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**Election Finance Law: Public
Funding, Donations and
Expenditure**

by

Rachel Callinan

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EXECUTIVE SUMMARY

This paper examines three areas of election finance law. First, the public funding of election campaigns. Second, the obligation on political parties, candidates and others to disclose the source of donations and third, the regulation of election expenditure: expenditure limits and disclosure of expenditure. The eight Australian jurisdictions represent the diversity in approach to election finance taken by Australian Governments. It ranges from virtual deregulation in SA and the NT to comprehensive schemes in several jurisdictions including the Commonwealth and NSW. A comparative table of Australian jurisdictions is contained in Appendix 1.

Part 1. Election finance law: public funding, donations and expenditure

In Part One, an overview of the three aspects of election finance is undertaken. A review of some of the current issues and reform proposals in each area is also included.

Part 2. New South Wales funding and disclosure scheme

In this Part, NSW election finance law is examined in detail: the public funding scheme (2.2), and the disclosure scheme that includes disclosure of both donations (2.3) and election expenditure (2.4). The Part commences with an examination of the development of the NSW funding and disclosure scheme (2.1).

Part 3. Federal funding and disclosure scheme

In Part Three, Federal election finance law is examined in similar detail to the NSW law. The public funding scheme (3.1), and the disclosure scheme that incorporates disclosure of donations (3.2) election expenditure (3.3) are examined, as well as the requirement for political parties and associated entities to file annual returns (3.4).

Part 4. Other Australian Jurisdictions

In Part Four, an overview of election finance law in the remaining Australian jurisdictions is undertaken. The schemes in Queensland (4.1) and the ACT (4.6) closely mirror the Federal scheme, incorporating public funding and disclosure of donations and expenditure. Western Australian (4.5) election finance law includes disclosure of donations and election expenditure. In Tasmania (4.3) and Victoria (4.4) only election expenditure is regulated. In SA (4.2) and the NT (4.7) the election finance issues examined in this paper are unregulated, although the South Australian Parliament is currently considering the introduction of a disclosure scheme.

Part 5. Overseas Comparisons

Election finance law in three countries is examined by way of comparison in Part 5. Those countries are New Zealand (5.1), the United Kingdom (5.2), and the United States of America (5.3). While some of the aspects of election finance law are similar to schemes found in Australia, there are also many differences.

Conclusion

The concluding remarks note the diversity in election finance law in Australia and overseas. Also noted is the constant need for reform of disclosure legislation to keep pace with the discovery and abuse of loopholes.

1. ELECTION FINANCE LAW: PUBLIC FUNDING, DONATIONS AND EXPENDITURE

This paper examines three areas of election finance law: public funding of election campaigns; disclosure of donations; and disclosure of, and limits on, election expenditure. The three areas are closely linked: the requirement to disclose donations is coupled with a requirement to disclose election expenditure; in NSW and Queensland, public funding is linked to the amount of election expenditure incurred by political parties; and disclosure and public funding are interconnected.

Some of these aspects of election finance have existed in Australia in some form or another for over a century. However, it wasn't until 1981 that the first comprehensive election finance scheme was adopted in NSW. Comprehensive schemes also now exist at the Federal level and in Queensland and the ACT. The Federal Government enacted its public funding and disclosure scheme in 1983 and Queensland and the ACT both established schemes based on the Federal scheme in 1994. Tasmania, Victoria and WA have only some aspects of these election finance laws while the NT and SA have none.

The paper examines the law in relation to Federal and State and Territory elections in Australia, but does not examine local government elections. Section 1 provides an overview of each of the areas of election finance and examines some current issues and reform proposals in relation to each. Sections 2 and 3 examine in detail the NSW and Federal funding and disclosure schemes, respectively. In Section 4 the remaining Australian jurisdictions are examined. A comparative table of Australian jurisdictions is contained in Appendix 1. Three overseas jurisdictions, New Zealand, the United Kingdom and the United States, are also examined for comparison. In the following introductory paragraphs the application of these areas of election finance laws is discussed.

The application of election finance law

The election finance areas examined in this paper relate to various individuals and organisations involved in the electoral process. The law applies principally to candidates, groups of candidates and registered political parties. The disclosure of donations and expenditure laws also apply to others including, donors, associated entities and 'third parties'. A brief description of these individuals and organisations is undertaken below. The relationship between Federal and State and Territory disclosure laws is examined in Section 1.2.1.

Registered political parties

Reference in this paper to a 'party' is a reference to a political party registered under relevant electoral legislation in each jurisdiction. In all jurisdictions, except the NT, electoral law provides for the registration of political parties.¹ Some parties are registered

¹ *Commonwealth Electoral Act 1918* (Cth), Part 11; *Parliamentary Electorates and Elections Act 1912* (NSW) Part 4A; *Electoral Act 1992* (Qld), Part 5; *Electoral Act 1985* (SA), Part 6; *Electoral Act 1985* (Tas), Part 4; *Constitution Act Amendment Act 1958* (Vic), Part V, Division 1A; *Electoral Act 1907* (WA), Part 3A; and *Electoral Act 1992* (ACT), Part 7.

in more than one jurisdiction. The overlap that this causes in relation to disclosure obligations is examined under the heading ‘Relationship between Federal and State disclosure laws’ in Section 1.2.1. To be eligible for registration a party must satisfy certain requirements. For example, to be eligible to register as a political party under NSW legislation, the party must have either, at least one member who is a Member of Parliament, or, a minimum of 750 members.² The party must be established on the basis of a written constitution that sets out the platform or objectives of the party.³

While it is generally not compulsory for political parties to be registered, most parties who meet the eligibility requirements do register, because unregistered parties do not qualify for the rights and entitlements in relation to elections and the electoral process that registration confers. For example, public funding, in the jurisdictions in which it is available (Federal, NSW, Queensland and the ACT), is only available to registered parties. Parties must be also registered before their names can appear on ballot papers.

Registration also attracts obligations under electoral legislation. For example, in the jurisdictions that have disclosure laws (Federal, NSW, Queensland, WA, and the ACT) registered parties are obliged to lodge returns disclosing information about donations and election expenditure.⁴ In NSW and WA registered and *unregistered* parties are subject to the disclosure requirements regarding donations and expenditure.⁵ Under Federal electoral law State and Territory branches or divisions of registered political parties are also obliged to comply with disclosure requirements, whether or not those branches or divisions are separately registered.⁶

Candidates

A reference in this paper to ‘candidates’ includes a reference to both candidates endorsed by a registered political party and independent candidates, unless otherwise stated. In all jurisdictions candidates must comply with the nomination procedures in order to contest an election.⁷ Candidates are then subject to the rights and obligations conferred by electoral

² The figure is 500 under Federal and Queensland legislation.

³ *Parliamentary Electorates and Elections Act 1912* (NSW), s 66A.

⁴ This is the case under Federal and Queensland legislation.

⁵ *Election Funding Act 1981* (NSW), ss 83 and 4. Note that a ‘party’ is defined as ‘a body or organisation, incorporated or unincorporated, having as one of its objects or activities the promotion of the election to Parliament of a candidate or candidates endorsed by it or by a body or organisation of which it forms a part’: s 4. A similar definition is contained in the WA legislation: *Electoral Act 1907* (WA), s 4.

⁶ AEC, *Federal Registration of Political Parties*, Commonwealth of Australia (2001), p 21.

⁷ *Commonwealth Electoral Act 1918* (Cth), Part 14; *Parliamentary Electorates and Elections Act 1912* (NSW), Part 5, Divisions 4 and 5 (note that in NSW candidates must also be registered under Part 4, Division 2 of the *Election Funding Act 1981* (NSW)); *Electoral Act 1992*, (Qld), Part 6, Division 2; *Electoral Act 1985* (SA), Part 8, Division 1; *Electoral Act 1985* (Tas), Part 5, Division 3; *Constitution Act Amendment Act 1958* (Vic), Part 5, Division 4; *Electoral Act 1907* (WA), Part 4, Division 2; *Electoral Act 1992* (ACT), Part 9, Division 1; and *Northern Territory Electoral Act 1995* (NT), Part 6.

legislation, such as eligibility for public funding and the requirement to disclose donations and expenditure.

Groups

This paper also makes reference to ‘groups’. The definition of a group varies between jurisdictions but generally, it refers to a group formed by a number of candidates, generally of the same party, standing for election for an upper house (or the Legislative Assembly in the ACT). The names of candidates within a group are together on the ballot paper and particular rules in relation to the distribution of preferences apply. Depending on the jurisdiction, groups must either be registered,⁸ or simply grouped upon request.⁹

Groups are able to receive public funding under the Federal, NSW and ACT schemes. Groups also have disclosure obligations under those schemes, as well as under the WA scheme. For example, under the NSW scheme, public funding for Legislative Council elections is available to groups endorsed by parties and independent groups. These groups are also obliged to file disclosure returns after each election containing information about donations and election expenditure.

Others

As well as candidates, groups and parties, other individuals and entities are also subject to disclosure of donations and expenditure requirements, because of their participation in the electoral process.

- Third parties who make donations over certain limits are required to disclose details of donations under the Federal, NSW and ACT schemes.
- Third parties who make election expenditure over certain limits are also subject to disclosure requirements under the Federal, NSW, Queensland, WA and ACT schemes.
- Broadcasters and publishers are under certain obligations to disclose election expenditure under the Federal and ACT schemes.
- Organisations controlled by political parties, referred to as ‘associated entities’, are subject to disclosure requirements under the Federal, Queensland, WA and ACT schemes.

⁸ *Election Funding Act 1981* (NSW), Part 4, Division 2.

⁹ *Commonwealth Electoral Act 1918* (Cth), s 168; *Electoral Act 1907* (WA), s 80; and *Electoral Act 1992* (ACT), s 115.

1.1 PUBLIC FUNDING OF ELECTION CAMPAIGNS

Public funding for election campaigns is currently available for Federal elections, and State and Territory elections in NSW, Queensland and the ACT. NSW was the first jurisdiction to establish public funding in 1981. This was followed by the introduction of the Federal scheme in 1983. The public funding schemes in Queensland and the ACT mirror the Federal scheme and were introduced in 1994 and 1992 respectively. Most of the remaining Australian jurisdictions have considered introducing public funding at one time or another, and some political parties in those jurisdictions have the introduction of public funding as current policy.¹⁰ There are no initiatives presently under way to introduce new schemes.

Public funding for election campaigns provides parties and candidates with a subsidy to the cost of contesting elections.¹¹ There are three main interrelated rationales, or aims, of public funding. First, it is argued that as the electoral system is the backbone of our democracy, political parties should have sufficient funds to be able to participate in the electoral process. Second, public funding is a means of ensuring a level of equality between election participants, so candidates are not simply elected because they have a lot of money to spend on their campaigns. Third, public funding is seen as necessary to ensure that election participants are not only sufficiently funded, but that their funds come from appropriate sources. Public funding is seen as an appropriate source and one that eases reliance on a potentially inappropriate source: donations.

The cost of election campaigning increased markedly during the 1970's. A particular cost factor was the use of radio and television advertising. Reliance by parties on traditional sources, such as membership fees and donations no longer ensured sufficient funds. One political analyst, Dr Ernest Chaples noted in the context of the introduction of public funding in NSW, that the ALP which traditionally relied on donations for union affiliates, had found itself hard pressed to raise sufficient monies to remain competitive.¹² Public funding was seen as necessary to ensure that parties could run a good election campaign without the threat of financial difficulty.

As examined in Section 2.1, the introduction of the first public funding scheme in NSW in 1991 was controversial. However, by the time the Federal scheme was introduced in 1983, the controversy had died down and the Federal scheme was introduced with very little debate. Despite some criticisms of public funding, which are discussed below, there now seems to be general acceptance of public funding in those jurisdictions that have it, and

¹⁰ For example, the Victorian ALP has a policy to introduce limited public funding of elections: ALP (Victoria), 'Labor New Solutions 1999 – Labor's plans for the first decade of the new century', ALP Victorian Branch Platform, 1999, p 38. It has also been reported recently that the WA Labor Government has supported a proposal for the introduction of public funding and may provide for public funding in a package of electoral reforms currently being developed: 'McGinty backs state poll funding', *The Australian*, 20/7/01, p 6.

¹¹ Australian Electoral Commission, *Funding and Disclosure Report – Election 1998*, Commonwealth of Australia (2000), p 5.

¹² Chaples E, 'Public funding of elections in Australia', in Alexander H (ed), *Comparative Political Finance in the 1980's*, Cambridge University Press, 1989, p 76.

moves to introduce it in other jurisdictions.

1.1.1 Overview of public funding¹³

Public funding is retrospective: it is granted after an election and in accordance with the number of votes polled by the claimants at that election. Funding for Federal and ACT elections is automatic, while in NSW and Queensland those eligible for funding must apply to the relevant electoral body for funding. In NSW and Queensland funding is also limited to the amount of election expenditure actually incurred by the claimant.¹⁴

Who can receive public funding?

Under the Federal scheme funding is available to the candidates for both Houses and groups for the Senate. The Queensland scheme provides funding to candidates, and in the ACT funding is available to parties, non-party groups, ballot groups and independent candidates. In NSW, funding is available to parties, independent groups and independent candidates for the Legislative Council and candidates for the Legislative Assembly.

Eligibility threshold

In all four schemes, a 4% threshold of votes must be met before a claimant is entitled to funding. For example, under the Federal scheme, a candidate or Senate group must win at least 4% of the formal first preference vote in the electorate contested to be eligible for election funding. For Senate groups, it is sufficient if the group as a whole wins at least 4% of the votes.

Determining amount of funding

In the Federal, Queensland and ACT schemes, the amount of funding is determined by the number of first preference votes received by the claimant, multiplied by the rate set for public funding in those jurisdictions. The rate varies in each scheme. Under the Federal scheme those eligible are entitled to \$1.79026 per first preference vote for an election held between 1 July 2001 and 31 December 2001. In Queensland the rate is \$1.23995 for an election in the 2001/2002 financial year and in the ACT the rate \$1.20854 for an election held in 2001.

¹³ Each public funding scheme is described in more detail in the sections of this paper concerning those jurisdictions.

¹⁴ The Federal public funding scheme operated on a reimbursement basis until 1995 when the scheme was amended by the *Commonwealth Electoral Amendment Act 1995* (Cth) to establish the automatic system that operates today. Under the reimbursement scheme funding entitlements were calculated according to the number of votes as well as the actual expenditure incurred. Parties and independent candidates were required to submit evidence of campaign expenditure and the final payment could not exceed expenditure actually incurred: Australian Electoral Commission, *Funding and Disclosure Report – Election 1996*, Commonwealth of Australia (1997), p 3.

In NSW the scheme is a little more complex. As explained in detail in Section 2.2, there are two main election campaign expenditure funds. The Central Fund relates to Legislative Council elections and the Constituency Fund relates to Legislative Assembly elections. The funds are distributed in accordance with formulas relating to the total amount available to the relevant fund, the primary votes polled by the claimant and other variables.

Example of public funding distribution – 1999 NSW State Election

To illustrate the amount of funding involved, the funds distributed after the 1999 NSW State election are set out below. The total amount distributed from the Central Fund was \$7,256,216. It was distributed in the following way:¹⁵

Party	% of eligible primary votes ¹⁶	Entitlement \$
Australian Labor Party (NSW Branch)	44.75	3,247,371
Liberal Party NSW & National Party NSW	32.89	2,386,511
Pauline Hanson's One Nation	7.62	552,735
Australian Democrats (NSW Division)	4.82	349,686
Christian Democratic Party (Fred Nile Group)	3.80	276,037
The Greens	3.49	253,415
Reform the Legal System	1.21	87,470
Unity	1.17	85,200
Outdoor Recreation Party	.25	17,791

¹⁵ Distribution of the Central Fund pursuant *Election Funding Act 1981*, s 62 - Legislative Council Election, 27 March 1999. This information is taken from the SEO web site at: www.seo.nsw.gov.au (accessed 1/9/01, copy with author).

¹⁶ The percentage of eligible primary votes is the ratio of the primary votes of a group of candidates securing the return of the deposit, to the total primary votes of all groups of candidates securing the return of the deposit.

The total amount distributed from the Constituency Fund was \$3,628,110.¹⁷ The table below shows the distribution of the Constituency Fund in relation to three electorates.¹⁸

Electoral District	Candidates	Party	% eligible primary votes ¹⁹	Entitlement \$
Albury	GLACHAN, Ian	LIB	43.00	16,774
	DOUGLAS, Claire	IND	34.85	13,596
	O'DONNELL, Mike	ALP	17.60	6,866
	SMITH, Michael	PHO	4.55	1,773
Blacktown	KING, David	AD	7.85	3,062
	SHERWOOD, Ed	AAF	-	-
	BAWDEN, Bob	CDP	5.87	2,290
	HOLDER, Rick	LIB	20.40	7,959
	GIBSON, Paul	ALP	56.11	19,505
	NIXON, Bill	PHO	9.76	3,809
Maroubra	HASSAN, Nagaty	UP	-	-
	FAULKNER, Tio	LIB	25.84	10,081
	CORBEN, Paul	AD	-	-
	McEWEN, Jack	PHO	5.23	2,038
	CARR, Bob	ALP	63.48	19,505
	PATON, Cecilia	AAF	-	-
	BASTABLE, Jules	GNS	5.45	2,126

Arguments in support of and against public funding²⁰

The arguments in support of the public funding of election campaigns are summarised below.

- As political parties perform functions that are crucial to our parliamentary democracy, they need to be properly funded so they can perform these functions properly.
- Public funding addresses the financial inequality between candidates and parties.

¹⁷ Election Funding Authority of New South Wales, *Annual Report to Parliament of the Election Funding Authority of New South Wales for the Year Ended 30 June 2000*, p 8.

¹⁸ Distribution of Constituency Fund pursuant *Election Funding Act 1981*, s 67 – General Election, 27 March 1999: This information is taken from the SEO web site at: www.seo.nsw.gov.au (accessed 1/9/01, copy with author).

¹⁹ The ratio of the primary vote of the candidates who secured the return of their deposit to the total primary votes of all candidates in the electorate who secured the return of their deposits.

²⁰ Many of these arguments were set out in: United Kingdom, Parliament, Committee on Standards in Public Life, *The Funding of Political Parties in the United Kingdom*, Volume 1: Report (Lord Neill of Bladen Chairman), 1998, ¶ 7.19 - 7.23 (referred to in this paper as 'the Neill Committee'). Note that the Neill Committee examined the issue of public funding of political parties generally and not just in relation to campaigning. The Neill Committee Report is examined in further detail in Section 5.2.

- Public funding means parties do not have to be reliant upon large donors and would therefore be immune, and would be seen to be immune, from outside (and potentially improper) influence.
- Public funding indicates to the public that political parties are valuable, indeed essential, institutions in a democratic society.
- Disclosure requirements for donations discourage people from donating. This limits the ability of candidates and parties to raise funds, therefore public funding is necessary.
- Parties would be able to fulfil their essential functions in the democratic system more fully and effectively because fund could more appropriately be spent on matters such as policy development and research than expensive campaigning.

The arguments against the public funding of election campaigns and criticisms of the current schemes are summarised below.

- Public (ie taxpayer) money should not be spent to support parties with whose views individual taxpayers may not agree.
- Political parties are not the highest priority in terms of public expenditure.
- Public funding in Australia is only available after an election, to parties and candidates receiving more than 4% of the votes in proportion to their popularity. This does not result in any equality between candidates, because it assumes that candidates have sufficient private resources to mount electoral campaigns in the first place and takes no account of the amount of private funding received in the course of the campaign.²¹
- This in turn leads the current party system to ossify: existing parties are supported out of the public purse and new parties find that they have to struggle to break into the funding scheme. It entrenches existing parties to the detriment of new and small parties.
- Parties are able to sufficiently fund themselves through membership and donations.
- Parties might be tempted to decrease fundraising efforts at the grassroots level and thereby decrease the amount of ‘civic engagement’ in the political process.
- The disclosure of donations schemes that are now in place in most Australian jurisdictions (except SA and the NT) are sufficient to ensure that campaign funds come from appropriate sources.

²¹

Laws of Australia, Volume 21, Human Rights, 21.4 [27].

1.1.2 Current public funding issues

Does public funding promote equity?

It has been suggested that the Federal public funding scheme does not promote equality between candidates as is intended. For example, it has been argued that as public funds are only available after the election to parties and candidates receiving more than 4% of the votes, in proportion to their popularity, '[t]his does not result in any equality between candidates, for it assumes that candidates have sufficient private resources to mount electoral campaigns in the first place and it takes no account of the amount of private funding received in the course of the campaign'.²²

This criticism is applicable to the three other Australian public funding schemes as they all operate retrospectively in relation to the number of votes received by a candidate at an election. In a recent submission to the Australian Parliament Joint Standing Committee on Electoral Matters (JSCEM), the Australian Electoral Commission (AEC) noted the risk of spending money on a campaign in the hope of recouping that money after an election is too big a risk to bear for many smaller parties and independent candidates.²³ The AEC also suggested that the difficulty in addressing criticisms against the current system of public funding is identifying a system that would deliver equitable funding and not be open to misuse.²⁴

Profiteering on public funding

The potential for profiteering on election funding has also been raised as a criticism of the various schemes. The AEC considered this issue in the context of the Federal scheme and the 1998 Federal election. It pointed out that '...the validity of such concerns is founded on the fact that the introduction of the election funding scheme in 1983 was intended to assist candidates and political parties defray the direct costs incurred in a federal election campaign.'²⁵ When a party spent less on its election campaign than it receives in funding this purpose is undermined.

When it was introduced, the Federal scheme operated on a reimbursement basis similar to the Queensland and NSW schemes, where a party received the lesser of the entitlement based on votes polled and the amount of expenditure.²⁶ Despite concerns about profiteering, the AEC strongly opposed a return to the reimbursement scheme. It argued that the reintroduction of direct reimbursement of campaign expenses would not prevent profiteering as there are various means by which a party or candidate could evidence

²² *ibid.*

²³ Australian Electoral Commission, *Submission to the Joint Standing Committee on Electoral Matters Inquiry into Electoral Funding and Disclosure*, 17/10/00.

²⁴ *ibid.*

²⁵ AEC (*Report - Election 1998*), n 11, p 5.

²⁶ See Sections 2.2 and 4.1.

campaign expenses for the purposes of funding.²⁷

It is interesting to note also that the reimbursement method whereby the payment of funds is aligned to actual expenditure has had some unpredictable effects, as illustrated by the 1991 NSW State election. At that election the Australian Democrats polled rather higher than they expected. The party had determined its election expenditure according to its own perceived chances of success. When it polled much higher anticipated the party's entitlement came to \$90,000 more than their expenditure, which they therefore were unable to receive. While this example sits comfortably with the underlying principle of public funding, the experience of the Call to Australia party in the same election does not. As election analyst, Antony Green writes: '...the lower than expected vote for Call to Australia also created problems for the party with its funding falling \$80,000 short of its expenditure.'²⁸

Introduction of full public funding

There have been calls over the years to increase the level of public funding. For example, NSW Greens MLC, the Hon Ian Cohen, has suggested that 'full public funding of political campaigns' be introduced. As previously noted, one of the aims of public funding is to reduce the need for political parties to raise funds, and in doing so, reduce their reliance on donations. The NSW Greens have, over recent years, expressed concern about the reliance of the major parties on corporate donations, which they argue, places undue influence on parties to create policy favourable to major donors. To this end Cohen has suggested that corporate donations should in fact be banned, and that to counteract the effect of this on the finances of political parties, full public funding of political campaigns should be introduced.²⁹ The independent MLC, the Hon Richard Jones, has also expressed support for full public funding of elections.³⁰

Distributing Federal public funding within a national political party³¹

Where public funding is payable in respect of votes given in an election for an endorsed candidate, payment is received by the agent of the registered political party rather than the endorsed candidate himself or herself. Funding is paid to the agent of the State or Territory branch of the party in the jurisdiction in which the endorsed candidate stood for election.³²

²⁷ AEC (*Report - Election 1998*), n 11, p 6.

²⁸ Green A, *The New South Wales State Election 1991*, NSW Parliamentary Library, Department of Government University of Sydney, 2000, p 41.

²⁹ NSWPD, per the Hon Ian Cohen, MLC, 3/5/00, p 5098. The proposal to ban corporate donations is discussed in further detail in Section 1.2.3(b).

³⁰ NSWPD, per the Hon. Richard Jones, MLC, 10/11/99, p 2575.

³¹ For further information see: Parliament of Australia, Parliamentary Library, *Bills Digest No 24 2001-02, Commonwealth Electoral Amendment Bill 2001*.

³² S 299. In relation to independent candidates and Senate groups, payment is made to the agent of the candidate or the Senate groups. For a Senate group endorsed by a registered political party, the payment is made to the agent of the State branch of the

Under specific provisions introduced in 1995, the Australian Democrats have appointed a 'principal agent' to receive all of the party's election funding, thus centralising the collection of their election funding.³³

The legislation also provides for the redirection of election funding payments from one party, or State/Territory branch, to another.³⁴ In order to redirect payments a notice must be lodged with the Electoral Commission requesting that payments that would otherwise be made to the agent of a party, or State/Territory branch, specified in the notice are to be paid instead to the agent of another party, or State/Territory branch, specified in the notice. This provision has been utilised by the ALP which reached an agreement between its Federal and State and Territory branches that the payment of all entitlements is to go to the National Secretariat. The Liberal Party has not lodged a similar agreement.

In August 2001, the Federal Government introduced the Commonwealth Electoral Bill 2001 to allow the agent of the Liberal Party of Australia to determine the distribution of election funding between the Federal Secretariat and the State and Territory divisions of the party. The bill proposed the amendment of the *Commonwealth Electoral Act 1918* to provide that the agent of the Liberal Party (commonly known as the Federal Secretariat) may, before polling day, provide a written notice to the AEC specifying the percentage of public funding that is the 'federal percentage', and the percentage that is the 'State percentage', for a specified division of the party. If such a notice has been provided, following the election the public funding for the party is to be paid accordingly, with the 'federal percentage' being paid to the Federal Secretariat, and the 'State percentage' being paid to the relevant State/Territory division of the party. If no such notice has been lodged, following the election, public funding for the Liberal Party is to be paid to the Federal Secretariat, rather than to the State/Territory divisions.³⁵

The Liberal Party described the amendments as necessary to ensure that public funding is paid to the Federal Secretariat rather than to agents of the State and Territory branches of the party. The move was met with a number of criticisms as noted below.

- Media reports also describe the move as an attempt by the Federal Secretariat of the Liberal Party to strengthen central party control over millions of dollars of election funding at the expense of the States.³⁶ One political commentator described it as a way to '...stop money going to the crazy Queensland division.'³⁷

party that is organised on the basis of the State or Territory in which the members of the group stood for election. However, if a Group is endorsed by the Australian Democrats payment is made to the principal agent.

³³ *Commonwealth Electoral Act 1918* (Cth), ss 299 and 288A. Australia (*Bills Digest No 24, 2001-02*), n 30, Background.

³⁴ Ss 299(5A), (5B) and (5C).

³⁵ Commonwealth Electoral Amendment Bill 2001, Explanatory Memorandum, Outline.

³⁶ 'Liberal split over election funds grab', *The Australian Financial Review*, 27/6/01, p 1.

³⁷ 'It just keeps going Howard's way', *The Sydney Morning Herald*, 27/9/01, p 2.

- The Federal Opposition has suggested that the amendment bill is a means of sidestepping internal disagreement over the issue in the Liberal Party. The Opposition has objected to the bill on the basis that the issue should be resolved internally, rather than by Parliament.
- It has also been suggested that the amendment is designed to ease the GST burden on payments from the State branches to the Federal Secretariat.³⁸

The Government decided not to proceed with the bill before Parliament was dissolved for the 2001 election when Opposition moves to debate the bill in the Senate, coupled with time constraints, threatened the passage of more essential Government legislation.³⁹

1.2 REGULATION AND DISCLOSURE OF DONATIONS

This section deals with disclosure of donations. Disclosure of donations schemes exist in five Australian jurisdictions: Federal, NSW, Queensland, WA and the ACT. While the disclosure schemes also incorporate disclosure of expenditure, expenditure is dealt with separately in Section 1.3. The first part of this section contains a general overview of the nature of the five disclosure schemes, each of which is examined in detail in other sections of this paper. A comparison of the schemes is contained in the comparative table of Australian jurisdictions in Appendix 1.

In the second part of this section, current issues in disclosure law and related reform proposals are examined. First, the nature of the problem posed by donations – the potential for undue influence - as the main rationale for disclosure laws, is explored. The major current issues surrounding disclosure concern instances of political parties allegedly failing to comply with disclosure laws through the use of fundraising events and ‘front organisations’. These issues, the relevant law and related reform proposals are examined. Other reform proposals, all designed to promote the goal of full disclosure, are also reviewed. These are: tightening the prohibition on anonymous donations; capping the level of donations; requiring early disclosure of large donations; restricting corporate donations; and banning foreign donations.

1.2.1 Overview of disclosure schemes

Comprehensive disclosure schemes were first introduced under NSW and Federal legislation in the early 1980’s. Queensland, WA, and the ACT followed suit with comprehensive schemes in the 1990’s. There are many similarities between the schemes, particularly as the Queensland and ACT schemes are modelled on the Federal scheme. There are no restrictions on donations or disclosure requirements in SA, Tasmania, Victoria

³⁸ Australia (*Bills Digest No 24*), n 31.

³⁹ ‘It just keeps going Howard’s way’, *The Sydney Morning Herald*, 27/9/01, p 2.

or the NT, although legislation to establish a donation disclosure scheme is currently before the SA Parliament.⁴⁰

Who is required to disclose donation information?

The disclosure schemes centre on disclosure of donations received by candidates, groups and political parties. However, the disclosure net is cast wider than these main election participants, to ensure that all contributions made to them are accounted for. Therefore, other individuals and entities are also required to disclose donations made and received. While there is variation between the five schemes, disclosure is generally required by:

Main election participants

- Candidates
- Groups
- Registered political parties

Other participants

- Third parties who make donations
- Third parties who incur election expenditure
- Associated entities

Candidates, groups and registered political parties are essentially required to make full disclosure of money and gifts over certain thresholds that they have received within the disclosure period. The aim is to ensure that the financial aspect of their participation in the electoral process is ‘transparent’. Definitional issues, and registration and nomination requirements of candidates, groups and registered political parties is examined in Section 1.1.

