The Senate

Finance and Public Administration References Committee

Commonwealth legislative provisions relating to oversight of associated entities of political parties

Final report

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Report

Referral

1.1 On 19 April 2016, the Senate referred the following matter to the Finance and Public Administration References Committee (committee) for inquiry and report by 4 May 2016.

> (a) Commonwealth legislative provisions relating to oversight of associated entities of political parties, with particular reference to the adequacy of:
>
> (i) the funding and disclosure regime relating to annual returns;
>
> (ii) the powers of the Australian Electoral Commission with respect to supervision of the conduct of and reporting by associated entities of political parties; and
>
> (iii) any related matters; and
>
> (b) Senator Sinodinos appear before the committee to answer questions.[1]

Conduct of the inquiry

1.2 Details of the inquiry were placed on the committee's website at www.aph.gov.au/senate_fpa.

1.3 The committee directly contacted a number of relevant organisations and individuals to notify them of the inquiry and invite submissions by midday on 26 April 2016. Submissions received by the committee are listed at Appendix 1.

1.4 The committee held a public hearing in Canberra on 28 April 2016. A list of witnesses who appeared at that hearing is set out in Appendix 2.

Interim report

1.5 On 29 April 2016, the committee tabled an interim report in order to report non-compliance of the Senate order (Term of Reference (b)) by Senator the Hon Arthur Sinodinos AO to the Senate.

1.6 The committee thanks those who assisted by providing submissions and appearing at the hearing.

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1 *Journals of the Senate*, No. 150 — 19 April 2016, p. 4129.

Funding and disclosure schemes

1.7 Political funding and disclosure laws vary widely between the Commonwealth, States and Territories. A Panel of Experts, established by the NSW State Government to investigate potential reforms to the funding and disclosure regime in that jurisdiction, summarised:

> Most jurisdictions require the public disclosure of political donations in the interests of transparency and provide some level of public funding to political parties and candidates and groups to promote electoral competition and reduce the reliance on large donations from private sources.[2]

1.8 Appendix 3 of this report sets out a comparative table of funding and disclosure schemes between the Commonwealth and NSW.

Commonwealth

1.9 The Commonwealth funding and disclosure scheme (the disclosure scheme), established under Part XX of the *Commonwealth Electoral Act 1918* (the Act), deals with the public funding of federal electoral campaigns and the disclosure of detailed financial information.[3]

1.10 On its website, the Australian Electoral Commission (AEC) summarises the operation of the disclosure scheme:

> The disclosure scheme requires candidates, registered political parties, their State Branches, local branches/sub-party units and their associated entities, donors and other participants in the electoral process to lodge annual or election period financial disclosure returns with the AEC.[4]

1.11 At the public hearing, Mr Tom Rogers, Electoral Commissioner, stated:

> [T]he AEC considers its main focus in the regulation of political parties and associated entities is to achieve disclosure.[5]

1.12 Mr Rogers also highlighted two comments from the Act's second reading speech:

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

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2 NSW Panel of Experts (Dr Kerry Schott (Chair), Mr Andrew Tink AM, the Hon John Watkins), *Working Paper 1 – Overview of Australian Election Funding and Donations Disclosure Laws*, August 2014, p. 1. Available at: www.dpc.nsw.gov.au/__data/assets/pdf_file/0006/164625/Working_Paper_1_-_Overview_on_International_Election_Funding_and_Donations_Disclosure_Laws_including_Annexure_A.pdf.

3 Australian Electoral Commission website, *Financial disclosure*, available at: www.aec.gov.au/Parties_and_Representatives/financial_disclosure/.

4 Australian Electoral Commission website, *Financial disclosure*, available at: www.aec.gov.au/Parties_and_Representatives/financial_disclosure/.

5 *Committee Hansard*, 28 April 2016, p. 2.

> The Government believes that the independence of the Commission must be reinforced by a similar faith and trust in the integrity and independence of our political parties.[6]

1.13 The terms of reference for this inquiry specifically refer to the legislative provisions relating to the oversight of associated entities of political parties. An overview of those provisions is set out below.

Associated entities

1.14 'Associated entities' are defined in section 287 of the Act. The AEC provides the following summary:

> [A]n entity:
>
> - that is controlled by one or more registered political parties; or
> - that operates wholly or to a significant extent for the benefit of one or more registered political parties; or
> - that is a financial member of a registered political party; or
> - on whose behalf another person is a financial member of a registered political party; or
> - that has voting rights in a registered political party; or
> - on whose behalf another person has voting rights in a registered political party.
>
> Examples of associated entities include '500 clubs', 'think tanks', registered clubs, service companies, trade unions and corporate party members.[7]

1.15 Mr Rogers indicated that the definition of 'an entity that operates wholly, or to a significant extent, for the benefit of one or more registered political parties' is one that 'causes grief occasionally'.[8] Mr Rogers noted:

> [The AEC] have asked previously, through the Joint Standing Committee [for Electoral Matters (JSCEM)], for that definition to be tightened to make it easier for everyone involved in the process to understand what an associated entity is.[9]

1.16 To this end, in 2011 the JSCEM recommended that the Act be amended to improve the clarity of the definition of 'associated entity':

> Particular steps that could be taken might include the following:

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6 *Committee Hansard*, 28 April 2016, p. 2 quoting from the Hon Kim Beazley MP, Special Minister of State, second reading speech for the Commonwealth Electoral Legislation Amendment Bill1983, *House of Representatives Hansard*, 2 November 1983, p. 2215.

7 Australian Electoral Commission website, *Associated entities*, available at: www.aec.gov.au/Parties_and_Representatives/financial_disclosure/guides/associated-entities/index.htm.

8 *Committee Hansard*, 28 April 2016, p. 3.

9 *Committee Hansard*, 28 April 2016, p. 3.

- Defining 'controlled' as used in section 287(1)(a) to include the right of a party to appoint a majority of directors, trustees or office bearers;
- Defining 'to a significant extent' as used in section 287(1)(b) to include the receipt of a political party of more than 50 per cent of the distributed funds, entitlements or benefits enjoyed and/or services provided by the associated entity in a financial year; and
- Defining 'benefit' as used in section 287(1)(b) to include the receipt of favourable, non-commercial arrangements where the party of its members ultimately receives the benefit.[10]

1.17 Mr Rogers also referred to another option that the AEC has supported in relation to associated entities:

> In our submission in 2011 [to the JCSEM's inquiry into the funding of political parties and election campaigns] we went further and said that one particular way of doing that would be to abolish altogether the definition of associated entity and establish a third-party scheme similar to the one that operates in Canada and the UK, thus avoiding the issue of whether or not an associated entity is an associated entity. Anybody who contributes to the political process during the period would be caught under that third-party scheme.[11]

1.18 Mr Rogers indicated that a third party registration scheme was not supported by the JSCEM, but that the AEC remains of the view 'it would be useful for a further definition about what an associated entity actually is to be put in the Act'.[12]

Annual disclosures

1.19 Associated entities are required to lodge an 'Associated Entity Disclosure Return' by 20 October each year.[13] Mr Rogers informed the committee that for the 2014-15 financial year there were 189 annual returns submitted by associated entities.[14]

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10 Joint Standing Committee on Electoral Matters, *Report on the funding of political parties and election campaigns*, November 2011, p. xxxii (Recommendation 25).

11 *Committee Hansard*, 28 April 2016, p. 3. See also Australian Electoral Commission, *Submission 19* to the Joint Standing Committee of Electoral Matters' inquiry into the funding of political parties and election campaigns, pp 6-8; and Australian Electoral Commission, *Supplementary Submission 19.2* to the Joint Standing Committee of Electoral Matters' inquiry into the funding of political parties and election campaigns, pp 7-8.

12 *Committee Hansard*, 28 April 2016, p. 3.

13 Australian Electoral Commission website, *Associated entities*, available at: www.aec.gov.au/Parties_and_Representatives/financial_disclosure/guides/associated-entities/index.htm. Section 314AEA of the *Commonwealth Electoral Act 1918* (the Act) deals with annual returns by associated entities. Subsection 314AEA(1) of the Act provides that annual returns by associated entities must be provided within 16 weeks of the end of the financial year.

14 *Committee Hansard*, 28 April 2016, p. 4.

1.20 The AEC produce a Financial Disclosure Guide (Guide) for associated entities each year 'to assist associated entities to understand their financial disclosure obligations under Part XX of the Act'.[15]

1.21 An associated entity's annual return must set out the following information covering the financial year from 1 July to 30 June:

- total receipts
- details of amounts received that are more than the disclosure threshold
- total payments
- total debts as at 30 June
- details of debts, outstanding as at 30 June that total more than the disclosure threshold
- details of capital contributions (deposits) from which payments to a political party were generated.[16]

1.22 The Guide states that amounts received include, but are not limited to, the following:

- gifts of money
- gifts-in-kind of services or goods
- membership subscriptions
- loan monies received
- returns on investments
- proceeds from the sale of assets
- capital contributions.[17]

1.23 'Gift' is defined in section 287 of the Act as:

> any disposition of property made by a person to another person, otherwise than by will, being a disposition made without consideration in money or money's worth or with inadequate consideration, and includes the provision of a service (other than volunteer labour) for no consideration or for inadequate consideration, but does not include:
>
> (a) a payment under Division 3 [of Part XX – Election Funding]; or
>
> (b) an annual subscription paid to a political party, to a State branch of a political party or to a division of a State branch of a political party by a person in respect of the person's membership of the party, branch or division.

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15 Australian Electoral Commission, *Financial Disclosure Guide for Associated Entities 2014-15 financial year*, 13 July 2015, p. 4.

16 Australian Electoral Commission, *Financial Disclosure Guide for Associated Entities 2014-15 financial year*, 13 July 2015, p. 6.

17 Australian Electoral Commission, *Financial Disclosure Guide for Associated Entities 2014-15 financial year*, 13 July 2015, pp 9-10.

