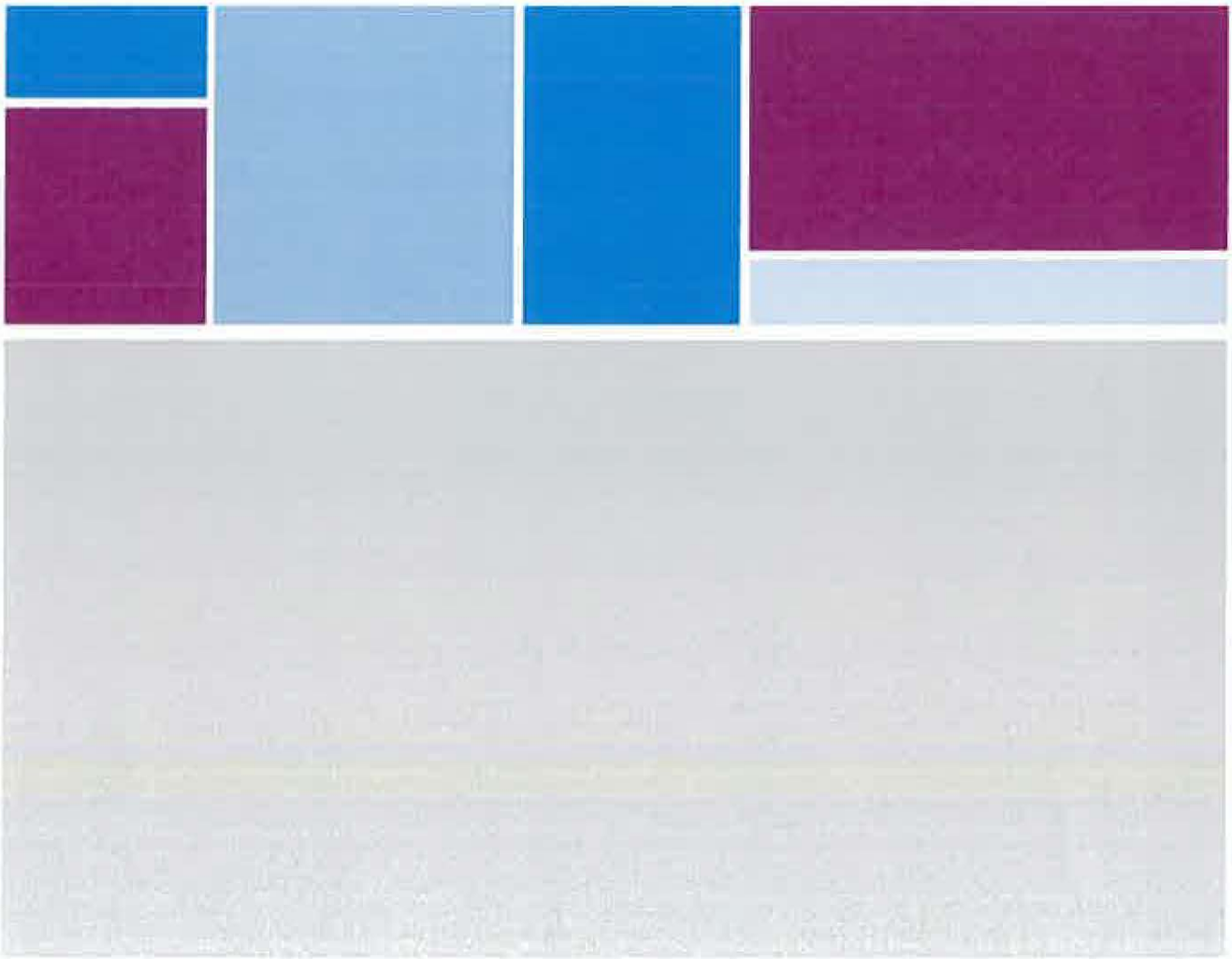
Submission to the Joint Standing Committee on Electoral Matters

