3

AEC possible measures for consideration

Introduction

3.1 The Australian Electoral Commission's (AEC) analysis of the Fair Work Australia (FWA) report into the investigation of the National Office of the Health Services Union (HSU) drew attention to limitations in the *Commonwealth Electoral Act 1918* (Electoral Act). The Electoral Commissioner, in his letter dated 16 May 2012 to the Special Minister of State, provided a list of matters for consideration to address limitations in the Electoral Act. These possible measures are shown in Appendix A. The Electoral Commissioner noted that 'some of these matters have been considered previously by the Joint Standing Committee on Electoral Matters without being adopted'.[1]

3.2 The Electoral Commissioner listed 17 possible measures for consideration. These measures are examined in this chapter. Where the committee has previously examined certain matters, the committee's position is overlayed against the relevant measure. Recommendations will be made, where appropriate.

---

1 Letter from the Electoral Commissioner, Mr Ed Killesteyn, to the Special Minister of State, the Hon Gary Gray AO MP, dated 16 May 2012.

Measure 1—Reconsideration of the disclosure threshold

Background

3.3 The Electoral Commissioner proposed that there be 'reconsideration of the appropriate level of the disclosure threshold'.

3.4 Transparency and accountability are central goals of Australia's disclosure arrangements. Disclosure is crucial to provide electors with sufficient information about the flow of money in the political system.

3.5 In 2006 the Electoral Act was amended to increase the disclosure threshold from $1 500 to $10 000, indexed annually in line with the Consumer Price Index (CPI) figure. The disclosure threshold for returns relating to the 2008-2009 financial year was $10 900. It rose to $11 200 for 2009-2010, and $11 500 for the 2010-2011 financial year. As a result of a higher disclosure threshold fewer receipts by political parties are publicly disclosed.

3.6 The committee has previously reviewed and made recommendations about the level of the disclosure threshold. In October 2008 the disclosure threshold was examined in the *Advisory Report on the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008*.[2] This Bill proposed that the disclosure threshold be reduced from the then $10 900 (adjusted annually for inflation) to $1 000 (not adjusted for inflation). The committee supported this proposal commenting that it 'will lead to a significant increase in the transparency of financial support and expenditure by participants in the political process'.[3]

3.7 The committee also supported the proposal 'to close the existing loophole that allows for donation splitting—which treats state and territory branches as separate entities and allows donors to contribute up to $10 899.99 to nine separate branches of the same political party (almost $98 100 in total)'.[4]

3.8 The 2008 Bill was subsequently negatived at the second reading stage in the Senate on 11 March 2009. The Commonwealth Electoral Amendment (Political Donations and Other Measures) Bills introduced in 2009 (2009 Bill) and 2010 (2010 Bill) were substantially similar to the 2008 Bill, and

2 Joint Standing Committee on Electoral Matters, *Advisory Report on the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008*, October 2008.

3 JSCEM, *Advisory Report on the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008*, October 2008, p. 51.

4 JSCEM, *Advisory Report on the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008*, October 2008, p. 51

proposed to reduce the disclosure threshold for political donations to $1 000, without CPI indexation. The 2009 Bill lapsed at the end of the 42nd Parliament. The 2010 Bill passed the House of Representatives in November 2010 and was introduced into the Senate, but has not progressed further.

3.9 In November 2011 the disclosure threshold was examined again in the *Report on the funding of political parties and election campaigns* (November 2011 report).[5] The committee recommended that the disclosure threshold be lowered to $1 000, and CPI indexation be removed. The committee stated:

> An effective financial disclosure scheme is an important measure for transparency and accountability in the political financing process. In particular, the level of the disclosure threshold is central to the effectiveness and accountability obtained by the financial disclosure scheme.[6]

3.10 Coalition members of the committee opposed the recommendation to reduce the disclosure threshold to $1 000, stating:

> Coalition members of the Joint Standing Committee on Electoral Matters note most of the recommendations by the Committee are solely to serve the interests of the Australian Labor Party, the Greens and their backers such as GetUp. This is particularly evident in relation to the proposed lowering of the donation disclosure threshold from $11,900 to $1000, which will significantly impact the ability of individuals to give donations to political parties without the potential for intimidation and harassment.[7]

3.11 No further legislative action has been taken in 2012 to amend the disclosure threshold.

Analysis

3.12 In its submission to the inquiry, the AEC revisited the arguement that a lower threshold would provide greater transparency of 'who is funding or donating to election campaigns and what those funds are being spent on'.[8] It was also posited that treating related political parties as a single entity

5 JSCEM, *Report on the funding of political parties and election campaigns*, November 2011.
6 JSCEM, *Report on the funding of political parties and election campaigns*, November 2011, p. 49.
7 JSCEM, *Report on the funding of political parties and election campaigns*, November 2011, p. 217.
8 Australian Electoral Commission, *Submission 1*, pp. 13-14.

for disclosure purposes would help combat the practice of donation splitting. The AEC acknowledged that decreasing the threshold would also result in:

- increased numbers of persons having reporting obligations;
- increased reporting and therefore compliance costs to donors, political parties and candidates; and
- increased administration costs to be incurred by the AEC.[9]

3.13 More generally, in relation to political party disclosures, the AEC commented:

> It is the case that disclosures by political parties is now a considerably less complex and time consuming activity than it was when first introduced. But this simplification of disclosures has made cross-checking more complicated. Part of the design of disclosures was for returns to be complementary in terms of providing some cross checking of completeness and accuracy. The returns by broadcasters, publishers and printers were meant to be able to be compared to what was disclosed for advertising by political parties, candidates and Senate groups in their returns of electoral expenditure. Similarly, cross checking of donations between the disclosure returns of political parties and donors has been complicated by the removal of the requirement for political parties to list each receipt and by allowing political parties to omit individual receipts of less than the threshold amount.[10]

3.14 While the AEC did not offer a suggestion as to the appropriate disclosure level, it commented on issues to be considered when determining an appropriate disclosure level:

> **Mr Killesteyn:** ... The lower the threshold, the greater are the reporting obligations that arise both in terms of donors as well as recipients of those donations. As our report said, the AEC does not have a view on what the appropriate disclosure threshold should be. If you go through all of the jurisdictions across Australia and, indeed, jurisdictions overseas, you see many different levels of disclosure thresholds. There are some that are lower than ours and, obviously, there are some that are higher. For example, if you look at Canada as a comparable jurisdiction, their disclosure threshold is I believe, $1,500. If you go to the United Kingdom, they have a disclosure threshold for central parties of £7,600 or the

9 AEC, *Submission 1*, p. 14.

10 AEC, *Submission 1*, p. 12.

equivalent of about A$11,000. You see quite a variety of disclosure thresholds from very low comparable to the Australian federal scene.

CHAIR: So when you say that a measure is the reconsideration of the appropriate level of the disclosure threshold, what does that mean if you do not do not have a level that you want to recommend to the committee or to the parliament?

Mr Killesteyn: It means, ultimately, there is a question of balance that the lower the threshold the more you are likely to capture and the more that you are likely to see the sorts of circumstances that arose in relation to this particular matter being revealed. However, the balance is that the more you capture the greater is the obligation that is imposed on donors and the greater is the workload that is imposed on the AEC.

You could take this to the level of having no disclosure threshold at all. That would obviously be terrific in terms of transparency but, equally, you could also suggest that that would present such a level of detail that transparency would be mitigated because you would have so much work to do, and the ability of the AEC to process this information and put it in the public domain would be compromised.

We are suggesting that the committee may, once again, want to consider this issue. If it is concerned about the sorts of issues that arose in relation to Mr Thomson, then it can lower it, but if it believes on balance that the disclosure threshold provides a reasonable level of information for the public, then it can leave it as it is.[11]

Conclusion

3.15 The AEC anticipates that the disclosure threshold for the current financial year 2012-2013 will be more than $12 100.[12] Add to this the practice of donation splitting, this can mean significant sums of money moving through the political system without the knowledge of Australian electors.

3.16 There are clear benefits in having a lower threshold to improve transparency in the movement of money in Australia's political system.

11 Mr Ed Killesteyn, Electoral Commissioner, AEC, *Committee Hansard*, 6 July 2012, Canberra, p. 3.

12 AEC, <http://aec.gov.au/Parties_and_Representatives/public_funding/threshold.htm>, viewed 28 August 2012.

The level of the threshold is central to the effectiveness of the current system which relies on disclosure.

3.17 As outlined in the above discussion the committee has already considered the issue of the disclosure level on a number of occasions, and has recommended the lowering of the disclosure threshold to $1 000.

3.18 The committee maintains its position that an appropriate disclosure threshold must strike the right balance between achieving transparency of the movement of money in the political system and the administrative demands placed on individuals, parties and organisations with reporting obligations under the Electoral Act.

3.19 The committee continues to support its previous recommendations that the disclosure threshold be lowered to $1 000, and that the CPI indexation be removed.

Recommendation 1

3.20 **The committee recommends that the disclosure threshold be lowered to $1 000, and that the CPI indexation be removed.**

Measure 2—Administrative penalties

Background

3.21 Under item (ii) in the list of possible measures, the Electoral Commissioner proposed the introduction of administrative penalties for objective failures, such as failing to lodge on time.

3.22 Administrative penalties would involve the AEC administering sanctions for a breach of the relevant law, without having to involve the courts. For example, the AEC would be able to issue a fine for a failure to lodge a disclosure return.

3.23 Currently, offences against Part XX of the Electoral Act are all criminal offences. This means that if prosecution action is pursued, a brief of evidence must be compiled by the AEC, which is then referred to the Commonwealth Director of Public Prosecutions (CDPP). The CDPP undertakes an assessment to determine whether there is sufficient evidence and public interest to prosecute.

3.24 The AEC has previously argued for the introduction of administrative penalties for certain offences:

> The addition of administrative penalties would assist the AEC to enforce compliance requirements without the necessity of referring all matters to the CDPP. It is expected that these types of administrative penalties would result in more timely compliance with disclosure provisions without creating an additional burden on the CDPP resources.[13]

3.25 The AEC also advised that it has advocated for similar changes in previous years:

> Recommendation 12 of the AEC's *Funding and Disclosure Report on the 2010 Federal Election* was that 'the Act be amended to introduce administrative penalties to support compliance with the provisions of the disclosure scheme based on objective tests, for example late lodgement'.
>
> A similar recommendation has previously been made in the AEC submission no. 11 of 26 April 2004 to the JSCEM's Inquiry into Disclosure of Donations to Political Parties and Candidates. Recommendation 4 of this report was: 'that Part XX of the *Commonwealth Electoral Act 1918* be amended to enable the AEC to apply an administrative penalty for failure to lodge a return by the due date, including the capacity to impose further administrative penalties for continued failure to lodge'.[14]

3.26 In its November 2011 report on the funding of political parties and election campaigns, the committee considered the matter of administrative penalties. One concern raised was that having an administrative rather than a criminal penalty could be seen as lessening the gravity of the offence. In evidence to the committee, the AEC suggested that additional measures could be taken to encourage compliance. For example, the AEC could publish a list of all penalties imposed for breaches of the reporting requirements.[15]

3.27 The committee supported the introduction of administrative penalties for 'certain more straightforward offences', such as a failure to lodge a disclosure return by the due date and lodging an incomplete return. The committee made a unanimous recommendation:

---

13 JSCEM, *Report on the funding of political parties and election campaigns*, November 2011, p. 180.

14 AEC, *Submission 1.2*, p. 2.

15 JSCEM, *Report on the funding of political parties and election campaigns*, November 2011, p. 181.

> ... that the *Commonwealth Electoral Act 1918* be amended, as necessary, to make offences classified as 'straightforward matters of fact' subject to administrative penalties issued by the Australian Electoral Commission. The issuance of an administrative penalty should be accompanied by a mechanism for internal review.[16]

Analysis

3.28 The AEC in its submission to this inquiry again expressed support for the introduction of administrative penalties, stating:

> We think there would be value if an administrative penalty allowed us to impose a small monetary sanction. Certainly the evidence from overseas is that this would instil greater urgency in the minds of those who have an obligation to lodge.[17]

3.29 The AEC submitted that the current arrangement is 'time consuming, costly and often fraught with there being no guarantee that the CDPP will accept the brief of evidence given their need to prioritise work or that a court will record a conviction even in the case of a successful prosecution'.[18]

3.30 Few electoral offences are criminally prosecuted, particularly if they are of a relatively minor administrative nature.

3.31 The AEC has previously advised that in late 2011 the CDPP in NSW and Queensland were considering whether to pursue three cases of failure to lodge a disclosure return.[19] The AEC has since advised that the Queensland case did not proceed, as the candidate eventually lodged the return before the court attendance notice (CAN) was issued.

