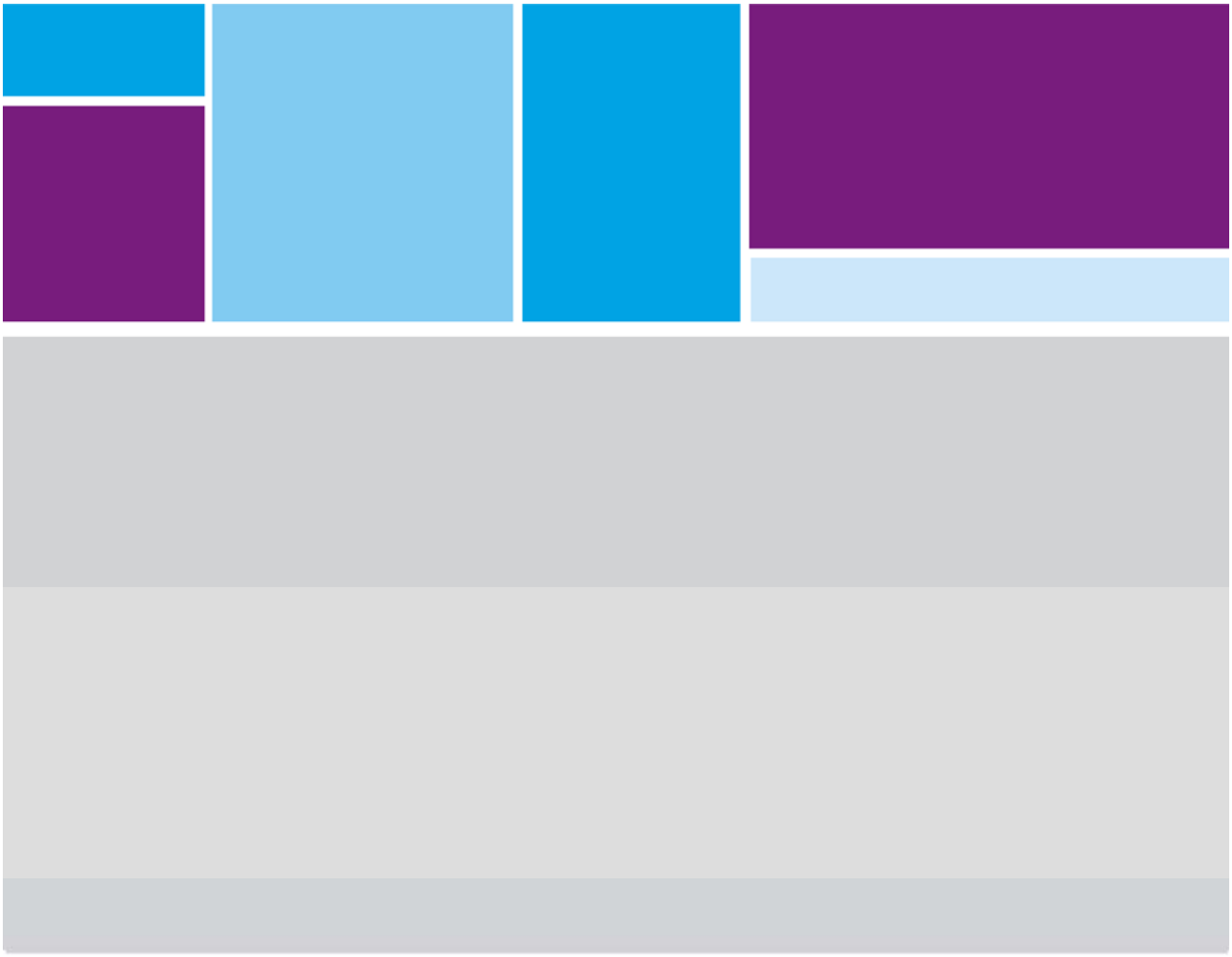
Submission to the Joint Standing Committee on Electoral Matters on the Inquiry into the AEC analysis of the FWA report on the HSU

21 June 2012



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Background

On 16 May 2012 the Australian Electoral Commission (AEC) posted to its website an analysis of possible disclosure obligations arising out of information detailed in the Fair Work Australia report: *Investigation into the National Office of the Health Services Union under section 331 of the Fair Work (Registered Organisations) Act 2009* (the FWA Report). On the same day, the Special Minister of State (SMOS), the Hon Gary Gray AO MP, asked the Joint Standing Committee on Electoral Matters (JSCEM) to inquire into this targeted analysis by the AEC.

Included in the SMOS's request to the JSCEM was a list of 17 measures for consideration of possible changes to the disclosure provisions in the *Commonwealth Electoral Act 1918* (the Electoral Act). This list was prepared by the AEC after a a request from the SMOS in the context of the analysis of the FWA Report to nominate issues concerning the operation of the Electoral Act that could be considered for possible change. In this submission the AEC seeks to expand on these 17 measures. To put the current disclosure scheme in context this submission commences with a summary of the major relevant changes that have occurred since its inception.

As discussion specific to the disclosure obligations arising out of the AEC's analysis of the FWA Report is already on the public record, the AEC has not further discussed these matters in this submission, but rather, has attached and provided an update on its existing commentary. The AEC's original analysis of 16 May 2012 is included at Annex 1. In addition to this analysis, the AEC tabled a document at the hearing of the Senate Finance and Public Administration Legislation Committee – Estimates (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* which contained an outline and timeline of the action taken by the AEC in dealing with the allegations involving the Health Services Union. This document discusses the current provisions of the Electoral Act and how they influenced the actions that were under consideration by the AEC in dealing with the allegations involving electoral expenditure incurred on credit cards issued by the Health Services Union National Office. A copy of this document is provided at Annex 2. An update as at 21 June 2012 on the AEC's inquiries into these matters is included at Annex 3.

Evolution of Disclosure

Genesis of the Disclosure Scheme

The first proposal for a public disclosure scheme was recommended in the April 1981 *Report of the Inquiry into Disclosure of Electoral Expenditure* conducted by Sir Clarrie Harders (the Harders Report). While this report did not lead to any legislation, it did inform an inquiry by the Joint Standing Committee of Electoral Reform (JSCER). The *First Report* of the JSCER was released in September 1983 and the Government's response to that report's recommendations for the introduction of public disclosures formed the basis for the final scheme passed into legislation.

Passage of the original provisions was secured in December 1983 and commenced by proclamation on 21 February 1984. The scheme has been altered substantially in the intervening years. This has come about often by way of regular incremental changes to ongoing requirements rather than arising out of fundamental shifts in overall objectives.

The election funding and financial disclosure provisions are found in Part XX of the Electoral Act.

The Original Disclosure Scheme – 1984

The disclosure scheme was introduced into the Electoral Act as part of the wide ranging changes ushered in by the *Commonwealth Electoral Legislation Amendment Act 1983*. The original scheme was confined to disclosures of donations and nominated categories of campaign expenditure directly relevant to federal election campaigns. It was introduced in tandem with an election funding scheme.

Political Parties

Federally registered political parties and their State/Territory branches lodged returns of:

- the number and total value of donations received during the disclosure period and used in funding the election campaign, along with details of donors who contributed $1,000 or more; and
- electoral expenditure incurred under specified categories, being:
  - broadcasting advertisements
  - publishing advertisements
  - displaying advertisements at a place of entertainment
  - costs of production for the above advertisements
  - costs of campaign material requiring the inclusion of the name and address of the author or the person who authorised it (eg. how-to-vote cards, pamphlets, posters)

- consultants' or advertising agents' fees
- opinion polling or other research relating to the election.[1]

The donation disclosure period ran from the day after the polling day in the previous election to the polling day in the current election.

While the categories of electoral expenditure relate only to activities during the election period – that is, from the issue of the writ until the conclusion of polling – the costs to be disclosed could have been incurred at any time inside or outside the election period.

Political parties[2] were given 20 weeks from polling day to lodge their disclosure returns, whereas all others with a disclosure obligation had 15 weeks from polling day. Parties were not required to lodge 'nil' donation returns, but, candidates and Senate groups did have to lodge 'nil' returns.

Candidates

Candidates in House of Representatives and Senate elections lodged returns of:

- the number and total value of donations received during the disclosure period and used in funding the election campaign, along with details of donors who contributed $200 or more; and
- costs incurred under the specified categories of electoral expenditure.[3]

The disclosure period covering donations received commenced:

- if a candidate had stood previously in a federal election or by-election (within the last four years for the House of Representatives or seven years for the Senate), on the day after the polling day in the last election contested; or
- if a candidate had not stood previously at such an election, on the date that their candidacy was declared; and

concluded on polling day.

