JSCEM BRIEF – BACK POCKET

INQUIRY INTO THE 2016 FEDERAL ELECTION

TITLE FAD policy matters - AEC perspectives

KEY POINTS

Commissioner's key points

- Decisions about the policy framework are a matter for Government.
- The Department of Finance has broad carriage for electoral policy development, and will generally seek technical advice on detailed proposals from the AEC.
- The AEC stands ready to provide advice, and to implement legislation enacted by the Parliament.
- Although the AEC has made recommendations and statements on policy matters in the past, it is not the role of the AEC to lead this discussion.
- The Australian Government's December 2008 "Electoral Reform Green Paper. Donations, Funding and Expenditure", contained a list of principles which could form a starting point for discussion on these issues. See **Attachment A**.

AEC statutory role

- Section 7 of the *Commonwealth Electoral Act 1918* (Electoral Act) provides as follows.

Functions and Powers of Commission

(1) The functions of the Commission are:

…

(b) to consider, and report to the Minister on, electoral matters referred to it by the Minister and such other electoral matters as it thinks fit; and

(c) to promote public awareness of electoral and Parliamentary matters by means of the conduct of education and information programs and by other means; and

(d) to provide information and advice on electoral matters to the Parliament, the Government, Departments and authorities of the Commonwealth; and

…

(2) The Commission may perform any of the functions referred to in paragraphs (1)(b) to (f) (inclusive) in conjunction with the electoral authorities of a State, of the Australian Capital Territory or of the Northern Territory.

(3) The Commission may do all things necessary or convenient to be done for or in connection with the performance of its functions.

- The AEC has previously made detailed recommendations for reforms and changes to disclosure provisions, although these respond to specific circumstances. I do not intend to discuss these again. It would be a matter for the Committee to consider whether a more wholesale change is required.
  - See the AEC's 17 measures to the 2012 JSCEM Inquiry into the AEC analysis of the FWA report on the HSU. **Attachment B**.
  - See also the 41 recommendations from the AEC's Election Funding and Disclosure Report, Federal Election 2010. **Attachment C**.

Branch	Disclosure Assurance and Engagement Branch
Assistant Commissioner	Gabrielle Paten
Contact Officer	Matt Gardiner
Phone	02 6271 4721

- In the current environment it is not a matter for the AEC to lead in this space, or to do more than identify principles. The AEC would be happy to comment on specific proposals if asked.

Introductory positions – lay of the land

- There is currently a disclosure scheme. The broad approaches are: remain with the current arrangements ("status quo"); "root and branch reform"; or patch any perceived current weaknesses or issues ("band aid"). Despite many inquiries and reviews in recent times, there have been only limited changes and no major reform.
- It is legitimate and desirable for individuals and organisations to communicate with candidates, politicians and parties, and to not be prevented from providing support. Adequate regulation or control of financial contributions may be considered to address potential corruption.
- It is generally accepted that political parties need adequate funding and resources to continue to carry out their functions, however that funding is raised or provided.
- There is a public expectation that certain donors will be identified, subject to reasonable thresholds or qualifications.
- Note the comment that "Daylight is the best disinfectant" (See Richard Alston article in *The Australian*, 7 October 2016. **Attachment D**).

Principles for any disclosure regime

Principle 1 - transparency

- Financial dealings of election candidates and political parties and their supporters are reported and made publically available.
- Information is easily accessible to the public and is trackable. Actual or perceived influence and corruption is reduced.
- Voters have a clear and timely understanding of candidate, party and donor financial dealings.

Principle 2 – clarity

- Legislation needs to be unambiguous and descriptive.
- The regime needs simple, clear and descriptive regulations which address all aspects of participant financial dealings encompassing the whole electoral cycle. All participants should have a precise understanding of the disclosure requirements. The regulations should be in an easily accessible format. Adequate guidelines should be available on how to comply with regulations.

Principle 3 - timeliness

- Disclosures are reported and published in a timely and easily accessible manner.
- The definition of "timely" is a policy matter.

Principle 4 - enforceability

- Legislation should include sanctions for non-disclosure and wilful incorrect disclosure.
- Oversight and enforcement should be provided by an independent body. The independent body needs to be adequately resourced.

Miscellaneous considerations

- There state and territory schemes have different requirements to the Commonwealth and to each other.
  - How are overlap, duplication, and “loopholes” best addressed?
  - Is there an appetite for harmonisation with the states and territories or discuss referral of powers (etc.) to or from other jurisdictions?
- Any consideration of changes to the existing Commonwealth requirements should include consideration of the timeframe and resources required to implement and administer the changes.
- The AEC considers the following items are matter for Parliament and the Government, and accordingly the AEC does not have a position on them.
  - Real-time disclosure
  - Periodic disclosure
  - Public funding of parties and/or administrative funding
  - Bans and limits on contributions and expenditure
  - Registration of third parties
  - Changes to compliance auditing processes.

BACKGROUND

Previous JSCEM recommendations

In its 'Report on the funding of political parties and election campaigns' of November 2011, JSCEM recommended that 'the [Electoral Act] be amended to ban political parties, independent candidates, associated entities and third parties from receiving 'gifts of foreign property'.' (Recommendation 10).

- The AEC made a submission, but did not focus on the subject of foreign donations.
- The Government did not respond to this JSCEM report.

Key statement by the Prime Minister – donations to political parties

"I have argued that ideally donations to political parties should be limited to people who are on the electoral roll, voters. So you would exclude not simply foreigners but you would exclude corporations and you'd exclude trade unions. I've always felt that would be a good measure and again I've been on the record long before I was in Parliament."

Doorstop interview, Vientiane, Laos.
8 September 2016

Key statements by Special Minister of State, Senator the Hon Scott Ryan – donations to political parties

"I am a believer that people who want to make a contribution to our political process should be able to do so. I am believer that that is a form of their freedom of expression and that that is partaking in democracy."

