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How would proposed Commonwealth Electoral Act reforms affect charities?

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Note: this paper does not constitute legal advice and should not be relied upon as such. Individual organisations should obtain their own professional legal advice in light of their particular circumstances. This paper does not discuss State and Territory laws that also contain obligations similar but not identical to those applicable at Federal level.

1. Introduction

For many charities, contributing to sound public policy in the furtherance of their charitable purposes is an important part of the organisation's activities. To accomplish their goals, charities may find themselves commenting on issues that arise in an election context, and throughout the political cycle they may comment on or refer to the policies of governments, political parties or candidates.

In some cases, the expression of views on what are deemed to be "political" or electoral matters may trigger legal obligations under the Commonwealth *Electoral Act 1918* (the "**Act**"). These obligations are triggered because the Act extends beyond disclosure and reporting requirements applicable to political parties and candidates to cover the activities of broad sections of civil society in Australia.

This paper:

- summarises some of the practical challenges posed for charities by the Act in its current form; and
- outlines the potential impact of new proposed amendments to the Act contained in a Bill currently before the Senate ("**2009 Bill**")[1].

2. Summary of existing requirements

2.1. Overview

Charities that engage in public commentary have three important compliance obligations under the Act in its current form:

- inclusion of ***authorisation statements*** on certain publications that contain "electoral matter" (sections 328 & 328A);
- annual ***disclosure of "political expenditure"***, if such expenditure exceeds an annually indexed threshold, currently $11,200 for FY 2009/2010 (section 314AEB); and

[1] *Commonwealth Electoral Amendment (Political Donations And Other Measures) Bill 2009*

- annual ***disclosure of gifts*** exceeding the threshold (currently $11,200) that are used to enable such "political expenditure" (section 314AEC).

2.2. Practical difficulties raised by current regime

In practice the Act in its current form poses a number of practical challenges for charities whose activities might fall within its scope and the Australian Electoral Commission ("**AEC**") as its regulator.

Despite previous amendments to the Act to clarify some obligations and the publication in 2007 of a helpful guidance note by the AEC on interpretation,[2] significant uncertainties around interpretation of key terms and practical implementation remain for charities.

The flow-charts prepared by ACF set out in the **Appendix** to this paper highlight some of the difficult assessments that need to be made in ascertaining compliance obligations.[3]

Particular issues arising under the Act in its current form include:

- the need to make difficult judgments about whether a proposed public statement includes commentary that might be "***an issue before electors***", is "***intended or likely to affect voting***" in a future election or indeed whether an "***election period***" has commenced for the purposes of the Act. If so, an "***authorisation statement***" must accompany the statement and expenditure in connection with it must be disclosed to the AEC;
- the need to navigate subtle and puzzling distinctions between statements or expenditure caught by the regime and those excluded. For example the publication or distribution of a pamphlet or "handbill" containing "***electoral matter***" including a comment considered an "***issue before electors***" in a future election must carry an authorisation statement and triggers disclosure requirements but an "***electoral advertisement***" published on the internet does not unless the charity has paid a third party to carry the advertisement; and
- the ***significant resources*** required for charities to comply with (and presumably for the AEC to enforce) the Act. The compliance burden is heightened for charities with fewer staff and limited access to legal advice on the subtle differences in interpretation that can mean the difference between compliance and penalties.

3. <u>Overview of proposed 2009 changes</u>

3.1. Overview

The 2009 Bill was introduced into Parliament by the Government in March 2009. The Bill primarily amends the funding and disclosure provisions of the Act in order to implement

[2] '*Electoral Advertising*' – Electoral Backgrounder No.15. Available at http://www.aec.gov.au/

[3] The flow-charts contain general information only and should not be relied upon as legal advice.

the Government's election commitments and to reflect 2008 findings of the Joint Standing Committee on Electoral Matters following its inquiry into a predecessor Bill.[4]

Key changes proposed under the 2009 Bill are summarised below. If passed by Parliament, they would apply with effect from **1 July 2009**.

3.2. Shift to six-monthly filing - "political expenditure" and gift returns

The Bill requires more frequent filing obligations – moving from annual to six monthly reporting periods and a compressed time-frame within which reports must be filed following the end of each period.

