



New South Wales

Electoral Funding Bill 2018

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to make provision for the disclosure, capping and prohibition of certain political donations and electoral expenditure for State Parliamentary and local government election campaigns and for the public funding of State Parliamentary election campaigns.

This Bill has been prepared in response to the *Final Report on Political Donations* by the Panel of Experts (known as the Schott Report) dated December 2014, the *Report on the Inquiry into the Final Report of the Expert Panel - Political Donations and the Government's Response* dated June 2016 and the *Report on the Administration of the 2015 NSW Election and Related Matters* dated November 2016 both by the Joint Standing Committee on Electoral Matters.

This Bill repeals and replaces the *Election Funding, Expenditure and Disclosures Act 1981* (the *1981 Act*). In particular, this Bill:

- (a) sets out and clarifies certain definitions and key terms used in the legislation, including the definition of *political donation*, and
- (b) requires a disclosure of a reportable political donation as follows:
 - (i) in general in relation to reportable political donation received or made during the 6-month period preceding a State general election, by the relevant recipient and donor within 14 days of its being received or made,
 - (ii) in general in relation to reportable political donation received or made at any other time, by the relevant recipient and donor within 4 weeks of the end of the quarter in which it was received or made,
 - (iii) in relation to a disclosure of a reportable political donation made by a major political donor:

- (A) by the relevant recipient within the periods required by subparagraphs (i) and (ii) above, and
- (B) by the donor within 4 weeks of the end of the financial year in which it was made,
- (iv) in relation to a disclosure of a reportable political donation for a local government election, by the relevant recipient and donor within 4 weeks of the end of the quarter in which it was received or made, and
- (c) provides that independent elected members, candidates and groups of candidates are personally responsible for making disclosures of political donations and electoral expenditure as required by the proposed Act (rather than the official agent of those persons), and
- (d) provides that the relevant party agents of elected members, candidates and groups that are endorsed by registered political parties are responsible for making such disclosures of political donations and electoral expenditure as required by the proposed Act (except in certain circumstances), and
- (e) extends provisions relating to the disclosure of political donations and electoral expenditure to associated entities of political parties (*associated entities*), being corporations or entities that operate solely for the benefit of one or more registered parties or elected members, and
- (f) makes it clear that, for the purposes of the proposed Act, things done by (or on behalf of) a body or organisation that is controlled by a political party are deemed to be have been done by the political party, and
- (g) removes the concept of associated political parties that was used in the 1981 Act to determine reportable political donations and the caps on electoral communication expenditure for State election campaigns, and
- (h) provides for the disclosure of further information relating to political donations and electoral expenditure, such as the terms and conditions and total loan repayments of reportable loans and the identification of electoral expenditure aimed at influencing the voting in a particular electoral district, and
- (i) provides that the Electoral Commission is to publish on its website an explanation and analysis of the sources and amounts of reportable political donations (subject to an obligation on the Electoral Commission to first consult with parties and candidates concerned regarding such publications), and
- (j) requires that political donations, self financing contributions and electoral expenditure for the benefit of elected members, candidates and groups that are endorsed by registered political parties are to be made through the parties' campaign accounts, and
- (k) increases the cap on indirect campaign contributions to match the cap on other political donations, and
- (l) provides that certain, specified amounts paid by State parliamentary election candidates to their own political party or group are to be exempted from the applicable caps on political donations, and
- (m) decreases the applicable cap on electoral expenditure for a third-party campaigner for a State general election to:
 - (i) \$500,000 if the third-party campaigner was registered before the commencement of the capped State expenditure period for the election (rather than indexing the \$1,288,500 amount that applied for the 2015 general election), or
 - (ii) \$250,000 in any other case (rather than indexing the \$644,300 amount that applied for the 2015 general election), and
- (n) provides for the capping of electoral expenditure for local government election campaigns during a capped local government expenditure period in a similar manner to the current capping of electoral expenditure on State election campaigns during the capped State expenditure period, and

