AEC
Australian Electoral Commission

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

Dear Mr Melham

INQUIRY INTO THE FUNDING OF POLITICAL PARTIES AND ELECTION CAMPAIGNS

I refer to the public hearing of the Joint Standing Committee on Electoral Matters (the Committee) on 21 September 2011 at which the Australian Electoral Commission (AEC) was asked to provide the Committee with some additional information. I also refer to your letter dated 11 October 2011 in which you requested the response from the AEC on six further questions raised by the Committee following the conclusion of the hearing.

Please find attached a document that contains information in response to those requests.

The AEC seeks further clarification from the Committee on any further specific information that is being sought by the Committee.

In the hearing of 8 August 2011, the AEC was requested to provide specific data on three matters. At page 5 of the Hansard the AEC was asked to provide information "tracking disclosure as to the manner in which equal donations to the large parties occurred after disclosure was brought in". At page 9 of the Hansard the AEC was also asked to provide information on the costs of elections by political parties since the introduction of public funding. At pages 10 and 11 of the Hansard the AEC was asked to provide information on the proposed changes to the public funding regime in Canada.

The AEC provided the responses to the above information requested by the Committee in a letter dated 20 September 2011.

In the hearing of 21 September 2011 three further specific areas of information were identified, being union donations to the Labor Party, donations to the Greens and donations by the Member for New England.

In relation to the first of these areas, the AEC's ability to respond is limited by the information included in the various returns that are in our possession. For example, in relation to donations from unions, there are several provisions contained in the *Commonwealth Electoral Act 1918* (Electoral Act) which

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impact on information being available in this area. The first provision is the definition of "gift" contained in subsection 287(1) of the Electoral Act which excludes "an annual subscription paid to a political party ..... in respect of the person's membership of the party...". I am aware that the AEC has previously responded to queries raised by the Committee Secretary on the issue of subscriptions and whether unions are persons. The second provision is subsection 305B(5) of the Electoral Act which states that the donor disclosure provisions do not apply to "an associated entity". Accordingly, those unions which are an "associated entity" as defined in subsection 287(1) of the Electoral Act have no donor reporting obligations. The third provision is section 314AEA of the Electoral Act which sets out the reporting obligations of an "associated entity". Subsection 314AEA(1) requires the return to include the amounts received, amounts paid and any debts for the relevant financial year. These three amounts are to be included in the return as lump sums. Subsection 314AEA(3) of the Electoral Act does require the reporting of certain amounts paid to or for the benefit of a registered political party but only where that amount "was paid out of funds generated from capital of the associated entity". There is a further limitation contained in subsection 314AEA(5) of the Electoral Act regarding the disclosure threshold.

The combined effect of the above provisions is that the records available to the AEC will not normally disclose details of amounts that have been paid to political parties by unions which are capable of being categorised as "gifts" or donations.

In relation to the second and third areas, the AEC has published all of the disclosure returns that it has received since the 1998-99 financial year on our website at the following link:

http://periodicdisclosures.aec.gov.au/

I am conscious of the imminent reporting deadline for the Committee in this inquiry. Accordingly, I look forward to receiving your early advice of whether the Committee has any specific further queries about which the AEC is able to assist.

Yours sincerely

Ed Killesteyn

21 October 2011

Attachment

Hansard page 3 – "reasonable grounds" test

Subsections 316(3) and (3A) of the *Commonwealth Electoral Act 1918* (Electoral Act) contain a condition precedent that must be addressed by the authorised officer prior to any notices being issued compelling the production of documents and other things to the AEC. This is in contrast to the power contained in subsection 316(2A) of the Electoral Act.

The condition precedent in subsection 316(3) of the Electoral Act is that the authorised officer must have "reasonable grounds to believe that a person is capable of producing documents or other things" relating to a breach or possible breach of the reporting requirements set out in section 315. This includes false or misleading information included in a claim or return.