Charities incurring "political expenditure" above the new lower dollar threshold (discussed below) would now be required to file returns within 8 weeks of 31 December and 30 June each year (irrespective of whether there is an election in the relevant year) (section 314AEB). Previously reporting was required within 20 weeks of the end of each financial year. Separate returns applicable to **gifts** enabling "political expenditure" (discussed below) must also now be filed bi-annually.

3.3. Substantial decrease in disclosure thresholds - "political expenditure" and gifts

The 2009 Bill proposes a return to low reporting thresholds. The current financial year thresholds of $11,200 ("political expenditure" and gifts enabling such expenditure) would be reduced to $1,000 during each new 6 month reporting period under the Act. This amount would remain constant and not escalate by reference to changes in the CPI as under the current approach (section 314AEB).

As discussed further in paragraph 3.6 below, changes are proposed to both the triggers for, and the required content of, **gift** reporting.

3.4. New anonymous gift offences

The 2009 Bill includes new and complex rules about "anonymous" gifts.

It is unlawful for a charity that is required to lodge a political expenditure return[5] to incur political expenditure enabled by an anonymous gift of money unless the gift is a "permitted anonymous gift" (section 306AJ). A ***permitted anonymous*** gift is one:

- that is less than ***$50***; **and**

[4] *Advisory Report on the Commonwealth Electoral Amendment (Political Donations and Other Measures Bill 2008*.

[5] That is, a charity that incurs $1000 or more during a 6 month reporting period on "political expenditure" as defined.

- that is received at a "***general public activity***" (ie. an activity open to the general public such as a school fete) or "***private events***" (a function, meeting or other event that is not a "general public activity"); **and**
- in respect of which ***prescribed records*** regarding the activity, its organisers and the total amount of anonymous gifts have been made by the charity (section 306AF).

For these purposes, a gift is "***anonymous***" if it is not made by a "known donor". A ***known donor*** is one who has provided their name and address to the charity at the time the gift is received (or is otherwise known to the charity at the time the gift is provided) (section 306AE).

Importantly, in addition to the anonymous gift having to be less than $50 in order to be "permitted", it must also be collected at ***public or private event*** as defined.

A gift will be deemed to have ***enabled*** the political expenditure if all or a substantial part of it enables a charity to undertake all or a substantial part of the "political expenditure" or to be wholly or substantially reimbursed for it (section 306AE).

The Bill contains ***anti-avoidance provisions*** that capture two or more gifts individually less but in the aggregate more than $50 where the persons involved in the collection know that the separate gifts are from the same person.

Gifts received by a charity that are not "permitted" (eg. because they exceed $50) will not attract liability if they are ***refunded*** to the donor or where that is not possible, ***paid to the Commonwealth***, within 6 weeks of receipt (section 306AG).

The ***penalty*** applicable to incurring expenditure unlawfully in contravention of these anonymous gift provisions is imprisonment for ***12 months or 240 penalty units (currently $26,400) or both*** (section 315(10E)).

A ***new offence*** is also created for knowingly making false or misleading records for the purposes of the anonymous gift provisions (penalties: imprisonment for 1 year or 120 penalty units (currently $13,200) or both (section 315(4C)).

In addition to these penalties the amount of an anonymous gift that is not permitted and has not been returned to the donor is also a ***debt owed to the Commonwealth*** (section 306AJ).

3.5. New foreign gift offences

Under the 2009 Bill it is unlawful for a charity that is required to lodge a political expenditure return[6] to incur political expenditure if it is enabled by a gift of "***foreign***

[6] That is, a charity that incurs $1000 or more during a 6 month reporting period on "political expenditure" as defined.

property" and the donor's main purpose in making that gift was to enable the recipient to incur political expenditure (section 306AD).

Critically, whether a transaction is caught by these provisions turns upon an assessment of the donor's "***main purpose***".

"***Foreign property***" is defined as:

- money standing to the credit of an account outside Australia;
- other money (eg. cash) located outside Australia; or
- property other than money located outside Australia (section 306).

