5

Offences, penalties and compliance

Background

5.1 To bring greater integrity to any regulatory system it is important that there be an appropriate enforcement and compliance regime. As part of such as regime, it is important to define offences, set appropriate penalties and ensure that there are workable processes for regulatory authorities to investigate and enforce breaches of the law.

5.2 To be effective, strategic regulation should serve two functions:

- Impose punishments against persons committing contraventions of the law (the enforcement function); and
- Deter people from contravening the law (the preventative function).[1]

5.3 The importance of compliance and enforcement activity was noted by the Public Interest Advocacy Centre, who told the committee in their submission to the 2007 election inquiry that:

> Accountability is dependent not only on disclosure requirements but the capacity to have them effectively enforced, including a penalty regime that can act as a deterrent.[2]

5.4 The bill proposes to introduce new offences associated with the proposal to ban overseas and anonymous donations. In addition, the level of existing penalties for breaches of funding and disclosure provisions will

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1 Gilligan G, Bird H and Ramsay I (1999), 'The Efficacy of Civil Penalty Sanctions under the Australian Corporations Law', Australian Institute of Criminology trends and issues in crime and criminal justice, no 136, November, p. 3.

2 Public Interest Advocacy Centre, submission 103 to the 2007 election inquiry, p. 13.

be increased significantly — a number of existing penalties have remained largely unchanged since their introduction in 1984.

5.5 The bill also includes provisions that will strengthen the powers of the Australian Electoral Commission to undertake compliance activities relating to funding and disclosure parts of the *Commonwealth Electoral Act 1918*. Effective enforcement of the funding and disclosure arrangements will also depend on appropriate resourcing of these activities by the Government.

Proposed changes

5.6 The bill proposes a series of changes to existing penalties and introduces new offences associated with the proposed ban on receiving overseas donations and anonymous donations. In addition, a range of proposals are made to strengthen the Australian Electoral Commission's capacity to undertake compliance activities.

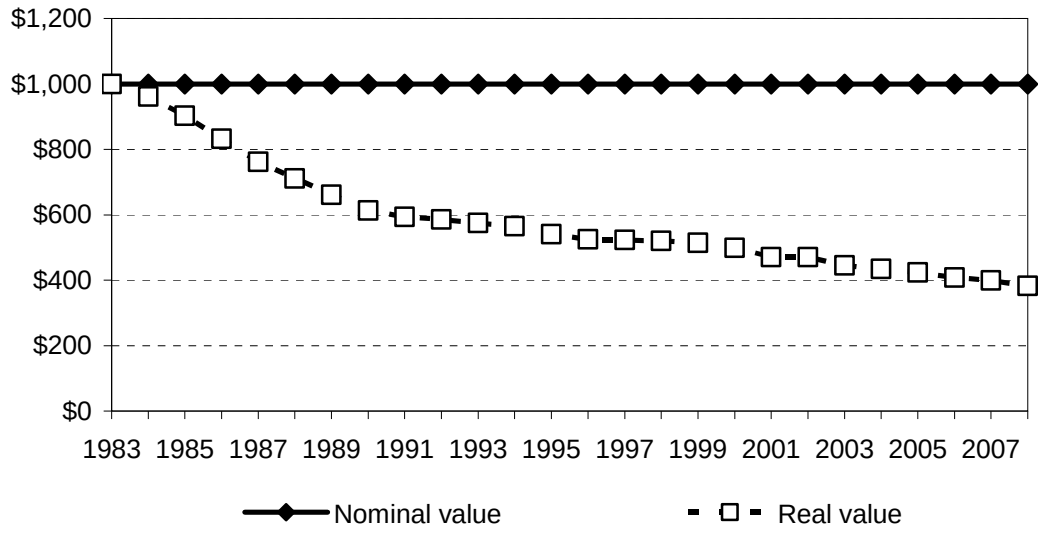
Strengthening existing penalties

5.7 The level of monetary penalties specified in the Commonwealth Electoral Act in relation to funding and disclosure have remained largely unchanged since their introduction in 1983.[3]

5.8 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 (figure 5.1).

