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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**Commonwealth Electoral Amendment
(Cleaning up Political Donations) Bill 2022**

**EXPLANATORY MEMORANDUM
and
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

Circulated by authority of
Andrew Wilkie MP

Commonwealth Electoral Amendment (Cleaning up Political Donations) Bill 2022

OUTLINE

This Bill amends the *Commonwealth Electoral Amendment Act 1918* (the Act) to strengthen the transparency and accountability of political donations by introducing a number of measures including:

- lowering the donation disclosure threshold from \$13,800 (or \$14,500 as indexed) to \$1,000 for individual donations and requiring aggregation under the threshold. This means that multiple donations received by the same recipient from the same source must be disclosed if the sum of those gifts is equal to or greater than the threshold;
- Donations include gifts. This Bill expands the definition of 'gift' to include actions taken by an individual or entity, to the value of \$1,000 and without consideration, which benefits a political entity. This includes actions taken to oppose another political entity. The Bill also expands the definition to include amounts paid to attend fundraisers or functions;
- introducing a cap of \$50,000 on the total amount of donations a donor can provide during an electoral cycle;
- requiring real-time disclosure by gift recipients to the Australian Electoral Commission (AEC) within two business days of the donation threshold being reached or exceeded;
- requiring the AEC to publish returns provided by reporting entities on the Transparency Register as soon as reasonably practicable;
- implementing an electoral expenditure cap to limit the amount that can be spent on election campaigns;
- prohibiting political donations from particular industries, including fossil fuel entities, gambling companies, liquor companies and the tobacco industry; and
- increasing penalties for contravention of the Act for corporations.

Australians' trust in politicians and the political process is at an all-time low. The provisions in the Bill will increase the public's confidence in donations made to, and received by, political entities.

FINANCIAL IMPACT

The Bill will have no financial impact.

NOTES ON CLAUSES

Clause 1: Short Title

This clause is a formal provision and specifies the short title of the Bill as the *Commonwealth Electoral Amendment (Cleaning up Political Donations) Bill 2022*.

Clause 2: Commencement

This clause provides for commencement of the Act on the first day of the next financial year occurring the 28th day after this Act receives Royal Consent.

Clause 3: Schedules

This clause establishes that, as the intent of the Bill is to be realised through amendments to another Act, the Schedules of this Bill will amend that Act accordingly.

Schedule 1 – Disclosure Threshold

Commonwealth Electoral Amendment Act 1918

Item 1: Subsection 287(1) (definition of *disclosure threshold*)

Item 1 repeals and substitutes the current definition of *disclosure threshold*, changing it from \$13,800 (or \$14,500 as indexed) to \$1,000.

Item 2: Subsection 314AC(2)

Item 2 ensures that aggregated donations, once they reach or exceed the donation threshold, must be provided as a return to the AEC.

Item 3: Transitional provision

Item 3 provides for indexation of the amended disclosure threshold 12 months after the commencement of the item.

Schedule 2 – Real-time disclosure of donations

Commonwealth Electoral Amendment Act 1918

Item 1: After Division 4 of Part XX

Item 1 inserts a new Division into the Act, which requires the continuous disclosure of political donations where those donations are above the disclosure threshold of \$1,000.

Section 307AA provides definitions for *agent or financial controller*, *disclosure gift*, *disclosure sum* and *reporting entity*.

A *disclosure gift* is a gift that is equal to or greater than the disclosure threshold.

A *disclosure sum* is the sum of all gifts, received from the same donor during the relevant reporting period, that are equal to or greater than the disclosure threshold. This definition is designed to capture multiple, smaller donations which on their own would not require disclosure, but when aggregated would be greater than the disclosure threshold. For example, if a donor donates \$950 to a reporting entity in one transaction, and then donates \$100 to the same reporting entity in another transaction within the same reporting period, the total sum of donations is \$1050, thus exceeding the disclosure threshold and requiring disclosure.

A political entity, a group, an associated entity, and a Senator or Member of the House of Representatives are considered *reporting entities* for the purposes of this Division.

Section 307AB requires the reporting entity to provide a return to the AEC within two business days of receiving a gift which makes the sum of all gifts equal to or greater than the disclosure sum. It also requires returns to be provided for each subsequent gift received over the disclosure threshold within two business days.

This section also specifies the particulars which must be included in the return.

Section 307AC requires significant third parties and third parties to provide a return to the AEC within two business days of using any part of a disclosure gift or a disclosure sum to incur electoral expenditure. The section acknowledges that significant third parties and third parties often receive gifts for multiple purposes, not just electoral purposes, and it is designed to ease the administrative burden for those organisations.

