Submission No 3

THE FINAL REPORT OF THE EXPERT PANEL – POLITICAL DONATIONS AND THE GOVERNMENT'S RESPONSE

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JOINT STANDING COMMITTEE ON ELECTORAL MATTERS

Inquiry into the Final Report of the Expert Panel – Political Donations and the Government's Response

Submission by the NSW Electoral Commission

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Submission by the NSW Electoral Commission

Introduction

1. The NSW Electoral Commission (the Electoral Commission) welcomes this opportunity to make a submission to the Committee on this vital inquiry. We acknowledge the important work undertaken by the Expert Panel – Political Donations (the Expert Panel) and were pleased to have the opportunity to consult with it during the course of its work.

2. The work of the Expert Panel arose from deep public concern about the nature and extent of political donations, and their influence on the decision-making processes of public officials. Its work and that of the Committee are essential components in restoring the confidence of the NSW public in these decision-making processes. Accordingly, the Electoral Commission is committed to working with the Committee, other agencies and stakeholders at large to develop a robust, consistent and effective campaign finance regime in NSW.

3. This submission is divided into the following three parts:
    1. The Electoral Commission's comments on each of the recommendations made in the Final Report by the Expert Panel and the Government's response;
    2. Those recommendations of the Expert Panel that the Electoral Commission submits are of key importance in ensuring a comprehensive and effective scheme of regulating election campaign finance in NSW; and
    3. The manner in which the Electoral Commission has responded to, and implemented the Expert Panel's recommendations to date.

4. This submission is on behalf of the NSW Electoral Commission. The views expressed herein are those of the Electoral Commission and do not represent the views of the NSW Government or the responsible Minister, in this case the Premier.

Part 1: Recommendations made by the Expert Panel and the Government's response

5. The Electoral Commission supports the recommendations made by the Expert Panel with few exceptions. We maintain that the greatest single challenge to successfully implementing these recommendations is the associated legislative change, and this must be achieved by way of a comprehensive review of the *Election Funding, Expenditure and Disclosures Act 1981* (the EFED Act). We note that some recommendations would also require, if put into effect, amendment to the *Parliamentary Electorates and Elections Act 1912* (the PEE Act); this could be addressed most effectively, in our view, by way of a review to consolidate the EFED Act and PEE Act, into one piece of electoral legislation, as previously has been recommended by the Committee.[1]

6. We welcome the Government's in-principle support of all but one of the Expert Panel's recommendations, and note the Government's undertaking to consult with the Electoral Commission in relation to implementing a number of the Expert Panel's recommendations. The Electoral Commission is committed to continuing its work with the Government to ensure NSW has a workable and robust scheme for regulating election campaign finances. Government consultation with key stakeholders including the Electoral Commission will be a crucial factor in ensuring the Expert Panel's recommendations are implemented fully and effectively.

7. Following the release of the Expert Panel's report, the Electoral Commission assessed each recommendation and provided a high level commentary to the Government. Since early 2015 the Electoral Commission has been implementing a number of the recommendations. Further commentary on how the Electoral Commission has implemented the Expert Panel's recommendations is located in Part 3 of this submission.

8. A detailed commentary on each of the Expert Panel's recommendations can be found in Appendix 1 to this submission.

[1] See Joint Standing Committee on Electoral Matters, *Review of the Parliamentary Electorates and Elections Act 1912 and the Election Funding, Expenditure and Disclosures Act 1981*, May 2013.

Part 2: Key recommendations of the Expert Panel

9. Whilst the Electoral Commission has considered the suite of recommendations made by the Expert Panel holistically, we would suggest that from the recommendations a number of important themes and areas for reform have emerged. Thus, the following areas are of vital importance in building effective election campaign finance regulation in NSW:
    - a comprehensive review of the EFED Act;
    - online election funding, expenditure and disclosure management system and improved information to stakeholders;
    - the introduction of associated entities;
    - internal governance and auditing of political parties;
    - abolition of party agents and official agents; and
    - increased enforcement options for the Electoral Commission.

10. Each of these areas will now be discussed in more detail.

A comprehensive review of the EFED Act (Rec 1)

11. In its current form, the EFED Act is effectively self-defeating, in that it impedes compliance by political participants. Successive waves of and major reforms to the EFED Act in recent years has resulted in an unbalanced and convoluted Act, which is difficult to understand. The series of amendments has done little to modernise the expenditure, funding and disclosure regime, which is paper-based and fails to use current business practices.

12. Since 2008 the provisions in the EFED Act have been subject to no fewer than eight substantial amendments, as follows:
    - In 2008 the *Election Funding (Political Donations and Expenditure) Amendment Act 2008* introduced:
        - 6 monthly disclosure periods;
        - ongoing disclosure obligations for elected members;
        - the requirement for all candidates, groups and elected members to have an official agent;
        - a standard reporting threshold for political donations of $1,000;
        - a requirement for candidates, groups and elected members with campaign finances in excess of $1,000 to have a campaign account;
        - unlawful indirect campaign contributions over $1,000;

- the requirement for entities making donations to have an ABN or other business number;
- unlawful anonymous reportable political donations; and
- the requirement for the disclosure of reportable loans

- In 2009 the *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009* introduced a ban on political donations by property developers.
- In 2010 the *Election Funding and Disclosures Amendment Act 2010* ('the 2010 amendments'):
  - changed the disclosure periods from six-monthly to twelve-monthly;
  - introduced electoral communication expenditure as a subset of electoral expenditure;
  - introduced caps on political donations and electoral communication expenditure (except for local government elections and local government councillors);
  - introduced the Election Campaigns Fund for the purpose of reimbursing eligible parties and candidates a proportion of electoral communication expenditure;
  - abolished the Political Education Fund and introduced the Administration Fund (for Parliamentary parties and independent MPs) and the Policy Development Fund (for non-Parliamentary parties);
  - expanded the categories of prohibited donors to tobacco, liquor and gambling entities;
  - introduced third-party campaigners for State elections;
  - introduced a penalty notices scheme for strict liability offences; and
  - introduced compulsory investigation powers for the purposes of enforcement.
- In 2012 the *Election Funding, Expenditure and Disclosures Amendment Act 2012* introduced a ban on all political donations other than those from individuals on the electoral roll, and required electoral communication expenditure incurred for a State election campaign by an affiliated organisation of a party to be combined with the expenditure of the party for the purposes of the applicable cap on expenditure by the party. These amendments were later found invalid by the High Court in the case of *Unions NSW & Ors v State of New South Wales* [2013] HCA 58 (*Unions NSW*).

