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Appendix B – AEC analysis of the FWA report

Reporting obligations under the *Commonwealth Electoral Act 1918* and the Report of the Delegate to the General Manager of Fair Work Australia

The purpose of this document is to set out the analysis by the Australian Electoral Commission (AEC) of the information contained in the Report of the Delegate to the General Manager of Fair Work Australia – "Investigation into the National Office of the Health Services Union under section 331 of the Fair Work (Registered Organisations) Act 2009" (the FWA Report) dated 28 March 2012 against the reporting obligations contained in the *Commonwealth Electoral Act 1918* (Electoral Act).

Paragraph 204 of Chapter 7 of the FWA Report clearly sets out that the FWA Report does not purport to address matters relating to the reporting obligations under the Electoral Act. The author specifically states that he makes *"no comment or judgement (and have no knowledge)"* about whether all of the expenditure was disclosed under relevant electoral laws. Similarly, this document does not purport to address matters relating to the conduct of Mr Thomson and others mentioned in the FWA Report against relevant industrial laws administered by FWA.

The AEC has examined the 1105 page FWA Report against the overlay of the reporting and disclosure obligations contained in the Electoral Act. The AEC is required to administer the laws contained in the Electoral Act as enacted by the Parliament.

To understand the potential reporting obligations under Part XX of the Electoral Act for each of the individuals or entities mentioned in the FWA Report, it is necessary to distinguish between the role of Mr Thomson in each of the entities named in the FWA Report versus his role as a person who was seeking pre-selection and subsequently endorsed as a candidate by the NSW Branch of the Australian Labor Party (ALP). The AEC notes the findings at paragraphs 177 to 266 of Chapter 6 concerning the leave arrangements for Mr Thomson and the conclusion at paragraph 263 that Mr Thomson continued to work as the national Secretary of the HSU National Office during the period in the lead up to the 24 November 2007 election. Accordingly, Mr Thomson was performing at least three roles during the period of expenditure contained in the FWA Report. He was the National Secretary of the HSU National Office up until at least 4 December 2007 (see paragraph 201 of Chapter 6). He was a person seeking pre-selection by a registered political party and attempting to raise his profile in the Division of Dobell. He became the endorsed ALP candidate on 13 April 2007. For most of the period of expenditure described in the FWA Report, Mr Thomson was undertaking two roles at the same time.

Each of these roles involves the possible application of different reporting and disclosure obligations contained in the specific requirements of the Electoral Act. For example, the potential disclosure obligation of a payment "authorised" by Mr Thomson whilst National Secretary of the HSU National Office was the responsibility of the HSU National Office to report, rather than Mr Thomson as the ALP endorsed candidate for the Division of Dobell for the

November 2007 election. Whether or not such a payment was authorised under the rules of the HSU National Office or under the requirements of the *Fair Work (Registered Organisations) Act 2009* is not of itself relevant to the operation or interpretation of the Electoral Act.

In addition the actual timing of each of the reporting obligations under Part XX of the Electoral Act is also relevant as the obligation to lodge the various disclosure returns with the AEC were spread over several years as follows:

- Donor Annual Returns for the 2006-07 financial year - 17 November 2007;
- Annual Return Relating to Political Expenditure for the 2006-07 financial year - 17 November 2007;
- Candidate Election Return for the 24 November 2007 election – 11 March 2008;
- Donor Annual Returns for the 2007-08 financial year – 17 November 2008;
- Third Party Return of Political Expenditure for the 2007-08 financial year - 17 November 2008.

Individuals and entities with potential reporting obligations under the Electoral Act

The individuals and entities with potential reporting obligations under Part XX of the Electoral Act based on the material in the FWA Report include:

1. <u>The Candidate</u>

   Mr Craig Thomson was the endorsed Australian Labor Party (ALP) candidate for the Division of Dobell in the 2007 general election and appointed a candidate agent who was responsible for lodging the candidate election return following the November 2007 election.

2. <u>The Donor and Third Party</u>

   The HSU National Office, of which Mr Thomson was the National Secretary prior to the 2007 general election and was replaced by Ms Kathy Jackson in late 2007.

3. <u>Other Third Parties</u>

   The Coastal Voice Community Group Incorporated (INC 9885522) (Coastal Voice), which has been claimed to be an "associated entity", and which is described at paragraph 417 of Chapter 7 of the FWA Report as *"a profile building vehicle for Mr Thomson on the Central Coast for the purposes of enhancing his electoral prospects rather than for purposes related to the HSU"*.

4. A Registered Political Party

The NSW Branch of the ALP, which endorsed Mr Thomson as a candidate for the Division of Dobell on 13 April 2007 and which was responsible for including donations and electoral expenditure on behalf of the Dobell campaign committee in its annual returns.

Attachment A is an overview of the requirements of the Electoral Act which have been applied to each of the above individuals and entities. It sets out the reporting criteria contained in Part XX of the Electoral Act.

1. Mr Thomson the candidate

The first issue is whether or not Mr Thomson (or rather his candidate agent) had an actual disclosure obligation in relation to the items of expenditure that have been identified in the FWA Report, particularly those contained in Chapter 7. The AEC is aware of various comments that the FWA Report describes large amounts of funds and expenditure that was required to be disclosed by Mr Thomson under the requirements of Part XX of the Electoral Act.

Most of these comments have overlooked the specific requirements in sections 304, and 309 of the Electoral Act which limit the reporting obligations of candidates and their agents to "amounts received in the disclosure period" (see subsection 304(2)) and the expenditure incurred on a specified range of activities during the "election period". It should also be noted the Electoral Act does not apply to the pre-selection of new candidates or expenditure that they have incurred before they are actually endorsed by a registered political party.