Section 307AD excludes the requirement of disclosure for gifts made in a private capacity for personal use. This section assumes that gifts of this nature would be encompassed in the Register of Senators' Interests and Register of Members' Interests.

Item 2: Subsection 320(1) (after table item 4)

Item 2 outlines the timeframes in which the AEC must publish certain returns. A return provided under this Division must be published by the AEC as soon as reasonably practicable after receiving the return.

Schedule 3 – Prohibited Donors

Commonwealth Electoral Amendment Act 1918

Item 1: After Division 5A of Part XX

Item 1 encompasses the whole of Schedule 3 and inserts a list of prohibited donors into the Act. Prohibited donors include a fossil fuel extraction industry business entity, a gambling industry business entity, a liquor industry business entity, and a tobacco industry business entity.

As per sections 314AK and 314AL, it is unlawful for a prohibited donor to make a political donation, for a person to make a political donation on behalf of a prohibited donor, or for a prohibited donor, or someone on behalf of a prohibited donor, to solicit another person to make a political donation. It is also unlawful for a recipient to accept a gift from a prohibited donor. The fault element for these offences is knowledge by the defendant (section 314AL(6)).

As per section 314AM, it is an offence for a person to enter into or carry out a scheme for the purpose of circumventing the requirements under this Division. This provision seeks to prevent donors or recipients from channelling funds through other entities to avoid restrictions imposed by the Act.

Under section 314AN the AEC may, in writing, declare a person or entity to not be a prohibited donor. This declaration remains in force for 12 months and may be revoked at any time by the AEC in writing. Decisions made by the AEC are not legislative instruments. The AEC must maintain a register of determinations and publish the register on its website.

Unlawful political donations may be recoverable by the Commonwealth as a debt due to the Commonwealth.

Schedule 4 – Capping Donations

Commonwealth Electoral Amendment Act 1918

Item 1: Before Division 6 of Part XX

Item 1 inserts Division 5C into the Act. The item imposes a cap of \$50,000 on political donations provided by any one donor to, or for the benefit of, a registered political party or state branch of a political party, member of the Commonwealth Parliament, candidate, group or member of a group, associated entity or significant third party within a donation period (section 314AQ). The amount of \$50,000 is the aggregated sum of all donations provided by the donor within the donation period (section 314AR).

As per section 314AR(6), only donations made to associated entities and significant third parties for the purpose of electoral expenditure are included under the cap. This Bill recognises that many organisations under these categories also perform a range of non-electoral work. It is not the intention of the Bill to impose a cap on donations provided for this non-electoral work.

As per section 314AS it is unlawful to receive a donation if that donation would exceed the cap. However, subsection (2) allows for a donation that has been accepted, but which the recipient subsequently discovers has exceeded the aggregate donation cap, to be returned to the donor within five days of discovery.

Where an unlawful political donation has been accepted, the amount of that political donation is recoverable by the Commonwealth as a debt.

Item 2: Subsection 315A(1)

Item 2 allows for the Electoral Commissioner to bring actions in the name of the Commonwealth for certain contraventions of the Act.

Schedule 5 – Definition of Gift

Commonwealth Electoral Amendment Act 1918

Item 1: Subsection 287(1) (definition of *gift*)

Item 1 repeals the current definition of *gift* in the Act and replaces it with the definitions provided by Item 2 in this Schedule.

Item 2: After section 287

Item 2 expands the definition of gift.

Section 287AAA expands the general definition of *gift* to include the disposition of property or provision of services without consideration or with inadequate consideration. It also includes amounts paid to attend fundraisers or functions. This amendment aims to prevent the perception that attendees pay money to attend party/political fundraisers or functions to gain access to politicians and exercise undue influence. The section also extends the definition to cover gifts to political entities (section 287AAB) and Members of Parliament (section 287AAC).

Sections 287AAB and 287AAC expand the definition of gift beyond monetary donations, to include any action taken by an individual or entity, to the value of \$1,000 and without consideration, which benefits a political entity or a Member of Parliament. This can include actions taken to oppose another political entity.

Subsection 287AAB(4) recognises that there is potential for overlap between state and federal political entities. It stipulates that, for the purpose of disclosure, the gift is taken to be given to either the State branch, or the candidate endorsed by a party, or a member of group, but not all three.

The political entity is taken not to have received the gift if they could not reasonably have known that the gift was given.

Schedule 6 – Capping electoral expenditure

Item 1: Part XX (heading)

Item 1 is procedural and includes 'electoral expenditure' in the heading of the Part relating to election funding and financial disclosure.

Item 2: After Division 5 of Part XX

Item 2 inserts a new Division into the Act, which caps the amount of electoral expenditure that can be incurred during the expenditure cap period.

