AEC
Australian Electoral Commission

Mr Daryl Melham
Chair
Joint Standing Committee on Electoral Matters
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Parliament House
CANBERRA ACT 2600

Dear Chair

I refer to your letter of 17 August 2011 to the Electoral Commissioner in which you sought further information from the Australian Electoral Commission (AEC) on matters relating to the Committee's inquiry into the funding of political parties and election campaigns. I have been asked to reply to your letter on behalf of the AEC.

The following responses are provided to the ten questions contained in your letter.

1. What are the existing penalties for non-compliance with donation disclosure rules?

Section 315 of the *Commonwealth Electoral Act 1918* (the Act) sets out the penalties for breaches of the provisions contained in Part XX relating to the lodging of disclosure returns with the AEC by the various deadlines. All of the penalties are criminal penalties and are as follows:

Failure to lodge a disclosure return – subsection 315(1)

A person who fails to lodge a disclosure return by the due date is punishable by a fine of up to $5,000 for a person required to lodge a party return, or up to $1,000 for any other person. This is a strict liability offence. Where a person has been convicted of having failed to lodge a return and continues to not lodge that return, under subsection 315(8) that person is guilty of an offence for each day that the return remains outstanding that is punishable by a fine of up to $100 per day.

Lodging an incomplete disclosure return – paragraph 315(2)(a)

A person who lodges an incomplete return is punishable by a fine of up to $1,000. This is a strict liability offence. In the circumstances where, after all reasonable attempts, the agent is unable to obtain all the relevant particulars to be included in the return, section 318 provides that the return should include a notice in writing to the AEC setting out what information may be missing, the reason it cannot be obtained and the name, address and phone number of each person whom it is believed holds that information.

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Including false or misleading information in a disclosure return – subsections 315(3) & (4)

A person who knowingly lodges a disclosure return which contains false or misleading information is punishable by a fine of up to $10,000 for a person lodging a party return, or up to $5,000 for any other person.

Providing false or misleading information to an agent – subsection 315(7)

A person who knowingly provides to an agent false or misleading information which is to be included in a disclosure return is punishable by a fine of up to $1,000.

Failure to retain records – section 315(2)(b)

Failure to retain (for three years) records containing information which could be required to be included in an election disclosure return is punishable by a fine of up to $1,000.

Penalties also exist for non-compliance with notices of investigation, which are the authority under which the AEC can conduct investigations of possible breaches of section 315 as well as compliance reviews of political parties and associated entities. A third investigative power exists to enable the AEC to inquire into whether an entity may have a disclosure obligation as an associated entity. These penalties are found in section 316, which is the section governing investigation matters. These penalties include:

Failure to comply with a notice authorising an investigation – subsections 316(5) & (5A)

A person who refuses or fails to comply with a notice authorising an investigation conducted by the AEC is punishable by a fine of up to $1,000.

Providing false or misleading information during an investigation – subsection 316(6)

A person who knowingly provides false or misleading information during an investigation conducted by the AEC is punishable by a fine of $1,000 or imprisonment for six months or both.

2. *How effective are they?*

A substantial limitation to the AEC taking any enforcement action in relation to non-compliance with the donation disclosure rules are that all the penalties involve criminal offences. Offences such as the failure to lodge a disclosure return or lodging an incomplete disclosure return are straightforward matters of fact and could be better enforced if they were administrative penalties.

The relatively low penalties that currently apply remain unchanged since the funding and disclosure provisions first came into effect in 1984. The relatively low value of the penalties is indicative to the Commonwealth Director of Public Prosecutions (CDPP) that these transgressions are considered relatively minor and makes it

difficult to justify that it is in the public interest to pursue such prosecutions having regard to the *Prosecution Policy of the Commonwealth*.