Amounts received

The "disclosure period" is defined in subsection 287(1) of the Electoral Act and paragraph (c) applies to Mr Thomson as he was not a candidate for the 2004 election. Mr Thomson was pre-selected as the ALP candidate for Dobell on 13 April 2007. Therefore, any "gift" that was received prior to that date (e.g. the services of Ms Stevens and Mr Burke) was not required to be disclosed by either Mr Thomson or his candidate agent. The schema in the Electoral Act does not recognise that the expenditure of funds to raise the profile on a person in an electorate prior to that person actually being endorsed by a registered political party could be categorised as being for the benefit of the registered political party that subsequently endorsed the person as their candidate. As already stated, the Electoral Act does not apply to the pre-selection of new candidates or expenditure that they have incurred before they are actually endorsed by a registered political party.

Expenditure incurred

Similarly the "electoral expenditure" that is required to be disclosed by a candidate or their agent is regulated by sections 308 and 309 of the Electoral Act. These provisions limit the disclosure requirement to expenditure during

the "election period" which is defined in subsection 287(1) of the Electoral Act as the period between the issuing of the writs for the 2007 general election (17 October 2007) and the polling day on 24 November 2007. Further, the actual items of electoral expenditure which are required to be disclosed are limited to those items set out in subsection 308(1) of the Electoral Act. In general terms, subsection 308(1) limits any reporting obligation to expenditure incurred on electoral advertising which takes place during the "election period".

2. HSU National Office

The second issue is whether or not the HSU National Office had an actual disclosure obligation in relation to the items of expenditure that have been identified in the FWA Report. The HSU National Office was not an "associated entity" as defined in subsection 287(1) of the Electoral Act. It was separate from the branches of the HSU (some of which had voting rights in a registered political party) due to the operation of subsection 242(5) of the *Fair Work (Registered Organisations) Act 2009*. Accordingly, the HSU National Office did not have a reporting obligation as an "associated entity" under section 314AEA of the Electoral Act.

There are two other provisions of the Electoral Act which give rise to reporting obligations that could apply to the HSU National Office based on the information contained in the FWA Report.

Gifts made

The first provision is the donor obligations under section 305A of the Electoral Act. This section requires a person to provide a return to the AEC if the person makes a "gift" to any candidate "during the disclosure period in relation to an election". The reciprocal reporting obligation of the candidate to disclose such a "gift" has a limitation as the candidate is only required to disclose any "gift" that has been used by the candidate "solely or substantially for a purpose related to an election" as required by subsection 304(5) of the Electoral Act. In other words, gifts made only for the personal benefit of the candidate need not be disclosed under the Electoral Act.

As set out above, as Mr Thomson was not a "candidate" in the 2007 election until after he was endorsed by the ALP on 13 April 2007, the expenditure of HSU National Office funds for the benefit of Mr Thomson that have been identified by the FWA Report which occurred before this date could not have given rise to any donor reporting obligation under section 305A of the Electoral Act as he was not a candidate in the election. One of the effects of section 305A is that the donor would need to know that the person to whom they gave the gift was a candidate in the election and that the "disclosure period" applied at the time of the making of the "gift". The expenditure of HSU National Office funds for the benefit of Mr Thomson after 13 April 2007 when he became the ALP endorsed candidate for the Division of Dobell could have given rise to a donor reporting obligation due to the definition of the "disclosure period". The AEC notes that the reporting deadline for the 2006-

07 Donor Annual Returns to be lodged with the AEC was 17 November 2007 (i.e. the week before the 24 November 2007 election) and the Election Donor Return was due on 11 March 2008.

Political expenditure

The second provision is the political expenditure return under section 314AEB of the Electoral Act. This section was inserted into the Electoral Act by item 84 of Schedule 1 to the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Act No. 65 of 2006). Item 85 of Schedule 1 to this Amending Act provided that *"The amendment made by item 84 applies to the 2006-07 financial year and later financial years"*. The AEC notes that the reporting deadline for the 2006-07 Annual Return Relating to Political Expenditure was 17 November 2007 (i.e. the week before the 24 November 2007 election).

Act No. 65 of 2006 also introduced the disclosure threshold of $10,000 which was indexed in accordance with the methodology continued in the then new section 321A which was also inserted by this Act. This amending Act increased the previous disclosure thresholds of $200, $1,000 and $1,500 contained in Part XX of the Electoral Act and established a single disclosure threshold for individual "gifts", receipts and expenditure of $10,000. Due to the operation of section 321A of the Electoral Act, the threshold amounts above which disclosure was required under Part XX of the Electoral Act were $10,300 for the 2006-07 financial year and $10,500 for the 2007-08 financial year.

Under the cover of a letter to the AEC dated 13 October 2009 from Ms Kathy Jackson, the HSU National Office lodged three returns. The three returns lodged with the AEC were:

- 2006-07 annual return relating to political expenditure totalling $404,292;
- 2007-08 third party return of political expenditure totalling $586,673;
- 2007-08 donor return totalling $12,511.40.

None of these returns were subject to any qualification under section 318 of the Electoral Act indicating that, at that time, Ms Jackson had access to sufficient particulars of the HSU National Office expenditure to prepare and lodge accurate returns. Section 318 of the Electoral Act enables a person with a reporting obligation to provide the AEC with a written notice setting out the particulars and reasons why a person is unable to complete a return and to identify the person who on reasonable grounds they believe is able to provide the missing particulars.