1.24 At the 2015-16 Additional Estimates hearing in February 2016, Mr Paul Pirani, Chief Legal Officer, AEC clarified:

> The definition of 'gift' in section 287(1) of the Electoral Act at paragraph (b) does not include an annual subscription paid to a political party, to a state branch or to a division. So the definition of 'gift'—which loosely, in the forms that they fill out, equates to a donation—does not include subscription.[18]

1.25 The disclosure threshold for the 2015-16 financial year is for amounts of more than $13,000.[19] The disclosure threshold is indexed annually.[20] In 2011, JSCEM recommended that the disclosure threshold be lowered to $1,000 and indexation be removed.[21] The JSCEM stated:

> An effective financial disclosure scheme is an important measure for transparency and accountability in the political financing process. In particular, the level of the disclosure threshold is central to the effectiveness and accountability obtained by the financial disclosure scheme.
>
> …
>
> To be effective, the disclosure threshold must strike a balance between placing a realistic administrative obligation on political parties, associated entities and donors and the need to maintain the integrity of the system. A threshold amount of $1,000…will obtain the desired balance.[22]

1.26 Where an associated entity receives amounts which are more than the disclosure threshold, the Guide states the details to be disclosed are:

> - Full name and address details of the person or organisation from whom the money or gift-in-kind was received.
> - The sum of amounts received from that person or organisation.
> - Whether the receipt is a 'gift/donation' or 'other receipt'.
>
> In the case of an amount received from an unincorporated association (other than a registered industrial organisation), the name of the association along with the name and address of each member of the executive committee of the association must be disclosed.

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18 *Estimates Hansard*, 9 February 2016, p. 50.

19 Australian Electoral Commission website, *Disclosure threshold*, available at: www.aec.gov.au/Parties_and_Representatives/public_funding/threshold.htm. This page also sets out the disclosure threshold for each financial year from 2005.

20 Australian Electoral Commission, *Financial Disclosure Guide for Associated Entities 2014-15 financial year*, 13 July 2015, p. 6.

21 Joint Standing Committee on Electoral Matters, *Report on the funding of political parties and election campaigns*, November 2011, p. xxvii (Recommendation 1).

22 Joint Standing Committee on Electoral Matters, *Report on the funding of political parties and election campaigns*, November 2011, p. 49.

> In the case of an amount received from a trust or foundation, the name and description of the trust or foundation, along with the names and addresses of the trustees must be disclosed.[23]

1.27 Mr Rogers noted that the annual reporting obligations for associated entities 'are similar to what applies to a registered political party….[t]hey are virtually treated as though they are similar to a political party'.[24]

1.28 Mr Rogers clarified for the committee that in an associated entity's annual return all money coming into the entity has to be declared as an aggregated total. However, where an individual donation does not exceed the disclosure threshold, the associated entity does not need to disclose the identity of the donor.[25]

1.29 Mr Rogers confirmed that the annual return for an associated entity only requires the entity to disclose the total payments for a financial year. The total payment figure disclosed by the associated entity is not further disaggregated.[26]

1.30 Mr Pirani confirmed that where an associated entity receives a range of donations from multiple sources and donates all of that money to a political party, the associated entity only needs to disclosure the total amount of its outgoings. There is nothing further in an associated entity's annual return which indicates where, or to whom, the money has been paid.[27]

1.31 The committee put to Mr Rogers and Mr Pirani the proposition that the current disclosure regime 'means that you cannot follow the money'.[28] Mr Pirani responded:

> Unfortunately…I believe that is what our submissions to previous parliamentary inquiries have been. We cannot match, often, some of the money that comes through in the donor forms with that received in the associated entity or the political party returns.[29]

1.32 Mr Pirani advised the committee that the AEC does try to cross-reference money coming from an associated entity or a donor to money going to a political party.[30] However, Mr Rogers and Mr Priani noted the limitations of cross-referencing disclosure forms:

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23 Australian Electoral Commission, *Financial Disclosure Guide for Associated Entities 2014-15 financial year*, 13 July 2015, p. 13. See also section 314AC of the Act.

24 *Committee Hansard*, 28 April 2016, p. 5.

25 *Committee Hansard*, 28 April 2016, p. 5.

26 *Committee Hansard*, 28 April 2016, p. 5.

27 *Committee Hansard*, 28 April 2016, p. 5.

28 *Committee Hansard*, 28 April 2016, p. 6.

29 *Committee Hansard*, 28 April 2016, p. 6.

30 *Committee Hansard*, 28 April 2016, p. 6.

> [The Act does not provide for the AEC to do] the step before that—the donor going into the associated entity, with the donor going through to whatever money might have gone through to the political parties…[31]

1.33 Mr Pirani also confirmed, that in relation to donations directly from donors to political parties, a political party does not have to disclose donor details if cumulative donations exceed the donation disclosure threshold, but no individual donation exceeds the threshold.[32] Mr Pirani agreed this may mean the AEC is 'missing out on a whole chunk of information'.[33]

1.34 Mr Rogers indicated that the AEC has previously advocated the establishment of campaign accounts:

> [T]hat is where all money coming in and going out is actually tracked contemporaneously so people can understand where that money comes from and goes to.[34]

1.35 Mr Pirani explained the benefits of campaign accounts, in conjunction with the abolition of associated entities:

> [O]ne of the reasons why we recommended the abolition of associated entities as a test, and the adoption of the UK and Canadian model whereby anyone who engages in campaign or electoral expenditure has to be registered if they incur any expenditure over a prescribed amount [is that it] would make it easier for us to be able to identify people who become involved in the political process.[35]

Administration

1.36 The Guide states that annual returns are made available for public inspection on the first working day of February each year.[36]

1.37 In terms of record keeping, the Guide advises:

> Associated entities must give consideration to the financial recording systems and procedures that are appropriate to their needs and circumstances.
>
> Financial recording systems and procedures must be sufficient to enable the return, which will be publicly available, to be properly completed.
>
> All transactions should be supported by source documents recording the details of individual transactions.
>
> …

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31 *Committee Hansard*, 28 April 2016, p. 7.

32 *Committee Hansard*, 28 April 2016, p. 13.

33 *Committee Hansard*, 29 April 2016, p. 13.

34 *Committee Hansard*, 28 April 2016, p. 6.

35 *Committee Hansard*, 28 April 2016, pp 13-14.

36 Australian Electoral Commission, *Financial Disclosure Guide for Associated Entities 2014-15 financial year*, 13 July 2015, p. 13.

> All relevant records, whether formal or informal, should be retained for a minimum of three years. Receipt books, bank records, receipt registers, source documents and working papers supporting the completion of the return must be kept for this period.[37]

Compliance reviews and offences

1.38 The Guide states:

> The AEC aims to conduct compliance investigations of all annual returns lodged by political parties and their associated entities to verify the accuracy and completeness of disclosures. The investigations are also an opportunity for advice and guidance to be provided by AEC officers…
>
> The investigations are undertaken 'off-site' with copies of records, documents and other information relating to matters that should be included in the return delivered to the AEC in Canberra. Officers of the AEC may still attend the office of an associated entity to inspect original documentation and to hold an exit interview to discuss the investigation.
>
> A written report will be issued to the associated entity detailing any findings. This may include an advice to amend the associated entity's return.[38]

1.39 Sections 315 and 316 of the Act sets out offences in relation to the funding and disclosure provisions. Those offences include:

- failure to lodge a return by the due date;
- lodging an incomplete return;
- failure to retain records for three years;
- including false and misleading information in a return; and
- providing false or misleading information for inclusion in a return.[39]

1.40 A full list of offences and the maximum penalties is set out at Appendix 4 of this report. The Guide states:

> The AEC aims to assist the financial controller of the associated entity to fulfil their obligations under the Act. Where there has been a breach of the Act, the AEC may refer matters to the Director of Public Prosecutions.[40]

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37 Australian Electoral Commission, *Financial Disclosure Guide for Associated Entities 2014-15 financial year*, 13 July 2015, pp 23-24.

38 Australian Electoral Commission, *Financial Disclosure Guide for Associated Entities 2014-15 financial year*, 13 July 2015, pp 24-25. Section 316(2A) provides the authority for the Australian Electoral Commission to conduct compliance investigations.

39 See Australian Electoral Commission, *Financial Disclosure Guide for Associated Entities 2014-15 financial year*, 13 July 2015, Appendix 3, p. 31.

1.41 Mr Rogers advised that the AEC has recently introduced a risk based framework:

> This risk based matrix was developed with the assistance of external audit specialists and is reviewed on a regular basis. Where a compliance review indicates an error or omission, the AEC contacts the individual or group in question, and in the overwhelming majority of instances the individual or group takes immediate steps to correct the error through a revised return. The AEC only takes more punitive action when it becomes clear the individual or group does not intend to fulfil their obligations.[41]

1.42 Mr Rogers did not provide further details of how this risk based framework operates.

1.43 Mr Rogers provided further details on the conduct of compliance reviews by the AEC:

> [E]very year we conduct a number of compliance reviews, not just on political parties but on other parties or associated entities, including unions. Each one of those compliance reviews is launched under the scope of section 316(2A) [a notice to produce documents and financial information]. So at the start of those compliance reviews we use our powers under section 316(2A). We send a letter to the party or associated entity that is being reviewed. We require them to produce a range of documentation. It is our experience that overwhelmingly the vast majority of parties and associated entities, including unions, actually want to comply with the act and they do. If we were required to go further than that, if we met some sort of resistance, we would then proceed under section 316(3) the power of investigation, or section 316(3A) in the case of associated entities. From my perspective, those coercive powers—which is a term that has occasionally been used—are sufficient.[42]

1.44 In terms of the numbers of referrals to the Commonwealth Director of Public Prosecutions (DPP), Mr Rogers noted:

> If the AEC were required to prosecute every instance of error or omission then over the last three financial years it would have litigated 80 amendments from political parties, 36 amendments from associated entities, 92 amendments from donors and six amendments from third parties.
>
> Many of these amendments occur as a result of the AEC either checking party and associated entity returns or conducting more formal compliance reviews. In its 2015 program, the AEC undertook 38 compliance reviews,

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40 See Australian Electoral Commission, *Financial Disclosure Guide for Associated Entities 2014-15 financial year*, 13 July 2015, p. 25. The financial controller of an associated entity is responsible for lodging returns. The financial controller is defined by section 287 of the Act as: the company secretary if the entity is a company; or the trustee if the entity is a trust; or in other cases, the person responsible for maintaining the financial records.