3 *Commonwealth Electoral Legislation Amendment Act 1983*, s.113.

Figure 5.1 Value of penalty for the failure to furnish a return, 1983 to 2008 (dollars) (a)



Note *(a) in the case of a return required to be furnished by the agent of a political party or of a State branch of a political party the penalty is a fine not exceeding $5,000. In any other case the fine does not exceed $1,000 (Commonwealth Electoral Act 1918, s. 315(1)).*

Source *Committee estimates based on the nominal value of the penalty for failing to furnish a return. Nominal amounts were deflated using the June quarter values of the all groups consumer price index from ABS cat no 6410.0, time series spreadsheets tables 1 and 2, viewed on 15 September 2008 at http://www.ausstats.abs.gov.au/Ausstats/ABS@Archive.nsf/0/B30A20A7A8A4F783CA25748E0012B5D6/$File/640101.xls#A2325846C.*

5.9 The bill proposes to increase the penalties for a number of existing offences including:

- failure to furnish a return — 120 penalty units (equivalent to $13,200). Under current arrangements a fine cannot exceed $5,000 for an agent of a political party or of a State branch of a political party or $1,000 in other cases;
- furnishing an incomplete return — 120 penalty units (equivalent to $13,200). Under current arrangements a fine cannot exceed $1,000;
- failure to retain records — 120 penalty units (equivalent to $13,200). Under current arrangements a fine cannot exceed $1,000;
- lodging a claim or return about election expenditure that is known to be false or misleading in a material particular — Imprisonment for 2 years or 240 penalty units (equivalent to $26,400), or both. Under current arrangements an agent of a political party or of a State branch of a political party may be fined up to $10,000, other persons may be fined up to $5,000;

- providing information to another that is false or misleading in a material particular in relation to the making a claim or the furnishing of other types of returns — Imprisonment for 12 months or 120 penalty units (equivalent to $13,200), or both. Under current arrangements an agent of a political party or of a State branch of a political party may be fined up to $10,000, other persons may be fined up to $5,000; and
- failure or refusal to comply with notices relating to Australian Electoral Commission-authorised investigations and knowingly giving false or misleading evidence required for such investigations — imprisonment for 12 months or 60 penalty units (equivalent to $6,600). Under current arrangements the penalties for a range of offences relating to refusing to comply with notices is $1,000. A person who knowingly provides false or misleading information during a compliance audit or investigation by the Commission is punishable by a fine of $1,000, or imprisonment for six months, or both.[4]

5.10 The proposed penalties appear to provide a significantly greater deterrent, particularly the inclusion of imprisonment as a penalty for several offences. The change proposed by the bill to specify penalty levels in terms of 'penalty units' rather than nominal amounts also provides a simpler mechanism to maintain penalty levels by linking them to a benchmark specified in the *Crimes Act 1914* (s. 4AA) — a benchmark widely used in Commonwealth law and used in other parts of the Commonwealth Electoral Act.

5.11 The committee notes that since the introduction of the concept of penalty unit into Commonwealth law in 1992, when it carried a nominal value of $100, the level has changed only once, when it was increased to $110 in 1997. Since then, it has declined by over 25 per cent in real terms.[5] It will be important that attention is paid in the future to ensuring that the level of a penalty unit in the Crimes Act is reviewed on a regular basis to ensure its ongoing appropriateness.

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4 See *Commonwealth Electoral Act 1918*, s. 315 and s. 316 for existing penalties and Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008, clause 82, for proposed penalties.

5 Committee estimates based on the nominal value of penalty units in the *Crimes Act 1914*, s. 4AA. Nominal amounts were deflated using the June quarter values of the all groups consumer price index from ABS cat no 6410.0, time series spreadsheets tables 1 and 2, viewed on 15 September 2008 at http://www.ausstats.abs.gov.au/Ausstats/ABS@Archive.nsf/0/B30A20A7A8A4F783CA25748E0012B5D6/$File/640101.xls#A2325846C.

5.12 The penalties proposed in the bill are generally comparable with those for similar offences in other Australian jurisdictions (table 5.1). Care needs to be taken when making such comparisons because of differences in the regulatory frameworks across jurisdictions.

