GetUp Limited

The matter

Whether the entity known as GetUp Limited (ACN 114 027 986)(Getup), for the purposes of Part XX of the *Commonwealth Electoral Act 1918* (Electoral Act), was an associated entity at any time in the financial years 2015–16 or 2016–17 and therefore whether the financial controller of GetUp at the relevant times has an obligation to lodge annual returns with the Australian Electoral Commission (AEC) in accordance with s314AEA of the Electoral Act for these years.

Legislative changes

As a result of the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (the FAD Reform Act), a number of changes have recently been made to election funding and disclosure laws in the Electoral Act. These have not impacted on this investigation, but are summarised at the end of this outcome statement.

When and how matter raised

At a public hearing of the Joint Standing Committee on Electoral Matters (JSCEM) on 22 November 2016, Mr Ben Morton MP tabled documents relating to GetUp's activities during the 2016 Federal Election. Mr Morton enquired whether this information changed the AEC's view about whether GetUp is an associated entity and the Electoral Commissioner undertook to examine the matter.

Legislation

Part XX of the *Commonwealth Electoral Act 1918*.

Legal framework

Despite the fact that the offence in the former s315 of the Electoral Act (e.g. the financial controller of an associated entity 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).

As this is a criminal offence the fact that an entity is an associated entity must be proven 'beyond reasonable doubt'. This is a high standard of proof that must be met and in this regard the AEC notes the comments of the High Court concerning the interpretation of penal provisions as indicated in the case of Beckwith v The Queen (1976) 135 CLR 569 where Gibbs CJ stated at page 576 that:

> *'In determining the meaning of a penal statute, the ordinary rules of construction must be applied, but if the language of the statute remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences.'*

The ambiguity surrounding the exact scope of the definition in paragraph (b) of an associated entity is likely to fall within the above comments, resulting in criminal action being unlikely to succeed where there is any doubt as to whether a particular entity falls within this definition

AEC process

The AEC considered information from the following sources:

- Documents tabled by Mr Ben Morton MP at a public hearing of the JSCEM in November 2016
- Information publically available on Getup's website
- Letters and accompanying documents sent from GetUp to the AEC in response to informal enquiries by the AEC
- Company information purchased through the Australian Securities and Investment Commission's website
- Information received from GetUp in response to a notice issued by an authorised officer of the AEC under s316(3A) of the Electoral Act
- Advice received from the Australian Government Solicitor and the Commonwealth Director of Public Prosecutions.

Background

In 2005 the AEC considered whether GetUp was an associated entity as defined in s287(1) of the Electoral Act. This review was not a formal investigation conducted under s316(3A) of the Electoral Act. On the information available at the time of the review, the AEC was not able to conclude that GetUp was an associated entity for the purposes of Part XX of the Electoral Act. The outcome of the AEC's review was published on the AEC's website.

In 2010 the AEC again considered whether GetUp was an associated entity as defined in s287(1) of the Electoral Act. This review was not a formal investigation conducted under s316(3A) of the Electoral Act. On the information available at the time of the review, the AEC concluded that there was no information or evidence available to establish that GetUp was an associated entity for the purposes of Part XX of the Electoral Act. The outcome of the AEC's review was published on the AEC's website.

Of relevance from these previous investigation is the AEC's views in relation to the general campaign activities of GetUp. For example, the following campaign activities were conducted by GetUp during the 2016-17 financial year:

- Save the Reef
- Our Clean Energy Future
- Protect Medicare
- Brighter Budget
- No Business in Abuse

- Better Power

The AEC's view, as set out in the previous reviews of GetUp, is that indirect or consequential benefits to a particular political party do not constitute a "benefit" for the purposes of paragraph 287(1)(b). 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. The fact that an organisation advocates an agenda on one side of the political spectrum does not mean it is 'operating' for the benefit of all registered political parties on that side of the spectrum. Some closer connection is required between the actions of an organisation and a party before one can say the organisation operates for the benefit of that party.

In summary, the AEC remains of the view that the expression of views or other conduct by an entity that broadly or closely aligns with the policy of a registered political party do not support a finding that the entity is operating wholly or to a significant extent for the benefit of one or more registered political parties.

Considerations

At the public hearing of the JSCEM on 22 November 2016, Mr Ben Morton MP tabled copies of six how-to-vote (HTV) cards distributed by GetUp for the 2016 Federal Election. The HTV cards preferenced the ALP and Greens for the Divisions of Dickson, Paterson, Burt, Swan and the WA and NSW Senate.

Also tabled was a copy of a letter from GetUp outlining GetUp's activities during the 2016 Federal Election. According to the letter, 1.1 million voters were reached with these HTV cards.

The AEC initially conducted informal enquiries of GetUp and was provided with additional information to assist its consideration. On 3 April 2018 an authorised officer of the AEC for the purpose of s316(2) of the Electoral Act issued the financial controller of GetUp a notice under s316(3A) of the Electoral Act, requiring the production of documents and other information in relation to GetUp's activities. GetUp complied with this notice.

As set out above, the AEC is of the view which has been supported by external advice, that other than that referred to below, GetUp's general campaign activities, do not support a finding that Getup is an associated entity operating wholly, or to a significant extent for the benefit of one or more registered political parties. This is primarily because these campaigns are issue-oriented.