41 *Committee Hansard*, 28 April 2016, p. 2.

42 *Committee Hansard*, 28 April 2016, p. 4.

> and this includes a variety of parties and associated entities, including unions.[43]

1.45 However, Mr Rogers continued:

> The AEC does not resile from pursuing cases where an individual or group appears to attempt to avoid its disclosure obligations. In April 2014, the AEC referred 10 candidates who contested the 2013 federal election to the Commonwealth Director of Public Prosecutions. Of the six proven cases, two were fined, two received no penalty and two were placed on good behaviour bonds. The AEC continues to give active consideration to incidents of apparent wilful refusal to meet disclosure obligations. I am currently examining the cases of around 20 entities and donors that have not acquitted fully their reporting obligations for 2014, and I am likely to refer some of those to the Director of Public Prosecutions as well.[44]

1.46 Mr Rogers indicated that, in his view, the regime in the Act adequately regulates associated entities:

> Associated entities are required to declare on an annual basis the activity they have been through in the previous financial year. To my mind, that is a significant piece of regulation.[45]

1.47 Similarly, the Liberal Party of Australia submitted:

> [I]n our view the current arrangements set out in the Electoral Act for the funding and disclosure regime in general and for annual returns by parties and other entities in particular works adequately.[46]

1.48 However, Dr Joo-Cheong Tham, Associate Professor, Melbourne Law School, outlined significant shortcomings in the AEC's investigative powers:

> [The powers] are directed at *identifying non-compliance* with the Act rather than being anchored in the broader goal of *promoting compliance* - they are 'after the event' powers that focus on enforcement.[47]

1.49 Dr Tham continued:

> Alongside such powers should be proactive measures that promote compliance on the part of political parties and their associated entities.[48]

1.50 One of the key measures proposed by Dr Tham is that the Act should require that parties and candidates 'provide policies detailing the arrangements put in place to

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43 *Committee Hansard*, 28 April 2016, p. 2.

44 *Committee Hansard*, 28 April 2016, pp 2-3.

45 *Committee Hansard*, 28 April 2016, pp 3-4.

46 *Submission 4*, p. 2.

47 *Submission 1*, pp 1-2. Emphasis in original.

48 *Submission 1*, p. 2.

comply with the Act (including arrangements relating to associated entities)'.[49] Further:

> Public funding should not be paid to parties and candidates unless the AEC has approved the policies as being sufficient to ensure compliance with the Act.[50]

1.51 Dr Tham referred to shortcoming in relation to penalties:

> A shortcoming here is the absence of the ability of the AEC to withhold public funding should a party or candidate fail to comply [with] disclosure obligations under the Act.[51]

1.52 Dr Tham commented on two other aspects of the offence provisions:

> First, the offences under section 315 of the Act fail to require parties and their associated entities to take reasonable steps to comply with the disclosure obligation. For example, inaccuracies in disclosure returns (including false statements) will result in breach of this section only when there is knowledge of falsity[.]
>
> …
>
> The Act should be amended to make it an offence to fail to take all reasonable steps to ensure compliance with the Act's disclosure obligations on the part of a party, associated entity and officers within these organisations responsible for ensuring compliance with these obligations.
>
> The Act also provides for derisory fines in relation to breaches of disclosure obligations - for the most part, offences under section 315 of the Act are punishable by a maximum fine of $1,000 with the maximum fine that can be imposed is $10,000. These fines fail to provide adequate deterrent to would-be wrongdoers; they can also be a powerful disincentive to mounting prosecutions for reasons of cost-effectiveness; they may explain why prosecutions for breaches of the disclosure obligations are exceedingly rare. The level of these fines should be substantially increased and perhaps to a proportion of public funding received by a party or candidate.[52]

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49 *Submission 1*, p. 2.

50 *Submission 1*, p. 2. Under the Electoral Act, a candidate or Senate group is eligible for election funding if they obtain at least four per cent of the first preference vote in the Division or the State or Territory they contested. The amount to be paid is calculated by multiplying the number of votes obtained by the current election funding rate. This rate is indexed every six months to increases in the Consumer Price Index (CPI). For the period 1 January to 30 June 2016 the rate is 262.259 cents per first preference vote. The Act requires that at least 95 percent of election funding entitlements, calculated on the basis of votes counted as at the 20th day after polling day, be paid as soon as possible. The balance of entitlements must be paid when the counting of votes is finalised, see Joint Standing Committee on Electoral Matters, Inquiry into political donations, referred 15 October 2015, *AEC correspondence 2*, p. 7.

51 *Submission 1*, p. 3.

52 *Submission 1*, p. 3.

1.53 Dr Tham argued that in addition to legislative measures, there should be a corresponding change in how the AEC approaches its role:

> It is crucial that the AEC focuses on regulating to prevent and address the risks of non-compliance rather than merely administering the provisions of the Act.[53]

1.54 In 2011, JSCEM noted that under the current scheme all offences against the Act are criminal offences and require prosecution. JSCEM proposed the following approach:

> Administrative penalties with a right of review should be implemented for all offences that are 'straight forward matters of fact' to allow the AEC to more effectively enforce the provisions.
>
> Matters it could cover are:
>
> - Failure to lodge a disclosure return
> - Lodging an incomplete return
> - Refusing to comply with a notice issued under section 316.
>
> Penalties for more serious offences (those that do not attract administrative penalties) should be strengthened to convey the gravity of breaches of the law to the [DPP] and increase prosecution rates.[54]

New South Wales

1.55 The committee spent significant time during the course of the inquiry considering the funding and disclosure scheme in NSW. Some of the features of the NSW scheme, include:

- an annual cap of $5,800 for donations to registered political parties and groups, and $2,500 for candidates, elected members and third-party campaigners;[55]
- cap of $1,000 on anonymous donations and in-kind campaign contributions;
- ban on political donations from property developers, tobacco, gambling and liquor entities;

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53 *Submission 1*, p. 3.

54 Joint Standing Committee on Electoral Matters, *Report on the funding of political parties and election campaigns*, November 2011, p. xxv. See also Joint Standing Committee on Electoral Matters, *Report on the funding of political parties and election campaigns*, November 2011, p. xxxii (Recommendations 26 and 27).

55 As noted above, Appendix 3 of this report sets out a comparative table of the disclosure and funding schemes for the Commonwealth and NSW. 'Group' means, in relation to State elections, a group of candidates, or part of a group of candidates, for a periodic Legislative Council of NSW election; 'third-party campaigners' means 'an entity or other person (not being a registered party, elected member, group or candidate) who incurs electoral communication expenditure during an expenditure period that exceeds $2,000', see Section 4 of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW).

- ban on donations from unenrolled individuals and entities without an ABN.[56]

1.56 The New South Wales Electoral Commission (NSWEC) administers three public funding schemes:

> Election Campaigns Fund
>
> Reimburses eligible candidates and political parties for certain electoral expenditure incurred for a State general election or State by-election.
>
> Administration Fund
>
> Reimburses eligible political parties and independent members of Parliament for administrative or operating expenditure incurred.
>
> Policy Development Fund
>
> Reimburses eligible political parties for policy development expenditure incurred. This fund is not available to parties eligible to receive payments from the Administration Fund.[57]

1.57 In relation to the payment of public funding:

> The Electoral Commission will not make any payments where the party or candidate has any outstanding declarations of political donations and electoral expenditure or where a party has failed to provide audited annual financial statements with a declaration of political donations and electoral expenditure.[58]

1.58 The NSW *Election Funding, Expenditure and Disclosures Act 1981* (EFED Act) does not provide for 'associated entities'. In correspondence to the committee, the Chairperson of the NSW Electoral Commission, the Hon Keith Mason QC AC, noted that in December 2014, an Expert Panel reporting on Political Donations in NSW found:

> [S]pecific legislative provisions should be introduced regulating 'associated entities' (being entities that are controlled by a political party or that operate

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56 See NSW Panel of Experts (Dr Kerry Schott (Chair), Mr Andrew Tink AM, the Hon John Watkins), *Working Paper 1 – Overview of Australian Election Funding and Donations Disclosure Laws*, August 2014, Annexure A: Summary of Commonwealth State and Territory Election funding and donations disclosure rules; NSW Electoral Commission website, *Caps on Political Donations*, available at: www.elections.nsw.gov.au/fd/political_donations/caps_on_political_donations; NSW Electoral Commission website, *Unlawful Political Donations*, available at: http://www.elections.nsw.gov.au/fd/political_donations/unlawful_political_donations.

57 NSW Electoral Commission website, *Public Funding*, available at: www.elections.nsw.gov.au/fd/public_funding

58 NSW Electoral Commission, Election Campaigns Fund Fact Sheet – 2015 NSW State Election, p. 5, available at: www.elections.nsw.gov.au/__data/assets/pdf_file/0009/198882/EF_00-0845_Fact_Sheet_Election_Campaigns_2015SGE_Accessible.pdf. See also Sections 70 and 97L of the *Election Funding, Expenditure and Disclosures Act 1981*.