Inquiry into the conduct of the 2016 federal election and matters related thereto – Financial Disclosure

February 2017



AEC
Australian Electoral Commission

Contents

Part A - Background

Funding and Disclosure

The Commonwealth Funding and Disclosure Scheme (the scheme) was established in 1983 under Part XX of the *Commonwealth Electoral Act 1918* (the Electoral Act) and deals with the public funding of federal election campaigns and the disclosure of certain donations and other financial information. The scheme was introduced to:

- lessen the reliance of candidates and political parties on the receipt of private donations with the provision of public funding, and
- increase overall transparency and inform the public about the financial dealings of political parties, candidates and others involved in the electoral process.

The scheme requires candidates, registered political parties, their state branches, their associated entities, donors and other participants (third parties) in the electoral process to lodge annual or election period financial disclosure returns with the Australian Electoral Commission (AEC).

- Annual financial disclosure returns, for the previous financial year, must be lodged by 20 October (political parties and associated entities) or 17 November (donors and third parties) and are published on the AEC website on the first working day in the following February.

- Candidate and Senate group returns of donations received and electoral expenditure incurred during the election period, and returns by persons who have made donations to candidates that total above the disclosure threshold, must be lodged before the expiration of 15 weeks after election day, and are published on the AEC website 24 weeks after election day.

Annual returns for political parties and associated entities must contain the total amounts of all receipts, payments and debts. Political parties are required to provide details of all individual monetary and non-monetary receipts that are of a greater value than the disclosure threshold ($13,000 for 2015-16, indexed annually).

The Electoral Act has restrictions in regard to anonymous donations and requires loans, greater than the threshold from sources other than a financial institution, to be properly documented.

AEC focus on Disclosure

The *Commonwealth Electoral Legislation Amendment Act 1983* provided the legislative framework for the public funding of election campaigns and the obligation to report financial donations and electoral expenditure. The intention of Part XX was that the proposed amendments would provide clarity and transparency; linking the obligation to report financial transactions by candidates, parties, donors and others, to the general public's confidence in the electoral process.

Accordingly, the AEC seeks to achieve impartiality and build public confidence by consistent decision-making through objective application of the law and parity of treatment of all stakeholders. The AEC notes that the 1983 second reading speech, during the passage of the legislation, made it clear that the intention of Parliament was for Part XX of the Electoral Act to achieve public disclosure of financial information by those who have a reporting and disclosure obligation. This is consistent with the:

- aims of providing political parties and candidates with public funding to assist them in contesting elections, reducing their reliance on private funding, requiring the disclosure of campaign related transactions in the interest of transparency (particularly donations and electoral expenditure), and reducing the risk of corruption.
- penalty regime contained in the Electoral Act, which requires the AEC to refer breaches to the Commonwealth Director of Public Prosecutions, and combines relatively low penalties ($100 for some offences) with potentially high thresholds for establishing an offence.

To assist those who may have a disclosure obligation, the AEC takes an educative approach to assist people and parties to meet their requirements. The AEC provides a range of forms, guides, online portal and a helpdesk to support stakeholders. The AEC issues obligation letters to known stakeholders, and to those who may come to the attention of the AEC through means such as other returns and media reports. However, the Electoral Act does not absolve electoral participants from complying with their disclosure and reporting obligations where they have not received an obligation letter from the AEC. This is consistent with the fact that unlike many international disclosure schemes, there is no obligation on a person or organisation to register with the AEC prior to incurring electoral expenditure resulting in the AEC not being aware of the identity of each person who may have incurred electoral expenditure or made a political donation.

Key legislative changes

The AEC administers the financial disclosure scheme in accordance with the requirements in Part XX of the Electoral Act. The scheme has undergone several changes since 1984, particularly with the move away from an election expenditure related disclosure basis to a more comprehensive annual disclosure regime for political parties and their donors. Political parties and their associated entities are now required to account for the sum of all receipts, expenditure and debts. These amendments have not altered the fundamental philosophy behind the original scheme. The main legislative amendments to the scheme include:

- In 1996 the election funding reimbursement scheme requiring parties and candidates to lodge a claim for electoral expenditure including all receipts with the AEC was repealed. It was replaced by an election funding entitlement scheme and a requirement for political parties to lodge more comprehensive annual returns.