Senate groups

Federally registered political parties and their State/Territory branches lodged returns of:

[1] The categories of electoral expenditure are largely similar to those that exist in the current definition found at s.308 of the Electoral Act). The single difference is that consultants and advertising agents' fees were replaced in the definition from 1995 onwards by the costs of production and distribution of direct mail.
[2] All references to 'political parties' in this submission includes registered political parties and their unregistered State/Territory branches, all of which have identical disclosure obligations under the Electoral Act.
[3] The electoral expenditure of candidates who were members of a Senate group were not disclosed on their candidate returns, but, required to be consolidated and reported in the return lodged by the group

- the number and total value of donations received and used in funding the election campaign, along with details of donors who contributed $1,000 or more; and
- costs incurred under the specified categories of electoral expenditure.

The disclosure period applying to the disclosure of donations received commenced:

- on the day the group was registered with the AEC;[4] or
- on the day that a claim to be grouped on the ballot paper was formally made to the AEC; and

concluded on polling day.

Third parties

Third parties (i.e. anyone other than a political party or candidate) lodged returns of:

- donations received and used in whole or in part to incur or reimburse $1,000 or more in expenditure for a political purpose[5] incurred during the election period; and
- costs incurred under the specified categories of electoral expenditure where those costs exceeded $200.

Broadcasters

Broadcasters had to lodge a disclosure return for each station within the group listing details of electoral advertisements placed by or on behalf of political parties, candidates and by others commenting on an election issue, political parties or candidates. The details to be disclosed included the amounts charged for each broadcast advertisement.

Publishers

Publishers had to lodge a disclosure return for each publication within the group listing details of electoral advertisements placed by or on behalf of political parties, candidates and by others commenting on an election issue, political parties or candidates. The details to be disclosed included the amounts charged for each advertisement. A return only had to be lodged for a publication if charges for electoral advertisements totalled $1,000 or more.

Printers

Printers had to lodge a disclosure return where it produced or printed an electoral advertisement (other than one published in a newspaper etc), handbill, pamphlet or notice with the authority of a participant in the election. The details to be disclosed included the

[4] Up until June 1987 a system of candidate registration operated. Registration was replaced by the current system of candidate nomination.

[5] Expenditure for a political purpose was distinct from electoral expenditure. It covered: campaigning in the election in support of, or in opposition to, a political party, candidate or Senate group; publicly expressing views on an issue in the election; making donations to a political party, candidate or Senate group; and making donations to another person on the understanding that it would be used for these purposes.

amounts charged for each print job. A return only had to be lodged, however, if charges totalled $1,000 or more.

History of Major Developments in the Disclosure Scheme

3 June 1987

Printers

Printers were no longer required to lodge disclosure returns.

Third parties

The period covering expenditure for a political purpose (used in determining whether there was an obligation to disclose donations received) was extended from the election period to the period from the day after the polling day in the previous election to the polling day in the current election.

9 February 1990

Campaign Committees

All transactions of the campaign committees of endorsed candidates and Senate groups are deemed to be transactions of the relevant political party. That is, the transactions of a candidate's campaign committee are not to be disclosed on the candidate's return, but, must be disclosed in the consolidated disclosure return of their endorsing political party irrespective of whether those transactions were considered to have been entered into on behalf of the party.

Senate groups

Senate groups, all of whose members were endorsed by the same political party[6], were no longer required to lodge disclosure returns. The transactions of these Senate groups were, like campaign committees, to be incorporated into the disclosure returns of the endorsing political party.

Broadcasters and Publishers

The timeframe for lodgement of disclosure returns by broadcasters and publishers was reduced from 15 weeks to 8 weeks after polling day.

[6] Joint Senate groups (groups containing members endorsed by two or more political parties) continued to be required to lodge separate disclosure returns.

19 December 1991

Political Parties

Political parties were no longer required to lodge election disclosure returns of donations received or electoral expenditure. This change was made in conjunction with the introduction of annual disclosures by political parties.[7]

Compliance Reviews

The AEC was empowered to conduct investigations, termed compliance reviews by the AEC, to determine whether the agent of a political party or a 'prescribed person' had complied with their disclosure obligations. The concept of prescribed person was introduced at this time, being anyone listed by the AEC in a s.17(2) report on the operation of the funding and disclosure schemes as having an obligation to lodge a third party election return of donations received or of electoral expenditure incurred.

11 June 1992

Political Parties

Financial year disclosure returns were introduced for political parties extending disclosure beyond federal election-related transactions to all receipts, payments and outstanding debts. The names, addresses and total sum of transactions had to be provided of persons who reached a threshold of $1,500 or more under receipts, payments or debts, along with the date and value of each receipt from persons who had reached the disclosure threshold.

These annual disclosures were further expanded by Regulations gazetted on 24 September 1992. These regulations broke down disclosures of receipts and payments into a number of sub-categories. These disclosures are detailed in Annex 1.

(The scheme of annual disclosures was largely unchanged in substance from what had been introduced into the legislation in 1991, but, important differences were: the lodgement period was extended from 8 weeks after the end of the financial year to 20 weeks;[8] and the public disclosure date was shifted out from the end of September to the first working day in February. The replacement of Division 5A delayed commencement of annual disclosures by a year.)

[7] Subsequent to the High Court decision in *Australian Capital Television Pty Ltd v Commonwealth [1992]* Division 5A of the Electoral Act which provided for annual disclosures by political parties was repealed and replaced by a new Division 5A in 1992.
[8] Reduced to 16 weeks for the 1994/95 financial year onwards.

Donors

Introduced a requirement for donors who, during the course of the disclosure period in relation to an election, gave $4,500 or more to political parties, $200 or more to candidates and $1,000 or more to gazetted bodies[9] to lodge election disclosure returns, due within 15 weeks after polling day.

15 June 1995

Donors to Political Parties

Annual disclosures by donors to political parties were introduced to synchronise with the disclosures of political parties. Disclosure was required where a donor gave $1,500 or more to a political party in the course of a financial year with disclosure of the date and amount of each separate donation required.[10]

Associated Entities

Annual disclosures were introduced for associated entities of political parties, with the first full year of disclosures covering the 1995-96 financial year. The disclosure obligation extended to entities that were either controlled by or operated wholly or mainly for the benefit of a political party. The substance of these disclosures was linked to those required of political parties, meaning any changes to party disclosure requirements were reflected in the disclosures of associated entities.

Political Parties

Only individual receipts of $500 or more needed to be counted in determining whether a total of $1,500 or more had been received from an individual person/entity and so triggering more detailed disclosure of that person/entity.

The requirement to list details of the individual receipts making up the total sum of amounts received from persons from whom $1,500 or more had been received was removed.

The requirement to lodge an election disclosure return of electoral expenditure was reintroduced.[11]

[9] Gazetted bodies were entities identified as likely to be undertaking transactions on behalf of political parties. This provision remains in the Electoral Act at s.305A(1A), but, has not been utilised since the introduction of associated entity disclosures effectively made it redundant.
[10] An effect of this change was to no longer have donors to political parties subject to compliance reviews by the AEC under s.316(2A) as they no longer fell under the umbrella of being a prescribed person.
[11] This reintroduction of party disclosures of electoral expenditure coincided with election funding being changed from a reimbursement to an entitlement scheme thus eliminating the requirement for parties to lodge claims of campaign expenditure.

1 July 1995

Political Parties

The Regulations governing annual disclosures were repealed.

18 July 1998

Political Parties

The requirement to lodge a disclosure return of electoral expenditure was again removed.

Political parties (and, therefore, also associated entities) no longer were required to disclose details of persons to whom $1,500 or more was paid. That is, only a single line figure for the total of amounts paid in a financial year was now required to be disclosed.

The option was inserted to lodge audited annual accounts in substitution of a disclosure return. These accounts, however, had to be in a form approved by the Electoral Commission.

13 October 1999

Political Parties

The 'transaction threshold' of $500 was increased to parity with the disclosure threshold of $1,500 meaning political parties (and, therefore, associated entities) only had to disclose details of the sum of individual receipts of $1,500 or more.

Donors to Political Parties

Introduced the requirement for donors of $1,500 or more to a political party to disclose details of each donation of $1,000 or more received, at any time, and used to fund their donations made to a political party.

Third Parties

The period covering donations received was extended to "at any time".

Associated Entities

The definition was amended from "operating wholly or mainly for the benefit" to "operating wholly or to a significant extent for the benefit". The term 'significant extent' has no precise legal meaning and has been interpreted in the context of this definition as being one degree removed from wholly for the benefit of a political party.

2 December 2005

Disclosure Thresholds

All thresholds in Part XX of the Electoral Act were raised to amounts of more than $10,000. This figure is indexed annually, with the threshold applicable to the 2012-13 financial year being amounts of more than $12,100.

