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The Parliament of the Commonwealth of Australia

# Review of the AEC analysis of the FWA report on the HSU

Joint Standing Committee on Electoral Matters

September 2012  
Canberra

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## Foreword

During this inquiry the committee reviewed the Australian Electoral Commission's (AEC) analysis of the Fair Work Australia (FWA) report on the Health Services Union National Office. The committee's focus was on disclosure obligations under the *Commonwealth Electoral Act 1918* (Electoral Act). It was not the committee's role to forensically examine internal HSU authorisation processes, or to adjudicate on alleged contraventions against the *Fair Work (Registered Organisations) Act* or other alleged fraudulent behaviour. A number of other processes are underway to address those matters.

The Special Minister of State also referred a list of 17 possible measures provided by the AEC for consideration. A number of the issues raised in the measures have previously been examined and recommendations made by the committee.

In this report the committee makes 13 recommendations to improve Australia's disclosure arrangements. As it has done in previous reports, the committee made recommendations to:

- reduce the disclosure threshold from more than \$12 100 for the 2012-2013 financial year (i.e. \$10 000 with CPI indexation) to \$1 000 and remove CPI indexation;
- introduce administrative penalties for more straightforward breaches of the Electoral Act, such as a failure to lodge a return by the due date;
- clarify the definition of an 'associated entity' to address some of the current confusion surrounding the application of the term;
- strengthen the penalties for more serious offences under the Electoral Act, including fraud related offences; and

- increase the frequency of disclosure reporting from annually to six-monthly.

In addition, the committee has made recommendations to:

- require returns to be lodged electronically to improve the timeliness and efficiency of lodging and processing returns;
- require that records relevant to disclosure be kept for seven years rather than the current three years;
- insert a new offence in the Electoral Act for failing to create the records needed to enable complete and accurate disclosure;
- extend the disclosure period for new candidates to 12 months prior to their pre-selection or nomination, whichever is earlier;
- clarify, and where needed strengthen, the AEC's coercive powers;
- expand the categories of 'electoral expenditure' to cover additional relevant items including campaign staff, premises, office equipment, vehicles and travel;
- deem registered political parties to be bodies corporate for the purposes of Part XX of the Electoral Act; and
- provide greater clarity of who in an organisation has responsibility for ensuring that the required returns are lodged with the AEC.

Recommendation 12 to deem registered political parties as bodies corporate is a significant reform. It will shift the focus of prosecution and financial responsibility from the individual to the political party. Ultimately, political parties must be responsible for meeting their reporting obligations. It is intended that this will encourage political parties to ensure that the person tasked with lodging its returns is suitably qualified to perform the role, and that effective systems are in place to ensure a complete and accurate return is lodged.

Another gap in the current arrangements is in the current disclosure period for new candidates, which only commences from their pre-selection or nomination. The committee has recommended introducing a requirement for new candidates to disclose relevant donations and gifts received and money spent in the 12 months prior to their pre-selection or nomination.

Effective compliance and enforcement mechanisms are essential if the disclosure arrangements are to serve their purpose of enabling Australian electors to see the flow of money through the political system.

Whether the AEC fully utilised its coercive powers in relation to matters arising in the FWA report was a matter of lengthy discussion during the committee's public hearings for this inquiry. It needs to be made clear what steps the AEC can take to

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gather information from individuals and organisations with confirmed, or suspected, reporting obligations under the Electoral Act. This may involve clarifying, or strengthening, coercive powers in the Electoral Act.

The committee did not support some of the possible measures on the AEC's list of matters. The AEC indicated that it was keen to pursue measures 4, 5 and 6:

- introducing a requirement for independent auditing of lodged returns;
- abolishing associated entities; and
- introducing a requirement for dedicated campaign accounts.

The committee acknowledged the problems these possible measures seek to address. However, it concluded that requiring independent audits of all returns lodged and dedicated campaign accounts, would add an unnecessary administrative burden and unduly complicate the disclosure system.

The current definition of associated entities is confusing, and when applied does not work as effectively as it should. The intention of the category is to provide greater transparency of the flow of money of an entity that has close links to a political party. This is in contrast to a third party for which political advocacy and expenditure may only be a small part of its activities.

The committee supports reviewing and improving the clarity of the definition of an associated entity. It would be premature to abolish the category of associated entities and could result in reducing transparency of money in and out of an entity that has close political ties.

On behalf of the committee I thank the organisations and individuals who assisted the committee during the inquiry through submissions or participating at the public hearings in Melbourne and Canberra. I also thank my colleagues on the committee for their work and contribution to this report, and the secretariat for their work on this inquiry.

Daryl Melham MP  
Chair





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## Membership of the Committee

**Chair**            Mr Daryl Melham MP

**Deputy Chair**   The Hon Alexander Somlyay MP

**Members**        The Hon Bronwyn Bishop MP

                      The Hon Alan Griffin MP

                      Ms Amanda Rishworth MP

                      Senator Simon Birmingham

                      Senator Carol Brown

                      Senator Helen Polley

                      Senator Lee Rhiannon

                      Senator Scott Ryan

## Committee Secretariat

|                         |                      |
|-------------------------|----------------------|
| Secretary               | Mr Stephen Boyd      |
| Inquiry Secretary       | Ms Samantha Mannette |
| Research Officers       | Ms Zoë Smith         |
|                         | Ms Siobhan Coughlan  |
| Administrative Officers | Ms Natasha Petrović  |



## Terms of reference

On 16 May 2012 the Special Minister of State, the Hon Gary Gray AO MP, referred the AEC analysis of the FWA report and the list of matters to the Joint Standing Committee on Electoral Matters for its consideration. The letter of referral is at Appendix A.



## List of abbreviations

|               |  |
|---------------|--|
| AEC           | Australian Electoral Commission                                |
| CAN           | Court attendance notice  |
| CDPP          | Commonwealth Director of Public Prosecutions                   |
| CPI           | Consumer Price Index   |
| FEC           | Federal Election Committee                                     |
| FWA           | Fair Work Australia  |
| HSU           | Health Services Union  |
| Electoral Act | <i>Commonwealth Electoral Act 1918</i>                         |
| RO Act        | <i>Fair Work Australia (Registered Organisations) Act 2009</i> |

# Executive summary

## List of measures provided by the AEC and committee view

| No.                        | Measure  | Committee view  |
|----------------------------|--|---|
| <b>Disclosure</b>          |  |   |
| 1                          | Reconsideration of the appropriate level of the disclosure threshold   | Supported— <b>Recommendation 1</b><br>Reduce the disclosure threshold to \$1 000 and remove CPI indexation  |
| 7                          | Require the electronic lodgement of all returns to the AEC (with the power for the Electoral Commissioner to grant some exceptions)                  | Supported— <b>Recommendation 4</b><br>Require electronic lodgement of returns to improve the transparency and efficiency of the disclosure system                 |
| 11                         | Require more frequent reporting of relevant expenditure and receipts   | Supported— <b>Recommendation 8</b><br>Introduce six-monthly reporting to improve the transparency and timeliness of disclosure                                    |
| 13                         | Review the 'disclosure period' and the 'election period' in relation to disclosure obligations and new candidates who are seeking pre-selection      | Supported— <b>Recommendation 9</b><br>Extend the disclosure period for new candidates to 12 months prior to the earlier date of their nomination or pre-selection |
| 15                         | Expand the categories of 'electoral expenditure' that are to be disclosed to include campaign staff, premises, office equipment, vehicles and travel | Supported— <b>Recommendation 11</b><br>Improves transparency of election related spending   |
| <b>Associated entities</b> |  |   |
| 5                          | Abolish 'associated entities' and establish a third party scheme similar to Canada and the UK  | Not supported<br><b>Recommendation 3</b> —Clarify the definition of 'associated entities' to improve the effectiveness of the category                            |

| No.               | Measure  | Committee view   |
|-------------------|--|--|
| <b>Compliance</b> |  |  |
| 2                 | Introduce administrative penalties for objective failures (such as failing to lodge on time)   | Supported— <b>Recommendation 2</b><br>Introduce administrative penalties to provide the AEC with greater flexibility to deal with breaches of straightforward offences   |
| 3                 | Provide 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) | Not supported<br>Would add an unnecessary layer of complexity to public funding process  |
| 4                 | Require 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)                            | Not supported<br>Potential benefit is disproportionate to the administrative burden on those with reporting obligations  |
| 8                 | Require the period for the retention of records in section 317 and related offence in section 315(2)(b) be increased to 7 years  | Supported— <b>Recommendation 5</b><br>It is important to ensure the retention of relevant records  |
| 9                 | Insert a new offence for a person who fails to make records to enable complete and accurate disclosure   | Supported— <b>Recommendation 6</b><br>It is important to ensure that appropriate records are created in order to meet disclosure obligations   |
| 10                | Increase relevant criminal penalties that are fraud related (e.g. knowingly providing false and misleading information in a return)  | Supported— <b>Recommendation 7</b><br>Penalties for ‘serious’ offences should be strengthened. Fraud related offences should come under this category  |
| 14                | Increase 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   | Supported in part— <b>Recommendation 10</b><br>Clarify, and where needed strengthen, the AEC’s coercive powers to put beyond question the actions that can be taken to investigate and ensure compliance                       |
| 16                | Deem registered political parties to be bodies corporate for the purposes of Part XX of the Electoral Act  | Supported— <b>Recommendation 12</b><br>Shifting the focus from the individual to the political party to take greater responsibility for their reporting obligations and the consequences of failures to meet these obligations |
| 17                | Introduce provisions with greater certainty about who has the relevant reporting obligation  | Supported— <b>Recommendation 13</b><br>Identify positions or individuals within political parties, associated entities, or third party organisations, who are responsible for meeting reporting obligations                    |

| No.                                   | Measure  | Committee view  |
|---------------------------------------|--|---|
| <b><i>Campaign administration</i></b> |  |   |
| 6                                     | Establish the requirement 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) | Not supported<br>Potential benefit is disproportionate to administrative burden on those with reporting obligations |
| 12                                    | Reintroduce requirements that campaign committee expenditure is to be reported separately from the state party unit and specifically covers the election period for each division  | Not supported<br>Would place an undue burden on campaign volunteers by adding another layer of administration       |



# List of recommendations

## 3 AEC possible measures for consideration

### Recommendation 1

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

### Recommendation 2

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. (paragraph 3.38)

### Recommendation 3

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. (paragraph 3.104)

#### Recommendation 4

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. (paragraph 3.127)

#### Recommendation 5

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. (paragraph 3.139)

#### Recommendation 6

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. (paragraph 3.147)

#### Recommendation 7

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*. (paragraph 3.164)

#### Recommendation 8

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. (paragraph 3.175)

#### Recommendation 9

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. (paragraph 3.204)

#### Recommendation 10

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. (paragraph 3.225)

#### Recommendation 11

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. (paragraph 3.234)

#### Recommendation 12

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. (paragraph 3.249)

#### Recommendation 13

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. (paragraph 3.257)

## Introduction

### Background to the review

- 1.1 On 28 March 2012 Fair Work Australia (FWA) completed its report into the investigation of the National Office of the Health Services Union (HSU). 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* will be referred to as the FWA report.
- 1.2 A copy of the FWA report was provided to the Senate Standing Committee on Education, Employment and Workplace Relations. On 7 May 2012 the Senate committee published the report, excluding the annexures.<sup>1</sup>
- 1.3 The FWA report examined the administration and expenditure of the HSU National Office. In particular, the FWA report examined and made adverse findings about Mr Craig Thomson MP, who was the National Secretary of the HSU before being elected to the Federal Parliament in 2007.
- 1.4 Chapter 7 of the FWA report examined expenditure of National Office funds for the purpose of assisting Mr Thomson's election to parliament for the seat of Dobell. Chapter 20 of the report detailed contraventions in relation to matters raised in Chapter 7.

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1 The Fair Work Australia report table of contents lists Annexures A to M. Annexure J covered the *Report on suspected irregularities in the expenditure of the National Office of the Health Services Union 2002-2007*, which contained the findings of an independent investigation undertaken by Slater & Gordon Lawyers and Accountants' BDO Kendalls.

- 1.5 On 16 May 2012 the Australian Electoral Commission (AEC) responded to a request from the Special Minister of State, the Hon Gary Gray AO MP. The Electoral Commissioner noted in his letter that he had been asked to advise the Special Minister of State on ‘whether or not there have been any failures to comply with the provisions of the *Commonwealth Electoral Act 1918* (Electoral Act) as disclosed by the information in the recently published Fair Work Australia Report into the Health Services Union National Office’.<sup>2</sup>
- 1.6 The AEC response included a 22 page document entitled *Reporting obligations under the Commonwealth Electoral Act 1918 and the Report of the Delegate to the General Manager of Fair Work Australia* (AEC analysis). It is reproduced in Appendix B. The Electoral Commissioner stated:
- In summary, the document concludes that most of the expenditure described in the FWA report has been disclosed by relevant entities under the Electoral Act, with queries surrounding four payments totalling \$17 014.88.<sup>3</sup>
- 1.7 In addition to responding to issues in the FWA report, the AEC also provided a ‘list of matters’ for consideration. In his letter, the Electoral Commissioner stated:
- In relation to limitations contained in the Electoral Act which have been highlighted by the circumstances of this matter, Attachment B is an initial list of possible matters that could be considered. The AEC notes that some of these matters have been considered previously by the Joint Standing Committee on Electoral Matters without being adopted.<sup>4</sup>
- 1.8 On 16 May 2012 the Special Minister of State referred the AEC analysis of the FWA report and the ‘list of matters’ to the committee for its consideration. The Special Minister of State’s letter of referral, the AEC’s letter to the Minister and its ‘list of matters’ are in Appendix A.
- 1.9 This inquiry focuses on matters relating to political funding and disclosure obligations, as defined by the Electoral Act, and the AEC analysis of the FWA report.
- 

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

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

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

## FWA report on the HSU and AEC analysis

- 1.10 The FWA investigation into the HSU took more than three years to complete and the report comprises over 1100 pages. Chapter 7 of the report covered the following areas:
- the Dobell campaign;
  - Ms Criselee Stevens;
  - Coastal Voice;
  - Mr Matthew Burke;
  - Central Coast Rugby League;
  - Dads in Education Fathers Day Breakfast;
  - Golden Years Collectables;
  - Central Coast Convoy for Kids; and
  - The requirements of section 237 of Schedule 1 to the *Workplace Relations Act 1996* in relation to donations. This issue has not been reviewed by either the AEC or the committee.
- 1.11 The FWA report concluded that Mr Thomson expended \$71 300.23 of HSU funds on the Dobell campaign.<sup>5</sup> In relation to this expenditure, the HSU stated:

Mr Thomson contravened Sub-rule 32(n) and Sub-rule 36(b) by incurring and purporting to authorise each item of expenditure of National Office funds listed in the table at paragraph 197 of chapter 7 totalling \$71,300.23 for a purpose which was not the business of the HSU in circumstances where neither National Executive nor National Council had authorised the spending of any monies in support of the campaign for Dobell (apart, possibly, from monies which were specifically referable to the Dental Campaign) and none of this expenditure was for, or for a purpose incidental to, the general administration of the HSU.<sup>6</sup>

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5 Fair Work Australia, *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*, 28 March 2012, p. 651.

6 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, pp. 1079-1080.

- 1.12 On 21 May 2012 Mr Thomson made a statement in parliament responding to the findings in the FWA report. In that statement Mr Thomson claimed that ‘since these allegations were first raised I have consistently and on many occasions made it clear that I have done nothing wrong’.<sup>7</sup>
- 1.13 The AEC examined the FWA report against the overlay of the reporting and disclosure obligations contained in the Electoral Act. In relation to the \$71 300.23, the AEC advised that it was seeking further information about four items of expenditure which total \$17 014.88.<sup>8</sup>
- 1.14 The AEC drew attention to two key aspects of electoral law in its analysis of HSU funds used in relation to Mr Thomson’s election to parliament. First, is the question of whether Mr Thomson (or 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’.<sup>9</sup>
- 1.15 The AEC commented that ‘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’.<sup>10</sup> The AEC stated:
- ... 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.<sup>11</sup>
- 1.16 The second key point made by the AEC relates to the statute of limitations for prosecution set out in the Electoral Act. Subsection 315(11) of the Electoral Act provides that:
- 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.*
- 

7 Mr Craig Thomson MP, *House of Representatives Hansard*, 21 May 2012, pp. 4715-4716.

8 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. 15.

9 AEC analysis of the FWA report, p. 3.

10 AEC analysis of the FWA report, p. 3.

11 AEC analysis of the FWA report, p. 4.

1.17 The AEC stated:

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 year period to commence any prosecution has expired.<sup>12</sup>

1.18 In its submission to the inquiry, the AEC has provided an addendum to its analysis. The addendum contains an update on the four items of expenditure, totalling \$17 014.88. When considering the FWA report it was unclear to the AEC whether these amounts had been disclosed by the ALP and HSU. Full details are available in Annex 3 of the AEC's submission, and in Appendix C of this report.<sup>13</sup>

1.19 The AEC found that the HSU had seemingly failed to report three items of expenditure in the 2006-2007 and 2008-2009 returns. The AEC also noted that the HSU had included other items in returns that 'probably were not electoral expenditure'.<sup>14</sup>

1.20 The AEC asserted that 'the HSU National Office made reasonable attempts to disclose all electoral expenditure that they were able to identify from the incomplete records that were available to them in 2009'.<sup>15</sup> The AEC concluded that given the difficulties with availability and accuracy of records, it has 'been unable to identify any public interest that could result in action being now initiated against the HSU National Secretary, Ms Kathy Jackson, in relation to the apparent failure to fully disclose three items of expenditure'.<sup>16</sup> On 13 September 2012 the AEC provided a further update to its analysis, following the review of additional material. It is attached at Appendix F.

## Objectives and scope of the inquiry

1.21 The committee's objective was to examine the AEC analysis of the FWA report and the 17 possible measures for improving the Electoral Act that were contained in the list of matters provided by the AEC. Where deemed

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12 AEC analysis of the FWA report, p. 18.

13 AEC, *Submission 1*, Annex 3, pp. 62-65.

14 AEC, *Submission 1*, Annex 3, p. 65.

15 AEC, *Submission 1*, Annex 3, p. 64.

16 AEC, *Submission 1*, Annex 3, p. 65.

necessary, the committee makes recommendations to strengthen parts of the Electoral Act, particularly in relation to funding and disclosure requirements.

- 1.22 The FWA report covers a range of matters relating to requirements under the *Fair Work Australia (Registered Organisations) Act 2009* (RO Act). This included, but was not limited to, disclosure obligations for donations and political expenditure. The AEC analysis of the FWA report focused on who incurred a reporting obligation under the Electoral Act and whether the required expenditure was disclosed.
- 1.23 On 21 May 2012 the Member for Dobell, Mr Craig Thomson MP, made a parliamentary statement responding to the findings in the FWA report.<sup>17</sup> In that statement Mr Thomson disputed some of the findings in the FWA report and claimed that the Delegate who undertook the investigation was ‘selective and biased’.<sup>18</sup> In evidence to the committee the Delegate denied this characterisation.<sup>19</sup>
- 1.24 In the context of this inquiry it was not the role of the committee to forensically examine internal HSU authorisation processes or adjudicate on these matters. Any alleged contraventions against the *Fair Work (Registered Organisations) Act* (RO Act) and rules, or suspected fraudulent behaviour, are not matters for this committee. There are a number of other processes underway to deal with those matters.

## Conduct of the inquiry

- 1.25 On 16 May 2012 the Special Minister of State, the Hon Gary Gray AO MP, asked the committee to review the AEC analysis of the FWA report and the ‘list of matters’ for strengthening the Electoral Act.
- 1.26 On 23 May 2012 the Committee Chair, Mr Daryl Melham MP, issued a media release to announce the inquiry and call for submissions. Six submissions and three exhibits were received.
- 1.27 Public hearings were conducted in Melbourne on 3 July 2012 and in Canberra on 6 and 16 July, and 22 August 2012. Witnesses are listed at Appendix E. Submissions and transcripts of evidence are available from the committee’s website at: [www.aph.gov.au/em](http://www.aph.gov.au/em).

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17 Mr Craig Thomson MP, *House of Representatives Hansard*, 21 May 2012, pp. 4715-4728.

18 Mr Craig Thomson MP, *House of Representatives Hansard*, 21 May 2012, p. 4719.

19 Mr Terry Nassios, FWA, *Committee Hansard*, 16 July 2012, Canberra, p. 4.

## **Structure of the report**

- 1.28 Chapter 2 examines the issues raised in Chapter 7 of the FWA report and overlays this with the AEC analysis of each matter.
- 1.29 Chapter 3 examines the 17 possible measures proposed by the Electoral Commissioner for addressing limitations in the Electoral Act. The committee's previous deliberations on certain matters are provided and recommendations made, where appropriate.



## FWA report on the HSU and AEC analysis

### Introduction

- 2.1 Chapter 7 of 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* (FWA report) examines expenditure of Health Services Union (HSU) National Office funds for the purpose of assisting Mr Thomson's election to Federal Parliament for the seat of Dobell.
- 2.2 On 16 May 2012 the Australian Electoral Commission (AEC), in response to the request of the Special Minister of State, provided the *Reporting obligations under the Commonwealth Electoral Act 1918 and the Report of the Delegate to the General Manager of Fair Work Australia* (AEC analysis). In its analysis of the FWA report, the AEC considered whether 'there have been any failures to comply with the provisions of the *Commonwealth Electoral Act 1918* (Electoral Act)'.<sup>1</sup>
- 2.3 The fundamental question, for the FWA, was the issue of expenditure of HSU National Office funds and whether or not it was authorised by the HSU National Executive (see Chapter 7 of the FWA report). The FWA delegate concluded that the National Executive did authorise a national campaign against the proposed Work Choices legislation. However, there

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

was no resolution authorising funding for the ALP federal election campaign or for Mr Thomson's campaign in the seat of Dobell.<sup>2</sup>

2.4 The FWA report acknowledged that it was not commenting on Electoral Act disclosure requirements :

Mr Thomson has submitted that all expenditure was disclosed in accordance with relevant electoral disclosure laws. While I make no comment or judgement (and have no knowledge) regarding whether or not this statement is correct, I note that my investigation concerns whether there have been contraventions of the Rules or of the RAO Schedule and that any disclosures under electoral law are not relevant to my consideration of whether such contraventions have occurred.<sup>3</sup>

2.5 In evidence to the committee the FWA Delegate confirmed that the focus of his investigation was on the HSU's observance of the rules for registered organisations:

My investigation dealt with the Fair Work (Registered Organisations) Act. That act, in dealing with the expenditure by Mr Thomson, largely revolved around whether that expenditure was authorised in accordance with the rules. That was the essence of my investigation, not whether it did or did not comply with any aspect of the Electoral Act.<sup>4</sup>

2.6 The AEC examined the FWA report against the overlay of the reporting and disclosure obligations contained in the Electoral Act. The FWA report concluded that Mr Thomson expended \$71 300.23 of HSU funds on the Dobell election campaign. In its analysis, the AEC advised that it would seek further information about four items of expenditure which total \$17 014.88.<sup>5</sup>

2.7 The AEC subsequently produced an addendum to its analysis, which addressed these four items of expenditure.<sup>6</sup> The details will be discussed in the following section on the Dobell campaign.

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2 Fair Work Australia, *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*, 28 March 2012, p. 631.

3 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 653.

4 Mr Terry Nassios, FWA, *Committee Hansard*, 22 August 2012, Canberra, p. 3.

5 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*, p. 15.

6 AEC analysis of the FWA report, Annex 3, pp. 62-65.

## Scope of the AEC analysis

- 2.8 The AEC analysis raised a number of points important for understanding their consideration of the issues in the FWA report. Firstly, that the AEC 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’.<sup>7</sup>
- 2.9 Secondly, the AEC explained that whether or not ‘a payment was authorised under 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 interoperation of the Electoral Act’.<sup>8</sup>
- 2.10 Thirdly, the Electoral Act defines specific categories and periods of ‘electoral expenditure’. The AEC stated that the Electoral Act is not concerned with the ‘motives for the expenditure, such as raising a prospective candidate’s profile’.<sup>9</sup>
- 2.11 A final key point is that disclosure obligations under the Electoral Act do ‘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’.<sup>10</sup> The AEC noted:
- The schema in the Electoral Act does not recognise that the expenditure of funds to raise the profile of 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.<sup>11</sup>
- 2.12 In evidence to the committee, the AEC set out the parameters of its analysis of the FWA report:
- The AEC analysis of the Fair Work Australia report was released as quickly as possible due to the continued public interest involved and to give time for members of parliament to digest the complex analysis of the application of the requirements of the Electoral Act to the information contained in the Fair Work Australia report. Indeed, work on the AEC analysis commenced on the evening that the Senate publicly released the Fair Work

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7 AEC analysis of the FWA report, p. 1.

8 AEC analysis of the FWA report, p. 2.

9 AEC analysis of the FWA report, p. 16.

10 AEC analysis of the FWA report, p. 3.

11 AEC analysis of the FWA report, p. 3.

Australia report, prior to my receipt of the request from the Special Minister of State contained in his letter to me of 8 May 2012.

