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Appendix F – AEC supplementary submission on its analysis

AEC
Australian Electoral Commission

Electoral Commissioner

Mr Daryl Melham MP
Chair
Joint Standing Committee on Electoral Matters
Department of the House of Representatives
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Mr Melham

INQUIRY INTO THE AEC ANALYSIS OF THE FWA REPORT ON THE HSU

I refer to your letter of 11 September 2012 and the CDs that contained some of the confidential attachments to the FWA Report. I understand that you wish that the AEC responds to your letter by COB 13 September 2012 in the interests of enabling the Committee to finalise its report on this matter as soon as possible.

The Committee has asked the AEC to consider the attachments provided and to respond to two specific matters. First, whether the AEC had previously been provided with a copy of the Slater & Gordon investigations with the BDO Kendalls Report. Second, whether the information contained on the CD changes or alters in any material manner the AEC's previous analysis of the disclosure obligations under the *Commonwealth Electoral Act 1918* that arise from the FWA Report and the list of 17 possible measures provided to the Special Minister of State on 16 May 2012.

I can confirm that the AEC has not been provided with a copy of either the Slater & Gordon investigation or the BDO Kendalls Report prior to the arrival of the CD from the Committee. This is despite the resolution of the National Executive of the HSU referred to in the letter from Slater & Gordon to the Acting Industrial Registrar dated 16 June 2009 that a copy should be provided to the AEC. The AEC notes that the letter to the Acting Industrial Registrar from Slater & Gordon of 16 June 2009 predates the letter to the AEC from Slater & Gordon dated 30 June 2009 in which Mr Fowlie advised that the investigation by Slater & Gordon (which presumably included the BDO Kendalls Report) had been sent to the Industrial Registrar. This letter went on to state that:

West Block Offices, Queen Victoria Terrace, Parkes ACT 2600 | PO Box 6172, Kingston ACT 2604
Tel 02 6271 4780 Fax 02 6271 4554 *www.aec.gov.au*
ABN 21 133 285 851

"So as not to prejudice those investigations [by the Industrial Registrar] my client proposes to await the conclusion of the Industrial Registrar's inquiries before finalising any disclosure under the CEA".

Accordingly, it appears that the instructions to Slater & Gordon to provide the AEC with the results of the investigations and the BDO Kendalls Report were changed sometime between 16 June and 30 June 2009.

In relation to the AEC's examination of the attachments to the FWA Report contained on the CD, the AEC notes that both the Slater & Gordon investigation and the BDO Kendalls Report indicate that those findings are subject to limitations caused by the absence of relevant records and the sampling of documents and information (see paragraphs 15 to 19 of the Slater & Gordon investigation and the comments at page 3 of the BDO Kendalls Report that the payments identified by Union officers *"may be in the nature of electoral campaign material"* and that amounts of expenditure *"may not have included these expenses on their Schedule due to their specific knowledge of the expenditure incurred or the existence of adequate supporting material").*

The Slater & Gordon investigation concludes at paragraphs 3(d) and 96 that it may not be possible to precisely separate the Central Coast Expenditure into expenditure spent on the one hand directly to the Dobell campaign and on other Your Rights at Work and campaigning activities that were union related. This issue was also raised in the BDO Kendalls Report where it stated at page 3 that:

"If it is demonstrated that Ms Stevens and Mr Burke were engaged exclusively in respect of Mr Thomson's election campaign (a conclusion that we are not yet able to make) then it would likely follow that expenditure incurred by them would likely be of an electoral character."

The disclosure recommended by Slater & Gordon was to adopt a *"cautious approach"* in regard to the inclusion of possible political expenditure in the three disclosure returns that were lodged with the AEC on 13 October 2009 (see paragraph 115). The AEC also notes that paragraph 120 of the Slater & Gordon investigation appears to refer to the requirements of section 318 of the *Commonwealth Electoral Act 1918* where a person who is responsible for providing a disclosure return is able to give notice to the AEC stating why it was not possible to provide the required particulars and to identify another person who they believe may give those particulars. No section 318 notice was given to the AEC by Ms Kathy Jackson at the time when the three disclosure returns were lodged on 13 October 2009 or subsequently.

The BDO Kendalls Report indicates that it was requested to review the schedules prepared by the HSU officers and to compare them with the credit card statements that were also provided. At page 3 of the BDO Kendalls

letter to Slater & Gordon dated 16 April 2009 reference is made to *"Probable Election Campaign Expenditure"* and that several schedules provided to them to review identified such expenditures. BDO Kendalls state at page 1 of the letter that *"Our review has substantially confirmed the accuracy of the Schedules"*. At page 3 BDO Kendalls state that they agreed with the characterisation of the expenditure listed in the schedules incurred on the credit cards issued by the HSU to Mr Thomson, Ms Stevens and Mr Burke was probable election campaign expenditure.