- *The Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* enacted changes to raise the minimum threshold requirement for donations to be made public to $10,000 for candidates, Senate groups and political parties and for the threshold to be indexed annually to the CPI. It had previously been $200 for candidates, $1,000 for groups, and $1,500 for political parties.

- The *Tax Laws Amendment (Political Contributions and Gifts) Act 2010*, removed provisions allowing businesses to claim a tax deduction for donations to political parties. This applied retrospectively from 1 July 2008. Provisions still allow tax deductions up to $1,500 for gifts and contributions to political parties and Independent candidates and members by individual taxpayers.

Part B – AEC submission regarding financial disclosure

Overview

In the past six years the JSCEM has conducted three inquiries into political funding and disclosure: the 2011 inquiry into the funding of political parties and election campaigns, the 2012 inquiry into the AEC analysis of the Fair Work Australia (FWA) report on the Health Services Union (HSU) and the 2015 inquiry into political donations.

On 15 October 2015, the Senate referred to the JSCEM an inquiry into political donations. The inquiry lapsed with the dissolution of the Senate and the House of Representatives on Monday 9 May 2016.

The AEC has provided submissions to these inquiries with the exception of the lapsed inquiry in 2016. These submissions have included a comprehensive overview of the funding and disclosure framework, some generic commentary and specific suggestions for consideration by the Committee. For reference previous AEC submissions are available at:
http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=em/political_funding/subs.htm

http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=em/fundingdisclosure/subs/sub001aec.pdf.

Most notably, the report on the 2012 JSCEM inquiry into the AEC analysis of the FWA report on the HSU contains considerable discussion about a list of 17 items that, in the opinion of the AEC, were limitations in part XX of the Electoral Act. Not all of the AEC's suggestions from that list were supported by the Committee, and a dissenting report rejected all but one. Additionally, none of the JSCEM recommendations from any of those reports have ever been specifically responded to by the government of the day, or enacted in legislation.

On 19 April 2016 a matter was referred to the Finance and Public Administration References Committee for inquiry and report, concerning the Commonwealth legislative provisions relating to oversight of associated entities of political parties. An interim report was tabled on 29 April 2016, and the final report was tabled on 4 May 2016.

On 3 March 2016, the Senate referred the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2016 to the Senate Finance and Public Administration Legislation Committee for inquiry. This inquiry lapsed with the dissolution of the Senate and the House of Representatives on Monday 9 May 2016.

Reconciling divergent and strongly held views about this key and sensitive issue is, clearly, a matter for Parliament. Prescriptive and highly detailed advice from the AEC about what 'must' be included in a best practice funding and disclosure scheme may create the impression that the AEC has entered into a partisan debate. Accordingly, this submission does not repeat previous AEC advice or commentary. Instead, this part of the submission outlines the AEC's general observations regarding common principles underpinning many financial disclosure schemes, and provides commentary on specific elements of the current scheme that have been the subject of public critique.

Common elements of disclosure schemes

There is a vast array of different political funding and disclosure schemes within Australian and international jurisdictions. Some of these schemes are highly regulated, including bans on various categories of donation and punitive sanctions, whilst other schemes are less prescriptive. There are also significant differences, even between Australian jurisdictions, such as the threshold for detailed disclosure, the timing of disclosure and in one state no disclosure at all.

The principles detailed below are a summation of the AEC's observations regarding the key common (high level) elements, reflected to varying degrees, in the different approaches to regulation of disclosure in place throughout Australia and in comparable countries internationally. It could be argued, therefore, that an effective disclosure scheme may reflect these characteristics.