The ‘other’ individuals and organisations listed above are required to make disclosure because of their participation in the electoral process. This participation may involve making donations to the candidates, groups and parties, incurring election expenditure on their behalf, or otherwise providing assistance. To ensure the transparency of the financial dealings of the main electoral participants, the assistance provided to them by these other individuals and entities is required to be transparent as well.

The term ‘third parties’ refers to individuals or organisations that are not candidates, groups, parties or associated entities such as, lobby groups and individual, corporate or institutional supporters. There are two types of disclosure required by third parties. First, disclosure of donations received by third parties who incur election expenditure (all schemes) and second, disclosure by third parties who donate to candidates, groups and parties (Federal, NSW and ACT schemes). An ‘associated entity’ is an organisation such as a company, trust fund or foundation that is closely associated with a political party, operating for that party’s benefit. The Federal, Queensland and ACT schemes require such entities to file annual reports containing details of certain donations made and received. In the WA scheme associated entities are required to file disclosure of donations returns annually. Third parties and associated entities are examined in further detail in the current issues part of this Section (Subsection 1.2.3).

⁴⁰ See Section 4.2 of this paper for further detail.

How and when is disclosure made?

Disclosure returns

The usual form of disclosure is a document called a ‘return’ or ‘declaration’ filed with the relevant electoral body in each jurisdiction.⁴¹ Disclosure returns must generally be filed within a specified time period after each election. There are some instances however, where disclosure returns must be filed annually. In WA parties and associated entities must lodge annual disclosure returns. In the ACT, annual disclosure returns are required of people who make donations over certain thresholds to a party, ballot group, MLA or associated entity.

Annual returns

The Federal, Queensland and ACT schemes require political parties and associated entities to disclose information about donations in the ‘annual returns’ that they are required to file, rather than in specific disclosure returns. These annual returns also contain other information about the financial affairs of parties and associated entities. Like disclosure returns, an annual return must be made in the approved form and filed with the relevant electoral body within a specified time period.

Disclosure period

The period of time for which donations must be disclosed varies, depending on the jurisdiction and who is under the obligation. It also varies according to whether disclosure is made in the form of a disclosure return filed after an election or annually, or in an annual return. For example, in NSW, candidates, groups and parties are required to file disclosure returns after an election. The disclosure period ends on the 30th day after an election for candidate, groups and parties, but the commencement date varies. For candidates and parties who contested the previous general election, the period commences the day following polling day for the previous general election. For other candidates the disclosure period commences the day that is 12 months before the day on which the candidate nominated for election at the current election. For groups the period commences the day of nomination for the current election. Where a disclosure return must be filed annually, or disclosure is made in an annual return, the disclosure period is the financial year.

⁴¹ In some jurisdictions the same document is used to make disclosure of expenditure as well, as discussed in Section 1.3.

Definition of donations

Donations, or ‘gifts’ as they are generally referred to in legislation, are generally made in the form of money. However, gifts are broadly defined in all schemes, to capture most forms of benefit that can be conferred on a candidate, group or party for the purpose of promoting electoral success. For example, under the NSW scheme, a ‘gift’ means as any disposition of property (ie money, goods, shares, a licence, discharge of a debt etc) made by a person to another person (except by will) being a disposition made without consideration in money or money’s worth or with inadequate consideration. It includes the provision of a service (other than volunteer labour) for no consideration or for inadequate consideration. It also includes an amount paid to a person as a contribution, entry fee or other payment to participate in a fund-raising venture or function. However, it does not include party membership subscriptions and gifts to a candidate made in a private capacity for the candidate’s personal use, if the candidate has not (and will not) use the gift solely or substantially for a purpose related to an election.

What information must be disclosed?

Basic information

The disclosure schemes require that some basic information (which does not identify the donor) about *all* gifts must be supplied to the relevant electoral body, by those under an obligation to make disclosure. In the Federal, Queensland, WA and ACT schemes, candidates and groups⁴² must disclose the total amount or value of all gifts and the number of persons who made the gifts. In the ACT, the amount of each gift and the date on which it was received must also be included. The NSW scheme requires that details of the number and monetary range of all contributions must be shown.⁴³

Details of donations over certain limits

Specific details of the source of donations received, over certain monetary thresholds, must also be disclosed.⁴⁴ When the issue of disclosure on donations is discussed it is usually this specific, identifying, form of disclosure that is referred to. Donations over the threshold amounts are considered large enough to be of potential influence, therefore the source must be disclosed. The thresholds in relation to various election participants in each scheme are set out in the following table.

⁴² The Queensland disclosure requirements do not apply to groups.

⁴³ Election Funding Authority of New South Wales, *The Election Funding Authority Handbook – Guide for Making a Claim for Payment and Obligations for Disclosing Income and Expenditure*, 1999, p 4.

⁴⁴ Under the Federal and ACT scheme, people who make donations to candidates, groups and parties must also disclose specific details of those donations, which, of course, reveals their identity to the electoral authority.

	Federal	NSW	Qld	WA	ACT
Candidates	\$200	\$200	\$200	\$1,600	\$200
Groups	\$1,000	\$1,000	-	\$1,600	\$200
Parties	\$1,500	\$1,500	\$1,500	\$1,600	\$1,500
Associated entities	\$1,500	-	\$1,500	\$1,600	\$1,500
Third parties who incur election expenditure ⁴⁵	\$1,000	\$1,000	\$1,000	\$1,600	\$1,000
Third parties who donate to: ⁴⁶					
• A candidate	\$200	\$200	-	-	\$200
• A group	\$200	\$1,000	-	-	\$1,500
• A specified body	\$1,000	-	-	-	\$1,500
• A party	\$1,500	\$1,500	-	-	\$1,500

Relevant details: In all schemes the relevant specific details that must be provided are the date on which the gift was received, the amount or value of the gift and the name and address of the person who made the gift. In all schemes, except the NSW scheme, further specific details are required in relation to gifts made by, or on behalf of, an unincorporated association, trust fund, or a foundation. For example in relation to an unincorporated association, the name of the entity and the names and addresses of the members of the executive committee of the association must be supplied.

Multiple donations: All schemes recognise the potential for a person or organisation to make several donations below the disclosure threshold that would avoid disclosure of the source of donations. The schemes therefore generally provide that the sum of two or more gifts from the same source shall be added, and the aggregate shall be taken as one gift for the purpose of determining whether the disclosure threshold has been met.

Ban on anonymous donations over certain thresholds

In the five schemes, it is unlawful for the main election participants to receive anonymous gifts over certain limits. For example, under Federal legislation it is unlawful for political parties and groups to accept anonymous donations of \$1,000 or more, and for candidates to accept anonymous donations of \$200 or more.⁴⁷ In NSW the thresholds are \$1,500 for parties, \$1,000 for groups and \$200 for candidates. Similar thresholds exist in Queensland and the ACT, and in WA a single threshold of \$1,600 applies to parties, candidates and groups. In the jurisdictions without disclosure schemes, there are no restrictions on anonymous donations.

⁴⁵ ie, third parties who incur election expenditure over certain thresholds must disclose donations they received that are over the threshold amounts listed in the table.

⁴⁶ ie, third parties must disclose donations they make to certain election participants over the threshold amounts listed in the table.

⁴⁷ Note that the AEC has recommended that the prohibition on the receipt of anonymous donations be extended to associated entities on the same basis as for those made to registered political parties: AEC (*Report - Election 1998*), n 11, Recommendation 7, p 15.

A gift will be considered anonymous unless:

- (a) The name and the address of the donor⁴⁸ are known to the person receiving the gift, or
- (b) At the time when the gift is made, the person making the gift gives the person receiving it, his or her name and address, and the person receiving it has no grounds to believe that the name and address are not correct.

Relationship between Federal and State disclosure laws⁴⁹

Federal disclosure laws apply to parties registered under the *Commonwealth Electoral Act 1918* and to candidates and groups who contest Federal elections. They also apply to State and Territory branches or divisions of parties registered under the *Act*, whether or not those branches or divisions are themselves registered under the *Act*.⁵⁰

NSW, Queensland, WA and ACT disclosure laws apply to parties registered in those jurisdictions and to candidates and groups contesting elections in those jurisdictions (the NSW and WA laws also apply to unregistered parties).

For political parties registered only in one jurisdiction their disclosure obligations are clear-cut; they must simply comply with the disclosure requirements of the jurisdiction in which they are registered.⁵¹ For example, the Outdoor Recreation Party was formed to contest the 1999 NSW election and is registered as a political party under the NSW *Parliamentary Electorates and Elections Act 1912*.⁵² It is therefore obliged to make financial disclosure under the NSW *Election Funding Act*, but has no obligations under federal laws.

As many political parties are registered in more than one jurisdiction, and the major political parties have branches registered in all jurisdictions, there is some overlap of disclosure requirements. Parties may be required to submit more than one disclosure return (or annual return, as the case may be). For example, the ALP (NSW Branch) is registered under NSW legislation⁵³ and also under the Federal electoral legislation.⁵⁴ The NSW ALP

⁴⁸ In regard to 'name and address', if the donor is an unincorporated association, or a trust fund or foundation, specific details are required to identify the organisation.

⁴⁹ This discussion applies to disclosure of expenditure in those jurisdictions that require it in all jurisdictions except SA and the NT.

⁵⁰ AEC (*Federal Registration of Political Parties*), n 6, p 21.

⁵¹ Unless the party is a branch or division of a political party registered under the Federal legislation (and is itself not registered under the Federal legislation), in which case it must also comply with Federal requirements.

⁵² Registered as at 13 June 2001.

⁵³ *Parliamentary Electorates and Elections Act 1912* (NSW), Part 4A. An application for registration must state whether or not the party wishes to be registered for the purposes of the *Election Funding Act 1981*(NSW).

⁵⁴ Branches of the ALP are also registered in all other States and Territories and under the Federal Act.

is therefore under an obligation to make financial disclosure under both the NSW scheme, to the State Electoral Office, and under the Federal scheme, to the AEC. This would be the case even if the NSW Branch were not registered under Federal legislation. As a branch of a party (ie the ALP) registered under the Federal legislation, it would be required to comply with disclosure obligations whether it were separately registered or not.

When Queensland and the ACT introduced their disclosure schemes, the issue of doubling up was considered. It was decided that legislation that mirrored the Federal scheme would be introduced to lessen the impact of disclosure requirements. The disclosure requirements are similar and therefore less onerous to duplicate.

1.2.2 Donations and undue influence

There are two main rationales for requiring disclosure of the source of donations received by candidates, and parties. The first is based on the public's right to know. In this regard, the NSW Joint Committee Upon the Public Funding of Election Campaigns, in recommending the establishment of the NSW scheme, stated that:

[t]he Committee is firmly of the view that giving money to a party to assist in its pursuit of public office is an involvement in the electoral process. No privacy should be attached to this involvement: the electorate has a right to know who is providing funds for parties and candidates seeking their votes.⁵⁵

The Committee expressed the opinion that disclosure is an essential ingredient of public subsidies to political parties, while also recommending that disclosure be required of parties who did not receive public funding.⁵⁶

The second, related, rationale concerns preventing the use of donations as a means of influencing political decision-making. It is in the context of this second rationale that the donation of money and other gifts to candidates and political parties has become an increasingly contentious issue over the past few decades.

Individuals and organisations have a variety of motives for making donations, not least of which is the desire to support the party or candidate of their choice. The Australian Democrats recently stated its opinion that '...in most cases donors appear to make donations to political parties for broadly altruistic purposes, in that the donor supports the party and its policies, and is willing to donate to ensure the party's candidates and policies are represented in parliament.'⁵⁷ While this is undoubtedly the case, it is also clear that some people do not donate for purely altruistic purposes, and in fact make donations in an attempt to influence political decision making in some way or another.

⁵⁵ NSW, Parliament, Joint Committee of the Legislative Council and Legislative Assembly Upon Public Funding of Election Campaigns, *Report* (EN Quinn, MP, Chairman), NSW Parliament, 1980, p 32.

⁵⁶ *ibid.*

⁵⁷ Australian Democrats, *Submission to the Parliament of Australia Joint Standing Committee on Electoral Matters Funding and Disclosure Inquiry*, October 2000, p 7.

Knowledge of the source of donations raises the spectre of undue influence, however the extent of the problem is unclear. For all the media reports of allegations of undue influence and corruption, there have been very few convictions for related offences or even inquiries into allegations. The NSW Independent Commission Against Corruption Investigation into North Coast Land Development in 1990 is the only instance where ICAC has considered the issue of political donations in any detail.⁵⁸ ICAC did not find that any donations investigated had the effect of influencing party decision-making. However, the fact that all donations in question were handled in a manner to avoid disclosure obligations and that attempts to purchase influence by donations had been made, was noted.⁵⁹

While denying allegations of undue influence, some corporate donors have acknowledged that their donations have been successful in buying them access to politicians.⁶⁰ The payment of large fees to attend fundraising dinners or 'round table' discussions with politicians is one clear example of donations buying access. Another, more concerning example, is the case of a donor making regular large donations to a particular MP to build a rapport, or 'open the channels of communication'.

The true scope of the use of donations to affect political decisions making will probably never be publically known. However, it is not crucial that it be established in light of the point noted by Deborah Cass and Sonia Burrows, that the purpose of disclosure laws is to preserve the integrity of the political process by preventing not just the *actuality*, but also the *imputation* or *perception* of corruption. In this regard they note that:

[b]y ensuring that the public is aware of the sums of money gifted to political parties, the public is able to judge the legitimacy of legislative proposals and identify avenues of influence that may affect politician's judgments. This is the 'transparency furthers accountability' argument.⁶¹

As any hint of corruption undermines public confidence in the political process, '...transparency helps maintain public confidence and is a barrier to corruption of our political process.'⁶²

The main argument put by those who disagree with disclosure is that it infringes the privacy of donors. Consequently, it is argued, disclosure may discourage those concerned about

⁵⁸ NSW, Independent Commission Against Corruption, *Report on Investigation into North Coast Land Development*, July 1990, Part 5, Chapter 26.

⁵⁹ *ibid*, p 493.

⁶⁰ See for example ABC Television, *Stateline* – Quentin Dempster interview with Mr Harry Triguboff (Chief Executive Officer of the property development company *Meriton Pty Ltd*), 27/4/01.

⁶¹ Cass D, Burrows S, 'Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits', *Sydney Law Review*, Vol 22, 2000, p 479.

⁶² Parliament of Australia, Joint Standing Committee on Electoral Matters, *Report of the Inquiry into the Conduct of the 1998 Federal Election and Matters Related Thereto*, Canberra (2000), p 126.

privacy from making donations. The Australian Liberal Party and the National Party (federal body) have generally been opposed to the disclosure of donations, on the basis of privacy. Their opposition was noted by the NSW Joint Committee on Public Funding of Election Campaign in its report on the establishment of the NSW public funding and disclosure scheme, and by the JSCEM in its seminal report.⁶³ As the following discussion highlights, the concern for privacy has fuelled the practice of avoiding, or otherwise failing to comply, with disclosure obligations.

1.2.3 Current disclosure issues and reform proposals

Reform of disclosure laws has occurred on a rather ad hoc basis, through a number of amendments to all schemes since their introduction. The amendments have generally been in response to the discovery of ‘loopholes’ in the law, whereby donations can find their way into the coffers of candidates and political parties without being caught by disclosure requirements. In this regard, commentator Teresa Somes described the attitude of parties toward compliance with disclosure laws as being akin to ‘...that which exists with respect to taxation laws; that is, parties will seek to exploit avenues that achieve technical compliance with existing laws, but effectively evade its spirit.’⁶⁴ In particular, the practice of filtering donations through individuals and ‘front organisations’, and more recently, the fundraising activities of political parties, have revealed several loopholes in the disclosure schemes. While past amendments such as the introduction of third party disclosure in all schemes, and the requirement for associated entities to make disclosure in some schemes, have been successful in forcing disclosure in many instances, there are still loopholes and further reform is required to move closer to the goal of full disclosure. These issues are explored below.

Australian jurisdictions have consistently dealt with the potential for political contributions being used to exert undue influence, by requiring disclosure, not by restricting the size and source of donations. As the AEC recently stated, ‘[t]he system seeks full public disclosure of all such transactions rather than any prohibition.’⁶⁵ The only way in which donations have been restricted is by banning anonymous donations over certain limits, and this restriction fits with the principle of disclosure rather than representing a step toward more interventionist regulation of donations. However, the increasing size of corporate donations and the ever-looming spectre of undue influence, has motivated some individuals and minor parties to call for the introductions of restrictions on the size and source of donations. Reforms include limiting the size of donations, requiring immediate disclosure of large donations, banning corporate donations and banning foreign donations. These reform proposals are examined below.

⁶³ NSW, Parliament, (EN Quinn, MP, Chairman), n 55, p 32 and Australia, Parliament, Joint Standing Committee on Electoral Reform, (Dr RE Klugman, Chairman), *First Report*, September 1983, p 162-163.

⁶⁴ Somes T, ‘Commentary – Political Parties and Financial Disclosure Laws’, *Griffith Law Review* (1998) Vol 7 No 2, p 181.

⁶⁵ *Australian Electoral Commission*, ‘Submission to the Joint Standing Committee on Electoral Matters Inquiry into Electoral Funding and Disclosure’, Submission No 15 of 3/8/01, ¶ 2.6.1.

Reform has been prompted by several sources including recommendations made by the various electoral authorities and parliamentary inquiries, and through the media. The combination of political parties, donations and allegations of corruption is a favourite media topic and the media has served to raise public awareness of issues and highlighted the need for reform. Despite this, there does not appear to be much current momentum for reform of disclosure laws in NSW. There has also been very little comment on these issues in NSW Parliament, although reform proposals have occasionally been put forward by minor parties and independents (as discussed below). There is greater momentum for reform at the Federal level, where the AEC and the JSCEM review disclosure laws after each election, making recommendations for reform. Many of the reform proposals explored in the following paragraphs have been canvassed by these two bodies.

‘Front organisations’ and disclosure by associated entities

As well as donations given directly to candidates and parties, donations can also flow through companies, trusts and other entities closely associated with political parties. These organisations are sometimes referred to as ‘front organisations’ and can be used as a way of ‘filtering’ donations to avoid disclosure requirements. Some refers to the ‘...not uncommon practice of individuals donating to such organisations which in turn channel the funds to the associated party, enabling the party to avoid disclosing the original source of the funds.’⁶⁶

After the introduction of the first disclosure schemes in NSW and at the Federal level, the use of such organisations became more common.⁶⁷ In order to ensure the disclosure of donations made to political parties via these organisations, the Federal scheme was broadened to require disclosure by ‘associated entities’. The requirement for associated entities to disclose financial information was incorporated into the Federal disclosure scheme in 1995, through the passage of the *Commonwealth Electoral Amendment Act 1995*. The second reading speech of the bill provides some background to the introduction of the associated entity requirements:

A loophole in the existing legislation which is addressed by this bill relates to the operation of trust funds and similar organisations – including companies – which function wholly or mainly for the benefit of a registered political party or a number of political parties. ... The bill provides that trusts and related entities must provide annual reports to the Electoral Commission containing substantially the same information as parties are required to report. However, where an amount was paid to or for the benefit of one or more registered political parties from funds generated by capital of that entity, each person who contributed to the capital must be identified in the return. Following from this is a provision which makes these entities subject to compliance investigations by the Australian Electoral Commission.⁶⁸

⁶⁶ Some, n 64, p 176.

⁶⁷ *ibid.*

⁶⁸ CPD (HR), per the Hon FJ Walker, MP, Minister for Administrative Services, Second Reading speech of the *Commonwealth Electoral Amendment Bill (No.2) 1994*, 9/3/95, pp 1950-1951.

The Queensland and the ACT schemes contain similar provisions to the Federal legislation, and the WA scheme requires disclosure by associated entities in the form of an annual disclosure of donations returns. The NSW scheme does not have associated entity requirements.

Under the Federal scheme an associated entity is defined as: ‘an entity that is controlled by, or operates wholly or to a significant extent for the benefit of, one or more registered political parties’.⁶⁹ The definition was broadened in 1999 when the words ‘wholly or mainly’, were changed to ‘wholly or to a significant extent’. The ACT made a similar change this year.⁷⁰ The Queensland scheme retains the old Federal definition,⁷¹ and the definition in the WA *Electoral Act 1907*, is broader in that an associated entity can be an entity that operates for the benefit of one or more political parties.⁷² Organisations that fall within these definitions include ‘companies that hold assets for a political party, trust funds or fundraising organisations, groups and clubs’.⁷³

Under the Federal scheme, associated entities are required to provide the AEC with annual returns.⁷⁴ Of relevance to the issue of donations, the returns must state all amounts received by or on behalf of the associated entity during the financial year. The names and addresses of persons or organisations reaching a \$1,500 threshold under receipts or debts must be disclosed. Only sums of \$1,500 or more need to be taken into account in determining whether the \$1,500 threshold has been reached. Where a payment has been made to a party out of income earned from the capital of an associated entity, the details of all persons or organisations who deposited capital in trust with the associated entity must be disclosed. Donors to associated entities may be deemed to have made their donations direct to a party and therefore also have disclosure obligations.⁷⁵

⁶⁹ *Commonwealth Electoral Act 1918* (Cth), s 287. Although it is not specified in legislation the AEC requires registered parties to provide the AEC with contact details for all associated entities of the party: Australian Electoral Commission, *Funding and Disclosure Handbook for Political Parties 2000*, Part 3. This handbook can be viewed on the AEC web site at: www.aec.gov.au/disclosure/associated/main.htm (accessed 1/9/01).

⁷⁰ *Electoral Act 1992* (ACT), s 198. *Electoral Amendment Act 2001* (ACT), s 24. This change of wording was designed to close a loophole to capture entities ‘...that may contribute substantially to a political party but do not operate wholly or mainly for that purpose’: Electoral Amendment Bill 2001, Explanatory Memorandum, p 12.

⁷¹ *Electoral Act 1992* (Qld), s 287.

⁷² *Electoral Act 1907* (WA), s 175.

⁷³ Australian Electoral Commission *Funding and Disclosure Handbook for Associated Entities 2000* Commonwealth of Australia (2000), Introduction.

⁷⁴ *Commonwealth Electoral Act 1918* (Cth), s 314AEA.

⁷⁵ AEC (*Handbook for Associated Entities*), n 75, Introduction.

Similar requirements exist in the Queensland and ACT scheme. Under the WA scheme, associated entities must file an annual disclosure return containing basic details of all gifts and specific details of donations received of \$1,500 or more.

Since the introduction of the associated entity provisions, the AEC has noted the difficulty in determining whether a particular organisation falls within the definition. The problem was noted by Cass and Burrows: '[I]f the body in question said it was not, or simply refused to cooperate, the Commission was unable to do anything more, at least until after a regular compliance audit of the party which might take up to two years after the donations were made'.⁷⁶ Power to inspect relevant documentation of organisations for the purpose of determining whether an organisation is an associated entity was given to the Commission in 1998.⁷⁷ Despite this amendment, continuing interpretational difficulties led the AEC to recommend in its 1998 Election Report, that the definition of associated entities be clarified by inserting interpretations of the terms 'controlled', 'to a significant extent' and 'benefit' into the *Commonwealth Electoral Act*.⁷⁸ The AEC has also recently pointed out that 'uncertainty about the disclosure obligations of possible associated entities can arise where it is the members, or certain members, of a political party, as distinct from the political party itself, that are the beneficiaries of the operation of an organisation.'⁷⁹

Fundraising events

Fundraising events such as dinners and auctions are being used increasingly by political parties to raise money for election campaigns. Fundraising events can raise considerable amounts in the form of ticket sales, auction prices and specific donations. For example, it was recently reported that a table for 10 people at a fundraising dinner held by the Australian Democrats, cost \$25,000.⁸⁰

Where a party conducts its own fundraising event, donations passed on at the event are covered by disclosure rules and the source of donations a party receives of over \$1,500 must be disclosed by the party in its annual return. While many fundraising events are organised by parties themselves, increasingly, events are being organised by fundraising or service organisations on behalf of the party. An example of a fundraising organisation is *Markson Sparks*, a company that has conducted several ALP fundraising events.⁸¹

⁷⁶ Cass, n 61, pp 514-515.

⁷⁷ *Electoral and Referendum Amendment Act 1998* (Cth). This was recommended by the AEC in its 1996 election report: AEC (*Report – Election 1996*), n 14, recommendation 10, p 17. For background information about this amendment see Cass, n 61, pp 515-518.

⁷⁸ AEC (*Report – Election 1998*), n 11, recommendation 6, p 14.

⁷⁹ AEC, (*Submission to the JSCEM, 3/8/01*) n 65, ¶ 2.4.10.

⁸⁰ 'Democrats to review donations rules', *The Sydney Morning Herald*, 19/7/01, p 5.

⁸¹ See for example, 'You'll never guess who came to dinner', *The Sydney Morning Herald*, 12/6/01, p 7 which reported on a *SMH* investigation into a NSW ALP fundraising function organised by *Markson Sparks*.

While the utility of fundraising organisations and events as a method of raising funds may explain their use, it is commonly implied that they are used by parties as a deliberate ploy to avoid disclosure obligations. Events conducted by fundraising or service organisations present a problem for disclosure laws because they place the fundraising entity between the donor and the party to whom the donation is made, rendering the donation out of reach of disclosure laws. Some fundraising entities may fall within the definition of an ‘associated entity’, and therefore are required to make disclosure. However, others do not. As noted recently by the AEC:

Entities that operate on purely commercial terms with a political party, especially where the political party is only one of a number of its clients have no disclosure obligation [under the Federal scheme]. ...Legitimate, independent fundraisers could be used as a vehicle to suppress the names of major financial contributors to a party, much in the same way as associated entities were once able to be used to hide donor details.⁸²

Donations collected at a function organised in this purely commercial sense, are generally passed on to the political party by the organiser, in a lump sum and only the total net sum received from the fundraiser need be disclosed by the party. The identity of the actual donor does not have to be revealed.

The AEC has suggested the following reform proposal to ensure that donations made through fundraising events are disclosed. The recommendation is relevant to the other disclosure schemes as well.

It would be unreasonable to expect that organisations independent of political parties other than by way of arms-length commercial contracts should be required to publicly disclose the entirety of their operations. However, public disclosure depends upon the full reporting of all transactions by, or on behalf of, political parties. A practical compromise would be to require the full disclosure of that discrete portion of business that applies to transactions relating to the party. This could be achieved by requiring:

- disclosure of the transactions by the political party in its annual return, ie deem the transactions to have been made by the political party (in the same manner as transaction of campaign committees are already deemed); or
- disclosure by the service entity of all transactions relating to the political party (as a ‘limited associated entity’).⁸³

Another problem posed by the use of fundraising events is that there is currently some confusion whether ticket sales or the contribution of goods to an auction etc are categorised as a donation for the purpose of disclosure. This uncertainty effects the disclosure obligations of candidates, political parties, third parties and associated entities. The AEC has referred to this as a ‘grey area’ under the Federal scheme noting that ‘...not all paying guests are necessarily supporters of the party. Some attendees are there from purely commercial motivations in that they are purchasing access to and the opportunity to question and lobby key politicians. Still others attend in order to network with other

⁸² AEC (*Submission to the JSCEM, 17/10/00*), n 23, ¶ 7.2.

⁸³ *ibid*, ¶ 7.4 – 7.6.

attendees rather than from any direct interest.⁸⁴ The AEC also recognised the potential for donors to disguise their donations by providing money to another person or organisation who uses it to purchase a table at a fundraising event. It recommended that the only way to prevent this occurring is to deem all payments at fundraising events to be donations.⁸⁵

Fundraising and the NSW scheme

The NSW scheme attempted to deal with fundraising issues in its 1993 reforms. As well as introducing third party requirements in NSW for the first time (discussed below), the Election Funding (Amendment) Bill 1993 also introduced amendments to ensure that fundraising events are to be treated in a manner more consistent with reporting of other donations. The amendment provided that an amount paid to a person as a contribution, entry fee or other payment to entitle that, or any other person, to participate in or otherwise obtain any benefit from a fund-raising venture or function was to be considered a 'gift' if it formed part of the net proceeds of the venture or function. Such a gift therefore falls under the disclosure requirements.⁸⁶ The net proceeds of a fundraising venture or function together with a brief description thereof and the date on which it was held, must be shown in the declarations filed by candidates and parties.⁸⁷ The identity of a person or organisation spending more than \$1,500 at a party function, \$1,000 at a group function or \$200 at a candidate's function as an entry fee or other payment to entitle that or any other person or organisation to obtain any benefit must also be disclosed. These details are shown as a political contribution and are not included in details relating to fund-raising ventures or functions.⁸⁸

Lee Rhiannon, MLC of the NSW Greens, has suggested a number of reforms to the NSW scheme to ensure that the source of money raised at fundraising events is accounted for.⁸⁹ These suggestions are set out below.

- Corporate bodies should be required to disclose fundraising contributions and must provide the street address of their premises not just a PO Box and must tender a statement detailing the nature of their business.
- Political parties should be required to submit details of all fund raising ventures. Locations, participant numbers, ticket process, gifts donated for raffles, auctions and function costs should be disclosed.

⁸⁴ AEC (*Submission to the JSCEM, 3/8/01*), n 65, ¶ 8.4.

⁸⁵ *ibid.*

⁸⁶ S 87(1AA).

⁸⁷ EFA (*Handbook*), n 43, p 4.

⁸⁸ *ibid.*

⁸⁹ This information is taken from a statement made by Lee Rhiannon MLC displayed on the NSW Greens web site: www.nsw.greens.org.au/parl/lee/Street/Street00/docs/Misc/partydons.html (accessed 1/9/01, copy with author).

- The EFA should be given the power and resources to carry out random audits of fundraising events.
- Fundraising declarations should be declared annually. Individuals and companies must identify and declare their overall contributions to political parties via events, on an annual basis, if their contributions exceed \$2,000.

Disclosure by third parties who incur expenditure and make donations

As noted in Section 1.2.1, the term ‘third parties’ refers to individuals or organisations who are not candidates, political parties or groups or associated entities. Examples of third parties are lobby groups and individual supporters. Third parties provide assistance to the main election participants in many ways, typically by making donations or placing electoral advertisements.⁹⁰ The third party disclosure requirements also capture some of the donations made in the context of fundraising as noted above. Within the five Australian disclosure schemes there are two types of disclosure required by third parties: disclosure of donations received by third parties who incur election expenditure (all schemes) and disclosure of donations made by third parties (Federal, NSW and ACT schemes).