3.32 The NSW DPP pursued one of the NSW candidates who failed to lodge a return. A magistrate found the candidate guilty. The case was 'proven, but dismissed without penalty, section 19B *Crimes Act 1914*'. The second candidate could not be served with a CAN as a residential address could not be ascertained.

3.33 The AEC also noted that while there were other candidates who failed to lodge a return for the 2010 federal election, it has not been able to contact

16 JSCEM, *Report on the funding of political parties and election campaigns*, November 2011, p. 186.

17 Mr Ed Killesteyn, Electoral Commissioner, AEC, *Committee Hansard*, 6 July 2012, Canberra, p. 34.

18 AEC, *Submission 1*, p. 15.

19 AEC, Supplementary submission 19.1 to JSCEM inquiry into the funding of political parties and election campaigns, p. 3.

them, and consequently has been unable to prepare a brief of evidence that would satisfy the CDPP to proceed with a prosecution.[20]

3.34 Administrative penalties for straightforward offences would complement the criminal penalties for more serious breaches of the reporting obligations, such as fraudulent behaviour. This is discussed further in the section on measure 10 on increasing the criminal penalties for fraud related offences.

Conclusion

3.35 The committee reiterates its conclusions in its November 2011 report that the low penalties for offences relating to the funding and disclosure regime, coupled with the Prosecution Policy of the Commonwealth Director of Public Prosecutions which requires consideration of the public interest in pursuing prosecution, have made it difficult to obtain criminal conviction for breaches of the funding and disclosure provisions in the Electoral Act.

3.36 Having administrative penalties, to complement the criminal penalties to deal with more serious offences, will provide the AEC with greater flexibility to more effectively deal with breaches of straightforward offences.

3.37 The committee endorses recommendation 26 in its November 2011 report to introduce administrative penalties for objective failures to meet certain reporting obligations.

Recommendation 2

3.38 **The committee recommends that the *Commonwealth Electoral Act 1918* be amended, as necessary, to make offences classified as 'straightforward matters of fact' subject to administrative penalties issued by the Australian Electoral Commission. The issuance of an administrative penalty should be accompanied by a mechanism for internal review.**

20 Emailed correspondence from the AEC, dated 22 June 2012.

Measure 3—Offsetting financial penalties against public funding

Background

3.39 The Electoral Commissioner, under item (iii), proposed that 'financial penalties be offset against public funding entitlements (perhaps combined with the AEC withholding a small percentage of such entitlements for a period of 12 months following an election)'.

3.40 As political parties are generally not legal entities, party agents are appointed and themselves become liable for penalties and the recovery of monies. If there is not an agent appointment in place the members of the executive committee are liable. This can be problematic when seeking to prosecute breaches of reporting obligations, and particularly when seeking to recover significant sums of money. Having to repay significant monies can have a serious financial impact on party agents. Alternatively, if the proposal to deem political parties as bodies corporate under item (xvi) is adopted, there could be direct financial implications for parties.

Analysis

3.41 The AEC saw merit in moving the focus away from individual officers to political parties. It stated:

> At the present stage the AEC has to [prosecute] individual officers within a political party and associated entities and a donor in relation to any failures. Having penalties offset against public funding entitlements would provide a neater, easier and more cost-effective way to recover any amounts.[21]

3.42 If action is taken against a party agent for noncompliance or recovery of monies—or is able to be taken against the registered political party itself—the AEC proposed:

> A means of recovering those sums while also easing the financial impact could be to offset a sum equivalent to the penalty or monies to be recovered against public funding entitlements. This could be by way of the AEC withholding a proportion of current entitlements for a period, for instance withholding a sum of election funding equivalent to the maximum penalty for failure to lodge an election disclosure return by the due date which will then

21 Mr Paul Pirani, Chief Legal Officer, AEC, *Committee Hansard*, 6 July 2012, Canberra, p. 34.

> only be released if the return is lodged on time. Another method would be to register the sum owed to be offset against future public funding entitlements before their payment. [22]

3.43 The AEC also argued that linking reporting obligations to public funding would be even more effective if an ongoing system of administrative funding to political parties is introduced.[23]

3.44 The committee in its November 2011 report recommended that administrative funding be introduced for registered political parties and Independents—as part of a broader package of proposed funding and disclosure reforms—to assist them to meet the administrative burden of more frequent and detailed disclosure reporting requirements.[24]

3.45 Canada has taken a proactive approach in linking reporting obligations to public funding. The *Electoral Reform Green Paper: Donations, Funding and Expenditure* (Green Paper) noted that Canada has established a range of 'administrative incentives' to encourage compliance. These include the power to withhold the final instalment of election funding where reporting requirements are not met.[25]

3.46 Progressively reimbursing public funding entitlements has been proposed in the 2010 Bill. However, in the 2010 Bill it is not linked to offsetting penalties for noncompliance with disclosure obligations. Rather, the 2010 Bill proposed to allow the AEC to revisit and adjust a final claim for electoral expenditure, and where necessary recover debts to the Commonwealth. It will involve a two-stage process in which the claimant must submit: (1) an interim claim—at which time the claimant would receive 95 per cent of their entitlement; and (2) a final claim—where the claimant would receive the remaining five per cent of their entitlement.[26]

---

22 AEC, *Submission 1*, pp. 14-15.

23 AEC, *Submission 1*, p. 16.

24 JSCEM, *Report on the Funding of Political Parties and Election Campaigns*, November 2011, p. 146.

25 Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, Commonwealth of Australia, p. 70.

26 Explanatory Memorandum, Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010, p. 13; B Holmes, N Horne, and D Spooner, Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010, Bills Digest no. 43 2010-11, Parliament of Australia, pp. 12-13.

Conclusion

3.47 The committee does not support the idea of offsetting financial penalties or potentially withholding public funding. It would add an unnecessary layer of complexity to the public funding process.

3.48 The fact that to pursue a breach of reporting obligations involves prosecuting an individual is an issue warranting review. The difficulties associated with criminal prosecutions of certain funding and disclosure breaches and the potential criminal and financial implications for the individuals need to be considered. However, this issue will be addressed as part of the committee's consideration of measure 16.

Measure 4—Compulsory and timely independent audits

Background

3.49 The Electoral Commissioner, in item (iv), proposed requiring 'the compulsory and timely auditing of all records held by registered parties (and party units), candidates, third parties, etc, by independent auditors (do not include donors)'.

3.50 The AEC has previously recommended in its *Funding and Disclosure Report on the 1996 Federal Election* that 'political party annual returns be accompanied by a report from an accredited auditor'.[27]

3.51 Section 316(2A) of the Electoral Act confers power on the AEC to conduct compliance reviews of federal registered political parties, their state branches and associated entities for the purpose of assessing adherence to the disclosure laws. However, currently the AEC does not have any powers to conduct compliance reviews of candidates and Senate groups. Most candidates incur expenditure and receive donations through the political party itself.

3.52 The 2010 Bill seeks to broaden the investigatory scope of AEC-authorised officers in relation to compliance by extending the list of persons who may be required, by notice, to produce documents or other evidence. For example, candidates and their agents, members of Senate groups and their agents, and those acting on behalf of registered political parties, party

27 AEC, *Submission 1.2*, p. 2.

branches, candidates, groups, and associated entities would be added to the list.[28]

3.53 In November 2011 the committee recommended providing the AEC with 'the power to conduct compliance reviews and serve notices on candidates and Senate groups, in addition to federal registered political parties, their state branches and associated entities'.[29]

Analysis

3.54 In relation to their current compliance review powers under section 316, the AEC stated:

> ... it is impossible for the AEC to achieve a full coverage of compliance returns lodged by political parties and associated entities in the course of 12 months, much less during the window from lodgement in October through January before public release on 1 February. Even with greatly increased resources, both the volume of the task and the complication that audits would be being undertaken over the Christmas/New Year holiday period makes impossible audits being undertaken by a single, central body.[30]

3.55 The AEC suggested that one alternative is to require that returns be audited prior to lodgement. In evidence to the committee, it stated:

> ... the independent auditing of disclosure returns may be worth considering, given the sorts of issues that we have uncovered here. Essentially, there is a lot of work associated with the returns. The ability of the AEC or indeed of any agency to audit every single return, I think, will lead to a significant cost. Here is a potential way of ensuring that donors and others who have an obligation provide information which has been audited.[31]

3.56 The AEC indicated that the onus would be on the person with the reporting obligation to arrange for a suitable auditor. The AEC acknowledged:

---

28 B Holmes et al., Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010, Bills Digest no. 43 2010-11, Parliament of Australia, pp. 23-24.

29 JSCEM, *Report on the Funding of Political Parties and Election Campaigns*, 2011, p. 188.

30 AEC, *Submission 1*, p. 16.

31 Mr Ed Killesteyn, Electoral Commissioner, AEC, *Committee Hansard*, 6 July 2012, Canberra, p. 34.

> If moving in this direction, consideration would need to be given to whether registered auditors need further accreditation as an assurance that they are proficient in the requirements of disclosure under Part XX of the Electoral Act. Such accreditation could be managed by the AEC either through face-to-face training or via the development of an on-line training course. Accreditation would need to be updated every time an important change is made to disclosure requirements.
>
> ... Consideration would also need to be given to whether the AEC should be tasked with exercising a quality assurance function over audit certificates issued on lodged disclosure returns.[32]

3.57 The Green Paper noted Canada, New Zealand and the United Kingdom currently require returns to be accompanied by an auditor's report vouching for their accuracy.[33]

3.58 The AEC acknowledged that requiring auditing before lodgement could have cost implications. For some it may be relatively inexpensive, but large parties with a range of party units may incur significant costs.[34]

Conclusion

3.59 The committee does not support a requirement for compulsory auditing of returns prior to lodgement. Weighed against the potential benefit, such a requirement could place a disproportionate administrative and financial burden on those with reporting obligations.

3.60 The AEC drew attention to the possibility that a system of further accreditation may be required to ensure that auditors are proficient in the disclosure reports of Part XX of the Electoral Act.

3.61 The committee endorses recommendations 28 and 29 in its November 2011 report: to provide the AEC with the power to conduct compliance reviews and serve notices on candidates and Senate groups, in addition to federal registered political parties, their state branches and associated entities; and to make available on the AEC website compliance review reports and details of final determinations.

3.62 The AEC is the body best placed to conduct compliance reviews to ensure that those lodging returns are meeting reporting requirements under the

32 AEC, *Submission 1*, pp. 16-17.

33 Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, Commonwealth of Australia, p. 51.

34 AEC, *Submission 1*, p. 17.

Electoral Act. However, the committee appreciates that there are resourcing pressures on the unit that prevent a review of all returns and those with suspected obligations. In developing its compliance review programs and prioritising reviews, the AEC should take into consideration: ensuring reviews are undertaken on a cross-section of organisations; returns that involve the movement of significant sums; and cases where returns—or the lack of returns—seem to warrant closer examination.

Measure 5—Abolish associated entities

Background

3.63 Previously, the AEC has supported improving the clarity of the definition of associated entities. However, under item (v), the AEC went further and included in its list of matters abolishing 'associated entities' and establishing a third party scheme similar to Canada and the United Kingdom.

3.64 The requirement for annual disclosures by associated entities was introduced in 1995 in recognition that there were organisations with strong links to political parties. At the time this covered entities that were 'controlled' by or operating 'wholly or mainly for the benefit of' a political party. In 2006 the category was expanded to cover 'any entity that, or on whose behalf a person, is a financial member of a political party or has voting rights in a political party'.[35]

3.65 Currently, section 287 of Part XX of the Electoral Act defines an associated entity as:

(a) an entity that is controlled by one or more registered political parties; or

(b) an entity that operates wholly, or to a significant extent, for the benefit of one or more registered political parties; or

(c) an entity that is a financial member of a registered political party; or

(d) an entity on whose behalf another person is a financial member of a registered political party; or

(e) an entity that has voting rights in a registered political party; or

35 AEC, *Submission 1*, pp. 9 and 11.

(f) an entity on whose behalf another person has voting rights in a registered political party.

3.66 Associated entities operating wholly, or to a significant extent, for the benefit of a political party may include: companies or incorporated associations, trusts, unincorporated associations, societies, groups or clubs.

3.67 Associated entities are required to lodge annual returns by 20 October each year. The information to be disclosed includes:

- total receipts and payments, and total debts for the financial year;
- details of amounts received above the disclosure threshold;
- details of outstanding debts above the disclosure threshold; and
- details of capital contributions (deposits) from which payments to a political party were generated.

