AUSTRALIAN ELECTORAL COMMISSION

JOINT STANDING COMMITTEE

ON ELECTORAL MATTERS

INQUIRY INTO

DISCLOSURE OF DONATIONS

TO POLITICAL PARTIES AND CANDIDATES

SUBMISSION FROM THE

AUSTRALIAN ELECTORAL COMMISSION

Canberra

26 April 2004

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Attachments:

A. Attachment A sets out the previous recommendations made by the AEC from the 1993 FAD report to the submissions to the previous JSCEM disclosure inquiry in 2001 (inclusive), with a reference to where they are mentioned in the current submission (where applicable).

B. Attachment B is a table which cross-references recommendations of a similar theme.

1. INTRODUCTION

1.1 On 17 March 2004, the Secretary of the Joint Standing Committee on Electoral Matters (the JSCEM) wrote to the Australian Electoral Commission (the AEC) to advise that the JSCEM had reconstituted its inquiry into electoral funding and disclosure that lapsed at the 2001 federal election.

1.2 The Secretary advised that the inquiry had been referred to the JSCEM by the Senate with the following terms of reference:

- the matter relating to electoral funding and disclosure, which was adopted by the Committee on 15 August 2000, and any amendments to the Commonwealth Electoral Act necessary to improve disclosure of donations to political parties and candidates and the true source of those donations; and
- any submissions and evidence received by the Committee in relation to that inquiry of 15 August 2000."

1.3 The Secretary noted that the JSCEM had accepted into evidence two previous submissions from the AEC and advised that the JSCEM:

- *"requested that the AEC provide a further submission to its inquiry which consolidates these two submissions and which also includes any additional information that [the AEC] might wish to provide, particularly concerning the disclosure of donations to political parties and candidates."*

1.4 The two AEC submissions to the JSCEM's previous inquiry into election funding and financial disclosure to which the Secretary refers are:

- Submission No.7 17 October 2000
- Submission No.15 3 August 2001

1.5 The AEC's previous submissions are available through the JSCEM website at http://www.aph.gov.au/house/committee/em/f_d/subs.htm.

1.6 This submission is provided in response to the JSCEM's request for a submission consolidating the previous two submissions and including any additional information that the AEC considers appropriate.

1.7 It should be noted that the *Commonwealth Electoral Act 1918* consistently uses the term 'gifts' to denote donations. For ease of understanding the AEC will use the term 'donations' in this submission. Also for ease of reference the *Commonwealth Electoral Act 1918* is referred to as the Electoral Act in this submission.

1.8 Further, the AEC is required by subsection 17(2) of the Electoral Act to produce a report after each election on the operation of Part XX of the Electoral Act. For ease of reference these reports are referred to in this submission as the '(election year) FAD report'.

2. ELECTION FUNDING AND FINANCIAL DISCLOSURE, THE FIRST 20 YEARS

THE ORIGINAL FAD SCHEME

2.1 The election funding and financial disclosure scheme (the FAD scheme) for elections to the House of Representatives and Senate was passed by Parliament in late 1983 and commenced on 21 February 1984 as Part XX of the *Commonwealth Electoral Act 1918* (the Electoral Act). It first applied for the elections held on 1 December 1984.

2.2 On its introduction, the FAD scheme required the following:

DISCLOSURE OF 'GIFTS' (DONATIONS) RECEIVED

2.3 Political parties were required to furnish details of donations received since the previous election (or since the commencement of the provisions in the first instance), which the parties were free to apply to election-related expenditure. Individual candidates and Senate groups were also required to furnish details of donations received. There was a further requirement for any 'third party' which campaigned or made donations to a political party or candidate to also disclose donations received and used for that purpose.

DISCLOSURE OF ELECTION EXPENDITURE

2.4 Political parties, candidates, Senate groups and 'third parties' who campaigned were required to furnish details of specific items of election expenditure which were expected to account for the major part of their election campaign expenditure.

2.5 Broadcasters, publishers and printers were also required to furnish details of campaign expenditure that political parties, candidates, Senate groups and 'third parties' placed through them.

PUBLIC FUNDING OF ELECTION CAMPAIGNS

2.6 Public funding was provided for election campaigns on the basis of reimbursement of expenditure incurred on the campaign up to the limit of entitlement. Entitlement was calculated on a formula which essentially applied the cost of two postage stamps to each House of Representatives vote received and one postage stamp to each Senate vote received. There was a minimum threshold of 4% of the vote to qualify for public funding and the rate of public funding was indexed to increases in the Consumer Price Index.

2.7 Public funding was paid to registered candidates, or where registered political parties had endorsed those candidates, to the registered political parties. The rates for public funding at the 1984 elections were 61.2 cents for a House of Representatives vote and 30.6 cents for a Senate vote. The total payment made in respect of the 1984 election was $7.8m.

OTHER PROVISIONS

2.8 Anonymous donations were prohibited and provision made for an amount equal to an anonymous donation received to be forfeited to the Commonwealth. All returns furnished disclosing donations received or election expenditure (and claims for public funding) were placed on a register available to the public. No limits were placed on electoral expenditure.

2.9 The AEC was provided with powers to investigate possible contraventions of the FAD provisions and the accuracy of claims and returns. Penalties were provided.

CHANGES MADE OVER 20 YEARS

2.10 Minor changes have been made to thresholds below which donations or expenditure do not need to be disclosed. The requirement for candidates to register for public funding has been dropped, as has the requirement for printers to lodge returns. A bill was introduced in the autumn 2004 sittings which contains provisions to relieve publishers and broadcasters of the requirement to lodge returns.

2.11 The requirement for political parties to lodge returns following an election has been replaced by provisions requiring registered political parties to lodge annual returns disclosing receipts, payments and debts. Provision has been made for 'associated entities' to have similar reporting obligations to registered political parties.

2.12 Public funding is now paid as a grant in proportion to votes received, rather than as reimbursement of expenditure incurred. The amount of public funding for Senate votes was doubled to equal that for House of Representative votes and that rate was increased in 1995.

2.13 The Electoral Act was strengthened to ensure compliance officers from the AEC had powers to investigate the accuracy of returns.

THE CURRENT FAD SCHEME

POLITICAL PARTY FINANCIAL DISCLOSURE

2.14 Registered political parties are required to lodge annual financial disclosure returns showing the totals of all receipts, payments and debts and the details of those that reach a $1,500 threshold under receipts and debts. Associated entities of registered political parties are required to lodge similar returns.

CANDIDATES, SENATE GROUP AND 'THIRD PARTY' FINANCIAL DISCLOSURE

2.15 Candidates and Senate groups are required to lodge returns after the election showing donations received. Candidates and Senate groups are also required to lodge returns showing election expenditure. Further, those who campaign are also required to lodge election expenditure returns. Persons making donations to political

parties or candidates, or incurring expenditure for the benefit of political parties or candidates, may also have to lodge returns. 'Third parties' taking part in the campaign are required to lodge expenditure returns.

PUBLIC FUNDING OF ELECTION CAMPAIGNS

2.16 The election funding scheme is a grant scheme. Provided candidates and Senate groups reach the 4% threshold, payment of their entitlement is made automatically. Ninety-five percent of their entitlement is calculated on the 20th day after polling day and paid shortly after. The final amount is paid as soon as the election results are finalised.

2.17 The current rate for public funding is approximately 4 postage stamps for each vote received (rate is currently 191.713 cents per vote). The total payment made in respect of the 2001 election was $38.6m.

OTHER PROVISIONS

2.18 Anonymous donations are prohibited as in the original scheme and may be forfeited to the Commonwealth. Similar provisions now apply to loans. There is also an additional provision for the recovery of donations made by a corporation which is wound up within one year of the donation being made.

3. PURPOSE OF THE FUNDING AND DISCLOSURE SCHEME

INTRODUCTION

3.1 The AEC suggests that the 20th anniversary of the introduction of the FAD scheme might be cause for the JSCEM to review the purpose of the FAD scheme and the extent to which the current legislative scheme meets that purpose.

3.2 In addition to any recommendations for legislative change, the JSCEM may wish to consider whether the basic principles of the funding and disclosure scheme remain appropriate, and if not, what principles should be adopted for a funding and disclosure scheme of the future. The original principles were discussed in Chapter 10 of the First Report of the Joint Select Committee on Electoral Reform of September 1983.

3.3 That report considered the introduction of both an election funding scheme and a financial disclosure scheme. At paragraph 10.9 on page 164 the Committee advised:

- The majority of the Committee accepts the view that the receipt of significant donations provides the potential to influence a candidate or party and that to preserve the integrity of the system the public need to be aware of the major sources of party and candidate funds of any possible influence.

FINANCIAL DISCLOSURE - INCOME

3.4 As early as in the 1984 FAD report, the AEC commented on the use of several foundations or trusts to source donations to political parties. The most frequent matter raised by politicians or the media concerning financial disclosure is whether the true source of funds received by parties is being revealed. There is also concern about disclosure by entities whose existence in some way benefits a party(ies).

3.5 For example, while there are instances of political parties providing (and donors using) foundations and trusts to avoid disclosure, the AEC does not necessarily believe that all such situations are evidence that political parties or their donors are primarily concerned with avoiding disclosure. The investment of capital by parties to provide a more steady flow of income, rather than relying solely on donations to provide the income as and when needed, may also have contributed significantly to the use of trusts and foundations to manage those capital assets.

3.6 The circumstances surrounding the establishment of the Greenfields Foundation are probably the most widely reported example of the AEC having a different view to a foundation on their ensuing disclosure obligations.

3.7 Traditional fundraising dinners, at which participants often pay a premium price for the opportunity to hear and access senior party members (including MPs),

have generated public comment from the media. It is difficult to assess the extent to which participants think they pay a fair price for these opportunities or otherwise choose to make a donation to the party concerned with part of the price they pay. Since some companies book large tables at these fundraising dinners and, therefore, pay a price of several thousand dollars, the funds raised can appear prima facie, and on some occasions actually are, donations given without the real sources of the funds being identified.

3.8 The legislation allows, because of the definition of 'gift', for the giver to make the determination as to whether a payment made to a political party is a donation. This includes payments to attend fundraising events. The individual circumstances of a payment to attend a party function or conference, for example, will determine whether the payment constitutes a 'gift' (donation) under the provisions of the Electoral Act. A payment becomes a donation where the person or organisation making the payment does not receive their "money's worth" in return. If the giver believes that a payment made for a fundraising event which totals $1500 or more is not a donation, then there is no requirement to lodge a donor disclosure return.

3.9 In the view of the AEC, if the disclosure provisions in the Electoral Act are to deliver transparency in the financial relationships of political parties, candidates and others associated with them, then a comprehensive review of the legislation and the principles underpinning the legislation is required. There is a need to move beyond the "ad hoc" pattern of the last 20 years (since the legislation commenced) of introducing amendments as individual deficiencies are identified. If the JSCEM thinks that the current scheme is inadequate, it would be of assistance if the Committee were to provide guidance as to the extent and levels of disclosure which should be the aims of the financial disclosure scheme. Issues that such guidance might cover include the objectives of the scheme (such as 'is it meant to reveal the 'true' source of the donation?') and what the AEC's role is in the scheme (such as 'is it expected that the AEC operate as a regulator?'). Having a concrete set of goals giving policy guidance is critical before any substantive legislative review could be undertaken. Once the aims of the disclosure scheme have been clarified, then a legislative proposal could be developed to reach that goal.

FINANCIAL DISCLOSURE – PAYMENTS

3.10 The original FAD scheme provided a basic comparison of the major elements of election campaign costs incurred by political parties. The Parliament has twice decided that the comparative campaign cost information provided under the original scheme is unnecessary (the *Political Broadcasts and Political Disclosures Act 1991* and the *Electoral and Referendum Amendment Act 1998*). Previously, there was a requirement for detailed disclosure of payments to be included in political party annual returns. The last returns in which such disclosure appeared were the 1997/98 annual returns. However, whilst the AEC has received questions on this matter, there seems to have been negligible political or media comment on the fact that disclosure in relation to expenditure is now limited to reporting of total annual expenditure by political parties.