> solely for the benefit of a political party) and that the disclosure obligations of associated entities be the same as those of political parties[.][59]

1.59 Mr Mason indicated that the Expert Panel's report has been the subject of an inquiry by the NSW Parliament's Joint Standing Committee on Electoral Matters. In a submission to that NSW Parliament Inquiry, the NSW Electoral Commission noted:

> [W]e agree with the Expert Panel's contention that the absence of an ongoing and comprehensive disclosure obligation for associated entities of political parties is out of step with other jurisdictions and creates potential loopholes for donations to be made and received, and expenditure to be incurred, which are not then disclosure. As these entities are closely related to political parties, the donations and expenditures of these entities should be properly disclosed, as is the case for parties, on an annual basis.[60]

Statement by the Chairperson of the NSW Electoral Commission

1.60 The committee focussed on matters arising from the statement by the Chairperson of the NSW Electoral Commission on 23 March 2016 (Chairperson's Statement) and whether these matters gave rise to any implications for political funding and disclosure at the Commonwealth level.

1.61 The Chairperson's Statement was with regards to the eligibility of the NSW Division of the Liberal Party of Australia (Liberal Party) for public funding:

> The NSW Electoral Commission has decided that the [Liberal Party] is not eligible for payments for its current claim of about $4.4 million in public funding because it failed to disclose the identity of all major political donors in its 2011 declaration.
>
> Effective 23 March 2016, the Liberal Party will not receive further funding from the Election Campaign Fund or the Administration Fund, administered by the [NSW Electoral Commission] The [Liberal] Party will remain ineligible until it discloses all reportable political donations in relation to its 2011 declaration.[61]

1.62 The NSW Electoral Commission set out a Summary of Facts relevant to its decision that the Liberal Party is ineligible for its claim to public funding (Summary of Facts). A copy of the full Summary of Facts is set out at Appendix 5.

1.63 That Summary of Facts states:

> Oral and documentary evidence from Liberal Party officials and agents and from the Free Enterprise Foundation [the Foundation or FEF] that was provided to the Independent Commission Against Corruption (the ICAC) in

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59 Correspondence from the Hon Keith Mason QC AC, Chairperson of the NSW Electoral Commission, to the Senate Finance and Public Administration References Committee, dated 21 April 2016, p. 1.

60 Correspondence from the Hon Keith Mason QC AC, Chairperson of the NSW Electoral Commission, to the Senate Finance and Public Administration References Committee, dated 21 April 2016, p. 1.

61 Statement by Chairperson, NSW Electoral Commission, 23 March 2016, p. 1.

> the course of its Operation Spicer Inquiry led the 3 member NSW Electoral Commission (the Commission) to conclude there were significant breaches of election funding laws in the latter part of 2011. Those breaches require the Commission to withhold payments for claims by the Liberal Party of Australia, New South Wales Division (the Party) from the Election Campaigns Fund and the Administration Fund…in accordance with the [EFED Act].
>
> …
>
> On 26 September 2011 the Party disclosed a list of reportable political donations for the period 1 July 2010 to 30 June 2011, including donations purportedly received from the Foundation on 16 August 2010 ($94,000), 22 December 2010 ($171,000), 23 December 2010 ($358,000 and $64,000) and 24 December 2010 ($100,000). The disclosed list further declared that all political donations required to be disclosed for the disclosure period had been disclosed.
>
> …
>
> In truth, the Foundation had been used by senior officials of the Party and an employed party fund-raiser to channel and disguise donations by major political donors some of whom were prohibited donors. No disclosure of the requisite details of those major donors has been made despite the Party having been requested to remedy the deficiency.[62]

1.64 The Summary of Facts continues:

> The Commission has relied on the evidence provided to the ICAC by Mr Simon McInnes, the Finance Director and Party Agent of the Party; Mr Paul Nicolaou of Millennium Forum; and Mr Mark Neeham, State Director of the NSW Division of the Party between 2008 and 2013. Through them evidence was also given of the involvement of other senior Party officials constituting the Party's Finance Committee, including Mr Sinodinos the Finance Director/Treasurer, Mr Webster and others…in the arrangements touching the Foundation.[63]

1.65 On the operation of the Foundation, the Summary of Facts states:

> The Foundation commenced to be used well before 2010 as a means of offering anonymity to favourable disposed donors wishing to support the Liberal Party. This was not the sole function of the Foundation but it appears to have been a major part of its activities.
>
> …
>
> Mr Nicolaou was paid commission for donations raised, including money channelled through the Foundation. His practice was to solicit donations on behalf of the Party, frequently proposing to donors that they could donate

62 NSW Electoral Commission, *Summary of Facts relevant to the decision of the NSW Electoral Commission: Liberal Party of Australia (NSW Division) claim for public funding*, p. 1.

63 NSW Electoral Commission, *Summary of Facts relevant to the decision of the NSW Electoral Commission: Liberal Party of Australia (NSW Division) claim for public funding*, p. 2.

> via the Foundation. Cheques in favour of the Foundation were then passed by him to officers of the Foundation accompanied by a standard form letter requesting the Foundation to make an equivalent donation to the Party. This in turn would be done.
>
> …
>
> On some occasions amounts intended to be donated to the Liberal Party were entered into the Liberal Party's accounts before a cheque for that amount was paid to the Party from the Foundation.
>
> The five large donations of August and December 2010…purportedly from the Foundation were in reality sums aggregated from individual donors whose money was paid to the Foundation in the manner indicated.
>
> Senior officers of the Party's NSW Division knew of the scheme and its use to disguise donations, including from property developers.[64]

1.66 Having considered the evidence available, the NSW Electoral Commission concluded firstly that:

> The Free Enterprise Foundation was never a validly constituted charitable trust because the purposes to which money it controlled could be paid were not exclusively charitable in the eyes of the law.
>
> …even if (which is denied by the Commission) "donors" to the Foundation purported to arm the Foundation's Council with unfettered authority to decide as to the disposition of gifted moneys, the true legal position was that the money remained under the control of the "donors" because of a resulting trust consequent upon invalidity.
>
> When the Foundation purported to pay the money to the Liberal Party…it was in truth acting as agent for the donors. At all times they were the true donors and their details should have been disclosed by themselves and the Party if the sums involved made them "major political donors".[65]

1.67 Secondly, the NSW Electoral Commission resolved that, regardless of the FEF's arguments:

> …the evidence revealed that s 85(1)(d) of the Act was engaged. It stipulates that a gift made to or for the benefit of an entity [here The Free Enterprise Foundation, according to the Party's position] which was used or intended to be used by the entity to enable the entity to make directly or indirectly a political donation is itself a political donation. Section 85(1)(d) is attracted in two separate ways. The gift was actually used by the Foundation to make a political donation. As well, the gift was intended to be used by the Foundation to make a political donation.[66]

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64 NSW Electoral Commission, *Summary of Facts relevant to the decision of the NSW Electoral Commission: Liberal Party of Australia (NSW Division) claim for public funding*, p. 2.

65 NSW Electoral Commission, *Summary of Facts relevant to the decision of the NSW Electoral Commission: Liberal Party of Australia (NSW Division) claim for public funding*, p. 3.

66 NSW Electoral Commission, *Summary of Facts relevant to the decision of the NSW Electoral Commission: Liberal Party of Australia (NSW Division) claim for public funding*, p. 3.

Response from Senator the Hon Arthur Sinodinos AO

1.68 Pursuant to the order of the Senate in term of reference (b) for this inquiry, the committee wrote to Senator Sinodinos asking him to make himself available for the committee's public hearing on 28 April 2016, at Parliament House in Canberra. The committee also invited Senator Sinodinos to make a submission to the inquiry.

1.69 The committee notes that Senator Sinodinos has not complied with an order of the Senate to appear before the committee and answer questions.[67]

1.70 The committee notes correspondence from Mr Mark Leibler and Mr Jonathan Milner, Arnold Block Leibler, Lawyers and Advisors, acting for Senator Sinodinos, to the Chairperson of the NSW Electoral Commission regarding the contents of the statement on 23 March 2016. In that correspondence Mr Leibler and Mr Milner state:

> [T]he Commission's Statement, together with the Summary of Facts…may erroneously convey to some readers that there was evidence that Senator Sinodinos was knowingly involved in the so-called scheme to disguise donations by prohibited donors and the preparation and filling of the 2011 declaration.
>
> Any suggestions that Senator Sinodinos knew of (or was indifferent to) and was involved in a so-called scheme to disguise donations by prohibnited donors is contrary to all of the evidence adduced by the [ICAC] during the Operation Spicer hearings. Critically, no suggestion was ever put to Senator Sinodinos either privately, publicly or otherwise.[68]

1.71 Mr Leibler and Mr Milner argue:

> People within the Liberal Party, including Senator Sinodinos, but by no means limited to him, went to great lengths to ensure that the NSW Division [of the Liberal Party] understood and complied with the law.
>
> …
>
> Senator Sinodinos [has] denied knowing that persons donating to the FEF were prohibited donors. He also denied knowing at the relevant time that there was money coming from prohibited donors that was sent to the FEF

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67 See Senate Finance and Public Administration References Committee, *Interim report for the inquiry into Commonwealth legislative provisions relating to oversight of associated entities of political parties*, 29 April 2016.

68 Correspondence from Mr Mark Leibler and Mr Jonathan Milner, Arnold Bloch Leibler, Lawyers and Advisors, acting for Senator the Hon Arthur Sinodinos AO, to The Hon Keith Mason AC QC, Chairperson, NSW Electoral Commission, dated 24 March 2016, p. 1. A copy of this correspondence is available on the NSW Electoral Commission's website at: www.elections.nsw.gov.au/__data/assets/pdf_file/0004/214771/24_March_2016_Letter_from_Arnold_Bloch_Leibler_about_23_March_2016_Statement_by_Chairperson_of_Commission-redacted.pdf.

