Submission

No 18

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

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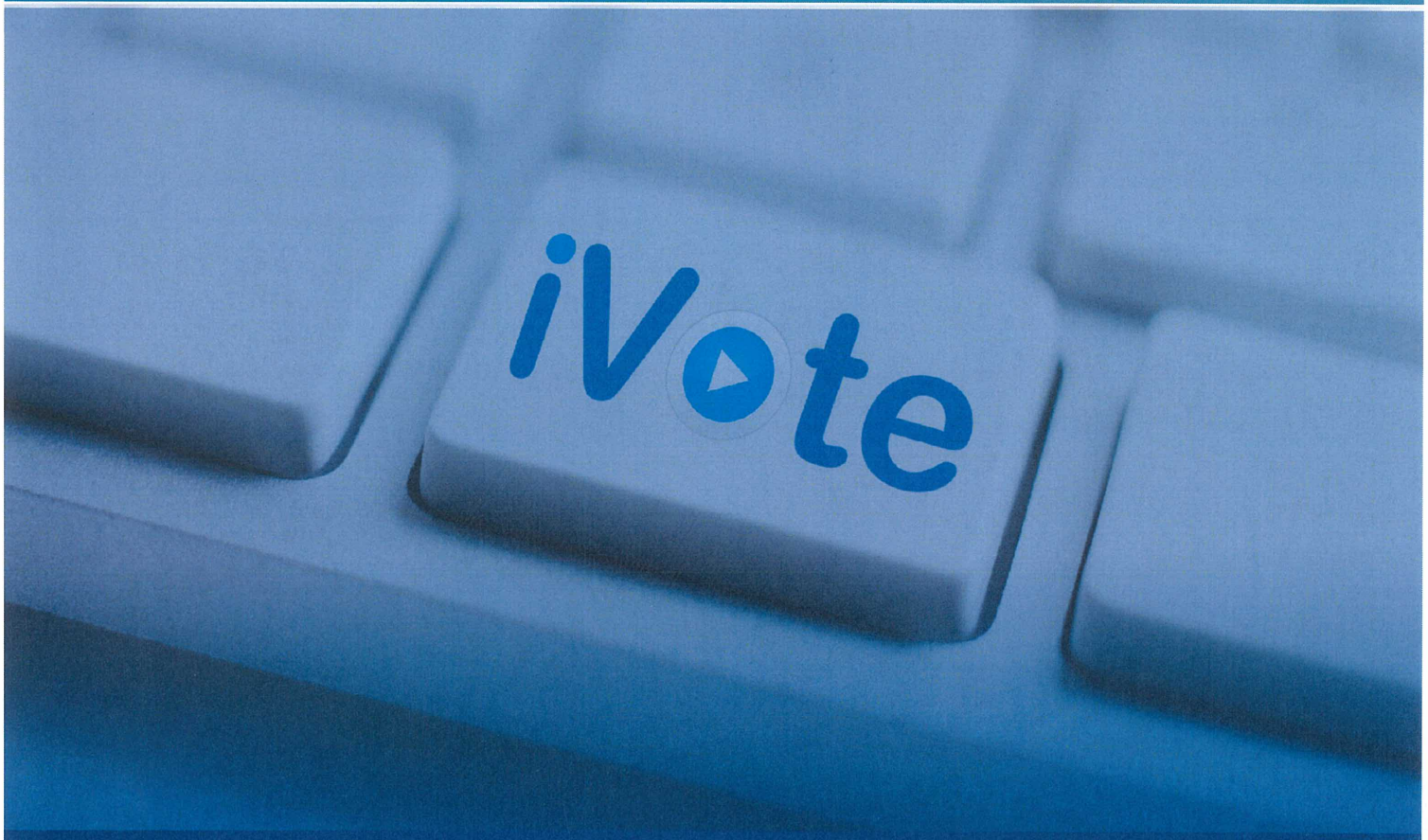
electoral commission NSW

Submission of the NSW Electoral Commissioner



2012

Submission of the NSW Electoral Commissioner to the comprehensive review of the *Parliamentary Electorates & Elections Act 1912* and the *Election Funding, Expenditure and Disclosure Act 1981* by the Joint Standing Committee on Electoral Matters

Contents

Executive summary

The core of this submission is that the *Parliamentary Electorates and Elections Act 1912*, the *Election Funding and Disclosure Act 1981*, the electoral provisions of the *Local Government Act 1993* and their respective Regulations require root and branch reform and amalgamation.

New South Wales should have one piece of electoral legislation which encompasses the conduct of both State and Local Government elections and the regulation of campaign finance and expenditure. The Act should be administered by an independent three-member NSW Electoral Commission which acts as regulator of campaign finance, and which delegates to the NSW Electoral Commissioner the responsibility for the administration of elections.

Where possible, this legislation should consist of plain English legislative principles determined by the Parliament with the legislative machinery to be implemented by the NSW Electoral Commission as a trusted integrity agency of the State.

In exercising that implementation role, the NSW Electoral Commission and the Electoral Commissioner will be guided by the following principles for the conduct of elections:

- universal franchise exercised by
- a secret vote overseen by
- an independent electoral authority operating within
- a participatory democracy based on
- a principle of political equality;

and the following general principles for the funding and disclosure regime:

- protecting the integrity of representative government;
- promoting fairness in politics;
- supporting parties to perform their functions; and
- respecting political freedoms.

Reforming the *Parliamentary Electorates & Elections Act 1912* and the *Election Funding, Expenditure and Disclosure Act 1981*

Background

1. The NSW Electoral Commission [NSWEC] welcomes the comprehensive review of the *Parliamentary Electorates & Elections Act 1912* [PE&EA] and the *Election Funding, Expenditure and Disclosure Act 1981* [EFEDA] by the Joint Standing Committee on Electoral Matters [the Committee]. I am pleased to be able to make this submission, and hope that it will assist Committee Members in their deliberations on these important issues.

2. The Premier succinctly summarised the pressing need for this Inquiry in comments he made in the Legislative Assembly in June 2011:

> The Parliamentary Electorates and Elections Act was originally passed by this Chamber in 1912, and over the century that it has operated the nature of politics, parties and political campaigning has changed enormously. What were once street corner meetings, pamphlets and radio and cinema broadcasts have been replaced, whether for better or for worse, by direct mail, robocalls and online campaigning.
>
> The Election Funding, Expenditure and Disclosures Act is 30 years old and, similarly, the matters that it seeks to regulate have suffered significant change over those three decades...
>
> The Acts have been amended on numerous occasions... but they have never been subject to historic comprehensive reviews to ensure that the regulation of elections, election funding and political donations offer the public the strongest guarantee of free, open and honest elections.[1]

3. In conducting this review, the Committee is in a position to recommend that electoral legislation in NSW be brought into line with international best practice, and I urge Committee Members to take full advantage of this very rare opportunity.

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[1] Hon B R O'Farrell MP, Premier, Legislative Assembly *Hansard*, 23 June 2011.

Scope of the Inquiry

4. In its review of the PE&EA, the Committee is to inquire into and report to Parliament on the following matters:

   (a) whether the terms and structure of the PE&EA remain appropriate having regard to changes in electoral practices and the nature of modern political campaigning;

   (b) the role and functions of the New South Wales Electoral Commission;

   (c) whether existing provisions regarding the entitlement to enrol and vote in New South Wales elections are appropriate;

   (d) the effectiveness of amendments made by the *Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Act 2009* to facilitate automatic enrolment for the NSW elections;

   (e) whether existing provisions relating to pre-poll voting, postal voting and other forms of voting remain appropriate;

   (f) whether the PE&EA provides appropriate voting options for electors with a disability and rural and remote electors;

   (g) those provisions of the *Local Government Act 1992* (*sic*) that relate to local government elections and that are administered by the Electoral Commissioner under s 21AA(2) of the PE&E Act;

   (h) whether the offences and penalties prescribed by the PE&EA remain appropriate; and

   (i) any other matter relating to the administration of state and local government elections under the PE&E Act.

5. In its review of the EFEDA, the Committee is to consider the following matters:

   (a) whether the terms and structure of the EFEDA remain appropriate having regard to changes in electoral practices and the nature of modern political campaigning;

   (b) the role and functions of the Election Funding Authority of New South Wales;

   (c) the operation and effectiveness of recent campaign finance reforms including the *Election Funding Amendment (Political Donations and Expenditure) Act 2008*, the *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009*, and the *Election Funding and Disclosures Amendment Act 2010*; and

   (d) the recommendations made by the Committee following its 2010 inquiry into the public funding of local government election campaigns.

6. This submission will therefore attempt to address each of these issues in turn, but at the outset I note my preference for **one** simplified, modernised, principles-based Electoral Act which will cover:

- the conduct by the Electoral Commissioner of all State Government and Local Government elections; and
- the administration by the reconstituted NSWEC of the electoral funding and disclosure regime in New South Wales.

History of the PE&EA

7. The NSWEC is the successor agency to the NSW State Electoral Office [SEO], which had its roots in the very first election of 24 representatives to the Legislative Council in 1843, conducted by the Elections Branch of the Chief Secretary's Department. At that time, the Legislative Council consisted of 36 members, twelve of whom were appointed by the Governor, and the remaining 24 elected on a limited franchise by an electorate consisting of 9,315 enrolled voters.[2] By way of comparison, at the March 2011 State Elections, 4,635,810 electors voted for 93 Members of the Legislative Assembly and 21 Members – half the full complement - of the Legislative Council.

8. In 1928 the PE&EA was amended to create the office of Electoral Commissioner, and in 2006 the NSWEC was established.

9. Electoral legislation in New South Wales has always reflected societal changes, and the development of concepts of electoral entitlement. Australia and New Zealand were regarded in the late 19th and early 20th centuries as "social laboratories", due in no small part to the extent of the franchise, and the development of innovative electoral procedures such as the secret ballot, at that time known widely as the "Australian ballot".[3]

10. Legislative amendment has generally been based on pragmatism, rather than lofty political principles, as is reflected in the haphazard accretions to the PE&EA. It is noteworthy that the 1912 Act was itself a consolidation of enactments relating to Parliamentary electorates and elections, dating back to the original 1843 Act, when the Colony still included Port Phillip and Moreton Bay.[4] To gain an appreciation of the extent to which the PE&EA has been amended since 1912, the legislative history of the Act is attached as Annexure 1; it shows a plethora of substantive amendments by way of over 80 pieces of legislation dating from 1918 to the most recent in 2011.

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[2] The voting qualifications were set out in the Imperial *Australian Constitutions Act (No 1) 1842*.

[3] See, e.g., H Obinger, S Liebfried and F G Castles, *Federalism And The Welfare State: New World And European Experiences*, (CUP 2005), p 64.

[4] The Act to *provide for the division of the Colony of New South Wales into Electoral Districts and for the election of Members to serve in the Legislative Council*, 23 February 1843. On the nature of the 1912 Act, see also Legislative Council *Hansard* 13 November 1912.

11. This piecemeal process of amendment has led to the quandary of applying what is in effect a 19th century Act to a 21st century electoral regime. Updating New South Wales electoral legislation necessarily requires a complete re-writing of the PE&EA by:
    - applying consistent, contemporary plain English legislative principles; and
    - clearing cobwebs, including by adapting any better crafted provisions from other jurisdictions.

The voting process

12. Voting in New South Wales State Elections was originally first-past-the-post, whereby the winning candidate was simply the one with the largest number of votes; in 1910 a second ballot was introduced in instances where no candidate had an absolute majority. In 1912 the method of voting also changed, with voters being required to make a cross in the square opposite the name of their chosen candidate.[5] Postal votes were introduced in 1918, although subject to some limitations between 1949 and 1965.[6] The modern form of preferential voting was introduced in 1928, and in 1979 this system was modified to allow optional preferential voting where either a single vote or a full list of preferences could be shown by the voter.[7]

13. From 1918 to 1926 proportional representation returned multiple representatives from each Legislative Assembly electorate.[8] The system returned to single member electorates in 1926.[9] In 1979, single Member electorates were entrenched by s 76 of the Constitution Act, and a subsequent High Court decision tends to suggest that this provision can only be changed as the result of a referendum, rather than by way of simple legislative amendment.[10]

The franchise

14. Universal manhood suffrage had been introduced by the *Parliamentary Electorates and Elections Act 1893*, which also removed plural voting.[11] Women had gained the

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[5] *Parliamentary Electorates & Elections Act 1912*, s 103.
[6] *Parliamentary Electorates & Elections Act (Amendment) Act 1918*, s 5, inserting ss114A-114M.
[7] *Parliamentary Electorates and Elections Act Constitution) Amendment Act 1979*, Sch 1(14).
[8] It has been suggested that the aim of this was to "destroy the power of the party machines over the selection of candidates". It failed to have this effect: D Clune and G Griffiths, *Decision and Deliberation: The Parliament of New South Wales 1856-2003*, p 224.
[9] *Parliamentary Electorates & Elections Act (Amendment) Act 1926*, s 2.
[10] A High Court majority has held that this aspect of membership goes to the very representative nature of the Parliament: *Attorney-General (WA) v Marquet* (2003) 217 CLR 545. See generally, A Twomey, "Electoral Procedure", Ch 6, *The Constitution of New South Wales*, (Sydney: 2004).
[11] The Act also provided for three public servants acting as Electoral Commissioners to conduct redistributions: D Clune and G Griffiths, *Decision and Deliberation: The Parliament of New South Wales 1856-2003*, p 34.

right to vote in State elections in August 1902, although they could neither stand for election to the Legislative Assembly nor be appointed to the Legislative Council.[12]

15. Although NSW legislation never denied the vote to Indigenous people, the prohibition on those receiving charitable aid from voting had the practical effect of excluding many. This prohibition was repealed in 1928, more than twenty years before Aborigines and Torres Strait Islanders were allowed to vote at Commonwealth elections, with the amendment of the *Commonwealth Electoral Act 1918* in 1949.

Compulsion

16. Enrolment to vote was made compulsory in 1921,[13] and this was followed by voting itself being made compulsory in 1928, and put into effect at the 1930 State Elections.[14] Compulsory voting was enshrined in s 11B of the Constitution Act in 1979, and would appear to be entrenched by s 7B of that Act.[15]

Electoral principles

17. The fundamental principles distilled from this evolutionary legislative process are that the electoral system in New South Wales is characterised by:
    - a **universal franchise** exercised by
    - a **secret vote** overseen by
    - an **independent electoral authority** operating within
    - a **participatory democracy** based on
    - a principle of **political equality**.

18. I note that these principles reflect the human rights of Article 25(b) of the UN International Covenant on Civil and Political Rights [ICCPR], discussed below, to:

> ...vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

19. Australia's ratification of the ICCPR in 1980 means that it has an obligation under international law to implement its provisions. This includes a duty to ensure that the

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[12] *Women's Franchise Act 1902*, s 2 and s 4. The *Parliamentary Elections Act 1918* gave women the right to become Members.
[13] *Parliamentary Electorates and Elections Act (Amendment) Act 1921*.
[14] *Parliamentary Electorates and Elections Act (Amendment) Act 1928*, Part V.
[15] I say appears to be entrenched, because Professor Twomey uses the descriptor "purportedly entrenched" when discussing the Constitution Act in the leading text on the subject, her *The Constitution of New South Wales*. See, generally, Chapter 5, "Manner and Form".

States and Territories also implement the Convention.[16] The submission will now consider to what extent the PE&EA in its current form facilitates these principles.

Appropriateness of the PE&EA

20. The 2005 United Nations *Declaration of Principles for International Election Observation* states that electoral legislation should be so structured as to be unambiguous, understandable and transparent, and should address all components of an electoral system necessary to ensure democratic elections.[17] By way of contrast, in its current form, the PE&EA can be described in the same terms as the equivalent Victorian legislation prior to its thorough re-writing in 2002:

> The act has never been thoroughly revised, yet has been amended on numerous occasions. The result is that Victoria's electoral legislation has a number of deficiencies:
>
> > it is extremely prescriptive in some areas and lacking in detail in other areas;
> >
> > it is written in difficult language and is poorly organised;
> >
> > it does not provide for modern election management practices; and
> >
> > in some cases, it is out of step with current electoral practice and community expectations.[18]

21. The ensuing Victorian *Electoral Act 2002* has been characterised as retaining "all essential electoral principles, while leaving more detailed administrative provisions to regulations".[19] Similarly, Tasmania's revised electoral legislation has been described as presenting "electoral principles in a simple and clear way which will assist with the understanding and administration of the Act."[20]

22. It is arguable that the highly prescriptive nature of the current NSW electoral legislation makes it susceptible to becoming quickly outdated, and requires regular amendments to be made to update particular provisions from time to time. A less

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[16] See http://www.un.org/en/documents/udhr/. Australia has ratified and is therefore bound by the ICCPR. Art 2 of the ICCPR imposes on Australia a range of responsibilities and obligations of realisation in relation to civil and political rights; namely obligations to respect, protect and fulfil human rights.

[17] *UN Declaration of Principles for International Election Observation,* 27 October 2005. http://www.idea.int/publications/other/upload/dec_obs_coc.pdf

[18] Hon J M Madden, Minister for Sport and Recreation, Victorian Legislative Assembly *Hansard*, 28 May 2002.

[19] Victorian Electoral Commission, 'A New Electoral Act for a new century', *Selections Newsletter*, Vol 9, July 2002, pp. 4-5.

[20] See Tasmanian Electoral Commission, 'Public comment invited on new Electoral Act for Tasmania', Media Release, 5 August 2004, available at www.tec.tas.gov.au/pages/Media/PDF/PublicBill.pdf.

prescriptive regime would ensure greater flexibility for processes to be updated to reflect community expectations, advances in technology and changes in modern management techniques, without the need for Parliament to consider amendments to legislation.[21] The PE&EA should be sufficiently prescriptive to ensure that electoral administrators uphold key principles, while leaving the detailed administrative arrangements as the administrative responsibility of the Electoral Commissioner, to adapt where necessary.

Objects of electoral legislation

23. The Declaration of Principles for International Election Observation states the following:

> Genuine democratic elections are a requisite condition for democratic governance, as they are the means whereby the people freely express their will, on a basis established by law, as to who shall legitimately o govern in their name and in their interests.[22]

24. The NSWEC Mission is to deliver high quality election services which are impartial, effective, efficient and in accordance with the law.[23] Following modern drafting practice, I would suggest that this would be strengthened by commencing a new Electoral Act with a general objects provision, reflecting this mission, and forming the basis of the electoral legislative regime in New South Wales.[24]

25. In the absence of such express objects, any judge interpreting an ambiguous electoral provision may either adopt a narrowly literal approach or invoke some purposes drawn from his or her own conception of electoral democracy. A well-drafted objects clause may be more balanced, and certainly more explicit and hence procedurally democratic, than common law intuition.

26. I would also like to suggest to Committee Members that the efficacy of any objects clause would be enhanced by the express inclusion as a function of the NSWEC of promoting public awareness of electoral and parliamentary topics by means of educational and information programs and by other means. I note that New South Wales is the only Australian State which does not have this educative role as one of

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[21] For example, the Commonwealth JSCEM recently recommended that the Electoral Act be amended 'to provide a flexible regime for the authorisation by the Australian Electoral Commission of approved forms, which will: allow for a number of versions of an approved form; enable forms to be tailored to the needs of specific target groups; and facilitate online transactions': JSCEM, *Report on the Conduct of the 2007 Federal Election and Matters Related Thereto*, 2009, pp. 273-275).

[22] http://www.osce.org/odihr/elections/16937

[23] See http://www.elections.nsw.gov.au/about_us.

[24] See also the Charter of the Queensland Electoral Commission: http://www.ecq.qld.gov.au/info.aspx?id=117

its statutory functions,[25] and that it is one of the functions of the EFA: s 25 of the EFEDA.[26]

Legislative design

27. In addition to the framework of State and Commonwealth legislation, the electoral process in NSW is informed by enforceable international human rights. The starting point for this is Article 21 of the 1948 *Universal Declaration of Human Rights*, which provides that everyone has the right to take part in the government of his or her country, directly or through freely chosen representatives.[27]

28. This right was amplified in Article 25 of the ICCPR, which provides that every citizen shall have the right and the opportunity, without unreasonable restrictions to:
    - take part in the conduct of public affairs, directly or through freely chosen representatives; and
    - vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

29. The right to vote is regarded as a fundamental right,[28] and as the bedrock on which other civil rights rely.[29] In General Comment 25, the UN Committee on Human Rights made a number of additional important observations about the content and exercise of the right to vote under Art 25:

    (a) The right to vote must be recognised and protected for all citizens, with no distinctions, restrictions or impairments permitted on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;

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[25] For the other Australian jurisdictions see *Electoral Act 1992* (ACT), s 7(1)(c); *Commonwealth Electoral Act 1918*, s 7(1)(c); *Electoral Act 1992* (Qld) 7(1)(d); *Electoral Act 1985* (SA) 8(1)(c); *Electoral Act 2004* (Tas) s 9(1)(c); *Elections Act 2002* (Vic) s 8(2)(f); *Electoral Act 1907* (WA) s 5F(1)(d).

[26] Under s 25, the EFA may carry out, or arrange for the carrying out of, such research into election funding, political donations, electoral expenditure and other matters to which the EFEDA relates as the EFA thinks appropriate and may publish the results of any such research.

[27] Not only is Australia a signatory to the Universal Declaration, but an Australian, Col. William Hodgson, was one of its drafters as a member of the original UN Commission on Human Rights headed by Eleanor Roosevelt.

[28] A Gray, "The Guaranteed Right to Vote in Australia", *Queensland University of Technology Law and Justice Journal*, Vol 7, No 2, 2007, p 192, assessing the High Court decision in *Roach v Commonwealth* (2007) 233 CLR 162. Dr Gray argues that the principle of universal suffrage enunciated therein also applies to the States.

[29] See Chief Justice Warren of the United Supreme Court to the effect that, "especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized": *Reynolds v Sims* [1964] USSC 202.

(b) States must adopt specific measures to ensure that obstacles to voting and participation, such as poverty, illiteracy, restrictions to freedom of movement and homelessness, are overcome; and
(c) Any restrictions on the right to vote must be established by law and must be objective, reasonable and proportionate.[30]

30. Undoubtedly, the terms and content of electoral legislation impact on the way in which these rights are exercisable. As the International Institute for Democracy and Electoral Assistance [IDEA] has noted:

> Effective and sustainable electoral system designs are more likely to be easily understood by the voter and the politician. Too much complexity can lead to misunderstandings, unintended consequences, and voter mistrust of the results.[31]

31. The piecemeal amendment of the PE&EA over the last century has indeed led to excessive complexity, and the potential for voter mistrust: to borrow Chief Justice French's description of the Australian Constitution, the reader of the PE&EA does not experience "a significant sense of uplift".[32] I would suggest that the appropriate remedy for this situation is the adoption of a principles-based regime in which delegated rule-making plays a prominent part.

Principles-based legislation

32. Law, whether set by contract, treaty, statute or precedent, can be classified into three forms:

    (i) Principles - norms expressed at a high level of generality. Principles most obviously express values and goals, and express the fundamental obligations that all should observe;

    (ii) Rules - typically narrow, specific and relatively mechanical; and

    (iii) Standards - supply a set of criteria to delimit a decision-maker's discretion, and tend not to be mechanically applicable.

33. This system of classification can readily be illustrated with the redistribution of electoral boundaries:

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[30] http://www.osce.org/odihr/elections/19154

[31] IDEA, *Electoral System Design: the New International IDEA Handbook* www.idea.int/publications/esd/upload/esd_chapter6.pdf. IDEA is an intergovernmental organization that supports sustainable democracy worldwide, of which Australia was a founding member in 1995. Its mission is to support sustainable democratic change by providing comparative knowledge, and assisting in democratic reform, and influencing policies and politics: http://www.idea.int/about/index.cfm.

[32] Justice Robert French, 'The Constitution and the People", in R French, G Lindell and C Saunders (eds), *Reflections on the Australian Constitution*, 2003, p 60.

- the key **principle** is that redistributions are to achieve one-vote, one-value;
- a **standard** is that the Electoral Districts Commissioners are to take account of certain factors in drawing electorate boundaries: community of interest, geographical features, existing boundaries, communication and transportation. That standard gives binding guidance to the discretion of the commission; and
- one **rule** exists in the formula that electoral enrolments must fall within a 10% tolerance of the average enrolment – this imbeds the one-vote, one-value principle. Another **rule** is that redistributions must occur every five years, or earlier if triggered by some formula - this rule triggers the re-implementation of the standards driven process of drawing boundaries.

34. Principles-based law-making aims to draft legislation in clear but general terms and, where possible, to leave fine detail to be filled by administering agencies. A useful comparator to this process comes from the common law of negligence, in which higher courts do not attempt to lay down strict rules of behaviour. Rather, they set:

    (i) principles - "act reasonably to avoid foreseeable harm to your neighbour"; and

    (ii) standards – "what is reasonable depends on the level of foreseeability, the likely harm and the cost of precautions".

    These principles and standards are then fleshed out in concrete health and safety codes dealing with, e.g., particular chemicals; and in decisions by people in charge of physical activities, which are judicially reviewable.

35. Although principles-based law-making is usually attributed to the continental European tradition, as early as 1975 a United Kingdom report on *The Preparation of Legislation* called for principles-based drafting "wherever possible":

    > ...the traditional approach in Europe has been to express the law in general principles, relying upon the courts ... to fill in the details necessary for the application of the statutory propositions to particular cases ... This approach appears to result in simpler and clearer primary legislation ... but equally it lacks the greater certainty which a detailed legislative application of the principles would promote.[33]

36. Nonetheless, I would suggest that any issues of principle, or those on which there is no real consensus; or where there is a real potential for a conflict of interest

[33] The Renton Committee, (London: 1975, Command Paper 6053) at paragraphs 6.5 and 9.14. Thus it has been suggested that common law countries suffer from rule-madness, a "disease that affects the advanced Anglo-Saxon countries generally with Australia having a particularly virulent form": R Vann, quoted in J Jones, "Tax Law: Rules or Principles?", *Fiscal Studies*, Vol 17, 1996, p 69.

involving or within the NSWEC, should *not* be left primarily to delegated discretion. Examples from the current New South Wales regime would include:

- the core elements of voting;
- the basic rules for party registration;
- qualification to register to vote;
- qualification for and restrictions on candidacy;
- secrecy of the vote;
- election management (i.e., authority);
- offence and penalty provisions;
- methods of filling casual vacancies;
- removal of mandates (i.e., any recall); and
- accountability mechanisms: basic rights of scrutineers, and resolution of disputes (e.g., disputed returns and judicial review).

37. Bearing in mind these exceptions, I would suggest that a complex modern electoral system can confidently reduce the contents of its principal legislation to principles which are to be fleshed out by an election authority, as a trusted integrity agency

The NSWEC as an integrity agency

38. In referring to "integrity agencies", I mean the emerging "fourth branch" of government, consisting of strong oversight bodies. Obvious examples in New South Wales are the Ombudsman, the Audit Office, and the Independent Commission Against Corruption.[34] An integrity *system* is a series of institutions and practices that collectively aim to:

> ...build integrity, transparency, and accountability in the public sector... to provide a framework of checks and balances, to foster an environment of high quality decision making, and to identify and address inappropriate behaviour including corruption.[35]

39. I would suggest that the NSWEC also has a role to play in the integrity process, as an independent body essential to the health of a democratic governance model. This is true from both the viewpoint of the legitimacy of the electoral process and the transparency of campaign finances. I therefore agree with Professor Chris Aulich of the ANZSOG Institute for Governance at the University of Canberra that:

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[34] See N Kelly, *Australia's Electoral Management Bodies – Degrees of Independence*, Paper presented at the 2007 APSA conference Monash University September 24-26, http://arts.monash.edu.au/psi/news-and-events/apsa/refereed-papers/au-nz-politics/nkelly.pdf
Also, see Hon J J Spigelman AC, "The Integrity Branch of Government", *The first lecture in the 2004 National Lecture series*, Sydney, 29 April 2004. http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_290404

[35] C Aulich, "Integrity Agencies as One Pillar of Integrity and Good Governance", *Public Policy and Administration*, 2011, Vol 10, No 1, p 41.

> ...strong and independent electoral commissions should be included in the list of watchdog integrity agencies.[36]

40. I would also suggest that the proposed structural changes to the NSWEC set out below will enhance its role as an integrity agency.

41. If it can be said that Electoral Commissions in Australia can be described as administrators, rather than regulators, this reflects the strictures of the tradition of excessively detailed electoral legislation under which they have operated. Moreover, it under-sells the independence and expertise of the Commissions. With respect to the independence of Electoral Commissions, the ACT Electoral Commissioner, Phillip Green, has observed that:

> ...independence is not an absolute, so that an electoral commission is either independent or not; rather, ... the extent of independence can fall on a continuum, and ... where an electoral commission falls on that continuum will depend on the extent of its institutional independence in a number of different dimensions.[37]

42. There have been international efforts to identify these dimensions. The International Institute for Democracy and Electoral Assistance [IDEA] has listed seven key elements of statutory independence for electoral bodies:
    - institutional independence from the executive;
    - the ability to exercise full responsibility for electoral functions;
    - power to make policy decisions independently under the legal framework;
    - composition - members from outside the executive with security of tenure;
    - ownership and management of a budget independent of day-to-day government control that does not fall within the budget of a government ministry;
    - autonomy to determine staffing needs and appointments; and
    - is not part of a department of state.[38]

43. Principles-based electoral drafting, twinned with delegation of rule-making to the NSWEC in suitable areas, would make for more streamlined and flexible electoral

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[36] C Aulich, "Integrity Agencies as One Pillar of Integrity and Good Governance", *Public Policy and Administration*, 2011, Vol 10, No 1, p 44.

[37] Submission of the ANZSOG Institute for Governance in the University of Canberra to the Inquiry into Electoral Issues in the A.C.T. July 2011.
http://www.governanceinstitute.edu.au/magma/media/upload/publication/196_Standing-Committee-on-Justice-and-Coimmunity-Safety.pdf

[38] A Wall, A Ellis, A Ayoub, C W Dundas, J Rukambe and S Staino, *Electoral Management Design: The International IDEA Handbook,* Stockholm: International IDEA, 2006, 7-9

rule-making. Accordingly, I would suggest that there are strong arguments for the NSWEC to exercise delegated rule-making under a new Electoral Act.

Delegated rule-making

44. One obstacle to comprehensible legal English is that accurate statements of complex ideas will often require technical language and intricate layout. An example of this in NSW electoral legislation is the provisions stipulating how votes are counted under proportional representation: Part 2 of Schedule 6 to the Constitution Act requires four pages to set out the manner in which the Legislative Council count is to be conducted. These provisions are entrenched, i.e., they can only be amended via referendum: s 7A(1)(b) of the Constitution Act.

45. The fundamental problem with this example is that a prescriptive and complex set of rules has been constitutionalised, rather than just the key principle, namely proportional representation. By contrast it is the *principle* of optional preferential voting for the Legislative Assembly which is included in the Constitution Act.[39] While I doubt that the Government would be inclined to hold a referendum simply to streamline the procedure for electing Members of the Legislative Council, this provision of the Constitution Act highlights the fact that amending the PE&EA cannot be considered in isolation.

46. The principles-based method would involve:
    (i) **Parliament** laying down *principles and standards* in suitable areas where
    (ii) the *detailed implementation* is to be filled in by an **independent and expert agency**.

47. Therefore, the detailed expression of procedures for balloting and counting would be provided for as follows:

    (i) Parliament decides upon the key principles of the particular voting and counting system chosen by the Parliament; and
    (ii) the technical implementation of those principles is set out in directions developed by the NSWEC, and made public on the NSWEC website.

48. There are a range of benefits from such delegated rule-making, namely:
    - the electoral legislation is cleaner and simpler to understand, by politicians and interested citizens;
    - fine-detail, typically of a machinery kind, is left to non-partisan experts;
    - valuable Parliamentary time is not wasted on relative minutiae; and

[39] See *Constitution Act 1902*, Sch 7.

- electoral regulation can change more speedily and flexibly when needed, especially to take advantage of new technology or administrative methods.

49. One of the aims of principles-based regulation is to provide a degree of "future-proofing", which would enable the NSWEC to respond to new issues as they arise without actually having to create new rules. This can be achieved by drafting purposive principles that both express the rationale for the rules and make use of qualitative and often evaluative terms such as *fair*, *reasonable* and *appropriate*.[40]

50. Principles-based electoral legislation may also provide greater clarity through the interpretation of the principles by the NSWEC, and the enforcement of those interpretations in respect of all participants in the election process. This leads to the development of a body of precedent that clarifies the principles and provides candidates and parties with further guidance.

Concerns with delegated rule-making

51. I note that there are four major concerns with delegated rule-making under principles-based legislation, which stem from the belief that principles are inherently vague. Although these concerns are not baseless, I would suggest that they are overstated and can be avoided through judicious use of delegation. This section of the submission will address each in turn.

    (i) *If the Parliament legislates principles, but an agency like the NSWEC fills in the detail, isn't the process less democratic?*

52. Undoubtedly, the NSWEC is not "responsible" in the way that Cabinet is responsible via the Parliament, and Parliamentarians via elections. However, this rule of law concern is more theoretical than practical. The aim is to relieve Parliament from legislating the *detail* of electoral administration in suitable areas, to achieve flexibility and expertise. Australian electoral authorities form trusted and independent "integrity" agencies, and the NSW Parliament can always revoke the NSWEC rules or guidelines if they are abused.

53. Moreover, in the structure for the NSWEC which I am proposing in paragraphs 90 – 97 below, the division of decision-making powers between the Electoral Commissioner and the three-person NSWEC - of which the Electoral Commissioner is but one member - will ensure an additional probity mechanism for internal scrutiny

[40] See generally Australian Law Reform Commission Report 108, *For Your Information: Australian Privacy Law and Practice* http://www.alrc.gov.au/publications/4.%20Regulating%20Privacy/regulatory-theory.

and review of decisions by the Electoral Commissioner as administrator of State and Local Government Elections.

54. Arguably, given that Bills and regulations are invariably framed by the Executive, leaving some of the detail of electoral law to the NSWEC may in fact make the process appear less partisan.

(ii) *Will the NSWEC's integrity be compromised?*

55. The answer to this concern lies in having a balanced approach, namely:

- delegate only in areas of limited contention, where the NSWEC's technical expertise is predominant; and
- frame the NSWEC's discretion within the new electoral legislation with sufficiently clear principles and standards.

(iii) *Will excessive use of delegated rule-making risk fragmenting the law?*

56. Members of the public and Parliamentarians may consider that electoral legislation should form a code: a "one-stop shop" for all the elements of electoral regulation. However, I note that there is always some discretion reposed in an administering agency to settle policy and process in putting legislation into effect. What matters is not so much whether the rules are in an Act, a Regulation or some instrument published on an agency website, but that they are developed by the most suitable body, and are consistent, clear and easily accessible to the public.

57. The accessibility of delegated-rules (whether in the form of approved procedures, directions or guidance), and the principal legislation under which they will be made, is a key component of the effectiveness of delegated rule making. The renaming of the principal Act as the Electoral Act will signpost the legislative framework making it easily locatable and gives consistency with the naming of electoral legislation in other jurisdictions. Plain English legislative drafting principles (not observed in 1912 when the PEEA was first enacted - with remnants of antiquated language remaining and incongruously adjacent to modern passages) applied to the new Act and delegated rules will also enhance and encourage participatory democracy. In practical terms the delegated rules will be prominently published in a high profile location, whether that be:
    - on the NSWEC website;
    - the NSW Parliament website;
    - the NSW legislation website with other notifications of statutory rules and instruments by persons/entities with delegated authority e.g., planning instruments by councils, orders by Ministers etc.; or

a combination of these.

(iv) *The law will still be complex, but the complexity hidden in instruments promulgated by the NSWEC.*

58. Concerns that principles-based regulation may lead to a lack of clarity and certainty are addressed by integrating the principles with other forms of regulation. Thus, detailed rules will be crafted by the Electoral Commission to supplement the statutory principles; and guidance can be issued by the Electoral Commission to explain the principles. The rationale behind this approach is set out in the New Zealand Ministry of Justice *Electoral Finance Reform: Issues Paper*:

> General principles are important to the development of new legislation, particularly in a complex area... where the rules themselves can be very detailed. If there is widespread agreement on clear principles, then we will be in a good position to know what the law means and how people who participate in electoral campaigns should act.[41]

59. I note that New South Wales has already pioneered this approach, in the 2010 amendments to the PE&EA which implemented the "Technology Assisted Voting" or iVote scheme. Although those legislative provisions were fundamentally technical, rather than pure principles or standards, the importance for adopting principle-based electoral legislation lies in the delegation of rule-making power to the NSWEC, over an issue which requires technical innovation and design.