ELECTION FUNDING

3.11 The Joint Select Committee on Electoral Reform discussed public funding of political parties at Chapter 9 of its First Report of September 1983. In considering the introduction of such funding, the JSCEM noted the following reasons for having such a scheme:

- to assist parties in financial difficulty
- to lessen corruption
- to avoid excessive reliance upon 'special interests' and institutional sources of finance
- to equalise opportunities between parties, and
- to stimulate political education and research.

3.12 Public (election) funding at the 2001 federal election was paid as shown in the following table:

Payee		**Amount ($)**
Australian Labor Party (ALP)	$	14,917,024.57
Liberal Party of Australia (LP)	$	14,492,349.83
National Party of Australia (NP)	$	2,845,193.98
Australian Democrats (DEM)	$	2,411,689.69
Australian Greens (AG)	$	1,370,734.04
Pauline Hanson's One Nation (PHON)	$	1,709,752.00
No Goods and Services Tax Party	$	5,488.94
Northern Territory Country Liberal Party	$	138,997.58
Christian Democratic Party NSW (Fred Nile Group)	$	7,647.99
The Greens WA - Inc	$	223,129.05
liberals for forests	$	14,332.82
Progressive Labour Party	$	7,327.53
Unity - Say No To Hanson	$	17,689.55
ANDREN Peter James- Calare NSW	$	73,017.54
AUSTIN Pauline Maisie - Solomon NT	$	4,257.24
BOWN Conway - Herbert QLD	$	11,588.35
COCHRAN Peter Lachlan – Eden-Monaro NSW	$	11,522.11
COOPER Thomas James - Page NSW	$	9,814.21
DALGLEISH David Bruce - Wide Bay QLD	$	5,714.51
DOUGLASS Ross Thomas - Mallee VIC	$	6,631.12
HAIGH Bruce Douglas - Gwydir NSW	$	8,301.44
HOURIGAN Rosalind - Fisher QLD	$	10,745.14
KATTER B Robert Karl - Kennedy QLD	$	63,652.69
KESSELS Colin James - Dickson QLD	$	9,314.72
MacDONALD Peter Alexander - Warringah NSW	$	38,472.69
MCINTOSH Nelson Douglas - Indi VIC	$	9,459.73
MELVILLE Peter Lloyd - Hinkler QLD	$	12,794.99
MOTT William Trevor - Cunningham NSW	$	7,581.75
PAULGER S Shane Peter - Fairfax QLD	$	13,460.96
STEGLEY Kristin - Goldstein VIC	$	8,605.78
THEOPHANOUS Andrew Charles - Calwell VIC	$	15,023.86
TREASURE Douglas Harry - Gippsland VIC	$	7,606.81
WICKS Graeme Francis - Wide Bay QLD	$	6,051.08
WINDSOR C Antony Harold - New England NSW	$	64,435.04
TOTAL	**$**	**38,559,409.33**

3.13 Information contained in party returns, as well as to whom payments of public funding are made, would seem to indicate that the election funding scheme is not achieving the goals of reducing party reliance on funds from sources other than public funding or equalising the opportunities between parties. Therefore, it may be appropriate for the JSCEM to reconsider the objectives of the scheme and the way in which public funding is paid. Whilst it may be considered that the bulk of public funding should continue to be paid in response to support garnered at an election, it may also be appropriate for a degree of public funding to be paid yearly to parties to assist with administration costs.

4. THE ROLE OF THE AEC DURING INVESTIGATIONS

4.1 The AEC believes that the major responsibility for ensuring the timeliness and accuracy of disclosure returns lies with the person/s or organisation completing the return. The standard of some parties' records has made it difficult to have confidence in the returns lodged by those parties and for the AEC to come to any clear conclusions as a result of its compliance reviews (audits).

4.2 The AEC refers the JSCEM to recommendation 6 of the 1996 FAD Report suggesting that annual returns be accompanied by a report from an accredited auditor attesting to the correctness of the return.

4.3 The AEC sees the following two issues as among those that would need to be addressed as part of dealing with such a recommendation:

- the standard of some parties' record keeping, and
- reinforcing the parties' responsibility for ensuring the correctness of returns.

4.4 The AEC wishes to emphasise that there is a clear distinction between its responsibilities and those of the parties. Ultimately it is up to parties to ensure that they have the necessary information and record keeping systems (including forwarding of information from candidates, party units, and so on) in place to ensure that the returns they lodge are accurate and complete. The same would apply to associated entities' returns and all other returns required to be lodged under the disclosure provisions of the Electoral Act.

4.5 The AEC has a policy of considering matters that are brought to its attention either directly or through public forums such as Parliament or the media in order to determine whether disclosure obligations have been met. The number of such matters being considered has increased significantly over recent times. Careful consideration by the AEC of these matters and its powers under the provisions of the Electoral Act has led the AEC to conclude that the expectations of some commentators and stakeholders, as to the way the AEC implements this policy, may be unreasonable. Media reports and commentary regarding the AEC's exercise of its statutory powers have also served to reinforce this view.

4.6 The AEC has investigatory powers under section 316 of the Electoral Act to (in essence):

- 'audit' political party and associated entity returns to find out whether they comply with the relevant disclosure obligations,
- require the production of relevant documents or information where it has reasonable grounds to believe that there has been a contravention or possible contravention of the relevant disclosure provisions, and
- require the production of relevant documents or information where it has reasonable grounds to believe that an entity is or was an associated entity.

4.7 The precondition to have reasonable grounds to believe something before acting is important to have in legislation. It ensures that an agency does not inappropriately exercise its powers, can substantiate its actions and that it behaves in a way that preserves the precepts of natural justice. However, it means that there needs to be facts in existence and in front of the AEC which satisfy the AEC that something possibly is the case, rather than something is not the case.

4.8 It seems clear from the legislative provisions that, whilst Parliament meant for the AEC to have fairly broad investigatory powers, it did not necessarily mean that the AEC could go on 'fishing expeditions' and it is not appropriate for persons to raise issues with the AEC with the expectation that this will happen.

4.9 The AEC notes the Hansard records in relation to the inclusion of subsections 3A, 3B and 3C into section 316 of the Electoral Act and, in particular, that it was thought these were 'appropriate powers to give to the Electoral Commission to ensure that any organisation that the Commission suspects may be an associated entity can be brought within the system' (Senate Hansard of 25 June 1998 p.4173). However, the wording of the provisions requires the AEC to first have reasonable grounds to believe that it is possible an entity is or was an associated entity, before investigating. That is, the provisions require the AEC to have some objective basis for actions taken in exercising the powers given to it.

4.10 Accordingly, the AEC's position needs to be clarified. Whilst the AEC will continue to give preliminary consideration to all matters brought to its attention, continued action in relation to such matters will not be undertaken unless the AEC forms the view that it has reasonable grounds for doing so. If further evidence, which would assist the AEC in reaching the conclusion that reasonable grounds exist for pursuing the matter, is not available, then it would be inappropriate for the AEC to take further action at that time.

4.11 In addition, 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.

5. CONSOLIDATION OF PREVIOUS TWO SUBMISSIONS

INTRODUCTION

5.1 The recommendations in this submission have been re-numbered for ease of reference in this submission. However, as the JSCEM requested the AEC to consolidate its submissions to the previous funding and disclosure inquiry (in 2000-2001), most of the recommendations in this submission are from those previous submissions. Attachment A sets out the previous recommendations made by the AEC since the 1993 election, with a reference to where they are mentioned in the current submission (if they have been). Please note though that recommendations from the 1993 FAD report have not been incoporated into the text of this submission. However, many of them are still relevant and the JSCEM may wish to consider them. Discussion of the reasoning behind the 1993 FAD report recommendations can be found in that report. To further assist the JSCEM, at Attachment B is a table which cross-references recommendations of a similar theme.

THE FINANCIAL DISCLOSURE SCHEME

5.2 The following disclosure issues have emerged over the last few years. They were addressed in previous AEC submissions and recommendations relating to them are again included in this submission:

- a range of allegations concerning donations made in return for various considerations/favourable treatment by parties;
- access to Members of Parliament in return for contributions to parties (eg that access is being bought by attendees at fundraising events);
- whether certain organisations are associated entities;
- payments for attendance at fundraising events and the amounts paid for auction items;
- true source of donations/anonymous donations;
- overseas donations;
- overseas debts;
- possible incomplete annual returns.

LEGISLATIVE REFORM

5.3 The effectiveness of disclosure legislation depends upon the true source of support provided to political parties and candidates being publicly disclosed. The deficiencies in the current legislation primarily revolve around loopholes that can allow the true source of donations to go undisclosed. In the introduction to the post 1998 FAD report to the Parliament, the AEC expressed its concern that financial arrangements can be contrived to avoid full disclosure by means that nevertheless meet the letter of the law. Compliance with the clear intent of the disclosure provisions is being abandoned in some instances, denying the public its right to know who is funding political parties. This is the reason that the AEC continues to suggest greater prescription and rigidity in the legislation.

5.4 Inevitably the legislation trails behind in dealing with specific deficiencies. The attempts by the AEC to pre-empt the exploitation of loopholes in the legislation have not been taken on board. For instance, only selected recommendations from the 1996 and 1998 FAD reports to the Parliament have been considered and adopted. It often takes a current, prominent exploitation of a 'loophole' in the legislation for Parliament to recognise the importance of dealing with a particular issue.

5.5 Broad questions are arising over the adequacy of the current disclosure provisions. Much of this has been canvassed in the media. Two examples illustrate how the requirements of the law do not necessarily match the expectations of some in the community.

5.6 Firstly, there was the matter raised in late 2000 of a "donation" allegedly made by Mr Wayne Swan of the ALP to an Australian Democrats candidate. The sum involved was variously stated to be either $500 or $1,400. In this case there was no disclosure to the AEC required under the current law because of the quantum of the donation made. Nevertheless, because this matter raised the possible offence of electoral bribery by Mr Swan, it was referred by the AEC to the Australian Federal Police (the AFP) for investigation. Although the AFP found no evidence of either bribery or disclosure breaches by Mr Swan or the Democrat candidate, media reporting of this case demonstrated that there seems to be a public expectation that such donations should be disclosed.

5.7 Secondly, there was a donation of free time made to Senator Natasha Stott Despoja by a public relations consultant during the Australian Democrats party leadership ballot. Such a donation was not made in Senator Stott Despoja's capacity as a candidate in the federal election, so there would likely be no requirement for it to be disclosed. The company that made the donation may also not have had a disclosure obligation for the same reason. This raises the issues of what transactions should be disclosed and the timeliness of those disclosures.

5.8 In neither case does the legislation stipulate for candidates what might be considered to be the fuller disclosure prescribed for political parties. The situation that exists with candidates remains virtually unchanged from the time when disclosure was restricted to transactions specific to federal election campaigns (the way the disclosure legislation was originally written in 1983). Donations received by a Member of Parliament are only required to be disclosed if they relate to their election campaign. Donations made for other purposes would not necessarily be required to be disclosed. A legislative response, however, would need to be carefully thought through. Simply widening the current election based disclosures required of candidates and Members of Parliament may prove similarly ineffective. Unlike political parties, upon which it is not unreasonable to impose a requirement to disclose all their transactions, individuals have separate, personal financial affairs. Hence, "full" disclosure may not be achieved without what might be considered as an unnecessary intrusion into their, and their immediate family's, personal financial affairs. Also, this matter may be considered to be already adequately covered, in relation to MPs, by the parliamentary requirements for them to disclose pecuniary interests.

