

# ELECTION FUNDING AUTHORITY

## Joint Standing Committee on Electoral Matters - Inquiry into the 2008 Local Government Elections - Questions on Notice

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### Question 1

*The Committee welcomes the statement on page 2 of the Authority's submission that it would be pleased to provide the Committee with a proposal to address the issues raised in its submission. Could the Authority provide such a proposal to the Committee prior to the hearing on 26 August 2009, at which Mr Colin Barry, Chair, Election Funding Authority (EFA), will be giving evidence?*

### Response

A table is attached as Appendix 1 outlining the proposals that are considered appropriate to address issues identified with the legislation.

The document is not intended to establish policy but, rather, offer amendments to the current model that will remove the complexities which are confusing to stakeholders and which are proving difficult in the management and administration of the Act.

The Authority cannot be certain as to whether matters it considers to be inconsistencies within the current legislation were intended but is of the view that any such matters should be identified for consideration.

### Question 2

*The submission refers to advice given by the Crown Solicitor's Office to the EFA. Please indicate for the Committee the nature of this advice and what implications it has for the operation of the Election Funding and Disclosures Act 1981 (EFDA).*

### Response

The legal advice referred to in Point 1. of the Authority's submission refers to advice sought from the Crown Solicitor's Office in respect to clarification of the designating of persons to be official agents pursuant to part (g) of the definition of official agents in S4 of the Act.

The advice dealt with the Authority's capacity to retrospectively designate persons as official agents pursuant to S4 of the Act, and, the manner in which future designations may be made (whether by naming individual elected members or by class of persons).

On the basis of the advice, the Authority designated:

- any local government councillor who is an elected member within the meaning of the Act, but who for the time being is not also a candidate, to be the councillor's own official agent; and
- any elected member of Parliament who is an elected member within the meaning of the Act, who for the time being is not also a candidate, and who is not a member of a registered party within the meaning of that Act, to be the member's own official agent.

The advice received from the Crown Solicitor did give rise to further matters which were the subject of subsequent correspondence.

As a consequence of the advice from the Crown Solicitor's Office, the Authority exercised its capacity to designate persons as official agents pursuant to S4 of the Act but the Authority considers this to be an unsatisfactory arrangement and would prefer that elected members are empowered in the Act to appoint their own official agent.

### **Question 3**

*Page 10 of the EFA submission indicates that "it is the view of the Authority that the amended Act is in need of considered and comprehensive revision". In general, what needs to be done to improve the EFDA? Is it a matter of simplifying and clarifying the provisions recently added to the Act, or does the EFDA need a complete overhaul?*

#### **Response**

The Authority recognises that there needs to be two considerations in any revision of the Act.

Firstly, there needs to be a policy consideration of the preferred model. The Authority has not, at this time, given consideration to this aspect on the basis that the Authority recognises that the preferred model is the prerogative of the Government of the day. However, any model needs to be capable of being easily understood by those required to comply.

The second consideration is that the Act is capable of being interpreted so as to facilitate effective implementation and administration consistent within the intent of the policy. This is the aspect which the Authority has concerned itself with in suggesting that the Act is in need of considered and comprehensive review.

The original Act was created in 1981 and has been subject to a number of subsequent amendments. The amendments introduced in 2008 were far reaching and had the affect of imposing additional policy considerations on an existing model resulting in inconsistencies (whether intentional or not) within the legislation and complexities which continue to give rise to uncertainty in their implementation. These issues are not confined to within the amendments introduced in 2008 but, in many respects, their interrelationship with the provisions of the original Act.

The resultant inconsistencies and complexities have presented difficulties for the Authority in the administration and implementation of the Act, particularly in the education and management of stakeholders, and enforcement of many provisions of the Act.

The Authority considers that a rewrite of the Act would present an opportunity to revisit the policy objectives of the Act and whether those objectives are being met by the current legislation and, in doing so, also have regard to the ability of the Act to be easily understood by stakeholders.

### **Question 4**

*Submissions 17 and 32 reported conflicting advice being given in relation to the amendments to the Election Funding and Disclosures Act 1981 (EFDA). Page 8 of the EFA's submission indicates that "the precise wording" of the provision in the EFDA relating to the \$1,000 campaign threshold is "so ambiguous that it is difficult for its meaning to be accurately conveyed".*

- a. *Could the complexity of, and ambiguities in, many of the provisions in the EFDA have resulted NSW Electoral Commission (NSWEC) and EFA staff giving inconsistent or conflicting advice?*
- b. *In preparation for the elections of 13 September 2008, what training was provided to NSWEC and EFA staff with regard to the changes to the EFDA?*

## **Response**

The amendments to the legislation in 2008 were assented to on Monday 30 June 2008 with a commencement date of 10 July 2008. The “regulated period” for the 2008 local government election commenced on Monday 4 August 2008 with election day being Saturday 13 September 2008.