> with a request that the money come back to the NSW Division [of the Liberal Party].[69]

1.72 In responding to Senator Sinodinos' lawyers, the Chairperson of the NSW Electoral Commission notes:

> [The Commission's Statement and Summary of Facts dated 23 March 2016] sought to explain the [NSW Electoral] Commission's reasons why funding was being withheld pending the filing on behalf of the [Liberal] Party of a requisite Declaration containing the statutory details of all reportable donations for the disclosure period of 1 July 2010 to 30 June 2011. Such donations were required to be disclosed whether or not from prohibited donors.
>
> The 'arrangements' surrounding the [FEF], which was the vehicle through which many such reportable donations were channelled, began before that reporting period, were continued during that period, and provided the factual and legal matrix upon which non-disclosure was made by the Party in the return filed by Mr McInnes [the Party Agent] on 26 September 2011. [Senator Sinodinos] was the Honorary Treasurer at all material times, ceasing to hold that office on 16 August 2011[.][70]

Response by the Liberal Party

1.73 The committee issued invitations to Mr Chris Stone, State Director of the NSW Division of the Liberal Party, Mr Simon McInnes, former Finance Director of the NSW Division of the Liberal Party, Mr Mark Neeham, former State Director of the NSW Division of the Liberal Party and Mr Brian Loughnan, former Federal Director of the Liberal Party to make submissions to this inquiry and to attend the public hearing and give evidence.

1.74 The committee also invited other individuals, including Mr Anthony Bandle, Trustee of the FEF and Mr Paul Nicolaou, a major Liberal Party fundraiser, who were named in the Chairperson's Statement, to make a submission and appear before the committee. All those invitations were declined.

1.75 The committee did receive a submission from the Liberal Party of Australia.[71] However, that submission did not address matters in relation to the Chairman's Statement.

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69 Correspondence from Mr Mark Leibler and Mr Jonathan Milner, Arnold Bloch Leibler, Lawyers and Advisors, acting for Senator the Hon Arthur Sinodinos AO, to The Hon Keith Mason AC QC, Chairperson, NSW Electoral Commission, dated 24 March 2016, pp 2 and 3.

70 Correspondence from the Hon Keith Mason AC QC, Chairperson, NSW Electoral Commission, to Mr Mark Leibler and Mr Jonathan Milner, Arnold Bloch Leibler, Lawyers and Advisers, acting for Senator the Hon Arthur Sinodinos AO, dated 31 March 2016, p. 1. A copy of this correspondence is available at: http://www.elections.nsw.gov.au/__data/assets/pdf_file/0003/214770/31_March_2016_NSWEC_Response_to_Arnold_Bloch_Leibler_dated_24_March_2016_-_Redacted.pdf.

71 *Submission 4*.

1.76 The committee notes that correspondence on the NSW Electoral Commission's website, does address various aspects of the Chairperson's Statement. In summary, the NSW Liberal Party has responded:

- that the FEF was and is a valid charitable trust;
- the donations made by the FEF to the NSW Liberal Party were properly disclosed in its return for the financial year ending 30 June 2011;
- the obligation to disclose political donations made to the FEF is that of the FEF, not the NSW Liberal Party; and
- the NSW Electoral Commission has no basis to withhold funding totalling approximately $4.4 million.[72]

1.77 On 31 March 2016, the Chairperson of the NSW Electoral Commission released an update to the statement of 23 March 2016:

> Representatives of the [NSW Electoral Commission] are due to meet with the [Liberal] Party's representatives on 1 April [2016] to discuss the requirements for making a requisite declaration of the disclosures for the 2011 disclosure period.[73]

1.78 The NSW Electoral Commission also addresses the issue of prosecutions over the matter:

> The [NSW Electoral] Commission is unable to prosecute any person in relation to breaches of disclosure laws during the relevant period ending 30 June 2011 that have come to light through the public hearings in [ICAC's] Operation Spicer which commenced on 28 April 2014. This is because, at the relevant time, the time limit for prosecution of offences under the [*Election Funding, Expenditure and Disclosures Act 1981* (NSW) (EFED Act)] was 3 years. In October 2014, the NSW Parliament passed an amendment to the EFED Act which increased the time limit for prosecutions to 10 years; however, this only applies to offences that were committed after 28 October 2014.[74]

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72 See Response to the New South Wales Electoral Commission in relation to donations received by the Liberal Party of Australia (NSW Division) from the Free Enterprise Foundation, p. 1, attached to correspondence from Ms Michelle Harpur, Partner, SWAAB Attorneys, acting for the NSW Division of the Liberal Party of Australia, to Ms Linda Franklin, Acting Electoral Commissioner (NSW), dated 18 March 2016. The letter and response are an attachment to the Statement by the Chairperson of the NSW Electoral Commission on 23 March 2016.

73 NSW Electoral Commission, Update to the Statement of 23 March 2016, by Chairperson NSW Electoral Commission, 31 March 2016, p. 1. Available at: http://www.elections.nsw.gov.au/__data/assets/pdf_file/0005/214772/31_March_2016_Update_to_the_Statement_23_March_2016_by_the_Chairperson,_NSW_Electoral_Commission.pdf.

74 NSW Electoral Commission, Update to the Statement of 23 March 2016, by Chairperson NSW Electoral Commission, 31 March 2016, p. 1.

Actions by the Australian Electoral Commission

1.79 In terms of disclosures made by the Foundation pursuant to Commonwealth legislation, Mr Rogers informed the committee:

> I have spoken previously about the Free Enterprise Foundation. It does lodge disclosure returns as an associated entity on an annual basis, so, for all intents and purposes…it is an associated entity—or we treat it as an associated entity, in any case.[75]

1.80 Mr Rogers indicated that donations made by the FEF to the Liberal and National Parties since its inception would be found on those parties' returns for the various years.[76] However, Mr Pirani and Mr Rogers agreed that this money would only appear on the FEF's annual return as part of the aggregated payments by the FEF and would not be able to be disaggregated between State or Federal Liberal or National Parties.[77]

1.81 The committee questioned Mr Rogers as to whether he was aware of the evidence before the ICAC that the Foundation could be seen as being set up just to provide funding to the Liberal and National Parties. Mr Rogers responded:

> I am aware of some of the proceedings that occurred in the Independent Commission Against Corruption.[78]

1.82 Mr Rogers then stated:

> I am deliberately not commenting on matters that are before the ICAC.[79]

1.83 The committee asked Mr Rogers whether he had acquainted himself with the evidence given to ICAC about the Foundation and other associated entities, Mr Rogers informed the committee:

> I am waiting for the final report [of ICAC] to come out before I make any determinations about those matters.[80]

1.84 Mr Rogers advised the committee that he has had no direct engagement with ICAC or the Foundation on these matters.[81]

1.85 The committee pressed Mr Rogers as to whether he was troubled by the evidence before ICAC about the role played by the Foundation in channelling and disguising prohibited donations under New South Wales law. Mr Rogers stated:

> I am not going to comment on those matters until the [final ICAC] report is handed down, for, I think, very sound reasons. The evidence that has been

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75 *Committee Hansard*, 28 April 2016, p. 8.

76 *Committee Hansard*, 28 April 2016, p. 8.

77 *Committee Hansard*, 28 April 2016, p. 8.

78 *Committee Hansard*, 28 April 2016, pp 7-8.

79 *Committee Hansard*, 28 April 2016, p. 8.

80 *Committee Hansard*, 28 April 2016, p. 8.

81 *Committee Hansard*, 28 April 2016, p. 8.

> presented in the public domain is potentially contested evidence until that report is handed down[.][82]

1.86 The committee questioned Mr Rogers as to why the AEC is not acting on this matter, when there is evidence of systemic abuse. In responding, Mr Rogers noted comments by the inspector of the ICAC to the effect that 'it would have been preferable for the [NSW] Electoral Commission to have waited until after ICAC had published its report based on all the material that had become available during Operation Spicer'.[83]

1.87 The committee also pressed Mr Rogers as to why the NSW Electoral Commission was able to take steps to withhold the $4.4 million from the NSW Division of the Liberal Party. Mr Rogers stated:

> The New South Wales electoral laws are very different from the Commonwealth electoral laws, in any case. I would not comment on the actions of the New South Wales Electoral Commission—they are entirely separate; they make their own decisions—and it would be inappropriate for me to do so. I do note that there are classes of prohibited donors in New South Wales that we do not have under the Commonwealth Electoral Act.[84]

1.88 Mr Rogers denied that he was ignoring evidence on the public record or turning a blind eye to systemic abuse:

> I have spoken at length about this to previous inquiries and I do not intend to resile from my position on this. It would be, I think, incorrect of me to make comment on the actions of the New South Wales ICAC until that report is handed down. Much of that evidence before the ICAC is contested evidence. I intend to wait until those reports are produced. Secondly, I have given a commitment to the Senate that, once those reports are published, I will see whether there are any issues that need to be acted on, with reference to the Commonwealth legislation, and I will still keep true to the commitment that I made. Thirdly, I might come back to where you said I was turning a blind eye. I was reading out the comments of the inspector of ICAC.
>
> …
>
> I have no role with regard to the New South Wales ICAC….I am not resiling from the fact that we will look at that [ICAC] report when it comes out.[85]

Issues raised by the Trade Union Royal Commission

1.89 The committee questioned Mr Rogers about matters arising out of the Trade Union Royal Commission. These questions predominately related to activities

82 *Committee Hansard*, 28 April 2016, p. 8.

83 *Committee Hansard*, 28 April 2016, pp 8- 9.

84 *Committee Hansard*, 28 April 2016, p. 11.

85 *Committee Hansard*, 28 April 2016, p. 9.

undertaken by the CFMEU and the Victorian AWU, and how they may relate to the Australian Labor Party.