5.9 Reaching a position as to what disclosure is required is a matter of individual interpretation of the Electoral Act. This can be seen in examples of matters that have been raised with the AEC such as possible disclosure obligations for organisations such as The McKell Foundation, Markson Sparks! P/L, The Greenfields Foundation and Emily's List. Because of this, persons and organisations are not always clear as to their obligations. Other situations also sit in, at best, a grey area. For example: a trust set up to gather donations to fund the campaign in a council election by a candidate who may be endorsed by, a member of, or associated with a registered political party. The AEC believes that this points to a need for greater clarity in the expression of disclosure obligations in the Electoral Act and recommendations that would assist in providing greater clarity are set out in this submission.

5.10 Other issues that have been raised in the media include:

- the amount of money paid to attend fundraising events and the amount of money paid for auction items at such events;
- suggestions that, as a result of making donations to political parties, organisations are being allowed to continue to operate inappropriately.

5.11 The debate surrounding these issues indicates the high expectations held for disclosure under the Electoral Act.

5.12 This JSCEM inquiry represents an appropriate opportunity for the JSCEM to consider the extent and timeliness of disclosures that it expects under the Electoral Act. To fully address community expectations, such considerations would need to involve wide ranging consultation with all stakeholders. Whilst any such review might result in more complex administrative processes for the AEC, parties, candidates and others, this would need to be weighed up against the benefits of introducing a framework for legislative amendment which meets current community expectations.

5.13 The issue of uniformity of disclosure provisions and obligations with State/Territory provisions has been raised in Senate Estimates Committee hearings with the AEC and is a matter that the JSCEM may also wish to consider. The AEC agrees that such uniformity would simplify matters for parties and donors but makes no specific recommendation on this.

Recommendation 1: that the JSCEM specifies the breadth of coverage of disclosure believed necessary under the Electoral Act, from which the existing legislation can be reviewed and, as necessary, redrafted.

DISCLOSURE RESPONSIBILITIES

5.14 Dealing in an 'ad hoc' way with specific instances that render the disclosure provisions ineffectual is inadequate in ensuring full public disclosure. Without the in-depth consideration of what is now required of disclosure, the recommendations made in the AEC submissions to any JSCEM inquiry and in its post-election FAD reports to Parliament, if adopted, will only close down loopholes apparent at the time they were written.

5.15 A sufficient motivation to legally avoid a legislative responsibility may well see arrangements being contrived in the future that are not prevented by even amended

legislation. It will always be difficult, if not impossible, to propose specific legislation that would prove effective in closing down all possible future disclosure loopholes.

5.16 The Income Tax Assessment Act 1936 Part IVA provides for arrangements that are deemed to be contrived for the purpose of avoiding tax to be treated as if they do not exist. The disclosure provisions in the Electoral Act, if they are to be able to deal with future avoidance schemes as they arise, need a general provision prohibiting arrangements contrived with a purpose of circumventing disclosure, allowing unforeseen anti-disclosure schemes to be dealt with as they arise.

5.17 For disclosure to operate effectively the disclosures made must be complete and correct at the time they are released to the public. For that same reason arrangements and transactions that have been deliberately contrived with a purpose of avoiding disclosure should be punishable by a fine that is sufficient to act as a deterrent.

5.18 Clearly, however, such a provision would need to be invoked by the AEC only where there were reasonable grounds to believe that such arrangements had been contrived for this purpose.

Recommendation 2: that, where an arrangement has been entered into which has the effect of reducing or negating a disclosure obligation under Part XX, disclosure is to be made as if that arrangement had not been entered into.

Recommendation 3: that all those involved in an arrangement found to have been contrived to avoid disclosure should be subject to a financial penalty sufficient to act as a deterrent to engaging in such arrangements.

5.19 Disclosure returns are released for public inspection without any independent assurance of their completeness or accuracy. It is the AEC's understanding, based on advice, that the power to review (audit) disclosure returns contained in the Electoral Act relates to annual returns and not election returns (except any election returns that need to be lodged by specified persons). Further, the AEC does not have the capacity to undertake audits of annual returns between the date of lodgement and the date of public release. Therefore, returns are not reviewed by the AEC prior to them being made available for public inspection. It is for these reasons that the AEC, in its 1996 FAD report to the Parliament, recommended that the annual returns of political parties (and associated entities) be lodged with an accompanying report from an accredited auditor.

5.20 In the case of donors to political parties, there is no assurance that all returns have indeed been lodged. This is because the AEC can only identify these donors (by public release date) from party and associated entity returns, and party returns do not have to distinguish between donations and other receipts (the AEC recommended that donations be required to be separately disclosed in annual returns in its 1996 FAD report). With such indeterminate information and the problems with the definition of 'gift', any cases where a return is not lodged by a possible donor may have to be viewed as an implied statement that the transaction was not a donation.

5.21 The important issue here is that if full, accurate disclosure is not achieved by the date of public release then the information is unlikely to ever be widely reported or known to the general public. This is because the major conduit for informing the public is the media, and their comprehensive interest generally does not extend beyond the first few days after the release of disclosure returns. Of course, there will still be specific issues that the media are interested in after public release date.

5.22 Until February 2000, disclosure returns were only available in hard copy format for inspection at AEC offices. The returns being made available for inspection on the AEC's website has greatly enhanced the public's ability to access this information. The AEC has also provided an update service to which interested persons may subscribe thereby receiving notification of amendments placed on the website. However, the JSCEM may consider and comment on whether there are further ways in which to ensure accurate, complete and timely disclosure of information to the public. For example, the AEC sees it as appropriate that there be an administrative penalty system in place for failure to lodge returns.

Recommendation 4: that Part XX of the *Commonwealth Electoral Act 1918* be amended to enable the AEC to apply an administrative penalty for failure to lodge a return by the due date, including the capacity to impose further administrative penalties for continued failure to lodge.

5.23 It is impossible for the AEC to ensure the integrity of the information released to the public, so this responsibility must, and properly should, fall to those compiling and submitting returns if the public interest is to be served. Currently the Electoral Act deals only with clearly deliberate failures in disclosure. To this extent, there is no effective requirement that due care be exercised in discharging these responsibilities. In other words, mistakes in compiling information to be disclosed is accepted by the Electoral Act.

5.24 This opens up a number of significant opportunities to effectively avoid full public disclosure, whether deliberately or inadvertently. The simplest would be omitting a donation and then requesting a correction to the return some weeks after its public release. The late disclosure of a donation, even of significant value, may never to be extensively reported. That is, the public may not become aware of the donation having been made. Even if deliberate, the AEC could have a most difficult time proving that such action was not the result of a genuine mistake.

5.25 The following number of amendments have so far been received to political party annual returns:

Year	Amendments
2002/2003	22
2001/2002	68
2000/2001	41
1999/2000	42
1998/1999	79

5.26 The largest number of amendments received to one return is eight.

5.27 Other opportunities exist for the deliberate or inadvertent delaying of full disclosure until after initial public release. The obvious example is with donors who have provided a benefit to a political party indirectly. (Section 305B(2) of the Electoral Act deems that a person who makes a donation to another person with the intention of benefiting a political party is taken to have made that donation direct to the political party.) The political party, however, may not report the 'real' donor as it did not receive any donation directly from that person. Therefore, unless the donor knows of and accepts their responsibility to lodge a return without first being approached to do so by the AEC or the AEC becoming aware that such a donation was made, there is a significant chance that the donation would not be disclosed come public inspection day. The AEC will not necessarily have a trail that allows it to identify and advise that donor of their need to lodge a return and it cannot be expected that all such donors will know of their disclosure obligation. But, in most instances where a donation is made that sees a disclosure responsibility arise under section 305B(2), the political party would be aware of the donation or be able to apprise itself of the donation. Such donations are primarily made through associated entities of a party or through other organisations or arrangements that the party is fully aware of, such as fundraising organisations operating on their behalf or with their knowledge.

5.28 One further example is the practice of receiving 'split' donations where an individual person/entity breaks down a single donation into a number of smaller donations each of which falls below the disclosure threshold. In the case of corporations, the Electoral Act specifically deems related bodies corporate to be the one entity and therefore, transactions must be consolidated for the group when determining whether the disclosure threshold has been reached. The AEC's observations, however, are that split donations appear to only rarely be checked by parties prior to disclosure. This is despite the fact that split donations often are received together, making obvious the potential for under-disclosure. It is generally left to the AEC as part of its compliance review (audit) function to perform these checks and, where necessary, require an amendment to the lodged return. A requirement for returns to be audited prior to lodgement may in some way lessen such occurrences.

5.29 For the disclosure provisions of the Electoral Act to be effective, the responsibility for ensuring full and accurate disclosure as at the date of public release must be recognised as resting with those who contribute to, compile and lodge the

return. Ignorance, feigned or real, and negligence (for example, failure to institute appropriate administrative procedures) can be vehicles for effectively suppressing disclosure. This responsibility has not been voluntarily shouldered in all instances and, therefore, needs to be formalised under the legislation. If not, disclosure will, for all intents and purposes, remain a voluntary code.

5.30 Any material failure of disclosure, including disclosure made after the date for public inspection, should be viewed with the same seriousness as the receipt of anonymous donations. As with anonymous donations, the appropriate legislative response would be the forfeiture of amounts equivalent to the value of receipts or debts not fully disclosed at the time of public release of the information.

5.31 This is not to suggest that there are not genuine cases where an agent is unable to complete a return. Such situations are recognised under section 318 of the Electoral Act, allowing an agent to lodge an incomplete return where they have been unable to obtain all necessary information by identifying those particulars and the contact details of the person/s believed to be in possession of that information.

5.32 This provision can, however, also be used to frustrate disclosure either deliberately or through inadequate attempts to obtain all necessary details. Section 318 should be further strengthened to detail some of the minimum steps believed reasonable to expect an agent to have taken to gather all disclosable information before they can be considered to be in the position of being "unable" to lodge a complete disclosure return.

Recommendation 5: that where a receipt of $1,500 or more has been omitted from a disclosure return of a political party, associated entity, donor to a political party, candidate or Senate group, or the details of a receipt included on such a disclosure return do not clearly identify the true source and value of those funds, then a sum equivalent to that receipt should be forfeited to the Commonwealth.

Recommendation 6: that where an outstanding debt of $1,500 or more has been omitted from a disclosure return or the details of that debt included on such a disclosure return do not clearly identify the true source and value of the debt, then a sum equivalent to that debt should be forfeited to the Commonwealth.

Recommendation 7: that section 318 be amended to strengthen the test for an agent to be allowed to lodge an incomplete disclosure return by specifying certain minimum steps required to have been taken before they can be considered to be unable to obtain all necessary particulars. These steps should not, however, be considered an exhaustive test as to what should be considered reasonable attempts. Such steps must have been taken before the due date for lodgement of the return. The section should contain a penalty provision for deliberate inaction or the provision of inaccurate information.

5.33 Even with the adoption of the above recommendations, the AEC believes that the issue of continued failure to correct and/or complete a disclosure return would not necessarily be effectively dealt with. It can be the case that a disclosure return is not corrected and finalised until many months or even years after the disclosure was placed on the public record. Timeliness of disclosure is as important as correct

disclosure. The failure to lodge a return at all, of course, is an even more serious undermining of disclosure. In the case of political parties, such failure should be treated as a grave neglect of the responsibilities of federal registration. While the Act provides penalties for the late lodgement of returns, this can involve expensive and possibly lengthy legal action having to be undertaken by the AEC. The possibility of de-registration would be a more appropriate means of ensuring compliance. As disclosure is an obligation that is accepted when a political party becomes federally registered, a continued failure to properly discharge that obligation should be grounds to cancel registration.

Recommendation 8: that the Electoral Act be amended to require that a political party be deregistered for continued failure (two or more years running) to lodge an annual return or a properly completed annual return by the due date, **or**

Recommendation 9: the failure by the agent of a political party to lodge a disclosure return within 12 months of its due date be grounds for de-registration of that party.

POLITICAL PARTY GROUPINGS

5.34 A major element in the evolution of the legislation has been an attempt to ensure the disclosure of all transactions that may have the potential to lead to undue influence and political corruption. When political parties disclose, they must consolidate transactions throughout the entire party structure. Entities closely associated with parties now must also lodge comprehensive disclosure returns.