60. As the iVote scheme has been a highly successful example of the NSW Parliament breaking the statutory mould in adopting principles-based legislation, the submission will now consider the implementation and operation of iVote in detail.

Delegated rule-making in practice in NSW: introducing iVote

61. Prior to the March 2011 State Election, electors in New South Wales could vote only by attending a polling place (either on election day or in the two weeks prior to the election at a pre-poll location) or by lodging a postal vote. On 16 March 2010 then-Premier Rees announced that the Electoral Commissioner was to "investigate internet voting for visually impaired people of New South Wales improving their democratic right to a secret ballot".

62. A final version of the feasibility report was sent to the Premier's Office on 23 July 2010 and tabled in Parliament on 2 September 2010. The Government then appropriated funds for the implementation of the project. The *Parliamentary Electorates and Elections Further Amendments Act 2010* provided for technology

[41] New Zealand Ministry of Justice, *Electoral Finance Reform: Issues Paper*, May 2009, p 10.

assisted voting, which NSWEC named iVote. Section 120AC of the PE&EA requires the Electoral Commissioner to approve and publish procedures in relation to technology assisted voting as follows:

(1) The Electoral Commissioner may approve procedures to facilitate voting by eligible electors at an election by means of technology assisted voting.

(2) The approved procedures must provide:

(a) for an eligible elector to register before voting by means of technology assisted voting, and

(b) for the making of a record of each eligible elector who has voted by means of technology assisted voting, and

(c) for the authentication of the eligible elector's vote, and

(d) for the secrecy of the eligible elector's vote, and

(e) that any vote cast in accordance with the approved procedures be securely transmitted to the Electoral Commissioner and securely stored by the Electoral Commissioner until printed, and

(f) for the production of a printed ballot paper at the close of the poll, for the purposes of the scrutiny, for each vote transmitted to the Electoral Commissioner showing the vote cast by the eligible elector, and

(g) for the bundling of those ballot papers according to the electoral district of the eligible elector (separating Assembly and Council ballot papers into different bundles), the sealing of the bundled ballot papers in packages and the distribution of:

(i) the sealed packages of Assembly ballot papers to the relevant returning officers for each of those districts, and

(ii) the sealed packages of Council ballot papers to the Electoral Commissioner.

(3) A printed ballot paper produced in accordance with the approved procedures does not need to be in or to the effect of the form prescribed in Schedule 4 or 4A (as the case requires), or be of the same size or format as the ballot papers printed in accordance with section 83 or 83B, so long as the vote cast by the eligible elector can be accurately determined.

(4) The Electoral Commissioner may approve procedures under this section only if the Electoral Commissioner is satisfied that a class of electors, who in other circumstances would be unable to vote or would have difficulty voting, would benefit from the approval of the procedures.

(5) The only limit on the power of the Electoral Commissioner to approve procedures under this section is that the pre-condition for approval set out in subsection (4) is met.

(6) The approval of procedures under this section cannot be challenged, reviewed or called into question in proceedings before any court or tribunal except on the grounds that the approval exceeds the jurisdictional limit specified by subsection (5) for the approval of such procedures.

63. To qualify for iVote, s 120AB of the PE&EA listed the following eligibility requirements:
    - the elector's vision is so impaired, or the elector is otherwise so physically incapacitated or so illiterate, that he or she is unable to vote without assistance;
    - the elector has a disability (within the meaning of the *Anti-Discrimination Act 1977*) and because of that disability he or she has difficulty voting at a polling place or is unable to vote without assistance;
    - the elector's real place of living is not within 20 kilometres, by the nearest practicable route, of a polling place; or
    - the elector will not throughout the hours of polling on polling day be within New South Wales: s 120AB of the PE&EA.

64. In addition, s 120AB(2) provides that the Electoral Commissioner may, by order published on the NSW legislation website, impose additional requirements on any of the eligibility requirements for technology assisted voting. Regulations made under the PE&EA may limit the classes of electors who may be eligible for technology assisted voting: s 120AB(3). Accountability of the entire process was retained by way of a requirement under s 120AD for an independent audit.

65. Under Division 123A of the PE&EA, iVote is available to voters who:
    - qualify under one of the above grounds;
    - appear on the authorised electoral roll at the time of issue of writ for the NSW State General Election; and
    - register their intention to use iVote.

66. The security and privacy within iVote is ensured by methods such as external expert scrutiny and extensive testing, including intrusion testing and also an audit whenever iVote is used for State General Elections.

The response to iVote

67. The NSWEC's digital iVoting advertisements were seen by 1.4 million people almost three times each. More importantly perhaps, the iVote advertisements generated 592 direct iVote applications, with the *Sydney Morning Herald* website delivering the highest conversion rate from the advertisements to completion of registration. The videos on YouTube were viewed more than 22,000 times with those on iVote and pre-poll and counting of the votes the most popular. Indeed, feedback received by the NSWEC indicated that electors were frustrated with not being able to use iVote, as it was only available for voters who met the statutory criteria.

68. The estimated use of iVote vastly exceeded expectations. Registrations for iVote totalled 51,103, with 46,864 subsequently using iVote to cast their ballot. While iVoting was initially conceived to assist voters with visual impairment, it was taken up enthusiastically by voters outside New South Wales, with 43,257 (92.3%) such voters using iVote. Voters in remote areas also voted in greater numbers than the NSWEC expected, while those with a disability voted at a much lower rate than anticipated. The independent evaluation - detailed below - found significant public value in extending this voting method to other elections such as enabling voters at Local Government elections to vote out of their council area.

69. In assessing the operation of iVote, the July 2011 Allen Consulting Group report made the following findings:
    - iVote was effective in facilitating a secret and independently verifiable vote for electors who were blind or had vision impairment and that the system enfranchised a lot of people who would not have otherwise voted;
    - the take-up of the iVote system was highly successful with actual numbers of users being over four times the original estimates. Registrations and votes received from electors in rural and remote areas exceeded the original take-up estimates by almost threefold while there was lower than estimated take-up rate amongst blind or vision impaired voters and voters with a disability. The vast majority of iVote registrants and users were people outside the State on election day;
    - significantly high satisfaction levels with iVote overall (91% of iVote users were either satisfied or very satisfied) and individual elements of the system. Most iVote users were interested in using the system again and would recommend it to other people;
    - from the perspective of users, both registration and voting were relatively problem free;

- a major improvement suggested by users was for increased promotion of iVote and amend the legislation to allow a wider group of people to use it. Additional recommendations concerned the ease of navigation of the NSWEC's iVote website, addressing the few technical issues experienced and making the registration process easier to use;
- the average cost per vote cast using iVote was lower than originally anticipated largely due to the extension of eligibility to electors outside the State during pre-poll voting and on polling day;
- the system was cost effective when compared to other systems with similar aims;
- with a take-up of 200,000 votes, the costs would lower to around $24 per vote. With increased usage to around 500,000 the cost per iVote could be comparable (or possibly cheaper) than postal and pre-poll voting methods;
- the use of iVote for future Local Government elections appeared to be even more cost effective however this would require legislative change to local government elections regulation; and
- the recommendations included amending the legislation to extend iVote eligibility to other groups such as those eligible for a pre-poll or postal vote.[42]

70. I note that in their submission to the Committee's review of the 2011 State General Election, the NSW Nationals recommended that eligibility for iVote be extended to electors who will be more than 20km outside their electorate on polling day for a by-election.[43] I note also that this could be facilitated by amending the categories for eligible iVoters within s 120AB(d) of the PE&EA for by-elections from "not ...be within New South Wales" to "not....be within the district" on polling day.

71. Homelessness NSW supported the continued use of iVote as an engagement strategy to allow, particularly, young people experiencing homelessness to participate in the electoral process;[44] and the ALP recommended that the iVote system be extended to the 2012 Local Government Elections in NSW, as the larger than expected volume of iVotes cast at the 2011 NSW Election "suggests that this system is helping more electors to cast a vote".[45]

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[42] The entire report is available on the NSWEC website: http://www.elections.nsw.gov.au/__data/assets/pdf_file/0004/93766/July_2011_Final_ACG_iVote_Report_ELE01-C_Final.pdf

[43] NSW Nationals, Submission No 11 to the Review of the Administration of the NSW Election and other related matters, p 2.

[44] Homelessness NSW, Submission No 12 to the Review of the Administration of the NSW Election and other related matters, p 2.

[45] Australian Labor Party, Submission No 10 to the Review of the Administration of the NSW Election and other related matters, p 4.

72. Much of this information has already been made publicly available – both on the NSWEC website and in my report on the conduct of the 2011 Elections, tabled in Parliament on 24 November 2011. However, I considered it was important to again bring it to the attention of Committee Members as it is a highly successful example of the NSW Parliament entrusting delegated rule-making to the NSWEC.

Antarctic voters

73. Another example of the efficacy of delegated rule-making, is in the case of Antarctic voters. An elector employed in Antarctica on election day can request to vote as an Antarctic elector: "Antarctica" for this purpose includes the Australian Antarctic Territory, the Territory of Heard Island and McDonald Islands, Macquarie Fields and on a ship in transit to or from one of these a places that has been declared by the Electoral Commissioner to be an Antarctic ship.

74. Prior to the *Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Act 2009* [Automatic Enrolment Act], the voting procedures in the PE&EA consisted of an extremely cumbersome and prescriptive regime of some 17 sections. The Automatic Enrolment Act introduced new s 154AA, which delegates to the NSWEC the function of approving procedures to enable any Antarctic elector, where practicable, to vote at an election.

75. Antarctic voters were given a number of options to complete their ballot papers, one of which was iVote. I am pleased to note that the iVote option was exercised by all electors who voted in Antarctica.

76. I would like to suggest to Committee Members that, although there were only a handful of votes cast in Antarctica for the NSW State Election, scattered across a number of electorates, this nonetheless highlights the commitment of the NSWEC to implementing those principles for the conduct of elections set out above through a continuing process of reform entailing the use of the most up to date technology available.

Legislative terminology

77. An important indicator of the appropriateness of the PE&EA in its current form is its use of language. Despite its many amendments, much of the PE&EA's statutory terminology very much reflects its 19th century origins. For instance, s 125 reads as follows:

> **Returning officers' parcels**
>
> The returning officer shall, in respect of the polling booth at which the returning officer has presided, make up in separate parcels in like manner as is herein required of polling place managers, all ballot papers used or

unused, and all books, rolls and papers kept or used by him or her at such polling booths and, if relevant, *copies of the electronic authorised copy of the roll*, or other files, showing the delivery of ballot papers to voters at such polling booths; and shall seal up and also permit to be sealed up by the scrutineers, and shall indorse in like manner as aforesaid the several parcels and deal with the same as hereinafter provided; and shall also make out in respect of the said booth the like list as is herein required in the case of polling place managers, which said list shall be verified by the signature of the returning officer, one or more other election officials and scrutineers in manner aforesaid.

78. The juxtaposition of this archaic procedure with the contemporary use of electronic rolls, as provided for by the Automatic Enrolment Act, exemplifies the many incongruities in the PE&EA.

79. I would suggest that a more serviceable version of this provision would be:

> Each returning officer presiding over a polling booth must account for and secure all ballot papers in accordance with the EC/NSWEC's approved procedures.

80. In addition, terminology such as "district", "returning officer" and "polling booth" could be rendered much more recognizable to voters if they were replaced with terms such as "electorate", "election manager", and voting centre". Another example would be the removal of references to "treating" as an electoral offence, to be subsumed under the more intelligible "bribery".[46]

81. Generally, the PE&EA needs a thorough re-assessment to gauge the suitability of language used throughout.

Conclusion

82. From the above it will be seen overwhelmingly that the PE&EA in its current form is not appropriate for the complex undertaking that is a State General Election in New South Wales in the 21st century. Moreover, it is completely inappropriate and counter-productive to continue the piecemeal process of adding and removing sections of an Act which has become the legislative equivalent of the real estate terminology "renovate or detonate".

83. Rather, as iVote has resoundingly demonstrated, to continue the momentum for reform to best electoral practice, a new Electoral Act should consist - wherever reasonably possible - of principles determined by the Parliament, the implementation of which is undertaken by the Electoral Commissioner.

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[46] See Part 5 Div 17 of the PE&EA.

The role and functions of the New South Wales Electoral Commission

84. As noted above, it is my view that the best way forward is for the amalgamation of the PE&EA, the local government election provisions in the *Local Government Act 1993* [LGA] and *Local Government (General) Regulation 2005*, and the EFEDA into one Electoral Act, providing for both State and Local Government Elections for New South Wales. This section of the submission will deal briefly with the future structure of the NSWEC and the EFA under such a legislative regime.

The current structure

85. Section 21AA of the PE&EA provides that the Governor may appoint an Electoral Commissioner for New South Wales, who has the responsibility of administering the PE&EA and any provisions of any other Act, so far as the PE&EA and those other provisions relate to the enrolment of electors, the preparation of rolls of electors, and the conduct of elections.

86. Pursuant to s 21A of the PE&EA, the NSWEC is a corporation whose functions are exercisable by the Electoral Commissioner, such that anything done by the Electoral Commissioner on behalf of the NSWEC is taken to have been done by the NSWEC. The EFA is constituted as a corporation under s 5 of the EFEDA.

87. Under the provisions of Part 2 of the EFEDA, the Electoral Commissioner is also the Chairperson of the three-member Election Funding Authority [EFA]. The other members are appointed by the Governor on the nomination of the Premier, and of the Leader of the Opposition in the Assembly, respectively.[47] I note that in the Second Reading Speech of the 1981 Elections Funding Bill, Premier Wran stated that the method of nomination of the other two members "recognizes implicitly the importance of Parliament in our democratic system and will ensure a balanced representation".[48]

88. Generally, the EFA has the responsibility of dealing with:
    - applications for registration of candidates for election, third party campaigners, party agents and official agents under Part 4;
    - claims for payments from the Election Campaign Fund under Part 5;
    - disclosures of, and caps on, political donations and electoral expenditure under Part 6; and

[47] Each member of the EFA also has an alternate: s 8 of the EFEDA.
[48] Hon N K Wran QC MP, Premier, Legislative Assembly *Hansard*, 15 April 1981.

- claims for payments from the Administration Fund under Part 6A: s 23 of the EFEDA.[49]

These responsibilities are dealt with in detail below.

89. Neither the NSWEC nor the EFA can, as statutory corporations, employ any staff [s 21A(5) of the PE&EA & Note; s 22(3) of the EFEDA & Note] . However, the Electoral Commissioner in his capacity as Division Head of the Office of the NSWEC may employ staff in the Government Service under Chapter 1A of the *Public Sector Employment and Management Act 2002* [PSEMEA] (see also Sched 1, PSEMA, Divisions of the Government Service). Staff employed by the Office of the NSWEC provide administrative support to the NSWEC and the EFA to enable them to exercise their functions. I note that the PSMEA has never provided for an Office of the EFA.

A 21st century structure

90. I would like to propose that the new legislation would constitute the NSWEC as a three-member entity with overall responsibility for both the conduct of elections and regulation of campaign funding and disclosure. Having regard to these responsibilities, I would recommend that the other Members should be a retired Supreme Court judge as Chair, the Electoral Commissioner and the Auditor-General of New South Wales, *ex officio*. I note that this resembles the system adopted by the Commonwealth,[50] Queensland,[51] Tasmania,[52] the ACT,[53] and New Zealand;[54] and I consider that this combination would provide the skillset to best allow the NSWEC to fulfil its new statutory role.

91. Under this model, there will be a clear distinction between the Electoral Commissioner as the individual with responsibility for conduct of elections delegated by the NSWEC as statutory corporation, and that entity itself.[55] The new NSWEC will replace the EFA as campaign finance regulator, and it will be the NSWEC with delegated authority under the enabling legislation that will approve rules and procedures for the conduct of elections and administrative functions in the funding

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[49] In addition, the EFA is to issue guidelines with respect to any matters dealt with in the EFEDA, except Parts 1 and 2: s 24 of the EFEDA.

[50] *Commonwealth Electoral Act 1918*, s 6(2).

[51] Qld *Electoral Act 1992,* s 6(2). However, the three-member Commission only exercises boundary-setting responsibilities. Otherwise the Commission consists of the Commissioner: s 6(3).

[52] Tas *Electoral Act 2004*, s 7.

[53] ACT *Electoral Act 1992*, s 6.

[54] NZ *Electoral Act 2002*, s 4D.

[55] I would also recommend that an augmented NSWEC, consisting of the three members outlined together with the Surveyor-General of NSW, would set electoral boundaries. However, as Part 2 of the PE&EA is specifically excluded from the remit of the Committee's Inquiry, I will not go into this in any detail.

and disclosure context. This separation of roles and responsibilities will be an important probity safeguard.

The EFA

92. The current situation of the EFA as a separate statutory corporation to regulate campaign finances is unique among Australian jurisdictions. As previously mentioned - and as is the case in other States [see Annexure 2] - under my proposed model a single entity will be responsible for administering elections as well as regulating funding and disclosure.

93. The proposed membership of the NSWEC would also address any potential appearance of bias in the enforcement of the funding and disclosure regime. While I am not suggesting that there has ever been any impropriety on the part of appointees to the EFA, members of the public would probably be surprised to discover that their appointments are at the behest of the Premier and Opposition Leader.

94. I would suggest that at the inception of the EFA in 1981, the amounts being dealt with would have been of such a small amount as to render its make-up uncontroversial. However, given that there was an amount of $28,575,000 available for distribution from the Election Campaign Fund to the eligible parties for the 2011 State Election, the proposed new structure would increase public confidence in the independence of the NSWEC. Also, it would take into account that the historical dominance of the legislature by the two major parties is not necessarily the case, having regard to, e.g., the importance of the Greens and the minor parties in the Legislative Council.

95. The importance of the public perception of the independence of the NSWEC is highlighted by the fact that the three-member NSWEC would also be the decision-maker in the area of prosecutions for breaches of the funding and disclosure provisions of the legislation.

96. I also note that the role and functions of the EFA need to be considered separately from the administration of the EFEDA. For example, it may be queried as to what is the purpose of the EFA having to approve public funding entitlements if those entitlements are in fact prescribed in the EFEDA and the EFA has no discretion? Any new legislation should have regard to identified administrative requirements being exercised - or delegated to - to an appropriate person.

97. Moreover, the EFA currently is empowered only to delegate functions to the Chairperson; there is no power to subdelegate [s 115 of the EFEDA]. Practically, this means reliance on vague common law implied authorisations for staff to exercise

functions on behalf of the EFA. I would strongly suggest that any delegation power in a new Electoral Act should be broader, and to any employee, as is currently the case for the NSWEC: s 21AM of the PE&EA.

Independence of the Electoral Commissioner

98. The importance of an independent authority conducting elections is recognised internationally:

> The status, powers and independence of the election administration and administrators, and the impartiality and transparency with which they act and are seen to be allowed to act, are fundamental to the integrity of an election. The composition, mandate and status of an election management body ... should be clearly defined to ensure its independence and non-partisan character.[56]

99. The International Institute for Democracy and Electoral Assistance [IDEA] has identified three models of electoral authority. These incorporate a range of criteria including institutional arrangements, accountability, powers, composition, security of tenure and budget control. Briefly, the models are:
    - Independent – being institutionally independent from the Executive;
    - Government – within or under the direction of a Minister and Department; and
    - Mixed – a combination of the first two models, with a degree of institutional independence, but still within the direction and control of the government of the day.[57]

100. IDEA's model of an independent electoral authority is set out below:

Aspect	Independent electoral management body
Institutional arrangement	Is institutionally independent of the executive branch of government
Implementation	Exercises full responsibility for implementation
Formal accountability	Does not report to executive branch of

[56] Commonwealth Secretariat (1997), *Good Commonwealth Electoral Practice: A Working Document 1997,* p 6.

[57] A Wall, A Ellis, A Ayoub, C W Dundas, J Rukambe and S Staino, *Electoral Management Design: The International IDEA Handbook,* Stockholm: International IDEA, 2006, p 9. An alternative model is the fourfold one of Rafael López-Pintor: a *governmental* approach, with elections conducted by civil (public) servants; a *judicial* approach, in which judges are appointed to administer the election; a *multi-party* approach, where the electoral body is composed of party representatives; and an *expert* approach, in which political parties, by consensus, delegate responsibility to a group of experienced individuals with a reputation for independence: http://epress.anu.edu.au/wp-content/uploads/2012/04/ch03.pdf

	government but with very few exceptions is formally accountable to the legislature, judiciary or head of state
Powers	Has powers to develop the electoral regulatory framework independently under the law
Composition	Is composed of members who are outside the executive branch while in office
Term of office	Offers security of tenure, but not necessarily fixed term of office
Budget	Has and manages its own budget independently of day-to-day governmental control

101. IDEA includes Australia as an example of this independent model,[58] although in doing so, it does not appear to consider Electoral Commissions at the sub-national level. However, the fact that Commissions such as the NSWEC do not have the power to develop the electoral regulatory framework independently of statute detracts from this. In this respect, Australian electoral authorities lie more within IDEA's Government or Mixed models.

Ability to contract

102. The authority of the NSWEC to enter into agreements to offer services to, or receive services from, other government agencies should be explicitly recognized in the legislation, rather than having to rely on the provisions of the *Interpretation Act 1987*.

103. This is not to suggest that the NSWEC cannot currently enter into contracts - as a statutory corporation it has its own legal status by virtue of being established by legislation.[59] Moreover, pursuant to s21A(3) of the PE&EA, the functions of the NSWEC are exercisable by the Electoral Commissioner, and any act, matter or thing done in the name of, or on behalf of, the NSWEC by the Electoral Commissioner, or with the authority of the Electoral Commissioner, is taken to have been done by the NSWEC.

104. However, for the avoidance of any confusion, the Electoral Commissioner should be provided with the authority to, for example, enter into leases for all premises used by election officers for the purposes of an election: what is needed is an express provision within the PE&EA which clarifies that a natural person can sign such leases, without any need for the use of the seal of the corporation. One option would be to amend the current s 21A along the following lines:

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[58] *Electoral Management Design: The International IDEA Handbook*, p 7.

[59] Whether it can enter into a *particular* contract is a matter of construction: see *Commonwealth v Australian Commonwealth Shipping Board* [1926] HCA 39 per Isaacs J.

The Electoral Commissioner may sign as a natural person any contracts on behalf of the Electoral Commission necessary for the effective exercise of the Electoral Commission's functions under this or any other Act.

Public perception of the NSWEC

105. It is also generally agreed that electoral authorities should not only be independent and impartial, but that they should also not allow for any perception of dependence or partiality to occur.[60] To this end, IDEA identifies five essential criteria for ethical electoral administration, being:

- respect for the law;
- non-partisanship and neutrality;
- transparency;
- accuracy; and
- service to voters.[61]

106. As noted above, the NSWEC's mission is to provide high quality election services that are:

- impartial;
- effective;
- efficient; and
- in accordance with the law.

107. I would suggest that there is sufficient overlap between these two sets of criteria to establish that the NSWEC is already operating as an ethical election administrator. In addition, the removal of the existing process of "political" appointments to the EFA will also remove any perception of partial decision making.

NSWEC approved procedures and directions

108. In practice, delegated rule-making under a new Electoral Act would involve the NSWEC making rulings/approving procedures which would be published on the NSWEC website - and others as foreshadowed, such as Parliament and legislation websites - and which would then be binding on all participants in the electoral process at both the State and local government levels. I note that there is already a precedent for this procedure in the form of the existing power of the EFA to determine and issue guidelines, in respect of any matters dealt with in the EFEDA, except Parts 1 and 2: s 24 of the EFEDA.

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[60] P Dacey, 'What Do "Impartiality", "Independence" and "Transparency" Mean? – Some Thoughts from Australia', Paper delivered at the *Improving the Quality of Election Management Conference of Commonwealth Chief Election Officers*, New Delhi, India, 2005, pp 2-3.

[61] IDEA, *Code of Conduct for the Ethical and Professional Administration of Elections*, 1999, pp 9-15. http://www.idea.int/publications/conduct_admin/upload/adm_english.pdf

109. Other examples of the power to make binding directions are that, at the Commonwealth level, the Public Service Commissioner may make Directions with which Agency Heads and APS employees must comply;[62] and in Tasmania the State Service Commissioner may issue binding Directions on any matter relating to the Commissioner's functions. Decisions arising from the determination of Reviews are also binding and final.[63]

110. Also at the Commonwealth level, the Commissioner of Taxation is empowered to make binding public rulings. These are published statements of the Commissioner's opinion of how a provision of tax law applies, or would apply, to taxpayers in relation to a class of schemes or to a class of taxpayer generally, rather than in respect of the specific circumstances of a particular taxpayer. Public rulings provide advice for taxpayers, their advisers and tax officers on the interpretation of tax laws that affect liability or entitlements under those laws. In addition, public rulings can address administrative and procedural provisions, including those relating to the collection of liabilities.

111. Notice of the making of a public ruling is published in the *Commonwealth of Australia Gazette*, and the public rulings are accessible via ATOlaw or through the Legal database on the ATO website.[64]

112. With respect to the content of the NSWEC's Directions, I would suggest that Committee Members refer to Annexure 3, which sets out the Technology Assisted Voting Approved Procedures for NSW State General Election 2011, drafted pursuant to s 120AC of the PE&EA.

The Committee on Electoral Matters

113. In stressing the need for the independence of the NSWEC and of the Electoral Commissioner, my submission is not making the case for a body freed from any form of accountability, and a law unto itself. Indeed, I would like to suggest to Committee Members that the review of the legislation is an appropriate opportunity to give a statutory role to the Committee on Electoral Matters.

114. Specifically providing for the NSWEC to be accountable to the Committee under a new Electoral Act would replicate the current provisions in New South

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[62] Such Directions cannot create offences or impose penalties; may be made by applying, adopting or incorporating any matter in Classification Rules as in force from time to time, or at a particular time; and are disallowable non-legislative instruments for the purposes of s 46B of the *Acts Interpretation Act 1901*: s 42 of the *Public Service Act 1999* (Cth).

[63] See s 17 of the Tasmanian *State Service Act 2000*.

[64] See ATO, *Practice Statement Law Administration*, PS LA 2008/3 http://law.ato.gov.au/atolaw/view.htm?locid='PSR/PS20083/NAT/ATO/ft50'&PiT=99991231235958

Wales relating to other integrity agencies: the Auditor-General,[65] the Health Care Complaints Commission,[66] the Independent Commission Against Corruption,[67] and the Ombudsman.[68] As Dr Gareth Griffiths has noted, these Parliamentary Committees "guard the guardians of integrity".[69]

115. Direct accountability to the Committee also fits within the current statutory scheme whereby the Electoral Commissioner can only be removed from office by a resolution of both Houses of Parliament to that effect: s 21AB(3)(b) of the PE&EA.

116. Consideration might also be given to providing the Committee with the power of veto over the appointment of the Electoral Commissioner, thereby removing the appointment from the remit of the Executive alone.[70]

117. The conferral on f the Committee of an express role under the Electoral Act would also formalise the existing practice of the NSWEC producing a report on elections which then forms the basis of the Committee's review of those elections. The new Act should expressly impose on the NSWEC a requirement to provide such reports to the Chair of the Committee on Electoral Matters who would then table it in Parliament.

Conclusion

118. A new Electoral Act should provide for an independent three-member NSWEC – augmented when reviewing electoral boundaries – with direct responsibility for the State's election funding and disclosure regime, rather than a separate Election Funding Authority. The NSWEC would delegate the responsibility for the conduct of State and Local Government Elections to the Electoral Commissioner, a statutory appointee who reports to the Parliament's bi-partisan Joint Standing Committee on Electoral Matters, established under the new Act.

The entitlement to enrol and vote in New South Wales

119. Subject to the exceptions in s 25 of the PE&EA,[71] an elector who is enrolled in an electoral district is entitled to vote at a Legislative Assembly election for that

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[65] *Public Finance and Audit Act 1983*, s 57.
[66] *Health Care Complaints Act 1993*, s 65.
[67] *Independent Commission Against Corruption Act 1988*, s 64.
[68] *Ombudsman Act 1974*, s 31B.
[69] G Griffith, *Parliament and Accountability: The Role of Parliamentary Oversight Committees*, NSW Parliamentary Library Research Service Briefing Paper No 12/05, p 11.
[70] See, e.g. s 31BA of the *Ombudsman Act 1974*.
[71] The s 25 exceptions are incapability of understanding the nature and significance of enrolment and voting due to being of unsound mind; serving a prison sentence of 12 months; or holding a temporary entry permit or being a prohibited immigrant under the Commonwealth *Migration Act 1958*.

electorate [s 23]. Under s 22(1) a person is entitled to be enrolled for a district if the person is 18 years of age, an Australian citizen, and has lived at an address in that electorate for at least one month before enrolling.

120. As was noted above, voting was made compulsory in New South Wales in 1928. Pursuant to s 27(1) of the PE&EA, enrolling to vote and keeping that enrolment current is compulsory, with a maximum fine of 1 penalty unit, i.e. $55. The participation rate at the 2011 State Elections was 92.6%, a small decrease of 0.7% on the 2007 result; and the rate within New South Wales at the 2010 Federal Elections was 93.33%, also a small decrease of 1.58% from the 2007 result.

121. In the wake of the 2011 State Elections, 234,463 electors who had not been granted an exemption from voting and whose names were not marked off the roll, received notices requesting an explanation for the apparent failure to vote.

122. Electors who did not respond to the penalty notice received a follow up penalty reminder notice. There were 112,943 electors in this category, comprising 2.4% of the roll and 48.1% of those who received an initial penalty notice. In early September 2011 the NSWEC issued 1,649 final notices to electors who did not provide an acceptable reason for not voting. Of these electors, 26 chose to have the matter dealt with in court, and these matters are currently proceeding.

The nature of compulsion

123. The Australian Commonwealth is one of only 19 countries which enforce compulsory voting.[72] I am aware that there remains considerable debate on the desirability of compulsory voting, but I maintain that decisions made by democratically elected governments are more legitimate when higher proportions of the population participate. Moreover, if democracy is government by the people, then it is every citizen's responsibility to elect their representatives. I note that voter participation at the New Zealand 2008 Parliamentary Elections was 79.46%; that of the United Kingdom 2011 Parliamentary Elections was 65.77 % - up from a low of 59.38% in 2001; and the United States 2008 Congressional Elections was only 41.59%.[73]

124. The submission referred earlier to the Universal Declaration of Human Rights. Article 29 thereof states that rights and freedoms are subject to duties to the community, including the "just requirements of morality, public order and the general welfare in a democratic society". Following on from this, I agree with the

[72] http://www.aec.gov.au/About_AEC/publications/voting/index.htm#other

[73] For further comparison, see IDEA's *Voter Turnout Database*, http://www.idea.int/vt/introduction.cfm

following statement of the Public Interest Advocacy Centre stated, in a submission to the Commonwealth Joint Standing Committee on Electoral Matters, that:

> [t]here are many things that people do not wish to do and which they would not do if they were able to exercise 'individual freedoms', but which parliament has legislated to require. The role of parliament in a parliamentary democracy includes passing laws to ensure the effectiveness of that democratic system.[74]

125. Accordingly, for the time being I remain a supporter of compulsory voting. However, Committee Members may wish to consider whether the current penalty for non-voting is a sufficient deterrent.

Conclusion

126. Having regard to the statistics on voter turnout - and comparing them with some other English-speaking democracies where voting is voluntary - I would suggest that compulsory voting has been an effective means of promoting participation in the democratic process in New South Wales. I do not consider that there is any contemporary evidence to suggest that making voting voluntary would improve that process, but would suggest that the likely concomitant drop in participation may ultimately have a deleterious effect on the legitimacy of elected governments in the State.

Automatic enrolment

127. The Committee seeks input on the effectiveness of amendments made by the Automatic Enrolment Act to facilitate automatic enrolment for the NSW elections, i.e., the SmartRoll project.

128. Prior to the introduction of SmartRoll, the NSWEC had realised that the roll integrity maintenance practices largely utilised by the AEC of writing to people and requesting they complete a further form to change their enrolment was not working. Of most concern to the NSWEC was the cohort aged 17 to 24: national figures showed that about 120,000 eligible young people were resident in NSW but not enrolled.[75]

129. The nexus between an effective enrolment scheme and compulsory voting was set out in the Second Reading speech of the Automatic Enrolment Act in the following terms:

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[74] Cited at http://www.aec.gov.au/About_AEC/publications/voting/index.htm#other

[75] http://www.aec.gov.au/About_AEC/Media_releases/2010/4-15.htm.

> One thing is clear: If the Government does not take action now, the number of people on the roll will continue to decline. Our system of compulsory voting, which is a hallmark of Australian democratic and political culture, will be rendered a fiction. A number of groups in our society, such as young people, indigenous Australians, people with disabilities and people from non-English-speaking backgrounds, will continue to be under-represented on the electoral roll. Their voices simply will not be heard in our electoral process.[76]

Young voters

130. I note in the 2010 case of *Rowe v Electoral Commissioner*,[77] in which the issue of first-time voters was at the fore of their Honours' reasoning, French CJ cited the earlier High Court decision of *Snowdon v Dondas* to the effect that:

> The importance of maintaining unimpaired the exercise of the franchise hardly need be stated.[78]

131. Electoral demographers are seeing that young people – with their life experience of downloadable Apps and click and go technology - are increasingly less inclined to enrol to vote. For example, of the approximately 67,000 17-18 year olds who are registered with the NSW Office of the Board of Studies and complete the Higher School Certificate, only 50% enrol. It is extremely important that this percentage improves, and the NSWEC is keen to assist in that enrolment process.

132. Another part of the SmartRoll reforms was that information from various educational institutions is used to encourage 16 year olds to provisionally enrol, as is the case now; and those who are actually 18, to enrol to vote. SMS and emails are used to allow a simple enrolment using the same principle as that applying to those eligible electors who notify a NSW agency of a change of address.

A mobile population

133. It has been estimated that over 500,000 electors in New South Wales change their address each year. The SmartRoll project has recognized that the average mover's priority for changing their enrolment address details is not as high as, e.g., changing their address details with institutions such as the NSW Roads and Traffic Authority. I note that the NSWEC has long had powers to demand information from a wide range of sources, in acknowledgment of the importance of maintaining the accuracy of the roll.

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[76] Hon P G Sharpe MLC, Parliamentary Secretary, Legislative Council *Hansard*, 12 November 2009.
[77] [2010] HCA 46 at para 2.
[78] (1996) 188 CLR 48 at 71.

134. SmartRoll minimises the need to complete and lodge enrolment forms by providing that electors who have changed their address details, and notified a NSW agency of that change, are automatically enrolled at that new address. The elector will be given the opportunity to respond to a proposed automatic enrolment before being notified of their formal enrolment.

135. In other words, the process is an "opt-out" system, designed to allow those potentially eligible people to disagree with a proposed automatic enrolment if the information received by the NSWEC from other agencies is not correct. The time in which an elector can disagree depends on the mode of contact: for SMS it is 7 days, for email 10 days, and 14 days for letters. If there has been no disagreement within the relevant period, the eligible elector is notified that they are enrolled at their notified address.

136. SmartRoll sends at least two communications to potential electors. These are:

- initial SMS, email or letter notification:
  - that address information has been received by the NSWEC indicating that the person is required to be enrolled/their enrolment details updated ;
  - that it is the intention of the NSWEC to enrol the person at a specified location; and
  - advising the time frame to contact the NSWEC to make changes to the proposed enrolment or indicate disagreement with the enrolment completely.

  The recipient of a notice may contact the NSWEC by phone or through a self-service facility where access is controlled by a unique "token" included in the initial communication; and
- confirmation of enrolment letter - if, after a minimum of seven days, no response has been received disagreeing with automatic enrolment, the person is notified of their NSW enrolment. The confirmation letter will also contain Federal enrolment information and a Federal/NSW enrolment form.

The results

137. By the 2011 State Elections some 42,172 voters had been enrolled using SmartRoll, thereby exceeding the NSWEC's aim of an additional 40,000 eligible but unenrolled electors onto the NSW Electoral Roll. By the September 2012 Local Government Elections the NSWEC will have newly enrolled approximately 150,000 of the missing 500,000 electors in the State, and changed the enrolment of almost 400,000 electors through the SmartRoll process.