Senator the Hon Scott Ryan
Senate Question Time
12 September 2016

"It's important when we look at foreign donations, and this is one of the reasons for the terms of reference that I've given the electoral matters committee, what is a foreign donation? There was one proposal before the Parliament, several years ago, by the Labor Party, that wouldn't have actually banned a lot of the donations that have been in public debate in the last fortnight. Mr Wilkie has put up another one, based on the definition of a foreign person in the Takeovers Act, that has a different application. So I've asked the electoral matters committee to look at foreign persons, foreign entities, foreign sources and even foreign-owned subsidiaries. The truth is, no one is particularly concerned with Toyota here, or some of the other large multinational subsidiaries, and I don't think people think that they are a particular risk to our political system."

Senator the Hon Scott Ryan
Interview with Patricia Karvelas
ABC Radio. 14 September 2016

“The current disclosure regime or approach was set up many years ago when technology was very different. Now I’ve indicated in the past that I think the movement of technology allows for more regular donation disclosures and I think that is something that I’m very open to looking at. However, we do also need to keep in mind that political parties are voluntary organisations. Different parties are structured different ways, so we need to ensure that the regime we put in place takes account of the fact that there are hundreds and hundreds of Liberal Party branches, for example, in my home state of Victoria that might only handle several thousand dollars each in non-election years, so we have to ensure, we don’t place too great a burden on what are, effectively, voluntary associations. But I do think technology allows us to consider more regular disclosure than the current system that is in place.”

Senator the Hon Scott Ryan
Interview with Michelle Grattan
“The Conversation” 28 September 2016

Attachment A

Excerpt from the 2008 Electoral Reform Green Paper (Political Donations)

PRINCIPLES INFORMING REGULATION OF ELECTORAL FUNDING AND DISCLOSURE

2.1 The following principles or values may be considered to be reflected, to varying degrees, in the different approaches to regulation of electoral funding and disclosure in place throughout Australia and in comparable countries internationally.

- Integrity – establishing conditions that minimise the risk or perception of undue influence or corruption in the system.
- Fairness – establishing, as far as possible, fairness in access to resources for participants in an election.
- Transparency – providing enough information to citizens about financial transactions of identified participants in the electoral process, including political parties and candidates, to inform their choice of representatives.
- Privacy – balancing citizens' interests in obtaining information with respect for individuals' right to privacy.
- Viability – ensuring that political parties and candidates have sufficient financial support to enable them to provide the electorate with a suitable choice of representatives.
- Participation – encouraging citizens to participate in the political process through a variety of different means.
- Freedom of political association and freedom of expression – avoiding unnecessary burdens or restrictions on these freedoms.
- Accountability and enforceability – ensuring participants in the electoral process are accountable for relevant financial information.
- Fiscal responsibility – ensuring the public costs involved in democratic processes, including election costs and public funding costs, are not unreasonable.
- Efficiency and effectiveness – ensuring that regulation balances these principles against the costs of compliance and administration.

2.2 These principles may provide suitable criteria for evaluation of existing electoral regulation, and evaluation of options for changing the system.

Attachment B

Excerpt from the AEC submission to JSCEM, 21 June 2012.
Inquiry into the AEC analysis of the FWA report on the HSU

[From page 13]
Possible measures for reforming the Electoral Act

Disclosure threshold
(i) Reconsideration of the appropriate level of the disclosure threshold
The question of what is an appropriate disclosure threshold will be guided by the public policy objective set for disclosures. Setting the threshold is a matter for the Parliament.

Many of the transactions commented upon in the AEC's analysis of the FWA Report did not meet the disclosure threshold of more than $10,500 current at the 2007 federal election. A threshold of 'more than $12,100' will apply from 1 July this year. Greater transparency of who is funding or donating to election campaigns and what those funds are being spent on would require a lower threshold. However, it should be recognised that a decrease in the disclosure threshold will result in:

- increased numbers of persons having reporting obligations;
- increased reporting and therefore compliance costs to donors, political parties and candidates; and
- increased administration costs to be incurred by the AEC.

Transparency is also influenced by who has the responsibility to disclose transactions and the extent to which figures are broken down, particularly in regard to expenditures which are not required to be itemised on disclosure returns. These matters are further discussed later in this submission.

The appropriateness of a threshold is also relative to its materiality as influenced by a number of factors and circumstances. The practice of donation splitting, for instance, can operate as a multiplier of the nominal threshold before disclosure would be required. One way this can happen is through the Electoral Act's separate recognition of related political parties (typically the federal body and State/Territory branches of a political party).

Donations to each of these related parties are separately aggregated for disclosure purposes, meaning that a donor can give up to the disclosure threshold to each related party without being required to lodge a donor return or be disclosed on a party return.

Another potential means of donation splitting could be to make donations each under the threshold to a number of candidates during an election campaign, so long as those candidates claim those donations personally and disclose them in the total figure on their election returns rather than in the returns of their endorsing party.

It is also important to not view the appropriateness of disclosure thresholds solely in terms of the finances and operations of large political parties. Smaller parties and independents can be in positions to exercise significant political power and influence, for instance by holding the balance of power in the Parliament. By contrast, their finances can be small by comparison to the large parties and hence the relative value, and so the perception of potential influence, of a donation can be vastly different. "Just another donation" to a major party could be significant to a minor party.

Administrative penalties

(ii) Introduce administrative penalties for objective failures (such as failing to lodge on time)

In its Election Funding and Disclosure Report – Federal Election 2010 (FAD Election Report) the AEC discussed offences contained in Part XX of the Electoral Act that, where establishing the offence was a matter of objective fact, as being appropriate to being converted into administrative penalties. The current arrangement of requiring all offences to be pursued through the Commonwealth Director of Public Prosecutions (CDPP) is time consuming, costly and often fraught with there being no guarantee that the CDPP will accept the brief of evidence given their need to prioritise their work or that a court will record a conviction even in the case of a successful prosecution. For an offence such as failing to lodge a disclosure return by the due date, an administrative penalty seems more appropriate than pursuing a criminal conviction through the courts. Beyond this simply being a more practical approach, the AEC believes that securing compliance would be significantly enhanced from having administrative offences.

