Submission

No 11

Review of the Parliamentary Electorates and Elections Act 1912 and the Election Funding, Expenditure and Disclosures Act 1981

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Introduction

The Nationals appreciate the opportunity to provide this submission to the Joint Standing Committee on Electoral Matters inquiry into the provisions of the *Parliamentary Electorates and Elections Act* and the *Election Funding, Expenditure and Disclosures Act*. This wide-ranging review of both Acts is necessary given the considerable number of ad-hoc changes – some of them very significant – that have been made to both Acts in recent years.

This inquiry is also being conducted at an ideal time to ensure that any amendments that are subsequently made to both Acts can be in place for a reasonable period prior to the next general state election, which will deliver a much greater level of certainty to all involved in the campaign process than was the case at the most recent election, where all parties and candidates were contending with broad legislative changes made only a few months before the election was due.

In making this submission, we note that those matters raised in our submission of 17 February 2012 to the Committee concerning the administration of the 2011 state election are relevant to this inquiry also, and request that the comments and recommendations in that submission be taken to be a part of this submission as well. To that end, we do not propose to address the matters included in that submission again, and commence this submission with the making of recommendation number 27, following on from the 26 in our previous submission.

This submission is divided according to the relevant Acts, addressing first the provisions of the *Parliamentary Electorates and Elections Act* and then the provisions of the *Election Funding, Expenditure and Disclosures Act*.

Where relevant, we have provided recommendations for the Committee's consideration. For the Committee's convenience, a summary of those recommendations appears at the front of the submission.

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Summary of recommendations

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28. The current requirement for applications for the registration and renewal of registration of political parties to be supported by 750 members be retained.

29. Parties be given access to the NSW Electoral Commission's Political Party Registration System on an ongoing basis to update members' details for registration purposes.

30. The requirement at s 66D(2)(g) for 750 members' details to be provided to the Electoral Commission be amended to require "at least 750" members to allow the Commission to record the details of members in addition to the first 750 for the purpose of party registration.

31. Where a Legislative Council group comprises independent candidates not endorsed by a registered political party or parties, that group not be allowed to nominate a group name to appear above the line on the ballot paper.

32. Where a Legislative Council group is jointly endorsed by two or more registered political parties, the group name above the line comprise the names or registered abbreviations of those parties separated by ampersands.

33. That ss 79(7A) and 81F of the *Parliamentary Electorates and Elections Act* be amended to allow more flexibility in the payment of nomination deposits, including payment by electronic means.

34. That the existing requirement to register any electoral material to be distributed on polling day be maintained.

35. Size restrictions currently applying to posters displayed at polling places should be abolished.

36. That the iVote system continue to be promoted, especially to remote electors.

37. The Electoral Commission be granted sufficient powers and resources to investigate alleged breaches of the *Parliamentary Electorates and Elections Act*, and to commence prosecutions when such breaches are established.

38. That penalties for breaches of the *Parliamentary Electorates and Elections Act* be reviewed to ensure consistency within the Act, and to bring them into line with penalties for breaches of the *Election Funding, Expenditure and Disclosures Act* where appropriate.

39. The *Parliamentary Electorates and Elections Act* be amended to prevent the holding of a Legislative Assembly by-election in the event of a casual vacancy arising on or after 1 October in the year prior to the next general state election.

40. The Joint Standing Committee on Electoral Matters undertake a review into the provisions of Part 2 of the *Parliamentary Electorates and Elections Act* as a matter of priority.

41. That Part 6 of the *Election Funding, Expenditure and Disclosures Act* be re-drafted to clarify the extent of the Part's application.

42. That restrictions on donations and disclosure obligations within the *Election Funding, Expenditure and Disclosures Act* apply to candidates and elected members at state and local government level, and that they apply broadly to political parties, but not in relation to any account/s of any parties that are kept exclusively for the purpose of expenditure in connection with federal government election campaigns.

43. That s 96D be amended to clearly allow for donations to be received in circumstances where an individual does not maintain a bank account in their own name.