- (o) provides that the electoral expenditure incurred by an associated entity of a party is to be aggregated with the electoral expenditure incurred by the party for the purposes of the caps on electoral expenditure, and
- (p) clarifies and modifies the definition of *property developer* for the purpose of the prohibition on political donations by property developers as follows:
 - (i) by expanding the definition to include individuals as well as corporations,
 - (ii) by providing that such an individual or a corporation is a property developer if:
 - (A) the person or corporation carries on a business mainly concerned with the residential or commercial development of land, with the ultimate purpose of the sale or lease of the land for profit, and
 - (B) in the course of that business:
 - (a) 1 relevant planning application has been made by or on behalf of the individual or corporation and is pending, or
 - (b) 3 or more relevant planning applications made by or on behalf of the individual or corporation have been determined within the preceding 7 years,
 - (iii) by expanding the definition of a *close associate* of such an individual or corporation to include a person in a joint venture or partnership with a property developer in connection with a relevant planning application made by or on behalf of the property developer who is likely to obtain a financial gain if development that would be or is authorised by the application is authorised or carried out, and
- (q) provides that if a person makes a political donation and, within 12 months of making that donation becomes a property developer, then the person must pay an amount that is double the amount or value of the donation to the State, and
- (r) provides that provisions of the proposed Act that aggregate political donations are not to apply in relation to the acceptance of certain small political donations of \$50 or less made at fundraising ventures and functions (but will apply in relation to the making of those donations), and
- (s) removes the distinction between electoral expenditure and electoral communication expenditure to provide that all electoral expenditure (and not only electoral communication expenditure) is covered by the caps on electoral expenditure and can be the basis of a claim for public funding from the Election Campaigns Fund, and
- (t) prohibits third-party campaigners from acting in concert with other persons to incur electoral expenditure that exceeds the cap on electoral expenditure for the third-party campaigner, and
- (u) provides for a “dollar-per-vote” model of public funding for State election campaigns (being the model that was used at the 2015 State general election) and provides for such funding to be indexed for inflation, and
- (v) increases advance payments of public funding available to parties from the Election Campaigns Fund from 30% to 50% of the amount to which the party was entitled to in relation to the previous general election, and
- (w) increases the preliminary payment amount that may be made by the Electoral Commission to a party in relation to a claim for public funding that it is unable to finalise within 14 days from 70% of the total amount estimated by the Electoral Commission to be payable to the party to 90% of that amount, and
- (x) renames the Policy Development Fund as the New Parties Fund to better reflect the aims of that Fund, and
- (y) expands the items of policy development expenditure claimable from the New Parties Fund to include electoral expenditure in the calendar year in which an Assembly general election is held, and

- (z) provides that entitlement to payment from the Administration Fund is to be determined as at the end of each quarter (rather than each calendar year) for which the payment is to be made, and
- (aa) introduces and defines a new defined term of a *senior office holder* of a registered political party and imposes duties and obligations on those senior office holders, including:
 - (i) a duty of care and diligence, and
 - (ii) a duty to act in good faith, and
 - (iii) a duty to report alleged contraventions of the proposed Act to the Electoral Commission, and
- (ab) requires that only a senior office holder of a registered political party may be a party agent for the party, and
- (ac) requires registered political parties to notify the Electoral Commission of the names of all senior office holders and requires the Electoral Commission to publish those names and a summary of the role and responsibilities of a senior office holder under the proposed Act, and
- (ad) requires registered political parties to provide the Electoral Commission with audited annual financial statements, and
- (ae) clarifies other auditing requirements placed on registered political parties, by removing the requirement that declarations of disclosures under the proposed Act must be accompanied by an auditor's certificate, but retains a discretion of the Electoral Commission to audit those declarations of disclosures (other than declarations lodged by major political donors), and
- (af) clarifies and modifies the offences under the proposed Act, including the maximum penalties for breaches of those offences, and
- (ag) enables certain civil and criminal proceedings to be brought against parties that are unincorporated associations as if the parties were corporations, and
- (ah) confers a specific function on the Electoral Commission to undertake educational and information programs to educate and inform elected members, candidates, groups, third-party campaigners and associated entities of their obligations under the proposed Act.

The Bill also makes a number of miscellaneous law revision amendments to the *Electoral Act 2017*.