Disclosure of donations received by third parties who incur election expenditure: All of the disclosure schemes require third persons who incur a certain amount of election expenditure to disclose donations over certain thresholds received by them and which they subsequently used, in whole or in part, to incur the expenditure.⁹¹ For example, under the NSW scheme a third person who, during the election period, incurs election expenditure of more than \$1,500 must lodge a declaration of political contributions and electoral expenditure after each election. Political contributions that must be disclosed are gifts of \$1,000 or more received during the election period, the whole or part of each of which was used by the person to enable the person to incur the electoral expenditure concerned, or to reimburse the person for incurring that expenditure.

Disclosure by third parties who donate to candidates, groups, specified bodies and parties: The Federal, ACT and NSW schemes also require third persons who donate gifts over certain limits to disclose details of those donations. For example, under the Federal scheme, third parties who make gifts to candidates totalling \$200 or more, to specified bodies totalling \$1,000 or more, are required to furnish the AEC with a return after each election. Third parties who make gifts to political parties totalling \$1,500 or more must file an annual return. In regard to donations to parties, donations made to another person or organisation with the intention of benefiting a political party, where the total is over the specified limit must be disclosed. All donations including those of less than \$1,500 must be counted when determining whether the \$1,500 disclosure threshold has been met.

⁹⁰ AEC, *Funding and Disclosure Handbook for Third Parties*, Commonwealth of Australia 2000, Part I.

⁹¹ Third parties are also required to disclose information about the expenditure they made, as discussed in Section 1.3.

Donors must also disclose donations they have received of \$1,000 or more that they used to make their donations to political parties.

The table in Section 1.2.1 of this paper shows the relevant threshold for the donations that must be disclosed by third parties in each scheme.

Introduction of third party disclosure in NSW

The NSW disclosure scheme as it was originally introduced applied only candidates, groups and parties. While these main election participants were required to disclose donations received from fundraising committees and organisations, as donations or receipts, the identity of the actual donor did not have to be revealed. It soon became clear that limiting disclosure obligations in this way meant that the original source of funds was not being revealed. The implementation of third party disclosure in NSW also followed criticism of the disclosure scheme by ICAC in its 1990 report into the Investigation into the North Coast Land Development. ICAC identified the ability of a donor to divert a donation through a third party, enabling the donation to be disclosed under the third party's name rather than the donor's real name, as a major weakness in the scheme.⁹²

The Election Funding (Amendment) Bill 1993 was primarily designed to tighten existing disclosure requirements under the scheme and to introduce third party disclosure.⁹³ Third parties were now required to disclose details of the expenditure incurred and details of gifts and donations over \$1,000 received by the third party and used to make the expenditure. As part of the expenditure to be disclosed, the declaration must also include disclosure of any contribution of \$1,500 or more to a political party, contributions of \$1,000 to a group and contributions of \$200 or more to a candidate.

Proposals for reform of third party disclosure under the Federal scheme

In its 1998 Election Report, the AEC highlighted the fact that under the Federal third party requirements, disclosure is required by donors to candidates, members of groups, specified bodies and parties, but not by donors to Senate groups. To ensure 'complete disclosure at elections' the AEC has recommended that similar disclosure requirements be applied to donors who donate \$1,000 or more to Senate groups.⁹⁴

The AEC also noted that the practice of 'splitting' donations is undermining the effectiveness of these requirements. 'Splitting' occurs where a single large donation being made to a party is split into a number of donations each falling below the threshold and split

⁹² NSWPD, 10/11/93, p 5136, per the Hon C Hartcher, MP (then Minister for Environment) Second Reading Speech of the Election Funding (Amendment) Bill.

⁹³ It also included other amendments such as decreasing the threshold levels, removing the distinction between electoral donations and maintenance of administrative donations, and establishing the Political Education Fund.

⁹⁴ AEC (*Report – Election 1998*), n 11, Recommendation 1, p 8

between family members or various State branches of a party. The AEC recognised however, that there was little that could be done to prevent this.⁹⁵

The Liberal Party has recently argued that, in regard to the Federal scheme, the requirement for donors to political parties to lodge returns is unnecessary because it simply duplicates the disclosure already required by a political party.⁹⁶ In response, the AEC pointed out that this would introduce a loophole that this requirement is intended to prevent. In this regard the AEC noted that parties are not currently required to aggregate transactions of less than \$1,500 when determining whether an individual has reached the \$1,500 threshold, at which point the details of that person must be disclosed (see Section 3.2 for further detail). Without a separate donor return it would be open to donor to donate any amount to a party without it being disclosed as long as the donation was made in lots of less than \$500'.⁹⁷ The JSCER agreed with the AEC view when it reviewed the issue in its report on the 1998 Federal Election. The JSCER also recommended that the disclosure limit for donors to political parties be raised to \$3,000.⁹⁸

Tightening the prohibition on anonymous donations

The AEC has made several reform recommendations with regard to anonymous donations, to make the provisions more effective. As the anonymous donation provisions under NSW, Queensland, WA and ACT legislation are similar to the Federal provisions, the recommendations are also relevant to those jurisdictions. The prohibition on anonymous donations is outlined in Section 1.2.1.

- In its 1996 election report, the AEC revealed that there were ‘...instances where, when a question has arisen as to the possible anonymity of a particular donation, party officials have maintained that donor details were in fact known at the time the donation was received but had since been lost’.⁹⁹ Since such a gift is not anonymous at the time of acceptance, its acceptance is therefore lawful. It also means that as the identity of the donor has since been lost, the source of the donation does not have to be declared. The AEC therefore recommended that the definition of anonymous donations be revised from the name or address not being known *at the time* of receipt to not being known *at the time of disclosure*.

⁹⁵ ibid, p 16.

⁹⁶ JSCER (*Report - 1998 Election*), n 52, p 128.

⁹⁷ ibid, pp 128-129.

⁹⁸ ibid, p 129. Note that in its report on the 1996 Federal election, the JSCER recommended that this threshold be increased to \$10,000: Parliament of Australia, Joint Standing Committee on Electoral Matters, *Report of the Inquiry into the Conduct of the 1996 Federal Election and Matters Related Thereto*, Canberra (1997), recommendation 60, p 103. After an amendment to implement this increase was removed from the passage of the *Electoral and Referendum Amendment Act (No 1) 1999* (Cth), the Committee changed its recommendation to \$3,000 in the later report.

⁹⁹ AEC (*Report - Election 1996*), n 14, Recommendation 9, p 15.

- In 1998, the AEC recommended that the prohibition on the receipt of anonymous donations be extended to associated entities on the same basis as for those made to political parties.¹⁰⁰
- In determining whether the thresholds are met for the purposes of the prohibition on anonymous donations, multiple donations from the same source are to be counted together. This is intended to ensure that donors don't get around the prohibition by making several anonymous donations of amounts just under the threshold limit. In a recent submission to the current JSCEM *Inquiry into Electoral Funding and Disclosure*, the AEC pointed out an obvious flaw in this accumulative provision. It stated that '...it can be impossible to establish whether two or more donations have come from the same source when the name and address of the donor are unknown.'¹⁰¹ The AEC recommended that the only way in which this accumulative provision could operate effectively is if it applied irrespective of the source of funds. In other words, if a maximum total amount of anonymous donations that could be received by a candidate or party was set (as well as the limits on individual donations).

Capping the level of donations

There are no limits on the amount of money that can be donated to any election participant in any of the disclosure schemes in Australia. Over the last couple of years the Australian Democrats have called for a ceiling on the size of donations that political parties can accept. In their minority report to the JSCEM *1998 Federal Election Report*, Senators Andrew Bartlett and Andrew Murray, argued that 'in order to minimise the public perception of corruptibility associated with political donations, a good donations policy should forbid a political party from receiving inordinately large donations.'¹⁰² They recommended that a ceiling should be placed on the amount of money any corporation or organisation can donate to a political party.¹⁰³

The issue of capping donations does not appear to have been seriously considered in the context of the introduction of any of the Australian disclosure schemes. The issue was briefly considered in a review of the NSW funding and disclosure scheme conducted by the NSW Parliament Joint Select Committee Upon the Process and Funding of the Electoral System in 1992.¹⁰⁴ The Committee heard evidence from several individuals who presented the main arguments. On the one hand, it was argued that substantial political donations raise the spectre of undue influence and a cap would limit the opportunity for such

¹⁰⁰ *ibid*, Recommendation 7, p 15.

¹⁰¹ AEC (*Submission to the JSCEM, 3/8/01*), n 65, Part 2.5.

¹⁰² AEC, (*Report - Election 1998*), n 11, *Minority Report of Senator Andrew Bartlett and Andrew Murray*, Recommendation 6.6, p 176. See also 'Democrats to review donation rules', *The Sydney Morning Herald*, 19/7/01, p 5.

¹⁰³ See also Australian Democrats, n 57, Recommendation 6.6, p 7.

¹⁰⁴ NSW Parliament, Joint Select Committee upon the Process and Funding of the Electoral System, Second Report, (C Hartcher MP Chairman), NSW Parliament, 1992, pp 72-79.

influence. On the other hand, the practicality of administering a maximum donation limit and the ease of getting around it was said to outweigh its usefulness. It was also argued that individuals and organisations should be free to donate as much as they liked. Ultimately, the Committee did not recommend the introduction of a cap.

The AEC also addressed the issue in its submission to the JSCEM in October 2000, concluding that donation limits should not be imposed.¹⁰⁵ The issue was similarly considered by the Neill Committee in its 1998 report on the funding of political parties in the UK. The Neill Committee ultimately concluded that no limit should be introduced on the amount which an individual company or institution may contribute to a political party. The Neill Committee outlined four arguments against and four in favour of capping donations as set out below.

Arguments in favour of limits	Arguments against limits
<ul style="list-style-type: none"> • Parties receiving large donations may be so unfairly advantaged that electoral competition becomes distorted, with wealth individuals 'buying' the outcome of an election. • Parties should not be over-dependent upon a narrow income base, both to avoid apparent or real illegitimate pressures and for the practical reason that the withdrawal of a large donation could cause a party financial difficulty. • A limit would require parties to broaden their support base and so increase political involvement, especially in relation to newer parties • Large corporate donations from. organisation, businesses or trade unions which have been able to exercise (or appear to exercise) influence over public policy as a result of financial contributions should be subject to limits to mitigate any such influence. 	<ul style="list-style-type: none"> • In a healthy democracy individuals should have the freedom to contribute to parties, and the parties should be free to compete for donations. • Disclosure of donations removes illegitimate pressures, whether apparent or real and lessens any risk of a political party having to return a large donation. • If a party becomes over-dependent on a particular source that is its own affair, provided its dependence is public knowledge. • There would be a strong temptation for parties to seek to evade the limit. There would be no way to detect such a strategy and to enforce the limit.

¹⁰⁵

AEC (*Submission to the JSCEM, 17/10/00*), n 23, ¶ 8.8 - 8.13, Recommendation 3.

Requiring the early disclosure of large donations

The Australian Democrats have proposed that political parties should disclose significant donations soon after they are made, rather than within the usual time frame. In a submission to the JSCEM in October 2000, the Australian Democrats suggested that donations of over \$10,000 to a political party should be declared to the AEC within a short period.¹⁰⁶ The Australian Democrats also recommended that the AEC should publish the declaration on its web site so that it can be made public straight away, rather than leaving it until an annual return.

Currently, under Federal legislation, parties are required to lodge annual returns by 30 October each year. Therefore, it may be over twelve months before donations received by a party at the start of the financial year have to be disclosed. And, it is another three months before the information is made publicly available on 1 February in the year following the due date for that Return.

The length of time before disclosure is required under the NSW scheme is even longer. All parties (and candidates and groups) are required to lodge a declaration of political contributions received during the disclosure period, within 120 days after the return of the writs for an election. For parties who contested the previous election, the disclosure period commences the day following polling day for that previous general election and ends on the 30th day after polling day for the current election. This means that a donation received shortly after an election does not have to be disclosed until four months after the following election; a period of over four years.

Restricting corporate donations

The controversy surrounding political contributions often centres on sizeable donations made by large corporations. Some corporate donors make contributions in the tens of thousands. Several reform options have been advocated, to remove or lessen the possibility of influence being exerted by such donors.

A trust fund to 'clean' corporate donations: The NSW Greens have, in recent years, expressed concern about the reliance of the major parties on corporate donations which, they argue, places undue influence on parties to create policy favourable to major donors. To this end, the Greens NSW State election policy includes the establishment of a trust fund for '...cleaning political donations of any corporate influence.'¹⁰⁷ Under the proposal, all corporate donations for political parties would be placed in a trust fund and then distributed by the State Electoral Office in a similar way to public funding, ie in proportion to the primary votes received. Greens MLC Lee Rhiannon, has suggested that because companies claim that they are not seeking to influence political parties with their donations, but rather are supporting the democratic process, this option would allow them to do just that.¹⁰⁸

¹⁰⁶ Australian Democrats, n 57, Recommendation 6.1, p 5.

¹⁰⁷ Rhiannon L, MLC, 'Trust fund for political donations', *Media Release*, 12/6/2001.

¹⁰⁸ This information is taken from a statement made by Lee Rhiannon MLC displayed on

Ban on corporate donations: NSW Greens MLC, Ian Cohen, has suggested that corporate donations should be banned altogether.¹⁰⁹ Support for banning corporate donations has also been voiced by independent MLC, the Hon Richard Jones. In 1999, Jones suggested that:

...the more than we can minimise the impact that trade unions, big business, small business or any external money have on Government the better. Therefore, I believe that all funding for elections should be paid out of the public purse and that there should be no donations whatsoever from organisations, except for small amounts of, say, less than \$100. That would remove the potential for corruption.¹¹⁰

The introduction of a ban on corporate donations is unlikely given the interest that the major parties have in maintaining this source of donations. Dr Rolf Gerritsen considered the issue of a broad ban on all corporate and institutional donations concluding that:

...this measure would most likely affect trade union donations to the ALP and business donations to the Coalition parties. It would in all likelihood be opposed by the major political parties, and especially the Liberal Party, which seeks to encourage corporate participation in financing election, and has consistently argued for the tax deductibility of all donations as an alternative route to public funding.¹¹¹

Gerritsen also noted the difficulty in separating personal donations and corporate donations in cases where individuals with interests in corporate concerns make donations in their own name.¹¹² Enforcement issues, particularly the possibility of donors circumventing the ban by filtering donations through other entities also challenge the viability of this reform proposal.

Ban on donations from problematic corporate sectors: Support has also been voiced for banning donations from particular corporate sectors that are seen as problematic. For example, former Prime Minister, the Hon Paul Keating, recently advocated that NSW property developers should be banned from giving political donations to municipal candidates and political parties.¹¹³ His suggestion reflects concern about the influence of wealth property developers, on the NSW Government. Keating's suggestion was supported by Sydney's Lord Mayor, Frank Sartor but rejected by the NSW Liberal Party, and the Property Council of Australia which argued that its members should not be treated differently to other donors.¹¹⁴

the NSW Greens web site:

www.nsw.greens.org.au/parl/lee/Street/Street00/docs/Misc/partydons.html (accessed 1/9/01, copy with author).

¹⁰⁹ NSWPD, per the Hon Ian Cohen, MLC, 3 May 2000, p 5098. To counteract the effect of such a ban on the finances of political parties, Cohen argues that full public funding of political campaigns should be introduced, as discussed in Section 1.1.2.

¹¹⁰ NSWPD, The Hon. Richard Jones, MLC, 10/11/01, p 2575.

¹¹¹ Gerritsen Dr R, 'Election Funding Disclosure and Australian Politics: Debunking Some Myths, (1995) *Parliamentary Research Paper*, No 21 1994/95, p 40.

¹¹² *ibid.*

¹¹³ 'Keating wants developer's donations banned', *The Daily Telegraph*, 5/4/01.

¹¹⁴ 'Keating backs ban on developer donations', *The Australian Financial Review*, 6/4/01 and 'Carr to examine ban on developers' donations', *The Sydney Morning Herald*, 6/4/01, p 5.

It has been reported that the Victorian Government plans to introduce a cap for all contributions from gaming companies (along with the introduction of public funding and a disclosure of donations scheme).¹¹⁵ The plan followed controversy surrounding the ALP's acceptance of a \$100,000 donation from a company owned by Crown Casino investor Kerry Packer just before the 1999 election. An editorial in *The Age* outlines some of the issues behind the cap:

The relationship between gaming operators and government is different from the relationships that governments generally have with other sections of private enterprise. The gaming industry is strictly regulated by government and the size of profits is, to a significant degree, determined directly by decisions of the state. The State Government can decide how many casino operators and how many poker machines there will be. Thus it makes sense to also set limits on how generous the industry can be towards political parties.¹¹⁶

Banning foreign donations

Donations to political parties and candidates by foreign individuals and organisations can be used as a means of avoiding disclosure requirements. While the recipients of such donations must still disclose details of the donor if the donation exceeds the disclosure threshold, the donor is not under such an obligation and there is no way to ensure that the donor was the real source of the money. Unlike other countries, such as the UK and the US, foreign donations are not banned in any Australian jurisdiction.¹¹⁷ The issue of foreign donations is also much less contentious in Australia than in other countries. In fact, the AEC recently described foreign donations as being 'quite rare'.¹¹⁸

However there is growing concern over the issue and the AEC has recognised the potential problem. In its 1996 Election Report, the AEC expressed concern that Federal disclosure laws were 'not adequate to ensure full disclosure of the true source of donations received from overseas.'¹¹⁹ At that time the AEC suggested that the Government explore options for regulating overseas donations, including banning them altogether or placing limits on how much money could be donated.¹²⁰ There does not appear to be any plans to implement these suggestions at present. At that time, Gerritsen similarly warned that the potential for abuse of this loophole in '...a tight disclosure regime in Australia could encourage the political parties to establish overseas holding companies to which donations could be made from Australia. These monies could then be 'donated' by the overseas company without

¹¹⁵ 'Premier seeks cap on gaming donations, *The Age*, 7/3/01, p 3, 'Gaming donations cap a wise step', *The Age*, 8/3/01, p 14 and 'Push to cap political donations', *The Age*, 21/8/01, p 2.

¹¹⁶ 'Gaming donations cap a wise step', *The Age*, 8/3/01, p 14.

¹¹⁷ For a discussion of foreign donations in relation to the UK see: Neill Report, n 20, p 64.

¹¹⁸ AEC (*Submission to the JSCEM*, 3/8/01), n 65, ¶ 2.6.1.

¹¹⁹ AEC (*Report - Election 1996*), n 14, pp 15-16.

¹²⁰ *ibid.*

disclosure of the Australian source of its income'.¹²¹ Gerritsen, describes foreign donations as '...an area of some political sensitivity, since historically Labor has exhibited an - albeit undocumented - conviction that the Liberals receive large foreign donations.'¹²²

The AEC raised the issue of foreign donations with the Government again this year. In its submission to the JSCEM *Inquiry into Electoral Funding and Disclosure*, the AEC described the foreign donations loophole in the following terms:

Australian law generally has limited jurisdiction outside our shores and hence the trail of disclosure can be broken once it heads overseas. This provides an obvious and easily exploitable vehicle for hiding the identity of donors through arrangements that narrowly observe the letter of the Australian law with a view to avoiding the intention of full public disclosure. If the overseas based person or organisation who makes a donation to the political party were not the original source of those funds, there would be no legally enforceable trail of disclosure back to the true donor, nor would any penalty provisions be able to be enforced against persons or organisations domiciled overseas.¹²³

The AEC recommended that '...donations received from outside Australia either be prohibited, or forfeited to the Commonwealth where the true original source of that donation is not disclosed through the lodgement of disclosure returns by those foreign persons and/or organisations'.¹²⁴ The AEC recognised that the second option also does nothing to resolve the problem of trying to track and prosecute donors who are overseas. The AEC also recommended that whatever action is taken, it must be extended to donations received from overseas by third parties or associated entities which are then passed on to a political party or candidate or used to their benefit and that it should also apply to loans and debts owed by parties to overseas entities.¹²⁵

For some the objection to foreign donations extends beyond its use as a loophole. Some argue that foreign individuals and organisations should have no role in the domestic electoral process at all. Conversely it is argued that overseas donors may have a genuine interest in the domestic politics of a country and should be able to donate. For example, there may be people whose ancestry or interests incline them to follow and support a political party in another country (although this argument is less convincing for foreign Governments or corporations).¹²⁶ Another argument is that, in any case, provided donations over a certain limit are subject to disclosure laws, there is nothing intrinsically wrong with foreign donations.¹²⁷

¹²¹ Gerritsen, n 111, p 42.

¹²² *ibid*, p 41.

¹²³ AEC (*Submission to the JSCEM, 3/8/01*), n 65.

¹²⁴ Recommendation 11, ¶ 2.6.4.

¹²⁵ ¶ 2.6.5 and 2.7.

¹²⁶ UK, Parliament, n 20, pp 65-66.

¹²⁷ *ibid*.

1.3 REGULATION AND DISCLOSURE OF ELECTION EXPENDITURE

The third area of election finance examined in this paper is the regulation of election expenditure, that is, money spent on election campaigns by candidates, political parties and others. There are two main ways in which election expenditure has been regulated in Australia. The first is capping the level of expenditure and the second is requiring disclosure of expenditure. Both of these, like the other areas of election finance examined in this paper, are designed to strengthen the democratic process by promoting equality between election participants and transparency of the electoral process.

Only two Australian jurisdictions currently have a statutory limit on the amount of money that can be spent by candidates on election campaigns: Tasmania and Victoria. Expenditure limits were once a more common feature of election finance law in Australia, with SA, WA and the Commonwealth previously having limits. In NSW, expenditure limits were considered and rejected when the public funding and disclosure scheme was developed in 1980. Most Australian jurisdictions have laws requiring the disclosure of election expenses, with the exception of SA and the NT. Disclosure of election expenditure is closely linked with disclosure of donations, and in some cases both types of disclosure are made at the same time.

1.3.1 Election expenditure limits: overview and current issues

Limits on the amount of election expenditure have traditionally been placed on candidates, rather than political parties. The primary aim of expenditure limits is to create a level of financial equality between candidates at an election. As commentators, Cass and Burrows, suggest: ‘with expenditure being capped there [is] no real advantage to greater access to resources because there [is] a limit on what those resources could be spent on.’¹²⁸

Another purpose of expenditure limits is to reduce the level of election finance needed and therefore contain overall election costs. This in turn reduces the reliance on donations and the concomitant problem of the use of donations to influencing candidates or parties policies.

Overview of current expenditure limits in Tasmania and Victoria¹²⁹

In Tasmania, candidates at Legislative Council elections can only spend up to \$9,000 on their campaigns. There is no limit on Legislative Assembly candidates, although there was prior to 1985. There is also a prohibition on political parties and people other than the Legislative Council candidate, or the candidates’ election agent, incurring expenditure (although this does not preclude the gift of any money directly to the candidate with a view to promoting or procuring the election of the candidate). Election expenditure is broadly defined and the legislation also lists several matters that are specifically excluded. A

¹²⁸ Cass, n 61, p 485.

¹²⁹ Only a brief summary of the legislative provisions is undertaken here. For full details see Sections 4.3 and 4.4 of this paper.

candidate who contravenes the expenditure limit commits an offence and, if a candidate exceeds the permitted maximum amount by more than \$1,000, their election may be declared void.¹³⁰ In Victoria, the election expenses of candidates for both Houses of Parliament cannot exceed \$5,000.¹³¹ Election expenditure is broadly defined and the legislation also lists specific matters that are included in the definition. As is the case in Tasmania, a person who contravenes the expenditure limits commits an offence. However, it does not go as far as stating that the election of a candidate who commits an offence may be invalid. Some of the problems associated with expenditure limits are illustrated by the experiences of the two jurisdictions that have maintained them.

1979 Tasmanian election crisis

Prior to 1980 it was commonly known in political circles in Tasmania that many politicians did not comply with their statutory obligation in relation to election expenditure (at that time expenditure limits related to candidates for both Houses of Parliament). In the 1979 State House of Assembly election it was reported that only 15 out of the 87 candidates submitted a return of electoral expenses.¹³² Following that election the expenditure limits were used to challenge the validity of the election of a candidate, sparking an electoral crisis that was played out over several months. The following is an analysis of the crisis published that year in the *Australian Journal of Politics and History*:

Shortly after the 1979 election, defeated sitting ALP member, Mr McKinnon, lodged a petition with the Supreme Court against his successor, Mr Aird, also from the ALP. The petition alleged that Mr Aird had exceeded the allowable campaign expenditure limit. Mr Aird did not take his seat when parliament commenced and cross-petitioned against 14 Opposition MHA's on the same grounds. The Australian Democrats subsequently filed petitions against nine MHA's and the Liberal Party responded by filing petitions against 19 Government MHA's. By mid-September, petitions before the Supreme Court challenged every MHA and the only solution appeared to be another general election.

However, Mr McKinnon was re-elected by count-back on 28 September and subsequently withdrew his petition. Mr Aird, and the other Labor petitioners, as well as the Australian Democrats, followed suit. The Liberal Party also announced its intention to withdraw its petitions. The end to the crisis was in sight until it became apparent that two members of the Liberal party were not prepared to withdraw their petitions. It was rumoured that many leading Liberals in the party machine believed that the parliamentary party should have attempted to force a general election. All but two of the petitions, from Liberals Mr Bower and Mr Brookes, were dismissed.

After further legal wrangling, Premier Lowe, Opposition Leader Pearsall and 75 other parliamentarians and unsuccessful candidates were charged with having failed either to lodge a return of electoral expenses or to lodge a return within time, the matter finally reached the Supreme Court.¹³³ On 19

¹³⁰ *Electoral Act 1985* (Tas), s 203.

¹³¹ *The Constitution Act Amendment Act 1958* (Vic), s 257 and Schedule 16. This limit was set in 1995 through the passage of *The Constitution Act Amendment (Amendment Act) 1995* (Vic). Prior to this amendment the limit was set at \$3,000 for Legislative Council candidates and \$1,500 for Legislative Assembly candidates. These limits had existed since 1978; VPD (LA), 26/10/95, p 887, per Mr Kennett.

¹³² 'Australian Political Chronicle July–December 1979: Tasmania', *Australian Journal of Politics and History*, (1980) Vol 26 No 1, p 119.

¹³³ The charges were laid pursuant to s 141 of the *Electoral Act 1907* (Tas).

November 52 members and candidates were ordered to pay \$4,646 in fines and costs and were told that 'they were not above the law'.

Meanwhile, in the Supreme Court, it was decided after days of legal argument that the challenges should be heard and Mr Brookes and Mr Bower were ratified as real petitioners. After an unsuccessful attempt to get the decision overturned by the Full Court (which would have ended the crisis) hearing of evidence began. To protect itself against successful petitions the Government introduced into the House of Assembly, the Electoral Amendment Bill (No2) 1979 that had application for 12 months only. Under the Bill a by-election became automatic if more than one seat in a division was declared void. The Bill received Royal assent on 11 December.

In the Supreme Court on 12 December, the three Dension Division Labor members, Dr Amos, Mr Green and Mr Devine, admitted to overspending in the July 1979 election. The crisis was brought to an end on 18 December when the Supreme Court Judge ruled that section 143 of the *Electoral Act* was applicable and declared the election of the three Labor Members void. The decision resulted in the application of the Electoral Amendment Act (No 20) 1979, with all seven Dension members losing their seats. The Dension by-election was held on 16 February 1980.¹³⁴

Problems with the Victorian expenditure limit

The efficacy of the Victorian expenditure limit appears to be undermined in today's election climate, as pointed out by the Victorian Electoral Commissioner in 1992. In a report on the 1992 Victorian State election, the Commissioner stated that the expenditure provisions were in urgent need of attention, describing the limit as unrealistic. He also pointed out what he described as a 'serious flaw' in that the limit only applies to expenditure by the candidates themselves, and does not apply to expenditure incurred by supporters of candidates on a candidate's behalf. In this regard he stated that:

If the purpose of the provisions is to place candidates on an equal footing – with all Legislative Council (and their supporters) candidates spending approximately the same amount on their election campaigns, and all Legislative Assembly candidates (and their supporters) spending approximately the same amount on their campaigns – then the provisions do not achieve this result. As matters stand, the wealthy supporters of a candidate could spend \$1 million (or whatever it takes to ensure that a candidate is elected) without breaching the provisions in question.¹³⁵

The Commissioner recommended that the provisions be given urgent attention if expenditure on candidate's election campaigns is to be truly subject to limits. He concluded that if expenditure on candidate's election campaigns is not to be regulated, then the provisions should be repealed.¹³⁶ The fact that there are no limits on expenditure incurred by people or organisations on a candidates behalf was noted again in 1999 in the Victorian Electoral Commissioner's Report to Parliament on the 1999 Victorian State election. As yet there has been no move in Victoria to rectify this deficiency.¹³⁷

¹³⁴ *Australian Journal of Politics and History*, n 132, pp 119-120. This extract has been edited in order to summarise the account.

¹³⁵ Victoria, State Electoral Office, Victoria, *Report to Parliament on the Administration of the 1992 Victorian State Election* (1992), p 40.

¹³⁶ *ibid.*

¹³⁷ Personal communication with an officer of the Victorian Electoral Commission, 16/7/01.

Previous expenditure limits for Federal elections

Prior to 1980, the *Commonwealth Electoral Act 1918* included a scheme for the limitation of electoral expenses by candidates in a Federal election. It provided that a candidate for the House of Representatives could spend no more than \$500, and a candidate for the Senate could spend no more than \$1,000 in respect of any candidature.¹³⁸ Each candidate was required to file a return of election expenses within eight weeks after the result of an election had been declared, showing all electoral expenses paid and all disputed and unpaid claims for electoral expenses.¹³⁹ The provisions dealing with limitation of electoral expenses were repealed in 1980.¹⁴⁰ At the time the expenditure limits were repealed it was widely known that, as in Tasmania, candidates did not always act in accordance with the expenditure limits and reporting requirements.¹⁴¹ Dr John Uhr described the practice as a parliamentary ‘convention’:

It has been acknowledged in Parliament, by Members of both Government and Opposition parties, that no successful campaign can be managed through observance of the current limits. Because members from all parties agree that these limits are unrealistically low, a parliamentary convention has developed sanctioning non-compliance with the statutory declarations. This situation sufficed - and will suffice - so long as it is complemented by a political convention to the effect that unsuccessful candidates do not contest the legality of the successful candidates’ campaign expenditure.¹⁴²

There was growing fear that this practice could lead to challenges to election results as occurred in Tasmania. The second reading speech of the Commonwealth Electoral Amendment Bill 1980 provides further background to the removal of expenditure limits:

The effect of this Bill will be to repeal those provisions of Part XVI of the Commonwealth Electoral Act 1918 that limit and circumscribe a candidate’s electoral expenditure. All members will be aware that the existing provisions of Part XVI are unsatisfactory in a number of respects, and have proved to be unworkable... The growth of the modern political party system has meant that the personal electoral expenditure incurred by the candidate is of lesser importance compared with the expenditure by the party machine. One of the consequences of this is that the emphasis of the existing provisions on return by the candidate himself has become inappropriate. Another consequence is to present candidates with serious problems of compliance. The recent events in Tasmania, in which a general election was followed by a multiplicity of challenges to successful candidates based on the Tasmanian provision corresponding to Part XVI, make it clear that the Part must be overhauled. In the case of Tasmania, questions were raised whether the challenges would completely paralyse the State parliament. Clearly this possibility must be avoided in the national Parliament.¹⁴³

¹³⁸ *Commonwealth Electoral Act 1918* (Cth) (as amended), s 145. These figures were originally set at £100 (House of Representatives) and £250 (Senate) under the *Commonwealth Electoral Act 1902* (Cth). They were adjusted to £250 (House of Representatives) and £500 (Senate) in 1946 pursuant to the *Commonwealth Electoral Act 1946* (Cth): Cass, n 56, p 491.

