

HSU Points

The National Office of the HSU has lodged third party political expenditure returns for 2006/07 (\$404,292) and 2007/08 (\$586,673). They also lodged a donor return for 2007-08 showing two payments totalling \$12,511.40 to the NSW Branch of the ALP. The returns were lodged on 13 October 2009 and were therefore in breach of subsection 315(1) of the *Commonwealth Electoral Act 1918* (Electoral Act) for failing to lodge within the required time. This aspect will be referred to the Commonwealth Director of Public Prosecutions (DPP).

The *Sydney Morning Herald* (SMH) allegations appear to be there was a wide range of HSU expenditure authorised by Mr Thomson that occurred in the Dobell electorate and that this had not been disclosed. However, examining the items that the SMH allege to have been expended there are issues about whether they are even reportable in any disclosure return under the Electoral Act.

The two relevant legal tests in the Electoral Act which have to be met before a reporting obligations arises are (i) that it is a "gift" as defined in subsection 287(1) of the Act involving a "disposition of property" or the "provision of a service" and (ii) that it is not for personal use and is "solely or substantially" for the purpose related to an election (see subsection 304(5)). Unless both of these tests are met and the amounts involved are greater than the disclosure threshold then there is no donor reporting obligation or candidate reporting obligation. The majority of the allegations in the SMH of expenditure by Mr Thomson from HSU funds does not appear to meet these two tests, in particular the expenditure was not "solely or substantially" used for the purposes of the 2007 federal election.

The third party electoral expenditure reporting obligation arises under section 314AEB of the Act where the expenditure is used for a number of matters including the "public expression of views on an issue in an election". The "Your right at work" campaign run by the unions in the lead up to the 2007 general election was clearly within the scope of section 314AEB. The HSU National Office has disclosed that substantial sums were expended in 2006/07 and 2007/08 which are clearly in excess of any amounts alleged by the SMH to have been expended by in Dobell.

The relevant AEC's investigation powers in section 316 of the Act are twofold. First, in relation to political parties and the financial controller of an associated entity, the power in subsection 316(2A) can be used to compel the production of evidence "for the purpose of finding out whether a prescribed person has complied with this Part". In the case of the National Office of the HSU, the available evidence is that various Branches of the HSU which are separately registered under the Fair Work Act 2009 are an "entity", but that the National Office of the HSU is not an "associated entity" under the Electoral Act. Accordingly, this power cannot be used and the AEC

is not able to use this power to confirm whether or not the National Office of the HSU has complied with the reporting obligations and included all relevant expenditure.

The second power is in subsection 316(3) of the Act. This power is more limited and requires several things. First, the holding of the view by the authorized officer that there are “reasonable grounds” for believing that there has been a breach of the Act. The only probative evidence of a breach of the Act that the AEC has at this time is that the HSU National Office returns were lodged too late, not that their contents are misleading or incorrect in a material particular. Second, that the documents covered by the notice to produce must be “evidence relating to a contravention or possible contravention” of the reporting obligations. Both of these matters require the “reasonable grounds” test to be satisfied which the AEC applies the test espoused 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 person. The AEC is of the view that such facts do not presently exist.

The BDO Kendall report would not fall within the scope of this test as it is not relevant to any allegation of a contravention of the Act (i.e. the late lodgement) based on probative evidence that is available to the AEC.

The AEC has concluded that while there is a breach of the Electoral Act for late lodgement, there is no public interest at stake that would see the AEC take any further action in relation to late lodgement of the returns. This is because the principle aim of the Act is to secure their lodgement and make them available for public inspection and, in any event, prosecution of the responsible individual would ultimately be a matter for the DPP to determine

The AEC await the results of the inquiry by Fair Work Australia before contemplating whether any further action may be required.