposes from anyone other than an individual on the electoral roll.<sup>33</sup> This in effect banned organisations such as unions from donating to political parties. Under the *EFED Act* political campaign expenditure is capped, and the new law also required affiliated organisations to have their spending caps aggregated. This meant that the Labor Party and any affiliated unions were captured under the one expenditure cap, significantly reducing their campaigning capacity.

Unions NSW successfully contested the constitutionality of these two provisions of the *EFED Act* in the High Court on the grounds of the burden on the implied freedom of political communication.<sup>34</sup> An analysis of the case provides a concise description of the freedom and the test on its restriction adopted by the High Court.

The implied freedom of political communication is an integral element of representative and responsible government. It derives chiefly from ss 7 and 24 of the *Constitution*, which dictate that Members of Parliament shall be ‘directly chosen by the people’. In electing representatives to govern, communication between voters and current Members of Parliament, running candidates and other voters is essential to ensure that voters can ‘exercise a free and informed choice’. This freedom is not a personal right, nor is it absolute. It is a limitation on legislative power: a law is invalid if it impermissibly burdens political communication.

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29. The Treasury, [Tax deductible gift recipient reform opportunities](#), Discussion paper, Commonwealth of Australia, 15 June 2017; J Mather, ‘[Proposal to curb activist work blasted](#)’, *The Australian Financial Review*, 17 January 2018, p. 5.
  30. S Maddison and A Carson, [Civil Voices: researching not-for-profit advocacy](#), Report, Analysis & Policy Observation (APO) website, October 2017, p. 1.
  31. Joint Standing Committee on Electoral Matters, [Second interim report on the inquiry into the conduct of the 2016 federal election: foreign donations](#), op. cit., p. 15.
  32. Senate Select Committee into the Political Influence of Donations, [Select committee into the political influence of donations inquiry homepage](#), Parliament of Australia.
  33. [Election Funding, Expenditure and Disclosures Amendment Act 2012 No 1](#) (NSW); [Election Funding, Expenditure and Disclosures Act 1981](#) (NSW).
  34. *Unions NSW v New South Wales* [\[2013\] HCA 58](#).

The two-limbed test to determine whether a law unjustifiably restricts free political communication was developed in *Lange*.<sup>35</sup> The first limb asks: ‘does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?’ If it does, the second limb asks: ‘is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with ... representative and responsible government?’ A law is invalid where the first limb is answered affirmatively and the second negatively.<sup>36</sup>

The High Court found both the restrictions on who can donate, and the aggregation of the expenditure caps, to be unconstitutional. In respect of the restriction on donors, the High Court found that it did not meet the second limb in that it was not reasonably appropriate and adapted to serve a legitimate end. The Court found that the anti-corruption purposes of the *EFED Act* were not met by limiting donations to only those on the roll.<sup>37</sup>

Of relevance to the current Bill, in its judgment the Court explicitly stated that some people and organisations other than electors could still have a legitimate interest in seeking to influence the political process through donations. It stated:

There are many in the community who are not electors but who are governed and are affected by decisions of government. Whilst not suggesting that the freedom of political communication is a personal right or freedom, which it is not, it may be acknowledged that such persons and entities have a legitimate interest in governmental action and the direction of policy. The point to be made is that they, as well as electors, may seek to influence the ultimate choice of the people as to who should govern. They may do so directly or indirectly through the support of a party or a candidate who they consider best represents or expresses their viewpoint.<sup>38</sup>

While the Court did not explicitly state that making a political donation was a form of political communication, it noted that restricting the source of funds available to political parties was a burden on political communication.<sup>39</sup>

The JSCEM in its report on foreign donations noted that banning foreign political donations in such a way ‘that respects Australia’s constitutional and democratic freedoms and does not create exploitable loopholes’, would be a ‘complex constitutional and technical challenge for lawmakers’.<sup>40</sup>

## Committee consideration

### *Joint Standing Committee on Electoral Matters*

The Bill has been referred to the Joint Standing Committee on Electoral Matters for inquiry and report by 2 March 2018. Details of the inquiry and submissions to the inquiry are at the Committee [homepage](#).

### *Senate Standing Committee for the Scrutiny of Bills*

The Bill was considered by the Senate Standing Committee for the Scrutiny of Bills and reported in its Scrutiny Digest 1 of 2018.<sup>41</sup> The Committee sought the Minister’s advice in relation to the following issues:

- why the Bill provided the power to exclude Australian residents as allowable donors as delegated legislation rather than primary legislation
- why the burden of proof would be reversed to require those entered on the registers of third parties, political campaigners and associated entities to prove that they should not be on the respective register, and
- whether the penalties proposed for receiving or soliciting donations from non-allowable donors are appropriate by reference to comparable Commonwealth offences.<sup>42</sup>

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

36. S Graham, ‘[Unions New South Wales v New South Wales \(2013\) 304 ALR 266](#)’, *Adelaide Law Review*, 35, 2014, pp. 179–80.

37. *Ibid.*, p. 181.

38. *Unions NSW v New South Wales* [2013] HCA 58, [30].

39. *Ibid.*, [38].

40. Joint Standing Committee on Electoral Matters, [Second interim report on the inquiry into the conduct of the 2016 federal election: foreign donations](#), op. cit., p. xi.

41. Senate Standing Committee for the Scrutiny of Bills, [Scrutiny digest](#), 1, 2018, The Senate, 7 February 2018.

42. *Ibid.*, p. 21.

At the time of publication the Minister had not yet responded. See the [Committee homepage](#).

## Policy position of non-government parties/independents

Labor introduced a Bill in 2008 (and then again in 2009) that proposed banning donations of ‘foreign property’ to political parties, candidates or anyone who would use it for political expenditure. If such a gift were received, an identical amount was payable to the Commonwealth, and criminal penalties were provided. Foreign property was defined as money or property that was located outside Australia. The 2008 Bill was negated at the second reading in the Senate in 2009.<sup>43</sup> The Bill was re-introduced in the 42nd Parliament and passed the House of Representatives but lapsed in the Senate at the end of the Parliament.<sup>44</sup> Another Bill with identical foreign property provisions was introduced in the current Parliament by Labor in the Senate as an Opposition Bill in 2016.<sup>45</sup>

The introduction and continued re-introduction of these Bills indicate that Labor has adopted a policy position opposed to foreign political donations. In addition, the Leader of the Opposition has publicly stated that Labor has stopped taking donations from ‘certain organisations and people’, specifically in the context of donations from Mr Huang.<sup>46</sup> It is worth noting that the approach that Labor proposed was not a ban on foreign donors as such, and would have allowed foreign nationals who had access to an Australian bank account, for example, to have made political donations. Thus, applying the approach to the context of Mr Huang, as a permanent resident who owns a company registered in Australia (the details of which are discussed below), he would presumably not have been captured under Labor’s Bill. Labor’s Bills would not require donors or recipients to attest that any donation was not foreign property.

In addition to prohibiting donations of foreign property the Labor Bills also had a number of other effects, including capping public election funding to election expenditure. The wording of the public funding section of Labor’s Bill is in many places identical to the current Bill, down to the timeframes and allowed reasons for rejecting a claim for public funding.<sup>47</sup> It seems reasonable to suggest that Labor is likely to support at least this part of the Bill.

Perhaps due to the Bill having been released at the end of the 2017 parliamentary year Labor has not commented extensively on the actual content of the Bill. Opposition front-bencher Senator Carr has expressed ‘grave concerns about the reach of that bill, particularly insofar as it deals with international philanthropic contributions’.<sup>48</sup> The Labor Deputy Chair of the JSCEM criticised the Bill for targeting civil society organisations and charities by increasing their regulation under electoral law.<sup>49</sup> He further stated that the Bill’s ‘GetUp! clause’ was contrary to the purpose of the Bill to reduce foreign interference and could lead to Labor not supporting the Bill.<sup>50</sup> Labor Shadow Minister for Charities and Not-for-Profits Dr Andrew Leigh expressed concerns with how the Bill conflates politics and policy, and that the charities sector ‘needs a government that works with them, not against them’.<sup>51</sup>

The Greens have criticised the Bill for targeting GetUp!, but also for capping public funding to electoral expenditure which they claim would reduce the ability of small parties to campaign, while expressing their in-principle support for banning foreign donations.<sup>52</sup> The Greens’ submission to the JSCEM inquiry into the Bill

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43. Parliament of Australia, [‘Commonwealth Electoral Amendment \(Political Donations and Other Measures\) Bill 2008 \[2009\] homepage’](#), op. cit.

44. Parliament of Australia, [‘Commonwealth Electoral Amendment \(Political Donations and Other Measures\) Bill 2009 homepage’](#), Australian Parliament website.

45. Parliament of Australia, [‘Commonwealth Electoral Amendment \(Donation Reform and Transparency\) Bill 2016 homepage’](#), op. cit.

46. B Shorten (Leader of the Opposition), [‘Transcript of doorstep with Nick Champion’](#), transcript, 30 November 2017.

47. Parliament of Australia, [‘Commonwealth Electoral Amendment \(Donation Reform and Transparency\) Bill 2016 homepage’](#), op. cit.

48. K Carr (Shadow Minister for Innovation, Industry, Science and Research), [‘Address to the Association of Australian Medical Research Institutes, Canberra’](#), speech, 7 December 2017.

49. A Giles, [‘As politicians we must lift our game and respond to the frustrations of Australians’](#), *The Guardian*, (Australian edition), 2 January 2018.

50. P Karp, [‘Coalition’s GetUp crackdown could harm support for foreign interference bill, Labor warns’](#), *The Guardian*, (Australian edition), 2 January 2018.

51. J Taylor, [‘Charities are warning that the Australian Government is trying to silence them on political issues’](#), *BuzzFeed News*, 12 January 2018.