¹³⁹ *Commonwealth Electoral Act 1918* (Cth), s 152.

¹⁴⁰ *Commonwealth Electoral Amendment Act 1980* (Cth), s 4.

¹⁴¹ Cass, n 61, p 491.

¹⁴² Parliament of Australia, Parliamentary Library, Basic Paper No 1/1980, *Public Funding of Elections and Political Parties*, by Dr John Uhr, 7/3/80.

¹⁴³ CPD (H of R), 15/5/80, pp 2848-2849, per John McLeay.

The constitutional validity of limiting expenditure on federal election campaigns has been questioned.¹⁴⁴ However, this was not raised as a factor at the time of their removal.

Consideration of election expenditure limits in New South Wales

The question whether to introduce election expenditure limits was considered when public funding and disclosure was first introduced in NSW, by the NSW Joint Committee Upon Public Funding of Election Campaigns. The Committee was sceptical that limits could ever be effective, concluding that ‘the upper limits set out in legislation have served, however, usually as scarecrows. The limits in fact imposed no real inhibition on expenditure by candidates.’¹⁴⁵ The Committee therefore recommended that expenditure limits not be introduced.

In forming this view the Committee considered several issues. It was particularly wary of the potential perils of not following statutory limits, as illustrated by the Tasmanian experience in 1979 which was heeded by the Federal Government in removing its limits shortly after. After examining the experiences of several overseas jurisdictions the Committee concluded that while most countries that it reviewed had expenditure limits, the inability to regulate the limits undermined their intention. The ability of parties and candidates to circumvent the limits by setting up other organisations to incur expenditure was noted in this regard.¹⁴⁶

The issue was considered again by a NSW Parliamentary Committee in 1992. The Joint Select Committee Upon the Process and Funding of The Electoral System heard evidence both supporting and rejecting expenditure limits. Arguments based on the difficulty of enforcing an expenditure limit were again persuasive and the Committee concluded that expenditure limits should not be introduced.¹⁴⁷

Arguments for and against election expenditure limits

The arguments in support of limiting the amount of money that can be spent by candidates on an election campaign are summarised below.

- Expenditure limits create a level of financial equality between candidates at an election.
- They reduce the level of election finance needed and contain overall election costs.
- Containing election expenditure in turn reduces the reliance on donations, thus reducing

¹⁴⁴ For a discussion of question of constitutionality, see Cass n 61, p 487-488, in which the relevance of expenditure limits in the reforms of 1991 concerning political advertising in also noted on p 502.

¹⁴⁵ NSW, Parliament, (EN Quinn, MP, Chairman), n 55, pp xxxiv-xxxvi.

¹⁴⁶ *ibid.*

¹⁴⁷ NSW, Parliament, (C Hartcher, MP, Chairman), n 104, p 160.

the concerns raised by donations, such as the potential for corruption.

- Many overseas jurisdictions place limits on election expenditure.

The arguments against election expenditure limits are summarised below.¹⁴⁸

- The growth of the modern political party system has meant that the personal electoral expenditure incurred by the candidates is of lesser importance compared with the expenditure by the party machine.
- Expenditure limits are difficult to enforce.
- Candidates should be free to campaign in whatever way they see fit (subject to laws relating to bribery and corruption).
- Non-compliance resulting in the possibility of a candidate's election being invalidated threatens the stability of Parliament, as occurred in Tasmania in 1979.
- Determining a realistic limit is difficult and limits would need constant revision in relation to inflation, changing electioneering practices and the innovative abuse of loopholes.¹⁴⁹

1.3.2 Disclosure of election expenditure: overview and current issues

Transparency of the electoral process has been a recurring theme in this paper and it is raised again in the context of disclosure of expenditure. In those jurisdictions where public funding for election campaigns also exists, disclosure of expenditure has been described as another method of reinforcing the integrity of the public funding system.¹⁵⁰ In the context of public funding, disclosure of expenditure is also linked to the public's right to know how public funds are being spent.

All Australian jurisdictions, with the exception of SA and the NT, have disclosure laws generally requiring candidates, and other specified people and entities, to disclose certain information about expenditure for election purposes. For example, under NSW legislation, parties, groups and candidates who incur electoral expenditure are under an obligation to disclose details of that expenditure. Other persons who incur expenditure of more than \$1,500 must also lodge a disclosure return.

¹⁴⁸ Most of these reasons are found in the second reading speech to the amendment bill which removed the expenditure provisions from the *Act*. CPD (HR), 15/5/80, pp 2848-2849, per John McLeay, MP.

¹⁴⁹ NSW, Parliament, (EN Quinn, MP, Chairman), n 55, p xxxvi.

¹⁵⁰ Cass, n 61, p 500.

Under the Federal scheme candidates, Senate groups, broadcasters and publishers, are all required to disclose election expenditure. People who incur electoral expenditure without the written authority of a political party, associated entity, candidate or a member of a group are also required to disclose. The Federal scheme does not apply to expenditure incurred by or with the authority of a registered political party or a State branch of a registered political party.¹⁵¹ In Tasmania and Victoria, disclosure of expenditure is only required of candidates who must file a return disclosing particulars of all election expenditure and all disputed and unpaid claims against the candidate.

Election expenditure returns

Generally, disclosure is made in the form of a return filed with the relevant electoral authority. In NSW, donations and electoral expenditure are disclosed in the one return, while in other jurisdictions election expenditure returns are separate documents. In most cases disclosure is made after an election, although under the Federal and Queensland schemes political parties and associated entities are required to provide information about expenditure (which includes election expenditure) in an *annual* return. The returns must also be filed within set times. For example, under Federal legislation returns must be filed within 15 weeks after polling day and for NSW the due date for returns is 120 days after the return of the writs for a general election.

Disclosure period

The period for disclosure differs between jurisdictions and depends who is required to file the return. For example, in NSW the disclosure period for parties and candidates who contested the previous general election, commences on the day following the polling day of the previous general election and ends on the 30th day. The commencement dates for new candidates and groups begins on the day of nomination for the election.

Expenditure to be disclosed

The type of expenditure constituting election expenditure for the purpose of disclosure is broadly defined in each jurisdiction. In NSW it includes expenditure ‘for or in connection with promoting or opposing, directly, or indirectly, a party or the election of a candidate or candidates or for the purpose of influencing, directly or indirectly, the voting at an election.’¹⁵² A non-exhaustive list of matters that constitute campaign expenditure is also set out in the NSW legislation and includes: expenditure on advertisements in radio, television, cinemas, newspapers, periodicals, posters, brochures, how-to-vote cards and any other printed election material; expenditure on the holding of election rallies, the distribution of election material; travel and accommodation for a candidate; research associated with election campaigns; and expenditure incurred in raising funds for an election.

¹⁵¹ *Commonwealth Electoral Act 1918* (Cth), s 309(1). Parties are required to file annual returns with the AEC.

¹⁵² S 88(1).

Third parties

Under the Federal, NSW, Queensland, WA and ACT disclosure schemes, ‘third parties’ who incur election expenditure are also required to make disclosure. For example, in NSW, persons who are not a party, candidate or member of a group, who incur electoral expenditure within the disclosure period of over \$1,500 are required to disclose details of that expenditure. This includes making donations to candidates, groups and parties over the relevant thresholds. Under the Federal, Queensland and ACT schemes, a person who incurred electoral expenditure of \$200 or more *without the written authority* of a party, associated entity, candidate or a member of a group must disclose. And, in WA persons who incur expenditure without the authority of a party, candidate or group are required to make disclosure and the threshold is \$500.

Third party disclosure is designed to ensure that *all* persons contributing to the election campaign of a candidate make disclosure. For example, it captures organisations or lobby groups undertaking an independent advertising campaign on an election issue during the disclosure period.¹⁵³ Third party disclosure requirements were introduced in NSW and under Federal legislation in response to the abuse of loopholes. Disclosure of election expenditure by third parties was introduced into the NSW legislation in 1993 with other amendments designed to ensure that the election activities (particularly donations to election participants) of the third parties were disclosed. This is discussed in further detail in Section 1.2.3(a).

Broadcasters and publishers

The Federal and ACT disclosure schemes also require disclosure by broadcasters and publishers in certain circumstances. Under the Federal scheme each broadcaster who, during an election period broadcasts an advertisement relating to the election, authorised by an election participant, must within eight weeks of polling day, furnish a return to the AEC. The particulars that must be set out in the return include: the identity of the broadcaster, the identity of the person at whose request the advertisement was broadcast; the identity of the participant in the election with whose authority the advertisement was broadcast, the dates and times on which it was broadcast.¹⁵⁴ Similarly, a publisher of a journal who, during an election period, published in the journal an advertisement/s relating to the election with the authority of a participant/s in the election must also furnish a return within eight weeks after polling day. The particulars that must be identified are similar to those in relation to broadcasters.¹⁵⁵

The efficacy of the requirement for disclosure by publishers and broadcasters has been questioned by the AEC. In its 1998 election report, the AEC recommended that Federal disclosure of expenditure required by broadcasters and publishers be abolished. The AEC argued that there was no justification in continuing ‘...this administrative and financial

¹⁵³ AEC (*Report - Election 1998*), n 11, p 9.

¹⁵⁴ S 310.

¹⁵⁵ S 311.

imposition upon broadcasters and publishers.’¹⁵⁶ In this regard, the AEC noted that the returns of broadcasters and publishers are rarely inspected once placed on the public record and that the Commission itself makes little use of the information contained in the returns.¹⁵⁷ Administrative difficulties faced by broadcasters and publishers in making returns were also noted by the AEC in an earlier report.¹⁵⁸

The ACT provisions are modelled on the Federal legislation. Queensland, which, like the ACT, modelled its funding and disclosure scheme on the Federal scheme, did not include the provisions relating to disclosure of expenditure by broadcasters. This is despite a report by the Electoral and Administrative Review Commission, which was part of the development of the Queensland scheme, which recommended that provisions requiring disclosure by publishers and broadcasters be included.¹⁵⁹

¹⁵⁶ AEC (*Report - Election 1998*), n 11, p 11.

¹⁵⁷ *ibid.*

¹⁵⁸ *ibid.*

¹⁵⁹ Queensland, Electoral and Administrative Review Commission, *Report on Investigation of Public Registration of Political Donations, Public Funding of Election Campaigns and Related Issues*, June 1992, pp 86-87.

2. NEW SOUTH WALES FUNDING AND DISCLOSURE SCHEME

Elections and related matters in NSW are governed principally by the *Parliamentary Electorates and Elections Act 1912* and the *Election Funding Act 1981*. NSW has one of the most comprehensive schemes for the regulation of election finance in Australia. It incorporates all of the election finance issues examined in this paper, except for statutory caps on election expenditure. The public funding and disclosure scheme was established in 1981, through the introduction of the *Election Funding Act 1981* and is administered by the Election Funding Authority ('EFA') also established by the act.¹⁶⁰ The EFA operates within the NSW State Electoral Office. The NSW Electoral Commissioner also holds office as Chairperson of the EFA and the State Electoral Office provides the EFA with administrative support.¹⁶¹

2.1 INTRODUCTION OF THE FUNDING AND DISCLOSURE SCHEME

The introduction of the first Australian public funding (and comprehensive disclosure) scheme in NSW was controversial. The division of opinion between the ALP, which supported public funding, and the Liberal/National coalition, which opposed public funding, fuelled the debate. In the late 1970's the Wran Government embarked on a drive to introduce public funding for election campaigns. The ALP had traditionally advocated public funding of election campaigns. The need for funding became more acute at that time, due to an escalation of campaign costs (caused largely because of the increasing use of television campaigning) and the difficulty experienced by the ALP raising funds compared to the fund raising successes of the conservative parties.¹⁶²

The NSW Parliament Joint Select Committee Upon Public Funding of Election Campaigns was established in 1979, to inquire into and make recommendations on the introduction of a system involving public funding of campaigns for elections.¹⁶³ The terms of reference of the inquiry indicated that the aim of the Committee was to investigate *how* to introduce public funding, not *whether* it should be introduced. The terms of reference were also broader than the issue of public funding. They also empowered the Committee to examine whether there should be compulsory disclosure and restrictions of electoral expenditure and whether there should be compulsory disclosure of contributions and gifts to political parties and individuals.¹⁶⁴ Over the course of a year, the Committee examined several overseas jurisdictions and conducted hearings and took submissions.

¹⁶⁰ The Election Funding Authority was established pursuant to s 5 of the *Election Funding Act 1981* (NSW).

¹⁶¹ State Electoral Office web site: www.seo.nsw.gov.au/framesets/mf_contact.htm (accessed 1/9/01, copy with author).

¹⁶² Chapels in Alexander, n 12, p 77.

¹⁶³ NSW, Parliament, (EN Quinn, MP, Chairman), n 55.

¹⁶⁴ *ibid*, p vii.

Opposition members opposed the aim of the Committee to examine how, and not whether, to introduce public funding and withdrew from the Joint Committee shortly before the report was finalised in November 1980. The Coalition parties stated their opposition to public funding in principle, demanding a referendum and announcing that they would not accept such funds.¹⁶⁵ In order to obtain the support necessary to adopt public funding, the ALP made a few concessions, as described by Ken Turner:

... a party's entitlement to funds would be determined by the current election, not the previous election (so Labor would not be seen as exploiting its 1978 landslide). No party or candidate would get more than half the available funds, with the surplus returned to Consolidated Revenue along with funds that were refused. Amendments were accepted to define more strictly the election funding authorities inspectorial powers and to double the amount above which parties must disclose donor's names.¹⁶⁶

The Committee's final report was adopted with only a few changes and formed the basis for the scheme introduced by the *Public Funding Act 1981*. The scheme had four basic features. First, public funds were to supplement, not replace private funds and funds allocated were to cover specific expenditure on election purposes and not ordinary party expenses. Upper limits on election spending would continue not to be imposed, largely because of anticipated difficulties with 'front organisations' and problems of implementation. However, disclosure of election expenditure would be required. Second, an 'Election Funding Authority' (EFA) would be formed to administer the new funding scheme.

Third, the total funds available for disbursement would initially be 22 cents per voter for each year of a parliament's life. This was to be divided into two separate funds: a central fund and a constituency fund. The *Central Fund* to be allocated to registered parties for use against election expenses. Funds would be allocated according to a party's state wide vote in the Legislative Council provided that a threshold level was reached. The *Constituency Fund* to be divided equally among contested LA constituencies. No party or candidate could get more than half the funds available. Fourth, within 90 days of the return of the writ for an election, all donations had to be reported. The names of donors giving candidates above \$200 and parties above \$1,000 were to be publicly reported to the EFA, whether or not the candidate or party had registered to receive public funding.¹⁶⁷

Despite declaring that they would refuse to accept public funds, the Liberals found private funds difficult to obtain and, with debts of approx \$2 million, they applied for funding for the 1981 election in January 1982. After initially ruling that the Liberals could apply for 1981 election funding, the EFA ruled that the Liberals could not register late and were therefore ineligible. The National Party did not accept funds for the 1981 election. Both parties accepted funds for the 1984 election, but promised to repeal the legislation when

¹⁶⁵ Chaples E (ed), *The Wran Model, Electoral Politics in New South Wales 1981 and 1984*, Oxford University Press (1985), p. 84.

¹⁶⁶ Turner K, *The New South Wales State Election 1981*, The NSW State Election Series, NSW Parliamentary Library, Department of Government and Public Administration, University of Sydney (1998), p 16.

¹⁶⁷ Based on the material in Turner K, n 166, p 16 and Chaples (ed), n 165, pp 84-85.

returned to office.¹⁶⁸

Ken Turner described the initial operation of the scheme as follows:

In summary, the new funding legislation had a controversial and mixed beginning. It rescued the state ALP from a debilitating financial squeeze in the age of expensive television campaigning. That the coalition did not benefit similarly was largely by its own choice in 1981, and it did so benefit at subsequent by-elections and in 1984. Although the Authority treated minor groups fairly, the Act still operated to their substantial disadvantage. In 1981 only seven of 83 minor parties or Independent candidates for the Legislative Assembly qualified for constituency funds. If the same threshold provisions applied as for the central fund (that is 3.125% of the Legislative Council vote), 85 per cent of Democrats and 57 per cent of Independents and other minor candidates would have been eligible for constituency funds.¹⁶⁹

The scheme as established in 1981 remains essentially the same today, although there have been a number of amendments over the years.¹⁷⁰ In the early 1990's the NSW Parliament Joint Select Committee Upon the Process and Funding of the Electoral System examined ways in which the system of election funding could be improved. The Committee's second report was published in September 1992 and recommended changes to finetune the public funding and disclosure scheme.¹⁷¹ Several of the recommendations concerning disclosure requirements and other administrative matters were implemented in 1993 via amendment to the *Election Funding Act 1981*.¹⁷² For example, the disclosure threshold for donations were reduced to the current levels and the requirement that third parties make disclosure was introduced. The requirement to disclose the identity of donors at fundraising events in the same manner as ordinary political donations was also introduced and anonymous donations over certain thresholds were rendered unlawful.¹⁷³

The 1993 amendments provided for the establishment of the Political Education Fund to provide funds to parties for the purpose of political education.¹⁷⁴ The fund is described in further detail in Section 2.2 of this paper. In recommending the establishment of the Fund the Joint Select Committee expressed the view that:

¹⁶⁸ Chaples (ed), n 165, p 86.

¹⁶⁹ Chaples (ed), n 165, p 88.

¹⁷⁰ For example, *Election Funding (Amendment) Act 1984* (NSW) No 35; *Election Funding (Amendment) Act 1987* (NSW) No 133; *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1990* (NSW) No 111; *Election Funding (Amendment) Act 1991*(NSW), No 13; *Election Funding (Amendment) Act 1993* (NSW), No 104.

¹⁷¹ NSW Parliament, (C Hartcher MP, Chairman), n 104. An earlier preliminary report reviewing the evidence received by the Committee was published in 1991: NSW Parliament, Joint Select Committee upon the Process and Funding of the Electoral System, *First Report*, (J Booth MP Chairman), NSW Parliament, 1991.

¹⁷² Election Funding (Amendment) Bill 1993.

¹⁷³ *ibid.* For further detail about these amendments see the Explanatory Note to the bill and Election Funding Authority of New South Wales, *Annual Report 1994*, p 12.

¹⁷⁴ Election Funding (Amendment) Bill 1993.

[T]he important function of political education of the voting community is not presently assisted by the state in any real way but is left largely to the political parties. As this imposes a considerable burden on them the committee supports the creation of a political education fund based on the cost of one standard postage stamp per elector per year... This money may be expended on political education and educational materials only...¹⁷⁵

Amendments in 1999 varied the manner in which the total contribution to the funding of election campaigns is calculated. Currently, the amount of the contribution is expressed to be proportional to the time that elapses between the return of the writs for the general election for which the contribution is to be calculated and the return of the writs for the previous general election. The old formula, however, measured this time in years and provided for any part of a year to be measured as a full year. The amendment varied the formula so that the time between elections is to be measured in months (any part of a month being treated as a full month), and in measuring that time, any month after the 48th month is to be disregarded.¹⁷⁶

Because the *Election Funding Act 1981* was enacted before the introduction of fixed four-year terms in NSW, it was not anticipated that the period between the return of the writs for two consecutive elections could exceed four years by a few days. Since fixed four-year terms were introduced, the period between the issue of the writs for the current and previous elections can run just over four years. It was therefore thought to be '...inappropriate in these circumstances that five years worth of funding be provided to political parties.'¹⁷⁷ The amendments corrected this drafting anomaly by putting an absolute ceiling on funding so that it could be calculated in relation to no more than four years between elections. The bill also made the relationship between time periods and funding more accurate by measuring the funding according to the number of months between the return of writs or elections, rather than the number of years. This meant that in the limited circumstances where an election was held early, funding would be more accurately calculated.¹⁷⁸

¹⁷⁵ NSW, Parliament, (C Hartcher MP Chairman), n 104, p 6.

¹⁷⁶ Election Funding Amendment Bill 1999, Explanatory Note.

¹⁷⁷ NSWPD, Election Funding Amendment Bill 1999, Second Reading Speech, per Mr lemma MP, 20/10/99, p 1636.

¹⁷⁸ *ibid.*

2.2 PUBLIC FUNDING

The public funding of election campaigns in NSW is governed by Part 5 of the *Election Funding Act 1981*. There are two main election campaign funds in NSW: the Central Fund which relates to Legislative Council elections; and the Constituency Fund which relates to Legislative Assembly elections. Both funds are kept by the EFA and are credited and distributed in accordance with the *Election Funding Act*. The Act also provides for a By-election Constituency Fund, advance payments in certain circumstances and a Political Education Fund.

To be eligible for funding for a particular election, a political party must have been registered by the Electoral Commissioner under the *Parliamentary Electorates and Elections Act 1912* (NSW), and will only be entitled to funding after the first anniversary of registration.¹⁷⁹ The party must have also stated on its application for registration that it wished to be registered for the purpose of the *Election Funding Act*.¹⁸⁰ Candidates and groups must also lodge an application for registration with either the EFA, or an electoral district returning officer no later than Nomination Day for an election, to be eligible for funding.¹⁸¹

Total funds available

The total amount of election campaign funds available must be determined by the EFA as soon as possible after 6pm on the day of the issue of the writs for a general election.¹⁸² The amount is calculated using the following formula:

$$A = E \times \frac{N}{12} \times \frac{M}{100}$$

A = Amount (in dollars) to be credited to the funds.

E = Number of electors enrolled for all electoral districts at 6pm on the day of issue the writs for the general election.

N = (a) the number of months between the day for the return of the writs for the general election and the day for the return of the writs for the previous general election (both days inclusive), any fraction of a month being treated as one month, or (b) 48, whichever is less.

M = Amount (in cents) of the monetary unit (48.3 cents applied to the 1999 election).¹⁸³

¹⁷⁹ S 66A.

¹⁸⁰ *Parliamentary Electorates and Elections Act 1912* (NSW), s 66D(2)(h) and *Election Funding Act 1981*, ss 4 and 59.

¹⁸¹ *Election Funding Act 1981* (NSW), ss 60, 61 and 65. A 'group' means a group of candidates, or part of a group of candidates, for election to the Legislative Council: *Election Funding Act 1981*, s 4.

¹⁸² S 57.

¹⁸³ 22 cents was the amount that applied to the first general election after the commencement of the *Election Funding Act 1981* (NSW). Note that the formula was changed in 1999 as described in Section 2.1 of this paper.

Central Fund

Two-thirds of the aggregate amount is to be credited to the Central Fund.¹⁸⁴ Parties (via a group endorsed by the party), independent groups and independent candidates for a Legislative Council election are eligible for money from the Central Fund. Claimants must be registered on polling day and, at least one member (in the case of parties or groups) or the candidate, must either be elected to the Legislative Council, or poll at least 4% of the total number of primary votes cast in the Council election to receive funds.¹⁸⁵ The Central Fund is distributed in accordance with the following formula:

$$P = \frac{F \times PV}{TEV}$$

- P** = Amount (in dollars) payable to a party, group or candidate eligible to participate in the distribution of the Central Fund.
- F** = Amount (in dollars) in credit in the Central Fund.
- PV** = Primary votes of the party, group or candidate.
- TEV** = Number of primary votes of all parties, groups and candidates eligible to participate in the distribution of the Central Fund.¹⁸⁶

No one party, group or candidate may receive more than half of the amount in the Central Fund. Any amount left over shall not be distributed.¹⁸⁷

Constituency Fund

The remaining third of the total funds are credited to the Constituency Fund. Candidates who have been nominated for election to the Legislative Assembly are eligible for funds. The candidate must be registered on polling day and must either be elected to the Legislative Assembly or receive at least 4% of the primary vote for the election district concerned.¹⁸⁸ Money in the Constituency Fund is to be divided by the number of electorates for which there is two or more candidates for the election and distributed according to the following formula:

$$C = \frac{F \times CV}{TEV}$$

- C** = Amount (in dollars) payable to a candidate who has been nominated for election for an electoral district at the general election.
- F** = Amount (in dollars) available for distribution in respect of the electoral district.
- CV** = Number of primary votes of the candidate.
- TEV** = Number of primary votes of all candidates for election for the electoral district eligible to participate in the distribution of that amount.¹⁸⁹

¹⁸⁴ S 58.

¹⁸⁵ Ss 59, 60 and 61.

¹⁸⁶ S 62.

¹⁸⁷ S 63.

¹⁸⁸ S 65.

¹⁸⁹ Ss 66 and 67.

No one candidate may receive more than 50% of money from the constituency fund available for distribution in respect of his or her electoral district, despite the operation of the above formula. Any amount left over shall not be distributed.¹⁹⁰

Advance Payments and the By-election Constituency Fund

There is also provision under the *Election Funding Act* for advance payments and payments for by-elections.¹⁹¹ A party is eligible for the payment, as an advance payment for expenditure incurred for election campaign purposes for a general election, of an amount for each of the first three complete years after the day for the return of the writs for the previous general election. The amount of an advance payment for a complete year after the day for the return of the writs for the previous general election is an amount equal to 10 % of the total amount to which the party was entitled to for that previous general election.¹⁹²

The amount to be credited to the By-election Constituency Fund is determined by the Authority as soon as possible after 6pm on the day of the issue of the writ for the by-election. The amount is calculated according to a formula set out in the Act:

$$A = \frac{E \times M \times 3}{100}$$

A = Amount (in dollars) to be credited to the fund.

E = Number of electors enrolled for the electoral district concerned at 6pm on the day of the issue of the writ for the by-election.

M = Amount (in cents) of the monetary unit.¹⁹³

Funds are distributed to candidates in a similar way to which funds from the Constituency Fund are distributed for a general election.¹⁹⁴

Claims for payment

A claim for payment from the Central Fund or the Constituency Fund must be lodged with the EFA before the expiration of 120 days after the day for the return of writs for the periodic Council election. In the case of a by-election, a claim must be lodged before the expiration of 120 days after the day for the return of the writ for the by-election.¹⁹⁵ A payment to a party, group or candidate can only be made to the registered agent of the party,

¹⁹⁰ S 68.

¹⁹¹ Part 5, Divisions 5 and 6.

¹⁹² S 69.

¹⁹³ S 73. The monetary unit is the same as if the by-election were a general election.

¹⁹⁴ Ss 73 (5) and (6) and 73A.

¹⁹⁵ S 74. The time period for lodgement was increased to 120 days from 90 days in 1994: *Statute Law (Miscellaneous Provisions) Act (No.2) 1994* (NSW).

group or candidate.¹⁹⁶

The EFA will refuse to make payments to the extent that it would exceed the amount of election expenditure incurred for election campaign purposes.¹⁹⁷ Therefore, a claim for payment may only be made in respect of items which are deemed to constitute 'election campaign expenditure' in accordance with the *Election Funding Act*, regulations or Guidelines laid down by the EFA.¹⁹⁸ The *Election Funding Act* defines election campaign expenditure to include, expenditure for goods and services for election campaign purposes, expenditure for election campaign preparation purposes, and expenditure incurred in respect of the audit of the relevant claim for payment and declaration lodged (but cannot exceed \$200 in each case). It does not include expenditure incurred substantially in respect of an election for a legislature other than the Parliament or expenditure incurred substantially in respect of an election held before that in respect of which the relevant application for payment under the act is made.¹⁹⁹ The decision of the EFA as to whether any expenditure is or is not for election campaign purposes is final.²⁰⁰ The EFA has laid down 29 Guidelines, which set out restrictions on items that maybe claimed as 'election campaign expenditure.'²⁰¹ The Guidelines are set out in Appendix 2.

Political Education Fund

The Political Education Fund was established in 1993.²⁰² Following a general election, a registered party is entitled to receive annual payments from the Fund, until the polling day for the next general election, for the purposes of political education.²⁰³ Under the *Election Funding Act*, 'political education purposes' includes (but is not limited to) the posting of written materials and information, regardless of whether the information contains material only about the party concerned. However, it is not to include travelling or accommodation expenses.²⁰⁴ A registered party is not entitled to receive payments from the Fund unless it endorsed candidates for election to the Assembly at the general election, and was entitled to receive public funding (as discussed in Section 2.2) in respect of the general election.²⁰⁵

¹⁹⁶ S 77.

¹⁹⁷ S 74(2)(b).

¹⁹⁸ EFA (*Handbook*), n 43, p 11.

¹⁹⁹ S 55(1).

²⁰⁰ S 55(2).

²⁰¹ EFA (*Handbook*), n 43, p 11.

²⁰² The establishment of the Fund is discussed in further detail in Section 2.1.

²⁰³ S 97B as inserted by *Election Funding (Amendment) Act 1993* (NSW), No 104, Schedule 1(14).

²⁰⁴ S 97C(1)(2) and (3).

²⁰⁵ S 97C(4).