Paragraph 119 of Chapter 1 of the FWA Report indicates that the HSU National Office actually did disclose the expenditure incurred on Ms Stevens and Mr Burke under section 314AEB as a third party political expenditure in their annual returns that were lodged in October 2009 for the 2006-07 and

2007-08 financial years. A donor return was also lodged by the HSU National Office for the 2007-08 financial year.

3. Coastal Voice

The third issue is the activities of Coastal Voice and the involvement of Mr Thomson in that entity. The information in the FWA Report shows that Coastal Voice was not an "associated entity" under the Electoral Act due to its activities and operations. Further as Coastal Voice has been found to have been moribund since 18 March 2007 (being a date before Mr Thomson was endorsed as the ALP candidate for Dobell), it could not have been operating "for the benefit of" a registered political party (see paragraph (b) of the definition of an "associated entity") as Mr Thomson only became the endorsed ALP candidate for the Division of Dobell on 13 April 2007. There is no other material in the FWA Report which would indicate that Coastal Voice had any possible reporting obligation under the Electoral Act.

4. ALP NSW Branch

The fourth issue is the disclosure obligations placed on the ALP NSW Branch under sections 287A, 314AB and 314AC of the Electoral Act. Some of the items of expenditure identified in the FWA Report include items of expenditure that would normally be included in an annual return under section 314AB of the Electoral Act. This would usually include campaign costs such as the payment to the Dobell FEC, advertising invoices by the ALP NSW Branch, the "Kevin 07" bus and the establishment/running costs of the Long Jetty campaign office.

Section 287A of the Electoral Act deems the expenditure incurred and donations received by the campaign committee of an endorsed candidate to be treated as part of the relevant State Branch of the registered political party which endorsed the candidate. Accordingly, relevant items of expenditure incurred and donations received after the date of the pre-selection of Mr Thomson on 13 April 2007 on behalf of the Dobell campaign committee would have been required to be disclosed in the ALP NSW Branch Annual Returns under section 314AB of the Electoral Act for the 2006-07 and 2007-08 financial years rather than by Mr Thomson under sections 304 and 309. Of course, this obligation could only be complied with if the campaign committee was advised of these amounts.

Section 314AB of the Electoral Act requires that the agent of a registered political party and each State Branch of that registered political party must lodge an annual return within 16 weeks after the end of a financial year. That annual return is to include the total amount received, the total amount paid and the total outstanding amount of all debts incurred. Section 314AC(1) of the Electoral Act requires that the particulars of the amounts reported by a registered political party need only be disclosed where the amount is above the threshold (i.e. $10,300 for 2006-07 and $10,500 for 2007-08). This provision was amended in 2006 so that its effect is that if amounts are received or expended on different days so that each amount is less than the

applicable disclosure threshold for that reporting period, then the particulars set out in subsection 314AC(3) need not be included. This means that the disclosure return need only include the total amount of the expenditure without any of the particulars of each transaction which makes up that total.

The Annual Returns of the ALP NSW Branch were:

- 2006-07 – total receipts of $27,572,169.16 and total expenditure of $28,487,550.23;
- 2007-08 – total receipts of $17,682,023.00 and total expenditure of $17,285,632.00.

The FWA Report

The following parts of the FWA Report were particularly noted in the AEC's consideration of this matter.

Paragraphs 118 and 119 of Chapter 1 describe the HSU National Office response to the notice to provide information to the FWA. Reference is made to the two returns that were lodged with the AEC for Annual Return Related to Political Expenditure for the 2006-07 and 2007-08 financial years. Several points to be noted include:

- The wages for Ms Stevens and Mr Burke are stated to have been included in the two returns on the basis that they were primarily engaged in activities connected with the public expression of views on an election during the relevant period;

- There were issues about the then availability of records; and

- The HSU National Office prepared the returns on the basis that if there was any uncertainty and it was plausible given the material available to it that expenditure may have been political expenditure, they chose to disclose that expenditure.

Chapter 6 – Expenditure of National Office funds for Mr Thomson's personal benefit

Paragraphs 177 and following in Chapter 6 disclose that, for the purposes of industrial laws, Mr Thomson was still the National Secretary of the HSU National Office during the election period for the November 2007 election and was not on leave. The FWA Report concludes at paragraph 263 that Mr Thomson did not take annual leave during October and November 2007 and that no-one else was appointed to act as National Secretary during this period. The FWA Report concludes that Ms Kathy Jackson only commenced the duties as Acting National Secretary of the HSU National Office on 14 December 2007 being the date on which Mr Thomson resigned from his position. The FWA Report also states at paragraph 236 that Mr Thomson

was *"actively undertaking at least some of the duties of National Secretary during October and November 2007".*

The AEC notes that the FWA Report is silent as to which person within the HSU National Office was undertaking the remaining duties of the National Secretary during November 2007 and in particular on 17 November 2007 when the various annual returns for the 2006-07 financial year were due to be lodged with the AEC. The information contained in the FWA Report indicates that the HSU National Office would have continued to have reporting obligations under Part XX of the Electoral Act after 13 April 2007 being the date when Mr Thomson was pre-selected as the endorsed ALP candidate for the Division of Dobell.