3.68 In addition, some associated entities who incur political expenditure also have an obligation to lodge a Third Party Return of Political Expenditure.[36]

3.69 The definition of 'associated entity' in the Electoral Act has been, and remains, a source of concern. There are three main weaknesses in the current definition of associated entities:

- it does not capture all groups and organisations that it should (that is, it is under-inclusive);
- it captures groups and organisations that do not have an influence over political party affairs (that is, it is over-inclusive); and
- it results in inconsistencies with some groups and organisations being classified as associated entities, with similar groups and organisations escaping the disclosure obligations (that is, it has a disparate impact).[37]

3.70 The AEC has previously advised that the current definition of an 'associated entity' creates administrative challenges:

> ... imprecision in the second arm of the definition – '*an entity that operates wholly, or to a significant extent, for the benefit of one or more registered political parties*' – complicates its administration. It is also the case that the AEC's interpretation of its practical application

36 AEC, <http://aec.gov.au/Parties_and_Representatives/financial_disclosure/guides/associated-entities.htm>, viewed 20 June 2012.

37 JSCEM, *Report on the funding of political parties and election campaigns*, November 2011, p. 173.

> opens a potential loophole whereby an entity need only prove that a comparatively small proportion of its operations benefit someone other than a political party for it to escape having a disclosure obligation.[38]

3.71 Such definitional weaknesses can result in an inconsistent application of the requirements for associated entities and potentially undermine the aims of the Electoral Act.

3.72 In order to address these concerns, the committee has previously unanimously recommended amending the Electoral Act*:*

> ... to improve the clarity of the definition of 'Associated Entity'. Particular steps that could be taken might include the following:
>
> - Defining 'controlled' as used in section 287(1)(a) to include the right of a party to appoint a majority of directors, trustees or office bearers;
> - Defining 'to a significant extent' as used in section 287(1)(b) to include the receipt of a political party of more than 50 per cent of the distributed funds, entitlements or benefits enjoyed and/or services provided by the associated entity in a financial year; and
> - Defining 'benefit' as used in section 287(1)(b) to include the receipt of favourable, non-commercial arrangements where the party or its members ultimately receives the benefit.[39]

Analysis

3.73 In evidence to the committee, the AEC restated concerns around the current operation of associated entity provisions:

> As has been highlighted in a number of inquiries and complaints received by the AEC, the current test for what is an "associated entity" included an inexact test of "operates wholly, or to a significant extent, for the benefit of one or more registered political parties".[40]

3.74 The AEC observed that under the current provisions in the Electoral Act, registered political parties are not required to identify all associated

38 AEC, Supplementary submission 19.1 to JSCEM Inquiry into the funding of political parties and election campaigns, p. 8.

39 JSCEM, *Report on the funding of political parties and election campaigns*, November 2011, Recommendation 25, p. 176.

40 AEC, *Submission 1.1*, p. 1.

entities which 'operate for their benefits or which have voting rights in their party'. The AEC argued that:

> Accordingly, it is often not clear whether or not a particular organisation is an "associated entity" and it is clearly possible for an organisation to be established in such a way as to avoid being subject to the operation of the existing provisions and yet have a significant impact on the electoral processes.[41]

3.75 In its submission to the current inquiry the AEC questioned the value of retaining the category of associated entity, and contended that disclosure by groups could operate effectively as part of third party arrangements. The AEC submitted:

> The primary policy aim behind any disclosure scheme is that electors should be informed of the sources of funds used in an election campaign so as to inform their decisions about who to vote for on polling day. Applying this policy aim to the disclosures by all of the players in an election campaign suggests that the distinction between a third party incurring political expenditure and an "associated entity" would be of little, if any, utility to electors making a decision about how to vote for on polling day.[42]

3.76 Further, the AEC argued that:

> This is particularly the case given that the current disclosure obligations differ so markedly between an "associated entity" and a third party incurring political expenditure. On the one hand the third party disclosure obligation is targeted at matters that related to the conduct of an election campaign. This is to be contrasted with the current disclosure obligation that is placed on an "associated entity" which includes all payments, revenue and debts irrespectively of whether or not they related to an election campaign. In general terms, the experience of the AEC is that for registered organisations (e.g. trade unions), the majority of the payments made and revenue raised relate to their primary activities under industrial law.[43]

3.77 The AEC asserted that:

> The provisions under 287(1)(b) have a fairly high benchmark. This is one of the reasons we put forward the idea to the committee is

41 AEC, *Submission 1.1*, p. 1.

42 AEC, *Submission 1*, pp. 17-18.

43 AEC, *Submission 1.1*, p. 2.

> to consider moving to a third-party registration scheme. That would mean so that you would not get into these subjective assessments of whether an organisation is an associated entity or not.[44]

3.78 The proposed approach has the potential to bypass the ongoing arguments about whether certain organisations are associated entities. At the public hearing on 6 July 2012, the AEC stated:

> We have long arguments in relation to whether particular agencies are associated entities. We have had ongoing arguments about Coastal Voice. Other arguments have been raised about GetUp! One matter that we are suggesting is worthy of consideration is that we simply move to a third-party registration scheme, which would avoid all of the arguments. Essentially, they are subjective arguments and a third-party registration scheme would clearly result in additional work but may avoid some of the subjective issues associated with assessing whether an agency is an associated entity.[45]

3.79 When questioned by the committee, the AEC outlined the following advantages of abolishing 'associated entities' and establishing a new third party scheme:

- clarity of information available to electors;
- harmonisation of the disclosure requirements;
- clarity as to who will have a reporting obligation;
- potential for "campaign accounts" to be specified at the time of registration to assist in reporting and disclosure to electors;
- the ability for the Parliament to set an expenditure threshold for amounts of electoral expenditure that are regarded as material before a registration requirement arises.

3.80 The AEC also outlined the following disadvantages, which would include:

- the potential that some third parties may not recognise that certain activities are related to the conduct of an election requiring their prior registration before the expenditure is incurred;
- additional compliance costs, as consequences of increased numbers of organisations and individuals that could be

44 Mr Ed Killesteyn, Electoral Commissioner, AEC, *Committee Hansard*, 16 July 2012, Canberra, p. 20.

45 Mr Ed Killesteyn, Electoral Commissioner, AEC, *Committee Hansard*, 6 July 2012, Canberra, p. 34.

captures by the scheme. Again this would be affected by any disclosure threshold.[46]

3.81 The AEC acknowledged that a third party registration scheme would bring in more organisations. This would increase the resources needed by organisations to understand and comply with their obligations and by the AEC to monitor these organisations.[47]

3.82 Table 3.1 sets out the current disclosure requirements for associated entities and third parties.

Table 3.1 Disclosure requirements for associated entities and third parties

	Associated entities	**Third parties**
Type of return	Associated Entity Disclosure Return	Third Party Return of Political Expenditure
Due date	16 weeks after the end of the financial year	20 weeks after the end of the financial year
Items to be disclosed	- total receipts - details of amounts received that are more than the disclosure threshold - total payments - total debts as at 30 June - details of debts, outstanding as at 30 June that total more than the disclosure threshold - details of capital contributions (deposits) from which payments to a political party were generated	- political expenditure incurred for one or more of the five specified purposes listed in section 314AEB(1)(a) (the disclosure threshold applies) - gifts received, that were used to incur such political expenditure (gifts from the same person or entity are cumulative for disclosure threshold purposes)
Who is responsible for lodging the return	Financial controller of the associated entity	A person or entity incurring political expenditure or receiving gifts that were used for political expenditure purposes

Source *AEC, Financial Disclosure Guide for Associated Entities: 2011-12 financial year, p. 6; and Financial Disclosure Guide for Third Parties incurring Political Expenditure: 2011-12 financial year, pp. 6-7.*

46 AEC, *Submission 1.1*, p. 2.

47 Mr Ed Killesteyn, Electoral Commissioner, AEC, *Committee Hansard*, 16 July 2012, Canberra, p. 20.

Canada and UK third party arrangements

3.83 In comparing Australia's arrangements with international approaches, the AEC observed:

> The overseas approach has generally been to require any third party who incurs political expenditure during an election campaign over a set threshold to be registered with the relevant electoral management body before that expenditure is incurred. This enables their campaign accounts to be reported against in a manner that enables electors to be fully informed as to those parts of the business of the third party which are involved in seeking to influence the outcome of an election.[48]

3.84 The AEC has suggested that developing third party arrangements based on Canadian and UK practices is an option for Australia to consider.

3.85 In Canada, the *Canada Elections Act* regulates third parties who engage in election advertising. A third party can be an individual or a group, with the latter including an unincorporated trade union, trade association, corporation or a group of people acting together for a common purpose.[49]

3.86 When an individual or group spends more than $500 on election advertising, they are required to register as a third party with the Chief Electoral Officer of Elections Canada. If less than $500 is spent on the election advertising, the responsible individual or group does not need to register as a third party, but must identify themselves on the advertising material as having authorised the advertisement. Certain limits apply to third parties depending on whether the advertising supports or opposes a specific candidate or political party.[50]

3.87 A registered third party is required to report its election advertising expenses within four months after the relevant Election Day. For a general election the report must include the times and places of the broadcasts or publication of advertisements, indicating (1) promotion of or opposition to one or more candidates in a given electoral district (to which a $3 000 limit applies), and (2) all other electoral advertising expenses.[51]

---

48 AEC, *Submission 1*, pp. 17-18.

49 *Canada Elections Act*, ss. 319, 349 and 353.

50 Elections Canada, <http://www.elections.ca/content.aspx?section=pol&document=index&dir=thi/que&lang=e>, viewed 20 June 2012.

51 Elections Canada, <http://www.elections.ca/content.aspx?section=pol&document=index&dir=thi/que&lang=e>, viewed 20 June 2012.

3.88 In the United Kingdom, third parties are 'individuals or organisations other than political parties or candidates which campaign at an election'.[52] Different electoral laws apply depending on whether the campaign is for or against an individual candidate, political party or issue. Strict expenditure limits apply to candidate based campaigns under section 75 of the UK *Representation of the People Act 1983*. No returns are required and there are no controls on their donations or loans.[53]

3.89 Election campaigning for or against a political party or issue is regulated under the UK *Political Parties, Elections and Referendums Act 2000*. Spending is regulated for a year ending with the date of poll for UK Parliamentary general elections and for four months preceding an election for the other types of regulated elections. Section 87 of that Act provides:

> (2) "Controlled expenditure", in relation to a third party, means (subject to section 87) expenses incurred by or on behalf of the third party in connection with the production or publication of election material which is made available to the public at large or any section of the public (in whatever form and by whatever means).

3.90 After an election third parties must submit a spending return to the UK Electoral Commission. There are restrictions on the amount of donations third parties can receive, when it is to be directed to 'controlled expenditure', and the donor must be a 'permissible donor', as provided in Part II of that Act.[54]

3.91 The AEC noted that the Canadian and UK third party registration process 'appears to only operate during an election period'. The AEC explained that this is because the requirement relates to expenditure caps that apply only during election periods.[55]

3.92 The committee questioned the AEC as to what features of the Canadian and UK arrangements it saw as being applicable in the Australian context. The AEC outlined the following as specific features that could be included in a redesign of Australian arrangements:

---

52 The Electoral Commission, UK, < http://www.electoralcommission.org.uk/party-finance/legislation/third-partiespermitted-participants/third-parties>, viewed 20 June 2012.

53 The Electoral Commission, UK, < http://www.electoralcommission.org.uk/party-finance/legislation/third-partiespermitted-participants/third-parties>, viewed 20 June 2012.

54 The Electoral Commission, UK, < http://www.electoralcommission.org.uk/party-finance/legislation/third-partiespermitted-participants/third-parties>, viewed 20 June 2012.

55 AEC, *Submission 1.1*, p. 3.

- The harmonisation of disclosure requirements (i.e. the same for political parties, candidates, third parties) that are linked to electoral expenditure;
- The establishment of a prior registration requirement for any person or organisation (excluding candidates and registered political parties) who intend to incur electoral expenditure;
- A requirement to nominate a "campaign account" to the AEC at the time of registration and any electoral expenditure can only be lawfully incurred from funds available in that account;
- An expenditure threshold before third party registration is required. ...
- Loans that are used to incur political expenditure should be disclosed.[56]

3.93 The AEC acknowledged that a third party approach such as that in Canada broadens the groups covered and moves the focus away from groups that have a significant connection with a given political party or candidate. This was discussed at the hearing on 16 July 2012:

> **Senator RYAN:** But there is a very big difference between the current associated entity test, which talks about political parties, and a third-party registration regime that is broad enough to capture political entity, isn't there? They are two very different concepts, aren't they?
>
> **Mr Pirani:** We acknowledge that.
>
> **Mr Killesteyn:** They are different concepts, but we are suggesting that the concept of 'associated entity' is not working as well as—
>
> **Senator RYAN:** To further the point put by Mr Griffin, the intent of this is to disclose the activities of political parties and the groups that are in orbit around them, for lack of a better way of putting it. A third-party regime such as that in Canada captures groups that are in no way operating to a significant or other extent for the benefit of one or more registered political parties.
>
> **Mr GRIFFIN:** Or maybe doing so in a manner which is a little less transparent.
>
> **Senator RYAN:** Groups that are getting involved in the political process, to use your phrase.
>
> **Mr Killesteyn:** That is true; we acknowledge that.[57]

56 AEC, *Submission 1.1*, p. 3.

57 *Committee Hansard*, 16 July 2012, Canberra, p. 20.