- In 2013 the *Election Funding, Expenditure and Disclosures Amendment (Administrative Funding) Act 2013:*
    - increased the amounts for which registered parties are eligible to be paid for administrative expenditure incurred;
    - enabled quarterly payments from the Administration Fund; and
    - required payments from the Administration and Policy Development Funds to be paid within 6 weeks of the Electoral Commission receiving a claim.
- In 2014 the *Election Funding, Expenditure and Disclosures Consequential Amendment Act 2014* repealed those provisions found to be invalid in *Unions NSW*, and made a number of other amendments that were consequential to the invalid provisions.
- In 2014, the *Electoral and Lobbying Legislation Amendment (Electoral Commission) Act 2014*:
    - abolished the Election Funding Authority of NSW (the Authority);
    - constituted a new NSW Electoral Commission consisting of a retired Supreme Court Justice as Chair of the Commission, the Electoral Commissioner and a person with financial and/or auditing expertise;
    - conferred the duties, functions and authorities of the Authority on the Electoral Commission;
    - expanded the enforcement powers and functions of the Electoral Commission under the EFED Act to investigate breaches of the PEE Act and *Lobbying of Government Officials Act 2011* (the LOGO Act); and
    - introduced express objects of the EFED Act.
- Also in 2014, the *Election Funding, Expenditure and Disclosures Amendment Act 2014:*
    - introduced a one off special disclosure period that required the disclosure of reportable political donations received up to 1 March 2015;
    - reduced caps on political donations and electoral expenditure in relation to the 2015 State election to the levels applicable to the 2011 State election;
    - expanded the categories of people who can make political donations to those with identification that is acceptable to the Electoral Commissioner;
    - replaced the scheme of public funding for the 2015 State election with a scheme that paid eligible parties and candidates the lesser amount of the following - a certain number of dollars per first preference vote received by the eligible

party's endorsed candidates or by the eligible candidate, or the amount of actual campaign expenditure incurred by the eligible party and its endorsed candidates or the eligible candidate;

- introduced two new categories of electoral communication expenditure;
- introduced an indictable offence provision applicable to those who enter into a scheme to circumvent the donation and expenditure requirements under the EFED Act;
- increased the maximum penalty amounts for most offence provisions;
- extended the prospective limitation period for the commencement of proceedings from 3 years to 10 years;
- increased the amounts payable to eligible parties from the Administration Fund and Policy Development Fund; and
- introduced quarterly advance payments from the Administration Fund.

13. The above list shows the sheer scale of changes made to the EFED Act; not only have successive Governments implemented change, but individual Premiers have made such changes keynotes of their tenure.

14. It appears that in most cases the objective of the amendments was to improve the regulation and administration of election campaign finances in NSW; however, in some cases the amendments were in response to allegations of corruption and misconduct. These successive changes have resulted in an Act which has become overly complex and impractical, as it attempts to be a 'one size fits all' system for stakeholders. We now have a scheme wherein many stakeholders have difficulty understanding and complying with the requirements, with the available enforcement options so limited that we experience great difficulty in engendering compliance and enforcing breach provisions.

15. The deficiencies in the EFED Act affect compliance in a number of ways. First, non-compliance occurs where participants find it difficult to understand exactly what is required of them under the EFED Act. The vast majority of participants want to comply with their statutory obligations. Often, however, the content and scope of those obligations cannot be easily determined.

16. Second, inconsistencies and omissions within the EFED Act have led to failed enforcement attempts; these not only hamper the EFED Act's deterrence effect, but also create negative perceptions of the Electoral Commission as a regulator. If it is known that the Electoral Commission cannot enforce the EFED Act's provisions, some participants will deliberately flout the law.

17. Third, due to outdated offence provisions, participants are avoiding liability for responsibilities and obligations that should rightly fall on them. Instead, the position of "agent" has become a scapegoat for others' misdeeds. Finally, offence provisions and penalties - both the range and type of penalties - do not reflect the particular environment and culture of modern elections and campaign finance. Soft penalties and unattainable burdens on the prosecution fail to support compliance and achieving the objectives of deterrence, protection and punishment.

18. For example, in 2010 the Authority abandoned prosecutions of elected members and candidates due to inconsistent provisions concerning the role of the official agent and the duty to lodge declarations of disclosures. This inconsistency meant that the Authority could not prove who was responsible for the breach.

19. In 2012, the Authority was forced to abandon prosecutions of people who had failed to lodge declarations, due to the inconsistent use of the terms ‘declaration’ and ‘disclosure’ in the relevant provisions. This inconsistency meant that whilst a declaration of disclosures had to be lodged by a particular date, a declaration that did not contain disclosures had no time limit for lodgement. On both occasions, legislative amendment was required to enable the Authority, and now the Electoral Commission, to prosecute such breaches in the future (i.e., the amendments were not retrospective).

20. As a further example, whilst certain offence provisions apply to parties (such as s 96I of the EFED Act[2]), because many parties are unincorporated associations, there are significant obstacles in the way of prosecuting them in their own right. Section 112 of the EFED Act

[2] Under s 96I(1), a person who does any act that is unlawful under Div 3, 4 or 4A of the EFEDA is guilty of an offence if they were, at the time of the act, aware of the facts that result in it being unlawful. Maximum penalty is 400 penalty units, imprisonment for 2 years, or both; under s 96I(2), a person who fails to keep for at least 3 years (a) a record made by the person under s 96C relating to a reportable political donation, or (b) any other record that is required by the regulations to be kept by the person for that period, is guilty of an offence. Maximum penalty: In the case of a party, 200 penalty units or in any other case, 100 penalty units.

allows for proceedings under the EFED Act to be instituted against an officer(s) of the party as a representative(s) of the members of the party. However, this provision has never been relied upon by the Authority or the Electoral Commission. First, it would be extremely difficult, if not impossible, to prove a party's intent; and second, if the party is not a legal entity, each party member would have standing in such a proceeding. This situation results in the wrong people being held accountable for breaches of the EFED Act - often the party agent bears sole responsibility, which does little to deter parties from breaching the legislation.

21. In 2012 the Committee held an inquiry into the *Review of the Parliamentary Electorates and Elections Act 1912 and the Election Funding, Expenditure and Disclosures Act 1981* to which the Electoral Commissioner submitted that a comprehensive review of the legislation was critical.[3] In the May 2013 Report of that Inquiry, the Committee recommended such a comprehensive review with a view to incorporating both Acts into a holistic, modern Electoral Act. In its response to the Committee's report, the Government supported this and others of the Committee's recommendations.

22. In 2013/14 the Electoral Commission worked with the Department of Premier and Cabinet (DPC) and the Parliamentary Counsel's Office (PCO) to reform both the PEE Act and the EFED Act with the object of creating a consolidated, consistent and simplified Electoral Act. Achieving this object will go a long way to increasing compliance with the legislation. Due to the enormity of the task, and constraints imposed by the 2015 State General Election, review of the EFED Act was suspended so that focus could be redirected to the PEE Act ahead of the election. Once the review of the PEE Act was finalised, DPC intended to resume our review of the EFED Act with the aim of incorporating the 'new' campaign finance provisions into the Electoral Act. At the time of writing this submission the revised Electoral Act that came from the review of the PEE Act has not yet been introduced to Parliament and the review of the EFED Act was never revived.

23. There is no doubt that should the implementation of the Expert Panel's recommendations be achieved by a further series of ad hoc amendments, the election campaign finances scheme will only become more incoherent and ineffective. Indeed, success will be

[3] NSWEC submission to the Committee, see pp 69-100 on the issues with the EFED Act: http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/E30620BFE58F1C13CA257A2200004A30

dependent upon a comprehensive review of the EFED Act and PEE Act to ensure NSW has legislation which is contemporary, cohesive and comprehensible.

An online election funding, expenditure and disclosure management system and improved information to stakeholders (Rec 23)

24. The Expert Panel recommended the Electoral Commission replace its paper-based disclosures with an online disclosure lodgement system as soon as possible. The Electoral Commission agrees with the Expert Panel's recommendation and believes that an online disclosure lodgement system will be of great benefit to stakeholders, as well as the Electoral Commission.

