

Compliance

- 8.1 Compliance and enforcement of political financing arrangements is central to the effectiveness of the overall scheme. There are a number of issues relating to compliance and enforcement in the context of political financing. However, based on the evidence received for the inquiry, the committee focussed its discussion on the need for compliance and enforcement measures to complement the principles and design of the broader funding and disclosure scheme; the need for effective mechanisms for prosecution; and the issues to be considered if major reforms to the wider system were to occur. These matters formed the basis for discussion in this chapter.
- 8.2 The importance of an effective enforcement and compliance scheme was highlighted in the *Electoral Reform Green Paper – Donations, Funding and Expenditure* (first Green Paper):
- To achieve real change in political practice, electoral reforms must be backed by an effective regulatory and enforcement regime, including penalties that those involved in the political system will take seriously, and which will penalise those involved in practices that breach electoral regulations.¹
- 8.3 The current funding and disclosure scheme at the Commonwealth level is based on two elements. First, disclosure is designed with the threat of sanction through voting and ultimately the electoral outcome, as its primary enforcement strategy. The idea is that the electorate will not vote for a political party or candidate that does not comply with laws designed

¹ Commonwealth of Australia, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, December 2008, p. 72.

to combat the potential for undue influence. The second element is the enforcement of the scheme through offences and imposing penalties.²

- 8.4 The current compliance and enforcement scheme operates on an *ex post facto* basis, which involves seeking to punish non-compliance, rather than compelling compliance at the time relevant actions are being undertaken.
- 8.5 It has been argued that the 'lag' in disclosure coupled with the minor penalties that currently apply mean that the threat of punishment does not act as an effective deterrent to non-compliance.³ The underlying principles of the scheme – disclosure backed up by penalties to deter a breach, with the ultimate threat of sanction at the ballot box – are not supported by the design of the scheme itself. That is, disclosure happens on an *ex post facto* basis meaning that sanction from electors at the ballot box is not possible.
- 8.6 The Nationals argued that there is no need for a reform of the offences and penalties attached to breaches of funding and disclosure laws, because compliance levels are high and 'deliberate breaches are rare'.⁴ However, for disclosure returns relating to the 2007-2008 financial year, the AEC website shows 17 political parties as not having lodged a disclosure return as at the deadline of 20 October 2008. A breach of law, whether deliberate or through poor management, has technically occurred in each of these cases.⁵
- 8.7 Calls for reform in the area of enforcement and compliance of the Commonwealth political financing regime can be divided into two categories. Firstly, there is the option to make changes to improve the existing enforcement and compliance regime, if the broader scheme retains its current focus on transparency and accountability through disclosure. Such measures would include changes to render the design of the scheme more conducive to the principles and rationales that underpin it.
- 8.8 Secondly, there are the necessary changes to the compliance and enforcement scheme to align with the goals and direction of a revised scheme involving, for example, caps and bans. It would be important to ensure that such changes complement the principles driving reform of the broader funding and disclosure regime. That is, where a political financing regulatory system requires that something 'not' be done, such as

2 See generally Australian Electoral Commission, *Submission 19*.

3 See Australian Electoral Commission, *Submission 19*, p. 2.

4 National Party of Australia, *Submission 24*, p. 3.

5 AEC website, <<http://periodicdisclosures.aec.gov.au>Returns/10/late.pdf>> viewed 3 November 2011.

breaching a cap, the enforcement measures would be best suited to ensuring that the particular action is not taken, rather than punishing the behaviour if the action is undertaken.⁶

- 8.9 Consensus among key stakeholders for political financing is the best foundation for compliance because the key actors will be committed to upholding and adhering to the system.

Improving the current system

- 8.10 There are two immediate issues with the current Commonwealth enforcement scheme that warrant consideration:
- the introduction of administrative penalties to increase administrative efficacy and address issues pertaining to low prosecution rates; and
 - the strengthening of penalties for those matters considered serious and/or involve a 'wilful' breach of the law.