3.94 In relation to setting thresholds before third party registration is required, the AEC noted how this operates in some Australian state jurisdictions and internationally:

> The AEC notes that in NSW, the registration of "third party campaigners" under sections 38A to 38D of the *Electoral Funding, Expenditure and Disclosures Act 1981* has a threshold of $2,000 of electoral communication expenditure before registration is required. In Queensland the registration of third parties takes place under section 297 of the *Electoral Act 1992* and has a threshold of $200. In Canada, section 353 of the *Canada Elections Act 2000* provides for the registration of third parties who incur electoral advertising expenses after the issuing of the writs for an election with a threshold of $500 (Canadian dollars). In the United Kingdom, Part VI of the *Political Parties, Elections and Referendums Act 2000* deals with the registration of third parties and section 86 includes a threshold of £200.[58]

Conclusion

3.95 In this and previous inquiries it has been apparent that the category of 'associated entity', as defined in section 287 of the Electoral Act, lacks clarity.

3.96 At various hearings during the course of this parliament, time was spent debating whether specific organisations should be classified an associated entities for the purposes of disclosure reporting requirements. The AEC made judgments based on the current definition, but it was argued by some that certain groups should be classified as associated entities as they have significant links to political parties or candidates.

3.97 It is clear that the current associated entities provision does create confusion. This is problematic as it could result in the aims of the category not being met and an inconsistent application of which groups are included in the category for disclosure purposes.

3.98 If the category of associated entity was abolished this could mean simply requiring all organisations to come under the third party requirements rather than having a discrete category for associated entities. Or there could be a redesign of the current third party system, drawing on features from international approaches, such as the Canadian and UK requirement

58 AEC, *Submission 1.1*, p. 3.

for third parties to register with the electoral commission if they intend to incur political expenditure above a certain threshold.

3.99 A system of pre-registration of third parties would be administratively beneficial in assisting the AEC to identify those with reporting obligations. However, the AEC would still need to monitor that obligations were being met, ensure that individuals and organisations know about the requirement, and identify and take action against those who fail to do so.

3.100 As Table 3.1 reflects, the disclosure required by associated entities is more detailed than that required of third parties incurring political expenditure. This is appropriate as the intention of the third party arrangements are to capture movements of funds by people and organisations that are not necessarily linked to political parties or candidates but are playing a financial role in the political arena.

3.101 Having associated entities come under the broader third party arrangements would mean that some transparency is being lost in the disclosure by entities that are recognised as being closely linked to specific political parties or candidates.

3.102 On balance, the committee believes that work should be done to improve the clarity of the current definition of an associated entity rather than abolish the category. This should involve revisiting the intent of the category, entities that should be covered, and addressing any loopholes that may exist.

3.103 The committee endorses recommendation 25 of its November 2011 report to improve the clarity of definition of 'associated entity'. This clarification requires detailed consideration to target some of the current problems hampering the operation of this category for disclosure purposes.

Recommendation 3

3.104 **The committee recommends that the *Commonwealth Electoral Act 1918* be amended to improve the clarity of the definition of 'Associated Entity'. Changes could include:**

- **Defining 'controlled' as used in section 287(1)(a) to include the right of a party to appoint a majority of directors, trustees or office bearers;**
- **Defining 'to a significant extent' as used in section 287(1)(b) to include the receipt of a political party of more than 50 per cent**

of the distributed funds, entitlements or benefits enjoyed and/or services provided by the associated entity in a financial year; and

- **Defining 'benefit' as used in section 287(1)(b) to include the receipt of favourable, non-commercial arrangements where the party or its members ultimately receives the benefit.**

Measure 6—Dedicated campaign accounts

Background

3.105 Under item (vi), the Electoral Commissioner proposed requiring 'that electoral expenditure can only come from specific and dedicated campaign accounts into which all donations must be deposited that have been nominated to the AEC and which can be "trawled" by the Australian Transaction Reports and Analysis Centre (AUSTRAC)'. This would also require the *Financial Transactions and Report Act 1988* to be amended to include these campaign accounts.

3.106 Electoral expenditure is defined under subsection 308(1) of the Electoral Act as encompassing a very specific list of categories. The proposal to expand the categories within the definition is discussed in the section on item (xv).

3.107 The *Financial Transactions and Report Act 1988* provides for the reporting of certain transactions and transfers to AUSTRAC and imposes certain obligations in relation to accounts.

Analysis

3.108 The AEC argued that from an electoral administrative and monitoring perspective, there are benefits to having dedicated campaign accounts. It stated:

> The practice of campaign accounts is used overseas; it is certainly a practice used in Canada. It is a mechanism for ensuring that all donations and all expenditure flow through a single account,

> which makes it much easier for audits and compliance to be determined.[59]

3.109 The AEC argued that requiring the use of a dedicated account for campaign donations and expenditure would 'greatly enhance accountability'. The AEC submitted:

> With a dedicated campaign account there can be no doubt as to what the total cost of an election campaign was and how it was funded. It would make disclosure a simpler task, while it also becomes easier to identify possible omissions from that record, as the election disclosure record should reconcile back to the campaign account.[60]

3.110 The AEC also stated that it would be necessary to articulate if the AEC is to play a role in conducting compliance reviews and investigations of campaign accounts, as this could 'potentially be a very resource intensive role to fulfil'.[61]

3.111 Both New South Wales and Queensland have introduced measures to more directly regulate the management of campaign finances in recent years.

3.112 From 2008 New South Wales has required candidates and groups to register with the Election Funding Authority before being able to accept donations. They are also required to appoint and register an official agent and must have a campaign account before receiving or spending $1 000 or more for an election. All donations must be paid into the campaign account of the party, group or candidate, and all electoral expenditure must be paid from the campaign account, to ensure that political donations are used for legitimate purposes.[62]

3.113 Similarly, from 2011 Queensland has required that all political parties, candidates and third parties establish and maintain a dedicated state campaign account.[63]

---

59 Mr Ed Killesteyn, Electoral Commissioner, AEC, *Committee Hansard*, 6 July 2012, Canberra, p. 34.

60 AEC, *Submission 1*, p. 18.

61 AEC, *Submission 1*, p. 18.

62 JSCEM, Report on the Funding of Political Parties and Election Campaigns, 2011, p. 25.

63 JSCEM, Report on the Funding of Political Parties and Election Campaigns, 2011, p. 29.

Conclusion

3.114 The committee does not support requiring dedicated campaign accounts. While introducing dedicated campaign accounts may assist the AEC in monitoring donations and electoral expenditure, this benefit is likely to be disproportionate to the considerable administrative burden it would place on those involved.

Measure 7—Electronic lodgement of returns

Background

3.115 The Electoral Commissioner, at item (vii) on the list of possible measures, proposed requiring 'the electronic lodgement of all returns to the AEC (with the power for the Electoral Commissioner to grant some exceptions)'.

3.116 In the Green Paper, the timely publication of returns in the United States and the United Kingdom is attributed to 'their systems of mandatory electronic record keeping and lodgement'.[64]

3.117 The AEC noted that disclosure was introduced in 1984 before there was widespread use of computers or online technology. In the past the AEC has met its section 320 requirement (to make copies of claims and returns available for public inspection) by making hard copies available for public inspection at AEC offices. Since the 1998 to 1999 reporting period, the AEC has been entering the information from returns into an electronic database, and making scanned copies of returns available on the AEC website.

3.118 In July 2010 the AEC introduced the eReturns system, a secure online lodgement facility for election and annual returns. Clients have a logon, and can regularly update their records before completing and submitting their returns. Spreadsheets and other relevant documentation can also be attached. Once it is lodged, the material becomes available to the AEC.

3.119 More than 40 per cent of 2009-2010 annual returns and 2010 federal election returns were lodged electronically. However, that still leaves a significant amount of data contained in other returns that still must be entered by AEC staff. The AEC submitted:

64 Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, Commonwealth of Australia, p. 55.

> This is a lengthy and expensive exercise for the AEC and is simply not practical if timely turnarounds in placing information from lodged returns on the internet are required.[65]

Analysis

3.120 The AEC has indicated that electronic lodgement of returns would provide administrative efficiencies in the processing and publication of returns.[66] The AEC stated:

> If more timely disclosure becomes a requirement, and especially if accompanied by a requirement for the AEC to release that information to its website in a timely manner, then electronic lodgement of disclosure information must be mandatory. Otherwise the objective of timely disclosure could be frustrated by the inevitable delay caused by the AEC needing to manually input the information into a database. Electronic lodgement would allow disclosure information to be released to public scrutiny almost immediately if so desired.[67]

3.121 In addition, electronic lodgement would also provide efficiency benefits in the conduct of compliance reviews. The AEC stated:

> During 2009 and 2010 the AEC requested records electronically, where they existed, and undertook increasing amounts of analysis electronically on a dedicated secure network at the AEC's National Office in Canberra. From 2011 the AEC will undertake all reviews electronically where such records exist (almost all parties and associated entities use electronic accounting packages). Electronic records allow for compliance reviews to be undertaken at the AEC's premises, with less disruption to the political parties and associated entities, resulting in more comprehensive, efficient and cost effective reviews.[68]

3.122 In its *Election Funding and Disclosure Report* on the 2010 federal election, the AEC recommended:

> In the event of electoral reform increasing the frequency of periodic reporting, reducing the disclosure threshold and reducing the timeframe for political parties to lodge periodic returns, and

65 AEC, *Submission 1*, p. 19.

66 AEC, *Election Funding and Disclosure Report: Federal Election 2010*, 2011, Commonwealth of Australia, p. 16.

67 AEC, *Submission 1*, p. 19.

68 AEC, *Election Funding and Disclosure Report: Federal Election 2010*, 2011, p. 43.

> for the AEC to make them publicly available, the Act be amended to require political parties and associated entities to lodge disclosure returns electronically.[69]

3.123 Receiving returns electronically would be an essential part of the development of a system of contemporaneous disclosure. The committee, in its November 2011 report, unanimously recommended:

> ... that the Australian Electoral Commission investigate the feasibility and requirements necessary to implement and administer a system of contemporaneous disclosure and report back to the Special Minister of State by 31 March 2012.[70]

3.124 The AEC has since made a submission to the Special Minister of State on the feasibility of contemporaneous disclosure, which the Minister is considering.

Conclusion

3.125 The committee supports introducing the requirement that returns be lodged electronically with the AEC. It would improve the transparency and efficiency of the disclosure system. It also appropriate for the Electoral Commissioner to be able to grant exceptions in limited circumstances where electronic submission may place an unreasonable burden on those lodging the return. For example, in the case of an individual one-off donor without convenient access to facilities to lodge an electronic return.

3.126 As the committee has indicated in previous reports, it supports a move to more timely disclosure, and potentially contemporaneous disclosure. The electronic lodgement of returns will be an important step towards achieving this.

Recommendation 4

3.127 **The committee recommends that the *Commonwealth Electoral Act 1918* be amended to require the electronic lodgement of returns with the Australian Electoral Commission. The Electoral Commissioner should be able to grant exemptions to this requirement in limited circumstances.**

---

69 AEC, *Election Funding and Disclosure Report: Federal Election 2010*, 2011, p. 70.

70 JSCEM, *Report on the funding of political parties and election campaigns*, November 2011, p. 67.

Measure 8—Extending the period for retaining records

Background

3.128 Under item (viii), the Electoral Commissioner proposed that 'the period for the retention of records in section 317 and related offence in section 315(2)(b) be increased to 7 years'.

3.129 Section 317 states that records pertaining to an election claim or return must be retained for three years:

> ***317 Records to be kept***
>
> *Where, on or after the commencement of Part 3 of the Political Broadcasts and Political Disclosures Act 1991, a person makes or obtains a document or other thing that is or includes a record relating to a matter particulars of which are, or could be, required to be set out in a claim or return under this Part relating to an election, not being a record that, in the normal course of business or administration, would be transferred to another person, the first mentioned person must retain that record for a period of at least 3 years commencing on the polling day in that election.*

3.130 Subsection 315(2)(b) stipulates that where a person fails to retain records for three years in accordance with section 317, 'the person is guilty of an offence punishable, upon conviction, by a fine not exceeding $1 000'.