5.35 One area that has not been specifically addressed is that of party groupings and factions, including the parliamentary grouping of politicians (the 'parliamentary party') as distinct from the political party organisation registered with the AEC. Such groupings are not always constituent parts of a political party and while they can exercise influence over the internal operations of a party, and, in the case of the parliamentary grouping, heavily influence the political fortunes of the party, they do not necessarily fit the definition of being an associated entity. Hence, their transactions are not always subject to public disclosure. Nevertheless, there is a compelling case that it is in the public interest that such disclosures be made.

5.36 Undue influence can potentially occur at any stage of the political process, including winning faction support, reaching senior positions in the party structure or within a faction, and contesting preselections. The 'parliamentary party' and individual parliamentarians would be obvious targets for someone wishing to seek preferential treatment through the making of donations.

5.37 In normal operations, such groupings could be expected to have few financial transactions. The importance of making these transactions transparent on the public record greatly outweighs what would be a relatively minor exercise in compliance for these groupings by also being included under the Electoral Act's disclosure provisions.

Recommendation 10: that all entities and groupings whose membership or existence is significantly linked to or dependent upon the existence of a registered political party be treated as associated entities for disclosure purposes, or be treated as a part of the party and be required to give information to the party for inclusion in the party's return. (revised recommendation - refer recommendation no. 8 of submission 15 to the 2000-2001 disclosure inquiry)

RECEIPTS AND DONATIONS

5.38 Division 5A of Part XX of the Electoral Act requires annual returns to be lodged by registered political parties and associated entities. Registered political parties are required to lodge a return with the AEC, within sixteen weeks of the end of the financial year, setting out the total amount received, the total amount paid and the total outstanding amount of all debts incurred by, or on behalf of, the party. A similar requirement is made of associated entities.

5.39 There is a requirement for the AEC to make the various disclosure returns publicly available for inspection. To facilitate this process, the AEC now makes annual disclosure returns available on its website. Increasingly, these details are being accessed by the public, particularly the media.

5.40 However, there appears to be some lack of understanding of the information being viewed in the disclosure returns on the AEC's website.

5.41 There seems to be little misunderstanding about what is meant by "the total amount paid" and "the total outstanding amount of all debts incurred". However, there does appear to be some confusion in relation to what is meant by "the total amount received", particularly in the media. Many interpret "the total amount received" to mean only donations and therefore, expect to see donor returns matching the amounts each party has listed in its receipts valued over $1,500. People find it hard to accept that the difference is due entirely to items that would not be considered donations. For example, parties have declared around $88.8 million in receipts for the 2002/2003 financial year whereas donors have so far declared around $19.1 million in donations.

5.42 The term "gift" (donation) is defined in section 287 of the Electoral Act. Whilst donations and receipts are both monies incoming to parties or associated entities, donations will form only part of their receipts, and so the total of donations cannot be expected to match the total of receipts. "Receipts" include donations but will also include other income such as membership fees, bank interest, rent on property owned, and so on.

5.43 Given that the point of making these returns public is to combat undue influence in the political process by making the financing and support of political parties and others as transparent as possible, it would be of major benefit for anyone looking at these returns to be able to readily identify which receipts are donations and which are not. Refer to recommendation 23 later in this submission.

5.44 Further, recent media commentary has brought to the fore an issue raised previously by the AEC in its first submission to the JSCEM inquiry into disclosure

matters in 2000-2001. That is, the issue of organisations or groups which do not meet the current definition of associated entity, yet are the channel for what might often be a considerable amount of funds to the party. There is a range of organisations or groups which may fulfil this role but the ones most recently reported by the media have been both internal and external fundraising organisations/groups as well as organisations set up to handle party funds.

5.45 Sometimes these organisations or groups do not have to lodge a separate return with the AEC as they do not meet the definition of associated entities. Attendees at the fundraising functions some of these organisations and groups run would be required to lodge a donor return if the money they paid at the function was a donation intended to benefit a political party. However, many attendees are not aware of their disclosure obligations, if applicable, and so may inadvertently not lodge returns. Whilst it is an individual's responsibility to be aware of his or her legal obligations, it may assist donors if parties, for example, referred donors to the AEC website for information on disclosure obligations. One of the important tools that the public has to ensure that the disclosure requirements of the Electoral Act are being properly met by political parties, is to be able to cross-check the information in political party returns with the information in donor and associated entity returns. This cannot be done if all returns are not being lodged.

5.46 Discussion of such fundraising organisations and bodies also raises the issue of the sorts of activities they undertake, for example dinners and auctions. There has been considerable media commentary on the amounts paid for dinners and for items at auction and whether these are reasonable amounts (that is market value), or simply an easy way to avoid the disclosure provisions of the Electoral Act as they relate to donors and donations.

5.47 These issues have been previously raised by the AEC: **recommendation 5 of the 1996 FAD report** called for the separate disclosure of donations from general receipts; **recommendation 6 of the 1998 FAD report** called for a further defining of "associated entity"; **recommendation 1 of the first AEC submission** to the first part of this inquiry proposed extending associated entity disclosure in a limited form where organisations external to political parties conduct transactions on their behalf; and **recommendation 2 of the same submission** suggested all payments in relation to a fundraising event be deemed to be donations for the purposes of disclosure. The JSCEM should be aware of the continuing disquiet in regard to these matters and the need to consider remedies.

5.48 In regard to **recommendation 6** of the 1998 FAD report further defining "associated entity", this continues to be a difficult area in the legislation, and perhaps is responsible for the greatest number of concerns being publicly voiced about the comprehensiveness of disclosure. It is also a highly resource intensive area for the AEC. Uncertainty about the disclosure obligations of possible associated entities can arise where it is the members, or certain members, of a political party as distinct from the political party itself that are the beneficiaries of the operations of an organisation.

5.49 It is, therefore, proposed that the definition of associated entity be expanded to ensure that it clearly covers instances where members of political parties are in receipt of the benefit provided by an organisation. In considering any such

amendment though, it is important to keep in mind that 'benefit' is not a strictly financial term and that the benefit flowing may not always be tangible. That is, benefit received may not necessarily be in the form of money. As well as gifts-in-kind, benefit may also be in the form of assistance (such as campaigning on the same platforms as a party) or other actions which may directly and positively affect a party.

Recommendation 11: that the term 'benefit' currently used in the definition of 'associated entity' be further clarified by inserting the following interpretation: that 'benefit' include instances where the benefit is enjoyed by members of a registered political party on the basis of that membership.

Recommendation 12: that the transactions of a political party undertaken on its behalf by another organisation be disclosed by that organisation in a 'special' return (this would be in addition to the current requirement for parties to included these details in their returns).

Recommendation 13: that all payments at fundraising events be deemed by the Electoral Act to be donations or be required to be disclosed anyway. (revised version of recommendation 2 of submission 7 to the 2000-2001 disclosure inquiry)

ANONYMOUS DONATIONS

5.50 The AEC made a number of recommendations on anonymous donations in the 1996 and 1998 FAD reports. This is a fundamental issue because, clearly, anonymity undermines transparency in disclosure. Although anonymous donations are already addressed in the Electoral Act, the AEC believes that this provision demands greater rigour.

5.51 The Electoral Act makes illegal the receipt of donations unless the name and address of the donor are known (or reasonably believed to be known) where that sum equals or exceeds $200 for candidates and $1,000 for political parties and Senate groups. In applying these thresholds, multiple donations from the same source are to be counted together.

5.52 An obvious flaw in this provision as it currently stands is that it can often be impossible to establish whether two or more donations have come from the same source when the name and address of the donor is unknown. The only manner in which this accumulation provision could operate effectively is if it applied irrespective of the source of the funds.

Recommendation 14: that the cumulative thresholds outlawing the acceptance of anonymous donations apply irrespective of the source of the gift.

OVERSEAS DONATIONS

5.53 There are no restrictions placed upon political parties or others by the Electoral Act on either the size or source of donations. The system seeks full public disclosure of all such transactions rather than any prohibition. Unlike some other countries, therefore, Australia allows political donations to be received from overseas

sources, although they have been relatively rare. But donations sourced from overseas can pose problems for disclosure.

5.54 Australian law generally has limited jurisdiction outside our shores and hence the trail of disclosure can be broken once it heads overseas. This provides an obvious and easily exploitable vehicle for hiding the identity of donors through arrangements that narrowly observe the letter of the Australian law with a view to avoiding the intention of full public disclosure. If the overseas-based person or organisation who makes a donation to the political party were not the original source of those funds there would be no legally enforceable trail of disclosure back to the true donor, nor would any penalty provisions be able to be enforced against persons or organisations domiciled overseas.

5.55 Indeed there was a widely reported case in the 1990s where a donation 'travelled' from Australia to an overseas-based company which then passed that donation on to a political party in Australia. The true donor was not originally disclosed in that instance, but no disclosure law had been broken. Full disclosure had been legally avoided.

5.56 Set out on the following page is data extracted from the annual returns on the AEC's website showing receipts reported in party returns with an overseas address.

Years	Party	Return	Amount	Name	Address	Suburb
1998/1999	Liberal Party of Australia - Federal Secretariat	P208	$5,000.00	M J Dwyer	PO Box 443	PORT MORESBY
1998/1999	Citizens Electoral Council of Australia	P178	$5,250.00	Michael Esdaile	PO Box 299, Kumea	WEST AUCKLAND
1998/1999	Liberal Party of Australia (WA Division) Inc	P140	$5,000.00	W S Cairns	c/ Lakersfield Investment, St Peter Port	GUERNSEY ISLAND
1999/2000	Australian Labor Party (NSW Branch)	P0075	$25,000.00	B Salizar	C/- Food Terminal Inc, South Superhighway, Taguig Metro	MANILLA, PHILLIPINES
1999/2000	Australian Greens	P0016	$19,438.22	Green Forum Foundation	Box 2136 103 14 Stockholm	SWEDEN
2000/2001	Liberal Party of Australia - NATIONAL	P2069	$3,301.05	International Democrat Union	32 Smith Square	WESTMINISTER
2001/2002	Australian Labor Party - SA	P2112	$10,000.00	Alastair Walton	41 Island Road	HONG KONG
2001/2002	Australian Labor Party (State of Queensland)	P2116	$9,586.42	Chen Kang	401-3 Prosperous Building, 48 Des Voeux Road C	HONG KONG
2001/2002	Liberal Party of Australia - Queensland Division	P2124	$2,000.00	David Argyle	Sichuan Province	CHINA
2001/2002	Liberal Party of Australia - Queensland Division	P2124	$2,000.00	Flextronics	2010 Fortune Drive	SAN JOSE, 95131
2001/2002	Australian Greens - NATIONAL	P2101	$7,724.15	French Greens (Les Verts)	25 rue Melingue 75019	PARIS, FRANCE
2001/2002	Australian Greens - NATIONAL	P2101	$1,553.00	French Greens (Les Verts)	25 rue Melingue 75019	PARIS, FRANCE
2001/2002	Liberal Party of Australia (Victorian Division) - VIC	P2126	$1,948.00	J Mackay Gill	C/- Sungard, 9th Floor, 560 Lexington Ave	NEW YORK NY USA
2001/2002	Australian Democrats - NATIONAL	P2089	$2,200.00	Lucent Technology	29F Shell Tower, Time Square	HONG KONG
2001/2002	Australian Labor Party – WA	P2151	$5,000.00	Potain Pty Ltd	70 Shannons Way	SINGAPORE
2001/2002	Australian Labor Party (State of Queensland)	P2116	$9,769.25	Zhang Ziaojing	401-3 Prosperous Building, 48 Des Voeux Road C	HONG KONG
2002/2003	Liberal Party of Australia (Victorian Division)	P2229	$14,000.00	Dr Kazumasa Ikoma MD	Director of Hospital, 99/8 Hiron, Ingawa/Cho	KAWABE, HYOGO, JAPAN
2002/2003	Australian Labor Party (N.S.W. Branch)	P2195	$17,674.09	Hatco Corporation	1020 King George Post Road	FORDS, NJ, 98568
2002/2003	Liberal Party of Australia, NSW Division	P2214	$8,360.00	Icon Productions LLC	808 Wilshire Boulevard, 4th Floor	SANTA MONICA
2002/2003	Australian Labor Party - SA	P2168	$5,500.00	SkyCity Entertainment Group	PO Box 90643 Wellesley Street	AUCKLAND NZ
2002/2003	Australian Greens - NATIONAL	P2221	$2,858.20	United States Greens	PO Box 57065	WASHINGTON DC

5.57 The AEC sees two options to address this loophole. The first would be to place a blanket prohibition on the receipt of funds that have come from or passed through an overseas entity. This seems the easiest solution and removes any doubt from those receiving donations. Based on disclosed histories (for examples see previous table), such a prohibition would have negligible impact upon the donation receipts of political parties or candidates. The second option would be to make the retention of overseas donations conditional upon full disclosure, including by the overseas entity or entities. Disclosure that does not identify the true source of a donation that has passed through overseas hands would be forfeited to the Commonwealth. This second option places an obligation upon overseas donors to comply with Australian disclosure laws. It should also be a reasonable expectation that a political party or candidate with a commitment to public disclosure would ensure that all donors, including overseas donors, were aware of the disclosure laws. This second option, however, does nothing to resolve the problem of trying to track and prosecute donors who are overseas.