What the AEC analysis attempted to do was to examine each item of expenditure described in the Fair Work Australia report as assisting Mr Thomson in his election bid during the 2007 election and to make an assessment on, firstly, whether that item of expenditure was disclosable under the Electoral Act; secondly, who had the disclosure obligation; and thirdly, whether that item of expenditure was actually disclosed in one of the political expenditure or donation returns lodged over the 2006-08 period. The AEC analysis points out that the AEC is not making comment on, nor can it be taken to have made comment on, the question of whether the payments and donations made were or were not properly authorised by the various entities in which Mr Thomson was involved over the period leading up to the 2007 election. That is not the role of the AEC. Nor does the AEC analysis carry any implications for the veracity or otherwise of the findings of the Fair Work Australia report in terms of the charter that Fair Work Australia has to carry out. All the payments identified in the Fair Work Australia report have been taken at face value and simply assessed against the provisions of the Electoral Act in terms of an obligation for disclosure.

Whether or not the payments were properly authorised under either the relevant union rules or under industrial laws is not material to the disclosure obligation arising under the Electoral Act.<sup>12</sup>

- 2.13 At the public hearing on 16 July 2012, the Delegate was asked to comment on the AEC analysis of the FWA report:

**CHAIR:** Have you looked at the Electoral Commission's report in relation to this matter we are looking at?

**Mr Nassios:** I looked at it briefly when I got your correspondence at the beginning of last week.

**CHAIR:** Are there any comments you want to make in relation to that? It really looks at different areas, I think.

**Mr Nassios:** The report of the Electoral Commission itself makes it fairly clear. I certainly did not look at my investigation in terms of

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12 Mr Ed Killesteyn, Electoral Commissioner, AEC, *Committee Hansard*, 6 July 2012, Canberra, p. 1.

how it may impact on the Electoral Act. To that extent I can only agree with the views expressed in the Electoral Commission's report.<sup>13</sup>

- 2.14 As mentioned in Chapter 1, the FWA report released by the Senate committee did not include Annexures A to M. During the course of the inquiry, the committee heard that in conducting its analysis of the FWA report, the AEC had not received a copy of the *Report on suspected irregularities in the expenditure of the National Office of the Health Services Union 2002-2007*, contained in Annexure J of the FWA report.
- 2.15 At its public hearings the committee discussed whether the AEC's analysis may have been comprised by not being able to also take the contents of Annexure J into consideration. The AEC described its approach in undertaking the analysis:

**Mr Killesteyn:** We took each of the payments that were identified under the Fair Work Australia report. We applied them against the law and we made a view about whether they had been disclosed or not. That is what we did.

**Mrs BRONWYN BISHOP:** As you read the FWA report you would have read all the references to the report. If any report was referred to me that was lacking the annexures to that report, which are intrinsic to the value of the report, I would simply write back and say, 'I cannot do it until I receive that report.' But obviously near enough is good enough, is it?

**Mr Killesteyn:** I acknowledge that. But what we did, as I have said on many occasions, was to analyse the payments identified in the Fair Work Australia report because that is what the public interest was around in relation to whether those payments have been disclosed or not.

**Mrs BRONWYN BISHOP:** The minister said he asked you to do a review of the report. He did not say, 'Just look at these bits of it.' He asked you to do a proper analysis on whether there had been gaps in the act.

**Mr Killesteyn:** Indeed, and that is what we have done.<sup>14</sup>

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13 Mr Terry Nassios, FWA, *Committee Hansard*, 16 July 2012, Canberra, p. 8.

14 *Committee Hansard*, 16 July 2012, Canberra, p. 16.

- 2.16 The AEC acknowledged that when undertaking its analysis there were instances where it did not have sufficient information to draw conclusions:

**Mr Pirani:** There was the other area where we raised the concern of the issue about the Dads in Education Father's Day donation. We raised an issue on that one that it was not clear what the arrangements were in relation to that donation –

**CHAIR:** That is page 42.

**Mr Pirani:** and whether that included a right to appear on television. Again, right at the end we say:

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 ...

So there are some areas where we have looked at the Fair Work Australia report, we have applied the prism of the Commonwealth Electoral Act and there was still not sufficient information for us to be able to offer a firm conclusion.<sup>15</sup>

The committee subsequently wrote to the AEC asking it to review the BDO Kendalls report, Annexure J to the FWA report, and transcripts of interviews undertaken by the Delegate, and to advise the committee if this material impacts on the analysis. On 13 September 2012 the AEC indicated that these documents did not change the conclusions in its analysis or the content of the 17 possible measures. The AEC's response is available at Appendix F.

- 2.17 Annex 2 of the AEC's submission to the inquiry reproduces a statement provided to Senate Estimates on 23 May 2012, entitled Health Services Union and Craig Thomson – failure/late lodgement of returns under Part XX of the Commonwealth Electoral Act 1918. It outlines action taken by the AEC in dealing with this matter.
- 2.18 The AEC contended that it acted within the powers provided to it under the Electoral Act. For example, at the hearing on 16 July 2012 the committee discussed the matter:

**Mrs BRONWYN BISHOP:** You still have not addressed the question that is the most serious, so far as I am concerned, and that is the finding that large amounts of money which were

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15 Mr Paul Pirani, Chief Legal Officer, AEC, *Committee Hansard*, 6 July 2012, Canberra, p. 32.

unauthorised payments by Mr Thomson during the reporting period, which have been either misappropriated, fraud or theft, are given a tick-off by you as having been disclosed by the HSU and therefore there is no problem. To me that is a gaping hole in the act. You still have not addressed the question of how that should be remedied. Giving you more powers is certainly not the answer, because you do not use the ones that you have got. ...

**Mr Killesteyn:** ... The difficulty I have with this question of whether the payments were authorised or unauthorised is that irrespective if the AEC concluded that there was a payment that was not authorised, we do not have any power to do anything about it. Our power is simply vested in the Electoral Act. At this point it is a finding of Fair Work Australia. The matter is going forward for civil proceedings. That is presumably going to be defended. At this point we have to take the payments as they have been made and make an assessment as to whether they have been disclosed. That is the limit of the act.

... section 318 of the act provides the scope for dealing with payments that an organisation believes are not authorised. The facility was there all the time for the HSU national office to make a statement to the Australian Electoral Commission that they could not provide a complete return because they had concerns about particular payments. That is a facility that already exists.<sup>16</sup>

- 2.19 The rest of this chapter examines the issues raised in Chapter 7 of the FWA report and overlays this with the AEC analysis of each matter.

## The Dobell campaign

- 2.20 Mr Thomson was preselected as the ALP candidate for the Dobell electorate on 13 April 2007.<sup>17</sup>
- 2.21 While the National Executive passed a motion in support of a marginal seats campaign at its 7 December 2006 meeting, neither of the minutes of the two National Executive meetings held in 2007 record a 'direct specific

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

17 AEC analysis of the FWA report, p. 8.

resolution' which authorised the expenditure of National Office funds in the electorate of Dobell.<sup>18</sup>

2.22 The FWA report outlines charges made to HSU credit cards which related to Mr Thomson's campaign for Dobell totalling \$71 300.<sup>23</sup> These included:

- establishment of the campaign office at Long Jetty – \$4 826.99;
- payments to the Dobell Federal Election Committee (FEC) – \$3 500.00;
- campaign bus – \$1 277.96;
- payments to LBH Promotions (letterbox material related to the 'Your Rights at Work' campaign) – \$7 409.93;
- postage expenses – \$9 574.17;
- ALP advertising – \$12 511.40;
- radio advertising – \$18 731.00; and
- printing expenses – \$13 468.78.<sup>19</sup>

2.23 In the AEC analysis on the FWA report, the AEC stated that the HSU National Office disclosed the expenditure in relation to the postage, ALP advertising, radio advertising and printing expenses. However, the AEC indicated that it was seeking further information as to whether the NSW Branch of the ALP or HSU National Office had disclosed expenditure on the first four items, as listed above.

2.24 The ALP advised that it had not included these four payments in its disclosure returns, as it was 'not aware of the expenditure'. The AEC found that the HSU had only disclosed some components of these expenses.<sup>20</sup>

## Long Jetty campaign office

2.25 In relation to the establishment of the campaign office at Long Jetty, the AEC noted that the amount was under the disclosure threshold for the expenditure to have been particularised in either a donor return or an annual return. In its analysis, the AEC stated that it was 'currently seeking

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18 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 633.

19 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, pp. 650-651.

20 AEC, *Submission 1, Annex 3*, pp. 62.

further advice about whether or not this expenditure has been included in the total amounts that have already been disclosed'.<sup>21</sup>

- 2.26 In the addendum to the AEC analysis, the AEC provided an update on the disclosure of expenses associated with the establishment and operations of the Long Jetty campaign office. Information from the HSU National Office indicated that expenses in relation to the Long Jetty campaign office were 'generally included in three returns lodged by Ms Kathy Jackson in October 2009'.<sup>22</sup>
- 2.27 The purchases of workstations (\$1 587) and a printer (\$604.95) were disclosed by the HSU in the 2006-07 return. However, the cost of an air conditioner (\$1 053) was not identified as related to this office, and was not included due to an oversight.<sup>23</sup>
- 2.28 Telephone and fax charges (\$860.64) were not disclosed in the 2007-08 return, as it was thought that some of these costs were incidental to Mr Thomson's duties as the HSU National Secretary. The total of \$4 826.99 also included \$721.40 of internet access costs, not mentioned in the AEC analysis addendum.
- 2.29 The ALP advised that the payments queried by the AEC in relation to the Long Jetty campaign office were not included in the ALP disclosure returns, and that the party was not aware of the expenditure.<sup>24</sup>

## Dobell Federal Election Committee

- 2.30 The AEC found that there were two separate payments made to the Dobell FEC totalling \$3 500, which were under the disclosure threshold that applied in the 2006-07 financial year. The AEC also sought 'further advice about whether or not this expenditure has been included in the total amounts that have already been disclosed'.<sup>25</sup>
- 2.31 In the AEC analysis addendum, information obtained from the HSU National Office indicated that 'these two payments were not disclosed in a donor return for the 2006-07 financial year as they were below the disclosure threshold'.<sup>26</sup>

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21 AEC analysis of the FWA report, p. 9.

22 AEC, *Submission 1*, Annex 3, p. 63.

23 AEC, *Submission 1*, Annex 3, p. 63.

24 AEC, *Submission 1*, Annex 3, p. 62.

25 AEC analysis of the FWA report, p. 9.

26 AEC, *Submission 1*, Annex 3, p. 63.

- 2.32 The ALP advised that payments to the Dobell FEC were not included in its disclosure returns, and that it was not aware of the expenditure.<sup>27</sup> The AEC noted that there was no disclosure obligation on the HSU National Office.<sup>28</sup>

## Campaign bus

- 2.33 The FWA report found three separate payments for a campaign bus totalling \$1 277.96.<sup>29</sup> Mr Thomson agreed that the bus was used in his campaign for the seat of Dobell and that this was 'an election expense'.<sup>30</sup> Again, in its analysis the AEC indicated that it was 'seeking further advice about whether or not this expenditure has been included in the total amounts that have already been disclosed'.<sup>31</sup>
- 2.34 In the AEC analysis addendum, the AEC noted HSU National Office advice that two of the payments made in relation to the campaign bus were 'identified as likely electoral expenditure and included in the return for 2007-08'.<sup>32</sup> The third payment 'was described in the HSU records as "motor vehicle expenses" which did not provide any direct link for this payment to be categorised as possible electoral expenditure when the annual returns were being prepared in 2009'.<sup>33</sup>
- 2.35 The ALP advised that payments for the campaign bus were not included in its disclosure returns, and that it was not aware of the expenditure.<sup>34</sup>

## Payments to LBH Promotions

- 2.36 The FWA report found that two separate payments totalling \$7 409.93 were made to LBH Promotions for the 'Your Rights at Work' campaign.<sup>35</sup> The AEC sought 'further advice about whether or not this expenditure has been included in the total amounts that have already been disclosed'.<sup>36</sup>
- 2.37 In the AEC's update on the status of these payments, the AEC noted HSU advice that in relation to the first and larger of the payments of \$5 931.53,
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27 AEC, *Submission 1*, Annex 3, p. 62.

28 AEC, *Submission 1*, Annex 3, p. 63.

29 AEC analysis of the FWA report, pp. 641-642.

30 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 642.

31 AEC analysis of the FWA report, p. 9.

32 AEC, *Submission 1*, Annex 3, p. 64.

33 AEC, *Submission 1*, Annex 3, p. 64.

34 AEC, *Submission 1*, Annex 3, p. 62.

35 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 645.

36 AEC analysis of the FWA report, p. 9.

the National Office is 'still unable to identify whether this expenditure was for the 'Your Rights at Work' campaign, the activities of Coastal Voice or some other matter'.<sup>37</sup> Consequently the HSU was not able to determine whether it was electoral expenditure and it was not included in the 2006-07 return.

2.38 The second smaller amount of \$1 478.40 was identified as payment for a mail out as part of the March 2007 NSW State election and thus not disclosed in any return under the Electoral Act. The AEC noted this amount was also under the disclosure threshold of \$1 500 in the *NSW Election Funding Act 1981*.<sup>38</sup>

2.39 The ALP advised that payments to LBH Promotions were not included in its disclosure returns, and that it was not aware of the expenditure.<sup>39</sup>

## Postage expenses

2.40 In relation to the postage expenses totalling \$9 574.17, the FWA report concluded that it seemed 'probable' that this was related to Mr Thomson's Dobell campaign. The assumption was based on the location of the purchases in Long Jetty, the site of his campaign office, as well as an invoice and statement sent from Australia Post addressed to Mr Thomson as the 'ALP candidate' and 'Member for Dobell'.<sup>40</sup> The AEC analysis questioned this conclusion stating:

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 other ALP specific advertising.<sup>41</sup>

2.41 The AEC also noted that it 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.<sup>42</sup>

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37 AEC, *Submission 1*, Annex 3, p. 64.

38 AEC, *Submission 1*, Annex 3, p. 64.

39 AEC, *Submission 1*, Annex 3, p. 62.

40 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 644.

41 AEC analysis of the FWA report, p. 9.

42 AEC analysis of the FWA report, p. 9.

## ALP and radio advertising

2.42 The FWA report stated that Mr Thomson agreed that payments made for ALP advertising totalling \$12 511.40 were most likely for 'ALP-related expense that should have been declared'.<sup>43</sup> The AEC analysis stated that 'this amount corresponds to the amount disclosed by the HSU National Office Annual Donor Return for the 2007-08 financial year'. The AEC was satisfied this item has been properly reported.<sup>44</sup>

2.43 For expenses incurred on advertising with Central Coast Radio Centre from 25 October 2007, FWA commented that 'it is clear Mr Thomson accepts that these payments were for campaign advertising which he commissioned in relation to his own political campaign'.<sup>45</sup> The AEC analysis noted that:

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.<sup>46</sup>

## Printing expenses

2.44 In relation to the printing expenses from The Entrance Print, which commenced in May 2007, Mr Thomson stated that the payments were made for a 'variety of things'. He explained that it was unlikely earlier charges were for electoral purposes, but conceded that later charges could have been. He added the caveat that although some of the later charges were directly for the Dobell campaign, they may also have been for the 'Your Rights at Work' campaign.<sup>47</sup> The AEC analysis noted that:

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.<sup>48</sup>

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43 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 646.

44 AEC analysis of the FWA report, p. 10.

45 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 648.

46 AEC analysis of the FWA report, p. 10.

47 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 650.

48 AEC analysis of the FWA report, p. 10.

## AEC analysis addendum conclusions

2.45 While there were some items not disclosed, the AEC found that the HSU National Office 'made reasonable attempts to disclose all electoral expenditure that they were able to identify from the incomplete records available to them in 2009'.<sup>49</sup> In the addendum to its analysis, the AEC concluded:

- (i) there were difficulties with the availability and accuracy of records held by the HSU National Office which led to uncertainties over the characterisation of expenditure that had been incurred on the credit cards issued to its various officers and employees;
- (ii) those difficulties led to some amounts of electoral expenditure that has been identified in the FWA Report not being included in any disclosure return lodged by the HSU National Office, while other amounts were included which probably were not electoral expenditure (e.g. the total salaries of Ms Stevens and Mr Burke);
- (iii) the HSU National Office took reasonable measures in 2009 to attempt to comply with the disclosure obligations contained in the Electoral Act; and
- (iv) the total amount of electoral expenditure that has been identified in the FWA Report and which has not been disclosed is less than the disclosure threshold that was in force at the relevant time.

In these circumstances the AEC has been unable to identify any public interest that could result in action being now initiated against the HSU National Secretary, Ms Kathy Jackson, in relation to the apparent failure to fully disclose three items of expenditure which were not included in the HSU National Office returns for 2006-07 and 2007-08 financial years.<sup>50</sup>

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49 AEC, *Submission 1*, p. 64.

50 AEC, *Submission 1*, pp. 64-65.

## Ms Criselee Stevens

- 2.46 The FWA report identifies Ms Stevens as commencing work for the HSU National Office in July 2005 as an Organising Works trainee and that Ms Stevens' employment was based on the NSW Central Coast.
- 2.47 The FWA report noted that the purpose of the trainee program was outlined in a Memorandum of Understanding between Trade Union Training Australia Inc and Unions Participating in the Organising Works Traineeship Program. The program's aim was 'to recruit, train and support "a new generation of union organisers to focus on organising for growth and acting as a catalyst for change within unions"' and that 'to meet the broad objectives of the program, trainees shall primarily be organising non union workers, not servicing existing members'.<sup>51</sup>
- 2.48 Ms Stevens described her duties at the HSU as encompassing a range of activities including: running aged care meetings for the public, a local campaign to 'check on your neighbours', 'informing' and 'educating' people about industrial relations issues and predominantly working on industrial relations issues. Ms Stevens was also identified as the primary contact for a sponsorship deal with Central Coast Rugby League which was related to the 'Your Rights at Work' campaign and the organiser of the community group Coastal Voice.<sup>52</sup>
- 2.49 The FWA report approximated Ms Stevens' employment related costs as \$114 208.83 between 26 September 2005 and 14 December 2007. The report also identified a further \$39 314.24 of expenditure by Ms Stevens between December 2005 and December 2007 and \$1 190.89 after this period totalling an amount of \$154 713.96.
- 2.50 The FWA report concluded that Ms Stevens 'had no involvement in ordinary activities of the HSU that exposed her to engagement with employees in the workplace' and that her duties 'were closely connected to, if not entirely directed towards building [Mr Thomson's] profile within the electorate of Dobell, and later towards campaigning for his election as the member of Dobell'.<sup>53</sup>
- 2.51 Chapter 1 of the FWA report noted that the wage of Ms Stevens was disclosed by the HSU National Office in annual returns lodged for the 2006-07 and 2007-08 financial years. This was done on the basis that she

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51 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 655.

52 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, pp. 658-659.

53 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 687.

was 'primarily engaged in activities connected with the public expression of views on an issue in a federal election during the relevant period'.<sup>54</sup>

2.52 In correspondence with FWA relating to this matter, the HSU National Office also explained that as there were issues with record keeping, the union had erred on the side of greater disclosure:

Consequently, in circumstances where, while uncertain, it was plausible given the material available to it that expenditure may have been political expenditure within the meaning of the Electoral Act, the Union chose to disclose that expenditure.<sup>55</sup>

2.53 The FWA report raised two findings in relation to Ms Stevens' employment as having possible disclosure implications:

- At a minimum, a reasonable person in Mr Thomson's position would have:
  - e. ensured that appropriate transactional records of all expenditure of Ms Stevens were maintained to ensure that the National Office would be able to fulfil its reporting obligations to the Australian Electoral Commission and the AIR.<sup>56</sup>
- Mr Thomson contravened subsection 287(1) of the RAO Schedule by improperly using his position as National Secretary to gain an advantage (namely, to advance his prospects of becoming elected to Parliament) for himself by employing Ms Stevens and by purporting to authorise, expenditure of National Office funds referred to ...<sup>57</sup>

2.54 The AEC analysis concluded that given that Ms Stevens' salary was included in the third party political expenditure returns for the relevant years, 'this expenditure has been disclosed by the HSU National Office'.<sup>58</sup>

2.55 The AEC also noted public comments 'that the salary of Ms Stevens should have been disclosed as a donation to the ALP NSW Branch or to Mr Thomson'. The AEC found that 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' and that her duties 'included a range of matters'.<sup>59</sup>

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54 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 47.

55 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 47.

56 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 688.

57 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 689.

58 AEC analysis of the FWA report, p. 11.

59 AEC analysis of the FWA report, pp. 10-11.

- 2.56 The AEC considered that while some of these duties did not give rise to a donor reporting obligation (namely work with Coastal Voice and the Central Coast Rugby League sponsorship), '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'.<sup>60</sup> However, the AEC commented that there is not enough information contained in the FWA report for such a conclusion to be reached.

## Coastal Voice

- 2.57 A sum of money was expended by the HSU National Office at the direction of Mr Thomson on an organisation known as 'Coastal Voice', in and around May 2006. An application was received by the NSW Office of Fair Trading on 3 May 2006 for the incorporation of Coastal Voice in which Mr Thomson described its objects as:

Protect rights; especially of the elderly and youth; promote provision of quality aged care services; health care services.<sup>61</sup>

- 2.58 Mr Thomson also described the principle activities as:

Volunteer aged care hotline; seek opinions of Central Coast residents on key community issues.<sup>62</sup>

- 2.59 Coastal Voice was issued a certificate of incorporation on 22 June 2006. Mr Thomson was president until his resignation in March 2007 when he sought pre-selection for the seat of Dobell.

- 2.60 The FWA report considered that:

At least as far as Ms Stevens was concerned, it is clear that Coastal Voice was intended to be a community group that would set out to engage with persons on the Central Coast who did not identify themselves as being supporters of any particular party.<sup>63</sup>

- 2.61 However, Ms Stevens' evidence also indicated that Coastal Voice was intended to be a vehicle for attracting 'soft votes' for the ALP.<sup>64</sup>

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60 AEC analysis of the FWA report, p. 11.

61 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 694.

62 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 694.

63 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 691.

64 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 701.

- 2.62 The launch of Coastal Voice was timed to coincide with an ALP function which was being patronised by the then Federal Opposition Leader, the Hon Kim Beazley MP. It was intended that Mr Beazley would attend the Coastal Voice function after his official duties.
- 2.63 The FWA report concluded 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.<sup>65</sup>
- 2.64 The FWA report also found that Coastal Voice appeared to have been moribund since Mr Thomson's resignation in March 2007.
- 2.65 The FWA report raised two findings in relation to Coastal Voice as having possible disclosure implications:
- At a minimum, a reasonable person in Mr Thomson's position would have:
    - e. ensured that appropriate transactional records of all expenditure incurred in relation to the activities of Coastal Voice were maintained to ensure that the National Office would be able to fulfil its reporting obligations to the Australian Electoral Commission and the AIR.<sup>66</sup>
  - Mr Thomson contravened subsection 287(1) of the RAO Schedule by improperly using his position as National Secretary to gain an advantage (namely, to advance his prospects of becoming elected to Parliament) for himself ...<sup>67</sup>
- 2.66 Mr Thomson, in his submission included in the FWA report, quoted an AEC finding into whether Coastal Voice was an associated entity:
- In the absence of full and specific details of all the activities undertaken by Coastal Voice in specific time periods, the AEC is unable to conclude that those activities which may reasonably be regarded as directly benefiting a particular political party comprise the whole or a significant portion of all the activities undertaken by Coastal Voice and are of benefit to a particular political party. The AEC is of the view that the present information and available evidence is unlikely to be sufficient to enable a Court in a criminal prosecution to find that Coastal Voice is operating "wholly, or to a significant extent" for the benefit of the ALP.

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65 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 701.

66 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 702.

67 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 703.

Accordingly, the AEC concludes that there is no information or available evidence to show that Coastal Voice meets any of the six grounds set out in paragraph (b) of the definition of an “associated entity” contained in subsection 287(1) of the Electoral Act.<sup>68</sup>

2.67 Section 287(1) of the Electoral Act defines ‘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*
- (f) *an entity on whose behalf another person has voting rights in a registered political party.*

2.68 The AEC analysis concluded that the FWA report supported its previous findings that Coastal Voice was not an associated entity.<sup>69</sup>

2.69 The AEC also maintained that there were no reporting requirements contained within the Electoral Act for candidates or their parties, prior to their official pre-selection. The report concluded:

As Coastal Voice has 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 ... as Mr Thomson only became the endorsed ALP candidate for the Division of Dobell on 13 April 2007.<sup>70</sup>

## **Mr Matthew Burke**

2.70 Mr Matthew Burke commenced employment with the National Office of the HSU in July 2006 as a result of being approached by Mr Thomson. Mr Burke ceased employment with the HSU close to March 2007.<sup>71</sup>

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68 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 701.

69 AEC analysis of the FWA report, pp. 11-12.

70 AEC analysis of the FWA report, pp. 11-12.

71 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 176.

- 2.71 Between March and November 2007 Mr Burke was employed by Senator Stephen Hutchins. Mr Burke also performed unpaid work for the HSU National Office and the HSU incurred any costs associated with this work.<sup>72</sup>
- 2.72 The FWA report found that the estimated employment costs and other expenditure made by Mr Burke totalled \$41 707.46, with Mr Burke's salary costs totalling \$29 400.
- 2.73 The FWA report concluded that while 'there is some evidence that Mr Burke did at least perform some ordinary administrative duties for the National Office ... this evidence does not seem to suggest that this was a significant part of Mr Burke's duties'.<sup>73</sup>
- 2.74 The FWA report further concluded:
- It appears that the majority of Mr Burke's time was spent on activities on the Central Coast ... closely connected to, if not entirely directed towards, building Mr Thomson's profile within the electorate of Dobell, and later, towards campaigning for his election as the member of Dobell.<sup>74</sup>
- 2.75 Chapter 1 of the FWA report notes that the wage of Mr Burke was disclosed by the HSU National Office in annual returns related to political expenditure lodged for the 2006-07 and 2007-08 financial years. This was done on the basis that he was 'primarily engaged in activities connected with the public expression of views on an issue in a federal election during the relevant period'.<sup>75</sup>
- 2.76 The FWA report raised two issues in relation to Mr Burke's employment as having possible disclosure implications:
- At a minimum, a reasonable person in Mr Thomson's position would have:
    - e. ensured that appropriate transactional records of all expenditure by, or in relation to, Mr Burke were maintained to ensure that the National Office would be able to fulfil its reporting obligations to the Australian Electoral Commission and the AIR.<sup>76</sup>
  - Mr Thomson contravened subsection 287(1) of the RAO Schedule by improperly using his position as National

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72 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 177.