22 June 2006

Third Parties

The election disclosures of third parties were repealed[12] and annual disclosures required where a third party incurred political expenditure in a financial year totalling more than the threshold. Political expenditure covers:

- public expression of views on a political party, candidate in an election or member of the Commonwealth Parliament by any means;
- public expression of views on an issue in an election by any means;
- printing, production, publication, or distribution of any material that is required by s328 or s328A of the Act to include a name, address or place of business;
- broadcast of political matter in relation to which particulars are required to be announced under sub-clause 4(2) of schedule 2 to the *Broadcasting Services Act 1992*; and
- opinion polling and other research relating to an election or the voting intention of voters.

Where third parties lodging returns of political expenditure have received donations from a single source totalling more than the threshold which were used to incur or reimburse that expenditure, then they are required to disclose the name and address of the donor along with the date and sum of each donation received.

Broadcasters and Publishers

Broadcasters and publishers were no longer required to lodge disclosure returns.

Associated Entities

The definition of associated entity was expanded to include 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.

[12] An effect of this change was to no longer have third party returns of electoral expenditure and donations received subject to compliance reviews by the AEC under s.316(2A) as they no longer fell under the umbrella of being a prescribed person. From this point on prescribed persons essentially constitute only a very small group of donors to candidates.

Summary of Disclosure Changes

The original construction of the disclosure scheme could be argued to have been a reflection of the more decentralised manner in which election campaigns were conducted 30 years ago. As the campaigns of the major political parties in particular have become more centralised, so too has the disclosure scheme has become aligned with the change in the operations of political parties.[13] 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.

The introduction of annual disclosures by political parties (and extended to their associated entities) reached beyond federal election-related transactions to all receipts, payments and outstanding debts of the party, opening up to scrutiny the entirety of parties' financial dealings. But, the Regulations that provided additional break down of receipts and expenditure and the requirement to provide detailed disclosure of expenditure above the threshold from annual returns were repealed. The reason given for these reductions has often been to ease the burden of compliance on political parties[14]

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.

Clear objectives for the disclosure scheme are important in determining what is to be achieved and whether those goals are being met. Expectations of what information can be

[13] This centralisation has also been reflected in the election funding scheme which originally paid funding only to the State branches of political parties, but, now has a variety of options for redirecting those payments to the federal body of political parties.

[14] For example: the Explanatory Statement accompanying the repeal of the regulations gave the reason as being to "facilitate the completion of annual disclosure returns by making them less complex"; the Explanatory Memorandum explained that the introduction of the $500 transaction threshold on receipts was designed to "simplify the record keeping requirements at all levels of the party organisation" and the removal of the requirement to list the individual receipts for persons from whom $1,500 or more had been received was described in the Explanatory Memorandum as being intended to "greatly reduce the amount of detail to be included in an annual return".

divined from disclosures often do not match what is required by the present scheme. A regular inquiry made of the AEC is how information can be obtained on the donations and expenditures relevant to election campaigns for individual political parties and for particular electorates or campaigns. Disclosures do not provide information that allows such analyses. Endorsed candidates of the major parties almost always lodge 'nil' returns following an election. Political parties' returns of electoral expenditure have not been required to be lodged since the 1998 federal election. Another regular inquiry relates to what donations or expenditure has been undertaken by a particular class of person/entity (such as grouping donors or third parties by the industry they may be active in). Again, this expectation cannot be satisfied from the raw data released in disclosure returns.

The shift of disclosures to political parties along with the change of political party, political party donor and third party disclosures to being solely financial year based also means that disclosures relevant to an election are now split between election period disclosures and financial year disclosures. This split further complicates analysis and interpretation of that information. For example, the 21 August 2010 federal election saw the disclosures of candidates, Senate groups and donors to candidates[15] released on 7 February 2011 while the disclosures of political parties, donors to those political parties, associated entities and third parties that incurred political expenditure covering the date of the election were released a year later on 1 February 2012.

Possible measures for reforming the Electoral Act

Disclosure threshold

(i) Reconsideration of the appropriate level of the disclosure threshold

The question of what is an appropriate disclosure threshold will be guided by the public policy objective set for disclosures. Setting the threshold is a matter for the Parliament.

Many of the transactions commented upon in the AEC's analysis of the FWA Report did not meet the disclosure threshold of more than $10,500 current at the 2007 federal election. A threshold of 'more than $12,100' will apply from 1 July this year. Greater transparency of who is funding or donating to election campaigns and what those funds are being spent on would require a lower threshold. However, it should be recognised that a decrease in the disclosure threshold will result in:

[15] Essentially these returns only cover donations made to a small number of mostly independent candidates as donations to endorsed candidates are normally treated as donations to their political parties and so are disclosed in the annual returns of the political parties and their donors.

- 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.

Transparency is also influenced by who has the responsibility to disclose transactions and the extent to which figures are broken down, particularly in regard to expenditures which are not required to be itemised on disclosure returns. These matters are further discussed later in this submission.

The appropriateness of a threshold is also relative to its materiality as influenced by a number of factors and circumstances. The practice of donation splitting, for instance, can operate as a multiplier of the nominal threshold before disclosure would be required. One way this can happen is through the Electoral Act's separate recognition of related political parties (typically the federal body and State/Territory branches of a political party). Donations to each of these related parties are separately aggregated for disclosure purposes, meaning that a donor can give up to the disclosure threshold to each related party without being required to lodge a donor return or be disclosed on a party return. Another potential means of donation splitting could be to make donations each under the threshold to a number of candidates during an election campaign, so long as those candidates claim those donations personally and disclose them in the total figure on their election returns rather than in the returns of their endorsing party.

It is also important to not view the appropriateness of disclosure thresholds solely in terms of the finances and operations of large political parties. Smaller parties and independents can be in positions to exercise significant political power and influence, for instance by holding the balance of power in the Parliament. By contrast, their finances can be small by comparison to the large parties and hence the relative value, and so the perception of potential influence, of a donation can be vastly different. "Just another donation" to a major party could be significant to a minor party.

Administrative penalties

(ii) Introduce administrative penalties for objective failures (such as failing to lodge on time)

In its Election Funding and Disclosure Report – Federal Election 2010 (FAD Election Report) the AEC discussed offences contained in Part XX of the Electoral Act that, where establishing the offence was a matter of objective fact, as being appropriate to being converted into administrative penalties. The current arrangement of requiring all offences to be pursued through the Commonwealth Director of Public Prosecutions (CDPP) 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 their work or that a court will record a conviction even in the case of a successful prosecution. For an offence such as failing to lodge a disclosure return by the due date, an administrative penalty seems more appropriate than pursuing a criminal conviction through the courts. Beyond this simply being a more practical approach, the AEC believes that securing compliance would be significantly enhanced from having administrative offences.

Offset penalties against public funding

(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

Because political parties are mostly not entities that are legally separate from the members, the Electoral Act makes the appointed Party Agent (or where no agent appointment is in force, each member of the executive committee – see section 292B), liable for any penalties or recovery of monies. This approach has inherent problems in attempting to make an individual liable personally for matters that the individual may have no knowledge of or which may be a wider responsibility within the political party. This is particularly the case in instances where monies were to be recovered[16] from the personal finances of an individual (the Party Agent) even though that person may have never received or had personal use of those monies because they were paid directly into the bank accounts of the political party and spent by/for the party.

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.

With or without such a deeming of a registered political party as a legal entity under (at least Part XX of) the Electoral Act, there can remain a problem of the potential financial impact on the party / Party Agent, particularly in the case of recoveries of monies which could involve significant sums. 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 only be released if the return is lodged on

[16] The recovery of funds can occur in circumstances of: s.299(6) for overpayments of election funding; s.306 for unlawful (anonymous) gifts received; s.306A for a sum equivalent to funds received from an unlawful loan; and s.306B for gifts made by a corporation which is wound up within the subsequent 12 months.

time. Another method would be to register the sum owed to be offset against future public funding entitlements before their payment.

Such arrangements become even more effective should there be a scheme providing ongoing administrative funding to political parties rather than only from election funding.

Independent auditing of disclosure returns

(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)

The value of any disclosure scheme rests upon the reliance that can be placed on the accuracy and completeness of the information released to public scrutiny. Disclosures lodged under Part XX of the Electoral Act are released to the public without independent verification. That is, they must be taken on trust.

Currently the AEC has powers to conduct the equivalent of audits (compliance reviews under s.316(2A) of the Electoral Act), but, not of all disclosure returns. For example, there is no power contained in the Electoral Act that enables the AEC to conduct compliance reviews of donors to political parties or third parties who incur political expenditure. Even so, 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.