It is fair to say that the initial advice given to some stakeholders in respect to the interpretation of the amendments to the Act did subsequently alter as the practical examples identified greater complexity within certain provisions.

The short timeframe between the commencement of the amended Act and the commencement of the “regulated period” for the election offered little opportunity to comprehensively consider the range of practical issues likely to be raised or encountered by stakeholders. It needs to also be borne in mind that in many respects campaigning had commenced some months earlier and the urgency surrounding the implementation of the Act was self evident.

Any inconsistent or conflicting advice was not a result of a number of different staff members having differing interpretations in respect to any particular matter. The Authority had instituted strict protocols for minimising inconsistent advice. As issues emerged and stakeholders asked more specific questions it was necessary to obtain legal advice in order to provide guidance to stakeholders. ,

Following legal advice and further consideration of practical issues raised by stakeholders it was, in a few instances, necessary to revise previous advice or provide further clarification.

Help desk staff were available at the 2008 local government election as the initial contact point to deal with enquiries relating to funding and disclosure matters. This staff referred to a prepared manual to handle any enquiries. However, senior experienced staff were available to deal with any calls escalated beyond that initial contact point. Registered political parties had direct contact with senior staff.

## **Question 5**

*The Committee understands from the EFA submission that the EFDA enables a candidate to spend \$100,000 on a campaign without opening a campaign account, provided they are using their own, and not other people’s, money.*

- a. *Is this the EFA’s understanding?*
- b. *Are there any consequences of the changes to provisions relating to donations that appear to be unintended?*

## **Response**

In order for an individual to be captured by the Act as a “candidate”, the individual must do one of the following:

- nominate as a candidate at a State or local government election
- apply for, or be registered as, a candidate with the Authority
- accept a gift which is solely or substantially for a purpose related to being a candidate at a future election

In the circumstance that (in a particular disclosure period) an individual is using \$100,000 of their own money to incur electoral expenditure, has received no donations and has not been captured by the Act as a candidate, the legislation does not require that individual to:

- register (as a candidate) with the Authority
- appoint an official agent
- open a campaign account
- lodge a disclosure (for that particular disclosure period)

This situation could occur in the disclosure period from 1 July 2010 to 31 December 2010 in the lead up to the 2011 State general election due to be held on 26 March 2011.

To extend this example, if the same individual used a further \$100,000 of their own money to incur electoral expenditure in the following disclosure period 1 January 2011 to 30 June 2011, and still not have received any donations, the individual would:

- be captured by the Act as a candidate at the time they nominate as a candidate for the election
- be required to lodge a disclosure (that would require previous expenditure to be disclosed for a period linked to the candidate's individual circumstances)

However, the candidate would still not be required to:

- appoint an official agent
- open a campaign account

## **Question 6**

*What issues raised in the EFA submission are relevant to state elections, and could these issues pose problems for the conduct of the 2011 state election?*

### **Response**

It is considered that none of the issues raised are confined to local government elections and are, potentially, issues that could emerge at the 2011 NSW State general election.

However, the benefit of the experience at the 2008 local government election has provided the opportunity to be proactive in addressing these issues subject to any amendments to the legislation which may occur in the future.

Matter	Proposal	Comment
Definition of Candidate	To include a person who is nominated as a candidate at an election, a person who intends to accept gifts or incur electoral expenditure for a purpose related to a candidacy at a future election and a person applying for registration as, or registered as, a candidate.	<ul style="list-style-type: none"> <li>• To require a person to register who intends to accept a gift for a purpose related to a candidacy at a future election. Presently, the Act infers that registration is required from a person after they receive a gift.</li> <li>• To require a person to register who intends to incur electoral expenditure for a purpose related to a candidacy at a future election. These persons are not presently required to register.</li> <li>• The definition of candidate to be captured, in its entirety, in S4 of the Act. Some aspects of the extended definition are embodied in S84(2) and 96A(2) of the Act.</li> </ul>
Registration of Candidates	<p>Registration of a candidate to be automatic in those instances where a person nominates as a candidate at an election.</p> <p>Registration to be required in those instances where a person intends to accept gifts or incur electoral expenditure for a purpose related to a candidacy at a future election.</p> <p>A candidate remains registered as a candidate up to and following the election and until such time as the candidate’s agent (being either appointed or ex officio) finalises all financial management matters associated with the candidacy and complies with reporting obligations under the EF&amp;D Act.</p>	<ul style="list-style-type: none"> <li>• Registration of a candidate to be automatic in those instances where a person nominates at an election. Presently, persons who nominate at an election are required to separately register with the Election Funding Authority as a candidate.</li> <li>• It is not clear from the Act as to when a person ceases to be a candidate. Clarification in the Act would be beneficial and, in this regard, it is proposed that a “candidate” should continue to retain that status until such time as the candidate’s agent (being either appointed or ex officio) finalises all financial management matters associated with the candidacy and complies with reporting obligations under the EF&amp;D Act.</li> <li>• It is further proposed that the “candidate” would, if elected, assume the status of “elected member”, as defined in the Act, but would continue to hold the dual status of “candidate” until such time as the candidate’s agent (being either appointed or ex officio) finalises all financial management matters associated with the candidacy and complies with reporting obligations under the EF&amp;D Act.</li> </ul>