3.131 The time period in which action can be taken on this offence is outlined in section 315(11):

> *A prosecution in respect of an offence against a provision of this section (being an offence committed on or after the commencement of this subsection) may be started at any time within 3 years after the offence was committed.*

Analysis

3.132 The AEC observed that the three year period in which action can be taken for a breach of the requirement to retain records correlates to the normal electoral cycle. However, the AEC argued that the three year requirement in relation to records can be problematic:

> Allegations of offences against the disclosure provisions of the Electoral Act have on occasion stretched back to events and transactions more than three years prior. In these circumstances

> records which may provide important evidence no longer need to be retained, and so do not need to be presented for examination. This can undermine the success of any inquiries into these matters.[71]

3.133 The AEC maintains that a record retention period of seven years—as is applied to records for taxation purposes—would provide more 'flexibility for inquiries and investigations into possible contraventions of the disclosure provisions of the Electoral Act'.[72]

3.134 The AEC drew the committee's attention to the fact that section 317 covers election returns and does not extend to annual returns. The AEC stated:

> This situation has arisen because this section was not updated at the time that disclosure moved from an entirely election based scheme to one that now has its major emphasis on annual returns.
>
> This apparent oversight means that there is no requirement to retain any records that support the disclosures made in annual returns. Even without an extension to the retention period, there is a need to bring records that support annual disclosure returns under coverage of s.317.[73]

3.135 Further, the AEC explained that:

> The reason why these two recommendations [measures 8 and 10] are linked is because the status of the offence has an impact on the time period in which a prosecution can be commenced.[74]

Conclusion

3.136 Australia's funding and disclosure system relies on individuals and organisations disclosing money received and spent relating to their activities in the political arena. Accordingly, their ability to accurately disclose, and for the AEC to be able to check that they are complying with the relevant Electoral Act obligations, is dependent on the accuracy and retention of financial records.

3.137 There can be considerable time lags between when certain donations or gifts were received or expenditure incurred, and the lodgement of election and annual returns. It is important that those with reporting obligations be

71 AEC, *Submission 1*, p. 20.
72 AEC, *Submission 1*, p. 20.
73 AEC, *Submission 1*, pp. 20-21.
74 AEC, *Submission 1.1*, p. 3.

required to retain records to help ensure that the AEC can effectively undertake any necessary compliance reviews or investigations.

3.138 The proposed extended period of seven years would not apply to the other offences in section 315, such as a failure to lodge a return or providing false or misleading material for the purposes of a return. The AEC indicated that the prosecution period for fraud related offences under section 315 are to be addressed as part of measure 10, which proposes increasing criminal penalties for these offences.

Recommendation 5

3.139 **The committee recommends that the *Commonwealth Electoral Act 1918* be amended to increase the period for the retention of records in section 317 and related offence in section 315(2)(b) to seven years.**

Measure 9—Failure to make a record for disclosure purposes

Background

3.140 Item (ix) of the AEC's list of matters is also related to disclosure records. The Electoral Commissioner proposed a new offence be inserted into the Act for a 'person who fails to make records to enable complete and accurate disclosure'.

3.141 While section 315(2)(b) makes not retaining a record an offence, no penalty applies to a person who fails to make a record.[75] The AEC has previously suggested that the Electoral Act be amended to provide a penalty for a person who fails to make a record.

3.142 The AEC indicated that it has been seeking to address this issue for some time, outlining relevant recommendations it has made in its funding and disclosure reports on the 1993, 1998 and 2010 federal elections. The AEC stated:

> A series of recommendations has been made in relation to this matter. Recommendation 18 of the AEC's *Funding and Disclosure Report on the 1993 Federal Election* was that: 'persons required to

75 AEC, *Election Funding and Disclosure Report: Federal Election 2010*, 2011, p. 27.

furnish returns under Part XX be required to make and maintain such records as are necessary to enable them to comply with the disclosure requirement of the Act'.

This was followed by Recommendation 5 of the AEC's *Funding and Disclosure Report on the 1998 Federal Election* which was that: 'persons who fail to make or maintain such records as enables them to comply with the disclosure provisions of the Act be subject to the same penalty provisions as apply to persons who fail to retain records'.

Most recently, Recommendation 15 of the AEC's *Funding and Disclosure Report on the 2010* was that 'the Act be amended to provide a penalty for a person who fails to make records to enable complete and accurate disclosure'.[76]

Analysis

3.143 The AEC noted that the Electoral Act 'does not demand any minimum standards of record keeping'. The AEC suggested that this has implications for those attempting to discharge their reporting obligations, and in the conduct of compliance reviews or more serious investigations of possible offences.[77]

3.144 The AEC claimed that reviews and investigations 'can be effectively frustrated by inadequate records'.[78] The AEC stated:

> Where the records are deficient in establishing evidence of the financial dealings of a person/entity with a disclosure responsibility, it undercuts the purpose of any requirement for records to be retained. Provisions need to work together to first ensure that adequate records are created/maintained and that those records are then retained for a minimum period of time as evidence of disclosures made.[79]

76 AEC, *Submission 1.2*, p. 3.
77 AEC, *Submission 1*, p. 21.
78 AEC, *Submission 1*, p. 21.
79 AEC, *Submission 1*, p. 21.

Conclusion

3.145 As indicated in the committee's response to measure 8, the accuracy of records is important for disclosure purposes. In addition to retaining records for a reasonable period, it is essential that individuals and organisations make accurate records in relation to disclosure obligations.

3.146 Unless the necessary records are made, individuals and those responsible for reporting in organisations may not be able to meet their disclosure obligations. Further, the AEC will be hampered in the event that compliance reviews or investigations need to be undertaken.

Recommendation 6

3.147 **The committee recommends that the *Commonwealth Electoral Act 1918* be amended to insert an offence for a person who fails to make records to enable complete and accurate disclosure.**

Measure 10—Criminal penalties for fraud offences

Background

3.148 The Electoral Commissioner, under list item (x), proposed increasing the 'relevant criminal penalties that are fraud related'.

3.149 It is central to a successful penalty regime that the penalty is proportional to the offence and that the penalty can be enforced. The AEC submitted:

> The financial penalties in Part XX of the Electoral Act have not been increased since they were introduced (in many cases that means there has been no increase since 1984). ... That these penalties have not been updated has eroded their value not only in simple present dollar terms but also in terms of their deterrence value and their relative severity to other Commonwealth offences.[80]

3.150 Submitting a false or misleading claim or return to an AEC agent is an offence under sections 315. A political agent lodging a false or misleading

80 AEC, *Submission 1*, p. 22.

return is committing an offence punishable by a $10 000 fine. A person (not a political agent) who makes a false or misleading claim is committing an offence punishable by a $5 000 fine. Providing a person who is making a claim with false or misleading material is an offence punishable by a $1 000 fine. Providing a person making a return with false or misleading material is an offence punishable by a $1 000 fine. Section 315 provides:

315 Offences

... (3) Where the agent of a political party or of a State branch of a political party lodges a claim under Division 3, or furnishes a return that the agent is required to furnish under Division 4, 5 or 5A, that contains particulars that are, to the knowledge of the agent, false or misleading in a material particular, the agent is guilty of an offence punishable, upon conviction, by a fine not exceeding $10,000.

(4) Where a person (not being the agent of a political party or of a State branch of a political party) lodges a claim under Division 3, or furnishes a return that the person is required to furnish under Division 4 or 5, that contains particulars that are, to the knowledge of the person, false or misleading in a material particular, the person is guilty of an offence punishable, upon conviction, by a fine not exceeding $5,000 ...

(6A) A person shall not give to another person, for the purpose of the making by that other person of a claim under Division 3, information that is, to the knowledge of the first mentioned person, false or misleading in a material particular.

Penalty: $1,000.

(7) A person shall not furnish to another person who is required to furnish a return under Division 4, 5 or 5A information that relates to the return and that is, to the knowledge of the first mentioned person, false or misleading in a material particular.

Penalty: $1,000. ...

(11) A prosecution in respect of an offence against a provision of this section (being an offence committed on or after the commencement of this subsection) may be started at any time within 3 years after the offence was committed.

3.151 The AEC maintains that the criminal prosecution of offences is a 'timely and costly process'.[81] A person must be pursued for prosecution by the CDPP and convicted in a court for a penalty to be imposed. On conviction, the courts are also able to order the reimbursement to the Commonwealth of a wrongfully obtained payment.

3.152 The Green Paper made the observation that Australia's approach to electoral regulation can be categorised as 'all carrots, no stick'.[82] The Joint Select Committee on Electoral Reform report in 1983 recommended that suitably severe penalties be attached to the 'wilful filing of false or incorrect returns'.[83]

3.153 In the 2010 Bill the Government proposed strengthening the funding and disclosure penalty regime. In its November 2011 report, the committee supported the measures:

> The committee recommends that the penalties in relation to offences that are classified as more 'serious' should be strengthened along the lines proposed in the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010.[84]

3.154 In the 2010 Bill imprisonment and increased monetary penalties are proposed for offences relating to false or misleading information and failure or refusal to comply with notices. The 'reasonable excuse' defence for the noncompliance offences will also be repealed. As discussed, failure to furnish a return, furnishing an incomplete return, failure to retain records, and failure to comply with a notice will no longer be offences of strict liability and will instead be treated as administrative breaches by the AEC. The key proposed changes are outlined below:

> **Item 98** repeals subsection 315(1) to (4) and substitutes **new subsections 315 (1) to (4C).**
>
> **New subsections 315 (1) to (4**) provide that a person will commit an offence for failure to furnish a return, furnishing a return that is incomplete or failing to keep records as required under section 317. The maximum penalty is increased to 120 penalty units ($13 200).

81 AEC, *Election Funding and Disclosure Report: Federal Election 2010*, 2011, p. 26.

82 Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, Commonwealth of Australia, p. 19.

83 Joint Select Committee on Electoral Reform, First Report, September 1983, Commonwealth Parliament of Australia, p. 168.

84 JSCEM, *Report on the funding of political parties and election campaigns*, November 2011, p. 186.

Item 98 repeals the provisions that applied strict liability to the offences, which means that all elements of the offences have to be proved, potentially making prosecutions more difficult.

New subsections 315 (4A), (4B) and (4C) provide for offences where a person furnishes a claim or a return that the person knows is false or misleading in a material particular; or knows the claim or return has an omission that makes the claim or return false or misleading; or makes a record about an activity connected with permitted anonymous gifts and knows that the record is false or misleading. The penalty will be 2 years imprisonment or 240 penalty units (or both) for a false or misleading claim conviction, or 12 months imprisonment or 120 penalty units (or both) for a false or misleading particulars offence.

Item 100 provides for a significant increase in the penalty for an offence against subsection 315(6A) where a person gives false or misleading information to another person making a claim under Division 3. The maximum penalty is increased from $1 000 to imprisonment for 2 years or 240 penalty units (or both).

Offences are created (**Item 102)** for the unlawful receipt of a donation in new **subsections 315(10A), (10B) and (10D)**, and also for incurring unlawful expenditure under **new subsections 306AD(1) or (2) or 306AJ(1) or (2) [new subsection 315(10E)]**. These carry the penalty of imprisonment of 12 months or 240 penalty units, or both.[85]

Analysis

3.155 The offences under section 315 of the Electoral Act are currently 'summary offences', which are punishable by not more than 12 months imprisonment. These are usually regarded as less serious offences. The AEC noted:

> Under section 15B of the *Crimes Act 1914* the usual limitation period for commencing a prosecution for such offences is within one year of the commission of the offence.[86]

3.156 Further, the AEC noted that there is 'no such limitation on the commencement of a prosecution for an indictable offence'.[87]

---

85 B Holmes et al., Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010, Bills Digest no. 43 2010-11, Parliament of Australia, pp. 16-17.

86 AEC, *Submission 1.1*, p. 3.

3.157 In the AEC analysis on the FWA report, when considering the period in which prosecutions must commence, the AEC observed:

> As the three disclosure returns completed by Ms Jackson were received by the AEC on 13 October 2009, the three year limitation period in subsection 315(11) of the Electoral Act has not expired. However, in relation to the return lodged by the candidate agent for Mr Thomson and the ALP NSW Branch returns, the three period to commence any prosecution has expired.[88]

3.158 In evidence to the committee during the inquiry into the funding of political parties and election campaigns, the AEC submitted:

> The AEC notes that the Act contains a 3 year limitation placed on commencing prosecution action. Under subsection 315(11) of the Act prosecutions for offences against the funding and disclosure provisions must be commenced within three years of the offence being committed. In practical terms (particularly due to the post event reporting of matters), this means, in some instances, that by the time the AEC becomes aware of a possible breach and/or conducts inquiries to accumulate sufficient evidence to warrant the preparation of a brief of evidence, there is no opportunity to pursue prosecution action. The can leave the AEC with no ability to enforce a correction to the public record.
>
> However, the AEC notes that the general provision in section 4H of the *Crimes Act 1914* for commencing criminal proceedings for a summary offence is only 12 months. Accordingly, the level of the offences impacts on the time in which proceedings must be commenced.[89]

3.159 The AEC noted that Parliament has already 'extended the normal timeframe for commencing a prosecution for an offence under Part XX of the Electoral Act from the usual one year of the offence being committed to three years'.[90]

---

87 AEC, *Submission 1.1*, p. 3.

88 AEC, *Reporting obligations under the Commonwealth Electoral Act 1918 and the Report of the Delegate to the General Manager of Fair Work Australia*, p. 18.