Table 5.1 Penalties for funding and disclosure offences, selected Australian jurisdictions

Jurisdiction	Failing to lodge a return by the due date	Knowingly lodging false or misleading information in a return or claim for funding	Failure to retain records	Failure to produce documents or evidence when required
NSW	$22,000	$22,000 or 12 months imprisonment or both	$22,000 (party) $11,000 (party agent and others) **(a)**	$11,000
Qld	$7,500 (party) $1,500 (others)	$15,000 (party agent) $7,500 (agent of a candidate) $3,750 (other than an agent)	$1,500 **(a)**	$3,000
WA	$7,500 (party agent) $1,500 (others)	$15,000 (part agent) $7,500 (others) **(b)**	$3,000 (party agent and financial controller of an associated entity) $1,500 (others) **(c)**	$1,500
ACT	$5,000 (party) $2,000 (individual) $25,000 (corporation)	$5,000 or six months imprisonment or both	$2,000 **(d)**	$5,000 or six months imprisonment or both
NT	$22,00 or 12 months imprisonment (natural person) $110,000 (body corporate)	$22,00 or 12 months imprisonment (natural person) $110,000 (body corporate)	$22,00 or 12 months imprisonment (natural person) $110,000 (body corporate) **(a)**	$22,00 or 12 months imprisonment (natural person) $110,000 (body corporate)

Notes *(a) records to be retained for 3 years. (b) A separate offence for knowingly giving evidence that is false or misleading is also defined, with a penalty of $1,500. (c) records to be retained for 6 years. (d) records to be retained for 4 years.*

Source *NSW Election Funding Authority, Funding and disclosure guide: Political parties and agents, pp. 33 and 40, viewed on 16 September 2008 at http://www.efa.nsw.gov.au/__data/assets/pdf_file/0007/48877/Guide_for_Parties_and_Party_Agents.pdf; Election Funding and Disclosures Act 1981 (NSW), s. 110A; Electoral Act 1992 (Qld), ss. 315 to 333; Western Australian Electoral Commission, Funding and Disclosure in Western Australia: Guidelines, pp. 31–32, viewed on 16 September 2008 at http://www.waec.wa.gov.au/pp_candidate/documents/Funding%20and%20Disclosure%20in%20WA%20Guidelines.pdf; ACT Electoral Commission, Funding and financial disclosure handbook: 2008 / 2009 registered political parties, p. 13 viewed on 16 September 2008 at http://www.elections.act.gov.au/pdfs/fadhandbooks/partiesfadhandbook2008_2009.pdf; Northern Territory Electoral Office, Disclosure Handbook for Registered Political Parties, p. 24, viewed on 16 September 2008 at http://notes.nt.gov.au/nteo/ElectorI.nsf?OpenDatabase.*

5.13 While the increase in penalties can have a deterrent effect, the increase will also affect the relative seriousness of offences when they are presented by the Australian Electoral Commission to the Australian Federal Police (AFP) and Commonwealth Director of Public Prosecutions (CDPP) for enforcement action. In its submission to the 2007 election inquiry, the Australian Electoral Commission told the committee that:

> The existing process for dealing with serious breaches of the Act is that the first step is to identify prima facie evidence of the breach, including the identity of any persons involved. The matter is then referred to the AFP for investigation and the preparation of a brief of evidence to be given to the CDPP.
>
> The above processes are also subject to the guidelines issues by both the AFP and the CDPP for the referral and handling of alleged criminal offences. Both of these sets of guidelines refer to an assessment of the seriousness of the alleged offence, the resources available for dealing with these matters and the public interest involved. It is noted that with the exception of the bribery offence in section 326 of the Act, almost all of the penalties for a breach of the Act are fines of up to $1,000 that under the criminal law they are summary offences (see section 4H of the Crimes Act 1914).
>
> Accordingly, the evaluation undertaken by the AFP of the available resources and the relatively low penalties in the CEA, almost always results in the AFP deciding not to accept the referral and therefore it is unable to investigate breaches of the CEA.[6]

