



AEC

Australian Electoral Commission

AEC Ref: 07/1228

Senator Guy Barnett
Liberal Senator for Tasmania
33 George Street
LAUNCESTON TAS 7250

Original by facsimile: (03) 6334 1624

Dear Senator Barnett

I refer to your letter dated 14 April 2010 addressed to the Acting State Manager of the Australian Electoral Commission (AEC) in Tasmania concerning further allegations that certain unnamed persons may have breached the requirements of section 326 of the *Commonwealth Electoral Act 1918* (the Electoral Act) in relation to the decision by Mr Kevin Harkins not to nominate as a candidate on behalf of the Australian Labor Party for the Division of Franklin for the 2007 general election. I also refer to our subsequent telephone conversations in which you were advised that I was dealing with this matter on behalf of the Australian Electoral Commission (AEC).

I also note our previous advice that the AEC has no investigatory powers in relation to allegations of breaches of the offences contained in Part XXI of the Electoral Act. The AEC has no power to obtain information in matters involving serious criminal offences. The AEC has no power to interview witnesses or to obtain statements from third parties. The AEC has no power to obtain search warrants or to otherwise compel the production of information and documents. The established process for dealing with such allegations is that the AEC undertakes a preliminary assessment of the material and if there is any relevant evidence that could sustain a criminal investigation, the matter is referred to the Australian Federal Police (AFP).

As you are aware from my letter to you dated 8 January 2008, the AFP have previously advised the AEC that Mr Harkins was not prepared to take part in an interview or to provide a statement that would be admissible in evidence in possible criminal proceedings.

The AEC has recently obtained sought external legal advice from the Office of the Director of Public Prosecutions (DPP) on a number of issues surrounding this matter, including both the scope of the offence in section 326 of the Electoral Act and the "prima facie" evidence contained in both the *7.30 Report* transcript and the previous media reports. The DPP advice received by the AEC does not support the taking of any further action on this matter, particularly given the limited scope of the available evidence. Let me explain the reasons for this view.

Senate F&PA Committee

Tabled Document

Inquiry: Budget Estimates 10-11

Date/Time: 27 May '10, 4:10pm

Witness Name: Sen. Barnett

Organisation:

One of the key elements of the offence is that the "understanding" in subsection 326(1)(b) must be a common understanding reached between each person involved. Further, for the offence in subsection 326(2) to be established, the "intention" of the person giving or conferring the property or benefit must be established.

M The material from the *7.30 Report* transcript does not contain any precise details of the conversation that apparently took place in 2007. It is possible that evidence could be obtained that may show an intention on others who attended that meeting to affect Mr Harkins' candidature in return for a promised benefit. However, the current available material appears to support an alternative conclusion based on the perceived effect that Mr Harkins' candidacy may have had on other electorates in Tasmania. The material used in the *7.30 Report* appears to indicate that there was agreement from those involved in the meeting that it would be in the best interests of the Australian Labor Party (ALP) for Mr Harkins not to stand as a candidate at the 2007 election but that this could change in later elections. This alternate conclusion is further supported by the letter that Mr Harkins sent to the ALP dated 7 April 2010 in which he stated that he "stood aside in the best interests of the party".

The above statement by Mr Harkins is also relevant in examining the issue of causation that arises in both paragraph 326(1)(b) and section 326(2) of the Electoral Act. If Mr Harkins did stand aside because he believed that it was in the interests of the party, this would tend to suggest that any discussion about future benefits were not made with the intention to influence or affect his candidature. Further, there are some discrepancies in the transcript about the nature of the alleged promise. The transcript records Mr Harkins as stating that the commitments were about what "might" happen to him in the future if he stood aside. This would not appear to be an absolute commitment that could be regarded in a criminal prosecution as amounting to "any property or benefit of any kind". Indeed, the extract of the letter cited by the *7.30 Report* from Mr Harkins to the Prime Minister, the Hon Kevin Rudd MP, refers to his "sincere hope" that his earlier letter "has cleared the air so I may contest federal preselection unfettered". This suggests that Mr Harkins was not convinced that he would be able to contest the next ALP federal preselection unfettered. Given that this letter was dated 18 August 2009, this would appear to support a conclusion that Mr Harkins' understanding of what took place in 2007 was that no absolute commitment had been made but merely a discussion about future possibilities were discussed.

A further issue is the scope of paragraphs 326(1)(b) and 326(2)(b) of the Electoral Act in dealing with "any candidature of another person". Historically the Courts have been reluctant to become involved in the internal disputes of voluntary associations such as political parties (see *Cameron v Hogan* [1934] HCA 24). However, this situation has now been changed with the advent of the payment of public funds to political parties (see *Clarke v Australian Labor Party (SA Branch)* [1999] SASC 365 and *Coleman v The Liberal Party of Australia, New South Wales Division (No.2)* NSWSC 736).

The AEC is not aware of any previous view that the scope of the Electoral Act includes the internal activities of political parties in relation to the preselection of candidates who would subsequently be endorsed on behalf of a registered political party. I note that when the original bribery provisions were inserted into the

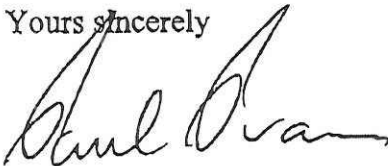
Commonwealth Electoral Act 1902 (see section 59 of the Act No. 26 of 1905) the provision dealing with bribery of a candidate (section 206A) only applied to any person who had announced themselves as a candidate "within three months before the day of the election". This provision was inserted following an investigation by a Select Committee appointed by the House of Representatives.

In 1918, the Electoral Act replaced the various bribery provisions with a new bribery offence in section 156 and a separate undue influence offence in section 158. Both of these provisions included the term "candidature". There is no indication in the parliamentary debates that there was some intention for these amendments to extend the operation of the criminal offences for an unlimited period of time prior of the official nomination of candidates after the issue of the writs for an election. While it has been unnecessary to resolve this issue at the present time due to the limited available evidence, nonetheless this will remain an issue if further evidence comes to light of the events that apparently took place in early August 2007.

The current material available to the AEC does not provide sufficient evidence that there was a promise or offer of any property or benefit to Mr Harkins in 2007 that was made with the intention of influencing or affecting his candidature as an endorsed ALP candidate for the Division of Franklin. Accordingly, the AEC is unable to take any further action on this matter.

I trust that the above information is of assistance in explaining the position of the AEC and the reasons why this matter is unable to be progressed in the manner that you have requested. Thank you for bringing your concerns to the attention of the AEC. If you have any queries, I can be contacted on (02) 6271 4474.

Yours sincerely



Paul Pirani
Chief Legal Officer

21 May 2010