However, in relation to the production and distribution of HTV materials the AEC determined that two conditions of associated entities could have been met:

(a) the entity is controlled by one or more registered political parties;
(b) the entity operates wholly, or to a significant extent, for the benefit of one or more registered political parties;

Controlled by one or more registered political parties

Documents received in response to the s316(3A) noticed were examined with a view to determining if GetUp was, in relation to the HTV campaign, controlled by a registered political party (or parties). In reference to the HTV campaign there was no evidence to suggest GetUp was controlled by a registered political party or parties.

Operates wholly, or to a significant extent, for the benefit of one or more registered political parties

The AEC views this definition as having two important elements: 'for the benefit of' and 'operates wholly, or to a significant extent'. Thus, to meet this criteria, both elements have to be satisfied.

Operates wholly, or to a significant extent

Whether an entity operates 'wholly, or to a significant extent' for the benefit of a registered political party will depend on whether its benefitting operations from a significant or substantial part of its overall activities.

To establish if GetUp satisfied this part of the definition of an associated entity, the AEC sought to determine if at any time the HTV campaign could have been considered to constitute the whole, or a significant extent, of GetUp's operations

The AEC was able to determine that the HTV campaign did not make up the whole, or a significant extent, of GetUp's operations in 2015–16. Comparison between resources allocated to the HTV campaign and GetUp's total resources – whether examined on the full financial year or the shortened 'HTV campaign period' of March to June 2016 – did not appear to show that the HTV campaign, at any time in the financial year, constituted a significant extent of GetUp's total operations.

However, information provided by GetUp in relation to the first two days of the 2016–17 financial year suggests that on these two days the HTV campaign could have been considered as making up a significant extent, if not the whole, of GetUp's operations.

For the benefit of one or more registered political parties

The HTV materials examined could suggest a closer connection between GetUp and one or more political parties than the mere expression of views, in that they advocate a vote for one or more particular registered political parties.

The stated aims of Getup are consistent with a constant feature of the HTV cards, that is, an emphasis on issues. Every card references a particular issue and they are presented as providing voter options to best reflect their views on these issues.

On every card Getup presents at least two, and sometimes up to four, parties or candidates as options for first placed preferential votes. In total, nine different parties or candidates were endorsed as first place votes on the HTV cards

While the legislation provides for a benefit to 'one or more' registered political parties, the effect of GetUp endorsing multiple parties/candidates, in the AEC's view, serves to diminish the benefit to an individual party.

Further to this, it was observed on a number of cards, GetUp rated to what extent each of the parties they are endorsing is committed to actioning the relevant issue. For example, Party A was rated “very strong support for” and Party B “minor support for” the issue the HTV card presented. Party A and B could have been considered to be in direct competition for an electors vote in regard to the issues presented. This further diminishes the benefit to an individual party of the wider HTV campaign.

A number of factors which would be strong indicators that an entity is an ‘associated entity’ are not present. For example, the financial donations made to, or received from, registered political parties. Equally, an entity would be more likely to be an associated entity where they consistently used HTV cards to endorse the same, singular party, in relation to all issues presented. This was not the case with the HTV materials distributed by GetUp.

Ultimately, it might be seen that GetUp’s HTV campaign may be more accurately described as to the detriment of those registered political parties not named, rather than to the benefit of those named. The AEC has been unable to find any legal argument to support the conclusion that a detriment to one equates to a benefit to another.

Consultation with other agencies

During the course of the investigation the AEC sought the advice of the Australian Government Solicitor and the Commonwealth Director of Public Prosecutions.

Conclusion

The AEC is of the view that the definition of associated entity contains ambiguity and there is little guidance to be taken from the legislation and case law in this matter. However, the standard of proof required – beyond reasonable doubt – sets a high standard. Having sought advice the AEC has reached a conclusion that there is insufficient evidence to show that GetUp was an associated entity at the relevant time, and is of the view that it is unlikely that a Court would agree that Getup met the definition of an associated entity for the purposes of Part XX of the Electoral Act at any time during the 2015–16 or 2016–17 financial years.

Note – legislative changes

Changes have recently been made to election funding and disclosure laws in the Electoral Act as a result of the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (the FAD Reform Act).

The FAD Reform Act changed the definition of associated entity in the Electoral Act. Under s287(1), associated entity now means an entity that is registered as an associated entity under s287L.

The changes have not altered the conditions by which entities may be considered as associated entities. The conditions as specified by the former definition now appear under s287H(1) of the Electoral Act as follows:

(a) the entity is controlled by one or more registered political parties;

(b) the entity operates wholly, or to a significant extent, for the benefit of one or more registered political parties;

(c) the entity is a financial member of a registered political party;

(d) another person is a financial member of a registered political party on behalf of the entity;

(e) the entity has voting rights in a registered political party;

(f) another person has voting rights in a registered political party on behalf of the entity.

Entities which meet any of the conditions specified above must register with the AEC.

Similarly the offence of failing to lodge a return as an associated entity is now s314AEA(1) of the Electoral Act, and is a civil penalty. Prior to the legislative changes it was s315 of the Electoral Act and was a criminal penalty.

These changes were only effective from 1 December 2018 (registration requirements) and 1 January 2019 (penalties), and do not apply to the financial years the subject of the AEC's investigation.