25. In our view, however, an online disclosure lodgement system does not go far enough. Rather, an election funding, expenditure and disclosure management system would increase the currency of available information, while allowing stakeholders to manage most, if not all, contact with the Electoral Commission through an online system. This would increase transparency and would enable stakeholders to do the following:

    - apply for registration of candidates, groups and third-party campaigners;
    - apply for amendments to the Register of Candidates and Register of Third-party campaigners;
    - update and maintain relevant contact information with the Electoral Commission;
    - receive electronic notifications and updates from the Electoral Commission regarding obligations and newsworthy items;
    - log enquiries with the Electoral Commission;
    - keep and maintain records of political donations and electoral expenditure, as well as other relevant income (e.g., self-funding) and expenditure (e.g., administrative expenditure);
    - produce receipts for major political donors;
    - produce disclosure information and submit that information to a registered auditor for their review;
    - lodge disclosures with the Electoral Commission;
    - make claims for payment from the Election Campaigns Fund, Administration Fund and Policy Development Fund;
    - track the status of a stakeholder's disclosure or claim, as to whether it has been reviewed by the Electoral Commission; and

- receive requests for further information by the Electoral Commission for the purposes of the compliance audit.

26. Such a system could also allow major political donors to keep records, for the purpose of disclosure, of political donations made and receive notifications from the system when the disclosure lodgement period has commenced. It would greatly improve the way the Electoral Commission provides information to its stakeholders by providing current and relevant information electronically, reflecting the reality of contemporary life in which most people are comfortable with receiving important messages by email and/or messages through their smart device.

27. The benefits of such a system abound, including that communications between stakeholders and the Electoral Commission are incorporated into the system; stakeholders can use the system to manage all of their political donations and electoral expenditure ensuring proper records are kept (resulting in a higher likelihood that full and accurate disclosure will be made); and parties and candidates can keep track of donations received across NSW. In addition, a corollary of the online system would be the easy and timely transition of funding and disclosure information onto the Electoral Commission's website. Currently the Electoral Commission publishes disclosure information on its website within 2-3 months of the lodgement due date. An online system would likely mean the disclosure information could be published more promptly, possibly in 'real time'.

The introduction of associated entities (Rec 30)

28. As the Expert Panel outlined in its report, the EFED Act does not contain any express provisions to capture 'associated entities' of political parties. If an associated entity makes a reportable political donation it would have a disclosure obligation as a major political donor. If an associated entity incurs more than $2,000 in electoral communication expenditure during the capped expenditure period for a State election it would have a disclosure obligation as a third-party campaigner. However, major political donors and third-party campaigners do not have an ongoing disclosure obligation, such that an associated entity of a political party only has a disclosure obligation in relation to the reporting period in which the donation was made or expenditure was incurred.

29. If the associated entity were a major political donor it is only required to disclose reportable political donations made in the 12-month reporting period. Small political donations and

electoral expenditure incurred are not required to be disclosed. We also note that, prior to the 2010 amendments, major political donors were required to disclose political donations they had received which were used to make political donations to others. As this requirement no longer exists, where an associated entity receives donations there is no requirement on it to disclose as a major political donor the source of the funds used to make the donation.

30. If the associated entity incurred electoral communication expenditure and is a third-party campaigner, it is only required to disclose such expenditure that was incurred in the capped expenditure period. Therefore, electoral communication expenditure incurred outside that capped period is not disclosed. Even though third-party campaigners are required to disclose political donations made and received, they are only required to disclose such donations for the reporting period in which the expenditure was incurred. So, if an associated entity raises funds over a number of years and subsequently uses those accumulated funds to incur electoral communication expenditure prior to an election, only those donations received by the associated entity during the reporting period will be disclosed.

31. The Electoral Commission agrees with the Expert Panel's contention that the absence of an ongoing and comprehensive disclosure obligation for associated entities of political parties is out of step with other jurisdictions in Australia and creates potential loopholes for donations to be made and received, and expenditure to be incurred, which are not then disclosed. As these entities are closely related to political parties, the donations and expenditure of these entities should be properly disclosed, as is the case for parties, on an annual basis.

32. The introduction of associated entities would require amendment to the EFED Act and possibly also the PEE Act. One option for consideration is that political parties advise the Electoral Commission of the parties' associated entities at the time of the party's registration under the PEE Act, and on an ongoing basis at the time the party applies to the Electoral Commission to have its registration continued. This way the names of those associated entities would form part of the party's registration process with the Electoral Commission. Registration of the party could therefore be dependent, in part, on the party providing an accurate list of associated entities.

33. The EFED Act would also require amendment to provide for disclosure obligations for associated entities and requirements for how such entities keep and maintain proper records.

The internal governance and auditing of political parties (Recs 33 to 38)

34. The Electoral Commission strongly supports the Expert Panel's recommendations regarding the introduction of governance and accountability obligations on political parties and the Electoral Commission's regulation of same. As is the case with other organisations which receive public funds, political parties which receive funding under the EFED Act should be accountable for how those funds are spent. Further, information on party funding, reporting and associated governance standards should be made available for public scrutiny.

35. The current provisions of the EFED Act impose very few obligations on parties in regard to their governance and accountability standards. This deficiency is made more problematic as most parties are unincorporated entities, and not therefore subject to the reporting and governance requirements of corporations and incorporated associations.

36. Further, it is often the party agent of the party who is liable under the EFED Act, even though it may be the case that the party's members or office bearers failed to act in a way which promoted the party's compliance with the EFED Act. In our experience, parties choose people of varying levels of seniority to be a party agent. In some cases the party agent may be a person who has little to no control over the procedures and processes of the party, let alone the party's governance, and this person has the responsibility for making true and accurate disclosure of the party's donations and expenditure.

37. Parties currently bear no responsibility for their endorsed candidates and elected members, despite the fact that the party's public funding is based on those elected members and the number of first preference votes received by those candidates. If an endorsed elected member or candidate fails to comply with their requirements, the party will nevertheless receive funding in respect of that person.

38. The EFED Act also fails to accommodate the fundamental differences between major parties and minor parties (including local government parties). The 'one size fits all' approach of the EFED Act means that small parties are subject to the same requirements as the major parties even though many do not receive any public funding and have far fewer resources and

capabilities than major parties. In addition, the EFED Act fails to acknowledge the different internal structures and governance of the major parties. Some of the major parties are somewhat decentralised, in that the campaign workers at the local level are given authority by the party to manage the local campaign's finances. In the case of other parties, the local campaigns are not given such authorisation and the head office of the party maintains strict control over all of the party's income and expenditure.

39. The implementation of the Expert Panel's recommendations regarding the internal governance and accountability of parties needs to consider that the requirements of the parties should be rigorous but at the same time flexible, so as to best fit the different ways parties operate. We are not of the view that there should be a single approach to the way a party should be governed and so the governance and accountability standards of parties should reflect the different approaches of the various parties.

40. If the legislation introduces governance and accountability standards for political parties; empowers the Electoral Commission to regulate parties' standards and compliance with these requirements; and introduces appropriate enforcement options for non-compliance, the Electoral Commission is well placed to undertake the role as regulator of political parties and monitor their internal governance standards. As will be outlined in Part 3 of this submission, the Electoral Commission has already taken a number of steps to implement some of the Expert Panel's recommendations including the regulation and auditing of political parties.

The abolition of party agents and official agents (Rec 40)

41. The Electoral Commission recommended in its submission to the Expert Panel, and has previously submitted to this Committee, that the role of agents should be abolished. We argue that those who stand for public office and those who are elected to Parliament (or local government) should be responsible and accountable for their expenditure, funding and disclosure obligations.

42. Currently the EFED Act requires all local government candidates and groups, and all independent State election candidates and groups, to appoint an official agent. In the case of endorsed State election candidates, groups and elected members, the party agent of the party is the official agent of those candidates, groups and elected members.

