

Committee Secretary
Senate Finance and Public Administration Committee
By email: fpa.sen@aph.gov.au

25 April 2016

Dear Secretary,

Submission to the inquiry of the Senate Finance and Public Administration Committee into Commonwealth legislative provisions relating to oversight of associated entities of political parties

My submission focuses on the principal areas of deficiency in relation to the oversight of associated entities of political parties under the *Commonwealth Electoral Act 1918* (Cth) ('the Act'), namely:

- The inadequate compliance framework under the Act;
- The failure of the Act to require political parties and associated entities to establish adequate governance arrangements.

An important starting point is that the disclosure scheme under the Act essentially treats political parties and their associated entities in the same way¹ hence, the shortcomings examined below are not confined to associated entities and indeed, extend to political parties.

Given the shortness of time provided for submissions, this submission is relatively brief and will tend to refer to other reports on the question of detail.

Inadequate compliance framework under the Act

The key dimensions of this framework are the:

- 1) The powers it confers upon the Australian Electoral Commission (AEC) to secure compliance;
- 2) The penalties that apply to non-compliance.

In terms of the AEC's powers, they are principally found in section 316 of the Act. This provision confers investigative powers on the Commission, including the power in certain circumstances to compel the giving of evidence and production of documents and records. The exercise of these powers may result in the Commission referring a case of the Commonwealth Director of Public Prosecutions for further action, including the prosecutions for breaches of the Act.²

A significant shortcoming of the AEC's investigative powers is that they are directed at *identifying non-compliance* with the Act rather than being anchored in the

¹ See *Commonwealth Electoral Act 1918* (Cth) ss 314AB, 314AC, 314AE, 314AEA.

² See http://www.aec.gov.au/Parties_and_Representatives/compliance/index.htm (accessed on 22 April 2016).

broader goal of *promoting compliance* - they are 'after the event' powers that focus on enforcement.

While such powers are necessary to any effective compliance framework but they are not sufficient. Alongside such powers should be proactive measures that promote compliance on the part of political parties and their associated entities. In a report I wrote for the New South Wales Electoral Commission in 2012, *Establishing a Sustainable Framework for Election Funding and Spending Laws in New South Wales*,³ I proposed several measures to promote compliance in relation to New South Wales political parties and candidates. Of note is the recommendation to require compliance policies on the part of parties and candidates *as a condition of receiving public funding*.⁴ The same measure should be implemented at the Commonwealth level (with adaptation to the federal disclosure scheme).

Recommendation One

- A scheme of Party and Candidate Compliance Policies should be enacted under the Act with parties and candidates requiring to provide policies detailing the arrangements put in place to comply with the Act (including arrangements relating to associated entities);
- Public funding should not be paid to parties and candidates unless the AEC has approved the policies as being sufficient to ensure compliance with the Act.

In terms of penalties for non-compliance with the Act, a shortcoming here is the absence of the ability of the AEC to withhold public funding should a party or candidate fail to comply disclosure obligations under the Act. This is a power available to the New South Wales Electoral Commission under the *Election Funding, Expenditure and Disclosure Act 1981* (NSW);⁵ it was this power that was recently exercised to deny the New South Wales Liberal Party under that Act.⁶ Such a power should also be conferred upon the AEC.

Recommendation Two

The Act be amended to confer upon the AEC powers modeled upon sections 70(1) and 97L(1) of *Election Funding, Expenditure and Disclosures Act 1981* (NSW).

³ Available at https://www.elections.nsw.gov.au/_data/assets/pdf_file/0018/111591/20121113_Joo-Cheong_Tham_-_Establishing_A_Sustainable_Framework_for_Election_Funding_and_Spending_Laws_in_New_South_Wales_final_report.pdf (accessed on 22 April 2016).

⁴ Ibid 201-202.

⁵ *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ss 70(1), 97L(1).

⁶ See statement of the New South Wales Electoral Commission at http://www.elections.nsw.gov.au/_data/assets/pdf_file/0004/214672/23_March_2016_Liberal_Party_of_Australia_NSW_Division_ineligible_for_further_public_funding_and_supporting_information.pdf (accessed on 22 April 2016).

There are two other related defects in relation to penalties for non-compliance with the Act. First, the offences under section 315 of the Act fail to require parties and their associated entities to take reasonable steps to comply with the disclosure obligation. For example, inaccuracies in disclosure returns (including false statements) will result in breach of this section only when there is knowledge of falsity etc.⁷ Such a lax standard contrasts with Recommendation 11 of the Heydon Royal Commission (extracted below):

Officers with responsibility for ensuring compliance by a reporting unit with its financial obligations under the Fair Work (Registered Organisations) Act 2009 (Cth) be subject to civil penalties if they fail to take *all reasonable steps* to ensure the reporting unit complies with its financial obligations (emphasis added).⁸

The higher standard recommended by the Heydon Royal Commission is the appropriate one and should be instituted in relation to the Act.

Recommendation Three

The Act should be amended to make it an offence to fail to take all reasonable steps to ensure compliance with the Act's disclosure obligations on the part of a party, associated entity and officers within these organisations responsible for ensuring compliance with these obligations.

The Act also provides for derisory fines in relation to breaches of disclosure obligations - for the most part, offences under section 315 of the Act are punishable by a maximum fine of \$1,000 with the maximum fine that can be imposed is \$10,000.⁹ These fines fail to provide adequate deterrent to would-be wrongdoers; they can also be a powerful disincentive to mounting prosecutions for reasons of cost-effectiveness; they may explain why prosecutions for breaches of the disclosure obligations are exceedingly rare. The level of these fines should be substantially increased and perhaps to a proportion of public funding received by a party or candidate.