73 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 720.

74 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 720.

75 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 47.

76 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 722.

Secretary to gain an advantage (namely, to advance his prospects of becoming elected to Parliament) for himself by employing Mr Burke, and by purporting to authorise expenditure of National Office funds totalling \$41, 707.46 by, or in relation to, Mr Burke, including after Mr Burke's resignation from the HSU, which was not expenditure on, or for a purpose reasonably incidental to, the general administration of the HSU.<sup>77</sup>

2.77 The AEC made the following observations regarding the FWA report findings into Mr Burke's employment:

- 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.<sup>78</sup>

## Central Coast Rugby League

2.78 In 2006 Mr Thomson, in his position as National Secretary for the HSU, signed a sponsorship contract with the Central Coast Division of Rugby League. The agreement was in force for the 2006, 2007 and 2008 seasons for \$30 000 per annum plus a CPI increase each year for the 2007 and 2008 seasons. The total estimated cost is \$103 393.32.<sup>79</sup>

2.79 The contract required the HSU logo to be placed on the team jerseys and alongside the 'Your Rights at Work' logo on the weekly completion programs for the 2006 season. The logos were also placed on letterhead, advertising and promotional signage at the grounds. The HSU was provided with advertising space in the competition programs.<sup>80</sup>

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77 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 723.

78 AEC analysis of the FWA report, p. 12.

79 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 738.

80 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 724.

2.80 The FWA report considered that ‘the payment of those monies was not authorised by either the National Council or National Executive’.<sup>81</sup> However, the FWA report also found that ‘any personal advantage [to Mr Thomson] is remote’<sup>82</sup> and concluded that :

It seems probable that the key reason for entering into the Sponsorship Agreement was the one identified by Mr Thomson, namely, that it gave exposure through naming rights, advertising and signage to the HSU and to the ‘Your Rights at Work’ brand.<sup>83</sup>

2.81 The AEC analysis considered that:

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.<sup>84</sup>

2.82 The ‘election period’ is defined under section 287(1) of the Electoral Act 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.*

2.83 The AEC further noted that a payment made for the 2008 season occurred well after the November 2007 election.

## **Dads in Education Fathers’ Day Breakfast**

2.84 The HSU National Office was invoiced for \$5 000 for ‘Support of Fathers’ Day Breakfast’ on 25 June 2007. The payments were made in two payments of \$2 500 on 22 and 23 August 2007.<sup>85</sup>

2.85 The event was described by Mr Thomson as originating on the Central Coast, but occurring in schools in Sydney and the ACT as well. It was held at the end of literacy week and encouraged fathers to come into schools to read to their children.<sup>86</sup>

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81 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 738.

82 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 737.

83 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, pp. 736-737.

84 AEC analysis of the FWA report, p. 13.

85 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 740.

86 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 742.

2.86 Mr Thomson appeared, but apparently did not speak, at a nationally televised media event on *Sunrise* in order to promote the event.<sup>87</sup>

2.87 The FWA report raised the following findings as having possible disclosure implications:

The benefit of sponsorship of the Fathers' Day Breakfast to Mr Thomson's candidacy in Dobell is patent given that the agreement was entered into in mid 2007 and that payments for the 2007 Breakfast were made in August 2007. Given that Fathers' Day is in the first Sunday in September and the federal election was held in late November 2007, Mr Thomson's appearance on National television in association with this event just a few months before the election would, on any reasonable view, have assisted in gaining publicity for his candidacy in the seat of Dobell. ...

A reasonable person in Mr Thomson's position would have taken steps to ensure that these payments were approved by National Executive and recorded in the minutes of National Executive.<sup>88</sup>

2.88 In relation to this matter the AEC analysis 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.<sup>89</sup>

2.89 The AEC also questioned whether a reporting obligation would have existed had the payments been above the threshold. The AEC indicated that to make a conclusion of personal gain to Mr Thomson's candidacy in Dobell, further evidence would be required regarding the contents of the television program, such as whether his candidacy in Dobell was mentioned or as to whether the payments entitled Mr Thomson to rights of publicity.<sup>90</sup>

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87 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 743.

88 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 744.

89 AEC analysis of the FWA report, p. 13.

90 AEC analysis of the FWA report, p. 13.

## Golden Years Collectables

- 2.90 In November of 2006 a payment of \$2 050 was made to Golden Years Collectables to purchase memorabilia to donate to the ALP for fundraising raffles.
- 2.91 In Mr Thomson's submission to the FWA, he stated that 'the HSU supported the ALP and this donation was disclosed in accordance with the political donation laws'.<sup>91</sup>
- 2.92 The FWA report concluded that the expenditure for this item was not approved by the National Executive. Further, the report finds that Mr Thomson was 'motivated by a desire to increase his profile within the ALP by promoting the memorabilia to the ALP'.<sup>92</sup>
- 2.93 The AEC noted that while it was apparent that this donation 'could be reasonably regarded as a donation to the ALP', there was no 'potential donor disclosure obligation as the amount is below the \$10 300 disclosure threshold that applied in the 2006-07 financial year'.<sup>93</sup>

## Central Coast Convoy for Kids

- 2.94 On 12 September 2006, the National Office made a payment of \$5 000 to the 'Central Coast Convoy for Kids'. The event was described as a longstanding Central Coast community event that fundraises for a local children's hospital. The event was not connected with the HSU or the ALP. In Mr Thomson's submission to FWA he noted that 'the HSU had a history of donating to the Central Coast Convoy for Kids'.<sup>94</sup>
- 2.95 The FWA report concluded in relation to this matter that in making the donation, Mr Thomson was motivated by a desire to increase his public profile within the seat of Dobell explaining:

The payment to Central Coast Convoy for Kids was made some six months before Mr Thomson was preselected for the seat of Dobell. While he was therefore not actively canvassing for votes as a preselected candidate at this point in time, sponsorship of the event must nevertheless have had at least the potential to raise

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91 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 746.

92 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 747.

93 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 13.

94 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, pp. 748-749.

Mr Thomson's public profile within the seat of Dobell in anticipation of fighting for ALP pre-selection and (should that be successful) subsequently for election to Parliament.<sup>95</sup>

- 2.96 In its analysis, the AEC found that as the payment was made well before Mr Thomson was pre-selected as the endorsed ALP candidate for Dobell, there was no requirement for this payment to be disclosed.<sup>96</sup>

## HSU National Office and the category of associated entity

- 2.97 There was discussion at the committee's hearings as to whether the HSU National Office should be classified as an 'associated entity', as provided in 287(1) of the Electoral Act.
- 2.98 At the committee's request, the AEC provided copies of correspondence on this issue. A brief summary of relevant exchanges are outlined in Table 2.1.

Table 2.1 List of correspondence on whether the HSU National office is an associated entity

| Date          | Key details  |
|---------------|--|
| 10 March 2009 | Letter: ALP National Secretariat to AEC<br>Providing a list of the ALP's associated entities, which included the HSU National Office.  |
| 12 May 2009   | Letter: AEC to HSU National Office<br>Advising that the HSU National Office had been identified by the ALP as an associated entity and seeking lodgement of their associated entity annual return for 2007-2008. The return was due on 20 October 2008.                    |
| 18 May 2009   | Letter: AEC to political parties<br>Asking for a list of all associated entities of federally registered political parties for the 2008-2009 financial year.   |
| 20 May 2009   | Email: AEC to HSU National Office<br>Seeking to ensure that the HSU complies with their obligation to lodge an associated entity return for 2007-2008.   |
| 26 May 2009   | Letter: HSU National Office to AEC<br>Noting that the HSU National Office had not yet lodged a return and that an independent audit of HSU National Office was underway due to issues arising out of the exit audit after the change of leadership at the National Office. |

95 FWA, *Report of the Delegate to the General Manager of Fair Work Australia*, p. 750.

96 AEC analysis of the FWA report, p. 14.

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|-----------------|---|
| 27 May 2009     | <p>Letter: ALP National Secretariat to AEC</p> <p>The ALP updated its advice to the AEC as to which associated entities were affiliated to it: The ALP stated: <i>all unions and some other entities are affiliated at state level only, there is no process of national union affiliation and unions do not have voting rights at the national level.</i></p> <p>The ALP indicated that there had been some confusion due to prior legislative changes as to which organisations fell under the definition of an associated entity for each party.</p> |
| <hr/>           |   |
| 13 October 2009 | <p>Letter: HSU National Office to AEC</p> <p>Responding to an earlier letter from the AEC in relation to HSU reporting obligations as an associated entity.</p> <p>The HSU National Officer asserted that it was not an associated entity.</p>  |

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Source Correspondence provided by the AEC, see Submission 1.3.

2.99 Prior to 2009, the AEC believed that the HSU National Office was an associated entity and expected it to lodge an associated entity annual return. The HSU National Office, in a letter to the AEC, set out the following claims as to why it should not be classified as an associated entity:

By virtue of s27 of the Fair Work (Registered Organisations) Act 2009 (Act), the Health Services Union is an incorporated entity. As you know, the Union is divided into a number of separate branches, each of which, pursuant to the rules of the Union and the operation of the Act, operate autonomously, including with respect to their financial affairs and reporting with respect to those affairs. This is particularly governed by s242 of the Act. A number of the branches of the Union, specifically the NSW Branch, the Tasmanian Branch, the West Australian Branch and several of the Victorian Branches are Associated Entities of the Australian Labor Party. In each case, they are affiliated to the Australian Labor Party in their respective states and they provide delegates to the conferences of those branches of the ALP.

Pursuant to s242(5) of the Act, the National Office of the Union is regarded by the Act as a separate branch for the purpose of reporting. However, unlike the state branches of the Union described above, the HSU National Office, is not affiliated with the ALP and does not provide delegates to any forum of the ALP. It seems to us, in those circumstances, that the National Officer of the

HSU cannot be an Associated Entity having regard for the definition within the Australian Electoral Commission Act.<sup>97</sup>

- 2.100 The AEC advised that it accepted the arguments as to why the HSU National Office was not an associated entity:

... the authorised officer made the decision on 16 October 2009 in relation to the status of the HSU National Office and part of that was a letter to me from Kathy Jackson dated 13 October 2009 where they went through provisions of the Fair Work (Registered Organisations) Act to deal with the status of the HSU National Office.<sup>98</sup>

- 2.101 Further, the AEC explained how it came to this conclusion:

**CHAIR:** In plain English can you tell us what was the key factor in your mind in then conceding that they were not an associated entity?

**Mr Pirani:** Two key factors: firstly, that the HSU national office did not have voting rights in the ALP separate from other branches of the HSU and, secondly, that under the Fair Work (Registered Organisations) Act – in particular section 245 – their national office is deemed to be separate from the other parts of the party. When we put those two factors together we accepted that they were not an associated entity.

**CHAIR:** Is there anything that has come to your attention since that would change your mind or are you still of that view?

**Mr Pirani:** Based on the information we have there has been no change.<sup>99</sup>

- 2.102 Some members of the committee disagreed with the AEC's finding and maintained that the HSU National Office should be classified as an associated entity. The AEC was examined on this issue at the public hearings:

**Mr Pirani:** It has a separate registration process under our act. In relation to the union structure – and it is included in our background here – we had advice from the union itself and from the lawyers of the union pointing to a provision in the Fair Work (Registered Organisations) Act saying that the Health Services

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97 Letter from National Secretary, HSU National Office, to Chief Legal Officer, AEC, dated 13 October 2009. Copy reproduced in *Submission 1.3*.

98 Mr Paul Pirani, Chief Legal Officer, AEC, *Committee Hansard*, 16 July 2012, Canberra, p. 16.

99 Mr Paul Pirani, Chief Legal Officer, AEC, *Committee Hansard*, 16 July 2012, Canberra, p. 18.

Union national office was legally separate from each other branch that had separate legal status because of the Fair Work (Registered Organisations) Act.

That is the basis on which we were dealing with this matter.

**Mrs BRONWYN BISHOP:** So that was your sole source of legal advice as to whether or not the national office was an associated entity?

**Mr Pirani:** The separate registration under the Fair Work (Registered Organisations) Act, yes.

**Mrs BRONWYN BISHOP:** No other legal opinion?

**Mr Pirani:** No other legal opinion.

**CHAIR:** There is no other opinion asserting the contrary, is there?

**Mrs BRONWYN BISHOP:** So you simply got it from the union?

**Mr Pirani:** No, we also looked at the Fair Work Australia website, which has a list of the separate registration of all the various bodies that made up the Health Services Union at that time. Then we had a discussion with both Ms Kathy Jackson and the lawyers for the Health Services Union national office, and they directed us to a particular provision in the Fair Work Act which deemed the national office to be separate from the other bodies that made up the Health Services Union. I will just try to find where that is referred to.

**CHAIR:** Could I also ask you: in your understanding, is it not common within the union movement to have the national office separate from the state offices, similarly to the political parties? The national secretariat of the ALP is separate from the New South Wales office.

**Mr Pirani:** If I could just refer you to page 56 of our submission. I refer to the contact –

**Mrs BRONWYN BISHOP:** Which submission?

**Mr Pirani:** The submission to JSCEM. It refers to contact that I had and a letter that I had from the senior lawyer for the law firm Slater and Gordon. When we were originally dealing with this matter, we initially had formed a view that the national office of the Health Services Union may well have been an associated entity. We were directed to several provisions that were in the Fair Work Act under which they were able to argue – and I agreed with the view – that the national office, because of these provisions

in the Fair Work (Registered Organisations) Act, was legally separate and therefore was separately registered for the purposes of the Fair Work (Registered Organisations) Act. Therefore it was a separate body corporate and legal entity from each of the other branches.

**Mrs BRONWYN BISHOP:** What was the position in 2007, before the Fair Work Act was passed?

**Mr Pirani:** Our understanding is it was the same, but I would have to take that on notice because I did not look at the transitional provisions.<sup>100</sup>

- 2.103 In response to committee questioning on whether there are any national branches of trade unions that the AEC has identified as being an associated entity, the AEC stated:

The AEC searched our records and, for the last period for annual returns, there were no national branches of trade unions (within the scope of section 242(5) of the *Fair Work (Registered Organisations) Act 2009*) that were regarded as being an “associated entity” due to their office bearers having voting rights with a registered political party.<sup>101</sup>

- 2.104 Some members of the committee also expressed concern that since unions came under the category of associated entity in 2006, only one compliance review of a union has been undertaken by the AEC. In 2011 the AEC undertook a review of HSU East Branch after it came to the AEC’s notice that a nil return had subsequently been amended to a disclosure of \$24 million.<sup>102</sup>

- 2.105 The AEC argued that unless certain elements are satisfied, ‘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 any entity is an “associated entity”’.<sup>103</sup>

- 2.106 The FWA Delegate was also questioned on this issue. However, as the Electoral Act is not his area of expertise, he was only able to respond in more general terms:

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100 *Committee Hansard*, 6 July 2012, Canberra, pp. 7-8. See also *Committee Hansard*, 16 July 2012, Canberra, pp. 16-22.

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

102 *Committee Hansard*, 6 July 2012, Canberra, pp. 30-31. See also AEC, *Submission 1.3*.

103 AEC, *Submission 1.1*, p. 9.

**Mrs BRONWYN BISHOP:** I now have a list of registered organisations. It says here that the Health Services Union is 'U' type. Presumably that is a union. It has an abbreviation and a code. So the Health Services Union itself is a registered organisation under your act.

**Mr Nassios:** Correct.

**Mrs BRONWYN BISHOP:** We have been told all along that it was the national office of the Health Services Union that was registered under the act and it was not an associated entity – I think I said 'related' entity before, but I meant associated entity – whereas it clearly shows in this list that the Health Services Union itself is registered. I am at a loss to know whether there was ever to your knowledge a distinction made between the registration of the union and the national office.

**Mr Nassios:** Again, I am going to struggle. I do not understand the Electoral Act at all. I do not know how that operates. As best as I can assist you, in terms of the Health Services Union and the Registered Organisations Act, the easiest way to explain this is if we presume that there is an overriding national body and each state has a branch in its own name. The way the Registered Organisations Act works is that each of those branches – in other words, each of the states – are referred to as reporting units. It has to report on its finances as a component part of the whole national body. The HSU has a number of branches, most of which are based in the various states, and there are a number that are based in Victoria.

**Mrs BRONWYN BISHOP:** Yes, I can see that.

**Mr Nassios:** Our finding in terms of HSU is that the national office itself – this is a unique situation; it is certainly not common amongst most organisations – is also a reporting unit for the purposes of financial reporting. Hence the reason we had an inquiry and investigation into the national office.

**Mrs BRONWYN BISHOP:** I see.

**Mr Nassios:** It is important to make the distinction that we did not investigate the Health Services Union as a whole. We did not look at, for example, Tasmania's branch reports. That is a different entity in terms of the Registered Organisations Act.

**Mrs BRONWYN BISHOP:** I see. So you would have treated the national office like a branch – as a reporting entity.

**Mr Nassios:** Correct.<sup>104</sup>

- 2.107 The issue of the difficulties associated with determining whether organisations are associated entities will be discussed under measure 5 in Chapter 3.

## **KPMG review of the FWA investigation**

- 2.108 On 21 August 2012 the FWA released the KPMG *Process review of Fair Work Australia's investigations into the Health Services Union* (KPMG review). It covered the conduct of inquiries and investigations into the HSU National Office and the Victoria No.1 Branch.

- 2.109 The scope of the KPMG review was limited to the FWA investigation processes and did not involve an evaluation of the evidence:

The scope of work for Phase 1 and Phase 2 was restricted to a review of the process followed by FWA in undertaking their investigation of the matters and specifically did not include the re-performance of any part of the HSU investigations or the evaluation of evidence presented in support of the any findings made in the HSU investigation reports.<sup>105</sup>

- 2.110 The FWA media release made reference to the following key findings:

- That the investigations by FWA were hampered by the absence of relevant investigation standards and procedures, document and case management protocols and insufficient appropriately qualified and experienced personnel.
- These issues almost certainly contributed to the time taken to complete the investigations.
- KPMG did not identify any indications of potential interference in the HSU investigations.
- KPMG made 31 recommendations to improve FWA's investigations procedures.<sup>106</sup>

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104 Mr Terry Nassios, FWA, *Committee Hansard*, 16 August 2012, Canberra, p. 6.

105 KPMG, *Process review of Fair Work Australia's investigations into the Health Services Union*, 17 August 2012, p. 2.

106 FWA, *Release of the review into HSU investigations*, Media Release, 21 August 2012, available at <<http://www.fwa.gov.au/index.cfm?pagename=aboutmediareleases>>

2.111 KPMG found that:

FWA is not experienced in the conduct of investigations, and has not previously had to deal with investigations which have generated as much public interest as the HSU investigations.<sup>107</sup>

2.112 Some aspects of the HSU investigations were found to have been conducted appropriately. These were:

- Interviews conducted by the Investigations team;
- The process for the preparation and completion of the National Office report; and
- There was a formal process in place to ensure the accuracy of public statements made regarding the status of the HSU investigations.<sup>108</sup>

2.113 However, KPMG also identified a number of key deficiencies:

This report includes 38 findings in relation to the conduct of the HSU investigations which are summarised as follows:

- FWA did not have and did not refer to any relevant investigation standards and procedures;
- There is a lack of adequate documentation setting out the investigation process followed by FWA;
- FWA did not implement an adequate investigation case management system or process, which resulted in deficiencies in the planning, management and execution of the HSU investigations;
- FWA did not have sufficient appropriately qualified and experienced resources involved in the conduct of the HSU investigations;
- FWA did not consider all potential sources of information, particularly electronic information, and did not appear to fully understand its rights to access all potentially relevant sources of information;
- FWA did not have protocols in place for the collection and retention of documents; and
- The security arrangements over documents were inadequate.

The findings referred to above almost certainly contributed to the time taken to complete the HSU investigations.<sup>109</sup>

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107 KPMG, *Process review of Fair Work Australia's investigations into the Health Services Union*, 17 August 2012, p. 3.

108 KPMG, *Process review of Fair Work Australia's investigations into the Health Services Union*, 17 August 2012, p. 5.

109 KPMG, *Process review of Fair Work Australia's investigations into the Health Services Union*, 17 August 2012, p. 4.

2.114 KPMG identified 31 opportunities for improving FWA investigation processes. The FWA General Manager indicated that the organisation 'had already made significant changes to its policies and processes and would adopt all of the review's recommendations'.<sup>110</sup>

2.115 When releasing the KPMG review, the FWA General Manager also stated:

FWA notes that this review did not consider the substance of the findings made by the Delegate of the General Manager regarding contraventions by the Victoria No.1 Branch and the National Office, their officers, employees and auditor. As such, the findings of the review do not detract from the validity of the findings of the Delegate, which will ultimately be tested in proceedings in the Federal Court of Australia.<sup>111</sup>

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110 FWA, *Release of the review into HSU investigations*, Media Release, 21 August 2012, available at <<http://www.fwa.gov.au/index.cfm?pagename=aboutmediareleases>>

111 FWA, *Release of the review into HSU investigations*, Media Release, 21 August 2012, available at <<http://www.fwa.gov.au/index.cfm?pagename=aboutmediareleases>>

## 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'.<sup>1</sup>
- 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 overlaid against the relevant measure. Recommendations will be made, where appropriate.

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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*.<sup>2</sup> 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’.<sup>3</sup>
- 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)’.<sup>4</sup>
- 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
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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 42<sup>nd</sup> 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).<sup>5</sup> 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.<sup>6</sup>

- 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.<sup>7</sup>

- 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 argument 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'.<sup>8</sup> It was also posited that treating related political parties as a single entity

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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.<sup>9</sup>

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.<sup>10</sup>

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

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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.<sup>11</sup>

## Conclusion

- 3.15 The AEC anticipates that the disclosure threshold for the current financial year 2012-2013 will be more than \$12 100.<sup>12</sup> 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.

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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](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.<sup>13</sup>

- 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'.<sup>14</sup>

- 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.<sup>15</sup>

- 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:

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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.<sup>16</sup>

## 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.<sup>17</sup>

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'.<sup>18</sup>

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.<sup>19</sup> 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

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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.<sup>20</sup>

- 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.**

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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.<sup>21</sup>
- 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
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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.<sup>22</sup>

- 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.<sup>23</sup>
- 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.<sup>24</sup>
- 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.<sup>25</sup>
- 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.<sup>26</sup>

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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'.<sup>27</sup>
- 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-authorized 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

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

branches, candidates, groups, and associated entities would be added to the list.<sup>28</sup>

- 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’.<sup>29</sup>

## 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.<sup>30</sup>

- 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.<sup>31</sup>

- 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:

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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.<sup>32</sup>

- 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.<sup>33</sup>
- 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.<sup>34</sup>

## 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
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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’.<sup>35</sup>
- 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*

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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.<sup>36</sup>
- 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).<sup>37</sup>
- 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](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.<sup>38</sup>

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.<sup>39</sup>

## 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".<sup>40</sup>

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

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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.<sup>41</sup>

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.<sup>42</sup>

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.<sup>43</sup>

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

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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.<sup>44</sup>

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.<sup>45</sup>

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

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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.<sup>46</sup>

- 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.<sup>47</sup>
- 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

|   | <b>Associated entities</b>   | <b>Third parties</b>  |
|---|--|---|
| 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                     | <ul style="list-style-type: none"> <li>- total receipts</li> <li>- details of amounts received that are more than the disclosure threshold</li> <li>- total payments</li> <li>- total debts as at 30 June</li> <li>- details of debts, outstanding as at 30 June that total more than the disclosure threshold</li> <li>- details of capital contributions (deposits) from which payments to a political party were generated</li> </ul> | <ul style="list-style-type: none"> <li>- political expenditure incurred for one or more of the five specified purposes listed in section 314AEB(1)(a) (the disclosure threshold applies)</li> <li>- gifts received, that were used to incur such political expenditure (gifts from the same person or entity are cumulative for disclosure threshold purposes)</li> </ul> |
| 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.<sup>48</sup>

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.<sup>49</sup>

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.<sup>50</sup>

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.<sup>51</sup>

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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’.<sup>52</sup> 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.<sup>53</sup>
- 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.<sup>54</sup>
- 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.<sup>55</sup>
- 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:

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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.<sup>56</sup>

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.<sup>57</sup>

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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.<sup>58</sup>

## 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 as 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

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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.<sup>59</sup>

- 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.<sup>60</sup>

- 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’.<sup>61</sup>
- 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.<sup>62</sup>
- 3.113 Similarly, from 2011 Queensland has required that all political parties, candidates and third parties establish and maintain a dedicated state campaign account.<sup>63</sup>

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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’.<sup>64</sup>
- 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:

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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.<sup>65</sup>

## Analysis

3.120 The AEC has indicated that electronic lodgement of returns would provide administrative efficiencies in the processing and publication of returns.<sup>66</sup> 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.<sup>67</sup>

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.<sup>68</sup>

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

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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.<sup>69</sup>

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.<sup>70</sup>

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 is 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.<sup>71</sup>

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’.<sup>72</sup>

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.<sup>73</sup>

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.<sup>74</sup>

## 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

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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.<sup>75</sup> 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

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<sup>75</sup> 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’.<sup>76</sup>

## 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.<sup>77</sup>

3.144 The AEC claimed that reviews and investigations ‘can be effectively frustrated by inadequate records’.<sup>78</sup> 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.<sup>79</sup>

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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.<sup>80</sup>
- 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

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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’.<sup>81</sup> 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’.<sup>82</sup> 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’.<sup>83</sup>
- 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.<sup>84</sup>
- 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).