A registered party must claim for payment from the Fund in each year to the EFA.²⁰⁶ The annual amount payable to each party at 1 January each year, in respect of the last general election held before that date, is calculated at the rate of 45 cents for each first preference vote cast for candidates endorsed by the party at the Legislative Assembly Election.²⁰⁷ The following formula is set out in the *Election Funding Act*:

$$P = CS \times FPV$$

- P** = Amount of payment to the party from the Fund for the year concerned.
CS = Cost (at 1 December before the payment is made) of a postage stamp needed to post a standard postal article by ordinary mail from Sydney to an address in Sydney.
FPV = Number of first preference votes recorded at the last general election on all ballot papers not rejected as informal, for the candidates endorsed by the party for election to the Legislative Assembly.²⁰⁸

There are restrictions on the way in which the funds are to be spent. For example, if a registered party has spent an amount received from the Fund in a manner that is contrary to the Authority's determinations, or other approved purposes, the Authority may require the party to return the amount. Also, unspent funds are to be carried over to the following year.²⁰⁹

2.3 DONATIONS

Disclosure by candidates, groups and parties

All candidates, groups and parties are required to lodge a declaration of political contributions that are received and electoral expenditure incurred, during the disclosure period.²¹⁰ The expenditure aspect of the declaration is discussed in Section 2.4. The declarations must be lodged within 120 days after the return of the writs for an election. The disclosure period ends on the 30th day after an election in all cases,²¹¹ but the commencement point varies. For parties and candidates who contested the previous general election the period commences the day following polling day for the previous general election. For candidates who contested a by-election after a general election the disclosure period commences the day following polling day for the by-election. For other candidates the disclosure period commences the day that is 12 months before the day on which the candidate nominated for election at the current election. For groups the period commences

²⁰⁶ S 97F.

²⁰⁷ EFA (*Handbook*), n 43, p 15.

²⁰⁸ S 97E.

²⁰⁹ Ss 97I and 97J.

²¹⁰ S 87(1).

²¹¹ The end of the disclosure period was extended from the polling day to 30 days after polling day in 1993: *Election Funding (Amendment) Act 1993* (NSW).

the day of nomination for the current election.²¹²

The *Election Funding Act* requires that party's, groups and candidates include in their declaration details of the source of contributions over a certain monetary levels:

- Candidate: \$200
- Group: \$1,000
- Party: \$1,500²¹³

The necessary details are the date on which the contribution was made and the name and address of the person who made the contribution. The source contributions below the specified amounts need not be disclosed, although details must be shown of the number and monetary range of any such donations.²¹⁴ If, however, two or more contributions are made by one person, body or organisation, within any period of 12 months during the relevant period, and the aggregate of those 2 or more contributions exceeds the amounts specified above, this exemption does not apply.²¹⁵

Disclosure by third parties who incur election expenditure

Persons (other than a party, candidate or group member) who incur electoral expenditure²¹⁶ of more than \$1,500 are also obliged to make disclosure of certain donations received and donations made. These people are often referred to as 'third parties'.²¹⁷ 120 days after the day for the return of the writs for an election, third parties must lodge with the Authority, a declaration of electoral expenditure incurred and political received during the disclosure period. The disclosure period is the 31st day after polling day for the previous election until the 30th day after polling day for the current election.

The political contributions that must be included are gifts of \$1,000 or more received by the person, if the whole of the gift, or part of the gift, was used by the person to incur the expenditure, or to reimburse the person for the expenditure. As part of the requirement to disclose election expenditure, the declaration must also disclose donations made by the person of \$1,500 or more to a political party, donations of \$1,000 to a group and donations of \$200 or more to a candidate.²¹⁸ The details to be disclosed are the same as for candidates,

²¹² Ss 83, 84 and 85.

²¹³ Ss 87(3), 87(3A) and 87(4). The thresholds were reduced from \$2,500 for parties and groups and \$500 for candidates to the current thresholds in 1993: *Election Funding (Amendment) Act 1993* (NSW).

²¹⁴ EFA (*Handbook*), n 43, p 4.

²¹⁵ S 87(5).

²¹⁶ What constitutes 'election expenditure' is explained in Section 2.4.

²¹⁷ Ss 85A, 86 and 87. Third party disclosure was introduced in 1993: *Election Funding (Amendment) Act 1993* (NSW). The background to this amendment is examined in Section 2.1.

²¹⁸ S 88(2A).

groups and parties as stated above.

What constitutes a political contribution?

The political contributions that must be disclosed are ‘gifts’ received during the disclosure period. A ‘gift’ is defined as:

Any disposition of property made by a person to another person, otherwise than by will, being a disposition made without consideration in money or money’s worth or with inadequate consideration and includes the provision of a service (other than volunteer labour) for no consideration or for inadequate consideration.²¹⁹

A gift to a candidate need not be disclosed if it was made in a private capacity for the candidate’s personal use and the candidate has not used, and will not use, the gift solely or substantially for a purpose related to an election.²²⁰

Fund raising functions

The amount paid to a person as a contribution, entry fee or other payment, to entitle that or any other person to participate in or otherwise obtain any benefit from a fund-raising venture or function, is also a gift.²²¹ The amount must form part of the net proceeds of the venture or function.

Anonymous donations

It is unlawful for a party, group or candidate to receive a gift of more than the respective threshold amounts stated above, from an unknown source. Any anonymous gift received are payable to the State.²²² Gifts cannot be lawfully accepted unless:

- (a) The full name and address of the person, body or organisation making the gift are known to the person receiving it, or
- (b) When the gift is made, the person making the gift gives to the person receiving the gift his or her name and address and the person receiving the gift has no grounds to believe that the name and address so given are not the true name and address of the person making the gift.

²¹⁹ S 4. The definition of ‘gift’ was extended to include the provision of a service (other than volunteer labour) in the absence of or for inadequate consideration in 1993: *Election Funding (Amendment) Act 1993* (NSW).

²²⁰ S 87(2).

²²¹ S 87(1AA). The fund raising provision was introduced in 1993: *Election Funding (Amendment) Act 1993* (NSW). Fundraising is discussed in more detail in Section 1.2.3(a).

²²² S 87A. The prohibition on anonymous donations over the threshold was introduced in 1993: *Election Funding (Amendment) Act 1993* (NSW).

Offences

If the agent of a political party fails to lodge a declaration of political contributions received and electoral expenditure incurred the agent and the party is guilty of an offence. The agent will therefore be liable to a penalty of up to \$11,000 and the party liable to a penalty of up to \$22,000. If the agent of a candidate or group, or a third fails to lodge a declaration as required by the *Election Funding Act*, the agent is guilty of an offence and is liable to a penalty of up to \$11,000.²²³

A person who, in any declaration makes a false or misleading statement knowing it to be false or not reasonably believing it to be true, is guilty of an offence. A candidate or group member who, in relation to any matter to be included in a declaration, gives or withholds giving information to the agent of the candidate or group, knowing that it will result in the making of a false or misleading declaration by the agent, is also guilty of an offence. These offences are punishable by penalties of up to \$1,000.²²⁴

2.4 ELECTION EXPENDITURE

The disclosure returns that candidates, groups and parties must file in relation to donations (outlined in the previous section) must also include information about election expenditure. The basic rules, such as the length of the disclosure period and due date for returns are the same. Similarly, the third parties who incur electoral expenditure of more than \$1,500, and subsequently must disclosed information about donations they received, must also disclose information about election expenditure.²²⁵

The expenditure to be disclosed is defined as expenditure ‘for or in connection with promoting or opposing, directly, or indirectly, a party or the election of a candidate or candidates or for the purpose of influencing, directly or indirectly, the voting at an election.’²²⁶ The *Election Funding Act* contains a non-exhaustive list of matters that constitute campaign expenditure including expenditure on the following items:

- advertisements in radio, television, cinemas, newspapers, periodicals, posters, brochures, how-to-vote cards and any other printed election material;
- holding election rallies;
- the distribution of election material;
- travel and accommodation for a candidate;
- research associated with election campaigns;
- committee rooms; and

²²³ *Election Funding Act 1981*(NSW), s 96 and *Crimes (Sentencing Procedure) Act 1999* (NSW), s 17.

²²⁴ *ibid.*

²²⁵ S 85A.

²²⁶ S 88(1).

- expenditure incurred in raising funds for an election.²²⁷

In relation to third parties, the *Election Funding Act* specifies that the election expenditure that must be disclosed also includes any contribution of \$1,500 or more to a political party, contributions of \$1,000 to a group and contributions of \$200 or more to a candidate.²²⁸

The *Election Funding Regulation 1999* provides that election campaign expenditure in relation to advertising and printed material must be vouched for by the production of a copy of the material, together with accounts and receipts in respect thereof. Copies of the text of any advertisements in the electronic media together with accounts or receipts are also required.²²⁹

Where the amount of this expenditure is less than a claimant's entitlement under the *Election Funding Act*, receipts or accounts are required in respect of other election campaign expenditure such as administrative costs. Therefore, where the expenditure for advertising and printed matter is supported by the necessary documentation and the amount of this expenditure exceeds a claimant's entitlement under the *Election Funding Act*, no documentation is required in respect of administrative expenses.²³⁰

²²⁷ S 88(2).

²²⁸ S 88(2A).

²²⁹ EFA (*Handbook*), n 43, p 6. *Election Funding Act 1981* (NSW), s 94, *Election Funding Regulation 1999* (NSW), s 10.

²³⁰ EFA (*Handbook*), n 43, p 6.

3. FEDERAL FUNDING AND DISCLOSURE SCHEME

The essence of the current scheme for regulating Federal election finance has been in place since the early 1980's and has been developed through various amendments to the *Commonwealth Electoral Act 1918*. In terms of the areas of election finance regulation examined in this paper, the scheme includes public funding of election campaigns for candidates for both Houses and Senate groups, and disclosure of donations and election expenditure. There are no limits on election expenditure.²³¹ The main elements of the Federal election funding and financial disclosure scheme are set out in this section.²³² A brief summary of the development of the current scheme is included below.²³³

After the NSW public funding and disclosure scheme was established in 1981, the Federal Government soon set about introducing public funding and disclosure at the Federal level. As Chaples noted, the Federal Government was '[u]ndoubtedly encouraged by the collapse of coalition opposition to public funding and private disclosure legislation in New South Wales.'²³⁴ After the controversy in NSW had played itself out, the opposition to the principles of public funding and disclosure seemed to fade. The introduction of the Federal scheme passed with relatively little debate.

In 1983, the Federal Government established a Joint Select Committee on Electoral Reform (JSCER) to conduct a wide ranging inquiry into electoral reform in several areas including public funding, disclosure of donations, redistribution of electorates and the registration of voters.²³⁵ The JSCER issued its first report in September 1983, recommending the introduction of a comprehensive system of public funding and disclosure.²³⁶ The scheme was implemented through the passage of the *Commonwealth Electoral Legislation Amendment Act 1983*, which inserted a new Part 16 (later to be renumbered as Part 20) into the *Commonwealth Electoral Act*.

²³¹ Note that a limit on the type of election expenditure, in the form of a prohibition on paid political advertising, was introduced in 1991 and later struck down by the High Court in a seminal constitutional case. This issue is beyond the scope of this paper. See Cass, n 61, for a review of this issue.

²³² For further information, see the funding and financial disclosure handbooks produced by the AEC. They can be viewed on the AEC web site at: www.aec.gov.au (accessed 1/9/01).

²³³ A more detailed analysis is beyond the scope of this paper. For a thorough examination of the history of Federal election finance laws and the development of the current scheme, see: Cass, n 61.

²³⁴ Chaples in Alexander, n 12, p 81.

²³⁵ Note that prior to this, in 1981, an independent inquiry into disclosure of election expenditure was undertaken by Sir Clarrie Harders: *Inquiry into Disclosure of Electoral Expenditure - Report* (Sir C Harders), Canberra, April 1981. The JSCER considered the recommendation of the Harders Inquiry in its 1983 report: Australia (Klugman, Chairman), n 63, pp 168-178.

²³⁶ Australia, (Klugman, Chairman), n 63.

The scheme has undergone a number of amendments over the years. This is particularly the case in relation to disclosure, where the scheme has been amended several times to close loopholes that have allowed many donations to political parties and candidates to go undisclosed. Amendments have largely stemmed from the work of the AEC and the JSCEM. The AEC has reviewed the operation of the funding and disclosure scheme after each Federal general election, making recommendations for reform. The JSCEM has also reviewed the funding and disclosure scheme as part of its inquiries into the conduct of each Federal election, also recommending reform.

Future reforms are likely as elections become more costly and the fundraising work of individuals and organisations closely linked to political parties challenges the objective of full disclosure and the effectiveness of disclosure laws. The JSCEM is currently inquiring into those recommendations of the AEC's 1996 and 1998 Funding and Disclosure Reports not currently incorporated in legislation, or not previously examined by the Committee. The JSCEM is due to report on the desirability of incorporating the remaining AEC funding and disclosure recommendations into the existing legislation in the next session of Parliament. Some current issues in disclosure laws and proposals for reform that relate to the Federal scheme as well as other Australian schemes, are examined in Section 1.2 of this paper.

3.1 PUBLIC FUNDING

Public funding for Federal election campaigns is governed by Division 3, Part 20 of the *Commonwealth Electoral Act 1918*. Candidates in a House of Representatives election, and candidates and groups²³⁷ in a Senate election, are entitled to election funding at prescribed rates in proportion to the number of formal first preference votes received.²³⁸ There is a threshold requirement to entitlement. A candidate or Senate group must win at least 4% of the formal first preference vote in the electorate contested to be eligible for election funding. For Senate groups, it is sufficient if the group as a whole wins at least 4% of the votes.²³⁹

The amount payable to a candidate or Senate group is calculated by multiplying the number of first preference votes received by the candidate or Senate group in the election, by the election funding rate applicable at the time.²⁴⁰ The rate for 1 July 2001 to 31 December 2001 has been set at \$1.79026 per vote in either a House of Representatives or Senate election.

²³⁷ A 'group' means a group of two or more candidates nominated for election to the Senate who have their names grouped in the ballot papers in accordance with s 168 of the *Act*: s 287.

²³⁸ S 294.

²³⁹ S 297.

²⁴⁰ The legislation states that the rate payable is \$1.50: s 294. This amount is indexed in line with the Consumer Price Index every six months.

Example

A Candidate in the House of Representatives received 10,987 first preference votes in an election in December 2001 and this represented at least 4% of the total number of eligible votes polled in favour of all of the candidates in the election. Payment would be calculated in the following way:

$$10,987 \times \$1.79026 = \$19,669.59$$

Entitlements are paid automatically and as soon as possible after the 20th day following polling day. The *Commonwealth Electoral Act* requires the AEC to pay at least 95% of the entitlement on the basis of the votes counted as at the twentieth day after polling day. In many cases, however, the payment may actually be 100% of the final entitlement, depending on the progress of the count. Any balance will be paid as soon as the full entitlement is known. Payment is made automatically.²⁴¹ Endorsed candidates and Senate groups do not receive a direct payment of the election funding entitlement from the AEC. This payment is made to the agent of the relevant State/Territory branch of the endorsing party. For independent candidates and groups, payment is made to their agent.²⁴²

The *Commonwealth Electoral Act* also provides for the redirection of election funding payments from one party, or State/Territory branch of a party, to another. For example, pursuant to the legislation, the ALP has an agreement in place that the money that would normally be paid to the agents of the State/Territory Branches is paid to the National Secretariat's agent. A redirection remains ongoing until withdrawn and an agreement for redirection can only be withdrawn with the consent of both parties.²⁴³ The issue of redirecting party funding is examined in further detail in Section 1.1.2.

3.2 DONATIONS

Division 4 of Part 20 of the *Commonwealth Electoral Act* deals with the disclosure of donations. The Division obliges candidates, Senate groups, and third parties who incur election expenditure, to file returns with the Electoral Commission after each election, disclosing certain information about donations they *received*. Third parties must also file returns disclosing information about donations they *made* to candidates and political parties.

Candidates and Senate Groups

Within 15 weeks of polling day for an election, every candidate is required to lodge a Return of Election Donations with the AEC. The return must set out the total value of all gifts, and the number of persons who made the gifts, received by the candidate during the disclosure period. The 'relevant details' of gifts of \$200 or more must also be included, except gifts made in a private capacity to the candidate for his or her personal use, and

²⁴¹ S 299(5D).

²⁴² S 299(1), (2) and (3).

²⁴³ S 299(5A), (5B) and (5C).

which have not (or will not) be used, wholly or substantially, for an election purpose.²⁴⁴ Jointly endorsed and unendorsed Senate groups must lodge similar returns, except that relevant details must be supplied only in relation to gifts of \$1,000 and over.²⁴⁵

Relevant details: Relevant details are the name and address of the person making the gift, the value of the gift and the date it was made. If the donor was an unincorporated association (other than a registered industrial organisation) the name of the association and the names and addresses of the members of the executive committee must also be included. If the donor was a trust fund or a foundation, the names and addresses of the trustees of the fund or foundation and the title of the fund or foundation must be included.²⁴⁶

Disclosure period: The commencement date of the disclosure period for candidates depends upon the circumstances of the candidate such as, whether the candidate has previously stood in a Federal election and whether a new candidate is standing as an independent or an endorsed candidate. For a Senate group, the disclosure period commences on the date that a claim to be grouped on the ballot paper is formally made to the AEC. In all cases the disclosure period concludes 30 days after polling day.

Definition of donation/gifts: Donations, or ‘gifts’ as they are referred to in the legislation are defined as ‘any disposition of property made by a person to another person, otherwise than by will, being a disposition made without consideration in money, or money’s worth or without adequate consideration.’²⁴⁷ It does not include an annual subscription paid to a political party. Not only cash donations but ‘gifts-in-kind’ are included. Gifts-in-kind are goods, assets or services received for which no payment (in cash or kind) or a payment less than the true value is made. For example, free legal advice given by a law firm or the donation of an artwork to the party as a raffle prize. These donations need to be disclosed at the appropriate value, ie the commercial or sale value of the item or service.²⁴⁸

Multiple donations: When determining whether a threshold has been met, two or more donations from the same source are aggregated. In other words, two or more gifts from the same person, made during the disclosure period, are taken to be one gift.²⁴⁹

Anonymous donations: It is unlawful for a candidate to receive anonymous donations of \$200 or more, and for a Senate group to receive anonymous donations of \$1,000 or more. It is also unlawful for a political party or a state branch of a political party to receive an anonymous gift of \$1,000 or more.²⁵⁰

²⁴⁴ S 304(2).

²⁴⁵ S 304(2) and (3). Donation returns and electoral expenditure returns (discussed in Section 3.3 of the paper) are actually made in the one document.

²⁴⁶ S 304(4).

²⁴⁷ S 287.

²⁴⁸ AEC (*Handbook for Political Parties*) n 69.

²⁴⁹ Ss 304(6), 305(4), 305A(2), 305B(1).

²⁵⁰ S 306(2).

Third parties who make donations

People (not being a political party, branch of a party, an associated entity, a candidate or member of a group) who make certain donations during the disclosure period must also file a return.²⁵¹ These people are generally referred to as ‘third parties’.

Third parties who donate \$200 or more to a candidate or a member of a group, or \$1,000 or more to a specified body must file a return within 15 weeks of polling day of an election. Specified bodies include Australian Democrats Support Trust; ALP Legacies and Gifts Ltd; Bjelke-Petersen Foundation; Janine Haines Trust Fund; and Labor Holdings.²⁵² The details that must be disclosed are the amount or value of the gift, the date on which it was made and the name and address of the person or organisation it was made to. If the donation was made to an unincorporated association (other than a registered industrial organisation) or a trust fund, or paid to the funds of a foundation, further identifying details of the organisation it was made to are required.²⁵³

Third parties who donate \$1,500 or more to a political party or a State branch of a party must file a return within 20 weeks of the end of each financial year, covering all the gifts made to that party or branch during the financial year.²⁵⁴ If a person makes a gift to any person or body with the intention of benefiting a particular party or branch the person is taken to have made that gift directly to the party or branch. The return must include the amount of each gift, the date it was made and the name and address of the party or branch. These donors must also disclose donations they have received, of \$1,000 or more, which they in turn used to make their donations.²⁵⁵

Third parties who incur election expenditure

A person (not being a political party, branch of a party, an associated entity, a candidate or member of a group) who, during the disclosure period, incurs election expenditure for a political purpose of over \$1,000, is also required to file a disclosure return within 15 weeks of an election. ‘Political purpose’ in this context means the incurring of expenditure in connection with or by way of:

- the publication by any means of electoral matter;
- by any other means publicly expressing views on an issue in an election;

²⁵¹ Ss 305A and 305B.

²⁵² A list of all specified bodies is contained on the AEC web site at: www.aec.gov.au/disclosure/thrdparty/appendix1.htm (accessed 1/9/01).

²⁵³ S 305A.

²⁵⁴ S 305B. Note that a donor which is an organisation controlled by, or operating wholly or to a significant extent for the benefit of, a registered political party (or parties) is an ‘associated entity’ and as such has disclosure responsibilities separate from a third party donor (see Section 3.4 of this paper).

²⁵⁵ S 305B.

- the making of a gift to a political party, or a State branch of a political party, a candidate or a group;
- the making of a gift to a person on the understanding that that person or another person will apply, either directly or indirectly, the whole or part of the gift in manner listed above.²⁵⁶

The return must include the *relevant details* of all gifts of \$1,000 or more (received during the disclosure period), where the whole or part of the gift was used by the person to enable him or her to incur the expenditure, or to reimburse the person for incurring expenditure.²⁵⁷

3.3 ELECTION EXPENDITURE

The disclosure of electoral expenditure requirements are dealt with in Division 5 of Part 20, of the *Commonwealth Electoral Act* and relate to candidates, Senate groups, and persons who incur electoral expenditure without the written authority of a party, associated entity, candidate or group. Broadcasters and publishers are also under certain disclosure obligations. The provisions do not apply to electoral expenditure incurred by or with the authority of a registered political party or a State branch of a registered political party.²⁵⁸

Candidates and Senate groups

The total of a candidate's or Senate group's campaign expenditure in each of six specified categories must be reported in a Return of Donations within 15 weeks after the polling day of an election, unless the expenditure was under \$200.²⁵⁹ The six categories are:

1. Broadcasting advertisements (including production costs);
2. Publishing advertisements (including production costs);
3. Displaying advertisements at a theatre or other place of entertainment (including production costs);
4. Costs of campaign material where the name and address of the author required (eg how-to-vote cards, pamphlets, posters);
5. Direct mailing; and
6. Opinion polling or other research relating to the election.

²⁵⁶ S 305.

²⁵⁷ *ibid.*

²⁵⁸ S 309(1). A requirement for parties to lodge election expenditure returns was part of the original scheme but was removed prior to the 1993 election. It was reinstated in 1995 and removed again, upon the recommendation of the Joint Standing Committee on Electoral Matters in 1998, through the passage of the *Electoral and Referendum Amendment Act 1998* (Cth).

²⁵⁹ *Commonwealth Electoral Act 1918* (Cth), ss 308 and 309. Except a Senate group all of whose members are endorsed by the same registered political party. Note also that candidates who were members of a Senate group do not, however, need to report campaign expenditure on their personal Return as their expenditure is to be included on the group's Return. Electoral expenditure returns and donations returns (discussed in Section 3.2 of the paper) are actually made in the one document.

Only the total of expenditure under each of these categories must be disclosed. No disclosure is required of the person or organisation to whom payment was made.²⁶⁰ The return must cover campaign expenses from the issue of the writ until the close of polling, irrespective of when payment is made. For example, both the production cost and broadcast cost of an election advertisement must be included even where that advertisement was produced prior to the election period. Other campaign expenditure such as the hire of premises and equipment, freight, telephone charges and travel costs are not required to be included in the return.²⁶¹

Third parties who incur election expenditure

A person who incurred electoral expenditure without the written authority of a registered political party, an associated entity, a candidate in the election or a member of a group must also furnish a return. A return is not required if the expenditure was less than \$200.²⁶²

In 1996, the AEC recommended that this threshold be changed to \$1,000, to keep in step with increases in costs of election expenditure (particularly the costs of broadcasting). However, this recommendation has not been implemented. The AEC also suggested that this threshold would ensure that disclosure obligations would only be placed on those third parties who involve themselves in an election campaign to a significant degree.²⁶³

Broadcasters and publishers

Each broadcaster who, during an election period, broadcasts an advertisement relating to the election authorised by a participant must furnish a return within eight weeks of polling day. The return must include: the identity of the broadcaster, the identity of the person at whose request the advertisement was broadcast; the identity of the participant in the election with whose authority the advertisement was broadcast, the dates and times on which it was broadcast.²⁶⁴ A publisher of a journal who, during an election period, published in the journal an advertisement/s relating to the election with the authority of a participant/s in the election must also furnish a return if the total charged for electoral advertisements was more than \$1,000. The particulars that must be identified are similar to those in relation to broadcasters.²⁶⁵

In its 1998 election report, the AEC recommended that these requirements be abolished, arguing that there was no justification in continuing to impose this administrative and

²⁶⁰ AEC (*Report – Election 1998*), n 11, p 7.

²⁶¹ S 308.

²⁶² S 309(4).

²⁶³ AEC (*Report – Election 1996*), n 14, p 9.

²⁶⁴ S 310.

²⁶⁵ S 311.

financial burden on broadcasters and publishers. In forming its recommendation, the AEC noted that the returns of broadcasters and publishers are rarely inspected once placed on the public record and that it 'likewise makes little use of the information contained in these returns'.²⁶⁶ Other administrative difficulties faced by broadcasters and publishers in making returns were noted in an earlier AEC report.²⁶⁷

3.4 ANNUAL RETURNS OF POLITICAL PARTIES AND ASSOCIATED ENTITIES

While political parties and associated entities do not have to file election expenditure returns, as required by candidates and Senate groups, they do have to make annual returns disclosing certain financial information to the AEC. These annual returns reveal donations made to and received by political parties and associated entities.

Parties

The agent of each registered political party and each State/Territory branch of a registered political party is required to furnish an annual return to the AEC by 20 October.²⁶⁸ The total amount received by or on behalf of the party during the financial year must be disclosed, including donations. If the sum of all amounts received from a person or organisation is equal to or greater than \$1,500 the return must include the particulars of that sum. When calculating the sum an amount of less than \$1,500 does not have to be included. The particulars are the name and address of the person or organisation. Further details are required if the sum was received from an unincorporated association or paid out of a trust fund or the funds of a foundation.²⁶⁹ A loan to the value of \$1,500 or more must be disclosed as a receipt from that financial institution.²⁷⁰

The total amount paid by or on behalf of the party or entity during the financial year must be disclosed and the total amount of debts outstanding at 30 June must also be disclosed.²⁷¹ If the sum of all outstanding amounts incurred is \$1,500 or more the return must include particulars of that sum. The Return becomes available for public inspection on 1 February in the year following the due date for that Return (or the first working day thereafter if 1 February falls on a weekend or public holiday).

²⁶⁶ AEC (*Report – Election 1998*), n 11, p 11.

²⁶⁷ AEC (*Report – Election 1996*), n 14, pp 10-11.

²⁶⁸ S 314AB(1).

²⁶⁹ S 314AC.

²⁷⁰ AEC (*Handbook for Political Parties*), n 69. The handbook can be viewed on the AEC web site at: www.aec.gov.au/disclosure/political_parties/main.htm (accessed 1/9/01).

²⁷¹ S 314AB(2).

Associated entities

An associated entity is an organisation that is either controlled by, or operates wholly or to a significant extent for the benefit of, one or more registered political parties. Parties should provide the AEC with contact details for all associated entities of the party.²⁷² Associated entities are subject to essentially the same financial disclosure requirements as political parties as described above.²⁷³

²⁷² *ibid.*

²⁷³ S 314AEA.

4. OTHER AUSTRALIAN JURISDICTIONS

In the remaining States and the Territories, election finance laws range from the comprehensive to the minimal. Queensland and the ACT have comprehensive schemes, essentially adopting the Federal public funding and financial disclosure scheme. Tasmania and Victoria are the only jurisdictions with a limitation on election expenditure, but that is the extent of election finance regulation in those States. WA has a comprehensive disclosure scheme, but does not have public funding of elections or limitations on election expenditure. SA and the NT are the only jurisdictions with none of the aspects of election finance examined in this paper. An overview of each jurisdiction is contained in this section. A comparative table of all Australian jurisdictions is contained in Appendix 1.

4.1 QUEENSLAND

The public funding and financial disclosure scheme was introduced in Queensland by the Goss Government in 1994. The scheme is based on the Federal scheme, with Part 20 of the *Commonwealth Electoral Act 1918* (the *Commonwealth Act*) being adapted to the Queensland requirements and inserted into the schedule to the *Queensland Electoral Act 1992* (the *Queensland Act*). The schedule uses the same numbering as the *Commonwealth Act* and changes to the text of the *Commonwealth Act* are noted in the text in italics. The *Queensland Act* states, however, that the schedule is not a mere adoption or application of the *Commonwealth Electoral Act*.²⁷⁴

The genesis of the Queensland scheme can be traced to recommendations made in the Fitzgerald Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct completed in 1989.²⁷⁵ The Fitzgerald Report expressed concern about the potential for corruption via political donations and recommended that the Electoral and Administrative Review Commission (EARC) – the establishment of which was a fundamental recommendation of the report – consider the establishment of a public register of donors to all political parties.²⁷⁶ The EARC examined this issue and, in its report of June 1992, recommended that candidates and parties should be required to disclose political donations received.²⁷⁷

²⁷⁴ *Electoral Act 1992* (Qld), ss 126A and 126B.

²⁷⁵ Queensland, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report of a Commission of Inquiry Pursuant to Orders In Council* (Fitzgerald Chairman), July 1989.

²⁷⁶ QPD, 16/11/94, the Hon DM Wells, Second Reading speech of the Electoral Amendment Bill 1994, p 10405. Queensland (Fitzgerald Chairman), n 275, Recommendation 11(a), p 371.

²⁷⁷ Queensland, Electoral and Administrative Review Commission, *Report on Investigation of Public Registration of Political Donations, Public Funding of Election Campaigns and Related Issues*, June 1992.

Subsequently, the Parliamentary Committee for Electoral and Administrative Review considered the EARC report and produced its own report in November 1993.²⁷⁸ The Parliamentary Committee agreed that such a register be established and recommended that for administrative ease Queensland should enact legislation based on the *Commonwealth Act*. As stated by the then Attorney-General, in the Second reading speech to the Bill introducing this new scheme, ‘one of the reasons for this approach is that it will minimise the burden on political parties who are already required to report to the Commonwealth on these matters. A similar system will assist them in their duties under the Queensland Act.’²⁷⁹ The public funding and disclosure of election expenditure aspects of the Federal scheme were also incorporated into the *Queensland Act*.

Because the Queensland scheme is similar to the Federal scheme, only a few points of note, and of difference, are made below.