Offset penalties against public funding

(iii) Provide that financial penalties be offset against public funding entitlements (perhaps combined with the AEC withholding a small percentage of such entitlements for a period of 12 months following an election

Because political parties are mostly not entities that are legally separate from the members, the Electoral Act makes the appointed Party Agent (or where no agent appointment is in force, each member of the executive committee – see section 292B), liable for any penalties or recovery of monies. This approach has inherent problems in attempting to make an individual liable personally for matters that the individual may have no knowledge of or which may be a wider responsibility within the political party. This is particularly the case in instances where monies were to be recovered[1] from the personal finances of an individual (the Party Agent) even though that person may have never received or had personal use of those monies because they were paid directly into the bank accounts of the political party and spent by/for the party.

The most effective solution to this anomaly is for political parties to be recognised as legal entities for the purposes of the Electoral Act as part of the registration process under Part XI of the Electoral Act. This would allow the AEC to take prosecution or recovery action against the registered political party as a legal entity rather than against an individual office holder within the party.

With or without such a deeming of a registered political party as a legal entity under (at least Part XX of) the Electoral Act, there can remain a problem of the potential financial impact on the party / Party Agent, particularly in the case of recoveries of monies which could involve significant sums. A means of recovering those sums while also easing the financial impact could be to offset a sum equivalent to the penalty or monies to be recovered against public funding entitlements. This could be by way of the AEC withholding a proportion of current entitlements for a period, for instance withholding a sum of election funding equivalent to the maximum penalty for failure to lodge an election disclosure return by the due date which will then only be released if the return is lodged on time. Another method would be to register the sum owed to be offset against future public funding entitlements before their payment.

Such arrangements become even more effective should there be a scheme providing ongoing administrative funding to political parties rather than only from election funding.

[1] The recovery of funds can occur in circumstances of: s.299(6) for overpayments of election funding; s.306 for unlawful (anonymous) gifts received; s.306A for a sum equivalent to funds received from an unlawful loan; and s.306B for gifts made by a corporation which is wound up within the subsequent 12 months.

Independent auditing of disclosure returns

(iv) Require the compulsory and timely auditing of all records held by registered parties (and party units), candidates, third parties, etc, by independent auditors (do not include donors)

The value of any disclosure scheme rests upon the reliance that can be placed on the accuracy and completeness of the information released to public scrutiny. Disclosures lodged under Part XX of the Electoral Act are released to the public without independent verification. That is, they must be taken on trust.

Currently the AEC has powers to conduct the equivalent of audits (compliance reviews under s.316(2A) of the Electoral Act), but, not of all disclosure returns. For example, there is no power contained in the Electoral Act that enables the AEC to conduct compliance reviews of donors to political parties or third parties who incur political expenditure. Even so, it is impossible for the AEC to achieve a full coverage of compliance returns lodged by political parties and associated entities in the course of 12 months, much less during the window from lodgement in October through January before public release on 1 February.

Even with greatly increased resources, both the volume of the task and the complication that audits would be being undertaken over the Christmas / New Year holiday period makes impossible audits being undertaken by a single, central body.

An alternative which is used both overseas and in a number of other areas in Australia (e.g. tax, industrial law, Corporations Act, etc.) is to require the disclosure returns to be audited prior to their lodgement and so be lodged with an audit certificate. It would be the responsibility of the person lodging the return to engage a suitably qualified auditor.

If moving in this direction, consideration would need to be given to whether registered auditors need further accreditation as an assurance that they are proficient in the requirements of disclosure under Part XX of the Electoral Act. Such accreditation could be managed by the AEC either through face-to-face training or via the development of an online training course.

Accreditation would need to be updated every time an important change is made to disclosure requirements.

The accountability of auditors beyond their professional bodies would also be important. This could be by way of withdrawal of accreditation through to offences and penalties for serious failures to properly discharge their responsibilities. Consideration would also need to be given to whether the AEC should be tasked with exercising a quality assurance function over audit certificates issued on lodged disclosure returns.

While the audit would in many cases be relatively inexpensive for those lodging disclosure returns, it should be recognised that this would not always be the case. In particular, large political parties which can operate hundreds of out-posted party units may be faced with a significant cost.

Abolish associated entities

(v) Abolish "associated entities" and establish a third party scheme similar to Canada and the UK

Associated entities were originally viewed as being arms of the political parties they are associated with and so were required to disclose in the same level of detail as parties.

Third parties disclosures of political expenditure were only introduced in 2006 in recognition that there were significant gaps in the reporting of expenditures incurred during a political campaign. The third parties were assumed to not have the same intimacy in their relationships with political parties, substantially undertaking operations that are not considered to be either on behalf of or

primarily for the benefit of a political party. Accordingly, their disclosures are not comprehensive of their entire operations, being limited to particular transactions specified under the Electoral Act.

The issue here is threefold. Firstly, the difficulties arising from the complexity of the definition of an "associated entity" can result in a lack of certainty as to what is an "associated entity". Secondly, whether the current disclosure obligations achieve the purposes of transparency and accountability to electors during the conduct of election campaigns. Thirdly, whether there is some useful distinction that can be drawn between an "associated entity" and a third party incurring political expenditure during an election campaign.

The primary policy aim behind any disclosure scheme is that electors should be informed of the sources of funds used in an election campaign so as to inform their decisions about who to vote for on polling day. Applying this policy aim to the disclosures by all of the players in an election campaign suggests that the distinction between a third party incurring political expenditure and an "associated entity" would be of little, if any, utility to electors making a decision about how to vote for on polling day. The overseas approach has generally been to require any third party who incurs political expenditure during an election campaign over a set threshold to be registered with the relevant electoral management body before that expenditure is incurred. This enables their campaign accounts to be reported against in a manner that enables electors to be fully informed as to those parts of the business of the third party which are involved in seeking to influence the outcome of an election. Other parts of the third party's business which have no direct relationship to the election campaign activities are, therefore, not required to be reported against.

Establish campaign accounts

(vi) Establish the requirement that electoral expenditure can only come from specific and dedicated campaign accounts into which all donations must be deposited that have been nominated to the AEC and which can be "trawled" by AUSTRAC – also amend the Financial Transactions and Report Act 1988 *to include these campaign accounts*

Dedicated campaign accounts into which all campaign donations must be deposited and only out of which can campaign expenses be paid would greatly enhance accountability.