An alternative which is used both overseas and in a number of other areas in Australia (e.g. tax, industrial law, Corporations Act, etc.) is to require the disclosure returns to be audited prior to their lodgement and so be lodged with an audit certificate. It would be the responsibility of the person lodging the return to engage a suitably qualified auditor.

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.

The accountability of auditors beyond their professional bodies would also be important. This could be by way of withdrawal of accreditation through to offences and penalties for serious failures to properly discharge their responsibilities. 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.

While the audit would in many cases be relatively inexpensive for those lodging disclosure returns, it should be recognised that this would not always be the case. In particular, large political parties which can operate hundreds of out-posted party units may be faced with a significant cost.

Abolish associated entities

(v) Abolish "associated entities" and establish a third party scheme similar to Canada and the UK

Associated entities were originally viewed as being arms of the political parties they are associated with and so were required to disclose in the same level of detail as parties. Third parties disclosures of political expenditure were only introduced in 2006 in recognition that there were significant gaps in the reporting of expenditures incurred during a political campaign. The third parties were assumed to not have the same intimacy in their relationships with political parties, substantially undertaking operations that are not considered to be either on behalf of or primarily for the benefit of a political party. Accordingly, their disclosures are not comprehensive of their entire operations, being limited to particular transactions specified under the Electoral Act.

The issue here is threefold. Firstly, the difficulties arising from the complexity of the definition of an "associated entity" can result in a lack of certainty as to what is an "associated entity". Secondly, whether the current disclosure obligations achieve the purposes of transparency and accountability to electors during the conduct of election campaigns. Thirdly, whether there is some useful distinction that can be drawn between an "associated entity" and a third party incurring political expenditure during an election campaign.

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. 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. Other parts of the third party's business which have no direct relationship to the election campaign activities are, therefore, not required to be reported against.

Establish campaign accounts

(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*

Dedicated campaign accounts into which all campaign donations must be deposited and only out of which can campaign expenses be paid would greatly enhance accountability. Many political parties operate their election campaigns out of multi or general purpose accounts and it is not uncommon for small parties and independent candidates to conduct their election campaigns through their personal accounts. In these circumstances it can be exceedingly complex to try to identify which debits and credits (particularly receipts/donations) relate to the election campaign and which are for general or private purposes. The AEC is not suggesting that political parties should only have one campaign account at either a state or federal level. The internal structures of political parties are a matter for the members of each political party to determine. If a political party wishes to be structured on a federal, state and local level, then this should be able to continue. However, the receipt of donations and expenditure of funds on an election campaign should only lawfully occur where the particular account has been disclosed to the AEC and specified to be a campaign account.

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.

Ready access to those accounts, such as through AUSTRAC, would also facilitate easier and more timely resolution of inquiries into the completeness and accuracy of the disclosure record.

Inevitably the completeness of campaign accounts and whether all campaign related finances have been transacted through those accounts will be queried. To this end there would still be a requirement for comprehensive disclosures to allow the public to form views in this regard, or to challenge disclosures. Any role expected of the AEC in conducting compliance reviews and investigations of campaign accounts would need to be clearly articulated, as this would potentially be a very resource intensive role to fulfil.

Electronic Lodgement

(vii) Require the electronic lodgement of all returns to the AEC (with the power for the Electoral Commissioner to grant some exceptions)

Disclosure was introduced in 1984 before the widespread use of computers or on-line technology. All disclosures were prepared and lodged in hard copy. The AEC used to fulfil its obligation under s.320 of the Electoral Act to have copies available for public inspection at its principal capital city offices in each State/Territory by photocopying multiple copies of every return and making them available in folders.

The AEC moved with the 1998-99 annual returns to have the information on them entered into a database which was available, along with imaged copies of the original returns, to be accessed via the internet. This offered the public vastly improved access and capacity for analysis irrespective of their physical location.

The AEC has more recently complemented this on-line public access service through the development of an on-line lodgement system for disclosure returns. As most persons and entities with disclosure obligations now record their finances electronically, from simple Excel spread-sheets where relatively immaterial sums are involved through to proprietary accounting software packages for the larger political parties and associated entities, uploading disclosure information to the AEC's on-line lodgement system is a straightforward matter.

Nevertheless, not all political parties and associated entities have chosen to utilise electronic lodgement and continue to lodge manual disclosure documentation.[17] As a result there remains a significant volume of data that must be manually data entered by AEC staff. 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. If more timely disclosure becomes a requirement,[18] 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.

[17] The answer to Question on Notice F74 to Senate Estimates provided the following data for the 2010/11 financial year: 40% of the annual returns from registered political parties were lodged online with the online lodgement rates for associated entities, donors to political parties and third parties running at 45%, 52% and 47% respectively.
[18] As discussed under item (xi) below.

While necessary overall, in recognition that lodgement by electronic means may not be possible for everyone with a disclosure obligation a discretion should be provided allowing the Electoral Commissioner to waive the requirement for persons who can establish that they are not able to reasonably comply. Consideration in exercising such discretion would need to take account of individual circumstances beyond 'inconvenience' and any costs involved.

Extend the time period for the retention of records

(viii) Require the period for the retention of records in section 317 and the related offence in in section 315(2)(b) be increased to 7 years

Apart from offences arising out of straight matters of fact known to the AEC, such as the failure to lodge a disclosure return by the due date,[19] securing evidence of breaches of the disclosure provisions sufficient for possible prosecution action necessitates inquiries of external parties. This evidence nearly always takes the form of supporting records to the financial transactions in question.

Currently s.317 requires a person who makes or obtains records supporting disclosures to keep those records for a period of three years. This period is in line with the limitation under s.315(11) of three years in which a prosecution of an offence can be commenced, thus being a logical connection given the necessity of supporting records as evidence for possible prosecution action. The period of three years also coordinates with the normal electoral cycle.

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.

A period of seven years, such as required for taxation purposes, would provide more flexibility for inquiries and investigations into possible contraventions of the disclosure provisions of the Electoral Act.

In discussing s.317, it is important to note that the current construction of the section limits its reach to records relating to disclosures in election returns only.[20] 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.

[19] As discussed earlier, offences such as this could perhaps be more appropriately dealt with as administrative offences rather than through criminal court proceedings.
[20] The AEC has previously identified this anomaly and recommended in its *Funding and Disclosure Report on the 1993 Federal Election* that the requirement to retain records be amended to at least three years after the due date for lodging the return.

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.

Minimum standards of record keeping

(ix) Insert a new offence for a person who fails to make records to enable complete and accurate disclosure

The Electoral Act does not demand any minimum standards of record keeping. While there is a requirement, in certain instances as discussed above, to retain a record made or obtained, there is no obligation on a person to in fact make or obtain any records in the first place. This is a somewhat anomalous situation as it becomes impossible to discharge disclosure responsibilities if the record keeping of the person/entity is not competent for that purpose.

Compliance reviews of disclosure returns, or more serious investigations of possible offences against the disclosure provisions can be effectively frustrated by inadequate records. 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.

A failure to maintain adequate records may not always be deliberate or premeditated. The AEC's experience through its compliance review programme is that there are highly variable standards of record keeping being observed. It is also not always correct to assume that the competence and professionalism of record keeping increases in line with more revenues coming into a political party. In many political parties it appears that administrative support staffing has been subject to savings pressures, or are simply not acknowledged as being a function important enough to be adequately funded. In what is a strongly competitive market for accounting staff the staff employed by political parties are not always sufficiently skilled to cope with the added responsibility of maintaining records suitable to support what can be complex disclosure obligations.

To ensure that adequate records are competently maintained, the Electoral Act could specify that there it is necessary for a person to initiate and obtain appropriate records which allow that person to fully comply with the disclosure provisions of the Electoral Act.

Increase Penalties

(x) Increase relevant criminal penalties that are fraud related (eg knowingly providing false and misleading information in a return)

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). There is one term of imprisonment (for 6 months) included under offences in Part XX, being for knowingly providing false or misleading information in purported compliance with a notice of investigation issued under s.316. 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.[21]

The seriousness of an offence should be reflected in the penalty that attends it. This not only encourages compliance but assists in enforcement. Consideration could be given to what would amount to appropriate penalties for offences under Part XX of the Electoral Act, in particular those that are fraud related.

More timely disclosures

(xi) Require more frequent reporting of relevant expenditure and receipts

There is no particular purpose mandated by the Electoral Act to which the AEC is meant to put disclosure information, the AEC's primary function being to operate as the conduit to making disclosures available to public scrutiny. It is the public who are the users of disclosure information.

For investors who are users of the financial statements of public companies the timeliness of the receipt of information is important to their decisions. Hence there are requirements for timely notification of changes to profit forecasts and the like rather than making investors and others wait for annual reports to be published. Timeliness is similarly important to the relevance of financial disclosures under the Electoral Act.