89 AEC, Submission 19.1 to JSCEM inquiry into the funding of political parties and election campaigns, p. 3.

90 Australian Electoral Commission, *Reporting obligations under the Commonwealth Electoral Act 1918 and the Report of the Delegate to the General Manager of Fair Work Australia,* May 2012, p. 18.

3.160 The AEC surmised that the current three year period for commencing prosecution of offences under Part XX of the Electoral Act relates to the normal election cycle. The AEC submitted:

> This suggests that the original intention of the Parliament was that the resolution of any criminal proceedings could be resolved prior to the next election where voters would be able to express their view by the way that they cast their ballots.[91]

3.161 The AEC has listed as a matter for consideration increasing the relevant criminal penalties under Part XX of the Electoral Act for fraud related offences. When considering what penalties may be appropriate for funding and disclosure purposes, the AEC submitted:

> Similar fraud offences under 7.3 of the *Criminal Code Act 1995* carry penalties ranging from 12 months imprisonment to up to 10 years imprisonment. The actual level of any penalty would need to be considered against the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* issued by the Attorney-General's Department.[92]

Conclusion

3.162 The committee supports stronger penalties for fraud related offences in the funding and disclosure requirements of the Electoral Act. This should provide a greater deterrent to individuals and organisations who deliberately attempt to mislead the AEC and Australian electors about relevant donations, gifts or expenditure.

3.163 The committee endorses recommendation 27 in its November 2011 report 'that the penalties in relation to offences that are classified as more "serious" should be strengthened along the lines proposed in the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010'. It is appropriate that fraud related offences should be categorised among the more 'serious' breaches against the Electoral Act.

91 AEC, *Submission 1.1*, p. 4.

92 AEC, *Submission 1.1*, p. 4.

Recommendation 7

3.164 **The committee recommends that the penalties in relation to offences that are classified as more 'serious' should be strengthened along the lines proposed in the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010. Fraud related offences should be treated as serious offences for the purposes of the *Commonwealth Electoral Act 1918*.**

Measure 11—Frequency of expenditure reporting

Background

3.165 Under item (xi), the Electoral Commissioner proposed 'more frequent reporting of relevant expenditure and receipts'.

3.166 The timeframes for the lodgement and public release of disclosure returns differs between submitters. Annual returns by registered political parties and associated entities must be furnished 16 weeks after the end of the financial year (sections 314AB and 314AEA). Donors to a political party and returns by third parties must be lodged 20 weeks after the end of the financial year (sections 314AEB and 314AEC). Annual returns are made public on the first working day of February after lodgement. Election returns by candidates, Senate groups and donors to candidates must be lodged 15 weeks after polling day (section 309). Returns are made public nine weeks after lodgement.

3.167 In the 2008 and 2010 Bills the Government proposed to reduce the disclosure timeframes. Provisions in the 2010 Bill, which is still before the Senate, would:

- replace annual return requirements with bi-annual return provisions which are due 8 weeks after the end of the reporting period; [93] and
- shorten the reporting period for election returns from 15 weeks to 8 weeks after polling day.[94]

93 Explanatory Memorandum, Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010, 2010, Parliament of the Commonwealth of Australia, p. 29.

94 Explanatory Memorandum, Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010, 2010, Parliament of the Commonwealth of Australia, p. 26.

3.168 Replacing annual reporting with the six monthly reporting of disclosure returns has been recommended in various forums.[95] In 2011 the committee supported the introduction of six-monthly reporting as outlined in the 2010 Bill.[96] The Coalition members on the committee saw no problem with the current annual reporting requirement, and opposed the introduction of six monthly disclosure requirements on the basis that it would 'add significant compliance costs' and increase the administrative burden on those with reporting obligations and the AEC.[97]

3.169 The committee also addressed the issue of reporting large single donations, recommending that single donations above $100 000 should be subject to special reporting requirements, in particular the lodgement of a return with the AEC within 14 days of receipt of the donation.[98] Additionally, the AEC should publish these returns within 10 business days of lodgement.

3.170 The Green Paper noted that the lag between transactions being entered into and their disclosure raises questions over their transparency. It stated:

> Clearly the major point of public disclosure, particularly in the absence of comprehensive regulation through bans or caps on financial activities, is to allow the public to form judgements about political parties and candidates and to apply that knowledge in exercising their franchise at the ballot box.[99]

Analysis

3.171 The AEC stressed that the public are the users of disclosure information:

> For the public, as voters, to effectively exercise their discretion at the ballot box based on financial disclosures made by those directly and indirectly participating in the election, those disclosures need to be available to them in a suitably timely manner. In this context, that would require disclosures in the lead-up to the polling day in an election to be made

95 Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, Commonwealth of Australia, pp. 54-55; JSCEM, *Advisory report on the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008*, October 2008, Recommendation 3.

96 JSCEM, *Report on the funding of political parties and election campaigns*, November 2011, pp. 65-67.

97 JSCEM, *Report on the funding of political parties and election campaigns*, November 2011, p. 229.

98 JSCEM, *Report on the funding of political parties and election campaigns*, November 2011, p. 67.

99 Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, Commonwealth of Australia, p. 55;

> contemporaneously, or as close to contemporaneously as practical.[100]

3.172 To further minimise the lag time between lodgement and public disclosure the committee also recommended the AEC investigate the feasibility of a 'system of contemporaneous disclosure'.[101] At the time of writing, this Government has not responded to the committee's recommendation.

3.173 The AEC advised that it has undertaken some preliminary work in this area, including some analysis of international approaches. However, it stated:

> ... until such time as an actual model is proposed, the AEC is unable to undertake a detailed analysis of any such scheme. Further ... any lowering of disclosure thresholds and increasing reporting frequency will also result in increased compliance costs to third parties, candidates, registered political parties and donors.[102]

Conclusion

3.174 More frequent reporting for disclosure purposes is important. The committee reiterates recommendation 6 in its November 2011 report for the introduction of six-monthly rather than annual reporting. This would include expenditure. Ultimately, the committee supports moving towards a system of contemporaneous disclosure, which would provide greater and timelier transparency.

Recommendation 8

3.175 **The committee recommends that the Australian Government introduce a six-monthly disclosure reporting timeframe, as outlined in the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010.**

100 AEC, *Submission 1*, p. 23.

101 JSCEM, *Report on the funding of political parties and election campaigns*, November 2011, p. 67.

102 AEC, *Submission 1.1*, p. 6.

Measure 12—Campaign committee expenditure reporting

Background

3.176 The Electoral Commissioner, under item (xii), proposed reintroducing 'requirements that campaign committee expenditure is to be reported separately from the state party unit and specifically covers the election period for each division'.

3.177 Donations received or expenditure incurred by a campaign committee on behalf of an endorsed candidate is required to be disclosed by the relevant political party rather than by the candidate themselves. This information is disclosed within the political party's annual return but is not separately identified.

3.178 A 'campaign committee' is defined in subsection 287A(2) of the Act as 'a body of persons appointed or engaged to form a committee to assist the campaign of the candidate or group in an election'.

3.179 Section 287A states that campaign committees are to be treated as part of the State branch of a party:

Divisions 4, 5 and 5A apply as if a campaign committee of an endorsed candidate or endorsed group were a division of the relevant State branch of the political party that endorsed the candidate or the members of the group.

3.180 Divisions 4, 5, and 5A relate to the 'disclosure of donations', 'disclosure of electoral expenditure' and 'annual returns by registered political parties and other persons'.

Analysis

3.181 In its submission to the inquiry, the AEC stated:

> Changes under the Electoral Act, such as the deeming of the transactions of campaign committees and Senate groups to be transactions of the political party irrespective of the nature of their operation, have had the effect of shifting the responsibility for disclosure away from endorsed candidates and Senate groups to political parties.[103]

103 AEC, *Submission 1*, p. 12.

3.182 Having the disclosure as part of a larger party return makes it difficult for the public to interpret in relation to a particular candidate or campaign. The AEC submitted:

> The means of achieving this break-down of disclosure would be to require campaign committees of endorsed candidates and Senate groups to lodge separate election disclosure returns rather than have their financials subsumed into the annual disclosures of their political parties...This then provides a picture of the activity at the electorate level (or Senate group level).[104]

3.183 The Green Paper also cautioned that 'requiring individual branches of a party to lodge returns may impose a substantial and unnecessary administrative burden on these groups'.[105]

3.184 The committee considered the issue of campaign committees lodging returns, in its 2010 report on the funding of political parties and election campaigns, and did not support the reintroduction of campaign committee returns. The committee concluded:

> Volunteers [of campaign committees] play important roles in the political process and care should be taken to ensure that changes to funding and disclosure arrangements do not discourage participation through imposing onerous obligations on those that wish to contribute in this manner.[106]

3.185 However, the committee further observed that there is still an onus on campaign committees to keep appropriate records and provided these to the relevant party for inclusion in returns. The committee stated:

> The committee has recommended that detailed disclosure of expenditure be introduced. While the agent for the relevant party will be responsible for lodging this information, the campaign committees will also have a role to play in being aware of these obligations and maintaining accurate records of relevant expenditure that will need to be provided to the political parties.[107]

---

104 AEC, *Submission 1*, p. 24.

105 Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, Commonwealth of Australia, p. 52.

106 JSCEM, *Report on the Funding of Political Parties and Election Campaigns*, November 2011, p. 104.

107 JSCEM, *Report on the Funding of Political Parties and Election Campaigns*, November 2011, p. 104.

Conclusion

3.186 The committee does not support the reintroduction of campaign committee expenditure reporting requirements. As outlined in its report in November 2011, reintroducing this requirement would place an undue burden on campaign committee members, many of whom are often volunteers, by adding another layer of administration.

3.187 The campaign committees have a role to place in the creation and retention of accurate records, but the parties need to take responsibility for meeting reporting obligations.

Measure 13—Disclosure and election periods

Background

3.188 The Electoral Commissioner proposed reviewing 'the "disclosure period" and the "election period" in relation to disclosure obligations and new candidates who are seeking pre-selection'.

3.189 The 'disclosure period' is defined under subsection 287(1):

> ***disclosure period****, in relation to an election, means the period that commenced:*
>
> *in the case of a candidate in the election (including a member of a group) who had been a candidate in a general election or by-election the polling day in which was within 4 years before polling day in the election or in a Senate election the polling day in which was within 7 years before polling day in the election—at the end of 30 days after polling day in the last such general election, by-election or Senate election in which the person was a candidate;*
>
> *in the case of a candidate in the election (including a member of a group) who had not been a candidate in a general election or by-election the polling day in which was within 4 years before polling day in the relevant election or in a Senate election the polling day in which was within 7 years before polling day in the relevant election—on the day on which the person announced that he or she would be a candidate in the election or on the day on which the person nominated as a candidate, whichever was the earlier;*
>
> *in the case of a person who, when he or she became a candidate in the relevant election, was a Senator holding office under section 15 of the Constitution but was not a person who had been a candidate in a general election or by-election the*

polling day in which was within 4 years before polling day in the relevant election or in a Senate election the polling day in which was within 7 years before polling day in the relevant election – on the day on which the person was chosen or appointed under section 15;

in the case of a group – on the day on which the members made a request under section 168; and

in the case of a person or organisation to which subsection 305A(1) or (1A) applies – at the end of 30 days after the polling day in the last general election or election of Senators for a State or Territory;

and ended 30 days after polling day in the election.

3.190 The disclosure period differs significantly for new candidates and candidates who have previously contested elections. For candidates who contested an earlier election, the disclosure period commences 30 days after polling day of the last federal election they contested within the past four years in the case of the House of Representatives, or seven years for the Senate.

3.191 For new candidates the disclosure period commences from the earlier of the date the candidate nominated for the election he or she is contesting, or the date the candidate declared his or her candidacy. For endorsed candidates this is usually the date of their formal pre-selection, and for Independents their nomination date. For a casual Senate vacancy, the disclosure period is taken from their appointment.