138. Although a few of the electors placed on the roll by the SmartRoll process were re-enrolments [2.4%], the majority involved updating the enrolment address [52.6%], followed closely by new enrolments [45.0%]. I note also that the independently conducted survey of electors undertaken following the 2011 NSW State Election found that of those electors who had their details updated by SmartRoll, 25% said that they would probably not have updated their enrolment details themselves. Less than 0.1% of people objected to the NSWEC using data they had provided to other government agencies being used by the NSWEC for SmartRoll purposes. [79]

139. I note that the NSW Division of the Liberal Party has concerns over the SmartRoll process on the grounds of reliability of data, accountability of the process, and issues to do with individual responsibility for enrolment.[80] I am confident, however, that the information gained in the process is able to withstand the closest scrutiny, and that SmartRoll strikes the right balance between safeguarding the integrity of the roll and ensuring that it is accurate so that the franchise is accessible to every citizen who is entitled to exercise it, as was envisaged in the Second Reading Speech of the Automatic Enrolment Bill.[81]

Conclusion

140. The adoption of SmartRoll falls within the principles of universal franchise and participatory democracy. Based on the information set out above, I would suggest that Committee Members can be confident that its adoption in New South Wales has been a considerable success. Moreover, its implementation has struck the right balance between safeguarding the integrity and accuracy of the electoral roll.

Forms of voting

141. The Committee seeks input as to whether existing provisions relating to pre-poll voting, postal voting and other forms of voting remain appropriate. I note that in the 2011 State Election, the various forms of early voting, i.e., pre-poll, postal, declared institution voting and iVote, comprised at least 15.4% of total votes cast; nearly one in ten voters (9.5%) voted out of their electoral district and these votes were counted as "Absent votes".[82] This part of the submission will not deal with iVote, as it has been covered in detail above.

142. The amendments made by the Automatic Enrolment Act allowed "ordinary" voting - i.e., dispensing with declaration envelopes - for electors at pre-poll voting places and declared institutions within the district for which the elector was

[79] NSWEC, *Report on the conduct of the NSW State Election 2011*, p 86.
[80] Liberal Party of Australia, NSW Division, Submission No 15, np.
[81] See Hon P G Sharpe MLC, Parliamentary Secretary, Legislative Council *Hansard*, 12 November 2009.
[82] NSWEC, *Report on the conduct of the 2011 State Election*, p 63.

enrolled. This both sped up the voting process and substantially relieved congestion at pre-polling places, causing the least inconvenience to elderly and infirm voters.

Postal voting

143. As noted above, postal voting was introduced in New South Wales in 1918, Section 114A(1) of the PE&EA provides an extensive list of electors who may apply to the Electoral Commissioner for a postal vote certificate and a postal ballot.

144. At the 2011 State Election, postal voting material (including ballot papers) was sent over three days from 14-16 March to the 180,000 NSW electors who had requested them in the previous weeks. Postal vote applications from within Australia need to be received by 23 March 2011, and those from overseas by 21 March 2011. Ultimately, postal votes constituted 5.7% of the vote. The electoral district with the highest number of postal votes was Parramatta. The electoral district of Monaro was the rural district with the highest number of postal votes.

145. For the first time in providing postal votes the NSWEC used an online application to increase convenience to electors and streamline the administrative processes involved. Prior to the NSW State Election 2011, applications for postal voting could be lodged by:

- mail – electors download the form, fill it in and mail the signed application form to NSWEC;
- scan and email or fax – the signed application form is received by the NSWEC via fax or email;
- political parties – political parties are a major source of postal vote applications. The parties actively support the use of postal votes by distributing applications, receiving completed postal vote applications, and then submitting the completed applications to NSWEC for processing. There is usually a significant amount of 'last minute' applications lodged by the parties; and
- "over the counter" at Returning Officers' offices – electors could hand in applications personally.

146. The volume of postal vote applications generated from parties was expected to increase significantly for the NSW State Election 2011. The likelihood of significant numbers of applications being received just prior to the close of applications led the NSWEC to take the application process online believing this would be convenient for many electors and that the centralised pool of resources established to process packages for Registered General Postal Voters would better handle the volume and other challenges of processing postal vote applications.

147. The perceived benefits of a centralised and online approach were:

- more efficient utilisation of dedicated resources;
- ability to better train and support staff processing postal vote applications; and
- alleviation of the workload in Returning Officers' offices with a potential reduction in the cost of staffing this process.

148. The service provided to electors meant that they could apply online and submit the application online. Once accepted, the form was automatically forwarded to the centralised postal vote processing centre which generated a 'ballot paper certificate' pack appropriate for that elector and directly mailed back to the applicant. The elector then only needed to complete the ballot papers, complete the declaration and have it witnessed, and post them directly to the Returning Officer in their electoral district.

149. The NSWEC also liaised with registered political parties to achieve prompt receipt of applications. As a result, in a pattern atypical for an election, party sourced postal vote applications arrived very early. One party started their postal vote application process very widely and in early February. Other political parties followed suit. When the Central Processing Centre commenced on 28 February there was already a large backlog of postal vote applications of which the vast majority were sourced from political parties. The Centre was running at full capacity in the first ten days of its operation and there were no "last minute" bulk submissions from the parties.

150. Of the total number of applications received for postal voting at the 2011 NSW State Election (263,050 applications), 10.1% were from the online system (26,586 applications). The busiest days of processing for hardcopy applications were 10 March (19,516 processed) and 15 March (18,453). For online applications, these days were 7 March (2,116) and 21 March 2011(3,093).

151. The take up of the online application exceeded expectations, although it only constituted a small percentage of voters. However, the advantages of this new system were that it made the application process more convenient for electors and reduced the delays in processing. The NSWEC's survey of Returning Officers indicated a high degree of satisfaction (over 80%) with the centralisation of processing of postal vote applications.

152. The independently-conducted evaluation of electors' satisfaction with the electoral services provided by the NSWEC found that of the 64 respondents who had voted by post, 28% had obtained their application form from a political party process and 25% had contacted the NSWEC in one way or another. 11% had used the online application process. Of all postal vote users, 86% were either very

satisfied or satisfied with the service. The numbers of respondents are too small to compare whether there were any differences in satisfaction between those who use the online system and other approaches.

153. The advantages of centralising the administrative workload, using web technology to meet growing demands for more convenience, and the greater quality assurance available from maintaining just one processing centre are powerful incentives for the NSWEC to continue centralised postal vote application processing.

Universal postal voting for Local Government Elections

154. In its report on the 2008 Local Government Elections, the Committee recommended that:

- the LGA be amended to allow elections with universal postal voting for those councils who opt to use that method of election, in time for the 2012 local government elections;
- the Government undertake consultation on the best method for councils to use to decide to opt into a universal postal voting system; and .
- the NSWEC provide advice to the General Manager of local councils interested in universal postal voting as to the costs involved in taking up this option.

155. The Committee acknowledged that it had heard evidence against universal postal voting from some councils, but concluded that there was sufficient evidence to support consideration of an opt in system whereby those councils who choose to can continue to hold attendance elections.[83]

156. In her response to the Committee, then-Premier Keneally noted that there was a divergence of views among local councils and the Local Government and Shires Associations of New South Wales concerning optional universal postal voting. The recommendation was not supported at that time, but the Government was to consult further with stakeholders to explore whether any change should be introduced to the LGA to permit universal postal voting in the future.[84]

157. I remain a supporter of universal postal voting. As I put to the Committee in 2009, from my experience as the Victorian Electoral Commissioner I would suggest that cost savings of approximately 15-20% could be made by implementing universal postal voting, utilising regional Returning Officers.[85]

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[83] Joint Standing Committee on Electoral Matters, *Public Funding of Local Government Elections*, Report No.3/54, June 2010, p 66 para 4.125.

[84] Hon K K Keneally, Premier, to Russell D Grove, Clerk of the Legislative Assembly, 9 December 2010.

[85] Joint Standing Committee on Electoral Matters, *Public Funding of Local Government Elections*, Report No.3/54, June 2010, p 62 para 4.106.

158. I would suggest that consideration of the matter could be assisted by reference to the procedures set out in Part 6 – Voting in Postal Elections of the *Victorian Local Government (Electoral) Regulations 2005*. I note also that both Victoria and Western Australia similarly confer a discretion on the individual council to decide whether elections are to be conducted by way of postal vote or by attending in person.

Pre-poll voting

159. Division 10 of the PE&EA sets out the procedure whereby an elector may apply for permission to vote prior to the election date. Pre-poll voting constituted 8.2% of the vote at the 2011 State Election.

160. Mobile pre-poll voting was made available in two areas of NSW: the Murray –Darling and Barwon. There were 10 locations within these two districts and the number of votes taken was 32 and 51 respectively across the two districts. Information concerning these pre-poll venues was available from the NSWEC's election website. The NSWEC is currently assessing the cost and effectiveness of the trial providing mobile pre-poll voting in remote parts of NSW. This review will assist in determining whether iVote may provide a more cost effective and convenient form of voting for those small numbers of electors who used the mobile pre-poll voting service.

161. I note that the Christian Democratic Party [CDP] has expressed concerns that the current declaration submitted by a pre-poll is "obviously a minimal deterrent to prevent voters from submitting a Pre-Poll vote even though they are ineligible to do so". Therefore, the CDP recommends that either the pre-poll declaration be tightened to ensure true eligibility, or be abandoned altogether so that anyone who wishes to pre-poll vote can do so.[86] Given that s 114P(1)(e) provides that an elector who will, by reason of being engaged for fee, gain or reward in any work throughout the hours of polling on polling day, be precluded from attending at any polling booth to vote, may pre-poll vote, I would suggest that the increasing trend of pre-poll voting is in part a reflection on the changing lifestyles of electors, many more of whom are working on Saturdays.

162. Moreover, I would agree with the suggestion of the CDP that the pre-poll declaration is in effect redundant as a cultural relic which has no place in a 21st century electoral regime. The importance of the *process* is that as many electors as possible exercise their vote, thereby giving the greatest legitimacy to the results, and

[86] CDP, Submission No 5 to the Review of the Administration of the NSW Election and other related matters, p 6. For the trends, see NSWEC, *Report on the conduct of the 2011 State Election*, p 12.

it is important that the NSWEC acknowledge the right of voters to do so in the manner which is the most convenient to them. I would therefore suggest that this principle also should be kept in mind in any consideration of the expansion of access to iVote.

Declared institutions

163. Pursuant to 114ZN, the Electoral Commissioner may declare an institution to be a "declared institution" for the purposes of Division 11A of the PE&EA. Such institutions are convalescent homes, hospitals or similar institutions in which a polling place has not been appointed. Any temporary or permanent resident or inpatient of a declared institution who has requested an opportunity to record his or her vote at the institution is entitled to vote while the pre-poll voting officers are at the institution for the purpose of taking the poll: s 114ZP.[87]

164. The NSWEC contacts every declared institution during the pre-election planning phase to explain the voting process, and to ascertain whether they would like a visit from a mobile polling team. Following this, the relevant Returning Officer contacts each declared institution within their electoral district to confirm the visit and discuss the associated logistics and procedures. A number of declared institutions have advised the NSWEC that their residents would rather take the option of postal voting or iVoting, and consequently the number of declared institutions visited by a mobile team may well decline in the future. The NSWEC considers it the right of a declared institution to choose the most suitable method of voting for their residents, and will continue to service those declared institutions who wish to have a mobile team visit their facility.

165. I note that in their submission to the Committee's Review of the 2011 State Election, the Nationals suggested that there wasn't uniformity in procedures across the State, and that the NSWEC should provide more detailed explanations to institutions of the procedures for voting, and electoral officials should be given more training in overseeing the process at each declared institution. I note, however, that Returning Officers are trained in voting procedures at declared institutions and they in turn train their Election Officials. Nonetheless, the NSWEC will review the training and standard operating procedures for voting procedures at declared institutions to ensure greater consistency and adherence to these procedures at future elections.

Provisional voting

166. Provisional or "declaration" voting provides electors presenting at a polling place who do not appear on the roll, or whose names have already been marked off the roll, with an opportunity to vote by casting their ballot paper in an envelope

[87] On any day during the 7 days before polling day, at least two pre-poll voting officers may attend at the institution for the purpose of taking the poll: s 114ZO(2)].

bearing a declaration that the person is in fact eligible to do so. These envelopes are scrutinised after the close of poll, and if it appears that the person is eligible to vote, the ballot papers are admitted to the count. Provisional voting has always been available for people who claim that they are enrolled for a particular electorate and that they have been omitted from the roll, or marked off the roll, in error.

167. Among the provisional vote types available is where a person has a declaration issued when he or she is enrolling to vote at the time of actually voting. To be able to do so, the person must show to an electoral official a NSW photo driver licence or a NSW photo card issued by the Roads and Maritime Services [formerly, the Roads and Traffic Authority] [s 106(2A)]. Similar provisions apply to a person seeking to transfer enrolment on election day: s 106(2B).

168. The importance of the current availability of enrolment voting is that it helps to address the divergence of rolls which is occurring while NSWEC enrolment is automated pursuant to SmartRoll, and enrolment at the Commonwealth level is still only available via paper application (though it is noted that existing enrolees on the Commonwealth roll may now update their details online.).

Conclusion

169. Ensuring that as many electors as possible are able to cast a vote strengthens democracy in New South Wales. It also helps enforce compulsory voting and realise the exercise of the universal franchise. While the overwhelming number of electors continues to vote by attending at a polling booth on election day for State Parliamentary elections, there are nonetheless a considerable number of people who require a means of early voting. As noted above, I agree with the suggestion that the use of pre-poll declarations be discontinued.

Electors with a disability and rural and remote electors

170. In order to achieve a fully participatory democracy in New South Wales, some sectors of the population require additional assistance to exercise their vote, particularly by way of some form of pre-poll. This section of the submission will deal with the appropriateness of voting options for the two sectors highlighted by the Committee, i.e., electors with a disability, and rural and remote electors.

Electors with a disability

171. The NSWEC acknowledges that people with a disability comprise a significant proportion of the population and are often disadvantaged in accessing electoral services. Accordingly, since 2007 the NSWEC has partnered with a range of peak bodies representing the interests of people with disabilities to improve electoral facilities. Representatives of these organisations form the Equal Access to Democracy Reference Group. The result of this partnership was the NSWEC *Equal*

Access to Democracy Action Plan 2010-12, which is published on the NSWEC website.[88] The plan will be updated prior to the 2015 State Election, after extensive consultation.

Technology assisted voting

172. In its submission to the Committee's Review of the 2011 State Election, Vision Australia considered that the iVote telephone option available at the 2011 State Election should be maintained, arguing that in the November 2011 Clarence by-election, people who were eligible for iVote could not take advantage of it, as it was not offered.[89] I note, however, that of the 668 blind/vision impaired/illiterate electors who used iVote, 450 iVoted by internet as opposed to 218 iVoting by telephone. Of the electors with other disabilities, 1,136 iVoted by internet with only 160 iVoting by telephone.[90] Accordingly, the feasibility of telephone iVoting is open to serious questioning on at least a costs basis.

173. In response to these concerns, the NSWEC will investigate the use of technology-based phone voting using a voice actuated interactive voice response approach for the next State Election; all by-elections between now and next State Election will use a call centre based phone voting approach with a human interface keying votes into the web browser based iVote system. The NSWEC will survey disabled electors to identify whether they would be better served at the next State Election by phone voting using a technology interface using DTMF or voice

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[88] http://www.elections.nsw.gov.au/__data/assets/pdf_file/0003/91650/EA_to_Dem_Action_Plan_Web_8_3_11_FINAL.pdf. I note also Australia's international obligations under the UN Convention on the Rights of Persons with Disabilities, which Australia ratified on 18 July 2008. Article 12 of the convention provides that parties to the convention "shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life": See http://www.un.org/disabilities/convention/conventionfull.shtml

[89] Vision Australia argued that the telephone option had the following advantages:

- almost everybody in Australian society will have had continuous exposure to a phone keypad, particularly given the importance of telephone communication to people who are blind or have low vision;
- increasingly both business and government are deploying Interactive Voice Response (IVR) systems which require people, whether they have a vision impairment or not, to use a phone keypad;
- many people who are older are not necessarily comfortable doing business over the internet, are often reasonably comfortable doing the same business using IVR over the telephone, e.g., phone banking; and
- while public internet cafes or even a friend's computer may not have the technology to enable them to use the internet, they will likely be able to use the phone from any location: Vision Australia, Submission No 13 to the Review of the Administration of the NSW Election and other related matters, para 4.1.

[90] See NSWEC, *Report on the Conduct of the NSW State Election 2011*, p 90. The other eligible groups even more overwhelmingly opted for inter voting: 1,542 internet as opposed to 101 telephone for electors more than 20km from a polling place; and 41,477 internet versus 1,780 telephone for voters outside NSW on polling day.

actuation, a human interface, or a combination of all of these approaches, although I note that the immediacy of an independent and secret vote in elections guarantees the freedom and fairness of that vote.

174. The NSWEC will also work with Vision Australia and other peak disability bodies to promote iVote at the next State Election, to ensure that opportunities for a secret vote through iVote are maximised. NSWEC also recommends the establishment of a permanent iVote register for electors with long term disabilities, to avoid the necessity of re-registering for each election.

Voters of "unsound mind"

175. I would also like to use this opportunity to refer to another issue raised by the Australian Centre for Disability Law [ACDL] in its submission to the Committee's review of the 2011 State Election. That issue is the current provision for a voter to be disqualified from voting if found to be incapable of understanding the nature and significance of enrolling and voting, due to "being of unsound mind": s 25 of the PE&EA.

176. I would suggest that ACDL rightly raises the following concerns:

- the decision could be made inappropriately and has the potential to being used as a form of abuse towards people with disability;
- people with an intellectual impairment or psychiatric impairment who are in fact able to understand the ramifications of enrolment and voting may fall into this definition inappropriately; and
- arguably, people of "sound mind" don't necessarily understand the nature and significance of enrolment and voting: as ACDL notes, "[i]t is a person's right to make a bad decision regardless of whether they have a disability that impacts on their decision making capacity".[91]

177. On its face, excluding persons of unsound mind from voting could be viewed as the removal of their fundamental right to vote; on the other hand, this may be viewed as a necessary way to protect the integrity of the electoral system. Also, it may operate as a mechanism by which some persons e.g., those suffering from dementia, are removed from the roll and thereby avoid the distress of receiving penalty notices, etc.

178. In practice, however, no test for "soundness of mind" is conducted when a person seeks to enrol, or approaches a polling booth on election day: an elector can only be removed from the roll on these grounds if a medical practitioner provides a medical certificate to certify that the elector does not understand the nature of

[91] ACDL, Submission No 9 to the Review of the Administration of the NSW Election and other related matters, paragraph 13(c).

enrolment and voting. Nonetheless, the exemption does not acknowledge that intellectual or psychiatric impairments are not necessarily either permanent or constant.[92]

179. One option that the Committee may wish to consider in addressing the current arrangements would be to abolish the current exclusion for persons of unsound mind, as has occurred in Canada;[93] and introducing a broader medical exemption under s 120C(6) of the PE&EA, which could be available for persons who are medically unfit to vote, by way of a medical certificate stating that a person is at a certain date incapable of understanding the nature and significance of enrolment and voting, without prohibiting the person from voting if they wished to do so on a particular occasion, as suggested by the ACDL.[94]

Accessibility

180. Under the heading of "Promote equal access at buildings used to conduct Elections", the NSWEC Equal Access to Democracy Plan provides that the NSWEC will do the following:

> 3.1 Assess the accessibility of all venues to be used at an election and, wherever possible, select those complying with the highest standard.
> 3.2 Ensure the level of accessibility is identified on the NSWEC website for all Returning Officers' offices, pre-poll venues or polling places.
> ...
> 3.4 Provide a wheelchair accessible voting screen at all polling places.
> 3.5 Ensure election staff receive instruction on the layout of polling places to maximise accessibility of entry and exit paths.

181. However, according to the Nationals, a number of complaints were received of pre-poll and election day polling places with inadequate access for persons with mobility impairment, a particular issue in regional locations with only one polling place.[95]

182. While the NSWEC is committed to providing the best possible access and service to all electors in New South Wales, it should be noted that the NSWEC

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[92] For example, see Disability Council of New South Wales, 'Are the rights of those people whose capacity is in question being adequately promoted or protected?', Submission to the Attorney-General's Department of NSW, June 2006, available at www.disabilitycouncil.nsw.gov.au/archive/06/capacity.html.

[93] See Canadian Electoral Commission, *The Evolution of Federal Voting Rights for Canadians with Disabilities*, www.elections.ca/eca/eim/article_search/article.asp?id=17&lang=e&frmPageSize=&textonly=false.

[94] ACDL, Submission No 9 to the Review of the Administration of the NSW Election and other related matters, para 18.

[95] NSW Nationals, Submission No 11 to the Review of the Administration of the NSW Election and other related matters, p 10.

delivers its electoral services in buildings that it does not own or control. As Committee Members will appreciate, State Elections are held every four years at over 2,500 polling places throughout New South Wales, mainly in schools and community halls. Where possible, buildings with full wheelchair access are selected as polling places. However, because the NSWEC does not own these premises, and only leases them for one day every four years, this restricts the level of modification possible

183. In addition, the proximity of a facility to accessible public transport is not within the control of the NSWEC, although wherever possible, venues are hired that are accessible and close to public transport. Unfortunately, the NSWEC is also constrained by which buildings are available for leasing/hiring at the time of the election, and period of time required for hire, and often the choice of venues is limited due to this timing constraint.

184. One way of addressing this would be for the adoption of a provision similar to s 67 of the Victorian Elections Act:

67. Use of prescribed premises as voting centre

(1) The Commission may use as an election day voting centre any room or hall in a prescribed premises.

(2) The Commission must give 7 days' notice to the managers, trustees or owners of the prescribed premises.

(3) The Commission must pay—

(a) reasonable costs for lighting, air conditioning and cleaning of the prescribed premises; and

(b) if, as a result of using the premises as a voting centre, the premises or any furniture in the premises is damaged, the full costs of repairing the damage.

(4) If there is a dispute between the Commission and the managers, trustees or owners of the prescribed premises about the amount payable under subsection (3), the matter is to be determined by the Magistrates' Court.

(5) In this section, "prescribed premises" means a school or building that is not used exclusively for religious services and that—

(a) is supported wholly or in part by—

(i) public funds; or

(ii) a perpetual endowment; or

(b) has been built with, or is supported wholly or in part by, a grant from the Consolidated Fund.

185. This would allow the NSWEC to use the facilities of any school in New South Wales which is in receipt of State funding, thereby considerably increasing the availability of buildings with appropriate access.

Rural and remote electors

186. In their submission to the Committee's Review of the 2011 State Election, the Nationals suggested that nominations for the Legislative Assembly and Legislative Council be closed no less than three weeks prior to polling day. Whilst I do not disagree that extending the period between close of nominations and polling day would enable a higher percentage of remote postal voters to receive and return their ballot papers in time to be admitted to the count, I would suggest that the introduction of iVote offers a more reliable and efficient form of voting for those electors. Due consideration also needs to be given to any other election processes which may be impacted by this extended period: under the current timeline it is not possible to close nominations three weeks before election day.

187. I note also that the Nationals raised the issue that forms which include (02) in the phone number field created problems for electors in border areas. The NSWEC notes this recommendation and will take this into consideration when developing the fields for Postal Vote Applications for future elections.

188. The Nationals also noted that rural electors were required to register for iVote by phone due to their inability to provide a description of their address matching that which appears on the electoral roll, which effectively prevented them from registering online. To avoid a recurrence of this, the NSWEC will ensure that all staff dealing with iVote applications are well versed in the conventions of rural property addressing.

Conclusion

189. The NSWEC is committed to increase the accessibility of the electoral process to all voters in New South Wales, and is keen to embrace reforms which will facilitate access for voters who require some form of special consideration, whether that is due to disability or to remoteness of residence. While the PE&EA currently includes a range of voting options, I would suggest that the proposals made above such as the expansion of the entitlement to iVote and the requirement of schools etc., in receipt of state funding to make their premises available to the NSWEC are the types of reforms which will ensure the highest rate of participation in democracy in the State.

Conduct of local government elections

190. The Committee wishes to inquire into those provisions of the *Local Government Act 1993* [LGA] relating to local government elections and that are

administered by the Electoral Commissioner under s 21AA(2) of the PE&EA. I note that the Committee has an ongoing interest in the conduct of local government elections, as evidenced by its 2010 Inquiry into their public funding. The issue of government funding for local elections is dealt with below.

The legislative scheme

191. Under s 21AA(2), the Electoral Commissioner has the responsibility of administering the provisions of any other Act, so far as they relate to the enrolment of electors, the preparation of rolls of electors, and the conduct of elections. Part 6 of the LGA sets out the Electoral Commissioner's responsibilities for the conduct of local government elections, with much of the relevant detail contained in Part 11 of the *Local Government (General) Regulation 2005*.[96] Section 287 of the LGA provides generally that an ordinary election of councillors for a local government area is to be held on the second Saturday of September 2008 and on the second Saturday of September in every fourth year after 2008. Accordingly, the next council elections will be held in September 2012.

192. I would like to strongly recommend that the Committee give consideration to incorporating the provisions of Part 6 of the LGA in a new Electoral Act. The pressing need for this change is the difficulty in ensuring harmony between the provisions of the PE&EA and of the LGA. Although in some circumstances there may be good reasons for differentiating practice at the State and Local Government levels, generally electors should be able to expect a consistent process in the conduct of elections. As matters currently stand, any amendments to the PE&EA which change practice and procedure must be mirrored by amendments to the LGA and regulations.

193. Coordinating such legislative change is often an inordinately complicated exercise, requiring a resource intensive process of preparing amendment proposals to the Minister for Local Government; settling with agency staff on which proposals will be supported; and reviewing and correcting numerous drafts of amending legislation prepared on instruction to the Parliamentary Counsel's Office by departmental/division staff with little or no expertise in electoral procedure.

194. This is not to criticise those agencies with portfolio responsibility for administration of electoral legislation: the NSWEC has established excellent working relationships with them and is generally consulted on all technical aspects of the election process. However, this playing "legislation catch-up", and having to settle

[96] The *Constitution Act 1902* provides that the manner in which local government bodies are constituted and the nature and extent of their powers, authorities, duties and functions shall be as determined by or in accordance with laws of the Legislature: s 51(2). This section was only added to the Constitution Act in 1986, and local councils remain creations of statute: see, e.g., Hon J A Crosio MP, Minister for Local Government, Legislative Assembly *Hansard*, 25 September 1986.

on prescriptive procedural minutiae in the tight period between State and Local Government elections highlights the deficiencies in the maintenance of two regimes across two portfolios for the conduct of Statewide elections. It also reinforces the argument for principles based legislation, with the detailed procedure for conducting elections being developed by the electoral administrator.

195. I note in relation to the 2008 Local Government Elections, amendments to relevant legislation were not settled and in force until 1 July 2008 - just two months before the elections. Committee Members will appreciate the significant logistical effort and expense involved in amending forms, handbooks, guides, standard operating procedures and training modules to reflect the changes at such a late date in the process. At the time of writing this submission, the NSWEC is again in the process of settling local government legislation to align it with State provisions at a time very close to the elections.

Conclusion

196. It is a fundamental tenet of my submission that the provisions of the LGA which relate to local government elections ought to be included in a new, single Electoral Act, and that **all** elections should be conducted by the Electoral Commissioner. This would lead to certainty and consistency of electoral practice; enhance the general public's perception of the integrity of the process; and result in considerable improvements in efficiency.

Offences and penalties under the PE&EA

197. The Committee also seeks input as to whether the offences and penalties prescribed by the PE&EA remain appropriate. There are some 77 offences against the PE&EA. These range from the relatively trivial, such as failing to deliver a request to vote to a pre-poll voting officer [s 114ZQ: 0.5 penalty units]; to those which strike at the heart of the integrity of the electoral process, such as bribery [s 150: 100 penalty units and up to 3 years' imprisonment].

198. There are also severe penalties for the disclosure or use of enrolment information provided by the NSWEC to candidates, parties, etc., as required under the PEEA, other than for a permitted purpose - a maximum fine of 1,000 penalty units applies [s 43].

199. The penalties that apply in relation to non-complying electoral posters, how-to-vote cards and other electoral material range from 3 penalty units for exhibition of posters in prohibited places [s 151B], to 5 penalty units or to imprisonment for 6 months for printing/distribution of electoral material without authorisation details [s 151E]. In the latter case, I would suggest the penalty is reflective of a bygone era.

Dealing with offences under the PE&EA

200. Offences under the PE&EA are predominantly of a punitive nature: rather than ameliorate the effects of wrongful conduct, they mete out punishment to the responsible person or organisation. Nonetheless, they do constitute an indirect mechanism for ensuring that compliance with the statutory framework. However, I would suggest that there may be some confusion in the community as to who has the responsibility for bringing actions to enforce these offence provisions, and thereby uphold the integrity of the process.

201. As elections administrator, the Electoral Commissioner necessarily has a limited role in enforcing electoral offences, except where the legislation expressly provides that the Electoral Commissioner has a duty in this regard. For instance, the Electoral Commissioner has a duty to serve penalty notices on electors for failure to vote offences under s.120C.

202. The PEEA does not confer on the Electoral Commissioner or the NSWEC an investigatory or prosecutorial function regarding offences by candidates, groups or parties. This is because it is essential that community and stakeholder confidence in the Commissioner's impartiality is maintained. The Electoral Commissioner must discharge his or her duties in an impartial way and there must be no reasonable apprehension of bias, for example, if the Electoral Commissioner was required to make an administrative decision in relation to an election while at the same time undertaking the prosecution of one or more candidates for offences.[97]

203. Nonetheless, I acknowledge that there is a case for interpreting "the conduct of elections" to encompass any alleged offences against the legislation under which those elections are being conducted and which occur during an election campaign. However, the NSWEC as currently structured and staffed is not in a position to bring prosecutions for alleged infringements of the PE&EA. One option which would go some way to addressing this is the division of responsibility I have referred to under the proposed new structure of the NSWEC, where the Electoral Commissioner has delegated responsibility for the conduct of elections and is therefore separated from the investigative and enforcement functions vested in the NSWEC entity, the potential for any apprehension of bias is removed. The introduction of penalty notices for certain offences under the PE&EA might also augment enforcement of electoral offences.

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[97] See NSWEC enforcement policy at:
http://www.elections.nsw.gov.au/__data/assets/pdf_file/0020/92351/NSWEC_Electoral_Offences_Enforcement_Policy_-_Summary.pdf

A penalty notice regime?

204. The recent NSW Law Reform Commission Report on penalty notices stated that in 2009/10, 2.83 million penalty notices were issued in New South Wales, with a total value of more than $491 million dollars: there are currently over 7,000 penalty notice offences under some 110 different statutes.[98] As the Report notes, penalty notices:

> ... save time and money for the agencies that issue them, for courts that avoid lengthy lists of minor offences, and for recipients who do not have to take time off work to attend court or pay court or legal costs. The penalty is immediate and certain and is usually significantly lower than the maximum penalty available for the offence, were it to be dealt with by a court. Penalty notice recipients also avoid having a conviction recorded.[99]

205. I do not intend to canvass in this submission all the "for and against" issues dealt with in the Law Reform Commission's extensive Report. However, I would suggest that a penalty notice regime would have a powerful deterrent effect and would increase confidence in the NSWEC as a regulator. I note also that the EFEDA was recently amended to introduce a penalty notice scheme: s 111A of the EFEDA.

206. As noted above, the NSWEC would require a considerable increase of staff to enforce a penalty notice regime. However, as the relevant offences would generally relate to the actual election campaign period, these staff would only be required at that time. It might be possible therefore to institute a process of calling for expressions of interest for NSWEC Enforcement Officers, as is now done for Returning Officers. The cost of this process is one of the practical ramifications of instituting a penalty regime, to which Government resources would need to be committed.

Amount of penalties

207. While I am not aware of any occasion on which the monetary value of the penalties prescribed by the PE&EA has been subject to systematic review, it would seem timely that the Committee give consideration to whether the deterrent effects of the current amounts are reasonable and realistic, in a review of the appropriateness of the Act as a whole.

208. I would recommend that any general review of the penalty amounts under the PE&EA should adhere to the following statement of the IDEA in relation to offences against electoral legislation:

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[98] NSW Law Reform Commission, *Penalty Notices*, Summary Report 132-S, February 2012, p 1.
[99] NSW Law Reform Commission, *Penalty Notices*, Summary Report 132-S, February 2012, p 1.

> Financial sanctions should be proportionate and therefore severe enough to fulfil their purpose of inhibiting prohibited conduct. If they are merely symbolic, this may be read as an invitation to break the law, as the person committing the infraction may calculate that the benefits of violating a prohibition may be greater than the cost of the sanction.[100]

209. In terms of setting the actual penalty amounts, I would suggest that the Committee give consideration to those most recently set in other Australian jurisdictions.

Conclusion

210. The PE&EA provides for penalties for a wide variety of offences which range from relatively minor infractions to serious crimes. As noted above, the NSWEC currently has a limited role in enforcing electoral offences..

211. However, this could be addressed by the proposed restructuring of the the NSWEC so that it would have responsibility for enforcing electoral offences , while delegating to the Electoral Commissioner the task of administering elections, thereby removing the concerns about possible bias. The imposition of a penalty notice regime for relatively minor offences would also assist in this separation of the administration of elections from the enforcement process.

Other matters

212. The Committee has sought input on other matters which relate to the administration of state and local government elections under the PE&EA. There are a number of specific issues which I would like to bring to the attention of Committee Members, namely:

- commencing the election period;
- party registration;
- candidates' child-related conduct declarations;
- the application of the *Government Information (Public Access) Act 2009* to the election process; and
- the process of disputing electoral results.

Commencing the election period

213. Sections 74 and 74D of the PE&EA provide that once the Electoral Commissioner has received from the Governor the writs for the election of the Legislative Assembly and the Legislative Council respectively, the Electoral Commissioner is to advertise the details of the elections.

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[100] IDEA, *Electoral Justice: The International IDEA Handbook*, p 49.

214. However, some difficulties have been encountered previously in respect of the timing of the receipt of the writs and the placing of advertisements.

215. Accordingly, as the date for the next election for the Legislative Assembly and half of the Legislative Council is already known, I would like to suggest that this procedure be amended. My suggestion to the Committee is that the writs be deemed to be issued at 9.00 a.m. on the Friday four weeks before the day before the election. This would mean the next State General Election period would commence on Friday 6 March 2015.

216. I acknowledge that the return of the writs to the Governor, and thus the end of the election period, will continue to be subject to variables such as recounts and disputed returns. However, I would suggest that certainty at the beginning of this period will provide for smoother electoral administration.

Party registration

217. Part 4A of the PE&EA provides for the registration of parliamentary parties in NSW. Part 7 of the LGA provides for the registration of local government parties in New South Wales by applying the provisions of the PE&E Act, subject to some modifications.

218. Both Acts set out registration procedures , including the requirement to keep a register of parties, the application for registration, entitlements resulting from registration, refusal to register, cancellation of registration, amendment of the register and continued registration requirements.

219. Party registration provides the following entitlements on the first anniversary of registration:

- party endorsement on ballot papers;
- nomination of Assembly and Council candidates by registered officers; and
- the registration of electoral material.

220. Additionally, an eligible party may be registered under the EFEDA for public funding payments under that Act.

221. These fragmented arrangements highlight the benefits of a holistic approach to regulation of elections and campaign finance through the consolidation of state and local government provisions.

222. Consolidation would facilitate removal of the current convoluted and highly prescriptive arrangements for the oversight of party registration by two entities across three pieces of legislation: the PE&EA, EFEDA and the LGA and regulations.

The current arrangements also highlight a number of substantive deficiencies in party registration processes as prescribed and these are outlined further below.

Constitutions and Rules

223. Under Part 4A of the PE&EA, and Part 7 of the LGA, to be eligible to register as a political party, a party must be established on the basis of a written constitution (however expressed) that sets out the platform or objectives of the party [s 66A(1)]; and must provide the NSWEC with a copy of its constitution as part of its application for registration: s.66D(2)(f). However, there is no further reference as to what a party constitution might consist of and no requirement for notification of amendments to the constitution.

224. This is important in respect of validating whether an applicant for amendment of the Party Register is the relevant party office bearer as prescribed by the legislation, and where that applicant is not the person appearing on the register at the time of application. The matter takes on particular significance where the application is disputed. In these circumstances, it is necessary to examine the processes by which the applicant purporting to hold a particular prescribed office was validly appointed in accordance with the party constitution.