5.14 While penalties have been significantly increased, this has been balanced by removing requirements that 'strict liability' apply.[7] For an offence of strict liability there is no requirement to prove intention as an element of the offence, but the accused will not be guilty if he or she acted under an honest and reasonable mistake of fact.[8]

6 Australian Electoral Commission, submission 169 to 2007 election inquiry, pp. 68–69.

7 Explanatory Memorandum, Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008, paras 178, 180, 183 and 207.

8 Halsbury's Laws of Australia, Classification as strict or absolute liability, p. 130-7955.

New offences

5.15 The bill proposes to introduce a number of new offences that are primarily associated with proposals to ban donations from overseas and anonymous sources.[9] These include offences to cover:

- situations other than when political party, State branch or associated entity is not a body corporate, or when a gift is received by person on behalf of group;
- registered political parties, State branches and associated entities that are not bodies corporate;
- person acting on behalf of group; and
- unlawful incurring of expenditure.

5.16 The bill includes provisions that would allow a responsible person working for a registered political party, State branch or associated entity, to receive such a gift if they do not know of the circumstances because of which the receipt of the gift is unlawful or they take all reasonable steps to avoid those circumstances occurring. The bill further provides that any defendant in this situation bears an evidential burden of proof in relation to these matters.[10]

5.17 The penalties proposed in the bill for breaches of these new offences provide for imprisonment for 12 months or 240 penalty units (equivalent to $26,400).[11] This level of penalty is consistent with the higher levels proposed for other offences in the Act.

Strengthening compliance and enforcement

5.18 Penalties are an important part of encouraging compliance with regulatory arrangements. To be an effective deterrent, it is important that regulators are able to effectively investigate and, when appropriate, take action for breaches.

9 Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008, clause 86.

10 Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008, clause 86.

11 Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008, clause 86.

5.19 The Democratic Audit of Australia supported the proposed strengthening of penalties but noted that there are potential limits on enforcement action:

> We welcome the strengthening of penalties, which were originally set low and had become risible over the decades. However, setting higher maximum fines may on its own do little, given:
>
> - the absence of strict liability for most offences (indeed reference to 'strict liability' has been removed from the s 315 offences of 'failing to furnish a return' and 'furnishing a .. return that is incomplete').
> - the historical lack of prosecutions.
> - the absence of civil and political penalties. For example, Corporations Act style provisions for a party agent or candidate to be disbarred from holding office in a registered party, or nominating for Parliament, if found to have been involved in serious offences or those involving mens rea. Currently the burden is placed almost solely on party and candidate agents - people who in minor parties and independent candidatures will be volunteers. What is lacking is any liability reaching up to the party leaderships and candidates, who after all are the beneficiaries of political donations.[12]

5.20 The bill proposes to broaden the investigatory scope of Australian Electoral Commission-authorised officers by extending the list of persons who may be required to produce documents or other evidence.[13] While not changing the approach that the Commission would take in its compliance reviews, the benefits of this proposed change were explained by the Australian Electoral Commission:

> the current powers in section 316 do limit the investigative powers of the AEC particularly in relation to associated entities, third parties et cetera. The aim of the proposed provision is to enable the AEC to have a standard process of compliance audits that can be applied to political parties, candidates, Senate groups, associated entities and third parties.[14]

5.21 To ensure that the Australian Electoral Commission can effectively use these stronger compliance powers it will be important that it is adequately resourced.

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12 Democratic Audit of Australia, submission 1, p. 4.

13 Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008, clause 89.

14 Pirani P, Australian Electoral Commission, transcript, 26 September 2008, p. 23.

Other issues

5.22 Two issues were raised with the committee that, although not covered by the bill, were potentially related to its implementation.

Interference with political liberty

5.23 The proposed lowering of the disclosure threshold from more than $10,000 to $1,000 seeks to balance the transparency of political funding and the privacy of those participating in the electoral process who give financial support to political parties and candidates.