3.192 Section 287(1) defines 'election period' as 'the period commencing on the day of issue of the writ for the election and ending at the latest time on polling day at which an elector in Australia could enter a polling booth for the purpose of casting a vote in the election'.

3.193 The Green Paper made the point that 'in the current climate of "continuous campaigning", significant expenditure can occur quite some time before this'. The Green Paper also noted that extending the definition of the election period has only been feasible in jurisdictions that have fixed terms and that without this certainty, 'spending during an election period can only be clearly defined by the calling of an election'.[108]

3.194 Some alternative approaches suggested included 'expecting political parties, candidates and other participants to plan their expenditure

108 Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, Commonwealth of Australia, p. 67.

according to the anticipated date, or, alternately, applying a cap to certain kinds of expenditure across the entire election cycle'.[109]

Analysis

3.195 In relation to the disclosure period, the AEC noted in its submission to the committee:

> Extending the disclosure period for first time candidates by having it commence on the 31st day after the last general or Senate election would have little practical impact in most instances, but, it would capture all donations received and used in relation to an election campaign irrespective of whether they were received prior to a person's formal announcement of their candidacy.[110]

3.196 The AEC indicated that the election period had remained unchanged since the introduction of the disclosure provisions in 1984. It suggested that a review of the election period would be timely, as the nature of campaigning is now substantially different, with 'proxy' campaigns often commencing in advance of an election announcement.[111] The AEC submitted:

> The definition of election period could be commenced earlier so as to capture expenditures incurred on campaign activities being undertaken prior to the formal commencement of the election campaign at the time of the issuing of the election writs by the Governor-General. The complication in setting a new commencement date when there is not a fixed election date is to provide certainty for those with disclosure obligations. For this reason it would be preferable to count forward from a known date, such as calculating the commencement period as being 24 or 30 months from the polling day in the last election, although with the rider that it be the earlier of this calculated date or the date of the issue of the writ in case of an early election (or by-election).[112]

109 Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, Commonwealth of Australia, p. 67.

110 AEC, *Submission 1*, p. 24.

111 AEC, *Submission 1*, p. 24.

112 AEC, *Submission 1*, p. 24.

Conclusion

3.197 The election period is a relatively straightforward category from the issue of the writs to Election Day. The committee acknowledges that the nature of political engagement has changed the face of campaigning from what used to be a distinct period to an ongoing activity.

3.198 However, there does not seem to be another timeframe that would lend itself to being a recognisable 'election period'. One option could be to identify a certain amount of time after the last election and deem that to be the commencement of the election period, but this would not necessarily address the concerns motivating such a change, especially in a culture of continuous campaigning.

3.199 Currently, incumbent parliamentarians have ongoing disclosure obligations, but new candidates only have an obligation from when they announce their candidacy or nominate. For candidates seeking pre-selection with a political party, there is the potential for them to be receiving donations and gifts and incurring political expenditure prior to their candidacy being formalised. However, they do not have to disclose transactions prior to their pre-selection. Independent candidates do not have to disclose until they announce their intention to run or nominate with the AEC.

3.200 The committee acknowledges that this is a gap in the current system. It is reasonable that new candidates also be accountable for the receipt of donations and gifts and expenditure that relates to their political candidacy.

3.201 However, identifying an appropriate period in which to extend the disclosure period for new candidates does pose a challenge. For example, the disclosure period for endorsed candidates could be from the date they nominated to be considered for pre-selection, but this date could vary considerably between and within parties. Such an approach would also fail to cover Independent candidates.

3.202 The committee believes that the transactions of new candidates for election purposes must be transparent. New candidates should be accountable for the flow of money in relation to their election activities. It is reasonable to suggest that many new candidates would have had an intention to, or at the very least interest in, seeking pre-selection or running as an Independent well in advance of the election.

3.203 The committee proposes extending the disclosure period for new candidates to twelve months prior to their pre-selection or nomination date, whichever is the earlier, to address the current gap in transparency. A period of twelve months strikes an appropriate balance between increasing transparency without imposing unnecessary administrative burdens on these individuals.

Recommendation 9

3.204 **The committee recommends that the *Commonwealth Electoral Act 1918* be amended to extend the disclosure period for new candidates to 12 months prior to pre-selection or nomination, whichever is earlier.**

Measure 14—Coercive powers of the AEC

Background

3.205 The Electoral Commissioner proposed increasing 'the coercive powers of the AEC to enable it to act as a regulator in relation to matters under Part XX of the Electoral Act'. Part XX of the Electoral Act relates to election funding and financial disclosure.

3.206 The Green Paper highlighted the importance of an effective compliance regime stating that 'electoral reforms must be backed by an effective regulatory and enforcement regime'.[113] However, it was also noted that 'the number of successful prosecutions in relation to offences under the Electoral Act is small, which raises the question of whether the current offence provisions are effective to enforce compliance with the Electoral Act'.[114]

3.207 Section 316 of the Electoral Act provides the AEC with coercive information gathering powers:

> *(2A) An authorised officer may, for the purpose of finding out whether a prescribed person, the financial controller of an associated entity or the*

113 Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, Commonwealth of Australia, p. 72.

114 Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, Commonwealth of Australia, p. 70.

agent of a registered political party has complied with this Part, by notice served personally or by post on:

(a) the agent or any officer of the political party; or

(aa) the financial controller of the associated entity or any officer of the associated entity; or

(b) the prescribed person or, if the prescribed person is a body corporate, any of its officers;

as the case may be, require the agent, financial controller, person or officer:

(c) to produce, within the period and in the manner specified in the notice, the documents or other things referred to in the notice; or

(d) to appear, at a time and place specified in the notice, before the authorised officer to give evidence, either orally or in writing, and to produce the documents or other things referred to in the notice.

3.208 In the November 2011 report, the committee recommended that funding and disclosure functions 'continue to be exercised and administered by the Australian Electoral Commission, and that the Australian Electoral Commission receives additional resources to carry out these functions and exercise its enforcement powers'.[115]

Analysis

3.209 The AEC argued that the section 316 information gathering powers are limited by subsection 315(3) that requires 'reasonable grounds' be established before these coercive powers can be used. The AEC stated:

> It prevents investigations being mounted as 'fishing expeditions' by requiring that there be credible evidence of a possible contravention of a disclosure offence rather than mere suspicion. It also acts as a safeguard against harassment being visited upon parties or other persons from unsupported allegations being levelled at them.[116]

3.210 In response to further questioning from the committee on the perceived restrictions imposed by the 'reasonable grounds' test, the AEC submitted:

> The power in subsection 316(3) of the Electoral Act has several limitations. The authorised officer must have:

115 JSCEM, *Report on the funding of political parties and election campaigns*, November 2011, p. 211.
116 AEC, *Submission 1*, p. 25.

i. "reasonable grounds";
ii. to believe that a specified person;
iii. is capable of producing or giving evidence; and
iv. the documents or evidence relates to a contravention or possible contravention of section 315.

Similarly the power contained in subsection 316(#A) of the Electoral Act has several limitations. The authorised officer must have:

i. "reasonable grounds";
ii. to believe that a person who is the financial controller or an officer of the entity:
iii. is capable of producing documents or giving evidence; and
iv. the documents or evidence relates to whether an entity is an associated entity.

Unless all of the above elements are satisfied, then the Electoral Act provides the AEC with no legal authority to issue the notices to any person or entity to ascertain whether a contravention has occurred or whether an entity is an "associated entity".[117]

3.211 When asked about its actions pertaining to the HSU and ALP reporting obligations, the AEC commented that:

> ... in its dealings with the HSU National Officer and the NSW Branch of the ALP in this matter, the AEC has received full cooperation and response to inquiries without the need to use any of its coercive powers.[118]

3.212 However, the AEC argued that additional action could have been taken by the AEC if it were operating under a different enforcement model:

> ... one of the examples is in relation to the penalty provisions. We have offered, for your information, a model that applies, for example, in the United Kingdom. I think it is a useful model in the sense that it provides a graduated set of sanctions starting with relatively modest fines for fairly objective offences such as late lodgement and then progressively moves up towards more serious offences for misleading information, and then indeed finalised in relation to the investigation powers that we have been discussing in the last hearing.

117 AEC, *Submission 1.1*, p. 9.
118 AEC, *Submission 1.1*, p. 10.

> That is a model that in the circumstances of the HSU case might have provided some additional ability for the AEC to encourage the lodgement of the returns from the HSU national office in a much more expeditious manner. As you would have seen in the chronology that we provided to you in the attachment to our first submission, there were some delays in there. We were in constant discussions and contact with the HSU national office. With some additional powers, for example, to issue a compliance notice to comply, that would have been a matter that we would have had some additional authority to demand the returns.
>
> The penalty sanctions generally have not been changed since 1984. So I think invariably there is an argument that suggests—as you were just talking to Mr Nassios about—that perhaps the penalty provisions are in need of some modernisation and some lifting.[119]

3.213 The AEC asserted that greater coercive powers would enable it to act as a regulator:

> The AEC notes that the recommendation that was made in Measure 14 was couched in terms of enabling the AEC to act as a regulator. The present powers contained in section 316 of the Electoral Act are the same in substance as when this provision was inserted by the *Commonwealth Electoral Act 1983*. The powers are essential limited to the conduct of monitoring activities (e.g. compliance review) and the investigation of possible criminal offences under section 315 of the Electoral Act.[120]

3.214 The AEC acknowledged that 'changes to penalties and the exercise of coercive powers under Commonwealth laws require consultation with the Attorney-General's Department', to ensure that any changes are consistent other Commonwealth laws and compliant with human rights obligations. The AEC also noted that the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) contained principles for coercive powers that need to be taken into account.[121]

3.215 The AEC asserted that the following issues would need to be considered:

> Firstly, whether the criminal offence framework presently in Part XX of the Electoral Act is the appropriate framework for dealing with all breaches of the disclosure provisions in section

119 Mr Ed Killesteyn, Electoral Commissioner, AEC, *Committee Hansard*, 16 July 2012, Canberra, p. 15.

120 AEC, *Submission 1.1*, p. 6.

121 AEC, *Submission 1.1*, p. 7.

> 315. Second, whether the development and use of sanctions such as infringement notices and enforceable undertakings should arise from the use of coercive powers. Third, whether there is some public interest in apply the Crime Act model.[122]

3.216 The AEC submitted that Australia could draw on the United Kingdom enforcement policy model:

> The AEC suggests that a similar approach could be considered in relation to the coercive powers that are available to the AEC for dealing with breaches under section 315 of the Electoral Act. Once set of powers for dealing with monitoring and supervisory work. A separate set of powers for the investigation of breaches, This approach appears to be consistent with the approach set out for the Commonwealth laws in the Guide issued by the Attorney-General's Department.[123]

3.217 The UK Electoral Commission's powers are separated into supervisory and investigatory work. Its approach is described as follows:

> The Commission undertakes supervisory work to ensure that those who are regulated meet their legal requirements. Funding is checked to ensure it is derived from permissible sources. Formal processes ensure the Commission's advice is targeted and supervisory and auditing resources are optimised. ...
>
> The Commission will take enforcement action where it is necessary and proportionate to do so. Many of the individuals responsible for complying with the law at the local level are volunteers. It is therefore particularly important that the Commission's objectives are pursued in a proportionate way, taking the facts of each case into account and only taking action when it is necessary in order to achieve its objectives.[124]

3.218 The UK Electoral Commission's *Enforcement Policy* outlines how the powers operate:

> The supervisory powers available to the Commission only apply to those who are regulated under The Political Parties, Elections and Referendums Act 2000 (PPERA). These powers support routine work monitoring compliance by regulated organisations and individuals with the requirements set down in law.

---

122 AEC, *Submission 1.1*, p. 8.

123 AEC, *Submission 1.1*, p. 8.

124 UK Electoral Commission, *Enforcement Policy*, December 2010, UK Parliament, p. 3.

> The investigatory powers available to the Commission extend to individuals and organisations beyond those who it regulates. The Commission may use its investigatory powers (to require documents, information or to attend an interview) in respect of any person or organisation when it has reasonable grounds to consider that there has been a breach of the law on party and election finance. The Commission's powers to request information apply to and may be enforced against both the subject of any investigation and any other person or organisation that holds relevant information.[125]

3.219 In relation to the 'reasonable grounds' test, the AEC noted that a similar test applies in the UK.

3.220 The AEC indicated that additional resources would be required if it is expected to take a 'more activist role' in conducting investigations.[126]

Conclusion

3.221 During the inquiry, there was some discussion at public hearings about whether the AEC had effectively utilised its existing powers in addressing the matters arising in relation to the HSU National Office and that organisation's obligations under the Electoral Act.

3.222 The AEC asserted that it had used the coercive powers at its disposal in relation to the HSU matters, and argued that it was restricted by the 'reasonable grounds' test.