Section 314AAAA provides definitions for *acts in concert*, *election* and *expenditure cap period*.

A person or entity will be determined to *act in concert* with another person or entity where they have entered into an agreement to campaign with the object of having a particular party or candidate elected or opposing the election of a particular party or candidate. Where this is the case, the expenditure is aggregated (section 314AAAE).

The *expenditure cap period*, in which electoral expenditure must be recorded and reported, begins 18 months from the date of the previous election. This provision acknowledges that federal elections occur, on average, every 2 years and 7 months.

The expenditure cap for a by-election will commence on the day that the writ or writs are issued.

Section 314AAAB implements a cap on the total amount of electoral expenditure that may be incurred nationally. The section sets the cap at \$40m for political parties and \$5m for significant third parties or third parties.

Section 314AAAC implements a cap on the amount that may be spent on a Senate candidate. The section sets the cap at \$500,000 per candidate for political parties and independent candidates and \$250,000 for significant third parties and third parties. This figure is greater than that provided to House of Representatives candidates to reflect that candidates for the Senate much reach a much wider audience geographically.

Section 314AAAD implements a cap on the amount that may be spent on a House of Representatives candidate. The section sets the cap at \$250,000 per candidate for political parties and independent candidates and \$100,000 for significant third parties and third parties.

Section 314AAAE(6) states that expenditure incurred by an associated entity is taken to be incurred by the political party with which the entity is associated.

It's important to note that the respective caps for significant third parties and third parties are included as a response to the High Court decision of *Unions NSW v New South Wales* which found that imposing a lower cap for these entities was unconstitutional.

Section 314AAAF stipulates when certain electoral expenditure is taken to have occurred.

Schedule 7 – Penalties

Item 1: subsection 384A(1)

Item 1 increases the pecuniary penalty that a court may impose on a corporation to five times that specified for the civil penalty provision.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Commonwealth Electoral Amendment (Cleaning up Political Donations) Bill 2022

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

Overview of the Bill

The Bill amends the *Commonwealth Electoral Amendment Act 1918* (the Act) to strengthen the transparency and accountability of political donations. The Bill introduces a number of measures including:

- lowering the donation threshold from \$13,800 (or \$14,500 as indexed) to \$1,000 for individual gifts and requiring aggregation under the threshold. This means that multiple donations received by the same recipient from the same source must be disclosed if the sum of those gifts is equal to or greater than the threshold;
- Donations include gifts. This Bill expands the definition of 'gift' to include actions taken by an individual or entity, to the value of \$1,000 and without consideration, which benefits a political entity. This includes actions taken to oppose another political entity. The Bill also expands the definition to include amounts paid to attend fundraisers or functions;
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- requiring continuous disclosure by gift recipients to the Australian Electoral Commission (AEC) within two business days of the donation threshold being reached or exceeded;
- requiring the AEC to publish returns provided by reporting entities on the Transparency Register as soon as reasonably practicable;
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Australians' trust in politicians and the political process is at an all-time low. The provisions in the Bill will increase the public's confidence in donations made to, and received by, political entities.

Human rights implications

The amendments proposed in the Bill engage the right of freedom of expression under Article 19(2) of the International Covenant on Civil and Political Rights. This right includes freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or in print, or through another media of his or her choice.

As this Bill places a cap on the amount that people and organisations can donate and the amount that can be spent on electoral campaigns, and restricts donations from particular industries, it may be argued that this limits the right for people to participate in the political process. However, this prohibition is proportionate to the benefit that will be gained from the public, as the Bill will improve public confidence in the political system by enhancing transparency and accountability of politicians and political parties. The Bill also recognises the High Court decision of *Unions NSW v New South Wales* and accordingly provides a higher cap for significant third parties and third parties, allowing them to continue to engage with the political process while proportionally limiting undue involvement.

Further, there is a strong and ongoing correlation between bodies considered 'prohibited donors', and the development of public policy and government funding. The Select Senate Committee on the Political Influence of Donations highlights clear examples of this correlation and the extent to which such donations may have resulted in favourable policy determinations for the industries, which may suggest undue influence.

The Bill also engages the implied right to political communication. However, per common law, any burden on the implied right to political communication will be acceptable if it is for a legitimate purpose and is proportionate. History has shown that political donations from 'prohibited donors' has resulted in favourable policy outcomes for the respective industries. As such, banning political donations from such industries is a proportionate response to achieving the legitimate aim of a more representative democracy.

Conclusion

This Bill is compatible with human rights because it promotes the equality within human rights, namely the protection of freedom of expression.

Andrew Wilkie MP