Under the same test as is applicable to the new anonymous gift provisions, "foreign property" will be deemed to have ***enabled*** the political expenditure if all or a substantial part of it enables a charity to undertake all or a substantial part of the political expenditure or to be wholly or substantially reimbursed for it (section 306).

A gift of money made by ***credit card*** will be caught based upon the "country in which the credit card is based" (section 306AB).

The Bill contains ***anti-avoidance*** provisions to counter the use of intermediaries in making the gift and other avoidance strategies (section 306AB).

Foreign gifts received by a charity will not attract liability if they are ***refunded to the donor*** within 6 weeks of receipt (section 306AA).

The ***penalty*** applicable to incurring expenditure unlawfully in contravention of the foreign property gift provisions is imprisonment for ***12 months or 240 penalty units (currently $26,400) or both***(section 315(10E)).

In addition to the offence, the amount of the political expenditure that is unlawful because it is enabled by a gift of foreign property is a ***debt owed to the Commonwealth*** (section 306AD).

3.6. Expanded gift reporting obligations

General

In addition to reporting on their "political expenditure", charities must also file a return relating to gifts enabling that expenditure. The Bill makes changes to both the trigger for, and content of, these returns.

Under the proposed new laws, a charity required to lodge a political expenditure return must also lodge a gift return if during the 6 monthly reporting period the charity received a gift(s):

- used to enable or reimburse political expenditure; and
- there is at least one "***major donor***" for the reporting period and/or the gift(s) included one or more permitted anonymous gift(s). A major donor is a person who has provided $1000 or more during the reporting period (section 314AEC(1)).

The $1,000 threshold would not be annually indexed. As is currently the case, for "major donors" the return must include details of the amount of the gift, the date made and the name of the donor (section 314AEC(2)).

Unless the gift is "anonymous" or of "foreign property" (discussed below) a gift returned to the donor within 6 weeks of receipt is not required to be reported in a gift return (section 314AAA).

Anonymous gifts

If the gifts include permitted anonymous gifts, the return must include a list of prescribed information about those gifts (section 314AEC(2)).

The intention of proposed new section 314AAA(4) seems to be to require charities to include in their gift returns, details of anonymous gifts even where they have been returned to the donor or paid to the Commonwealth (because they are not "permitted anonymous gifts" as discussed above). The precise scope of the reporting requirements in these circumstances is not clear.

Gifts of foreign property

Likewise, the intention of proposed new section 314AAA(2) seems to be to require gift returns to include purported gifts of foreign property whether or not returned to the donor.

3.7. Increased penalties

The 2009 Bill substantially increases the penalties for failing to lodge a return or providing an incomplete return from the current level of $1000 to ***120 penalty units (currently $13,200)*** (section 315(1) and (2)) .

Penalties for lodging a return that is knowingly false or misleading are ***imprisonment for 1 year or 120 penalty units (currently $13,200) or both*** (section 315(4B)**.** The penalty was previously $5000.

Penalties applicable to a failure to comply with ***authorisation statement*** requirements remain unchanged.

4. Critical issues raised for the charitable sector

Key practical and compliance issues arising for the charitable sector if the 2009 Bill becomes law include:

Significant increase in disclosing charities

- As a large number of charities (including small community based groups) are likely to spend relatively small amounts on activities caught by the Act, a substantial increase in the number of reporting charities can be expected as a result of the lower disclosure thresholds. As the interpretation or scope of a number of key obligations under the Act is unclear, it will be generally be prudent to adopt an "***if in doubt disclose***" approach to compliance. As the new threshold is not indexed, over time the threshold will operate to catch increasingly small scale activities conducted by charities.

- Charities not used to reporting under the existing current regime may need to ***establish internal accounting systems*** that allow individual expenditures (and gifts) to be tagged as "political" and the source of funding for them to be identified in order to facilitate preparation of returns. Care should be taken to brief relevant staff on the legal criteria, and/or to create review procedures internally to ensure that transactions are properly characterised.

Significant increase in volume of disclosures

- The lower dollar thresholds and the move from annual to bi-annual reporting of political expenditure and gifts will clearly increase the volume of disclosures made under the Act.