Public funding

- Public election funding is available to candidates contesting a Queensland State election who meet the 4% threshold.²⁸⁰
- The funding rate is lower than the Federal rate at: \$1.23995 per first preference vote polled by the endorsed candidates of the party or the independent candidate.²⁸¹ The rate is indexed annually, unlike the Federal rate that is indexed twice a year.
- Public funding is based on reimbursing parties for their election expenditure and the amount of public funding granted cannot exceed the amount of election expenditure incurred by the claimant.²⁸² The *Commonwealth Act* does not have this restriction.
- Payments are made after a claim is made to the Queensland Electoral Commission (under *Commonwealth Act* payment is automatic). The candidate’s agent must make the claim, or in the case of a candidate endorsed by a registered political party, the agent of the political party must make the claim.²⁸³

²⁷⁸ Queensland Parliament, Parliamentary Committee for Electoral and Administrative Review, *Report on Public Registration of Political Donations, Public Funding of Election Campaigns and Related Issues* (Dr L Clark, Chairman), November 1993.

²⁷⁹ QPD, 16/11/94, the Hon DM Wells, Second Reading speech of the Electoral Amendment Bill 1994, p 10406.

²⁸⁰ Schedule, s 297.

²⁸¹ Schedule, ss 294 and 294A. The rate set in the *Act* is \$1.03531, and is indexed annually to the CPI. The rate stated above is for the 2001/02 financial year.

²⁸² Schedule, s 298.

²⁸³ Schedule, s 295.

Donations

- The Federal provisions relating to disclosure of donations by candidates, and persons (other than a political party, associated entity or candidate) who incur expenditure for a political purpose, are the same under the *Queensland Act*.²⁸⁴
- The ban on anonymous donations is also the same.²⁸⁵
- The *Queensland Act* does not include disclosure by people who make donations to candidates and political parties, as required under the *Commonwealth Act*.

Election expenditure

- The disclosure of election expenditure provisions apply to candidates, and people who incur election expenditure of \$200 or more without the written authority of a registered political party, an associated entity or a candidate in an election.²⁸⁶
- The *Commonwealth Act* also requires returns from broadcasters and publishers – these are not required under the *Queensland Act*.
- There is no limit on election expenditure.

Annual returns of political parties and associated entities

- The requirements for political parties and associated entities are essentially the same as the requirements under the *Commonwealth Act*.²⁸⁷

²⁸⁴ Schedule, Division 4, ss 304 and 305. The *Queensland Act* does not, of course, provide for Senate groups as the *Commonwealth Act* does.

²⁸⁵ Schedule, s 306.

²⁸⁶ Schedule, s 309.

²⁸⁷ *Electoral Act 1992* (Qld), Schedule, Division 5A.

4.2 SOUTH AUSTRALIA

Parliamentary electoral matters in SA are governed by the *Electoral Act 1985* and are administered by the South Australian State Electoral Office.²⁸⁸ As at August 2001, election finance law in SA relates only to local government. There is no regulation of donations received, or election expenditure incurred, by parliamentary candidates and parties, and no public funding exists for parliamentary elections. This was not always the case. Prior to 1969 there were limits on the amount of election expenditure that could be incurred by candidates to both houses of the South Australian Parliament. Candidates were limited to a total expenditure of £50, plus an additional £5 for every 200 electors on the roll above 2000 and there were also limits on the type of election expenditure that could be incurred.²⁸⁹ All gifts and loans were to be paid to candidates only, and gifts and loans of more than £2 had to be declared.²⁹⁰ All of these limitations were abolished through the passage of the *Electoral Act Amendment Act 1969*.

Legislation currently before the South Australian Parliament proposes the introduction of donation disclosure requirements similar to the Federal scheme. The Electoral (Miscellaneous) Amendment Bill was introduced into the Legislative Council on 5 March 2001. The bill was introduced to implement a number of recommendations made by the Electoral Commissioner, most of which are ‘...of a technical nature and seek to streamline existing electoral processes.’²⁹¹ The bill originally did not provide for disclosure scheme. After an amendment suggested by the Hon T Cameron, MLC, of the SA First Party, the Government filed its own proposals for a new part 13A to be inserted into the *Electoral Act 1985* to establish a scheme for the disclosure of donations.

Part 13A is based on aspects of Part 20 of the *Commonwealth Electoral Act 1918*. It provides that a person who donates \$5,000 or more to a political party, \$500 or more to a candidate, or makes a gift to a prescribed person or organisation, must file a disclosure return with the Electoral Office. A person incurring ‘political expenditure’ of \$1,000 or more in relation to an election must also furnish a return.²⁹² The provisions will only apply to information that does not have to be disclosed under Federal legislation ie, donations to parties and independents who only stand for State elections.

²⁸⁸ For information about the State Electoral Office see: www.seo.sa.gov.au (accessed 1/9/01).

²⁸⁹ See *The Electoral Code 1896 (SA)*, Act No 667, s 146. These limits were removed by the *Electoral Act Amendment Act 1969 (SA)*, Act No 50.

²⁹⁰ See *The Electoral Law Amendment Act 1893 (SA)*, Act No. 583, ss 3 and 5 and *The Electoral Code 1908 (SA)*, Act No 971, s 173.

²⁹¹ SAPD, 15/3/01, p 1071, Legislative Council, per the Hon K Griffin, Attorney-General, Second reading speech, Electoral (Miscellaneous) Amendment Bill. Note that the Electoral Commissioners recommendations did not include any in relation to the issue of disclosure of donations.

²⁹² Electoral (Miscellaneous) Amendment Bill 2001, ss 130H and 130I.

At the time of writing, the bill had passed the Upper House and debate in the Lower House was adjourned until the next session due to disagreements unrelated to the disclosure provisions. The disclosure aspects of the amendment legislation were supported by the Government²⁹³ and were deemed uncontroversial by a Parliamentary Committee. The bill, including the disclosure provisions, is likely to be passed if Parliament resumes, as scheduled, on 25 September 2001.²⁹⁴ However, the possibility of a State election in SA this year (or at least before 20 April 2002) may impact on the introduction of the disclosure provisions if an election is called before the amendment bill is passed and/or proclaimed.

4.3 TASMANIA

Tasmanian state election matters are governed principally by the *Electoral Act 1985* (the *Electoral Act*). The *Electoral Act* repealed all existing electoral legislation, including the *Electoral Act 1907*, and established a new code for elections and electoral procedure for Tasmanian elections.²⁹⁵ The Tasmanian Electoral Office oversees elections and generally administers electoral laws.²⁹⁶ The *Electoral Act* contains little regulation of election finance. There is no public funding of Tasmanian state election campaigns, nor is there any regulation of donations to political parties registered under the act, or to candidates contesting Tasmanian elections (although there has been some support over the years to introduce a disclosure scheme for donations²⁹⁷). There is, however, a statutory limit on the amount of money that can be spent by candidates on elections for the Tasmanian Legislative Council (upper house), and such candidates are required to file a return disclosing the amount of election expenditure. There was once a limit on the amount that could be spent by candidates to the House of Assembly (lower house) as well, however, it was abolished with the introduction of the *Electoral Act*.²⁹⁸

²⁹³ SAPD, 30/5/01, p 1634, the Hon K Griffin, Attorney-General.

²⁹⁴ Personal communication with the State Electoral Office, 1/8/01.

²⁹⁵ Parliament, Tasmania, *Report on Parliamentary Elections 1983 to 1986* (1986), p 5. See also the *Constitution Act 1985* (Tas).

²⁹⁶ For information about the Tasmanian Electoral Office, see the Office's web page at: www.electoral.tas.gov.au (accessed 1/9/01).

²⁹⁷ For example, in 1990, the Electoral Amendment (Disclosures) Bill 1990 was introduced into Parliament by the Green Independent, Dr Brown, providing for limited disclosure in relation to donations made and utilised in election periods. The Bill was unsuccessful. In 1991 a Tasmanian Royal Commission recommended the introduction of a scheme for the disclosure of donations: *Report of the Royal Commission into an Attempt to Bribe a Member of the House of Assembly and Other Matters* (W Carter, Commissioner), 1991, Volume 2, p 918. Note that the Royal Commission also considered the issue of public funding of election campaigns but did not recommend its introduction.

²⁹⁸ The 1991 Royal Commission also examined the issue of expenditure limits and concluded that electoral spending limits should be reinstated for all candidates who contest a seat at any election for the House of Assembly: Tasmania (W Carter, Commissioner), n 297, p 919. This recommendation was not implemented and there does not appear to be any moves to do so in the future.

Electoral expenditure of Candidates for the Legislative Council

Candidates at Legislative Council elections are restricted in their expenditure in respect of their campaigns. The permitted maximum amount for 2001 elections is \$9,000 and the limit increases by \$250 each year. The relevant period commences 1 January in the election year and concludes on the day of the election.²⁹⁹

‘Election expenditure’ is broadly defined under the *Electoral Act* as ‘expenditure that relates to the campaign for promoting or procuring the election of the candidate.’ It includes expenditure incurred within the relevant period, or goods and services purchased before that period but used by the candidate within the period.³⁰⁰ The items listed below are specifically excluded from the definition and therefore expenditure on them is unlimited.

- The purchase of electoral rolls
- The personal and reasonable travel expenses of the candidate and of the candidates election agent
- The appointment of scrutineers
- Renting or hiring of premises for the purposes of the campaign
- Conveying electors on the day of the election to and from polling booths within the electorate.³⁰¹

A candidate must file a return of his or her electoral expenditure with the Chief Electoral Officer within 60 days after the day on which election results are declared. The return must show particulars of all such expenditure paid by the candidate, or on the candidate’s behalf, by the candidate’s election agent. All disputed claims and all unpaid claims against a candidate in respect of any such expenditure must also be disclosed.³⁰²

The *Electoral Act* prohibits election expenditure by other people. As well, no person, other than the candidate or his or her election agent is permitted to incur any election expenditure. However, this does not include the payment or gift of any money, security or equivalent of money directly to the candidate (ie a donation) with a view to promoting or procuring the election of the candidate.³⁰³ Also, no political party expenditure is permitted at Legislative Council elections.³⁰⁴

A person who contravenes these provisions is guilty of an offence. The penalties vary according to who contravened the provision (candidate, party or other person) and the amount of over-expenditure, with increased penalties for expenditure of \$1,000 over the permissible amount. And, if a candidate exceeds the permitted maximum amount by more

²⁹⁹ Ss 195 and 197.

³⁰⁰ S 195.

³⁰¹ *ibid.*

³⁰² S 198.

³⁰³ S 196.

³⁰⁴ S 199.

than \$1,000, their election may be declared void.³⁰⁵ This capacity for invalidating the election of a candidate was central to the 1979 Tasmanian electoral crisis discussed in Section 1.3.1 of this paper.

4.4 VICTORIA

Election matters in Victoria are governed principally by *The Constitution Act Amendment Act 1958* and are overseen by the Victorian Electoral Commission.³⁰⁶ There is no public funding of political parties or candidates in Victoria, nor is there any disclosure requirements in relation to donations. There is however, a statutory obligation on candidates to declare electoral expenses after each election, and a limit on the amount that can be spent by candidates on election campaigns. The efficacy of the expenditure limit has been questioned by the Victorian Electoral Commissioner. This issue is discussed in Section 1.3.1 of this paper.

Election laws have been the subject of reform suggestions in Victoria for a number of years. In 1991 a bill was introduced by the Labor Government to establish a system of public funding for election campaigns, disclosure of donations and electoral expenditure. However, the bill was withdrawn before it was debated.³⁰⁷ While the Victorian Liberal Party has stated its opposition to the idea of public funding over the years,³⁰⁸ the ALP has maintained its policy to introduce a system whereby all political donations are fully disclosed and limited public funding of elections is available.³⁰⁹ It has been reported in the media this year that the Victorian Government plans to introduce public funding along with a disclosure of donations scheme and a cap on political donations from gaming companies.³¹⁰

Election expenditure limits and disclosure

The Constitution Act Amendment Act 1958 places limits on the expenditure of candidates for election to the Legislative Assembly and the Legislative Council.³¹¹ These election

³⁰⁵ S 203.

³⁰⁶ For further information about the Victorian Electoral Commission, see the Commission's web page at: www.vec.vic.gov.au (accessed 1/9/01).

³⁰⁷ VPD (LA), 27/3/90, p 288, per Mr Walsh, Election Donations Disclosure and Public Funding Bill 1990, Second Reading speech.

³⁰⁸ See for example, VPD (LA), 25/10/95, p 774, per Mr Kennett, The Constitution Act Amendment (Amendment) Bill 1995, Second Reading speech.

³⁰⁹ VPD (LC), 4/11/99, p 38, per Ms Broad, and ALP Victoria, n 9, p 38.

³¹⁰ 'Premier seeks cap on gaming donations', *The Age*, 7/8/01, p 3, 'Gaming donations cap a wise step' *The Age*, 8/3/2001, p 14, and 'Push to cap political donations', *The Age*, 21/8/01. The cap on contributions from gaming companies is discussed in Section 1.2.3.

³¹¹ S 255.

expenditure provisions are of long standing and date back to early 20th Century election laws designed to prevent a candidate from buying an election. For elections for both Houses of Parliament, a candidate's electoral expenses (other than personal expenses of a candidate in travelling and attending election meetings) shall not exceed the maximum amount of \$5,000.³¹² The limit relates only to expenditure incurred by the candidate. There is no limit on expenditure incurred by a person or organisation on behalf of a candidate.

'Electoral expenses' or 'electoral expense' includes all payments, including any pecuniary or other reward (other than personal expenses of a candidate in travelling and attending election meetings) made by a candidate.³¹³ The *Act* also sets out the matters in relation to which electoral expenses can be incurred:

- printing, advertising, publishing, issuing, and distributing addresses and notices and purchase of rolls;
- stationery, messages, postage, and telegrams;
- holding public meetings, and hiring halls for that purpose;
- committee-rooms;
- one scrutineer at each polling-booth and no more;
- one agent for any electoral province or district;
- contributions to campaign funds;
- advertising on radio or television;
- telephones;
- provision of light refreshment etc. to helpers or persons attending a political meeting; and
- payment to helpers, or persons conducting election campaign.

Within three months after the day of polling at any election, each candidate must provide the Victorian Electoral Commissioner with a return containing a statement of all electoral expenses and a statement of all disputed and unpaid claims of which the candidate is aware.³¹⁴

It is an offence to act in contravention of the spending limit, or to fail to make a return. The penalty is a fairly nominal fine of \$400, or a somewhat disproportionate term of imprisonment for up to 6 months.³¹⁵ There have been no prosecutions under this offence.³¹⁶ In regard to the 1999 Victorian state election, prosecution proceedings were commenced

³¹² S 257 and Schedule 16. This limit was set in 1995 via amendment to *The Constitution Act Amendment Act 1958 (Vic)* by *The Constitution Act Amendment (Amendment Act) 1995 (Vic)*. Prior to this amendment the limit was set at \$3,000 for Legislative Council candidates and \$1,500 for Legislative Assembly candidates. These limits existed from 1978; VPD (LA), 26/10/95, p 887, per Mr Kennett.

³¹³ S 256.

³¹⁴ S 259.

³¹⁵ S 264.

³¹⁶ Personal communication with an officer of the Victorian Electoral Commission, 13/7/01.

against 14 candidates who failed to lodge a return within the time period,³¹⁷ however, the prosecutions were not finalised.³¹⁸

The Court of Disputed Returns has the power to declare the election of a candidate void for specific offences under the *Act* (bribery or interference with political liberty).³¹⁹ The Court also arguably has the discretion to declare the election of a candidate void for expenditure offences. However, the Court would have to be satisfied that the result of the election was likely to be affected and that it is just that the candidate should be declared not to be duly elected or that the election should be declared void.³²⁰

4.5 WESTERN AUSTRALIA

There is no public funding of state elections in WA, although it has recently been reported that the WA Government has supported a proposal for the introduction of public funding and may include such a scheme in a package of electoral reforms currently being developed.³²¹ There is also no limitation on the amount that can be spent on election campaigns.³²²

There is, however, a disclosure of donations and electoral expenditure scheme in WA. The disclosure of donations scheme was introduced in 1992. This scheme was expanded to incorporate disclosure of election expenditure in 1996.³²³ Under the disclosure scheme, all political parties, associated entities, individual candidates, groups and other persons are required to submit a return with the Electoral Commission³²⁴ disclosing details of gifts received and expenditure incurred for election purposes.

The disclosure scheme was introduced through the *Electoral Amendment (Political Finance) Act 1992*, which inserted a new Part VI into the *Electoral Act 1907*.³²⁵ Its

³¹⁷ Victorian Electoral Commission, *Report to Parliament on the 1999 Victorian State Election*, p 24.

³¹⁸ Personal communication with an officer of the Victorian Electoral Commission, 26/9/01.
³¹⁹ S 287.

³²⁰ S 287(3)(b).

³²¹ 'McGinty backs state poll funding', *The Australian*, 20 /7/01, p 6.

³²² Prior to 1979 there were expenditure limits: they abolished on the recommendation of a Royal Commission: NSW, Parliament, (Quinn, MP, Chairman), n 55, xxxiii.

³²³ *Electoral Amendment (Political Finance) Act 1992* (WA) and *Electoral Legislation Amendment Act 1996* (WA).

³²⁴ For information about the WA Electoral Commission view the Commission's web site at: www.waec.wa.gov.au (accessed 1/9/01).

³²⁵ The *Act* was assented to in December 1992, however, it was not proclaimed and therefore did not come into force, before the 1993 State General Election: Western Australian Electoral Commission, *1996 Election Report*, p 4.

introduction followed the WA Royal Commission into Commercial Activities of Government Report (completed in 1992), which found that some of the reprehensible conduct engaged in by politicians was ‘made possible by a legal system which lacked specific controls over fundraising for political purposes.’³²⁶ The Royal Commission expressed the view that ‘a wide ranging disclosure Act is essential if the integrity of our governmental system is to be secured.’³²⁷ The Commission also stated that as a parallel measure to the disclosure of donations, ‘the public should also be informed as to how the donations are spent for electoral purposes.’³²⁸ The Commission also considered the desirability of recommending a maximum limit on the size of donations, although it concluded that a limit would be difficult to set as well as enforce and may also ‘offend the freedom to engage in political discussion.’³²⁹

Donations

All political parties and associated entities³³⁰ are required to lodge an *annual return* by November 30, setting out details of all gifts (and other income) received for the previous financial year.³³¹ The details to be set out are, the amount or value of all of the gifts, and the *relevant details* of each gift the value of which equal or exceeds the specified amount. The specified amount is currently \$1,600.³³² The *relevant details* are the amount or value of the gift, the date on which the gift was made and the name and address of the donor. If a gift was made by an unincorporated association, or made out of a trust fund or out of the funds of a foundation, further identifying details must be included.³³³

³²⁶ Western Australian Royal Commission Into Commercial Activities of Government and Other Matters, *Report of the Royal Commission Into Commercial Activities of Government and Other Matters*, Part I, 1992, Chapter 26, p 22.

³²⁷ *ibid*, Chapter 5, p 17.

³²⁸ *ibid*.

³²⁹ *ibid*, p 19.

³³⁰ An associated entity is defined as an entity that is controlled by one or more political parties or operates for the benefit of one or more political parties: s 175.

³³¹ *Electoral Act 1907 (WA)*, ss 175N and 175NA. Note that parties do not have to disclose gifts made to the party, or which the party will use, for a purpose related to an election or a by-election under the *Commonwealth Electoral Act 1918*; *Electoral Act 1907 (WA)*, s 175N.

³³² The ‘specified amount’ is set in the legislation at \$1,500, however the legislation also requires the Electoral Commissioner to determine the specified amount from time to time in accordance with the CPI: s 175 and *Electoral (Political Finance) Regulations 1996*, s 3. The amount was increased to \$1,600 as of 1/7/01. When calculating whether the specified amount has been reached, the sum of the respective amounts, or values of two or more gifts by the same person shall be taken to be one gift, but in calculating that sum an amount or value that is less than one-third of the specified amount need not be counted: *Electoral Act 1907 (WA)*, ss 175N and 175NA.

³³³ S 175M

Candidates and groups are also required to lodge a return, within 15 weeks of polling day, disclosing all gifts received within the disclosure period. The return must set out the total amount or value of all gifts, the number of persons who made the gifts and the relevant details (as above) of each gift the value of which is equal to or exceeds the specified amount (\$1,600).³³⁴ It is unlawful for a political party, a candidate, a group of candidates, or a person acting on behalf of the aforementioned, to accept an anonymous donation which is equal to or exceeds the specified amount (\$1,600).³³⁵

A person (not being a political party, an associated entity, a candidate or group) who incurs election expenditure for an election, is also required to disclose relevant details of gifts they received.³³⁶ The return must be filed within 15 weeks of polling day. Only gifts of \$1,500 or more, which were used in whole or in part to incur the expenditure, or to reimburse the person for incurring expenditure, must be disclosed.

Election expenditure

Political parties, candidates and groups are required to disclose expenditure incurred during the disclosure period for each election.³³⁷ Persons who incur election expenses during the disclosure period without the written authority of a political party, a candidate or a person included in a group are also required to disclose expenditure, unless expenditure was below \$500.³³⁸

The definition of election expenditure is similar to the definition contained in the Federal legislation, listing items such as broadcasting, advertising, distributing electoral matter and carrying out polls.³³⁹ The disclosure period ends 30 days after polling day. For previous candidates the period commences 30 days after polling day in the previous election, and for new candidates it commences one year prior to the day of nomination in the present election. For groups the period commences from the hour of nomination.

All election returns must be sent to the Electoral Commissioner within 15 weeks after polling day.³⁴⁰ If a person fails to lodge a return as required that person commits an offence. In the case a political party the fine may be up to \$7,500. In all other cases the fine can be up to \$1,500. Lodging a false return is also an offence.³⁴¹

³³⁴ Ss 175O and 175P.

³³⁵ S 175R.

³³⁶ S 175Q.

³³⁷ Ss 175SA, 175SB and 175SC.

³³⁸ S 175SD.

³³⁹ S 175.

³⁴⁰ Ss 175SA, 175SB and 175SC.

³⁴¹ S 175U.

4.6 AUSTRALIAN CAPITAL TERRITORY

Prior to the 1995 ACT Legislative Assembly election, election matters were overseen by the AEC pursuant to Federal legislation. The *Australian Capital Territory (Self Government) Act 1988* contains provisions in relation to elections to the ACT Legislative Assembly and also (since 1992) empowers the Assembly to make other laws in relation to elections.³⁴² The first ACT electoral legislation was introduced in 1992. Among other matters, 1994 amendments to the *Electoral Act 1992* established the election funding and disclosure scheme to be administered by the ACT Electoral Commission (the Commission).³⁴³ The scheme incorporates public funding of election campaigns, disclosure of donations and disclosure of election expenditure. There are no limits on the amount of money that can be spent on an election in the ACT.

Like Queensland, the ACT scheme was modelled closely on the Federal scheme, as a means of reducing the administrative load on parties registered both under Federal and ACT legislation.³⁴⁴ Over the years, the *Electoral Act 1992* has been amended to keep in step with amendments to the Federal scheme.³⁴⁵

In 1998, the Commission conducted a review of the *Electoral Act 1992* following the 1998 Assembly election.³⁴⁶ As part of the review the Commission considered further amendments to the election funding and financial disclosure scheme in light of recent amendments and proposed amendments to the Federal scheme. In its report, the Commission emphasised that there were differences between the ACT and Federal electoral environment which meant that simply mirroring Federal legislation did not create the most effective election finance law for the ACT. For example, because of the smaller scale of ACT politics compared to Federal politics, mirroring Federal increases to the threshold for disclosure of donations would mean that the majority of donations made in the ACT would not have to be disclosed. Due to these inconsistencies, and the constant need for amendment, the Commission recommended that the Assembly ‘break the nexus’ between the two schemes and make certain provisions which were more specific to the needs of the ACT.³⁴⁷

The report was considered by the Legislative Assembly Select Committee on the Report of the Review of Governance.³⁴⁸ Following the Select Committee’s review, the *Electoral*

³⁴² Part VIII and s 22.

³⁴³ For information about *Elections ACT*, see the web site: www.elections.act.gov.au (accessed 1/9/01).

³⁴⁴ Elections ACT, *Review of the Electoral Act 1992: The 1998 ACT Legislative Assembly Election*, November 1998, p 17.

³⁴⁵ *ibid*, pp 17-18.

³⁴⁶ *ibid*.

³⁴⁷ *ibid*, recommendation 13, p 20.

³⁴⁸ The Review recommended that the rules for disclosure of contributions to electoral

Amendment Bill 2001 was introduced into the Assembly. After considerable debate and amendment, the bill, as passed by the Assembly on 15 June 2001 did not reflect the recommendations of the Commission in regard the election funding and financial disclosure scheme.³⁴⁹ The Bill did make several amendments to the election funding and financial disclosure scheme and these amendments are incorporated in the information below. Because the ACT scheme is based on the Federal scheme, only the main aspects and differences of the scheme are noted below.³⁵⁰

Public funding

- Election funding is available to independent candidates, parties, non-party groups and ballot groups contesting Assembly elections, provided they meet the threshold requirement.³⁵¹ A party or ballot group is eligible to receive funding for the votes obtained by its endorsed candidates who together polled at least 4% of the formal first preference votes cast in an electorate. An independent candidate is eligible if he or she polls at least 4% of the formal first preference votes cast in the relevant electorate. A non-party group is eligible if the number of eligible votes cast for the group is at least 4% of the formal first preference votes cast in the relevant electorate.³⁵²
- The rate differs from one election to another as it is adjusted to the Consumer Price Index. For the six-month period ending 31 December 2001, the rate is \$1.20854 per eligible vote. For the most recent election, in February 1998, the rate was \$1.09015 per vote.³⁵³
- Eligible parties, ballot groups, non-party groups and independent candidates do not have to lodge a claim for their funding entitlement. The Commission will automatically pay eligible claimants once the voting figures are finalised. There is no obligation to accept public funding.³⁵⁴

funds should be amendment so as to remove any obvious loopholes in the current system: Australian Government and ACT Government, *Review of the Governance of the Australian Capital Territory*, (P Pettit, Chairman), April 1998.

³⁴⁹ *Electoral Amendment Act* (ACT) 2001 No 36.

³⁵⁰ For further information, see the funding and financial disclosure handbooks for 2001 produced by *Elections ACT*. They can be viewed on the web site at: www.elections.act.gov.au (accessed 1/9/01).

³⁵¹ A 'non-party group' is a group of non-party independent candidates who are not members of the Legislative Assembly whose names are grouped on a ballot paper. A 'ballot group' is a group formed by an independent sitting MLA: s 198.

³⁵² S 208.

³⁵³ Elections ACT web site: www.elections.act.gov.au/FAD.html#F (accessed 1/9/01, copy with author).

³⁵⁴ Elections ACT, *Funding and Financial Disclosure Handbook – Registered Political Parties and Ballot Groups, 2001-2002 Financial Year* (2001), p 5. *Electoral Act 1992* (ACT), s 212.

Donations

- Candidates, non-party groups, people who incur political expenditure and people who make donations to non-party groups and candidates are required to file disclosure returns after each election.
- The agents of each candidate and non-party group contesting an election must furnish a disclosure return setting out the total value of all gifts received, and the number of persons who made the gifts, during the disclosure period. For gifts of \$200 and over (or gifts adding up to \$200 or over), the return must also set out further details identifying the source of the donation. The requirements are the same as under the Federal scheme. Gifts that are made in a private capacity to a candidate and which are not used for election purposes do not have to be disclosed.³⁵⁵ If there are no donations to disclose a nil return must be filed.³⁵⁶
- A person (other than a party, ballot group, candidate or associated entity³⁵⁷) who incurs expenditure for a political purpose of \$1,000 or more during the disclosure period, and receives one or more gifts during the period may also have to disclose the details of the gift in a return. This is the case if the gift amounted to \$1,000 or more, and the whole or part of the gift was used by the person to enable him or her to incur expenditure for a political purpose or to reimburse him or her for incurring expenditure for a political purpose.³⁵⁸
- People who make gifts totalling \$1,500 or more to the same non-party group or 'specified body' or, \$200 or more to the same candidate during the disclosure period must also file a return after each election.³⁵⁹
- A person who makes a gift of (or gifts totalling) \$1,500 or more to the same party, ballot group, MLA or associated entity must file an *annual return* providing details of all the gifts made during the financial year. This includes a person who makes a gift to any person or body with the intention of benefiting a party, ballot group, MLA or associated entity. If a person receives a gift of (or gifts totalling) \$1,000 or more, and the person uses all or part of the gift/s to make a gift of (or gifts totalling) \$1,500 or more to a party ballot group, MLA or associated entity, that person must also furnish an annual return disclosing details of the gift/s.³⁶⁰

³⁵⁵ Ss 217 and 218.

³⁵⁶ S 219.

³⁵⁷ An 'associated entity' is an entity that is controlled by one or more parties, ballot groups or MLAs or operates, completely or to a significant extent, for the benefit of one or more registered parties, ballot groups or MLAs: s 198.

³⁵⁸ S 220.

³⁵⁹ S 221.

³⁶⁰ S 221A.

- Anonymous donations of \$1,000 or more in the case of a party, ballot group, MLA or associated entity, or \$200 or more in the case of candidate or non-party group are prohibited.³⁶¹
- A party, ballot group, non-party group, MLA, candidate or associated entity can only receive a loan of \$1,500 or more, from a person or entity that is not a financial institution, if certain information about the loan is recorded. The receiver of the loan must immediately make a record of the terms of the loan and details of the identity of the lender. If the lender is a registered industrial organisation, an unincorporated body or a trust fund or foundation other specific details are to be provided.³⁶²

Election expenditure

- Each candidate in an election must lodge a return with the Commission within 15 weeks of an election, specifying details of the electoral expenditure incurred by or with the authority of the candidate. The reporting agents of non-party groups and parties must also lodge a return. If no election expenditure has been incurred by a candidate, non-party group or a party, a nil return must still be filed.³⁶³
- Where election expenditure was incurred by or with the authority of a person, and the expenditure was not incurred with the written authority of a party, non-party group, candidate or an associated entity, that person must also lodge a return unless the expenditure was less than \$200.³⁶⁴
- ‘Electoral expenditure’ is defined in the same way as under s 308 of the *Commonwealth Electoral Act 1918* (described in Section 3.3 of this paper), except that it also includes consultants or advertising agent’s fees in respect of services provided during the pre-election period, being services relating to the election or material relating to the election that is used during the pre-election period.³⁶⁵
- Broadcasters and publishers who broadcast or publish electoral advertisements during the pre-election period with the authority of a participant in an election are also required to submit returns of electoral expenditure. The return must be filed within 8 weeks after polling day.³⁶⁶

³⁶¹ S 222.

