

# Third party financial disclosure obligations under the *Commonwealth Electoral Act 1918* (Cth)

Legal information for not-for-profit community organisations

## This fact sheet covers:

- Financial disclosure obligations for third parties under the *Commonwealth Electoral Act 1918* (Cth)
- How to make a disclosure
- Publication of the disclosure

## This fact sheet provides information on the financial disclosure obligations of not-for-profit organisations under the *Commonwealth Electoral Act 1918* (Cth).

Election funding and financial disclosure obligations are regulated by the Australian Electoral Commission (AEC) pursuant to the *Commonwealth Electoral Act 1918* (Cth) ('the Act'). Under the Act, a 'third party' (a person or organisation other than a political party, candidate, member of the House of Representatives or Senate or a donor) that incurs expenditure in the Commonwealth (Federal) electoral process may be required to lodge a financial disclosure return with the AEC.

Broadly, financial disclosure obligations may arise for not-for-profit organisations (NFP) when the NFP has incurred political expenditure above the disclosure threshold, which is \$13 200 for the financial year, indexed annually. The amount that will apply from 1 July 2017 to 30 June 2018 is \$13 500. Further financial disclosure obligations may arise if the NFP has used money received as a gift or donation wholly or partly for that political expenditure.

The disclosure requires the NFP to declare its entire political expenditure (provided it exceeds the disclosure threshold). Further, where a gift or donation has been used for the political expenditure (and the disclosure threshold is met), information about the gift or donation and the donor (if applicable) must be declared.

For example, consider an NFP which is politically "neutral" and not tied to any political party and which incurs \$100,000 for a political purpose in a financial year. If \$50,000 of that \$100,000 was provided by 'Donor X' and the NFP uses that money to campaign on an issue contrary to the sitting government's policy (regardless of whether 'Donor X' gave the donation conditionally), the NFP must declare:

- the \$100,000 it has spent, and
- the \$50,000 donation from 'Donor X'.

### NOTE

In this fact sheet we have tried to explain the Act and how it might apply. However, as we have set out throughout the fact sheet, there is a lack of clear guidance on how the Act is to be interpreted. This means that your organisation may need to seek legal advice on whether it has financial disclosure obligations under the Act in a given financial year.

## CAUTION

The *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (Cth)* is currently before the Federal Parliament. The Bill proposes to make a number of changes to the Act.

It has been subject to an inquiry by the Joint Parliamentary Committee into Electoral Matters, which released a report on 9 April 2018 and has recommended a number of changes be made to the Bill.

Not-for-profit Law has more detailed information at: [www.nfplaw.org.au/electoral-amendment](http://www.nfplaw.org.au/electoral-amendment).

Note that the information contained in this fact sheet may no longer be applicable if and when the Bill becomes law.



# 1. Financial disclosure obligations for third party political expenditure

## 1.1 Annual returns relating to political expenditure

The Act requires a third party organisation to provide a return for a financial year if

- it incurred expenditure (at a set amount, see below)
- for any of the five purposes outlined below (which are set out in section 314AEB(1)(a) of the Act) during the financial year

It does not matter whether it has been expended directly a person or by somebody with that person's authority (see below at 2.1).

### 1.1.1 The purposes (which require returns)

- (i) The 'public expression' of views on a political party, a candidate in an election or a member of the House of Representatives or the Senate by any means

## NOTE

The words "*public expression of views*" is not defined in the Act.

The AEC has commented that an "expression of views" does not cover the presentation of merely factual information.

Your organisation may need to seek legal advice if it is uncertain about whether statements it may have made publicly or plans to make are an 'expression of views'.

For example, a statement that a member of Parliament said something that was reported in the news is likely only 'factual information'. On the other hand, an 'expression of views' may be a statement that a member of Parliament is wrong about a particular matter.



- (ii) the public expression of views on an issue that is, or is likely to be, before electors in an election (whether or not a writ has been issued for the election) by any means

#### NOTE

The clause "issue that is, or is likely to be, before electors in an election (whether or not a writ has been issued for the election) by any means" is vague and it is not defined in the Act.

This means it cannot be interpreted with clarity.

On this provision, the AEC has made the following comments:

- there is a distinction between an "issue before electors in an election" and other "public issues". Merely because a person raises an issue in the public domain does not result in that being an "issue before electors in an election"
- the above assessment would take into account how topical the issue is and the difference, if any, between the policy platforms of each party
- there must also be a temporal nexus between the actual views that have been publicly expressed and an issue in an "upcoming election"
- an assessment is made by the AEC to ascertain the subjective purpose of the NFP in making a public expression of a relevant issue
- the nearer in time the "public expression" to the possible date for the holding of an election, the more likely that it will meet the subjective intention of placing an "issue before electors in an election".