225. Therefore, it is critical that the NSWEC has up to date and detailed information in relation to party constitutions and internal governance rules including processes for office bearer appointments, and it should be incumbent on parties to provide this information on a regular basis. The NSWEC should also be conferred with the appropriate discretion to make binding determinations as to the matters that should be included in a constitution. Where it is considered appropriate that minimum matters should be prescribed in principal legislation, I would recommend that the Committee has regard to Part 6 of the *Electoral Act 1996* (Qld) which sets out "complying constitution" requirements for the purposes of party registration Section 76 of the Qld Electoral Act is set out in full as Annexure 4.

226. However, where minimum requirements for a complying constitution are prescribed, it is important that the legislation contains mechanisms for flexibility to modify the criteria where appropriate. In this regard, I note that recent amendments to the EFEDA (described in detail below at paragraphs 296-353) will require examination of party constitution/rules to determine whether a particular entity is an "affiliated organisation" for the purposes of enforcing breaches of expenditure caps. Therefore, a complying constitution of a party should contain provisions that would enable the regulator to determine whether a particular entity incurring expenditure is authorised to appoint delegates to the governing body of that party or to participate in the pre-selection of candidates (or both).

227. If the NSWEC and EFA were to continue as separate entities, it would be appropriate to prescribe arrangements for the NSWEC (as the entity that processes party registrations) to provide the EFA with copies of complying constitutions and updates as received. In the absence of same, somewhat artificial but necessary instruments and arrangements for transfer of information between the entities is required. This also applies to the provision by the NSWEC of electoral roll information to the EFA to enable auditing of declarations for compliance with the requirement that only enrolled electors are permitted to make political donations.

Registered Officer

228. Another example of inconsistencies between regimes that might be remedied by consolidation of legislation and regulating bodies is in relation to the registered officer of a party. Under Part 4A of the PE&EA, the registered officer must furnish to the Electoral Commissioner a return each year as to the party's continued eligibility for registration [s 66HA(1)]. Difficulties currently arise where the registered officer is not in a position to fulfil this responsibility.

229. The EFEDA prescribes the requirement for parties to appoint a party agent, an appointment made by the registered officer under the PE&EA Act. The EFEDA provides that at any time a party does not have a party agent, the party agent is the person who holds office at that time as the registered officer of the party [s 41(1)]. The EFEDA also addresses the issue of a party agent dying, resigning or having their appointment revoked. In these circumstances, notice of such is to be given to the EFA in writing and the party is required to appoint another party agent: s 41(2)-(6).

230. It would seem logical that there be consistency in approach to registered officer appointments under the PE&EA. There have been many instances where a registered officer has advised of his/her resignation but there is currently no impetus for the party to appoint another person to the office to fulfil the role of furnishing annual returns for continuing party registration.

231. The registered officer as "default" party agent for the purposes of the EFEDA also highlights a gap in the legislation that may impact on enforcement action. This is because one of the qualifications for appointment as party agent under the EFEDA is enrolment. However, enrolment is not a qualification for appointment as a registered officer under the PE&EA. Consequently, there is a possibility that a registered officer who is a party agent for the time being under the EFEDA may not be enrolled. This would cast doubt from an evidentiary perspective on the ability to issue penalty notices to or prosecute a registered officer as "default" party agent for offences against the Act.

Unregistered parties

232. Notably, whereas the PE&EA provisions apply exclusively to registered parties, the EFEDA recognises that unregistered parties are participants in the electoral process. However, amendments to both the PE&EA and the EFEDA over the years has led to overlaps and inconsistencies in the regime for regulation of the campaign finance activities of unregistered parties. This issue is discussed further under the part of the submission specifically dealing with the EFEDA at paragraphs 266-281.

Child-related conduct declarations

233. Pursuant to Division 5A of the PE&EA, all candidates for election to the NSW Parliament must declare whether they have been:

- convicted of the murder of a child or a child sexual offence (defined in s 81K);
- the subject of proceedings for such an offence; or
- the subject of an apprehended violence order for the purposes of protecting a child from sexual assault: s 81JEA.

234. I note that this requirement was added to the PE&EA in response to the conviction of Mr Milton Orkopoulos, Member for Swansea, for a series of child sex offences. If a person fails to complete this declaration the nomination will be invalid. The declarations of all candidates are posted on the NSWEC's website.

235. After a State Election, the declarations of elected candidates only are reviewed by the Commissioner for Children and Young People, who then tables a report on the findings in both Houses of Parliament.

236. I would suggest that, in its current form, Division 5A has a number of flaws The first is that it fails to actually address the "mischief"' at which it is directed: Mr Orkopoulos could easily have signed such a declaration when he nominated for the 2003 State Election, as he hadn't been charged with, let alone convicted of, any of the relevant offences. The declaration is based on the NSW *Working With Children Check*, and I note that Members of Parliament would not otherwise fall within the definition of "child-related employment" in s 33 of the *Commission for Children and Young People Act 1998*.

237. Second, the only realistic way for the Division to achieve its purported aim is for the declarations of *all* candidates to be audited by the Commissioner for Children and Young People, as a pre-requisite to a nomination being accepted. I note that it was suggested in the Second Reading speech of the *Parliamentary Electorates and*

Elections Amendment (Child Sexual Offences Disclosures) Bill 2006 that this process was "simply not practical".[101]

238. Finally, Division 5A ought to specifically include a reference to s 13A(1)(e) of the Constitution Act with respect to disqualification as a Member, given that s 81L(4) provides that it is a criminal offence deliberately to make a false declaration, with a maximum penalty of up to five years imprisonment. Accordingly, if a Member of Parliament is convicted of making a false declaration, he or she will be disqualified from sitting in Parliament pursuant to s 13A(1)(e). I note that, in the event of a single-seat majority or a hung Parliament, this could result in a change of Government, and would create significant uncertainty as the case was heard in the courts, including any appeal process.

239. Given the fundamental flaws in the operation of the child-related declaration process, Committee Members may wish to give some consideration as to whether Division 5A ought to be retained in its current form.

The role of Courts in Electoral Law

240. Another matter which I would like to canvass is the issue of disputed State elections, and most particularly, the operation of the Court of Disputed Returns under Part 6 of the PE&EA. At the outset of this part of the submission, I would like to acknowledge the assistance given to the NSWEC on the law of disputed elections by Professor Graham Orr of the Faculty of Law at the University of Queensland.

241. Originally Parliament was the only body capable of deciding issues such as its own membership. However, in the wake of considerable electoral reform, in 1868 the United Kingdom Parliament ceded its power over disputed elections to the British equivalent of the Australian Supreme Courts; to this day, two judges hear any petition disputing an election return.[102] Soon afterwards, most Australian jurisdictions adopted that model, albeit with a single Supreme Court judge deciding a petition.[103]

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[101] Hon R P Meagher MP, Minister for Community Services, Legislative Assembly *Hansard*, 15 November 2006.

[102] Between 1924 and 1997 there were only a handful of successful petitions in the United Kingdom, and these arose from candidates being disqualified: it was said that the British parties had a tacit gentleman's agreement to avoid petitioning. In 1997, a petition was successful over electoral administration error (*Malone v Oaten* (1997) unreported; discussed in S Whetnall, 'Three Counts and a Wedding: the Winchester Election Saga' (1998) *Arena* 14); and in 2010 a petition succeeded over allegations of campaign malpractice.: *Watkins v Woolas* [2012] EWHC 2702; mostly upheld in *R (Woolas) v Parliamentary Elections Court for Oldham East and Saddleworth* [2010] EWHC 3169.

[103] For the history and nature of disputed returns power in Australia, see G Orr and G Williams, "Electoral Challenges: Judicial Review of Parliamentary Elections in Australia" (2001) 23 *Sydney Law Review* 53. For the history of disputed returns power in the United Kingdom, see C Morris, 'From "Arms, Malice, and Menacing" to the Courts: Disputed Returns and the Reform of the Election

242. Nonetheless, disputed returns in Australia are a relatively rare occurrence, although they have been known to bring down Governments, as in the case of the 1995 Mundingburra election petition in Queensland.[104] I would suggest that this reflects the fact that campaigns are relatively clean and conducted professionally by electoral administrators; and the fact that petitions are difficult to mount, and confront significant legal barriers. However, even unsuccessful petitions can serve two useful purposes to the system, in that they may clarify the law, and give confidence to the public that the electoral process in NSW is fully accountable to the law.

243. One result of petitions being conducted relatively quickly and infrequently is that there is not a large body of legal precedent in Australia interpreting electoral law, which somewhat neutralises the benefits of employing a court model. Within this modern practice of disputed returns, petitions can be broken down into the following categories:

- disqualification matters;
- real or perceived errors in electoral administration;
- campaign malpractice, e.g., dubious how-to-vote cards; and
- miscellaneous objections.

Special procedures

244. Pursuant to s 156 of the PE&EA, disputed returns in Parliamentary elections in New South Wales are heard by a Supreme Court judge sitting as a "Court of Disputed Return" [CDR], using the resources - and to a fair degree the procedures - of the Supreme Court.

245. The petitioning process under s 157 is the only way to challenge an election outcome. In litigation before a CDR, the usual civil court procedures and powers are modified by the electoral acts in some important ways:

- a petition must be filed within 40 days from the return of the writ;
- a CDR is to determine cases according to justice and good conscience which, implies not simply according to legal technicalities [s 166] - paradoxically, the CDR process is hedged with procedural technicalities [ss157-159]; and

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Petitions System', Queen Mary School of Law Research Paper 79/2011: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1807152

[104] *Tanti v Davies (No 3)* (1996) 2 Qd R 602. Ambrose J found the Queensland Electoral Commission in breach of the law because of difficulties the defence force encountered in couriering a small number of postal ballots to troops in Rwanda: had the ECQ taken the slower and even less reliable method of posting the ballots, he would have found no breach.

- a CDR cannot act merely in cases of unethical or misleading behaviour - there has to have been some breach of electoral law, deliberate or inadvertent, by campaigners or administrators: s 167.

246. Pursuant to s 175E of the PE&EA a CDR has the power to unseat a successful candidate who was disqualified at the time of nomination. However, the PE&EA provides that Parliament in New South Wales retains the right to determine if a Member is disqualified during a Parliamentary Term *or* to refer such a matter to the Supreme Court: s 175B.

247. The typical order of a CDR, in a successful case, is to vacate the seat. However, a CDR is not to unseat a Member unless the result was likely to have been affected, with exceptions of strict liability for bribery by a candidate [s 164]. Pursuant to s 169, there is no right to appeal a CDR decision, although there are constitutional arguments that the High Court retains a power of review.[105]

Criticism of the CDR

248. Criticism of the CDR process has come from several quarters. On one side are criticisms of the restrictiveness of the process: as noted above, a petitioner has only 40 days from the return of the writ to gather the evidence and define the pleadings, with no amendment allowed to correct the pleadings or to add new grounds that come to light.[106]

249. CDR petitions are also costly to run properly, as Supreme Court pleading requires significant legal expertise. In theory, a losing petitioner risks two or more sets of costs – their own, the respondent Member's and the NSWEC's. I note, however, that this has not been recent practice. Indeed, the contrary view is that the process is too accessible. As has been seen recently in the wake of the 2011 State Election, a judge sitting as a CDR has the discretion to relieve a losing party of costs, thereby removing the deterrent effect of costs award from otherwise spurious claims. One way to address this would be to ameliorate the restrictiveness by extending the time limit or allowing amendment once the merits of a case have been assessed, whilst deterring litigants-in-person through security deposits significantly larger than the $250 currently required by s 158 - the current deposit required in the Australian Capital Territory is $2,000[107] - or even by restricting the right to petition to only candidates or registered party agents.

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[105] This is due to the operation of s 73 of the Australian *Constitution*. See discussion in Legal, Constitutional and Administrative Review Committee (Report No 18/1999), *Report on ... Regulating How-to-Vote Cards and Providing for Appeals from the Court of Disputed Returns* (Legislative Assembly of Queensland (Sept 1999) 29-51.

[106] A McGrath, 'One Vote, One Value: Electoral Fraud in Australia' in The Samuel Griffith Society, *Upholding the Australian Constitution*: Volume 8 (1997). See also Orr and Williams, above n .

[107] See ACT *Court Procedures Rules*, Reg 3355.

250. Another criticism arises from the fact that, given the rarity of electoral petitions, very few judges would ever sit as a CDR and there is therefore a general lack of specific CDR experience. Moreover, the very fact that judges are independent and have little practical experience of politics can be a drawback. In the 1988 *Port Stephens election petition*, a Member was unseated for electoral bribery due to the manner in which he had distributed community grants within his electorate during the campaign. This outcome was criticised as unrealistic, even by the incoming Premier from the other side of politics.[108] At the other extreme, judges have been criticised for taking a too narrow or legalistic approach to the law, and allowing the election of a Member to stand where a purposive approach would have meant that the seat would be vacated.[109]

251. In terms of efficiency, the criticism is that judges fall back on an adversarial approach. This is inevitable in a CDR in New South Wales, given:

- the CDR piggy-backs on the Supreme Court;
- the training/background of judges as barristers; and
- the nature of the "contest" between petitioner against respondent.

Alternatives to the CDR

252. The CDR is only one of a number of models used to settle electoral disputes. Some alternatives to it are considered in the following section of the submission.

The NSW Electoral Commission

253. One option would be to give power over disputed returns, at least in the first instance, to the NSWEC, or some specially constituted version of it, e.g. a panel consisting of a judicial member, the Electoral Commissioner and one other expert, such as a retired Electoral Commissioner or Clerk of Parliament.

254. However, there are two significant shortcomings to this approach. The first is that the NSWEC may not be seen as a fully impartial body if its own administrative competence were called into question. The second is that the NSWEC itself might be embroiled in controversy, arising not only in cases alleging incompetence against NSWEC officers, but also in having to rule on malpractice allegations involving political parties. While the latter shortcoming is not insuperable, it would require a shift from conceiving of the NSWEC as essentially an administrator to also a regulator.

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[108] *Scott v Martin* (1988) 14 NSWLR 663. See also the 1995 Mundingburra election petition, *Tanti v Davies (No 3)* (1996) 2 Qd R 602, which brought down the Goss Labor government. Ambrose J found the Queensland Electoral Commission in breach of the law because of difficulties the defence force encountered in couriering a small number of postal ballots to troops in Rwanda: had the ECQ taken the slower and even less reliable method of posting the ballots, he would have found no breach.

[109] *Carroll v ECQ (No 1)* [2001] 1 Qd R 117.

255. Nevertheless, there are precedents for such a process. In European countries, it is common for a central Electoral Commission to have inquisitorial powers to determine the validity of election outcomes otherwise declared by local electoral authorities. Some American States also rely on Commissions: North Carolina provides that disputed elections proceed first to the County Board of Elections, then to the State Board of Elections and then to a Superior Court, and congressional election contests in New Hampshire go before a five-member Ballot Law Commission.[110]

Adapt an existing tribunal

256. Currently, challenges to New South Wales local government elections go before the NSW Administrative Decisions Tribunal [ADT]. This system is more open than the CDR for parliamentary elections: pursuant to s 329 of the *Local Government Act 1993* the time limit for commencing proceedings is three months, and there are not the strict petition-related requirements as are set out in s 157 of the PE&EA.

257. Like the CDR, the ADT model is one that adapts the apparatus of an existing tribunal to election hearings. The one main difference is that the ADT is not a superior "court" of general jurisdiction, but a lower level tribunal with specific expertise in governmental matters. It already deals with anti-discrimination claims involving electors.[111] One advantage of a tribunal model is that the tribunal, not being a court, may be more likely to conduct itself in a less adversarial manner.

258. Removing the Supreme Court's role as the CDR could create a problem with public perception, as a "court" traditionally has more gravitas than a "tribunal". Also, even when tribunals are set up to achieve informality they often begin to mimic court formalism when parties before them are legally represented. An absence of clear procedures or excessive haste can also reduce due process, creating problems for the perceived fairness of the process and even for the accuracy of the outcome.

A new Tribunal?

259. Creating a new tribunal would enable a break with the assumption that a randomly allocated judge is ideally placed to resolve contested elections. An ideal panel might include retired senior electoral officials and former politicians respected across the party divides. Such a panel could have a legal member to guide it: mixed

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[110] See *New Hampshire Rev Stat Ann* §665.

[111] See, e.g., *Electoral Commissioner v McCabe* [2003] NSWADTAP 28 (freedom of information claim in party registration); and *Fittler v NSW Electoral Commission (No 2)* [2008] NSWADT 116 (access to Braille ballot).

expert panels are common in administrative law.[112] The tribunal could be established on an inquisitorial model, with investigatory powers to obtain and summon evidence, or decide not to proceed with a claim lacking any reasonable basis.

260. Besides perceptions of status, in any new electoral tribunal the key question would be actual independence. People appointed to some form of Election Disputes Tribunal ought to have some degree of tenure, e.g., a significant fixed term appointment with no power of removal except for impropriety touching their duties or incapacity. The appointment process should also not be solely within executive fiat. Instead, drawing on models of appointing Electoral Commissioners in other jurisdictions, appointments could require the approval of both Houses, as in South Australia.[113]

261. However, I note that since disputed Parliamentary election contests are uncommon, the ultimate question for Government is whether the ground-work in creating a new tribunal, and the resources required, are worth the effort.

Alternative Dispute Resolution

262. There is academic interest, in the United States, in using negotiated outcomes to help resolve election contests.[114] This borrows from the use of ADR in private litigation to focus issues, limit costs and time, or to achieve creative win/win outcomes.

263. I would suggest that ADR *instead* of a definitive, public and binding hearing would be incompatible with Australian traditions. However, mandating timely, pre-hearing negotiation, early-on following an application for a disputed election, could assist resolve some misunderstandings, particularly if the NSWEC was required to be involved. Such a process could occur under the supervision of a representative of the election court or tribunal, but be *in camera*. It may be that mandatory pre-trial ADR may have helped short-circuit the Hanson petition of 2011.[115]

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[112] [112] For instance, Mental Health Review Tribunals in Queensland are chaired by someone with administrative law experience, who sits alongside a medical expert and another with relevant expertise, e.g., in social welfare.

[113] *Electoral Act 1985* (SA) s 5. A more exacting model would require a Parliamentary super-majority; a less exacting model would merely require "consultation" with all Parliamentary party leaders, as in the appointment of Western Australian, Australian Capital Territory and Northern Territory Electoral Commissioners.

[114] See, e.g., J A Douglas, "Election Law and Civil Discourse: the Promise of ADR" http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1871280.

[115] See *Hanson v Johnston & Ors* [2011] NSWSC 621.

Conclusion

264. In this submission, I have attempted to give some idea of possible alternatives to the system of CDR which has developed in New South Wales. However, the very fact that elections are so rarely contested means that there is not necessarily any momentum to change the manner in which electoral disputes are dealt with: some solace can be taken by the fact that their rare occurrence is a testament to the professionalism of the conduct of elections in Australia generally.

265. Therefore, to paraphrase Winston Churchill's dictum on democracy, Committee Members may conclude that CDR is the worst form of dealing with electoral disputes, other than every other system that has been tried from time to time.

The current EFEDA

266. The scheme established by the *Election Funding Act 1981*, now the EFEDA, incorporated three main elements which remain relevant today:

- public funding for State Elections, which can be supplemented by private funds;
- disclosure of political donations by both donors and recipients; and
- disclosure of electoral expenditure.

267. There has been sustained and extensive amendment to the EFEDA since its introduction in 1981, conferring on the EFA a significantly enhanced regulatory role in respect of election campaign finance management. The status of matters such as donations, expenditure, caps and campaign accounts is now fundamental to the EFEDA's objectives.

268. Nevertheless, the structure of the Act has remained largely unaffected:

"Part 1 – Preliminary" contains the formalities of the legislation and an inclusive definitions list.

"Part 2 – The Election Funding Authority" establishes the Election Funding Authority ("the Authority") and its procedures.

"Part 3 – Responsibilities of the Authority" provides an inclusive and rather simplistic outline of the Authority's duties.

"Part 4 – Registration" comprises the responsibilities of candidates, groups, third party campaigners, party agents and official agents to register for local

government, State general and by-elections. The Part outlines the procedure for registration and the corresponding responsibilities and powers of the Authority.

"Part 5 – Public Funding of State election campaigns" applies to State elections only. It contains provisions relating to the establishment of the public funding regime for State parties and candidates and the procedure for allocating and claiming said funding. The Part contains relevant definitions.

"Part 6 – Political Donations and electoral expenditure" contains an extensive list of definitions relevant not only to the Part but to other provisions throughout the Act. The Part outlines the duties and procedure of disclosure, caps on political donations for State elections, caps on electoral expenditure for State election campaigns, duties in the management of donations and expenditure, prohibition on certain political donations and incidentals relating to disclosure and offences under the Part.

"Part 6A – Administrative and policy development funding" outlines the Administration Fund and Policy Development Fund for State members and parties.

"Part 7 – Financial provisions" contains surplus provisions in relation to funding and expenses.

"Part 8 – Miscellaneous" is the repository for residual provisions. It empowers the Authority to investigate offences, impose sanctions such as penalty notices, compliance agreements or commence prosecutions, produce evidence, as well as procedural matters such as the power of delegation, reporting to Parliament, transitional provisions and regulations.

269. In previous submissions to the Committee and to the Select Committee on Electoral and Political Party Funding [the Select Committee] I have strenuously advocated for reform of the EFEDA. In fact, this is not the first submission in which I have advocated the repeal of the EFEDA and its replacement with a new piece of legislation. However, this is, excitingly, the first time that I have been afforded the opportunity to address fundamental flaws in both the EFEDA and the PE&EA, and propose a truly holistic approach to reform.

270. In the Second Reading speech on the 1981 Election Funding Bill, then-Premier Wran said of the proposed legislation:

> It removes the risk of parties selling favours and declares to the world that the great political parties of New South Wales are not for sale.[116]

271. However, the introduction of successive and major reforms in recent years has resulted in an unbalanced, inaccessible, and convoluted Act. It would not be unfair to suggest that the complaints made about the Canadian political financing regime could easily be made about the EFEDA in its current form:

> The different aims of the reforms have at times affected the consistency of the regime and created challenges in the areas of clarity and compliance with the ... Act.[117]

272. A great many of the difficulties associated with the implementation of the 2008, 2009, 2010 and 2012 amendments stem from the fact that they did not sit well within the existing scheme. Far too many injuries have been done to the EFEDA by the implementation of ad hoc amendments. Those injuries have long been terminal, and we have reached the point where the responsible thing to do is to "let the Act go". The modern political environment requires modern funding and disclosure legislation.

273. The quick succession of major amendments, each overlaying the previous round, has created problems in clarity and interpretation. The unnecessary complexity of the EFEDA in its current form has rendered it unclear, and therefore makes it bad law. The submission identifies some general deficiencies in paragraphs 306 to 363 below, and more particular issues that have arisen following each round of amendments since 2008. In my view, however, it is important that we do not become bogged down in the detail and look for quick fixes through further piecemeal amendments. My submission is for root and branch reform: to start from the beginning with a clean slate and to be guided by appropriate principles.

Guiding Principles

274. I endorse the following general principles ("The General Principles") espoused by Melbourne University's Dr Joo-Cheung Tham, as a guide in the development and implementation of reform of the funding and disclosure system:

- protecting the integrity of representative government;
- promoting fairness in politics;
- supporting parties to perform their functions; and

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[116] Hon NK Wran QC MP, Premier, Legislative Assembly *Hansard,* 15 April 1981.
[117] *Responding to Changing Needs – Recommendations from the Chief Electoral Officer of Canada Following the 40th General Election,* 10 June 2010.

- respecting political freedoms.[118]

275. The first principle (*protecting the integrity of representative government*) encapsulates the concept that Members of Parliament and local government councillors are accountable to the citizens whom they represent and are expected to act in the interests of those citizens.[119] Following from this principle, a fundamental aim of funding and disclosure legislation is the prevention of corruption through accountability and transparency.

276. The second principle (*promoting fairness in politics*) advocates that political freedom is made formally available to all citizens and that they have a genuine chance to make a difference.[120] In order to have leverage in the political process, citizens need the ability to act as a group and access to the public space and the forums in which public opinions are voiced, i.e., the mass media. The electoral and political finance regime should address the risk that the financial strength of some allows them to drown out the voice of others or makes it impossible for others to be heard.[121]

277. The third principle (*supporting parties to perform their functions*) promotes public funding. In evidence to the Committee's Inquiry into public funding of election campaigns I stated:

> There is no doubt that political parties are the major players in the Australian representative democracy. They are the main opinion framers and the agenda setters... The parties are central to our system of representative democracy, and in moving forward they will remain as such well into the future. Consequently, the political finance framework that the Committee recommends should acknowledge the key role played by the political parties. The parties need to be appropriately funded in order for them to fulfill their functions as a party. This does not translate into giving parties what they think they need; it is more fundamental than this. It is to provide parties with adequate funding in order for them to do what parties ought to perform. The question I pose for this Committee is: What ought parties do?[122]

278. The fourth principle (*respecting political freedoms*) requires that, in our representative democratic system it should not be the case that the winner takes all:

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[118] J C Tham, *Regulating the Funding of New South Wales Local Government Election Campaigns*
[119] C Barry, Chair of the Election Funding Authority, Transcript of evidence, 9 December 2009, p. 2.
[120] C Barry, Chair of the Election Funding Authority, Transcript of evidence, 9 December 2009, p. 3.
[121] C Barry, Chair of the Election Funding Authority, Transcript of evidence, 9 December 2009, p. 3.
[122] C Barry, Chair of the Election Funding Authority, Transcript of evidence, 9 December 2009, pp. 3-4.

> Political competition is the joust of ideas, policies and ideologies. Whoever wins has to govern for all. Deliberation is the basis for citizens to become involved in the process of law making. Deliberation involves justifying, arguing for various positions, and seeking to influence.[123]

279. It is my view that free political communication is integral to democratic deliberation and regulation of political funding should not unduly restrict political communication. However, this should not mean that there is no regulation, but that it should be "careful, calibrated regulation based on legitimate outcomes".[124]

280. Another aspect of democratic deliberation is informed voting. This includes adequate disclosure provisions so that citizens have "...access to information about the funding activities of the parties and candidates at the time of the election, and in between elections in the case of parties.[125]"

281. In addition, the EFEDA suffers from a lack of clear purpose and objectives, making it very difficult to evaluate its effectiveness, and whether it is doing what it was designed to do.[126] In evidence to the Committee in 2008, Dr Tham stated:

> The danger is that without any governing principles, without some kind of moral compass through this debate, we will delve into a morass of regulatory detail... These abstract principles are important. People are debating how to prioritise them but I think those principles should be at the forefront of any debate.[127]

Compliance-oriented regulation

282. Given the application of principles-based legislation to a wide range of commercial and financial undertakings,[128] I would suggest that it is appropriate also to the regulation of election campaign finance. However, I do acknowledge that there is a case for more prescription particularly in relation to offence provisions. Nevertheless, the offence provisions as currently drafted are convoluted and in some cases, novel and I will address these issues in more detail below. Ultimately, the regulatory regime for campaign finance management should encourage compliance. This will be best achieved where obligations and entitlements are

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[123] C Barry, Chair of the Election Funding Authority, Transcript of evidence, 9 December 2009, p. 4.
[124] C Barry, Chair of the Election Funding Authority, Transcript of evidence, 9 December 2009, p. 4.
[125] C Barry, Chair of the Election Funding Authority, Transcript of evidence, 9 December 2009, p. 4.
[126] NSW Parliament, Legislative Council Select Committee on Electoral and Political Party Funding, Report 1 – June 2008, p 193, para 11.7.
[127] Dr Tham, Transcript of evidence, 1 February 2010.
[128] For example, tax, takeovers, accounting and corporate governance regulation: see UK Department of Trade and Industry, *Promoting Competitiveness: The UK Approach to EU Company Law and Corporate Governance* (HMSO, undated), p 6.

plainly and clearly expressed, whether they be contained in principal legislation or delegated rules, giving certainty to stakeholders and the regulatory authority.

283. In its report on Australian privacy law and practice, the Australian Law Reform Commission [ALRC] went into considerable detail on the elements of compliance-oriented regulation. For convenience, the ALRC grouped them as follows:

- securing voluntary compliance with the regulatory objectives;
- undertaking informed monitoring for non-compliance; and
- engaging in enforcement actions where voluntary compliance fails.

284. The ALRC notes that a key way for a regulator to achieve voluntary compliance is by helping to foster an organisation's capacity to comply through education, guidance and other assistance. The next step is monitoring to determine whether the regulatory regime is having its desired effect on the target population. Finally, a compliance-oriented regulatory design also must provide for enforcement in the event of non-compliance.

285. As the ALRC also notes, this principle is encapsulated in Professors Ian Ayres and John Braithwaite's enforcement pyramid: Braithwaite contends that compliance is "most likely" when a regulator displays an explicit enforcement pyramid. This process is largely that utilised by the EFA in putting into effect the provisions of the EFEDA to date: a pyramid of advice, audit and prosecution.

286. Monash University's Professor Arie Freiberg has argued that that the purpose of sanctions such as prosecution is to ensure that the purposes of regulation are achieved. Therefore, prosecutions for funding and disclosure breaches should:

- change the behaviour of the offender - the focus should not be solely on punishment but on changing the non-compliant behaviour;
- ensure that there is no financial benefit obtained by non-compliance. The aim is to reduce any financial incentive for non-compliance;
- be responsive and consider what is appropriate for the particular offender and the particular regulatory issue. Regulators need flexibility and discretion in determining the best method to achieve the desired regulatory outcome;
- be proportionate to the nature of the offence and the harm caused;

- aim to restore the harm caused by regulatory non-compliance, particularly when there are identifiable victims; and

- aim to deter future non-compliance.

Local Government Elections

287. It is also vital that in developing a new and modern legislative regime that the Parliament's focus is not solely on State Elections and the practices of political parties in that particular context, but also considers the uniqueness of campaign finance management at the local government level. Local government elections in New South Wales are the most complex in Australia, with legislative and regulatory frameworks creating a variety of voting and counting systems for different types of elections across councils.

288. The following facts from 2008 give some indication of the complexity of local government elections and the many variables that a regulatory regime for campaign finance in New South Wales must contemplate:

- elections were held for 148 council areas across the State;
- there were 332 individual elections conducted for councillors in 187 wards, 84 undivided councils and 27 mayoral elections;
- thirty-nine uncontested elections were conducted for 36 wards, two undivided councils and one mayoral election;
- seventeen council referenda and polls were conducted;
- a roll of 4,500,000 million electors was managed;
- 3,529,220 votes were cast for councillor positions; and
- nominations were processed for 4,654 candidates.[129]

289. Under s 278 of the LGA, a council may be undivided, so that councillors are elected by electors in the local government area as a whole. However, both the number of councillors and the number of electors in undivided councils varies widely across the State. Thus, at the 2008 Local Government Elections:

- Albury City Council had nine councillors and 26,188 electors;
- Balranald Shire Council had ten councillors and 1,211 electors;
- Burwood Council had seven councillors and 16,301 electors;
- Campbelltown City Council had fifteen councillors and 79,568 electors;
- Inverell Shire Council had twelve councillors and 9,338 electors;
- Tumut Shire Council had seven councillors and 6,505 electors; and
- Lismore City Council had ten councillors, a popularly elected mayor and 24,837 electors.[130]

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[129] NSWEC, *Report on the 2008 Local Government Elections*, June 2009, p 10.
[130] NSWEC, *Report on the 2008 Local Government Elections,* June 2009, p.10.

290. Pursuant to s 210 of the LGA, a local government area may be divided into wards with an equal number of electors in each ward; each ward must also have the same number of councillors to be elected [s 280(2)]. However, the number of wards per council, councillors per ward and electors per ward also varies widely across the state, so that at the 2008 Local Government Elections, for example:

- Wyong Shire Council had two wards with five councillors per ward, and an average of 42,179 electors per ward.
- Liverpool City Council had two wards with five councillors per ward, a popularly elected mayor, and approximately 43,500 electors per ward;
- Penrith City Council had three wards with five councillors per ward, and approximately 33,000 electors per ward;
- Shoalhaven City Council had three wards with four councillors per ward, a popularly elected mayor, and approximately 18,454 electors per ward;
- Council of the Shire of Wakool had three wards with two councillors per ward, and an average of 729 electors per ward;
- Sutherland Shire Council had five wards with three councillors per ward, and an average of 26,145 electors per ward; and Ku-ring-gai Council had five wards with two councillors per ward, and an average of 12,288 per ward.[131]

Role and functions of the Election Funding Authority

291. The EFA is currently constituted as a corporation with the corporate name of the Election Funding Authority of New South Wales [s 5]; the Office of the NSWEC is the administrative unit through which the Authority exercises its statutory responsibilities.

292. As noted earlier, the EFA consists of:

- the New South Wales Electoral Commissioner as Chairperson;
- a member appointed on the nomination of the Premier of New South Wales; and
- a member appointed on the nomination of the Leader of the Opposition in the Legislative Assembly.

293. As the statutory body responsible for administering the provisions of the EFEDA, the EFA has responsibility for:

- the registration of candidates, groups, official agents and third party campaigners for funding and disclosure purposes;
- receiving and processing claims for payment from the Election Campaign Fund for State elections;

[131] NSWEC, *Report on the 2008 Local Government Elections,* June 2009, p.10.

- receiving, processing and publishing disclosures of political donations received and electoral expenditure incurred lodged by or on behalf of political parties, elected members, candidates, groups, third party campaigners and political donors;
- receiving and processing claims for payment from the Administration Fund;
- receiving and processing claims for payment form the Policy Development Fund; and
- exercising the compliance and enforcement provisions of the EFEDA.

294. The EFA has a number of other responsibilities including conducting research in relation to election funding, political contributions, electoral expenditure and other matters relating to the EFEDA.

295. Given the functions of the EFA, the regulatory model as established in 1981 is no longer appropriate. As indicated previously in this submission, it is my view that the entity that is the EFA should be subsumed into a new NSW Electoral Commission that delegates to the Electoral Commissioner the responsibility for administering elections while the Commission entity is responsible for enforcing compliance with electoral laws in relation to both the elections and campaign finance processes. As the electoral process and campaign finance are inextricably intertwined, the schemes would be best governed holistically by a single entity, with membership holding appropriate expertise, rather than treated as parallel worlds that occasionally collide.

Operation and effectiveness of recent campaign finance reforms

296. Since the enactment of the Election Funding Act in 1981, there has been a long and varied history of electoral finance reform in New South Wales. The ad hoc accretion of amendments has created a range of deficiencies in the legislation, including with respect to:

- internal inconsistencies and contradictions;
- disjointed definitions and related provisions;
- an absence of definition for some critical terms e.g., election material, advertising, extended meaning of "candidate", unregistered parties;
- the relationship with definitions in the PE&EA;
- excessive complexity rendering it difficult for stakeholders to comply and the EFA to enforce/implement; and
- out of date provisions which ought to have been repealed.

297. The central features of each amending Act and the resulting operational issues are addressed in further detail below.

The Election Funding Amendment (Political Donations and Expenditure) Act 2008 [the 2008 amendments]

298. The 2008 amendments were introduced to "strengthen the regulation of political donations and electoral expenditure in relation to State and local government elections and elected members".[132] Important amendments were the following:

- requiring biannual disclosures of political donations and election expenditure (instead of four yearly disclosures following a State general or ordinary council election);
- extending reporting to elected members of State parliament and elected local government councillors (in addition to reporting by parties, groups and candidates for election);
- imposing an obligation to disclose the details of all political donations of or above $1000 (with aggregation of donations from the same person over the same financial year);
- requiring the disclosure of details of membership or affiliation fees of or above $1000;
- prohibiting entities from making reportable political donations unless they have an ABN;
- prohibiting indirect campaign contributions valued at $1000 or more;
- increasing the penalty for failing to make disclosures or making false disclosures and conferring increased investigative powers to the EFA;
- introducing new rules for the management of campaign finance, including the obligation for an official agent or party agent to control the campaign accounts of, and receive and handle political donations to, elected members, groups, candidates and parties; and
- applying the disclosure provisions - but not the election funding provisions - of the EFEDA directly to local government elections (in place of similar provisions under the LGA).

299. In evidence to the Committee's review of the 2008 Local Government Elections, I submitted that the interrelationship between the 2008 amendments and the existing Act provisions had resulted in a disclosure regime that was complex and unclear. I provide a summary here of residual issues flowing from the 2008 amendments despite subsequent reforms:

Difficulties in prosecuting certain offences

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[132] Explanatory Notes, *Election Funding Amendment (Political Donations and Expenditure) Act 2008*. Amendments regarding disclosure of political donations were also introduced into the *Local Government Act 1993* and the *Environmental Planning and Assessment Act 1979* at this time.

