

**AEC**

Australian Electoral Commission

Electoral Commissioner

Mr Daryl Melham MP
Chairman
Joint Standing Committee on
Electoral Matters
Parliament House
CANBERRA ACT 2600

Dear Mr Melham

You will recall that at the hearing of the Committee of 27 June 2008 several members of the Committee were concerned with the response of the AEC contained in Attachment A to my letter of 20 June 2008 to the matters covered in paragraph 1 of the Terms of Reference agreed by the Senate on 12 March 2008 and referred to the Committee for inquiry and report. There were several passages in the transcript of the Committee's hearing that deal with this issue (EM 3 to 5 and 28 to 32)

In response to a question from the Deputy Chair, Mr Morrison MP (EM 4), concerning the terms of reference, I stated that:

"If we misread that, I am quite happy to go away and respond, as best we can, to issues raised in that resolution, in the terms of reference 1a to 1i. But, as I stress, I will not be able to do some of those because I cannot talk about state and local or about the 2007 election."

You will recall that in my previous evidence to the Committee, I indicated that the AEC had interpreted paragraphs 1a to 1i of the Terms of Reference in the context of the commencing words used by the Senate at the start of this paragraph i.e. "...the 2007 election and matters relating thereto". These words appear to establish the context for all of the matters covered by the referral and were interpreted by the AEC as indicating the Senate's intention that each of those matters covered by the subsequent paragraphs related back to the AEC's experiences with those matters during the 2007 federal election.

In this context, much of the information that is required to answer the matters covered in paragraph 1a to 1j will only become available when the AEC receives the annual returns from registered political parties, associated entities and third parties which, for the 2007 general election, are not due to be lodged until November 2008. The time-lines for the lodging of these returns and the publishing of the information from those returns is specified in the relevant provisions of Part XX of the *Commonwealth Electoral Act 1918* (the Electoral Act). Until such time as those returns are received and analysed by the AEC, the AEC is not in a position to be able to assist the Committee on any matter that directly relates to the November 2007 general election that involves questions about electoral expenditure and the reported activities of the main players in the election process.

However, in an attempt to assist the Committee further in its deliberations the following additional information is now provided.

In regards to Item 1a, the AEC was asked to comment on the level of donations and expenditure in relation to the activities of registered political parties, associated entities and third persons at recent local, State and federal elections. The AEC has no power under the Electoral Act to obtain information about donations or expenditure incurred by persons and organisations involved in local government or State elections. The AEC acknowledges that when the annual returns that are received in November 2008 from federally registered political parties under section 314AB of the Electoral Act, some general information of the total amounts received, amounts paid and all debts incurred by that party in the 2007/08 financial year will be disclosed. However, based on previous experience, it is unlikely that the information will be reported in such a form that would enable the AEC to extract information from those returns that solely relate to the activities at local government and State elections or to identify amounts as solely relating to the November 2007 general election. The AEC does not have the resources available to undertake the research and data collection that would be required to attempt to provide any specific evidence to the Committee in response to this Item.

The AEC publishes the annual returns and other returns that are lodged in accordance with the requirements of Part XX of the Electoral Act. The requirement for the lodging of annual returns by certain third parties involved in the political processes was only added to the Electoral Act by amendments introduced in 2006 (the *Electoral and Referendum (Electoral Integrity and Other Measures) Act 2006*). The first third party returns for the 2006/07 financial year have been published on the AEC's website earlier this year. The third party annual returns for the 2007/08 financial year (which include the November 2007 election period) will not be received by the AEC until November 2008.

In Item 1b the AEC was asked to provide evidence on any relationship between the activities of third parties and registered political parties. The current provisions of the Electoral Act restrict the third party annual returns to only reporting expenditure above the \$10,500 threshold that was incurred by the third parties involved in one of the five categories of political activity specified in subsection 314AEB(1). The returns do not include details of any links between the activities of the thirds parties with either the fundraising activities undertaken by, or expenditure incurred by, registered political parties or associated entities. There is no requirement in the Electoral Act for a third party to disclose the source of the funds that it expends on political activities or to report on any fundraising activities in which it may be engaged that benefit a particular political party. Accordingly, the AEC is not in a position to provide further information to the Committee on the matters covered by this Item.