5.24 Concerns over the potential discrimination, harassment or intimidation of a donor on the basis of published information about their financial support for a candidate or party have been raised over a number of years.[15]

5.25 The Commonwealth Electoral Act (s. 327(2)) already provides deterrence for these types of activities, with the inclusion of a criminal offence provision:

> A person must not discriminate against another person on the ground of the making by the other person of a donation to a political party, to a State branch or a division of a State branch of a political party, to a candidate in an election or by-election or to a group:
>
> (a) by denying him or her access to membership of any trade union, club or other body;
>
> (b) by not allowing him or her to work or to continue to work;
>
> (c) by subjecting him or her to any form of intimidation or coercion;
>
> (d) by subjecting him or her to any other detriment.
>
> Penalty:
>
> (a) if the offender is a natural person—$5,000 or imprisonment for 2 years, or both; or
>
> (b) if the offender is a body corporate—$20,000.

15 See for example, Joint Standing Committee on Electoral Matters (2005), *The 2004 Federal Election: Report of the Inquiry into the conduct of the 2004 federal election and related matters*, p. 332 and Metherall M (2005), 'Political donations plan raises corruption fears', *Sydney Morning Herald*, 21 May, p. 10.

5.26 The Australian Electoral Commission advised that it had received over 400 complaints which involved allegations of criminal breaches of the Commonwealth Electoral Act during the 2007 election campaign period. Of these, 10 were referred to the Australian Federal Police for further investigation.[16] During evidence, the Commission was unable to advise whether any of these complaints involved breaches of s. 327(2), but undertook to provide further advice to the committee.

5.27 The Australian Electoral Commission subsequently advised:

> The evidence provided by the AEC referred to the existing complaints mechanism for dealing with electoral offences under Part XXI of the Electoral Act. This includes the offence contained in section 327 of the Electoral Act which covers unlawful discrimination against a person who makes a donation to a political party. The AEC is aware of general allegations having been made of such unlawful conduct in breach of this section. However, in the past 3 years, the AEC has not been provided with any evidence that would indicate that such discrimination has actually taken place.
>
> Neither has the AEC been provided with any details of allegations that could be referred to the Australian Federal Police for investigation.
>
> The AEC also notes that the Human Rights and Equal Opportunity Commission Act 1986 contains the International Covenant on Civil and Political Rights in Schedule 2. Articles 2 and 26 prohibit discrimination on the grounds of 'political or other opinion'. As to whether this provides an alternative existing mechanism to deal with the types of concerns raised by the Committee would be a matter on which the Committee would need to seek the views of the HREOC or the Attorney-General's Department. This legislation is not administered by the AEC.[17]

5.28 While the committee is aware of the potential for the information associated with the public disclosure of donations to political parties to be related to attempts to intimidate or harass individuals and others, the current provisions in the Commonwealth Electoral Act appear to provide an appropriate deterrent to such action.

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16 Pirani P, Australian Electoral Commission, transcript, 26 September 2008, p. 8..

17 Australian Electoral Commission, submission 3, p. 2.

5.29 The committee considers that the government should provide adequate resources to the Australian Electoral Commission so that it is able to conduct public awareness activities in relation to the protections provided by section 327(2) of the Commonwealth Electoral Act. This should include appropriate resources to establish a dedicated unit within the Commission that is responsible for promoting awareness of this section of the Act, maintaining a formal complaints register and direct access by a separate website and an advertised telephone 'hotline' number. In addition, sufficient resources should be provided to ensure that the Commission, the Australian Federal Police and the Commonwealth Director of Public Prosecutions can investigate any substantive allegations of harassment and intimidation which are related to the making of a political donation.

Electoral and disclosure administration structure

5.30 Currently the Australian Electoral Commission undertakes a full range of functions associated with the administration of the electoral roll, the management of federal elections and referenda (including the counting of votes) and the administration of the funding and disclosure scheme. It also provides services for industrial elections and protected action ballots, fee-for-service elections and advice and assistance in overseas elections.[18]

5.31 The Democratic Audit of Australia noted in their submission to the 2007 election inquiry that these tasks required different skills and that some jurisdictions, such as New Zealand, had three electoral agencies — one to maintain the electoral roll, one to conduct elections and a third to deal with party/campaign finance matters, regulation of advertising, logos and electoral education.[19]

5.32 In New South Wales, there already is some structural separation in electoral administration. The NSW Electoral Commission is responsible for the administration of the electoral roll (working with the Australian Electoral Commission under the joint roll arrangements) and the conduct of elections. A separate agency (albeit with an overlap in terms of some personnel and services) — the Election Funding Authority — is responsible for overseeing public funding for state elections and expenditure on political education by political parties and the administration of the disclosure scheme.[20]

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18 Australian Electoral Commission (2007), *Annual Report 2006-07*, p. 12.