300. Whilst s 96I of the EFEDA was amended pursuant to the 2010 Act, the provision still requires proof of actual knowledge on the defendant's part. This remains a barrier to the successful operation of the EFA's enforcement powers and renders ineffectual the power to commence prosecutions for certain offences. I will provide more detail in relation to strict liability offences later in the submission.

Ambiguity in the term of office of official agents

301. The 2008 amendments were unclear as to the precise time at which certain official agents cease to hold office, and the mechanics for their revocation or replacement. A particular issue arose - and remains today - as to the continuity of an official agent where there is a change in status of the principal.

302. Since the 2008 amendments there has been further amendment of the EFEDA in relation to the appointment of official agents. The definition of official agent under s 4, creating ex-officio official agents, juxtaposed with the system of appointment under Part 4 Division 4 of the EFEDA, renders the appointment process an unnecessarily complex and unclear, creating a legal minefield for both stakeholders, in their attempts to comply with the EFEDA; and for the EFA, in its attempts to administer it.

303. In addition, the provisions are unclear as to the process of establishing official agents for independent elected members who are also candidates; as well as the ramifications such changes in status, or multiple status, have on elected members and candidates and their official agents. This situation has resulted in the EFA declining to prosecute individuals for breaches of the EFEDA, as the evidence could not establish the identity of the putative defendant to the requisite standard.

Ambiguity as to the conditions under which an individual is a candidate

304. The term "candidate" is defined variously throughout the EFEDA, which makes for a complex and challenging system for both stakeholders and the EFA.

Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009 [the 2009 amendments]

305. As the name suggests, the 2009 amendments introduced prohibitions on political donations (including loans) made or made on behalf of property developers; the solicitation of political donations by property developers; and the acceptance of political donations made by or on behalf of property developers. They included "close associates" of property developers within the definition of property developers for the purpose of the prohibition.

306. There was significant debate amongst academics as to whether the 2009 amendments burdened the constitutionally implied freedom of political communication. I note that this debate was recently re-enlivened by the *Election Funding, Expenditure and Disclosures Amendment Act 2012*, which prohibited donations by entities.

307. The effectiveness and operation of prohibitions on donations from property developers will be addressed below in relation to the current prohibition on "prohibited donors".

Election Funding and Disclosures Amendment Act 2010 [the 2010 amendments]

308. In the Act's Agreement in Principle Speech, then-Premier Keneally argued that the 2010 amendments would:

> ... provide certainty and confidence in the electorate of the impartiality of government decision-making and of the transparency of process in government... These reforms are about putting a limit on the political "arms race", under which those with the most money have the loudest voice and can simply drown out the voices of all others. The reforms will help to give voters a better opportunity to be fully and fairly informed of the policies of all political parties, candidates and interested third parties.[133]

309. The amendments included:

- setting the applicable cap on political donations to a registered party or group set at $5000 per financial year;
- setting the applicable cap on political donations to non-registered parties, elected members, candidates or third party campaigners set at $2000 per financial year;
- introducing expenditure caps for political parties, candidates and groups contesting State elections, and the regulation of advertising and communication by third parties;
- increasing the level of public funding available to political parties and candidates under a reimbursement scheme;
- restricting donations from individuals to individuals on the NSW and/or Australian electoral roll;
- entitling 'entities' that include companies with an Australian Business Number, registered trade unions and incorporated associations which carry out the majority of their activities in NSW, to make political donations;

[133] Hon K K Keneally MP, Premier, Legislative Assembly *Hansard*, 28 October 2010.

- exempting party membership fees and party compulsory levies on Parliamentarians from the cap on political donations;
- introducing the regulation of third party campaigners into the election funding and disclosures regime;
- increasing the relevant disclosure period for lodgment of disclosures of political donations received or made, and electoral expenditure incurred, pursuant to Part 6 of the EFEDA to each 12 month period ending 30 June; and
- extending the range of persons/entities who are "prohibited donors" to include property developers, tobacco industry business entities and liquor and gambling industry business entities.

310. The 2010 amendments followed the Committee's Inquiry into Public Funding of Election Campaigns, in which I gave evidence supplemented by written submissions. The core of my submission was the need to employ the General Principles as noted above, and I am pleased to note that the Committee's recommendations were largely in accordance with my submissions on issues such as caps on political donations and campaign expenditure; the reform of the public funding regime; and limits on individuals and entities who are entitled to make donations.

311. In evidence and submissions to the Committee, I was among a number of stakeholders who raised numerous broad issues which affect the operation of the EFEDA and its effectiveness in regulating political funding and disclosure in New South Wales. Due to the impending State Election those broad issues could not be addressed in the 2010 amendments, and I will address them in detail at the end of this part of the submission.

Election Funding, Expenditure and Disclosures Amendment Act 2012 [the 2012 amendments)

312. In introducing the 2012 amendments, the Premier stressed that it fulfilled an election promise made by him in 2010:

> This State's approach to regulating political donations and expenditure must:
>
> ... ensure that those who exercise executive power in New South Wales understand that they are accountable, that we insist on having standards, and that they should operate with integrity and honesty.

These reforms are a reasonable, measured and equitable way to put in place a system of political participation in New South Wales that is more transparent and more accessible.[134]

313. The amendments included:

- providing for the aggregation of the electoral communication expenditure of parties and their affiliated organisations within the applicable cap for the party;
- limiting the ability to make political donations to individuals enrolled on the roll of electors for local government, State or Federal elections; and
- prohibiting the payment of annual or other subscriptions to a party by an entity - including an industrial organisation - other than a citizen on the electoral role for affiliation with the party.

314. In previous evidence to the Committee, I noted that the first principle of a democratic finance scheme is the protection of the integrity of representative government. One way in which this can be corrupted is by undue influence, which can occur when financial donors are treated preferentially rather than decisions being made in the public interest. Such behaviour is not necessarily linked to a specific transaction but, rather, is a culture of delivering preferential treatment to donors.

315. I also stated that the system of political finance in New South Wales should recognise the increasing importance of third party players, who must not be allowed to fly under the radar. Third party campaigners must be regulated and subject to rules otherwise they have the potential to drown out the voice of the real players, the candidates and the political parties.

316. Proponents of the aggregation of the electoral communication expenditure of parties and their affiliated organisations argued that such aggregation was necessary to close a loophole in the existing regime which allows parties and affiliates to jointly campaign with no impact on the electoral communication expenditure cap for either entity. Opponents argued that the proposed amendments would unfairly restrict the political voice of affiliated organisations during election campaigns, and that the amendments failed to take into consideration instances where an affiliated organisation may advocate against the party to which it is affiliated.

317. Support for limiting donations to enrolled individuals was based on the view that the power to make political donations should be solely in the hands of those

[134] Hon B R O'Farrell MP, Premier, Legislative Assembly *Hansard*, 12 September 2011.

able to vote, thus reducing the risk and perception of undue influence or corruption. Conversely, it was argued that the ban on corporate/entity donations would eliminate the ability of citizens to engage in collective political action, and skew the political system.

318. In addition, for those who argued that affiliation fees were seen by many as a backdoor way to allow donations, the prohibition on affiliation fees from entities was a necessary amendment. The opposing view was that the ban was unnecessary because the fees could only be used for administrative, and not electioneering, purposes. It was also argued that the ban would restrict the ability of affiliates to influence the policy decisions of the party, and that the ban would force change to the internal structure of some parties.

Challenges of the 2012 amendments

319. Whilst still in their infancy, it is apparent that the 2012 amendments have caused significant concern to industrial, not-for-profit, community and environmental organisations.[135] There is a real possibility that industry organisations and other groups will mount a constitutional challenge to the amendments, arguing that they infringe upon the groups' implied freedom of political communication and the related freedoms of political association and political participation.[136]

320. In terms of administering the EFEDA, the EFA is not yet in a position to determine the effectiveness of the 2012 amendments. Quite apart from the significant concerns already raised by community groups in other forums regarding restrictions on their ability to participate in the electoral campaigning process, in my view, some of the practical effects of enforcing the amendments will be at odds with the General Principles espoused above, as evidenced by the following example:

> A butcher wishes to donate a meat tray to his local member. Where the butcher is an entity, the donation of the meat tray from the entity is prohibited. The butcher would be obliged to purchase the meat tray from his business, at the market rate, using his personal income, and then donate the tray as an individual on the electoral roll.

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[135] These concerns were voiced by a number of organisations ranging from the Deer Association of Australia, to Unions NSW, to the Cancer Council of NSW in their submissions to the Legislative Council's Select Committee on the Provisions of the *Election Funding, Expenditure and Disclosures Bill 2011*: http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/V3ListSubmissions?open&Parent UNID=401F472F5EF271BDCA257952001DB134

[136] See, e.g., the submissions to the Select Committee Inquiry from Dr Graham Orr (University of Queensland), Dr Anne Twomey (University of Sydney) and Dr Iain Stewart (Macquarie University): http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/V3ListSubmissions?open&Parent UNID=401F472F5EF271BDCA257952001DB134

321. While the above scenario is less likely to occur at State level, it is very real in the local government context. A range of other complications is set out below.

Third Party campaigners and "affiliated organisations"

322. An organisation is capable of satisfying both the definition of third party campaigner [s 4] and the definition of "affiliated organisation"'.

323. It is unclear as to how the aggregation of expenditure of parties and affiliated organisations aligns with the provisions around third party campaigners:

- are 'affiliated organisations' also third party campaigners and subject to the provisions regulating third party campaigners e.g., requirement to appoint an official agent, comply with third party expenditure cap)? or

- do they form part of the political party for funding and disclosure purposes (i.e., would they disclose their expenditure as part of the party expenditure, would the party agent be their official agent, would they be able to seek reimbursement from the Elections Campaign Fund for eligible expenditure etc)?

Party expenditure caps in particular electorates

324. As well as a state-wide expenditure cap, parties are also subject to a cap of $50,000 in each electorate (within their overall applicable cap).

325. Therefore, if an "affiliated organisation" incurs electoral communications expenditure promoting or opposing a party endorsed candidate in a particular electorate, will this electoral communications expenditure be credited to the party's expenditure in that electorate, or is the expenditure only to be credited to the party's state-wide expenditure cap?

Expenditure by an affiliated organisation which promotes unrelated party/candidate

326. It is unclear as to whether the EFEDA is intended to aggregate electoral communications expenditure by an 'affiliated organisation' which promotes a party or candidate to whom it is not affiliated. For example, an organisation is affiliated to Party A, and incurs expenditure promoting Party A, but also incurs electoral communications expenditure promoting the election of Party B. Therefore, is the expenditure by the affiliated organisation promoting party B included in the expenditure cap for party A (if it exceeds the expenditure cap)?

Prosecutions

327. There could be difficulties in prosecuting a party which exceeds its expenditure cap on the basis of electoral communications expenditure incurred by an affiliated organisation.

328. Section 96HA(1) of the Election Funding, Expenditure and Disclosures Act provides as follows:

> A person who does any act that is unlawful under Division 2A or 2B is guilty of an offence if the person was, at the time of the act, aware of the facts that result in the act being unlawful.
>
> Maximum penalty: In the case of a party, 200 penalty units or in any other case, 100 penalty units.[137]

329. It could be very difficult for the EFA to prove that a political party was aware that an affiliated organisation had incurred expenditure which exceeded the applicable party expenditure cap at the time when the expenditure is incurred.

330. A general concern with the EFEDA, in its current form, is that the penalty for exceeding an expenditure cap may not be adequate where there has been a significant breach – for example, where a party exceeds their expenditure cap by $1 million, a maximum penalty of $22,000 seems insufficient.

331. Section 96J of the EFEDA provides for the recovery of unlawful donations. It states:

> If a person accepts a political donation, loan or indirect campaign contribution that is unlawful because of this Part, an amount equal to the amount or value of the donation, loan or contribution (or double that amount if that person knew that it was unlawful) is payable by that person to the State and may be recovered by the Authority as a debt due to the State from:
>
> (a) in the case of a donation, loan or contribution received by a party that is a body corporate—the party, or
>
> (b) in the case of a donation, loan or contribution received by a party that is not a body corporate—the party agent of the party, or
>
> (c) in any other case—the person who received the donation, loan or contribution or the official agent of the person.
>
> (2) This section extends to a political donation that would be unlawful under this Part but for section 95B (5) or 95C (3).

332. In addition to the existing offence provision under s 96HA, a similar provision to s 96J, which allows the EFA to recover an amount equal to the extent to

[137] It appears that proceedings for breach of a party's expenditure cap as a result of expenditure by an affiliated organisation would be instituted against the party and not the affiliated organisation.

which a party or candidate exceeds an expenditure cap, might be a more proportionate deterrent and efficient and effective enforcement option in some circumstances. It would also better align with the compliance-oriented regulation approach.

Proceedings against representatives of a party

333. The 2012 amendments expanded the range of offences that a 'party' is capable of committing. This exacerbates an existing problem with the scope of s 112 of the EFEDA, which I understand is unique in the statute law of this State. That provision permits commencement of proceedings against a representative subset of a party on behalf of all party members:

> A proceeding in respect of an offence against this Act alleged to be committed by a party that is unincorporated, or in respect of any amount recoverable from such a party under section 71, 71A, 77, 77A, 97I or 97J, may be instituted against an officer or officers of the party as a representative or representatives of the members of the party, and a proceeding so instituted shall be deemed to be a proceeding against all the persons who were members of the party at any relevant time.

334. One of the impracticalities of an attempt to impose criminal liability on all (say, 2000) members of a party via a representative subset thereof is that a court might insist that all 2000 members have a right to representation before the court. A court that took the alternative view might find itself in contravention of an (arguably constitutionally guaranteed) right of a person to a hearing at the tribunal before which he or she is charged. Hence the section raises the prospect of criminal proceedings being commenced against literally thousands of persons, including Parliamentary members.

335. A possible solution might be to restrict criminal responsibility in respect of a party to, for example, the party agent or the party's governing body, as is provided for in s 18A of the *Lotteries and Art Unions Act 1901*.

Small donations

336. The EFEDA now restricts permissible donations to those given by enrolled individuals. The prohibition on donations from other than enrolled individuals applies to small donations (that is those below the reportable amount of $1,000) which become reportable when from the same person and aggregated to the threshold.

337. The EFA regularly receives queries from stakeholders seeking guidance about how to give practical effect to this provision. These queries were particularly in relation to small donations, such as the purchase of raffle tickets, and whether it

was necessary for party/official agents to determine that an individual is on an electoral roll in every instance.

338. To ensure compliance with the EFEDA, parties, elected members, candidates and third-party campaigners must put in place appropriate practices and procedures to ensure compliance with the legislation. This is clearly an onerous exercise in the case of small donations and is counter to encouraging compliance.

Access to the electoral rolls

339. Not all political parties and candidates have access to the state, federal and local government electoral rolls. While registered political parties are periodically provided with the roll under the PE&EA, the EFEDA also regulates unregistered political parties, as discussed above (and in further detail below). These unregistered parties do not have access to the electoral roll, and hence would be unable to determine whether an individual is enrolled.

340. Independent candidates are only entitled to access the state government electoral roll or local government electoral roll on nomination. However, they are able to receive donations as soon as they are registered with the EFA [s 96A(2)(b)], which can occur from polling day for the previous general election: s 31(2).

341. Third parties do not have access to the electoral rolls.

342. One option to enable parties and candidates to verify that a person is on the state and local government elector roll would be to amend s 44 of the PE&EA, which provides for on-line access by an individual to enrolment information about the individual. It states:

> (1) The Electoral Commissioner may provide internet on-line access to information contained in the roll for a district for the purpose of allowing an individual to ascertain whether or not he or she is correctly enrolled for the district.
>
> (2) The Electoral Commissioner may determine the manner and form in which information is to be available under this section.
>
> (3) The Electoral Commissioner must provide such security measures as the Commissioner considers necessary to ensure that information relating to an individual is available only to:
>
> > (a) that individual, or
> >
> > (b) a person who is authorised by that individual to access that information.

343. Section 44 could be amended so that a political party, group, or candidate is permitted to access the enrolment information, where they have the donor's consent and are provided with the required personal information by the donor.

344. Another option would be for an amendment to the EFEDA to provide that a person accepting a donation from an individual must satisfy themselves that the donor is on an electoral roll by requiring the person to provide a declaration to that effect.

Parties as donors

345. The prohibition on donations except from individuals on an electoral roll would seem to restrict parties from donating to their own candidates, groups and elected members.

346. However, given the exemption of disposition of property between branches of parties from the prohibition on donations other than from individuals in s 96D(5), it is unclear whether this was the intention of the 2012 amendments.

Groups as donors

347. The prohibition on donations except from individuals would prevent a group from donating to a candidate or another group. Particularly for local government elections, there have been instances where groups of candidates have donated to other associated groups. Where a council is divided into wards, associated groups of candidates (either endorsed by the same party, or related independent candidates) may be represented by a group within each ward.

348. For example, Party A endorses groups in Ashfield Council East ward, South ward, North ward and North East ward. The Group representing Party A in Ashfield East ward requires additional funds to support its campaign, which are donated to the group from the Party A group in Ashfield South ward.

349. However, it is unclear whether it was the intention of the 2012 amendments to prohibit donations between associated groups.

"Person" or "individual"?

350. Although the term "person" is not defined in the EFEDA, I note that s 21 of the *Interpretation Act 1987* provides that person "includes an individual, a corporation and a body corporate or politic".

351. The 2012 amendments would seem to allow a candidate or party to receive a reportable loan (other than a loan from a financial institution) from a person, as broadly defined under the Interpretation Act. Section 85(3B) provides that:

Uncharged interest on a loan to an entity or other person is taken to be a gift to the person for the purposes of this section. Uncharged interest is the additional amount that would have been payable by the person if:

(a) the loan had been made on terms requiring the payment of interest at the generally prevailing interest rate for a loan of that kind, and

(b) any interest payable had not been waived, and

(c) any interest payments were not capitalised.

352. It is unclear whether the 2012 amendments intended to restrict the giving of reportable loans (and the donation of uncharged interest) to those from individuals on an electoral roll.

Proposals for future reform

Construction

353. The issues of interpretation noted above are significant obstacles to the efficient management and administration of the current scheme and the ability to successfully enforce offences for non-compliance with the requirements of the Act.

354. Fundamental to the review and restructure of the EFEDA must be the consolidation of definitions which are presently fragmented throughout the Act and, at times, unclear. The definitions of "candidate", "official agent" "affiliated organisation", "party" (namely unregistered or not), and "third-party campaigner" are examples of definitions that suffer from these issues.

355. I recommend simplifying the process of registering candidates and groups for election and funding purposes and appointing and registering official agents. This might best be achieved by entrusting to the regulatory agency the responsibility for determining through delegated rule making powers appropriate arrangements, having regard to contemporaneous and emerging issues.

356. Other issues of construction which the Committee might like to consider include, but are not limited to:

- the definition of political donation;
- the definitions of electoral expenditure and electoral campaign expenditure;
- the requirement to establish a campaign account;
- the proceeds from fundraisers and ventures; and
- the definition of prohibited donor (if retained).

Offence provisions

357. I recommend a complete overhaul of the offence provisions, introducing a Part into the new Electoral Act in which all campaign finance related offences are listed with their penalty immediately following each offence. By listing each offence individually, rather than having a general offence provision applicable to a variety of "unlawful acts" (such as is the current s 96I), the new Part will promote a better understanding of the campaign finance regime and each person's responsibilities thereunder. It will also allow for a fairer and tailored approach to individual offences, in line with The General Principles, rather than the current "one size fits all" provision.

358. The most significant feature of the proposed new offence provisions will be the introduction of specified strict liability offences. Strict liability offences displace the common law presumption that the prosecutor must prove that the defendant *intended* to commit the offence. The prosecutor is required to prove that the alleged act took place (known as *actus reas*) but is not required to prove that the defendant intended to commit the act (known as *mens rea*).

359. It is my submission that the introduction of specified strict liability offences in the Act is fundamental to promoting fairness, equity and integrity in the campaign finance regime. The current general offence provision requires the prosecution to prove that the defendant had actual knowledge of the unlawfulness of his/her actions which effectively prevents the successful prosecution of all but those offences where an admission has been made.

360. In reaching this conclusion I have considered the findings of the Parliament's Legislation Review Committee on Strict and Absolute Liability, particularly that strict liability for an offence may be appropriate where:

- it is necessary to ensure the integrity of a regulatory regime;
- its application is necessary to protect the general revenue;
- it has proved difficult to prosecute fault provisions, particularly those involving intent;
- it would overcome the knowledge of law problem, where a physical element of the offence expressly incorporates a reference to a legislative provision, in such cases the defence of mistake of fact should apply; and
- the defendant can reasonably have been expected, because of his or her professional involvement, to know what the requirements of the law are, and 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.[138]

361. The new offence Part would:

- expressly state which offences are strict liability offences;
- include a provision that the defence of honest and reasonable mistake of fact is available to strict liability offences; and
- contain reviewed monetary penalties applicable to strict liability offences.

362. However, I would recommend that any offence carrying a penalty of imprisonment should not be a strict liability offence.

363. I would suggest that the general defence of mistake of fact, with its lower evidentiary burden, is a substantial safeguard for those affected by the introduction of strict liability offences. The defence allows a defendant to raise an honest and reasonable belief in a state of facts, which, if they existed, would render the act innocent.[139] The defendant need only prove to the balance of probabilities that he or she held this honest and reasonable mistake of fact to then shift the burden to the prosecution who must prove beyond reasonable doubt that the defendant did not have an honest and reasonable belief in the facts asserted.

364. In addition, the EFA would continue to apply its Compliance and Prosecution Policies which give it the discretion to employ any of a number of enforcement options, including declining to prosecute where the defendant has submitted compelling evidence that prosecution would not be in the public interest.

365. I recommend the introduction of provisions to enable the EFA to prosecute political parties in their own right and to create sanctions such as the reduction of public funding or the suspension of public funding for parties found to be in breach of the Act, as is currently the case for breaches of expenditure cap.

Investigative powers

366. The current power under s 110 of the EFEDA has no application to major political donors. In the modern political climate, the EFA is more likely to require such information from donors during the course of an investigation.

367. The powers available under s 110A, as introduced by the 2010 amendments, are substantially more extensive than those under the preceding section. However,

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[138] See the Committee's *Discussion Paper No. 2*, 8 June 2006. See also ACT Standing Committee on Legal Affairs, *Scrutiny Report No 2 of 2005,* p 10.
[139] *Proudman v Dayman* (1941) 67 CLR 536.

an administrative issue has arisen due to the disjunctive use of the word "or" in s 110A(1), which results in the requirement that a separate s 110A notice must be issued to exercise each power under the provision.

368. Ideally, the new Act would integrate the powers under the existing s 110 and s 110A and expand on the functions available to the EFA.As mentioned previously, I welcome working together with agencies and drafters in developing a new Electoral Act which will encompass these and other reforms based upon the experiences of the EFA and stakeholders.

Electoral communication expenditure and Parliamentary allowances

369. The provisions of the EFEDA acknowledge that payments for parliamentary allowances might intersect with public funding payments under the EFEDA. However, they miss the mark.

370. Pursuant to s 97B(1)(b)(ii) of the EFEDA expenditure for which a member may claim a parliamentary allowance is excluded for the purposes of payments from the Administrative Fund: there is no corresponding exclusion in relation to payments from the Election Campaign Fund.

371. Candidates who are already Members of Parliament are not permitted to use their Parliamentary entitlements for "*direct* electioneering purposes" or "political campaigning" (the Logistics Support Allowance and Electorate Mailout Account to be discussed in more detail below).The definition of "electoral expenditure" in the EFEDA refers to expenditure "for the purpose of influencing, d*irectl*y or indirectly, the voting at an election" [s 87(1)]. There would, therefore, appear to be a gap where expenditure may be allowed by the Parliamentary administration (as it is not *direct* campaigning), but which is still caught as "electoral communications expenditure" under the EFEDA (as it is *indirect* campaigning).

372. This could result in a situation where a Member expends their Parliamentary Allowance on a newsletter or brochure which does not const*itute* "electioneering" for Parliamentary Allowance purposes, but does constitute "electoral communications expendit*ure" for* the purposes of the EFA.

373. I note that there was some media coverage of this issue prior to the 2011 State Elections.[140]

[140] See http://www.smh.com.au/nsw/taxpayer-cash-could-help-win-election-labor-chief-told-mps-20110122-1a0kz.html

Relevant Parliamentary Allowances

374. The Logistics Support Allowance is an amount between approximately $32,000 – 40,000 per annum to support the running of an electorate office - equipment, postage, stationery, etc., - and to fund travel by the member and their spouse. The guidelines state that:

> Members may not use their Logistic Support Allocation to procure goods or services to be used for direct electioneering purposes or political campaigning.

375. The Electorate Mailout Account (EMA) was created in 2002 by the Parliamentary Remuneration Tribunal to permit Members of the Legislative Assembly to communicate with constituents in their respective electorates concerning electorate matters. A separate entitlement is provided to each Member for this purpose and the quantum of the entitlement is determined by the number of constituents in each electorate. It is an amount between approximately $55,000-65,000 per annum.

376. The guidelines that apply to additional entitlements such as the Mailout Account state that they may be used for Parliamentary duties, including activities 'undertaken in representing the interests of constituents, but excluding activities of a direct electioneering or political campaigning nature.'

377. Arguably, newsletters and other letters distributed by Members of Parliament to their constituents funded by the Electoral Mailout Account fall within the definition of "electoral expenditure" and/or "electoral communications expenditure".

378. I note that the Committee included a graph from the Auditor General of expenditure by members from the Electoral Mailout Account in its Report.[141] That graph showed that patterns of expenditure from this allowance in election years vary compared to other years. In 2007, electoral expenditure was concentrated in the three months leading up to the election, with a significant peak in March. In other years, expenditure is concentrated in June, coinciding with the end of the financial year. This would seem to indicate that expenditure on the distribution of newsletters and other communications with constituents in an election year is for the purposes of the election.

379. The proximity of the distribution of such material to an election may be an indicator as to whether it is caught by the definition of "electoral communications

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[141] See http://www.audit.nsw.gov.au/publications/reports/financial/2010/vol01/pdfs/06fa0276_members'_additional_entitlements__the_legislature__volume_1_2010.pdf.

expenditure". If that expenditure is classified as electoral communications expenditure then:

- the expenditure must be disclosed;
- it is unlawful for the expenditure by an elected member to be made other than from their campaign account [s 96A(5)];
- it will be included in the cap on expenditure; and
- it may be eligible for public funding reimbursement.

380. The EFEDA provides that the EFA, if it is satisfied that it is proper to do so, may disallow, wholly or in part, any items of expenditure covered by a claim under Part 5 Public Funding for State Elections [s 64(4)]. However, this puts the EFA in an invidious situation as it was clearly Parliament's intention that Parliamentary allowances would necessarily be characterised under the EFEDA as "administrative" in nature; I would suggest that in drafting and passing the legislation, it was understood that since Parliamentary entitlements are not permitted to be used for campaigning or electioneering, then they necessarily could not be contemplated as electoral expenditure under the EFEDA. However, as outlined in the foregoing discussion, this rationale appears to be misconceived. This is an issue which would best be addressed by a holistic view of the EFEDA and Parliamentary allowances.

Prohibited donors

381. The first incarnation of the prohibited donor provisions under Division 4A of Part 6 of the EFEDA was introduced in 2009 as a prohibition on property developer donations. It applied to property developer corporations and their "close associates" which included related entities and individuals. The other prohibited donor categories of tobacco industry business entities and liquor or gambling industry business entities including any industry representative organisation if the majority of its members are such prohibited donors, together with their close associates, was introduced in 2010 along with the caps on donations provisions.

382. Since 2012, the prohibited donor provisions as they apply to entities are no longer relevant, yet they incongruously and confusingly remain sitting under s 96GB. I note also that, while Division 4A of Part 6 of the EFEDA relates to all categories of prohibited donor, the heading to that Division was not amended in 2010 and still confusingly refers only to prohibited property developer donors.

383. If the policy rationale in introducing the ban on corporate donations was not to also displace the ban on prohibited donor *individuals* (caught under the definition of "close associate" of prohibited donor entities), then the prohibited donor entity provisions should have been redrafted for consistency and clarity.

384. To determine whether a person is a prohibited donor or close associate of same is a tortuous process as is apparent from an examination of the definitions. I would suggest that the prohibited donor provisions as currently drafted fails the compliance-oriented regulation test: it is unlikely that voluntary compliance will follow where governing provisions are virtually indecipherable.

385. In addition - and bearing in mind that the 2010 and 2012 amendments have introduced caps on all donations and prohibited donations from corporations and other entities, respectively - it is questionable whether the original intent of the provisions remains relevant. It is therefore recommended that the policy rationale underpinning the prohibited donor provisions is re-examined and/or the provisions themselves are overhauled.

Unregistered parties

386. As foreshadowed earlier in this submission, the EFEDA contemplates unregistered political parties as stakeholders in the regulation of campaign finances. However, it has become increasingly unclear, following the introduction of each amending Act since 2008, which provisions apply to these entities - and to any candidates that may be "endorsed" by same - and when. I refer you to the table in Annexure 5 which outlines the provisions impacting on registered and unregistered parties under the EFEDA and gives an indication of the interpretive problems associated with the legislation as currently drafted. It also highlights the problems of the fragmentation of definitions, and intersection of provisions, as between the PEEA and EFEDA. A summary of issues is outlined further below.

Party agent and/or official agent

387. Although an unregistered political party is required to appoint a party agent [s 41(1)], there is no default party agent for an unregistered party [s 41(2)]. This could create difficulties in enforcing offences against the Act by an unregistered party where they have not appointed a party agent; or where the party agent dies or resigns, or his or her appointment is revoked and a new party agent is not appointed.[142]

388. This problem could be addressed by enabling the EFA to nominate the officer of a party as the party agent.

Broad and narrow interpretations of "endorsed"

389. The defined term "endorsed" is identical under both the PEEA and the EFEDA, namely, ***"endorsed***, in relation to a party, means endorsed, selected or

[142] The party agent of an unregistered political party is not the ex officio agent for any candidates or groups endorsed by the party, and they would need to appoint an official agent [s 46(1)]. If a candidate or group of an unregistered party has not appointed an official agent, the candidate or the first candidate on the list for the group, is deemed to be their own official agent [s 46(6)].

otherwise accredited to stand as a representative of the party". However, its meaning under the PE&EA is qualified by operation of that Act to be applicable only to candidates formally nominated by registered political parties. In contrast, by operation of the provisions of the EFEDA, the term "endorsed" has a much broader meaning to apply to candidates of unregistered parties.

390. This inconsistency has required the EFA to map a course in interpreting the provisions of the EFEDA to ensure fair and equitable outcomes to stakeholders. Much depends on whether a narrow or broad definition of the term 'endorsed' is applied.

Public funding

391. Unregistered parties are not eligible for public funding [s 57(2)(a)]. Candidates for unregistered political parties may be eligible for public funding, if they meet the eligibility criteria. However, candidates at a periodic Council election are only eligible where they are not included in a group, or are in a group none of whose members were endorsed by a party.

392. If a broad definition of the term 'endorsed' is adopted, and unregistered parties are able to endorse candidates, then candidates forming part of a Legislative Council group endorsed by a registered party may be ineligible for public funding. On the other hand, if a narrow definition is adopted - as is provided for under the PE&EA - and unregistered parties are unable to endorse (or in other words, nominate) candidates, then candidates for unregistered political parties forming part of a Legislative Council group would appear to be eligible for public funding.

Donations

393. Political donations to unregistered parties are capped at $2,000 per annum [s 95A(1)(b)].[143] Donations to a group are capped at $5,000 and to a candidate at $2,000 [s 95A(1)(d) and (e)].

394. Donations to elected members, groups and candidates of the same party within the same financial year are aggregated for the purpose of caps on donations [s 95A(4)]. For the purposes of this section, members of the same party are those endorsed by the same party at the last election or are to be endorsed by the same party at the next election.

395. As with the relevant public funding provisions, if a broad definition of "endorsed" is adopted, then the aggregation provisions apply. However, if a narrow definition is adopted, then the aggregation provisions would not apply.

[143] Party subscriptions to unregistered parties under $2,000 are exempt from the cap on donations: s 95.

396. As the purpose of this section would seem to be to prevent a person or corporation from making donations to numerous candidates of the same party (whether the party is registered or not), then a broad definition of 'endorsed' should be adopted. However, this is patently unclear.

Expenditure caps

397. The sections of the EFEDA outlining the expenditure caps for parties refer to a "party" rather than a "registered party". However, they also refer to endorsed candidates. If a broad interpretation of "endorsed" is applied, then unregistered political parties would be subject to the caps on expenditure for parties.

398. If a narrow interpretation of "endorsed" is applied, then there would be no circumstances in which an unregistered party would meet the requirements of s 95F(2)-(4), as it is unable to nominate candidates. Should this be the case, an unregistered party may be subject to the expenditure cap for third party campaigners. Third party campaigners are defined as an entity or other person (not being a registered party, elected member, group or candidate) who incurs electoral communications expenditure during a capped expenditure period (as defined in Part 6) that exceeds $2,000 in total. This may create practical difficulties around registration.

399. I would suggest that a broad interpretation of "endorsed" is adopted in relation to the following additional areas:

- expenditure caps in relation to candidates [s 95F(6) – (7)];
- aggregation of expenditure caps [ss 95G(1), (2) and (4)];
- management of donations and expenditure [s 96 and 96B(6)]; and
- prohibition on certain donations [ss.96D – 96GB and 96EA].

400. However, I would suggest that a narrow interpretation of the term "endorsed" should be applied in relation to the administrative and policy development funding provisions for to apply a broad interpretation may deny administrative funding to elected members of unregistered political parties.

401. This is because the EFEDA provides for public funding for elected members for administrative expenditure, *where they were not an endorsed candidate of any party* [s 97F]. If "endorsed" is read in this context as "formally nominated" (i.e., a narrow interpretation), a member of an unregistered political party that might be elected to Parliament would not be disentitled to administrative funding. I would suggest that it would not have been intended that "independent" candidates that happen to be members of political parties would be disentitled to funding, even if it is considered that this circumstance is unlikely to occur.

402. In this regard, it should be remembered that there is nothing in the PE&EA to preclude a candidate who has not been formally nominated by a registered party, but who may be a member of a political party (whether registered or not), to stand as an Independent candidate.

Public funding of local government election campaigns

403. In its report on Public Funding of Local Government Election Campaigns,[144] the Committee recommended that consideration be given to the reformation of the political finance regime for local government election campaigns, including the introduction of a public funding scheme, administered by the State Government.[145]

404. The full list of the Committee's Recommendations is attached as Annexure 6.

405. I have noted the complexity of the process of conducting local government elections above at paragraphs 286- 289, and would now like to provide the detail as to why, in my view, public funding should not be introduced for local government election campaigns.

406. I concur with the conclusion expressed by Dr Tham in his report *Regulating the Funding of New South Wales Local Government Election Campaigns* that there is no demonstrated case for public funding of local government election campaigns. I note that the Committee specifically recommended that the Premier have regard to this report, and I have annexed a copy of that Report for the Committee's information [Annexure 7].

407. In the report, Dr Tham states that there are three possible rationales for the introduction for public funding for NSW local government elections:

- anti-corruption - by reducing reliance on private funding, thereby lessening the risk of corruption and undue influence;
- fairness - by ensuring the electoral contest is open to "worthy parties and candidates [that] might not [otherwise] be able to afford the considerable sums necessary to make their policies known;
- compensatory: to compensate for reduced private income resulting from introduction of contribution limits.[146]

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[144] Report No. 4/54, December 2010.
[145] Recommendations 1 and 13.
[146] J C Tham, *Regulating the Funding of New South Wales Local Government Election* Campaigns, p 64.

408. Dr Tham concluded that all three rationales lacked persuasiveness in relation to NSW local government elections. The first rationale is not strong in relation to public funding of elections at any level. The second rationale is not compelling in the context of 'low cost' election campaigns (which the overwhelming majority of local government campaigns in NSW are). Indeed there is a risk that public funding will inflate election spending thereby undermining fair elections. The third rationale is clearly weak in relation to local government candidates for contribution limits of $1000 per financial year will have a minimal impact on these candidates. Accordingly, I do not support the introduction of funding for local government elections in New South Wales.

Donation and expenditure caps

409. The Committee recommended that a cap on donations to local government election campaigns be introduced, having regard to consistency with the donation caps applicable for state election campaigns; and the arguments made by the Independent Commission Against Corruption and myself for lower donation caps than those adopted for state government election campaigns.