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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.<sup>85</sup>

## 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.<sup>86</sup>

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

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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.<sup>88</sup>

- 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. This 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.<sup>89</sup>

- 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'.<sup>90</sup>

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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.<sup>91</sup>

- 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.<sup>92</sup>

## 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.

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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;<sup>93</sup> and
  - shorten the reporting period for election returns from 15 weeks to 8 weeks after polling day.<sup>94</sup>

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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.<sup>95</sup> In 2011 the committee supported the introduction of six-monthly reporting as outlined in the 2010 Bill.<sup>96</sup> 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.<sup>97</sup>
- 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.<sup>98</sup> 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.<sup>99</sup>

## 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

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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.<sup>100</sup>

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'.<sup>101</sup> 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.<sup>102</sup>

## 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.**

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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.<sup>103</sup>

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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).<sup>104</sup>

- 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'.<sup>105</sup>

- 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.<sup>106</sup>

- 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.<sup>107</sup>

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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’.<sup>108</sup>
- 3.194 Some alternative approaches suggested included ‘expecting political parties, candidates and other participants to plan their expenditure

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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'.<sup>109</sup>

## 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 31<sup>st</sup> 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.<sup>110</sup>

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.<sup>111</sup> 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).<sup>112</sup>

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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’.<sup>113</sup> 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’.<sup>114</sup>
- 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’.<sup>115</sup>

## 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.<sup>116</sup>

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:

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<sup>115</sup> JSCem, *Report on the funding of political parties and election campaigns*, November 2011, p. 211.

<sup>116</sup> 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”.<sup>117</sup>

- 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.<sup>118</sup>

- 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.

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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.<sup>119</sup>

- 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.<sup>120</sup>

- 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.<sup>121</sup>

- 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

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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.<sup>122</sup>

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.<sup>123</sup>

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.<sup>124</sup>

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.

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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.<sup>125</sup>

- 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.<sup>126</sup>

## 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.

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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'.<sup>127</sup> The committee was concerned with ensuring that all 'reasonable administrative expenses related to campaigning' would be eligible to receive public funding.<sup>128</sup>

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.<sup>129</sup>

## 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.<sup>130</sup>

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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’.<sup>131</sup>
- 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.<sup>132</sup>

## 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.

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### 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

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

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

therefore not legal entities.<sup>133</sup> 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.<sup>134</sup> 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’.<sup>135</sup> 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.<sup>136</sup>

- 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.<sup>137</sup>

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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.<sup>138</sup>

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.<sup>139</sup>

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.<sup>140</sup>

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.<sup>141</sup>

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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.<sup>142</sup> 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.<sup>143</sup> 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.

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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.<sup>144</sup>

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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 identify 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 assembling 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 identify 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.<sup>145</sup>

## 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.

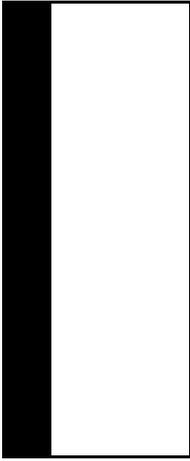
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145 AEC, *Submission 1.1*, p. 11.

**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



Dissenting report – The Hon Bronwyn  
Bishop MP, The Hon Alex Somlyay MP,  
Senator Scott Ryan and Senator Simon  
Birmingham



# **Inquiry into the Review of the AEC report on the HSU**

**Joint Standing Committee on Electoral Matters**

***How Craig Thomson dodged the rules  
with the help of the AEC***

**Dissenting Report**

**The Hon. Bronwyn Bishop MP**

**The Hon. Alex Somlyay MP**

**Senator Scott Ryan**

**Senator Simon Birmingham**

**September 2012**



## **Dissenting Report – Joint Standing Committee on Electoral Matters**

### **Executive Summary**

s)305A of the Commonwealth Electoral Act 1918 requires a donor who made gift(s) to candidate(s) and/or political party(ies) made in relation to an election within the disclosure period, which in Mr Thomson's case was between 13<sup>th</sup> April 2007 (date of his endorsement as a candidate) and 24<sup>th</sup> November 2007 (Election Day) to file a Donor Annual Return, setting out the total amount or value of gift(s). The monetary threshold for disclosure is for 2006/7 \$10,300 and for 2007/8 \$10,500.

s)305(B) relieves associated entities and candidates from filing a Donor Return as they report gifts in Associated Entity Returns or Return or Candidate/ Agent Return respectively.

In the case of Mr Thomson a total sum of \$21,901.77 was identified by Slater & Gordon/BDO Kendall forensic accountants as gifted from HSU to him within the relevant disclosure period. This was not reported in either of the above returns. In the case of the HSU the AEC appears to believe the HSU National Office was not an associated entity and said it was sufficient just to have these gifts included in a political expenditure return, which a year late, was filed in 2009. The Candidate/Agent did not disclose any gifts and filed a nil return.

This however is not correct. If the HSU National Office is not an associated entity it is not relieved of its obligation to file a donor return. No Donor Return in respect of Mr Thomson was filed. This was not done despite Slater & Gordon's advice to the HSU to do so. The money concerned was not gifted to the ALP as a political party but to the candidate himself and as such must be disclosed by him in his/agent return. This was not done. \$12,511.40 was disclosed in a Donor Return – again late 13<sup>th</sup> October 2009, filed by National Secretary Kathy Jackson on behalf of the HSU.

In the words of Slater & Gordon, page 31 paragraph 114 of its report (forwarded to FWA but not obtained by the AEC at the time of writing their analysis)

“Invoices which were addressed to Thomson personally or in his capacity as a candidate for election would seem most likely to have been Campaign Expenditure. The Expenditure incurred by the NSW branch of the ALP which was later reimbursed by the Union would also certainly have been campaign Expenditure. Doing the best we can, expenditure of this nature has been marked with and (\*) in attachment 7.

### Slater & Gordon further state

“on available information Slater & Gordon regard the items marked “\*” in the schedule as gifts or donations within the meaning of ss305A and/or 305B of the Commonwealth Electoral Act.”

Expenditure identified by forensic accountants BDO Kendall are at p)133 of attachment 7 - Schedule of Electoral Expenditure, - Expenditure by Electronic Transfer from SGE Credit Union Account. Within the reporting period totalled \$27,651.93. This account belonged to Mr Thomson and the details are set out below.

#### Expenditure by Electronic Transfer from SGE Credit Union Account

| Date Paid  | Payee                         | Amount            |
|------------|-------------------------------|-------------------|
|            |                               | \$                |
| 12/07/2007 | DP Parish                     | 671.88            |
| 12/07/2007 | Australia Post – Long Jetty * | 7,253.17          |
| 12/08/2007 | DP Parish                     | 79.28             |
| 22/08/2007 | Dad's in Education - Wyoming  | 2,500.00          |
| 23/08/2007 | Dad's in Education - Wyoming  | 2,500.00          |
| 12/11/2007 | Central Coast Radio Centre *  | 2,895.20          |
| 12/11/2007 | Central Coast Radio Centre *  | 4,493.50          |
| 12/11/2007 | Central Coast Radio Centre *  | 1,540.00          |
| 12/11/2007 | Central Coast Radio Centre *  | 1,996.50          |
| 12/11/2007 | Central Coast Radio Centre *  | 3,722.40          |
| 03/12/2007 | Dad's in Education            | 5,000.00          |
| 06/03/2007 | Central Coast Rugby League    | 15,000.00         |
| 07/03/2007 | Central Coast Rugby League    | 19,320.00         |
| 30/06/2008 | Central Coast Rugby League    | 39,073.32         |
| 18/02/2008 | ALP - NSW Branch *            | 12,511.40         |
|            |                               | <u>118,556.65</u> |

In addition in the relevant reporting period Mr Thomson withdrew \$13,700 in cash (in \$500 every 3 to 4 days) which is consistent with his practice since 2002 (the date of his becoming National Secretary). Total withdrawals are shown by BDO Kendall, as a schedule of ATM Cash Withdrawal Transactions CBA MasterCard Mr Craig Thomson, to total \$101,000. The relevant pages of Schedule of ATM Cash Withdrawal Transaction is attached as Annexure A.

The tax treatment of Mr Thomson's credit card use including cash withdrawals should also be investigated both from income tax and Fringe Benefits Tax as well as misappropriation, fraud or theft.

Evidence from Mr Williamson, President of the HSU stated that first he knew of these cash withdrawals was when he saw the BDO Kendall Report.

None of the expenditure or withdrawals during the relevant reporting period were authorised by the National Council or National Executive of the HSU in accordance with its rules. Dick & Smith Chartered Accountants and Auditors for the HSU in an advice to Kathy Jackson National Secretary set out the rules on 12<sup>th</sup> May 2008 and how they were flaunted.

Response

All expenditure between 1 July 2007 and January 2008 was not authorised by National Council or National Executive. In addition, expenditure by Mr Thomson personally after 14 December 2007 is detailed in the response to question 5 below.

It is ultimately a question of law as to whether the rules require authorisation of expenditure by National Council or National Executive.

Rule 21 states:

*The National Council shall, subject to these Rules and the control by the members as hereinafter mentioned, be the supreme governing body of the Union and have the management and control of the affairs of the Union and, without limiting the generality of the foregoing, shall in particular have power:-*

- (e) to appoint and remove such National Industrial Officers and Research Officers and other types or category of officials as it deems necessary and to fix the remuneration and terms and conditions of employment of the same;*

Rule 27(a) states:

*The National Executive shall, subject to these Rules and to the decisions of National Council and to the control of members as hereinafter mentioned, have power (in addition to powers conferred on it elsewhere in these Rules) to conduct and manage the affairs of the Union including the power to set the wages and conditions of the National Office Staff and between meetings of the National Council may exercise all the powers of National Council except the power to grant life membership and the power to make, add to, amend, rescind and/or otherwise alter these Rules.*

Rule 32 relevantly states:

*The National Secretary shall -*

- (n) Between meetings of the National Executive, control and conduct the business of the Union;*

Rule 36(b) states:

*The funds and property of the Union shall be controlled by the National Council and the National Executive both of which shall have power to expend the funds of the Union for the purposes of carrying out the objects of the Union and all cheques drawn on the funds of the Union shall be signed by two officers of the Union and at least one Trustee. For the expenditure of the funds of the Union on the general administration of the Union and for purposes reasonably incidental to the general administration of the Union, the prior authority of the National Council or the National Executive shall not be necessary before cheques are signed or accounts paid.*

Prior to the relevant reporting period Mr Thomson engaged Miss Chrislee Stevens and Mr Matthew Burke without any authorisation by the National Council or National Executive as required by the Union rules.

The Dick & Smith advice identifies another \$10,000 to Dad's in Education with two \$5000 payments on 17<sup>th</sup> July 2007 and 18<sup>th</sup> October 2007.

Prior to the relevant reporting time Mr Thomson had employed Ms Chrislee Stevens and Mr Matthew Burke without the authority of the National Council or National Executive. Dr Rosemary Kelly, a member of the HSU Finance Committee testified to the FWA investigation that

"I didn't know that they were employed by the national office until after Craig Thomson had left. I was not aware of their employment, it never went to national executive, it didn't go to finance committee, and I questioned the amount in the salaries, under the salaries line, because it seemed to me the salaries were too high. I did a back of the envelope on what I thought everybody was being paid and I thought, "That's funny, has the national secretary got a salary increase, or what's happening with the salaries budget?" So I actually questioned that, I didn't know these two people were employed until afterwards."<sup>1</sup>

In the relevant reporting time Miss Stevens worked for Mr Thomson as the endorsed candidate and the value of her salary package in that period was \$32,000. Slater and Gordon at page 49 of their report, in paragraph 30 state

"The ACTU Circular recommended that YR@W activities, whilst political expenditure would not be characterised as a gift or donation to a political party or candidate. We again concur. This is of course to be contrasted with:

- (a) Expenditure directly contributed to an electoral campaign or to a political party; and
- (b) Union staff working directly (during working hours) on the campaign of a particular candidate for election or political party.

Both would be gifts warranting disclosure under s305A and/or 305B.

Mr Burke left the employment of the HSU prior to Mr Thomsons's endorsement and went to work for the Dobell electorate "duty Senator", Senator Hutchins. Mr Burke kept his HSU credit card and made purchases which could be gifts to Mr Thomson's campaign as a candidate. His services were made available to Mr Thomson by Senator Hutchins. This in itself is not permitted but is still constituted a gift

As previously outlined none of this expenditure was authorised by the HSU so the question must be asked who was the donor? If Mr Thomson was the donor of gifts he improperly gained from the HSU, s)305B of the Commonwealth Electoral Act relieves the candidate of filing a disclosure of gifts return but requiring gifts to be

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<sup>1</sup> Transcript of proceedings, Fair Work (Registered Organisations) Act 2009, 11.00AM, THURSDAY, 15 APRIL 2010

included in his candidate/agent return. Mr Thomson though his agent filed a nil return disclosing no gifts.

This money, which was in light of the myriad of evidence in the total FWA report was either misappropriated or fraudulently acquired, means it remained unreported to the AEC and the whole schema of the reporting and disclosure obligations is avoided..

The AEC did not address any of these issues even though the Minister asked the AEC to report on “any issues concerning the operation of the Electoral Act which could be considered for possible remedy.”

The AEC analysis which only queried \$17,014.88 of other expenditure completely overlooked all of the above.

The current Funding and Disclosure Guide published by the AEC for election donors points out the distinction between third parties required to file a third party return of political expenditure and a donor. Page 6 of the guidelines provides that the monetary threshold for disclosure applies to the total value of all gifts or donations, meaning “all donations, regardless of their value must be disclosed”.

The AEC guidelines may also capture additional electronic transfers from the SGE Credit Union made during the reporting period (and disclosed in the BDO Kendall Report) to Dad’s in Education, Central Coast Rugby League totalling a further \$49,067.32.

The Guidelines state donations made indirectly to a candidate (during the disclosure period) must be disclosed. It is certainly able to be argued that the donations to these entities in the disclosure period were meant to benefit Mr Thomson as the Candidate.

Thus gift in excess of \$100,000 to Mr Thomson either direct or indirect in accordance with the BDO Kendall Report and the AEC Guidelines should have been disclosed. But by whom?

A Third Party expenditure disclosure does not relieve a person of the obligation to make a donor return unless that person is an associated entity or candidate.

Up to May 2009 the AEC could have used its statutory powers to do a Compliance Review pursuant to s)316 (2R) of the HSU National Office believing it to be an associated entity.

Indeed it is important to note that the AEC did no compliance reviews of Trade Unions with the exception of one of the HSU in late November 2011 when they were embarrassed into it with the HSU supplying 3 returns (all late for 2010) going

from a miniscule political expenditure return to one showing \$24 million dollars of expenditure. This in itself shows the AEC knew they had the power to conduct Compliance Reviews on Trade Unions but simply elected not to do so and elected to ignore the 2006 amendments to The Electoral Act adding Trade Unions to the group to be supply returns and be subject to compliance review.

The list of the 256 Compliance Reviews carried out from 2007 to 2012 are attached as Annexure B

The AEC was further derelict in its duty to carry out its responsibilities under the Act by its failure to carry out any investigation of HSU and its National Office despite knowledge in the press concerning payments made to and/or on behalf of Mr Thomson within the reporting period.

Annexure C is the correspondence received by the committee relating to the filing of returns between the AEC and the HSU National Office and Mr Ken Fowlie of Slater & Gordon demonstrating failure on behalf of the AEC to act in a timely way. It is interesting to note that in his email to Ms Jackson, Mr Pirani, the Chief Legal Officer of the AEC only becomes insistent when he flags that he will be questioned at Senate Estimates and his salutation to Miss Jackson the then National Secretary becomes Kathy rather than the previous Ms Jackson (Annexure D). The AEC's failure to act means no action can now be taken because 3 year limitation period has elapsed.

### Table of Comparisons between positions of AEC, Labor/Greens and the Coalition

| AEC "measure"  | Committee recommendation<br>Labor/Green   | Coalition position   |
|--|---|--|
| 1.<br><br>Reconsideration of the appropriate level of disclosure threshold | <b>Recommendation 1</b><br><br>The Committee recommends that the disclosure threshold be lowered to \$1,000 and that the CPI indexation be removed. | <b>Coalition opposes</b><br><br>It should be noted that no evidence was taken on the disclosure threshold issue and therefore cannot be relevant to this inquiry or its recommendations. The Coalition members of JSCEM do not agree with the reduction in the disclosure threshold, noting that it strongly increases compliance costs for political parties, third parties and individuals and will lead to potential intimidation of small donors.<br><br>Evidence exists that prior to |

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|   |   | <p>the lifting of the threshold intimidation did in fact occur. Donors to non-Labor parties were harassed and intimidated by union bosses and Labor Party heavies.</p> <p>Coalition members of the committee also note that this recommendation, allegedly based on the transparency desired by the Government majority of the Committee does nothing to deal with two issues that are specifically relevant to this inquiry.</p> <p>Evidence was received about the use of credit cards by Mr Thomson, including for substantial cash withdrawals. Coalition members of the Committee highlighted the threat posed by the use of credit cards in the Dissenting Report into the 2011 inquiry<sup>2</sup>.</p> <p>There are no records of what this money was used for. Even if only part of the more than \$100,000 was utilised for Mr Thomson's campaign, this would represent a substantially greater threat to transparency than a donation of little more than \$1000. The refusal of the ALP or Greens to address this gaping loophole brings into question the claimed commitment to transparency as opposed to a disclosure regime that provides a political advantage.</p> |
| <p>2.<br/>                 Introduce administrative penalties for objective failures (such as failing to lodge on time)</p> | <p><b>Recommendation 2</b></p> <p>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</p> | <p><b>Coalition is opposes</b></p> <p>This recommendation, which seeks to grant more power to the Australian Electoral Commission. The Coalition remains steadfast in its belief that the Australian Electoral</p>   |

<sup>2</sup> p 222

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|  | <p>Commission. The issuance of an administrative penalty should be accompanied by a mechanism for internal review.</p>  | <p>Commission should not be granted additional powers until such time as they can demonstrate they are prepared to use the powers already given to them.</p> <p>Furthermore, Coalition members believe that 'straightforward matters of fact' is too broad. Before Coalition members support the institution of administrative penalties, the specific list of offences for their application needs to be considered, as well as appropriate penalties and the threshold for consideration of more serious charges.</p>  |
| <p>5.</p> <p>Abolish 'associated entities' and establish a third party scheme similar to Canada and the UK</p> | <p><b>Recommendation 3</b></p> <p>The committee recommends that the <i>Commonwealth Electoral Act 1918</i> be amended to improve the clarity of the definition of 'Associated Entity'.</p> <p>Changes could include:</p> <p>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;</p> <p>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</p> <p>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. (paragraph 3.104)</p> | <p><b>Coalition opposes</b></p> <p>This recommendation whilst opposing the AEC measure to abolish associated entities does not include provisions to ensure that all Trade unions together with each branch of each union and each national office are clearly defined as an associated entity. This issue was highlighted in evidence given.</p> <p>Evidence given showed the AEC believed the national office of the HSU was an associated entity until 27<sup>th</sup> May 2009, when it accepted a simple denial that it was from the ALP Assistant National Secretary reversing his advice of the 10<sup>th</sup> March 2009 that the HSU National office was an associated entity.</p> <p>This is yet another example where the AEC did not use its available powers; does not act in a timely way and simply wants to abolish the provision to give itself less work.</p> <p>An amendment in the above terms is required.</p> |

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|  |   | The Labor/Green suggested amendments which does nothing to change the current legislation which creates an incentive for political support to be directed through national offices whereby such support is not disclosed under the associated entity regime. This should be addressed as a matter of urgency so that all constituent bodies of a trade union affiliated to a political party are covered by the associated entity disclosure regime.                       |
| 7.<br><br>Require the electronic lodgement of all returns to the AEC (with power for the Electoral Commissioner to grant some exceptions)  | <b>Recommendation 4</b><br><br>The committee recommends that the <i>Commonwealth Electoral Act 1918</i> 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. | <b>Coalition opposes</b><br><br>The Coalition believes this should only apply to political parties and associated entities, which would include all branches of Trade Unions as defined under the Registered Organisations Act.  |
| 8.<br><br>Require the period of retention of records in sections 317 and related offence in section 315 (2)(b) be increased to seven years | <b>Recommendation 5</b><br><br>The committee recommends that the <i>Commonwealth Electoral Act 1918</i> 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.  | <b>Coalition opposes</b><br><br>This recommendation is opposed by the Coalition as it would be out of kilter with the three year prosecution period and the electoral cycle.<br><br>In particular, Coalition members restate their previous concern about the burden upon the many thousands of volunteers who engage in the political process, often absent of professional support that would facilitate the maintenance of records for such an extended period of time. |

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| <p>9.</p> <p>Insert a new offence for a person who fails to make records to enable complete and accurate disclosure</p>                                       | <p><b>Recommendation 6</b></p> <p>The committee recommends that the <i>Commonwealth Electoral Act 1918</i> be amended to insert an offence for a person who fails to make records to enable complete and accurate disclosure.</p>  | <p><b>Coalition supports</b></p> <p>The Coalition agrees with this recommendation as it would have covered Mr Thomson's period as National Secretary of the HSU and his failure to keep records as evidenced by the BDO Kendall and Slater and Gordon Reports.</p>  |
| <p>10.</p> <p>Increase relevant criminal penalties that are fraud related (eg. Knowingly providing false and misleading information in a return)</p>          | <p><b>Recommendation 7</b></p> <p>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 <i>Commonwealth Electoral Act 1918</i>.</p> | <p><b>Coalition opposes</b></p> <p>There has been no definition of the term 'more serious'</p>  |
| <p>11.</p> <p>Require more frequent reporting of relevant expenditure and receipts</p>  | <p><b>Recommendation 8</b></p> <p>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.</p>  | <p><b>Coalition opposes</b></p> <p>The Opposition is opposed to this recommendation, which would provide a significant regulatory burden on political parties and associated entities.</p> <p>Furthermore, no evidence was adduced in this inquiry</p>  |
| <p>13.</p> <p>Review the 'disclosure period' and 'election period' in relation to disclosure obligations and new candidates who are seeking pre-selection</p> | <p><b>Recommendation 9</b></p> <p>The committee recommends that the <i>Commonwealth Electoral Act 1918</i> be amended to extend the disclosure period for new candidates to 12 months prior to pre-selection or nomination, whichever is earlier.</p>  | <p><b>Coalition opposes</b></p> <p>Unnecessary regulatory burden.</p> <p>The requirement to extend the disclosure period for candidates to 12 months prior to preselection or nomination would impose a massive compliance cost on individuals as well as political parties.</p> <p>Even more concerning, it could act as a disincentive for people to decide to nominate or participate in</p> |

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|  |   | <p>the political process.</p> <p>This recommendation fails to acknowledge or understand that many people would not be in a position to comply with such a requirement, despite their best efforts in all good faith.</p> <p>Occasionally, a by-election is warranted by virtue of the sudden resignation or death of a member of the house. A candidate who was not expecting to nominate for office may then simply not be able to comply with this requirement as, despite them having been politically involved, they may not have expected to nominate and therefore may not have maintained the necessary records.</p> <p>If this requirement was to serve as a disincentive for someone to nominate it would be an indictment of our electoral administration that we allowed such a provision to have this effect.</p> <p>This represents a complete over-regulation of the activities of candidates to no demonstrated good purpose.</p> |
| <p>14.</p> <p>Increase 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</p> | <p><b>Recommendation 10</b></p> <p>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 <i>Commonwealth Electoral Act 1918</i> have been met.</p> | <p><b>Coalition opposes</b></p> <p>The Opposition is opposed to this recommendation, The Coalition members note that there are currently sufficient powers already granted to the Australian Electoral Commission and there is no evidence that such current powers are being utilised. The Coalition in general is opposed to granting the Australian Electoral Commission additional powers, until the Commission is prepared to use the powers they currently have.</p>   |

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| <p>15.</p> <p>Expand the categories of 'electoral expenditure' that are to be disclosed to include campaign staff, premises, office equipment, vehicles and travel</p>   | <p><b>Recommendation 11</b></p> <p>The committee recommends that the <i>Commonwealth Electoral Act 1918</i> 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.</p>   | <p><b>Coalition opposes</b></p> <p>This is unnecessary as these items are already covered.</p>  |
| <p>16.</p> <p>Deem registered political parties to be bodies corporate for the purposes of Part XX of the Electoral Act</p>  | <p><b>Recommendation 12</b></p> <p>The committee recommends that the <i>Commonwealth Electoral Act 1918</i> be amended to provide that registered political parties be deemed bodies corporate for the purposes of Part XX of the Act.</p>   | <p><b>Coalition opposes</b></p> <p>No evidence was tested as to the fairness of this provision or any unintended consequences. It would penalise volunteers which is an essential part of Australian political life.</p> <p>The principle of mutuality is time honoured within Australian political life and would once again favour Labor and the unaffected unions which lie outside such a definition.</p> |
| <p>17.</p> <p>Introduce provisions with greater certainty about who has the relevant reporting obligation</p>  | <p><b>Recommendation 13</b></p> <p>The committee recommends that the <i>Commonwealth Electoral Act 1918</i> 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.</p> | <p><b>Coalition opposes</b></p> <p>Provisions already exist and it is the responsibility of the AEC to act upon them. This however they are ever reluctant to do.</p> <p>The AEC is always looking for someone else to do their work.</p>   |
| <p>3.</p> <p>Provide 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 twelve months following the election.</p> | <p><b>Not supported</b></p>  | <p><b>Not supported</b></p>   |

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| <p>4.</p> <p>Require 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)</p>   | <p><b>Not supported</b></p> | <p><b>Not supported</b></p> |
| <p>6.</p> <p>Establish the requirement 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)</p> | <p><b>Not supported</b></p> | <p><b>Not supported</b></p> |
| <p>12.</p> <p>Reintroduce requirements that campaign committee expenditure is to be reported separately from the state party unit and specifically covers the election period for each division.</p>  | <p><b>Not supported</b></p> | <p><b>Not supported</b></p> |

## Introduction

The basis of the reference to the Committee by the Minister was fundamentally flawed as the AEC at the time of writing its analysis, did not have, nor had ever seen or had access to the Slater and Gordon BDO Kendall Report which is an intrinsic part of the FWA Report. The AEC could not have in good faith analysed the report as they did not have it all. Further, in these circumstances should not have purported to have analysed the report and still further their failure to advise the committee that they had not seen the whole report is reprehensible.