52. P Karp, [‘Greens to oppose foreign donation bill over “unfair” advantages to major parties’](#), *The Guardian*, (Australian edition), 4 January 2018.

reiterated these themes, and called for greater transparency in the political donations disclosure scheme.<sup>53</sup> A Greens Senator has called for the banning of all political donations.<sup>54</sup>

## Position of major interest groups

Despite the Bill having been released in the lead-up to the Christmas period, a number of media articles have appeared commenting on its provisions. The provisions relating to increasing the regulatory burden for campaigners, particularly those that might also be charities, have attracted the most commentary. However in a submission by Professor Anne Twomey to the JSCEM inquiry into the Bill she notes that because the Bill amends the Act, but the Act has unincorporated amendments from a previous Bill which have not yet come into effect, it is particularly difficult to fully evaluate the effects of the Bill.<sup>55</sup>

Constitutional law experts Professor Anne Twomey and Professor George Williams have both reportedly expressed the view that the Bill risks a successful challenge in the High Court due to the extent of its restrictions on who can be a political donor. It would be incumbent on the Government to establish that the ban was imposed for a legitimate end and that 'it was hard to predict what the court would decide in relation to threats posed by foreign influence of Australia's political system'.<sup>56</sup> The Human Rights Law Centre has said that the Bill will likely be challenged in the High Court if it passes in its current form.<sup>57</sup>

Professor Twomey in her submission to the JSCEM inquiry into the Bill noted that the constitutional questions raised can only be resolved by the High Court, but that by not unduly restricting the ability of third parties to engage in political communication the Government could ameliorate the risks of the Bill being found unconstitutional. Professor Twomey also highlights a number of other issues with the Bill, including the human rights implications of requiring third parties to disclose their political affiliations, and that by not restricting donation amounts more generally the Bill is unlikely to be successful in its stated aim of reducing influence on elections.<sup>58</sup>

GetUp! has in the past expressed in-principle support for banning foreign donations, which would potentially include donations to GetUp!, however more recently stated that it does not support this Bill because it is selective in which campaigners it targets:

A spokesman for GetUp! said it would support a ban on foreign donations only if it were extended to foreign companies that could use groups such as the Minerals Council to run campaigns in Australia, calling the new laws "politically targeted legislation, devised to attack those who speak out against the government's policies while letting its big multinational mates off the hook".<sup>59</sup>

In its submission to the JSCEM inquiry into the Bill GetUp! states that the Bill is not an effective policy solution to the issue of foreign influence in elections because it does not include foreign multinational corporations and that it will have a negative impact on civil society.<sup>60</sup>

The Institute of Public Affairs (IPA) has reportedly stated that, although it does not receive foreign donations and is unlikely to fall under the definition of an associated entity, it opposes the changes, and restrictions on foreign donations more generally. The Director of the IPA is quoted as saying of the Bill that 'it will cast a very wide net at anyone expressing a political opinion. ... It's potentially very dangerous.'<sup>61</sup> In its submission to the JSCEM inquiry into the Bill the IPA states that it does not believe further regulation of political communication is

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53. The Australian Greens, [Submission](#) to the Joint Standing Committee on Electoral Matters, *Inquiry into the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017*, 25 January 2018.

54. N McKim, '[Ban all donations to political parties to restore public trust](#)', *the Mercury*, 17 January 2018, p. 16.

55. A Twomey, [Submission](#) to the Joint Standing Committee on Electoral Matters, *Inquiry into the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017*, 15 January 2018.

56. K Murphy, '[Ban on foreign donations open to challenge, legal experts say](#)', *The Guardian*, (Australian edition), 7 December 2017.

57. P Karp, '[Foreign donation and charity law changes "likely" to face high court challenge](#)', *The Guardian*, (Australian edition), 12 January 2017.

58. A Twomey, [Submission](#) to the Joint Standing Committee on Electoral Matters, op. cit.

59. L Shanahan, '[GetUp! about-face on foreign donor law](#)', *The Australian*, 19 December 2017, p. 4.

60. GetUp, [Submission](#) to the Joint Standing Committee on Electoral Matters, *Inquiry into the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017*.

61. P Karp, '["Potentially very dangerous": IPA opposes foreign donation ban and "GetUp clause"](#)', *The Guardian*, (Australian edition), 5 January 2018.

necessary or desirable, but that even if it is accepted that regulation of non-political actors is required the way the Bill is currently drafted will 'go substantially beyond this aim'.<sup>62</sup>

Charity the St Vincent de Paul Society has stated that the laws relating to foreign donations will increase its regulatory burden and have a chilling effect on democratic debate. The charity states that advocacy on issues such as homelessness, pension and welfare payments, wages and electricity costs will require it to register as a political campaigner, and bear the associated donation restrictions and reporting requirements. Its CEO is quoted as saying:

There is no evidence that our major charities are a vehicle for foreign powers. Rather, this bill is aimed at muting the voice of charities and others who have been critical of the government. It is dangerous legislation that is not only a threat to charities, but to democracy itself.<sup>63</sup>

Anglicare Australia reportedly stated that the Bill will mean that most charities will elect to stop advocating for issues rather than shoulder the increased regulatory burden imposed by the Bill. The Executive Director of the charity has described it as 'an absolute and direct threat to democracy'.<sup>64</sup>

Other charities claim that similar laws in the UK and Canada had been shown to have a chilling effect on the advocacy work of the community sector, and that charities regularly accepted donations from overseas donors without risking foreign interference, such as from Bill Gates for medical research.<sup>65</sup> The Australian Charities and Not-for-profits Commission (ACNC) reports that in a submission to the JSCEM inquiry into the Bill it has argued that the Bill 'will place a further regulatory burden on charities, and may inhibit their ability to advocate as a method of achieving its charitable purpose'.<sup>66</sup>

The Australian Council of Social Services (ACOSS) in its submission to the JSCEM inquiry into the Bill acknowledges the need for regulation to prevent foreign influence in Australia but argues that the Bill goes too far as it would prohibit legitimate advocacy by charities and place new compliance burdens on them. It argues that charities are already well regulated and that charities provide a valuable contribution to election debates.<sup>67</sup>

While there has been some support for the principles of preventing foreign influence in elections, no interest group has come out in support of the actual operation of the Bill to the Library's knowledge.

## Financial implications

The Explanatory Memorandum states that implementation costs are estimated to be \$70 million over the forward estimates.<sup>68</sup> It is not clear what these costs encompass, but they likely relate to the increased administrative and enforcement responsibilities associated with the AEC's new functions under the Bill. The Explanatory Memorandum does not state whether this takes into account the expected decrease in public funding payments resulting from public funding being capped at electoral expenditure, which as discussed below, could save the Commonwealth \$2 million in public funding in an election year.

## Statement of Compatibility with Human Rights

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Government has assessed the Bill's compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.<sup>69</sup>

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62. IPA, [Submission](#) to the Joint Standing Committee on Electoral Matters, *Inquiry into the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017*, 25 January 2018.

63. R Baxendale, '[Charities fear donations bill a muzzle](#)', *The Australian*, 11 January 2018, p. 4.

64. J Taylor, '["An absolute and direct threat to democracy": Anglicare warns about charities crackdown](#)', *BuzzFeed News*, 17 January 2017.

65. R Baxendale, '[Charities fear donations bill a muzzle](#)', op. cit., p. 4.

66. Australian Charities and Not-for-profits Commission (ACNC), '[Commissioner's Column—25 January 2018](#)', ACNC website; ACNC, [Submission](#) to the Joint Standing Committee on Electoral Matters, *Inquiry into the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017*, 24 January 2018.

67. Australian Council of Social Services, [Submission](#) to the Joint Standing Committee on Electoral Matters, *Inquiry into the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017*, 25 January 2018.

68. [Explanatory Memorandum](#), Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017, p. 4.

69. The Statement of Compatibility with Human Rights can be found at page 5 of the [Explanatory Memorandum](#) to the Bill.

## **Parliamentary Joint Committee on Human Rights**

The Committee reported on the Bill in Report 1 of 2018 and is seeking additional information from the Minister.<sup>70</sup> The concerns raised by the Committee included:

- whether the requirement to register as a third party campaigner, political campaigner or associated entity is compatible with the right to freedom of expression, the right to freedom of association, the right to take part in public affairs and the right to privacy and whether the limitations on these rights resulting from the registration requirement are proportionate to the measure's objective<sup>71</sup>
- whether the civil penalties associated with failing to register as a third party campaigner, political campaigner or associated entity, and the requirement to report non-financial particulars, should be considered 'criminal' in nature for the purposes of international human rights law, and if so, whether they should be accompanied by criminal process rights such as the right to a fair trial<sup>72</sup>
- whether the restrictions on receiving foreign donations are proportionate restrictions on the right to freedom of expression, the right to freedom of association and the right to take part in public affairs<sup>73</sup>
- how the requirement to disclose names and political affiliations of senior staff members is connected to the objective of the Bill and whether it is a proportionate limitation of the right to privacy.<sup>74</sup>

## **Key issues and provisions**

Due to the complexity of the Bill and the ways it affects the operation of the political donation and disclosure provisions of Part XX of the Act, this section has been structured in terms of the effect of the Bill, rather than along the lines of the structure of the Bill.

Broadly, the key issues of the Bill primarily affect who can donate to political parties and categorisation as an associated entity, third party campaigner or political campaigner and how and what these groups must report to the AEC. The effect of the Bill on charities and registered organisations has been a particular feature of media coverage of the Bill and submissions to the JSCEM inquiry into the Bill, and so is highlighted separately.

## **Allowable donors and foreign political donations**

**Item 9** of the Bill adds a new definition to the Act in **proposed section 287AA**, defining who is an 'allowable donor'. Anyone who is not an allowable donor faces certain restrictions on donating to political parties—generally, that they cannot donate an amount of \$250 or more in a year (see **proposed sections 302D** and **302E**, at **item 33**). The Bill distinguishes between individuals and entities as donors.