Australia operates a public disclosure scheme. The point of the scheme is for disclosures to be open to public scrutiny so that the public can make use of that information. That use is probably not so much about assessing strict legal compliance with disclosure obligations (given there are few restrictions placed on the financial operations of political parties, candidates and others by the Electoral Act). The absence of restrictions on how funds are obtained and expended indicates that it is for the public to make judgements about the ethics and desirability of financial arrangements, in particular in relation to

[21] The value of a penalty denotes the relative severity of an offence and is a factor taken into account by the CDPP when assessing whether to accept a brief of evidence and pursue prosecution.

matters such as possible conflicts of interest. These judgements may then influence how individuals vote at an election.

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 contemporaneously, or as close to contemporaneously as practical.

Separate campaign committee disclosures

(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[22]

As can be seen from the earlier discussion of the evolution of disclosure, the scheme as originally introduced intended disclosures to be made at the electorate level. As also previously mentioned, the AEC regularly receives requests as to how the donations made to and expenditures incurred for individual electorates by endorsed candidates can be separately identified. The public, and the AEC, however, are in no position to be able to distil this information and so to form any opinion as to the completeness or accuracy of the disclosures covering the activities of endorsed candidates, endorsed Senate groups and their campaign committees from the information contained in returns being lodged.

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 could include a requirement for expenditures of political parties that are specific to an electorate (or to the Senate campaign) to be included in the disclosures lodged for the relevant campaign committee. Similarly, any donations accepted by, or campaign expenditures authorised by or on behalf of the candidate could also be required to be incorporated into this return irrespective of whether they were transacted through the formal campaign committee. This then provides a picture of the activity at the electorate level (or Senate group level). At the very least this would provide some indication as to whether it would appear that disclosures are complete (for instance, for a candidate and political party active in an electorate, a return lodged for that campaign committee that discloses immaterial sums would immediately raise questions about those disclosures).

[22] And for each State/Territory in the case of a campaign committee of a Senate group.

Review periods applying to disclosure obligations

(xiii) Review the "disclosure period" and the "election period" in relation to disclosure obligations and new candidates who are seeking pre-selection

The disclosure period for the disclosure of donations received by candidates that have stood previously at a federal election within the last four years for the House of Representatives or seven years for the Senate runs from the 31st day after the previous polling day to the 30th day after the current election's polling day. Therefore, disclosure is continuous upon candidates until they cease to contest elections. However, this breadth of coverage does not apply to first time candidates. The disclosure period for these candidates commences upon the earlier of the announcement of their candidacy or formal nomination (or for a person appointed to a casual Senate vacancy, from the date of that appointment). In practical terms, for endorsed candidates this means the date of their formal pre-selection while for all but the highest profile independent candidates it means the date of nomination.

While calculating the commencement date in this manner may appear logical it is inconsistent with the disclosure obligations of their donors who are required to observe a disclosure period commencing from the 31st day after the last general or Senate election. Extending the disclosure period for first time candidates by having it commence on the 31st 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.

The election period governing the disclosure of electoral expenditure runs from the date of the issue of the writ through to the close of polling on polling day. This period has remained unchanged since Part XX was introduced into the Electoral Act in 1984. Campaigning is now substantially different, with an important change being that 'proxy' campaigns often commence before an election is announced.

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).

Increase the AEC's coercive powers

(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

The AEC has previously raised with the JSCEM the issue of clarifying the role expected of it in administering the disclosure provisions of the Electoral Act. In its submission (no.11) of 26 April 2004 to the JSCEM's *Inquiry into Disclosure of Donations to Political Parties and Candidates* the AEC observed:

> '… there seems to be an expectation that the AEC, at least in relation to financial disclosure matters, plays a regulatory role similar to that performed by the Australian Competition and Consumer Commission (ACCC). The AEC does not see its roles or it powers as being on a par with the ACCC. However, if the JSCEM considers this to be the case, the AEC would appreciate input on how it is seen the AEC should fulfil such a role. The JSCEM may also wish to make recommendations as to the sort of powers the AEC should have to enable it to carry out such a role. The AEC could then consider, in concord with the Australian Government Solicitor and the Office of Parliamentary Counsel, what amendments may be necessary to the Electoral Act to provide such powers.'

The current requirement for there to be 'reasonable grounds' before the AEC can use its coercive information gathering powers under s.316(3) of the Electoral Act limits the use of that power. 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.

Also, a more activist role for the AEC in conducting investigations will necessarily require additional resources. If there is to be an expectation that the AEC should assume some increased level of responsibility for checking the completeness and accuracy of disclosure returns lodged with it, then, depending on just what is expected, this may require a significant increase in resourcing.

Expand the definition of Electoral Expenditure

(xv) Expand the categories of "electoral expenditure" that are to be disclosed to include campaign staff, premises, office equipment, vehicles and travel

As discussed earlier, the disclosure of electoral expenditure is now only required of House of Representatives candidates and jointly endorsed or unendorsed Senate groups. Nearly all endorsed candidates lodge 'nil' disclosure returns, and independent candidates and Senate groups mostly lodge returns disclosing immaterial sums, if anything at all is

disclosed.[23] As such, the value of any move to expand the reach of electoral expenditure disclosures would need to be considered in conjunction with initiatives to review who has responsibility for disclosing such expenditures (as discussed in point (xvii) below).

The current categories of electoral expenditure as outlined in s.308 of the Electoral Act are:

- broadcasting advertisements
- publishing advertisements
- displaying advertisements at a place of entertainment
- costs of production for the above advertisements
- costs of campaign material requiring the inclusion of the name and address of the author or the person who authorised it (e.g. how-to-vote cards, pamphlets, posters)
- costs of production and distribution of direct mail
- opinion polling or other research relating to the election.

These categories are targeted primarily at electoral advertising costs and do not cover the range of campaign costs. For smaller party and independent candidates in particular, a significant proportion of their campaign costs will come in areas other than those falling within the present definition of electoral expenditure. More comprehensive disclosures of campaign costs could cover expenditures on items such as:

- staff
- premises (including facilities and signage/branding)
- office furniture and machines/equipment
- communication costs, such as phones and internet connections
- vehicles
- travel and accommodation

In any consideration of the extent of disclosures for campaign expenditures, it is important to note that only aggregated, single line totals are disclosed under the categories of electoral expenditure. These disclosures are not designed to provide details of expenditure, only an overall view of the scale of certain specified expenditures.

The purpose to which those disclosures are to be put will dictate whether more detailed disclosure is required. For example, to conclude whether the use of temporary campaign offices has been disclosed, it would be necessary to see details of the payment for the rental of those premises and, should there be no such payment disclosed, to see details

[23] The absence of disclosures in the returns of independent candidates and Senate groups is not always because they have not incurred campaign costs, but, because the areas in which they spend money often falls outside the categories covered by the definition of electoral expenditure.

of donations which would need to show a gift-in-kind equivalent to the value of the rental waived by the premises owner.[24]

Deem political parties to be bodies corporate

(xvi) Deem registered political parties to be bodies corporate for the purposes of Part XX of the Electoral Act

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. (This matter is discussed further under the earlier heading *Offset penalties against public funding*.)

The concept of having registered political parties deemed to be bodies corporate for the purposes of the Electoral Act is not new. The idea was raised both in the Harders Report in 1981 and the First Report of the JSCER in 1983.[25] It is also not a unique proposal, having parallel precedents in other legislation.[26]

Clarify who has reporting obligations

(xvii) Introduce provisions with greater certainty about who has the relevant reporting obligation

Who discloses and what they have responsibility for disclosing influences the level of transparency in disclosures. As discussed earlier in this submission, changes to the Electoral Act have had the deliberate effect of centralising disclosures with political parties, irrespective of whether the transactions can be considered to have been by, or on behalf of, the party. This has meant that, apart from a small number of mostly independent candidates, there is little information available as to individual campaigns at the electorate level.

In other areas of the law (e.g. Corporations Act, industrial law, etc) there is a clearly defined person who has the relevant reporting obligation imposed upon them by the relevant legislation. Under the current provisions of Part XX of the Electoral Act there is no

[24] The disclosure threshold and whether disclosures are made at the campaign level or consolidated at the party level also are relevant to this example.
[25] Harders Report, page 70; and the JSCER First Report, page 171. The Harders Report referred to the *Electoral Bill* 1974 which also proposed giving an unincorporated party a statutory personality for prosecution purposes.
[26] For example, s.27 of the *Fair Work (Registered Organisations) Act 2009* and each State/Territory's Associations Incorporations Act.

such clear obligation. It is generally left up to the political party or other entity to determine who is to sign the disclosure return. For example, when dealing with a body that is registered under the *Fair Work (Registered Organisations) Act 2009,* the AEC can receive returns signed by a President, National Secretary, financial controller or some other official. Similarly in dealing with a company, the AEC can receive returns that are signed by anyone from a range of office-bearers within the company. 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.