5.58 Whatever action is taken must be extended to donations received from overseas by third parties or associated entities which are then passed on to a political party or candidate or used to their benefit.

Recommendation 15: that donations received from outside Australia be either prohibited, or forfeited to the Commonwealth where the true original source of that donation is not disclosed through the lodgement of disclosure returns by those foreign persons and/or organisations.

OVERSEAS LOANS / DEBTS

5.59 Loans and debts have the same potential for exercising political influence as donations. The threat of calling in a major debt, for instance, could be more harmful to a political party than the withholding of a donation of an equivalent value.

5.60 The identification of the true source of a loan or debt, not just the entity to whom the sum is owed as at the reporting date of 30 June, is as important to disclosure as the true identity of donors. The same problems presented to disclosure by donations sourced from outside Australia equally apply to loans or debts owed overseas.

5.61 For that reason, the AEC believes that any legislative measure introduced to ensure full disclosure of donations sourced from overseas must also be equivalently applied to the disclosure of overseas debts.

5.62 As with donations sourced from overseas, debts owed by political parties to overseas concerns have received some prominence in the media, particularly given that debts can be outstanding for some years. For example, there have been reports concerning the ongoing nature of a large outstanding debt held by the Citizens' Electoral Council of Australia (CEC). The 2002/2003 return for the CEC shows an 'overseas' debt of approximately $268,000.

Recommendation 16: that debts and loans sourced from outside Australia or owed to an entity outside Australia either be prohibited, or forfeited to the Commonwealth where the true original source is not fully disclosed by the political party or associated entity under that commitment.

FORFEITURE OF FUNDS TO THE COMMONWEALTH

5.63 Under the Electoral Act the penalty for accepting anonymous donations or certain loans is a sum equivalent to the sum received, and is forfeited to the Commonwealth. Indeed, the acceptance of sums under these circumstances is deemed illegal under the Electoral Act.

5.64 The current penalty is only a moderate deterrent at very best. The penalty does no more than return the party (or candidate) to the financial position that it would have been in had it observed the law in the first place. In other words, there is nothing to be lost by accepting money that the Electoral Act deems to be illegal. The penalty should contain some element of punishment for breaking the law if it is to operate as a deterrent.

Recommendation 17: that the amount to be forfeited to the Commonwealth where a sum deemed to be illegal under the disclosure provisions has been received, be increased to double the value of the sum received.

'SHELL' POLITICAL PARTIES

5.65 Associated entity provisions are designed to ensure full disclosure of the transactions of political parties even where transactions are undertaken on their behalf by a separate entity. However, these provisions do not cover all arrangements. One such instance is the use of 'shell' political parties.

5.66 The Australian Shooters' Party (ASP) serves as an example of what is meant by a 'shell' party. The ASP is registered federally while a separate party, The Shooters' Party, is registered in New South Wales. As stated in previous submission, the AEC understands that the ASP undertakes limited fundraising in its own right and is effectively only functional during federal election campaigns. The bulk of the funding that the ASP received for the 1996 and 1998 federal elections came as a lump sum donation from The Shooters Party. The two parties have separate constitutions and membership and there is no apparent legal connection between them. Notwithstanding this separation, the ASP is, for all practical purposes, the federal arm of The Shooter's Party. The suspension of the ASP's operations between federal elections and its reliance upon The Shooters' Party for its financial viability, suggest that it is a 'shell' party through which The Shooters' Party contests federal elections.

5.67 The arrangement has the effect of limiting the disclosure required of those funding the electoral campaign of the ASP. As a political party registered in New South Wales, The Shooters' Party has only limited disclosure responsibilities in conjunction with contesting New South Wales state elections and is only required to disclose as a donor to a political party under the Commonwealth Electoral Act.

The Shooters' Party does not appear to meet the definition of an associated entity due to it's dominant role in the relationship.

5.68 Arrangements similar to that which exist between The Shooters' Party and the ASP could be entered into for the express purpose of avoiding public disclosure. An extension of the associated entity disclosure provisions may overcome this loophole. Legislation, however, would need to be carefully drafted to ensure that full disclosure is achieved. In the cases of State registered political parties, any significant relationship with a federally registered party, administrative or financial, direct or indirect, should oblige that State registered party to assume the disclosure obligations of a federally registered political party. Consequently, organisations that have a relationship with that party, if it were a federally registered party, would assume federal disclosure responsibilities (that is, as a donor to the party or as an associated entity).

Recommendation 18: that entities that operate through 'shell' political parties be required to assume full disclosure responsibilities under the Electoral Act such that the true source of funds used by that party are made public.

SECTION 306B

5.69 The AEC wishes to repeat comments made in its fifth submission in response to questions on notice (dated 23 April 2003) to the JSCEM inquiry into the 2001 federal election regarding possible problems with section 306B of the Electoral Act.

5.70 The AEC believes that the Electoral Act will require further amendment if section 306B is to be made workable. The section was inserted as a result of an amendment made in the Senate. The stated purpose of the amendment is to 'require political parties to return donations that are received from companies that go broke'.

5.71 As a result of advice from the Australian Government Solicitor, the AEC believes that certain aspects of section 306B may be found by a court to be constitutionally invalid because they may effectively impose a tax (section 55 of the Constitution). In particular, it may be considered by a court to impose a tax on party agents, candidates' agents, Senate group agents or members of a Senate group, who did not actually receive the sum in question but are made liable, by virtue of section 306B, to pay it back. They would not have a common law right of reimbursement of the amount from whoever actually received it.

5.72 At the time that this was previously raised with the JSCEM, the Committee recommended that definitive legal advice be sought. However, the AEC sought legal advice prior to its previous submission to the JSCEM on this matter. Only a court can provide a definitive interpretation. Given that such flaws may result in an unfair imposition on those affected, the AEC again seeks the support of the JSCEM to have the flaws corrected. The AEC does not believe that the flaws in the provision would be difficult for the drafters in the Office of Parliamentary Council to resolve.

Recommendation 19: That the JSCEM recommend that section 306B be amended to remove, or at least reduce, the possibility that the section may be found constitutionally invalid.

SUBSECTION 316(2D)

5.73 Subsection 316(2D) was inserted into the Electoral Act as a result of amendment to the Commonwealth Electoral Amendment Bill (No.1) 2002 moved by the ALP. The subsection states:

> (2D) Where a body corporate, unincorporated body or individual has made a gift or disposition of property of $25,000 or more to a registered political party or candidate, an authorised officer must conduct an investigation of that gift or disposition of property in accordance with this section.

5.74 The AEC has two main concerns with this subsection. The first concern is that the section compels the AEC to investigate all receipts of $25,000 without, it would appear, regard to whether the amounts may have already been disclosed in accordance with obligations set out in Part XX of the Electoral Act.

5.75 The second concern is that it requires the AEC to conduct an investigation in accordance with section 316 of the Electoral Act. Section 316 does not actually prescribe how the AEC should go about its investigations (although clearly it does not intend for the AEC to be irresponsible or oppressive in its approach), it merely gives the AEC power to investigate. The AEC does not think that section 316 should prescribe the manner of investigations, rather that subsection 2(D) should not refer to the manner.

5.76 Further, the AEC understands that the amendment was moved in response to a recommendation made by the AEC that it be given the power to investigate donations over a certain threshold. As the subsection requires the AEC to investigate a 'gift' (donation) or a disposition of property, it actually requires the AEC to investigate all party/candidate receipts of $25,000 or more. This may or may not have been intended when the amendment was made. It is further complicated by the fact that candidates and donors to candidates are only required to declare donations received/made and not all receipts (as is required of parties). It should also be kept in mind that, under subsection 316(3) of the Electoral Act, the AEC only has the power to investigate election returns where it has reasonable grounds to believe that there has been a contravention or possible contravention of the relevant disclosure provisions. Subsection 316(2D) would appear to be in conflict with that.

Recommendation 20: That subsection 316(2D) be amended to remove the words 'in accordance with this section' and include the proviso that an investigation only be undertaken to find out whether relevant disclosure obligations have been complied with (a similar concept to that in subsection 2A).

OTHER RECOMMENDATIONS IN PREVIOUS SUBMISSIONS

5.77 The 1996 FAD report made several detailed recommendations:

5.78 All House of Representatives and Senate candidates must disclose election donations received. Jointly endorsed and unendorsed Senate groups must also lodge donations returns. The donor must also separately disclose donations totalling $200 or more made to candidates. The $200 threshold has not changed since 1984, with the result that donations that may now be considered minor are still required to be disclosed along with the significant donors. In comparison, the disclosure threshold for Senate groups is already set at $1,000, which appears to be a more appropriate level.

Recommendation 21: the threshold for disclosure of donations to candidates be raised to $1,000.

5.79 Where third parties have incurred electoral expenditure totalling $200 or more they are required to furnish a return. The $200 threshold has not changed since disclosure was introduced, and may no longer considered to be set at an appropriate level, particularly given the steep increase in the cost of broadcast advertising. The AEC believes that this disclosure threshold should be raised to $1,000 so that disclosure obligations are placed only upon those third parties who are involving themselves in an election campaign to a significant degree.

Recommendation 22: the threshold for disclosure of electoral expenditure by third parties be raised to $1,000.

5.80 All transactions received by, or on behalf of, a political party, must be included in their returns. Disclosure includes donations received; federal, state and local election transactions; ongoing administration; membership; business transactions; and non-monetary 'gifts-in-kind'. Donations, however, are not separately identified from other receipts in the returns. This can lead to confusion and, in some cases, misreporting by journalists. It also complicates the task for the AEC when attempting to identify donors who are required to lodge disclosure returns.

Recommendation 23: in their annual returns, political parties be required to identify donations separately from other receipts.

5.81 For disclosure to be effective, the returns lodged with the AEC must be accurate and complete at the time that they are placed on the public record. It is well beyond the AEC's current resources to undertake reviews of returns in the period between their receipt and public display. There is a strong public interest argument that disclosure returns of political parties (and perhaps associated entities) should carry some guarantee that they are free from errors and omissions at the time that they go on display. Requiring parties to submit disclosure returns which have been certified by a registered auditor would address this concern.

Recommendation 24: political party annual returns be accompanied by a certification from an accredited auditor.

5.82 Section 306 of the Act makes it illegal to receive anonymous donations where the total of such donations from a single source equals or exceeds $1,000 in the case of a political party or Senate group and $200 for a candidate. Anonymous donations are payable to the Commonwealth. For ease of understanding and compliance, these threshold amounts should be linked to the disclosure threshold of donations/receipts, ie $1,500 for political parties, $200 for candidates and $1,000 for a Senate group.