### **Individuals**

In the case of an individual, an allowable donor is someone who is an elector (that is, is enrolled to vote in federal elections<sup>75</sup>), an Australian citizen, or an Australian resident, unless the Minister has made a legislative instrument saying that Australian residents are not allowable donors as per **proposed subsection 287AA(2)**. Even if the Minister has made such a determination, resident non-citizens who were enrolled to vote as British subjects prior to 1984, and were grandfathered onto the electoral roll, should continue to be able to make political donations as long as they remain enrolled, as they will come within the first category of allowable donor (that is, an elector).<sup>76</sup>

A legislative instrument under **proposed subsection 287AA(2)** stating that Australian residents were not allowable donors would apply to all Australian permanent residents, rather than being a means to prevent specific Australian residents from donating. The wording of the Bill indicates that the default state is for Australian residents to be allowable donors, and that only a legislative instrument issued under that section of the Bill would prevent them from being allowable donors.

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70. Parliamentary Joint Committee on Human Rights, [Human rights scrutiny report](#), 1, 6 February 2018, p. 11.

71. *Ibid.*, p. 17.

72. *Ibid.*, p. 20.

73. *Ibid.*, p. 24.

74. *Ibid.*, pp. 27–8.

75. Subsection 4(1) of the Act.

76. AEC, '[British subjects eligibility](#)', AEC website, 21 April 2015.

Why this approach has been taken to permanent residents is not addressed by the Explanatory Memorandum or the Minister's Second Reading Speech. In a press conference introducing the Bill, the responsible Minister stated:

If you are involved in political campaigning, then you can only rely on political donations from **Australian citizens**, from Australian businesses and Australian organisations. That is the intent of this reform and this is deliberately the intent of this legislation [Emphasis added].<sup>77</sup>

Earlier in the same press conference the Minister stated:

Only Australians, Australian businesses, Australian organisations should be able to influence Australian elections via political donations.<sup>78</sup>

Assuming a more inclusive definition of 'Australians' to include permanent residents, the Bill enables either of these statements to be true. The Minister is reported to have told the media that non-citizen residents will be banned from making donations, and that 'should the Bill be enacted, I will make any necessary regulations to give full effect to the government's commitment to ban foreign political donations'.<sup>79</sup>

This provision gives the Minister sole discretion (subject to disallowance) to prevent more than 2.1 million Australians over 18 years of age, or just over one tenth of the population, from participating in the political process in Australia through supporting candidates and parties through donations.<sup>80</sup>

The JSCEM's report on foreign donations, as part of Recommendation 3, recommended any ban on foreign political donors 'not apply to dual Australian citizens either in Australia or overseas, or to non-Australian permanent residents in Australia'.<sup>81</sup>

Additionally, **proposed paragraph 287AA(1)(d)** provides for a person or entity 'in a class of persons or entities prescribed by the regulations' to be an allowable donor. Note that this is an inclusive rather than exclusive category. That is, regulations can enable a class of people (foreign nationals who have invested significant money in Australia, for example) to be allowable donors, but cannot remove allowable donor status from existing allowable donors (preventing citizens who have been convicted of certain crimes from being donors, for example).

## Entities

An entity is an allowable donor if the entity is incorporated in Australia or, if it is not incorporated, its head office or principal place of activity is in Australia (**proposed paragraph 287AA(1)(b)**). In practice most significant political donors in Australian federal politics are entities rather than individuals. In the past decade (between 2005–06 and 2015–16) only 12 of the top hundred donors (by total amount of money donated) appear to be individuals rather than entities, based on an analysis of the AEC's Annual Returns database. Only two individuals have donated in total more than \$1 million in the past decade, compared to 28 entities who have donated \$1 million or more.<sup>82</sup>

Foreign political entities are specifically excluded from being allowable donors (**proposed subsection 287AA(3)**). These include a whole or part of a body politic of a foreign country or a part of a foreign country, or a foreign public enterprise—a company controlled by a foreign government.<sup>83</sup> On the basis of the information published by the AEC on political donors it is not possible to determine whether foreign political entities are currently donating to parties, candidates or third party campaigners.

As per individuals, entities may also be included as allowable donors by regulation under **proposed subsection 287AA(2)**.

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77. M Cormann (Minister for Finance), [Transcript of joint press conference](#), transcript, 5 December 2017, p. 8.

78. Ibid.

79. P Karp, '[Mathias Cormann conceded Coalition may have to change foreign donations ban](#)', *The Guardian*, (Australian Edition), 7 February 2018.

80. Based on Parliamentary Library calculations of the number of resident non-citizens from the 2016 Census.

81. Joint Standing Committee on Electoral Matters, [Second interim report on the inquiry into the conduct of the 2016 federal election: foreign donations](#), op. cit., p. xiv.

82. Parliamentary Library analysis of [AEC annual returns database](#), 'Annual returns locator service', AEC website, 3 February 2018.

83. Item 4 of the Bill provides that 'foreign public enterprise' has the meaning given by section 70.1 of the [Criminal Code Act 1995](#).

## Determining allowable donor status

In order to determine that a donor is an allowable donor the entity receiving the donation must either obtain a statutory declaration from the donor that they are an allowable donor, or any other information as required by regulations (**item 33, proposed section 302P**). A Commonwealth statutory declaration must be witnessed by an authorised witness, such as a doctor, lawyer or Justice of the Peace.<sup>84</sup> Presumably this information will only need to be collected once for each donor as allowable donor status is unlikely to change. A similar requirement for a statutory declaration to establish that a donor is not a foreign donor has been proposed in a private member's bill before the House sponsored by Bob Katter.<sup>85</sup>

The Act currently requires those receiving donations above the disclosure threshold of \$13,500 to know the name and address of the person making the donation (section 306). As allowable donor status must be determined for any donation of \$250 or more, the new provisions will substantially increase the regulatory burden on political actors and campaigners.

**Proposed section 302M**, in **item 33** of the Bill provides that if a recipient did its due diligence and obtained the required declaration of allowable donor status, and did not know or have any reasonable grounds to believe that the donor was not an allowable donor, they may not be subject to offences or civil penalty provisions for receiving money from people who were not allowable donors. However the evidential burden on proving that they did not know or believe the donor was not an allowable donor falls on the recipient wishing to rely on the exception.

**Item 8, proposed subsection 287(9)** also provides that a gift is taken to have been made by an allowable donor for the purposes of working out a person or entity's allowable amount for a financial year if the person or entity obtained the required declaration of allowable donor status, and did not have any reasonable grounds to believe that the donor was not an allowable donor.

## Practical application of the restrictions

Two individuals of Chinese descent have been explicitly alleged as problematic donors in the Australian media. A media report stated that the ASIO Director-General briefed officials from Australia's three largest political parties in 2015 and cautioned the parties about taking donations from 'billionaire property developers' Mr Huang Xiangmo and Dr Chau Chak Wing. The report stated that ASIO believes that the two men 'have deep but opaque connections to the Chinese Communist Party'.<sup>86</sup>

According to media reports, Huang Xiangmo is an Australian permanent resident and Dr Chau Chak Wing is an Australian citizen.<sup>87</sup> As such, Dr Chau would not be affected by the new allowable donor provisions and Mr Huang would only be affected if the Special Minister of State makes a determination under **proposed subsection 287AA(2)** that Australian residents are not allowable donors.

Mr Huang's company Yuhu Group, and companies linked to it, are also major political donors.<sup>88</sup> Yuhu Group, now known as Yufeng Investment Group (Australia) Pty Ltd, is registered as an Australia proprietary company, with a registered office and principal place of business in North Sydney, according to ASIC.<sup>89</sup> Under **proposed paragraph 287AA(1)(b)(i)** it would therefore be classed as an allowable donor.

Yuhu and Mr Huang have been specifically mentioned by senior members of the Government implying they act as agents of the Chinese state. For example, the previous Attorney-General stated in an interview:

We know that Senator Dastyari received benefits from the Yuhu Group, personal benefits including the payment of some personal debts. We know that he has in various ways in his dealings with Mr Huang Xiangmo, particularly that infamous press conference that he conducted in the middle of last year in which he sought deliberately and actively to undermine the alternative government's foreign policy in relation to China, and now, as it appears, in the asking of a series of evidently scripted questions at Senate Estimates, being in effect, China's interrogator of Australian

84. Attorney-General's Department, '[Statutory declarations](#)', Attorney-General's Department website.

85. Parliament of Australia, '[Electoral Amendment \(Banning Foreign Political Donations\) Bill 2017 homepage](#)', Australian Parliament website.

86. N McKenzie, C Uhlmann, R Baker and D Flitton, '[ASIO warns politics on Chinese donations](#)', *The Sydney Morning Herald*, 6 June 2017, p. 1.

87. J Wallace, '[Why Chinese Australians keep a low profile](#)', *The Australian Financial Review*, 11 August 2017, p. 34.

88. K Loussikian, '[The great haul of China's cash](#)', *The Daily Telegraph*, 16 December 2017, p. 68.

89. Australian Securities and Investments Commission, Current & Historical Extract - YUFENG INVESTMENT GROUP (AUSTRALIA) PTY LTD ACN: 160 437 374, 15 December 2017.

defence and security officials. ... The fact that he has allowed himself to be suborned or compromised by China is now a manifest public fact.<sup>90</sup>

If a policy objective of the Bill is to prevent instances of this type of influence on Australian politics by preventing significant donations to political parties, it appears it will be ineffective.

### Constitutional compatibility

As discussed in the Background section, above, the constitutionality of the donations ban is likely to be considered through the lens of the *Unions NSW* case. The High Court found that restricting who can donate to political parties, and hence the amount of money they can raise, is likely to trigger the first limb of the *Lange* test by burdening the freedom of political communication. If this is the case, it will then be examined in terms of the second limb: is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with representative and responsible government?

The Bill attempts to anticipate the second limb of the *Lange* test through the objects clause in **proposed section 302C at item 33** of the Bill, which provides that proposed Division 3A of Part XX of the Act aims to secure the actual and perceived integrity of Australian elections by reducing the risk of foreign donors exerting undue or improper influence on the outcomes of elections.