The AEC has compared the amounts shown in the schedules contained in the BDO Kendalls Report and the FWA Report with the total amounts contained in the three returns lodged by Ms Kathy Jackson on behalf of the HSU National Office. As the returns lodged by Ms Jackson under section 314AEB were only required to include total amounts and the sum of the amounts listed in the relevant schedules to the BDO Kendalls Report are less than the total amounts included in three returns, the AEC is not in a position to provide any further analysis of the information contained in the schedules. The AEC does note that the previous analysis based on the additional information contained in the FWA Report concluded that the majority of the items identified have been included in the three disclosure returns, albeit with some minor discrepancies. Those discrepancies were outlined in the "Addendum to the AEC's analysis of the FWA Report" that was published on the AEC website on 28 June 2012. The letter to the AEC from Slater & Gordon dated 23 May 2012 indicated that the three disclosure returns that were lodged with the AEC by the HSU National Office on 13 October 2009 *"were largely based upon the findings of the Slater & Gordon/BDO Kendalls Report"*. There is no information in the attachments that would lead the AEC to question this statement.

The transcripts of the FWA interviews with Mr Thomson, Ms Stevens and Mr Burke add some additional information about the duties of Ms Stevens and Mr Burke and the characterisation of particular items of expenditure that was made on their credit cards that could have been regarded as probable election campaign expenditure. The transcripts clearly show that Ms Stevens and Mr Burke undertook a range of duties which included some that would have been related to the ALP election campaign in Dobell (noting that some of these activities occurred prior to 13 April 2007 being the date when Mr Thomson was preselected as the ALP endorsed candidate for Dobell), while others involved duties involving the Your Rights at Work campaign, other union-related matters and State election campaign matters. On the material provided it is still not possible to accurately apportion the time and associated salaries to each activity. Indeed, it appears that due to this issue, paragraphs 118 and 119 of the Slater & Gordon investigation recommended the inclusion of the <u>total</u> salaries of Ms Stevens and Mr Burke as political expenditure incurred by the HSU National Office and this was included in the disclosure returns lodged with the AEC on 13 October 2009.

The AEC is on the record as stating that it would appear that the HSU National Office has made reasonable attempts to disclose all electoral expenditure that they were able to identify from the reconstructed records that

were available to them in 2009. The HSU National Office accepted the reporting responsibility in relation to all of the amounts of expenditure that were incurred by Mr Thomson, Ms Stevens and Mr Burke on the HSU issued credit cards.

The AEC notes that all of the attachments to the FWA Report that have now been provided concede that political expenditure was incurred on the credit cards issued by the HSU National Office. The available evidence indicates that this political expenditure has been disclosed in the three returns lodged with the AEC by Ms Kathy Jackson on behalf of the HSU National Office which retained the legal obligation for reporting such expenditure.

The AEC has concluded that the above circumstances show that:

(i) there were difficulties with the availability and accuracy of records held by the HSU National Office which led to uncertainties over the characterisation of expenditure that had been incurred on the credit cards issued to its various officers and employees;

(ii) those difficulties led to some amounts of electoral expenditure that have been identified in the FWA Report not being included in any disclosure return lodged by the HSU National Office, while other amounts were included which probably were not electoral expenditure (e.g. the total salaries of Ms Stevens and Mr Burke);

(iii) the HSU National Office took reasonable measures in 2009 to attempt to comply with the disclosure obligations contained in the *Commonwealth Electoral Act 1918*; and

(iv) the total amount of electoral expenditure that has been identified in the FWA Report and which has not been disclosed is less than the disclosure threshold that was in force at the relevant time.

In these circumstances the AEC has been unable to identify anything in the documents now provided to the AEC that would change the previous conclusions of its analysis of the FWA Report. This includes the content of the 17 recommendations made to the Special Minister of State on 16 May 2012.

The AEC notes that the schedules attached to the BDO Kendalls Report and the various transcripts point to the extensive and regular use of credit cards by Mr Thomson, Ms Stevens and Mr Burke on a range of disparate expenditure items, including conceded electoral campaign expenditure, but where the purpose of the expenditure is not always clear on the records available. Against this background the AEC reiterates its view, contained at Item VI of our report to the Special Minister of State, that dedicated campaign accounts operating at both electorate level and party level, from which electoral campaign expenditure must be incurred, would be of considerable aid to both candidates and parties in meeting their disclosure obligations and for subsequent scrutiny to ensure compliance with those obligations.

Expenditure on electoral activities outside of the dedicated campaign account would need to face strong penalties.

Yours sincerely

Ed Killesteyn

13 September 2012