In relation to Item 1c the AEC notes the comments made by Senator Ronaldson (EM 26 of 27 June 2008) recognising that the AEC is not responsible for the administration of tax laws and has no information on the take up of the current provisions for tax deductibility for political donations as requested by this Item.

In relation to Item 1d, the above comment in response to Item 1b also applies here. The only information that the AEC possesses and which could form the basis of any evidence to the Committee is the information that is received due to the statutory requirements of the Electoral Act that apply to annual and election returns that are specified in Part XX of the Electoral Act. The scope of who and what is regarded as an “associated entity” (and is therefore required to lodge returns with the AEC) is restricted to only those persons and bodies that fall within the definition of is the term “associated entity” in subsection 287(1) of the Electoral Act. This defines and restricts the current reporting obligations to “entities” that:

- are controlled by one or more registered political parties; or
- operate wholly or to a significant extent for the benefit of one or more registered political parties; or
- are a financial member of a registered political party, or on whose behalf another person is such a member; or
- have voting rights in a registered political party, or on whose behalf another person has such voting rights.

The existing reporting requirements were based on a policy that recognised that there were a class of entities that had a particularly close relationship with registered political parties. This is reflected through their disclosure obligations, which directly mirror those required of registered political parties. In addition to lodging annual disclosures of receipts, expenditure and debts identical to that disclosed by registered political parties, associated entities also include in their annual returns details of capital deposits received that are used to generate income paid to or for the benefit of a political party.

In contrast to who is regarded as being an “associated entity”, the scope of who is a “third party” is not defined in the Electoral Act. However, section 314AEB of the Electoral Act places a reporting obligation on any person who engages in one of the five categories of activities and incurs expenditure in those activities above the reporting threshold. Third parties are therefore treated in the Electoral Act as being independent of political parties (see the exclusion contained in paragraph 314AEB(1)(c)) and are not subject to the same level of disclosure as either political parties or associated entities. Their disclosure obligations are limited to an annual return of ‘political expenditure’ that falls within any of the five categories contained in paragraph 314AEB(1)(a) and where those transactions total above the disclosure threshold. The categories of reportable political expenditure include:

- public expression of views on a political party, candidate in an election or member of the Federal Parliament by any means;
- public expression of views on an issue in a federal election by any means;
- printing, production, publication, or distribution of any material that is required by section 328 or 328A of the Act to include a name, address or place of business;

- broadcast of political matter in relation to which particulars are required to be announced under sub-clause 4(2) of schedule 2 to the *Broadcasting Services Act 1992*; and
- opinion polling and other research relating to an election or the voting intention of voters.

The AEC has published a document entitled “Funding and Disclosure Guidance Note – Annual Return Relating to Political Expenditure”. A copy is attached. This document outlines some of the issues with the existing requirements of section 314AEB. Those issues include the scope of the reporting obligation where the expenditure is for one of more purposes (the dominant purpose test), the fact that the subjective intention of the third party to incur expenditure for one of the five activities is required and the broad scope of the phrase “public expression of views” in the first two categories.

Item 1e refers to the appropriate levels of public funding. The AEC notes that this was the subject of evidence already provided to the Committee (EM 29 to 30 of 27 June 2008) and the AEC is unable to provide any further detailed comment. However, it appears that the original purpose of a public funding scheme that was introduced in 1984 was to decrease the dependence by political parties on private donations and to promote fairness in the electoral system by providing a guarantee of funding. In contrast to this, the reported election expenditure of the major parties has indicated that the level of public funding as a proportion of the total expenditure by the political parties has decreased since the introduction of public funding.

The information in the possession of the AEC is somewhat limited on this issue as the Electoral Act was amended in 1996 to remove the reporting requirement previously placed on registered political parties to lodge returns setting out “election expenditure”. The term “election expenditure” is defined in subsection 308(1) of the Electoral Act. Prior to that time, there was a direct linkage between the amount of public funding that was paid up and the amount of election expenditure that was incurred. This changed with the passage of the *Commonwealth Electoral Amendment Act 1995* (Act No. 42 of 1995) which implemented a report from the then JSCEM entitled “Financial Reporting by Political Parties”.