Annex 1 – AEC's Analysis of the Fair Work Australia (FWA) Report

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

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

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

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

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

Dobell. He became the endorsed ALP candidate on 13 April 2007. For most of the period of expenditure described in the FWA Report, Mr Thomson was undertaking two roles at the same time.

Each of these roles involves the possible application of different reporting and disclosure obligations contained in the specific requirements of the Electoral Act. For example, the potential disclosure obligation of a payment "authorised" by Mr Thomson whilst National Secretary of the HSU National Office was the responsibility of the HSU National Office to report, rather than Mr Thomson as the ALP endorsed candidate for the Division of Dobell for the November 2007 election. Whether or not such a payment was authorised under the rules of the HSU National Office or under the requirements of the *Fair Work (Registered Organisations) Act 2009* is not of itself relevant to the operation or interpretation of the Electoral Act.

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

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

Individuals and entities with potential reporting obligations under the Electoral Act

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

1. <u>The Candidate</u>

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

2. 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
Total	**$71,300.23**	

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

Table 2 - Summary of all payments identified in FWA Report

Amount	Required to be disclosed?	Disclosure by?	Was it disclosed?
"Your Rights at Work" campaign costs	Yes under section 314AEB	HSU	Yes – HSU Political Expenditure Returns 2006-06 and 2007-08
Establishment of Long Jetty campaign office	Yes	HSU/ALP NSW Branch	See Table 1
Payments to Dobell FEC	Yes	HSU/ALP NSW Branch	See Table 1
"Kevin07" Campaign bus	Yes	HSU/ALP NSW Branch	See Table 1
Postage Long Jetty	Yes	HSU	Yes – HSU Political Expenditure Return 2007-08
LBH Promotions	Yes – "Your Rights at Work"	HSU	See Table 1
ALP advertising	Yes	HSU/ALP NSW Branch	Yes – HSU Donor Return 2007-08
Radio advertising	Yes	HSU	Yes - HSU Political Expenditure Return 2007-08
Printing expenses	Yes	HSU	Yes - HSU Political Expenditure Return 2006-07 and 2007-08
Salary Ms Stevens	In part	HSU	Yes - HSU Political Expenditure Return 2006-07 and 2007-08
Coastal Voice	No	N/A	N/A

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

The disclosure obligation and offences

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

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

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

The measures contained in the Amending Act were based on the then Government's response to the September 1983 First Report of the Joint Select Committee on Electoral Reform (the JSCER Report). Chapter 9 of the JSCER Report dealt with the issue of "Public Funding of Political Parties" and Chapter 10 dealt with the issue of "Disclosure of Income and Expenditure". Paragraph 10.24 of the JSCER Report stated that:

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

Paragraph 10.34 of the JSCER Report stated that:

"Disclosure provisions should be backed up by offences and penalties for non-compliance. However these should not extend to the invalidation of elections or disqualification of those elected. As some parties are not incorporated bodies there needs to be a means of enforcement. Legislation to give effect to these recommendations could deem an unincorporated political party to be a person for the purposes of prosecution."

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

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

Paragraph 10.52 of the JSCER Report stated:

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

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

The 1983 amendment to the Electoral Act did not contain any limitation period such as now exists in subsection 315(11). The offences in section 315 of the Electoral Act are "summary offences". Summary offences are offences that are punishable by not more than 12 months imprisonment – see section 4H of the *Crimes Act 1914*) deal with what are usually regarded as less serious offences. Under section 15B of the *Crimes Act 1914* the usual limitation period for commencing a prosecution for such offences is within one year of the commission of the offence. In addition under section 13 of the *Crimes Act 1914* any person is able to undertake a prosecution for a summary offence while for the more serious indictable offences the DPP is the only competent authority to proceed to a hearing for a conviction.

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

"(11) A prosecution in respect of an offence against a provision of this section (being an offence committed on or after the commencement of this subsection) may be started at any time within 3 years after the offence was committed"

Accordingly, the Parliament has extended the normal timeframe for commencing a prosecution for an offence under Part XX of the Electoral Act from the usual one year of the offence being committed to three years.

As the three disclosure returns completed by Ms Jackson were received by the AEC on 13 October 2009, the three year limitation period in subsection 315(11) of the Electoral Act has not expired. However, in relation to the return lodged by the candidate agent for Mr Thomson and the ALP NSW Branch returns, the three period to commence any prosecution has expired.

Attachment A

The reporting criteria

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

Candidates

Disclosure of Gifts

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

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

Disclosure of Electoral Expenditure

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

Candidate Agents

- Section 289 provides for the appointment of candidate agents who are responsible for completing and lodging the candidate election returns under Part XX of the Electoral Act. Mr Thomson appointed a candidate agent at the time of nomination

that was responsible for the lodging of the candidates election return with the AEC. The candidate agent had the responsibility for reporting any "gift" or "electoral expenditure" on behalf of the candidate

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

Donors

Disclosure of Gifts

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

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

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

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

Third Parties

- Section 314AEB provides that a person who incurs expenditure for any of the five purposes listed in subsection 314AEB(1) is required to lodge a return for that financial year. The five purposes listed in this subsection include the public

expression of views on a political party or a candidate in an election and the public expression of views on an issue in an election. For the 2006-07 and 2007-08 financial years, the union campaign involving "You Rights at Work" clearly fell within the scope of this section. However, noting that Mr Thomson did not become the endorsed ALP candidate for the Division of Dobell until 13 April 2007, expenditure for purposes that involved raising his profile in the Division of Dobell prior to that date would not have fallen within the scope of this section.

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

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

Associated Entities

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

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

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

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

Political Parties

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

- Section 314AC(1) of the Electoral Act requires that the particulars of the amounts reported by a registered political party need only be disclosed where the amount is above the threshold (i.e. $10,300 for 2006-07 and $10,500 for 2007-08). However, subsection 314AC(2) provides that in calculating the sum to be particularised, "an amount of $10,000 or less need not be counted".

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

Annex 2 – Statement tabled by the AEC at Senate Estimates on 23 May 2012

Health Services Union and Craig Thomson – failure/late lodgement of returns under Part XX of the *Commonwealth Electoral Act 1918*

The purpose of this document is to give an outline of the action taken by the Australian Electoral Commission (AEC) in dealing with this matter.

In summary

- The AEC is charged with administering the existing provisions of Part XX of the *Commonwealth Electoral Act 1918* (Electoral Act) concerning the obligations to report payments and gifts made for political purposes. Whether the funds to make those payments and gifts have been obtained illegally or improperly is a matter for the police or other appropriate authorities.
- The AEC's investigative powers under the Act depend on there being "reasonable grounds" for belief that the Act has been infringed – that is facts sufficient to induce that state of mind in a reasonable person. Various court decisions make it clear that this is not a broad power of inquiry.
- The AEC has actively pursued this matter since it was first raised by an article in the *Sydney Morning Herald* (SMH) in April 2009.
- The Health Services Union (HSU) National Office – a separate entity from the HSU's branches – in October 2009 lodged returns for the years ended 30 June 2007 and 2008 totalling $1,003,476.40.
- Advice from the Law Firm representing the HSU National Office revealed that the payments referred to in the SMH articles were in the HSU National Office returns.

Background

Under Part XX of the *Commonwealth Electoral Act 1918* (Electoral Act) third parties who incur political expenditure (section 314AEB), associated entities (section 314AEA), donors (sections 305A and B) and candidates (sections 304 and 309) must provide returns with the AEC giving details of certain payments, receipts, loans, donations and other particulars.

In April 2009, the first report appeared in the media containing various allegations about the activities of Mr Craig Thomson and the Health Services Union (HSU) in the lead up to the 24 November 2007 general election and the use of funds from the National Office of the HSU. At this election, Mr Thomson was elected as the Member for Dobell in the House of Representatives.

In dealing with the allegations the AEC considered two main matters. First, whether the allegations contained any prima facie facts sufficient to identify that the expenditure alleged to have been incurred required the lodging of a return. Second, to identify which persons or entities could be potentially liable for failing to lodge the returns within the required timeframe.

The allegations

The original allegations involving the HSU were first published in an article by Mark Davis of the *Sydney Morning Herald* (SMH) on 8 April 2009. In short the allegations referred to various HSU sourced funds that were allegedly used by Mr Thomson over a period of more than five years to bankroll his election campaign for the central coast seat of Dobell. The documents apparently provided to the SMH showed that HSU officials concluded in late 2008 that the HSU credit cards issued to Mr Thomson - and other financial resources - were used for election campaign spending.