43. The Electoral Commission understands the policy objective of requiring each candidate, group and elected member to have an agent so as to keep them at arm's length from the campaign finances. However, as independent MP's and local government councillors are not required to appoint an agent, the Electoral Commission has designated each person to be their own agent and, therefore, the policy objective has not been achieved in these circumstances.

44. The practical implications of the requirement for candidates and groups to appoint an agent are that many candidates and groups are put in the position of having to find a person who is willing to take on the role of agent even though the candidate or group member may be willing to be his or her own agent. Often the appointed agent is a relative or friend of the candidate or group and that person is then burdened with the responsibility to manage and disclose the candidate's or group's election campaign finances, even though the agent may be in reality far removed from the campaign finances. In our experience most candidates and groups appoint an agent only because they are told they have to, and they would rather be responsible for their own campaign finances.

45. On the other hand, there are endorsed candidates, groups and elected members at the State level who have the party agent as their official agent and are protected from (almost all) legal liability for acts or omissions that are unlawful under the EFED Act. It is our view that those who seek to represent their constituents in Parliament must be properly subject to the legal requirements for funding and disclosure and should be held liable where a breach has occurred.

46. We have discussed above our views on the difficulties party agents have in complying with the disclosure requirements on behalf of a party. We strongly support the related Expert Panel's recommendation (Rec 41) that a senior office holder of a party is responsible for making the requisite disclosures on behalf of the party and that senior office holders of the party be responsible and accountable for the party's finances.

Increase enforcement options for the Electoral Commission (Recs 43 to 48)

47. The Electoral Commission supports a review of the current monetary and imprisonment penalties under the EFED Act. For offences against the EFED Act, the maximum fine which can be imposed by the local court is $4,400. This amount does not reflect the gravity of the conduct constituting the offence, and is not a sufficient deterrent. It is true that proceedings

can be brought in the Supreme Court where the maximum monetary penalty for certain offences is $22,000; however, the local court is the more appropriate jurisdiction for most summary offences.

48. The Electoral Commission submits that the EFED Act must include a range of enforcement options for breaches of its provisions. The current provisions do not promote compliance in that enforcement options are limited and often do not 'fit the crime'; do not oblige parties, candidates, etc., to rectify their actions or alter their conduct; and do not assist stakeholders in understanding their obligations and learning how better to comply with their obligations. We propose that enforcement options under the EFEDA should consist of the following:
    - warnings and cautions;
    - fines;
    - enforceable undertakings;
    - mandatory compliance agreements;
    - suspension or cancellation of a party's registration;
    - imprisonment;
    - withholding public funding to a party, candidate or elected member; and
    - withholding an elected member's pension.

49. Most offences under the EFED Act require the prosecution to prove, beyond reasonable doubt, that the accused was 'aware' of the circumstances constituting each element of the offence, i.e., that the accused acted knowingly. This requirement impedes enforcement of the legislation for two main reasons. First, it is difficult to prove awareness when dealing with regulatory offences; and second, it is difficult to prove awareness when the accused is an agent who is responsible for the acts and omissions of others. Prosecutions under the EFED Act have been withdrawn or abandoned after advice received from the Crown Solicitor's Office (CSO) that there was insufficient evidence to prove 'awareness' on the part of the accused.

50. To increase deterrence, and to support the Electoral Commission's enforcement function, we recommend the introduction of strict liability offences for certain (although not all) breaches of the legislation. A strict liability offence does not require proof of fault (or in our case 'awareness'); however, a defence of 'honest and reasonable mistake of fact' is available to those charged with strict liability offences.

51. We note that the appropriateness of strict liability offences in certain circumstances has been considered in a number of jurisdictions. In its 2002 Report *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, the Commonwealth Parliament's Standing Committee on the Scrutiny of Bills enunciated principles relating to the merits of strict liability and criteria for its application which note that strict liability may be appropriate in the following instances:

    - where it is necessary to ensure the integrity of a regulatory regime such as, for instance, those relating to public health, the environment, or financial or corporate regulation;
    - where it has proved difficult to prosecute fault provisions, particularly those involving intent; and
    - where its application is necessary to protect the general revenue.[4]

52. In 2006, the NSW Parliament's Legislation Review Committee's Discussion Paper *Strict and Absolute Liability* commented that strict and absolute offences are generally:

    > …of a regulatory nature and where it is particularly important to maximise compliance (e.g., public safety or protection of the environment).[5]

53. Finally, the ACT Attorney General in 2008 gave a similar statement of criteria to the ACT Standing Committee on Legal Affairs, with the following addition:

    > In particular, where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental, or fault, element can justifiably be excluded. The rationale is that professionals engaged in [the matter being regulated] as a business, as opposed to members of the general public, can be expected to be aware of their duties and obligations.[6]

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[4] *Application of Absolute and Strict Liability Offences in Commonwealth Legislation,* Sixth Report of 2002, Senate Standing Committee on the Scrutiny of Bills at 284, 26 June 2002. Reviewed at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Reports/2002/-/media/Committees/Senate/committee/scrutiny/bills/2002/pdf/b06.ashx

[5] *Strict and Absolute Liability: Discussion Paper*, Legislation Review Committee, Parliament NSW Legislative Assembly, [Sydney, NSW]: The Committee, 2006. Reviewed at: www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/88212f7a0a84b436ca2571870022bc55/$FILE/Strict%20and%20Absolute%20Liability%20Discussion%20Paper.pdf

[6] *Strict and Absolute Liability Offences,* Report 7, ACT Standing Committee on Legal Affairs at 8 February 2008. Reviewed at http://www.parliament.act.gov.au/__data/assets/pdf_file/0010/380359/07StrictLiability.pdf

54. We maintain that the community is entitled to expect elected members, parties and other political participants to be aware of their duties under the EFED Act and to be held accountable for breaches of those duties.

Part 3: How the Electoral Commission has responded to and implemented the Expert Panel's recommendations

55. Shortly after the Expert Panel released its report, the Electoral Commission commenced a review of its processes, procedures, policies and structure [Rec 48]. The main objective of this review was to develop a Branch capable of responding to the challenges – both old and new - of the campaign finance scheme, with an increased focus on regulation rather than administration [Rec 47].

56. In January 2015 the Electoral Commission provided a high level response to the Government in relation to each of the Expert Panel's recommendations. The Electoral Commission is pleased that the Government has provided in principle support to the majority of the Expert Panel's recommendations and has indicated further consultation with the Electoral Commission for their implementation.

57. The Electoral Commission has almost finalised a restructure of its Funding, Disclosure and Compliance Branch (FDC). FDC now has three main areas of focus, namely:
    1. Client Services - the provision of high quality services to stakeholders in relation to registrations, disclosures, claims for payment and party registration;
    2. Compliance - an integration of the audit and investigation teams to achieve a strong investigation, compliance and regulatory focus; and
    3. Regulatory Advice and Analysis - the provision of quality education and information to stakeholders and the provision of legal analysis, advice and oversight to FDC to ensure our policies, processes and procedures facilitate us meeting our objectives.

58. As part of the internal review of the Electoral Commission's functions, the staff within FDC participated in a series of workshops with the Electoral Commission's internal auditors, PriceWaterhouseCoopers, to develop a best practice, risk-based auditing regime for disclosures and claims for payments [Rec 19]. Disclosures lodged for the 2015 reporting period and 2015 claims in relation to the Administration Fund and Election Campaigns Fund have been reviewed accordingly to this methodology.