In relation to Item 1f the AEC refers to the previous response provided to the Committee which referred to the 1992 decision of the High Court in the case of *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106. In this case the High Court held that those provisions of the *Political Broadcasts and Political Disclosures Act 1991* that provided for free air time were in breach of the *Constitution*. In particular, the Court found that those provisions dealing with free air time amounted to the acquisition of property otherwise than on just terms.

In relation to Item 1g the AEC notes that the issue of the qualifications of candidates and whether the AEC has any power or function to determine this has been the subject of previous evidence at the Committees hearing and at Senate Estimates hearings. As was acknowledged by Senator Ronaldson (EM 32 of 27 June 2008) it is a question of weighing up the risks of an unqualified candidate standing for an election and the

result being overturned by a petition in the Court of Disputed Returns. There are also other risks relating to both timing (with ballot-papers being printed in the election timetable only 2 days after the close of nominations) and costs.

The AEC notes that previous cases such *Nile v Wood* (1988) 167 CLR 133, *Sue v Hill* (1999) 199 CLR 462, *Sykes v Cleary* (1992) 176 CLR 77 and *Free v Kelly* [1996] HCA 42 show the difficulties in determining whether or not a candidate was qualified and the time delays that can result before such an issue is resolved.

In relation to Item 1h, the comments provided above in response to Item 1e apply also to this Item. As the AEC has not received information on "election expenditure" (which includes campaign expenditure) from registered political parties since 1996, the AEC is not in a position to provide any specific evidence in response to this Item.

Finally, in relation to Item 1i, the AEC is supportive of measures being introduced which recognise that many of the persons and organisations involved in the federal election process are also involved in State/Territory election processes. Currently, there are many differences in the reporting obligations and requirements between each jurisdiction. Given the various reviews in the States/Territories into these reporting and disclosure issues, the AEC is supportive of the introduction of measures that would achieve the goals of transparency, accountability, clarity and simplification. The AEC is of the view that there are apparent benefits that would be achieved with some harmonisation of the various disparate reporting requirements and obligations so that there are common reporting and disclosure obligations that prevent loopholes from being exploited. Such harmonisation would assist persons and organisations in complying with a single standard for reporting and disclosure obligations.

I trust that the above information is of assistance.

Yours sincerely


Ian Campbell
Electoral Commissioner

/s/ September 2008

FUNDING AND DISCLOSURE GUIDANCE NOTE

ANNUAL RETURN RELATING TO POLITICAL EXPENDITURE

This guidance note is to assist people or organisations who may have incurred political expenditure to prepare their annual return for the financial disclosure scheme established by Part XX of the *Commonwealth Electoral Act 1918* (the Act).

The financial disclosure scheme informs the public about the dealings of people and organisations involved in the electoral process. It requires candidates, political parties, associated entities, donors and those who incur political expenditure to lodge a return with the AEC. These returns are made available for public inspection.

The *Annual Return Relating to Political Expenditure* is a new return for the 2006-07 financial year.

WHO SHOULD LODGE A RETURN?

People and organisations that incur political expenditure in excess of the \$10,300 minimum disclosure threshold are required to lodge the return.

Exceptions - Federally registered political parties and their branches, Commonwealth government departments and some agencies, members of Commonwealth Parliament, and candidates for election to Federal Parliament have separate disclosure requirements and do not lodge this return.

Commonwealth government agencies and enterprises - The exemption of Commonwealth departments and agencies does not extend to statutory bodies outside of the ambit of the *Public Service Act 1999*.

State and Territory government agencies and enterprises - State and Territory governments must lodge the return if they incur political expenditure.

Associated entities - Associated entities of political parties must lodge a return if they incur political expenditure.

POLITICAL EXPENDITURE

Section 314 AEB of the Act¹ requires a return to be lodged for a financial year if a person or organisation incurred expenditure for any of the following purposes during the year, by or with their own authority:

- (i) the public expression of views on a political party, a candidate in an election or a member of the House of Representatives or the Senate by any means;
- (ii) the public expression of views on an issue in an election by any means;
- (iii) the printing, production, publication or distribution of any material (not being material referred to in subparagraph (i) or (ii)) that is required under section 328 or 328A to include a name, address or place of business;
- (iv) the broadcast of political matter in relation to which particulars are required to be announced under subclause 4(2) of Schedule 2 to the *Broadcasting Services Act 1992*;
- (v) the carrying out of an opinion poll, or other research, relating to an election or the voting intentions of electors

A number of issues of interpretation and clarification arising from this definition are canvassed below. This analysis is based on the AEC understanding of the provision and is general in scope. Specific legal advice should be sought where there is doubt as to the application of the provisions to particular fact situations.