It remains unknown whether the Minister was in possession of the whole report and only gave some of it to the AEC or whether he had not himself received the whole.

The FWA Report was fundamentally a report into the actions and behaviour of Craig Thomson as National Secretary of the Health Services Union, a person seeking pre-selection from the ALP and then as a candidate for Dobell.

Coalition members of the Joint Standing Committee on Electoral Matters note once again that most of the so called measures put forward by the AEC and the Labor/Greens recommendations flowing therefrom are solely to serve the interests of the Australian Labor Party, the Greens and particularly the trade union bosses. 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 Coalition Parties without being exposed to intimidation and harassment.

The Coalition has grave concerns with the current system and the way in which the AEC administers the Act. It is shown to have advantaged the Labor Party by refusing to use its powers to conduct compliance audits of Trade Unions and indulge particularly the HSU National Office, by not using its powers to investigate non compliance and only strongly seek compliance when the Legal Officer writes he will get questioned in Senate Estimates. See annexures D of correspondence between Mr Pirani (AEC) and Miss Kathy Jackson.

In evidence Mr Nassios the author of the report, stated on 22<sup>nd</sup> August 2012 in answer to a question from Mrs Bronwyn Bishop concerning the relevance the Slater and Gordon BDO Kendall Report "that was the basis of the commencement of the investigation. It's detailed a number of the issues that we needed to look at"

The Coalition believes in participatory democracy and that individuals should be allowed to contribute to the political process, however, the proposed reduction in the disclosure threshold will greatly hamper the ability of individuals and firms to contribute. Neither the evidence heard by the inquiry, nor the submissions have shown there to be any cause for concern of donations under the current threshold, the problem not addressed is dealing with the failure of the AEC and dishonesty of the Thomson case.

This shows that the need for the Coalition's recommendation for a dedicated fraud unit within the AEC is very much needed. The Coalition is particularly concerned about the evidence heard during the inquiry of the circumvention of electoral laws through the use of union credit cards by Mr Thomson.

Coalition members also note the issue about election campaigns being funded by tax deductible donations given to unions and special interest groups. At present, individuals are allowed to claim a deduction of up to \$1500 for donations to political parties or individual candidates; however, trade unions spend millions on election campaigns and receive much of their funding from tax deductible membership fees, not subject to the \$1500 cap. Similarly, groups such as the Australian Conservation Foundation and Greenpeace also receive tax deductible donations, and then spend money on political campaigning, putting them at a significant advantage over political parties whose donors have limited tax deductibility. The Coalition believes this issue should be examined further.

## The AEC and Craig Thomson – the real problem

The Committee took evidence from the Australian Electoral Commission on the 16<sup>th</sup> July 2012, after receiving the reference from the Special Minister of State. The Committee hearing was allowed sixty six minutes to question the Australian Electoral Commission.

The Committee only became aware that the AEC had not been given the complete FWA Report on that date. The missing Slater and Gordon BDO Kendall report is integral to the FWA Report authored by Mr Nassios holding a delegation from the General Manager of FWA to investigate the allegations made.

The HSU National Office engaged Slater and Gordon (solicitors) to investigate allegations, swirling in the media and particularly in the Sydney Morning Herald in articles written by Mark Davis showing the acquisitions and expenditure of Union funds by Craig Thomson, the Member for Dobell between the years of 2002 and 2007 being the time he was employed as the National Secretary of the HSU. This included cash withdrawals of several hundred dollars a time, every few days, totally \$101,000, \$13,700, which was during the disclosure period.

The allegations arose from material which became available as a result of Mr Thomson suing the Sydney Morning Herald for defamation relating to the claims that he had spent Union funds on prostitutes and on his campaign to win the seat of Dobell.

The court case was in fact dropped by Mr Thomson prior to it going to trial with Mr Thomson having to pay the legal costs and receiving no money from the defendant in settlement of his claim for damages despite his statements that the claim was settled implying he received compensation, which he did not.

He also failed to disclose in his pecuniary interest register that the ALP paid his legal fees of now admitted \$150,000, which he was required to do so.

Mr Thomson's constant statement that he has done nothing wrong is not borne out by the findings of the FWA Report and is resonant of his Party Leader, Julia Gillard's claims regarding her AWU related indiscretions, when a partner at Slater and Gordon, she claims to have done nothing wrong.

Ms Gillard remains dependant of the vote of Mr Thomson to retain the position of Prime Minister and the payment of his legal fees by the ALP's is significant because it prevented this debt making him bankrupt and thereby losing his seat under s44 of the Constitution.

## Some of the findings in the BDO Kendall Report

BDO Kendall being a firm of forensic accountants and the accompanying report from Slater and Gordon found that Mr Thomson had done plenty that was wrong.

It also made findings as to what disclosures Mr Thomson and the HSU should have made to the AEC in relation to the 2007 election and the election of Mr Thomson to the seat of Dobell.

The Slater and Gordon, BDO Kendall Report specifically found that amounts totalling \$21,906.77 marked with an asterisk in the schedules forming part of that report. The Chair along with the ALP and Green Members of the Committee has censored part of this schedule.

The report also showed that from 2002 till his resignation, Mr Thomson without any authorisation of the National Executive of the HSU withdrew \$101,000 out in cash and as shown by the affidavit of solicitors for Fairfax allegedly spent thousands of dollars on prostitutes. Miss Stevens and Mr Burke were put on the payroll by Mr Thomson to raise his profile through work in Dobell, without authority of the National Executive. After his endorsement their services were a gift and required disclosure which was not done.

The Coalition finds that the inquiry of the Joint Standing Committee on Electoral Matters does not fulfil the request of the Minister.

The misconduct of union officials is not a new concern and the Opposition would like to use this opportunity to note that this particular investigation is on an issue that first occurred during the 2007 election campaign but the severity of the issue was only raised in 2009. Three years later the Government and the AEC are still running the same agenda to avoid proper scrutiny of the actions of the HSU National Office, the inactions of the AEC in failing to use their powers to obtain information from the HSU. In this time there has been forensic accounting investigations, subsequent investigations, media speculation and now an inadequate analysis by the AEC and credit union.

## Terms of reference used by the committee

The BDO Kendall Report, commissioned by Mr Fowlie of Slater and Gordon at the behest of Mrs Kathy Jackson, was the report that triggered the investigation by FWA<sup>3</sup>. The forensic accounting report on the HSU by BDO Kendall outlines and identifies the spending of the HSU National Secretary, Mr Thomson, his staff, Chrisalee Stevens and Mr Matthew Burke, and the statements of their credit cards.

Letter from Kathy Jackson, HSU to Ken Fowlie, Slater & Gordon dated 11 December 2008

This letter, which has been censored and only partly released into the public domain by the Committee through Labor's use of its majority on the Committee to censor the letter is particularly informative as it outlines the detailed concerns of the HSU itself with the behaviour of Mr Thomson.

On page 2 of the letter, Ms Jackson specifically highlights the risk to the HSU of the undocumented and potential political expenditure by Mr Thomson and Mr Burke and Ms Stevens that is required to be disclosed. Furthermore, in her request to Mr Fowlie, Ms Jackson specifically requests advice regarding:

*"f. Whether it is possible to determine the total sum of Union funds expended on Mr Thomson's campaign to win the seat of Dobell in the 2007 Federal election and if so what sum?"*

*g. What other expenditure in the year 2007 was properly characterised as political expenditure which the Union is obliged to declare to the AEC?"*

These concerns by the HSU itself regarding its inability to determine whether information was available to comply with disclosure requirements highlight the scandal that surrounds this expenditure and undermines the conclusions arrived at by the AEC given the lack of records available.

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<sup>3</sup> Testimony of Mr Nassios

They also highlight the need for the AEC to have taken urgent and decisive action in investigating this matter. This letter in full is annexed in full as Annexure E to this dissenting report.

As minutes tabled with this report will show at the meeting held on the 22<sup>nd</sup> August 2012 the Chairman used the Government control of the Committee censor the Slater & Gordon BDO Kendal Report claiming that the information was outside of the terms of reference. The terms of reference are stated below.

The Australian Electoral Commission (AEC), in its analysis of the Fair Work Australia report into the Health Services Union National Office (FWA report), identified a number of areas for consideration to address limitations in the *Commonwealth Electoral Act 1918*.

The committee will examine the [AEC analysis](#) of the FWA report and the list of [possible measures](#) for reforming the Commonwealth Electoral Act.

The Minister's letter to the Committee made it quite clear that he wished the Committee to consider analysis of the FWA Report. On the 16<sup>th</sup> May 2012 The Special Minister of State wrote to the Joint Standing Committee on Electoral Matters. Contents of the Ministers letter is below.

As the Committee may have noted I wrote to the electoral commissioner on the 8<sup>th</sup> May 2012 seeking his advice on whether or not there had been any failures to comply with the provisions of the Commonwealth Electoral Act 1918 (Electoral Act) as disclosed by the information recently published Fair Work Australia Report into the Health Services Union National Office (FWA Report). The Commissioner has developed a detailed analysis of the FWA report and this advice is now publicly available from the Australian Electoral Commission.

At the time, I also sought advice from the Electoral Commissioner on any issues concerning the operation of the Electoral Act which could be considered for possible remedy.

I refer the Electoral Commissioners analysis and the list of matters to the Joint Standing Committee on electoral Matters for its consideration.

As the Minister had requested that the committee analyse the AEC Report which was to be an analysis of the FWA report into the HSU National Office and Mr Thomson the Coalition believes that this should include the time period in which Mr Thomson was the HSU National Secretary and the Labor Candidate for Dobell.

No proper understanding of the FWA Report can be had without reading the Slater & Gordon BDO Kendal Report.

The Coalition objects vehemently to the removal, that is censorship, of many parts of the Slater and Gordon BDO Kendall Report; the partial censoring of the Letter dated 11 December 2008 from Ms Jackson to Mr Ken Fowlie of Slater & Gordon and other annexures to the FWA Report.

## The inquiry process of the committee

The Coalition members of the committee found the process of inquiry to be poorly managed by the Chairman. In particular, many documents particularly from the AEC were not provided at the outset of the inquiry, and that they were only provided when requested by the Coalition members of the committee. Further many of these documents that were late, were presented after the AEC had testified and the Chairman of the Committee has refused to have the AEC reappear before the committee a final time prior to the writing of the report to allow legitimate questioning of the AEC on matters which needed answers following receipt of additional material.

During the process of the inquiry the committee took evidence from representatives of Fair Work Australia (FWA), Ms Bernadette O'Neill, General Manager and Mr Terry Nassios, and the AEC, Mr Brad Edgman, Director, Funding and Disclosure Section—Compliance, Australian Electoral Commission, Mr Ed Killestyn, Electoral Commissioner, Australian Electoral Commission and Mr Paul Pirani, Chief Legal Officer, Australian Electoral Commission.

Throughout the collection of evidence it became quite apparent that the FWA Report cannot be analysed properly without access to the BDO Kendall's forensic accounting report on the National Office of the Health Services Union and the Slater and Gordon advice on this report. This was provided to the committee members only after the request from Mrs Bishop during evidence given by Bernadette O'Neil, General Manager of FWA who took many questions on notice.

On the 6<sup>th</sup> July 2012 Mr Killestyn testified that that the AEC had not seen the Slater & Gordon BDO Kendal Report.

That the AEC did not request a copy of the BDO Kendall's report, as testified to by Mr Killesyteyn at the public hearing held on the 6<sup>th</sup> July 2012. This is viewed by the Coalition as gross incompetence on behalf of the AEC as it rendered it incapable of fulfilling the request of the Minister to analyse a report, the totality of which they did not have.

In previous evidence the AEC and Mr Pirani in particular argued that they could not use coercive powers under section 316(3) of the Commonwealth Electoral Act 1918 to call for the records of the HSU National Office as Mr Pirani did not believe the AEC had reasonable grounds that there could be non-compliance. This is despite Mr Pirani threatening to use these powers.

However further evidence was adduced that showed that the AEC had done compliance reviews pursuant to s316(2A) of the Commonwealth Electoral Act 1918 from 2007 to 2011 of 256 associated entities but none were trade unions as associated entities. In fact not one compliance audit of a Trade Union was done until November 2011 when HSU East was reviewed.

Coalition members of the Committee are extremely concerned at the pattern of AEC audit activity.

At the hearing on the 22<sup>nd</sup> August, following a request by Coalition members, the Commissioner tabled a list of audits undertaken by the AEC since 2007. This list comprised 256 audit activities – but only one of these involved the AEC auditing a union, HSU East, and this only after extensive public debate and comment about activities within the HSU.

Under questioning from Coalition members, the Commissioner admitted that the AEC had not focused on the activities of trade unions despite the substantial funds they directed to certain political parties and the fact that many unions have formal voting rights within the Labor Party.

**Senator RYAN:** This is a list comprising four to five years of work. Given the sheer quantum of money involved in trade unions and the role they play as associated entities on one side of politics, and given that there has been a compliance issue with at least one—I do not know if there are any more—don't you think that looking at this list and seeing the Dunkley Blue Ribbon Club and the North West 200 Club, which would both contribute an order of magnitude less than some of the larger trade unions in my home state of Victoria, it looks slightly odd to people with an interest in compliance that there is not a single trade union on this list? They are the largest funders. They are larger than most corporate donors. Most of these associated entities here would contribute zeroes less than a single large trade union. Don't you think this is a flaw in the judgment you have exercised as to which associated entities you audit?

**Mr Killesteyn:** I think it is a fair question but, as I explained before, you have for the unions another monitoring body, Fair Work Australia—

The Commissioner defended the lack of the AEC audit activity with respect to trade unions on two grounds:

- First, that Fair Work Australia performed an oversight role of trade unions; and,
- Second, that the AEC did not have the resources to effectively perform its role with respect to trade unions and that following the changes to the associated entity regime in the 2006 amendments to the act, no additional resources were provided.

Coalition members of the committee strenuously object to both these statements. The AEC did complete 256 reviews in the period between 2007 and 2012, there is only one trade union listed, the HSU in 2011. In the four year period identified the

AEC did however complete two reviews of the Lady Wilson Foundation (2008 and 2012), two reviews of the Violet Bobbin Trust (2008 and 2010) and a review of the Blue and White Committee (2008). Mr Edgman, Director, Funding and Disclosure Section, Compliance, Australian Electoral Commission gave the reasoning for the choice of entities to assess as follows.

**Senator RYAN:** Given the quantum of money involved with trade unions, as opposed to the Blue and White Committee of Victoria, which I have never even heard of, is there a reason why there are no associated entity compliance audits of trade unions on that list?

**Mr Edgman:** The reason that you will find a lot of smaller associated entities on that list is that our approach is primarily to look at political parties rather than associated entities.

**Senator RYAN:** There are a lot of associated entities there, though.

**Mr Edgman:** What happens is that when we choose the political parties, we fold in the associated entities with those parties, for the reason that quite often with the smaller associated entities their finances are linked in with the party's. There are movements of money between them. They can have money on deposit between each other, debts with each other. We do it because, if we looked only at the party, we could not see the other flows and the debts incurred. If we have done the party and we have done the associated entities once in three years—because we work on a three-year cycle—and if we come out believing that everything seems to be fine with the associated entities, we have it within our discretion next time we do the party not to do all the associated entities again.

Fair Work Australia performs a different role for a different purpose. Its performance of this or otherwise is completely irrelevant to the role of the AEC with respect to the disclosure regime and audit activity. To use the activity of an unrelated agency as an excuse for a failure to perform duties in a manner that appears fair and balanced is simply not acceptable.

With respect to the resources available to the AEC, Coalition members are concerned that the AEC has effectively ignored the changes to the regime in the 2006 Act.

**Senator RYAN:** I am asking you to explain why on this list there are myriad groups, including small ones made up of volunteers, that contribute maybe in the order of tens of thousands of dollars in a good year, yet the AEC has not seen fit to undertake a compliance audit of groups that are, firstly, members of the political party that happens to be in government, that have voting rights and that donate much larger sums of money. It is not up to me to make an accusation. I think, given the weighting of this list, that it is a very legitimate question to ask why no trade union has had a compliance review undertaken. If the answer is that it is Fair Work Australia's job, then fine—give us that answer. But I don't think you will find a good portion of the parliament accepting it.

**Mr Killesteyn:** No. What I am suggesting is that the amendments that were made in 2006 which brought in the unions raised our workload quite considerably—threefold. So the practice that we have had in the basic approach to determining who would be subject to a compliance audit has continued

since that time. The other point I would make is that the complexity of the financial arrangements of the unions, where they are primarily reliant on member contributions, is different from the complexity of financial transactions from other organisations, where there is a greater risk in terms of being able to track—

This statement by the commissioner implies that the scale, scope and complexity of unions compared to small, voluntary associations is a deterrent to undertaking audit activity upon them. This is unacceptable in a regime that is expected to apply the rules equally to all participants.

Coalition members of the committee remain extremely concerned at the inconsistency in the application of the AEC's audit powers. The ongoing audit of small groups which raise and/or donate relatively trifling sums, especially when compared to the millions of dollars paid and spent by the union movement, and the lack of audit activity on these unions brings into question the fair and transparent application and use of these powers.

Correspondence asked for but not received until after all of the evidence had been taken showed that until May 2009 the AEC and the Australian Labor Party both believed that the HSU National Office was an associated entity within the meaning of sections 314EA section 314 AEB of the Commonwealth Electoral Act 1918 as evidenced in the email from Mr Pirayni to Ms Jackson (annexed to this report). Thus the AEC should have carried out a compliance review of the HSU National Office within this period, but from subsequent evidence it became clear it was the policy of the AEC not to do compliance reviews of Trade Unions.

In March 2009 ALP Secretariat reversed its advice that the HSU National Office was not an associated entity. In May 2009 Ms Jackson advised that the HSU was not an associated entity.

Mr Pirayni, who is the chief legal officer of the AEC, simply accepted the statement from the Australian Labor Party and then the trade union.

*“Yesterday I had a discussion with Mr Michael Williamson, who confirmed that the existing third party political expenditure return that we have published only relates to the NSW branch of the HSU and does NOT include any information about the National Branch of which you are the National Secretary.*

*Similarly, the associated entity returns that we have publish apparently do not include the National Branch of your union*

*No doubt I will be questioned at Senate estimates Hearings next Thursday 28 May on this matter and would appreciate the opportunity to discuss this matter with you on a without prejudice basis. I just want to be clear about what pro-active action you are taking to address this matter (including the proposed timeframe) and to meet the statutory reporting obligations contained in Part XX of the Act.”*

From having seen this email the opposition notes that the AEC in these circumstances would have been able to use their powers to ascertain the information that was required and did not. The associated entity report was due in October 2008.

## Failure of the AEC to assess the BDO Kendall Report

The AEC was directed by the SMOS to assess the Fair Work Australia investigation in to the HSU. The opposition notes that this document was not provided in full when it was tabled in the Senate by Ms Bernadette O'Neill.

A glaring omission by the AEC in their report to the Minister is the lack of any mention to the Slater & Gordon BDO Kendall Report. As already stated the BDO Kendall Report was the report that triggered the FWA investigation. In being such an influential piece of evidence the information from the report was an inadmissible feature of the report.

The Coalition wish to have it noted that the role of this committee, as denoted by the Special Minister of State, is to is to assess the analysis of the AEC of the FWA report and their so called "measures". The opposition members of the committee find that the AEC failed dismally to properly assess the report.

In doing so the Opposition notes that the AEC in fact could not even do this properly. The accounting firm BDO Kendall's mentioned 48 times on 30 different pages of the tabled report, of which 27 times relates directly to the Report itself. That the AEC could fail to acknowledge the existence of such an important document is incomprehensible to the opposition members of the committee.

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**Mrs BRONWYN BISHOP:** The problem is this: the Electoral Commission has looked at this report – by the way, did you look at the BDO Kendalls report?

**Mr Killesteyn:** We still have not had that made available to us.

In the public hearing held on 22<sup>nd</sup> August Mr Nassios that the BDO Kendall's report was the single most important piece of information and that it was the completion of that document that triggered the Fair Work Australia investigation into the HSU National Office.

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**Mrs BRONWYN BISHOP:** Did you place a lot of reliance on that report?

**Mr Nassios:** As I think I answered last time, certainly that was the basis of the commencement of the investigation. It detailed a number of the issues that we needed to look into.

**Mrs BRONWYN BISHOP:** The AEC has given evidence that the report they were given did not contain the Slater & Gordon and BDO Kendalls reports. So the AEC's analysis – not, as Mr Thomson referred to it in his speech in the parliament, an investigation; the AEC deliberately said it was not an investigation; they said it was an analysis – did not have access to that highly important report on which you based your report. Did that surprise you? Would that surprise you?

**Mr Nassios:** As I said to you before, I cannot answer where that report has gone. As I say, unfortunately – or fortunately, from my perspective – two days after I completed the report I proceeded on leave. So I do not know.

**Mrs BRONWYN BISHOP:** But the Slater & Gordon and BDO Kendalls reports are fundamentally important to your view?

**Mr Nassios:** They were certainly important. As I have explained, they were the catalyst, so to speak, of a number of the issues – not all of the issues but certainly a number of the issues, yes.

The AEC does not have the BDO Kendall report, nor has it been published in full. There is information that requires scrutiny of the period.

The Coalition members of the committee draws attention to the letter from Mr Fowlie to Mr Nassios on 16 June 2009.

I have also been instructed to provide a copy of a resolution passed by the Executive, yesterday, which was in the following terms:

*National Executive:*

*Directs Slater & Gordon to provide a copy of the Findings to the Industrial Registrar and a copy of relevant findings of the Investigation to the Australian Electoral Commission ("AEC") as soon as practicable under cover of a letter providing a copy of this resolution and indicating to both that the Union is prepared to co-operate with whatever further investigation and inquiries those entities wish to make into the matters the subject of the Investigation.*

Slater and Gordon did not provide the relevant findings to the AEC as they concluded not to do so until after the FWA investigation was concluded.

## Conclusion

The Coalition members of the Committee reject in total the Report put forth by the Labor and Greens members of the Committee as it merely compounds the falsehood that the AEC conducted a paper an analysis of the FWA Report. The AEC was at all relevant times unable to analyse the said Report as they did not have access to the annexures to the report which are integral to the FWA Report, particularly the Slater & Gordon/ BDO Kendal Report and also the interim report

of the FWA delegate and all those annexures being the equivalent of 3 boxes of evidence.

Mr Nassios, the author of the FWA Report stated the importance of the report when questioned at the public hearing held on the 22<sup>nd</sup> August 2012.

**Mrs BRONWYN BISHOP:** But the Slater & Gordon and BDO Kendalls reports are fundamentally important to your view?

**Mr Nassios:** They were certainly important. As I have explained, they were the catalyst, so to speak, of a number of the issues—not all of the issues but certainly a number of the issues, yes.

This is to be compared with KPMG Labor/Green Report who did have access to the whole Report including all the annexures when doing their analysis of FWA and its report. It was confirmed by the General Manager of the FWA Ms Bernadette O’Neil, that KPMG had such access.

It is essential to this dissenting report that the Slater & Gordon/BDO Kendal Report be published in full. Together with all the other annexures the majority report is nothing but a cover-up resulting in information being withheld from the Parliament.

The problem with Mr Thomson was not the monetary threshold for disclosure, it is in fact that Craig Thomson did not disclose at all. The FWA Report including the Slater & Gordon BDO Kendall Report and other annexures and transcripts exposed him as having breached the Commonwealth Electoral Act 1918.



## Annexures

### **Annexure A**

BDO Kendall Schedule A (Pages 9-10/26 of the BDO Kendall Report.)

ATM Cash Withdrawal Transactions Commonwealth Bank Mastercard – Mr Craig Thomson  
Schedule A covering the period 13<sup>th</sup> April 2007 24<sup>th</sup> November 2007.