1.90 Mr Rogers noted that:

> … there was no explicit finding in the report of the royal commission, that I am aware of, that mentioned any infraction of the electoral law, and in fact I do not think it was mentioned at all…[86]

Foundation 51 donations to the Country Liberal Party

1.91 The Northern Territory Branch of the Australian Labor Party (NT ALP) made a submission regarding the activities of Foundation 51 (or F51), an associated entity of the Country Liberal Party (CLP):

> Both the CLP and F51 have committed clear and indisputable breaches of the law by failing to disclose donations (including in kind support) consistent with the requirements of the [Commonwealth Electoral Act and the Northern Territory Electoral Act].
>
> These breaches of the law are not the occasional omissions and administrative mistakes made by all organisations from time to time.
>
> Rather, they are part of an orchestrated, systemic and endemic strategy to circumvent the disclosure provisions in the [Commonwealth Electoral Act and the Northern Territory Electoral Act].[87]

1.92 The NT ALP referred the committee to an email, dated 26 November 2012 from the then Foundation 51 Director, Mr Graeme Lewis to Members of the CLP executive committee and then CLP Chief Minister Terry Mills:

> [T]he email sets out substantial financial and in kind support provided by F51 to the CLP over many years commencing in 2008/09.
>
> Much of this financial support was never declared by the CLP or F51 within the mandated timeframes for disclosure returns lodged with the [AEC] or the Northern Territory Electoral Commission (NTEC).[88]

1.93 The NT ALP submission stated:

> Over a protracted period, to avoid disclosure of its relationship with the CLP and the extent of its financial support, F51 denied that it was an associated entity under the [Commonwealth Electoral Act]. This denial was always inconsistent with relevant legislative provisions.
>
> Under pressure of media exposure of its activities and investigation of complaints by the AEC and the NTEC, F51 capitulated and lodged late disclosure returns with both electoral commissions. [89]

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86 *Committee Hansard*, 28 April 2016, pp. 15.

87 *Submission 3*, p. 2.

88 *Submission 3*, pp 2-3.

89 *Submission 3*, pp 3-4.

1.94 Mr Lewis, Foundation 51 Director, responded to the NT ALP submission, stating:

> The entire matter of [Foundation 51] revolves around whether the Company is, or was, or was never an associated entity under the definitions in the relevant legislation…it is my submission that the Company does not and never has come within any of the six criteria set out in the Act[.][90]

1.95 However, Mr Lewis explained that in the context of ongoing interest in the issue, Foundation 51 received legal advice on the matter:

> [I]t was deemed that caution was appropriate and the Company conceded to the AEC, and NTEC that it may have been or was an associated entity. Immediately thereupon, all appropriate disclosure and reporting was completed without hesitation or delay.[91]

1.96 NT ALP noted that in May 2014 it had lodged a complaint with the AEC concerning breaches of Part XX of the Act by Foundation 51.[92]

1.97 The committee also sought information from the AEC regarding Foundation 51. Mr Rogers indicated that Foundation 51 has complied with its disclosure obligations under the Act.[93] The committee pressed Mr Rogers to explain how Foundation 51 had complied with its disclosure obligations:

> We have completed a compliance review of Foundation 51 and the returns that they have submitted, and in my view they have therefore met the requirements under the Electoral Act.[94]

1.98 Mr Rogers detailed for the committee the AEC's response to the NT ALP's complaint:

> [W]hen the complaint was lodged with us from the Northern Territory Labor Party…we spoke to Mr Lewis and he subsequently submitted returns for those years where Foundation 51 were purported to be an associated entity. Those returns were lodged and we conducted a compliance review of the relevant returns. I was satisfied at that stage that they had met their requirements under the Electoral Act.[95]

1.99 Mr Rogers continued:

> [E]very year parties and associated entities from across the political spectrum put in amendments and make late amendments, sometimes years after the event, and we accept those as part of achieving disclosure.[96]

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90 *Submission 5*, p. 1.

91 *Submission 5*, p. 2.

92 *Submission 3*, p. 4.

93 *Committee Hansard*, 28 April 2016, p. 21.

94 *Committee Hansard*, 28 April 2016, p. 21.

95 *Committee Hansard*, 28 April 2016, p. 22.

96 *Committee Hansard*, 28 April 2016, p. 22.

1.100 The committee put it to Mr Rogers that, in the case of Foundation 51, the actions of the AEC are reactive and that disclosure was only achieved through the matter being made public and a complaint being made. Mr Rogers responded:

> It always concerns me when the obligations of the act are not being adhered to. I point out, if I look at how [many] compliance reviews, in 2015 in the first quarter of 2016 we have completed 38 reviews. Of those 38 returns that we reviewed, something like 58 per cent of them we found required amendment from across the political spectrum. This is a very common practice. We allow this practice across the board because, as I mentioned at the outset, the underpinning principle of this is to achieve disclosure.[97]

1.101 Mr Rogers confirmed that the returns submitted by Foundation 51 were not declared in the statutory period for declaration. However, Mr Rogers agreed that although there had been a breach of the Act which, in his view was subsequently remedied, once the matter was made public, he regarded the matter as closed.[98] Mr Rogers contended:

> We looked at Foundation 51. They put returns in. We conducted a compliance review. They were responsive to requests we made, so we have decided not to pursue this matter.[99]

1.102 Mr Rogers noted that the NT Electoral Commission 'took a different course of action'.[100] The committee queried why State and Territory commissions seemed to be much more proactive than the AEC. Mr Rogers responded:

> [T]heir legislation is better than ours.[101]

Committee view

1.103 The Senate initiated this inquiry due to evidence on the public record about the activities of associated entities that appear to have frustrated proper disclosure. The evidence received during this inquiry raises concerns that the AEC does not have the legislative tools or the regulatory approach necessary to address this.

1.104 This committee accepts that part of the problem is the inadequacy of the provisions of the Act dealing with associated entities.

1.105 When operating together, the statutory definition of associated entities, the provisions permitting the disclosure of donations in aggregate, and the various monetary thresholds for disclosure give donors a safe harbour from regulatory scrutiny.

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97 *Committee Hansard*, 28 April 2016. p. 22.

98 *Committee Hansard*, 28 April 2016, p. 22.

99 *Committee Hansard*, 28 April 2016, p. 23.

100 *Committee Hansard*, 28 April 2016, p. 23.

101 *Committee Hansard*, 28 April 2016, p. 23.

1.106 The Commonwealth's provisions are different from many State legislative regimes. This creates the potential for regulatory arbitrage, undermining the efficacy and integrity of both levels of governance.

1.107 The evidence to this inquiry illustrates that there is no easy way of tracking donations from donors, to associated entities through to political parties. In the words of Mr Pirani, '[i]t is complicated….and it is an issue'.[102] This committee recommends that consideration be given to amending the Act as appropriate to address these issues.

1.108 However the committee also believes that part of the problem is the approach to regulation adopted by the AEC.

1.109 The committee pressed the Electoral Commissioner as to why action was not taken in serious cases. The Commissioner stated that he is 'administering the legislation as it has been provided by this parliament'.[103] When asked why State and Territory commissions seemed to be more proactive than the AEC, the Commissioner stated that 'their legislation is better than ours.'[104]

1.110 The committee does not agree that this is a complete explanation. In the case of Foundation 51, for instance, the Commissioner's evidence was that there was a breach of the Act but a decision was made not to pursue the matter.[105] In other words, the outcome was the result of a regulatory decision, not the regulatory framework.

1.111 The committee notes the Commissioner's explanation that although Foundation 51 did not submit returns for some years, when it did submit returns they satisfied a compliance review.[106]

1.112 The consequence of this is that late disclosure can cure non -disclosure. The committee does not accept that this should always be the case.

1.113 The purpose of the Act is not simply disclosure. The circumstances in which the disclosure is made also important. This is because, as the Commissioner noted in his opening statement, the Act operates to support the integrity and independence of political parties.[107] For example, non-disclosure may damage the principle of transparency and the integrity of the system where the non-disclosure involves large amounts, has been systemic, and occurred over a long period of time. In such a circumstance, late disclosure might not remedy the damage done. This is especially the case where the disclosure has been prompted only by discovery of the omission by a third party.

1.114 The committee accepts the Commissioner's evidence that many parties and associated entities submit late disclosures, and that it would be unfeasible (and

102 *Committee Hansard*, 28 April 2016, p. 6.

103 *Committee Hansard*, 28 April 2016, p. 10.

104 *Committee Hansard*, 28 April 2016, p. 23.

105 *Committee Hansard*, 28 April 2016, pp. 22-23.

106 *Committee Hansard*, 28 April 2016, pp. 22.

107 *Committee Hansard*, 28 April 2016, pp. 2.

undesirable) for every instance to lead to prosecution. The committee questions, however, whether the AEC has created a regulatory environment that encourages proactive disclosure.

1.115 Finally, the committee wishes to comment on evidence it has not received. The committee notes that the AEC has refused to hand over documents related to the case of Foundation 51 on the basis of public interest immunity.[108] The committee does not accept that public interest immunity is made out by the circumstances set out in the AEC's letter. If anything, the committee is of the view that the public interest favours the release of the documents.

1.116 The committee also notes that Senator Sinodinos did not attend this inquiry's hearing, in contravention of an order of the Senate. This matter has already been the subject of the committee's interim report, and it is not intended to revisit those procedural matters.

1.117 The committee observes, however, that it would have benefited from hearing Senator Sinodinos' evidence.

1.118 Senator Sinodinos himself has intimated that he has intimate knowledge of the interface between NSW and Commonwealth electoral law, as well as at least one of the specific examples this committee was interested in. During the ICAC hearing, Senator Sinodinos had the following exchange with Counsel Assisting:

> That's right?---But there's another element to this. The other element is the link between national legislation and State legislation.
>
> All right. Well---? –So you avoid regulatory arbitrage.
>
> All right. Well---? ----You've got to have a nationally consistent set of laws.
>
> All right. Well, you'll appreciate we can't go into that space but anyway---?---Well, if you're happy to I'll make a submission to you in that regard because I think that is important to getting this right.
>
> No. All I'm saying is that's beyond our remit, that's all, Senator Sinodinos?---I understand.
>
> Anyway?---I'll take it up in the Senate.[109]

1.119 Senator Sinodinos' willingness to take up the issue in the Senate has seemingly not borne fruit. He did not initiate action himself, nor has he participated in the opportunity the Senate subsequently gave him.

