AEC
Australian Electoral Commission

Ms Samantha Mannette
Inquiry Secretary
Joint Standing Committee on Electoral Matters
Parliament House
CANBERRA ACT 2600

Dear Ms Mannette

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

I refer to your letter dated 11 July 2012 addressed to the Electoral Commissioner, Mr Ed Killesteyn, in which you advise that the Chair of the Committee has requested written responses to a number of questions to assist the Committee in its consideration of possible measures to amend the disclosure and reporting obligations contained in Part XX of the *Commonwealth Electoral Act 1918* (Electoral Act). I have been asked to reply to your letter on behalf of the Australian Electoral Commission (AEC).

Responding to each question in the order that they appear in your letter, the following further information is provided.

Measure 5—Abolish 'associated entities' and establish a third party scheme similar to Canada and the UK

1. What would be the advantages and disadvantages of this change?

As has been highlighted in a number of inquiries and complaints received by the AEC, the current test for what is an "associated entity" includes an inexact test of "operates wholly, or to a significant extent, for the benefit of one or more registered political parties". In addition, there is no obligation contained in the Electoral Act that requires a registered political party to identify all such associated entities which operate for their benefit or which have voting rights in their party. 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 so as to avoid being subject to the operation of the existing provisions and yet have a significant impact on the electoral processes.

West Block Offices
Queen Victoria Terrace
Parkes ACT 2600

PO Box 6172
Kingston ACT 2604

Tel 02 6271 4411
Fax 02 6271 4558

www.aec.gov.au
ABN 21 133 285 851

As the primary purpose behind the disclosure scheme is that electors should be informed in a timely manner of the source of funds used in an election campaign so as to inform their decisions about who to vote for on polling day, the current distinction between a third party who incurs political expenditure and all payments made by an "associated entity" does not appear to be of assistance in informing electors about who is paying for an election campaign. 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 relate 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 irrespective of whether or not they relate 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.

Accordingly, the advantages of this change would include:

- 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.

The disadvantages 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 a consequence of increased numbers of organisations and individuals that could be captured by the scheme. Again this would be affected by any disclosure threshold.

2. What specific features of the Canadian and UK third party arrangements are applicable in the Australian context?

The specific features suggested by the AEC include:

- 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. The AEC notes that in NSW, the registration of "third party campaigners" under sections 38A to 38D of the *Election 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.
- Loans that are used to incur political expenditure should be disclosed.

One issue that the AEC has not addressed is whether the third party registration should be limited to just expenditure incurred during the election period or whether it should operate at all times. The AEC notes that in both the UK and Canada, the third party registration process appears to only operate during an election period. The reason for this being that this requirement relates to expenditure caps which only apply during an election period.

3. What changes would have to be made to the current arrangements for third parties?

As outlined above.

Measure 8—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

4. Would this increase from three to seven years only pertain to the retention of records and the related penalty, and not to the three year time period in which the prosecution of other offences under section 315 can be commenced?

Measure 8 relates to Measure 10 in the AEC submission which recommended increased penalties for some offences contained in Part XX of the Electoral Act. The reason why these two recommendations are linked is because the status of the offence has an impact on the time period in which a prosecution can be commenced.

All of the existing 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*) and 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. There is no such limitation on the commencement of a prosecution for an indictable offence.

In addition under section 13 of the *Crimes Act 1914* any person is able to undertake a prosecution for a summary offence. However, for the more serious indictable offences, the Commonwealth Director of Public Prosecutions 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.

The AEC notes that the current three year time period appears to be related to the normal electoral cycle. 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. This view is supported by the specific comments of the September 1983 First Report of the Joint Select Committee on Electoral Reform where it rejected the recommendations of the Harders review about criminal penalties stating at paragraph 10.52 that:

> *"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 AEC recommendation 10 to the Special Minister of State was that there should be an increase in the relevant criminal penalties under Part XX of the Electoral Act where the offence is fraud related (e.g. knowingly providing false and misleading information). Similar fraud offences under Part 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.

5. How would retaining records for a longer period assist with enforcement, if the AEC is restricted by the three year time period for prosecution of offences under section 315, in particular the fraud related offences?

As outlined above.

6. In relation to the circumstances considered by the AEC in its analysis of the FWA Report, are there any breaches that the AEC were unable to refer due to the expiry of the three year period for commencing prosecutions?