Provisions of the *Parliamentary Electorates and Elections Act*

Form of the Act

We note that in its "Report on the conduct of the NSW State Election 2011" the NSW Electoral Commission has recommended a significant change in the form of the *Parliamentary Electorates and Elections Act*:

> *"Ideally, the primary legislation should enshrine all essential electoral principles at a high level, and in a simple and clear way, while leaving the more detailed operational matters to be developed in accordance with those principles and outlined in procedures determined and published by the NSWEC and, as necessary, in subordinate legislation."* (p 192)

While we can sympathise with the operational complications that the current approach causes for the Electoral Commission, we would caution against such an approach being adopted. In the ordinary course of government business, the approach advocated by the Electoral Commission may well be appropriate. However, the conduct of elections goes to the very heart of the operation of our democracy. Whilst inconvenient, the requirement for changes to be enacted through legislation guarantees a level of oversight through the Parliamentary processes that may not exist were such changes to be dealt with by regulation or by the publishing of guidelines. It would grant to the responsible Minister or Commissioner for the time being a degree of authority that we consider undesirable on account of the significance of the implication of any such determination. The Nationals have complete confidence in the current Commissioner and Premier to exercise any new authority granted to them in an appropriate and responsible way, but consider that the precedent set by such a grant of power has potential for abuse in the future.

That having been said, we do acknowledge that the concerns raised by the Electoral Commission are quite legitimate. The complications currently faced by the Commission are contributed to significantly by the past practices of the Parliament in making piecemeal amendments to the *Parliamentary Electorates and Elections Act*, and we would urge the current Parliament and those which follow it to be mindful of the unintended consequences of such further amendments that do not take into account the Act in its entirety.

Recommendation

27. That so far as possible matters concerning the conduct of state elections be dealt with by the provisions of the *Parliamentary Electorates and Elections Act* rather than by subordinate legislation or the issuing of guidelines by the Electoral Commission.

Registration of political parties

From time to time, the requirement for 750 members in order for a party to be registered is criticised as presenting a barrier to the entry of new parties into state elections. However, The Nationals consider that this requirement remains

appropriate, especially following the introduction of the Policy Development Fund (PDF). The thresholds to qualify for funding under the former Political Education Fund were much more onerous than that required to qualify for funding under the PDF. Indeed, the mere act of having been registered as a political party for twelve months qualifies a party to minimum funding of $5,000 annually for eight years.

The Nationals support the PDF, and consider that it will provide material assistance to newer parties seeking to establish themselves within NSW. However, we consider that in return for this new stream of financial assistance it is appropriate that parties demonstrate a basic level of community support, and the 750 member registration requirement should therefore be maintained.

Recommendation

28. The current requirement for applications for the registration and renewal of registration of political parties to be supported by 750 members be retained.

The current system of renewing party registration has seen significant improvements in the last two years, with the introduction by the Electoral Commission of an online system to allow parties to check their submitted members against the roll and have them validated by the Commission prior to submitting an annual return for party registration. However, further improvement in this area would be beneficial. This should be undertaken in two ways. First, parties should be given access to this online member registration system year round, not just as the 30 June deadline for renewal of registration approaches. Second, parties should be allowed to maintain more than the requisite 750 members within that system. At the moment, any declarations from members in addition to the required 750 are returned to a party after the renewal of its registration is confirmed. While the requirement facing parties is that the details and signed declarations of 750 members be provided for the purpose of the party's registration, that should not restrain parties from providing statements from further members and the Commission retaining those records.

The requirement for a party's registration to be formally renewed by 30 June each year ought to be retained, in order to ensure that each party has certainty concerning it registration.

Recommendation

29. Parties be given access to the NSW Electoral Commission's Political Party Registration System on an ongoing basis to update members' details for registration purposes.

Recommendation

30. The requirement at s 66D(2)(g) for 750 members' details to be provided to the Electoral Commission be amended to require "at least 750" members to allow the Commission to record the details of members in addition to the first 750 for the purpose of party registration.

Nomination of candidates

Following the closeness of the vote in the Legislative Council at the last state election, and especially during the subsequent appeal to the Court of Disputed Returns, it was suggested by an unsuccessful candidate that the absence of that candidate's name above the line had unfairly contributed to the candidate's failure to gain election. The purported solution to this alleged unfairness was to allow the inclusion of a candidate's name above the line where a group is not endorsed by a registered political party or parties. Such an approach would be inappropriate. Where a group consists of a number of independent candidates, the only potentially appropriate description for that group would be "independent". In our submission, groups should only have a group name where that group is endorsed by a registered political party or parties.