Many political parties operate their election campaigns out of multi or general purpose accounts and it is not uncommon for small parties and independent candidates to conduct their election campaigns through their personal accounts. In these circumstances it can be exceedingly complex to try to identify which debits and credits (particularly receipts/donations) relate to the election campaign and which are for general or private purposes. The AEC is not suggesting that political parties should only have one campaign account at either a state or federal level. The internal structures of political parties are a matter for the members of each political party to determine. If a political party wishes to be structured on a federal, state and local level, then this should be able to continue.

However, the receipt of donations and expenditure of funds on an election campaign should only lawfully occur where the particular account has been disclosed to the AEC and specified to be a campaign account.

With a dedicated campaign account there can be no doubt as to what the total cost of an election campaign was and how it was funded. It would make disclosure a simpler task, while it also becomes easier to identify possible omissions from that record, as the election disclosure record should reconcile back to the campaign account.

Ready access to those accounts, such as through AUSTRAC, would also facilitate easier and more timely resolution of inquiries into the completeness and accuracy of the disclosure record. Inevitably the completeness of campaign accounts and whether all campaign related finances have been transacted through those accounts will be queried. To this end there would still be a

requirement for comprehensive disclosures to allow the public to form views in this regard, or to challenge disclosures. Any role expected of the AEC in conducting compliance reviews and investigations of campaign accounts would need to be clearly articulated, as this would potentially be a very resource intensive role to fulfil.

Electronic Lodgement

(vii) Require the electronic lodgement of all returns to the AEC (with the power for the Electoral Commissioner to grant some exceptions)

Disclosure was introduced in 1984 before the widespread use of computers or on-line technology. All disclosures were prepared and lodged in hard copy. The AEC used to fulfil its obligation under s.320 of the Electoral Act to have copies available for public inspection at its principal capital city offices in each State/Territory by photocopying multiple copies of every return and making them available in folders.

The AEC moved with the 1998-99 annual returns to have the information on them entered into a database which was available, along with imaged copies of the original returns, to be accessed via the internet. This offered the public vastly improved access and capacity for analysis irrespective of their physical location.

The AEC has more recently complemented this on-line public access service through the development of an on-line lodgement system for disclosure returns. As most persons and entities with disclosure obligations now record their finances electronically, from simple Excel spread-sheets where relatively immaterial sums are involved through to proprietary accounting software packages for the larger political parties and associated entities, uploading disclosure information to the AEC's on-line lodgement system is a straightforward matter.

Nevertheless, not all political parties and associated entities have chosen to utilise electronic lodgement and continue to lodge manual disclosure documentation.[2] As a result there remains a significant volume of data that must be manually data entered by AEC staff. This is a lengthy and expensive exercise for the AEC and is simply not practical if timely turnarounds in placing information from lodged returns on the internet are required. If more timely disclosure becomes a requirement[3], and especially if accompanied by a requirement for the AEC to release that information to its website in a timely manner, then electronic lodgement of disclosure information must be mandatory.

Otherwise the objective of timely disclosure could be frustrated by the inevitable delay caused by the AEC needing to manually input the information into a database. Electronic lodgement would allow disclosure information to be released to public scrutiny almost immediately if so desired.

While necessary overall, in recognition that lodgement by electronic means may not be possible for everyone with a disclosure obligation a discretion should be provided allowing the Electoral Commissioner to waive the requirement for persons who can establish that they are not able to reasonably comply. Consideration in exercising such discretion would need to take account of individual circumstances beyond 'inconvenience' and any costs involved.

Extend the time period for the retention of records

(viii) Require the period for the retention of records in section 317 and the related offence in section 315(2)(b) be increased to 7 years

[2] The answer to Question on Notice F74 to Senate Estimates provided the following data for the 2010/11 financial year: 40% of the annual returns from registered political parties were lodged online with the online lodgement rates for associated entities, donors to political parties and third parties running at 45%, 52% and 47% respectively.

[3] As discussed under item (xi) below.

Apart from offences arising out of straight matters of fact known to the AEC, such as the failure to lodge a disclosure return by the due date,[4] securing evidence of breaches of the disclosure provisions sufficient for possible prosecution action necessitates inquiries of external parties. This evidence nearly always takes the form of supporting records to the financial transactions in question. Currently s.317 requires a person who makes or obtains records supporting disclosures to keep those records for a period of three years. This period is in line with the limitation under s.315(11) of three years in which a prosecution of an offence can be commenced, thus being a logical connection given the necessity of supporting records as evidence for possible prosecution action. The period of three years also coordinates with the normal electoral cycle.

Allegations of offences against the disclosure provisions of the Electoral Act have on occasion stretched back to events and transactions more than three years prior. In these circumstances records which may provide important evidence no longer need to be retained, and so do not need to be presented for examination. This can undermine the success of any inquiries into these matters.

A period of seven years, such as required for taxation purposes, would provide more flexibility for inquiries and investigations into possible contraventions of the disclosure provisions of the Electoral Act.

In discussing s.317, it is important to note that the current construction of the section limits its reach to records relating to disclosures in election returns only.[5] This situation has arisen because this section was not updated at the time that disclosure moved from an entirely election based scheme to one that now has its major emphasis on annual returns.

This apparent oversight means that there is no requirement to retain any records that support the disclosures made in annual returns. Even without an extension to the retention period, there is a need to bring records that support annual disclosure returns under coverage of s.317.

Minimum standards of record keeping

(ix) Insert a new offence for a person who fails to make records to enable complete and accurate disclosure

The Electoral Act does not demand any minimum standards of record keeping. While there is a requirement, in certain instances as discussed above, to retain a record made or obtained, there is no obligation on a person to in fact make or obtain any records in the first place. This is a somewhat anomalous situation as it becomes impossible to discharge disclosure responsibilities if the record keeping of the person/entity is not competent for that purpose.

Compliance reviews of disclosure returns, or more serious investigations of possible offences against the disclosure provisions can be effectively frustrated by inadequate records. Where the records are deficient in establishing evidence of the financial dealings of a person/entity with a disclosure responsibility, it undercuts the purpose of any requirement for records to be retained. Provisions need to work together to first ensure that adequate records are created/maintained and that those records are then retained for a minimum period of time as evidence of disclosures made.