In the case of *McCloy v New South Wales* the High Court was asked to consider whether the NSW ban on donations from property developers was constitutional.<sup>91</sup> A majority of the Court found that the provisions were not invalid. While the provisions did burden free political communication, they had been enacted for legitimate purposes, were adequate in their balance, and there was no other obvious means for achieving the policy outcome.<sup>92</sup>

In *Unions NSW*, the High Court accepted that one of the objects of the relevant part of the NSW *EFED Act* was ‘to help prevent corruption and undue influence in the government of the State’,<sup>93</sup> but that the 2012 amendments banning donations were, in the view of the Court, not rationally connected to that purpose.<sup>94</sup> In *McCloy* the majority judgment noted that sufficient evidence existed in relation to land development applications in NSW that the purpose of the Act to reduce the risk of undue or corrupt evidence was legitimate within the meanings of the *Lange* test.<sup>95</sup>

Should the provisions of the Bill be challenged the Government will be required to establish that banning donations of \$250 or more from non-Australians is a reasonable, appropriate and proportionate means of securing the actual and perceived integrity of Australian elections.

One challenge the Government might face is the focus of the objects clause only on elections rather than governing. The objects clause does not consider the possibility that political donations might buy influence after the election as a reason for limiting foreign donations. The argument that measures must be taken to prevent foreign interests influencing decisions of governments seems to be an easier one to make than measures being taken to prevent foreign interests buying election results, if for no other reason than the scope of alternative interventions and legislation that might potentially effect the same ends.

The possibility of a legislative instrument that could ban all non-citizen residents from donating more than \$250 and the impact of the provision on constitutionality was discussed briefly above. It is worth reiterating, however, that should that legislative instrument be enacted, the resulting effect on the capacity of individuals to donate would be much like the original NSW legislation that was found to be unconstitutional in *Unions NSW* (whilst noting that that legislation also included a ban on organisations donating, the majority judgment in the case did not distinguish between individuals who were not allowable donors, and entities). The inclusion of Australian non-citizen residents in a ban on donations designed to prevent foreign interference in elections may be found by the Court to be unnecessarily broad, even if the Court concludes the ban on foreign donors more generally is acceptable under the second *Lange* limb.

90. G Brandis (Attorney-General), [Interview with Sabra Lane – AM](#), transcript, 8 December 2017.

91. *McCloy v New South Wales* [2015] HCA 34.

92. M Clark, ‘[McCloy v New South Wales](#)’, *Opinions on High—High Court Blog*, 7 October 2015.

93. *Unions NSW v New South Wales* [2013] HCA 58, [53].

94. *Ibid.*, [60].

95. *McCloy v New South Wales* [2015] HCA 34, [53].

It seems reasonable to suggest that, should the Bill be passed, it will be challenged in the High Court. GetUp!, an organisation affected by the provisions of the Bill and therefore likely to have standing to bring a challenge, has already begun fundraising, according to media reports, ‘suggesting donations could be spent on an ad campaign, legal advice and potential legal challenges’.<sup>96</sup> GetUp! has a history of successfully challenging electoral laws, funding the challenge against the early closure of the rolls in *Rowe v Electoral Commissioner*.<sup>97</sup> Other organisations have also flagged legal challenges.<sup>98</sup>

### **Making and receiving donations**

#### **Definitions**

**Senate group:** Under section 168 of the Act, two or more candidates can request that they be listed together in a group on a Senate ballot paper, and have a box above the line that voters can use to vote for their group. Senate groups do not have the name of the group or party logo listed above the line, unlike registered political parties.

**Political entity:** A new definition added by the Bill meaning a registered political party, a state branch of a registered political party, a candidate in an election or by-election, or the member of a Senate group.<sup>99</sup>

**Third party:** Section 314AEB of the Act requires anyone who is not a registered political party, a candidate in an election, a member of a Senate group, or a member of the House of Representatives or the Senate (that is, anyone who is not a political entity) to submit an annual return to the AEC if they incur political expenditure above the disclosure threshold (currently \$13,500, indexed annually) in a financial year. The AEC refers to these as ‘third party’ returns, however the term ‘third party’ is not used in the Act.<sup>100</sup> The Bill replaces the requirement for an electoral expenditure return with the requirement to register as a third party campaigner or political campaigner, and associated reporting requirements.

**Political campaigner:** The Bill creates a register of political campaigners, maintained by the AEC. A political campaigner is any person or entity that incurred \$100,000 or more of political expenditure during any one of the previous three financial years, or \$50,000 during that financial year and 50 per cent of their available financial resources in the previous financial year (the ‘allowable amount’, discussed in further detail below).<sup>101</sup> Political campaigners must submit annual returns and have certain restrictions on donations from foreign sources.

**Third party campaigner:** Any entity that spends more than the disclosure threshold on political expenditure, but not enough to require registration as a political campaigner, must register with the AEC as a third party campaigner, and comply with the respective requirements imposed by the Bill in relation to reporting and accepting donations.

**Associated entity:** Under section 287 of the Act an associated entity is any entity that is controlled by or operates wholly, or to a significant extent, for the benefit of one or more registered political parties, is a financial member of a registered political party, or has voting rights in a registered political party. Many unions are associated entities of the Labor Party, and these are the most common associated entities. Other examples include think tanks, ‘500 clubs’, registered clubs and service companies.<sup>102</sup> Under the Act associated entities are required to submit an annual return to the AEC, and 188 associated entities submitted returns for 2016–17.<sup>103</sup> The Bill expands the definition of associated entities and imposes reporting requirements, and these are discussed in detail below.<sup>104</sup> The Bill allows an entity to be both an associated entity and either a political campaigner or a third party campaigner.

96. P Karp, ‘Coalition’s GetUp crackdown could harm support for foreign interference bill, Labor warns’, *The Guardian*, (Australian edition), op. cit.

97. G Orr, ‘Court by surprise: the High Court and voting rights’, *Inside Story*, 6 August 2010; *Rowe v Electoral Commissioner* [2010] HCA 46.

98. P Karp, ‘Foreign donation and charity law changes “likely” to face high court challenge’, op. cit.

99. **Proposed subsection 287(1) at item 7.**

100. AEC, ‘Third parties incurring political expenditure’, AEC website, 6 July 2016.

101. **Proposed section 287F at item 11** of the Bill.

102. AEC, ‘Associated entities’, AEC website, 6 July 2016.

103. AEC, ‘Summary of all Associated Entity Returns: 2016–17’, AEC website, 3 February 2018.

104. **Proposed section 287H at item 11** of the Bill.

The approach taken by the Bill in **proposed Division 3A** of Part XX of the Act makes it particularly difficult to determine the requirements around political donations that it imposes, and is almost certain to leave potential donors who delve into the legislation themselves confused. The way it is structured is to provide for a number of offences for political parties and other campaigners that receive certain donations from certain individuals, each of which have a large number of clauses that define their scope and application. Particular provisions exist in relation to charities and registered organisations that may incur political expenditure.<sup>105</sup>

A more useful way to look at these provisions is from the perspective of the donor. That is, assuming the donor does not want the recipient penalised, how much can they donate to whom and in what circumstances. These requirements follow from **proposed sections 302D** and **302E**.

Generally, a person who is an agent or financial controller of a *political party, candidate, Senate group, or political campaigner* commits an offence if they accept a donation of \$250 or more from a person who is not an allowable donor without taking 'acceptable action' (returning the gift or transferring an equal amount to the Commonwealth as per **proposed subsection 302B(1)**).<sup>106</sup>

A person who is an agent or financial controller of a *third party campaigner, or a political campaigner that is a charity or registered organisation*, commits an offence if they accept a donation of \$250 or more from a person who is not an allowable donor without taking 'acceptable action' if the gift is for a political purpose.<sup>107</sup>

If a party, candidate, Senate group, third party campaigner or a political campaigner receives such a donation from a non-allowable donor they must return the gift to the donor or pay an equal amount to the Commonwealth within six weeks.<sup>108</sup>

If a non-allowable donor donates to a political campaigner that is a charity or registered organisation the recipient must keep this money in a separate account and that money must not be used for political expenditure (**proposed section 302F**).

A breach of any requirement of **proposed section 302D** through **302F** may result in a maximum criminal penalty of 10 years imprisonment or 600 penalty units (\$126,000) or both, or a maximum civil penalty of 1,000 penalty units (\$210,000).<sup>109</sup> These penalties apply to the agent of the political entity or the financial controller of the third party campaigner or political campaigner that receives the donation.

In addition, the Bill prohibits:

- soliciting gifts from non-allowable donors (**proposed section 302G**)
- receiving a donation from a non-allowable donor in order to transfer the gift to a political entity or political campaigner, unless the recipient is a charity or registered organisation (**proposed section 302H**)
- forming a body corporate in order to avoid the restrictions on political donations under the Division (**proposed section 302J**) and
- receiving any amount of money from a foreign bank account or donations made while in a foreign country, unless the recipient is a charity or registered organisation (**proposed section 302K**).

More broadly, the Bill imposes no restrictions on donations received from people who are allowable donors, provided those donations are not from a foreign bank account or made while in a foreign country (except if made from an Australian bank account). This means an Australian who is overseas can only directly make a political donation if it is made from an Australian bank account. Australians who are enrolled and living overseas who have an overseas bank account cannot make donations from that account, even if they are otherwise an allowable donor (**proposed section 302K**).

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105. Charities and registered organisations here are taken to mean organisations that are registered under the [Australian Charities and Not-for-profits Commission Act 2012](#) or the [Fair Work \(Registered Organisations\) Act 2009](#), respectively. See **proposed section 302F** at item 33 of the Bill.

106. **Proposed section 302D**.

107. **Proposed section 302E**.

108. **Proposed sections 302B(1), 302D(1)(f) and 302E(1)(g)**.