Recommendation

31. Where a Legislative Council group comprises independent candidates not endorsed by a registered political party or parties, that group not be allowed to nominate a group name to appear above the line on the ballot paper.

The other issue concerning the naming if groups is instances where a group is endorsed by two or more registered political parties. In the past, the practice has been to show the names (or registered abbreviations) of the registered political parties endorsing the group separated by slashes. This has the tendency to imply that the group is nominated by a single party, rather than two or more discrete parties. In order to ensure such implications are avoided, we suggest that it would be more appropriate for the names or abbreviations of registered political parties who are jointly endorsing a group to be separated by ampersands rather than by slashes.

Recommendation

32. Where a Legislative Council group is jointly endorsed by two or more registered political parties, the group name above the line comprise the names or registered abbreviations of those parties separated by ampersands.

Currently, there are only two methods by which nomination deposits for Legislative Assembly and Legislative Council candidates can be paid, namely cash and bank cheques. Such a requirement is unnecessarily onerous. Whilst an aversion to the acceptance of personal cheques is understandable, there does not seem to be any reason to continue not to allow acceptance of payments by electronic means.

Recommendation

33. That ss 79(7A) and 81F of the *Parliamentary Electorates and Elections Act* be amended to allow more flexibility in the payment of nomination deposits, including payment by electronic means.

The taking of votes

One feature of NSW state elections that distinguish them from federal elections is the requirement that parties and candidates register with the Electoral Commission any materials that they wish to be able to distribute on polling day. The Nationals support the retention of this requirement. Polling day is often a day of high emotions, and disputes between volunteers working for different candidates and parties occur more frequently than anyone would like. Most often, these disputes concern the actions of the volunteers for one candidate or party engaging in conduct that volunteers for another candidate or party consider is in breach of electoral law. This creates tension at polling places regardless of whether or not any breach has been committed. Such disputes most commonly relate to either the placement of election posters or the content of electoral material that is being distributed. The registration requirements for electoral materials that are distributed on polling day mean that disputes about the content of these materials can be readily addressed by polling officials with reference to the registered materials. In our experience this has been beneficial in helping to reduce disputation between volunteers on polling days, and for this reason these requirements should be retained.

Recommendation

34. That the existing requirement to register any electoral material to be distributed on polling day be maintained.

Currently, ss 151B(2) and (2AA) restrict the display of posters at polling places on polling day. Such restrictions do not apply broadly on polling day, nor do they apply to pre-polling (while s 151B(8) extends the prohibitions on the display of posters within 6 metres of the entrance to a polling place to pre-polling, the size restrictions continue to apply on polling day only.) Such inconsistency is of no benefit to anyone involved in election campaigns, and should be addressed. This could be done either by expanding the application of the size restrictions, or removing them altogether. Given that the restrictions do not seem to serve any meaningful practical purpose, and given that for federal campaign purposes there is no such restriction, it seems most appropriate that they be repealed.

Recommendation

35. Size restrictions currently applying to posters displayed at polling places should be abolished.

In our previous submission, we made some comments which were generally supportive of the iVote system that was adopted at the 2011 state election. In addition to what we have already said, we would like to bring to the Committee's attention the significant potential for iVote to provide improved access to the electoral process for electors in more remote areas. While a significant majority of those using iVote at the 2011 state election did so because they were outside NSW on polling

day, the Clarence by-election saw a significant increase in the uptake of iVote by electors living more than 20km from the nearest polling place.

According to figures provided by the Electoral Commission,[1] between the state election in March 2011 and the by-election in November 2011, iVote registrations in the District of Clarence more than doubled, from 575 to 1,335, an increase of 232%, which comprised increases in all categories of registrants. While the majority of registrations were once again from electors outside NSW, the category that experienced the largest increase in registrations, and by a considerable margin, was those living more than 20km from a polling place. (Registrations in this category increased by 761% over the state general election.) This supports our view that that iVote has a significant role to play in assisting remote electors to be able to exercise their right to vote.