A failure to maintain adequate records may not always be deliberate or premeditated. The AEC's experience through its compliance review programme is that there are highly variable standards of

[4] As discussed earlier, offences such as this could perhaps be more appropriately dealt with as administrative offences rather than through criminal court proceedings.

[5] The AEC has previously identified this anomaly and recommended in its *Funding and Disclosure Report on the 1993 Federal Election* that the requirement to retain records be amended to at least three years after the due date for lodging the return.

record keeping being observed. It is also not always correct to assume that the competence and professionalism of record keeping increases in line with more revenues coming into a political party. In many political parties it appears that administrative support staffing has been subject to savings pressures, or are simply not acknowledged as being a function important enough to be adequately funded. In what is a strongly competitive market for accounting staff the staff employed by political parties are not always sufficiently skilled to cope with the added responsibility of maintaining records suitable to support what can be complex disclosure obligations.

To ensure that adequate records are competently maintained, the Electoral Act could specify that there it is necessary for a person to initiate and obtain appropriate records which allow that person to fully comply with the disclosure provisions of the Electoral Act.

Increase Penalties

(x) Increase relevant criminal penalties that are fraud related (eg knowingly providing false and misleading information in a return)

The financial penalties in Part XX of the Electoral Act have not been increased since they were introduced (in many cases that means there has been no increase since 1984).

There is one term of imprisonment (for 6 months) included under offences in Part XX, being for knowingly providing false or misleading information in purported compliance with a notice of investigation issued under s.316. That these penalties have not been updated has eroded their value not only in simple present dollar terms but also in terms of their deterrence value and their relative severity to other Commonwealth offences.

The seriousness of an offence should be reflected in the penalty that attends it.[6] This not only encourages compliance but assists in enforcement. Consideration could be given to what would amount to appropriate penalties for offences under Part XX of the Electoral Act, in particular those that are fraud related.

More timely disclosures

(xi) Require more frequent reporting of relevant expenditure and receipts

There is no particular purpose mandated by the Electoral Act to which the AEC is meant to put disclosure information, the AEC's primary function being to operate as the conduit to making disclosures available to public scrutiny. It is the public who are the users of disclosure information.

For investors who are users of the financial statements of public companies the timeliness of the receipt of information is important to their decisions. Hence there are requirements for timely notification of changes to profit forecasts and the like rather than making investors and others wait for annual reports to be published. Timeliness is similarly important to the relevance of financial disclosures under the Electoral Act.

Australia operates a public disclosure scheme. The point of the scheme is for disclosures to be open to public scrutiny so that the public can make use of that information. That use is probably not so much about assessing strict legal compliance with disclosure obligations (given there are few restrictions placed on the financial operations of political parties, candidates and others by the Electoral Act). The absence of restrictions on how funds are obtained and expended indicates that it is for the public to make judgements about the ethics and desirability of financial arrangements, in particular in relation to matters such as possible conflicts of interest. These judgements may then influence how individuals vote at an election.

For the public, as voters, to effectively exercise their discretion at the ballot box based on financial disclosures made by those directly and indirectly participating in the election, those disclosures

[6] The value of a penalty denotes the relative severity of an offence and is a factor taken into account by the CDPP when assessing whether to accept a brief of evidence and pursue prosecution.

need to be available to them in a suitably timely manner. In this context, that would require disclosures in the lead-up to the polling day in an election to be made contemporaneously, or as close to contemporaneously as practical.

Separate campaign committee disclosures

(xii) Reintroduce requirements that campaign committee expenditure is to be reported separately from the state party unit and specifically covers the election period for each division[7]

As can be seen from the earlier discussion of the evolution of disclosure, the scheme as originally introduced intended disclosures to be made at the electorate level. As also previously mentioned, the AEC regularly receives requests as to how the donations made to and expenditures incurred for individual electorates by endorsed candidates can be separately identified. The public, and the AEC, however, are in no position to be able to distil this information and so to form any opinion as to the completeness or accuracy of the disclosures covering the activities of endorsed candidates, endorsed Senate groups and their campaign committees from the information contained in returns being lodged.

The means of achieving this break-down of disclosure would be to require campaign committees of endorsed candidates and Senate groups to lodge separate election disclosure returns rather than have their financials subsumed into the annual disclosures of their political parties. This could include a requirement for expenditures of political parties that are specific to an electorate (or to the Senate campaign) to be included in the disclosures lodged for the relevant campaign committee. Similarly, any donations accepted by, or campaign expenditures authorised by or on behalf of the candidate could also be required to be incorporated into this return irrespective of whether they were transacted through the formal campaign committee. This then provides a picture of the activity at the electorate level (or Senate group level). At the very least this would provide some indication as to whether it would appear that disclosures are complete (for instance, for a candidate and political party active in an electorate, a return lodged for that campaign committee that discloses immaterial sums would immediately raise questions about those disclosures).

Review periods applying to disclosure obligations

(xiii) Review the "disclosure period" and the "election period" in relation to disclosure obligations and new candidates who are seeking pre-selection

The disclosure period for the disclosure of donations received by candidates that have stood previously at a federal election within the last four years for the House of Representatives or seven years for the Senate runs from the 31st day after the previous polling day to the 30th day after the current election's polling day. Therefore, disclosure is continuous upon candidates until they cease to contest elections. However, this breadth of coverage does not apply to first time candidates. The disclosure period for these candidates commences upon the earlier of the announcement of their candidacy or formal nomination (or for a person appointed to a casual Senate vacancy, from the date of that appointment). In practical terms, for endorsed candidates this means the date of their formal pre-selection while for all but the highest profile independent candidates it means the date of nomination.

While calculating the commencement date in this manner may appear logical it is inconsistent with the disclosure obligations of their donors who are required to observe a disclosure period commencing from the 31st day after the last general or Senate election.

Extending the disclosure period for first time candidates by having it commence on the 31st day after the last general or Senate election would have little practical impact in most instances, but, it would capture all donations received and used in relation to an election campaign irrespective of whether they were received prior to a person's formal announcement of their candidacy.

[7] And for each State/Territory in the case of a campaign committee of a Senate group.

The election period governing the disclosure of electoral expenditure runs from the date of the issue of the writ through to the close of polling on polling day. This period has remained unchanged since Part XX was introduced into the Electoral Act in 1984.