Further allegations were published by the SMH in articles dated 10 April 2009, 8 May 2009 and 11 May 2009.

AEC investigation powers

The powers of the AEC to compel the production of evidence and other information under section 316 of the Electoral Act are limited. First a possible breach of a reporting obligation under section 315 of the Electoral Act must be pointed to by the available material. Second, the actual individual with the reporting obligation must be identified. Third, the person with the relevant evidence or other material must be identified. Fourth, the authorized officer must have "reasonable grounds" for believing that a particular person "is capable of producing documents or other things or giving evidence" relating to a possible contravention.

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 reasonable persons."

Accordingly, facts must exist which are sufficient to induce the state of mind in a reasonable person.

AEC inquiries

On 8 April 2009 the SMH reporter contacted the media unit of the AEC asking for comments on his article. The AEC media unit sought advice and responded advising that the AEC was maintaining a watching brief, noting the involvement of the Industrial Registrar in this matter at that time.

The AEC had already examined the various annual returns lodged by a number of branches of the HSU for the 2007-08 financial year and could not identify any facts or material in this article that indicated that the expenditure referred to had not been included in the amounts reported by those branches in their annual returns.

On 19 May 2009 the AEC approached Mr Williamson, the signatory of one of the HSU returns, who confirmed that the third party political expenditure return that he lodged for 2007-08 did not include any of the amounts that were referred to in the four SMH articles. Mr Williamson also confirmed that the various associated entity returns lodged by the HSU did not include any expenditure incurred by the HSU National Office.

As a consequence of the advice from Mr Williamson, on 20 May 2009 the AEC wrote to the then National Secretary of the HSU National Office, Ms Kathy Jackson, who had replaced Mr Thomson in this position in late 2007. The reason for this approach was that the reporting obligation for the expenditure of HSU National Office rested with the HSU itself as a corporate entity and not with specific individuals who held positions within the National Executive at earlier times.

On 21 May 2009 the AEC spoke with Ms Jackson who undertook to provide a written response to the AEC setting out the process and timeframes for the HSU National Office to lodge any required disclosure returns.

In a letter dated 26 May 2009 Ms Jackson advised that she was then unable to determine when any required disclosure returns would be lodged as the HSU had appointed the Law Firm Slater & Gordon and an auditor (BDO Kendall) to investigate issues raised by their auditors. Ms Jackson also advised that the Industrial Registrar remained appraised of the investigation. Ms Jackson concluded that until the investigation was completed she was not in a position to accurately disclose political expenditure. She advised that the Slater & Gordon report was expected by early June 2009.

The AEC undertook further inquiries on 27 May 2009 into the structure of the HSU to attempt to identify the relationship between the HSU National Office and the HSU associated entities which had lodged returns with the AEC.

The AEC wrote to Ms Jackson on 28 May 2009 seeking further details of the status of the HSU National Office and the expenditure from the HSU contained in the two returns lodged by Mr Barry Gibson dated 1 October 2008.

On 26 June 2009 the AEC had contact with a senior lawyer from the Law Firm Slater & Gordon about the status of the HSU National Office and the progress of their investigation. The lawyer indicated his view that the HSU National Office was not an "associated entity" and was legally separate from the various branches of the HSU. He advised that his client was considering putting in both a third party political expenditure return and a donor return. The lawyer advised that there was still a lack of supporting documentation for much of the expenditure identified as being in issue by the HSU auditor (which led to the referral to Slater & Gordon) and that it was likely that this would lead to any return being qualified under section 318 of the Electoral Act. He also advised that this matter was being actively investigated by the Industrial Registrar.

In a letter to the AEC dated 30 June 2009 Slater & Gordon confirmed the telephone advice. In this letter the AEC was advised that although the Slater & Gordon inquiries had been completed, due to the inquiries initiated by the Industrial Registrar, his client did not wish to prejudice that process by lodging a return with the AEC that may later prove to be inaccurate.

The AEC wrote again to Slater & Gordon on 4 August 2009 seeking an update. Slater & Gordon responded on 10 August 2009 advising that the inquiries from the Industrial Registrar (now the General Manager of Fair Work Australia) were still continuing and that his client proposed to continue to refrain from filing the returns with the AEC as this could prejudice his client in the Fair Work Australia (FWA) process.

The AEC wrote again to Slater & Gordon on 10 September 2009 seeking an update on the status of matters involving the HSU National Office. The AEC was advised by telephone that the HSU Executive were currently working on the required returns which were expected to be lodged by 12 October 2009. The AEC was also advised that the FWA inquiries were continuing.

The AEC wrote again to Slater & Gordon on 12 October 2009 seeking an update on the status of the returns. Slater & Gordon telephoned to advise that the HSU had finalised the returns the previous week and that they were on their way to the AEC via mail.

In a letter to the AEC dated 13 October 2009, Ms Jackson lodged three returns and set out the reasons why the HSU National Office was separate from the other branches of the HSU and why it was not an "associated entity". The three returns lodged with the AEC were:

- 2006-07 third party political expenditure return totaling $404,292;
- 2007-08 third party political expenditure return totaling $586,673;
- 2007-08 donor return totaling $12,511.40.

The AEC reviewed the material provided and on 16 October 2009 the authorized officer concluded that there were no facts or other material pointing to the amounts referred to in the SMH articles having not been included in the HSU National Office returns. Accordingly, there was no basis on which section 316(3) notices could have been issued by the AEC. Part of the reasons for this conclusion was that the three returns lodged by Ms Jackson were not 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.

On 2 February 2010 the AEC had contact with an investigator in the office of FWA concerning the status of their investigation and the issues that limit any further investigation by the AEC without additional evidence.

On 9 February 2010 the AEC tabled in the Senate a document entitled “HSU Points” which indicated that the AEC would await the results of the inquiry by FWA before contemplating whether any further action may be required.

The AEC then commenced work on a request for advice to the Commonwealth Director of Public Prosecutions (DPP) on a number of matters relating to the HSU and Mr Thomson which was despatched on 7 May 2010.

In a letter dated 1 June 2010 the DPP responded to the AEC indicating insufficient admissible evidence was available to support a conviction.

In a letter dated to the AEC dated 12 August 2010, Senator the Hon Michael Ronaldson asked the AEC to conduct inquiries into the status of Coastal Voice as to whether it was an “associated entity” with reporting obligations. The relevance of this to Mr Thomson and the HSU was due to the allegations that Mr Thomson has used this organisation as an election vehicle and that HSU funds were involved in its establishment.

The AEC made various inquiries and reviewed the available material responding to Senator Ronaldson in a letter dated 15 November 2010. The AEC response indicated that there was no evidence that the Coastal Voice “operates wholly, or to a significant

extent, for the benefit of" the ALP (see the requirements for a "associated entity" in subsection 287(1) of the Electoral Act).

On 12 November 2010, the AEC was served with a Subpoena to Produce documents to the Supreme Court of NSW in relation to the law suit involving Fairfax Media Publications and Mr Thomson. Prior to responding formally to this subpoena, the AEC contacted the solicitors for Fairfax and had discussions about the various obligations contained in Part XX of the Electoral Act and the allegations printed by the SMH. The solicitors were invited to lodge any relevant documents with the AEC that may support any breach of the reporting obligations by either Mr Thomson or the HSU. No documents or other evidence were provided to the AEC by Fairfax.

On 23 February 2011 the AEC was formally advised by FWA that it had not yet concluded its investigations into the HSU National Office and that no report was yet available.

On 10 March 2011 the 3 year period expired for commencing any prosecution for the failure to lodge the various returns relating to the November 2007 general election and the 2007-08 financial year.

On 15 March 2011 the AEC was served with a further Subpoena to Produce documents to the Supreme Court of NSW. Prior to responding, the AEC again contacted the solicitors for Fairfax and had further discussions about the available evidence in the civil proceedings and the timeframes for the AEC to take any action under the Electoral Act. No material or other evidence was provided to the AEC by Fairfax.

In a letter dated 23 August 2011, the Hon Bronwen Bishop MP wrote to the AEC requesting that an investigation be undertaken into the activities of Mr Thomson following articles published by News Limited. These articles were apparently based on material contained in affidavits that were prepared in the legal proceedings involving Fair Media Publications. The AEC responded to Mrs Bishop in a letter dated 25 August 2011.