Recommendation 25: the threshold for recovering 'anonymous donations' to registered political parties, candidates and Senate groups be the same as the disclosure thresholds.

5.83 It has proven difficult in some circumstances for the Commonwealth to recover donations that, prima facie, appear to be anonymous. Given that the objective of the legislation is to prevent persons from remaining unidentified by not providing their details at the time of making the donation, an appropriate test would be whether a donor actually ends up being disclosed. A provision requiring the full details of donations received to be fully disclosed in a return lodged with the AEC, or else be deemed ‘anonymous’, would be more effective.

Recommendation 26: the definition of an 'anonymous donation' be revised from the name or address not being known at the time of receipt to not being known at the time of disclosure.

5.84 The 1998 FAD report made several detailed recommendations:

5.85 There is an anomaly in the legislation in that disclosure is not required by donors to Senate groups that have either been jointly endorsed or are unendorsed. To ensure complete disclosure at elections, these donors should also be required to lodge donor returns and to disclose any donations they received that assisted them in making their donations. This would result in consistent treatment with donors to candidates.

Recommendation 27: require disclosure by donors who have made donations of $1,000 or more to Senate groups the members of which have not all been endorsed by the one registered political party and disclosure by those donors of any donations they received of $1,000 or more which they used, in whole or in part, to incur expenditure for a political purpose.

5.86 The different definitions for expenditure for a political purpose (which is not disclosed) and electoral expenditure (which is disclosed) create confusion for third parties and unnecessarily complicate the task of disclosure. The disclosure of donations received could be greatly simplified if it were matched to the disclosures already required by third parties of their election expenditures and donations made to candidates and Senate groups. To ensure the true source of those donations is always disclosed, the requirement to disclose donations received where the electoral expenditure or donation made was indirect must be retained.

Recommendation 28: amend the requirement for a third party to lodge a return of donations received to instances where those donations were used in whole or in part on electoral expenditure or donations made which are required to be disclosed by the third party for that same election.

5.87 Broadcaster and publisher returns must be lodged within eight weeks following polling day. The 1996 FAD report discussed the fact that broadcaster and publisher returns are rarely ever inspected once placed on the public record, and following the release of the 1998 election returns there was not one request to inspect these returns. The interest in the 2001 returns seems to have been limited to researchers. The AEC likewise makes little use of the information contained in these returns. The AEC sees no justification in the continuation of this administrative and financial imposition upon broadcasters and publishers. The election and referendum disclosure obligations for broadcasters and publishers should be repealed. Donations by broadcasters and publishers, including instances where favourable advertising rates were charged, would of course continue to be subject to the general disclosure requirements

Recommendation 29: abolish the requirement for broadcasters and publishers to lodge disclosure returns following an election or referendum. (Included in the Bill which was introduced in the House of Representatives on 1 April 2004.)

5.88 Political parties, on an annual, financial year basis, are required to lodge returns disclosing the totals of all their receipts, payments and debts. The requirement for a political party (or an associated entity) to lodge an annual return is triggered by the end of a financial year on 30 June. But this trigger means that there is no provision for disclosure by a political party in the financial year that it is deregistered. This omission would appear to be a simple oversight in the legislation that should be corrected. Political parties and their associated entities should lodge final disclosure returns upon deregistration and/or cessation of operations.

Recommendation 30: the party agent or, in the absence of a registered party agent, those persons who currently form or last formed the party's Executive Committee, be required to lodge an annual return within 16 weeks of the date of deregistration of the party covering the period from 1 July until the date of deregistration.

Recommendation 31: The financial controller of an associated entity should be required to lodge a return covering the period up to the deregistration of the political party that it was associated with, or the period up to when the associated entity ceases operations, as the case may be.

5.89 The Electoral Act requires persons who make or obtain records which may contain information required to be disclosed in a return to the Commission, to retain those records for three years. Failure to retain such records is punishable by a fine of up to $1,000. The Act does not, however, place any obligation upon persons to maintain financial records to a standard that allows them to fully comply with the disclosure requirements of the Act. There is no requirement for persons to initiate records, such as documenting donations received, or to obtain records, such as receipts for monies paid, or to keep a set of accounting records. Allowing persons

handling financial transactions to not make a record of those transactions weakens disclosure.

Recommendation 32: persons who fail to make or maintain such records as enables them to comply with the disclosure provisions of the Act be subject to the same penalty provisions as apply to persons who fail to retain records.

5.90 Organisations continue to ask whether they fall within the definition of associated entity. The *Electoral and Referendum Amendment Act 1999* broadened the definition of associated entity from being one that 'operates wholly or mainly for the benefit of one or more registered political parties' to 'operates wholly or to a significant extent for the benefit of one or more registered political parties'. While the intent of this change seems to be to further prevent organisations from structuring their affairs to avoid disclosure as associated entities, the AEC is concerned that it adds yet further imprecision to the definition. This ultimately may only be able to be resolved before the courts on a case by case basis. The AEC believes that the aims of the legislation can be better realised by clarifying the existing definition of associated entity to remove arguments over interpretation.

Recommendation 33: the definition of an associated entity be clarified by inserting the following interpretations into the Act:

- 'controlled' to include the right of a party to appoint a majority of directors or trustees;
- 'to a significant extent' to cover the receipt by a political party of more than 50% of the distributed funds, entitlements or benefits enjoyed and/or services provided by the associated entity in a financial year; and
- 'benefit' to include the receipt of favourable, non-commercial terms and instances where the party ultimately enjoys the benefit.

5.91 The introduction of detailed annual disclosure by associated entities was aimed at helping ensure full disclosure by preventing political parties channelling transactions through third parties with limited disclosure obligations. The current provisions, however, still allow an avoidance of disclosure of the source of funds to political parties by allowing associated entities to accept anonymous donations of any value and then pass them on to a party, candidate or Senate group. This would appear to be an oversight in the legislation. The necessity to prohibit the receipt of anonymous donations by political parties is reinforced by the necessity to prohibit their receipt by associated entities.

Recommendation 34: the prohibition on the receipt of an 'anonymous donation' be extended to associated entities on the same basis as for those made to registered political parties.

5.92 Subsection 305B(2) of the Act deems that a person who makes a donation to another person with the intention of benefiting a political party is taken to have made that donation direct to that political party. In the circumstance where payment of a guarantee over the debt of a political party has taken place, that political party has benefited. The donor, who was the true source of the funds used to pay that guarantee, could have a disclosure responsibility under this deeming provision;

however, disclosure cannot be guaranteed. It is most likely that, under this scenario, the donor would not know of their disclosure responsibility. This ignorance is compounded by the lack of any legal compulsion for the AEC to be notified of the transaction or of the donor's identity - the guarantor who received the donation has no obligation to disclose its receipt, and the political party which has been the beneficiary may not even know of the donation to the guarantor and, therefore, would not disclose it. Ultimately the AEC, which is tasked to administer disclosure in the interests of transparency in the political financing process, has no means of identifying the donor and obtaining a disclosure return.

5.93 It is the opinion of the AEC that amendments to the Act effected by the *Electoral and Referendum Amendment Act 1999* do not fully address the loophole as outlined above. This is primarily because there remains no requirement for disclosure of the guarantor and, therefore, no link to the donor, the true source of the funds. The AEC believes that the simplest and most effective way to close this loophole is for the Act to deem the payment of a guarantee to be a donation. This would complement the initiative of the *Electoral and Referendum Amendment Act 1999* for donors to political parties to disclose donations they have received. While the payment of a guarantee is not identical to the making of a donation, the fact that a benefit is obtained by a political party in either instance is the critical issue and all benefits received by a political party that have a financial value should be disclosed if the intent of the Act is to be honoured

Recommendation 35: the payment of a guarantee to be deemed to be a gift for the purposes of the disclosure provisions of the Electoral Act.

5.94 The *Electoral and Referendum Amendment Act 1999* required donors to political parties to disclose details of donations of $1,000 or more they received in making their donations. The AEC believes that for clarity and consistency this threshold should be set at the same level as for the disclosure of donations made to a political party, that is to say, at $1,500.

Recommendation 36: raise the threshold at which donors to political parties are required to disclose donations received and used by them, either in whole or in part, to fund their donations to a registered political party from $1,000 or more to $1,500 or more to maintain a consistent value at which the Act deems disclosure necessary.

5.95 Further, the amendment described above contains a potentially serious flaw in that it does not specify, as is done elsewhere in the disclosure provisions of the Act, that two or more donations from the same person are to be taken as the one donation. Such a provision is intended to prevent a person from evading disclosure by splitting their donation into a number of amounts each falling under the set threshold.

Recommendation 37: the threshold at which donors to political parties are required to disclose donations received of $1,000 or more to include two or more donations from the same source which together exceed the set threshold.

5.96 Expenses or debts that have not yet arisen but are contingent upon the occurrence of some other event, could nevertheless be as significant to a political party or an associated entity as an existing debt. If donations and debts are required to be disclosed, there is an equivalent need to disclose contingent liabilities. Contingent liabilities, such as the giving of a guarantee over party debt, should be disclosed where the potential liability exceeds $1,500.

Recommendation 38: contingent debts be treated identically to current debts for disclosure purposes.

THE APPOINTMENT OF AGENTS

5.97 The 1996 FAD report made the point that it was unreasonable to expect candidates with limited knowledge of the legislation, to arrange the appointment of agents by the close of nominations when they had more important priorities. As an agent's roles in funding and disclosure matters do not manifest themselves until after polling day, there is the opportunity to extend the deadline for the appointment of candidate and Senate group agents beyond the close of nominations.

Recommendation 39: candidates and Senate groups be allowed to appoint agents up to 6:00 pm on polling eve.

OTHER MATTERS

5.98 Recommendation 15 of the 1993 FAD report stated: 'that consideration be given to repealing the remainder of section 305A (as amended by *Commonwealth Electoral Amendment Act 1995*).' In the time that has passed since this recommendation was made it has become clear that there is a public expectation that this level of disclosure be retained. However, it is still the case that there are issues relating to the administration and interpretation of the section that need to be clarified. The AEC therefore now makes the following recommendation.

Recommendation 40: that section 305A of the Electoral Act be revised to clarify who is meant to be captured by paragraph 305A(1)(c), extend the due date for lodgement of returns and clarify where donations to endorsed candidates should be reported.

6. PARTY REGISTRATION

THE FIRST 20 YEARS

6.1 The major amendments made to the Electoral Act in 1983 instituted a scheme of registering both candidates and political parties.

6.2 The Register of Candidates was established for two main purposes:

- to enable the clear identification of candidates eligible to receive public funds for their election campaign, and
- to facilitate the printing of party political affiliations of candidates on ballot papers.

6.3 It was not compulsory for candidates to register, however, registration was compulsory if endorsed candidates wanted their party affiliation to appear on the ballot paper or an unendorsed candidate wanted the word 'Independent' to appear on the ballot paper. Separate registers were maintained for each general election and each Senate election, and candidates had to register for each election they wished to contest. Unendorsed candidates also needed to be registered in order to claim election funding.

6.4 Registration of candidates was removed from the Electoral Act in 1987. Endorsement of candidates is now effected at the same time as nomination and it is at this point that the registered officer or deputy registered officer of a registered political party indicates the form in which the party name should appear against the candidate's name on the ballot paper. Candidates, and parties, no longer need to lodge claims for payment of election funding as payment is now purely formula driven based on votes received.

6.5 The concept of party registration has remained in the Electoral Act largely unchanged since its original introduction. The last major changes were made in 2000 and 2001. These changes altered the definition of a parliamentary party, restricted people (members) to only being able to support the registration of one political party, and also provided the AEC with a specific power to review the ongoing eligibility of parties to remain registered. These amendments are considered to have enhanced the integrity of the Register of Political Parties.