### **Annexure B** List of Reviews completed since 2007

### **Annexure C** Correspondence between Mr Priani and Mr Fowlie.

- From Mr Pirani to Mr Fowlie Tuesday 4<sup>th</sup> August 2009 9:18am
- From Mr Fowlie to Mr Pirani Monday 10<sup>th</sup> August 2009 2:14pm
- From Mr Pirani to Mr Fowlie Tuesday 11<sup>th</sup> August 2009 10:14am

### **Annexure D**

Email from Mr Pirani to Ms Kathy Jackson Wednesday 20<sup>th</sup> May 2009 1:44pm

### **Annexure E**

Letter from Ms Kathy Jackson to Mr Ken Fowlie, dated 11<sup>th</sup> December 2008

### **Annexure F**

Letter from Elias Hallaj, Assistant National Secretary of the Australian Labor Party National Office to Alan Page, Assistant Director Funding and Disclosure the Australian Electoral Commission advising of the Labor Party's Associated Entities, which includes the HSU. 10 March 2009.

Letter from Sue Sayer to Kathy Jackson 12 May 2012

Letter from the AEC to Karl Bitar of the ALP 18 May 2009

Letter from Kathy Jackson to Sue Sayer 26 May 2012

Letter from Kathy Jackson to Paul Pirani 13 October 2012

### **Annexure G**

Letter from Ken Fowlie to Terry Nassios 16 June 2009

Letter from Ken Fowlie to Paul Pirani 30 June 2009

**Annexure A**

BDO Kendall Schedule A (Pages 9-10/26 of the BDO Kendall Report.)

ATM Cash Withdrawal Transactions Commonwealth Bank Mastercard – Mr Craig Thomson  
Schedule A covering the period 13<sup>th</sup> April 2007 24<sup>th</sup> November 2007.

Schedule of ATM Cash Withdrawal Transactions  
 Commonwealth Bank Mastercard - Mr. Craig Thomson  
 Card No.: 5587 0131 6388 0019

Schedule A

| Date       | ATM                                | Amount |
|------------|------------------------------------|--------|
| 12/02/2007 | NAB ATM KINSTON NEWSAGENCY         | 500.00 |
| 12/02/2007 | NON CBA ATM CASH ADV CHARGE        | 1.50   |
| 16/02/2007 | WESPAC WALES CNR 2 MELB            | 500.00 |
| 16/02/2007 | NON CBA ATM CASH ADV CHARGE        | 1.50   |
| 26/02/2007 | STG ATM ST GEORGE BATEAU BAY       | 300.00 |
| 26/02/2007 | NON CBA ATM CASH ADV CHARGE        | 1.50   |
| 27/02/2007 | SHP 1/2,6 HONEY PO HUNTFIELD       | 500.00 |
| 27/02/2007 | NON CBA ATM CASH ADV CHARGE        | 1.50   |
| 06/03/2007 | CBA ATM RUNDEL MALL D SA           | 300.00 |
| 06/03/2007 | CBA ATM CASH ADVANCE CHARGE        | 1.25   |
| 08/03/2007 | CBA ATM MBL KILLARA NSW            | 500.00 |
| 08/03/2007 | CBA ATM CASH ADVANCE CHARGE        | 1.25   |
| 22/03/2007 | STG ATM LVL 1 O'CONNELL SYDNEY NSW | 500.00 |
| 22/03/2007 | NON CBA ATM CASH ADV CHARGE        | 1.50   |
| 27/03/2007 | ANZ ATM FORRESTERS BEACH           | 500.00 |
| 27/03/2007 | NON CBA ATM CASH ADV CHARGE        | 1.50   |
| 04/04/2007 | WESPAC TERRIGAL                    | 500.00 |
| 04/04/2007 | NON CBA ATM CASH ADV CHARGE        | 1.50   |
| 04/04/2007 | CBA CENTRAL MELBOURNE              | 500.00 |
| 11/04/2007 | CBA ATM CASH ADVANCE CHARGE        | 1.25   |
| 13/04/2007 | NAB PITT ST NSW                    | 400.00 |
| 13/04/2007 | NON CBA ATM CASH ADV CHARGE        | 1.50   |
| 16/04/2007 | ATM GIRRAWEE                       | 500.00 |
| 16/04/2007 | NON CBA ATM CASH ADV CHARGE        | 1.50   |
| 20/04/2007 | ANZ GOSFORD NSW                    | 500.00 |
| 20/04/2007 | NON CBA ATM CASH ADV CHARGE        | 1.50   |
| 29/05/2007 | CBA MID CITY CTR NSW               | 500.00 |
| 29/05/2007 | CBA ATM CASH ADVANCE CHARGE        | 1.25   |
| 04/06/2007 | ANZ ATM FORRESTERS BEACH           | 500.00 |
| 04/06/2007 | NON CBA ATM CASH ADV CHARGE        | 1.50   |
| 12/06/2007 | STG BATEAU BAY NSW                 | 500.00 |
| 12/06/2007 | NON CBA ATM CASH ADV CHARGE        | 1.50   |
| 14/06/2007 | ANZ ATM 68 PITT ST SYDNEY          | 500.00 |
| 14/06/2007 | NON CBA ATM CASH ADV CHARGE        | 1.50   |
| 19/06/2007 | ANZ ATM PITT ST NSW                | 500.00 |
| 19/06/2007 | NON CBA ATM CASH ADV CHARGE        | 1.50   |
| 19/06/2007 | CBA BATEAU BAY NSW                 | 500.00 |
| 29/06/2007 | CBA ATM CASH ADVANCE CHARGE        | 1.25   |
| 16/07/2007 | ANZ ATM TOURLEY                    | 500.00 |
| 16/07/2007 | NON CBA ATM CASH ADV CHARGE        | 1.50   |
| 26/07/2007 | WESTPAC ATM CARRINGTON NSW         | 500.00 |
| 26/07/2007 | NON CBA ATM CASH ADV CHARGE        | 1.50   |
| 03/08/2007 | ATM QANTAS - SYDNEY                | 500.00 |
| 03/08/2007 | NON CBA ATM CASH ADV CHARGE        | 1.50   |
| 14/08/2007 | CBA ATM BAY VILLAGE NSW            | 500.00 |
| 14/08/2007 | CBA ATM CASH ADVANCE CHARGE        | 1.25   |
| 21/08/2007 | ANZ ATM QANTAS                     | 500.00 |
| 21/08/2007 | NON CBA ATM CASH ADV CHARGE        | 1.50   |
| 23/08/2007 | CROWN CASINO                       | 500.00 |
| 23/08/2007 | NON CBA ATM CASH ADV CHARGE        | 1.50   |
| 13/09/2007 | ST GEORGE GEORGE ST NSW            | 500.00 |
| 13/09/2007 | NON CBA ATM CASH ADV CHARGE        | 1.50   |
| 20/09/2007 | ST GEORGE GEORGE ST NSW            | 300.00 |
| 20/09/2007 | NON CBA ATM CASH ADV CHARGE        | 1.50   |
| 20/09/2007 | CBA ATM WYNARD                     | 500.00 |
| 20/09/2007 | CBA CASH ADV CHRG                  | 1.25   |
| 01/10/2007 | CBA ATM BAY VILLAGE NSW            | 500.00 |
| 01/10/2007 | CBA CASH ADV CHRG                  | 1.25   |

Schedule of ATM Cash Withdrawal Transactions  
Commonwealth Bank Mastercard - Mr. Craig Thomson  
Card No.: 5587 0131 6388 0019

Schedule A

| Date       | ATM                         | Amount            |
|------------|-----------------------------|-------------------|
| 08/10/2007 | CBA ATM TERRIGAL NSW        | 500.00            |
| 08/10/2007 | CBA CASH ADV CHRG           | 1.25              |
| 09/10/2007 | CBA ATM EASTERN BCH C       | 500.00            |
| 09/10/2007 | CBA CASH ADV CHRG           | 1.25              |
| 16/10/2007 | CBA ATM BAY VILLAGE NSW     | 500.00            |
| 16/10/2007 | CBA CASH ADV CHRG           | 1.25              |
| 22/10/2007 | CBA BATEAU BAY NSW          | 500.00            |
| 22/10/2007 | CBA CASH ADV CHRG           | 1.25              |
| 30/10/2007 | CBA BATEAU BAY NSW          | 500.00            |
| 30/10/2007 | CBA CASH ADV CHRG           | 1.25              |
| 01/11/2007 | AAMI GOSFORD                | 500.00            |
| 01/11/2007 | NON CBA ATM CASH ADV CHARGE | 1.50              |
| 05/11/2007 | CBA BATEAU BAY NSW          | 500.00            |
| 05/11/2007 | CBA CASH ADV CHRG           | 1.25              |
| 12/11/2007 | CBA BATEAU BAY NSW          | 500.00            |
| 12/11/2007 | CBA CASH ADV CHRG           | 1.25              |
| 14/11/2007 | NAB KILLARNEY VALE          | 500.00            |
| 17/11/2007 | CBA CASH ADV CHRG           | 1.25              |
|            |                             | <u>102,034.45</u> |

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**Annexure B** List of Reviews completed since 2007

## List of Reviews completed since 2007

| Year | Party/Entity  |
|------|---|
| 2007 | Australian Labor Party - National Secretariat           |
| 2007 | Australian Labor Party - NSW Branch (part 1)            |
| 2007 | Australian Labor Party - NSW Branch (part 2)            |
| 2007 | Australian Labor Party - NSW Branch (part 3)            |
| 2007 | Australian Labor Party - NSW Branch (part 4)            |
| 2007 | Australian Labor Party - Tasmanian Branch               |
| 2007 | Australian Labor Party - Victorian Branch (Parts 1 & 2) |
| 2007 | Australian Labor Party - Victorian Branch (Part 3 & 4)  |
| 2007 | Liberal Party of Australia - Federal Secretariat        |
| 2007 | Liberal Party of Australia - NSW Division (parts 1 & 2) |
| 2007 | Liberal Party of Australia - NSW Division (part 3)      |
| 2007 | Liberal Party of Australia - NSW Division (part 4)      |
| 2007 | Liberal Party of Australia - SA Division Part 1         |
| 2007 | Liberal Party of Australia - SA Division (Parts 2 & 3)  |
| 2007 | Liberal Party of Australia - SA Division                |
| 2007 | Liberal Party of Australia - Tasmanian Division         |
| 2007 | Liberal Party of Australia - Victorian Division Part 1  |
| 2007 | Liberal Party of Australia - Victorian Division Part 2  |
| 2007 | National Party of Australia                             |
| 2007 | The Australian Greens - Tasmanian Branch                |
| 2007 | Bunori Pty Ltd  |
| 2007 | John Curtin House Ltd                                   |
| 2007 | John McEwen House Pty Ltd                               |
| 2008 | Australian Greens                                       |
| 2008 | Australian Labor Party - National Secretariat           |
| 2008 | Australian Labor Party - SA Branch (Part 1)             |
| 2008 | Australian Labor Party - SA Branch (Part 2)             |
| 2008 | Australian Labor Party Queensland (QLD) - PART 1        |
| 2008 | Australian Labor Party Queensland (QLD) - PART 2        |
| 2008 | Australian Labor Party Queensland (QLD) - PART 3        |
| 2008 | Australian Labor Party Queensland (QLD) - PART 4        |
| 2008 | Liberal Party of Australia - Queensland                 |
| 2008 | Liberal Party of Australia - Queensland                 |
| 2008 | Liberal Party of Australia - Queensland                 |
| 2008 | Liberal Party of Australia - Queensland                 |
| 2008 | Liberal Party of Australia - Queensland                 |
| 2008 | National Party of Australia                             |
| 2008 | National Party of Australia (NSW) - Part 1              |
| 2008 | National Party of Australia (NSW) - Part 2              |
| 2008 | National Party of Australia (NSW) - Part 3              |
| 2008 | National Party of Australia (NSW) - Part 4              |
| 2008 | National Party of Australia (NSW) - Part 5              |
| 2008 | National Party of Australia (NSW) - Part 6              |
| 2008 | National Party of Australia (Queensland) - Part 1       |
| 2008 | National Party of Australia (Queensland) - Part 2       |
| 2008 | Queensland Greens                                       |
| 2008 | The Greens NSW (Part 1)                                 |
| 2008 | The Greens NSW (Part 2)                                 |
| 2008 | 6 St Pauls Terrace Trust                                |
| 2008 | Altum Property Trust                                    |

2008 ALP Holdings Pty Ltd (SA)  
2008 Bass 200 Club  
2008 Bayside Forum  
2008 Bjelke Petersen Foundation Trust  
2008 Blue & White Committee (Victoria)  
2008 Canberra Labor Club (Part 1)  
2008 Canberra Labor Club (Part 2)  
2008 Canberra Labor Club (Part 3)  
2008 Casey Business Briefing Club  
2008 Cormack Foundation Inc.  
2008 Curlew Nominee Trust  
2008 Deakin Executive Forum  
2008 Enterprise 200 Club  
2008 Forward Brisbane Leadership  
2008 Higgins 200 Club (Part 1)  
2008 Higgins 200 Club (Part 2)  
2008 Indi Foundation  
2008 John McEwen House Pty Ltd  
2008 Kaye Sutherland Memorial Bequest Fund  
2008 Kooyong 200 Club  
2008 Labor Holdings Pty Ltd  
2008 Lady Wilson Foundation  
2008 Libco Pty Ltd  
2008 Menzies 200 Club  
2008 Monash Club  
2008 Murray 250 Club  
2008 Northwest 200 Club  
2008 Parliamentary Liberal Party Communication Committee  
2008 Platinum Forum (formerly: Outer Eastern 200 Club)  
2008 SA Progressive Business  
2008 Supporters for Re-electing Kotsiras  
2008 The 500 Club (VIC)  
2008 The Jim Killen Young Liberal Foundation  
2008 The Page Research Centre Ltd  
2008 Violet Bobin Trust  
2009 ALP (NT)  
2009 ALP (TAS)  
2009 ALP (VIC)  
2009 Greens (NT)  
2009 Democrats (WA)  
2009 Democrats (ACT)  
2009 Australian Greens (Tas)  
2009 Australian Greens (Vic)  
2009 Citizens Electoral Council  
2009 Family First (Vic)  
2009 Australian Greens (ACT)  
2009 One Nation (Qld)  
2009 One Nation (Vic)  
2009 National Party (WA)  
2009 Harold Nelson Holdings Pty Ltd  
2009 ALP Sisterhood  
2009 Emily's List Australia  
2009 AADB Pty Ltd

2009 ALP (NSW) Gifts Pty Ltd ➤  
2009 CEC Australia (Services) Pty Ltd  
2009 Citizens Media Group  
2010 ALP ACT  
2010 ALP QLD  
2010 Family First - SA  
2010 National Party SA  
2010 LPA NSW  
2010 Socialist Alliance  
2010 Socialist Alliance  
2010 LPA - Victoria  
2010 LPA - Victoria  
2010 LPA - Victoria  
2010 LPA - Victoria  
2010 The Greens (WA) Inc  
2010 Country Liberals  
2010 Country Liberals  
2010 Progressive Business  
2010 Friends of Indi  
2010 Violet Bobbin Trust  
2010 Chifley Research Centre  
2010 ALP Legacies & Gifts  
2010 John Curtin House  
2010 Labour Movement Education Assoc  
2010 Perth Trades Hall  
2010 Don Chipp Foundation  
2010 Kooyong 200 Club  
2010 Parliamentary Liberal Party Comm  
2010 Blue & White Committee  
2010 500 Club VIC  
2010 Monash Club  
2010 Enterprise Foundation  
2010 Indi Foundation  
2010 Dunkley Blue Ribbon Club  
2010 Bass 200 Club  
2010 Bayside Forum  
2010 Greater Eastern Network 200 Club  
2010 Murray 250 Club  
2010 North West 200 Club  
2010 Deakin Executive Forum  
2010 Menzies 200 Club  
2010 Casey Business Briefing Club  
2010 Dame Pattie Menzies Foundation

2010 Bunori Pty Ltd  
2010 500 Club of NSW  
2010 Liberal Asset Management  
2010 Liberal Properties Ltd  
2010 Cormack Foundation  
2010 Platinum Forum  
2010 Vapold Pty Ltd  
2010 CLP Gifts and Legacies  
2010 CLP Legacies and Gifts  
2010 Gatenby Investment Trust  
2010 Labor Holdings Pty Ltd  
2011 Family First - National  
2011 ALP WA  
2011 ALP WA  
2011 ALP WA  
2011 ALP WA  
2011 Australian Greens - SA  
2011 Socialist Equality  
2011 Australian Democrats - NAT  
2011 National Party - VIC  
2011 National Party - VIC  
2011 Christian Democrats \_WA  
2011 LPA TAS  
2011 LPA TAS  
2011 ALP VIC  
2011 ALP VIC  
2011 Christian Democrats Fed  
2011 Christian Democrats Fed  
2011 ALP (VIC)  
2011 CDP (Fed)  
2011 National Party of Australia (WA) Inc  
2011 Liberal Party of Australia - Tasmanian Division  
2011 Australian Labor Party (Tasmanian Branch)  
2011 Australian Labor Party (South Australian Branch)  
2011 Australian Greens - ACT  
2011 Senator On-Line  
2011 Liberal Democratic Party  
2011 Democratic Labor Party (DLP) - NSW Branch  
2011 Carers Alliance  
2011 Australian Sex Party  
2011 Socialist Alliance  
2011 One Nation  
2011 Democratic Labor Party (DLP) - Victorian Branch  
2011 Democratic Labor Party (DLP) of Australia - NATIONAL  
2011 Australian Greens - NT  
2011 Country Liberals (Northern Territory)  
2011 Democratic Labor Party (DLP) - WA Branch  
2011 Australian Greens - TAS  
2011 Family First Party - QLD  
2011 Democratic Labor Party (DLP) - Queensland Branch  
2011 Australian Fishing and Lifestyle Party  
2011 Family First Party - National  
2011 Democratic Labor Party (DLP) - SA Branch

2011 Family First Party - SA  
2011 Australian Democrats  
2011 Higgins 200 Club  
2011 Higgins 200 Foundation  
2011 Australian Labor Party - Investment Trust  
2011 The Eros Foundation Incorporated  
2011 The Page Research Centre Ltd  
2011 The Green Institute  
2011 The Chifley Research Centre Ltd  
2011 Australian Labor Party (Legacies and Gifts) Ltd  
2011 Don Chipp Foundation Ltd  
2011 CLP Gifts and Legacies Pty Ltd  
2011 Gatenby Investment Trust  
2011 Australian Labor Party Sisterhood  
2011 Donations Club  
2011 Liberal Club Limited  
2011 SA Progressive Business Incorporated  
2011 Liberal Foundation Inc  
2011 The Lady Wilson Foundation  
2011 Kaye Sutherland Memorial Bequest Fund  
2011 Health Services Union  
2011 Australian Labor Party - Holdings Pty Ltd (SA).  
2012 Christian Democratic Party (Fred Nile Group) WA Branch  
2012 Australian Greens (Secretariat)  
2012 Australian Labor Party (ALP) - NATIONAL  
2012 Liberal Party of Australia (S.A. Division)  
2012 Queensland Greens  
2012 Liberal Party of Australia -Federal Secretariat  
2012 Building Australia Party  
2012 Stable Population Party of Australia  
2012 Australian Greens (South Australia)  
2012 National Party of Australia (S.A.) Inc.  
2012 Secular Party of Australia  
2012 John Curtin House Limited  
2012 Free Enterprise Foundation  
2012 Parakeelia Pty Ltd  
2012 The Greenfields Foundation  
2012 Goulburn 100 Club  
2012 Business First  
2012 Scoresby City Club  
2012 Berwick Ranges 500 Club  
2012 Bulleen Supporters Group  
2012 Yarra Plenty Women's Group  
2012 The Free Enterprise Foundation- the same as Free Enterprise Foundation (see above)  
2012 Labor Campaign Pty Ltd  
2012 NSW Labor Campaign Investment Pty Ltd  
2012 Mornington Gold

**Annexure C** Correspondence between Mr Priani and Mr Fowlie.

- From Mr Pirani to Mr Fowlie Tuesday 4<sup>th</sup> August 2009 9:18am
- From Mr Fowlie to Mr Pirani Monday 10<sup>th</sup> August 2009 2:14pm
- From Mr Pirani to Mr Fowlie Tuesday 11<sup>th</sup> August 2009 10:14am

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**From:** Paul Pirani [mailto:Paul.Pirani@aec.gov.au]  
**Sent:** Tuesday, 4 August 2009 09:18 AM  
**To:** Ken Fowlie  
**Subject:** Health Services Union [SEC=LEGAL-IN-CONFIDENCE]

LEGAL-IN-CONFIDENCE

Mr Ken Fowlie  
Slater & Gordon Lawyers

Dear Mr Fowlie

I refer to previous correspondence relating to your client the Health Services Union and the reporting of electoral expenditure under Part XX of the *Commonwealth Electoral Act 1918*. I also particularly refer to your letter to me of 30 June 2009 in which you indicated that you would provide an update by 31 July 2009.

I am now proceeding to prepare various briefing documents for the Special Minister of State for use when the Parliament resumes on 11 August 2009. It is essential that I receive the previously foreshadowed update from you and your client in relation to the timeframes in which a response is to be provided to the Australian Electoral Commission which meets the reporting requirements contained in Part XX.

The delay in progressing this matter is becoming a concern and will no doubt lead to questions being raised in the Parliament.

I look forward to receiving your prompt advice as to the progress of this matter.

Yours sincerely

*Paul Pirani*  
Chief Legal Officer  
Chief Legal Officer Unit  
Australian Electoral Commission

Ph: (02) 6271 4474  
Fax: (02) 6271 4457

LEGAL-IN-CONFIDENCE

DISCLAIMER:

**From:** Ken Fowlie [mailto:kfowlie@slatertgordon.com.au]

**Sent:** Monday, 10 August 2009 2:14 PM

**To:** Paul Pirani

**Subject:** RE: Health Services Union [SEC=LEGAL-IN-CONFIDENCE]

PRIVILEGED & CONFIDENTIAL

Mr Pirani

Thank you for your email. I refer also to my letter dated 30 June 2009.

Unfortunately, I have not received any further advices from the Industrial Registrar (now, General Manager, Fair Work Australia) regarding its examination of the matters I was instructed by the Union to investigate. Consequently, my client proposes to continue to refrain from providing information to your office at this time. It remains concerned that to do otherwise, could prejudice the inquiries being made by Fair Work Australia.

I will provide you with a further update by the end of August 2009.

Yours Faithfully

Ken Fowlie  
Executive Director  
Practice Group Leader  
Slater & Gordon  
Sydney Office  
31 2 8267 0603 (d)  
0418 604 966 (m)  
31 2 8267 0650 (f)

**From:** Paul Pirani  
**Sent:** Tuesday, 11 August 2009 10:14 AM  
**To:** Ken Fowle  
**Cc:** Sue Sayer; Brad Edgman  
**Subject:** RE: Health Services Union [SEC=LEGAL-IN-CONFIDENCE]

LEGAL-IN-CONFIDENCE

Dear Mr Fowle

Thanks for the update. I look forward to being kept informed of the progress in this matter.

While I acknowledge the reason why your client is unable to lodge amended disclosure returns and a third party return at this time due to the particular circumstances of this matter, I note that this delay cannot continue indefinitely.

Accordingly, your clients are hereby placed on notice that if the delay in addressing the requirements contained in Part XX of the Commonwealth Electoral Act 1918 continues for any undue length of time, the AEC will be forced to consider exercising the power contained in subsection 316(3) of the Commonwealth Electoral Act 1918 and to direct notices to produce to both the HSU and to individual members of the HSU Executive.

Yours sincerely

*Paul Pirani*  
Chief Legal Officer  
Chief Legal Officer Unit  
Australian Electoral Commission

Ph: (02) 6271 4474  
Fax: (02) 6271 4457

LEGAL-IN-CONFIDENCE

**Annexure D**

Email from Mr Pirani to Ms Kathy Jackson Wednesday 20<sup>th</sup> May 2009 1:44pm

## Paul Pirani

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**From:** Paul Pirani  
**Sent:** Wednesday, 20 May 2009 1:44 PM  
**To:** kathy.jackson@hsuvc.asn.au  
**Cc:** Sue Sayer; Brad Edgman  
**Subject:** Disclosure obligations under the Commonwealth Electoral Act [SEC=IN-CONFIDENCE]  
**Categories:** IN-CONFIDENCE

IN-CONFIDENCE

Kathy

I have attempted to contact you twice today and am unable to access your voicemail to leave a message.

I would appreciate having a quick telephone conversation with you to discuss a way forward for ensuring that the National Branch of the HSU has complied with the obligations under sections 314AEA of the Commonwealth Electoral Act 1918 (ie the annual return of an associated entity for 2007-08) and section 314 AEB (the third party political expenditure return for 2007-08 which includes the November 2007 general election).

I am aware of the various articles in the Sydney Morning Herald about the HSU and the expenditure in Dobell that was apparently authorised by Mr Craig Thomson and is alleged to have involved HSU funds. I am also aware of media reports indicating that you have already taken action to refer this matter to BDO Kendall and Slater and Gordon. I also understand from media reports that the Industrial Registrar may also be investigating this matter.

Yesterday I had a discussion with Mr Michael Williamson who confirmed that the existing third party political expenditure return that we have published only relates to the NSW Branch of the HSU and does NOT include any information about the National Branch of which you are the National Secretary. Similarly, the associated entity returns that we have published apparently do not include the National Branch of your union.

No doubt I will be questioned at Senates Estimates hearing next Thursday 28 May on this matter and would appreciate the opportunity to discuss this matter with you on a without prejudice basis. I just want to be clear about what proactive action you are taking to address this matter (including the proposed timeframes) and to meet the statutory reporting obligations contained in Part XX of the Act.