Principle 1 - Transparency

- Financial dealings of election candidates and political parties and their supporters are reported and made publically available.
- Information is easily accessible by the public.
- Voters have a clear and timely understanding of candidate, party and donor financial dealings.

Principle 2 – Clarity

- Legislation is unambiguous and descriptive, easy to understand for stakeholders and the broader public and does not allow for any element of subjectivity.
- Simple, clear and descriptive regulations addressing all aspects of participants' financial dealings for the whole electoral cycle.
- Regulations are provided in an easily accessible format. The regulations are supported by adequate guidelines on how to comply with regulations.

Principle 3 - Timeliness

- Disclosures are reported and published in a timely and easily accessible manner.
- The timing of the disclosures are relevant to achieving the parliamentary purpose of the scheme (e.g. informing voters)
- Timeliness in regard to the entire election cycle is consistent.

Principle 4 - Enforceability

- Legislation includes appropriate sanctions for non-disclosure and willful incorrect disclosure.
- Oversight and enforcement should be provided by a body that is seen to be independent and does not compromise the conduct of elections. The independent body is adequately resourced.

Persistent Issues

The AEC is aware of the ongoing public commentary on a range of issues relating to financial disclosure which arise from time to time in the Parliament and the media. Issues which are regularly raised are highlighted below.

Timely disclosure: Currently under the Electoral Act, annual financial disclosure returns are published in February of the following financial year. This means some donations disclosed may have been received up to 18 months prior to publication. In an election year, financial disclosure by parties and other participants may not be published until months after the event. This is an issue often raised during the lead up to an election in the media and by the general public.

Jurisdictions have a variety of approaches regarding the timeframe for reporting and for different electoral events. These range from reporting donations and loans quarterly to weekly reporting during an election campaign.

By way of example, the Federal Electoral Commission (FEC), which administers certain financial disclosures in the United States, requires some disclosure reports within 24 hours and are made available to the public within 48 hours of the agency's receipt. In Canada, political parties who qualify for public funding must lodge a quarterly return

30 days after each quarter ends and leadership contestants must lodge weekly reports commencing four weeks out from an election.

The Joint Standing Committee on Electoral Matters 2011 Report on the funding of political parties and election campaigns provides a detailed comparison at Appendix D of Commonwealth, State and Territory schemes and at Appendix E a Comparison of international political finance schemes. These are available at:

http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=em/political%20funding/report.htm#chapters

Whether a particular disclosure regime is adjudged as 'timely' will ultimately be a matter of judgement for commentators and other stakeholders. However, given the principles espoused in the previous section, it would appear that disclosure closer to real time may provide a level of transparency to the public that optimizes engagement and confidence in the political process.

Disclosure threshold: Some political parties choose to disclose amounts at a lower threshold than required by the Electoral Act to reflect a public expectation about the required level of disclosure. There is considerable debate as to whether the current thresholds are appropriate. Different jurisdictions require reporting from as little as $100, others have a capped or fixed amount allowed.

Disclosure definitions: Concerns are often raised about what constitutes a gift (donation). Currently everything that is not a donation is most commonly reported in an annual return as an 'other receipt'. There appears to be an expectation that payments such as subscriptions, or for attendance at fundraising events, should be included in the definition of a 'gift'. Receipts for these items that are above the relevant threshold are required to be disclosed by political parties (and associated entities); however there is no obligation on the payer of such amounts to lodge a donor return due to the definition of a gift in the Electoral Act.

Harmonisation: Currently, state and territory disclosure schemes have different obligations to the Commonwealth and to each other. The different thresholds, definitions, and timings create a layer of complexity for all participants, particularly donors. Instances of non-disclosure can often be attributed to donors or organisations not fully appreciating the different requirements between jurisdictions.

For the general public the different disclosure provisions across the jurisdictions provide a layer of complexity that may add to a perception of a lack of transparency. Harmonisation of existing financial disclosure schemes could provide an opportunity for increased transparency and confidence in the electoral process.