Paragraph 624 of Chapter 7 refers to Mr Thomson having *"employed a National finance officer To undertake daily tasks…..it nevertheless remained the responsibility of the National Secretary under Sub-rule 32(f) to 'lodge and file with and furnish'"* the information required under relevant industrial laws. However, this does not provide any clarity as to the identity of the individual within the HSU National Office who was responsible for lodging the various returns under the Electoral Act. The fact that the various disclosure returns were lodged by Ms Kathy Jackson when she became the National Secretary of the HSU National Office does not alter this position. As is also acknowledged in paragraph 624, Mr Thomson, was as a matter of law, not the HSU National Office, merely the officer of that corporate entity responsible for lodging returns under industrial laws. Part XX of the Electoral Act does not contain the same degree of specificity as to who within a body corporate is responsible for lodging the returns with the AEC. This is relevant because the reporting date for the Donor Annual Returns and the Annual Return Relating to Political Expenditure for the 2006-07 financial year was 17 November 2007.

Chapter 7 of the FWA Report is entitled *"Expenditure of National Office funds for the purpose of assisting Mr Thomson's election to Parliament for the seat of Dobell".* The early part of the Chapter deals with the "Your Rights at Work" campaign which was the union run campaign in the lead up to the November 2007 election. Expenditure on this campaign by the HSU National Office would have fallen within the obligation under section 314 AEB of the Electoral Act. Accordingly, payments incurred on the credit card issued to Mr Thomson by the HSU National Office that related to the "Your Rights at Work" campaign would have been required to have been disclosed by the HSU rather than by Mr Thomson as a candidate.

At paragraph 84 of this Chapter the discussion shifts to the campaign in the Division of Dobell. Paragraph 85 refers to Mr Thomson being pre-selected as the ALP candidate for Dobell in March 2007. The AEC has previously been advised by the ALP NSW Branch that Mr Thomson was endorsed on 13 April 2007. This is relevant to the "disclosure period" in subsection 287(1) of the Electoral Act for candidates which was from the date of their endorsement by a registered political party to the date of the election.

Paragraph 109 of this Chapter refers to the establishment of the Long Jetty Campaign Office which the FWA Report concludes at paragraph 111 *"appears to have occurred in April and May 2007"*. At paragraph 118 the FWA Report concludes that the fact that various expenses commenced in 23 July 2007 and were incurred periodically after this *"strongly suggests that these expenses related to Mr Thomson's campaign for Dobell"*. The total costs are set out at paragraph 126 which amounts to $4,826.99. Noting the provisions of section 314AC and 314AEB, the AEC is currently seeking further advice about whether or not this expenditure has been included in the total amounts that have already been disclosed.

Paragraphs 128 to 133 of this Chapter describe two payments totalling $3,500 made in July and December 2006 to the Dobell FEC. The AEC understand that this is a reference to the ALP Federal Election Committee for the Division of Dobell. These two amounts are under the disclosure threshold that applied in the 2006-07 financial year. Noting the provisions of section 314AC and 314AEB, the AEC is seeking further advice as to whether or not this expenditure has been included in the total amounts that have already been disclosed.

Paragraphs 134 to 150 of this Chapter refer to expenditure on a campaign bus totalling $1,277.96 which occurred between April and June 2007. At paragraph 141 Ms Stevens is quoted as stating this was a *"Kevin07"* advertisement and at paragraph 142 Mr Thomson is quoted *"agreed this was an election expense"*. Noting the provisions of section 314AC and 314AEB, the AEC is currently seeking further advice about whether or not this expenditure has been included in the total amounts that have already been disclosed.

Paragraphs 151 to 162 of this Chapter refer to postage expenses at the Long Jetty campaign office totalling $9,574.17 that were incurred after May 2007. The FWA Report concludes at paragraph 153 that because the invoices were made out to Mr Thomson as the "ALP Candidate" *"it seems probable that Mr Thomson purchased [the stamps and envelopes] … for mailout purposes associated with Mr Thomson's campaign for Dobell."*. The actual evidence to support this conclusion is not apparent as there is no information as to whether this was part of the "Your Rights at Work" campaign or some ALP specific advertising. The AEC has previously been advised by the HSU National Office on 10 February 2012 that the expenditure on postage and envelopes from Australia Post for Long Jetty campaign office were included in the Annual Return Relating to Political Expenditure for the 2007-08 financial year.

Paragraphs 163 to 166 of this Chapter refer to payments in May 2007 to LBH Promotions totalling $7,409.93 in relation to the "Your Rights at Work" campaign. Noting the provisions of section 314AC and 314AEB, the AEC is currently seeking further advice about whether or not this expenditure has been included in the total amounts that have already been disclosed.

Paragraphs 167 to 175 of this Chapter refer to two payments made in February 2008 totalling $12,511.40 to the ALP NSW Branch for advertising relating to the Dobell FEC. At paragraph 175 Mr Thomson is reported as stating that these payments were most likely *"for ALP-related expense that should have been declared"*. The AEC notes that this amount corresponds to the amount disclosed by the HSU National Office Annual Donor Return for the 2007-08 financial year.

Paragraphs 176 to 187 of this Chapter deal with the radio advertising expenses totalling $18,731 incurred with 2GO and Sea FM in November 2007 which the FWA Report concludes at paragraph 180 that Mr Thomson accepts that these were for campaign advertising. The AEC has previously been advised by the HSU National Office on 10 February 2012 that payments to Central Coast Radio Centre and Nova 1069 Pty Ltd corresponding to these amounts were disclosed in the Annual Return Relating to Political Expenditure for the 2007-08 financial year.

Paragraph 188 to 196 of this Chapter refers to printing expenses with the Entrance Print in the period 26 May to 18 June 2007 totalling $13,468.78. The AEC has previously been advised by the HSU National Office on 10 February 2012 that this expenditure was included in the Annual Return Relating to Political Expenditure for the 2006-07 and 2007-08 financial years.