The AEC has external legal advice on the scope of "reasonable grounds". The advice refers to 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) where the Court stated that:

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

Accordingly, facts (as opposed to allegations) must exist which are sufficient to induce the state of mind in a reasonable person before this power can be lawfully exercised. Those facts must specifically relate to the requirements and obligations under Part XX of the Electoral Act.

The powers of the AEC to compel the production of evidence and other information under subsection 316 of the Electoral Act are therefore 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 authorised 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 specific contravention.

Hansard page 7 - Use of the section 316 power

As explained above, there are three separate and distinct powers contained in section 316 of the Electoral Act for the issuing of notices to compel the production of evidence and other material to the AEC.

The issuing of subsection 316(2A) notices is part of the business as usual process adopted by the AEC when it commences the compliance reviews of registered political parties and associated entities. Since 1 January 2008 the

AEC has issued 170 notices under subsection 316(2A) of the Electoral Act as part of the compliance review program.

The issuing of subsection 316(3A) notices occurs where there is some doubt as to whether or not an entity is or was an associated entity and a person is believed to hold relevant documents and other information relevant to the test in subsection 287(1) of the Electoral Act. Since 1 January 2008 no notices have been issued by the AEC under subsection 316(3A) of the Electoral Act.

The issuing of subsection 316(3) notices is able to take place in the circumstances outlined in the previous answer. Since 1 January 2008 the AEC has issued nine subsection 316(3) notices. Five notices were issued to two persons who had been identified as donors in other returns and who had repeatedly failed to respond to requests for relevant documents. Two notices were issued following the AEC being advised that information relevant to the lodging of an annual return by a registered political party had not been included in the return and that a former officer had retained relevant records that were no longer in the possession of that party. Two notices were issued on financial institutions. The first notice was issued to a financial institution for records that related to a trust that had not been included in an annual return lodged by a registered political party. The second notice was also issued to a financial institution to ascertain the source of cheques that had been identified in a compliance review of a political party.

There are two additional factors which have impacted on the AEC's use of section 316 notices. First, the AEC continues to receive the full cooperation of almost all persons and entities involved in lodging disclosure returns without the need to resort to the use of coercive powers. It is extremely rare for a person who is still involved in the political process to fail to respond to requests for information from the AEC. The threat of the possible use of a subsection 316(3) notice has proven to be sufficient in nearly all matters. Second, when dealing with financial institutions, it is always necessary for the AEC to use our coercive powers due to the sensitivities surrounding such financial records.

Hansard page 9 - 3 year period to commence prosecutions

Subsection 315(11) of the Electoral Act provides that:

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

Section 315 of the Electoral Act itself contains offences for the late lodgement of returns, furnishing incomplete returns, failure to retain documents for the 3 year period, lodging returns that contain particulars that are false or misleading in a material particular, giving another person false or misleading information for the purposes of making a claim for election funding or for the purposes of lodging a return.

The Commonwealth policy in relation to criminal offences is set by the Attorney-General's Department in a document entitled "A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers". Paragraph 6.26 of the "Legislation Handbook" requires that agencies consult the Attorney-General's Department in relation to drafting criminal offences in Commonwealth legislation.

The context and policy behind the 3 year limitation also needs to be kept in mind when considering any changes to the existing prosecution regime. Summary offences (e.g. 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 addition the purpose of the disclosure regime in the Electoral Act must be considered. In its original form, as introduced in 1984, the then Minister stated (House of Representative Hansard 2 November 1983 at page 2215) that:

"The whole process of political funding needs to be out in the open so that there can be no doubt in the public mind. Australians deserve to know who is giving money to political parties and how much."

With advancements in electronic communications and the ability to disclose information to the public in real time, the common development overseas and in some Australian jurisdictions is to have shorter disclosure periods, particularly during an election campaign, so that electors can be informed about such matters and use that information prior to making decisions as to whom they will support when casting their vote. If this policy objective remains, then having a process which enables criminal prosecutions to take place many years after the committal of the offense would appear to result in two things. First, the relevant electoral event will then be a distant memory for members of the public. Second, electors will not have been fully informed about matters that could have impacted on their decisions as to whom they would support at the time of voting. Further, there would be a risk that the passage of time will have diminished any "public interest" in pursuing any breaches of the reporting obligations.