410. The Committee also recommended that expenditure caps be introduced for local government election campaigns. However, I would suggest that, unlike caps at the State level, this may be unworkable, having regard to the byzantine nature of local government elections, as set out above, leading almost to the conclusion that each local government area would have to have its own formula for capping expenditure. I note that the complicated nature of any such undertaking is suggested by the fact that seven of the Committee's 16 Recommendations dealt with how this might be implemented in practice.

411. However, I would also like to suggest that the introduction of donation caps may well have the effect of limiting the amount of money being spent on local government elections. Although there may be exceptions in the case of high-wealth individuals, the fact that a candidate is only able to receive a certain amount of campaign donations most likely means that he or she will limit the amount of money spent on a campaign. Therefore, it will be possible for an overall scheme limiting donations to have the effect of capping expenditure in each local government election campaign

Audit costs

412. The Committee also recommended that, to ensure compliance with disclosure requirements, public funding could be introduced in the form of an allowance to candidates and groups to assist with the costs of auditing as required under the EFEDA.

413. The NSWEC proposed that the cost of these audits could be reduced by allowing any of the following to undertake the audit:

(a) a Certified Practising Accountant member of CPA Australia, New South Wales Division;

(b) a member of the Institute of Chartered Accountants in Australia, New South Wales Region, who holds a Certificate of Public Practice issued by that Institute; or

(c) a member of the Institute of Public Accountants who holds a Professional Practice Certificate issued by that Institute.

414. I note that these are the same categories of persons who are able to be appointed as official agents without the need to complete the EFA's online training: cl 36 of the EFE&D Regulation.

415. Recent amendments to the EFEDA provide that the cost of an audit of a disclosure or claim for payment may be claimed as a cost from the Administration Fund or Policy Development Fund for those independent members of Parliament and registered political parties that are entitled to such funding.

416. I would suggest that rather than have public funding for disclosure compliance, the broadening of the relevant categories combined with the ability to claim the costs goes some way to alleviating this problem.

417. In addition, although no public funding is currently available at local government elections, I note that the EFA does not require an audit certificate from candidates and groups which contest local government elections, except where there is more than $2,500 in political donations or electoral expenditure.

Conclusion

418. For the reasons set out above, I agree with the conclusions of Dr Tham that there is insufficient evidence to suggest that participants in local government elections should receive public funding from the State. I would suggest, rather, that a judicious use of donation caps would have the effect of limiting expenditure at the local government level, especially as the complexity of the electoral structure of local government in New South Wales, as highlighted earlier in the submission, bears little resemblance to the funding approach to the 93 single member electorates which make up the Legislative Assembly.

Annexure 1- Table of instruments amending the *Parliamentary Electorates and Elections Act 1912*

1918 No 40	*Parliamentary Elections (Amendment) Act 1918*
1919 No 39	*Proclamations Validation Act 1919*
1920 No 18	*Parliamentary Elections (Casual Vacancies) Act 1920*
1921 No 19	*Parliamentary Electorates and Elections (Amendment) Act 1921*
1926 No 12	*Parliamentary Electorates and Elections (Amendment) Act 1926*
1928 No 55	*Parliamentary Electorates and Elections (Amendment) Act 1928*
1929 No 33	*Parliamentary Electorates and Elections (Amendment) Act 1929*
1935 No 31	*Parliamentary Electorates and Elections (Amendment) Act 1935*
1937 No 35	*Statute Law Revision Act 1937*
1941 No 6	*Parliamentary Electorates and Elections (Amendment) Act 1941*
1944 No 2	*Parliamentary Electorates and Elections (Amendment) Act 1944*
No 10	*Parliamentary Elections (War Time) Act 1944*
1946 No 54	*Economic Stability and War-time Provisions Continuance Act 1946*
1949 No 23	*Parliamentary Electorates and Elections (Amendment) Act 1949*
1950 No 25	*Parliamentary Electorates and Elections (Amendment) Act 1950*
1952 No 16	*Parliamentary Electorates and Elections (Amendment) Act 1952*
1959 No 1	*Parliamentary Electorates and Elections (Amendment) Act 1959*
1961 No 48	*Parliamentary Elections and Liquor (Amendment) Act 1961*
1965 No 15	*Parliamentary Electorates and Elections (Amendment) Act 1965*
No 33	*Decimal Currency Act 1965*
1969 No 43	*Parliamentary Electorates and Elections (Amendment) Act 1969*
1970 No 52	*Supreme Court Act 1970* Amended by *Supreme Court (Amendment) Act 1972 No 41*
No 57	*Parliamentary Electorates and Elections (Amendment) Act 1970*
1973 No 44	*Parliamentary Electorates and Elections (Amendment) Act 1973*
No 87	*Registration of Births, Deaths and Marriages Act 1973*
1975 No 25	*Parliamentary Remuneration Tribunal Act 1975*
No 57	*Registration of Births, Deaths and Marriages (Amendment) Act 1975*
No 108	*Parliamentary Electorates and Elections (Amendment) Act 1975*
1976 No 4	*Statutory and Other Offices Remuneration Act 1975*
No 20	*Parliamentary Electorates and Elections (Amendment) Act 1976*
1977 No 91	*Parliamentary Electorates and Elections (Amendment) Act 1977*
No 133	*Parliamentary Electorates and Elections (Further Amendment) Act 1977*
1978 No 75	*Constitution and Parliamentary Electorates and Elections (Amendment) Act 1978*
No 155	*Prisons (Amendment) Act 1978*
1979 No 39	*Parliamentary Electorates and Elections (Constitution) Amendment Act 1979*
No 152	*Parliamentary Electorates and Elections (Amendment) Act 1979*
1981 No 28	*Parliamentary Electorates and Elections (Amendment) Act 1981*

1982 No 47 *Parliamentary Electorates and Elections (Legislative Assembly) Amendment Act 1982*

No 112 *Parliamentary Electorates and Elections (Amendment) Act 1982*

No 148 *Liquor (Repeals and Savings) Act 1982*

No 168 *Miscellaneous Acts (Local Courts) Amendment Act 1982*
Amended by *Statute Law (Miscellaneous Amendments) Act 1984 No 153*

1985 No 231 *Statute Law (Miscellaneous Provisions) Act 1985*

1986 No 58 *Parliamentary Electorates and Elections (Amendment) Act 1986*

1987 No 48 *Statute Law (Miscellaneous Provisions) Act (No 1) 1987*

No 132 *Parliamentary Electorates and Elections (Amendment) Act 198*
Amended by *Statute Law (Miscellaneous Provisions) Act (No 2) 1987 No 209*
Also amended by *Statute Law (Miscellaneous Provisions) Act 1988 No 20*

No 173 *Parliamentary Electorates and Elections (Further Amendment) Act 1987*

1988 No 20 *Statute Law (Miscellaneous Provisions) Act 1988*

1989 No 11 *Miscellaneous Acts (Theatres and Public Halls) Amendment Act 1989*

1990 No 111 *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1990*

1991 No 14 *Parliamentary Electorates and Elections (Amendment) Act 1991*

No 20 *Constitution (Legislative Council) Amendment Act 1991*

No 94 *Statute Law (Miscellaneous Provisions) Act (No 2) 1991*

1992 No 34 *Statute Law (Miscellaneous Provisions) Act 1992*

No 112 *Statute Law (Penalties) Act 1992*

1993 No 108 *Statute Law (Miscellaneous Provisions) Act (No 2) 1993*

1995 No 1 *Constitution (Fixed Term Parliaments) Amendment Act 1993*

No 11 *Statute Law Revision (Local Government) Act 1995*

No 54 *Parliamentary Electorates and Elections Amendment (Method of Voting) Act 1995*

No 62 *Births, Deaths and Marriages Registration Act 1995*

1997 No 88 *Constitution and Parliamentary Electorates and Elections Amendment Act 1997*

No 147 *Statute Law (Miscellaneous Provisions) Act (No 2) 1997*

1998 No 120 *Statute Law (Miscellaneous Provisions) Act (No 2) 1998*

1999 No 31 *Statute Law (Miscellaneous Provisions) Act 1999*

No 70 *Parliamentary Electorates and Elections Amendment Act 1999*

No 94 *Crimes Legislation Amendment (Sentencing) Act 1999*

2001 No 93 *Local Government and Environmental Planning and Assessment Amendment (Transfer of Functions) Act 2001*

No 121 *Justices Legislation Repeal and Amendment Act 2001*

2002 No 80 *Parliamentary Electorates and Elections Amendment (Party Registration) Act 2002.*

2003 No 82 *Statute Law (Miscellaneous Provisions) Act (No 2) 2003*

2004 No 55 *Statute Law (Miscellaneous Provisions) Act 2004*

2006 No 68 *Parliamentary Electorates and Elections Amendment Act 2006*

No 109 *Parliamentary Electorates and Elections Amendment (Child Sexual Offences Disclosures) Act 2006*

No 120 *Statute Law (Miscellaneous Provisions) Act (No 2) 2006*

2007	No 88	*Commission for Children and Young People Amendment Act 2007*
	No 94	*Miscellaneous Acts (Local Court) Amendment Act 2007*
2008	No 114	*Statute Law (Miscellaneous Provisions) Act (No 2) 2008*
2009	No 102	*Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Act 2009*
	No 119	*Surveying Amendment Act 2009*
2010	No 9	*Crimes Amendment (Child Pornography and Abuse Material) Act 2010*
	No 11	*Parliamentary Electorates and Elections Amendment Act 2010*
	No 126	*Parliamentary Electorates and Elections Further Amendment Act 2010*
2011	No 41	*Transport Legislation Amendment Act 2011*
	No 48	*Public Sector Employment and Management Amendment (Ethics and Public Service Commissioner) Act 2011*

Annexure 2 - Funding and disclosure regimes by jurisdiction

Commonwealth

Principal Act	Provision	Comment
Commonwealth Electoral Act 1918	Part XX—Election funding and financial disclosure	Annual returns and disclosures are provided to the Australian Electoral Commission (304-305B & 309, 314AB, 314AEA); payment of funding made by the AEC (294).

Victoria

Principal Act	Provision	Comment
Electoral Act 2002	PART 12—ELECTION EXPENDITURE; Part 12 deals with election expenditure and capping of political donations.	Statement of expenditure and Audit of statement is made to the Victorian Electoral Commission (208-209); payment of funding made by the VEC (212).

Queensland

Principal Act	Provision	Comment
Electoral Act 1992	Part 11 Election funding and financial disclosure	Claim for election funding is made to the Commission (230); the Commission decides whether to refuse or accept a claim (231); funding paid by the Commission (236); disclosures are made to the Commission (261)

Tasmania

Principle Act	Provision	Comment
Electoral Act 2004	PART 6 - Electoral Expenditure in respect of Council Elections	Only applies to the Legislative Council of the Parliament of Tasmania. Candidate's election expenditure return lodged with the Commission (161);

		Commission is to satisfy itself as to the authenticity and accuracy of the return (163)

South Australia

Principal Act	Provision	Comment
Electoral Act 1985	n/a	No provisions dealing with funding and disclosure
Local Government (Elections) Act 1999	Part 14 - Campaign donations	requires candidates to lodge a campaign donations return to the Chief Executive Officer of the council for which they nominated, once the election has concluded (81)

Northern Territory

Principal Act	Provision	Comment
Electoral Act	Part 10 Financial disclosure	Disclosures and returns for donations and expenditure are given to the Northern Territory Electoral Commission (191-194 & 200-202)

Australian Capital Territory

Principal Act	Provision	Comment
Electoral Act 1992	Part 14 Election funding and financial disclosure	Commissioner makes payment (212); returns for donations and expenditure are given to the Commissioner (220 & 224)

Western Australia

Principal Act	Provision	Comment
Electoral Act 1907	Part VI — Electoral funding and disclosure of gifts, income and expenditure	Electoral Commissioner to determine claims (175LE); Annual disclosure of gifts and other income to be made to the Electoral Commissioner (175N, 175NA, 175O, 175P,

	175Q); Disclosure of electoral expenditure made to Electoral Commissioner (175SA – 175SC)

electoral commission NSW

Annexure 3 – Technology Assisted Voting Approved Procedures for NSW State General Election 2011

Technology Assisted Voting Approved Procedures for NSW State General Election 2011

electoral commission NSW

The New South Wales Electoral Commission is pleased to be able to provide Technology Assisted Voting as another form of voting at the 2011 State Election.

iVote provides electors, who would otherwise have difficulty attending a polling place or casting an independent and secret ballot, a new voting option.

To allow for this method of voting to occur, the controlling electoral legislation requires that I approve procedures in relation to the implementation of technology assisted voting.

I hereby approve this document as the Approved Procedures for technology assisted voting for the NSW State Election 2011.

Colin Barry

Colin Barry

NSW Electoral Commissioner

Date 9 March 2011

Table of Contents

1. Purpose of this Document

Purpose and Audience

This document is for publication on the New South Wales Electoral Commission website as required in Parliamentary Electorates and Elections Act 1912 under

- (Section) 120AC Electoral Commissioner to Approve Procedures for Technology Assisted Voting and
- (Section)120AJ Approvals to be published on the internet.

Definitions used in this document

The following table defines some of the terms used in this document.

Term	*Definition*
ATL	Above The Line on the Legislative Council Ballot Paper
BTL	Below The Line on the Legislative Council Ballot Paper
iVote	The voting system that enables eligible electors to vote early electronically via the telephone or internet.
iVote Manager	The person delegated by the Electoral Commissioner to manage the use of iVote
iVote Number	A unique 8 digit vote number
PIN	A unique 6 digit Personal Identification Number
PEEA 1912	Parliamentary Electorates and Elections Act 1912

2. Introduction

Background

On 16 March 2010 the NSW Premier announced that the "Electoral Commissioner will investigate internet voting for visually impaired people of New South Wales improving their democratic right to a secret ballot".

The Premier's press release stated that "Nationally, there are 300,000 people who are blind or visually impaired with a third of them living in NSW" and that "Previously, blind and visually impaired people were only able to vote through the assistance of a friend or relative or through a large Braille ballot – which may run up to 67 pages."

The initiative was addressed in an amendment to the Parliamentary Electorates and Elections Act 1912, which required the "Electoral Commissioner to conduct an investigation as soon as possible into the feasibility of providing Internet voting for vision-impaired and other disabled persons for elections under this Act and, if such Internet voting is feasible, to propose a detailed model of such Internet voting for adoption."

A final version of the feasibility report was sent to the Premier's office on 23 July 2010 and tabled in Parliament on 2 September 2010. The Government then appropriated funds for the implementation of the project.

Legislation

The Parliamentary Electorates and Elections Act 1912 was amended by the Parliamentary Electorates and Elections Further Amendments Act 2010. The act which included legislation for technology assisted voting and other minor amendments was assented on 7 December 2011.

The final legislation provided for electors to use technology assisted voting provided that they met one of the following eligibility requirements. That the:

(a) elector's vision is so impaired, or the elector is otherwise so physically incapacitated or so illiterate, that he or she is unable to vote without assistance,

(b) elector has a disability (within the meaning of the Anti-Discrimination Act 1977) and because of that disability he or she has difficulty voting at a polling place or is unable to vote without assistance,

(c) elector's real place of living is not within 20 kilometres, by the nearest practicable route, of a polling place,

(d) elector will not throughout the hours of polling on polling day be within New South Wales

iVote

The technology assisted voting project was named iVote by the NSW Electoral Commission. iVote is an electronic voting solution that provides two channels of voting: one channel by telephone and the other channel by browser over the internet. By introducing two channels, the voter with a disability can choose the channel that suits them best and allows them to cast their vote using their own accessible technology to facilitate an, independent, private and secret vote.

iVote will be available to voters who:

(a) qualify under one of the above grounds;

(b) appear on the authorised electoral roll at the time of issue of writ for the NSW State General Election; and

(c) register their intention to use iVote.

3. Supporting Legislation

Electoral Commissioner approval

The Parliamentary Electorates and Elections Act 1912 requires the Electoral Commissioner to approve and publish procedures in relation to technology assisted voting.

Relevant sections

The relevant sections to the procedures are as follows:

Part 5 Division 12A

120AC Electoral Commissioner to approve procedures for technology assisted voting

(1) The Electoral Commissioner may approve procedures to facilitate voting by eligible electors at an election by means of technology assisted voting.

(2) The approved procedures must provide:

(a) for an eligible elector to register before voting by means of technology assisted voting, and

(b) for the making of a record of each eligible elector who has voted by means of technology assisted voting, and

(c) for the authentication of the eligible elector's vote, and

(d) for the secrecy of the eligible elector's vote, and

(e) that any vote cast in accordance with the approved procedures be securely transmitted to the Electoral Commissioner and securely stored by the Electoral Commissioner until printed, and

(f) for the production of a printed ballot paper at the close of the poll, for the purposes of the scrutiny, for each vote transmitted to the Electoral Commissioner showing the vote cast by the eligible elector, and

(g) for the bundling of those ballot papers according to the electoral district of the eligible elector (separating Assembly and Council ballot papers into different bundles), the sealing of the bundled ballot papers in packages and the distribution of:

(i) the sealed packages of Assembly ballot papers to the relevant returning officers for each of those districts, and

(ii) the sealed packages of Council ballot papers to the Electoral Commissioner.

(3) A printed ballot paper produced in accordance with the approved procedures does not need to be in or to the effect of the form prescribed in Schedule 4 or 4A (as the case requires), or be of the same size or format as the ballot papers printed in accordance with section 83 or 83B, so long as the vote cast by the eligible elector can be accurately determined.

(4) The Electoral Commissioner may approve procedures under this section only if the Electoral Commissioner is satisfied that a class of electors, who in other circumstances would be unable to vote or would have difficulty voting, would benefit from the approval of the procedures.

3. Supporting Legislation (Continued)

Relevant sections (cont.)

(5) The only limit on the power of the Electoral Commissioner to approve procedures under this section is that the pre-condition for approval set out in subsection (4) is met.

(6) The approval of procedures under this section cannot be challenged, reviewed or called into question in proceedings before any court or tribunal except on the grounds that the approval exceeds the jurisdictional limit specified by subsection (5) for the approval of such procedures.

The full text of the amendments are in the Parliamentary Electorates and Elections Further Amendments Bill 2010.

Throughout this document excerpts from the above legislation are quoted. Where the legislation is quoted it will appear in italics prior to the written procedure.

3. Supporting Legislation (Continued)

Supporting legislation

The table below reflects the legislation that enables the procedures within this document.

Approved Procedure	Section in Legislation
4.1 Approval and Publication	120AJ Approvals to be published on the internet 120AC Electoral Commissioner to approve procedures for technology assisted voting (1), (4), (5), (6)
4.2 Additional Requirements or Regulations on Eligible Electors	120AB Meaning of "eligible elector" (2), (3)
4.3 Use of Technology Assisted Voting	120AL Electoral Commissioner may determine that technology assisted voting is not to be used
4.4 Voter Registration	120AC Electoral Commissioner to approve procedures for technology assisted voting (2) (a)
4.5 Voting Method	120AK Regulations relating to technology assisted voting (2) (a)
4.6 Voting Period	120AK Regulations relating to technology assisted voting (2) (b)
4.7 Recording, Transmission and Storage of the Vote	120AC Electoral Commissioner to approve procedures for technology assisted voting (2) (b), (e)
4.8 Authentication of Vote	120AC Electoral Commissioner to approve procedures for technology assisted voting (2) (c)
4.9 Secrecy of Vote	120AC Electoral Commissioner to approve procedures for technology assisted voting (2) (d)
4.10 Printing and Handling of Ballot Papers	120AC Electoral Commissioner to approve procedures for technology assisted voting (2) (f), (g), (3) 120AF Technology assisted votes to be counted with postal votes 120AG Secrecy relating to technology assisted voting (1)
4.11 Scrutineers	120AE Scrutineers
4.12 Audit Programme	120AD Independent auditing of technology assisted voting (3)
4.13 System Security	120AG Secrecy relating to technology assisted voting. 120AI Protection of computer hardware and software

4. Approved Procedures

Procedures

The procedures in this section are:

4.1 Approval and Publication

4.1.1Supporting Legislation

120AC Electoral Commissioner to approve procedures for technology assisted voting

(1) The Electoral Commissioner may approve procedures to facilitate voting by eligible electors at an election by means of technology assisted voting.

120AJ Approvals to be published on the internet

An approval by the Electoral Commissioner for the purposes of this Division must be:

(a) in writing, and

(b) published on the Commission's internet website.

4.1.2 Procedure

1.	This procedures document will be reviewed by the iVote Manager for compliance to the legislation and to any existing regulations that pertain to technology assisted voting.
2.	The Electoral Commissioner will then approve the procedures by signing and dating the authorising memo attached to the procedures.
3.	The approved procedures will then be uploaded to the NSWEC website at the following location in both html format (so that it is accessible) and also as a scanned image in pdf format. http://www.elections.nsw.gov.au/about_us/information_from_us/policy_documents

4.2 Additional Requirements or Regulations on Eligible Electors

4.2.1 Supporting Legislation

120AB Meaning of "eligible elector"

(1) For the purposes of this Division, an eligible elector means an elector who meets any of the following eligibility requirements for technology assisted voting (and any additional requirements imposed on those eligibility requirements under subsection (2)):

(a) the elector's vision is so impaired, or the elector is otherwise so physically incapacitated or so illiterate, that he or she is unable to vote without assistance,

(b) the elector has a disability (within the meaning of the Anti-Discrimination Act 1977) and because of that disability he or she has difficulty voting at a polling place or is unable to vote without assistance,

(c) the elector's real place of living is not within 20 kilometres, by the nearest practicable route, of a polling place,

(d) the elector will not throughout the hours of polling on polling day be within New South Wales.

(2) The Electoral Commissioner may, by order published on the NSW legislation website, impose additional requirements on any of the eligibility requirements for technology assisted voting.

(3) The regulations can limit the classes of electors who may be eligible for technology assisted voting.

4.2.2 Procedure

1. No Regulations have been made under this section.

2. The Electoral Commissioner has not published any additional requirements on any of the eligibility requirements for iVote.

3. The Electoral Commissioner may choose to publish additional requirements to limit access to iVote by any eligible class of electors at any time during the operation of iVote. This decision may be made to ensure an acceptable voting experience across all classes of eligible electors.

4.3 Use of Technology Assisted Voting

4.3.1 Supporting Legislation

120AL Electoral Commissioner may determine that technology assisted voting is not to be used

(1) The Electoral Commissioner may determine that technology assisted voting is not to be used at a specified election.

(2) A determination under this section must be in writing and published on the Commission's internet website.

4.3.2 Procedure

1. The Electoral Commissioner has determined that technology assisted voting will be used for the NSW State Election 2011.

2. The Electoral Commissioner has also determined that technology assisted voting will not be used for any by-elections until the use of iVote for the NSW State Election 2011 has been fully evaluated.

4.4 Voter Registration

4.4.1 Supporting Legislation

120AC Electoral Commissioner to approve procedures for technology assisted voting.

(2) The approved procedures must provide:

(a) for an eligible elector to register before voting by means of technology assisted voting.

4.4.2 Procedure

Application

1. The registration period for iVote is from 10:00 am EDST on 17 February 2011 to 6:00 pm EDST on 23 March 2011.

2. From 10:00 am EDST on 17 February 2011 until 12:00 noon EDST on 25 March registered electors who have forgotten their PIN or lost their iVote number can re-register by telephoning the NSWEC iVote Call Centre

3. An eligible elector shall only apply for Technology Assisted Voting by either:
   a. self registering using a web based application service on the NSWEC iVote internet site or by
   b. telephoning the NSWEC iVote Call Centre and requesting a call centre operator to assist with the application.

4. Eligible electors who are also silent electors can only apply by telephoning the NSWEC iVote Call Centre.

5. At the time of application the elector must provide a 6 digit PIN which will be required when voting using iVote.

6. At the time of application the elector must identify themselves on the electoral roll by providing their full name, date of birth and the street name and postcode for their enrolled address.
   a. Except that a silent elector will identify themselves on the electoral roll by providing their full name, date of birth and that they are a silent elector.

4.4 Voter Registration (Continued)

7. The elector will make a declaration by affirming the contents of the declaration on the screen or by listening to the declaration that is read to the applicant by the call centre operator and affirming the declaration verbally.

I DECLARE

1. That I am an elector enrolled in NSW
2. That the ground on which I apply to vote using iVote is;

- my vision is so impaired, or otherwise I am so physically incapacitated or so illiterate, that I am unable to vote without assistance;
- I have a disability (within the meaning of the Anti-Discrimination Act 1977) and because of that disability I have difficulty voting at a polling place or I am unable to vote without assistance;
- my real place of living is not within 20 kilometres, by the nearest practicable route, of a polling place;
- I will not throughout the hours of polling on polling day be within New South Wales.

The eligible elector must select only one of the four grounds to apply on.

8. Eligible electors whose real place of living is more than 20km by the nearest practicable route of a polling place cannot apply for an iVote through the self registration online service unless they are enrolled in one of the following districts:

Districts		
ALBURY	HAWKESBURY	ORANGE
BARWON	KIAMA	OXLEY
BATHURST	LISMORE	PORT STEPHENS
BEGA	MONARO	SOUTH COAST
BURRINJUCK	MURRAY-DARLING	TAMWORTH
CESSNOCK	MURRUMBIDGEE	UPPER HUNTER
CLARENCE	MYALL LAKES	WAGGA WAGGA
DUBBO	NORTHERN TABLELANDS	WOLLONDILLY
GOULBURN		

Electors who consider themselves eligible but are not enrolled in the above districts may contact the iVote Call Centre to determine their eligibility. If the operator at the iVote Call Centre considers that the voter is eligible then the Call Centre Operator can register the elector over the phone. One such circumstance may be that the voter is registered in a metropolitan district but their Real Place of Living (RPOL) is now in a remote area within one of the above listed districts.

9. NSWEC may, at its discretion, require additional elector authentication information as a method for detecting identity theft. The additional information requested may include the elector's NSW Driver License number, Passport number or the like. Such elector information, when collected, will be checked via other Government departments but will not form an additional condition of eligibility for iVote. This additional information may be requested from a sample of electors who apply for iVote or imposed upon all applicants.

4.4 Voter Registration (Continued)

Acknowledgement

10. Each registered elector will be sent an iVote acknowledgement letter to their enrolled address acknowledging their registration. (The acknowledgement letter will not provide the iVote Number)

11. If the registered elector has provided a new RPOL address as part of their application, then an acknowledgement letter will also be sent to that address.

12. Electors who apply under the eligibility requirements of 120AB (1) (a) and (b) will also be sent an accessible acknowledgement by email and SMS if they have provided these details.

13. An elector who applies on the internet under the eligibility requirements of 120AB (1) (a) who has not indicated an email or SMS contact, will receive a personal telephone call to acknowledge their application if they have provided a phone number.

14. Delegated NSWEC staff and Call Centre staff can cancel the registration of electors in the following circumstances:

    a. An elector who advises that they did not apply for iVote but has received an acknowledgement letter

    b. An elector who advises that they applied for iVote but now want to cancel their application

    Cancelling a registration does not prevent the elector from re-applying.

15. Delegated NSWEC staff and Call Centre staff can Block the registration of electors when an elector has been identified as being at risk of impersonation and does not have an active registration.

    Blocking an elector prevents the elector from applying over the internet; however they can still apply via the call centre

4.4 Voter Registration (Continued)

Distribution of the iVote Number

16. Electors who are registered for iVote will receive their iVote number by post at either their:
    a. Enrolled address or enrolled postal address;
    b. Real place of living address or
    c. Other postal address. e.g. Holiday address

17. The elector can also provide an Australian mobile number and/or an email address to receive their iVote number via a second channel using SMS or email.

18. Electors who are registered under the eligibility requirements of 120AB (1) (a) and (b) can also provide an Australian telephone/mobile number and receive their iVote number by a personal phone call from a call centre operator. For security, to avoid a call centre operator knowing both the PIN and iVote number of an elector, the call centre operators making the calls with iVote numbers will not be the same operators as those who process iVote applications.

19. If the elector provides a telephone or mobile number that is not originating in Australia then the SMS and/or phone call service will not be provided.

20. Electors who have forgotten their PIN or did not receive, or have lost their iVote number can re-register via the iVote Call centre and will receive a new iVote number. Note that as per paragraph 2, re-registrations cannot be accepted after 12pm EDST on 25 March.

21. Eligible electors who apply for iVote on the grounds of being outside NSW on polling day are requested to provide the state or country where they will be on polling day. The provision of this information is optional and will be used for planning and statistical reporting purposes.

4.5 Voting Method

4.5.1 Supporting Legislation

120AK Regulations relating to technology assisted voting.

(2) Without limiting subsection (1), the regulations may make provision for or with respect to the following:

(a) the technology assisted voting method or methods that may be authorised under approved procedures.

(4) For the avoidance of doubt, neither this section nor any regulations made under this section prevent approved procedures dealing with matters referred to in this section.

(5) However, if a provision of a regulation made under this section is inconsistent with an approved procedure, the provision of the regulation prevails to the extent of the inconsistency.

4.5.2 Procedure

No Regulations have been made under section 120AK (2)(a).

1. Any voter who is connected to the iVote server during the voting period may remain connected up to an hour after the close of the voting period (6:00pm EDST 25 March) to enable them to complete their vote.

2. The voter gains access to the iVote system by entering the PIN number they provided at time of registration and the iVote number provided by the NSWEC.

3. The iVote service will be accessed by two channels:
   a) iVote by Web.
   b) iVote by Phone.

4. The voter can confirm their preferences prior to the vote being committed to the iVote system.

5. The Commissioner or their delegate may reject any vote cast using iVote by removing it from the iVote System if there is any doubt as to its authenticity of the vote or if it is regarded as a duplicate vote. This process will be done prior to the decryption and printing of votes.

6. The rejection of any votes in the iVote system will be open to observation by authorised scrutineers and a record of all rejected votes will be retained together with the evidence that caused the rejection.

7. The iVote system will only allow the voter to vote in the following ways:
   a) The voter can only assign preferences as numeric values in a sequential order starting from the number 1.
   b) Legislative Council ballots can only have preferences against one or more above the line groups or against one or more below the line candidates but preferences cannot be allocated to both.

4.5 Voting Method (Continued)

c) The voter can only enter an informal vote in the following ways:

- **Legislative Assembly** – not entering any preferences on the ballot paper

  i.e. a blank ballot paper

- **Legislative Council** – either of the following:

  i. a blank ballot paper both above and below the line; or

  ii. a ballot paper where above the line is blank and less than 15 preferences have been made below the line

d) The voter will be provided an explicit warning when either or both their Legislative Assembly and/or Legislative Council ballot papers have been completed and they have provided less than the minimum number of preferences required. The warning will advise them that their vote is not complete and provide them with the option to return and complete their ballot or proceed with casting an incomplete vote.

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8. The following words will replace the ballot paper instructions for the Legislative Assembly for the iVote by Web service.

- Number the first candidate of your choice by double clicking on that candidate's square.
- Alternatively, you can press the N key when you are in the square for that candidate.
- You can show more choices, if you want to, by assigning numbers to more squares.

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9. The following words will appear on the ballot paper instructions for the Legislative Council for the iVote by Web service.

Voting Above the Line

- If you vote ABOVE the line, number the first Group of your choice by double clicking on that Group's square.
- Alternatively, you can press the N key when you are in the square for that Group.
- You can show more choices, if you want to, by assigning numbers to more squares
- There are [N] groups above the line.

Note: N equals the number of Group Voting Squares above the line on the ballot for the Legislative Council.

Voting Below the Line

- If you vote BELOW the Line you must number at least 15 squares for candidates in the order of your choice.
- You must assign numbers to at least 15 squares for your vote to be counted.
- You can show more choices, if you want to, by assigning numbers to more candidates starting with the number 16.
- There are [N] groups below the line and a column of independent candidates at the far right of the ballot

Note: N equals the number of Groups listed below the line on the ballot for the Legislative Council.

4.5 Voting Method (Continued)

10. The following words will be heard for the Legislative Assembly for the iVote by Phone service.

- Legislative Assembly
- You are now allocating your preferences for the Legislative Assembly ballot.
- This ballot is for the District of [district name] and contains [N] candidates which are listed vertically.
- To move down the list of candidates press 8, or to move up the list press 2.
- When you hear the candidate's name of your choice, press 5 to allocate them a preference.
- You must allocate at least one preference in this ballot for your vote to count
- To repeat these instructions, press star 1. To hear the first candidate press 8.

Note: N equals the number of candidates on the ballot.

11. The following words will be heard for the instructions on the Legislative Council for the iVote by Phone service.

- You are now at the Legislative Council ballot.
- You can select to vote either "above the line" by group, or "below the line" by candidate.
- To vote above-the-line for one or more groups, please press 1;
- To vote below-the-line for at least 15 of the [N] candidates please press 2.
- To repeat these instructions, press star 1.

Note: N equals the number of candidates below the line on the ballot for the Legislative Council.

Voting Above the Line

- You have opted to vote above the line for the Legislative Council.
- Groups in this ballot are arranged horizontally.
- Please note, some groups only have a group letter as their name
- There are [N] groups arranged across this ballot.
- To move right, press 6. To move left, press 4.
- To assign a group with a preference, press 5.
- You must allocate a preference to one or more groups.
- When you have completed allocating your preferences, press the hash key and you will be prompted to review your vote.
- If instead you want to vote for candidates below the line, press star 7
- To repeat these instructions, press star 1. To hear the first group press 6

Note: N equals the number of Group Voting Squares above the line on the ballot for the Legislative Council.

Voting Below the Line

- You have opted to allocate preferences below the line for the Legislative Council ballot.
- Please note, some groups only have a group letter as their name
- To change the speaking rate, press star 5 at any time.
- To complete this ballot, you must assign preferences to at least 15 of the [N] candidates
- If instead you want to vote for one or more groups above the line, press star 7 or to continue to vote below the line please press 1.

Note: N equals the number of candidates below the line on the ballot for the Legislative Council.

4.6 Voting Period

4.6.1 Supporting Legislation

120AK Regulations relating to technology assisted voting

(2) Without limiting subsection (1), the regulations may make provision for or with respect to the following:

(b) the period during which voting by eligible electors using technology assisted voting is permitted (including a period before polling day),

(4) For the avoidance of doubt, neither this section nor any regulations made under this section prevent approved procedures dealing with matters referred to in this section.

(5) However, if a provision of a regulation made under this section is inconsistent with an approved procedure, the provision of the regulation prevails to the extent of the inconsistency.

4.6.2 Procedure

No regulations have been made in relation to the technology assisted voting.

1. This procedure determines that voting period using technology assisted voting will be from 8:00am EDST on Monday 14 March 2011 to 6.00pm EDST on Friday 25 March 2011.
   Note. These times reflect the pre-poll period

2. The Electoral Commissioner may, in extenuating circumstances, extend the voting period for iVote. For example; in case of a technical malfunction or power cut that prevented a significant number of registered electors from casting their vote on iVote during the afternoon of Friday 25 March.

3. The Electoral Commissioner may make the decision to extend the voting period at any point prior to the scheduled end of voting on iVote, subject to the following guidelines:
   - The decision shall be made public on the NSWEC and iVote websites.
   - The voting period cannot be extended beyond the end of polling for the election (6:00pm EDST Saturday 26 March 2011).
   - The reason for the extension must be that eligible electors, who would not otherwise be able to, would be able to cast a vote.

4.7 Recording, Transmission and Storage of the Vote

4.7.1 Supporting Legislation

120AC Electoral Commissioner to approve procedures for technology assisted voting

(2) The approved procedures must provide:

(b) for the making of a record of each eligible elector who has voted by means of technology assisted voting, and

(e) that any vote cast in accordance with the approved procedures be securely transmitted to the Electoral Commissioner and securely stored by the Electoral Commissioner until printed, and

4.7.2 Procedure

Making a record of each elector who has voted

1. At the time of registration the elector provides a 6 digit PIN. The PIN is immediately encrypted within the Registration System.

2. From the Registration System, the iVote System is loaded with the elector's iVote number, cryptographically hashed PIN and enrolled District.

3. When an elector accesses iVote, they are prompted to enter their iVote number and their PIN. The voter is served with a District ballot, which corresponds to their enrolled District, and a Legislative Council ballot.

4. The iVote System stores a list of the iVote numbers that have been used to cast ballots.

5. The used iVote numbers are exported at the conclusion of the election and matched back to the voter's enrolment which is used to check if they have already voted.