Employment of Ms Stevens

Paragraphs 205 to 349 of this Chapter deal with the employment of Ms Stevens. At paragraph 206 her employment is described as having commenced in July 2005 and was based on the NSW Central Coast. At paragraph 242 of the FWA Report reference is made to an estimate of the total salary paid to Mr Stevens during her employment with the HSU as being $92,960.55 and with total employment related costs this is stated to amount to $114,208.83 (see paragraph 245).

The basis for the above calculations is set out in Chapter 4 of the FWA Report. The annual salary for Ms Steven during the period 4 September 2006 until 14 December 2007 is stated at paragraph 40 of Chapter 4 as being $46,800. The duties of Ms Stevens are described in paragraphs 220 to 227 of Chapter 7. At paragraph 344 of Chapter 7 of the FWA Report the author concludes that *"she had no involvement in ordinary activities of the HSU that exposed her to engagement with employees in the workplace"*. The author goes on to state that her duties *"were closely connected to, if not entirely directed towards, building his [Mr Thomson's] profile within the electorate of Dobell, and later towards campaigning for his election as the member for Dobell"*.

The AEC makes several observations about the above information:

- Ms Stevens was engaged in a range of duties that pre-dated the pre-selection of Mr Thomson as the endorsed ALP candidate for the Division of Dobell;

- The duties of Ms Stevens appear to have included a range of matters including the "Your Rights at Work" campaign;

- Given the statement at paragraph 119 of Chapter 1 of the FWA Report (that Ms Stevens' salary was included in the third party political expenditure returns for 2006-07 and 2007-08), this expenditure has been disclosed by the HSU National Office.

The AEC is aware of comments that the salary of Ms Stevens should have been disclosed as a donation to the ALP NSW Branch or to Mr Thomson. Such comments have overlooked the facts in the FWA Report which disclose that some of her duties did involve HSU matters and the "Your Rights at Work" campaign (e.g. her activities in pursuing the sponsorship with the Central Coast Rugby League). Other duties also include her role with Coastal Voice. Neither of these duties could have given rise to a donor reporting obligation. However, the duties that Ms Stevens performed that solely related to the election campaign of Mr Thomson after 13 April 2007 could be argued to have been more appropriately disclosed in another return. The information contained in the FWA Report does not provide sufficient information to enable a conclusion to be reached.

Coastal Voice

Paragraphs 350 to 419 deal with Coastal Voice. The FWA Report at paragraph 417 concludes *"I consider that Coastal Voice was always intended to operate as a profile building vehicle for Mr Thomson on the Central Coast for the purpose of enhancing his electoral prospects rather than for purposes related to the HSU."*. The FWA Report has three key pieces of information relevant to the Electoral Act:

- Paragraph 365 describes the establishment of Coastal Voice in May 2006 and that its objects were *"Protect rights; especially of the elderly and youth; promote provision of quality aged care services; health services"*.

- Paragraph 414 refers to Mr Thomson having resigned from Coastal Voice on 18 March 2007.

- Paragraph 417(g) refers to Coastal Voice appears to have been moribund since Mr Thomson's resignation.

Irrespective of the characterisation of Coastal Voice in the FWA Report, the above information supports the previous conclusion reached by the AEC that Coastal Voice was not an "associated entity" under the Electoral Act due to its activities and operations. Further as Coastal Voice has been found to have been moribund since 18 March 2007 (being a date before Mr Thomson was endorsed as the ALP candidate for Dobell), it could not have been operating "for the benefit of" a registered political party (see paragraph (b) of the definition of an "associated entity") as Mr Thomson only became the endorsed

ALP candidate for the Division of Dobell on 13 April 2007. There is no other material in the FWA Report which would indicate that Coastal Voice had any possible reporting obligation under the Electoral Act.

Employment of Mr Burke

Paragraphs 420 to 513 of this Chapter deal with the employment of Mr Burke. This employment is described in paragraph 74 of Chapter 4 as having commenced in July 2006 and ceased in March 2007. At paragraph 89 of Chapter 4 the FWA Report states that the estimated figures for Mr Burke's salary and his superannuation contributions total $29,400.

The duties of Mr Burke are described in paragraphs 420 to 432 of the FWA Report. At paragraph 507 the author concludes (along similar lines to that for Ms Stevens) that Mr Burke's duties *"were closely connected to, if not entirely directed towards, building his [Mr Thomson's] profile within the electorate of Dobell, and later towards campaigning for his election as the member for Dobell"*.

The AEC makes several observations about the above information:

- Mr Burke was engaged in a range of duties that pre-dated the pre-selection of Mr Thomson as the endorsed ALP candidate for the Division of Dobell;

- The duties of Mr Burke appear to have included a range of matters including the "Your Rights at Work" campaign and included *"some ordinary duties"* for the HSU National Office;

- That Mr Burke ceased his employment with the HSU National Office in March 2007 prior to the pre-selection of Mr Thomson as the endorsed ALP candidate for the Division of Dobell;

- Given the statement at paragraph 119 of Chapter 1 of the FWA Report (that Mr Burke's salary was included in the third party political expenditure returns for 2006-07 and 2007-08), this expenditure has been disclosed by the HSU National Office.