Administrative penalties

- 8.11 One way in which to improve the current system is to introduce administrative penalties to operate alongside the current criminal sanctions.
- 8.12 Administrative penalties would involve the imposition by the administering agency of sanctions for a breach of the relevant law without having to involve courts or tribunals. In practical terms, this could mean that the AEC could impose a penalty, for example, issuing a fine for a failure to lodge a disclosure return.
- 8.13 Currently, offences against Part XX of the *Commonwealth Electoral Act 1918* (Electoral Act) are all criminal offences. This means that if prosecution action is pursued, a brief of evidence must be compiled by the Australian Electoral Commission (AEC), which is then referred to the Commonwealth Director of Public Prosecutions (CDPP). The CDPP undertakes an assessment to determine whether there is sufficient evidence and public interest to prosecute.
- 8.14 The prosecution rate for failing to lodge a disclosure return under the Electoral Act is relatively low. In its supplementary submission, the AEC noted that while no convictions had been obtained in the past five years,

⁶ Australian Electoral Commission, *Submission 19*, p. 4.

the CDPP in Queensland had found that there was sufficient evidence to pursue a case for failure to lodge a disclosure return and was prepared to issue a summons to commence proceedings. The AEC suggested that the low rate of prosecutions is due in part to the relatively weak penalties for offences under Part XX Electoral Act, which indicates to the CDPP that the offences are not serious, and that there will be limited public interest in pursuing prosecution.⁷

8.15 A shift to administrative penalties has been proposed as a means by which some of these challenges can be addressed. The AEC explained its rationale for supporting a move to administrative penalties for some offences, arguing that:

The addition of administrative penalties would assist the AEC to enforce compliance requirements without the necessity of referring all matters to the CDPP. It is expected that these types of administrative penalties would result in more timely compliance with disclosure provisions without creating an additional burden on the CDPP resources.⁸

8.16 The AEC suggested that offences under Part XX of the Electoral Act that could better operate as administrative ones were offences that were 'straightforward matters of fact'.⁹ These could include:

- late lodgement of a disclosure return;
- failing to lodge a disclosure return; or
- lodgement of an incomplete return without meeting the requirements of section 318 of the Electoral Act.

8.17 The AEC could issue 'on-the-spot' administrative penalties, such as fines, where occurrences of non-compliance with the laws were found.¹⁰ The refusal to comply with a notice issued under section 316 could include the penalty fine accumulating for each day the offence is active.

8.18 The AEC submitted that a move to administrative penalties for straightforward offences would be vital under a system requiring contemporaneous or continuous disclosure. This should help ensure that

7 Australian Electoral Commission, *Supplementary submission 19.1*, p. 3.

8 Australian Electoral Commission, *Supplementary submission 19.1*, p. 3.

9 Australian Electoral Commission, *Supplementary submission 19.1*, p. 3.

10 Australian Electoral Commission, *Supplementary submission 19.1*, p. 2.

just as disclosure occurs continuously, issues or failures can also be properly addressed in a timely and efficient manner.¹¹

- 8.19 A risk in the context of a move to administrative penalties is the appearance of a reduction of the 'gravity' of a breach of the law. However, the AEC highlighted additional measures that could be taken to address this concern. It stated that:

...as the imposition of an administrative penalty is an administrative decision, it would be appropriate to have a review right for an aggrieved person to challenge the AEC decision in this area. Second, the AEC could be required to publish on the Internet and in the subsection 17(2) report (on the operation of the Funding and Disclosure scheme to the Parliament) a regular updated list of all penalties imposed for a breach of the reporting requirements. Any such information to be added to this list could only occur after any period to seek a review had expired.¹²

- 8.20 The first Green Paper outlined the different approaches that other countries have taken to devising effective penalty regimes for campaign financing. It stated that some nations have differentiated between 'corrupt practices' which 'warrant criminal sanctions', and 'illegal practices' which can be addressed through other mechanisms.¹³ Such an approach received support in the First Report of the Joint Select Committee on Electoral Reform (JSCER) in 1983, in which it recommended that there be no penalty for inadvertent breaches of the law, but that severe penalties be attached to the 'wilful filing of false or incorrect returns'.¹⁴