PARTY REGISTRATION MATTERS

PROCEDURAL DELAYS IN REGISTERING POLITICAL PARTIES

6.6 The *Commonwealth Electoral Amendment Act (No.1) 2000* included changes to the political party registration provisions of the Electoral Act designed to prevent the registration of multiple parties by one person or group without a proven

level of community support. These changes commenced on 3 October 2000 and included:

- altering the definition of parliamentary party (previously a parliamentary party could be registered by a member of any Australian Parliament, now one can be registered only by a federal parliamentarian);
- adding the requirement that a list of 500 members be included with an application for registration by a non-parliamentary party;
- adding the requirement that a fee of $500 accompany an application for registration and for certain changes to a party's registered details;
- adding the requirement that a member cannot be relied upon by more than one party for the purposes of registration.

6.7 The biggest impact that these amendments had on the processing of applications for registration is that there is now a requirement to cross-check membership lists, including for parliamentary parties, to ensure that no member is being relied upon by more than one party for the purposes of registration.

6.8 To enable the AEC to carry out this task, it was first necessary for the AEC to review all currently registered political parties to determine:

- in the case of parliamentary parties, which member(s) of the Commonwealth Parliament the party was relying upon for the purposes of registration
- in the case of non-parliamentary parties, the names and details of the 500 members the party was relying upon for the purposes of registration.

6.9 The AEC conducted a review of the Register of Political Parties commencing in December 2000. The review resulted in a number of parties being deregistered. However, the Democratic Labor Party of Australia (DLP) contested in the Federal Court, the AEC's ability to deregister it contending that the AEC did not have the power to require parties to provide a list of 500 members. The AEC's view was that it could not administer the legislation as Parliament intended unless it was assumed that it had this power. The Court ordered on 8 June 2001 that the AEC take no further action in relation to the notice of deregistration of the DLP contained in the Gazette of 28 March 2001. This action, therefore, ceased.

6.10 Although court action had been taken only by the DLP, the AEC also ceased deregistration action against other parties which were to be deregistered on the same grounds as the DLP.

6.11 Further amendments to the Electoral Act inserted section 138A, which gave the AEC specific power to review the eligibility of parties to remain registered. These amendments were proclaimed on 16 July 2001. The amendments also provided that failure to comply with a notice issued under section 138A was grounds for deregistration.

6.12 The AEC then re-commenced its review of the Register of Political Parties to determine parties' continued eligibility to remain registered. The AEC issued "138A" notices to those parties against which deregistration action was ceased as a result of the "1st" DLP court case. After the deadline for reply to these notices, deregistration action was commenced against those parties that had failed to

comply with the "138A" notice. The AEC considered that the DLP was one of these parties.

6.13 The DLP lodged applications for an order of review and a writ for prohibition with the Federal Court on 7 January 2002. The AEC suspended deregistration action in respect of the DLP pending the outcome of this court case. The case was heard in the Federal Court on 5-6 and 15-16 August 2002. Justice Marshall handed down his decision on 11 October 2002. Justice Marshall's decision was that the application be dismissed and that the applicant pay the respondent's costs.

6.14 On 18 October, the DLP lodged an appeal against the decision to the full Federal Court. The appeal was heard on 17 February 2003 in Melbourne. The Court handed down its decision on 13 May. The Court dismissed the appeal and ordered the appellant to pay costs.

6.15 The DLP made application for special leave to appeal to the High Court. An application for expedited hearing of the special leave application was made by the DLP and joined by the AEC. The High Court ordered that the hearing of the application for special leave be expedited. The special leave application was heard by the High Court in Melbourne on 3 October 2003. Special leave was granted. The matter was heard by the High Court on 11 February 2004 in Canberra. The Court has reserved its decision. An injunction was issued by the High Court preventing the AEC from taking any action to deregister the DLP until after 21 May 2004.

6.16 The 2001 amendments contain a prohibition on the AEC undertaking a review of political parties between the issue of a writ for an election and the return of the writ. That is, the AEC was not able to (re)commence its review of currently registered political parties (started as a result of the amendments which came into effect in October 2000) until after 27 July 2001, the date of the return of the writ for the Aston by-election.

6.17 Further, there are minimum time periods set by both these amendments, and the existing deregistration provisions in the Electoral Act, which mean that it would take a minimum of 3 months to deregister any party failing to reply to a request for eligibility information from the AEC or refusing to supply the information requested.

6.18 If the AEC cannot finalise the basis for registration of currently registered parties, it may not be possible to finalise processing of new applications for registration. This is because the cross-checking of membership lists to ensure the 'uniqueness' of them, requires the AEC to be in possession all membership lists parties are relying upon for registration purposes. The AEC has, therefore, adopted a risk management approach to the processing of applicants pending finalisation of the DLP court case as it was considered inappropriate to effectively inhibit registration of new parties for reasons beyond their control.

6.19 The Electoral Act prohibits the AEC from taking any action in relation to applications for registration of political parties in the period from the issue of a writ

for an election and the return of that writ. Thus, processing of applications is, therefore, also delayed by any by-elections as well as general elections.

6.20 In contrast to the existing legislative provisions, the AEC does not see any impact on the election process of progressing applications for registration up to, but not including, the point where it would make a decision about whether the party should be registered.

6.21 The AEC has previously covered this issue at Recommendation 18 in the 1996 FAD report to the Parliament. The AEC reiterates its recommendation that only the actual decision of the Commission in relation to registration, deregistration and changes to the Register of Political Parties (other than changes to registered officer and deputy registered officer details) be suspended. That recommendation suggested that the suspension period be from issue to return of writ for an election. However, processing of applications for registration can be further streamlined by specifying that the period of suspension only be from issue of writ to polling day, since changes to the Register after polling day could not impact on the election.

Recommendation 41: that the suspension of party registration activity under section 127 of the Electoral Act cover the period from the issue of the writ for an election until polling day in that election and this suspension only be in relation to the actual decision to register or deregister a party (not the processing required to reach that point). Revised version of Recommendation 15 of submission 15 to the 2000-2001 disclosure inquiry.

POLITICAL PARTY NAMES

6.22 The issue of the name under which political parties can be registered has received continuing attention. Perhaps the most prominent instance recently concerned the application for registration from the political party "liberals for forests".

6.23 After considering objections lodged to the party's proposed name and legal advice obtained, the AEC delegate determined that the party's proposed name so nearly resembled the name of a currently registered party (the Liberal Party of Australia) as to cause confusion and the application for registration was rejected. On considering the applicant's request for a review of the delegate's decision, the Commission upheld the delegate's decision.

6.24 The applicant then lodged an appeal with the Administrative Appeals Tribunal (AAT) for review of the Commission's decision to reject the application for registration of liberals for forests on the basis of its proposed name. On 6 March 2001, the AAT set aside the decision of the AEC to reject the application. The AAT determined that it was not likely that a voter would mistake one party for the other when marking a ballot paper. The party "liberals for forests" was formally registered on 1 May 2001.

6.25 The AEC notes that both the Liberal Party of Australia and liberals for forests nominated candidates at the Aston by-election and the 2001 federal election. The percentage of the vote received by the candidates for each of those

parties could be taken as an indicator that the voters were not confused by the names of those two parties, and suggests that there is no legislative response required.

6.26 However, the Joint Standing Committee on Electoral Matters (JSCEM) considered submissions relating to parties with similar names in its report of its inquiry into the conduct of the 2001 federal election. The issue is covered at paragraphs 3.68 to 3.84 of that report. The JSCEM recommended that the AEC be required to publish reasons for decision in relation to party registration with reference to section 129 of the Electoral Act. The AEC has determined that it will publish its reasons on its website.

6.27 Further, the Government has included amendments in one of the electoral amendment bills currently before Parliament which would insert a provision in section 129 of the Electoral Act requiring the AEC to consider whether the proposed party name suggests a relationship to or connection with a registered political party that does not exist.

6.28 However, there is an issue of political parties registering with names identical or close to the names of recognised organisations. This is an issue that received media coverage at the 1999 New South Wales State election and has been raised in the federal parliament by Senator Bartlett. The AEC recognises that affected organisations have a legitimate concern that a party which has no association with the organisation is not precluded from using that organisation's name (or a name so similar as to suggest an association) as the party's name.

6.29 To deal with this concern, section 129 of the Electoral Act could be amended to include the fact that parties cannot be registered using the name of a recognised organisation (that is, a name which is generally recognised within the community), or a name so similar as to cause confusion. The AEC is not, of course, in a position to be able to be aware of the names of all recognised organisations, so it would need to be the responsibility of the relevant organisation, or someone on its behalf, to lodge an objection, during the objection period, to the use of its name by a party applying for registration.

6.30 The Joint Select Committee on Electoral Reform considered this question in paragraphs 4.32-34 of its December 1986 report "The Operation during the 1984 General Election of the 1983/84 Amendments to Commonwealth Electoral Legislation". However, after 20 years of operation of the scheme, this question could now be reviewed.

Recommendation 42: that section 129 of the Electoral Act be amended to require that the AEC will refuse an application for registration if the proposed name of the party is the same as, or so closely resembles as to cause confusion, the name of a recognised (as defined) organisation where that organisation has advised the AEC that it does not agree to the use of the name by the party.

6.31 Another issue is the use of a person's name/s in the registered name or abbreviation of a political party. While there is no particular problem with the name of a prominent member of a party being included in a party's name, it is another

matter altogether where a person's name is used by a political party without their consent. The unauthorised use of a person's name may be designed to trade off their reputation or to garner a protest vote against an individual (for example, Unity – Say No to Hanson).

6.32 The AEC does not see obtaining a person's consent to have their name used in the registered name of a political party as a solution. There are numerous examples of persons contesting elections who have legally changed their names or who happen to have names similar or identical to prominent persons. The prohibition of the use of a person's name, living or dead, in the name of a political party would be the only effective solution to the problem. However, there are problems with the way in which this could be administered by the AEC. Either the person or someone acting on their behalf would have to lodge an objection, and it would have to be clear that the provision did not exclude words that could be people's names such as "Green" but were not necessarily a person's name in the particular context. It may, in fact, be safest if parties wishing to use people's names in the party name were required to provide with their application for registration, a letter from the person giving permission for the use of the name.

Recommendation 43: that section 129 of the Electoral Act be amended to require that the AEC will refuse an application for registration if the proposed name of the party contains the name of a person where the AEC has received a sustainable objection from either the person(s) concerned or someone legitimately acting on behalf of the person (eg executor of the estate). Revised version of recommendation 17 of submission 15 to the 2000-2001 disclosure inquiry.

MEMBERSHIP FOR REGISTRATION PURPOSES

6.33 Section 123(3) of the Electoral Act defines a member of a political party as a person who is both:

- a member of the political party or a related political party; and
- entitled to enrolment under this Act.

6.34 The AEC has discussed the need to amend this definition in its 1998 FAD Report at recommendation 14. However, the amendments to the registration provisions of the Electoral Act effected in October 2000 and public discussion surrounding the recent JSCEM Inquiry into the Integrity of the Electoral Roll have raised further issues.

6.35 Non-parliamentary parties must provide a list of 500 members with their application for registration. One of the most obvious ways for the AEC to check the bona fides of the names provided on such lists is to check them against the electoral roll. However, given that section 123(3) of the Electoral Act requires only that members of parties be entitled to enrolment, not actually enrolled, the AEC is unable to reject an application for registration if this check of the membership list against the electoral roll shows a large number of discrepancies (that is, members not enrolled or not correctly enrolled). If any check of membership against the roll showed that too many members were not enrolled for the membership criterion to be satisfied, the need to confirm the eligibility for enrolment of sufficient members

prior to finalising the processing of the application would significantly delay registration.