109. Section 4AA of the [Crimes Act 1914](#) (Cth) provides that a penalty unit is currently \$210.

## **Registration as a political party, associated entity, third party or political campaigner**

The Act provides that eligible political parties may register with the AEC and requires the AEC to maintain a register of political parties (section 125). Associated entities and others incurring political expenditure are treated in a more *ad hoc* manner, with a requirement that they submit annual returns but no formal registration requirements (sections 314AEA and 314AEB). The Bill establishes a register of associated entities and separate registers for two classes of entities or persons incurring political expenditure: third party campaigners and political campaigners (**proposed section 287N**). The Bill does not affect the existing party registration scheme.

The Bill provides that the registration for third party campaigners and political campaigners is mutually exclusive (**proposed sections 287K** and **287L**). The Bill also requires the Register of Political Campaigners (**proposed paragraph 287N(2)(c)**) and the Register of Third Party Campaigners (**proposed paragraph 287N(3)(c)**) to list in the entry whether the entity is also an associated entity. The Explanatory Memorandum notes that it is possible to be registered as both an associated entity and a third party campaigner or an associated entity and a political campaigner, but not simultaneously a third party campaigner and a political campaigner.<sup>110</sup>

### **Registration as an associated entity**

The provisions in the Bill for registration as an associated entity are a significant expansion on the existing criteria in the Act in which an associated entity is required to submit a return, enforced by a maximum \$50,400 per day (240 penalty unit) civil penalty for failing to register (**proposed section 287H**).

The Act defines an associated entity in section 287(1), and **item 3** of the Bill repeals that definition and substitutes a definition pointing to entities registered as associated entities under **proposed sections 287L** and **287H**. The former specifies how the Electoral Commissioner goes about registering the entity, and **proposed section 287H** specifies the criteria for qualifying as an associated entity.

**Proposed subsection 287H(1)** essentially replicates and clarifies the existing section 287(1) definition of associated entity, discussed above. **Proposed subsections 287H(2)** through **287H(4)** give timelines for registering and the penalty for failing to do so. **Proposed subsection 287H(5)** substantially expands the existing criteria to cover potentially many more entities. It does so by providing (without limiting **proposed paragraph 287H(1)(b)**) that an entity is taken to be operating ‘wholly, or to a significant extent, for the benefit of one or more political parties’ if:

- the entity or an officer of the entity has stated publicly or privately that the entity is to operate for the benefit of one or more political parties (or a candidate endorsed by same) or to the detriment of one or more political parties (or a candidate endorsed by same) or
- the expenditure of the entity is wholly or predominantly political expenditure and is used to promote one or more political parties (or their candidates) or the policies of one or more political parties, or to oppose one or more political parties (or their candidates) or their policies.

In relation to the first point, the [Explanatory Memorandum](#) states:

What constitutes a statement for the purposes of this paragraph should be broadly interpreted. Statements may include oral, visual, graphic, written, digital electronic and pictorial communications, and could be communicated in a public, professional or private setting.<sup>111</sup>

This could mean that if, for example, a think tank held a private fundraising dinner and the director of the think tank, speaking to an attendee, thanked them for their attendance and stated that their contribution would help the think tank get X elected, or prevent Y being elected, that think tank would need to register as an associated entity. There appears to be no means for appealing this classification in the Bill (although **proposed subsection 287L(6)** states that the refusal of the AEC to register an organisation is reviewable). It is not clear that if the director was then to publicly disavow those previous remarks, or contradict the recollection of the guest, that would affect the think tank’s classification as an associated entity. How this information might be communicated to the AEC and how the AEC might verify that the information is accurate and genuine, including

110. [Explanatory Memorandum](#), Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017, p. 21.

111. *Ibid.*, p. 20.

if that information was contested by the organisation, is not addressed by the Bill or the Explanatory Memorandum.

Given that registration as an associated entity creates a significant administrative and regulatory burden for an organisation, malicious registration appears to be a possible outcome. That is, an organisation that operates non-political campaigns (such as an environmental organisation that campaigns against deforestation but not against any particular parties or their policies) may be forced to register as an associated entity due to a claim that one of its directors privately confided to someone that they hope their campaign disadvantages party X.

It is not known if organisations that are currently not submitting returns as associated entities would be required to register solely as a result of **proposed paragraph 287H(5)(a)**, in part because it is impossible to evaluate how common the non-public portion of the information might be. A recent media article, for example, asserts that GetUp! is working on a campaign targeting 25 seats held by conservative members of parliament at the next federal election, however GetUp! claims it is not doing this due to an arrangement with Labor, but because it reflects the progressive politics of its membership.<sup>112</sup> If GetUp! did make these statements this appears to be sufficient for it to be classed as an associated entity under these provisions.

It is not difficult to imagine how the operation of this provision might draw the AEC into partisan political fights, particularly where the requirement to register is based on non-public information. The situation where an entity is taken to be an associated entity based on whether its expenditure is wholly or predominantly political, is likely to be somewhat less complex in its operation. GetUp!, for example, spent \$10,081,186 on political expenditure in 2015–16 according to its third party annual return,<sup>113</sup> and had a total revenue \$10,049,568 according to its 2015–16 financial report.<sup>114</sup> If this expenditure could be shown to be wholly or predominantly used to promote one or more political parties (or their candidates or policies) or to oppose one or more political parties (or their candidates or policies), then this would require GetUp! to register as an associated entity under these provisions. Where the threshold for spending that is ‘predominantly’ political lies is less obvious.

### **Registration as a political campaigner or third party campaigner**

The two new categories of third party campaigners and political campaigners are based on the political expenditure of the entity (political expenditure is explained in more detail below). Third party campaigners are those that spend more than the disclosure threshold (currently \$13,500) in a financial year and who are not required to register as political campaigners. Failure to register as a third party campaigner within 28 days, when required, and continuing to incur political expenditure, can result in a maximum civil penalty of \$25,200 for each day that they are not registered (**proposed section 287G**).

Political campaigners are defined in **proposed section 287F** as those individuals or organisations whose political expenditure is:

- \$100,000 or more per financial year during that year or in the previous three financial years or
- \$50,000 or more during that financial year and during the previous year was at least 50 per cent of the ‘allowable amount’.

The allowable amount is defined in **item 2, proposed subsection 287(1)**, as, generally, the amount of money that the individual or organisation has access to before any donations from a non-allowable donor or loans.

Failure to register as a political campaigner within 28 days, when required, and continuing to incur political expenditure, can result in a maximum civil penalty of \$50,400 for each day that they are not registered.

Due to the complexity of the requirements for registration for political and third party campaigners it is not straightforward to determine which category existing campaigners would fall under, although broadly speaking political campaigner is a classification for entities with higher political expenditure (**proposed sections 287F and 287G respectively**). However, if the ‘allowable amount’ criterion under **proposed paragraph 287F(1)(b)(ii)** is ignored (as it is not necessarily possible to calculate on the basis of currently public information) on the basis of third party returns from 2015–16, 28 third parties had a total expenditure of over \$100,000, and an additional 10

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112. J Hewett, ‘[GetUp! gets busy getting Coalition MPs](#)’, op. cit., p. 2.

113. GetUp Limited, [Political Expenditure Return: 2015–16](#), GetUp Limited, 14 November 2016.

114. GetUp Limited, [Financial report for the year ended 30 June 2016](#), GetUp Limited, 2016.

had total expenditure between \$50,000 and \$100,000.<sup>115</sup> Only 11 of the third parties had an annual expenditure above the disclosure threshold but under \$50,000 and would therefore be potentially eligible to register as a third party rather than a political campaigner. Six of these 11 were unions, and would therefore be potentially also required to register as an associated entity. Six third parties, all unions, filed a nil return, indicating no political expenditure.

Of the 28 third parties that had expenditure over \$100,000, 14 were unions, eight were lobbyists or industry organisations, two were environmental, two were multi-issue activist organisations, one was a religious organisation and one was a secular charity. Table 1 below lists the 14 organisations that spent over \$100,000 in 2015–16 that are not unions (as unions are generally associated entities of the Labor Party they have long been subject to very similar disclosure requirements as parties, and the Bill has fewer changes for their reporting requirements).

**Table 1: reported political expenditure by non-union third parties in 2015–16**

Organisation	2015–16 Expenditure	Registered Organisation	Charity or Not-for-profit
GetUp! Limited	\$10,081,186.00	No	No
Business Council of Australia	\$2,662,083.00	No	No
ACA low Emissions Technologies Ltd	\$2,481,797.00	No	No
Universities Australia	\$1,647,017.00	No	<a href="#">Yes</a>
Australian Automobile Association	\$1,161,175.00	No	No
Minerals Council of Australia	\$789,706.00	No	No
Royal Australian College of General Practitioners	\$429,782.00	No	<a href="#">Yes</a>
World Wide Fund for Nature Australia	\$354,389.00	No	<a href="#">Yes</a>
One Community SA	\$351,329.00	No	No
Master Builders Australia Ltd	\$226,583.00	No <sup>(a)</sup>	No
World Vision Australia	\$215,505.00	No	<a href="#">Yes</a>
Australian Christian Lobby	\$208,436.00	No	<a href="#">Yes</a>
Australian Conservation Foundation Incorporated	\$173,783.00	No	<a href="#">Yes</a>
SA Road Transport Association	\$150,000.00	No	No

Notes: (a) Six state Master Builders Associations are registered, however Master Builders Australia is not.

Source: AEC 2016 political expenditure annual returns, [Registered Organisations Commission](#) website, Australian Government; [Australian Charities and Not-for-profits Commission](#) website, Australian Government.

One effect of the Bill is that it may motivate some political campaigners to register as registered organisations in order to take advantage of some of the exemptions for charities and registered organisations in the Bill, such as the ability to receive and quarantine donations from non-allowable donors (**proposed section 302F**). Generally, the large organisations represented on this list are ones that are likely to be able to absorb the additional administrative cost of obtaining appropriate donor information and establishing the internal financial controls to properly quarantine donations.

