



Copy of response provided

Dear Sir / Madam

Australians For Honest Politics Trust

I refer to your recent email about these matters. I have been asked to respond on behalf of the Electoral Commissioner.

Your email refers to concerns raised about the Australians For Honest Politics Trust (AFHPT) and the Trust's administrator, Mr Tony Abbott. The responsibility of the Trust's administrator under the provisions of the *Commonwealth Electoral Act 1918* (the Electoral Act) was dependent on whether or not the AFHPT was an associated entity. That is, the question of possible disclosure obligations with respect to the (AFHPT) first came to the attention of the Australian Electoral Commission (AEC) in September 1998. At that time the AEC sent a standard inquiry to The Hon. Tony Abbott MP on behalf of AFHPT indicating it considered the entity may meet the definition of "associated entity" (as it existed at that time) under s.287(1) of the Electoral Act, by being "an entity that operates wholly or mainly for the benefit of one or more registered political parties".

A response was received from Mr Abbott putting forward arguments that AFHPT was not an associated entity as defined in the Electoral Act and stating that, before seeking donations to the trust, he had received legal advice that AFHPT would not be subject to disclosure obligations. In support of this view Mr Abbott provided a copy of the trust deed.

On the basis of that evidence the AEC concluded at that time that there was insufficient evidence that pointed to AFHPT being an associated entity.

The operations of AFHPT and its possible disclosure obligations were raised again in 2003 following the conviction in the Queensland Supreme Court of Pauline Hanson in relation to that State's party registration and election funding laws. This led in 2004 to the AEC, under the authority of s.316(3A) of the Electoral Act, issuing a notice of investigation on Mr Tony Abbott seeking records and information to allow it to conclude whether there was a disclosure obligation for AFHPT as an associated entity (the relevant arm of the definition

having been amended in 1999 to now read: “an entity that operates wholly, or to a significant extent, for the benefit of one or more registered political parties”).

Mr Abbott exercised his right under s.316(3B) and requested that the decision to issue the notice be reviewed by the Electoral Commission, the three person body established under s.6 of the Electoral Act. In accordance with s.316(3C) the full Electoral Commission met and considered the matter, including obtaining legal advice. It concluded that there was no information available to it on which it could conclude that there were reasonable grounds to believe that AFHPT is or was at the time an associated entity and duly set aside the decision to issue the notice of investigation.

The issue of whether AFHPT is or was an associated entity is central to the decisions taken by the AEC and the Electoral Commission in 1998 and 2004 respectively. An "associated entity" is defined in paragraph 287(1)(b) as one that "operates wholly, or to a significant extent, for the benefit of one or more registered political parties". This arm of the definition as it now stands came into force in 1999 with the passage of the *Electoral and Referendum Amendment Act (No1) 1999* which amended the wording from “operates wholly or mainly for the benefit of one or more registered political parties” which existed when this matter was first raised in 1998.

The AEC has previously received a range of external legal advice on the application of the test "operates wholly, or to a significant 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. In the case of a trust, this would include the trust deed.
3. The making of donations to a registered 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 general support. An example of this was the action of the Minerals 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...'

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 a benefit as the aims themselves.

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 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 registered political party would appear to qualify the term "significant" in this context to be a degree once removed from "wholly" rather than more merely 50%.

9. Indirect or consequential benefits to a particular political 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 the actions of an organisation and a party before one can say the organisation operates for the benefit of that party.
10. 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.'

11. Despite the fact that the offence in section 315 of the Electoral Act (e.g. for 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). 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. In this regard the AEC also 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 paragraph (b) of the definition 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.

In addition, the 2004 decision of the Electoral Commission to set aside the s.316(3A) notice takes into account the requirement for there to be “reasonable grounds to believe that a person is capable of producing documents or other things, or giving evidence, relating to whether an entity is, or was at a particular time, an associated entity”.

The AEC has external legal advice on the scope of “reasonable grounds”. The advice refers to 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) where the court stated that:

‘When a statute prescribes that there must be “reasonable grounds” for a state of mind – including suspicion or belief – it requires the existence of facts that are sufficient to induce the state of mind in a reasonable person.’

Accordingly facts must exist which are sufficient to induce the state of mind in a reasonable person before this power can be lawfully exercised. External legal advice also indicates that the ‘reasonable grounds test’ also applies to the question of whether an entity was an associated entity, otherwise the reasons for inquiring about the entity would remain unchallenged.

The powers of the AEC to compel the production of evidence and other information under s.316(3A) of the Electoral Act is therefore limited.

The AEC does not have any further information currently in its possession that would lead to changing the view reached by the Electoral Commission in 2004. It is also important to note that, under s.315(11), actions in relation to the disclosure obligations of the Electoral Act are subject to a three year limitation period.

Ends

Australian Electoral Commission

12 December 2012