Electoral Board for Technology Assisted Voting

6. The Electoral Board of five members will be appointed by the Commissioner to control the keys to the encryption/decryption process.

7. At the time of the creation of the election within the iVote System the members of the Electoral Board will each enter a unique password into the iVote System to lock access to the System.

8. To open the iVote System three of these five passwords are required.

4.7 Recording, Transmission and Storage of the Vote (Cont.)

Secure Transmission

9. iVote by Phone opens up a telephone line that provides a single line between a handset and the iVote System.

10. iVote by Web uses HyperText Transfer Protocol Secure for connection to the iVote System. This ensures that all information is encrypted between the voter and the iVote System.

Secure Storage

11. Votes cast on the iVote system are stored within the locked database which is replicated in two secure data centres in different physical locations. This provides under normal operation two working copies of the database at all times.

12. Should one database fail or the infrastructure or parts of the infrastructure in the data centre supporting that database fail, then the second database located in the other data centre will receive all votes until the failed database can be restored.

13. The votes are encrypted and stored using a complex algorithm. The votes cannot be decrypted unless a quorum of three of the five members of the Electoral Board agree to do so.

14. Encrypted votes, all logs and all database transactions are written to a special tape mechanism that does not allow erasure.

15. The security of the databases and the infrastructure supporting these databases is subject to audit as described in section 5.12

16. Data centre equipment can only be accessed in emergency with authorisation from the Electoral Commissioner and all actions will be monitored by at least two Commission staff and recorded.

4.8 Authentication of Vote

4.8.1 Supporting Legislation

120AC Electoral Commissioner to approve procedures for technology assisted voting

(2) The approved procedures must provide:

(c) for the authentication of the eligible elector's vote, and

4.8.2 Procedure

1.	The iVote system provides the voter a receipt at the conclusion of their voting session.
2.	The receipt is a product of the encryption process.
3.	When the voter's iVote is decrypted, it will reproduce the same receipt number that confirms there has been no tampering to the vote. Should the vote be different to that which the voter has cast, the receipt number will be different.
4.	The voter can return to the iVote systems after the election and by entering their unique iVote number they will be able to see or hear that the receipt provided at the time of voting is still the same.

4.9 Secrecy of Vote

4.9.1 Supporting Legislation

120AC Electoral Commissioner to approve procedures for technology assisted voting

(2) The approved procedures must provide:

(d) for the secrecy of the eligible elector's vote, and

4.9.2 Procedure

1.	In concert with the secure transmission and storage of the vote as mentioned in 5.7 the following also applies.
2	On completion of a vote the ballots are encrypted and stored with all other ballots
3.	Encrypted ballots cannot be decrypted and viewed without the quorum of the Electoral Board entering three of the five passwords.
4.	Before decryption, all ballots are separated from the iVote number so they cannot be linked to the voter.
5.	as part of the decryption process the ballots are randomised so that the order of the votes cannot be used to link them to voters.

Note: For electors who are blind or vision impaired or who need assistance to vote for other reasons, iVote ensures a secret vote by providing a method of voting that can be used without assistance.

4.10 Printing and Handling of Ballot Papers

4.10.1 Supporting Legislation

120AC Electoral Commissioner to approve procedures for technology assisted voting.

(2) The approved procedures must provide:

(f) for the production of a printed ballot paper at the close of the poll, for the purposes of the scrutiny, for each vote transmitted to the Electoral Commissioner showing the vote cast by the eligible elector, and

(g) for the bundling of those ballot papers according to the electoral district of the eligible elector (separating Assembly and Council ballot papers into different bundles), the sealing of the bundled ballot papers in packages and the distribution of:

(i) the sealed packages of Assembly ballot papers to the relevant returning officers for each of those districts, and

(ii) the sealed packages of Council ballot papers to the Electoral Commissioner.

(3) A printed ballot paper produced in accordance with the approved procedures does not need to be in or to the effect of the form prescribed in Schedule 4 or 4A (as the case requires), or be of the same size or format as the ballot papers printed in accordance with section 83 or 83B, so long as the vote cast by the eligible elector can be accurately determined.

120AF Technology assisted votes to be counted with postal votes

Any vote cast by an eligible elector and transmitted to the Electoral Commissioner in accordance with the approved procedures is to be counted with the postal votes for that election.

120AG Secrecy relating to technology assisted voting

(1) Any person who becomes aware of how an eligible elector, voting in accordance with the approved procedures, voted is not to disclose that information to any other person except in accordance with the approved procedures.

Maximum penalty: 5 penalty units, or imprisonment for a term not exceeding 6 months, or both.

4.10.2 Procedure

Printing iVote Ballots

1. After 6.00pm EDST on Polling Day (26 March 2011) the Electoral Board will assemble and enter three of the five passwords to allow the iVote System to decrypt the stored votes.

2. A Summary Report will be produced of the number of votes cast for each District.

3. The decryption process will allow for the mixing of the votes into a random order within each District.

4.10 Printing and Handling of Ballot Papers (Continued)

4. All Legislative Assembly ballots will be printed in District groups on blank Legislative Assembly ballot templates.

5. The number of ballots printed will then be manually counted and reconciled against the Summary Report to ensure a balance is achieved.

6. When a balance is achieved, the Legislative Assembly Ballot Papers for that District will be placed into an envelope and addressed to the Returning Officer for that District. This process will continue until all ballots are printed for the 93 Districts and a balance is achieved.

7. The envelopes will then be security sealed and dispatched to the relevant District Returning Officer.

8. Separate advice will be provided to each District Returning Officer of the number of iVotes that have been dispatched.

9. The Legislative Council will also be printed in District order to maintain the nexus with the Legislative Assembly for reporting and for statistic and result reporting purposes.

10. All Legislative Council ballots will be printed in District groups on blank A4 security marked paper.

11. The printout will be in report format and not reflect the layout of the ballot paper as prescribed in Schedule 4A of the PEEA 1912 and as permitted in sec 120AC (3).

12. The number of ballots printed will then be counted and checked against the Summary Report to ensure a balance is achieved.

13. When a balance is achieved, the Legislative Council Ballot Papers for that District will be placed into an envelope and set aside until all Legislative Council Ballots have been printed in all 93 District groups and a balance is achieved.

14. The envelopes will then be security sealed and dispatched to the Legislative Council Returning Officer.

15. Separate advice will be provided to the Electoral Commissioner of the number of iVotes that have been dispatched.

16. When these processes have been completed the ballots can be transported using the secure methods employed by the NSWEC to transport all live ballot material.

17. iVote ballots will not be sorted to first preferences. They will only be printed, counted to ensure the correct number and then, dispatched.

4.10 Printing and Handling of Ballot Papers (Continued)

Counting and Reporting of iVotes

18. A District Returning Officer who receives an envelope of iVote ballots must open it and count the number of ballots enclosed to ensure that it balances with the separate advice received.

19. The Legislative Council Returning Officer, or their delegate, must open the envelopes of iVote ballots and count the number of ballots enclosed to ensure that it balances with the separate advice received.

20. Once a balance is achieved, iVotes are counted with the postal votes for that election in accordance with the rules in NSW Electoral Commission's Standard Operating Procedures.

Secrecy relating to technology assisted voting

21. Any person with access to sensitive voting data or handling encrypted or printed ballots for the iVote project will be appointed by the iVote Manager under section 4.14 Delegations of these procedures.

4.11 Scrutineers

4.11.1 Supporting Legislation

120AE Scrutineers

A candidate may appoint a scrutineer to observe:

(a) any production of the printed ballot papers and bundling and sealing of those ballot papers in accordance with the approved procedures, and

(b) any other element of the technology assisted voting process that is approved by the Electoral Commissioner for the purposes of this section.

4.11.2 Procedure

1. The Electoral Commissioner will write to the Registered Political Parties and provide a timetable of the events that Scrutineers can attend.

2. Scrutineers must be appointed by a candidate as per section 90 of the PEEA 1912

3. When the ballots are printed, as described in section 5.10 of these procedures, a scrutineer may observe all aspects of the printing, check counting, parcelling and security sealing.

4. The scrutineer may not count first or other preferences on the ballot, nor will the scrutineer be allowed to report a result, other than the total number of ballots printed and dispatched.

5. First and subsequent preference counts are carried out by the Returning Officer for the relevant District in the presence of any Scrutineers who choose to attend who represent the candidates for that District.

6. As there are no election results being reported as a result of printing, security sealing and dispatching, a Scrutineer may observe all 93 Districts and the Legislative Council instead of only being permitted to scrutineer for the electorate of the candidate for which they were appointed.

4.12 Audit Programme

4.12.1 Supporting Legislation

120AD Independent auditing of technology assisted voting

(1) The Electoral Commissioner is to engage an independent person (the independent auditor) to conduct audits of the information technology used under the approved procedures.

(2) Audits under this section are to be conducted and the results of those audits are to be provided to the Electoral Commissioner:

(a) at least 7 days before voting commences in each Assembly general election at which technology assisted voting is to be available, and

(b) within 60 days after the return of the writs for each Assembly general election at which technology assisted voting was available.

(3) Without limiting the content of the audit, the independent auditor is to determine whether test votes cast in accordance with the approved procedures were accurately reflected in the corresponding test ballot papers produced under those procedures.

(4) The independent auditor may make recommendations to the Electoral Commissioner to reduce or eliminate any risks that could affect the security, accuracy or secrecy of voting in accordance with the approved procedures.

120AK Regulations relating to technology assisted voting

(4) For the avoidance of doubt, neither this section nor any regulations made under this section prevent approved procedures dealing with matters referred to in this section.

(5) However, if a provision of a regulation made under this section is inconsistent with an approved procedure, the provision of the regulation prevails to the extent of the inconsistency.

(2) Without limiting subsection (1), the regulations may make provision for or with respect to the following:

(d) the independent auditing of the secrecy and authenticity of voting by means of technology assisted voting at any election.

4.12.2 Procedure

1. No Regulations have been made under section 120AK (2)(d).

2. The NSW Electoral Commission will appoint an independent auditor to report to the Electoral Commissioner at least 7 days before voting commences and again with 60 days of the return of the writs.

3. The Auditor will determine whether test votes cast in accordance with these approved procedures are accurately reflected in the corresponding test ballot papers.

4. The NSW Electoral Commission and its staff will provide access to all procedures and requests by the independent auditor.

4.12 Audit Programme (Continued)

5. The Electoral Commissioner will consider the outcomes of the report and determine if Technology Assisted Voting should proceed.

6. The Electoral Commissioner will publish the acceptance of the report on the NSW Electoral Commission internet site.

   http://www.elections.nsw.gov.au/about_us/information_from_us/policy_documents

4.13 System Security

4.13.1 Supporting Legislation

120AG Secrecy relating to technology assisted voting

(2) A person must not disclose to any other person any source code or other computer software that relates to technology assisted voting under the approved procedures, except in accordance with the approved procedures or in accordance with any arrangement entered into by the person with the Electoral Commissioner.

Maximum penalty: 5 penalty units, or imprisonment for a term not exceeding 6 months, or both.

120AI Protection of computer hardware and software

A person must not, without reasonable excuse, destroy or interfere with any computer program, data file or electronic device used, or intended to be used, by the Electoral Commissioner for or in connection with technology assisted voting.

Maximum penalty: 100 penalty units, or imprisonment for a term not exceeding 3 years, or both.

4.13.2 Procedure

1. Any staff working on the project with access to the source code or other security aspects of the computer infrastructure and sub systems shall be required to sign an acknowledgement of the above sections of the PEEA 1912.

4.14 Delegations

4.14.1 Supporting Legislation

120AK Regulations relating to technology assisted voting

(4) For the avoidance of doubt, neither this section nor any regulations made under this section prevent approved procedures dealing with matters referred to in this section.

(5) However, if a provision of a regulation made under this section is inconsistent with an approved procedure, the provision of the regulation prevails to the extent of the inconsistency.

(2) Without limiting subsection (1), the regulations may make provision for or with respect to the following:

(c) the appointment by the Electoral Commissioner of officers to facilitate voting by means of technology assisted voting,

4.14.2 Procedure

No Regulations have been made under this section.

1. The Electoral Commissioner appoints Ian Brightwell, NSW Electoral Commission Chief Information Officer as the iVote Manager for the NSW State Election 2011.

2. For the successful operation of iVote, the iVote Manager is authorised to appoint persons as follows:

   - to accept applications for iVote, to process registrations and to provide voter assistance;
   - to operate the iVote system by loading candidates to ballots, loading registered electors, running the decryption of votes, when authorised by the Electoral Board, and printing iVote ballot papers;
   - to handle the printed ballots from iVote before secure dispatch of the ballots to the relevant Returning Officer.

   The appointments should include a reference to *120AG Secrecy relating to technology assisted voting* in section 5.10.

3. The iVote Manager must ensure that all persons appointed are suitably qualified and trained for the tasks they are to perform and will maintain a register of all persons appointed. The register will record for each appointment; the name, contact details and period of appointment.

4.15 Spoken Candidate and Party Names

4.15.1 Supporting Legislation

120AK Regulations relating to technology assisted voting

(4) For the avoidance of doubt, neither this section nor any regulations made under this section prevent approved procedures dealing with matters referred to in this section.

(5) However, if a provision of a regulation made under this section is inconsistent with an approved procedure, the provision of the regulation prevails to the extent of the inconsistency.

4.15.2 Procedure

No Regulations have been made under this section.

1. The NSW Electoral Commission will record the names of candidates and any affiliations as they appear on the ballot paper but in the order first name, last name. All names will be spoken by the same professional voice actor in an even tone without emphasis.

2. All recorded candidate names will be made available on the NSW Electoral Commission internet pages alongside other candidate information. They will be made available as nominations are received and it is expected that all recordings will be completed and available by 6pm EDST Friday 11 March 2011.

3. Candidates will be encouraged by NSW Electoral Commission to visit the internet site to check their details and to listen to the recording of their name to ensure correct pronunciation.

4. If a name has been incorrectly pronounced and the candidate contacts the Electoral Commission by 6pm EDST Saturday 12th March to advise the correct pronunciation, then the name will be rerecorded on Sunday morning and replaced in the iVote system.

   There can be no subsequent changes made to the recorded name.

5. There can be no changes made to the recording of the spoken candidate name if the candidate is unhappy with the voice, the tone or anything other than incorrect pronunciation. eg. 'Smith' vs 'Smythe' or 'Antony' vs 'Anthony'.

   NSW Electoral Commission cannot guarantee correct pronunciation of any candidate name and can only provide the best pronunciation within the limits of the selected voice actor.

Annexure 7 – Regulating the Funding of New South Wales Local Government Election Campaigns - Dr Joo-Cheong Tham

REGULATING THE FUNDING OF NEW SOUTH WALES LOCAL GOVERNMENT ELECTION CAMPAIGNS

A Report Prepared for the New South Wales Election Funding Authority

December 2010

By Dr Joo-Cheong Tham*

* Senior Lecturer, Law Faculty, University of Melbourne. Thanks to Jesse Winton for exceptional research assistance in preparing this submission. A special debt is also owed to Brian DeCelis and his team at the New South Wales Electoral Commission who greatly assisted in providing and calculating most of the figures used in this report.

Annexure 4 - s 76 of the *Electoral Act 1992* (Qld)

(1) A political party's constitution is a complying constitution if it contains the following: (a) the party's objects, 1 of which must be the promotion of the election to the Legislative Assembly of a candidate or candidates endorsed by it or by a body or organisation of which it forms a part; (b) the procedure for amending the constitution;

(c) the rules for membership of the party, which must include the following rules:

(i) a rule stating the procedure for accepting a person as a member;

(ii) a rule stating the procedure for ending a person's membership;

(iii) a rule prohibiting a person from becoming a member of the party if the person has been convicted of a disqualifying electoral offence within 10 years before the person applies to become a member;

(iv) a rule prohibiting a person from continuing as a member of the party if the person is convicted of a disqualifying electoral offence;

(d) a statement about how the party manages its internal affairs, including a statement about:

(i) the party structure; and

(ii) the process for dispute resolution;

(e) the rules for selecting:

(i) a person to hold an office in the party; and

(ii) a candidate to be endorsed by the party for an election or an election for a local government;

(f) a rule requiring that a preselection ballot must satisfy the general principles of free and democratic elections.

(2) The general principles of free and democratic elections as applied to a preselection ballot are as follows:

(a) only members of the party who are electors may vote;

(b) only members of the party who are eligible to vote in the ballot under the party's constitution may vote;

(c) each member has only 1 vote;

(d) voting must be done by secret ballot;

(e) a member must not be improperly influenced in voting;

(f) a member's ballot paper must be counted if the member's intention is clear;

(g) members' votes must be accurately counted;

(h) each person who is seeking selection may be present personally, or may be represented by another person, at the ballot and for the scrutiny, and counting, of votes.

Annexure 5 - Table of obligations of unregistered parties under the *Election Funding, Expenditure and Disclosure Act 1981*

Section	Content	Application	Comments
Part 4	Registration		
Div 2	**Register of Candidates**		
33	Applications for registration of candidates 33(2)(b) provides that the application shall set out the candidate's party or group affiliation	Yes.	However, this wouldn't apply for deemed registration of candidates (under s32A).
Div 3	Register of Party Agents		
41(1)	'a party shall appoint one party agent'	Applies to all parties not just those that are registered under the PEEA or LGA	
41(2)	In relation to parties that do not have a party agent, 'the party agent is the person who holds office at that time as the registered officer of the party under Part 4A of the *Parliamentary Electorates and Elections Act 1912* or under the *Local Government Act 1993*, as the case requires.'	N/A	This could create difficulties with prosecuting an unregistered party where they have not appointed a party agent; or the party agent dies or resigns or his or her appoint is revoked and a new party agent is not appointed. In this instance, there would be no default party agent and they could not be prosecuted for any breaches of the EFED Act.
Div 4	Register of Official Agents		
46(1)	'a candidate or group must appoint one official agent (an appointed official agent) unless the candidate or group has an ex officio official agent'.	The *ex officio official* agent provisions do not apply to unregistered parties, as sections (a),(c) and (d) of the definition of *official agent* (see definition above) refer to registered political parties.	The party agent of an unregistered political party is not the ex officio agent for any candidates or groups endorsed by the party, and they would need to appoint an official agent.
46(6)	'at any time when a	Yes.	If a candidate or group of an

Section	Content	Application	Comments
	candidate or group required to appoint an official agent under this section does not have an appointed official agent: (a) the candidate is deemed to be his or her own official agent, or (b) the candidate whose name first appears on the list of members of the group is deemed to be the official agent of the group.'		unregistered party has not appointed an official agent, the candidate or the first candidate on the list for the group, is deemed to be their own official agent.
Part 5	**Public funding of State election campaigns**		
Div 2	**Public funding for electoral communication expenditure of parties and candidates**		
57	Registered parties eligible for public funding	Does not apply – only registered parties are eligible (s57(2)(a).	
59(2)	Candidates eligible for public funding (2) A candidate who is duly nominated for a State election is eligible for payments from the Election Campaigns Fund in respect of the election if: (a) the candidate is registered as such a candidate in the Register of Candidates for the election on polling day for the election, and (b) in the case of a candidate for a periodic Council election, the candidate was not included in a group, or was included in a group none of whose members were endorsed by a party,	Candidates of unregistered political parties may be eligible for public funding if they meet the eligibility criteria.	Section 59(2)(b) could be problematic as candidates for a periodic Council election are only eligible where they are not included in a group, or in a group *none of whose members were endorsed by a party*. If a broad definition of the term 'endorsed' is adopted, and unregistered parties are able to endorse candidates, then candidates forming part of a Legislative Council group endorsed by a registered party may be ineligible for public funding. If a narrow definition is adopted (as provided under the PEEA), and unregistered parties are unable to endorse candidates, then

Section	Content	Application	Comments
	and (c) the candidate satisfies at least one of the candidate eligibility criteria. (3) The candidate eligibility criteria are as follows: 4% etc.		candidates for unregistered political parties forming part of a Legislative Council group would appear to be eligible for public funding.
Div 3	**General provisions relating to funding**		
67	'a candidate to whom public funding is being paid may direct the Authority to make the payment to a party that (a) endorsed the candidate in that election; and (b) was a registered party on the polling day for that election.'	Only applies to registered parties.	Candidates cannot direct that their entitlement to public funding be paid to an unregistered political party.
Part 6	**Political donations and electoral expenditure**		
Div 2	**Disclosure of political donations and electoral expenditure**		
88	Disclosures of political donations and electoral expenditure by: (a) a Party (whether or not a registered party) (b) an elected member (c) a group (d) a candidate.	Yes.	Unregistered political parties need to lodge a disclosure, along with any groups or candidates endorsed or associated with the party.
88(3)	'regulations may provide for a single declaration of disclosures by an agent of a party relating to the party and to elected members and candidates (and groups of candidates) who are members of the party...'	Yes.	While this provision would apply to unregistered parties, no such regulations have been made.
90	outlines the person responsible for making disclosures: (a) in the case of a party—the party agent, (b) in the case of an elected member—the official agent of the member, (c) in the case of a group or candidate—the	Yes. The party agent would be responsible for making disclosures for an unregistered party.	Reference to party rather than registered party. Hence, an unregistered party is required to have a party agent.

Section	Content	Application	Comments
	official agent of the group or candidate, (d) in the case of a third-party campaigner—the official agent of the third-party campaigner, (e) in the case of a major political donor—the political donor.		
92(4)	Requires parties to disclose annual party membership or affiliation subscription	Yes.	
Div 2A	**Caps on political donations for State elections**		
95A(1)	Section 95A(1) provides that political donations to unregistered parties are capped at $2,000 per annum. Donations to a group are capped at $5,000 and to a candidate at $2,000.	Yes – specific cap for unregistered parties.	
95A(3), (4) and (6)	**Aggregation of donations during financial year:** 'A political donation of or less than an amount specified in subsection (1) made by an entity or other person to an elected member, group or candidate is to be treated as a donation that exceeds the applicable cap on political donations if that and other separate political donations made by that entity or person to elected members, groups or candidates of the same party within the same financial year would, if aggregated, exceed the applicable cap on political donations referred to in subsection (1).'		
95A(4) & (6)	**Aggregation of donations to elected members, groups**		Whether the aggregation of political donation provision

Section	Content	Application	Comments
	and candidates of the same party: A political donation of or less than an amount specified in subsection (1) made by an entity or other person to an elected member, group or candidate is to be treated as a donation that exceeds the applicable cap on political donations if that and other separate political donations made by that entity or person to elected members, groups or candidates of the same party within the same financial year would, if aggregated, exceed the applicable cap on political donations referred to in subsection (1). **Meaning of candidates etc of same party:** 'For the purposes of this section, elected members, groups and candidates are of the same party if the same party *endorsed* the elected members, members of the group or candidates at the last election (including any subsequent by-election) or are to be *endorsed* by the same party at the next election...'		applies to candidates and groups of unregistered political parties will depend on whether a broad or narrow interpretation of 'endorsed' (see definition above) is adopted. If a broad definition is adopted, then the aggregation provisions apply. If a narrow definition is adopted, then the aggregation provisions would not apply.
95D	Subscriptions and levies are exempt from the donation cap, except for the amount of a subscription that exceeds $2,000.	Yes.	Reference to party rather than registered party.
Div 2B	Caps on electoral communications expenditure for State election campaigns		
95F(2) and (3)	**Parties with Assembly Candidates in a general election:** 'the applicable cap for a party that endorses	TBD	These sections refer to a 'party' rather than a 'registered party' and hence would seem to apply to unregistered parties.

Section	Content	Application	Comments
	candidates for election to the Assembly is $100,000 multiplied by the number of electorates in which a candidate is so endorsed' However, this section 'does not apply to a party that endorses candidates in a group for election to the Council and endorses candidates for election to the Assembly in not more than 10 electoral districts' [s95F(3)].		However, if a narrow reading of 'endorsed' is applied, then there would be no circumstances in which an unregistered party would meet the requirements of s95F(2) as they are unable to endorse candidates.
95F(4) and (5)	**Other parties with Council candidates in a general election** Section 95F(4) provides that 'the applicable cap for a party that endorses candidates in a group for election to the Council, but does not endorse any candidates for election to the Assembly or does not endorse candidates in more than 10 electoral districts, is $1,050,000'. **Independent groups of candidates in Council general elections** Section 95F(5) provides that for 'a periodic Council election, the applicable cap for a group of candidates who are not endorsed by a party is $1,050,000.'	TBD	Again, the definition of 'endorsed' is crucial in determining which provision applies to unregistered parties. However, in this instance, this may not be a significant issue, given that the expenditure caps are identical.
95F(6) and (7)	**Party candidates** Section 95F(6) provides that ' the applicable cap for a candidate endorsed by a party for election to the Assembly is $100,000.' **Independent candidates** Section 95F(7) provides that ' the applicable cap for a candidate not endorsed by	TBD	There are different expenditure caps for endorsed and 'not endorsed' candidates. If a broad definition of 'endorsed' is adopted, candidates for unregistered political parties would be subject to a lower cap than

Section	Content	Application	Comments
	any party for the Assembly is $150,000.'		'not endorsed' candidates. However, a party may be able to access the separate expenditure cap for political parties (ie. where a party endorses candidates in more than 10 Legislative Assembly districts, a caps $100,000 per Legislative Assembly seat, with $50,000 of this $100,000 being able to be spent in each electorate). This could equalise the amount able to be spent by endorsed candidates for unregistered political parties and 'not endorsed' candidates. If a narrow definition of 'endorsed' is adopted, then Legislative Assembly candidates for unregistered political parties would be able to access the higher expenditure cap of $150,000.
95F(8)	'for a periodic Council election, the applicable cap for a candidate who is not included in a group is $150,000.'	This section would apply to ungrouped Legislative Council candidates for unregistered political parties.	
95G(1)	**Aggregation of applicable caps** (1) For the purposes of this section, registered parties are associated if: (a) they endorse the same candidate for a State election, or (b) they endorse candidates included in the same group in a periodic Council election, or (c) they form a recognised	No – only applies to registered parties.	

Section	Content	Application	Comments
	coalition and endorse different candidates for a State election or endorse candidates in different groups in a periodic Council election.		
95G(2)	**Aggregation of expenditure of associated parties** If 2 or more registered parties are associated: (a) the amount of $100,000 of electoral communication expenditure in respect of any electoral district in which there are candidates endorsed by the associated parties is, for the purpose of calculating the applicable cap on electoral communication expenditure by those parties under section 95F (2), to be shared by those parties (and is not a separate amount for each of those parties), and (b) the amount of $1,050,000 of electoral communication expenditure in respect of any group of candidates endorsed by those parties is, for the purpose of calculating the applicable cap on electoral communication expenditure by those parties under section 95F (4), to be shared by those parties (and is not a separate amount for each of those parties).	No – associated parties are only registered parties.	it is unclear why this provision does not apply to unregistered parties.
95G(3)	**Aggregation of expenditure of multiple endorsed candidates in Assembly electorate** The amount of $100,000 of electoral communication expenditure in respect of an	Yes, except for the reference to associated parties.	

Section	Content	Application	Comments
	election in an electoral district in which there are 2 or more candidates endorsed by the same party (or by associated parties) is, for the purpose of calculating the applicable cap on electoral communication expenditure by the candidates under section 95F (6), to be shared by those candidates (and is not a separate amount for each of those candidates).		
95G(4)	**Aggregation of expenditure of parties and endorsed Council candidates** Electoral communication expenditure incurred by a party for a State election campaign that is of or less than the amount specified in section 95F for the party (as modified by subsection (2) in the case of associated parties) is to be treated as expenditure that exceeds the applicable cap if that expenditure and any other electoral communication expenditure incurred by a candidate for election to the Council who is *endorsed* by the party (or associated party) exceed the applicable cap so specified for the party.	TBD	Will depend on the definition of 'endorsed'.
Div 3	**Management of donations and expenditure**		
96 (1) & (2)	The requirement under s96 for political donations to parties to be used for the objects and activities of the party and not for personal use.	Yes.	
96(3) & (4)	Requirement for payments for electoral expenditure by parties must be from a State	Yes.	

Section	Content	Application	Comments
	election campaign account.		
96(5) & (6)	The restrictions on types of money that can and can not be paid into a State campaign account.	Yes.	
96A	Various requirements for political donations to, and electoral expenditure by, elected member, group or candidates.		Would apply to elected members, groups and candidates of unregistered political parties.
96B	Campaign accounts of elected members, groups or candidates		Would apply to elected members, groups and candidates of unregistered political parties.
96B(6)	Money remaining in a campaign account etc.	Yes.	An elected member, group or candidates is required to return money to a party (whether registered or not) of which the person was a member.
Div 4	**Prohibition of certain political donations**		
96D – 96GB	Prohibition on certain political donations	Yes.	Prohibitions relate to donations to parties, whether registered or not.
96EA	**Prohibition on political donations by parties etc to independent candidates** (1) It is unlawful for a party (or a candidate or elected member endorsed by a party) to make a political donation to a candidate, or a group of candidates, not *endorsed* by that or any other party. (2) It is unlawful for such a candidate or candidates to accept the political donation.	TBD	If a narrow interpretation of 'endorsed' is applied, and candidates of unregistered political parties are not able to be endorsed, then s96EA may prevent unregistered parties from donating to their candidates.
Div 5	**Miscellaneous**		
96N	Annual financial statements of registered parties to accompany disclosures	No – only refers to registered parties.	
Part 6A	**Administrative and policy development funding**		
Div 2	**Administrative funding for parties and independent members**		
97E	**Public funding of eligible**	No – party must be	

Section	Content	Application	Comments
	parties for administrative expenditure	a registered party on polling day for the previous state election.	
97F	**Public funding of Independent members for administrative expenditure** (2) An elected member is eligible for payments from the Administration Fund if: (a) the elected member was not an *endorsed* candidate of any party at the State election at which the member was elected, and (b) the Authority is satisfied that the elected member is not a member or representative of any party on the date that the entitlement for an annual payment is determined under this Division.		Will depend on the whether a broad or narrow interpretation of 'endorsed' is adopted. If broad, then elected members of unregistered political parties would be ineligible for public funding. If narrow, then elected members of unregistered political parties would be eligible.
Div 3	**Policy development funding for parties not entitled to administrative funding**		
97I	Public funding for eligible parties for policy development expenditure	No – party must be registered for at least 12 months on the date of entitlement for annual payment is determined	If entitlements are determined annually, and the party subsequently become registered, it may be eligible for future payments.
Part 8	**Miscellaneous**		
110B	Compliance agreements	Yes. Authority can enter into a compliance agreement with an unregistered party.	
112	Prosecution of unincorporated bodies	Yes – proceedings can be instituted against an officers or representative of members of an unregistered party.	
113	Recovery of penalties etc from parties	Yes.	

Annexure 6 – Recommendations of the Inquiry of the Joint Standing Committee on Electoral Matters into the Public Funding of Local Government Elections

RECOMMENDATION 1: The Committee recommends that the findings of this inquiry be further reviewed, based on an evaluation of the operation of the November 2010 changes to the *Election Funding and Disclosures Act 1981*.

RECOMMENDATION 2: The Committee recommends that the Premier introduce legislation to reform the political finance regime for local government election campaigns, including the introduction of a public funding scheme.

RECOMMENDATION 3: The Committee recommends that a cap on donations to local government election campaigns be introduced.

FINDING 1: That in developing legislation for donation caps consideration be given to:

- consistency with the donation caps applicable for state election campaigns; and

- the arguments made by the Independent Commission Against Corruption and the Electoral Commissioner for lower donation caps than those adopted for state government election campaigns.

RECOMMENDATION 4: The Committee recommends that expenditure caps be introduced for local government election campaigns.

RECOMMENDATION 5: The Committee recommends that expenditure caps for local government election campaigns be based on an amount per elector and that there be consistent caps on expenditure for grouped and ungrouped candidates.

RECOMMENDATION 6: The Committee recommends that there be a separate expenditure cap for candidates for the position of popularly elected mayor, based on an amount per elector across the local government area.

RECOMMENDATION 7: The Committee recommends that there be a separate state-wide expenditure cap for registered political parties contesting local government elections.

RECOMMENDATION 8: The Committee recommends that the expenditure cap for local government election campaigns reflect the reasonable cost of communicating with electors in a local government area or ward.

RECOMMENDATION 9: The Committee recommends that the regulated period for expenditure caps for local government election campaigns should be consistent with that implemented for state election campaigns, that is, 6 months.

RECOMMENDATION 10: The Committee recommends that if candidates in local

government elections are subject to expenditure caps, then advertising and communication by third parties also be regulated.

RECOMMENDATION 11: The Committee recommends that disclosure requirements be strengthened so that donations and expenditure are required to be attributed to a candidate or group in a particular local government area.

RECOMMENDATION 12: The Committee recommends that the public funding model for local government election campaigns be based on the reimbursement of a percentage of expenditure (subject to an expenditure cap), provided that a candidate or group achieves a certain threshold percentage of primary votes.

RECOMMENDATION 14: The Committee recommends that, to ensure compliance with disclosure requirements, public funding could be introduced in the form of an allowance to candidates and groups to assist with the costs of auditing as required under the *Election Funding and Disclosures Act*.

RECOMMENDATION 15: The Committee recommends that compliance monitoring and penalties for breaches are consistent with those applying at a State level.

RECOMMENDATION 16: The Committee recommends that, in considering the above recommendations, the Premier have regard to the forthcoming research report to be published by the Electoral Commissioner.

Annexure 7 – Regulating the Funding of New South Wales Local Government Election Campaigns - Dr Joo-Cheong Tham

REGULATING THE FUNDING OF NEW SOUTH WALES LOCAL GOVERNMENT ELECTION CAMPAIGNS

A Report Prepared for the New South Wales Election Funding Authority

December 2010

By Dr Joo-Cheong Tham*

* Senior Lecturer, Law Faculty, University of Melbourne. Thanks to Jesse Winton for exceptional research assistance in preparing this submission. A special debt is also owed to Brian DeCelis and his team at the New South Wales Electoral Commission who greatly assisted in providing and calculating most of the figures used in this report.

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Recommendation One: Candidates, political parties and third parties to separately disclose funding and spending for State and local government elections.

Recommendation Two: Pre-election disclosure obligations should be introduced based the Western Australian provisions and with the following modifications:

- the obligations should apply to candidates, political parties and third parties;
- disclosure should be made to the New South Wales Election Funding Authority which is required to publish such details on-line;
- candidates, political parties and third parties should be prohibited from receiving political donations relating to local government elections for 12 months from the date of the last disclosure.

Recommendation Three: Candidates, political parties and third parties be required to establish separate local government campaign accounts.

Recommendation Four: In relation to funding for local government election campaigns:

- political donations to political parties should capped at $1,000 per financial year;
- political donations to candidates should be capped at $1,000 per financial year;
- third parties may not receive more than $400 per financial year from each donor; and
- each donor is limited to no more than three donations of up to $400 per financial year to third parties.

Recommendation Five:

- Disclosure obligations of councillors under the *Election Funding and Disclosures Act 1981* (NSW) should be amended in order to introduce obligations based on the *Local Government (Rules of Conduct)*

Regulations 2007 (WA) with these obligations, however, extended to all political donations;

- councillors to take reasonable steps to ascertain whether political donations to political party can be reasonably considered to be intended to benefit the councillor and his or her campaign;
- if reasonably considered to be intended to benefit the councillor and his or her campaign then donations to political parties should be treated as donations to councillor for purpose of disclosure obligations.

Recommendation Six: The following should be treated as a „pecuniary" interest under the *Local Government Act 1993* (NSW):

- receipt by councillors of gifts totalling $500 or more in the past five years from individuals and entities who have an interest in a matter before council;
- receipt by political parties of councillors of gifts totalling $1,000 or more in the past five years from individuals and entities who have an interest in a matter before council.

Recommendation Seven: The disclosure obligations under the *Environmental Planning and Assessment Act 1979* (NSW) be amended to require disclosure of political donations to:

- councillors of $50 or more made in the past six months;
- political parties of councillors of $50 or more made in the past six months.

Recommendation Eight: In the event that Recommendations Three to Seven being adopted, the ban on political donations from „property developers" under the *Election Funding and Disclosures Act 1981* (NSW) should be repealed.

Recommendation Nine: Spending limits should be enacted in relation to New South Wales local government elections with the following features:

- caps should apply to candidates, political parties and third parties;
- the level of these caps should be determined according to the number of electors involved;

- caps on candidate spending should be determined on the basis of $0.15 per elector;
- overall caps on party spending should be determined on the basis of $0.50 per elector;
- party spending in particular wards and councils should count towards the caps on candidate spending;
- caps on third party spending should be 1/7.5 of the caps on candidate spending.