In addition, due to the standard of proof that is required in criminal matters, the CDPP must be satisfied that the evidence is sufficient to sustain a successful prosecution. That is, the CDPP must be satisfied that there is evidence that meets the criminal standard of proof for each of the element of the offence and a reasonable prospect of obtaining a conviction. The CDPP must also consider and apply the public interest test currently contained in paragraph 2.10 of the *Prosecution Policy of the Commonwealth* to determine whether the public interest requires a prosecution to be pursued in each matter. The public interest test may look at things like, whether the offence is serious or trivial, the availability or efficacy of any alternatives to prosecution, and a range of other matters.

The AEC is of the view that compliance with the donation disclosure rules may be better managed with the introduction of administrative penalties for some offences such as late lodgement of a return without a valid and sufficient reason. The addition of administrative penalties would assist the AEC to enforce compliance requirements without the necessity of referring all matters to the CDPP. It is expected that these types of penalties would result in more timely compliance with disclosure provisions without creating an additional burden on the CDPP resources.

The AEC notes that the Act contains a 3 year limitation placed on commencing prosecution action. Under subsection 315(11) of the Act prosecutions for offences against the funding and disclosure provisions must be commenced within three years of the offence being committed. In practical terms (particularly due to the post event reporting of matters), this means, in some instances, that by the time the AEC becomes aware of a possible breach and/or conducts inquiries to accumulate sufficient evidence to warrant the preparation of a brief of evidence, there is no opportunity to pursue prosecution action. This can leave the AEC with no ability to enforce a correction to the public record.

However, the AEC notes that the general provision in section 4H of the *Crimes Act 1914* for commencing criminal proceedings for a summary offence is only 12 months. Accordingly, the level of the offences impacts on the time in which proceedings must be commenced.

3. *How many penalties have been issued in the past 5 years?*

No penalties have been issued in the last five years.

However, the CDPP in Queensland has agreed there is sufficient evidence to pursue a case for failure to lodge a disclosure return and is about to issue a summons to commence proceedings. The AEC is still waiting to hear whether the CDPP in NSW will pursue two other cases of failure to lodge a disclosure return.

4. What resources does the AEC currently have to investigate non-disclosure breaches and enforce disclosure rules?

There are currently five full time positions in the AEC dedicated to conducting compliance reviews of the annual returns lodged by political parties and associated entities, oversighted by a Director (ie a total of 6 Full Time Equivalents). Investigations of possible breaches against Part XX of the Act are normally undertaken by the staff engaged in compliance reviews. Other resources that assist include officers from the Legal Services Section in relation to providing legal advice and input to the preparation of letters, notices and briefs of evidence.

5. Has the AEC investigated an online reporting system to allow for continuous disclosure of donations, as well as public reporting prior to an election? Do you support this idea?

In 2009, the AEC sought the views of political parties, associated entities, corporate donors and third parties on what they would require in an online reporting tool to be able to meet a reduced timeframe for lodging disclosures. The feedback from these entities was that it would be impossible to meet a reduced disclosure timeframe without an online system, which enabled all parts of the entity that have financial transactions (eg party units and federal campaign committees) to record details of the financial transactions as they occur.

The AEC developed an eReturns portal which was released in July 2010. Although this facility does not meet the requirements to enable multiple levels of a political party to be able to enter transactions, it could be expanded to incorporate this function and to allow continuous disclosure of donations.

If the intention of any revised scheme is to have continuous disclosure of donations or to reduce the timeframe for lodging disclosure returns, the AEC agrees that this would not be possible with paper based returns. The AEC notes that the overseas experience (particularly in the US and Canada) is that the only means to ensure that electors are made aware of the source of donations in the lead up to an election is to have such details published daily on the Internet. Accordingly, the AEC strongly supports the development of an online reporting system that enables public release of disclosures within 1 working day of receipt of a disclosure including in the lead up to an election.

