

Standing Committee on Finance and Public Administration

ANSWER TO QUESTION ON NOTICE

Australian Electoral Commission

Finance and Deregulation Portfolio

Supplementary Estimates Hearing – October 2010

Outcome 1, Program 1.2

Topic: GetUp Limited and associated entities

Question reference number: F84

Type of Question: Written

Date set by the committee for the return of answer: 3 December 2010

Number of Pages: 6

Senator Abetz asked:

In its Funding and Disclosure report after the 1998 election, the AEC noted that the Electoral and Referendum Amendment Act 1999 broadened the definition of associated entity to one which ‘operates wholly or to a significant extent for the benefit of one or more registered political parties’. At the time the AEC commented that, it was concerned that this added further imprecision to the definition which ultimately may only be able to be resolved before the courts on a case by case basis. http://www.aec.gov.au/About_AEC/Publications/Reports_On_Federal_Electoral_Events/1998/part4.htm

My question is:

- a) Does the AEC admit, in principle, that an organisation need not be formally linked to a political party or parties in order to operate for their benefit?
- b) Also, what would be the process by which the question of whether or not an organisation was an associated entity would be resolved by the courts?

Answer:

- (a) Yes, if the “entity” “operates wholly or to a significant extent for the benefit of one or more political parties”; and
- (b) A prosecution under section 315 of the *Commonwealth Electoral Act 1918* (Electoral Act) is the process by which a court would determine whether or not an “entity” is an “associated entity” with the reporting obligations under section 314AEA.

Standing Committee on Finance and Public Administration

ANSWER TO QUESTION ON NOTICE

Australian Electoral Commission

Finance and Deregulation Portfolio

Supplementary Estimates Hearing – October 2010

Background

The test for what is an “associated entity” is a question of fact. The term “associated entity” is currently defined in subsection 287(1) of the *Commonwealth Electoral Act 1918* (Electoral Act) as:

“associated entity means:

- (a) an entity that is controlled by one or more registered political parties; or
- (b) an entity that operates wholly, or to a significant extent, for the benefit of one or more registered political parties; or
- (c) an entity that is a financial member of a registered political party; or
- (d) an entity on whose behalf another person is a financial member of a registered political party; or
- (e) an entity that has voting rights in a registered political party; or
- (f) an entity on whose behalf another person has voting rights in a registered political party.”

In addition, the term “entity” is defined in subsection 287(1) of the Electoral Act as:

“entity means:

- (a) an incorporated or unincorporated body;
- (b) the trustee of a trust.”

1999 amendments

Prior to 1999, the definition of an “associated entity” in subsection 287(1) was as follows:

“associated entity means an entity that:

- (a) is controlled by one or more registered political parties; or
- (b) operates wholly or mainly for the benefit of one or more registered political parties.”

Standing Committee on Finance and Public Administration

ANSWER TO QUESTION ON NOTICE

Australian Electoral Commission

Finance and Deregulation Portfolio

Supplementary Estimates Hearing – October 2010

Accordingly, in 1999, the test changed from “operates wholly or mainly for the benefit” to “operates wholly, or to a significantly extent, for the benefit” of a political party.

The current definition was inserted as an amendment by the *Electoral and Referendum Amendment Act (No1) 1999* (‘the Amending Act’). The then Leader of the Opposition in the Senate, Senator Faulkner, moved an amendment to ‘tighten the definition of associated entity’: Electoral & Referendum Amendment Bill (No 2) 1998, In Committee, Senate Hansard page 2182 (18 February 1999). However, the amendment proposed by Senator Faulkner was agreed to by the Senate without further debate evidencing the substantive or practical difference the Parliament considered would flow as a consequence of the amendment. Senator Faulkner’s reference to ‘tighten[ing] the definition of associated entity’, is the only available indication of the parliamentary intention about the nature of the changed test and appears to support a conclusion that the amendment was intended by the Parliament to reduce the threshold at which an entity would be considered to be an associated entity of a political party.

Consistent with the above apparent intention of the Parliament, it would be reasonable to conclude that the difference between *mainly* and *significant extent* is one of degree, the precise nature of which is underscored by the definition of *significant*.

To that end, the *Macquarie Dictionary* defines *significant* as: ‘important; of consequence.’ Accordingly, if an entity operates for the benefit of a political party in ways that are ‘important; of consequence’ for the entity (not the party) it would appear to fall within the terms of paragraph (b) of the definition of associated entity in subsection 287(1).

Factors

The AEC has a range of external legal advice on the application of the test “operates wholly, or to a significantly extent, for the benefit” of a political party. From those legal advisings the following principles emerge.

1. Determining whether an entity is an associated entity of a registered political party requires an assessment of the facts on a case by case basis.
2. The instruments that establish and govern the operations of the entity are relevant. In the case of a company that is subject to the Corporations Act 2001, this would include the Constitution and the Memorandum and Articles of Association setting out the purpose of the company. In addition, the recent financial statements of the entity are relevant.

Standing Committee on Finance and Public Administration

ANSWER TO QUESTION ON NOTICE

Australian Electoral Commission

Finance and Deregulation Portfolio

Supplementary Estimates Hearing – October 2010

3. The making of donations to a political party are a relevant factor in determining if an entity is an associated entity as the reporting requirements in section 314AEA relate to reporting the receipt and payment of monies. Donations to political parties are distinguished from donations to candidates. That is, a benefit to a candidate cannot always be equated to a benefit to a political party.

4. Directly advocating voting for a particular party '*...advocated a vote for a particular party...*', may be one factor to take into consideration when determining if an entity operates for the benefit of a registered political party. However, this needs to be directly advocating of a particular vote as opposed to the general support. An example of this was the action of the Mineral Council of Australia advocating on the resources tax.