³⁶² S 218A.

³⁶³ Ss 224 and 225.

³⁶⁴ Ss 224.

³⁶⁵ S 223.

³⁶⁶ S 226.

Annual returns by parties, ballot groups, MLAs and associated entities

- Parties, ballot groups, MLAs and associated entities must also provide annual returns to the Commission within 16 weeks of each financial year. The return must state the amount received (including details of donations of \$1,500 or more) and relevant particulars of those amounts during the financial year as well as the amount paid out during the financial year. It must also include details of the outstanding amount, at the end of the financial year, of debts incurred together with the particulars.³⁶⁷
- A political party registered at both the Federal and ACT levels, and with the same registered officer, may submit to the ACT Commission a copy of their Federal return or audited annual financial statement. Those parties registered only in the ACT must complete the form provided by the ACT Commission.³⁶⁸ An associated entity that has submitted an annual return to the AEC may submit a copy of that return to the ACT Commission.³⁶⁹

4.7 NORTHERN TERRITORY

NT electoral laws are contained in the *Northern Territory Self Government Act 1978* and the *Northern Territory Electoral Act 1995*. The Northern Territory Electoral Office is responsible for the administration of elections and related matters.³⁷⁰ There is no public funding of election campaigns in the NT, nor are there any disclosure requirements for donations or campaign expenditure, or limits on campaign expenditure. There is no indication that any of the aspects of election finance law discussed in this paper will be introduced in the NT in the near future.³⁷¹

³⁶⁷ Ss 230 and 231B.

³⁶⁸ Se 231A. Elections ACT, n 354, p 6.

³⁶⁹ S 231C. Elections ACT, *Funding and Disclosure Handbook – Associated Entities, 2001-2002 Financial Year* (2001), p 3.

³⁷⁰ For information about the Northern Territory Electoral Office see the Office's web site at: www.notes.nt.gov.au/nteo/Electo1.nsf?OpenDatabase (accessed 1/9/01).

³⁷¹ Personal communication with the Northern Territory Electoral Office, 7/8/01.

5. OVERSEAS COMPARISONS

In this section, a brief overview of election finance law in three overseas jurisdictions, New Zealand, the United Kingdom and the United States, is undertaken.³⁷²

5.1 NEW ZEALAND³⁷³

Only limited public election funding is provided to political parties in New Zealand. The issue of public funding was reviewed in 1986, by the Royal Commission on the Electoral System. The Royal Commission recommended the introduction of a comprehensive system of state aid for political parties, however, the recommendations were not taken up by the Government.³⁷⁴ Other areas of election finance law are more comprehensively dealt with in New Zealand: a disclosure scheme covers political donations and election expenditure and there is also a limit on election expenditure. The New Zealand Electoral Commission ('Electoral Commission') is responsible for administering public funding and monitoring political donations and expenditure requirements.³⁷⁵

Public funding

Public funding of election campaigns in New Zealand is limited to the provision of broadcasting time and funds to political parties for broadcasts during election periods, and the free use of school rooms for candidates holding public meetings. As in other jurisdictions examined in this paper, funds provided for the parliamentary duties of Members of Parliament and parliamentary parties, such as administration, travel and research, may also assist Members and parties during election time.³⁷⁶

The allocation of broadcasting time and funds to parties at a general election is governed by the *Broadcasting Act 1989*.³⁷⁷ Each election year, the Electoral Commission asks every

³⁷² A review of several other overseas jurisdictions undertaken in 1998 is contained in: UK, Parliament, n 20, pp 194-207.

³⁷³ All monetary amounts in this section are in New Zealand dollars.

³⁷⁴ New Zealand, *Report of the Royal Commission on the Electoral System – Towards a Better Democracy* (Justice J Wallace Chairman), December 1986.

³⁷⁵ For information about the New Zealand Electoral Commission and elections matters in New Zealand see the *Elections New Zealand* web site at: www.elections.org.nz (accessed 1/9/01).

³⁷⁶ New Zealand (Wallace, Chairman), n 374, p 210.

³⁷⁷ Particularly Part VI. While the provisions also apply to by-elections there has never been an allocation of time or money made in relation to a by-election: Electoral Commission of New Zealand, *Broadcasting at Parliamentary Elections; A Guide for Political Parties, Candidates and Broadcasters*, Revised Edition, July 1999, p 6. Note that a bill to amend the allocation procedures has been before the House since 1998. It is possible that the bill will be enacted this calendar year. Broadcasting (Election Broadcasting) Amendment Bill: personal communication with Dr Paul Harris, CEO, New Zealand Electoral Commission, 19/7/01.

broadcaster to indicate how much time it will provide free, or at discounted rates, to enable parties to broadcast election programs. To qualify for an allocation of time, a party must either be registered at least three months before the dissolution of Parliament for the general election or, at least three months before the dissolution of Parliament for the general election, a minimum of five of the party's endorsed candidates had declared their intention to contest the election. Candidates themselves are not eligible for an allocation of time and money for broadcasting. The Electoral Commission distributes the available time to the eligible parties. The public broadcasters, Television New Zealand and Radio New Zealand, must also state how much time they will provide to enable parties to broadcast their opening and closing addresses in relation to a general election.

In addition, the New Zealand Parliament provides a sum of money for allocation to eligible parties so they can buy time to broadcast other election programs.³⁷⁸ The total amount of funding available is determined by Parliament through legislation and has remained unchanged, at \$2.081 million, since the introduction of the scheme in 1990. If a party meets the statutory criteria, the funds are distributed by the Electoral Commission directly to the broadcasters, to meet the costs of broadcasts arranged by the parties.³⁷⁹

Donations

Only registered political parties and candidates in New Zealand are under statutory obligations to disclose donations over certain threshold limits. Unlike some Australian jurisdictions, individual donors and third parties are not required to disclose donations made to, or received and used to make election expenditure on behalf of, a party or candidate.³⁸⁰ The legislation governing disclosure of donations and election expenditure, and expenditure limits, is the *Electoral Act 1993*.

Candidates

Within 70 days after the day on which a constituency candidate³⁸¹ returned at any election is declared elected, every constituency candidate at the election must submit a return to the Returning Officer for the electorate they are contesting (who then forwards the return to the Electoral Commission). The return must set out the name and address of each person who made a donation of over \$1,000 to the constituency candidate, or to any person on the

³⁷⁸ NZ Electoral Commission (*Broadcasting Guide*), n 363, p 1.

³⁷⁹ For more detailed information about the scheme for the provision of time and funding for election broadcasts see: NZ Electoral Commission (*Broadcasting Guide*), n 377.

³⁸⁰ For a recent critical review of the New Zealand donations disclosure scheme see: Geddis A, 'Hide Behind the Targets, in Front of All the People We Serve – New Zealand Election Law and the Problem of 'Faceless Donations'', *Public Law Review*, Volume 12, Number 1, March 2001, pp 51-68.

³⁸¹ A 'constituency candidate' is a person who has been nominated as a candidate for a seat in the House of Representatives representing an electoral district. A 'candidate' means any person who has been nominated as a candidate for a seat in the House of Representatives and any person whose name is specified in a party list: *Electoral Act 1993*, s 3.

candidate's behalf, and the amount of each donation (the return must also include information about election expenditure – discussed below). The amount of \$1,000 is inclusive of any GST and of a series of donations made by or on behalf of any one person that aggregate more than \$1,000.

Registered political parties

Parties must make annual returns to the Electoral Commission by 31 March each year. The returns must disclose the total amount of a gift, or series of gifts, of money, goods or services which in aggregate during the year to 31 December are greater than \$1,000 at the electorate level, and \$10,000 at the regional or national level. The donor's name and address must also be disclosed. Parties do not have to disclose any election donation that is included in a return made by a constituency candidate.³⁸²

For the purposes of disclosure by parties and constituency candidates, a donation can be money, the equivalent of money, goods and services, or a combination of these things. Where goods or services are provided to a constituency candidate or party (or to any person on a candidate's or party's behalf) under a contract at 90% or less of their reasonable market value, the difference between the contractual price and the reasonable market value of the goods or services, is considered to be a donation.³⁸³ This would cover the case of a fund raising event where goods and services are donated, to be sold or auctioned at the event.³⁸⁴ Donations do not include the labour of any person provided to the constituency candidate or party free of charge by that person.³⁸⁵ Foreign donations are permitted.

There are no restrictions on candidates or parties receiving anonymous donations. If the amount of an anonymous donation exceeds the relevant thresholds, the amount of each such donation and the fact that it has been received anonymously must also be set out in the return.³⁸⁶

³⁸² Ss 214F, 214H and 214I.

³⁸³ Ss 210 and 214F.

³⁸⁴ New Zealand Electoral Commission, *Guide to Disclosure of Donations made to Registered Political Parties*, March 2001, p 14.

³⁸⁵ Ss 210 and 214F.

³⁸⁶ S 210.

Limits on election expenditure

Candidates

For their personal campaigns, constituency candidates can only spend \$20,000 (inclusive of GST) on 'election expenses'. In the case of a candidate at a by-election the total level of election expenses cannot exceed \$40,000 (inclusive of GST). It is an offence to exceed these election expenditure limits in certain circumstances.³⁸⁷

Registered political party

In the case of a general election, a party listed in the part of the ballot paper that relates to the party vote cannot exceed \$1,000,000 on 'election expenses', plus \$20,000 for each constituency contested by a candidate for that party in election expenses (inclusive of GST). If the party is not listed in the part of the ballot paper that relates to the party vote, the party cannot exceed \$20,000 for each constituency contested by a candidate for that party (inclusive of GST).³⁸⁸

'Election expenses', in relation to both parties and candidates, means expenses that are incurred by or on behalf of the party or candidate in respect of any 'election activity' incurred before or after the three months preceding polling day.³⁸⁹ It includes the reasonable market value of any materials applied in respect of any election activity given to the candidate or provided free of charge (or below reasonable market value). It also includes the cost of any printing or postage in respect of any election activity, whether or not the expenses in respect of the printing or postage are incurred by or on behalf of the candidate.³⁹⁰

In relation to candidates, 'election expenses' does not include the expense of operating a vehicle on which election advertising appears, if the vehicle is used by the candidate as his or her personal means of transport. Nor does it include the labour of any person provided to the candidate free of charge by that person.³⁹¹ In relation to parties, 'election expenses' does not include expenditure relating exclusively to the election expenses of any of that party's individual constituency candidates. It also does not include allocations of time and money made to political parties by the body responsible for such allocations under the *Broadcasting Act 1989* (discussed above).³⁹²

³⁸⁷ Ss 213 and 214B.

³⁸⁸ For further information about the disclosure of donations made to parties see: NZ Electoral Commission (*Donations Guide*), n 384, p 14.

³⁸⁹ This time frame is included so that parties cannot avoid declaring expenses simply by ensuring that expenses are invoiced to the commencement of or the expiration of the three months: New Zealand Electoral Commission, *Guide to Election Expenses for Registered Political Parties, 1999 General Election*, October 1999, p 3.

³⁹⁰ Ss 213 and 214B

³⁹¹ S 213.

³⁹² S 214B.

‘Election activity’ means an activity carried out by the constituency candidate (or with the candidate’s authority) that relates to the candidate solely in his or her capacity as a candidate for the district. The activity cannot relate to the candidate in his or her capacity as a Member of Parliament, as the holder of any other office, or in any other capacity. The activity must relate exclusively to the campaign for the return of the candidate and must take place within the three months before polling day.³⁹³ In relation to a party, election activity means activity carried out by the party or with the party’s authority which encourages or persuades or appears to encourage or persuade voters to vote for the party or not to vote for any other party.³⁹⁴ In relation to both candidates and parties, the definition specifically includes advertising of any kind or radio or television broadcasting or publishing, issuing, distributing, or displaying addresses, notices, posters, pamphlets, etc.³⁹⁵

Disclosure of election expenditure

Parties and constituency candidates must file returns containing details of election expenditure after each election.³⁹⁶ Constituency candidates must include details of election expenditure and donations (described above) in the same return. The return must be filed within 70 days after the day on which the constituency candidate returned at any election is declared. The Secretary of each registered political party must file a return of the party’s election expenses with the Electoral Commission within 70 days after the day on which the result of an election is declared. Each registered party must also provide the Electoral Commission with an auditor’s report on their return.³⁹⁷ All returns and auditor’s reports are made available for public inspection.³⁹⁸

³⁹³ S 213.

³⁹⁴ S 214B.

³⁹⁵ Ss 213 and 214B.

³⁹⁶ Ss 210 and 214C.

³⁹⁷ For further information about the obligations of parties to make election expenditure disclosure see: NZ Electoral Commission (*Guide to Election Expenses*), n 389.

³⁹⁸ Ss 210 and 214C.

5.2 UNITED KINGDOM

Until recently there was very little regulation of election finance, or of political parties in general, in the U.K. The lack of regulation ‘...was connected to the state of electoral law which characterised elections to the Commons as a series of contests between individual candidates, rather than a battle between national party organisations.’³⁹⁹ The situation changed last year with the introduction of the *Political Parties, Elections and Referendums Act 2000* (*‘2000 Act’*).

When the current Labor Government was elected in May 1997, it promised that the way political parties were funded would be made open and transparent. Accordingly, the Government referred an inquiry to the Committee on Standards in Public Life (the Neill Committee) to consider how the funding of political parties in the United Kingdom should be regulated and reformed. In its report, the Neill Committee made 100 recommendations concerning the regulation of political parties and elections.⁴⁰⁰ Most of the recommendations were implemented in the *2000 Act*, including the establishment of an Electoral Commission and a system of registration of political parties,⁴⁰¹ and the regulation of donations and election expenditure. The Committee also examined the issue of public funding of election campaigns and made a few recommendations for minor changes to the existing scheme of limited public funding.

The new Electoral Commission, which was established in November 2000, administers the new regulatory framework for the reporting of donations, the ban on foreign donations and the controls on campaign spending at parliamentary and other elections. It also maintains the register of political parties and regulates how they account for their income and expenditure.⁴⁰²

Public funding

There is only limited public election funding of parties in the United Kingdom. There is also some assistance given to political parties in Parliament. The issue of whether or not to introduce a more comprehensive system of public funding for political parties in general (and not just for election campaigns) has been on the agenda in the UK for several decades. While earlier inquiries, such as the Houghton Committee in 1975 and the Hansard Society Commission Report in 1981, recommended the implementation of a more comprehensive scheme, the Neill Committee did not recommend any substantial changes to the current system.⁴⁰³ The Neill Committee did however, recommend the introduction of a Policy

³⁹⁹ Gay O, ‘What’s in a name? Political Parties, Lists and Candidates in the United Kingdom’, (2001) *Public Law*, Summer, pp 245 - 255.

⁴⁰⁰ UK, Parliament, n 20.

⁴⁰¹ For an analysis of the reforms concerning the registration and naming of political parties see: Gay O, n 399, pp 245-255.

⁴⁰² *Political Parties, Elections and Referendums Act 2000*, Part I.

⁴⁰³ For a review of the public funding debate in the UK see: Walker A, ‘The Political Parties, Elections and Referendums Bill – Donations’, Research Paper 00/2, 7/1/00, *House of*

Development Fund to assist parties in long term policy development.⁴⁰⁴

Assistance to candidates and parties at election time

Assistance at election time is limited to the entitlement of candidates at a parliamentary election, or an election to the European Parliament, to free postage for one election communication to every address or elector within a constituency. It also includes the free use of school premises or other public buildings for the purpose of holding public meetings for Parliamentary, European and local elections.⁴⁰⁵ The Neill Committee recommended that these provisions should be continued and extended to elections to the Scottish Parliament, to the National Assembly for Wales and to the Northern Ireland Assembly.⁴⁰⁶

Assistance to parties in Parliament

There are two main types of public funding available to parties in Parliament; Short money and Cranbourne money. This is in addition to allowances available to individual members in relation to office and staffing costs.⁴⁰⁷ *Short money* is named after the Rt Hon Edward Short, who was the leader of the House of Commons when the scheme was first introduced in 1975. The purpose of Short money is to assist opposition parties in carrying out their parliamentary duties, in particular in holding the government of the day to account. Short money has three components, first, funding to assist an opposition party in carrying out its Parliamentary business, second funding for the opposition party's travel and associated expenses and third, funding for the running costs of the Leader of the Official Opposition's office. The eligibility criteria is either the possession of two seats or, one seat and at least 150,000 votes won at the preceding general election. The scheme was designed to ensure that the financial aid went to the parties rather than to individual Members.⁴⁰⁸ *Cranbourne money* is similar to Short money, but in the House of Lords, and has been available since 1996. Under the scheme, a fixed sum is allocated for the Official opposition and smaller amounts for the second largest opposition party and the convenor of the Cross-Bench Peers. Each sum is updated annually.⁴⁰⁹

Neither of these schemes is subject to any statutory provision – each House of Parliament votes the necessary funds directly. The money available to the various Opposition parties in the UK Parliament under the schemes in 1999-2000 is £4,886,215. This includes

Commons Library, Part VI.

⁴⁰⁴ UK, Parliament, n 20, p 93.

⁴⁰⁵ *Representation of the People Act 1983*, ss 91(1) and 95(1).

⁴⁰⁶ UK, Parliament, n 20, p 88-89.

⁴⁰⁷ Walker A, n 403, p 58.

⁴⁰⁸ *Political Parties, Elections and Referendums Act 2000*, s 12. UK, Parliament, n 20, p 100.

⁴⁰⁹ *Political Parties, Elections and Referendums Act 2000*, s 12. UK, Parliament, n 20, p 101 and Walker A, n 403, p 60.

£500,000 for the funding of the office of the Leader of the Opposition. Similar schemes operate in the parliaments of Scotland, Wales and Northern Ireland. The Neill Committee recommended a substantial increase in the amount of Short money and Cranbourne money available. It also recommended changes to the way in which Short money was allocated.⁴¹⁰

Policy Development Grants

Based on a recommendation of the Neill Committee, the *2000 Act* provides for the Electoral Commission to develop and, once it is approved by the Secretary of State, administer a scheme for the payment of Policy Development Grants to registered political parties.⁴¹¹ A Policy Development Grant may be granted to a represented registered party to assist with the development of policies for inclusion in any manifesto on the basis of which (i) candidates authorised to stand by the party will seek to be elected or (ii) the party itself will seek to be so elected.⁴¹² Grants are restricted to parties represented by at least two sitting Members of the House of Commons (in the current Parliament there are eight such parties: Labour, Conservative, Liberal Democrat, Ulster Unionists, Scottish National Party, Plaid Cymru, Social Democratic and Labour Party and Democratic Unionist Party). The total amount of disbursements under such a scheme to £2 million in any financial year.⁴¹³ The grant scheme is still being developed. After the summer recess the Commission will put its proposed scheme to the Secretary of State for Transport, Local Government and the Regions (who has responsibility for electoral matters).⁴¹⁴

⁴¹⁰ *Political Parties, Elections and Referendums Act 2000*, s 12. UK, Parliament, n 19, recommendation 40 and 41, p 101 and recommendation 42, p 105. Short money was increased by a factor of 2.7 at the start of the financial year 1999: personal communication with the Electoral Commission 18/8/01.

⁴¹¹ *Political Parties, Elections and Referendums Act 2000*, s 12. UK, Parliament, n 20, recommendation 37, p 93.

⁴¹² *Political Parties, Elections and Referendums Act 2000*, s 12. The Act provides that the Commission shall submit recommendations to the Secretary of State for the terms of a scheme for the making by the Commission of policy development grants. The detail will be set out in secondary legislation.

⁴¹³ *Political Parties, Elections and Referendums Act 2000*, Explanatory Memorandum.

⁴¹⁴ Personal communication with the Electoral Commission, 18/7/01.

Donations⁴¹⁵

The new scheme imposes disclosure obligations on parties, candidates, third parties and donors, in respect of donations over certain thresholds. It also regulates the type of donations that can be received and from whom.

Parties

Part VI of the *2000 Act* introduced controls on donations to registered political parties in the UK for the first time, based on the recommendations of the Neill Committee.⁴¹⁶ All donations of £200 or less can be accepted by a political party from any person and without ascertaining the identity of the donor. Donations of more than £200 (in cash or value) can be accepted only from ‘permissible donors’, which include:

- | | |
|---|---|
| <ul style="list-style-type: none"> • An individual registered in an electoral register • A company registered in the UK and incorporated in the European Union and which carries on business in the UK • A registered political party • A trade union • A building society • A friendly society | <ul style="list-style-type: none"> • A limited liability partnership registered in the UK or Northern Ireland and which carries on business in the UK • Any other unincorporated association of two or more persons which carries on business or other activities wholly or mainly in the UK and whose main office is there⁴¹⁷ |
|---|---|

Donations of over £200 from any other source are banned such as, foreign donations, donations and anonymous donations. The *2000 Act* also sets out specific requirements in relation to donations made in the form of a bequest, donations from trustees and companies and multiple donations. Briefly, donations of more than £200 resulting from a bequest are prohibited, unless the individual making the bequest was on an electoral register at any time in the 5 years before his/her death. Donations of more than £200 from a trustee acting in that capacity are prohibited unless (i) they are an agent of a person who is a permissible donor or (ii) the donation is from an ‘exempt trust’. Exempt trusts are trusts created before 27 July 1999 and those created by a person who was a permissible donor⁴¹⁸ The *2000 Act* makes a number of provisions regarding political donations by companies, whether to political parties or other bodies. The main effect is to require shareholder approval if aggregate donations exceed £5000 in 12 months.⁴¹⁹ Where a person (the principal donor)

⁴¹⁵ The information in this section is largely based on the information contained on the UK Electoral Commission web site: www.electoralcommission.gov.uk (accessed 1/9/01), except where otherwise indicated. For a detailed discussion of the new donation requirements see: Walker A, n 403.

⁴¹⁶ UK, Parliament, n 20, Chapter 4, 5 and 6.

⁴¹⁷ S 54(1).

⁴¹⁸ S 54(3).

⁴¹⁹ S 139. For further information about the regulation of donations made by companies, see the link from the UK Electoral Commission web site at:

makes a donation on behalf of him or herself and one or more other persons, or on behalf of two or more persons, each individual contribution of more than £200 shall be treated as if it were a separate donation received from that person. The recipient party will therefore need to establish the identity of each separate donor (and to this end the principal donor will be under a duty to provide such information) and whether each constitutes a permissible source.⁴²⁰

Registered parties are also subject to reporting requirements in respect of donations above a certain value. The reports must contain details of donations to political parties of £5,000 or more at national level, and £1,000 at local level. For the purpose of the reporting requirements 'donations' has a wide definition incorporating gifts of money or property, sponsorship and loans. The treasurer of a registered party must make quarterly donation reports to the Electoral Commission and weekly donation reports are required during an election period. The Electoral Commission maintains a register of donations reported.⁴²¹ A donor who makes multiple small donations which when aggregated exceeds £5,000 in the course of a year must also make a report to the electoral Commission. The report must contain details including, the value of the donations, the name of the party to whom the donations are made, and the name and address of the donor.⁴²²

Candidates

The control and reporting of donations to candidates is governed in a similar way as donations to political parties. A new section and new Schedule 2A are inserted into the *Representation of the People Act 1983* to provide for this scheme.⁴²³

Third Parties

Donations to third parties are also regulated in the same way as for registered parties. Third parties are organisations other than political parties who campaign at election times, such as pressure groups and trade unions. These restrictions were imposed to ensure that 'limits on election expenditure are not evaded by front organisations'.⁴²⁴

www.dti.gov.uk/cld/explan_note.htm (accessed 1/9/01, copy with author).

⁴²⁰ *Political Parties, Elections and Referendums Act 2000*, s 54(4) and (5).

⁴²¹ Ss 50, 62 and 63.

⁴²² S 68.

⁴²³ *2000 Act*, Schedule 16.

⁴²⁴ Walker A, n 403, p 22.

Donors

There are also reporting requirements relating to those making political donations. Donors are required to report to the Electoral Commission if, during a calendar year, they make donations in sums of £200 or less which in aggregate amount to:

- more than £5,000 to a registered party or to a members association;
- more than £1,000 to a member of a registered party for use in connection with political activities: or
- more than £1,000 to the holder of a relevant elective office.

Election expenditure*Controls on party expenditure in national elections*

Part V of the *2000 Act* concerns the control of campaign expenditure by political parties. It introduces limits on the amount of money that can be spent by registered parties on election campaigns for a Parliamentary general election, European Parliament election, Scottish Parliament general election, National Assembly for Wales general election and Northern Ireland Assembly general election.⁴²⁵ In terms of general elections, limits are imposed on campaign expenditure incurred by or on behalf of a registered party that contests one or more constituencies. The relevant period is normally 365 days before a parliamentary general election and 4 months before the date of the poll in all other cases.

The maximum amount a party may expend is governed by the number of constituencies contested in the election. The limits are aggregated where the relevant periods overlap.⁴²⁶ Where a registered party contests one or more constituencies in England, Scotland or Wales, the limit applying to campaign expenditure incurred by or on behalf of the party in the relevant period in that part of Great Britain is £30,000 multiplied by the number of constituencies contested by the party in that part of Great Britain, or if greater, the appropriate amount is £810,000 in relation to England, £120,000 in relation to Scotland and £60,000 in relation to Wales.⁴²⁷ A party contesting all the seats in the UK in a general election would have a limit of £19.77m.⁴²⁸ Where a registered party contests one or more constituencies in Northern Ireland, the limit applying to campaign expenditure which is incurred by or on behalf of the party in the relevant period in Northern Ireland is £30,000, multiplied by the number of constituencies contested by the party there.⁴²⁹

⁴²⁵ These provisions generally replicate the previous expenditure scheme provisions contained in the *RPA* 1983, with some changes: Gay O, n 399, p 9. This paper also contains a review of the scheme prior to the *2000 Act*.

⁴²⁶ Gay O, n 399, p 36.

⁴²⁷ Schedule 9, s 3.

⁴²⁸ Electoral Commission web site: www.electoralcommission.gov.uk/controls.htm (accessed 1/9/01, copy with author).

⁴²⁹ Schedule 9, s 4.

For the purpose of expenditure limits ‘campaign expenditure’ means expenses, incurred by or on behalf of the party for election purposes, which fall within the list of expenses set out in a schedule to the *2000 Act* such as, party political broadcasts, advertising, market research, and press conferences. It includes benefits-in-kind as well as cash expenditure. There are also specific exclusions including: reasonable personal expenses; party newsletters that report on activities of representatives or prospective candidates; and expenditure incurred in respect of an individual candidate.⁴³⁰ The registered treasurer (or Campaigns Officer if the party appoints such a person) of the party has responsibility for ensuring that the campaign spending limits are not exceeded.

Controls on candidates expenditure in national elections

Limits on the spending of individual candidates, which are often referred to as ‘local spending limits,’ have existed for over 100 years and are currently set in the *Representation of the People Act 1983* (the *RPAAct*). Under the *RPAAct* candidates are prohibited from exceeding the statutory limit in election expenditure for general elections and by-elections. Different limits are set depending on whether the candidate is standing for election in a country or borough seat and additional money is allowed for each elector in the constituency. For example, in the 1997 general election the average constituency limit was approximately £8,000. The *RPAAct* also prohibits election expenditure on a candidate by any third party, subject to exceptions.

The *2000 Act* amended the *RPAAct* in respect of expenditure by individual candidates to bring the definitions into line with those used for national campaign expenditure. The maximum expenditure per candidate in a by-election was also increased.⁴³¹

Controls on third party expenditure in national elections

Part VI of the *2000 Act* establishes a new regime of regulating the election expenditure of third parties, as recommended by the Neill Committee. Third parties are organisations other than political parties who campaign at election times, such as pressure groups and trade unions. Such parties must register with the Electoral Commission if they intend to incur expenditure of over £10,000 in England, or over £5,000 in Scotland, Wales or Northern Ireland. Notification must be made before these limits are reached to avoid committing an offence. The time period is the same as applies to parties: 365 days before the date of the election. Expenditure that is caught by Part VI is referred to as ‘controlled expenditure’ and includes expenses incurred in the production of material designed to promote or procure the election of candidates, including material which can reasonably be regarded as intended to enhance the electoral prospects of the candidate.⁴³² Overall expenditure limits for third parties are also set. The national limit on election spending by third parties is set at 5% of the maximum limit for any political party. In the case of a general election, the limits are £793,500 in England, £108,000 in Scotland, £60,000 in Wales and £27,000 in Northern Ireland.

⁴³⁰ S 72 and Part I of Schedule 8.

⁴³¹ Gay O, n 399, Summary of Main Points.

⁴³² *ibid.*

Disclosure of expenditure

Registered parties contesting elections are required to make a return to the Commission detailing their election spending. If expenditure exceeds £250,000 the return must be audited. The returns will be made available for public inspection.⁴³³ Third parties must also file a return of controlled expenditure expenses, accompanied by invoices and declarations as to accuracy. Where expenditure is over £250,000 it must be independently audited.⁴³⁴

5.3 UNITED STATES OF AMERICA⁴³⁵

In the US, Federal election finance law, or ‘campaign finance’ as it is generally called, includes public funding of Presidential election campaigns and the regulation of donations and expenditure. In this section, background information to the current campaign finance situation is set out, followed by an overview of relevant US Federal campaign finance law.⁴³⁶ Campaign finance is currently an extremely contentious issue in the US, as the reforms of the 1970’s (outlined below) are being eroded by what one commentator describes as the rise of ‘checkbook democracy’.⁴³⁷ A brief summary of the debate is contained at the end of this section.⁴³⁸

Background

In 1966, Congress enacted the first public funding legislation, but suspended it a year later. That law would have made U.S. Treasury funds available to eligible nominees in a Presidential general election through payments to their political parties. Funds would have come from a Presidential Election Campaign Fund in the U.S. Treasury consisting of

⁴³³ Ss 80-84.

⁴³⁴ Ss 96-100.

⁴³⁵ The information in this section is based on the information on the Federal Election Commission web site: www.fec.com (accessed 1/9/01) and other sources as noted. In this section all monetary amounts are in US dollars.

⁴³⁶ While most US States also have laws regulating campaign finance and many also provide public funding for election campaign, the States are not examined in this section. See the FEC web site at: www.fec.gov/pages/cflaw98.htm (accessed 1/9/01, copy with author) for a summary of state campaign finance laws in relation to donations, election expenditure and reporting requirements.

⁴³⁷ West D, *Checkbook Democracy – How money corrupts political campaigns*, Northeastern University Press, 2000.