6. How do you evaluate the current rate of donor disclosure compared with party disclosure?

The AEC uses the information provided in the political party returns that identify donations above the threshold to identify those donors with an obligation to complete a donor disclosure. A disclosure obligation letter is sent to all donors who appear on party returns. However, there are cases where a person or entity that receives a donor obligation disagrees with the classification of the transaction reported on the party return. That is, a company may consider that a payment for access to a Member of Parliament at a fundraising event is a genuine business transaction rather than a donation. In this situation, the AEC is not in a position to demand a

donor return with the current definition of gift not including payments made at fundraising activities.

Once donor returns are received, the AEC undertakes a compliance exercise to compare the transactions reported on the party returns with those on the donor returns to see if there are any discrepancies. Where discrepancies have been identified, these are investigated to determine whether the AEC needs to seek an amendment from either party or the donor.

7. *Is this currently being addressed by the AEC?*

Discrepancies between party returns and donor returns are investigated and if necessary amendments are sought.

8. *If there is a discrepancy between the rate of donor disclosure compared with party disclosure, do you think any issues with definitions in the legislation, for example, the definition of 'gift', contribute to the discrepancy?*

The current disclosure requirements on political parties and their donors are different and so the disclosure returns lodged by each cannot be expected to always reconcile.

The most obvious point of difference has come about since legislative amendments in 1995 that introduced a 'transaction threshold' for political parties when aggregating receipts from individuals. Currently, political parties only need to aggregate individual receipts above the threshold (sums above $11,900 for the 2011/12 financial year) when compiling their disclosure returns. Donors, however, continue to be required to aggregate donations of any value made to political parties. This can mean that a donor will lodge a return but not appear on a party's return or a donor will disclose a larger total of donations than the party discloses.

Other discrepancies arise from differing views on whether payments at or to attend a fundraising event are donations. Normally political parties do not treat payments at fundraisers as donations whereas an attendee may consider that they are, or alternatively, lodges a disclosure return in any case just to be sure of not being in breach of any obligation.

It can also be the case that for one attendee at a fundraiser, they will consider the payment to be a donation as the payment is made primarily for the purpose of financially supporting the party than any other 'benefit' to be received in return, while another will see it as a business expense and may not even be a supporter of that political party. The question of 'consideration' is different in each case and, as such, one attendee may lodge a donor return while another attendee does not, and both will have correctly complied with their disclosure obligations under the Act. The Act also captures donations that are made to another person with the intention of benefiting a political party. For example, a person making a donation over the threshold to an associated entity of a political party may be required to lodge a donor return disclosing the donation as having been made to the relevant political party. An apparent discrepancy therefore arises as the party's return will not show the

receipt of that donation because the money was never received by them (it will, however, be shown on the associated entity's disclosure return).

A possible solution to these discrepancies would be to bring the disclosure obligations of political parties and donors back into alignment. A move in this direction would, however, need to be to remove the 'transaction threshold' from the disclosures of political parties because to introduce it for donors would create a loophole for making large donations through multiple donations below the threshold (eg a weekly donation of $10,000 would result in a total annual donation of $520,000 going undisclosed). Also, by including transactions made at or to attend fundraising events in the definition of 'gift' would result in common classification and disclosure of these transactions between political parties and donors. Such a move would also require the sponsorships of events to be included in the definition of 'gift' because, as with payments made at fundraising events, the intent behind such payments often cannot be unequivocally established.

9. Have any administrative or operational issues arisen with the application of the current definition of 'political expenditure' in section 314AEB of the Commonwealth Electoral Act 1918?

The AEC does have concerns with the operation of the requirements for annual returns relating to political expenditure and has external legal advice that indicates uncertainty that exists in relation to the interpretation of this section of the Act. The uncertainty results in it being unlikely that any criminal proceedings could be instituted for an alleged breach of this provision.