*Paul Pirani*

Chief Legal Officer  
Chief Legal Officer Unit  
Australian Electoral Commission

Ph: (02) 6271 4474  
Fax: (02) 6271 4457

IN-CONFIDENCE

**Annexure E**

Letter from Ms Kathy Jackosn to Mr Ken Fowlie, dated 11<sup>th</sup> December 2008



**Health Services Union**

11 December 2008

Mr Ken Fowlie  
Executive Director  
Slater and Gordon Lawyers  
11<sup>th</sup> Floor, 51 Drutt Street  
Sydney NSW 2000

Dear Mr Fowlie,

### **Referral**

The National Executive of the Health Services Union ("the Union") wishes to engage the services of law firm Slater and Gordon to undertake an examination of possible irregularities in the expenditure of the Union for the period 16 August 2002 to 31 January 2008.

### **Background**

The Union is regulated by the Registered Rules of the Union and Schedule 1 of the *Workplace Relations Act 1996*.

On the resignation of the National Secretary Mr Craig Thomson in December 2007, the National Executive resolved that an exit audit would be conducted on the accounts of the Union. This is a routine procedure in the HSU. The Union's National Auditor, Mr Iaan Dick ("the Auditor") was appointed to conduct this audit. A report from the Auditor for the period of 1 July 2007 to December 2008 was provided to the National Executive in a letter to the National Secretary dated 12 May 2008. A copy is included in the enclosures to this letter.

The report identified what appeared to be a number of irregularities in the accounts of the Union and an apparent lack of documentation in support of some expenditure.

The National Office appears to have no official Minute Book or electronic copies of minutes of meetings of the National Executive or National Council for the period that Mr Thomson held the position of National Secretary. A set of draft minutes for all such National Executive meetings as circulated can be made available but these are not necessarily confirmed minutes. National Executive has approved the annual accounts and financial statements for the Union for each of the financial years prior to 2007/2008.

In another letter from the Auditor also dated 12 May 2008, the National Executive was advised that, in the course of preparing the exit audit report, the Auditor had become aware of the existence of a Commonwealth Bank credit card and that in the 2006-2007 financial year a considerable number of cash withdrawals from ATM's had occurred. Whilst the Auditor has noted that these entries have been entered in the Union's books and attributed to various purposes, there appeared to be no documentary evidence to support that expenditure and the Auditor advised that this may be in breach of the reporting guidelines or Schedule 1 to the Workplace Relations Act 1996. The Auditor has sought the response of the National Executive in relation to this matter.

After receiving the exit audit report from the Auditor, National Executive decided to investigate expenditure incurred on union credit cards to which Craig Thomson, and Matthew Burke and Crisalee Stevens (former employees of the Union), were signatories. The examination was conducted by the Union's Officers and covered the period July 2002 to January 2008.

The Officers of the HSU were unable to locate any supporting documentation for most of the withdrawals referred to in 6 below.

Further, there are a number of transactions which are unsupported by any documentation and which are not clearly identifiable as expenses for the purposes of carrying out the objects of the HSU. Some of these items appear to be of a personal nature, and some were incurred after Mr Thomson's resignation from office.

Matthew Burke and Crisalee Stevens also had HSU Diners Club cards. The summary documents list items of expenditure which are not clearly identifiable from the statement descriptions as HSU related, and, in Matthew Burke's case, were incurred after his employment ended. These transactions are not supported by any documentation. *but paid*

As you will know, the HSU is required to file a return identifying any expenditure for electoral purposes. There are transactions in respect of which the invoices suggest that they were political expenditure, and a number of transactions for which there are no invoices/receipts and which may be political expenditure.

## Examination

The HSU National Executive requests that you engage an appropriate forensic accounting firm to examine the enclosed documents and report to yourselves and the National Executive on any matters which arise from the above which in their opinion require action or attention by the National Executive, and to make recommendations as to the appropriate course of action the Union ought to take to address matters raised as a result of the investigation.

After receipt of the report of that examination, we seek your advice in relation to the following:

- a. Whether funds of the Union were expended in accordance with the rules of the Union;
- b. Whether any funds of the Union were inappropriately expended, or not clearly identifiable as expenditure consistent with carrying out the objects of the HSU, and if so to what extent;
- c. Whether funds of the Union were misappropriated, and if so to what extent;
- d. If funds of the Union have been misappropriated, or expended without authority, what course or courses of action is or are available to the Union to recover those funds;
- e. Any issues that arise regarding the responsibility of the Union in relation to Schedule 1 of the *Workplace Relations Act 1996*;
- f. Whether it is possible to determine the total sum of Union funds expended on Mr Thomson's campaign to win the seat of Dobell in the 2007 Federal election and if so what that sum is?
- g. What other expenditure in the year 2007 was properly characterised as political expenditure which the Union is obliged to declare to the AEC?
- h. What policies, procedures or practices ought to be adopted by the National Executive and/or National Council of the Union to ensure that the Union has in place proper corporate governance practices to comply with its financial management obligations?

We also seek your advice on the Union's obligations in responding to the second letter from the National Auditor. I advise that the National Auditor has not yet finalised the accounts and financial statements for year 2007/2008 pending our response.

Mr Thomson had accumulated entitlements of annual leave and long service leave of about \$190,000. He has only been paid a relatively small amount of this to date, pending the conclusion of the examination of these matters. We request that you advise Mr Thomson that the National Executive has referred the matter for investigation and pending the outcome of that investigation no further payment of outstanding entitlements will be made. Mr Thomson's address is P.O Box 5253, Chittaway Bay, NSW, 2261.

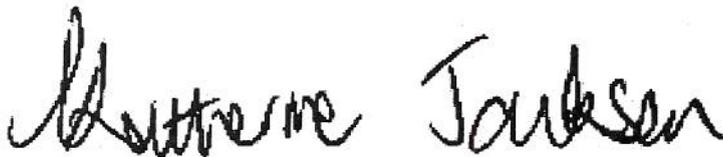
Prior to making any final recommendations to the National Executive, we authorise you to make contact with any person to either gain further relevant information or to give any person the opportunity to respond to any relevant findings of the investigation.

Please find enclosed the following documents:

1. Copy of a letter to the National Auditor dated 9 April 2008;
2. A copy of a letter from the National Auditor to the National Secretary dated 12 May 2008 together with attachments;
3. A copy of a second letter from the National Auditor to the National Secretary dated 12 May 2008;

4. Copies of credit card statements for Diners and Commonwealth Bank credit card accounts in the name of the HSU whose signatories were Craig Thomson, Matthew Burke and Crisalee Stevens;
5. Copies of analyses of that credit card expenditure conducted by Officers of the HSU;
6. A copy of a spread sheet listing credit card cash withdrawals;
7. A copy of a document listing payments from an SGE account of the HSU;
8. A copy of a letter to the National Secretary from the Australian Electoral Commission dated 21 January 2008;
9. A copy of the 2003 Terms of Reference for the Finance Committee, including 'Delegation of Approval for Outlays';
10. A copy of the Financial Governance Guidelines adopted by the National Executive in March this year; and
11. Copies of unconfirmed draft minutes of the National Executive.

Please contact me if you want any further information or want to discuss any of the matters raised.



Yours sincerely  
Kathy Jackson  
National Secretary

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**National Office**

208-212 Park Street, South Melbourne, Victoria, 3205 Telephone: (03) 9341 3328 Facsimile: (03) 9341 3329

Email: [hsu@hsu.net.au](mailto:hsu@hsu.net.au)

Website: [www.hsu.net.au](http://www.hsu.net.au)

**Annexure F**

Letter from Elias Hallaj, Assistant National Secretary of the Australian Labor Party National Office to Alan Page, Assistant Director Funding and Disclosure the Australian Electoral Commission advising of the Labor Party's Associated Entities, which includes the HSU. 10 March 2009.

Letter from Sue Sayer to Kathy Jackson 12 May 2012

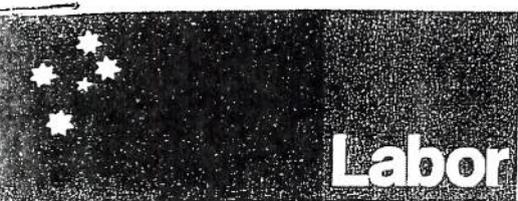
Letter from the AEC to Karl Bitar of the ALP 18 May 2009

Letter from Kathy Jackson to Sue Sayer 26 May 2012

Letter from Kathy Jackson to Paul Pirani 13 October 2012

65

206



Labor National Secretariat

10 March 2009

Mr Alan Page  
Assistant Director  
Funding and Disclosure  
Australian Electoral Commission  
PO Box 6172  
KINGSTON ACT 2604

see later list  
rec'd 27/5/09.  
only 3 AEs  
not 14  
*[Signature]*

Dear Mr Page

In reference to your letter of 4 March 2009 please find attached the list of Associated Entities as requested.

If you have any questions please do not hesitate to contact me.

Yours sincerely

*Elias Hallaj*

Elias Hallaj  
Assistant National Secretary

✓ Australian Manufacturing Workers Union (AMWU)

Dave Oliver  
National Secretary  
PO Box 160  
Granville NSW 2142

✓ Australian Services Union (ASU)

Paul Slape  
National Secretary  
Ground Floor, 116 Queensberry Street  
Carlton South VIC 3053

✓ Australian Workers Union (AWU) - NO

Paul Howes  
National Secretary  
Level 10, 377-383 Sussex Street  
Sydney NSW 2000

✓ Communications, Electrical and  
Plumbing Union of Australia (CEPU)

Peter Tighe  
National Secretary  
Suite 701, Level 7  
5-13 Rosebery Avenue  
Rosebery NSW 2018

Construction, Forestry, Mining  
And Energy Union (CFMEU)

John Sutton  
National Secretary  
PO Box Q235 QVB PO  
Sydney NSW 1230

Health Services Union (HSU)

Kathy Jackson  
National Secretary  
208-212 Park Street  
South Melbourne VIC 3205

✓ Liquor, Hospitality and Miscellaneous Union (LHMU)

Louise Tarrant  
National Secretary  
Locked Bag 9  
Haymarket NSW 1240

Maritime Union of Australia (MUA)

Paddy Crumlin  
National Secretary  
Level 2, 365 Sussex Street  
Sydney NSW 2000

National Union of Workers (NUW)

Charlie Donnelly  
National Secretary  
PO Box 343  
North Melbourne VIC 3051

Rail, Tram & Bus Union (RTBU)

Greg Harvey  
National Secretary  
83-89 Renwick Street  
Redfern NSW 2016

Shop Distributive and Allied  
Employees Association (SDA)

Joe De Bruyn  
National Secretary  
6<sup>th</sup> Floor, 53 Queen Street  
Melbourne VIC 3000

Textile, Clothing and Footwear  
Union of Australia (TCFUA)

Michele O'Neill  
National Secretary  
PO Box 441  
Carlton South VIC 3053

Transport Workers Union (TWU)

Tony Sheldon  
National Secretary  
PO Box 47  
Parramatta NSW 2124

United Firefighters Union of Australia (UFUA)

Peter Marshall  
National Secretary  
410 Brunswick Street  
Fitzroy Vic 3065

Ms Kathy Jackson  
National Secretary  
HSU  
208-212 Park Street  
SOUTH MELBOURNE Vic 3205

Dear Ms Jackson

**Re: Associated Entity Annual Disclosure Obligation – 2007- 08 Financial Year**

I am writing to advise that it has come to our attention that your entity has a disclosure obligation under Part XX of the *Commonwealth Electoral Act 1918* (the Act) for the 2007-08 financial year. The due date for lodging a return was 20 October 2008.

The Australian Electoral Commission (AEC) recently contacted all branches of the Australian Labor Party requesting a complete list of all associated entities. HSU was included on the list.

The financial controller of each associated entity has a responsibility to lodge a disclosure return for the 2007-08 financial year in accordance with Part XX of the Act unless the financial details of the entity are included in a disclosure return for a related entity. If the information for your associated entity has been included on the return of another associated entity, or your associated entity has already submitted a return under a different name, please contact the AEC on (02) 6271 4552 so our records can be updated

Failure to lodge the required disclosure return is a serious criminal offence which may result in the AEC referring this matter to the Commonwealth Director of Public Prosecutions.

A return form is included with this letter to assist you in meeting your disclosure obligation.

Signed forms, including any attached spreadsheets, can be lodged with the AEC via:

- Email to [fad@aec.gov.au](mailto:fad@aec.gov.au);
- Fax to (02) 6271 4555; or
- Post to:

Australian Electoral Commission  
Funding and Disclosure Section  
PO Box 6172  
KINGSTON ACT 2604

Important information to note is provided below.

### **Disclosure Threshold**

The disclosure threshold for the 2007-08 financial year is 'more than \$10, 500.' Transactions below this threshold are not usually required to be reported individually.

### **Third Party Return of Political Expenditure**

A *Third Party Return of Political Expenditure* is also required to be lodged by Associated Entities where they incur political expenditure in excess of the \$10, 500 threshold in 2007-08. Copies of the return form and handbooks are available from the AEC website ([www.aec.gov.au](http://www.aec.gov.au)).

### **Donor Returns**

The AEC uses information from associated entity returns to identify donors. Please ensure that the detailed information on your return is sufficient for the AEC to contact the person or organisation that has made the donation to advise them of their reporting obligation.

Further general information about completing the return can be obtained from the *Funding and Disclosure Handbook for Associated Entities*, available on the AEC website ([www.aec.gov.au](http://www.aec.gov.au)) or by contacting the Funding and Disclosure Section on (02) 6271 4552 or by emailing [fad@aec.gov.au](mailto:fad@aec.gov.au)

Yours sincerely



Sue Sayer  
Director, Funding and Disclosure  
Australian Electoral Commission

12 May 2009



Our Ref:

Title First Name Last Name  
Party  
Address Line 1  
Address Line 2  
Address Line 3

Dear Title Last Name

**RE: Associated Entities of Federally Registered Political Parties**

As you would be aware, bodies and organisations that satisfy the definition of 'Associated Entity' in section 287(1) of the *Commonwealth Electoral Act 1918* (the Act) have a disclosure obligation in relation to a given financial year. The definition of an associated entity is set out on the reverse of this letter.

The Australian Electoral Commission (AEC) requires an accurate and up to date list of all associated entities of federally registered political parties in order to inform them of their disclosure obligations under Part XX of the Act. To assist the AEC with this would you please provide a list of all organisations that are affiliated with your party for the 2008/2009 financial year, including:

- The name of a current contact for each organisation; and
- Full address details of each associated entity.

Where an associated entity operates under alternative names or abbreviations, please provide all details. Precise and accurate records will allow the AEC to contact and advise associated entities of their financial disclosure obligations for this financial year in a timely and efficient manner.

Should you have any queries in relation to this matter please do not hesitate to contact the funding and disclosure section on (02) 6271 4552 or via email at [fad@aec.gov.au](mailto:fad@aec.gov.au).

Your assistance in providing this information by 29 May 2009 is appreciated.

Yours sincerely



Sue Sayer  
Director  
Party Registration and Financial Disclosure

18 May 2009

Mr Karl Bitar  
Australian Labor Party (ALP)  
PO Box 6222  
KINGSTON ACT 2604



Sue Sayer

AEC

Director Funding and Disclosure

BY E-MAIL: [fad@aec.gov.au](mailto:fad@aec.gov.au)

26 May 2009

Dear Ms Sayer

**Re: Associated Entity Annual Disclosure Obligation 2007 – 09**

Thank you for your letter dated 14 May 2009

The HSU has not yet lodged a return as it is not yet able to determine whether expenditure was disclosurable.

Like most unions, it is customary for the Health Services Union to conduct an exit audit following a change of leadership within the Union or within one of its branches. An exit audit was conducted within the National office of the Union in 2008.

During the audit, the Union's National Auditor raised some issues, which were extensively reviewed by the Union.

The National Executive of the Union then unanimously resolved that the issues required further independent investigation.

The Union appointed a national law firm, Slater & Gordon, and an independent auditor, national accounting firm, BDO Kendall to conduct that investigation and make recommendations. A copy of the letter to Slater and Gordon is attached.

That investigation is continuing and no conclusions have been reached regarding the matters the subject of the investigation or the conduct of any officers of the Union.

The Industrial Registrar and the HSU National Executive have remained apprised of the progress of the investigation.

National Office



Until the investigation is completed we are not in the position to accurately disclose political expenditure.

I am advised that Slater & Gordon expect to provide a report by early June.

We will inform you of any developments.

I will provide you with further advice when it comes to hand.

Yours Sincerely

A handwritten signature in cursive script that reads "Kathy Jackson". The signature is written in black ink and is positioned above the typed name.

Kathy Jackson

National Secretary

13 October 2009



Mr. Paul Pirani  
Chief Legal Officer  
Australian Electoral Commission  
By Email: [Paul.Pirani@aec.gov.au](mailto:Paul.Pirani@aec.gov.au)  
By: Fax 02 6271 4552

Dear Sir

I refer to your letter of 14 May 2009 to me and the subsequent exchanges of correspondence between you and the Union's lawyer Mr Ken Fowle.

Please find enclosed:

1. Annual Return relating to Political Expenditure for Financial Year 2006 – 2007;
2. Annual Return relating to Political Expenditure for Financial Year 2007 – 2008; and
3. Donor Return for Financial Year 2007 – 2008.

**Associated Entity**

In your letter of 14 May you indicated that you regarded the HSU as an associated entity. Respectfully, we take a different view.

By virtue of s27 of the Fair Work (Registered Organisations) Act 2009 ("Act"), the Health Services Union is an incorporated entity. As you know, the Union is divided into a number of separate branches, each of which, pursuant to the rules of the Union and the operation of the Act, operate autonomously, including with respect to their financial affairs and reporting with respect to those affairs. This is particularly governed by s242 of the Act. A number of the branches of the Union, specifically the NSW Branch, the Tasmanian Branch, the West Australian Branch and several of the Victorian Branches are Associated Entities of the Australian Labor Party. In each case, they are affiliated to the Australian Labor Party in their respective states and they provide delegates to the conferences of those state branches of the ALP.

Pursuant to s242(5) of the Act, the National Office of the Union is regarded by the Act as a separate branch for the purpose of reporting. However, unlike the state branches of the Union described above, the HSU National Office, is not affiliated with the ALP and does not provide delegates to any forum of the ALP. It seems to us, in those circumstances, that the National Office of the HSU cannot be an Associated Entity having regard for the definition within the Australian Electoral Commission Act.

Naturally, we are happy to discuss this with you. We understand that the National office of the ALP is of the same view.

Please do not hesitate to contact me if you have any further questions.

Yours faithfully

A handwritten signature in black ink, appearing to read "Kathy Jackson".

Kathy Jackson  
National Secretary

National Office

208-212 Park Street, South Melbourne, Victoria 3205, Postal address PO Box 3078, South Melbourne, Victoria 3205  
Telephone: (03) 9341 3328, Facsimile: (03) 9341 3329. [www.hsu.net.au](http://www.hsu.net.au), Email: [hsu@hsu.net.au](mailto:hsu@hsu.net.au). ABN 68 243 768 561

**Annexure G**

Letter from Ken Fowle to Terry Nassios 16 June 2009

Letter from Ken Fowle to Paul Pirani 30 June 2009



BB

Level 11  
51 Druitt Street  
Sydney NSW 2000

www.slatergordon.com.au

GPO Box 1584  
SYDNEY NSW 2001

DX 1163 SYDNEY

Direct Ph: +61 2 8267 0603  
Fax: + 61 2 8267 0650  
Email: kfowlie@slatergordon.com.au

16 June 2009

**Private & Confidential**

Mr Terry Nassios  
A/g Industrial Registrar  
Australian Industrial Registry  
Level 4, 11 Exhibition St  
MELBOURNE VIC 3000

The period is  
2002 to 2007  
The period covering  
Mr Thomson's term

Dear Sir

**Health Services Union ("Union")**

Please find enclosed "Report on suspected irregularities in the expenditure of the National Office of the Health Services Union 2002 – 2007" ("The Report").

This Report contains the findings of an independent investigation undertaken by Slater & Gordon Lawyers and Accountants' BDO Kendalls ("BDO").

I was yesterday instructed by the National Executive of the Union to provide a copy of the Report to you. This followed a briefing given to the National Executive by me and BDO on the contents of the Report.

I have also been instructed to provide a copy of a resolution passed by the Executive, yesterday, which was in the following terms:

*National Executive:*

*Directs Slater & Gordon to provide a copy of the Findings to the Industrial Registrar and a copy of relevant findings of the Investigation to the Australian Electoral Commission ("AEC") as soon as practicable under cover of a letter providing a copy of this resolution and indicating to both that the Union is prepared to co-operate with whatever further investigation and inquiries those entities wish to make into the matters the subject of the Investigation.*

I and BDO hold all other copies of the Report. A copy of the Report has not been provided to any other person, including Mr Thomson, the former National Secretary of the Union.

I reiterate that the Union stands ready to co-operate with whatever further investigation and inquiry you and your office wish to make into the matters contained within the Report.

Please contact the writer if you require any further assistance with respect to this matter.

Yours faithfully

Ken Fowlie  
Executive Director  
Practice Group Leader  
SLATER & GORDON





**Slater &  
Gordon**  
Lawyers

30 June 2009

Mr Paul Pirani  
Chief Legal Officer  
Australian Electoral Commission  
PO Box 6172  
KINGSTON ACT 2604  
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Dear Sir

### Health Services Union

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I am instructed by the National Executive of the Health Services Union ("Union").

Along with directors from BDO Kendalls, I recently concluded an investigation and made findings in relation to expenditure within the National Office of the Union in the period 2002 - 2007.

As part of the investigation we made certain findings in relation to expenditure incurred by the National Office of the Union which may require disclosure under the Commonwealth Electoral Act 1918 ("CEA").

The full findings of our investigation have now been provided to the Industrial Registrar.

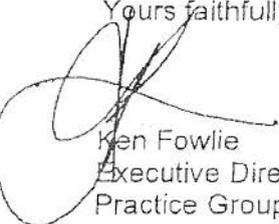
I understand that the Industrial Registrar has initiated inquiries pursuant to s330 of the RAO Schedule to the Workplace Relations Act 1996.

So as not to prejudice those investigations my client proposes to await the conclusion of the Industrial Registrar's inquiries before finalising any disclosure under the CEA.

Whilst I do not know how long it will take before Industrial Registrar reaches a conclusion to his investigation, I will ensure that you are provided with a further update by 31 July 2009.

Please contact me if I can be of any further assistance in relation to this matter in the interim.

Yours faithfully



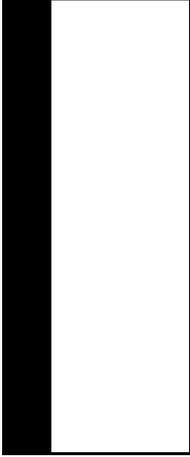
Ken Fowle  
Executive Director  
Practice Group Leader  
SLATER & GORDON

**The Hon Bronwyn Bishop MP**  
**Shadow Special Minister of State**

**The Hon Alex Somlyay MP**  
**Deputy Chair – JSCEM**

**Senator Scott Ryan**

**Senator Simon Birmingham**



Supplementary dissenting report – The Hon Bronwyn Bishop MP, The Hon Alex Somlyay MP, Senator Scott Ryan and Senator Simon Birmingham



## ***SUPPLEMENTARY DISSENTING REPORT***

To the AEC Submission received 13<sup>th</sup> September 2012 in response to the Chairman's letter 11<sup>th</sup> September 2012

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Coalition Committee Members of the JSCEM did not receive and at the time of writing, still have not received, a copy of the Chairman's letter to the AEC of 11 September 2012, to which the AEC replied 13 September 2012. This reply to the Chairman was accepted as a further submission to the JSCEM Inquiry into the HSU on a telephone hook-up on Friday 14<sup>th</sup> September and a date for submission for the entire Dissenting Report was minuted as 10am on Monday 17<sup>th</sup> September 2012.

The AEC confirmed that the Minister did not provide the complete report to the AEC for analysis. The AEC states that they were not provided with a copy of the Slater & Gordon investigation or the BDO Kendalls Report to it being forwarded by the Chairman by letter dated 11<sup>th</sup> September 2012. Coalition members have been unable to ascertain why this information was withheld from the AEC.

The Committee secretariat placed the Slater & Gordon/BDO Kendall Report plus records of interviews with witnesses on a CD because of the amount of material to be sent.

The AEC refers to the resolution of the HSU National Executive in the letter from Slater & Gordon to Mr Nassios, then Acting Registrar which states:

“National Executive:

Directs Slater & Gordon to provide a copy of the findings to the Industrial Registrar and a copy of the relevant findings of the Investigation to the Australian Electoral Commission....”

The AEC states in its submission that the HSU said the AEC was to receive the report.

“despite the resolution of the National Executive of the HSU referred to in the letter from Slater & Gordon to the Acting Industrial Registrar dated 16 June 2009 that a copy should be provided to the AEC.”

This sloppy statement is but one of many contained in the AEC submission relying on just 2 days work by the AEC.

Furthermore, the question arises why all of the information contained in the report was not and still has not been submitted to the AEC so that a complete forensic examination could be made to test the actions of the HSU and Craig Thomson and any non-compliance with legislation. In particular, it is not clear why the Government did not want the AEC to examine the complete Report, Annexures A - H and K - M. Representing thousands of pages contained in 13 lever arch folders were only received from FWA on the 11<sup>th</sup> September 2012 and never dealt with by the committee.

Despite being asked, the Chairman refused to publish this material and also refused to allow a hearing. It is particularly important that the Interim report prepared by Mr Nassios being Annexure M to the FWA Report and itself containing the thousands of pages mentioned above be the subject of proper

analysis. The Interim report addresses matters of significance to electoral expenditure and disclosure.