Central Coast Rugby League

The terms of this sponsorship agreement are described in paragraphs 515 to 517 of Chapter 7 of the FWA Report. The Agreement is stated to have been in force for the 2006, 2007 and 2008 football seasons. The promotional aspect is also described in these paragraphs to include the HSU logo and the "Your Rights at Work" logo on jerseys, stationery and other advertising. Paragraphs 518 and 521 of Chapter 7 outline two payments totalling $34,320 being made in March 2007 and a further payment of $39,073.32 in June 2008. At paragraph 557 of Chapter 7 the total amount of payment made between 2006 and 2008 are described as being $103,393.32.

The FWA Report concludes at paragraph 550 that the key reason for the sponsorship agreement was that it gave naming rights, advertising and signage to the HSU and the "Your Rights at Work" brand. At paragraph 552 the FWA Report also concludes that any personal advantage to Mr Thomson from this Agreement *"is remote"*.

Given that there is no connection between this expenditure with the election campaign of Mr Thomson during the "election period" this would not have been required to be included in a candidate election return (see subsection 308(1) and 309). Further the second payment of $39,073.32 occurred well after the November 2007 election in which Mr Thomson was elected as the Member for Dobell and applied to only the 2008 football season.

Dad's in Education Father's Day Breakfast

Paragraphs 562 to 590 of this Chapter deal with the payment of $10,000 sponsorship for this event. This expenditure was made up of a number of payments in August 2007 and December 2007. It should also be noted that as the individual amounts of payment involved in this matter were below the applicable $10,500 disclosure threshold that applied in the 2007/08 financial year this payment would not have been required to have been particularised in either a donor return or an annual return under the Electoral Act.

In any event, there is uncertainty as to whether a reporting obligation would have existed even if the amount was above the disclosure threshold. At paragraph 588 of the FWA Report the conclusion is reached that this payment resulted in Mr Thomson appearing on National television just a few months before the November 2007 election and *"assisted in his gaining publicity for his candidacy in the seat of Dobell"*. Without any information concerning the contents of the television program (e.g. whether Mr Thomson was mentioned as the endorsed ALP candidate for Dobell) it is not possible to make any further conclusions as to any potential reporting obligation. Further without any information concerning whether the payment of the sponsorship included any rights of publicity it is not clear whether this involved any disclosure obligation on the HSU National Office under section 314AEB of the Electoral Act.

Golden Years Collectables

Paragraphs 591 to 599 of this Chapter deal with the payment of $2,050 to Golden Years Collectables on 25 November 2006 for the purpose of purchasing sporting memorabilia to be donated to the ALP for raffles. It is apparent that this could be reasonably regarded as a donation to the ALP (assuming that the memorabilia was actually given to the ALP and used for this purpose). However, this does not give rise to any potential donor disclosure obligation as the amount is below the $10,300 disclosure threshold that applied in the 2006-07 financial year.

Central Coast Convoy for Kids

Paragraphs 600 to 616 deal with the payment of $5,000 to the Central Coast Convoy for Kids that was paid on 12 September 2006. The conclusions in the FWA Report are that, while there was no connection between this event and either the HSU or the ALP, this donation was for the personal benefit of Mr Thomson six months before he was pre-selected as the endorsed candidate for the ALP in the Division of Dobell as it raised his public profile. As this payment was made well before the pre-selection of Mr Thomson as the endorsed ALP candidate, there is no provision contained in the Electoral Act that would require this payment to be disclosed.

Analysis of payments made and disclosed

The AEC notes that few of the individual transactions reported in Chapter 7 of the FWA Report exceeded the respective disclosure thresholds applying for the 2006-07 and 2007-08 financial years. Accordingly detailed disclosure of the particulars set out in subsection 314AC(3) of the Electoral Act would not, therefore, have been required on the returns lodged by either the HSU National Office or by the ALP NSW Branch. However, some items of expenditure that have been identified would have been required to be incorporated into the total of all amounts received or paid in the 2006-07 and 2007-08 annual returns of the HSU National Office and of the ALP NSW Branch. The inquiries mentioned above are directed at establishing whether that has occurred.

In relation to the amounts listed at paragraph 197 of the FWA Report the following table sets out their status under the Electoral Act.

Table 1 - FWA Report paragraph 196 – Reporting status

Expenditure	Amount	Disclosure to the AEC
Establishment of the Campaign Office	$4,826.99	Under the threshold - Further information sought to establish whether disclosed by ALP or HSU
Payments to Dobell FEC	$3,500.00	Under the threshold – Further information sought to establish whether disclosed by ALP or HSU
Campaign Bus	$1,277.96	Under the threshold - Further information sought to determine whether disclosed by ALP or HSU
Postage expenses	$9,574.17	Disclosed by the HSU National Office

Payments to LBH Promotions	$7,409.93	Under the threshold - Further information sought to determine whether disclosed by HSU
ALP Advertising	$12,511.40	Disclosed by HSU National Office
Radio advertising	$18,731.00	Disclosed by HSU National Office
Printing expenses	$13,468.78	Disclosed by HSU National Office
Total	**$71,300.23**	

Accordingly, of the above amounts the AEC is currently seeking further information about four items of expenditure which total $17,014.88. The other amounts identified at paragraph 197 of the FWA Report have been disclosed by the HSU National Office.