Campaigning is now substantially different, with an important change being that 'proxy' campaigns often commence before an election is announced.

The definition of election period could be commenced earlier so as to capture expenditures incurred on campaign activities being undertaken prior to the formal commencement of the election campaign at the time of the issuing of the election writs by the Governor-General. The complication in setting a new commencement date when there is not a fixed election date is to provide certainty for those with disclosure obligations. For this reason it would be preferable to count forward from a known date, such as calculating the commencement period as being 24 or 30 months from the polling day in the last election, although with the rider that it be the earlier of this calculated date or the date of the issue of the writ in case of an early election (or by-election).

Increase the AEC's coercive powers

(xiv) Increase the coercive powers of the AEC to enable it to act as a regulator in relation to matters under Part XX of the Electoral Act

The AEC has previously raised with the JSCEM the issue of clarifying the role expected of it in administering the disclosure provisions of the Electoral Act. In its submission (no.11) of 26 April 2004 to the JSCEM's *Inquiry into Disclosure of Donations to Political Parties and Candidates* the AEC observed:

> '… there seems to be an expectation that the AEC, at least in relation to financial disclosure matters, plays a regulatory role similar to that performed by the Australian Competition and Consumer Commission (ACCC). The AEC does not see its roles or it powers as being on a par with the ACCC. However, if the JSCEM considers this to be the case, the AEC would appreciate input on how it is seen the AEC should fulfil such a role. The JSCEM may also wish to make recommendations as to the sort of powers the AEC should have to enable it to carry out such a role. The AEC could then consider, in concord with the Australian Government Solicitor and the Office of Parliamentary Counsel, what amendments may be necessary to the Electoral Act to provide such powers.'

The current requirement for there to be 'reasonable grounds' before the AEC can use its coercive information gathering powers under s.316(3) of the Electoral Act limits the use of that power. It prevents investigations being mounted as 'fishing expeditions' by requiring that there be credible evidence of a possible contravention of a disclosure offence rather than mere suspicion. It also acts as a safeguard against harassment being visited upon parties or other persons from unsupported allegations being levelled at them.

Also, a more activist role for the AEC in conducting investigations will necessarily require additional resources. If there is to be an expectation that the AEC should assume some increased level of responsibility for checking the completeness and accuracy of disclosure returns lodged with it, then, depending on just what is expected, this may require a significant increase in resourcing.

Expand the definition of Electoral Expenditure

(xv) Expand the categories of "electoral expenditure" that are to be disclosed to include campaign staff, premises, office equipment, vehicles and travel

As discussed earlier, the disclosure of electoral expenditure is now only required of House of Representatives candidates and jointly endorsed or unendorsed Senate groups. Nearly all endorsed candidates lodge 'nil' disclosure returns, and independent candidates and Senate groups

mostly lodge returns disclosing immaterial sums, if anything at all is disclosed.[8] As such, the value of any move to expand the reach of electoral expenditure disclosures would need to be considered in conjunction with initiatives to review who has responsibility for disclosing such expenditures (as discussed in point (xvii) below).

The current categories of electoral expenditure as outlined in s.308 of the Electoral Act are:

- broadcasting advertisements
- publishing advertisements
- displaying advertisements at a place of entertainment
- costs of production for the above advertisements
- costs of campaign material requiring the inclusion of the name and address of the author or the person who authorised it (e.g. how-to-vote cards, pamphlets, posters)
- costs of production and distribution of direct mail
- opinion polling or other research relating to the election.

These categories are targeted primarily at electoral advertising costs and do not cover the range of campaign costs. For smaller party and independent candidates in particular, a significant proportion of their campaign costs will come in areas other than those falling within the present definition of electoral expenditure. More comprehensive disclosures of campaign costs could cover expenditures on items such as:

- staff
- premises (including facilities and signage/branding)
- office furniture and machines/equipment
- communication costs, such as phones and internet connections
- vehicles
- travel and accommodation.

In any consideration of the extent of disclosures for campaign expenditures, it is important to note that only aggregated, single line totals are disclosed under the categories of electoral expenditure. These disclosures are not designed to provide details of expenditure, only an overall view of the scale of certain specified expenditures.

The purpose to which those disclosures are to be put will dictate whether more detailed disclosure is required. For example, to conclude whether the use of temporary campaign offices has been disclosed, it would be necessary to see details of the payment for the rental of those premises and, should there be no such payment disclosed, to see details of donations which would need to show a gift-in-kind equivalent to the value of the rental waived by the premises owner.[9]

Deem political parties to be bodies corporate

(xvi) Deem registered political parties to be bodies corporate for the purposes of Part XX of the Electoral Act

The argument for having parties treated as bodies corporate is to allow the parties, rather than individuals within the party, to be held accountable under the (funding and) disclosure provisions of the Electoral Act. This is particularly the case where financial penalties are to be imposed for convictions of offences against the disclosure provisions and where monies are to be recovered. It is both more feasible and appropriate to seek these outcomes from the political party as an entity

[8] The absence of disclosures in the returns of independent candidates and Senate groups is not always because they have not incurred campaign costs, but, because the areas in which they spend money often falls outside the categories covered by the definition of electoral expenditure.

[9] The disclosure threshold and whether disclosures are made at the campaign level or consolidated at the party level also are relevant to this example.

with collective responsibility rather than from an individual officer holder within that party. (This matter is discussed further under the earlier heading *Offset penalties against public funding*.)

The concept of having registered political parties deemed to be bodies corporate for the purposes of the Electoral Act is not new. The idea was raised both in the Harders Report in 1981 and the First Report of the JSCER in 1983.[10] It is also not a unique proposal, having parallel precedents in other legislation.[11]

Clarify who has reporting obligations

(xvii) Introduce provisions with greater certainty about who has the relevant reporting obligation

Who discloses and what they have responsibility for disclosing influences the level of transparency in disclosures. As discussed earlier in this submission, changes to the Electoral Act have had the deliberate effect of centralising disclosures with political parties, irrespective of whether the transactions can be considered to have been by, or on behalf of, the party. This has meant that, apart from a small number of mostly independent candidates, there is little information available as to individual campaigns at the electorate level.