Recommendation

36. That the iVote system continue to be promoted, especially to remote electors.

We also wish to comment on the current practice of automatically enrolling electors, and updating the enrolment of existing electors. While The Nationals are supportive of initiatives that seek to increase participation in the electoral process, we are concerned at the growing discrepancies that will continue to develop between the NSW and Commonwealth electoral rolls. When the *Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Act* was passed by the NSW Parliament in 2009, there was still an appetite at the federal government level for reform through the Green Paper process. In the three years since, nothing has happened federally, and there is nothing to indicate that reforms are anywhere near being implemented.

For this reason, there will be continuing and growing discrepancies between the rolls used for state and federal elections. We are concerned that such discrepancies could lead not only to confusion among electors, but also to a potential distrust of the electoral system when electors who have voted at state elections are denied a vote at subsequent federal elections, or vice versa, whether due to differences in the elector's enrolled address or the fact that they appear on one roll and not another. Based on Electoral Commission estimates of the number of people who are not enrolled at all and those who are enrolled incorrectly, once fully implemented the SmartRoll process could cause as many as 800,000 people to be enrolled differently for state as opposed to federal election purposes.[2] We are concerned about the potential consequences of having almost one in six electors affected by such discrepancies, however we acknowledge that there is no simple solution to this problem. Nonetheless, we consider it to be an important issue worthy of the Committee's attention and consideration.

[1] http://www.elections.nsw.gov.au/__data/assets/pdf_file/0008/96380/iVote_Presentation_9_Dec_2011_v4.pdf

[2] The Electoral Commission estimates that about 400,000 people are enrolled incorrectly at any time, and that there are between 350,000 and 400,000 who have never been enrolled. (*Report on the conduct of the NSW State Election 2011*, p 85)

Provisions concerning breach of the Act

There are a number of requirements that candidates and political parties must comply with in the course of conducting election campaigns, and offences are established under the *Parliamentary Electorates and Elections Act* for the breach of the Act's various provisions. For example, candidates (and other persons) must not engage in bribery (s 147) or treating (s 149), and must not distribute electoral matter without including upon it details of the persons who authorised and printed the matter (s 151E). The existence of such provisions and offences is a relatively simple matter. The ability to take action in the event of a breach of these legislative requirements is a more vexed issue.

The Electoral Commission does not have any power to investigate or take any other action concerning alleged breaches of the legislation governing the elections which it conducts. In our submission this is a less than ideal situation. As the regulator of elections in New South Wales, we consider it appropriate that in the first instance any allegations of a breach of the *Parliamentary Electorates and Elections Act* be investigated by the Commission. This would equate the role of the Commission in relation to the *Parliamentary Electorates and Elections Act* with the role of the Election Funding Authority in relation to the *Election Funding, Expenditure and Disclosures Act*. It would also provide all participants in the electoral process with a clear avenue by which to raise and have addressed concerns about possible breaches of the Act. Presently, any such concerns may be referred to the Electoral Commission, but the Commission does not undertake any investigation of allegations brought before it before it does not have the power to do so.

In response to a complaint of unauthorised electoral matter during the 2011 state election campaign, The Nationals received advice from the Commission's senior legal officer in the following terms:

> *The NSWEC does not have an investigatory or prosecutorial role regarding offences by candidates, groups or parties. If we have evidence, or are provided with evidence, that a person has committed an electoral offence, it is the general practice of the Electoral Commissioner to write to the person seeking an explanation of the breach and/or to provide an opportunity to remedy any apparent breach. Alternatively, serious matters may be referred directly to the police.*

We consider that the Commission's lack of power in this area diminishes its ability to fully manage the conduct of elections, and that the Commission should therefore be provided with the powers and resources to undertake investigations and prosecutions similar to the Election Funding Authority.

<u>Recommendation</u>

37. The Electoral Commission be granted sufficient powers and resources to investigate alleged breaches of the *Parliamentary Electorates and Elections Act*, and to commence prosecutions when such breaches are established.