- 8.21 The first Green Paper provided Canada as an example of a jurisdiction that has effectively revised its enforcement regime and indicated that the Canadian system included:

...a range of administrative options which are based on the proposition that most participants in the electoral process want to comply with the law and will react to correct their behaviour to ensure conformity with the law. Canada continues to have criminal penalties for serious offences; however it has also

11 Australian Electoral Commission, *Supplementary submission 19.3*, p. 12.

12 Australian Electoral Commission, *Supplementary submission 19.3*, p. 12.

13 Commonwealth of Australia, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, December 2008, p. 70.

14 Joint Select Committee on Electoral Reform, *First Report*, September 1983, Commonwealth Parliament of Australia, p. 168, paragraph 10.24, cited in Australian Electoral Commission, *Supplementary submission 19.3*, p. 10.

established a range of 'administrative incentives' to encourage compliance.¹⁵

- 8.22 Among the penalties under the Canadian scheme are the powers to deregister a political party and liquidate its assets, where the party provides false or misleading information or fails to provide a financial transactions return or related documents.¹⁶
- 8.23 An additional consideration where a shift to administrative penalties takes place is whether those who may be issued with an administrative penalty should have a right of review of the decision, as raised by the AEC above. At the federal level in Australia, certain decisions such as an authorised officer serving a notice to require a person to produce documents or give evidence regarding whether a particular entity is an associated entity, allow the person issued with a notice the right to request a review.¹⁷
- 8.24 Certain decisions under Part XI of the Electoral Act, which deals with the registration of political parties, also give a person 'affected by' the decision the right to seek a review by the full Electoral Commission.¹⁸ However, matters that would be considered 'straightforward matters of fact', such as failing to respond to a notice of review issued under section 138A do not give rise to a right of review by the Electoral Commission.¹⁹
- 8.25 Currently, even if a right of review to an AEC decision is not explicitly provided for, an individual may challenge the imposition of a penalty by the AEC by seeking a review of the decision by the Federal Court under section 5 of the *Administrative Decisions (Judicial Review) Act 1977*.

Strengthening current penalties

- 8.26 The accompanying argument in support of a move to administrative penalties for straightforward matters is that the penalties for the other offences under Part XX of the Electoral Act that are classified as more 'serious', such as lodgement of a false and misleading disclosure return, should be strengthened. The AEC advised that one way to address

15 Commonwealth of Australia, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, December 2008, p. 70. See also R Landry, 'Enforcement of Canada Elections Act', *Electoral Insight*, Vol. 5, No. 1, March 2003, pp. 2-6, <http://www.elections.ca/res/eim/article_search/default.asp?textonly=false&lang=e> viewed 21 November 2011.

16 *Canada Elections Act*, ss. 501(2) and 501(3).

17 *Commonwealth Electoral Act 1918*, s. 316(3B).

18 See generally *Commonwealth Electoral Act 1918*, s. 141.

19 See generally *Commonwealth Electoral Act 1918*, s. 141.

concerns about enforcement was to reconsider the severity of offences under Part XX of the Electoral Act.²⁰

8.27 The issue of the weak penalties for offences against the Commonwealth political financing arrangements has long featured in debate in the area. The *Advisory report on the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008* (2008 Advisory Report) identified low penalties as a problem that the bill was seeking to rectify. The previous committee that examined the bill noted that:

Since 1983, the real value of a number of financial penalties has declined over time, to a level that is less than 40 per cent of its value in 1983. For example, the penalty attached to the failure to furnish a return has remained at \$1,000 in nominal terms but has declined to only \$382 in real terms in 2008.²¹

8.28 The fines of approximately \$1 000 to \$10 000 that serve as penalties for most offences under section 315 and section 316 have remained at the same level since the inception of the Commonwealth political financing scheme in 1984. The disclosure threshold for the 2010-2011 financial year is \$11 500, which means that a wealthy person can donate amounts greater than this, and submit a return that is 'false or misleading in a material particular' and be subject to a fine of just \$5 000 if convicted.²² Thus the potential for this to act as a deterrent for a donor determined to obtain access or exercise influence through political donations is limited.