CATEGORIES OF POLITICAL EXPENDITURE

Public expression of views - items (i) and (ii) of the definition

Subject to the threshold, items (i) and (ii) of the definition require disclosure where you made (or were liable for) a payment the primary or dominant purpose of which was to fund:

- the public expression of views on a political party, candidate or member of the Commonwealth parliament by any means; or
- the public expression of views on an issue in an election by any means.

Primary or dominant purpose - A person or organisation may have a number of purposes in incurring expenditure on the public expression of views on a political party, candidate or member of the Commonwealth parliament and an issue in an election by any means.

To work out whether you have a disclosure obligation, you will need to reach a view as to whether your primary or dominant purpose for incurring the expenditure was to contribute to or achieve the public expression of views on

¹ The *Commonwealth Electoral Act 1918* is available on a link from the AEC website.

a party, candidate or a member of the parliament, or the public expression of views on an issue in an election.

The primary or dominant purpose does not need to be the sole purpose, but it must be dominant of the various purposes for which the expenditure was incurred. The activity must be primarily rather than incidentally concerned with the expression of views on the party, candidate, member or parliament or election issue.

The primary or dominant purpose should be assessed in relation to each item of expenditure that may require disclosure.

As an example, expenditure on the publication of a political or policy opinion piece in a newspaper may be an adjunct to your normal activity of reporting and commenting on news and issues and so is not political expenditure. The publication of that same opinion piece in a journal or web-site whose objective is to see the election of a particular government, or to further a particular policy line, may well give rise to reportable expenditure.

Similarly, the publication of a political or policy opinion piece in a peak body or trade union journal may well be an adjunct to your normal activity of reporting and commenting on issues of relevance to members' interests. The publication of that same material in a special journal or bulletin may well give rise to reportable expenditure.

Public expression of views - For the purposes of the definition, the public expression of views means the public expression of any views (be they positive, negative or neutral) on a political party, candidate, or member of the Commonwealth parliament, or issue in an election.

The public expression of views can be made through any media, but is more than reporting news or facts. The views must be expressed to people in general rather than to a private audience.

A petition solicited from members of an organisation and made to elected representatives is unlikely to be caught unless it is published and its substantive content is to do with the expression of views.

Issue in an election - This is the public expression of any views on an issue in an election that is likely to affect the outcome of the election. An issue intended to affect the outcome of the election may or may not be one likely to affect the outcome of the election.

The issue must be an issue in relation to a forthcoming election and not a previous election.

It is an issue submitted to or otherwise before electors in connection with the election, an issue of relevance rather than one of peripheral or passing interest to the campaign.

The issue may be one of broad or national import, or it may be of local import. The former is relevant to the outcome of the federal election generally and the latter is relevant to the outcome of the election in a particular State (Senate) or Division (House of Representatives).

Definitions – the following definitions are relevant:

- *Political party* – this is an organisation whose objects or activities include the promotion of candidates to the Federal parliament, regardless of whether the party is registered with the AEC. All Federally registered political parties meet this definition.
- *Candidate in an election* - a person who is or has been a candidate (including a member of a Senate group) in a Federal election. It is a person who has nominated as a candidate or who has announced that he or she will be a candidate.
- *Member of parliament* - a person elected as a Senator or a member of the House of Representatives, or appointed as a Senator.
- *Election* - the Federal election or by-election that follows the date on which the expenditure was incurred.

Election advertising - items (iii) and (iv)

Subject to the threshold, expenditure on all advertising materials that require an authorisation must be disclosed.

Information on what published material requires authorisation is contained in AEC Electoral Backgrounder No 15 at http://www.aec.gov.au/About_AEC/Publications/Backgrounders/.

Information on what broadcasts require authorisation is contained in the Australian Communications Media Authority Fact Sheet on Broadcasting and Communication of Political and Election Matter at http://www.acma.gov.au/WEB/STANDARD/pc=PC_91819

Electoral advertisements must contain the relevant authorisation details at all times and not only during an election period (see sections 328 and 328A of the Act).