The Bill also makes a number of amendments to the *Lobbying of Government Officials Act 2011* in response to the *Statutory Review of the Lobbying of Government Officials Act 2011* published in June 2017. Those amendments:

- (a) provide for an objects provision for that Act, and
- (b) clarify that the 18-month prohibition against lobbying Government officials (the cooling-off period) for former Ministers and Parliamentary Secretaries does not apply to lobbying by a former Minister or Parliamentary Secretary who is lobbying as a Commonwealth public official or as a member of the Commonwealth Parliament, and
- (c) empower the Electoral Commission to cancel or suspend the registration of a third-party lobbyist (or any individual engaged to undertake lobbying for a third-party lobbyist) if the lobbyist (or the individual) ceases to be eligible to be registered, and
- (d) provide that a person is taken not to be a fit and proper person to be registered in the Lobbyists Register if the person has been sentenced to a term of imprisonment of 30 months or more or has been convicted, within the previous 10 years, of an offence committed as an adult involving fraud or dishonesty, and
- (e) require the Electoral Commission to give notice and reasons for certain decisions it makes.

Outline of provisions

Part 1 Preliminary

Part 1 of the proposed Act contains preliminary machinery provisions, including provisions that:

- (a) set out the name of the proposed Act, and
- (b) provide that the proposed Act commences on a day or days to be appointed by proclamation, and
- (c) set out the objects of the proposed Act.

Part 2 Interpretation and key concepts

Part 2 of the proposed Act contains certain interpretative provisions, including provisions that:

- (a) define key terms and concepts for the purposes of the proposed Act, including *political donation*, *reportable political donation* and *electoral expenditure*, and
- (b) define or give meanings to other miscellaneous terms, phrases and concepts used in the proposed Act.

Part 3 Political donations and electoral expenditure

Part 3 of the proposed Act deals with political donations and electoral expenditure. Political donations and electoral expenditure are required to be disclosed in connection with both State and local government elections and members. Caps on political donations and electoral expenditure apply to both State and local government elections and members and candidates.

Division 1 Preliminary

Division 1 of Part 3 of the proposed Act provides that Part 3 applies to:

- (a) State elections and elected Members of Parliament, and
- (b) local government elections and elected members of councils.

Division 2 Disclosure of political donations and electoral expenditure

Division 2 of Part 3 of the proposed Act deals with the disclosure of political donations and electoral expenditure, including the following:

- (a) specifying what political donations and electoral expenditure must be disclosed,
- (b) the persons responsible for making disclosures,
- (c) when disclosures of political donations are to be made,
- (d) when disclosures of electoral expenditure are to be made,
- (e) how disclosures are to be made,
- (f) public access to disclosures.

Division 3 Caps on political donations

Division 3 of Part 3 of the proposed Act deals with the capping of political donations, including the following:

- (a) setting out the applicable caps on political donations (and providing for the indexation of those cap amounts),
- (b) prohibiting the acceptance of political donations that exceed the applicable cap,
- (c) prohibiting the making or acceptance of political donations to more than 3 third-party campaigners in the same financial year,

- (d) providing for the exemption from the applicable political donations cap for certain party subscriptions and party levies.

Division 4 Caps on electoral expenditure for election campaigns

Division 4 of Part 3 of the proposed Act deals with the capping of electoral expenditure during election campaigns, including the following:

- (a) specifying the capped State expenditure period and the capped local government expenditure period,
- (b) setting out the applicable caps on electoral expenditure for State election campaigns during the capped State expenditure period and the applicable caps on electoral expenditure for local government election campaigns during the capped local government expenditure period,
- (c) providing for aggregation of the electoral expenditure of parties and candidates and parties and associated entities for the purposes of the application of the applicable caps,
- (d) prohibiting electoral expenditure that exceeds the applicable caps,
- (e) deeming electoral expenditure to have been incurred at certain times,
- (f) prohibiting third-party campaigners from acting in concert with other persons to incur electoral expenditure that exceeds the applicable cap for the third-party campaigner.

Division 5 Management of donations and expenditure

Division 5 of Part 3 of the proposed Act deals with requirements for the management of political donations and electoral expenditure (including the mandatory use of campaign accounts and requirements to keep certain records) by parties, elected members, groups, candidates, third-party campaigners and associated entities.