8.29 Coupled with a shift of offences that are straightforward matters of fact into administrative offences, the strengthening of penalties for offences against the funding and disclosure provisions in the Electoral Act may play a key role in indicating to the CDPP the gravity with which such offences should be viewed, and accordingly, potentially increase the chance of prosecution.

8.30 The AEC argued that the reason for low prosecution rates stemmed from the relatively weak penalties for offences against Part XX indicate to the CDPP that the offences are not very serious.²³ It stated:

...in comparison to other penalties, they are relatively low. That then takes you into a consideration with the DPP that, against all

20 Australian Electoral Commission, *Supplementary submission 19*, p. 5.

21 Joint Standing Committee on Electoral Matters, *Advisory report on the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008*, October 2008, Commonwealth Parliament of Australia, p. 66.

22 *Commonwealth Electoral Act 1918*, s. 315(4).

23 Australian Electoral Commission, *Supplementary submission 19.1*, p. 2.

of the other matters that they are prosecuting, our matters appear relatively low priority from the perspective of public interest and what can be served.²⁴

8.31 It has been suggested that ‘electoral integrity depends not on the willing compliance of the ethical, but on the enforced compliance of the unethical’.²⁵ The first Green Paper stated that:

Australia’s electoral laws provide the framework for free and fair elections and protect the integrity of the electoral system and the faith Australians have in the process of democratically electing their government. Deliberate contravention of those laws strikes at the heart of democracy, and by undermining the legitimacy of the elected government, undermines governance itself. Such breaches must be acted on and penalised.²⁶

8.32 There are three options for strengthening the penalties under the Electoral Act for breaches of the funding and disclosure laws:

- increase the financial penalties;
- include imprisonment as a penalty for additional offences; or
- implement both increased financial penalties and add terms of imprisonment as a penalty for offences deemed more ‘serious’.

8.33 The Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010 (the 2010 bill) seeks to implement harsher penalties in respect of offences under the Commonwealth political financing regime relating to claims for election funding. In addition, the bill aims to strengthen penalties in relation to:

- failure to furnish a return;
- furnishing an incomplete return;
- failure to retain records;
- lodging a claim or return that is known to be false or misleading in a material particular;

24 Mr Ed Killesteyn, Electoral Commissioner, Australian Electoral Commission, *Committee Hansard*, 21 September 2011, p. 11.

25 B Edgman, ‘Political Funding: Challenges of Enforcement and Compliance’, Paper prepared for the Challenges of Electoral Democracy Workshop, University of Melbourne, July 2011, p. 2.

26 Commonwealth of Australia, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, December 2008, p. 72.

- providing information to another that is false or misleading in a material particular in relation to the making a claim or the furnishing of a return; and
 - failure or refusal to comply with notices relating to AEC-authorized investigations and knowingly giving false or misleading evidence required for such investigations.²⁷
- 8.34 The United States has taken the approach of dividing offences against campaign finance laws into offences committed by ‘mistake’ or unintentionally, and purposeful breaches of the law. Offences committed by mistake are handled administratively, while offences committed with intent can be pursued through criminal prosecution.²⁸
- 8.35 The 2010 bill proposes to remove the status of offences under the funding and disclosure provisions as strict liability ones, which means an intention element will need to be proven.