⁴³⁸ For further information see, for example: West, n 437; Corrado A, et al, *Campaign Finance Reform – a Sourcebook*, 1997, which can be viewed on the web at: www.brook.edu/gs/cf/sourcebk/default.htm (accessed 1/9/01); Sorauf F, *Inside Campaign Finance – Myths and Realities*, Yale University Press 1992; and Smith B, *Unfree Speech – The Folly of Campaign Finance Reform*, Princeton University Press 2001.

dollars voluntarily checked off by taxpayers on their federal income tax returns. A subsidy formula would have determined the amount of public funds available to eligible candidates.

In 1971, Congress adopted provisions, which formed the basis of the public funding system in effect today. Under the 1971 Revenue Act, the nominee, rather than the party, receives the public funds accumulated through the dollar check-off. The Revenue Act also placed limits on campaign spending by Presidential nominees who receive public money and a ban on all private contributions to them. In a parallel development, Congress passed the 1971 *Federal Election Campaign Act* (the *1971 Act*), which required full, detailed reporting of campaign contributions and expenditures by all federal candidates, including Presidential candidates.

However, without a central administrative authority, the campaign finance laws were difficult to enforce. In 1974, following reports of serious financial abuses in the 1972 Presidential campaign, Congress amended the *1971 Act* to establish an independent agency called the Federal Election Commission (the FEC) to enforce the law, facilitate disclosure and administer the new public funding program for Presidential elections. The FEC currently administers campaigning finance law over three main areas: the public funding of Presidential elections; public disclosure of funds raised and spent to influence federal elections; and restrictions on contributions and expenditure made to influence federal elections.

The 1974 amendments to the Federal Election Campaign Act completed the system now in place for public financing of Presidential elections. Those amendments extended the public funding provisions of the *Revenue Act* to Presidential primary elections and the Presidential nominating conventions of national parties. Court challenges to the expenditure limits followed soon after Congress passed the 1974 Amendments. However, the Supreme Court, in two separate suits, first implied and later affirmed that expenditure limits for publicly funded Presidential candidates are constitutional.⁴³⁹ In 1976, Congress made minor changes to the public funding provisions and in 1979 and 1984 increased the public funding entitlement and spending limit for national nominating conventions.

Public funding

Public funding is available for Presidential elections but not for Congressional elections. Candidates in Congressional elections must rely on private or party funding, subject to expenditure limits and restrictions on donations.⁴⁴⁰

The funding of Presidential elections was introduced in 1974 through amendments to the *1971 Act*. Under the scheme, qualified Presidential candidates receive money from the Presidential Election Campaign Fund, which is an account on the books of the United States Treasury. The Fund is financed exclusively by a voluntary tax check-off whereby taxpayers can tick a box on their income tax return authorising the Federal government to

⁴³⁹ See *Buckley v. Valeo* (1976) and *Republican National Committee v. FEC* (1980).

⁴⁴⁰ Note that the *1971 Act* sets limits on the amounts parties, interest groups, individuals and candidates can contribute or spend on behalf of the campaigns. The restrictions on campaign contributions and expenditure are examined below.

use one of their tax dollars to finance Presidential campaigns in the general election. This amount was raised to three dollars in 1993.⁴⁴¹ Checking the box does not increase the amount a taxpayer owes or reduce his or her refund; it merely directs that three dollars from the Treasury be used in presidential elections.⁴⁴² Check-off funds may not be spent for other federal programs. By 1976, sufficient tax money had been accumulated to fund the presidential election that year. After peaking in the early 1980's, with 30% of taxpayers ticking the check-off, the level of public support has declined until, by 1999 only approximately 10% agreed to the contribution.⁴⁴³ The Presidential Election Campaign Fund is distributed via three programs: Primary Matching Payments, General Election Grants and Party Convention Grants.

Primary Matching Payments

The Presidential primaries are funded through a combination of public and private funding. Eligible candidates in the Presidential primaries may receive public funds to match the private contributions they raise. While a candidate may raise money from many different sources, only contributions from individuals are matchable; contributions from PACs and party committees are not. Furthermore, while an individual may give up to \$1,000 to a primary candidate, only the first \$250 of that contribution is matchable. To qualify, a candidate must demonstrate broad-based support by raising more than \$5,000 in individual contributions of up to \$250 in each of 20 different states. Candidates must agree to use public funds only for campaign expenses, and they must comply with spending limits. Beginning with a \$10 million base figure, the overall primary spending limit is adjusted each Presidential election year to reflect inflation. In 1996, the limit was \$30.91 million. Private contributions to presidential candidates are limited as in Congressional campaigns.⁴⁴⁴

General Election Grants

The Republican and Democratic candidates who win their parties' nominations for President are each eligible to receive a grant to cover all the expenses of their general election campaigns. Democratic and Republican candidates are automatically eligible for public funds unless their party's vote slipped below 25% in their previous presidential election. Candidates from other parties can also receive partial funding. The sum of the allotment from the US Treasury for presidential general election funding is the current indexed value of \$20 million in 1974 dollars (\$61.82 million per candidate in 1996).⁴⁴⁵ That is also the candidate's spending limit. Candidates are also allowed to spend \$50,000 of their personal funds. Nominees who accept the funds must agree not to raise private contributions and to limit their campaign expenditures to the amount of public funds they

⁴⁴¹ Smith, n 438, p 32.

⁴⁴² UK, Parliament, n 20, p 199.

⁴⁴³ Smith, n 438, p 37-38.

⁴⁴⁴ UK, Parliament, n 20, p 199.

⁴⁴⁵ Corrado, n 438.

receive. They may use the funds only for campaign expenses. A third party Presidential candidate may qualify for some public funds after the general election if he or she receives at least five percent of the popular vote. Candidates may choose not to accept public funds and not be constrained by spending limits etc, but since its introduction in 1976 no major party candidate has refused public funding.

Minor parties (who receive between 5% and 25% of the vote in the preceding election) may also qualify for public funding. A candidate who agrees to abide by the funding restrictions may receive funding based on his or her share of the vote, but not until after the election. In subsequent elections, a candidate who has received at least 5% of the vote in a previous presidential general election may be eligible for funding before the following election. New and minor party candidates may accept private contributions, but only within the general limits for such contributions (eg \$1,000 per election from individuals and no corporate or labour contributions). The two major parties may also spend an amount based on an inflation adjusted 2 cents per voting age American (\$12 million in 1996). Each of the major parties' nomination conventions may also be paid for (in 1996 each major party received a grant of \$12.36 million to finance its nomination convention). Minor parties qualify for convention funding based on their presidential candidate's share of the popular vote in the previous election.⁴⁴⁶

Party Convention Grants

Each major political party may receive funds to pay for its national Presidential nominating convention. The statute sets the base amount of the grant at \$4 million for each party, and that amount is adjusted for inflation each Presidential election year. In 1996, the major parties each received \$12.36 million. Other parties may also be eligible for partial public financing of their nominating conventions, provided that their nominees received at least five percent of the vote in the previous Presidential election.

Donations and expenditure

Donation limits

The *1971 Act* places a limit on contributions by individuals and groups to candidates, party committees and PACs. In summary:

- Individuals may contribute: up to \$1,000 to a candidate or candidate committee per election; up to \$20,000 per year to the federal accounts of a national party committee per calendar year; and up to \$5,000 to any other political committee, such as a PAC, per calendar year. An individual cannot exceed a total of \$25,000 in donations per year.
- Multi-candidate committee contributions are limited to \$5,000 to a candidate or candidate committee per election, \$15,000 to a national party committee per calendar year and \$5,000 to any other political committee per calendar year. The total that can be donated per year is unlimited. A multi-candidate committee is a political committee

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ibid.

with more than 50 contributors which has been registered for at least six months, and with the exception of state party committees, has made contributions to five or more candidates for federal office.

- Other political committees are limited to: \$1,000, to a candidate or candidate committee per election; \$20,000, to a national party committee per calendar year; and \$5,000 to any other political committee per calendar year. The total that can be donated per year is unlimited

Prohibited contributions and donors

With respect to federal elections, no one may make a contribution in another person's name and no one may make a contribution in cash of more than \$100. The *1971 Act* places prohibitions on contributions and expenditures by certain individuals and organisations. National banks, corporations and labour organisations are prohibited from making any contribution in connection with a federal election.⁴⁴⁷ Donations to PACs are not covered by these provisions. Foreign nationals are also prohibited from making contributions, either directly or indirectly, in connection with any election to political office (which includes local, state and federal offices). The prohibition extends to domestic subsidiaries of foreign corporations, and includes political action committees.

Corporate and Union Activity

Although corporations and labour organisations may not make contributions or expenditures in connection with federal elections, they may establish PACs. Corporate and labour PACs raise voluntary contributions from a restricted class of individuals and use those funds to support federal candidates and political committees. Apart from supporting PACs, corporations and labour organisations may conduct other activities related to federal elections, within certain guidelines.

Political Party Activity

Political parties are active in federal elections at the local, state and national levels. Most party committees organised at the state and national levels, as well as some committees organised at the local level, are required to register with the FEC and file reports disclosing their federal campaign activities. Party committees may contribute funds directly to federal candidates, subject to the contribution limits. National and state party committees may make additional 'coordinated expenditures', subject to limits, to help their nominees in general elections. Finally, state and local party committees may spend unlimited amounts on certain grassroots activities specified in the law without affecting their other contribution and expenditure limits (for example, voter drives by volunteers in support of the party's Presidential nominees and the production of campaign materials for volunteer distribution). Party committees must register and file disclosure reports with the FEC once their federal election activities exceed certain dollar thresholds specified in the law.

⁴⁴⁷ The *Act* also prohibits foreign nationals, national banks and other federally chartered corporations from making contributions or expenditures in connection with state and local elections.

Disclosure of donations and expenditure

The *1971 Act* requires candidate committees, party committees and PACs to file periodic reports disclosing the money they raise and spend. Candidates must also disclose expenditure exceeding \$200 per year to any individual or supplier. Candidates must also identify all PACs and party committees that give them contributions, and must identify individuals who give them more than \$200 in a year.⁴⁴⁸

Election expenditure limits

Candidates who accept public funding for Presidential elections are restricted to spending the amount they receive. There is no limit on Presidential candidates who do not accept public funding, or on candidates for Congressional elections.⁴⁴⁹

Election expenditure by third parties

Under federal election law, an individual or group (such as a PAC) may make unlimited 'independent expenditures' in connection with federal elections. An 'independent expenditure' is an expenditure for a communication that expressly advocates the election or defeat of a clearly identified candidate and which is made independently from the candidate's campaign. To be considered independent, the communication may not be made with the cooperation or consent of the candidate or his or her campaign; nor may it be made upon a request or suggestion of either the candidate or the campaign. While there is no limit on how much anyone may spend on an independent expenditure, the law does require persons making independent expenditures to report them and to disclose the sources of the funds they used. The public can review these reports at the FEC's Public Records Office.

The organisations that are prohibited from making donations, as discussed above, are also prohibited from making election expenditure to influence Federal elections.⁴⁵⁰

The campaign finance debate

The debate centres on the rising cost of elections, particularly national and Presidential elections, the subsequent increased importance of fundraising, and practices which undermine contribution limits and disclosure laws, such as the abuse of the 'soft-money' loophole. The cost of running an election campaign in the US is astronomical and increasing with each election. For example, the *Washington Post* estimates that the Clinton and Dole campaigns spent approximately \$232 million in total in the 1996 campaign cycle, supplemented by approximately \$69 million in 'issue ads' paid for by the Republican and Democratic national committees.⁴⁵¹ The cost for the average House candidate is over

⁴⁴⁸ UK, Parliament, n 20, p 199.

⁴⁴⁹ *ibid.*

⁴⁵⁰ *ibid.*, p 200.

⁴⁵¹ This information is taken from the *Washington Post* web site section devoted to the

\$500,000 and the average cost of a Senate campaign is almost \$3.8 million.⁴⁵² The main cost factor is television and radio advertising: an essential element in running a national campaign. The need for each candidate to 'out campaign' the other also contributes to rising costs. Other cost factors include the payment of campaign staff, the cost of campaign materials, travel and the expensive business of raising money.

The high cost of running an election campaign prevents otherwise capable candidates from standing for election. Arguably, as the competitiveness of political office is reduced, the range of candidates is lowered. The rising costs of campaigning also means that 'for many candidates, raising money is no longer *one* important issue; it is the *only* issue.'⁴⁵³ The time spent by candidates on fundraising activities detracts from the quality of policy developed by candidates and the representation sitting candidates provide to their constituents.

Pressure to raise funds also increases the likelihood of funds being accepted from inappropriate sources or on conditions. The precise extent to which donations to election campaigns influence political decision making is as elusive in the US as it is in Australia (see Section 1.2.2). However, allegations of corruption are made broadly and confidently in the context of the debate. It is also clear that a substantial amount of money reaches candidates and parties through avenues that circumvent disclosure laws. The issue of access is also important in the US where, for example, individuals and organisations spend thousands of dollars for the opportunity to buy time with the President.⁴⁵⁴

One particular area of concern is the influence exerted by Political Action Committees (PACs). The proliferation of PACs in the 1980s has rendered them the primary vehicle whereby interest groups mobilise cash and volunteers for candidates.⁴⁵⁵ PACs sponsored by corporate and trade associations are primarily concerned with gaining access to legislators and rely on their contributions to obtain this access. By leveraging contributions from many individuals or companies, PACs can exert enormous influence (although they are limited in their contribution to \$5,000 per candidates and \$15,000 per national party committee). Gerritsen describes PACs as '...having become increasingly important, and influential, raising an ever larger proportion of political candidates defacto expenditures.'⁴⁵⁶

issue of campaign finance reform:

www.washingtonpost.com/wp-srv/politics/special/campfin/campfin.htm (accessed 1/9/01, copy with author).

⁴⁵² Committee for Economic Development, *Investigating the People's Business; A Business Proposal for Campaign Finance Reform, A statement by the Research and Policy Committee of the Committee for Economic Development*, 1999, p 2. This data relates to the 1998 campaigns and elections as reported by the FEC.

⁴⁵³ *ibid*, p vii.

⁴⁵⁴ Cass, n 61, p 478.

⁴⁵⁵ Gerritsen, n 111, p 13.

⁴⁵⁶ *ibid*.

In the 1990's another significant threat to the integrity of the electoral process has emerged, in the form of 'soft-money'. US Federal election law allows basically unlimited spending on 'party building activities', including generic advertising such as 'issue ads'. This spending is called 'soft-money' and is largely unregulated. Soft-money operates outside the Federal contribution limits and disclosure requirements (outlined above). This means that there is no limit on the amount that donors can give to a party as long as it goes into the party's soft-money accounts. Between the 1980's and the early 1990's, parties raised relatively small amounts of money for this type of expenditure. However, the discovery of the soft-money loophole led to unprecedented expenditure during the 1996 election campaign, much of it disguised as soft-money. This was largely a result of national committee's spending money on 'issue ads' that were theoretically supporting party positions, rather than specific candidates, and therefore unlimited spending was allowed. The advertisements were virtually indistinguishable from campaign advertisements and violated the intention, if not the letter, of the law. Unions and other interest groups could also exploit the soft-money loophole. The situation has been described by the *Washington Post* as follows:

Essentially, soft money blew a hole in the reforms of the 1970's. By any reasonable interpretation, the campaigns no longer adhered to contribution or spending limits. They voraciously courted private donors – the only difference being that money was sent to party committees, rather than their own campaign coffers. And the presidential campaigns still got their public funding.⁴⁵⁷

The Committee for Economic Development (CED) is currently lobbying the Federal US Government to reform campaign finance laws.⁴⁵⁸ It argues that a ban on soft-money is supported by business leaders in the US who are feeling pressured to make large political contributions.⁴⁵⁹ Recently, it was reported that the President of the CED, Mr Charles Kolb, warned the Australian business and union movement to stop making political donations '...or risk creating a political system similar to America's cash driven process.'⁴⁶⁰

The effect these matters have on those participating in the electoral process and the process generally, especially after the excesses of the 1996 election campaign, has led to the introduction of numerous reform proposals and bills in the last few years.⁴⁶¹ Reaching a consensus on reform options has proved to be extremely difficult. The major parties have starkly different views on the reforms. The Democrats generally support limits in soft-

⁴⁵⁷ This information is taken from the *Washington Post* web site section devoted to the issue of campaign finance reform: www.washingtonpost.com/wp-srv/politics/special/campfin/campfin.htm (accessed 1/9/01, copy with author).

⁴⁵⁸ The CED describes itself as '...an independent, nonpartisan organisation of business and education leaders dedicated to policy research on the major economic and social issues of our time and the implementation of its recommendations by the public and private sectors': www.ced.org/about/mission.htm (accessed 1/9/01).

⁴⁵⁹ CED, 'First ever corporate poll results', *media release*, 18/10/00.

⁴⁶⁰ Australia warned on US political donations trap, *The Australian Financial Review*, 26 June 2000, p 7.

⁴⁶¹ Wilcox C, 'Dead law: the federal election finance regulations 1974-1996', *PS: Political Science and Politics*, March 1998, Vol 31, No 1, p 14.

money and spending because of their traditional ability to raise funds from wealthy donors. Republicans generally argue against limits.⁴⁶² On the second of April this year the US Senate passed a sweeping campaign finance reform bill, the McCain-Feingold Bill, (introduced by the two Democrat Senators, Russel Feingold and John McCain). If the bill becomes law, it would ban soft money contributions to the national political parties, restrict candidate specific issue ads run by corporations or unions near an election, and increase individual hard money contribution limits. The bill has moved to the House of Representatives, where a companion bill has been introduced by Representatives Shays and Meehan (the Shays-Meehan Bill).⁴⁶³ Concern that the bill will fail in the House has been raised as a number of amendments which undermine the strength of the reforms in the bill have been moved, and an alternative Republican bill has been introduced into the House.⁴⁶⁴

⁴⁶² This information is taken from the *Washington Post* web site section devoted to the issue of campaign finance reform: www.washingtonpost.com/wp-srv/politics/special/campfin/campfin.htm (accessed 1/9/01, copy with author).

⁴⁶³ This information is sourced from the web page of the *Brookings Institute* in Washington DC: www.brook.edu/gs/cf/debate/debate_archive.htm#Day11 (accessed 1/9/01, copy with author).

⁴⁶⁴ *ibid.*

6. CONCLUSION

This paper has explored three aspects of election finance: public funding of election campaigns, donations to candidates and political parties and election expenditure by candidates and political parties. It has examined the law in relation to Federal and State and Territory elections in Australia, as well as an overview of the law in three overseas jurisdictions. In doing so, the diversity of the treatment of these election finance issues by the law has been explored.

Public funding is a relatively uncontentious feature of the Australian election landscape. It exists in four jurisdictions and there are moves to introduce it in at least two other jurisdictions. As a corollary to public funding, the disclosure of expenditure seems to also be uncontroversial, while the efficacy of the expenditure limits that exist in Tasmania and Victoria have been questioned. The disclosure of donations is a more topical issue. This paper has examined several current reform proposals in this area. The constant need for reform of disclosure legislation to keep pace with the discovery and abuse of loopholes has been highlighted. The steady rise in the cost of election campaigning over the last few decades in Australia will ensure that financing elections will remain a relevant issue in Australia and the object of proposals for further reform.

Appendix 1
Comparative table of Australian jurisdictions

	PUBLIC FUNDING	DONATIONS		ELECTION EXPENDITURE	
		Anonymous	Disclosure requirements	Limits	Disclosure
Cth For further detail see Section 3	Funding is available to candidates for House of Representatives elections and to candidates & groups for the Senate 4% threshold of first preference votes applies	Anonymous donations over certain limits are prohibited: Candidates \$200 or more Groups \$1000 or more Parties \$1000 or more	Basic details of all donations, & specific details of donations over certain thresholds must be disclosed after each election by: <ul style="list-style-type: none"> <u>Candidates</u> \$200 or more <u>Senate groups</u> \$1000 or more <u>Third parties</u> (anyone other than a group member, candidate party, party branch, or an associated entity): <ul style="list-style-type: none"> • who incur election expenditure of \$1000 or more must file a return after each election disclosing details of donations received by them of \$1000 or more used wholly or in part to incur the expenditure • who donate \$200 or more to candidates or a member of a group, or \$1000 or more to specified bodies must file a disclosure return after each election • who donate \$1500 or more to parties must file an annual disclosure return covering all donations made to the party during the financial year <u>Parties and associated entities</u> must file annual returns which include disclosure of details of donations over \$1500	None	<u>Candidates, Senate groups, and third parties who incur election expenditure</u> , must file expenditure returns after an election if the expenditure is \$200 or more <u>Parties and associated entities</u> must file annual returns which would disclose some information about expenditure <u>Broadcasters and publishers</u> may have to furnish a return after an election
NSW For further detail see Section 2	Funding is available to candidates for LA elections and groups and independent candidates who contest LC elections 4% threshold of first preference votes applies	Anonymous donations over certain limits are prohibited: Candidates \$200 or more Groups \$1000 or more Parties \$1500 or more	A disclosure return must be filed after an election with details of donations over certain thresholds by: <ul style="list-style-type: none"> <u>Candidates</u> more than \$200 <u>Groups</u> more than \$1000 <u>Parties</u> more than \$1500 <u>Third parties</u> (anyone other than a party, candidate or group member): <ul style="list-style-type: none"> • who incur election expenditure over \$1500 (including making a donation) must file a return after each election disclosing specific details of donations they received of over \$1000 used wholly or in part to incur the expenditure. • who donate \$200 or more to candidates, \$1000 or more to groups, or \$1500 or more to parties, must file a return after each election disclosing specific details of such donations 	None	<u>Candidates, groups and parties</u> must file a return containing information about expenditure after an election. <u>Third parties who incur expenditure of more than \$1500</u> must also disclose details of that expenditure after an election

	PUBLIC FUNDING	DONATIONS		ELECTION EXPENDITURE	
		Anonymous	Disclosure requirements	Limits	Disclosure
Qld For further detail see Section 4.1	Funding is available to candidates in LA elections 4% threshold of first preference votes applies	Anonymous donations over certain limits are prohibited: Candidates \$200 or more Parties \$1000 or more	<u>Candidates</u> must file a return after each election disclosing basic details of all donations & specific details of donations of \$200 or more <u>Third parties</u> (anyone other than a candidate, party or associated entity) who incur election expenditure of \$1000 or more must file a return after each election disclosing donations received by them of \$1000 or more used wholly or in part to incur the expenditure <u>Parties</u> and <u>associated entities</u> must file annual returns which include disclosure of details of donations over \$1500	None	<u>Candidates</u> , and <u>third parties</u> <u>persons who incur election expenditure over \$200</u> , must file expenditure returns after each election <u>Parties</u> and <u>associated entities</u> must file annual returns which would disclose some information about expenditure
SA For further detail see Section 4.2	None	No restrictions	No requirements	None	No requirements
TAS For further detail see Section 4.3	None	No restrictions	No requirements	Legislative Council candidates limited to \$9000. Only candidates can incur expenditure - no political party or third party expenditure allowed	Legislative Council <u>candidates</u> must file an expenditure return after each election
VIC For further detail see Section 4.4	None	No restrictions	No requirements	Candidates for both Houses are limited to \$5000	<u>Candidates</u> for both Houses must file an expenditure return after each election

	PUBLIC FUNDING	Anonymous	DONATIONS Disclosure requirements	ELECTION EXPENDITURE Limits Disclosure	
WA For further detail see Section 4.5	None	Anonymous donations to candidates, groups or parties of \$1600 or more are prohibited	<p><u>Candidates</u> and <u>groups</u> must file a return after each election disclosing basic details of all donations & specific details of donations of \$1600 or more</p> <p><u>Parties & associated entities</u> must file annual returns disclosing basic details of all donations and specific details of donations of \$1600 or more</p> <p><u>Third parties</u> (other than a candidate, group, party or associated entity) who incur election expenditure of \$1600 or more, must file a return after each election disclosing donations received by them of \$1600 or more used wholly or in part to incur the expense</p>	None	Expenditure returns must be filed after an election by <u>candidates, groups, parties, and third parties who incur election expenditure over \$500</u>
ACT For further detail see Section 4.6	Funding is available to independent candidates, non-party groups, ballot groups and parties who contest LA elections 4% threshold of first preference votes applies	Anonymous donations to an MLA, ballot group, party or associated entity of \$1000 or more are prohibited Anonymous donations to candidates and non-party groups of \$200 or more are prohibited	<p><u>Candidates & non-party groups</u> must file a return after each election disclosing basic details of all donations and specific details of donations of \$200 or more</p> <p><u>Third parties</u> (other than a candidate, ballot group, party, or associated entity):</p> <ul style="list-style-type: none"> • who incur expenditure for political purposes of \$1000 or more must file a return after each election disclosing donations received by them of \$1000 or more used wholly or in part to incur the expenditure • who donate \$200 or more to candidates, or \$1500 or more to non-party groups or specified bodies, must file a return after each election disclosing specific details of those donations • who donate \$1500 or more to a party, ballot group, MLA or associated entity must file an annual return disclosing details of all gifts <p><u>Parties and associated entities</u> must file annual returns which include disclosure of details of donations over \$1500</p>	None	<p><u>Candidates, parties, non-party groups and third parties who incur election expenditure over \$200</u> must file a return after each election disclosing expenditure</p> <p><u>Parties and associated entities</u> must file annual returns which would disclose some information about expenditure</p> <p><u>Broadcasters & publishers</u> may have to file a return after an election</p>
NT For further detail see Section 4.7	None	No restrictions	No requirements	None	No requirements

Appendix 2

Election Funding Authority of NSW, *Guidelines of the Authority*, 1999

GUIDELINES OF THE AUTHORITY

A claim for payment may only be made in respect of items which are deemed to constitute "election campaign expenditure" in accordance with the Act, Regulations or Guidelines laid down by the Authority.

At the present time the Authority has laid down some twenty-nine Guidelines which set out restrictions of certain items which may be claimed as "election campaign expenditure". These Guidelines are set out below.

GUIDELINES DETERMINED BY THE AUTHORITY

1. Where a vehicle owned by another person is made available to a candidate for use during an election campaign the value of the vehicle to the campaign is to be assessed and declared as a contribution unless a payment which is fully adequate is made to the owner for use of the vehicle. (Determined 1.4.82)
2. Where an advertisement is published by a candidate after a period of 30 days from polling day for the election in which is expressed the appreciation of the candidate for the support received at that election the expenditure incurred is to be treated as election campaign expenditure with respect to the next election. (Determined 1.4.82) (Amended 28.2.95)
3. Where a referendum is being conducted concurrently with a general election expenditure incurred by a candidate in advising the electorate how to vote in the referendum is not expenditure with respect to the election campaign of the candidate. (Determined 1.4.82)
4. A donation made by one candidate to the campaign fund of another candidate is not an election campaign expense of the candidate making the donation. (Determined 1.4.82)
5. Where a candidate publishes a newspaper with the primary object of promoting his own election to Parliament and sells advertising space in the newspaper to offset the cost of the publication the net expenditure incurred is election campaign expenditure. (Determined 1.4.82)
6. Where a candidate suffers a loss of pay caused by his attendance at campaign activities, that loss of pay is not an election campaign expense. (Determined 1.4.82)

7. Where a candidate incurs expenditure on an advertisement recommending the election to Parliament of a candidate in another electorate the expenditure so incurred is not an election (Determined 1.4.82)
8. Where a number of candidates share an advertisement the benefit is regarded as being equally shared. The value of the share only of a candidate featured in the advertisement is an election campaign expense of the candidate. (Determined 1.4.82)
9. Where goods (e.g. badges) are purchased by a candidate and some or all of those goods are resold the election campaign expense is the net expenditure incurred in purchasing the goods. (Determined 1.4.82)
10. Expenditure incurred in a fund raising activity is not claimable as an election campaign expense unless the activity resulted in a loss. The net reduction in the funds available for election campaign purposes would then become an election campaign expense. (Determined 1.4.82)
11. Interest payable on a loan raised by a party, group or candidate to finance an election is electoral expenditure. (Determined 1.4.82)
12. The investment of funds donated or raised for election campaign purposes is a fund raising venture and the net interest earned is to be declared. (Determined 1.4.82)
13. Where a voter intention survey is carried out on behalf of a candidate and no charge is made for the service the value of the survey is to be declared as a political contribution. (Determined 1.4.82)
14. Where expenditure is incurred in a celebration or social function after the close of the poll the expenditure is not an election campaign expense. (Determined 1.4.82)
15. A deposit paid by a candidate when lodging his nomination for election is not an election campaign expense. (Determined 1.4.82)
16. The Act currently provides that an amount of \$250 may be claimed for auditors fees in connection with claims and declarations. Any amounts above \$250 in respect of auditors fees should be deleted from the claim and declaration. (Determined 1.9.88)
17. Some cases have arisen where a candidate claims as expenditure an amount

given to a party by whom he is endorsed to defray the cost of advertising expenses incurred by the party. In cases where the party also includes this amount in the declaration of electoral expenditure incurred this could result in "double dipping" and the amount claimed as expenditure has to be deducted from either the expenditure of the party or the candidate. (Determined 1.9.88)

18. Amounts paid for annual subscription to newspapers or periodicals are not deemed to be electoral expenditure incurred by a candidate. (Determined 1.9.88)
19. Amounts paid by candidates for purchase of flowers and other gifts to office staff is not electoral expenditure incurred. (Determined 1.9.88)
20. Parking fines imposed on candidates whilst in the course of their electoral campaign is not an election campaign expense. (Determined 1.9.88)
21. Expenses incurred by a candidate or his campaign director in attending party seminars, "Meet the Leader" functions etc. are not election campaign expenses. (Determined 1.9.88)
22. Annual motor vehicle registration and insurance fees in respect of a vehicle used by a candidate are not campaign expenses. (Determined 1.9.88)
23. Telephone accounts for candidates private telephone outside the election campaign period is not an electoral campaign expense. (Determined 1.9.88)
24. Fees paid by a candidate to scrutineers for services at the count after polling day is not an electoral campaign expense. (Determined 1.9.88)
25. Contributions made and proceeds from fund-raising functions conducted after polling day be accepted as part of the political contributions received by a candidate in respect of the election. (Determined 1.9.88)
26. Non-promotional clothing purchased to be worn by a candidate in his campaign is not election campaign expenditure. (Determined 1.9.88)
27. Candidates hairdressing expenses are not electoral expenditure. (Determined 1.9.88)
28. Payments made for "child care" do not constitute electoral expenditure. (Determined 7.9.89)
29. Electoral expenditure does not include any amount specified in a contract or agreement whereby payment is contingent upon receipt of funding under the Act. (Determined 28.2.95)