59. Earlier this year the Electoral Commission undertook a review of the guidelines issued under s 22 of the EFED Act. As a result of that review a number of guidelines were amended to be more easily understood by stakeholders, and a number were removed as they were no longer relevant to the EFED Act.

60. As far as the current EFED Act allows, the Electoral Commission has commenced implementing steps to improve the information contained within disclosures. The Disclosure Forms for the 2015 reporting period include, in relation to political donations, the name of the person or entity for whose benefit the donation was made [Rec 26]. This changed is aimed at providing greater transparency as to who benefits from a donation made to a political party.

61. The disclosure forms also require greater information and supporting material in relation to reportable loans received by the party, candidate or elected member [Rec 27], aimed at providing greater transparency as to the source of party/candidate funding, as well as increasing compliance with donation provisions generally. In relation to electoral expenditure, the Disclosure Form now requires information in respect of in which electorate/s the expenditure was made [Rec 28], a change aimed at providing greater transparency in how much is being spent by parties in each electorate. It also allows the Electoral Commission to better assess whether the expenditure of a party is within the relevant caps for each electorate. This change has also been made to the Claim Form for the Election Campaigns Fund, thus ensuring that no funds are paid in excess of an expenditure cap.

62. These reforms not only provide greater transparency for all stakeholders, but they improve the quantity and quality of information available for use in the Commission's compliance audits and investigations.

63. As stated above, the Electoral Commission has developed a business case and model for an online funding and disclosure portal, as well as an enhanced public website for disclosures and related information [Recs 23 and 24]. Early this year we sought funding for this plan from Treasury, but were unsuccessful. The Electoral Commission is scheduled to publish information relating to the 2015 disclosures in November/December 2015. It is expected

that shortly thereafter supplementary information will be available on the Electoral Commission's website to assist people in understanding the disclosure information.

64. In 2015, FDC made a concerted effort to communicate with stakeholders in alternative ways, including emails and text messaging, to remind people of their obligations to make disclosures. The Electoral Commission has a target of 95% of disclosures being lodged on time. For the past five years we have fallen far short of this target with the exception of the special disclosure period applicable immediately before the 2015 State General Election. In relation to that period we reached the target of 95%, and it is our considered view that the improvement in the 'on-time' lodgement rate for the special disclosure period was largely due to our increased efforts informing people of their obligations.

65. Enforcement action has been taken against those who did not lodge a disclosure on time for the special disclosure period, and part of the audit function for the 2015 disclosures will include identifying any political donations that were required to be disclosed for the special disclosure period but were not in fact disclosed.

66. The Electoral Commission will continue to work with the Government in implementing the recommendations made by the Expert Panel, and will continue to enforce compliance with and foster stakeholder awareness of, the requirements of the EFED Act, as well as to promote transparency within the scheme.

Appendix 1: Expert Panel Recommendations and the Electoral Commission's comments

Expert Panel	Electoral Commission Comment
Recommendation 1 That the Government immediately review the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) so that it is simple, easy to understand and has clear policy objectives.	Agree. In 2013-14 officers from the Department of Premier and Cabinet and the Parliamentary Counsel's Office, with assistance from officers from the Electoral Commission, commenced a review of the EFED Act. The review was put on hold in early 2014. A comprehensive review of the EFED Act is integral to the successful implementation of the changes recommended by the Expert Panel.
Recommendation 2 That the Premier support co-ordinated national reform of election funding laws, and seek to put the issue on the COAG agenda.	Agree.
Recommendation 3 That the Premier report on the progress made in implementing the Panel's recommendations in June 2015 and annually thereafter, and that these reports be tabled in the NSW Parliament.	Agree.

Recommendation 4 That the Government not pursue: a) a total ban on political donations on the grounds that it is not in the public interest, not feasible in practice, and not likely to survive constitutional challenge; or b) an opt-in, opt-out full public funding scheme as an alternative to a total ban on political donations.	Agree with the Expert Panel's discussion. An opt-in/opt-out scheme would be difficult to administer and would result in inequality amongst the various political participants.
Recommendation 5 That: a) the ban on anonymous political donations above a certain amount be retained; and b) the provisions that aggregate multiple political donations from the same donor be amended so that small anonymous donations are exempt.	Agree that the ban on anonymous political donations above a certain amount be retained. We support a review of what is an acceptable amount for a "small donation" that is not subject to identification and aggregation rules. We do not agree that $1000 is an appropriate level for small donations. Any change in the aggregation of small "anonymous" political donations would require legislative amendment and should form part of a comprehensive review of the EFED Act.
Recommendation 6 That the ban on political donations from foreign sources be retained.	We disagree with the Expert Panel's interpretation of s96D. The NSW

	Electoral Commission cannot prevent donations from foreign donors and entities so long as they provide acceptable identification showing an Australian residential address. If the Committee is of the view that donations from foreign sources should be banned, legislative amendment is required.
Recommendation 7 That the ban on political donations from prohibited donors (property developers and liquor, gambling and tobacco industry business entities) be retained for the time being, subject to: a) the High Court's decision in *McCloy v New South Wales*; and b) the introduction of caps on political donations for local government.	We note the High Court's recent decision in *McCloy v New South Wales* upholding prohibited donor and donation cap provisions in the EFED Act. If bans on political donations from prohibited donors are retained, the enforcement options available to the Electoral Commission in relation to breaches of the prohibition should be increased. Irrespective of whether bans on political donations from prohibited donors are retained, caps on political donations for local government elections should be introduced.
Recommendation 8 That the current caps on political donations be retained and adjusted annually for inflation, rounded up to the nearest whole number multiple of $100.	Agree. No legislative amendment required.
Recommendation 9	

That: a) the cap on indirect campaign contributions (or in-kind donations) be made consistent with the caps that apply to other political donations (i.e. $2,000 for donations to candidates and $5,000 for donations to parties); and b) the NSW Electoral Commission issue guidelines to help smaller parties and volunteers better understand their obligations in relation to in-kind donations.	We do not oppose bringing the caps on indirect campaign contributions in line with the caps on other political donations. This would require legislative amendment. The Electoral Commission deferred acting on the second limb of this recommendation pending the High Court's decision in McCloy v New South Wales. As the High Court has recently found section 96E to be valid, the Electoral Commission will commence a review of the provisions relating to in-kind donations and issue guideline(s) to assist people in understanding their obligations.
Recommendation 10 That the current caps on electoral expenditure be retained and adjusted before each election for inflation, rounded up to the nearest whole number multiple of $100.	Agree. No legislative amendment required.
Recommendation 11 That all electoral expenditure incurred for the purpose of influencing the voting at an election be caught by the caps on electoral expenditure.	Agree. The distinction between electoral expenditure and electoral communication expenditure would need to be removed and replaced after consideration of an appropriate, purposive, straightforward definition of electoral expenditure.