Conclusion

- 8.36 The low penalties for offences relating to the funding and disclosure regime, coupled with the Prosecution Policy of the Commonwealth Director of Public Prosecutions which requires consideration of the public interest in pursuing prosecution, have made it difficult to obtain criminal conviction for breaches of the funding and disclosure provisions in the Electoral Act.
- 8.37 International examples provide some guidance on the way in which dividing the administrative penalties and criminal penalties can be done. Greater efficiencies in enforcement can be achieved if some offences that constitute ‘straightforward matters of fact’ are subject to administrative penalties in a system of contemporaneous disclosure.
- 8.38 The committee supports a shift to administrative penalties for certain more straightforward offences. The offences that could reasonably have administrative penalties apply are:
- failure to lodge a disclosure return by the due date (section 315(1));

27 Parliamentary Library, ‘Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010’, *Bills Digest No. 43, 2010-2011*, 17 November 2010, p. 22.

28 S. Nelson ‘Election Law Enforcement: International Comparisons’, *Electoral Insight, Vol. 5, No. 1*, March 2003, pp. 2-6, available at <http://www.elections.ca/res/eim/article_search/default.asp?textonly=false&lang=e> viewed 21 November 2011.

- lodging an incomplete return without complying with section 318 (section 315(2)); and
- refusal to comply with a notice issued under section 316 (section 316(5)).

Recommendation 26

8.39 **The committee recommends that the *Commonwealth Electoral Act 1918* be amended, as necessary, to make offences classified as ‘straightforward matters of fact’ subject to administrative penalties issued by the Australian Electoral Commission. The issuance of an administrative penalty should be accompanied by a mechanism for internal review.**

8.40 The committee supports the measures in the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010 that seek to implement harsher penalties in relation to offences against Part XX of the Electoral Act. The implementation of harsher penalties should act as a deterrent to breaching the Commonwealth funding and disclosure laws, and apply to the offences classified as more ‘serious’ breaches.

Recommendation 27

8.41 **The committee recommends that the penalties in relation to offences that are classified as more ‘serious’ should be strengthened along the lines proposed in the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010.**

Compliance review powers

8.42 The AEC conducts compliance reviews of federal registered political parties, their state branches and associated entities under the power conferred in section 316(2A) of the (Electoral Act). The purpose of these reviews is to assess each political party and associated entity’s adherence to the disclosure laws. Every political party and its associated entities are generally reviewed once in a parliamentary cycle. The AEC issues a report on its findings following the compliance review to the political party agent or associated entity’s financial controller, and if any problems are

identified, the AEC can request that an amendment be submitted, or that evidence be provided refuting the AEC's findings.²⁹

- 8.43 Currently the AEC does not have any power to conduct compliance reviews of candidates and Senate groups. Given that most endorsed candidates incur expenditure and receive donations through the political party itself, *prima facie*, the value of conferring the AEC with this power is limited.
- 8.44 The AEC is also missing the power to conduct reviews of elected members. In fact, elected members, including Independents do not have disclosure requirements and the trend in the Electoral Act has generally been to exempt Independent members (following the end of their candidacy) from disclosure. In NSW legislation the inspection powers extend to certain documents relating to elected members, and accordingly, a matter for broader consideration is whether there should also be a trend in this direction at the Commonwealth level.
- 8.45 Given the absence of regulation regarding Independent members once they are elected, in some circumstances there may be value in being able to conduct a compliance review of an individual candidate or Senate group, including Independents, particularly where large amounts of money are in play.
- 8.46 The NSW jurisdiction provides inspectors under its legislation with the power to inspect the books of candidates and groups. Section 110(2) of the *NSW Election Funding, Expenditure and Disclosures Act 1981* provides 'inspectors' under the legislation to inspect or take extracts of any bankers book kept by or on behalf of and to the extent they relate to a party, elected member, group or candidate or agent for any of these, and includes a former party, elected member, group, candidate or agent.
- 8.47 Inspectors can 'request' that documents are produced and make examinations.³⁰ There are financial penalties for any person that refuses or intentionally delays admission of an inspector, intentionally obstructs an inspector, or fails to comply with a request made by an inspector.³¹ This is in the context of a more complex system.

29 AEC website, <http://www.aec.gov.au/Parties_and_Representatives/compliance/compliance-reviews.htm> viewed 26 October 2011.