In other areas of the law (e.g. Corporations Act, industrial law, etc) there is a clearly defined person who has the relevant reporting obligation imposed upon them by the relevant legislation. Under the current provisions of Part XX of the Electoral Act there is no such clear obligation. It is generally left up to the political party or other entity to determine who is to sign the disclosure return. For example, when dealing with a body that is registered under the *Fair Work (Registered Organisations) Act 2009,* the AEC can receive returns signed by a President, National Secretary, financial controller or some other official. Similarly in dealing with a company, the AEC can receive returns that are signed by anyone from a range of office-bearers within the company. Establishing a specific person or position within a political party or other entity that is responsible for signing the disclosure return would provide certainty as to who has the reporting obligation and that the return is authorised by the person or entity with the reporting obligation.

[10] Harders Report, page 70; and the JSCER First Report, page 171. The Harders Report referred to the *Electoral Bill* 1974 which also proposed giving an unincorporated party a statutory personality for prosecution purposes.

[11] For example, s.27 of the *Fair Work (Registered Organisations) Act 2009* and each State/Territory's Associations Incorporations Act.

Attachment C

Excerpt from AEC Report: Election Funding and Disclosure Report, Federal Election 2010

Summary of recommendations
Updated: 14 November 2011

RECOMMENDATION 1
The Act be amended to allow the AEC to withhold payment of election funding if a registered political party or candidate specifically indicates that they do not wish to receive election funding.

RECOMMENDATION 2
The Act be amended to include provision for the payment of election funding to eligible unendorsed candidates and Senate groups into an Australian bank account held in the name of the candidate or, in the case of a Senate group, the candidate whose name is listed first on the ballot paper, by direct deposit.

RECOMMENDATION 3
The Act be amended to reduce the four separate provisions to a single provision that meets the requirements of all parties in order to rationalise and simplify provisions for payment of public funding to political parties.

RECOMMENDATION 4
The Act be amended to ensure the payment of election funding entitlements for eligible candidates and Senate groups can be made to the party whether or not the party is organised on the basis of a particular state or territory.

RECOMMENDATION 5
In the event of electoral reform increasing the frequency of periodic reporting, reducing the disclosure threshold and reducing the timeframe for political parties to lodge periodic returns, and for the AEC to make them publicly available, the Act be amended to require political parties and associated entities to lodge disclosure returns electronically.

RECOMMENDATION 6
Division 6 of Part XX of the Act be amended to insert definitions for 'formal error' and 'formal defect' with guidance from Parliamentary Counsel on appropriate wording.

RECOMMENDATION 7
The Act be amended to include total monies received at fundraising events in the definition of 'gift' for disclosure purposes.

RECOMMENDATION 8
The Act be amended to include 'financial guarantees' in the definition of 'gift'.

RECOMMENDATION 9
The Act be amended to clarify that receipts should not be "netted off" for disclosure purposes.

RECOMMENDATION 10
Subsection 292(2) of the Act be amended to automatically revoke the appointment of a party agent when a new party agent is appointed.

RECOMMENDATION 11
Subsection 290(2) of the Act be amended to remove reference to 'a particular election'.

RECOMMENDATION 12
The Act be amended to introduce administrative penalties to support compliance with the provisions of the disclosure scheme based on objective tests, for example late lodgement.

RECOMMENDATION 13
The Act be amended to provide a penalty similar to the penalty for failure to furnish a return provided under s.315 of the Act, for individuals that do not cooperate with a notice issued under s.318(1) requesting information required to complete a return.

RECOMMENDATION 14
Section 317 of the Act be amended to recognise periodic disclosures.

RECOMMENDATION 15
The Act be amended to provide a penalty for a person who fails to make records to enable complete and accurate disclosure.

RECOMMENDATION 16
Section 320 of the Act be amended to reflect the ability to publish returns on the internet and include a requirement to retain copies of claims and returns for a period of at least 10 years.

RECOMMENDATION 17
The Act be amended to include a provision that requires political parties to provide to the AEC details of their known associated entities, including a penalty for failure to comply.

RECOMMENDATION 18
The Act be amended to formalise the requirement for political parties and associated entities to distinguish between donations which go to benefit a registered political party and all other receipts on disclosure returns.

RECOMMENDATION 19
The Act be amended to impose an obligation on inactive associated entities to lodge a disclosure return until such time as they lodge a final disclosure return with the AEC after cessation of their association.

RECOMMENDATION 20
The Act be amended to clarify the definition of 'Associated Entity' by extending the definitions of:

'controlled' – define as the right of a party to appoint a majority of directors, trustees or office bearers,

'to a significant extent' – define as the receipt by a political party of more than 50% of the distributed funds, entitlements or benefits enjoyed and/or services provided by the associated entity in a financial year, and 'benefit' – define as the receipt of favourable, non-commercial arrangements where the party or its members ultimately receives the benefit.

RECOMMENDATION 21
Subsection 314AEB(1)(a)(ii) of the Act be deleted.

RECOMMENDATION 22
The Act be amended to delete ss.314AEB(1)(a)(v).

RECOMMENDATION 23
The Act be amended to allow for the appointment of Senate group agents to be lodged at the state or territory office of the AEC in which the Senate group is standing for election.

RECOMMENDATION 24
The Act be amended to allow for the appointment of candidate agents to be lodged at the state or territory office, or the divisional office, where the candidate nomination was lodged.

RECOMMENDATION 25
The Act be amended to deem the party agent of an endorsed candidate to be the candidate agent unless a different agent is appointed by that candidate.

RECOMMENDATION 26
Nomination forms described at s.166 and in Schedule 1 of the Act be amended to include the ability to appoint candidate and Senate group agents.

RECOMMENDATION 27
The Act be amended to increase penalties for failure to comply with a s.316 notice, with an equivalent to the accumulating penalty for each day that compliance remains outstanding.

RECOMMENDATION 28
The Act be amended to provide for the adoption of a prescribed model political party constitution, all the elements of which would need to be included in the mandatory constitution currently required under s.123 of the Act.

RECOMMENDATION 29
Subsection 123(3) of the Act be amended to change the requirement for registration of a political party from having 500 members 'entitled to enrolment under this Act' to having 500 members 'entitled to vote in General elections'.