Recommendation 12 That the electorate-based caps on expenditure by political parties apply to all expenditure which encourages or tries to persuade electors to vote for or against a candidate in a particular electorate.	Agree. This would require legislative amendment.
Recommendation 13 That: a) all expenditure incurred for the purpose of influencing the voting at an election be reimbursable from the Election Campaigns Fund; and b) the NSW Electoral Commission issue guidelines on the costs that can be reimbursed as electoral expenditure.	This recommendation relates to recommendation 11. If expenditure caps are extended to all electoral expenditure then such expenditure should also be reimbursable through the Election Campaigns Fund. This would require legislative amendment. An all-inclusive definition of electoral expenditure for the purposes of both caps and public funding would simplify the scheme for all stakeholders. A comprehensive review of the EFED Act and implementation of this recommendation will assist the Electoral Commission in ensuring the Commission's guidelines and publications are appropriate to educate our stakeholders.
Recommendation 14 That: a) the 'funding linked to electoral expenditure' model that operated for the 2011 State election for calculating entitlements from the	The 'dollar per vote' model, introduced in the October 2014 amendment to the EFED Act, applied only to the 2015 State election. Accordingly, public

Election Campaigns Fund be reinstated following the 2015 election; and b) if the Government decides to pursue a 'dollar per vote' model, it should only be used to allocate a small proportion of public funding, with the remainder to be allocated on a 'funding linked to electoral expenditure' basis; and c) whatever public funding model is adopted, it should not provide for 'full' public funding (i.e. where parties and candidates are entitled to be reimbursed for the total amount they are permitted to spend on election campaigns).	funding of parties and candidates for future State elections will be based on the "funding linked to electoral expenditure" model. No legislative amendment is required. Our experience is such that the "funding linked to electoral expenditure" model provided more certainty to stakeholders than the "dollar per vote" model used at the 2015 State election and was less onerous for parties to make their claim. For example, the "dollar per vote" model that applied to the 2015 State election assumes, in the case of a party, that the party agent is the agent for all of the party's endorsed candidates and therefore has access to all the records required in order to make a claim for payment. In cases where the party agent is not the agent of the endorsed candidates the party agent is burdened with obtaining all relevant documents from each candidate's agent in order to make a single claim that includes expenditure of the party and its endorsed candidates. We do not support a model that has both dollar per vote and funding linked to electoral expenditure as recommended under 14(b) as it would be difficult to administer, create greater complexity and, therefore, confusion amongst parties and candidates.

Recommendation 15 That advance payments to parties from the Election Campaigns Fund be increased from 30 percent to 50 percent of a party's entitlement at the previous election.	We do not oppose increasing a party's entitlement to an advance payment from 30% to 50% of the amount the party was entitled to receive at the previous election. This would require legislative amendment and would not be difficult to administer.
Recommendation 16 That a candidate's entitlement from the Election Campaigns Fund be paid directly to the candidate, unless the candidate directs otherwise.	In relation to the 2015 State election a party may direct the Electoral Commission to split a payment from the Election Campaigns Fund to one or more of the party's endorsed candidates. In relation to future State elections, as the EFED Act currently stands, all eligible candidates are entitled to make their own claim for payment and payment would be made to any such candidate's campaign account, unless the candidate directs otherwise. No legislative amendment required.
Recommendation 17 That there be clear rules, and that the NSW Electoral Commission issue guidelines, for the costs that can be reimbursed from the Administration Fund.	Agree. A comprehensive review of the EFED Act is required to ensure changes to public funding and the definitions of what expenditure may be reimbursed are cohesive and straightforward.
Recommendation 18	

That the model for calculating entitlements from the Administration Fund which operated immediately prior to the 2014 amendments to the Act be reinstated.	We do not oppose reinstating the funding entitlements of parties to the amounts prior to the 2014 amendments. This would require legislative amendment.
Recommendation 19 That the NSW Electoral Commission focus on: a) strategic oversight of the Administration Fund to ensure the integrity and proper use of the Fund; and b) monitoring and enforcing the rules to prevent the use of administration funds for electoral expenditure.	The Electoral Commission conducts compliance audits of party and candidate claims for funding from the Administration Fund. The Commission has practices and procedures in place in order to verify the accuracy, validity, cut off and classification of expenditure included in claims from the Administration Fund. The Commission supports the recommendations (discussed further below) regarding political party governance and internal controls, which will enhance the parties' and Commission's ability to promote and enforce compliance with funding rules.
Recommendation 20 That the Policy Development Fund be renamed the 'New Parties Fund' to better reflect its aims.	We do not oppose changing the name of the Policy Development Fund to better reflect the aims of the Fund; however, most parties who are eligible to receive payments from the Policy Development Fund are not new parties. New parties are not eligible to receive any payments from the Fund until the year after they have endorsed candidates at a State election. A change in the name of the Fund would require legislative amendment.
Recommendation 21	

That: a) payments from the 'New Parties Fund' be retained at the current levels and adjusted annually for inflation, rounded up to the nearest whole number multiple of $100; b) electoral expenditure for the purpose of influencing the voting at an election in election years be reimbursable from the 'New Parties Fund'; and c) that the ability for parties to be reimbursed for administration expenses in non-election years be retained.	In relation to paragraph (a) this would not require any legislative amendment and reflects the current legislative provisions. In relation to paragraph (b) it is generally the case that parties eligible for payments from the Fund are not also eligible for payments from the Election Campaigns Fund, as the parties' endorsed candidates receive insufficient first preference votes at an election and/or are not elected. Such parties have informed us that most of their expenditure is electoral expenditure and they would therefore benefit from reimbursement of electoral expenditure. Including electoral expenditure incurred in an election year would require legislative amendment. Parties would need further education and assistance from the Electoral Commission to understand what expenditure may be claimed. Our preferred view is that there is consistency with the models for reimbursing electoral expenditure for parties and candidates. Inconsistent models would introduce complexity in systems and processes, and effect stakeholder compliance.
Recommendation 22 That the process for making claims for payment from the 'New Parties	"Streamlining" the process as described by the Expert Panel involves a

Fund' be streamlined.	number of elements. We do not oppose this in principle, and the Electoral Commission's practices and procedures can be adapted; however, this recommendation again raises the object of consistency and cohesion. If the requirement for a registered company auditor is removed, the provisions surrounding the Electoral Commission's powers to audit and request documents for the purpose of audit must be reviewed. The provisions around stakeholders' financial documentation and systems as a whole should be reviewed, as the practices of parties have evolved over the last 20 years.
Recommendation 23 That the NSW Electoral Commission replace paper-based disclosures with an online disclosure system as soon as possible.	We believe what is required is an online election funding, expenditure and disclosure system – that is, an online portal for stakeholders that supports more than just the disclosure of political donations and electoral expenditure. Such a system would allow users to update their information with the Commission, record donations and expenditures as they go and then submit an online declaration of disclosures. Earlier in 2015 we presented a business case to Treasury for funding for this project; however, our request was unsuccessful.
Recommendation 24 That the NSW Electoral Commission supplement disclosures with explanatory material and analysis to inform the public about the sources	Further to our comments on recommendation 23 as part of the online funding and disclosure project, the Electoral Commission proposed to

and amounts of political donations.	Treasury that an online portal include a new searchable disclosure website with enhanced and up to date features and data analysis. In November/December 2015 the Electoral Commission will publish disclosures for the reporting period ending 30 June 2015. The disclosure forms used for the reporting period include additional information so as to show for whose benefit a political donation has been made. In addition the forms contain information to show for what electoral district expenditure was incurred. The current website does not allow stakeholders to filter or analyse data.
Recommendation 25 That online, real-time disclosure of political donations of $1,000 or more be introduced for the six-month period before the election.	This recommendation would require legislative amendment. Whilst changes to the disclosure period will require adaptation of processes, systems etc., it will ultimately enable the Electoral Commission to perform certain functions more efficiently and expediently (for example, with more frequent disclosure the Electoral Commission will be able to produce more frequent, up to date explanatory material and analysis [Recommendation 24] within a shorter period of time).
Recommendation 26 That political parties be required to identify where a political donation has been solicited by, or made for the direct benefit of, an endorsed candidate	We agree that the inclusion of additional disclosure information [Recommendations 26-29] will promote the objects of transparency and

