



Electoral Commissioner

Our Ref: 16/469

Ms Lynley Ducker
Committee Secretary
Joint Standing Committee on Electoral Matters
Parliament House
CANBERRA ACT 2614

Dear Ms Ducker

**Joint Standing Committee on Electoral Matters Inquiry into the Electoral Legislation
Amendment (Electoral Funding and Disclosure Reform) Bill 2017**

Thank you for the opportunity for the AEC representatives to appear before the Committee at a public hearing on 16 February 2018. At the hearing the AEC was asked to provide answers to Questions on Notice. Please find the responses to these questions at Attachment A.

Yours sincerely

Tom Rogers

2 March 2018

Attachment A

1. The Chair asked: In relation to an example Professor Twomey provided regarding political interest and political purpose, how is it possible to determine what might be an issue before electors at an election? [Proof Hansard page 50]

AEC response

The first issue raised by Professor Twomey is the scope of the phrase “the public expression by any means 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)”. This phrase also appears in the proposed definition of “political purpose” in item 7 of Schedule 1 of the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017. This phrase was also inserted in the existing section 314AEB of the *Commonwealth Electoral Act 1918* (Electoral Act) by item 6 of Schedule 1 to the *Electoral and Other Legislation Amendment Act 2017* (the 2017 Amendment Act).

The Explanatory Memorandum to the Bill that became the 2017 Amendment Act states that “This clarifies that to give rise to a need for a return, the public expression of views must relate to an upcoming election rather than a past election”. Accordingly, there must be a temporal nexus between:

1. the actual views that have been publicly expressed; and
2. an issue in an “upcoming election”; and
3. the actual incurring of expenditure in the particular financial year.

The above amendment is also linked to the scope of the new definition of “electoral matter” which applies to the authorisation requirements for electoral communications that commence on 15 March 2018 with the new section 321D of the Electoral Act. The Explanatory Memorandum to the Bill that became the 2017 Amendment Act refers to this having been “narrowed in scope” and that each communication containing comments or references needs to be assessed, on a case-by-case basis, as to whether it is intended or likely to affect voting in an election.

In regards to the assessment of what issues are before electors, the approach that has been taken by the AEC since the commencement of these provisions in 2006 has been as follows:

1. Section 314AEB is interpreted 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 subsection 314AEB(1);
2. Incidental expenditure or expenditure for a variety of purposes of which only a minor aspect falls within one of specified purposes will not be required to be included;
3. The “expression of views” does not cover the presentation of merely factual information;
4. There is also 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”;
5. In the absence of an actual election being called, to determine whether or not a matter is likely to be before electors involves an assessment of how topical the issue is and the difference, if any, between the policy platforms of each party;
6. An assessment is required to ascertain the subjective purposes behind a specific public expression of the relevant issue;
7. The nearer in time the “public expression” to the possible date for the holding of an election (e.g. the three-year term of the House of Representatives under section 28 of the

Constitution), the more likely that it will meet the subjective intention of placing an "issue before electors in an election".

Applying the above suggests that the concerns raised by Professor Twomey are misconceived and are not supported by the previous administrative practice that has been applied by the AEC.

Regarding expenditure, the further out from an election the expenditure occurs, the less likely it is to meet the test of being 'an issue that is likely to be before electors in an election'. The closer to an election, the more likely it is that a particular matter is going to be something that will be before electors.

2. Senator Leyonhjelm asked: If a political party or a charity advocates on an issue, does it mean it is before an elector? [Proof Hansard page 50]

AEC response

Refer to response to the first question above. There is a distinction between an "issue before electors in an election" and other "public issues". Simply because a person raises an issue in the public domain does not mean it becomes an "issue before electors in an election". In regards to the assessment of issues before electors in an election, note the seven factors listed above that are applied by the AEC in considering the scope of section 314AEB.

3. The Chair asked: In relation to evidence that has been tabled during the course of the inquiry about organisations which have been campaigning, can you confirm whether they should have submitted returns? [Proof Hansard page 51]

AEC response

It is not possible from the tabled evidence alone to determine whether an organisation had an obligation to submit a disclosure return. It would need to be determined whether political expenditure as defined in section 314AEB of the Electoral Act exceeded the threshold for the relevant year.

The information in the table below relates to organisations identified in evidence tabled with the Committee and provided by the Committee to the AEC.

Organisation	Third party return lodged?
Australian Conservation Foundation	Yes (last return lodged 2015-16)
World Wide Fund for Nature	Yes (last return lodged 2016-17)
Australian Youth Climate Coalition	No
Environment Victoria	Yes (last return lodged 2016-17)
Campaign for Australian Aid	No
Childfund Australia	No
Oaktree	Yes (last return lodged 2015-16)
Probono Australia	No

4. Mr Morton asked: In relation to the legislation, would the public expression of views capture things like a submission to a parliamentary inquiry, and the costs associated with travelling to and attending an inquiry? [Proof Hansard page 51]

AEC response

The dominant and subjective purpose of the public expression of views in this scenario would result in it not giving rise to a disclosure obligation under section 314AEB of the Electoral Act.

5. The Chair asked: Could you provide some advice on the ACNC evidence about charities' obligations to comply with legislation, which other witnesses have also raised? [Proof Hansard page 55]

AEC response

In his evidence, the Commissioner of the Australian Charities and Not-for-profits Commission, Dr Johns, referred to the reporting requirements charities have under the Electoral Act and their obligations under the Charities Act. Any change to the regulation of charities and which agency is responsible for the administration of such regulation is a matter for Parliament.