In addition to the manner in which breaches of the *Parliamentary Electorates and Elections Act* are investigated and prosecuted, it is also necessary to consider the adequacy of the penalties that are set out in the Act. Due to the ad-hoc manner in which electoral law has developed, especially in recent years, there is a significant level of discrepancy between the penalties that apply for breaches of the *Parliamentary Electorates and Elections Act* and those that apply for breaches of the *Election Funding, Expenditure and Disclosures Act*. Compliance with both Acts is important for ensuring that elections in NSW are conducted in a fair and transparent manner, and yet in the main the penalties that apply for breaches of the *Election Funding, Expenditure and Disclosures Act* are much more significant.

For example, almost all offences under the *Election Funding, Expenditure and Disclosures Act* carry maximum penalties of $11,000 or $22,000, with just two minor procedural offences concerning failure to update registers held by the Election Funding Authority having lower penalties. All offences under the *Election Funding, Expenditure and Disclosures Regulation* have maximum penalties of $2,200. However, offences under the *Parliamentary Electorates and Elections Act* have maximum penalties that vary widely, from as little as $55 up to $110,000. Although that Act does include a much broader range of offences and can therefore be expected to impose some differing maximum penalties, in our view the degree of discrepancies is too great. This is perhaps best illustrated by reference to those offences which are capable of punishment by imprisonment. Under the *Election Funding, Expenditure and Disclosures Act*, only those offences with a maximum financial penalty of $22,000 also attract the potential for imprisonment of offenders, whereas under the *Parliamentary Electorates and Elections Act* there are five offences for which a person may be imprisoned that carry a maximum financial penalty of just $550,[3] and a further 19 for which a person may be imprisoned that carry a maximum financial penalty of $1,100.[4]

In our submission this shows a need for greater consistency in the penalties that apply under the *Parliamentary Electorates and Elections Act* in and of itself, as well as greater consistency between the two Acts. We consider that the maximum penalties currently existing under the *Election Funding, Expenditure and Disclosures Act* are the most appropriate guide for the conduct of a full review into the consistency of available penalties. To do otherwise would be to suggest either that some breaches of electoral law are only minor matters, or that breaches of the financial aspects of electoral law are more serious than breaches of other aspects of electoral law. We don't believe either of these positions to be capable of support.

Recommendation

38. That penalties for breaches of the *Parliamentary Electorates and Elections Act* be reviewed to ensure consistency within the Act, and to bring them into line with penalties for breaches of the *Election Funding, Expenditure and Disclosures Act* where appropriate.

[3] ss 114J(1), 120AG(1), 120 AG(2), 151A(1), 151E(1)
[4] ss 90(4), 106(3)(v), 111, 114A(2B), 114A(3), 114AA(8), 114Q, 114P(3), 114P(4), 114P(5), 114U, 114ZT, 115(3), 122A(6), 122A(7), 151F(1), 176D(1), 176F, 177

By-elections

Presently, there are no legislative requirements concerning the timing of by-elections when vacancies arise as a result of the death or resignation of members of the Legislative Assembly. We believe that this is appropriate, as it allows for a date to be set for the conduct of polling that is appropriate in the circumstances. However, we do believe that there should be some provisions put in place to deal with vacancies that arise late in a Parliamentary term.

In our submission, where a casual vacancy arises on or after 1 October in the year prior to the next general state election, a by-election would incur an unnecessary expense and impose an ultimately fruitless inconvenience on the electors within the relevant district. Any such by-election is unlikely to be able to be held earlier than late November or early December, and there will be a further delay prior to the return of the writ before the new Member would be eligible to take their seat in the Parliament. We note that the last sitting day of the Parliament prior to the 2011 election was 3 December. If such a sitting pattern were to be adopted prior to future general state elections, the result would be that a Member so elected would be unable to take their seat before the Parliament was formally dissolved and the general election held.

While the flexibility inherent in the current system would allow the position to be held open until the general election, such an approach would render the government of the day liable to (unfounded) criticism that their decision was somehow politically motivated. To avoid such an eventuality, we believe the most appropriate course of action would be to legislate a period prior to a general election during which any casual vacancies that arise cannot be filled, and suggest that 1 October in the year prior to the general election is a sensible cut-off date.

Recommendation

39. The *Parliamentary Electorates and Elections Act* be amended to prevent the holding of a Legislative Assembly by-election in the event of a casual vacancy arising on or after 1 October in the year prior to the next general state election.