Table 2 - Summary of all payments identified in FWA Report

Amount	**Required to be disclosed?**	**Disclosure by?**	**Was it disclosed?**
"Your Rights at Work" campaign costs	Yes under section 314AEB	HSU	Yes – HSU Political Expenditure Returns 2006-06 and 2007-08
Establishment of Long Jetty campaign office	Yes	HSU/ALP NSW Branch	See Table 1
Payments to Dobell FEC	Yes	HSU/ALP NSW Branch	See Table 1
"Kevin07" Campaign bus	Yes	HSU/ALP NSW Branch	See Table 1
Postage Long Jetty	Yes	HSU	Yes – HSU Political Expenditure Return 2007-08
LBH Promotions	Yes – "Your Rights at Work"	HSU	See Table 1
ALP advertising	Yes	HSU/ALP NSW Branch	Yes – HSU Donor Return 2007-08
Radio advertising	Yes	HSU	Yes - HSU Political Expenditure Return 2007-08
Printing expenses	Yes	HSU	Yes - HSU Political Expenditure Return 2006-07 and 2007-08
Salary Ms Stevens	In part	HSU	Yes - HSU Political Expenditure Return

			2006-07 and 2007-08
Coastal Voice	No	N/A	N/A
Salary Mr Burke	In part	HSU	Yes - HSU Political Expenditure Return 2006-07 and 2007-08
Central Coast Rugby League	"Your Rights at Work" under section 314AEB	HSU	Yes - HSU Political Expenditure Return 2006-07 and 2007-08
Dads in Education Father's Day breakfast	No	N/A	N/A
Golden Years Collectables	Yes	ALP NSW Branch	Under the threshold
Central Coast Convoy for Kids	No	N/A	N/A

The disclosure obligation and offences

It is important to note that Part XX of the Electoral Act concerns itself with the disclosure of only certain types of "electoral expenditure" that has been incurred in relevant periods rather than the motives for the expenditure, such as raising a prospective candidate's profile. This was clearly the intention of Parliament when the original funding and disclosure scheme was introduced in 1984 with the *Commonwealth Electoral Legislation Amendment Act 1983* (the Amending Act). The then Minister stated (House of Representative Hansard 2 November 1983 at page 2215) that:

> *"An essential corollary of public funding is disclosure. They are two sides of the same coin. Unless there is disclosure the whole point of public funding is destroyed."*

The level of penalties contained in the then new section 153V inserted by the Amending Act are the same as those that presently exist in section 316 of the current Act. In general terms all of these penalties are fines ranging from $1,000 to $5,000. There is one exception to this and that is the offence in subsection 316(6) of the Electoral Act which is for providing information to the AEC in response to a notice requiring the production of information where the information is "to the knowledge of the person, false or misleading in a material particular". This offence includes a penalty of imprisonment of up to 6 months.

The measures contained in the Amending Act were based on the then Government's response to the September 1983 First Report of the Joint Select Committee on Electoral Reform (the JSCER Report). Chapter 9 of the JSCER Report dealt with the issue of "Public Funding of Political Parties" and

Chapter 10 dealt with the issue of "Disclosure of Income and Expenditure". Paragraph 10.24 of the JSCER Report stated that:

> *"The Committee recommends that no penalty be attached to innocent mistakes. However, suitably severe penalties should be attached to the wilful filing of false or incorrect returns."*

Paragraph 10.34 of the JSCER Report stated that:

> *"Disclosure provisions should be backed up by offences and penalties for non-compliance. However these should not extend to the invalidation of elections or disqualification of those elected. 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."*

Paragraphs 10.51 to 10.57 of the JSCER Report specifically addressed the level of penalties. Paragraph 10.51 of the JSCER Report stated in part that:

> *"10.51 The Committee considered that the appropriate penalties for non-compliance with disclosure of expenditure provisions and similarly with disclosure of donation provisions should be monetary, and do not warrant imprisonment……"*

Paragraph 10.52 of the JSCER Report stated:

> *"Wilfully submitting false returns is a serious matter. Harders suggests imprisonment as an appropriate penalty for such an offence. The Committee is not inclined to a penalty of imprisonment. Any private person or party official who is convicted of knowingly providing false returns and is fined would pay sufficient penalty with the consequent probable denial or loss of public office or office of trust."*

The above discussion in the JSCER Report and its recommendations were accepted by the then Government and were reflected in the new section 153V that was enacted by the Parliament which did not contain any penalty of imprisonment, but rather the imposition of monetary fines. Accordingly, this appears to have been the parliamentary intention when these provisions were originally enacted. There have been no relevant amendments made by the Parliament since the 1983 amendments to the Electoral Act which has changed this position.

The 1983 amendment to the Electoral Act did not contain any limitation period such as now exists in subsection 315(11). The offences in section 315 of the Electoral Act are "summary offences". Summary offences are offences that are punishable by not more than 12 months imprisonment – see section 4H of the *Crimes Act 1914*) deal with what are usually regarded as less serious offences. 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. In addition under section 13 of the *Crimes Act*

1914 any person is able to undertake a prosecution for a summary offence while for the more serious indictable offences the DPP is the only competent authority to proceed to a hearing for a conviction.

In 1991 the Electoral Act was amended by the *Political Broadcasts and Political Disclosures Act 1991* (Act No. 203 of 1991). Section 23 of this Amending Act included the then new subsection 315(11) which provides that:

> "(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"

Accordingly, the Parliament has 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.

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.

Attachment A

The reporting criteria

The relevant reporting criteria contained in the Electoral Act which apply to each of the above players involve the following provisions:

Candidates

Disclosure of Gifts

- Section 304 provides for the disclosure of a "gift" that is used solely or substantially for a purpose related to an election and which is above the disclosure threshold ($10,300 for the 2006-07 financial year; $10,500 for the 2007-08). This responsibility rested with the candidate agent appointed by Mr Thomson for the 2007 general election.