Division 6 Prohibition of certain political donations etc

Division 6 of Part 3 of the proposed Act prohibits certain political donations. More specifically, the Division:

- (a) prohibits the acceptance of political donations unless the donor is:
 - (i) enrolled on a State, federal elections or local government election roll or has supplied specified identification showing the individual's full name and an Australian residential address, or
 - (ii) an entity that has a relevant business number or a principal or executive officer of which has supplied specified identification showing the principal or officer's full name and an Australian residential address, and
- (b) prohibits certain indirect campaign contributions, and
- (c) prohibits political donations by a party (or a candidate or elected member endorsed by a party) to an independent candidate, and
- (d) prohibits the acceptance of a reportable political donation from an unknown source, and
- (e) prohibits a person receiving certain loans (other than loans from a financial institution), unless the person makes a record of the terms and conditions of the loan and the name and address of the entity or other person making the loan.

Division 7 Prohibition of donations from property developers or tobacco, liquor or gambling industries

Division 7 of Part 3 of the proposed Act prohibits the making of certain political donations. More specifically, the Division:

- (a) prohibits political donations from property developers or tobacco, liquor or gambling industry business entities, and

- (b) provides that a loan that, if it had been a gift, would be a political donation is to be regarded as a political donation for the purposes of the Division unless the loan is from a financial institution, and
- (c) provides that, in general, an annual or other subscription paid to a party by an individual as a member of the party or for the individual's affiliation with the party is not a political donation for the purposes of the Division, and
- (d) allows the Electoral Commission to make a determination that a person is not a prohibited donor for the purposes of the Division.

Division 8 Miscellaneous

Division 8 of Part 3 of the proposed Act contain miscellaneous provisions dealing with political donations and electoral expenditure. In particular, the Division:

- (a) provides for the recovery by the Electoral Commission on behalf of the State of unlawful political donations, donations by certain property developers and unlawful electoral expenditure, and
- (b) provides for the audit of declarations of disclosure by the Electoral Commission, and
- (c) allows the Electoral Commission to extend the due date for making disclosures, and
- (d) deals with the amendment of declarations of disclosure.

Part 4 Public funding of State election campaigns

Part 4 of the proposed Act provides for the public funding of State election campaigns.

Division 1 Preliminary

Division 1 of Part 4 of the proposed Act contains certain preliminary and interpretative provisions.

Division 2 Public funding for electoral expenditure of parties and candidates

Division 2 of Part 4 of the proposed Act contains provisions dealing with the public funding for electoral expenditure incurred by certain parties and candidates. In particular, the Division:

- (a) establishes a Election Campaigns Fund for State elections, and
- (b) provides the eligibility criteria for registered parties to receive public funding of election campaigns, and
- (c) sets out the amount of public funding those eligible parties are entitled to receive, and
- (d) provides the eligibility criteria for candidates to receive public funding of election campaigns, and
- (e) sets out the amount of public funding those eligible candidates are entitled to receive, and
- (f) provides that endorsed candidates of eligible parties are not entitled to public funding, and
- (g) sets out the amount of public funding for eligible independent candidates (or eligible candidates of parties not eligible for public campaign funding), and
- (h) deals with cases where 2 or more registered parties endorse the same candidate or same group of candidates, and deals with entitlements to advance payments.

Division 3 General provisions relating to funding

Division 3 of Part 4 of the proposed Act contains machinery provisions relating to the public funding of State election campaigns, including provisions dealing with:

- (a) claims for payments of public funding and approvals of those claims, and
- (b) audits before payments of claims, and

- (c) vouching of electoral expenditure, and
- (d) public access to claim documents and other related documents, and
- (e) other miscellaneous administrative matters.

Part 5 Administrative and New Party policy development funding

Part 5 of the proposed Act provides for public funding for certain parties and independent Members of Parliament for administrative expenditure and for public funding for certain parties not entitled to that administrative funding for policy development expenditure.

Division 1 Preliminary

Division 1 of Part 5 of the proposed Act contains certain preliminary and interpretative provisions.