of the party.	compliance, and will interact positively with changes as recommended above [Expert Panel Recommendations 23-24]. The additional information will assist the Electoral Commission in its regulatory function. The Electoral Commission has amended its disclosure forms with the aim of capturing such information. The Electoral Commission will review the information provided on the 2015 disclosures and then consider appropriate guidelines as well as policies and other informational material to educate and support stakeholders in their compliance with these and other changes.
Recommendation 27 That parties and candidates be required to disclose the terms and conditions of reportable loans (other than loans from financial institutions).	Agree. This may require legislative amendment and, as stated in our response to Recommendation 26 above, will promote the objects of transparency and compliance.
Recommendation 28 That: a) political parties be required to identify electoral expenditure aimed at influencing the voting in a specific electorate; and b) the NSW Electoral Commission issue guidelines to assist parties to comply with this disclosure obligation.	Agree. As stated previously, the Electoral Commission amended the 2015 disclosure forms which now include a request for information as to the amount of expenditure aimed at influencing the vote in each electorate. The Electoral Commission will review the information provided on the 2015

	disclosures and then consider appropriate guidelines as well as policies and other informational material to educate and support stakeholders in their compliance with these and other changes.
Recommendation 29 That for the six months before the election, political parties and candidates be required to specify the details of electoral expenditure incurred and the total electoral expenditure.	This recommendation would require legislative amendment. As stated in our response to recommendation 25, whilst changes to the disclosure period will require adaptation of processes, systems etc., it will ultimately enable the Electoral Commission to perform certain functions more efficiently and expediently (for example, with more frequent disclosure of expenditure the Electoral Commission will be able to produce more frequent, up to date explanatory material and analysis [Recommendation 24] within a shorter period of time).
Recommendation 30 That: a) specific provisions be introduced regulating 'associated entities' (being entities that are controlled by a political party or that operate solely for the benefit of a political party); and b) that the disclosure obligations of associated entities be the same as those of political parties.	This would require legislative amendment to introduce "associated entities" into the EFED Act and the PEE Act, as well as provide for disclosure obligations in the EFED Act for "associated entities". The introduction of obligations on associated entities should be part of the comprehensive review of the EFED Act and PEE Act to ensure consistency and simplicity amongst provisions.

Recommendation 31 That the cap on electoral expenditure by third-party campaigners be decreased to $500,000 and adjusted annually for inflation, rounded up to the nearest whole number multiple of $100.	This recommendation would require legislative amendment. We do not oppose a decrease in the expenditure cap for third-party campaigners; however, such a change should be properly considered as part of a comprehensive review of the EFED Act. For example, if all electoral expenditure were to be included in the expenditure cap [Recommendations 11 and 12] then this would also apply to third-party campaigners.
Recommendation 32 That: a) the electoral expenditure of a political party and its 'associated entities' be aggregated for the purposes of the party's expenditure cap; b) the definition of 'associated entity' be limited to those entities that are controlled by a party or elected Member, or that operate solely for the benefit of a party or elected Member; and c) a third-party campaigner be prohibited from acting in concert with others to incur electoral expenditure that exceeds the third-party campaigner's expenditure cap.	These recommendations would require legislative amendment. We do not oppose these recommendations; however, they should be considered as part of a comprehensive review of the EFED Act so as to ensure the expenditure caps are at appropriate levels and the definition of "associated entity" is clear and consistent across associated legislation, fostering stakeholder compliance and supporting the Electoral Commission's role in enforcement.
Recommendation 33 That:	This recommendation would require legislative amendment to the EFED Act

a) political parties that receive public funding for administration expenses be required to regularly submit details of their governance standards and accountability processes to the NSW Electoral Commission; and b) the payment of public funding for administration expenses be conditional on NSW Electoral Commission approval of those standards and processes.	and PEE Act. The Electoral Commission supports stronger governance and accountability of political parties, particularly those who benefit from public funding. The increased focus on governance and accountability introduces new challenges in compliance and enforcement for the Electoral Commission; however, our recent review and restructure of the FDC branch has introduced the resources and capabilities to regulate party governance. However, such significant changes to obligations, responsibilities and associated practices under the EFED Act and PEE Act can only be successfully implemented through a comprehensive review of the EFED Act to ensure stakeholder compliance.
Recommendation 34 That: a) parties be required to regularly submit a list of senior officeholders to the NSW Electoral Commission for approval as a condition of receiving administration funding. The Panel expects that, at a minimum, the NSW Branch of the Labor Party would nominate its President, Deputy Presidents, General Secretary and Assistant General Secretaries, and the NSW Division of the Liberal Party would, at a minimum, nominate its President and Vice-Presidents,	This recommendation would require legislative amendment to the EFED Act and PEE Act. The implementation of this recommendation should be considered as part of a comprehensive review of the EFED Act taking into account recommendations 33-36.

Treasurer and State Director; b) the Commission only approve the list if it is satisfied that the nominated officers have sufficient seniority, control and decision-making authority to be responsible for the party's compliance with the Act; and c) the approved officeholders, and a brief description of their roles and responsibilities, be published on the NSW Electoral Commission's website.	
Recommendation 35 That: a) the common law duties that already apply to senior officeholders of both incorporated and unincorporated associations be codified in the Act; and b) senior officeholders who breach these duties be personally liable for offences and penalties under the Act.	This recommendation would require legislative amendment to the EFED Act and the PEE Act. The Electoral Commission supports stronger governance and accountability of political parties and the senior office holders of parties. This recommendation should be considered as part of a comprehensive review of the EFED Act taking into account recommendations 33-36.
Recommendation 36 That there be a duty for senior officeholders to report any election funding law breaches or suspected breaches to the NSW Electoral Commission.	This recommendation would require legislative amendment to the EFED Act and PEE Act. This recommendation should be considered as part of a comprehensive review of the EFED Act which includes increased enforcement options for

	the Electoral Commission.
Recommendation 37 That: a) the current requirement for double-auditing of disclosures of political donations and electoral expenditure and claims for payment of public funding be removed; and b) the NSW Auditor-General be responsible for the auditing of the disclosures and claims for all political parties that receive public funding for administration expenditure.	This recommendation would require legislative amendment to the EFED Act. We agree that double auditing is counterproductive and we support a review of the independent audit requirements during the comprehensive review of the EFED Act. We do not agree that the NSW Auditor-General be responsible for auditing disclosures and claims for political parties that receive administration funding. This would introduce duplication and complexity to the system, as the NSW Auditor-General would be responsible only for auditing parliamentary parties and the Electoral Commission would be responsible for conducting audits of their candidates and members, as well as TPCs and other parties. As part of a recent review of the auditing practices of the Electoral Commission we have introduced a risk based audit approach for assessing claims and disclosures. This new approach was implemented for the purpose of assessing claims from the State election, disclosures for the 2015 reporting period and claims from the Administration Fund for 2015. The Electoral Commission has integrated compliance audits of claims for

	funding and declarations of disclosure to ensure that there is no misclassification, inaccurate or incomplete disclosures, or duplication between declarations and claims. Our recent review of our audit function and implementation of risk based audits is aimed to ensure consistency, equity, to facilitate compliance and to implement best practice.
Recommendation 38 That: a) political parties be required to produce annual financial statements that comply with Australian Accounting Standards, as a condition of receiving public funding for administration expenditure; b) the NSW Auditor-General be responsible for auditing these statements; and c) a summary of these statements be published on the NSW Electoral Commission's website.	Parties receiving funding for administrative expenditure are already require to provide with their annual disclosure of political donations and electoral expenditure a copy of the party's audited annual financial statement. The statements are currently to be provided in the form approved by the Electoral Commission; however, there is inadequate recourse if a party fails to provide the statement. The Electoral Commission supports the recommendation that the audited annual financial statements of a party comply with Australian Auditing Standards. Further, the Electoral Commission recommends that sanctions apply to parties that fail to provide financial statements. Legislative amendment is required to the EFED Act in order to publish such statements on the Electoral Commission's website.