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108 Answer to question on notice number 7 from 28 April 2016 hearing, received from AEC on 2 May 2016.

109 NSW Independent Commission Against Corruption, Public Hearing for Operation Credo and Spicer, *Transcript of* Proceedings, 12 September 2014, p. 7689T.

Senator Jenny McAllister

Chair

Coalition Senators' Dissenting Report

1.1 As outlined in our dissenting report to the Committee majority's interim report, minority senators believe this inquiry is nothing but a political stunt by the Australian Labor Party and the Australian Greens.

1.2 The Terms of Reference were constructed to give the impression the inquiry would be about Commonwealth legislation in relation to political donations. The short timeframe for the inquiry, its conduct, and the lines of questioning belie this. The motive behind this inquiry was simply to pursue matters which come within the purview of New South Wales legislation, as well as to pursue a Senate Minister.

1.3 Given the matters traversed in the inquiry are still currently being dealt with by the New South Wales Electoral Commission, it is an appalling waste of the committee's time and resources to pursue these matters in this hastily convened and overtly biased Senate Committee inquiry.

1.4 Mr Tom Rogers, the Electoral Commissioner and only witness at the Committee's hearing, is quite right to take a cautious and prudent approach to these matters, correctly asserting that 'much of that evidence before the Independent Commission Against Corruption is contested evidence'[1]. For certain senators of this Committee to relentlessly pursue Mr Rogers over his response to these matters is disgraceful, especially when the Electoral Commissioner has repeatedly previously laid out a clear, cogent, and reasonable course of action which he again reiterated at the inquiry's hearing: stating multiple times he would consider any potential issues arising from ICAC investigations after a final report is handed down. Minority senators again raise serious concerns about the behaviour of some senators taking part in this inquiry, particularly Senator the Hon Penny Wong, at the hearing towards Mr Rogers. At best, the treatment of Mr Rogers can be described as unedifying.

1.5 As Mr Rogers said in the Committee's two-hour hearing, there are currently 192 associated entities under the relevant Commonwealth legislation. We note that the majority of these associated entities are affiliated with the ALP. We further note that all ALP-aligned associated entities had a combined declared income of more than $800 million for financial year 2014-15.

1.6 Despite requests from Coalition senators, the Committee majority refused to invite one person from any of these associated entities.

1.7 The Committee majority report shows this inquiry has served no useful purpose. It has discovered nothing new and made no recommendations. It focusses on matters under New South Wales legislation in a thinly veiled attempt to drag them into the Commonwealth arena with an election looming. Such stunts achieve nothing useful; instead they risk bringing the Senate committee system into disrepute and compromising its integrity.

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[1] *Committee Hansard*, 28 April 2016, p.9.

Senator Cory Bernardi
Deputy Chair
Senator for South Australia

Senator Joanna Lindgren

Senator for Queensland

Appendix 1

Submissions and additional information received by the committee

Submissions

1 Associate Professor Joo-Cheong Tham

2 Australian Electoral Commission

3 Northern Territory Branch of the Australian Labor Party Australia

4 Mr Graeme Lewis

5 Country Liberals (Northern Territory)

Correspondence

1 Correspondence from the Hon Keith Mason AC QC, received 21 April 2016

2 Correspondence sent to Senator the Hon Arthur Sinodinos AO from the committee, dated 20 April 2016

3 Correspondence sent to Senator the Hon Arthur Sinodinos AO from the committee, dated 26 April 2016

Appendix 2
Public hearings

Thursday, 28 April 2016
Senate Committee Room 2S3
Parliament House, Canberra

Witnesses

Australian Electoral Commission
Mr Tom Rogers, Electoral Commissioner
Mr Paul Pirani, Chief Legal Officer

Appendix 3

Comparative table of Commonwealth and NSW funding and disclosure legislative provisions[1]

	Commonwealth	**NSW**
Donations bans and caps	Yes - cap on anonymous donations of more than $13,000 (2015-16 financial year): *Commonwealth Electoral Act 1918* (Cth) s 306.	Yes - annual cap of $5,800 for donations to registered political parties and groups; $2,500 for candidates, elected members and third-party campaigners (2015-16 financial year): *Election Funding, Expenditure and Disclosures Act 1981* (NSW) s 95A. Cap of $1,000 on anonymous donations and in kind campaign contributions: ss 96E and 96F. Ban on property developer, tobacco, gambling and liquor entity donations: Div 4A. Ban on donations from unenrolled individuals and entities without an ABN: s 96D.

1 Derived from NSW Panel of Experts (Dr Kerry Schott (Chair), Mr Andrew Tink AM, The Hon John Watkins), *Working Paper 1 – Overview of Australian Election Funding and Donations Disclosure Laws*, August 2014, Annexure A: Summary of Commonwealth State and Territory Election funding and donations disclosure rules; NSW Electoral Commission website, *Caps on Political Donations*, available at: www.elections.nsw.gov.au/fd/political_donations/caps_on_political_donations; NSW Electoral Commission website, *Unlawful Political Donations*, available at: http://www.elections.nsw.gov.au/fd/political_donations/unlawful_political_donations.

Expenditure limits	No.	Yes - s 95F sets limits on 'electoral communication expenditure' by parties, groups, candidates and third-party campaigners for general elections and by-elections. The expenditure limit for a party that endorses candidates in all 93 districts for the 2015 State election is $10,341,600.
Public funding	Yes – direct entitlement scheme. Candidates and Senate Groups that receive at least 4% of first preference votes (FPVs) are eligible. The current funding rate is $2.56 per FPV: Pt XX, Div 3.	Yes – reimbursement scheme. Parties and candidates who receive at least 4% of FPVs are eligible for payments from the Elections Campaign Fund: Pt 5. Parties are also entitled to Administration Funding based on no. of elected members: Pt 6A Div 2. Parties that are ineligible for Administration Funding may apply for Policy Development Funding: Pt 6A, Div 3.
Donations disclosure rules	Yes - parties, associated entities, and third parties who incur electoral expenditure must lodge annual returns, including details of donations of more than $12,800. Donors to parties must report annually on donations of more than $12,800. Candidates, donors to candidates, and Senate groups must disclose details of donations of more than $12,800 after each election: Pt XX, Divs 4-5A.	Yes - parties, groups, elected members, candidates, third party campaigners and major political donors must lodge annual returns, including details of donations of $1,000 or more: s 92. 'Political donations' include membership fees, intra-party transfers, and entry fees for fund-raising events: s 85(2).

Appendix 4

Penalties relating to the Commonwealth disclosure scheme[1]

Offence	**Section of the *Commonwealth Electoral Act 1918***	**Maximum penalty**
Failure to lodge a return by the due date	315(1)	Up to $5 000 for agent of political party Up to $1 000 in any other case
Lodging an incomplete return	315(2)(a)	Up to $1 000
Failure to retain records for three years	315(2)(b) and 317	Up to $1 000
Including false and misleading information in a return	315(3) and (4)	Up to $10 000 for agent of political party Up to $5 000 any other person
Providing false or misleading information for inclusion in a return	315(7)	$1 000
A person convicted of having failed to lodge a return, who continues not to lodge the return	315(8)	Up to $100 per day for each day the return is outstanding. The penalty accrues from the day following the day of the initial conviction.
Failure or refusal to comply with a notice relating to a compliance investigation	316(5) and (5A)	$1 000

1 Australian Electoral Commission, *Financial Disclosure Guide for Associated Entities 2014-15 financial year*, 13 July 2015, Appendix 3, p. 31.

Offence	**Section of the *Commonwealth Electoral Act 1918***	**Maximum penalty**
Providing false or misleading information during a compliance investigation	316(6)	$1 000 or imprisonment for 6 months, or both
Discriminating against a donor	327(2)	$5 000 or imprisonment for 2 years or both for an individual $20 000 for a body corporate

Appendix 5

SUMMARY OF FACTS RELEVANT TO THE DECISION OF THE NEW SOUTH WALES ELECTORAL COMMISSION: LIBERAL PARTY OF AUSTRALIA (NSW DIVISION) CLAIM FOR PUBLIC FUNDING

1. Oral and documentary evidence from Liberal Party officials and agents and from The Free Enterprise Foundation (the Foundation) that was provided to the Independent Commission Against Corruption (the ICAC) in the course of its Operation Spicer Inquiry led the 3 member NSW Electoral Commission (the Commission) to conclude there were significant breaches of election funding laws in the latter part of 2011. Those breaches require the Commission to withhold payments for claims by the Liberal Party of Australia, New South Wales Division (the Party) from the Election Campaigns Fund and the Administration Fund, in accordance with sections 70(1) and 97L(1) of the *Election Funding, Expenditure and Disclosures Act* 1981 (the Act).
2. The Act's objects include the establishment of a fair and transparent election funding, expenditure and disclosure scheme; and facilitating public awareness of political donations (s 4A). In its recent *McCloy* decision the High Court accepted that the purpose of the Act was "to secure and promote the actual and perceived integrity of the Parliament and other institutions of government in New South Wales. A risk to that integrity may arise from undue, corrupt or hidden influences over those institutions, their members or their processes."
3. The Act defines "reportable political donations" to include political donations of or exceeding $1000. Parties must disclose, in a declaration complying with section 91 of the Act, details of "reportable political donations" received, including donor names, donor addresses and amounts for donations over that sum where donations were made to or for the benefit of the party.
4. On 26 September 2011 the Party disclosed a list of reportable political donations for the period 1 July 2010 to 30 June 2011, including donations purportedly received from the Foundation on 16 August 2010 ($94,000), 22 December 2010 ($171,000), 23 December 2010 ($358,000 and $64,000) and 24 December 2010 ($100,000). The disclosed list further declared that all political donations required to be disclosed for the disclosure period had been disclosed. The various donations were made in the context of the NSW State General Election held on 26 March 2011.
5. The Commission is of the view that the auditor that provided the audit certificate accompanying the Party's declaration was not aware of, or sought or was provided with the details supporting the donations from the Foundation.
6. In truth, the Foundation had been used by senior officials of the Party and an employed party fund-raiser to channel and disguise donations by major political donors some of whom were prohibited donors. No disclosure of the requisite details for those major donors has been made despite the Party having been requested to remedy the deficiency.