Recommendation Four

The level of fines under section 315 of the Act should be substantially increased with consideration given to tying the amount of fines to a specified proportion of public funding received by a party and/or candidate.

The legislative amendments should be accompanied by corresponding changes in how the AEC approaches its role in relation to the political finance provisions of the Act. It is crucial that the AEC focuses on regulating to prevent and address the risks of non-compliance rather than merely administering the provisions of the Act. This was a key recommendation made by the New South Wales Panel of Experts on Political Donation in relation to the New South Wales Electoral Commission in its 2014 report (see below):

⁷ See *Commonwealth Electoral Act 1918* (Cth) s 315(3).

⁸ Royal Commission into Trade Union Governance and Corruption, *Final Report: Volume One* (2015) Appendix One: Law Reform Recommendations.

⁹ *Commonwealth Electoral Act 1918* (Cth) s 315.

Recommendation 47

That measures be introduced to support the NSW Electoral Commission to transition from a focus on administration to risk-based regulation.¹⁰

In this respect, the report of the Panel of Experts built upon the report of the New South Wales Independent Commission Against Corruption, *Election Funding, Expenditure and Disclosure in NSW: Strengthening Accountability and Transparency* (2014).¹¹ Both reports should inform the measures taken by the AEC in this regard.

Recommendation Five

Measures should be taken by the AEC to establish a focus on regulating to prevent and address the risks of non-compliance with the disclosure provisions of the Act, drawing upon the report of the New South Wales Expert Panel on Political Donations and the report of the New South Wales Independent Commission Against Corruption, *Election Funding, Expenditure and Disclosure in NSW: Strengthening Accountability and Transparency* (2014).

¹⁰ Panel of Experts, *Political Donations: Final Report, Volume 1* (2014) 16.

¹¹ Available <https://www.icac.nsw.gov.au/documents/preventing-corruption/cp-publications-guidelines/4538-election-funding-expenditure-and-disclosure-in-nsw-strengthening-accountability-and-transparency/file> (accessed on 22 April 2016).

Failure of the Act to require political parties and associated entities to establish adequate governance arrangements

The Act signally fails to require political parties and their associated entities to establish adequate governance arrangements, including in relation to their fund-raising.

In remedying this gap, instructive guidance can be gained here – especially in relation to associated entities – from Recommendation 44 of the Heydon Royal Commission (extracted below):

Provisions be introduced into the Fair Work (Registered Organisations) Act 2009 (Cth) concerning the registration of election funds in relation to elections for office in registered organisations or their branches. In order to be registered, election funds should be required to meet certain minimum governance standards, operate a separate bank account for election donations and expenditures, and report annually in relation to the operation of that account.

Unregistered election funds should not be permitted to receive election donations or make electoral expenditures in connection with elections for office in any registered organisation or branch.

This recommendation is reflected in model legislative provisions in Appendix 1 to Volume 5 of the Report.¹²

Significant guidance can also be gained from the following recommendations of the New South Wales Expert Panel on Political Donations:¹³

Recommendation 33

That:

- a) political parties that receive public funding for administration expenses be required to regularly submit details of their governance standards and accountability processes to the NSW Electoral Commission; and
- b) the payment of public funding for administration expenses be conditional on NSW Electoral Commission approval of those standards and processes.

Recommendation 34

That:

- a) parties be required to regularly submit a list of senior officeholders to the NSW Electoral Commission for approval as a condition of receiving administration funding. The Panel expects that, at a minimum, the NSW Branch of the Labor Party would nominate its President, Deputy Presidents, General Secretary and Assistant General Secretaries, and the NSW Division of the Liberal Party would, at a minimum, nominate its President and Vice-Presidents, Treasurer and State Director;

¹² Royal Commission into Trade Union Governance and Corruption, *Final Report: Volume One* (2015) Appendix One: Law Reform Recommendations.

¹³ Panel of Experts, *Political Donations: Final Report, Volume 1* (2014) 14-15.

- b) the Commission only approve the list if it is satisfied that the nominated officers have sufficient seniority, control and decision-making authority to be responsible for the party's compliance with the Act; and
- c) the approved officeholders, and a brief description of their roles and responsibilities, be published on the NSW Electoral Commission's website.

Recommendation 35

That:

- a) the common law duties that already apply to senior officeholders of both incorporated and unincorporated associations be codified in the Act; and
- b) senior officeholders who breach these duties be personally liable for offences and penalties under the Act.

Recommendation 36

That there be a duty for senior officeholders to report any election funding law breaches or suspected breaches to the NSW Electoral Commission.

The Act should be amended to require proper governance arrangements of political parties and their associated entities drawing upon the reports of the Heydon Royal Commission report and the New South Wales Expert Panel on Political Donations.

Recommendation Six

- The Act should be amended to require that political parties and their associated entities establish proper governance arrangements, drawing upon the relevant recommendations of the Heydon Royal Commission report and that of the New South Wales Panel of Experts on Political Donations.
- These amendments should require that political parties provide to the AEC a list of their associated entities together with a statement as to how the governance arrangements of these entities interact with those of the party; and
- Such information should be publicly disclosed by the AEC.

I hope my submission has been of assistance.

Thank you.

Yours sincerely,

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