Recommendation 39 That registered political parties be deemed to be legal entities for the purposes of prosecutions and the imposition of penalties under the Act.	We support the recommendation that parties be deemed to be legal entities for the purpose of the EFED Act. Legislative amendment would be required to the EFED Act.
Recommendation 40 That the scheme of party and official agents be abolished and that candidates and elected Members be responsible for compliance with the Act.	The Electoral Commission strongly supports this recommendation. The NSW Electoral Commissioner has previously made such a recommendation to the Committee in its review of the EFED Act and PEE Act. The current obligation that all candidates and groups appoint an official agent (or in the case of State elections the party agent of the party is the official agent for the party's endorsed candidates and groups) has resulted in a situation where candidates and groups are not responsible for compliance with the EFED Act. It is our view that those who stand for public office and those who are elected to Parliament or local council should be responsible and accountable for their own election funding, expenditure and disclosure obligations. It is our view that greater compliance can be achieved if candidates, groups and elected members are liable for breaches under the EFED Act.

	In the case of third-party campaigners the obligation to make disclosures should be placed on the third-party campaigner rather than the official agent (as is the case with major political donors). In some cases we have found an employee has been appointed official agent of an entity that is a third-party campaigner. The employee subsequently resigns from his or her employment but remains the appointed agent and no longer has access to the relevant financial documents of the entity in order to make full and accurate disclosure. In other cases where a third-party campaigner has not registered under the EFED Act and does not have an agent there isn't a person responsible for lodging a disclosure on behalf of the third-party campaigner. It is our view that this recommendation should be considered as part of a comprehensive review of the EFED Act bearing in mind that this recommendation should be implemented in time for the next local government elections.
Recommendation 41 That: a) parties be required to nominate a senior officeholder to lodge disclosures and claims for payment on behalf of the party, for example, the State Director of the Liberal Party or the General Secretary of the Labor Party; and	The Electoral Commission strongly supports this recommendation and is of the view it should be addressed in conjunction with recommendations 34-36. The obligation for a person to lodge disclosures on behalf of a party should

b) this officeholder be approved by the NSW Electoral Commission as a person of seniority and standing within the party.	rest with a senior person of the party who has personal liability for the party's compliance with the EFED Act. This would avoid situations where a party appoints a junior employee as the party agent knowing that the agent does not have sufficient access to the party's records and other resources in order to make proper and valid disclosures.
Recommendation 42 That: a) an independent body be established to approve any changes to levels of public funding for any purpose, including election campaigns and administration, following a referral by the Premier; and b) this body consist of a retired judge and a person with financial or audit skills.	The Electoral Commission does not have a view on this recommendation.
Recommendation 43 That the maximum monetary penalty that can be imposed by the local court for offences be increased as part of the review of the Act.	This would require legislative amendment to the EFED Act. The Electoral Commission strongly supports a review of enforcement options and penalties under the EFED Act as part of a comprehensive review of the Act.

	The Electoral Commission is of the view the EFED Act needs a suite of enforcement options that are linked to the objectives of the Act. Penalties should reflect the gravity of offences as well as achieve the objects of deterrence, retribution and rehabilitation.
Recommendation 44 That: a) the strict liability offences for failing to lodge a disclosure and failing to keep records be retained; and b) a new strict liability offence be created for lodging incomplete disclosures.	Refer to our comments in relation to recommendation 43. The Electoral Commission supports the retention of strict liability offences for failing to lodge a disclosure and failing to keep records. Further, the Commission supports a new strict liability offence provision to capture incomplete disclosures. The Commission is of the view that a comprehensive review of the EFED Act should include consideration of the introduction of additional strict liability offences within the EFED Act.
Recommendation 45 That the offences under the Act that require the prosecution to prove knowledge, awareness or intent be simplified to maximise the chances of successful prosecutions.	The Electoral Commission strongly supports the simplification of the offence provisions. This recommendation would require legislative amendment and is related to recommendations 40-41, 43 and 44. The Electoral Commission supports a considered review of the enforcement options available under the Act and the offence provisions.

	There are currently only a few offence provisions under the Act which do not require the Electoral Commission to prove "awareness" at the time of an unlawful act. Awareness is difficult to prove when there is a party agent or official agent who may be held responsible for the acts or omissions of others.
Recommendation 46 That a range of mid-level enforcement options be made available to the NSW Electoral Commission, including the ability to withhold public funding entitlements from parties and candidates.	This recommendation would require legislative amendment. The Electoral Commission supports enhanced enforcement options for breaches of the EFED Act. There are current provisions in the EFED Act to enable the Electoral Commission to withhold public funding in certain cases; however, these provisions should be broadened.
Recommendation 47 That measures be introduced to support the NSW Electoral Commission to transition from a focus on administration to risk-based regulation.	The Electoral Commission supports this recommendation. As noted above, the Electoral Commission has completed a review of the Funding, Disclosure and Compliance Branch's (FDC) resources, procedures and capabilities, and has almost finalised a restructure of the branch. The restructure has focused on FDC's audit, investigation and enforcement practices, procedures and systems, as well as developing quality and professional services to stakeholders. Included in the new structure is an

	education function responsible for improving our education for stakeholders, with the aim of achieving a higher level of stakeholder compliance. The timing of the review and restructure will enable FDC to continue implementing the Panel's recommendations.
Recommendation 48 That the NSW Electoral Commission conduct a root and branch review to identify gaps between its organisational capabilities and the demands of best practice electoral regulation.	The Electoral Commission supports this recommendation and has already completed a branch review. This includes re-design of some of its practices and procedures including the implementation of best practice procedures in customer service and audit.
Recommendation 49 That the NSW Electoral Commission be given a specific education function and that the Commission deliver an extensive and engaging education program before the 2019 State election.	As submitted previously, the Electoral Commission is committed to delivering high quality and professional services to stakeholders. As part of this commitment the newly restructured FDC includes a team to provide education to stakeholders with the aim of improving stakeholder compliance. The team will have a detailed plan in place not only for the 2019 State election but also the upcoming local government elections. However, amendment of the EFED Act and PEE Act is required should education be compulsory for candidates and elected Members.
Recommendation 50 That:	

a) Members of Parliament be required to attend a mandatory induction and continuing education program delivered by the NSW Parliament, with non-participation to result in the following penalties: i. failure to attend annual seminar – withhold a portion of a party's administration funding (for an endorsed Member) and/or some part of a Member's entitlements; and ii. failure to complete the online education module on ethics – withhold a Member's first salary payment pending completion. b) the Premier refer this recommendation to the Parliamentary Remuneration Tribunal for a special determination.	The Electoral Commission strongly supports the continued education of members of Parliament for the purposes of improving awareness and compliance with the requirements of the EFED Act. The Commission can work with NSW Parliament to align this recommendation with its education function under recommendation 49.