THE NATIONALS for Regional NSW

17 August 2012

Mr Jonathon Elliott
Inquiry Manager
Joint Standing Committee on Electoral Matters
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Dear Mr Elliott

I write in response to your letter of 26 July setting out further questions on behalf of the Joint Standing Committee on Electoral Matters.

I am pleased to be able to provide the Committee with responses to those questions as detailed below:

> *1. The Commission has argued in its report on the 2011 Election (pp190—193) that ideally primary legislation should set out the essential electoral principles — leaving the more detailed operational matters to the Commission and as necessary subordinate legislation.*
>
> *Your submission expresses concerns that this would diminish Parliamentary oversight.*
>
> *Would you be more comfortable with the Electoral Commission's model if parliamentary oversight was increased by giving this Committee direct oversight of the Commission?*

We consider that it is important to distinguish in this regard between prospective and retrospective oversight of the electoral process. While we would support the Joint Standing Committee on Electoral Matters having responsibility for oversight of the Electoral Commission (and in this regard we give substantial weight to the Commissioner's expressed concern at the Committee's public hearings that he does not have anyone who he formally reports to) this only addresses the issue of retrospective oversight of the electoral process. The concerns expressed in our original submission relate to the prospective oversight of electoral processes and procedures, which in our view can only be achieved by dealing with such matters as far as possible through primary rather than subordinate legislation.

> *2. The Commission has suggested in its submission on the Election Funding, Expenditure and Disclosure Act that the Act be subject to root and branch reform (p71). Would you agree with this assessment?*

There is no doubt that the ad-hoc manner in which the *Election Funding, Expenditure and Disclosures Act* has been amended over time, and most particularly in recent years, has created unnecessary complication and inconsistencies within the Act. For that reason the more fulsome any future reform of the Act is, the more likely it would be in our view to achieve a consistent and efficient regime for the regulation of campaign and other political finances in New South Wales.

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3. *Would you have the same concerns about a principles-based legislative approach to this Act as you have to the PE & EA Act?*

The concerns we have raised in relation to the *Parliamentary Electorates and Elections Act* being reduced to a set of guiding principles supplemented by more voluminous subordinate legislation are expressed in the context of the far-reaching implications of the Act's provisions for the process of electing Members of Parliament. In our view, such a critical and intrinsic part of the democratic system should not be delegated away from the legislature. On the other hand the *Election Funding, Expenditure and Disclosures Act*, while having some bearing on the electoral process, affects it in a more indirect manner. For that reason, we would have less concern about the use of subordinate legislation in developing a new political finance regime under the *Election Funding, Expenditure and Disclosures Act* than the application of that same approach to the *Parliamentary Electorates and Elections Act*.

4. *In its report on the 2011 Election, the Commission suggests the processes for the Court of Disputed returns should be modernised. Do you have any views on this?*

Our recent experience at the Court of Disputed Returns, while inconvenient and frustrating at the time, nonetheless provides us with a high degree of confidence in the process as it currently stands. There are two features that are essential in any such process: confidence that the right outcome has been reached; and a quick resolution to the uncertainty facing all involved (including the Parliament itself). In our view, both these matters were adequately addressed by the Court of Disputed Returns.

Confidence in the outcome is in our view promoted by having a senior judicial officer appointed to preside over proceedings. Such confidence would in our submission be diminished by allowing proceedings of this nature to go ahead before anyone other than a judge of the Supreme Court.

As to the issue of the timeliness of proceedings, the period in which the Hanson case was resolved compares favourably to similar proceedings before the Administrative Decisions Tribunal in relation to local government elections. The court's final orders in the Hanson case were delivered less than two and a half months after the return of the writ for the election. In contrast, the ADT process for disputes concerning local government elections can take almost two years. (In *Jeffery & ors v Roberts* [2002] NSWADT 57 the decision to dismiss a councillor from office was handed down more than 21 months after the declaration of the poll for the election that was complained about. It was a further 12 months before the Supreme Court determined an appeal by the person dismissed.) While it is acknowledged that had there still been matters in issue rather than the petition being dismissed by consent the Hanson case may have taken a little longer to resolve, but the distinction between the two processes is nevertheless quite stark.

In the interest of timely resolution of disputes, we would also support the continuation of a period not longer than 40 days from the return of the writ in which a petition must be lodged.

To deter frivolous or vexatious disputes, we believe the power of the Court to award costs against an unsuccessful party must be maintained. However, the discretion for the Court to recommend (or perhaps even order) that costs be paid by the Crown is also essential, for example in the event a respondent party's election is declared void due to maladministration by electoral officials or misconduct by another third party beyond the respondent's control.

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While we are generally supportive of the current process, it must be noted that there was some confusion during proceedings as to what powers the judge had, given that he was sitting as the Court of Disputed Returns and not as the Supreme Court. It may therefore be procedurally beneficial for the Supreme Court Rules and the laws of evidence to be applied to the Court of Disputed Returns, with a discretion granted to the judge to dispense with them in certain circumstances.

Once again, I would like to thank the Committee for considering our submissions, and indicate that I remain willing to answer any further questions that the Committee may consider to be of benefit in its ongoing consideration of these matters.

Yours sincerely

Ben Franklin
State Director

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