- The identity of donors giving the new lower threshold amount of $1,000 or more will have to be publicly disclosed if the donor's gift is used to enable "political expenditure". Therefore charities may wish to ensure that such donations are used for "political" expenditures only where they have explicit agreement with the donor to do so. Bi-annual reporting means that charities will have to be continually aware of the source of funding for any "political expenditure", and to clearly document these sources.

Anonymous gift provisions

- A charity that incurs $1,000 (or more) in "political expenditure" during a six month reporting period and that has used an anonymous gift for all or part of those purposes would commit an offence punishable by 12 months imprisonment or 240

penalty units (currently $26,400) or both - if the anonymous gift does not fall within the narrow definition of a "permitted anonymous gift".

- For example: a charity that incurred $1,000 (or more) in printing pamphlets containing views on a policy considered an issue before electors in a forthcoming election would commit an offence if it utilised as part of that expenditure, a $10 cash donation left anonymously in a collection tin at its office. This is the case because although the amount is less than $50, it is not collected at an "event" (public or private) as required under the Act. If the charity discovers that it has in fact applied such a gift to "political expenditure" the only avenue to avoid liability under the new provisions seems to be to make payment of the gift to the Commonwealth within 6 weeks of receipt. As difficult timing issues are raised due to the fact that a charity may not know if it will exceed the $1,000 reporting threshold for the period within that 6 week period (and therefore whether the expenditure will constitute an offence) the prudent course would seem to pay any gifts identified as potentially not "permitted" to the Commonwealth as a matter of course.

- This example highlights that charities (and in particular those reliant upon more traditional fundraising methods such as cash donations) will need to ensure that they have systems established to identify the receipt of all anonymous gifts and be able to track expenditure of them. Given the low $50 allowable maximum for any "political expenditure" enabled by a single anonymous gift, the onerous record keeping and reporting obligations attached to them and the lack of clarity around the types of "political expenditure" caught by the Act, it may be preferable for charities to put systems in place that would ensure that all anonymous gifts (irrespective of amount) are tagged and expended only on purposes that unequivocally do not constitute "political expenditure".

- In light of the strong penalties applicable (currently $26,400 or 12 months imprisonment) charities wishing to apply anonymous gifts to "political expenditure" will need to proceed with caution to ensure that the new record keeping and reporting obligations are met.

- Incurred "political expenditure" that is unlawful because it is enabled by an anonymous gift that is not "permitted" is a debt payable to the Commonwealth. Therefore in addition to any liability they may have for an offence committed under the Act, charities will effectively have to pay for the "political expenditure" twice (because they will already have incurred the "political expenditure" that gives rise to the obligation to pay the Commonwealth).

Foreign property provisions

- The new provisions prohibiting "foreign property" to be used for "political expenditure" also potentially pose significant compliance challenges.

- Whether a charity is permitted to use a donation originating outside Australia for "political expenditure" turns upon an assessment of the donor's main purpose in making the donation. In many circumstances this will be an impossible judgment for a charity to make. For example, a charity operating an on-line donation facility that allows a credit card to be debited may have no way of determining the main purpose of a donation (made say by an Australian expatriate wishing to support an Australian charity from overseas), other than by seeking to contact the donor to ask them. It would then fall to the charity to attempt to assess whether the purpose stated by the donor falls within the complex definition of "political expenditure". [7]

- Again, charities will need to put systems in place to enable foreign source gifts to be identified and their carefully expenditure tracked.

Substantial increase in penalties

- In addition to creating a range of new offences, the 2009 Bill implements a more than ten-fold increase in penalties for failing to comply with reporting requirements. These are discussed in paragraph 3.7 above.

Interaction with state law

- States and Territories have enacted electoral laws similar to the current Act. The changes proposed by the 2009 Bill would see substantial discrepancies between these and the Commonwealth regime resulting in fundamentally different reporting regimes and periods between the different jurisdictions.

[END]

[7] It is noted that if the donor is an Australian taxpayer, rules applicable to gift deductibility may operate to prevent the donor from claiming a tax deduction in connection with the gift if they have indicated a purpose for which the donation must be spent.