The advice available to the AEC is that the Parliamentary intention behind some of the requirements contained in subsection 314AEB is not clear and that there are subjective elements that would need to be assessed to establish the intention of the person who incurred the expenditure. This has led to the AEC publishing a broad guidance to those who may have a reporting obligation in relation to the subjective dominant purpose test which is contained in this section. As with all subjective tests in legislation, this makes it extremely difficult for the AEC to determine whether any breach may have occurred and therefore to apply the section in relation to a particular transaction.

A further problem with this section is that it does not use terms that appear elsewhere in the Act. For example, the expression "the public expression of views on an issue in an election" contains language that does not appear elsewhere in the Act leading to the precise scope of the section is unclear and fine distinctions may be necessary. In the absence of legislative amendment to clarify this, there will remain room for argument about the scope of this section.

The difficulties with this provision place the AEC in the position of needing to determine the subjective intent of the expenditure in each case and undertaking a detailed analysis on a case-by-case basis which could conceivably involve extensive resources including the need to obtain legal advice on almost every new third party expenditure to assess whether there is a disclosure obligation unless voluntary compliance is achieved.

The reference to 'issues in an election' in section 314AEB is also problematic in the context of annual disclosures. That is, it is not clear whether there is a disclosure obligation when the 'issues' for the next election may not be known.

It is also not clear or to what extent, if any, the costs associated with the following two aspects of the definition in section 314AEB should be disclosed. The phrase "carrying out an opinion poll" results in organisations that carry out opinion polling as a part of their day to day business, rather than actively participating in political activity, having an obligation. In addition, the phrase "other research" could result in people who discuss and analyse elections or the voting intentions of electors as part of their day to day business being potentially captured by this section. This requirement could potentially catch, for example, university students and political scientists, and be extremely difficult to administer with no apparent benefits to the financial disclosure scheme.

10. Have any administrative or operational issues arisen with the application of the current definition of 'associated entity' in section 287 of the Commonwealth Electoral Act 1918?

The definition of "associated entity" is set out in subsection 287(1) of the Act as follows:

'***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.'

Apart from associated entities that fall within the last four paragraphs of this definition (which were inserted into the definition in 2006 and encompass mostly trade unions affiliated with the Australian Labor Party), the associated entities lodging disclosure returns have all been caught by the second arm of the definition: '*an entity that operates wholly, or to a significant extent, for the benefit of one or more registered political parties*'. This arm of the definition was amended in 1999 from its original wording of '*operates wholly or mainly for the benefit*' which was administered by the AEC as meaning anything greater than 50%.

There is, however, no objective guidance as to how the term 'significant extent' is to be applied to the operations of an entity. While Senator Faulkner, who moved the amendment from the Opposition benches, signalled its intent as being to "tighten the definition of associated entity" (see Hansards of 15 February 1999 at page 1801, 17 February 1999 at page 2134 and 18 February 1999 at page 2182), there was no debate as to the Parliament's intention for its operation when passing the amendment.

Without this clarity being provided by the Parliament, the AEC has considered how the term 'significant extent' must best be interpreted from the wording of the Act alone. In considering that the word 'significant' has no absolute meaning and, therefore, must take its meaning from its context, the AEC has taken the view that its usage within the definition of associated entity in subsection 287(1) of the Act appears to qualify the term 'significant' to be a degree once removed from 'wholly'. That is, that the current definition is more limited in its application than what existed prior to the 1999 amendment.

This imprecision in the second arm of the definition – '*an entity that operates wholly, or to a significant extent, for the benefit of one or more registered political parties*' – complicates its administration. It is also the case that the AEC's interpretation of its practical application opens a potential loophole whereby an entity need only prove that a comparatively small proportion of its operations benefit someone other than a political party for it to escape having a disclosure obligation.

An example of the issues raised with this definition can be found on the AEC website in relation to the complaints raised about GetUp Limited and can be found at the following link:

http://www.aec.gov.au/Parties_and_Representatives/compliance/AEC_Advice/2010-nov-get-up.htm

I trust that the above information is of assistance.

Yours sincerely

Paul Pirani
Chief Legal Officer

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