There is considerable doubt and debate about this sub-section. The AEC's submission is not binding and may restrict parts of the requirement in a way that is not supported by the terms of the legislation. Your organisation may need to seek legal advice if it is uncertain about views it may have made publicly or plans to make on a particular issue (i.e. to check whether it will have obligations under the Act).

- (iii) the communicating of any electoral matters (which is not covered in the two points above) if that communication results in notification requirements under other parts of the Act

#### NOTE

The other parts of the Act which this refers to are set out in section 321D and they deal with:

- electoral advertisements (including internet advertisements, bulk text messages, bulk voice messages and bulk calls containing electoral matters)
- stickers, fridge magnets, leaflet, flyers, pamphlets, poster, notice or how-to-vote cards.

These materials require 'particulars' such as details of the person who authorised the material or the printer who printed it. There are many different requirements and exclusions may apply. The intention of this fact sheet is not to provide advice on these 'particulars' or go into detail about when disclosure under 321D may be required. Your organisation may need to seek legal advice, if it plans to communicate such material, in terms of meeting the requirements around the 'particulars' and if the expenditure associated with that would require your organisation to make a financial disclosure.

- (iv) the broadcast of political matters (which is not covered by the point above) in relation to which particulars are required to be announced under subclause 4(2) of Schedule 2 of the *Broadcasting Services Act 1992 (Cth)*”

#### NOTE

Subclause 4(2) of Schedule 2 applies if a ‘broadcaster’ broadcasts political matter at the request of another person. ‘Broadcaster’ means:

- a) commercial television or radio broadcasting licensee
- b) a community broadcasting licensee
- c) a subscription television broadcasting licensee; or
- d) a person providing broadcasting services under a class licence.

This clause is unlikely to apply to most NFPs other than community radio stations.



- (v) the carrying out of an opinion poll, or other research relating to an election or the voting intention of electors

#### NOTE

This is not defined in the Act. While the “the carrying out of an opinion poll” is reasonably clear, the second part “or other research relating to the election or the voting intentions” is less so. Your organisation may need to seek legal advice if it plans to carry out activities that could come within this clause and those activities exceed the expenditure requirement (see below).



### 1.1.2 How much expenditure?

The amount of the expenditure incurred for one or more of the purposes above must be more than the disclosure threshold which is \$13 200 (this figure is indexed annually, i.e. it is subject to a slight increase on an annual basis and for 2017-2018 is \$13 500).

#### NOTE

The Act does not define what subject matter can be classified as "expenditure".

The AEC has said that:

- Third parties are required to disclose expenditure on goods and services provided pursuant to the political purposes listed in section 314AEB(1). Nevertheless, the types of expenditure which constitute "expenditure" for the purposes of the Act are not defined
- The Act operates in a way that confines its operation to situations where the "primary or dominant purpose" of the particular expenditure is one of the categories of purposes listed in section 314AEB(1)(a)



- Incidental expenditure or expenditure for a variety of purposes of which only a minor aspect falls within one of the specified purposes will not be required to be included

**Note:** the references to 314AEB(1)(a) are those five purposes we have listed above at 1.1. The interpretation of "expenditure" under the Act may indeed be wider than the AEC's interpretation. Your organisation may need to seek legal advice if it is uncertain about 'expenditure'.

## CAUTION

The AEC has no authority to issue a binding determination on the meaning of the Act and its opinions (including those outlined above in the "note" boxes) should be taken as a guide only.

Further, this part of the Act (section 314AEB) has not been considered by the courts and therefore the AEC's interpretation is not a definitive statement of the law.

The AEC's interpretation of this part of the Act (section 314AEB) has been criticised by legal academics. As part of its recommendations into the current Bill before the Parliament to amend the Act, the Joint Parliamentary Committee into Electoral Matters recommended that guidance be developed by the AEC. You can access the Committee's report through Not-for-Profits Law's news page at: [www.nfplaw.org.au/ElectoralAmendmentReport](http://www.nfplaw.org.au/ElectoralAmendmentReport) or direct from the Committee at:

[www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Electoral\\_Matters](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters)

## 1.2 Annual returns relating to gifts received for political expenditure

### 1.2.1 What gifts must disclosed?

The Act also requires that a gift or or gifts received and used (wholly or partly) to incur political expenditure as outlined above (see 1.1) must be disclosed where at least one such gift was more than \$13 200 (it is subject to a slight increase on an annual basis and for 2017-2018 is \$13 500).

A return must be completed by a third party (ie in this section the "third party" is the NFP receiving the gift from 'Donor X'):

- who is required to complete an annual return for political expenditure (see 1.1); and
- received a gift more than financial disclosure amount (whether within the relevant financial year or not); and
- used that gift, or part of it, to incur the political expenditure or to reimburse for such expenditure.

## TIP

Remember if you are accepting gifts from unincorporated associations or trusts you will need to provide the following details:

- from an unincorporated association (other than a registered industrial organisation), the name of the association and the name and addresses of all the executive committee members
- from a trust, the name of the trust, and the name and addresses of all the trustees

## 1.2.2 What must be disclosed?

Where the above criteria is met, the following details must be disclosed:

- full name and address details of each person or organisation from whom the gift was received
- date each gift was received, and
- value or amount of each gift.