Part 2 of the Act

We note that the terms of reference for this inquiry specifically exclude consideration of Part 2 of *Parliamentary Electorates and Elections Act*. However, we feel the need to draw the Committee's attention to some of our concerns about the operation of that Part, with a view to having its provisions considered by a future inquiry of the Committee.

Section 17A of the Parliamentary Elections and Electorates Act (1912) requires that:

(1) In carrying out a distribution, the commissioners shall, subject to complying with section 28 of the Constitution Act 1902 :

a) have regard to demographic trends within the State and, as far as practicable, endeavour to ensure on the basis of those trends that, at the

relevant future time, the number of electors enrolled in each electoral district will be equal (within a margin of allowance of 3 per cent more or less of the average enrolment in electoral districts at that future time)

Section 28 of the Constitution Act ensures that enrolment in electoral districts shall not vary by more than 10% from the average enrolment across the state.

The use of projections in the 2003 electoral redistribution was problematic, and a single errant projection in a redistribution can have a dramatic effect almost eight years later at the second election to which it applies. For example, in 2003 the District of Campbelltown was projected to have an enrolment of 48,169 at the 2007 election. The actual enrolment was 44,151, more than 8.3% below the projection. Similarly, the District of Barwon was projected to have an enrolment of 47,776, but the actual enrolment at the election was 44,554. As the enrolment projection for Castle Hill was 47,185 when the actual enrolment was 48,953, at the projection date Castle Hill had over 4,000 more electors than both Campbelltown and Barwon. The gap in enrolments between Castle Hill and Campbelltown had blown out to more than 6,500 by 2011, whilst the gap between Castle Hill and Barwon was more than 8,000 - meaning that Castle Hill was almost 20 per cent bigger than Barwon at that election.

These were not isolated cases. The projections for 9 electorates – almost one-tenth of the state – had an error of more than 5 per cent against the realised values. Twenty-one electorates were outside of the 3 per cent deviation from the mean, which is the goal under the Act.

The immense size of the electorates of Murray-Darling and Barwon is also of considerable concern. Each of these electorates comprises more than one quarter of the state's area, which has very real implications concerning the ability of the Members to travel across their electorates, and also places barriers in front of electors and residents seeking access to meet with their local Member.

These are serious issues that are deserving of further consideration and possible legislative amendments. For these reasons, we would encourage the Committee to undertake a review of Part 2 of the *Parliamentary Electorates and Elections Act* as soon as possible, so that any recommendations such an inquiry might make can be addressed prior to the commencement of the redistribution of electoral boundaries that must take place during the term of the current Parliament.

<u>Recommendation</u>

40. The Joint Standing Committee on Electoral Matters undertake a review into the provisions of Part 2 of the *Parliamentary Electorates and Elections Act*, and related matters as a priority.

Provisions of the *Election Funding, Expenditure and Disclosures Act*

Our submission to the inquiry into the administration of the 2011 state election covered a broad range of issues concerning the provisions of the *Election Funding, Expenditure and Disclosures Act*, and having incorporated those matters into this submission, there are now two other matters that we wish to address, namely problems with the form of Act, and practical difficulties that have arisen in the application of the amendments made by the *Election Funding, Expenditure and Disclosures Amendment Act* 2012.

Further to our previous submission, we have continued to receive requests from officers of the Election Funding Authority for copies of documents that have previously been provided, either in the Party's original disclosure to the Authority or in answer to previous requests for clarification concerning the disclosure. The Authority has further alleged that at least one USB storage device personally delivered to the Authority by the Party Agent (containing a complete copy of the Party's accounting records) was never received. Anecdotally, we are aware of similar problems with respect to other parties. Such duplication places an unnecessary and unjustifiable burden on the party, and appears to be symptomatic of an Authority that is inadequately resourced to perform the tasks required of it. We would therefore reinforce our previous recommendations that the Authority be provided with increased resources as required, and that improved training be provided to staff.

Inadequacies in the form of the Act

There is a need for a significant review of the operation of Part 6 of the *Election Funding, Expenditure and Disclosures Act*. The Part is internally inconsistent, which leads to significant uncertainty about the extent to which the Part applies in particular situations (if at all), and various provisions are arguably unenforceable as a result. The matters set out below are considered from the perspective of The Nationals, being a party that does not presently endorse candidates for local government. It is acknowledged that some of the matters discussed below may be further complicated (at least in some small degree) for parties that also contest local government elections, however we consider that the issues raised would nonetheless be relevant for parties in that situation also.