6.36 Given that enrolment is compulsory for eligible persons, it would not be an unreasonable expectation that members of political parties actually be enrolled. The AEC, of course, understands that there will be some discrepancy between the membership lists it currently receives and the electoral roll given that there is a one month period before electors become eligible to enrol for their new address and there is a further three weeks for electors to lodge enrolment forms. However, the AEC still sees it as readily possible for parties to supply lists of 500 members, all of whom are correctly enrolled. For example, at the time a member completes the necessary membership application form they could also be advised by the party to update their enrolment. By the time the application for registration is received by the AEC in Canberra, the enrolment form should have been received and processed by the relevant DRO. The AEC may be able to provide some feedback to the party on those members who were not correctly enrolled so that the party could advise members of the need to update their enrolment.

6.37 This matter was also raised by the AEC in recommendation 23 of the 1993 FAD Report.

Recommendation 44: that paragraph 123(3)(b) be amended to require that members must be correctly enrolled.

6.38 A further relevant issue is the provision of membership forms with applications for registration of political parties. The AEC currently requires applicant parties to provide to it copies (or originals, which are returned) of the application for membership forms for the 500 members who are being used to support the registration of the party. This requirement is not specifically formalised in the Electoral Act but has been adopted by the AEC as it is a necessary part of the checking process so that the AEC can be satisfied that the application meets the registration requirements.

6.39 The AEC provides a sample form for a party's use in its Registration of Political Parties handbook. In particular, this sample form includes a declaration by the member that information in the form is true and complete, that the member is eligible for enrolment and that the member consents to the form being forwarded to the AEC in support of the party's application for registration. The AEC believes that it would simplify matters for parties if the requirement to provide copies of membership forms, which must meet certain minimum requirements, were formalised in the Electoral Act.

Recommendation 45: that section 126 of the Electoral Act be amended to require that copies of the membership application forms for the 500 members supporting the application for registration be provided with the application, and that the membership application forms meet certain minimum requirements (the form could be included in Schedule 1 of the Electoral Act).

PROCESS ISSUES

6.40 There are a number of other matters of concern relating to the registration of parties that have also come to the attention of the AEC, either as a result of day to day administration by the AEC, or by media comment. These matters should be clarified in the legislation so that both parties and the AEC are in no doubt about responsibilities and requirements.

6.41 The AEC currently has no power to require parties to formally advise the appointment of party office-holders (such as president, secretary, etc.) and so, has issues with checking whether a person purporting to act on behalf of a party is the person they claim to be and does represent the party. This is particularly important in relation to the appointment of party agents who may be receiving considerable amounts of election funding on behalf of the party. However, because of the requirements of the legislation, the AEC does have on record the names and signatures of registered officers (and deputy registered officers) and so is able to verify requests received from those officers. Therefore, the AEC believes that party agents should be appointed by the registered officer (the AEC understands that this person is often also the party secretary). This is already a requirement in section 288A dealing with the appointment of a principal agent by the Australian Democrats.

Recommendation 46: that the Electoral Act be amended to require that a party agent is to be appointed by the registered officer.

6.42 The amendments to the Electoral Act effected in October 2000 added a requirement (in section 126(2)(ca)) that a list of names of 500 members accompany an application for registration by a non-Parliamentary party. However, more information is needed by the AEC if it is to be able to carry out the checks necessary for it to be satisfied that the party meets the requirements for registration. As the legislation currently stands a party may refuse to provide the additional information that the AEC needs, making it impossible for the AEC to be satisfied that the party meets the registration requirements.

Recommendation 47: that section 126 of the Electoral Act be amended to require that certain member details are to be included in the list of members supplied to the AEC, in addition to the members' names. Details to include current residential address, date of birth, contact phone number. The list should also be exempted from public access for privacy reasons.

6.43 The AEC also sees problems with processing applications for registration from parties with constitutions which do not meet certain minimum standards and takes this opportunity to reiterate its recommendation 16 of the 1998 FAD report. In order for a party to obtain registration as a political party for federal elections, it should have a constitution which clearly indicates that it is a political party, that it intends to participate in the federal electoral process and certain minimum requirements in relation to its operations.

6.44 This is a particular problem in relation to schisms within parties and inadequate constitutions give the AEC no guidance on dealing with these

problems. It has also been a problem in determining whether membership lists provided are adequate for registration or continued registration purposes.

Recommendation 48: that the Electoral Act be amended to clearly set out minimum requirements for a party's constitution, such as it must:

- be written;
- include the aims of the party (one of which must be the endorsement of candidates to contest federal elections);
- set out the requirements to become a member, maintain membership and cease membership;
- set out the process for selection of officer-holders, including registered officer and party agent, the Executive and any committees;
- detail the party structure;
- detail the procedure for amending the constitution;
- detail the procedures for winding up the party.

6.45 Section 44 of the Constitution disqualifies any person who has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer, from being chosen or sitting as a Senator or Member of the House of Representatives. Section 93 of the Electoral Act disqualifies any person who is serving a sentence of 5 years or longer for an offence against the law of the Commonwealth or of a State or Territory from eligibility to enrol. Section 292 of the Electoral Act disqualifies a person from being appointed as a party agent if the person has been convicted of an offence against Part XX. Given the recent attention that has been paid to the integrity of electoral processes, it might further enhance the public perception of integrity if similar disqualifications applied to registered officers, deputy registered officers and any other party official wishing to act on behalf of the party in party registration, disclosure or funding matters.

Recommendation 49: that the Electoral Act be amended to provide that a person who is serving a sentence of one year or longer for any offence against the law of the Commonwealth or of a State or Territory is ineligible to be chosen as, or to continue to hold the position of, registered officer, deputy registered officer or party agent or be a party official who can perform party registration, disclosure or funding functions on behalf of the party.

6.46 Section 131 of the Electoral Act provides that where, after initial consideration, the Commission is of the opinion that it is required to refuse an application for registration, it may write to the applicant/s giving them an opportunity to vary the application in such a way that would allow it to meet the requirements for registration. However, there is no requirement for the applicant/s to respond to such an opportunity within a particular time period. The AEC then does not take any further action in relation to the application until a response is received.

6.47 It is therefore possible for months, perhaps years, to pass without the applicant/s responding to the opportunity to vary the application and so, effectively reserve that party name without ever actually registering the party. This would not

appear to be the intent of this section of the legislation, which the AEC has taken to be intended to prevent applications from being refused because of some minor technical flaw in the application. The AEC believes that section 131 needs to be amended to provide a response period.

Recommendation 50: that section 131 be amended to require that applicant/s must reply to a notice issued under that section within two months of receipt of the notice. Failure to reply to such a notice will be treated as a withdrawal of the application. Applicants may respond to such a notice advising that they wish to withdraw the application.

REGISTRATION OF RELATED POLITICAL PARTIES

6.48 The Electoral Act currently allows for the registration of related political parties, which means that the members of one party are treated as also being members of any other related party. Hence, to remain registered, it is sufficient for two or more related political parties to have sufficient members between them (that is, sufficient multiples of 500 members or members of the federal parliament), rather than each needing discrete qualifying memberships.

6.49 Concerns have been expressed that the current system of party registration can be manipulated through these related party provisions. In an article that appeared in the *Sydney Morning Herald* on 29 September 2000, Mike Seccombe wrote:

- The major political parties are preparing to change the Electoral Act to prevent the registration of "phantom" parties, but will leave open a loophole allowing them to use such parties themselves. That loophole allows the registration of multiple "related entities" to an existing party. Thus the Labor or Liberal parties could, if they wished, put up multiple candidates under multiple party names, to feed preferences back to them.

6.50 The AEC identifies a need for the related party provision of the Electoral Act to be amended to take account of the changes made by the 2000 amending Act (which to some degree negated the relevance of related party status due to the need for unique membership details to be provided for each part of party being registered). Parties should be required to qualify for registration independently. While a formal relationship with other parties may exist, this relationship would not be recognised for the purposes of registration. It should be understood that the removal of related party status would not prevent parties from having branches formally recognised under the Electoral Act in States or Territories where they do not meet membership requirements. It would, however, prevent them from separately registering parties in States and Territories where they do not qualify on membership grounds.

6.51 It should be recognised that a number of parties have chosen to register in this manner. The Australian Democrats is an example, having only its national body formally registered with the AEC but nevertheless having its various State and Territory branches recognised.

Recommendation 51: that the Electoral Act be amended to make "related party" status relevant to current registration requirements whilst still retaining the capacity for different parts of parties to be registered with the same name, where they qualify, and for objections to be lodged under section 134A. Revised version of Recommendation 25 of submission 15 to the 2000-2001 disclosure inquiry.

OTHER RECOMMENDATIONS IN PREVIOUS SUBMISSIONS

6.52 The 1996 FAD report made several detailed recommendations :

6.53 Where the AEC moves to deregister a party because it no longer meets the membership requirements, a party which was registered as a parliamentary party can be summarily deregistered by the AEC, whereas a party which was registered as a non-parliamentary party must be notified and given the opportunity to show cause why it should not be deregistered. It also has appeal rights that are not available to a parliamentary party. There is no obvious reason for the difference in approach and the AEC believes that the same processes and appeal rights should be afforded in every case.

Recommendation 52: the procedures for the deregistration of a party originally registered as a parliamentary party and the review of that decision be the same as currently exist for a non-parliamentary party

6.54 Voluntary deregistration is clearly an important decision for a party and one which would not be taken lightly. Under the current provisions it is open to a small number of disgruntled members to deregister a non-parliamentary party against the wishes of the wider membership.

Recommendation 53: that the Registered Officer of the party be the person who can apply for the voluntary deregistration of the party and that such a request must be supported by documentation demonstrating that the registered officer is seeking such deregistration with the authority of the party. (This recommendation replaces AEC recommendation 16 of its 1996 FAD report.)

6.55 The Act provides that certain decisions of the AEC are appealable to the Administrative Appeals Tribunal (AAT). This currently does not include all decisions to deregister political parties. Given the possible ramifications of deregistration, all such decisions should be open to review by the AAT.

Recommendation 54: all de-registration decisions of the Australian Electoral Commission should be included as reviewable decisions under the Commonwealth Electoral Act.

6.56 The 1998 FAD report made several detailed recommendations:

6.57 Apart from the requirement to be eligible for enrolment, the Electoral Act does not define or place any preconditions or restrictions upon who can be a member of a political party. Many of the smaller parties have constitutions that contain minimal information and certainly do not address the rules governing membership of the party. This undermines the AEC's ability to establish with

certainty a person's status as a party member and often leads to the party and persons listed on membership lists provided to the AEC having a different view as to whether they are, or ever have been, a member of the party. The AEC believes that the Electoral Act should set out minimum requirements for membership in relation to those members who are going to be used by the party to support the party's registration.

Recommendation 55: the definition of a member of a political party be expanded to include the requirements for a person to have:

- been formally accepted as a member according to the party's written rules;
- joined the party or renewed their membership within the previous 12 months; and
- paid a minimum annual membership fee of $5.00.

6.58 Parties are free to organise themselves according to the constitutions upon which they are founded. The AEC's observation, however, is that while the major, established parties have detailed rules governing their operations many smaller parties have few, if any, meaningful rules. While the Act should not impose itself unnecessarily on the internal structure and operations of political parties, some deficiencies in a party's constitution can undermine the administration of the party registration provisions of the Act. As there is an obligation for them to meet minimum requirements of legislation such as the Commonwealth Electoral Act, the Act should provide the AEC with the power to set standard rules which would supplant deficient rules.

Recommendation 56: the Electoral Act provide the Australian Electoral Commission with the power to set standard, minimum rules which would apply to registered political parties where the party's own constitution is silent or unclear.

6.59 It may be possible to exploit the preferential voting system by directing preferences from a number of individually registered candidates with separate party names to a single candidate, thereby garnering a range of votes in the hope of having that designated candidate elected, but without the voters necessarily being aware of the relationship between candidates. The preferred option to avoid such activity would be to restrict persons to being able to hold the position of Registered Officer for only one party at a time. As the Registered Officer is the person who endorses candidates at elections, this would limit the power one person can wield across more than one political party by preventing a person from controlling the endorsements for a number of parties.

Recommendation 57: that a person can only hold one appointment as a Registered Officer at any one time.