Any gift which has been disclosed in a previous financial year does not need to be disclosed again

## 2. How to disclose

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### 2.1 Who is responsible for completing the annual return?

For NFPs, the AEC requires a person with appropriate authority and access to financial records to sign the return (for example, an organisation's chief financial officer). In the case of a company, the AEC recommends a Chief Executive Officer, Chief Financial Officer, company secretary etc. On the other hand, an unincorporated NFP will need to nominate a person with appropriate authority and access to financial records.

### 2.2 What form is required?

The AEC publishes the required annual disclosure returns online using a form called the “*Third Party Return of Political Expenditure*” (**Return**).

The Return asks the details (full legal name and postal address) of the person or organisation covered by the Form, and details of the person completing the Form (name, position, postal address, contact numbers and email address).

The person completing the Return must certify the information contained in the Return

- is true and complete
- they have made due and responsible inquiries, and
- they understand it is an offence under the Act to provide an incomplete, false or a misleading return.

The Return includes two parts:

- a part for political expenditure incurred for that financial year (the specific amount spent must be detailed), and
- a part for gifts received for political expenditure each financial year (the specific amount gifted, the date of the gift and the name and address of the donor must be listed).

There is no fee to lodge the Return.

#### CAUTION

An offence is committed if your organisation is required to make a return and does not do so by the required time (see below at 2.4).

## How to lodge the Annual Return

Annual Return option	
<b>Hard Copy</b>	Hard copy disclosure forms are published for each financial year on the Australian Electoral Commission's websites, found <a href="#">here</a> .
<b>eReturn</b>	The Australian Electoral Commission provides for an eReturn to be made via their online portal, found <a href="#">here</a> .

Although these are not required to be included with an annual return, not-for-profit organisations are advised to keep records of expenditures so that they can identify whether they meet the disclosure threshold.

For the purposes of the Act you should keep these records for a minimum of 3 years:

- ✓ Tax invoices
- ✓ Receipts
- ✓ Salary records
- ✓ Bank deposit books and cheque books
- ✓ Bank account statements
- ✓ Credit card statements

## 2.3 When are persons required to provide a return?

The Act requires NFPs, who are subject to financial disclosure obligations, to provide a return to the AEC within 20 weeks after the end of the financial year.

The due date for lodging the 2017-2018 Financial Year return is 17 November 2018. The AEC publishes due dates on its website [here](#) or see [www.aec.gov.au](http://www.aec.gov.au) and go to "Funding, Disclosure and Political Parties".

### FURTHER READING

The AEC has issued a guide "[AEC Financial Disclosure Guide for Third Parties incurring Political Expenditure 2016-2017 financial year](#)". It is largely about the process as described in this fact sheet and does not offer any guidance on the interpretation of the Act.



## 2.4 What are the consequences of not making a return when required to?

It is an offence if your organisation is required to make a return and does not do so by the required date. The maximum penalty is 10 penalty units (a penalty unit is \$210 for offences committed after 1 July 2017).

The Act also sets out other offences which include the lodging of an incomplete return, or not retaining records for three years. The maximum penalty for these offences are 10 penalty units. Including false or misleading information in a return can result in a penalty of 50 units.

## 2.5 Public inspection of annual returns

Annual returns are publicised on the first day of February each year. They can be accessed online at <https://periodicdisclosures.aec.gov.au/> and also at AEC offices in each State and Territory, including its National Office in Canberra.

The site is searchable. For example, you can search under “political expenditure” and all persons or organisations that have lodged returns are listed. You can then access a PDF document of the Return made by a person or an organisation.

# Resources

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## Related Not-for-Profit Law resources

- ✔ [UPDATE: Report released on the Electoral Funding and Disclosure Reform Bill](#)
- ✔ [Information on the Electoral Amendment \(Electoral Funding and Disclosure Reform\) Bill 2017](#)
- ✔ [Not-for-Profit Law's submission to the inquiry on the Electoral Amendment \(Electoral Funding and Disclosure Reform\) Bill 2017](#)

## Related Resources

- ✔ [Australian Electoral Commission](#)

The AEC's website provides you with further information about the AEC. You can also access the Financial Disclosure Guide for Third Parties incurring Political Expenditure 2016-2017 financial year and access financial disclosure returns made by third parties.

- ✔ [AEC Financial Disclosure Guide for Third Parties incurring Political Expenditure 2016-2017 financial year](#)
- ✔ [Joint Standing Committee on Electoral Matters Advisory report on the Electoral Legislation Amendment \(Electoral Funding and Disclosure Reform\) Bill 2017](#)

## Legislation

- ✔ [Commonwealth Electoral Act 1918 \(Cth\)](#)

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