115. Parliamentary Library analysis of [AEC annual returns database](#), op. cit.

## Political Expenditure

A number of media reports have communicated some confusion as to what constitutes political expenditure, particularly in the context of where an organisation that is otherwise a charitable organisation might be required to register as a political campaigner under the Bill.<sup>116</sup>

The Bill expands the definition of political expenditure, and moves where it is located in the Act. Currently the definition of political expenditure is in paragraph 314AEB(1)(a), in the provision requiring people undertaking political expenditure to submit an annual return. As the political expenditure return will be replaced by requirements for registration as a third party campaigner or a political campaigner and associated reporting requirements, the definition of political expenditure has been moved into the definitions section of Part XX in **proposed subsection 287(1) (item 7)**.

Political expenditure is expenditure for any political purpose, and the political purpose definition, also in **proposed subsection 287(1)**, is therefore key. It has five components, which mirror and expand the definition it replaces in paragraph 314AEB(1)(a). Most of the differences between the two definitions either appear to be clarification of language, or aligning the definition to the new election authorisation provisions created by the *Electoral and Other Legislation Amendment Act 2017*, which do not come into effect until 14 March 2018.<sup>117</sup> The definition also provides certain exceptions, such as the reporting of news or for genuine satirical, academic or artistic purpose.

The key differences are in part (b) of the definition, which aligns with paragraph 314AEB(1)(a)(ii). Currently, political expenditure returns are required for, amongst other reasons, 'the public expression of views on an issue in an election by any means'. The equivalent in the Bill is 'the public expression by any means of views on an issue that is, or is likely to be, before electors in an election (whether or not a writ has been issued for the election)'.

That is, the Bill expands the definition as to what is captured under political expenditure to any expenditure in relation to an issue that may come up in an election. Given the range of issues that are or may be likely to be before electors in an election, this appears to be a broad collection of issues, and not always in a predictable way. For example, in the long election period for the 2016 election, the issues which seemed important at the start of the election (such as milk prices) and the end of the election (Medicare privatisation) varied substantially.<sup>118</sup> It is probably fair to say that any issue of public policy for which any political actor presents a differing view from another is an issue that is likely to be before electors in an election in some shape or form.

Note that, as discussed above, a certain threshold in yearly political expenditure must be met in order to meet the requirements to register as a third party campaigner or a political campaigner.

A media article reports that the St Vincent de Paul Society has 'fewer than a dozen' employees that are primarily focused on advocacy.<sup>119</sup> The web site of the St Vincent de Paul Society, at the time of writing, advertised campaigns on offshore detention, poverty, mental health, penalty rates, Centrelink debts, and overseas development.<sup>120</sup> While any of these could become issues in an election, at the threshold of 'likely' adopted in the Bill it seems reasonable to argue that at least Centrelink debts and offshore detention would be likely to be issues before an elector in an election. If the St Vincent de Paul Society spent \$100,000 on these issues in this or any of the past three financial years then it seems reasonable to conclude that under the provisions of the Bill the St Vincent de Paul Society would be required to register as a political campaigner. According to the AEC's Annual Returns database the St Vincent de Paul Society has not previously lodged an annual return for political expenditure.

Another way in which organisations might unexpectedly fall under the requirements to register is under part (e) of the political purpose definition, which covers carrying out opinion polls or other research relating to an election or voting intentions of electors. An interest group that carries out polling on an issue, and includes a question on voting intention, could be required to register if the expenditure threshold is exceeded. While this

116. See, for example, R Baxendale, '[Donations reforms a worry for charity](#)', *The Australian*, 12 January 2018, p. 4.

117. [Electoral and Other Legislation Amendment Act 2017](#).

118. D Muller, [Double, double toil and trouble: the 2016 federal election](#), Research paper series, 2016–17, Parliamentary Library, Canberra, 30 June 2017.

119. R Baxendale, '[Donation reforms a worry for charity](#)', *The Australian*, 12 January 2018, p. 4.

120. [St Vincent de Paul society website](#), as at 12 January 2018.

section is identical to the existing paragraph 314AEB(1)(a)(v) provision, the increased penalties and reduced deadlines for failing to register under the Bill may catch some organisations unawares.

### ***The effect on charities and registered organisations***

The Bill contains a number of provisions that place restrictions on the capacity of charities to receive donations and how those donations are spent. In practice these provisions specifically apply to entities that are registered under the [Australian Charities and Not-for-Profits Commission Act 2012](#). Identical provisions also apply to entities registered under the [Fair Work \(Registered Organisations\) Act 2009](#), which primarily applies to unions.

**Proposed section 302E**, at **item 33**, applies to political campaigners that are charities or registered organisations, and to third party campaigners. It prohibits donations from anyone other than an allowable donor if the donation is either \$250 or more and made for a political purpose, or the organisation receiving the donation has spent or donated more than the allowable amount for political purposes in that financial year. Here allowable amount is defined in **item 2, proposed subsection 287(1)**, as the amount of money an entity has access to before it has received gifts from non-allowed donors or loans.

**Proposed section 302F** applies only to political campaigners that are also charities or registered organisations. It requires that political expenditure not be made from an account into which donations from non-allowed donors is paid. That is, donations received from non-allowed donors must be administratively separated from any political spending.

Both of these proposed sections come with maximum criminal penalties of 10 years imprisonment or 600 penalty units (\$126,000) fines, or both, or a maximum civil penalty of 1,000 penalty units (\$210,000).

In summary, this means that charities and registered organisations that may qualify as a third party campaigner or political campaigner cannot receive gifts or donations of \$250 or more from foreign donors (or other non-allowable donors) for political purposes. And that any foreign donations they receive (regardless of amount) must not be used for political purposes, and must be kept in a separate bank account to ensure they are not used for political purposes. However, charities and registered organisations are explicitly exempted from the prohibition in the Bill on soliciting gifts from foreign donors (**proposed section 302G**).

Charities and registered organisations that meet the definition of a third party campaigner or a political campaigner must register as such with the AEC and provide the annual returns required by such registration, and include an audit report if they register as a political campaigner (**proposed paragraph 314AB(2)(c)**), or a signed statement that they have not received donations from non-allowable donors if they are registered as a third party campaigner (**proposed paragraph 314AEB(2)(b)**).

Charities and registered organisations that are third party campaigners must submit an annual return to the AEC if they have incurred political expenditure, listing the amount of expenditure, any senior staff employed by the campaigner and any membership of registered political parties they may hold, and any grants or money received from the Commonwealth or a state or territory (**item 101, proposed subsections 314AEB(1) and (2)**). If they received any donations over the disclosure threshold that were used for political purposes these must also be listed along with the details of the donor (**item 104, proposed section 314AEC**).

Charities and registered organisations that are political campaigners must submit an annual return equivalent to that of a political party. The annual report must list the total amount received and paid by the entity, and the total outstanding debts at the end of the financial year, and the amounts and details of any donations over the disclosure threshold. It must also list any senior staff employed by the organisation and any membership of registered political parties they may hold, and any grants or money received from the Commonwealth or a state or territory (**item 87, proposed section 314AB** and section 314AC as amended by **items 88 to 91**). The return must include a signed statement by its financial controller that it has complied with the requirements of **proposed sections 302E and 302F**, described above (**proposed paragraph 314AB(2)(d)**).

It seems reasonable to conclude that the significant additional regulatory requirements imposed on charities and registered organisations will prove to be a disincentive for these organisations to engage in political activity in an effort to avoid the requirements. However because the **proposed section 287F** criteria for registration as a political campaigner apply to electoral expenditure incurred before the Bill is passed (although offences for receiving donations from non-allowed donors are not retrospective), any organisation that has incurred political expenditure of \$100,000 or more in the previous three years will be required to register if it wishes to continue any political expenditure. The organisation must register within 28 days after becoming required to be registered. If such an organisation is not registered and then incurs further political expenditure in that financial

year it will be in contravention of **proposed subsections 287F(3) and (4)** with a maximum civil penalty of \$50,400 (240 penalty units) per day.

### ***Other features worth noting***

#### **Disclosure of political affiliations of directors**

One new feature of the Bill that has been mentioned elsewhere in this Bills Digest but is worth calling specific attention to are the provisions that will require any non-party political entity that has a reporting obligation (third parties, political campaigners and associated entities) to also report the membership of any political party of their 'senior staff' (for example, **proposed paragraph 314AB(2)(b)(i)**). The definition of senior staff is added to subsection 287(1) by **item 7** and means directors for an entity with directors, or otherwise 'any person who makes or participates in making decisions that affect the whole or a substantial part of the operations of the person or entity'.

In its discussions of the human rights implications of the Bill, the Explanatory Memorandum states of the reporting of non-financial particulars:

The Bill requires limited non-financial particulars to be disclosed in addition to the financial information currently disclosed. These non-financial particulars are details of:

- a) senior staff of candidates and Senate groups on ballots; and
- b) discretionary government benefits, such as payments and grants, received in the past 12 months.

Making this information publicly available engages the right to privacy of the candidates and their senior staff. However, these limitations are justifiable on the basis that they promote transparency of the electoral system, with the corresponding public benefits outlined in paragraph 6.

It is important to remember that the individuals whose privacy is impacted freely choose to play a prominent role in public debate and put themselves, or those they represent, forward for public office. It is therefore appropriate, objective, legitimate and proportional that the public has access to this information.<sup>121</sup>

This assessment appears to disregard the requirement that staff of political campaigners and third party campaigners, who are not staff of candidates, must also disclose non-financial particulars.

Beyond what has been quoted above, the policy objective of this provision is not clear and potential consequences are readily apparent. Larger organisations that might be captured under the political campaigner provisions might have large numbers of directors, most of whom are not involved in any activities that might class the organisation as a political campaigner, however all of whom would be required to disclose what political parties they may be a member of. It does not seem unreasonable to suggest that requiring this disclosure would lead some organisations to not engage in political expenditure, or to the organisations having difficulty filling director roles, in order that the directors might retain this information as personal and private.

Further, while under **proposed section 287N** the Bill requires the Electoral Commissioner to consult with the Information Commissioner before determining, by legislative instrument, what information is included on the Registers, **item 124** requires the Electoral Commissioner to publish 'each annual return' at the start of February of each calendar year (**proposed section 320**). As the political affiliation of directors is part of the annual return, and the Act doesn't provide for redacting any part of an annual return before publication, this presumably will be made public.