30 *Election Funding, Expenditure and Disclosures Act 1981*, s. 110(3).

31 *Election Funding, Expenditure and Disclosures Act 1981*, s. 110(4).

Conclusion

- 8.48 The absence of a power for the Australian Electoral Commission to conduct compliance reviews on candidates and Senate groups is contrary to the principles of transparency and accountability on which the Commonwealth political financing regime was built.
- 8.49 As most significant gifts and expenditure by endorsed candidates occurs through the political party, the provision of a broad power to conduct compliance reviews of all candidates and Senate groups may not be an effective solution. However, there is merit in providing the AEC with the power to conduct compliance reviews of candidates and Senate groups where there are receipts of greater than a prescribed amount. This would then cover Independents, Senate groups and candidates. The figure could be in line with that which applies to donors, \$25 000.

Recommendation 28

- 8.50 **The committee recommends that the *Commonwealth Electoral Act 1918* be amended, as necessary, to provide the Australian Electoral Commission with the power to conduct compliance reviews and serve notices on candidates and Senate groups, in addition to federal registered political parties, their state branches and associated entities.**
- 8.51 The compliance review function is an important mechanism to help ensure that those involved in the political and electoral processes are meeting their disclosure and reporting obligations. To enhance the transparency and accountability of this process, the Australian Electoral Commission should make all compliance reviews and details of final determinations available on its website.

Recommendation 29

- 8.52 **The committee recommends that the *Commonwealth Electoral Act 1918* be amended, as necessary, to require the Australian Electoral Commission to make available on its website compliance review reports and details of final determinations on reviews.**

Further reform options

Challenges

8.53 The AEC indicated in its submission that the current *ex post facto* approach to punishing non-compliance with the Commonwealth political financing scheme would not be effective if legislative changes were made which involved caps and bans on donations from certain sources.³² For example, a breach of an expenditure cap or acceptance of an illegal donation would only become evident after votes had already been cast.

8.54 Due to the current delay in relevant disclosure – political party returns that will cover the period in which the 2010 federal election was held will only be released to the public in February 2012 – a breach of an expenditure cap or acceptance of an illegal donation would only be evident well after votes had already been cast if this disclosure system was maintained with such a scheme. The AEC explained the issue in its submission, stating that:

The current approach under Part XX of the Electoral Act relies on identifying, investigating and then prosecuting to enforce penalties for offences committed. It is a traditional approach of punishing non-compliance rather than contemporaneously enforcing compliance. This essentially post-event strategy of enforcement through a penalty regime is perhaps best targeted at compliance behaviour that requires something to be done (i.e. make disclosures) rather than behaviour that requires something not be done (i.e. not exceed donation or expenditure caps).³³

8.55 The AEC argued that if a shift to a system of caps and bans was to take place, then the need for the implementation of a contemporaneous reporting requirement and an IT system to facilitate the administration of such a scheme would be necessary. The AEC submitted that:

...the accountability imposed by financial disclosures can ultimately only be exercised at the ballot box. To achieve this goal necessitates material disclosures being made public in a timely fashion. In an election campaign, this would require something as close to contemporaneous disclosure as practicable. The only means that this could be achieved [sic] would be for all disclosures to be made via an online lodgement system that then would allow

32 Australian Electoral Commission, *Submission 19*, p. 4.

33 Australian Electoral Commission, *Submission 19*, p. 4.

the AEC to release those disclosures without delay.