- For the purposes of section 304, section 287(1)(c) defines the "disclosure period" for donations to Mr Thomson (e.g. from the HSU National Office and to the Dobell FEC and to the ALP NSW Branch) which for the November 2007 general election was the period between the announcement of his pre-selection as an endorsed ALP candidate on 13 April 2007 until polling day on 24 November 2007. Any payments outside of this "disclosure period" were not required to be disclosed.

Disclosure of Electoral Expenditure

- Sections 308 and 309 deal with candidate reporting of "electoral expenditure". Noting that the definition of "electoral expenditure" in section 308 lists seven specific categories of expenditure that must be reported. However, a candidate is only required to report the expenditure which was incurred in the various items listed that were used in the "election period". The "election period" is defined is subsection 287(1) to be the period between the issuing of the writs for an election and polling day. For the 24 November 2007 general election the "election period" was the period between 17 October 2007 and polling day. Any "electoral expenditure" by a candidate outside of the "election period" is not required to be disclosed.

Candidate Agents

- Section 289 provides for the appointment of candidate agents who are responsible for completing and lodging the candidate election returns under Part XX of the Electoral Act. Mr Thomson appointed a candidate agent at the time of nomination that was responsible for the lodging of the candidates election return with the AEC. The candidate agent had the responsibility for reporting any "gift" or "electoral expenditure" on behalf of the candidate

Section 313 – the lodging of Nil returns by candidates or their agents. A "Nil" return was lodged by the appointed candidate agent on behalf of Mr Thompson on 28 February 2008.

Donors

Disclosure of Gifts

- Sections 305A and 305B provide for the Donor Annual Returns for gifts made to candidates and gifts made to registered political parties. The reporting obligation in section 305A is also limited to "a gift or gifts, during the disclosure period in relation to an election". The "disclosure period" for donations to Mr Thomson (e.g. from the HSU National Office and to the Dobell FEC and to the ALP NSW Branch) which for the November 2007 general election was the period between the announcement of his pre-selection as an endorsed ALP candidate on 13 April 2007 until polling day on 24 November 2007. Any "gift" outside of this "disclosure period" was not required to be disclosed.

- Section 305A also limits the reporting obligation where the total amount or value of the "gift" was less that the disclosure threshold ($10,300 for the 2006-07 financial year; $10,500 for the 2007-08).

- Subsection 305A(1A) excludes a "candidate in an election" from having a reporting obligations as a donor.

- Section 305B deals with the disclosure of a "gift" to a registered political party to be included in a Donor Annual Return. The reporting obligation is limited to gifts totalling more than the disclosure threshold ($10,300 for the 2006-07 financial year; $10,500 for the 2007-08). Subsection 305B(5) excludes any gifts made by an "associated entity" or a "candidate" from reporting gifts under section 305B. The reason for this exclusion is that an "associated entity" has a separate reporting obligation under section 314AEA and a candidate has the reporting obligation under section 309.

Third Parties

- Section 314AEB provides that a person who incurs expenditure for any of the five purposes listed in subsection 314AEB(1) is required to lodge a return for that financial year. The five purposes listed in this subsection include the public expression of views on a political party or a candidate in an election and the public expression of views on an issue in an election. For the 2006-07 and 2007-08 financial years, the union campaign involving "You Rights at Work" clearly fell within the scope of this section. However, noting that Mr Thomson did not become the endorsed ALP candidate for the Division of Dobell until 13 April 2007, expenditure for purposes that involved raising his profile in the Division of Dobell prior to that date would not have fallen within the scope of this section.

- Section 314 AEB is also subject to the disclosure threshold ($10,300 for the 2006-07 financial year; $10,500 for the 2007-08).

- Section 314AEB(1)(c) excludes from the reporting obligation any expenditure made by a "candidate in an election" under this section. The reason for this exclusion is that a candidate has the reporting obligation under section 309.

Associated Entities

- Section 314AEA provides that an "associated entity" has an annual reporting obligation and is required to disclose the total amount received, the total amount paid and the total amount of any outstanding debts in that financial year.

- Section 314 AEA is also subject to the disclosure threshold ($10,300 for the 2006-07 financial year; $10,500 for the 2007-08) due to the operation of section 314AC.

- The disclosure under section 314AEA is required to include the details set out in section 314AC. Subsection 314AC(3) sets out the particulars to be reported provides that in calculating the sum to be reported, "an amount of $10,000 or less need not be counted". This provision was amended on 2006 so that its effect is that if amounts are received or expended on different days so that each amount is less than the applicable disclosure threshold for that reporting period, then the particulars set out in subsection 314AC(3) need not be included. This means that the disclosure return need only include the total amount without any of the particulars of each transaction which makes up that total.

- Subsection 287(1) defines an "associated entity". The AEC has previously concluded that neither Coastal Voice nor the HSU National in relation to both HSU National Office and Coastal Voice Inc. It should be noted that the definition that appears to be relevant is paragraph (b) which requires that the entity operates "wholly, or to a significant extent, for the benefit of one of more registered political parties".

Political Parties

- Section 314AB deals with the annual returns of amounts received, amounts paid and debts to be lodged by registered political parties (i.e. the ALP NSW Branch).

- Section 314AC(1) of the Electoral Act requires that the particulars of the amounts reported by a registered political party need only be disclosed where the amount is above the threshold (i.e. $10,300 for 2006-07 and $10,500 for 2007-08). However, subsection 314AC(2)

provides that in calculating the sum to be particularised, “an amount of $10,000 or less need not be counted”.

- Section 287A deems that the expenditure made or donation received by an endorsed candidate’s campaign committee to be disclosed by the relevant State Branch of the registered political party.