On 23 August 2011 the AEC also became aware that the HSU auditors had qualified the HSU National Office financial statements for 2006-07 and 2007-08 financial years primarily due to an absence of records. In both cases the auditors stated that *"we were advised that the books and records of the Union had been removed from their offices and passed through the hands of several other organisations"* as a result of the investigation by the Australian Industrial Registrar. This led to the AEC writing to Ms Jackson on 25 August 2011 seeking information about what records had been available and used by her in preparing the three returns that were lodged with the AEC on 13 October 2009.

On 15 September 2011 the AEC received a response from the HSU National Office on behalf of Ms Jackson.

On 17 October 2011 the AEC wrote to Ms Jackson seeking further details of the financial records that were apparently used to complete the three returns that were lodged with the AEC on 13 October 2009 and whether the working papers that were used were still available.

On 12 December 2011 the AEC received a response from Ms Jackson setting out the financial records that were still available to the HSU and which had been used to complete the three returns.

On 1 February 2012 the AEC wrote to Ms Jackson referring to the article in the *Daily Telegraph* newspaper on Monday 22 August 2011 entitled "The Craig Thomson Scandal – Spending Spree" written by Steve Lewis and Andrew Clennell. That article referred to court documents lodged in the Supreme Court of NSW and listing five items of expenditure totalling $39,454 on the HSU credit card issued to Mr Thomson under the heading "Election campaign costs allegedly paid on union credit card". The five items were:

(1) Central Coast Radio Centre - $15,994

(2) Australia Post - $7,253

(3) The Entrance Print - $12,647

(4) Nova Radio Group - $2,739

(5) PK Printing Service - $821

Ms Jackson was requested to advise of the following in relation to each of the above five items of expenditure:

(i) whether the amount was included in the total amount disclosed in the third party political expenditure returns that she lodged on behalf of the HSU; and

(ii) if the amount was <u>not</u> included in the total amount disclosed in the third party political expenditure returns that she lodged on behalf of the HSU - the reason why the amount was excluded.

In a letter dated 10 February 2012, the Law Firm of Slater & Gordon, on behalf of Ms Jackson, advised:

(1) The expenditure payment of $14,647.60 to Central Coast Radio Centre (not $15,994 as reported in the article) was included in the 2007-08 third party political expenditure return by the HSU;

(2) The expenditure of $7,253.17 to Australia Post – Long Jetty was included in the 2007/08 third party political expenditure return by the HSU;

(3) Two payments totaling $12,937 to The Entrance Print (not $12,647 as reported in the article) were included in the HSU returns. These payments were made over 2 financial years with $9,991 included in the in the 2006-07 third party political expenditure return by the HSU and $2,946 in the 2007-08 return;

(4) The expenditure of $2,739 to Nova 1069 Pty Ltd was included in the 2007-08 third party political expenditure return by the HSU;

(5) The expenditure of $821.70 to PK Printing Services Tuggerah was included in the 2007-08 third party political expenditure return by the HSU.

Accordingly, all of the amounts of alleged electoral expenditure that were included in the $39,454.00 reported in the article were disclosed by the HSU National Office in their third party political expenditure returns.

On the evening of 7 May 2012 the AEC became aware that the Senate had published 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" dated 28 March 2012 (the FWA Report). The AEC then commenced a detailed examination of the additional information contained in the FWA Report.

On 10 May 2012 the AEC wrote to the Law Firm Slater & Gordon who had confirmed that they continued to act for the HSU National Office and to the ALP NSW Branch to seek further information about payments that were listed in the FWA Report.

On 18 May 2012 the ALP NSW Branch replied advising that none of the four items of expenditure had been included in the Party's returns lodged with the AEC. In particular the Party advised that:

(i) Payment to Dobell FEC in the 2006-07 financial year – if this donation was in fact received by the Dobell FEC the campaign committee should have made the Party aware and this appears not to have been done. The ALP NSW Branch records do not indicate that the donation was received.

(ii) Long Jetty campaign office costs in the 2006-07 financial year – if this expenditure was incurred by the HSU National Office, it occurred without the Party's knowledge and was not disclosed in the Party's return.

(iii) Campaign bus costs in the 2007-08 financial year – if this expenditure was incurred by the HSU National Office, it occurred without the Party's knowledge and was not disclosed in the Party's return.

(iv) Golden Years Collectables in the 2007-08 financial year – the Party has no records of this payment.

As at 23 May 2012 the AEC is awaiting the receipt of a response from the Law Firm Slater & Gordon on behalf of the HSU National Office.

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 - 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
Payments to LBH Promotions	$7,409.93	Under the threshold - Further information sought to determine whether disclosed by HSU
Total	**$17,014.88**	

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 that 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.

Annex 4 – Annual disclosure regulations

Upon the introduction of annual disclosures for political parties, regulations were in force under section 314AG of the Electoral Act requiring additional detail and dissection of receipts, payments and debts. The full breadth of disclosure required of political parties for the 1992-93 and 1993-94 financial years is set out below.

Amounts Received

- total of all amounts received in the financial year
- total of membership subscriptions and affiliation fees (no details were required to be disclosed of membership and affiliation receipts that exceeded the threshold)
- total of donations from a single source aggregating to $1,500 or more, along with the details of the sources of those funds, being: the name and address of the donor; the date of receipt of each donation; the value of each donation; and the sum value of those donations
- total of donations of less than $1,500
- total of fundraising receipts by the party, broken down to show the total amount received from fundraising events by each party unit (e.g. the central State branch, local branch or campaign committee)
- total of receipts for fund-raisers at which less than $5,000 was received
- for each fundraising event at which $5,000 or more was received disclosure had to be made of the class of fundraiser (these were specified in the regulations and included seminars, conferences, dinners, barbeques, raffles and auctions), the date the event was held, the total sum received at the fundraiser and details persons from whom $1,500 or more were received
- total of amounts received from assets (e.g. interest and dividends received) along with details of persons from whom $1,500 or more was received, being: the name and address of the person/entity; the date each amount was received; the value of each receipt; and the sum value of those receipts
- total of amounts received from the sale of goods and services along with details of persons from whom $1,500 or more was received, being: the name and address of the person/entity; the date each amount was received; the value of each receipt; and the sum value of those receipts
- total of all other receipts not listed in the above categories along with details of persons from whom $1,500 or more was received, being: the name and address of the person/entity; the date each amount was received; the value of each receipt; and the sum value of those receipts

Amounts Paid

- total of all amounts paid in the financial year
- total of staff costs (no details were required to be disclosed of payments to staff that exceeded the threshold)
- total of fundraising payments by the party, broken down to show the total amount paid at fundraising events by each party unit (e.g. the central State branch, local branch or campaign committee)
- total of payments for fund-raisers at which less than $5,000 was received
- for each fundraising event at which $5,000 or more was received disclosure had to be made of the class of fundraiser (these were specified in the Regulations and included seminars, conferences, dinners, barbeques, raffles and auctions), the date the event was held, the total sum paid at the fundraiser and details persons to whom $1,500 or more was paid
- total of amounts paid for assets along with details of persons to whom $1,500 or more was paid, being: the name and address of the person/entity; the date of receipt of each payment; the value of each payment; and the sum value of those payments
- total of amounts paid in respect of goods and services sold along with details of persons to whom $1,500 or more was paid, being: the name and address of the person/entity; the date of receipt of each payment; the value of each payment; and the sum value of those payments
- total of administration costs, including payments to consultants and on the conduct of opinion polls, along with details of persons to whom $1,500 or more was paid, being: the name and address of the person/entity; the date of receipt of each payment; the value of each payment; and the sum value of those payments
- total of payments for affiliations, donations and gifts along with details of persons to whom $1,500 or more was paid, being: the name and address of the person/entity; the date of receipt of each payment; the value of each payment; and the sum value of those payments
- total of payments on broadcast media advertising broken further down into totals for television and radio advertising along with details of persons to whom $1,500 or more was paid, being: the name and address of the person/entity; the date of receipt of each payment; the value of each payment; and the sum value of those payments
- total of payments on print media advertising broken further down into totals for newspaper and magazine advertising along with details of persons to whom $1,500 or more was paid, being: the name and address of the person/entity; the date of receipt of each payment; the value of each payment; and the sum value of those payments

- total of payments on other advertising broken further down into totals for display, published/printed and other/public relations advertising along with details of persons to whom $1,500 or more was paid, being: the name and address of the person/entity; the date of receipt of each payment; the value of each payment; and the sum value of those payments
- total of all other payments not listed in the above categories along with the details of persons to whom a total of $1,500 or more had been paid, being: the name and address of the person/entity; the date of receipt of each payment; the value of each payment; and the sum value of those payments

Amounts Outstanding

- total of all amounts outstanding as at 30 June
- details of creditors to whom a total of $1,500 or more is owed, being: the name and address of the creditor; the value of each amount outstanding; and the sum value of those donations