The correspondence from Slater and Gordon dated 23 May 2012 indicates several items of expenditure which were not included in the returns lodged by Ms Kathy Jackson of the HSU National Office. However, the AEC has been unable to ascertain whether or not there is supporting documentary evidence which would be admissible in a criminal prosecution.

In my opening statement to the Committee on 6 July 2012 I indicated that the AEC analysis has concluded that the circumstances of this matter show:

(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 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 political expenditure in the HSU National Office returns for 2006-07 and 2007-08 financial years.

Similarly, the AEC has no evidence or other material pointing to any breaches of the current requirements of the Electoral Act.

The AEC has indicated at several parts of the AEC Analysis that there remains insufficient evidence to determine whether some of the items of expenditure reported in the FWA Report were required to be disclosed under Part XX of the Electoral Act.

Measure 11—Require more frequent reporting of relevant expenditure and receipts

7. **In the *Report on the funding of political parties and election campaigns*, the Committee recommended the AEC investigate the feasibility of 'a system of contemporaneous disclosure' and report to the Special Minister of State by 31 March 2012 . Can you provide an update on any progress on this?**

The AEC notes that the Government is yet to respond to the JSCEM *Report on the funding of political parties and election campaigns.* The AEC has undertaken some preliminary work on the issue of a system of contemporaneous disclosure. This work has included some analysis of the overseas experience for the contemporaneous disclosure of electoral campaign expenditure in the US and Canada of the reporting frequency, whether this changes in the lead up to an electoral event and the mechanisms that are used to publish the relevant details. Attachment A is a table which lists the disclosure regime in the US and Canada.

However, until such time as an actual model is proposed, the AEC is unable to undertake a detailed analysis of any such scheme. Further, as has been acknowledged by the AEC at page 14 of the submission, any lowering of disclosure thresholds and increasing in reporting frequency will also result in increased compliance costs to third parties, candidates, registered political parties and donors.

Measure 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

The AEC has indicated that its powers to take action in relation to Part XX are limited by certain requirements in the Electoral Act. At the hearing on 6 July (and in previous hearings for other JSCEM inquiries) the extent to which the AEC can exercise its powers was discussed.

8. **Could you provide detail about what specific additional coercive powers you regard as necessary/desirable? Please provide the context/examples in which these powers could be used.**

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 essentially limited to the conduct of monitoring activities (e.g. compliance reviews) and the investigation of possible criminal offences under section 315 of the Electoral Act.

The AEC also notes that any changes to penalties and the exercise of coercive powers under Commonwealth laws require consultation with the Attorney-General's Department which maintains a policy oversight role to ensure consistency in Commonwealth laws and compliance with human rights obligations.

Modern models for the exercise of coercive powers by Commonwealth agencies exist in numerous Acts of the Parliament. These models include Part XID and XII of the *Competition and Consumer Act 2010* and the powers of the Fair Work Ombudsman under the *Fair Work Act 2009.*

The monitoring and compliance powers in Commonwealth legislation are generally based on a hierarchical model which includes the following concepts:

- Monitoring powers to ensure compliance which can be issued by the relevant agency against all relevant stakeholders;
- Investigation powers which use the "reasonable grounds" test and may also involve seeking warrants from the Courts;
- Civil penalty provisions;
- Infringement notices;
- Enforceable undertakings;
- Injunctions.

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) contains the principle that *"New coercive powers should contain equivalent limitations and safeguards to those in the Crimes Act".* Accordingly, there is a linkage between the nature of the penalty to be imposed (i.e. administration penalty as opposed to a criminal sanction) and the nature of the coercive power that can be exercised. This paragraph of the Guide concludes that *"These provisions contain well-developed safeguards which should form the basis for safeguards in new powers. These should only be departed from where there is strong justification for doing so".*

Paragraph 7.4 of the Guide states that:

> *"While coercive powers may be necessary to ensure effective administration of Commonwealth law, the exercise of these powers infringes upon fundamental rights of individuals, including rights to dignity, privacy and the security of premises. Intrusion upon these rights should not occur without due process and is only warranted where the use of the power is in the public interest.*
>
> *In developing proposals for new coercive powers, agencies should take into account the views of the Scrutiny of Bills Committee in Report 4/2000: Entry and Search Provisions in Commonwealth Legislation and Report 12/2006: Entry, Search and Seizure Provisions in Commonwealth Legislation."*

The above excerpts raise three issues. First, 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 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 disclosure matters under the Electoral Act that it outweighs the public interest in applying the Crimes Act model.