Division 2 Administrative funding for parties and independent members

Division 2 of Part 5 of the proposed Act contains provisions dealing with public funding for certain parties and independent Members of Parliament for administrative expenditure. In particular, the Division:

- (a) establishes an Administration Fund, and
- (b) provides for the eligibility criteria for the public funding of parties for certain administrative expenditure and sets out the amount of such funding, and
- (c) provides for the eligibility criteria for the public funding of independent Members of Parliament for certain administrative expenditure and sets out the amount of such funding, and
- (d) deals with certain machinery matters such as how to deal with cases where 2 or more registered parties endorsed the same elected member, the making of quarterly payments and quarterly advance payments.

Division 3 Policy development funding for parties not entitled to administrative funding

Division 3 of Part 5 of the proposed Act contains provisions dealing with public funding for certain parties not entitled to that administrative funding for policy development expenditure. In particular, the Division:

- (a) establishes a New Parties Fund, and
- (b) provides for the eligibility criteria for the public funding of certain parties (being parties not entitled to that administrative funding) for policy development expenditure and sets out the amount of such funding.

Division 4 General provisions relating to funding

Division 4 of Part 5 of the proposed Act contains machinery provisions relating to administrative and policy development funding, including provisions dealing with:

- (a) claims for payments of funding and approvals of those claims, and
- (b) declarations that are to be made and the documents to be provided by agents and elected members making claims for funding, and
- (c) making payments of funding conditional on compliance with other obligations under the proposed Act.

Part 6 Obligations of registered parties and senior office holders

Part 6 of the proposed Act contains provisions relating to the obligations of registered parties and senior office holders, including:

- (a) requiring each registered party to provide the Electoral Commission with a copy of the party's audited annual financial statements, and
- (b) imposing certain civil duties on senior office holders of registered parties, being duties to carry out the senior office holder's functions:
 - (i) for the benefit, so far as practicable, of the party and with due care and diligence, and
 - (ii) in good faith in the best interests of the party, and
 - (iii) for a proper purpose, and
- (c) providing that it is an offence if a senior office holder of a registered party fails, without reasonable excuse, to report to the Electoral Commission any conduct in connection with the party that he or she knows or reasonably believes constitutes a contravention of the proposed Act.

Part 7 Registration of electoral participants

Part 7 of the proposed Act provides for the registration of electoral participants for the purposes of the proposed Act, being:

- (a) candidates, and
- (b) associated entities, and
- (c) third-party campaigners, and
- (d) party agents, and
- (e) official agents.

The Part also provides for:

- (a) certain registers for by-elections, and
- (b) public access to registers.

Political parties are registered under the electoral legislation that governs the election concerned (ie the *Electoral Act 2017* for State elections and the *Local Government Act 1993* for local government elections).

Part 8 Financial provisions

Part 8 of the proposed Act contains provisions dealing with certain financial matters, including:

- (a) appropriating money from the Consolidated Fund for the payment of amounts in accordance with Part 4 (Public funding of State election campaigns) and Part 5 (Administrative and New Party policy development funding), and
- (b) requiring money received or recovered by the Electoral Commission to be paid to the Consolidated Fund, and
- (c) providing that the financial year of the Electoral Commission is the year commencing on 1 July unless another period (not exceeding 2 years) is prescribed by the regulations.

Part 9 Investigation powers

Part 9 of the proposed Act contains provisions dealing with investigations and confers certain enforcement powers on the Electoral Commission and its inspectors. The Part:

- (a) gives inspectors certain powers to inspect documents, and

- (b) gives inspectors certain powers to require information and records from certain persons, and
- (c) provides for the appointment and identification of inspectors, and
- (d) enables the Electoral Commission to enter into arrangements with the Commissioner of Police for a police officer to exercise the functions of an inspector.