Associated entities and third parties: Definitional issues are often raised regarding how an organisation is treated under the disclosure scheme. Associated entities have different disclosure obligations than third parties that incur political expenditure.

The Electoral Act does not prescribe a formal process for recognising associated entities nor does it require political parties to identify their associated entities to the AEC. Most associated entities, therefore, have either been identified by the AEC based on information contained in political party disclosure returns or in the public domain, or have self-identified by lodging disclosure returns without being contacted by the AEC.

The Electoral Act contains six criteria on which an entity may be assessed as to its status as an associated entity. Most associated entities have disclosure obligations because they operate 'wholly or to a significant extent' for the benefit of a political party.

Questions are sometimes raised regarding an organisation's disclosure obligations, where they may appear to be supporting a particular view. The organisation may consider themselves to have no direct affiliation to a particular political party and disclose as a third party.

The issue of whether the definition of an associated entity should be clarified to ensure consistency in application and that the groups that are intended to be captured are captured, is raised frequently in the Parliament and the media. There has also been commentary about whether third parties should be subject to the same disclosure obligations as political parties and associated entities in order to alleviate the concern around this definitional issue. However, the current third party reporting requirements provide more detailed information on actual electoral expenditure than the single expenditure figure covering all transactions (electoral and non-electoral) provided by an associated entity.

In the United Kingdom third parties that intend to incur above a set threshold of financial expenditure must first register with the relevant electoral administration body. Domestically, similar requirements exist in New South Wales (NSW).

Foreign donations: The Electoral Act contains no restrictions on donations by foreign donors and does not have extra-territorial application. That is, while the AEC can seek voluntary compliance with the disclosure requirements, overseas donors cannot be compelled to comply with Australian law. Some donors with overseas addresses do provide disclosure returns to the AEC, and they are published in the usual way.

Previous JSCEM reports have recommended that the Electoral Act be amended to ban political parties, independent candidates, associated entities and third parties from receiving donations from foreign sources.

In 2013 the High Court held that 'the government' (in this case NSW) cannot limit legitimate donors to individuals on the electoral roll.

Donation 'splitting': This term is commonly used in the media where the sum of donations disclosed by a donor in a particular year, is over the disclosure threshold, but the party named by the donor does not disclose the same or any amount. The Electoral Act does not require registered parties to provide details or a disaggregation of donations under the threshold. These donations are included and reported in a party's total receipts.

Donors are required to report 'gifts' made to the same candidate or political party totaling more than the threshold within a financial year. Registered parties and associated entities are encouraged as 'good practice' to advise donors of their obligation to report at the time of the donation.

The Electoral Act in its current form does not provide a mechanism to identify a donor's potential obligation where several small gifts under the threshold are made.

Sanctions/penalties for incomplete or non-disclosure: Different jurisdictions manage this issue through a range of administrative and/or criminal penalties and other mechanisms.

There are many reasons for partial or non-disclosure, for example instances of administrative oversight, poor record keeping, or staff turnover. Some jurisdictions employ a range of administrative penalties for these infringements, such as issuing on the spot fines etc. Criminal penalties for such cases could be seen as overly harsh and unlikely to progress through to prosecution.

Often jurisdictions manage instances of willful non-disclosure or fraud by employing a range of criminal penalties such as fines or imprisonment. The target of such penalties is also a matter for discussion. Different schemes target the individual, the individual position (for example the financial controller) or the organisation as a whole for penalties.

Some jurisdictions manage more serious breaches of their disclosure schemes by employing mechanisms to withhold election funding from candidates or parties until full and accurate disclosure has been achieved.

Conclusion

Given the critical importance of this matter to a functioning democracy, it is not surprising that previous JSCEM enquiries have exposed a multitude of stakeholder views and opinions about the detail and operation of the Commonwealth's funding and disclosure scheme. Reconciling those views and opinions are, clearly, a matter for Parliament. However, the AEC stands ready to assist the JSCEM with further research on specific

questions, and will continue to administer, to the best of its ability, whatever scheme is mandated by Parliament.