#### **Inconsistencies in indexing amounts**

The Bill references two indexed values: the disclosure threshold and the per-vote public funding amount. The amount of the disclosure threshold is defined by the Bill in the definitions section of Part XX of the Act (**item 4**), considerably simplifying and clarifying the text of the Act (there are currently 22 references to the amount in the Act, most accompanied by a note that the amount is indexed).

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121. [Explanatory Memorandum](#), Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017, p. 7.

The Bill might have also provided an opportunity to have taken a similar approach to the election funding amount of \$2.70479 per vote. However the Bill includes the actual value four times (**proposed sections 293 and 294 at item 27**), each accompanied by notes that it is indexed under section 321.

### Civil penalties for electoral offences

**Item 107** repeals and replaces section 315, which contained criminal offences and penalties for contravention of requirements under Part XX relating to donations and disclosure. Under the Bill the penalties associated with contraventions of various provisions of the Part are now generally listed with the respective provisions. This serves to clarify the penalties that apply in relation to particular provisions.

The Bill continues the Government's trend, begun in the [Electoral and Other Legislation Amendment Act 2017](#), of replacing many criminal offences in the Act with civil penalty provisions enforced under the [Regulatory Powers \(Standard Provisions\) Act 2014](#). While this change from criminal to civil penalties is noted in the Explanatory Memorandum of the Bill, it is not explained.<sup>122</sup> In addition to changing many existing criminal penalties to civil penalties, the maximum pecuniary penalty for many breaches has been increased substantially. For example, not furnishing a return within the required deadline currently invokes a maximum fine of \$10,500 for a political party, or \$2,100 for others (existing subsection 315(1)). Under the Bill the equivalent penalty is 360 penalty units, or \$75,600 (**proposed subsection 314AB(1)**), a seven-fold increase for political parties. Of course, additional non-monetary consequences, such as a criminal record, flow from conviction for a criminal offence.

While similar civil penalties were enacted in the *Electoral and Other Legislation Act 2017* in relation to authorisation of electoral advertising, these have not yet come into effect. Provisions that mirrored those in *Electoral and Other Legislation Act 2017* were also included in the *Marriage Law Survey (Additional Safeguards) Act 2017*,<sup>123</sup> however it is not known whether the AEC initiated any actions under the civil penalty provisions of that Act.

To the Library's knowledge, then, it is not known whether the AEC has ever enforced a civil penalty under the *Regulatory Powers (Standard Provisions) Act*, or the extent to which it has developed the investigatory capacity to do so following the passage of the *Electoral and Other Legislation Act 2017*.

The following observation in the Bills Digest to the *Electoral and Other Legislation Act 2017* remains broadly true for the current Bill:

Although nominally a regulatory agency, the AEC has generally managed to remain outside the political fray by taking a fairly light-touch approach to regulating political communication and deferring much of the decision making relating to investigating and prosecuting electoral offences to other agencies, such as the AFP and the DPP. By empowering the AEC to apply for injunctions, and investigate and prosecute certain classes of electoral offences, the proposed Bill involves the AEC much more directly in regulating political communication, and in the potential political fallout that its decisions might generate doing so in the midst of an election. While the exact implications of this remain to be seen, it is worth noting that the Bill substantially changes the regulatory relationship between the AEC and political actors, including potentially the parties of Government and opposition.<sup>124</sup>

### Interaction with the foreign influence transparency scheme

The National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 contains a small number of provisions that reference the Act and the Bill.<sup>125</sup> Specifically, Schedule 5, Part 2 includes references to amendments to the Act proposed by the Bill, such as the disclosure threshold and the inclusion of political campaigners as a category of political actor. These are essentially consequential and do not impact on the operation of the Bill.

### Transparency in the reporting of political expenditure

In an AEC submission to the JSCEM and the Senate Select Committee, the AEC noted the inconsistencies between the reporting requirements of third parties, who must submit a return specifying their political

122. Ibid., p. 7.

123. [Marriage Law Survey \(Additional Safeguards\) Act 2017](#).

124. D Muller, [Electoral and Other Legislation Amendment Bill 2017](#), Bills Digest, 101, 2016–17, Parliamentary Library, Canberra, 2017, p. 15.

125. Parliament of Australia, '[National Security Legislation Amendment \(Espionage and Foreign Interference\) Bill 2017 homepage](#)', Australian Parliament website.

expenditure, and associated entities, who must only report total spending and do not have a requirement to identify what of that total is electoral expenditure.

The issue of whether the definition of an associated entity should be clarified to ensure consistency in application and that the groups that are intended to be captured are captured, is raised frequently in the Parliament and the media. There has also been commentary about whether third parties should be subject to the same disclosure obligations as political parties and associated entities in order to alleviate the concern around this definitional issue. However, the current third party reporting requirements provide more detailed information on actual electoral expenditure than the single expenditure figure covering all transactions (electoral and non-electoral) provided by an associated entity.<sup>126</sup>

The Bill to some extent further complicates the reporting inconsistency between different participants. Section 314AEB of the Act requires third party campaigners incurring political expenditure to submit a return listing their political expenditure according to five categories. This section is amended by the Bill (**items 100 through 103**) to require entities registered as third party campaigners to submit an annual return that sets out the detail of any political expenditure incurred in a financial year, the details of its senior staff and their membership of any political parties, any funding received from the Commonwealth or a state or territory, and a signed statement that they have not received certain donations from non-allowable donors (**proposed subsection 314AEB(2)**). If the third party campaigner received any donations over the disclosure threshold, it must also provide an annual return listing those donations under **proposed subsection 314AEC at item 104**.

Political campaigners must also submit an annual return (**proposed section 314AB, at item 87**), and this is the same as the annual returns that must be submitted by political parties. Unlike third parties, political campaigners will be required to declare ‘the total amount paid by, or on behalf of, the party or campaigner during the financial year’ (**proposed subparagraph 314AB(2)(a)(ii)**).

Associated entities must also submit returns, unless the associated entity is also required to submit a return as a political campaigner (**item 99, proposed subsection 314AEA(6)**). The requirements for associated entity returns are aligned with the Bill’s additional reporting requirements for political parties (particularly in relation to political memberships of senior officers and money received from a government (**item 97, proposed paragraph 314AEA(1)(d)**), but are otherwise generally changed only in minor ways from the existing provisions of the Act (section 314AEA).

These provisions mean that the only political actors who will be required to disclose their actual political expenditure under the Bill are third parties who are not also associated entities. By not requiring political campaigners to disclose their actual political expenditure the Bill will decrease the amount of public information about the amount of money being spent on federal political campaigns in Australia.

## Other provisions

### *Public funding requirements*

Public funding for federal election campaigns was first introduced as part of the *Commonwealth Electoral Legislation Amendment Act 1983*.<sup>127</sup> It provided parties and candidates \$0.60 (equivalent to \$1.85 in 2017) in public funding per first preference House of Representatives vote,<sup>128</sup> for parties that received at least four per cent of the first preference vote, and was capped at the amount of election expenditure. In 1995 the Act was amended to increase public funding to \$1.50 per vote (\$2.52 in 2017 terms) and became an entitlement based only on the number of votes, and not limited to electoral expenditure.<sup>129</sup>

The Bill returns federal election public funding to a reimbursement of election expenditure, with a per-vote amount of \$2.70 (CPI indexed from the time the Bill receives Assent), capped at the amount of election expenditure (**item 27, proposed sections 293, 294 and 295**). The Second Reading Speech for the Bill states that this will ‘prevent political actors from profiteering and achieving private gain by standing candidates’, however

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126. AEC, [Submission](#) to Joint Standing Committee on Electoral Matters, *Inquiry into and report on all aspects of the conduct of the 2016 federal election and matters related thereto*, February 2017, p. 9.

127. [Commonwealth Electoral Legislation Amendment Act 1983](#).

128. And \$0.30 for each Senate vote at a joint House of Representatives and Senate election or \$0.45 for each Senate vote at a half-Senate only election.

129. [Commonwealth Electoral Amendment Act 1995](#).

the Government has not otherwise publically advocated for this change.<sup>130</sup> The initial amount of public funding per vote in the legislation is the 1 January 2018 to 30 June 2018 rate, as published by the AEC.<sup>131</sup> As the commencement for this part of the Bill is the first 1 July on or after the Act receives Assent, if the Bill is passed later than 1 July 2018 and the rate remains unamended it will miss one CPI increment.

The aforementioned 1995 amendments to the Act removed the requirement for parties to publically report their electoral expenditure as part of their annual returns, so it is not possible to accurately determine what effect this change will have. However parties are required to report their total annual expenditure as part of their annual return, and this can be used as an estimate of election campaign spending. This will likely over-estimate election spending in general, as it should include the normal business expenses of operating a political party, however as reporting is on a financial year basis and the 2016 federal election was held on 2 July 2016 the 2015–16 party annual returns likely provide a particularly good proxy of election spending.<sup>132</sup>

By comparing the reported 2015–16 party expenditure to the amount of public funding the AEC paid to the party it is possible to estimate what the reduction in public funding would have been had these provisions been in place at the 2016 federal election.

Only four parties reported that they had spent less money in 2015–16 than they received in public funding, and would therefore have received less public funding had the provisions proposed by the Bill been in effect (see Appendix). The estimated rounded reductions in public funding under the provisions of the Bill would have been:

- Pauline Hanson's One Nation: \$1.45 million
- Nick Xenophon Team: \$540,000
- Derryn Hinch's Justice Party: \$490,000
- Bullet Train for Australia: \$15,000

Pauline Hanson's One Nation has been subject to commentary for the amount of public funding that it has received from largely unsuccessful election campaigns, with a media report suggesting that Senator Hanson had received a total of \$6 million in public funding in elections prior to the 2016 federal election.<sup>133</sup> It should be noted, however, that all other Australian jurisdictions with the exception of the ACT will only reimburse actual electoral expenditure.<sup>134</sup>

Allegations of profiteering from public election funding also targeted the Liberal Democrats following the 2013 federal election, where the party secured \$1.046 million in public funding. According to a media report, LDP Senator David Leyonhjelm 'could buy a Ferrari and put a Liberal Democrats sticker on the side and they wouldn't be breaking the rules'.<sup>135</sup>

One effect of the Bill might be that it potentially removes around \$2 million of public funding from parties now sitting on the Senate cross-bench that the Government may be dependent upon to pass the Bill.