5. Whether the entity operates '*...for the benefit of a registered party*' is an objective fact and the subjective intention to benefit a party is not determinative. Thus the view of the entity is not a relevant factor when determining whether the entity is an associated entity.

6. The meaning of the term 'operate' has been judicially considered in *ASIC v Pegasus Leveraged Options Group Pty Ltd & Anor* [2002] NSWSC 310 (Pegasus Case). The meaning of 'operate' in the Pegasus Case has been positively applied in a case in the New South Wales Supreme Court and the Western Australia Supreme Court since the original decision. In the Pegasus Case Justice Davies stated:

'The word "operate" is an ordinary word of the English language and, in the context, should be given its meaning in ordinary parlance. The term is not used to refer to ownership or proprietorship but rather to the acts which constitute the management of or the carrying out of the activities which constitute the managed investment scheme. The Oxford English Dictionary gives these relevant meanings: "5. To effect or produce by action or the exertion of force or influence; to bring about, accomplish, work. 6. To cause or actuate the working of; to work (a machine, etc). Chiefly US 7. To direct the working of; to manage, conduct, work (a railway, business, etc); to carry out or through, direct to an end (a principle, an undertaking, etc). orig. US". I have concluded that Mr McKim operated the managed investment scheme. He was the living person who formulated and directed the scheme and he was actively involved in its day to day operations. He supervised others in their performance. I have also concluded that Mr McKim is not exempted by s601ED(6). He did not "merely" act as agent or employee of Pegasus. He was the directing mind and will of Pegasus and of the scheme.'

It is clear from this judicial definition of 'operate' that the aims of an organisation alone are not enough to determine that an entity operates for the benefit of a political party. The manner in which the entity carries out their aims is just as relevant to determining benefit as the aims themselves.

Standing Committee on Finance and Public Administration

ANSWER TO QUESTION ON NOTICE

Australian Electoral Commission

Finance and Deregulation Portfolio

Supplementary Estimates Hearing – October 2010

7. There is no absolute threshold at which something ceases to be insignificant and becomes significant. It is a matter of degree which must be assessed on a case by case basis. The meaning of the term 'significant' has also been judicially considered. In the case of *Emaas Pty Ltd v Mobil Oil Australia Ltd [2000] QCA 513* Justice Thomas of the Queensland Supreme Court stated:

'The word "significant" is not a synonym for "substantial", although it is often used in that way. It is richer in meaning than the quantity-oriented "substantial". The Oxford English Dictionary Second Edition definition of the word includes the following entries: "1. Full of meaning or import; highly expressive or suggestive ... 2. Having or conveying a meaning; signifying something ... 3. Expressive or indicative of something ..."

The word has been considered in a variety of legal contexts, both in statutes and other legal instruments, and while I will not attempt a review of authorities it is useful to note that on a number of occasions the terms "important" or "of consequence" have been adopted as useful synonyms. The comments of an American court adopted by Young J in *Coombs v Bahama Palm Trading Pty Ltd* suitably illustrate the flexibility of the word:

"While ... determination of the meaning of 'significant' is a question of law, one must add immediately that to make this determination on the basis of the dictionary would be impossible. Although all words may be 'chameleons, which reflect the colour of their environment', 'significant' has that quality more than most. It covers a spectrum ranging from 'not trivial' through 'appreciable' to 'important' and even 'momentous'."

It is a word then which takes its meaning very much from the context in which it is used.'

8. The context in which the term 'significant' is used in relation to the definition of associated entity in paragraph 287(1)(b) is used in close relation to the term '...operates wholly...' The fact that an associated entity must 'wholly or to a 'significant extent' operate for the benefit of a political party would appear to qualify the term 'significant' in this context to be a degree once removed from 'wholly'.

9. Indirect or consequential benefits to a particular party does not constitute a 'benefit' for the purposes of paragraph 287(1)(b) a more direct link than this is required. There may be situations involving indirect or consequential benefits for a party or number of parties as a result of the actions of an entity which does not involve 'operating for the benefit of' a party. A more direct link between the activity and a benefit for a party or parties concerned is required. Thus, the fact that an organisation advocates a 'left' agenda does not mean it is 'operating' for the benefit of all 'left' registered political parties. Some closer connection is required between

Standing Committee on Finance and Public Administration

ANSWER TO QUESTION ON NOTICE

Australian Electoral Commission

Finance and Deregulation Portfolio

Supplementary Estimates Hearing – October 2010

the actions of an organisation and a party before one can say the organisation operates for the benefit of that party.

10. Despite the fact that the offence in section 315 of the Electoral Act (e.g. for failing to lodge a return) is an offence of strict liability, the AEC must still prove that the entity is an associated entity (as this is not a physical element of the offence). Due to the fact that this is a criminal offence the fact that an entity is an associated entity must be proven by the AEC 'beyond reasonable doubt'. Obviously, this is a very high standard of proof that must be met by the AEC.

11. Judicial decisions relating to the meaning of 'benefit' have generally construed the definition widely. In the case of *Moylan v the State of Western Australia* [2007] WASCA 52 (the Moylan Case) 'benefit' was defined by Justice Miller as:

"The wide and residual meaning of 'benefit' has long been recognised in common law, as in the famous definition of consideration adopted from *Comyn's Digest* in *Currie v Misa* (1875) LR 10 Exch 153 at 162:

A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other:

This judicial definition states that a detriment to another may be considered a benefit in circumstances where the person gains something valuable from it or is placed in a superior position. This must be assessed on a case by case basis.