A related issue would be the difficulty in mounting a prosecution given the passage of time. The experience of the AEC has been that the longer the time period between the commission of an offence and the laying of charges, the more difficulties are incurred in the collection of evidence and other material, particularly witness statements.

In this regard the AEC also notes that the current obligation contained in section 317 of the Electoral Act limits the obligation to retain relevant documents "for a period of at least 3 years commencing on the polling day in that election".

Hansard page 9 – disclosure requirements for Independent candidates

The AEC is not in a position to comment on the timeliness or extent of the disclosures required by way of Registers of Members and Senators interests as these matters fall outside the ambit of the Electoral Act. The AEC's understanding is that the provisions in the Electoral Act that apply to the disclosure obligations for both endorsed and Independent candidates were not designed to coordinate with, or be supplemental to, these Parliamentary Registers and so it cannot be considered unusual that the disclosure requirements do not synchronize.

The AEC is aware of the issue raised by the Member for Lyne during the second reading debate for the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009 when he stated (see House of Representatives Hansard 16 March 2009 at page 2684) that:

"On a related issue that I would hope comes up in further rounds of reform, it was only last week that the declaration figures for the recent by-elections in Mayo and Lyne were released. I found it absolutely extraordinary that for the seat of Lyne I came out on top of the list in regard to the amount spent. I was clearly outspent by a major political party in that field by a ratio of five, six or seven to one. There is no question about that. The fact that the declaration of your expenditure happens separately for non-aligned candidates versus candidates who are members of major political parties is an issue that I would hope this government strongly considers. Surely it should be the same rule for all, and that includes the major political parties as well as Independent and unaligned candidates. The fact that the major parties can bury their figures in some sort of global expenditure at the end of the year, separate from by-election figures, which have to be declared by people such as me within a certain time frame, is an anomaly. I hope it can be corrected through what I hope is the start of a reform process.

The people on the mid-North Coast would love to see the figures for the expenditure of all the candidates put on the table. Unfortunately they do not have that right and privilege given to them. Maybe the figure will never be known but will be lost in some sort of overall annual figure from the political party in question. I say this not to isolate them but to reflect on a process which now has built into it rules for political parties that are separate to the rules for Independent and non-aligned candidates. If the principles are to be fair to all within a democratic process, if it is about being accessible for all within the democratic process and if it is about allowing absolutely anyone who comes in off the street to stand as a candidate in a representative process then surely the rules that apply to one should apply to all.
I speak in favour of this legislation. I do not think it is perfect at this stage as far as the full political reform process goes."

If one of the policy objectives in any revised scheme is a level playing field for all candidates, then there would appear to be no logical reason why the disclosure obligations should be different depending on the status of the candidate.

In considering more timely disclosure under the Electoral Act for candidates, political parties and others, it should be noted that if Australia was to follow the model of some overseas schemes, disclosure by all participants in an election campaign would require public declarations of receipts and expenditure in even shorter timeframes than 35 days.

Hansard page 9 – use of the section 316 powers

The material above appears to address the matters raised in this question on notice.

Hansard page 9 – fund raising events

The issue of whether a payment made in relation to a fundraising event should or shouldn't be treated as a gift (donation) is not directly addressed by the legislation. The existing provisions of the Electoral Act that are relevant to this issue are provided below.

"***gift*** means any disposition of property made by a person to another person, otherwise than by will, being a disposition made without consideration in money or money's worth or with inadequate consideration, and includes the provision of a service (other than volunteer labour) for no consideration or for inadequate consideration, but does not include:

(a) a payment under Division 3; or

(b) an annual subscription paid to a political party, to a State branch of a political party or to a division of a State branch of a political party by a person in respect of the person's membership of the party, branch or division."