New South Wales Electoral Commission
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7. The Commission has relied on the evidence provided to the ICAC by Mr Simon McInnes, the Finance Director and Party Agent of the Party; Mr Paul Nicolaou of Millennium Forum; and Mr Mark Neeham, State Director of the NSW Division of the Party between 2008 and 2013. Through them evidence was also given of the involvement of other senior Party officials constituting the Party's Finance Committee, including Mr Sinodinos the Finance Director/Treasurer, Mr Webster and others (ICAC transcript reference 7279T) in the arrangements touching the Foundation.
8. What follows is a bare summary of the ICAC evidence.
9. The Foundation was purportedly established by deed on 24 August 1981 between Denis Davis ("the Settlor") and Anthony Bandle and Charles Fox ('the Trustees"). Mr Fox was replaced by Peter Marlow in 1986, then Roderick Bustard and lastly Stephen McAnerny. The Trustees were also "the Council" of the Trust. All powers and discretions of the Council and Trustees were undertaken by the two individuals who were in those positions at the relevant time. No other individuals had any input into the decisions made by the Trustees (Reference Trust Deed; ICAC Transcript 3578 – 3580 & 3628 – 3629).
10. The Foundation commenced to be used well before 2010 as a means of offering anonymity to favourably disposed donors wishing to support the Liberal Party. This was not the sole function of the Foundation but it appears to have been a major part of its activities. Prior to 14 December 2009, donations from developers were not prohibited by New South Wales law. But disclosure requirements in relation to recipients of political donations have been in place, albeit subject to amendment, since 1981. Donors have been required to disclose donations since 1993 (once again this provision has been subject to amendment).
11. Mr Nicolaou was paid commission for donations raised, including money channelled through the Foundation. His practice was to solicit donations on behalf of the Party, frequently proposing to donors that they could donate via the Foundation. Cheques in favour of the Foundation were then passed by him to officers of the Foundation accompanied by a standard form letter requesting the Foundation to make an equivalent donation to the Party. This in turn would be done. He described the Foundation as "there to provide anonymity for donors who did not want to be disclosed as Liberal Party donors" (ICAC transcript reference 7279T).
12. Mr Neeham described the Foundation, "This was a body that could raise funds from, from prohibited donors to the division because it was, it was, it was a separate body... [and then it could] ... make a donation to the division" (ICAC transcript reference 7328T).
13. On some occasions amounts intended to be donated to the Liberal Party were entered into the Liberal Party's accounts before a cheque for that amount was paid to the Party from the Foundation.
14. The five large donations of August and December 2010 (stated in paragraph 4. above) purportedly from the Foundation were in reality sums aggregated from individual donors whose money was paid to the Foundation in the manner indicated.
15. Senior officers of the Party's NSW Division knew of the scheme and its use to disguise donations, including from property developers. See for example, ICAC transcript references 7266T-7273T, 7288T-7290T, 7298T, 7300T- 7301T, 7328T-7329T, 7334T-7340T.

16. Mr McInnes told ICAC that in early 2011 he had started to believe that using the Foundation was not within the spirit of the Act. Nevertheless "if [donations] happen to find their way back to the party [they] were completely legal". He conceded that he expected that the money paid by the Party to the Foundation would come back. It always did (See ICAC transcript 7231T - 7237T).

17. The Commission was constituted in December 2014. It replaces the former Election Funding Authority and is armed with regulatory and enforcement functions extending to matters previously regulated by the Authority.

18. Having examined the ICAC evidence in 2015 and 2016, the Commission took its own steps to consider the legal implications. It has concluded that:
    i. The Free Enterprise Foundation was never a validly constituted charitable trust because the purposes to which money it controlled could be paid were not exclusively charitable in the eyes of the law. As the Commission understands it, a valid trust must be for the benefit of entities with legal personality, or for charitable purposes (*Morice v Bishop of Durham (1804) 9 Ves Jun 399 at 404-405; 32 ER 656 at 658*; in *re Astors Settlement Trusts [1952] 1 Ch 534 at 540—547*; *Bacon v Pianta (1966) 114 CLR 635 at 638*). One consequence is that its Council did not have lawful authority to exercise any independent discretion to allocate funds for particular purposes. Accordingly, even if (which is denied by the Commission) "donors" to the Foundation purported to arm the Foundation's Council with unfettered authority to decide as to the disposition of gifted moneys, the true legal position was that the money remained under the control of the "donors" because of a resulting trust consequent upon invalidity. When the Foundation purported to pay the money to the Liberal Party in the abovementioned five large tranches of money (see paragraph 4 above) it was in truth acting as agent for the donors. At all times they were the true donors and their details should have been disclosed by themselves and the Party if the sums involved made them "major political donors".
    ii. In any event, the evidence revealed that s 85(1)(d) of the Act was engaged. It stipulates that a gift made to or for the benefit of an entity [here The Free Enterprise Foundation, according to the Party's position] which was used or intended to be used by the entity to enable the entity to make directly or indirectly a political donation is itself a political donation. Section 85(1)(d) is attracted in two separate ways. The gift was actually used by the Foundation to make a political donation. As well, the gift was intended to be used by the Foundation to make a political donation.

19. The above conclusions stem from the evidence revealed in 2014. And they address different legal issues and provisions of the Act to those considered by the Crown Solicitor in 2013 as well as resting on significantly different information made available through Operation Spicer in 2014.

20. On 11 February 2016 the Acting Electoral Commissioner wrote on behalf of the Commission to the Party Agent of the Party, Mr McInnes . The letter outlined the Commission's tentative concerns and invited submissions directed to the two legal

issues mentioned above as well as the issue as to whether a final payment should be made under the Election Campaigns Fund in light of these matters.

21. The letter in reply from Mr McInnes dated 18 February 2016 did not advance any response to the suggestion about the invalidity of The Free Enterprise Foundation "trust". The letter further asserted that the Party had and has no responsibility to disclose information relating to individual donors to the Foundation, a position that the Commission completely disputes. The invitation to remedy the deficient 2011 declaration was firmly declined.
22. On 24 February 2016 the Commission considered whether the Party was eligible for public funding taking into account sections 70(1) and 97L(1) of the Act. The Commission was not at that stage satisfied that the Party was eligible, because the Party had failed to disclose reportable political donations for the period ending 30 June 2011.
23. Since public monies totalling $4,389.822.80 is at issue the Commission decided to give the Party a further opportunity to change its stance or satisfy the Commission that the Commission's tentative views were erroneous. A letter was sent to Mr McInnes on 26 February 2016 enclosing a draft Summary of Facts document and inviting the Party's response.
24. On 18 March 2016, Swaab Attorneys forwarded the Party's response. None of the Summary of Facts were disputed.
25. The Party's response contended that a declaration in requisite form had been lodged and that its adequacy in terms of detail was irrelevant to the decision confronting the Commission under sections 70(1) and 97L(1).
26. The Commission rejects this submission for the reasons already set out. Neither does the Commission accept the submission that the amount that must be withheld cannot exceed the total of unlawful donations involved. For one thing, this ignores the matters set out in paragraphs 2 and 3 above. On 23 March 2016 SWAAB Attorneys sent a further letter on behalf of the Party urging the Commission to release all but $693,000 of the funding claimed. After careful consideration the Commission believes it does not have discretion in this matter having regard to the terms of sections 70(1) and 97(1) of the Act.
27. The Party further disputes the proposition that the Foundation was not a validly constituted charitable trust. Particular reference is made to *Attorney-General (NSW) v Henry George Foundation Ltd [2002] NSWSC 1128* and *Aid/Watch Incorporated v Commissioner of Taxation (2010) 241 CLR 539; 272 ALR 417*.
28. The Commission has considered this submission but remains of the view stated. Each of the cases cited in the Party's response involved a trust where the predominant purpose was charitable in the legal sense (educational in the former case, the relief of poverty in the latter). Even if one ignores entirely the activities of the Foundation, its Prescribed Purposes are not of this nature. Even if the purposes of the Foundation were beneficial to the community (which is not conceded) that would not be sufficient to make them charitable under the fourth head in Pemsel's case as it is only those purposes beneficial to the community which are "within the equity of the preamble to the Statute of Elizabeth" (*Aid/Watch* at [18]), or as it is sometimes put "within the spirit and intendment of the preamble to the statute of Elizabeth" (*Aid/Watch* at [28]) that are charitable. The purposes of *Aid/Watch* qualified as charitable within the fourth head

only because the debate that *Aid/Watch* fostered was debate concerning the relief of poverty, a matter clearly within the preamble to the Statute. In *Henry George Foundation* Young CJ also considered that the trust in question could have been saved by s 23 *Charitable Trusts Act (NSW).* There is no question of applying s 23 to the Foundation as the law that applies to the Foundation trust deed is that of the Australian Capital Territory (ACT), and there is no equivalent of s 23 under the ACT law.

29. The Commission invited the principals of the Foundation to comment on the draft Summary of Facts. A letter received by the Commission today from the Foundation's solicitor did not respond to the substance of the Commission's stated concerns about the validity of the Trust. Its terms were noted.

23 March 2016