Under the provisions of the Bill parties and candidates will have to submit a claim to the Electoral Commission between 20 days after polling day and up to six months after polling day, with late claims not accepted (**proposed section 298B**). While the claim must be made in 'an approved form' (**proposed paragraph 298A(b)**), there is no requirement that it be accompanied by an audit certificate.

The Bill does not require the amount of expenditure claimed by a party or candidate to be made public by the AEC. While the amount paid to each party has traditionally been made public by the AEC, and this would be expected to continue, most large political parties likely spend far more on their campaign than they are entitled

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130. M Cormann, '[Second reading speech: Electoral Legislation Amendment \(Electoral Funding and Disclosure Reform\) Bill 2017](#)', Senate, *Debates*, 7 December 2017, p. 10098.

131. AEC, '[Current funding rate](#)', AEC website, last updated 16 May 2017.

132. As an example of how annual expenditure might miss some election-related transactions, it was reported that Malcolm Turnbull donated \$1.75m to the Liberal Party for its 2016 election campaign, however this donation was not listed on the party's 2015–16 return, indicating that it must have been received after 1 July 2016. Likewise any invoices that were paid after 30 June 2016 but were spending for the 2016 federal election may not be included in the final amount.

133. N O'Malley, '[One Nation to pocket over \\$1 million in funding](#)', *The Sydney Morning Herald*, 28 November 2017, p. 7.

134. D Muller, '[Election funding and disclosure in Australian states and territories: a quick guide](#)', Research paper series, 2017–18, Parliamentary Library, Canberra, 9 November 2017.

135. H Aston, '[Liberal Democrats keep \\$1m taxpayer windfall](#)', *The Canberra Times*, 2 October 2013, p. 6.

to as public funding. As the maximum amount of public funding available to a party is trivial to calculate (both the number of eligible votes and the amount per vote is public), there is nothing in the Bill to prevent a party submitting only enough of its expenses to secure the maximum public funding it is eligible to. This is in contrast to non-party candidates (section 309) and third party campaigners (**proposed subsection 314AEB(2)**) who are required to report their campaign expenditure.

**Proposed section 298C** gives the Electoral Commission the power to accept, accept in part, or refuse a claim within 20 days of having received it. The Bill provides three criteria on which a claim must be assessed: whether the claimed expense is electoral expenditure, and if so, whether it has been incurred and whether it has been claimed by another party. It also makes provisions for appealing a refusal to pay a claim in part or in full.

The Bill provides no power for the Electoral Commission to determine whether an expense is a reasonable expense, only that the expense was incurred (**proposed paragraph 298C(2)(b)(i)**). This is potentially relevant given that media have reported discussions of inflating receipts for election expenses and keeping the difference as profit. While the parties in question have stated that this was only a hypothetical discussion, it does highlight the incentives that a reimbursement scheme might create.<sup>136</sup> The short timeframe for assessing a claim (20 days) provides the AEC little time to evaluate each claim.

One minor effect of this change to the public funding scheme is that the total amount of public funding provided to parties and candidates may not be known for up to six months after the election. This more diffuse payment of claims may reduce the media attention received by the announcements of the payment of public funding only weeks after the election.<sup>137</sup>

**Proposed subsections 293(1) and (2)** provide that a party will receive the specified amount of funding (up to the amount of their expenditure, as per **proposed paragraph 293(2)(b)**) for each formal first preference vote given for endorsed party members who are not a member of a group, but that for endorsed party members who are in a group the party will receive the specified amount only 'for each formal first preference group vote'. This is in contrast to the existing subsection 294(2), which it replaces, which provides for funding for 'each first preference vote given for a candidate or group in a Senate election'.

The Explanatory Memorandum states that **proposed paragraph 293(1)(b)** requires that calculating whether a party reaches the four per cent threshold includes both above and below the line votes cast for the candidates in the group.<sup>138</sup> However, proposed section 293 could be interpreted as providing that public funding will no longer be paid for below the line votes for Senate candidates endorsed by a party and part of a group, as most are. It is unclear whether this was the intended outcome by the Government, however if the Government intended below the lines party votes to be counted the Bill could potentially be clarified.

## Concluding comments

The Bill has some similarities to the other piece of legislation introduced by the current Government in response to JSCEM recommendations, the Electoral and Other Legislation Amendment Bill 2017,<sup>139</sup> in that while it implements recommendations of the Committee it also adds additional reforms beyond the scope of the recommendations which may be unpalatable to the non-Government parties. Like that Bill, it may need to be amended by the Government in order to pass.

The provisions in the Bill to ban certain political donations to political parties and associated entities, and the accompanying anti-avoidance provisions, are likely to be relatively uncontroversial in practice, although the provisions relating to resident non-citizens may be potentially problematic from a Constitutional perspective. The provisions limiting election funding to electoral expenditure are very similar to legislation Labor has proposed, and would, by themselves, be expected to be quickly passed by the Parliament.

The expansion of what is captured under the definition of an associated entity brings useful clarity to what has long been a somewhat contested category, and increases transparency through the creation of the register. The differentiation between third party campaigners and political campaigners appears somewhat arbitrary,

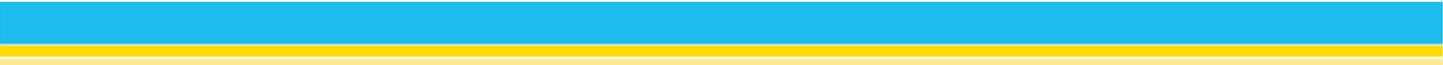
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136. M Grattan, '[Malcolm Turnbull seeks legal advice on Hanson's staffer Ashby](#)', *The Conversation*, 22 May 2017.

137. For the 2016 federal election the first payment of public funding was [announced by the AEC](#) on 27 July 2016, less than four weeks after the election.

138. [Explanatory Memorandum](#), Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017, p. 30.

139. Parliament of Australia, '[Electoral and Other Legislation Amendment Bill 2017 homepage](#)', Australian Parliament website.



however more systematically incorporating third parties into the electoral donation and disclosure system is worthwhile.

The main issues with the Bill that have emerged from media reporting ultimately relate to the ways in which third party campaigners will be bound by the increased regulatory burden of annual reporting and ensuring donations from non-allowable donors are not used for political campaigning. While these provisions are consistent with the aims of the Bill to ensure there is no way to get around the foreign donation ban, the perception in the not-for-profit community is that the end result of the provisions will be to make it difficult for not-for-profit organisations to advocate on issues that are subject to political debate. Regardless of whether this is the policy intention of the Bill or simply an unanticipated effect it appears that the Bill will struggle to gain the support of the broader community.

### **Appendix: reported 2015–16 expenditure and public funding of parties**

<b>Party</b>	<b>Amount Paid</b>	<b>Public Funding</b>	<b>Difference</b>
Liberal Party of Australia <sup>(a)</sup>	\$66,728,474.00	\$24,203,154.00	\$42,525,320.00
Australian Labor Party	\$48,960,961.00	\$23,191,686.57	\$25,769,274.43
Australian Greens	\$14,560,316.00	\$6,717,055.98	\$7,843,260.02
National Party of Australia	\$10,424,718.00	\$3,261,589.61	\$7,163,128.39
Liberal Democratic Party	\$1,503,737.00	\$49,174.00	\$1,454,563.00
Christian Democratic Party (Fred Nile Group)	\$1,407,380.00	\$289,036.12	\$1,118,343.88
Country Liberals (Northern Territory)	\$860,814.00	\$182,805.69	\$678,008.31
<b>Nick Xenophon Team</b>	<b>\$706,205.00</b>	<b>\$1,245,236.15</b>	<b>-\$539,031.15</b>
Australian Liberty Alliance	\$500,238.00	\$15,435.93	\$484,802.07
Katter's Australian Party	\$499,612.00	\$159,346.96	\$340,265.04
Family First	\$481,175.00	\$222,940.69	\$258,234.31
Animal Justice Party	\$386,136.00	\$34,445.73	\$351,690.27
Australian Christians	\$350,159.00	\$20,604.89	\$329,554.11
<b>Pauline Hanson's One Nation</b>	<b>\$294,870.00</b>	<b>\$1,745,369.28</b>	<b>-\$1,450,499.28</b>
Australian Sex Party	\$277,791.00	\$6,511.79	\$271,279.21
Shooters, Fishers and Farmers Party	\$248,110.00	\$17,856.17	\$230,253.83
Rise Up Australia Party	\$195,680.00	\$76,622.55	\$119,057.45
<b>Derryn Hinch's Justice Party</b>	<b>\$91,392.00</b>	<b>\$581,186.24</b>	<b>-\$489,794.24</b>
Jacqui Lambie Network	\$85,215.00	\$73,963.18	\$11,251.82
Australian Recreational Fishers Party	\$83,957.00	\$29,573.71	\$54,383.29
Australian Country Party	\$40,431.00	\$9,344.60	\$31,086.40
Glenn Lazarus Team	\$40,000.00	\$21,435.29	\$18,564.71
Help End Marijuana Prohibition (HEMP) Party	\$25,188.00	\$6,511.79	\$18,676.21
<b>Bullet Train For Australia</b>	<b>\$0.00</b>	<b>\$15,801.20</b>	<b>-\$15,801.20</b>

Source: AEC reported [public funding from the 2016 federal election](#) and Parliamentary Library analysis of [AEC annual returns data](#).

Notes: (a) Includes the Liberal National Party of Queensland.

Parties that received more public funding than their reported 2015–16 expenditure are bolded

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