Due to the confidentiality which censors the contents, members cannot canvass issues or questions on relevant matters, which may have led to different conclusions by the Labor/Greens majority in their report.

The language of the AEC is non-conclusive. The use of expressions such as:

- presumably
- it appears that the instructions to Slater & Gordon . . .
- limitations caused by the absence of relevant records . . .
- particular items of expenditure that was made on their credit cards that could have been regarded as possible election campaign expenditure
- HSU National Office has made reasonable attempts to disclose all election expenditure that they were able to identify from reconstructed records . . .
- (page 5) Expenditure on electorate activities outside of the dedicated campaign account would need to face strong penalties
- No comment at all on the failure of Mr Thomson to disclose gifts an obligation not extinguished by the HSU filing political expenditure returns

JSCEM has no further opportunity to call the AEC before this Committee for a further hearing to examine them on issues relating to matters identified in the censored CD.

The Labor/Green Majority Report remains silent as to why they refuse to publish the whole report to the Parliament and maintain such a degree of secrecy and deceit.

Clearly criticism made by KPMG to FWA concerning its investigation procedures apply equally but probably more strongly to the AEC and its inadequate dealings with Craig Thomson's failure to disclose.

It is to be noted that the AEC purported to deal with an additional 665 pages of evidence in 2 days and come to what appears to be their same conclusion but with qualifying words is remarkable indeed.

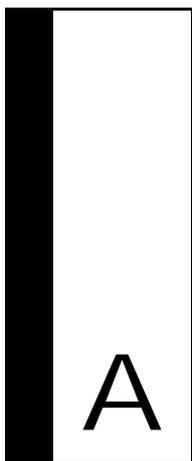
The public has a right to know what is contained in the complete FWA Report and that means all the annexures

**The Hon Bronwyn Bishop MP  
Shadow Special Minister of State**

**The Hon Alex Somlyay MP  
Deputy Chair – JSCEM**

**Senator Scott Ryan**

**Senator Simon Birmingham**



## Appendix A – Ministerial reference and AEC matters for consideration





## HON GARY GRAY AO MP

Special Minister of State  
Minister for the Public Service and Integrity

Mr Daryl Melham MP  
Chair  
Joint Standing Committee on Electoral Matters  
Parliament House  
Canberra ACT 2600

Dear Mr Melham,

As the Committee may have noted, I wrote to the Electoral Commissioner on 8 May 2012 seeking his advice on whether or not there had been any failures to comply with the provisions of the *Commonwealth Electoral Act 1918* (Electoral Act) as disclosed by the information in recently published Fair Work Australia Report into the Health Services Union National Office (FWA Report). The Commissioner has developed a detailed analysis of the FWA report and this advice is now publicly available from the Australian Electoral Commission.

At the time, I also sought advice from the Electoral Commissioner on any issues concerning the operation of the Electoral Act which could be considered for possible remedy.

I refer the Electoral Commissioner's analysis and the list of matters to the Joint Standing Committee on Electoral Matters for its consideration.

Yours sincerely

A handwritten signature in blue ink, consisting of a large, stylized 'G' followed by a long horizontal stroke that tapers to a point.

**GARY GRAY**

**16 MAY 2012**

## Attachment B

### Possible measures

- (i) Reconsideration of the appropriate level of the disclosure threshold;
- (ii) Introduce administrative penalties for objective failures (such as failing to lodge on time);
- (iii) Provide 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);
- (iv) Require 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);
- (v) Abolish "associated entities" and establish a third party scheme similar to Canada and the UK;
- (vi) Establish the requirement 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 AUSTRAC – also amend the *Financial Transactions and Report Act 1988* to include these campaign accounts;
- (vii) Require the electronic lodgement of all returns to the AEC (with the power for the Electoral Commissioner to grant some exceptions);
- (viii) Require the period for the retention of records in section 317 and the related offence in section 315(2)(b) be increased to 7 years;
- (ix) Insert a new offence for a person who fails to make records to enable complete and accurate disclosure;
- (x) Increase relevant criminal penalties that are fraud related (eg knowingly providing false and misleading information in a return);
- (xi) Require more frequent reporting of relevant expenditure and receipts;
- (xii) Reintroduce requirements that campaign committee expenditure is to be reported separately from the state party unit and specifically covers the election period for each division;
- (xiii) Review the "disclosure period" and the "election period" in relation to disclosure obligations and new candidates who are seeking pre-selection;

- (xiv) Increase 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;
- (xv) Expand the categories of "electoral expenditure" that are to be disclosed to include campaign staff, premises, office equipment, vehicles and travel;
- (xvi) Deem registered political parties to be bodies corporate for the purposes of Part XX of the Electoral Act;
- (xvii) Introduce provisions with greater certainty about who has the relevant reporting obligation.



## Electoral Commissioner

The Hon Gary Gray AO MP  
Special Minister of State  
Parliament House  
CANBERRA ACT 2601

Dear Minister

I refer to your letter dated 8 May 2012 (your reference C12/1387) in which you asked for my advice on whether or not there have been any failures to comply with the provisions of the *Commonwealth Electoral Act 1918* (Electoral Act) as disclosed by the information in the recently published Fair Work Australia Report into the Health Services Union National Office (FWA Report). In your letter you have also asked for my advice on any issues concerning the operation of the Electoral Act which could be considered for possible remedy.

Please find attached (Attachment A) a copy of a document that contains the AEC's consideration of the FWA Report. The AEC document was made available publicly today. In summary, the document concludes that most of the expenditure described in the FWA Report has been disclosed by relevant entities under the Electoral Act, with queries surrounding four payments totalling \$17,014.88. Given that each of the four payments fell under the reporting threshold, the AEC is seeking further information on whether these four payments have been included in the total amount reported by the relevant entities.

In relation to limitations contained in the Electoral Act which have been highlighted by the circumstances of this matter, Attachment B is an initial list of possible matters that could be considered. The AEC notes that some of these matters have been considered previously by the Joint Standing Committee on Electoral Matters without being adopted.

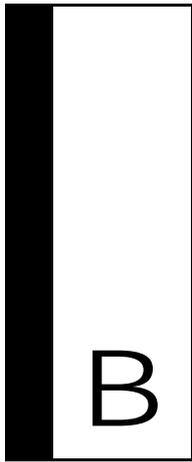
I trust that the above is of assistance.

Yours sincerely



Ed Killesteyn

16 May 2012



## 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. The Candidate

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. The Donor and Third Party

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. Other Third Parties

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   |
| <b>Total</b>               | <b>\$71,300.23</b> |  |

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**

| <b>Amount</b>                               | <b>Required to be disclosed?</b> | <b>Disclosure by?</b> | <b>Was it disclosed?</b>                                    |
|---|----------------------------------|-----------------------|---|
| "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 in 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 than 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

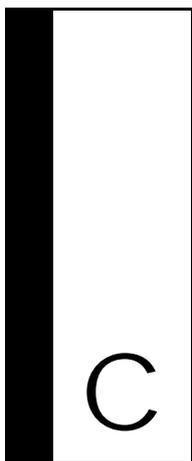
- Section 314AEA provides that an “associated entity” has an annual reporting obligation and is required to disclose the total amount received, the total amount paid and the total amount of any outstanding debts in that financial year.
- Section 314 AEA is also subject to the disclosure threshold (\$10,300 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.



Appendix C – Addendum to the AEC analysis  
of the FWA report



## Annex 3 – Update arising out of the AEC’s analysis of the FWA Report

### Addendum to the AEC’s analysis of the FWA Report

The document that was published by the AEC on 16 May 2012 indicated that further information was being sought from the NSW Branch of the Australian Labor Party (ALP) and the Health Service Union (HSU) National Office to ascertain whether or not those specific amounts of expenditure had been included in any returns lodged with the AEC. In particular, further information was sought about four items of expenditure that were listed at paragraph 196 of Chapter 7 of the FWA Report. The items were listed in Table 1 of the AEC analysis as follows:

| Expenditure                          | Amount             | Disclosure to the AEC  |
|--------------------------------------|--------------------|--|
| Establishment of the Campaign Office | \$4,826.99         | Under the threshold -<br>Further information sought to establish whether disclosed by ALP or HSU |
| Payments to Dobell FEC               | \$3,500.00         | Under the threshold –<br>Further information sought to establish whether disclosed by ALP or HSU |
| Campaign Bus                         | \$1,277.96         | Under the threshold -<br>Further information sought to determine whether disclosed by ALP or HSU |
| Payments to LBH Promotions           | \$7,409.93         | Under the threshold -<br>Further information sought to determine whether disclosed by HSU        |
| <b>Total</b>                         | <b>\$17,014.88</b> |  |

The ALP advised that the above payments were not included in their disclosure returns and that they were not aware of the expenditure.

The Law Firm Slater & Gordon have responded on behalf of the HSU National Office and advised that the three returns that were lodged by Ms Kathy Jackson in October 2009

included some, but not all, of the above expenditure. The advice also indicated that some of the amounts of expenditure were not required to be reported under the Electoral Act.

In relation to the three returns lodged by Ms Jackson Slater & Gordon advised that:

1. Only limited records were available to Ms Kathy Jackson and the HSU National Office to prepare the returns;
2. The records that were relied upon were reconstructed based on obtaining bank account statements from various financial institutions, credit card statements and some electronic accounting records;
3. Officers of the union and forensic accountants identified and analysed the financial information available and attempted to identify all expenditure that could have been required to have been disclosed under the Electoral Act;
4. In preparing the three returns, the HSU National Office attempted to err on the side of disclosure.

In relation to each of the above amounts of expenditure the following information was provided.

#### Long Jetty Campaign Office

Expenses associated with the establishment and operations of the Long Jetty Campaign Office were generally included in the three returns. The purchase of the workstations (\$1,587) and the printer (\$604.95) were included in the 2006-07 return. The cost of the air conditioner (\$1,053) was not identified as related to this office and was not included due to an oversight. The telephone and fax charges (\$860.64) were not disclosed in the 2007-08 return as it was thought that some of these costs were incidental to Mr Thomson's duties as the HSU National Secretary.

#### Payments to Dobell FEC

These two payments were not disclosed in a donor return for the 2006-07 financial year as they were below the disclosure threshold. A donor return is only required to be made under sections 305A and 305B where the amount of all gifts made was more than the disclosure threshold. This is to be contrasted with the obligations relating to annual returns lodged by political parties and persons who incur political expenditure where the total amount must be included in the disclosure return but only amounts greater than the threshold need to be individually disclosed. Accordingly there was no disclosure obligation on HSU National Office for these two payments as donations in the 2006-07 financial year as these two amounts were below the disclosure threshold.

### Campaign bus

The first two payments listed to D Parish of \$671.88 and \$79.28 were identified as likely electoral expenditure and included in the return for 2007-08. The third payment of \$526.80 was not identified as likely electoral expenditure and therefore was not included in the return for 2007-08. This third payment was described in the HSU records as “motor vehicle expenses” which did not provide any direct link for this payment to be categorised as possible electoral expenditure when the annual returns were being prepared in 2009.

### Payments to LBH Promotions

The first payment of \$5,931.53 on 30 October 2006 was not identified as likely electoral expenditure. As a consequence it was not included in the 2006-07 return. The HSU National Office is still unable to identify whether this expenditure was for the ‘Your Rights at Work’ campaign, the activities of Coastal Voice or some other matter. The second payment of \$1,478.40 was identified as payment for a mail out as part of the March 2007 NSW State election and thus not disclosed in any return under the Electoral Act. This amount was also under the disclosure threshold of \$1,500 in the NSW Election Funding Act 1981.

### **Conclusions**

It would appear that the HSU National Office made reasonable attempts to disclose all electoral expenditure that they were able to identify from the incomplete records that were available to them in 2009. The HSU National Office accepted the reporting responsibility in relation to all of the amounts of expenditure that were incurred by Mr Thomson on the HSU issued credit card.

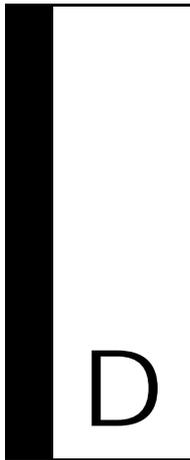
The letter from Slater & Gordon noted that possibly three of the above four items should have been included in the annual returns for the HSU National Office if they had been able to clearly identify the expenditure as being for purposes covered by the disclosure obligation in the Electoral Act (e.g. the air conditioner at the Long Jetty Campaign Office). In relation to the LBH Promotions expenditure, part of this was clearly made for a purpose that did not relate to the conduct of a federal election, while it remains unclear whether the remainder may have related to Coastal Voice or some other purpose. The two payments to the Dobell FEC were below the disclosure threshold for donations and therefore were not included in any return.

The AEC has concluded that the above circumstances show that:

- (i) there were difficulties with the availability and accuracy of records held by the HSU National Office which led to uncertainties over the characterisation of expenditure that had been incurred on the credit cards issued to its various officers and employees;

- (ii) those difficulties led to some amounts of electoral expenditure that has been identified in the FWA Report not being included in any disclosure return lodged by the HSU National Office, while other amounts were included which probably were not electoral expenditure (e.g. the total salaries of Ms Stevens and Mr Burke);
- (iii) the HSU National Office took reasonable measures in 2009 to attempt to comply with the disclosure obligations contained in the Electoral Act; and
- (iv) the total amount of electoral expenditure that has been identified in the FWA Report and which has not been disclosed is less than the disclosure threshold that was in force at the relevant time.

In these circumstances the AEC has been unable to identify any public interest that could result in action being now initiated against the HSU National Secretary, Ms Kathy Jackson, in relation to the apparent failure to fully disclose three items of expenditure which were not included in the HSU National Office returns for 2006-07 and 2007-08 financial years.



## Appendix D – Submissions, Exhibits and Additional information

### Submissions

No.

1. Australian Electoral Commission  
Supplementary to submission 1:
- 1.2 Australian Electoral Commission
- 1.3 Australian Electoral Commission
- 1.4 Australian Electoral Commission
- 2 Fair Work Australia

### Exhibits

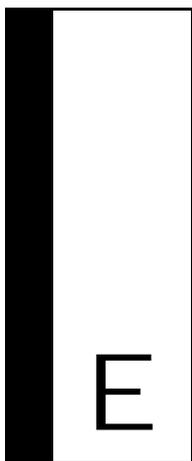
No.

1. List of Reviews completed since 2007 – provided by the Australian Electoral Commission
2. Letter, Mr Marcus Clayton, National Practice Group Leader, Slater & Gordon, to Mr Paul Pirani, Chief Legal Officer, Australian Electoral Commission, *Health Services Union National Office – Returns lodged under Part XX of the Commonwealth Electoral Act 1918 – 2006/7 and 2007/8 financial years, dated 23 May 2012* – provided by the Australian Electoral Commission
3. Sample of AEC Disclosure Compliance Review letter – provided by the Hon Bronwyn Bishop MP

### **Additional information**

Where relevant to the current inquiry, the committee has authorised the following additional material be published on the committee's website:

- Interim report to the Acting General Manager of the FWA, 16 January 2012
- Letter: FWA Delegate to the HSU National Secretary, 28 March 2012
- Extracts of Annexure J of the FWA's report on the HSU
- Extracts of the Report by BDO Kendalls on the HSU
- Extracts of transcripts from the FWA Delegate's investigation into the HSU



## Appendix E – Hearings and witnesses

Tuesday, 3 July 2012—Melbourne

**Fair Work Australia**

Ms Bernadette O’Neill, General Manager

Friday, 6 July 2012—Canberra

**Australian Electoral Commission**

Mr Ed Killesteyn, Electoral Commissioner

Mr Paul Pirani, Chief Legal Officer

Mr Brad Edgman, Director, Funding and Disclosure Section – Compliance

Monday, 16 July 2012—Canberra

**Fair Work Australia**

Mr Terry Nassios, Director, Client Services

**Australian Electoral Commission**

Mr Ed Killesteyn, Electoral Commissioner

Mr Paul Pirani, Chief Legal Officer

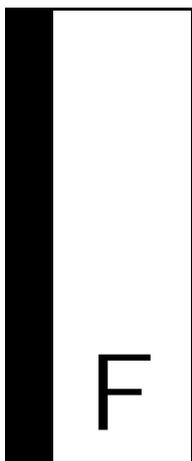
Mr Brad Edgman, Director, Funding and Disclosure Section – Compliance

Wednesday, 22 August 2012—Canberra

**Fair Work Australia**

Mr Terry Nassios, Director, Client Services





Appendix F – AEC supplementary  
submission on its analysis





## Electoral Commissioner

Mr Daryl Melham MP  
Chair  
Joint Standing Committee on Electoral Matters  
Department of the House of Representatives  
PO Box 6021  
Parliament House  
CANBERRA ACT 2600

Dear Mr Melham

### **INQUIRY INTO THE AEC ANALYSIS OF THE FWA REPORT ON THE HSU**

I refer to your letter of 11 September 2012 and the CDs that contained some of the confidential attachments to the FWA Report. I understand that you wish that the AEC responds to your letter by COB 13 September 2012 in the interests of enabling the Committee to finalise its report on this matter as soon as possible.

The Committee has asked the AEC to consider the attachments provided and to respond to two specific matters. First, whether the AEC had previously been provided with a copy of the Slater & Gordon investigations with the BDO Kendalls Report. Second, whether the information contained on the CD changes or alters in any material manner the AEC's previous analysis of the disclosure obligations under the *Commonwealth Electoral Act 1918* that arise from the FWA Report and the list of 17 possible measures provided to the Special Minister of State on 16 May 2012.

I can confirm that the AEC has not been provided with a copy of either the Slater & Gordon investigation or the BDO Kendalls Report prior to the arrival of the CD from the Committee. This is despite the resolution of the National Executive of the HSU referred to in the letter from Slater & Gordon to the Acting Industrial Registrar dated 16 June 2009 that a copy should be provided to the AEC. The AEC notes that the letter to the Acting Industrial Registrar from Slater & Gordon of 16 June 2009 predates the letter to the AEC from Slater & Gordon dated 30 June 2009 in which Mr Fowlie advised that the investigation by Slater & Gordon (which presumably included the BDO Kendalls Report) had been sent to the Industrial Registrar. This letter went on to state that:

**Enrol2Vote**

Year of enrolment | [www.aec.gov.au](http://www.aec.gov.au)

**50<sup>TH</sup> ANNIVERSARY**  
*of the Indigenous vote 1962-2012*

*"So as not to prejudice those investigations [by the Industrial Registrar] my client proposes to await the conclusion of the Industrial Registrar's inquiries before finalising any disclosure under the CEA".*

Accordingly, it appears that the instructions to Slater & Gordon to provide the AEC with the results of the investigations and the BDO Kendalls Report were changed sometime between 16 June and 30 June 2009.

In relation to the AEC's examination of the attachments to the FWA Report contained on the CD, the AEC notes that both the Slater & Gordon investigation and the BDO Kendalls Report indicate that those findings are subject to limitations caused by the absence of relevant records and the sampling of documents and information (see paragraphs 15 to 19 of the Slater & Gordon investigation and the comments at page 3 of the BDO Kendalls Report that the payments identified by Union officers "*may be in the nature of electoral campaign material*" and that amounts of expenditure "*may not have included these expenses on their Schedule due to their specific knowledge of the expenditure incurred or the existence of adequate supporting material*").

The Slater & Gordon investigation concludes at paragraphs 3(d) and 96 that it may not be possible to precisely separate the Central Coast Expenditure into expenditure spent on the one hand directly to the Dobell campaign and on other Your Rights at Work and campaigning activities that were union related. This issue was also raised in the BDO Kendalls Report where it stated at page 3 that:

*"If it is demonstrated that Ms Stevens and Mr Burke were engaged exclusively in respect of Mr Thomson's election campaign (a conclusion that we are not yet able to make) then it would likely follow that expenditure incurred by them would likely be of an electoral character."*

The disclosure recommended by Slater & Gordon was to adopt a "*cautious approach*" in regard to the inclusion of possible political expenditure in the three disclosure returns that were lodged with the AEC on 13 October 2009 (see paragraph 115). The AEC also notes that paragraph 120 of the Slater & Gordon investigation appears to refer to the requirements of section 318 of the *Commonwealth Electoral Act 1918* where a person who is responsible for providing a disclosure return is able to give notice to the AEC stating why it was not possible to provide the required particulars and to identify another person who they believe may give those particulars. No section 318 notice was given to the AEC by Ms Kathy Jackson at the time when the three disclosure returns were lodged on 13 October 2009 or subsequently.

The BDO Kendalls Report indicates that it was requested to review the schedules prepared by the HSU officers and to compare them with the credit card statements that were also provided. At page 3 of the BDO Kendalls

letter to Slater & Gordon dated 16 April 2009 reference is made to *"Probable Election Campaign Expenditure"* and that several schedules provided to them to review identified such expenditures. BDO Kendalls state at page 1 of the letter that *"Our review has substantially confirmed the accuracy of the Schedules"*. At page 3 BDO Kendalls state that they agreed with the characterisation of the expenditure listed in the schedules incurred on the credit cards issued by the HSU to Mr Thomson, Ms Stevens and Mr Burke was probable election campaign expenditure.

The AEC has compared the amounts shown in the schedules contained in the BDO Kendalls Report and the FWA Report with the total amounts contained in the three returns lodged by Ms Kathy Jackson on behalf of the HSU National Office. As the returns lodged by Ms Jackson under section 314AEB were only required to include total amounts and the sum of the amounts listed in the relevant schedules to the BDO Kendalls Report are less than the total amounts included in three returns, the AEC is not in a position to provide any further analysis of the information contained in the schedules. The AEC does note that the previous analysis based on the additional information contained in the FWA Report concluded that the majority of the items identified have been included in the three disclosure returns, albeit with some minor discrepancies. Those discrepancies were outlined in the "Addendum to the AEC's analysis of the FWA Report" that was published on the AEC website on 28 June 2012. The letter to the AEC from Slater & Gordon dated 23 May 2012 indicated that the three disclosure returns that were lodged with the AEC by the HSU National Office on 13 October 2009 *"were largely based upon the findings of the Slater & Gordon/BDO Kendalls Report"*. There is no information in the attachments that would lead the AEC to question this statement.

The transcripts of the FWA interviews with Mr Thomson, Ms Stevens and Mr Burke add some additional information about the duties of Ms Stevens and Mr Burke and the characterisation of particular items of expenditure that was made on their credit cards that could have been regarded as probable election campaign expenditure. The transcripts clearly show that Ms Stevens and Mr Burke undertook a range of duties which included some that would have been related to the ALP election campaign in Dobell (noting that some of these activities occurred prior to 13 April 2007 being the date when Mr Thomson was preselected as the ALP endorsed candidate for Dobell), while others involved duties involving the Your Rights at Work campaign, other union-related matters and State election campaign matters. On the material provided it is still not possible to accurately apportion the time and associated salaries to each activity. Indeed, it appears that due to this issue, paragraphs 118 and 119 of the Slater & Gordon investigation recommended the inclusion of the total salaries of Ms Stevens and Mr Burke as political expenditure incurred by the HSU National Office and this was included in the disclosure returns lodged with the AEC on 13 October 2009.

The AEC is on the record as stating that it would appear that the HSU National Office has made reasonable attempts to disclose all electoral expenditure that they were able to identify from the reconstructed records that

were available to them in 2009. The HSU National Office accepted the reporting responsibility in relation to all of the amounts of expenditure that were incurred by Mr Thomson, Ms Stevens and Mr Burke on the HSU issued credit cards.

The AEC notes that all of the attachments to the FWA Report that have now been provided concede that political expenditure was incurred on the credit cards issued by the HSU National Office. The available evidence indicates that this political expenditure has been disclosed in the three returns lodged with the AEC by Ms Kathy Jackson on behalf of the HSU National Office which retained the legal obligation for reporting such expenditure.

The AEC has concluded that the above circumstances show that:

- (i) there were difficulties with the availability and accuracy of records held by the HSU National Office which led to uncertainties over the characterisation of expenditure that had been incurred on the credit cards issued to its various officers and employees;
- (ii) those difficulties led to some amounts of electoral expenditure that have been identified in the FWA Report not being included in any disclosure return lodged by the HSU National Office, while other amounts were included which probably were not electoral expenditure (e.g. the total salaries of Ms Stevens and Mr Burke);
- (iii) the HSU National Office took reasonable measures in 2009 to attempt to comply with the disclosure obligations contained in the *Commonwealth Electoral Act 1918*; and
- (iv) the total amount of electoral expenditure that has been identified in the FWA Report and which has not been disclosed is less than the disclosure threshold that was in force at the relevant time.

In these circumstances the AEC has been unable to identify anything in the documents now provided to the AEC that would change the previous conclusions of its analysis of the FWA Report. This includes the content of the 17 recommendations made to the Special Minister of State on 16 May 2012.

The AEC notes that the schedules attached to the BDO Kendalls Report and the various transcripts point to the extensive and regular use of credit cards by Mr Thomson, Ms Stevens and Mr Burke on a range of disparate expenditure items, including conceded electoral campaign expenditure, but where the purpose of the expenditure is not always clear on the records available. Against this background the AEC reiterates its view, contained at Item VI of our report to the Special Minister of State, that dedicated campaign accounts operating at both electorate level and party level, from which electoral campaign expenditure must be incurred, would be of considerable aid to both candidates and parties in meeting their disclosure obligations and for subsequent scrutiny to ensure compliance with those obligations.

Expenditure on electoral activities outside of the dedicated campaign account would need to face strong penalties.

Yours sincerely  


Ed Killesteyn

13 September 2012