(A continuation of allowing disclosures to be lodged in paper format necessitates the AEC manually data-entering that information, which could take many days.)³⁴

- 8.56 In addition, the AEC highlighted the need for an effective enforcement scheme to include penalties that target the motivation for the crime. For example, the motivation for spending more than is allowed under an expenditure cap is to win the seat in which the cap is exceeded. The AEC noted that where the penalty is a fine, a wealthy person or group that is able to absorb the cost can easily breach expenditure caps that act as a limitation to other groups.³⁵ A more effective penalty could be to prevent the person that breaches the cap from taking up their seat in Parliament, as is currently applied in Canada. The AEC submitted that:

...presumably a candidate's motivation to spend above an expenditure cap would usually be to win a seat. If the penalty included action that prevented or limited the ability of the candidate to occupy that seat in the Parliament, then breaking the expenditure cap ultimately would not deliver the candidate the reward of sitting in Parliament and so would make overspending far riskier, and therefore a much less appealing strategy.³⁶

- 8.57 The Australian Greens also expressed support for targeting motivations for breaches of funding and disclosure laws. However, the AEC noted that while devising penalties that target the motivation for the crime is relatively simple where political parties are concerned, the development of equally effective penalties for offences by third parties may prove more difficult, primarily because the motivation for each third party participating in the political arena or breaching funding and disclosure laws is more difficult to pinpoint. The AEC submitted that:

Not everyone, however, will have a motivation that can be addressed in such a direct manner. Third parties particularly will fall into such a category, as they are not personally contesting an election and the outcome they are seeking is not always so readily identifiable or tangible.³⁷

- 8.58 However, in practice an *ex post facto* approach to disclosure and compliance could result in such penalties not serving their purpose. In
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34 Australian Electoral Commission, *Submission 19*, p. 12.

35 Australian Electoral Commission, *Submission 19*, p. 5.

36 Australian Electoral Commission, *Submission 19*, p. 5.

37 Australian Electoral Commission, *Submission 19*, p. 5.

Canada, a case has been pending in relation to the reimbursement of election expenses by political parties and candidates since 2006. While appeals were progressing, the relevant members continued to sit in their seats in the Canadian parliament. A further election was held due to 'deadlocking' of various committees on the issue.³⁸

8.59 Accordingly, the development of appropriate and effective penalties within a system involving increased regulation presents significant difficulties. The Canadian model discussed above provides some guidance, but a number of issues need to be addressed to create an enforcement and compliance scheme that is truly effective in an increased regulatory context.

8.60 In relation to the compliance and enforcement scheme in practice under the NSW system, the AEC stated:

There is little by way of new or innovative compliance strategies in New South Wales or Queensland. They are still largely dependent upon a penalty-and-offence regime of punishing noncompliance after the event...There is little in either of those two pieces of legislation that seeks to enforce compliance or compel compliance at the time. It is waiting to investigate noncompliance and prosecute offences after the event.³⁹

8.61 The NSW regime also employs a mechanism known as 'compliance agreements'. Section 110B of the *Election Funding, Expenditure and Disclosures Act 1981* provides the Election Funding Authority with the discretion to enter agreements with political parties to remedy non-compliance with the legislation or ensuring compliance with the legislation.

8.62 However the penalty for breaching a cap is still a fine, with false and misleading information offences carrying the potential for 12 months imprisonment. Disclosure still takes place after the electoral event. As these changes have only been in effect for approximately one year, it is too soon to determine what issues may have arisen.

38 See *Chief Electoral Officer of Canada v LG (Gerry) Callaghan in his capacity as agent for Robert Campbell, and David Pallet in his capacity as official agent for Dan Mailer* 2011 FCA 74, <<http://www.scribd.com/doc/49807655/Full-Ruling>> viewed 4 November 2011.