19 Democratic Audit of Australia, submission 45 to the 2007 election inquiry, pp. 12-13.

20 NSW Electoral Commission, About us, viewed on 29 September 2008 at http://www.elections.nsw.gov.au/about_nswec; NSW Election Funding Authority, About us, viewed on 29 September 2008 at http://www.efa.nsw.gov.au/efa_information.

5.33 Mr Norm Kelly from the Democratic Audit saw such a structural separation as providing for a concentration of expertise which could also be included as part of a move to harmonisation:

> The advantages are that you would develop specific expertise in each of those three areas. For it to work effectively you would want to coordinate that with state and territory jurisdictions. That is a particular issue relating to electoral finance, campaign finance and also to enrolment.
>
> … Because of the nine jurisdictions in the Australian environment you have the danger of getting excessive administrative split ups. That is why I recommend that it should come together so that you can coordinate it. New South Wales already has a separate election funding authority. Perhaps with some changes that could be used as a model that could be incorporated across Australia, including the Commonwealth.[21]

5.34 Responding to these suggestions, the Acting Australian Electoral Commissioner told the committee that:

> the current funding and disclosure unit is within the AEC and they are not really involved in our other core business. So if we were resourced to establish such a unit that would be quite possible from within the AEC.[22]

5.35 While there appear to be some benefits to a structural separation of the funding and disclosure unit to a new entity, the committee considers that this issue is one that needs to be explored as part of either the green paper process or the committee's own 2007 election inquiry. Any moves to harmonise the administration of funding and disclosure arrangements between the Commonwealth and the jurisdictions should also strongly consider the costs and benefits that such a model presents.

21 Kelly N, Democratic Audit of Australia, transcript, 22 September 2008, p. 3.

22 Dacey P, Australian Electoral Commission, transcript, 26 September 2008, p. 4.

Committee conclusion

5.36 The committee supports moves to modernise the level of penalties in relation to breaches of the proposed disclosure arrangements. These will see the level of financial penalties rise from $1,000 to more than $13,000 for some offences and the introduction of the penalty of imprisonment for some types of offences.

5.37 These higher penalties will be balanced by requiring that a more stingent threshold for prosecution applies, with strict liability for an offence to be proved removed.

5.38 Taken together with a strengthening of compliance processes, the proposed penalties should provide a significant deterrent to those who might consider circumventing measures designed to bring greater transparency to the flow of money in the electoral system.

5.39 Notwithstanding these improvements, it will be necessary for the Government to provide appropriate resources to the Australian Electoral Commission and other relevant agencies to ensure that compliance processes operate effectively.

Recommendation 7

5.40 **The committee recommends that the Senate should support without amendment the proposals in the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008 that:**

- **modernise the level of penalties for breaches of the proposed funding and disclosure provisions; and**
- **strengthen the Australian Electoral Commission's capacity to undertake compliance activities.**

(continued over)

Recommendation 8

5.41 **The committee recommends that the government provide adequate resources to the Australian Electoral Commission and other Commonwealth agencies so that they are able to:**

- **conduct effective public education activities to promote the protections offered in section 327(2) of the *Commonwealth Electoral Act 1918* against harassment and intimidation as a result of making a political donation;**
- **provide for a dedicated unit within the Commission that:**
  - ⇒ **is responsible for promoting awareness of this section of the Act**
  - ⇒ **maintains a formal complaints register;**
  - ⇒ **is directly accessible by a separate website and an advertised telephone 'hotline' number; and**
- **take effective regulatory action to enforce the existing protections against these actions provided by the *Commonwealth Electoral Act 1918*.**

Daryl Melham MP
Chair
13 October 2008