"***disposition of property*** means any conveyance, transfer, assignment, settlement, delivery, payment or other alienation of property, and includes:

(a) the allotment of shares in a company;

(b) the creation of a trust in property;

(c) the grant or creation of any lease, mortgage, charge, servitude, licence, power, partnership or interest in property;

(d) the release, discharge, surrender, forfeiture or abandonment, at law or in equity, of any debt, contract or chose in action, or of any interest in property;

(e) the exercise by a person of a general power of appointment of property in favour of any other person; and

(f) any transaction entered into by any person with intent thereby to diminish, directly or indirectly, the value of the person's own property and to increase the value of the property of any other person."

"***property*** includes money."

The matter of whether a payment at a fundraising event is a gift often turns on the question of whether 'inadequate consideration' is received in return for a payment to attend a fundraiser. At the extremes, this question can be readily resolved. However, many fundraisers offer intangibles as the primary consideration in return for the payment to attend a fundraiser, the most common example being access to politicians and party officials. Ultimately it is a matter of each individual's own motivation for attending a fundraiser. This approach, however, leads to the anomalous situation where one attendee will consider the entrance fee to be a donation while another will consider it a necessary business expense.

Having a provision that treats all payments made in relation to attendance at fundraising events as gifts that are required to be reported to the AEC and available for scrutiny by the public would overcome such anomalous situations and remove the uncertainty about disclosure obligations and ensure consistent treatment. It should be remembered that the disclosure provisions in the Electoral Act are not based on the concepts of assessable income under income tax law where only the net amounts are required to be disclosed rather than the gross amounts.

Hansard page 9 – resources for a revised disclosure model

It is difficult to speculate on what resources and systems the AEC would require without a clear understanding of the particulars of the scheme being contemplated and the role of the AEC in administering that scheme. However, in any move to more timely disclosure reporting, and especially if there is a move to contemporaneous reporting during election campaigns, the AEC's view is that it will be necessary for the legislation to mandate electronic lodgement of disclosure information. That is, any requirement for the AEC to image hard copy disclosure returns and data enter disclosure information from those returns into a searchable database would delay the release of those disclosures and so at least partially defeat the legislative intention of timely disclosure.

Such a requirement would have two benefits. First, it would assist in the prompt publication of relevant information without the need for intervention by the AEC in manipulating any data. Second, it would reduce the ongoing departmental costs incurred by the AEC and therefore the resources required to administer such a scheme.

The AEC at this stage would be contemplating operating an on-line lodgement system that allowed political parties, candidates and others to either enter disclosure information directly onto the AEC's website (suitable for those with few transactions to disclose) or upload data from their accounting systems. The AEC has an eReturns system already in place but it is not compulsory to use it and currently less than 50% of parties use it to lodge their return. To enable contemporaneous reporting this system would need to be expanded to incorporate a function that enabled every unit of a political party (e.g. party

units, campaign committees) to be able to access the system to enter their financial data into the party's disclosure return.

If the expectation that is part of any revised scheme involves the AEC being more proactive in monitoring compliance in a timely manner, this would require a significant increase in the staff and capability dedicated to this function. In addition if the revised scheme includes donation and/or expenditure caps the AEC would require additional funds to enhance its IT systems to assist in monitoring these and would also require increased resources to manage the compliance function that would be necessary to manage this function.

The AEC also notes that there will be additional costs incurred by the registered political parties, third persons and donors in ensuring compliance with any new disclosure regime. The AEC is aware that one of the mechanisms that have been successfully used overseas relates to the requirements to maintain campaign accounts from which electoral expenditure can lawfully be incurred. Having a single bank account that discloses all electoral expenditure should assist in limiting to some degree the costs of disclosure and simplify the reporting by political parties and third persons.

Hansard page 11 – prosecutions for non-compliance with Part XX

The AEC records have been examined and there is no record of any successful prosecution for a breach of the requirements of Part XX of the Electoral Act since 1990. Officers have found some references to prosecutions in the 1980s but the actual details of those prosecutions are not presently known.