Opinion polling and electoral research - item (v)

This covers the conduct of opinion polls and research relating to an election or the voting intentions of electors.

The words 'relating to' in this item are broader in meaning than the word 'on' as used in items (i) and (ii) above. Thus opinion polls or research relating to an election or the voting intentions of electors means:

- the carrying out of any opinion poll about a forthcoming election;
- the carrying out of any other research about a forthcoming election;
- the carrying out of any opinion poll about the intentions of voters as voters at a forthcoming election; and

- the carrying out of any other research about the intentions of voters at a forthcoming election, regardless of whether the election has been announced or not.

The person or organisation that is liable to pay for the polling and research has the reporting obligation. The person or organisation who conducted the poll or undertook the research is unlikely to have a reporting obligation unless the polling or research was undertaken of their own volition e.g. for subsequent sale.

INCURRED EXPENDITURE

Expenditure incurred for purposes other than the five defined categories is not political expenditure and is not required to be reported under the Act.

A return is lodged if expenditure incurred across the five defined categories of political expenditure exceeds the 'more than \$10,300' disclosure threshold. Disclosure is then required in each category even if the expenditure in a given category is below the threshold amount.

Expenditure is incurred if you paid, or are liable to pay, for the defined activity. The activity itself does not give rise to a disclosure obligation; it is the act of incurring expenditure for the activity. Thus a person who commissions and pays for an advertisement may have a disclosure obligation whereas those involved in the production and publication of that advertisement are unlikely to have a disclosure obligation.

CALCULATION OF EXPENDITURE

Political expenditure incurred will in many situations be readily determined as the contracted cost of the activity. For example, the cost of having an advertisement prepared and placed, a political pamphlet prepared and published or the development and conduct of a poll.

In other cases, determination of the amount of political expenditure incurred will be subject to the limitations of costing systems and may require estimation and allocation of expenses.

Expenditure may also need to be apportioned between categories - an article might cover two or more of the categories of political expenditure or an advertising campaign may involve both print and broadcast media.

Disclosure is of expenses with a direct connection to those in the definition of political expenditure. Overhead or administrative costs associated with the on-going operation of an organisation are not caught as these are not primarily incurred for the purposes of political expenditure.

GIFTS RECEIVED FOR POLITICAL EXPENDITURE

Section 314AEC of the Act requires disclosure of gifts received of more than \$10,300 that were applied (in whole or in part) to political expenditure.

Part 2 of the return form must be completed by persons or organisations who:

- Were required to complete Part 1 of the return; and
- Who received a gift of more than the \$10,300 disclosure threshold at any time that was wholly or partially used during the financial year to incur expenditure for a political purpose, or to reimburse such expenditure.

Two or more gifts from a single person are taken to be a single gift for the purposes of this part of the return.

A gift that has been previously reported (because it was partially used to incur or reimburse political expenditure in a previous year) which is again applied to incur or reimburse political expenditure should be reported with the notation that it has previously been reported.

The information required is the name and address of the donor, and the date (or dates) and amount of the gift or gifts:

- If the gift is from an unincorporated association (other than a registered industrial organisation), the name of the association and the names and addresses of the executive members are required.
- If the gift is from a trust or foundation, the name of the trust or foundation, and the names and addresses of the trustees are required.

DISCLOSURE THRESHOLD

The minimum disclosure threshold for the 2006-07 financial year is 'more than \$10,300'. This threshold amount is adjusted annually based on the rate of inflation.

RETURN FORM

The *Annual Return Relating to Political Expenditure* is in two parts:

- *Part 1* requires disclosure of political expenditure across five defined categories; and
- *Part 2* requires disclosure of gifts received for that political expenditure.

The return for 2006-07 may be lodged by e-mail, facsimile or post. The return is due twenty weeks after the end of the financial year.

The return form and guidance material is available at www.aec.gov.au under 'Parties & Representatives' and 'Political Disclosures'.

PUBLIC DISCLOSURE

All returns received will be publicly available on the AEC website on 1 February 2008.

LEGAL AUTHORITY

The authority for the *Annual Return Relating to Political Expenditure* is sections 314AEB and 314AEC of the *Commonwealth Electoral Act 1918*.