## Joint Standing Committee on Electoral Matters

## Appendix 1

<p>Register of Candidates</p>	<p>All references to a Register of Candidates are removed.</p>	<ul style="list-style-type: none"> <li>• The Register of Candidates has served no practical purpose and it is proposed that all references in the Act to the Register be removed.</li> <li>• The Register of Candidates presently is in force from polling day at one general election until the day before election day at the next general election.</li> <li>• In so far as the cessation of the Register may terminate the period for which a person is a candidate, there is uncertainty as to how this may impact on the person’s disclosure obligations.</li> <li>• For further information see comments under “Registration of Candidates”.</li> <li>• It is desirable that the period for which a person remains a candidate sits comfortably with the regime of six monthly disclosures.</li> <li>• As an alternative to a Register of Candidates, it is considered that a list of registered candidates should be available on the EFA website.</li> </ul>
<p>Appointment of Official Agent (in respect to Candidates)</p>	<p>A person must appoint an official agent as a requirement of registration as a candidate. The official agent takes office immediately upon appointment. The agent would remain as the agent until such time as they finalise all financial management matters associated with the election and complies with reporting obligations under the EF&amp;D Act, or, upon revocation, resignation or death.</p>	<ul style="list-style-type: none"> <li>• This would entail a candidate appointing an agent as a requirement of nomination at an election or, otherwise, upon registration as a candidate.</li> <li>• The nominated official agent would be required to accept the appointment (in writing) and complete the online training as a condition to their registration and, consequently, the registration of the candidate by whom they have been nominated.</li> <li>• This change would remove the present difficulties associated with the requirement for the candidate to appoint an agent prior to exceeding the \$1,000 threshold.</li> </ul>

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<p>Definition of Group</p>	<p>To include any group created pursuant to S81C of the PE&amp;E Act or S308A of the LG Act, two or more persons who intend to accept gifts or incur electoral expenditure for a purpose related to a group at a future election and two or more persons applying for registration as, or registered as, a group.</p>	<ul style="list-style-type: none"> <li>• To require a group to register who intends to accept a gift for a purpose related to a candidacy at a future election. Presently, the Act infers that registration is required from a group after they receive a gift.</li> <li>• To require a group to register who intends to incur electoral expenditure for a purpose related to a candidacy at a future election. These persons are not presently required to register.</li> <li>• The definition of group to be captured, in its entirety, in S4 of the Act. Some aspects of the extended definition are embodied in S84(2) and 96A(2) of the Act.</li> </ul>
<p>Registration of Groups</p>	<p>Registration of a group to be automatic in those instances where a group successfully forms at an election. A group remains registered up to and following the election and until such time as the group's agent (being either appointed or ex officio) finalises all financial management matters associated with the group and complies with reporting obligations under the EF&amp;D Act.</p>	<ul style="list-style-type: none"> <li>• Registration of a group to be automatic in those instances where a group successfully forms at an election. Presently, groups which form at an election are required to separately register with the Election Funding Authority as a group.</li> <li>• It is not clear from the Act as to when a group ceases to exist. Clarification in the Act would be beneficial and, in this regard, it is proposed that a "group" should continue to retain that status until such time as the group's agent (being either appointed or ex officio) finalises all financial management matters associated with the group and complies with reporting obligations under the EF&amp;D Act.</li> </ul>