The AEC notes that the UK Electoral Commission has a range of powers and options for enforcement action that were updated in 2010 with the passage of the *Political Parties and Elections Act 2009*. Attached for the information of the Committee is a document from the UK Electoral Commission which sets out its enforcement policy and refers to the legislative options that it has available to it (the UK document). This document can be also found at the following link:
http://www.electoralcommission.org.uk/__data/assets/pdf_file/0003/106743/Enforcement-Policy-30March11.pdf

The AEC notes that the UK document shows that it has separate sets of powers to support its supervisory and investigatory work. The document also shows the range of options that it has available to deal with non-compliance.

The supervisory powers available to the UK Electoral Commission only apply to those who are regulated under *The Political Parties, Elections and Referendums Act 2000* (PPERA). These powers support the monitoring of compliance by regulated organisations and individuals.

The investigatory powers available to the UK Commission extend to individuals and organisations beyond those who it regulates. The investigatory powers (to require documents, information or to attend an interview) are used 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 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. One 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 Commonwealth laws in the Guide issued by the Attorney-General's Department.

9. In the case of the circumstances raised in the FWA Report, what additional powers would have been needed to take action in relation to these matters? For example, when it was determined that you did not have 'reasonable grounds' to initiate an investigation, what specific legislative changes to the coercive powers would have enabled the AEC to mount an investigation?

The AEC's understanding is that the Commonwealth policy for investigations powers (as opposed to monitoring powers) is that 'reasonable grounds' must exist before such a power can be lawfully exercised. The AEC notes that this is similar to that which applies in the UK.

The AEC is on record (the inquiries made into Coastal Voice) in relation to the current legal test and its understanding of how it is to be applied. The power in subsection 316(3) of the Electoral Act has several limitations. The authorised officer must have:

i. "reasonable grounds";
ii. to believe that a specified person;
iii. is capable for producing documents 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(3A) of the Electoral Act has several limitations. The authorised AEC 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 for 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".

The AEC applies the scope of "reasonable grounds" test as indicated by the High Court decision in *George v Rockett* (1990) 170 CLR 104 at 115 (not dealing with the Electoral Act but with the Queensland Criminal Code Act) that:

> *"When a statute prescribes that there must be "reasonable grounds" for a state of mind – including suspicion and belief – it requires the existence of facts that are sufficient to induce the state of mind in a reasonable persons."*

Accordingly, facts must exist which are sufficient to induce the state of mind in a reasonable AEC officer that a relevant person has documents or evidence relating to a contravention, or possible contravention, of section 315 of the Electoral Act or that an entity is an "associated entity".

Combining the above would appear to result in the "reasonable grounds" tests in subsection 316(3A) of the Electoral Act requiring (i) the existence of facts sufficient to induce the state of mind in a reasonable person and (ii) those facts may not necessarily be established at a high standard of proof.

Whether these existing powers and the "reasonable grounds" threshold should apply to disclosure matters under Part XX of the Electoral Act is a matter of weighing up the relevant public interests as discussed in the response to Question 8 above.

However, the AEC also notes that, in its dealings with the HSU National Office and the NSW Branch of the ALP in this matter, the AEC has received full cooperation and responses to inquiries without the need to use any of its coercive powers.

Measure 16—Deem registered political parties to be bodies corporate for the purposes of Part XX of the Electoral

10. Can you provide details of any examples of this approach being taken in comparative jurisdictions? If so, how successful has it been?

The issue of whether or not a political party is a legal entity separate from its members appears to be peculiar to Australia. In other jurisdictions corporate entities are able to apply to be registered as political parties (see section 376 of the *Canada Elections Act 2000*).

The AEC also notes that in Western Australia, the provisions of the *Associations Incorporations Act 1987* enable 5 or more members of a 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 incorporation.

The AEC again notes that paragraph 10.34 of the September 1983 First Report of the Joint Select Committee on Electoral Reform (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."*

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 and then pursuing 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.

Measure 17—Introduce provisions with greater certainty about who has the relevant reporting obligation

11. The AEC submissions indicated that in other areas, such as corporations or industrial law, there is a clearly defined person with reporting obligations. How could this operate in relation to disclosure and expenditure reporting obligations? How might this affect the imposition of penalties for noncompliance?

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 for lodging returns and maintaining the campaign accounts.

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 reporting 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.

The AEC trusts that the above information is of assistance to the Committee.

Yours sincerely

Paul Pirani
Chief Legal Officer

13 July 2012