39 Mr Brad Edgman, Australian Electoral Commission, *Committee Hansard*, 8 August 2011, p. 3.

Proactive enforcement

- 8.63 Where a move to a system involving caps and bans may occur, consideration could be given to a complete shift in approaches to penalties, compliance and enforcement in the context of political financing to proactive enforcement. Proactive enforcement models in the area of political financing can involve the completion of certain 'checks' to ensure a cap has not been reached or exceeded or that the legislation is not being breached before, for example, expenditure can be incurred. Such models have been described as a 'solution of speed bumps rather than speed cameras'.⁴⁰
- 8.64 If an increased regulatory scheme for political financing requires, for example, a cap not to be breached, the mechanisms for enforcement must be designed to ensure that action cannot be carried out.
- 8.65 In a paper prepared for the purposes of the Challenges of Electoral Democracy Workshop held at the University of Melbourne Law School in July 2011, Mr Brad Edgman, Director of financial compliance in the AEC's Funding and Disclosure section provided an example of the way in which such a model could operate:
- Registration of third parties could be enlisted as a tool in enforcing compliance with campaign expenditure caps. This would require media outlets to first verify that an entity is registered to place advertisements (i.e. incur expenditure above a threshold) and that their cumulative spend remains under the cap at the point it is to be incurred. This would require checking registered details via a website, which could extend to who is authorised to incur expenditure on behalf of the third party, and to input the value of the advertising (through a secure logon issued to the media outlet). Only if these conditions are met should the media outlet be legally entitled to run/place the advertisement. Penalties should apply to media outlets that do not abide by these procedures.⁴¹
- 8.66 In its submission, the AEC acknowledged that such models of enforcement could be perceived as overly intrusive or bureaucratic, and as potentially impeding the freedom of political communication to an unnecessary and unwarranted extent, so far as it applies to third parties and political parties.⁴² It has also been argued that there is a need to
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40 B. Edgman, 'Political Funding: Challenges of Enforcement and Compliance', Paper delivered at the Challenges of Electoral Democracy Workshop, University of Melbourne, July 2011, p. 1.

41 B. Edgman, 'Political Funding: Challenges of Enforcement and Compliance', Paper delivered at the Challenges of Electoral Democracy Workshop, University of Melbourne, July 2011, p. 3.

42 Australian Electoral Commission, *Submission 19*, p. 6.

balance the delivery of an effective solution and placing restrictions on participants in the political process.⁴³

- 8.67 Proactive enforcement necessarily requires the consideration of measures to ensure laws are not broken as an integral part of any model of political financing regulation,⁴⁴ rather than as a matter to be dealt with once the rest of the scheme has already been designed. The AEC noted in relation to the reforms recently implemented in NSW and Queensland that this approach to enforcement had not been taken, stating that:

...with these new schemes... the outcomes they seek to achieve are all premised on full compliance... There is little by way of new or innovative compliance strategies... They are still largely dependent upon a penalty-and-offence regime of punishing noncompliance after the event. With donation and expenditure caps in particular, when trying to level the playing field and keep the relativities between the players, [third parties and other participants] become players within the integrity of the election outcome itself. There is little in either of those two pieces of legislation that seeks to enforce compliance or compel compliance at the time.⁴⁵

Conclusion

- 8.68 Compliance and enforcement mechanisms play an important role in the success of any regulatory framework for political financing.
- 8.69 If significant changes to the funding arrangements are to occur at the Commonwealth level, a complete overhaul of the enforcement scheme would also need to occur. However, a substantial reform of political financing arrangements presents significant challenges, particularly where third parties are concerned. The administering authority having more options for addressing non-compliance, rather than simply punishing non-compliance, would better support the aims of transparency and accountability of the funding and disclosure system.
- 8.70 The committee believes that proactive enforcement mechanisms are likely to be an effective measure in a system with increased regulation of the activities of political actors. However, it is important to strike an effective and workable balance between competing factors, and for the proactive

43 B. Edgman 'Political Funding: Challenges of Enforcement and Compliance', Paper delivered at the Challenges of Electoral Democracy Workshop, University of Melbourne, July 2011, p. 1.

44 B. Edgman, 'Political Funding: Challenges of Enforcement and Compliance', Paper delivered at the Challenges of Electoral Democracy Workshop, University of Melbourne, July 2011, p. 1.

45 Mr Brad Edgman, Australian Electoral Commission, *Committee Hansard*, 8 August 2011, p. 3.

enforcement scheme to avoid being overly bureaucratic while also meeting its aims.

- 8.71 Thorough investigation, consultation with experts and planning are essential if proactive enforcement mechanisms are to be pursued.