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<p>Register of Groups</p>	<p>All references to a Register of Groups are removed.</p>	<ul style="list-style-type: none"> <li>• The Register of Groups has served no practical purpose and it is proposed that all references in the Act to the Register be removed.</li> <li>• The Register of Groups is an inherent aspect of the Register of Candidates and consequently is in force from election day at one general election until the day before election day at the next general election.</li> <li>• In so far as the cessation of the Register may terminate the period for which a group exists, there is uncertainty as to how this may impact on the group’s disclosure obligations.</li> <li>• For further information see comments under “Registration of Groups”.</li> <li>• It is desirable that the period for which a group exists sits comfortably with the regime of six monthly disclosures.</li> <li>• As an alternative to a Register of Groups, it is considered that a list of registered groups should be available on the EFA website.</li> </ul>
<p>Appointment of Official Agent (in respect to Groups)</p>	<p>A group must appoint an agent as a requirement of registration as a group. The agent takes office immediately upon appointment. The agent would remain as the agent until such time as they finalise all financial management matters associated with the election and complies with reporting obligations under the EF&amp;D Act, or, upon revocation, resignation or death.</p>	<ul style="list-style-type: none"> <li>• This would entail a group appointing an agent as a requirement of forming a group at an election or, otherwise, upon registration as a group.</li> <li>• The nominated official agent would be required to accept the appointment (in writing) and complete the online training as a condition to their registration and, consequently, the registration of the candidate by whom they have been nominated.</li> <li>• This change would remove the present difficulties associated with the requirement for the group to appoint an agent prior to exceeding the \$1,000 threshold.</li> </ul>



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Register of Official Agents	All references to a Register of Official Agents are removed.	<ul style="list-style-type: none"> <li>• The Register of Official Agents has served no practical purpose.</li> <li>• The Register of Official Agents presently is in force from election day at one general election until the day before election day at the next general election.</li> <li>• In so far as the cessation of the Register may terminate the period for which an official agent holds office, there is uncertainty as to how this may impact on the status of the official agent and their disclosure obligations.</li> <li>• It is desirable that the period for which an official agent holds office sits comfortably with the regime of six monthly disclosures.</li> <li>• As an alternative to a Register of Official Agents, it is considered that a list of registered official agents should be available on the EFA website.</li> </ul>
Register of Party Agents	All references to a Register of Party Agents are removed.	<ul style="list-style-type: none"> <li>• The Register of Party Agents has served no practical purpose.</li> <li>• The Register of Party Agents presently is in force on a continuous basis which is inconsistent with the treatment of other registers under the Act having limited lives.</li> <li>• As an alternative, a list of party agents should be available on the EFA website.</li> </ul>
Appointment of Official Agent (in respect to Elected Members)	To provide elected members who are not a member of a registered party with the capacity to appoint their own agent. On becoming an elected member it is proposed that the person who is, at that time, the official agent for the elected member in their capacity as a candidate would automatically become the official agent. The official agent would remain as the official agent until such time as their appointment is revoked or upon resignation or death.	<ul style="list-style-type: none"> <li>• The EF&amp;D Act does not presently enable an elected member who is not a member of a registered party to appoint their own agent.</li> <li>• This category of persons is presently required to have an official agent “designated” by the Election Funding Authority.</li> <li>• In the absence of a person being nominated by the elected member for this appointment, the Authority will designate the elected member to be their own agent.</li> <li>• It is considered that these elected members should have the capacity to appoint their own official agent.</li> </ul>

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Refund of Nomination Fee	<p>A candidate would only be eligible to receive the refund of their deposit at an election on the basis that a disclosure(s) was received for the reporting period in which election day occurred. It is proposed that this initiative be considered in conjunction with the suggestion that all candidates/groups receive a refund of their nomination. (This might include consideration of an increase in the nomination fee.)</p>	<ul style="list-style-type: none"> <li>This would require affected nomination provisions and prescribed forms within the PE&amp;E and LG Acts (and possibly Regs) to be amended.</li> </ul>
Offences	<p>S96I of the EF&amp;D Act presently provides that a person who does any act knowing it is unlawful under Divisions 3 and 4 of Part 6 of the Act is guilty of an offence. The aspect of “knowing” presents a significant barrier to successful prosecution and might be considered for review.</p>	<p>Unlawful acts under Divisions 3 and 4 of Part 6 include, but are not limited to, accepting reportable political donations without appointing an official agent, accepting gifts in kind valued in excess of \$1,000, and accepting anonymous donations.</p> <p>The EFA is advised that S96I requires <i>actual</i> knowledge of the unlawful activity not <i>constructive</i> knowledge. For example, it would not be enough to establish that a candidate or official agent had attended seminars or training or been issued with guidelines or other advisory information</p>