RECOMMENDATION 30
The Act be amended to require political parties to provide the residential address and date of birth details of members.

RECOMMENDATION 31
The Act be amended to expand requirements for membership so that a member being used to support a party's registration must have:

- been formally accepted as a member according to the party's written rules,
- joined the party or renewed their membership within the previous 12 months prior to a list of members being lodged with the AEC, and
- paid a minimum annual membership fee in the last 12 months.

RECOMMENDATION 32
The Act be amended to include failure to lodge, and continued failure to lodge, by a political party by the due date for returns as grounds for forfeiture of party registration.

RECOMMENDATION 33
The Act be amended to limit the registration of political parties to one registration for each party. That is, no separate registrations for additional state or territory branches or other levels of the party.

RECOMMENDATION 34
The Act be amended to deem registered political parties to be incorporated associations.

RECOMMENDATION 35
The Act be amended to prevent political parties from registering or maintaining registration in the name, abbreviation or acronym of a prominent organisation without the written approval of that organisation.

RECOMMENDATION 36
The Act be amended to prevent political parties from registering or maintaining registration in the name of an individual without the written approval of that individual.

RECOMMENDATION 37
The Act be amended to prevent the name, abbreviation or acronym of certain special words (for example, Anzac, OAM) from being used in the name or abbreviation of a registered political party.

RECOMMENDATION 38
The Act be amended to provide that an application to deregister a parliamentary party must be submitted by three members of the party, with the party secretary being one of those members.

RECOMMENDATION 39
Section 141 of the Act be amended to provide a right of review of decisions to approve an application for voluntary deregistration under s.135 or decisions to deregister a party under ss.137(1)(cb) where a registered officer has failed to respond to a notice of review issued under s.138A.

RECOMMENDATION 40
The Act be amended to require the nomination of a party agent as part of the registration of a political party.

RECOMMENDATION 41
The Act be amended to empower the AEC to serve a Notice of Intention to Deregister to political parties who fail to appoint an agent for a period of 28 days on the revocation of appointment, resignation or death of the previously appointed party agent.

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WE MUST NOT FORCE TAXPAYERS TO FUND SYSTEM

Political funding laws need to be better enforced, not made more restrictive

RICHARD ALSTON

In the wake of the Dastyari affair, it is important to consider carefully the possible unintended consequences of any proposed changes to political funding.

At the outset, one thing should be clear. The Dastyari saga has nothing to do with a debate about donations to political parties. Sam Dastyari stands accused of taking funds for his personal benefit and flatly contradicting a key plank of the foreign policy of both major parties, with no satisfactory explanation for either.

He fell on his sword for one reason: to avoid having to explain his actions, reasons and motives. He should not be permitted to return to the frontbench until he comes clean with the Australian people.

It is fashionable to suggest that major donors have improper motives: "Why would they give unless in expectation of a return?" This is undoubtedly true of large union "generosity", but it is generally not true of individuals.

Major donors often donate to causes or political parties because they agree with their philosophy or policies, without any expectation of a quid pro quo. When Graeme Wood gives $1.3 million to the Greens, he presumably does so because he supports the ideals of the movement.

Labor purports to be the party of the workers and sees trade unions as its natural support base. In the same way the Liberal Party is the natural repository of support for free enterprise and businesses, large and small.

But because business leaders feel intimidated by Labor and persecuted by activist shareholders they are increasingly reluctant to give funds to political parties. Labor's rhetoric about the Liberal Party being funded by "the big end of town" is but an old and inaccurate caricature.

Meanwhile Labor continues to reap millions from unions, both in financial and human resources, and happily repays in government with a plethora of union-friendly measures.

It also continues to oppose fiercely the return of the building and construction watchdog, despite the overwhelming evidence of its need.

But bans on unions would face formidable constitutional hurdles, as the High Court has already ruled that such restrictions are an unacceptable burden on the implied freedom of political communication.

Even if union funding to a political party were curtailed, they easily could outsource the problem to outfits such as GetUp!, which boasted about single-handedly achieving an 8 per cent swing in Bass, more than twice the otherwise state average.

In the recent election, many marginal seats were bombarded by essentially anonymous "Put Liberals Last" propaganda sheets authorised by some unknown individual who technically doesn't belong to a party but sure knows whom he wants to win.

Requiring disclosure of money or "in kind" political assistance from these proxy parties would be a big step forward in political transparency.

Corporations also have rights, and indeed obligations, to protect the legitimate interests of their shareholders. As John Howard recently told the National Press Club: "Limiting the amount companies can donate to political parties would be fundamentally an attack on freedom of political activity and expression."

If a foreign individual or corporation with substantial investments in Australia is faced with one party seeking to damage their assets, why should they not be permitted to give financial support to another party opposing the threat?

Were mining companies, many of them part foreign owned, acting improperly in actively opposing Labor's mining tax?

Similarly, punters, large and small, are entitled to reflect their level of existential concern by providing substantial financial support to an opposing party.

Large-scale public funding is a very dubious solution — the thin end of a dangerous wedge. Look at what has happened in Ireland, where a political party faces a 50 per cent cut in government funding if it does not meet parliamentary gender quotas. The mind boggles at what "progressive" activists could do here with such an opportunity.

The last thing Australia needs is for all political parties to be equally funded by long-suffering taxpayers, while one major party continues to trouser enormous largesse from increasingly irrelevant and self-serving union bosses.

A properly functioning, competitive democracy needs a vibrant political culture where the major parties have clearly defined alternative visions for achieving economic and social

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prosperity and are actively seeking moral and financial support from the widest community of interests.

Our present system is not broken, with little or no evidence of corruption at federal level. Sunlight is the best disinfectant — disclosure regimes are already firmly in place and vigorously monitored by an ever vigilant media, constantly on the lookout for any sign of donor skulduggery.

The challenge is to ensure that the rules are properly enforced, instead of constant calls for the rules to be tightened, without any consideration of the likely adverse consequences.

Richard Alston is the federal president of the Liberal Party of Australia.

The last thing Australia needs is for all political parties to be equally funded by long-suffering taxpayers