It should be noted that in preparing this submission, The Nationals have not sought formal legal advice, nor have we had the benefit of persons with legal qualifications considering the matters raised. We have approached the legislation from the point of view of a plain English understanding of its provisions. As such, we conclude that at best, the matters raised below lead to confusion in the application of the provisions of the Act. At worst, they render entire sections of Part 6 ineffective and unenforceable.

Section 83 of the Act provides that:

> *"This Part [Part 6] applies in relation to:*
>
> *(a) State elections and elected members of Parliament, and*
>
> *(b) Local government elections and elected members of councils (other than Divisions 2A and 2B)."*

However, the subsequent provisions of the Part are expressed as applying to political parties generally. Ordinarily, one would therefore refer back to s 83 and ask 'Does the matter in question relate to a state or local government election or elected member?' with the conclusion that the Act applies if the answer is 'yes' and does not apply if the answer is 'no'. Unfortunately, such an approach is inadequate on a number of questions concerning Part 6.

Part 6 of the *Election Funding, Expenditure and Disclosures Act* effectively requires The Nationals to maintain at least three separate bank accounts:

- A state campaign account is required to be kept for the purpose of incurring electoral expenditure in connection with state campaigns (s 96(3))
- A federal campaign account is required to be kept in order for the party to be eligible to accept donations in excess of the cap on political donations (s 95B(2))
- An administrative account is required to be kept for the general activities of the party, into which the party's membership subscriptions and payments under Part 6A must be paid (it being unlawful to pay such amounts into the party's state campaign account pursuant to s 96(6), and such amounts not being able to be deposited into an account "kept exclusively for federal or local government election campaigns" under s 95B(2))

Given that s 83 provides that Part 6 applies in relation to state and local government elections and elected members, the extent to which Part 6 applies to the Party appears to be limited to matters concerning the Party's state campaign account. However, in reality, either the Part applies more broadly, or many of its provisions are of no effect.

Problems concerning income restrictions

For example, if the Part only applies in relation to state and local government elections and elected members, s 95B(2) is superfluous insofar as it relates to a federal campaign account of the Party, because the cap on donations at s 95A(1)(a) could never apply to such an account given the provisions of s 83.

Section 95D(1) is similarly superfluous, while ss 95D(3), 96D(4) and 96GD, which seek to impose conditions on party membership subscriptions in varying circumstances would be of no effect, remembering that s 96(6) prevents such amounts being paid into the state campaign account in the first place. The Part, expressed as it is to apply to state and local government elections and elected members, cannot at one and the same time prohibit the deposit of Party membership subscriptions into the state campaign account and then seek to prescribe other restrictions on those payments. The effect of s 96(6) (if complied with) is to exclude the Part's jurisdiction concerning Party membership subscriptions altogether.

Uncertainty about the extent to which Part 6 applies is perhaps most fraught concerning the broad restrictions placed on the source of donations by Division 4 (especially s 96D) and Division 4A. Whilst there is an explicit exemption (although

arguably superfluous) from the cap on political donations for a federal campaign account at s 95B(2), there is no such exemption within the Act from any of the restrictions within Divisions 4 and 4A. While there is a case to say that those restrictions have no legal force other than in relation to a state campaign account, elected member or candidate, the existence of an exemption for other accounts from the application of the caps on donations coupled with the absence of any other exemptions causes confusion.

Problems concerning disclosure requirements

Just as uncertainty concerning the application of the Part is problematic with regard to the receipt of donations, it is similarly bothersome with regard to disclosure requirements. The disclosure requirements are found within Part 6, and based on the application provision of s 83 should therefore be limited to matters relating to state and local government elections and elected members. However, in the most recent disclosures, the forms provided by the EFA required parties disclosing small and reportable donations, as well as fundraising functions or ventures, to indicate for each contribution or function whether its purpose was state, federal or local campaign, or administrative.