Hansard page 14 – article by Mark Davis

The AEC is and was aware of the article by Mr Mark Davis that was printed in the *Sydney Morning Herald* (SMH) on 8 May 2009. However, the electronic version of the article on the AEC files did not contain any legible copy of a photograph of a credit card statement or other original document. The article by Mr Davis included the statement that acknowledged that some of the expenditure that was apparently evidenced by documents in the possession of the SMH showed that "some of the funds were used on the Your Rights at Work campaign and some on Mr Thomson's election campaign". The apparent addressing of the invoices did not change the position of the facts available to the AEC as Mr Thomson still held the position of being the National President of the HSU and did not formally resign from this position until 14 December 2007 despite having announced his candidacy in April 2007.

The AEC is also aware that Mr Thomson issued a media release on 10 February 2010 and made a statement to the House of Representative on the same date (House of Representatives Hansard 10 February 2010 page 913) stating that:

"My responsibility for disclosure of HSU donations to candidates at the last federal election ceased when I took leave approximately 6 weeks prior to the election."

Accordingly, it was apparent that Mr Thomson had "two hats" immediately prior to the announcement of the 24 November 2007 federal election. One as the National Secretary of the HSU – the other as the Labor candidate for the Division of Dobell. As there was no material or facts in the article which pointed to exactly what was the subject or content of the advertisements or the mail out, there was insufficient material to enable the authorised officer to be satisfied that there were reasonable grounds to issue a subsection 316(3) notice.

A further issue that was considered was the requirements of sections 304 and 309 which only require a candidate to disclose "electoral expenditure" "during the disclosure period for the election". The "disclosure period" is defined in subsection 287(1) of the Electoral Act and for the circumstances of Mr Thomson paragraph (c) of this definition applied. The AEC understands that the Labor Party announced Mr Thomson's candidacy in April 2007. Accordingly the "disclosure period" commenced in April 2007. Therefore amounts of expenditure incurred before this date would not have been required to have been disclosed by Mr Thomson as a candidate or by his agent in the candidate's return that was lodged with the AEC on 28 February 2008.

JSCEM Additional Questions – 11 October 2011

1. Moving to administrative/civil penalties

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.

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 apparently accepted by the then Government and were reflected in the new section 153V inserted by the Amending Act 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.

The AEC remains of the view that having a scheme of administrative penalties for matters which are an objective fact (i.e. the late lodgement of a return or the failure to include all relevant information in a return) could be dealt with by administrative penalties. The AEC is not suggesting that all breaches are appropriate to be dealt with by an administrative penalty regime.

The AEC submits that the policy issue appears to be whether the Committee considers that the position contained in the JSCER Report in 1983 remains appropriate, particularly in relation to paragraph 10.52 (i.e. no penalty of imprisonment) in any revised scheme. The AEC notes that the general offence in the *Criminal Code Act 1995* for the provision of information to a Commonwealth officer that is false or misleading in a material particular is dealt with in Division 137 and carries a penalty of "Imprisonment for 12 months".

The AEC acknowledges the issue of 'transparency' and suggests that there may be several options for addressing such a concern. First, as the imposition of an administrative penalty is an administrative decision, it would be appropriate to have a review right for an aggrieved person to challenge the AEC decision in this area. Second, the AEC could be required to publish on the Internet and in the subsection 17(2) report (on the operation of the Funding and Disclosure scheme to the Parliament) a regular updated list of all penalties imposed for a breach of the reporting requirements. Any such information to be added to this list could only occur after any period to seek a review had expired.

2. Enforcement under contemporaneous disclosure

The effectiveness of a contemporaneous disclosure scheme naturally depends upon its timeliness. Under such a scheme there is an even stronger case for administrative penalties – including paragraph 315(8)(e) of the Electoral Act – so that failures can be corrected in a similarly timely manner. The delays inherent in most criminal prosecutions are generally acknowledged. Further, having to gather information and evidence at the criminal standard of proof (as opposed to the lesser civil standard of proof) should enable the more objective breaches of the reporting requirements to be dealt with in a more timely manner.

