

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

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

### In summary

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

### Background

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

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

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

### The allegations

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

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

### AEC investigation powers

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

The AEC applies the test espoused by the High Court decision in *George v Rockett* (1990) 170 CLR 104 at 115 (not dealing with the Electoral Act but with the Queensland Criminal Code Act ) that:

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

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

### AEC inquiries

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

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

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

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

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

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

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

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

On 26 June 2009 the AEC had contact with a senior lawyer from the Law Firm Slater & Gordon about the status of the HSU National Office and the progress of their investigation. The lawyer indicated his view that the HSU National Office was not an "associated entity" and was legally separate from the various branches of the HSU. He advised that his client was considering putting in both a third party political expenditure return and a donor return.

The lawyer advised that there was still a lack of supporting documentation for much of the expenditure identified as being in issue by the HSU auditor (which led to the referral to Slater & Gordon) and that it was likely that this would lead to any return being qualified under section 318 of the Electoral Act. He also advised that this matter was being actively investigated by the Industrial Registrar.

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

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

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

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

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

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

The AEC reviewed the material provided and on 16 October 2009 the authorized officer concluded that there were no facts or other material pointing to the amounts referred to in the SMH articles having not been included in the HSU National Office returns. Accordingly, there was no basis on which section 316(3) notices could have been issued by the AEC. Part of the reasons for this conclusion was that the three returns lodged by Ms Jackson were not subject to any qualification under section 318 of the Electoral Act indicating that, at that time, Ms Jackson had access to sufficient particulars of the HSU National Office expenditure to prepare and lodge accurate returns. Section 318 of the Electoral Act enables a person with a reporting obligation

to provide the AEC with a written notice setting out the particulars and reasons why a person is unable to complete a return and to identify the person who, on reasonable grounds, they believe is able to provide the missing particulars.

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

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

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

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

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

The AEC made various inquiries and reviewed the available material responding to Senator Ronaldson in a letter dated 15 November 2010. The AEC response indicated that there was no evidence that the Coastal Voice "operates wholly, or to a significant extent, for the benefit of" the ALP (see the requirements for a "associated entity" in subsection 287(1) of the Electoral Act).

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

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

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

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

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

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

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

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

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

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

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

- (2) Australia Post - \$7,253
- (3) The Entrance Print - \$12,647
- (4) Nova Radio Group - \$2,739
- (5) PK Printing Service - \$821

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

- (i) whether the amount was included in the total amount disclosed in the third party political expenditure returns that she lodged on behalf of the HSU; and
- (ii) if the amount was not included in the total amount disclosed in the third party political expenditure returns that she lodged on behalf of the HSU - the reason why the amount was excluded.

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

- (1) The expenditure payment of \$14,647.60 to Central Coast Radio Centre (not \$15,994 as reported in the article) was included in the 2007-08 third party political expenditure return by the HSU;
- (2) The expenditure of \$7,253.17 to Australia Post – Long Jetty was included in the 2007/08 third party political expenditure return by the HSU;
- (3) Two payments totaling \$12,937 to The Entrance Print (not \$12,647 as reported in the article) were included in the HSU returns. These payments were made over 2 financial years with \$9,991 included in the in the 2006-07 third party political expenditure return by the HSU and \$2,946 in the 2007-08 return;
- (4) The expenditure of \$2,739 to Nova 1069 Pty Ltd was included in the 2007-08 third party political expenditure return by the HSU;
- (5) The expenditure of \$821.70 to PK Printing Services Tuggerah was included in the 2007-08 third party political expenditure return by the HSU.

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

On the evening of 7 May 2012 the AEC became aware that the Senate had published the Report of the Delegate to the General Manager of Fair Work Australia – “Investigation into the National Office of the Health Services Union under section 331 of the Fair Work (Registered Organisations) Act 2009” dated 28 March 2012 (the FWA Report). The AEC then commenced a detailed examination of the additional information contained in the FWA Report.

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

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

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

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

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

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

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