Given that the Part, and therefore the disclosure obligations, apply only in relation to state and local government elections and elected members, it is doubtful what authority exists for the EFA to require disclosure of donations for federal campaign or administrative purposes. This is relevant not only with respect to party disclosures, but also to the disclosures that the Authority requires of donors. While so far as we are aware all major parties have complied with the Authority's request for such information, it would seem that such disclosures are better classified as voluntary disclosures, rather than obligatory disclosures, and that there is therefore no disclosure obligation for donors in respect of amounts that were received into federal campaign or administrative accounts.

In like manner, the requirement at s 92(4) for parties to disclose details concerning membership subscriptions appears to be of no effect, for the same reasons as are discussed above concerning purported restrictions on the receipt of such subscriptions.

<u>Recommendation</u>

41. That Part 6 of the *Election Funding, Expenditure and Disclosures Act* be re-drafted to clarify the extent of the Part's application.

Future application of Part 6 of the Act

Having established the need to re-draft Part 6 to clarify the extent of the Part's application, it is necessary to consider the extent to which the Part ought to apply. The provisions of s 83 are an obvious place to start, and represent the minimum application of the Part that is necessary to give it any effect whatsoever.

From the starting point of the Part's application extending to the state and local government campaign accounts of parties, as well as to candidates and elected members at those levels of government, the next area to consider is the administration of parties. It is quite apparent from the various provisions within Part 6 that at least the intent (if not the effect) of the Part is that it apply to the administrative accounts of political parties. Further, we consider that such an application is broadly expected, both by the various parties and also by the public. Given that the Act in Part 6A provides for the payment of administrative funding to parties, it is appropriate that such funding be accompanied by relevant restrictions and disclosure requirements.

This just leaves parties' federal campaign accounts to be considered. When caps on donations were introduced to the *Election Funding, Expenditure and Disclosures Act*, s 95B(2) provided explicitly that those caps do not apply to donations paid into a party's federal campaign account. We consider that this is the appropriate approach, and that it should be made explicit that the provisions of the *Elections Funding, Expenditure and Disclosures Act* have no application whatsoever in relation to accounts that are used exclusively for expenditure in connection with federal government election campaigns. All parties that are engaged in federal election campaigns are subject to such restrictions on their finances and disclosure obligations as are in force from time to time under the *Commonwealth Electoral Act*, and for the sake of simplicity (not to mention the potential jurisdictional issues that would arise were the NSW Parliament to act otherwise) these matters should be governed solely by Commonwealth law.

<u>Recommendation</u>

42. That restrictions on donations and disclosure obligations within the *Election Funding, Expenditure and Disclosures Act* apply to candidates and elected members at state and local government level, and that they apply broadly to political parties, but not in relation to any account/s of any parties that are kept exclusively for the purpose of expenditure in connection with federal government election campaigns.

Application of the *Election Funding, Expenditure and Disclosures Amendment Act* 2012

While seemingly simple, the recent amendments to s 96D of the Act have caused significant complications, especially for The Nationals. Many people simply do not have bank accounts in their own name, but rather maintain their personal and business finances through a single account in the name of their business. Alternately, their finances are all managed through a family partnership or trust. This is especially common with farmers, but is also known to occur with other business types. As such, personal donations made by these individuals will be made on cheques that bear a business or entity name, from credit card accounts held in a business or entity name etc because such people have no other means of making a donation. This is obviously problematic as these donations either have the effect, or give the impression of having the effect, of being in breach the prohibition on non-individual donations at s 96D of the *Election Funding, Expenditure and Disclosures Act*.

It could not have been the intention of this legislative change to disenfranchise such people from being able to donate on account of their personal financial arrangements, however attempts to find a way in which such donations can be lawfully accepted (and records kept to substantiate the same) have been problematic. For some this has been achievable (for example, sole traders whose accounts are kept in a trading name have provided statements to the effect that they are the legal person standing behind that name) but in other cases this has been more difficult. For example, where a person's finances are kept in a family trust, we have been unable to accept donations as s 84(1) of the Act defines the trustee of a trust as an "entity" and the language in s 96D draws a clear distinction between an "individual" who is eligible to donate on the one hand, and a "corporation or other entity" who is prohibited on the other.

<u>Recommendation</u>

43. That s 96D be amended to clearly allow for donations to be received in circumstances where an individual does not maintain a bank account in their own name.