3. Treating all branches of a party as a single entity for disclosure

Requiring donors to aggregate donations made across all related branches of a party is designed to prevent a donor from making a donation just under the threshold to each branch of the same political party (e.g. the ALP has 10 and the Liberal Party has 7), thereby effectively making a large but undisclosed donation to a single party grouping. The measures contained in the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010, which is still before the Senate, would require a donor to a political party to aggregate all donations made to the various branches of the same political party. The political party itself would continue to disclose to the AEC as separate entities.

The AEC is well aware that each State/Territory Branch of a registered political party is usually responsible for the management of their own financial affairs. However, the AEC is also aware that the experience in Canada is that the national body of the relevant political party takes on the reporting obligation as a single unit with this process being aided by the identification of specific campaign accounts from which amounts of electoral expenditure can be incurred. Expenditure incurred from other accounts is an offence.

The overseas experience has been that there are a range of measures that would be needed to curtail donation splitting and other possible loopholes.

4. Attendance at fundraisers be included in the definition of 'gift'.

a. The AEC is not aware of any issues or difficulties that have arisen under NSW law, where this treatment has been a feature of their disclosure schemes for many years.

b. The AEC submits that the issues relating to disclosure and the attendance at fundraisers could be simplified by including gross amounts of both payments to attend and all other payments made during the fundraiser events. This could include amounts such as winning auction bids, purchasing raffles tickets, and the like. Sponsorship arrangements should also be included in the definition. The AEC notes that some care would be needed in defining the scope of what is a 'fundraiser' to ensure that all events at which money is collected (e.g. such as conferences, golf days, etc.) are included. An event's inclusion should be irrespective of whether a profit was realised. It may also, under an expanded definition, be more appropriate for the Electoral Act to no longer refer to such payments as 'gifts' but to use some other term (e.g. 'contributions') to assist donor disclosure by attendees.

5. Definition of 'political expenditure'

The policy issue of concern here is that it is not clear what type of matters are covered by the phrase "the public expression of views on an issue in an election by any means". The remainder of the paragraphs contained in subsection 314AEB(1) of the Electoral Act are clearly defined. They include material that requires authorizations under sections 328, 328A and 328B. Thus printed electoral advertising is already included together with electoral advertisements published on the Internet which are paid for. Electoral advertisements on radio and television which are regulated under the *Broadcasting Services Act 1992* are also included. At this time it is not clear to the AEC what other types of third party political expenditure were of concern and designed to be addressed by subparagraph 314AEB(1)(a)(ii) of the Electoral Act.

Given that the scope of the existing provisions that include all of the main types of current electoral advertising and communications with electors during an election campaign, the AEC is not clear what additional material and activity would be regulated by any attempt to confine "the public expression of views" to just those views that involve "electoral matters". This does not appear to address the underlying issue of identifying to third parties exactly what expenditure is to be included in such a reporting obligation.

6. Contemporaneous disclosure by third parties

The AEC submits that the objective of contemporaneous disclosure to electors could be easily frustrated if it didn't extend to third parties who potentially could be used as vehicles to delay disclosure until after an election. That is, there appears to be a loophole in the operation of the current disclosure requirements contained in the Electoral Act that could be abused

so as to circumvent the current reporting and disclosure regime. Donors to political parties and candidates have a disclosure obligation that obliges them to also identify donors of sums they received and which are used, in whole or in part, to make their donation. This, importantly, establishes an audit trail back to the source of the funds, something that cannot be achieved for third parties where the only disclosure is on the third party's return showing donations received. In such circumstances a third party could disclose receiving funds from a private foundation or trust and there would be no public record of where that entity may have originally received its funds from. That is, the identity of a donor to a third party can be easily concealed through the insertion of a 'middle man' into the transaction. In dealing with that possibility, the disclosure obligations of direct and indirect donors to political parties would best serve as a model for all donor disclosure.

The AEC is aware that the overseas experience is that all third parties must be registered with the relevant electoral management body before they are able to incur electoral expenditure. In some jurisdictions there is also a requirement for specific campaign accounts to be established accompanied by proof that the organisation has formally agreed to use the funds in such an account for electoral purposes. This would obviate the need for the auditing and reporting of all other amounts of expenditure (i.e. non-political expenditure) incurred by a third party.