3.223 The committee sees merit in strengthening the AEC's coercive powers in such a way that it puts beyond question the AEC's powers to determine the extent of an organisation's disclosure obligations (i.e. what type of return(s) it should lodge) and investigate whether these obligations have been met.

3.224 It should be made clear what steps the AEC can take in gathering information from organisations with confirmed, or suspected, reporting obligations under the Electoral Act.

125 UK Electoral Commission, *Enforcement Policy*, December 2010, UK Parliament, p. 4.

126 AEC, *Submission 1*, p. 25.

Recommendation 10

3.225 **The committee recommends that the Australian Government clarify, and where needed strengthen, the coercive powers of the Australian Electoral Commission to determine the extent of an individual or organisation's disclosure obligations and to investigate whether reporting obligations under Part XX of the *Commonwealth Electoral Act 1918* have been met.**

Measure 15—Categories of electoral expenditure

Background

3.226 The Electoral Commissioner, under item (xv), proposed expanding 'the categories of "electoral expenditure" that are to be disclosed to include campaign staff, premises, office equipment, vehicles and travel'.

3.227 Electoral expenditure is defined under subsection 308(1) of the Electoral Act as encompassing a specific list of categories:

In this Division, electoral expenditure, in relation to an election, means expenditure incurred (whether or not incurred during the election period) on:

(a) the broadcasting, during the election period, of an advertisement relating to the election; or

(b) the publishing in a journal, during the election period, of an advertisement relating to the election; or

(c) the display, during the election period, at a theatre or other place of entertainment, of an advertisement relating to the election; or

(d) the production of an advertisement relating to the election, being an advertisement that is broadcast, published or displayed as mentioned in paragraph (a), (b) or (c); or

(e) the production of any material (not being material referred to in paragraph (a), (b) or (c)) that is required under section 328, 328A or 328B to include the name and address of the author of the material or of the person authorizing the material and that is used during the election period; or

(f) the production and distribution of electoral matter that is addressed to particular persons or organisations and is distributed during the election period; or

(g) the carrying out, during the election period, of an opinion poll, or other research, relating to the election.

3.228 In the advisory report on the 2008 Bill, the committee recommended broadening the definition of electoral expenditure to 'include reasonable costs incurred for the rental of dedicated campaign premises, the hiring and payment of dedicated campaign staff, and office administration'.[127] The committee was concerned with ensuring that all 'reasonable administrative expenses related to campaigning' would be eligible to receive public funding.[128]

3.229 In the 2010 Bill, which is still before the Senate, the Government proposes the inclusion of five new categories of electoral expenditure:

- the rent of any house, building or premises used for the primary purpose of conducting an election campaign
- paying additional staff employed, or a person contracted, for the primary purpose of conducting an election campaign
- office equipment purchased, leased or hired for the primary purpose of conducting an election campaign
- the costs of running or maintaining that office equipment, and
- expenditure incurred on travel, or on travel and associated accommodation, to the extent that the expenditure could reasonably be expected to have been incurred for the primary purpose of conducting an election campaign.[129]

Analysis

3.230 The AEC maintained that the current categories are 'targeted primarily at electoral advertising costs and do not cover the range of campaign costs'. The AEC suggested that a more comprehensive disclosure should cover expenditure on additional items, including: staff; premises; office furniture and equipment; communication costs; vehicles; and transport and accommodation.[130]

127 JSCEM, *Advisory report on the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008*, October 2008.

128 JSCEM, *Advisory report on the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008*, October 2008, p. iii.

129 B Holmes et al., Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010, Bills Digest no. 43 2010-11, Parliament of Australia, pp. 14-15.

130 AEC, *Submission 1*, p. 26.

3.231 When commenting on the possible expansion of the categories of electoral expenditure, the AEC cautioned that these disclosures 'are not designed to provide details of expenditure, on an overall view of the scale of certain specified expenditures'.[131]

3.232 Further, the AEC submitted that the expansion of the categories of electoral expenditure should be considered in conjunction with reviewing who is responsible for these disclosures, as proposed in measure 17.[132]

Conclusion

3.233 The current categories of electoral expenditure are limited, and fail to include certain key expenditure such as the rental of dedicated campaign premises, hiring campaign staff and office administration. To enhance transparency it is important to recognise these items that are integral to the conduct of a political campaign.

Recommendation 11

3.234 **The committee recommends that the *Commonwealth Electoral Act 1918* be amended to expand the categories of 'electoral expenditure' as set out in section 308(1), to cover additional relevant items including campaign staff, premises, office equipment, vehicles and travel.**

Measure 16—Deem registered political parties as bodies corporate

Background

3.235 Under item (xvi), the Electoral Commissioner has proposed for 'registered political parties to be bodies corporate for the purposes of Part XX of the Electoral Act'.

3.236 At present the offence provisions in the Electoral Act do not apply to political parties, as generally parties are voluntary associations and are

131 AEC, *Submission 1*, p. 26.

132 AEC, *Submission 1*, p. 26.

therefore not legal entities.[133] Agents appointed by the political party can be prosecuted under the Act. Section 414AEA provides:

> *(3) A reference in this Part to things done by or with the authority of a political party, a State branch of a political party or a division of a State branch of a political party shall, if the party, branch or division is not a body corporate, be read as a reference to things done by or with the authority of members or officers of the party, branch or division on behalf of the party, branch or division.*

3.237 The Green Paper posited that political parties could be incorporated associations—under state or territory legislation or as a company under the *Corporation Act 2001*—in order to be registered.[134] This would allow registered political parties to hold property and be liable for prosecution and recovery purposes, rather than focusing prosecution and recovery on an individual.

Analysis

3.238 The AEC argued that individuals can be personally liable for matters that the person 'may have no knowledge of or which may be a wider responsibility within the party'.[135] The AEC submitted:

> The most effective solution to this anomaly is for political parties to be recognised as legal entities for the purposes of the Electoral Act as part of the registration process under Part XI of the Electoral Act. This would allow the AEC to take prosecution or recovery action against the registered political party as a legal entity rather than against an individual office holder within the party.[136]

3.239 The AEC noted that in the 1983 report from the committee's predecessor, the Joint Select Committee on Electoral Reform, it was stated:

> As some parties are not incorporated bodies there needs to be a means of enforcement. Legislation to give effect to these recommendations could deem an unincorporated political party to be a person for the purposes of prosecution.[137]

133 Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, Commonwealth of Australia, p. 70.

134 Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, Commonwealth of Australia, p. 71.

135 AEC, *Submission 1*, p. 15.

136 AEC, *Submission 1*, p. 15.

137 AEC, *Submission 1.1*, p. 10.

3.240 The AEC expressed the view that:

> It is not apparent to the AEC why this recommendation has not been acted upon given the practical issues outlined in the AEC submission about identifying individual members of a political party for any breaches of the funding and disclosure obligations rather than the party as a whole which has obtained the benefit.[138]

3.241 When responding to committee questioning on approaches taken in comparative jurisdictions, the AEC observed that:

> The issue of whether or not a political party is a legal entity separate from its members appears to be peculiar to Australia.[139]

3.242 The AEC noted that in other jurisdictions corporate entities can be registered as political parties. For example, in Canada, section 376 of the *Canada Elections Act 2000* provides that a corporation is eligible to be a chief agent or agent of a registered or eligible party. At the Australian state level, the AEC also noted that:

> ... in Western Australia, the provisions of the *Associations Incorporations Act 1987* enable 5 or more members of an association that is established for political purposes to apply for incorporation. The AEC is not aware of any issues having been raised about the application of the Western Australian legislation to political parties who have chosen to make application for incorporations.[140]

3.243 In its submission to the current inquiry the AEC stated:

> The argument for having parties treated as bodies corporate is to allow the parties, rather than individuals within the party, to be held accountable under the (funding and) disclosure provisions of the Electoral Act. This is particularly the case where financial penalties are to be imposed for convictions of offences against the disclosure provisions and where monies are to be recovered. It is both more feasible and appropriate to seek these outcomes from the political party as an entity with collective responsibility rather than from an individual officer holder within that party.[141]

138 AEC, *Submission 1.1*, p. 11.
139 AEC, *Submission 1.1*, p. 10.
140 AEC, *Submission 1.1*, p. 10.
141 AEC, *Submission 1*, p. 27.

3.244 While requiring political parties to incorporate before registration may solve some of the legal standing issues, there would also be consequences in other areas of the internal party practices.[142] All internal party practices would need to be in accordance with the relevant legislation governing incorporated bodies.

3.245 An alternative approach may be to insert a provision into the Electoral Act that deems political parties to have legal standing for the purposes of that Act alone, or for prosecution and recovery purposes. The mechanism for 'deeming' could be upon registration. Once a political party is registered, it could be deemed to have legal standing for the purposes of the Electoral Act or before a court for certain proceedings.

3.246 It was acknowledged in the Green Paper that such an approach could be problematic as most political parties do not hold assets in their own name which would make it difficult to impose monetary fines.[143] The discussion under item (iii)—to offset penalties against public funding entitlements—is one way to address this limitation.

Conclusion

3.247 The committee supports introducing a provision to deem registered political parties as bodies corporate for the purposes of funding and disclosure purposes.

3.248 The current focus on the individual when pursuing failures to meet reporting obligations is not the most effective way to ensure full and accurate disclosure by political parties and organisations. The practicalities of taking action against an individual and the impact of financial penalties on that individual must be taken into consideration. Ultimately, the political party must be responsible for meeting its reporting obligations, and to bear the consequences of a deliberate or inadvertent failure to do so. It must ensure that the person tasked with lodging its returns is suitably qualified to perform the role and that it has systems in place for record keeping that enables the person to complete and lodge an accurate return that fully meets the party's disclosure obligations under the Electoral Act.

142 Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, Commonwealth of Australia, p. 72.

143 Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, Commonwealth of Australia, p. 71.

Recommendation 12

3.249 **The committee recommends that the *Commonwealth Electoral Act 1918* be amended to provide that registered political parties be deemed bodies corporate for the purposes of Part XX of the Act.**

Measure 17—Greater certainty about who has reporting obligations

Background

3.250 The Electoral Commissioner also proposed, under item (xvii), introducing 'provisions with greater certainty about who has the relevant reporting obligation'.

3.251 There are a range of donations and expenditure reporting obligations for political parties, associated entities, third parties, donors, candidates and Senate groups.

Analysis

3.252 The AEC suggested that the Electoral Act should be amended to make it explicit which person in an organisation is responsible for reporting various fiscal interests in political activities.

3.253 The AEC noted that in other areas of law, such as the Corporations Act and industrial law, there is a clearly defined person who has responsibility for certain reporting requirement under relevant legislation. The AEC stated:

> Under the current provisions of Part XX of the Electoral Act there is no such clear obligation. It is generally left up to the political party or other entity to determine who is to sign the disclosure return. ... Establishing a specific person or position within a political party or other entity that is responsible for signing the disclosure return would provide certainty as to who has the reporting obligation and that the return is authorised by the person or entity with the reporting obligation.[144]

144 AEC, *Submission 1*, pp. 27-28.

3.254 When commenting on the international experience in this area, the AEC stated:

> The overseas experience in both the UK and Canada is that specific office bearers within a political party (treasurers in the UK and three registered officers in Canada) are given the responsibility of lodging returns and maintaining the campaign accounts.

3.255 When discussing the application of this approach in Australia, the AEC stated:

> If a particular officer has the responsibility to lodge a return and fails to do so, then this would be a relatively simple matter to identity and prosecute. However, the AEC has experience with one matter where the Court declined to make a finding of guilt for the relevant party official on the basis that he was reasonably entitled to rely on the work of that party's finance staff in assembly the information that was included in an incorrect disclosure return.
>
> However, given the range of possible individuals and entities with reporting obligations, perhaps reference to the relevant person with the financial obligation under corporations law or under industrial laws would be sufficient to identity who within the body corporate has the reporting obligation. If the failure exists with those persons, then the corporate veil would then be lifted so that only those individuals would be held liable.
>
> However, if the failure arose due to some systemic failure to put systems in place and to maintain those systems, then the penalties would more appropriately be directed to the corporate entity rather than individual members of the political party.[145]

Conclusion

3.256 It is desirable for there to be greater clarity of who in an organisation has disclosure responsibilities. It is also important to ensure that there are appropriate systems in place to ensure that these people can meet their reporting obligations.

145 AEC, *Submission 1.1*, p. 11.

Recommendation 13

3.257 **The committee recommends that the *Commonwealth Electoral Act 1918* be amended to introduce provisions with greater certainty about which position or individual has relevant reporting obligations within political parties, associated entities and third party organisations.**

Daryl Melham MP
Chair
10 September 2012