Part 10 Criminal and other proceedings

Part 10 of the proposed Act contains provisions dealing with criminal and other proceedings. The Part:

- (a) creates a number of offences relating to political donations and electoral expenditure, including offences relating to disclosures of political donations and electoral expenditure, caps on donations and expenditure, schemes to circumvent the prohibitions or restrictions within the proposed Act and the furnishing of false or misleading information to the Electoral Commission, and
- (b) sets out how criminal proceedings are to be dealt with, and
- (c) provides for the issue of penalty notices for specified offences against the proposed Act or the regulations that are prescribed by the regulations, and
- (d) provides that certain civil and criminal proceedings may be taken against parties that are unincorporated associations as if the parties were corporations, and
- (e) provides for the use of certificate evidence in relation to certain matters in criminal or civil proceedings under the proposed Act.

Part 11 Miscellaneous

Part 11 of the proposed Act contains miscellaneous provisions, including provisions that:

- (a) confer the function on the Electoral Commission of undertaking educational and information programs to educate and inform elected members and candidates of their obligations under the proposed Act, and
- (b) enable the Electoral Commission to determine and issue guidelines for or with respect to any matters dealt with in the proposed Act, and
- (c) provide that the Electoral Commission may, in any particular case, extend the time for doing anything under the proposed Act, if it is satisfied that proper reasons exist justifying the extension, and
- (d) deal with reports to Parliament by the Electoral Commission of its work and activities under the proposed Act, and
- (e) deal with compliance agreements entered into by the Electoral Commission and a person affected by the proposed Act for the purpose of ensuring that the person complies with the proposed Act or remedies an apparent contravention of the proposed Act, and
- (f) enable the Governor to make regulations for the purposes of the proposed Act, and
- (g) repeal the *Election Funding, Expenditure and Disclosures Act 1981* and the regulations made under that Act.

Schedule 1 Adjustment for inflation of monetary caps

Schedule 1 contains provisions dealing with the annual adjustment for inflation of certain monetary amounts under the proposed Act.

Schedule 2 Savings, transitional and other provisions

Schedule 2 contains savings, transitional and other provisions consequent on the enactment of the proposed Act.

Schedule 3 Amendment of other legislation

Schedule 3 amends the Acts specified in the Schedule.

Schedule 3.1 makes a consequential amendment to the *Criminal Procedure Act 1986* consequent on the creation of an indictable offence by proposed section 146.

Schedule 3.2 makes consequential amendments to the *Electoral Act 2017* and also makes a number of law revision amendments to that Act.

Schedule 3.2 [1], [4], [9] and [10] make consequential amendments.

Schedule 3.2 [3] corrects a provision of the *Electoral Act 2017* by providing that it is the Electoral Commissioner (rather than the Electoral Commission) who is to exercise certain functions relating to the process of verifying members of political parties for the purpose of determining eligibility for registration under the Act.

Schedule 3.2 [5] and [6] prohibit the display of posters and canvassing for votes within 6 metres of the entrance of an early voting centre on early voting days (rather than prohibiting the display of posters within 3 metres of an entrance of an early voting centre and canvassing within an early voting centre only on those days).

Schedule 3.2 [7] modifies section 200 of the *Electoral Act 2017*, which sets out the circumstances in which electoral material must be refused registration, so that registration must be refused if the material does not include an address at which the individual on whose instructions the material was produced can usually be contacted during the day (rather than the residential address for which the elector on whose instructions the material was printed is enrolled, as is currently the case). **Schedule 3.2 [2]** extends the definition of *address* of an individual (meaning a street address at which the individual can usually be contacted during the day) so that it applies for the purposes of the amended section 200 of that Act. **Schedule 3.2 [7]** provides that electoral material that is printed material must be refused registration if it does not include the name of the printer and the address at which it is printed. The amendment will make the provision dealing with registration of electoral material consistent with section 186 of the *Electoral Act 2017* (which contains a prohibition on printing or publishing printed electoral material without showing the name of the printer and the address at which it is printed).

Schedule 3.2 [8] allows a person who is unable to mark a ballot paper or sign and complete an electoral paper without assistance, or who is under a religious obligation not to personally mark or sign and complete such a paper, to appoint another person to do so on his or her behalf.

Schedule 3.3–3.5 and 3.7 make consequential amendments.

Schedule 3.6 makes amendments to the *Lobbying of Government Officials Act 2011* to give effect to the objects listed in the Overview above and consequential amendments.