Recommendation Ten: Public funding for New South Wales local government election campaigns should not be introduced.

I INTRODUCTION

There is a distinct lacuna in scholarship and policy debates concerning money politics in Australia. With a predominant focus on federal and State politics, there has been a general neglect of the challenges money politics poses to local government. There has yet to be a sustained examination of these challenges either by academics or policy-makers. Indeed, the current inquiry by the New South Wales Joint Standing Committee on Electoral Matters into the public funding of local government election campaigns appears to be the first of its kind.

It is this lacuna that this report seeks to address. It provides the most comprehensive assessment to date of the funding of New South Wales („NSW") local government election campaigns – the report examines the distinctive structure of NSW local government and its electoral system, the regulation and patterns of election funding at this level of government, the risks posed by such funding, and the question of reform. The main parts of the report are as follows:

- the structure and functions of NSW local government;
- the NSW local government electoral system;
- the regulatory framework governing the funding of NSW local government election campaigns;
- the patterns of funding and expenditure in the 2008 NSW local government elections;
- central principles to govern the funding of NSW local government election campaigns;
- key risks relating to the funding of NSW local government elections;
- reform options.

The central question threading through the report is: How should the funding of NSW local government election campaigns be regulated? This question has particular significance not only because of the inquiry being undertaken by the NSW Joint Standing Committee on Electoral Matters, but also because of the recent passage of the *Election Funding and Disclosures Amendment Act 2010* (NSW) („*EFDA Act*").

This Act amends the *Election Funding and Disclosures Act 1981* (NSW)[1] in order to enact what is unquestionably the most tightly regulated political funding scheme in Australia. Commencing on 1 January 2011,[2] the key measures of the scheme are:

- caps on political donations;[3]
- bans on political donations from tobacco industry, liquor industry and gambling industry business entities;[4]
- caps on electoral communication expenditure;[5]
- an increase and reconfiguration of public funding of political parties and candidates;[6] and
- additional compliance powers for the NSW Election Funding Authority[7] („NSW EFA").

The caps on political donations[8] and electoral communication expenditure[9] and the new scheme of public funding[10] do not apply to NSW local government elections. The report examines a crucial question that arises in this context: Should the measures introduced by the *EFDA Act* be similarly adopted in relation to local government elections?

As will be emphasised throughout the report, this question can be properly answered by understanding the *distinctiveness* of NSW local government. This level of government has a distinctive structure of government and electoral system. There are also distinctive patterns of election funding and expenditure at this level of government. Such distinctiveness needs to be fully appreciated as it implies significant differences from the structure of government, electoral system and patterns of election funding and expenditure at the State level.

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[1] Upon the amendments taking effect, the *Election Funding and Disclosures Act 1981* (NSW) („*EFD Act*") will renamed the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) („*EFED Act*"): *EFDA Act* sch 1 para 1.
[2] *EFDA Act* s 2.
[3] *EFDA Act*, inserting *EFED Act* div 2A.
[4] *EFDA Act*, inserting *EFED Act* s 96GAA; *EFDA Act*, amending *EFED Act* ss 96GA-GB, 96GE.
[5] *EFDA Act*, inserting *EFED Act* div 2B.
[6] *EFDA Act*, inserting *EFED Act* pt 5.
[7] *EFDA Act*, amending *EFED Act* s 110A; *EFDA Act*, inserting *EFED Act* ss 110B, 111A.
[8] *EFED Act* s 95AA(a) (upon the amendments made by the *EFDA Act* taking effect).
[9] *EFED Act* s 95E(1) (upon the amendments made by the *EFDA Act* taking effect).

[10] *EFED Act* s 54A(1) (upon the amendments made by the *EFDA Act* taking effect).

Crucial implications follow. There is a more significant risk of corruption and undue influence, especially in relation to land development, at the level of NSW local government. This is due to its structure of government and „low cost" local government election campaigns. Paradoxically, fairness in local government elections is also threatened by relatively low levels of election spending. These differences mean that regulation should be tailored accordingly. Here the report makes ten recommendations. In order to deal with the more significant risk of corruption and undue influence, it recommends:

- pre-election disclosure obligations;
- limits on political donations (set at a lower level than those introduced by the *EFDA Act*);
- disclosure of all political donations received by councillors above a nominal amount;
- the recusal of councillors when significant political donations have been received by the councillor/s or his or her political party.

In order to deal with the challenge of promoting fairness in local government elections, it recommends caps on election spending set at a much lower level than those enacted by the *EFDA Act*, with the level of caps determined according to the number of electors to take into account the distinctive character of the NSW local government electoral system. It, however, recommends *against* the introduction of public funding for NSW local government election campaigns, arguing that there is no demonstrated case for such funding.

II Structure and Functions of NSW Local Government

The importance of the NSW local government, as a tier of government, is recognised by the NSW Constitution[11] which provides that:

> there shall continue to be a system of local government for the State under which duly elected or duly appointed local government bodies are constituted with responsibilities for acting for the better government of those parts of the State that are from time to time subject to that system of local government.[12]

As the NSW Independent Commission Against Corruption („NSW ICAC") correctly observed:

> Dealing with local government is for many people their most significant contact with the public sector. Every person in the State has services that affect their quality of life delivered by local councils. Local councils are a major contributor to the economic well being of the State as well as a significant employer of people.[13]

The NSW Constitution also provides that:

> The manner in which local government bodies are constituted and the nature and extent of their powers, authorities, duties and functions shall be as determined by or in accordance with laws of the Legislature. [14]

The key statute in this respect is the *Local Government Act 1993* (NSW) („*Local Government Act*").[15] The Act constitutes local councils for their respective areas[16] with these areas determined by the Governor by proclamation.[17] Each council is constituted by the Act as a legal entity with the status of „a body politic of the State with perpetual succession and the legal capacity and powers of an individual, both in

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[11] For discussion on the role of local government in the Australian constitutional system, see A J Brown, „In Pursuit of the "Genuine Partnership": Local Government and Constitutional Reform in Australia" (2008) 31 *University of New South Wales Law Journal* 435.

[12] *Constitution Act 1902* (NSW) s 51(1).

[13] NSW ICAC, „Corruption Resistance Strategies: Researching Risks in Local Government" (Research Findings Summary, NSW ICAC, 2001) 4.

[14] *Constitution Act 1902* (NSW) s 51(2).

[15] *Local Government Act 1993* (NSW) s 21. For texts on NSW local government, see Linda Pearson, *Local Government Law in New South Wales* (Federation Press, 1994); David Clark, *Bluett's Local Government Handbook: New South Wales* (Law Book, 16th edition, 2008).

[16] *Local Government Act 1993* (NSW) s 219.

[17] Ibid s 204.

and outside the State".[18] The Act also provides for different types of councils: ordinary and county councils;[19] councils which have their areas divided into wards and undivided councils.[20]

Each council has two key bodies. There is, firstly, the governing body consisting of the councillors, the elected representatives,[21] and including in its number, a mayor.[22] There is no standard number of councillors for each council but the number of councillors must be at least five and no more than 15 (including the mayor).[23] Secondly, there is the administrative body headed by the general manager.[24]

The governing body has the role of directing and controlling the affairs of the council according to the *Local Government Act*,[25] a responsibility that includes appointing the general manager.[26] Under the *Local Government Act,* councillors have governance and representative functions. The governance functions as set out by the Act are as follows:

- to provide a civic leadership role in guiding the development of the community strategic plan for the area and to be responsible for monitoring the implementation of the council"s delivery program
- to direct and control the affairs of the council in accordance with this Act
- to participate in the optimum allocation of the council"s resources for the benefit of the area
- to play a key role in the creation and review of the council"s policies and objectives and criteria relating to the exercise of the council"s regulatory functions
- to review the performance of the council and its delivery of services, and the delivery program and revenue policies of the council.[27]

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[18] Ibid s 220.
[19] Ibid s 388.
[20] Ibid s 210.
[21] Ibid s 222.
[22] Ibid s 225.
[23] Ibid s 224(1).
[24] See ibid ch 11.
[25] Ibid s 223.
[26] Ibid s 334(1).
[27] Ibid s 232(1).

The *Local Government Act* describes the representative functions of councillors in the following terms:

> The role of a councillor is, as an elected person:
>
> - to represent the interests of the residents and ratepayers
> - to provide leadership and guidance to the community
> - to facilitate communication between the community and the council. [28]

The *Local Government Act* further provides the following as the functions of the mayor:

- to exercise, in cases of necessity, the policy-making functions of the governing body of the council between meetings of the council
- to exercise such other functions of the council as the council determines
- to preside at meetings of the council
- to carry out the civic and ceremonial functions of the mayoral office. [29]

In terms of the functions conferred upon NSW local government councils, there are, broadly speaking, two sources of functions, namely:

- the *Local Government Act*;[30] and
- other Acts (e.g. *Environmental Planning and Assessment Act 1979* (NSW)).[31]

Under the *Local Government Act,* local councils are conferred a variety of functions. These functions fall into six categories:

- service functions (e.g. provision of community health, recreation, education and information services; environmental protection; waste removal and disposal; land and property, industry and tourism development and assistance);
- regulatory functions (e.g. functions relating to approvals, orders and building certificates);
- ancillary functions (e.g. resumption of land; powers of entry and inspection);

[28] Ibid s 232(2).
[29] Ibid s 226.
[30] Ibid s 21.
[31] Ibid s 22.

- revenue functions (e.g. functions relating to rates, charges, fees, borrowings and investments);
- administrative functions (e.g. functions relating to employment of staff, management plans, financial reporting and annual reports);
- enforcement functions (e.g. functions relating to proceedings for breaches of the *Local Government Act,* prosecution of offences and recovery of rates and charges).[32]

It should be noted here that local councils are bound by the council"s charter, a set of principles that are to guide the council"s discharge of their functions[33]

[32] Ibid s 21.
[33] Ibid table following s 23A.

III NSW Local Government Electoral System

A *The Regulatory Framework*

The *Local Government Act* provides a framework for electing both councillors and mayors of NSW local councils. The elections operate on a four year fixed-term (the next local council election is due to be held on second Saturday of September in 2012)[34] and are conducted by the NSW Electoral Commissioner.[35]

The *Local Government Act* provides for a variety of *voting systems* in relation to the election of NSW councillors and mayors. For councillors in an area not divided into wards, they are elected by all electors of the area.[36] If an area is divided into wards, the default method is election by an electorate comprising of all of the electors of a particular ward with the same number of councillors to be elected for each ward.[37] However, in these areas (those divided into wards), a decision can be made in a constitutional referendum for a mixed system where some councillors are elected by all electors of entire area while others by electors of particular wards.[38] Optional preferential voting applies if the number of councillors to be elected is one or two while proportional voting applies if there are three or more councillors to be elected.[39]

As is implied by the four year fixed-terms, councillors hold office for four years.[40]

Mayors are to be elected by councillors from their number unless a constitutional referendum of the council has decided that the mayor is to be directly elected by the electors of entire area.[41] With direct elections of mayor, optional preferential voting applies to contested mayoral elections.[42] A mayor elected by councillors holds office for one year whereas a mayor directly elected by electors holds office for four years.[43]

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[34] Ibid ss 287(1), 289.
[35] Ibid s 296.
[36] Ibid s 278.
[37] Ibid ss 279-280.
[38] Ibid ss 279, 281.
[39] Ibid s 301.
[40] Ibid s 285.
[41] Ibid ss 227-228. See also at s 282.
[42] Ibid s 284.

[43] Ibid s 230.

In terms of *eligibility to vote* in NSW local government elections, the *Local Government Act* provides that a person who is entitled to vote at an election for the NSW Legislative Assembly or at an election for the Commonwealth House of Representatives is entitled to be enrolled as an elector of ward/council if s/he falls into one of the following three categories:

- s/he is a resident of a ward/council;
- s/he is not a resident of the ward/council but is an owner of a rateable land in the ward; or
- s/he is an occupier or ratepaying lessee of rateable land in a ward/council.[44]

The NSW Electoral Commissioner is to keep electoral rolls for local councils. There are four different rolls:

- residential roll which lists all persons entitled to be enrolled because they are residents of an area;[45]
- non-residential rolls which lists all persons who are non-resident owners of rateable land for the area who have applied for the inclusion of their names on the roll;[46]
- roll of occupiers and ratepaying lessees which lists all persons who are occupiers and ratepaying lessees of the area who have applied for inclusion of their names on the roll;[47] and
- the role of electors which comprises all three of above rolls. [48]

A person who is on the rolls kept by the NSW Electoral Commissioner has the right to vote in local council elections. [49] Voting is compulsory for those on the residential rolls but optional for others.[50]

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[44] Ibid s 266.
[45] Ibid s 298.
[46] Ibid s 299.
[47] Ibid s 300.
[48] Ibid s 301.
[49] Ibid s 267.
[50] Ibid s 301.

B *Diversity and Distinctiveness*

In his foreword to the NSW Electoral Commission"s report on the 2008 Local Government Elections, the Commissioner observed:

> The 2008 NSW Local Government Elections were held on 13 September 2008. The NSWEC conducted 332 contested elections across NSW, including mayoral elections, referenda and polls. Nearly 4 million votes were counted for 4,620 candidates. The variations across the 148 Local Government authorities in terms of geographic size, population and population density were significant. Different logistical arrangements were required to meet the operational challenges of providing efficient electoral services across 148 councils where resident numbers ranged from 1,400 residents (Urana) to 283,000 residents (Blacktown), where the smallest geographical Local Government area was 5.8 square kilometres (Hunters Hill)) to the largest 53,510 square kilometres (Central Darling), where the density of population varied from 0.045person/ square kilometres (Central Darling) to the most densely populated 6,624.8 person/ square kilometres (Waverley).[51]

These remarks make clear the diversity and complexity of NSW local government elections. As the Commissioner has noted:

> Local Government elections in NSW are the most complex in Australia. The legislative and regulatory provisions impose different rules and processes for the voting and counting systems applicable to the different elections required for each council.[52]

Such diversity and complexity stems, firstly, from the significant differences in the size of council areas and the number of electors in each area. The *Local Government Act,* while mandating rough equality in number of electors for wards (there must not be variation of more than 10 per cent between number of electors in each ward of an area),[53] does not apply a similar requirement to council areas (see Appendix One). Second, as explained earlier, different voting systems can apply according to:

- whether council is divided or not into wards (see Table 1 and Appendix One);

[51] NSW Electoral Commission, „Report on 2008 Local Government Elections" (Report, NSW Electoral Commission, 2009) 8 (citations omitted).
[52] Ibid (citations omitted).
[53] *Local Government Act 1993* (NSW) s 210(7).

- whether there was a constitutional referendum adopting a mixed-system of electing councillors;
- number of councillors; and
- whether mayor is directly elected.

Table 1: Councils divided / not divided into wards

		as % Total
Total Councils	152	100%
Total Undivided Councils	88	57.89%
Total Councils with Wards	64	42.11%

Source: Data provided by NSW Electoral Commission (copy on file with author)

Differences also *potentially* arise due to the rules governing the eligibility of electors. With NSW local government elections, a kind of property vote is allowed because property rights through ownership, occupational and rental confer an entitlement to vote. Individuals in this category can be enrolled in the non-residential rolls *if* they apply for inclusion of their names on these rolls (see above). This system of optional enrolment, however, has resulted in a low level of electors on the non-residential roll – the highest proportion of the total rolls of a council comprising the non-residential roll stood only at 1.57% (see Table 2; see also Appendix Two).

The diversity in NSW local government elections distinguishes such elections from NSW State elections and makes it quite distinctive. There is far greater uniformity with State elections – there are 93 members for the NSW Legislative Assembly with electoral districts of approximately equal number of electors[54] and 42 members of the NSW Legislative Council who are voted by the electors of the entire State.[55]

[54] *Constitution Act 1902* (NSW) s 28.
[55] Ibid s 22A(1), sch 6 cl 1.

Table 2: Top three councils with highest proportion of voters on non-residential roll (2008 NSW Local Government Elections)

Council	Residential Roll	Non-Residential Roll	Total Roll	% of Roll Non-Resident
Eurobodalla Shire Council	26,456	421	26,877	1.57%
Central Darling Shire Council	1,199	16	1,215	1.32%
Tenterfield Shire Council	4,649	22	4,671	0.47%

Source: Data provided by NSW Electoral Commission (copy on file with author)

There is another feature of NSW local government elections which distinguishes them from NSW State elections. In NSW State elections, political parties - especially the major parties (Australian Labor Party, Liberal Party, National Party and the Greens) - dominate with candidates predominantly running on a party ticket. The position is quite different with NSW local government elections. With a high level of independent candidates and micro-parties, there is a much lower level of party-affiliated candidates and even lower proportion of candidates endorsed by the major parties. Of the 4620 councillor and mayoral candidates that ran in the 2008 NSW local government elections, only 1537, around a third, were endorsed by a political party (see Appendix Three). A similar situation pertains in relation to current councillors (who were elected in the 2008 NSW local government elections) where out of the 1474 current councillors, there are only 424, less than a third, with party affiliation (see Appendix Four). These figures testify to „the peculiar nature of Local Government elections (where candidates do not necessarily run on a party platform".[56]

[56] Queensland Criminal Justice Commission, „Report on a Public Inquiry into Payments made by Land Developers to Aldermen and Candidates for Election to the Council of the City of Gold Coast" (Investigation Report, Criminal Justice Commission, November 1991) 10.

IV Regulatory Framework Governing Funding of NSW Local Government Election Campaigns

Having set the scene by explaining the structure and functions of NSW local government and its electoral system, this report will turn more specifically to the regulatory framework governing the funding of NSW local government election campaigns. Such regulation generally falls into three categories:

- regulation that applies to local government and state elections alike, specifically the provisions of the *EFD Act* relating to disclosure returns and bans on political donations;
- disclosure obligations under *Environmental Planning and Assessment Act 1979* (NSW) that have particular importance to local councils as planning authorities; and
- local government-specific regulation, specifically the provisions of *Local Government Act* relating to „pecuniary interest" and codes of conduct.

A *Disclosure returns under the* Election Funding and Disclosures Act 1981 *(NSW)*

In New South Wales, the disclosure scheme under the *EFD Act* moved from a post-election disclosure scheme to a biannual system as a result of the enactment of the *Election Funding Amendment (Political Donations and Expenditure) Act 2008* (NSW). This system currently operates upon the notion of a „relevant disclosure period" which is defined to mean each six-month period ending on 30 June and on 31 December.[57] From 1 January 2011, the date on which the amendments by the *Election Funding and Disclosures Amendment Act 2010* (NSW) take effect, the system will move to an annual system of disclosure with the „relevant disclosure period" being changed to each 12-month period ending on 30 June.[58]

Under the scheme, the following persons and entities are required to lodge returns with the NSW EFA in relation to each „relevant disclosure period":

- parties (whether registered under the *EFD Act* or not);

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[57] *EFD Act* s 89.

[58] *EFD Act* s 89(1) (upon the amendments made by *EFDA Act* taking effect).

- candidates and groups of candidates;
- elected members of NSW Parliament;
- donors which have made a „reportable political donation" (i.e. a donation to or for the benefit of a party, candidate or elected member exceeding $1000) for the „relevant disclosure period"; and
- entities or persons who have incurred „electoral expenditure"[59] exceeding $1000 for the „relevant disclosure period".[60]

Of crucial importance is that these obligations apply to „local government election and elected members of councils".[61]

The returns lodged by the above are to disclose:

- various details of „reportable political donations" (i.e. a donation to or for the benefit of a party, candidate or elected member exceeding $1000);[62]
- the total amount of „political donations"[63] where donations are not „reportable political donations" (i.e. donations of $1000 or less) and the number of persons making such donations;[64]
- the total amount of annual party membership fees, the subscription rate/s and number of members paying such rate/s;[65]
- details, including net or gross proceeds, of each fundraising venture;[66]
- details of loans of $1000 or more;[67] and
- details of „electoral expenditure".[68]

All of these returns, except for those lodged by donors, are to be accompanied by an audit certificate.[69] The returns are also made publicly available through the NSW EFA"s website.[70] It should be noted here that the *Local Government Act* requires

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[59] „Electoral expenditure" is defined in the *EFD Act* s 87.
[60] Ibid ss 88(1)-(2).
[61] Ibid s 83(b).
[62] Ibid s 92(2).
[63] Ibid s 85 defines „political donation".
[64] Ibid s 92(3).
[65] Ibid s 92(4).
[66] Ibid s 92(5).
[67] Ibid ss 92(6), 96G.
[68] Ibid s 93.
[69] Ibid s 96K.
[70] Ibid s 95.

general managers of councils to keep register disclosure returns lodged by or on behalf of councillors under *EFD Act* since the last local council election.[71]

The 2008 amendments also resulted in various prohibitions aimed at ensuring the integrity of the disclosure scheme. These included a prohibition on making and receiving indirect campaign contributions.[72] In relation to „reportable political donations", there are prohibitions on accepting such donations in anonymous circumstances[73] or from entities without an ABN.[74]

For the purpose of ascertaining whether the provisions of the *EFD Act* and its regulations have been breached, inspectors under the Act have the power to inspect „bankers" books"[75] relating to political parties, elected members, groups of candidates and candidates.[76] The NSW EFA also has power to require the production of information when it reasonably suspects that a „major political donor" has not met its disclosure obligations.[77] There are also various offences relating to disclosures.[78] These offences can be enforced through criminal proceedings[79] and also through recovery of unlawful donations.[80]

B *Ban on Political Donations by Property Developers, Tobacco Industry, Liquor Industry and Gambling Industry Business Entities*

The *EFD Act* currently bans political donations from „property developers" through the following provision:

> **96GA Political donations by property developers unlawful**
>
> (1) It is unlawful for a property developer to make a political donation.
>
> (2) It is unlawful for a person to make a political donation on behalf of a property

[71] *Local Government Act 1993* (NSW) s 328A.
[72] *EFD Act* s 96E.
[73] Ibid s 96F.
[74] Ibid s 96D.
[75] The *EFD Act* defines „bankers" books" as „books of a bank, building society or credit union, or cheques, orders for the payment of money, bills of exchange or promissory notes in the possession or under the control of a bank, building society or credit union": at s 110(1).
[76] Ibid s 110.
[77] Ibid s 110A.
[78] Ibid ss 96H-96I.
[79] Ibid s 111.
[80] Ibid s 96J.

developer.

(3) It is unlawful for a person to accept a political donation that was made (wholly or partly) by a property developer or by a person on behalf of a property developer.

(4) It is unlawful for a property developer to solicit another person to make a political donation.

(5) It is unlawful for a person to solicit another person on behalf of a property developer to make a political donation.

The Act also provides an elaborate definition of „property developer" through s 96GB.[81] Breaches of the ban can be enforced through criminal proceedings[82] and the recovery of unlawful donations.[83]

As a result of the *EFDA Act*, this ban will extend, as of 1 January 2010, to „tobacco industry business entities"[84] and „liquor or gambling industry business entities".[85] These bans apply to all „political donations" hence, also apply to candidates, political parties and third parties campaigning in local government elections.

C *Disclosure of Political Donations under the* Environmental Planning and Assessment Act 1979 *(NSW)*

Local councils play a central role in NSW planning scheme. Amongst their key functions are proposing local environment plans („LEPs") (that are ultimately made by the responsible Minister).[86] LEPs are „environment planning instruments" under the Act, instruments that regulate the type of development that can occur in the areas they cover.[87] Moreover, local councils are „consent authorities" under LEPs meaning that they are the bodies which assess development applications in order to ensure their compliance with LEPs.[88] Local councils can also make development control plans

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[81] The NSW EFA also has the power to issue determinations stating that a person is not a „property developer": ibid s 96GE.
[82] Ibid s 111.
[83] Ibid s 96J.
[84] *EFED Act* s 96GB(2A) (upon the amendments made by *EFDA Act* taking effect).
[85] *EFED Act* s 95GB(2B) (upon the amendments made by *EFDA Act* taking effect).
[86] *Environmental Planning and Assessment Act 1979* (NSW) pt 3 div 4.
[87] See definition of „environment planning instrument": ibid s 4.

[88] Ibid pt 4.

that make more detailed provision with respect to development for the purpose of advancing the purpose of LEPs[89]

Specific disclosure obligations apply under the *Environmental Planning and Assessment Act 1979 (NSW)* in relation to the planning role of NSW local councils. Section 147(4) of *Environmental Planning and Assessment Act 1979 (NSW)* subjects persons making planning applications to local councils to the following disclosure obligations:

> (4) A person who makes a relevant planning application to a council is required to disclose the following reportable political donations and gifts (if any) made by any person with a financial interest in the application within the period commencing 2 years before the application is made and ending when the application is determined:
> (a) all reportable political donations made to any local councillor of that council,
> (b) all gifts made to any local councillor . . .
>
> A reference in this subsection to a reportable political donation made to a local councillor includes a reference to a donation made at the time the person was a candidate for election to the council.

Identical disclosure obligations also apply when person makes a relevant public submission in relation to reportable political donations and gifts made by person making submission or any associate of that person.[90]

D *Post-Election and Annual Returns of Pecuniary Interests under the* Local Government Act 1993 *(NSW)*

Under the *Local Government Act,* councillors are required to lodge with the general manager of the council two types of returns relating to „pecuniary interests":

- post-election returns which are due within three months of being elected as a councillor;[91]
- annual returns which are due within three months of 30 June of each year;[92]

[89] Ibid pt 3 div 6.
[90] Ibid s 147(5).
[91] *Local Government Act 1993* (NSW) s 449(1).

The general manager of each council is to keep a register of these returns and to table the returns at council meetings according to certain prescribed times.[93]

Both types of returns are to be in the form prescribed by regulations.[94] The *Local Government (General) Regulation 2005* (NSW) prescribes a range of pecuniary interests that must be disclosed in such returns: real property,[95] gifts,[96] contributions to travel,[97] interests and positions in corporations,[98] positions in trade unions and professional or business associations,[99] dispositions of real property,[100] sources of income,[101] debt.[102] Of particular relevance to the question of political funding are the obligations to disclose gifts and contributions to travel – these obligations, however, do not extend to political contributions disclosed, or required to be disclosed, under Pt 6 of the *EFD Act*.[103] As noted earlier, however, general managers of councils are to keep a register of disclosure returns lodged by or on behalf of councillors under *EFD Act* since the last local council election.[104]

E *Other Obligations Relating to 'Pecuniary Interests' under* Local Government Act 1993 *(NSW)*

The *Local Government Act* imposes a range of other obligations in relation to „pecuniary interest". This is defined as „an interest that a person has in a matter because of a reasonable likelihood or expectation of appreciable financial gain or loss to the person".[105] Excluded, however, are interests „so remote or insignificant that it could not reasonably be regarded as likely to influence any decision" a councillor might make).[106]

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[92] Ibid s 449(3).
[93] Ibid s 450A.
[94] Ibid s 449(1), (3).
[95] *Local Government (General) Regulation 2005* (NSW) reg 183.
[96] Ibid reg 184.
[97] Ibid reg 185.
[98] Ibid reg 186.
[99] Ibid reg 187.
[100] Ibid reg 188.
[101] Ibid reg 189.
[102] Ibid reg 190.
[103] Ibid regs 184(2)(b), 185(2)(e).
[104] *Local Government Act 1993* (NSW) s 328A.
[105] Ibid s 442(1).
[106] Ibid s 442(2).

A person is considered to have a „pecuniary interest" in a matter if the „pecuniary interest" is in the interest of the person as well as in the interest of a range of persons or bodies with whom the person is associated with (e.g. a councillor has a pecuniary interest when it is in the interest of a body of which councillor is a member).[107] Hence, a councillor has a „pecuniary interest" in the matter not only when is in his or her interest but also when it is in the interest of the political party of which s/he is a member. In particular, political contributions to either the councillor or the political party to which s/he belongs will constitute a „pecuniary interest" under the *Local Government Act* if it is reasonably likely that a favourable decision on a matter to be decided by the councillor would result in an increase or decrease in the amount of political contributions to either the councillor, or his or her political party.

Councillors are under two duties in relation to „pecuniary interests". They, firstly, have a duty to disclose:

> A councillor or a member of a council committee who has a pecuniary interest in any matter with which the council is concerned and who is present at a meeting of the council or committee at which the matter is being considered must disclose the nature of the interest to the meeting as soon as practicable.[108]

Second, there is a duty to remove oneself from the particular council (or committee) meeting:

> The councillor or member must not be present at, or in sight of, the meeting of the council or committee:
>
> (a) at any time during which the matter is being considered or discussed by the council or committee, or
>
> (b) at any time during which the council or committee is voting any question in relation to the matter."[109]

These duties are not breached if „the person did not know and could not reasonably be expected to have known that the matter under consideration at the meeting was a matter in which he or she had a pecuniary interest".[110]

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[107] Ibid s 443.
[108] Ibid s 451(1).
[109] Ibid s 451(2).
[110] Ibid s 457.

The Act provides for a complaint system in relation to a failure to disclose „pecuniary interests".[111] Such complaints can ultimately be heard by the Pecuniary Interest and Disciplinary Tribunal. Upon finding the complaint proved, the Tribunal may counsel or reprimand the councillor; suspend the councillor for a period of no more than six months, or suspend the councillor"s right; disqualify the councillor from holding civic office for a period of no more than five years; or suspend the councillor"s right to receive any fee or remuneration attached to the civic office for a period of no more than six months.[112] If such non-compliance amounts to „serious corrupt conduct" within the meaning of section 440A of the *Local Government Act*, there is the possibility of dismissal by Governor[113] and temporary suspension by Minister of councillors.[114]

F *Code of Conduct under the* Local Government Act 1993 *(NSW)*

Each council is also to adopt a code of conduct that incorporates and is not inconsistent with the Model Code prescribed by the *Local Government Regulations*[115] (the Model Code was published in the Gazette on 27 June 2008[116]). Failure to comply with provisions of the council"s code of conduct constitutes „misbehaviour" under the Act.[117] A councillor found to have engaged „misbehaviour" can be formally censured by council[118] or suspended by Director-General[119] or referred to Pecuniary Interest and Disciplinary Tribunal.[120] Upon a referral, the Pecuniary Interest and Disciplinary Tribunal may counsel or reprimand the councillor, suspend the councillor for a period of no more than six months, or suspend the councillor"s right or suspend the councillor"s right to receive any fee or remuneration attached to the civic office for a period of no more than six months.[121]

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[111] Ibid ch 14 pt 3 div 1.
[112] Ibid s 482.
[113] Ibid s 440B.
[114] Ibid s 440C.
[115] Ibid s 440.
[116] *Local Government (General) Regulation 2005* (NSW) reg 193.
[117] *Local Government Act 1993* (NSW) s 440F(1)(b).
[118] Ibid s 440G.
[119] Ibid ss 440H-440K.
[120] Ibid s 440N.
[121] Ibid s 482A.

Moreover, if a general manager of a council reasonably suspects that a councillor has not complied with code of conduct relating to the disclosure of political donations or the manner of dealing with perceived conflict of interest relating to political donations, the general manager may make a referral to the Director-General of the Department of Local Government who may, in turn, refer the matter to the Pecuniary Interest and Disciplinary Tribunal.[122] Further, if such non-compliance with the code amounts to „serious corrupt conduct" within the meaning of section 440A of the *Local Government Act*, there is the possibility of dismissal by Governor[123] and temporary suspension by Minister of the councillor.[124]

The Model Code has a range of provisions directly relevant to political contributions. Under a section entitled „Guide to Ethical Decision-Making", it states:

> ***Political donations and conflict of interests***
>
> 5.3 Councillors should take all reasonable steps to identify circumstances where political contributions may give rise to a reasonable perception of influence in relation to their vote or support.[125]

The Model Code also has a section entitled „Conflicts of Interest"[126] and states that „(a) conflict of interests exists where a reasonable and informed person would perceive that you could be influenced by a private interest when carrying out your public duty".[127] In this section are clauses relating to pecuniary interests that summarise the relevant provisions of the *Local Government Act*[128] (discussed above) hence, do not add much to what is already in the Act. What the Model Code does add is a range of clauses dealing with „non-pecuniary" interests. Such interests are defined as „private or personal interests the council official has that do not amount to pecuniary interest as defined in the Act".[129] Under the topic of „non-pecuniary" interests, there are several clauses dealing with political donations (reproduced below):

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[122] Ibid s 328B.
[123] Ibid s 440B.
[124] Ibid s 440C.
[125] NSW Department of Local Government, „The Model Code of Conduct for Local Councils in NSW" (General Publication, NSW Department of Local Government, June 2008) para 5.3 <http://www.dlg.nsw.gov.au/Files/Information/Model_Code_of_Conduct_June_2008.pdf>.
[126] Ibid para 7.
[127] Ibid para 7.1.
[128] Ibid paras 7.5-7.9.
[129] Ibid para 7.10.

Political donations exceeding $1,000

7.21 Councillors should note that matters before council involving political or campaign donors may give rise to a non-pecuniary conflict of interests.

7.22 Councillors should take all reasonable steps to ascertain the source of any political contributions that directly benefit their election campaigns. For example, councillors should have reasonable knowledge of contributions received by them or their "official agent" (within the meaning of the *Election Funding Act 1981*) that directly benefit their election campaign.

7.23 Where a councillor or the councillor"s "official agent" has received "political contributions" or "political donations", as the case may be, within the meaning of the *Election Funding Act 1981* exceeding $1,000 which directly benefit their campaign:
a) from a political or campaign donor or related entity in the previous four years; and
b) where the political or campaign donor or related entity has a matter before council,

then the councillor must declare a non-pecuniary conflict of interests, disclose the nature of the interest, and manage the conflict of interests in accordance with clause 7.17(b).

7.24 Councillors should note that political contributions below $1,000, or political contributions to a registered political party or group by which a councillor is endorsed, may still give rise to a non-pecuniary conflict of interests. Councillors should determine whether or not such conflicts are significant and take the appropriate action to manage them.

In terms of managing „non-pecuniary" conflicts of interest (including those arising from political contributions), the Model Code states that this will „depend on whether or not it (the conflict) is significant".[130] If the conflict is significant, the councillor must either remove the source of the conflict (e.g. return the political contributions) or have no involvement in the matter (as if section 451(2) of the *Local Government Act* applied).[131] If the councillor considers the conflict to be less than significant and requires no further action, the councillor is required to explain why no further action is required.[132]

The Model Code also makes particular mention of the development decisions through the following provisions:

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[130] Ibid para 7.15.
[131] Ibid para 7.17.
[132] Ibid para 7.18.

Development decisions

6.8 You must ensure that development decisions are properly made and that parties involved in the development process are dealt with fairly. You must avoid any occasion for suspicion of improper conduct in the development assessment process.

6.9 In determining development applications, you must ensure that no action, statement or communication between yourself and applicants or objectors conveys any suggestion of willingness to provide improper concessions or preferential treatment.

The relevance of these clauses to political contributions is made clear by the NSW Department of Local Government"s *Guidelines for the Model Code of Conduct for Local Councils in NSW* which includes a case-study involving political contributions by ratepayer who makes a development application.[133]

[133] NSW Department of Local Government, „Guidelines for the Model Code of Conduct for Local Councils in NSW" (General Publication, NSW Department of Local Government, October 2008) 22 <http://www.dlg.nsw.gov.au/dlg/dlghome/documents/Information/Model_Code_Guidelines_Oct2008.pdf>.

V PATTERNS OF FUNDING AND EXPENDITURE IN 2008 NSW LOCAL GOVERNMENT ELECTIONS

In NSW local government elections, there are three key groups of political participants (apart from electors): candidates, political parties and third parties. All three groups are required to lodge disclosure returns under the *EFD Act.*[134] However, these returns do not have to distinguish between funding and expenditure relating to NSW State elections as distinct from that relating to NSW local government elections.[135] This means that these returns do not provide a method of determining the patterns of funding and expenditure in NSW local government elections with full accuracy.

With two working assumptions, however, the funding and expenditure patterns of the 2008 NSW local government elections (held on 13 September 2008)[136] can be identified. The assumptions are as follows:

- *Funding received by local government candidates in the six-month disclosure period of 1 July 2008 to 31 December 2008 relate solely (or principally) to local government elections*

There are three reasons for this assumption: the disclosure period spans the election campaign of the 2008 local government elections; the overwhelming majority of local government candidates were only running in local government elections and not in State elections;[137] and no State election was held during this disclosure period. It should be noted, however, that this working assumption should not be applied to political parties because most of them, in particular, the major parties run candidates in both local government and State elections and also because political parties will be using funds for administrative and organisational expenses. This means that the

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[134] See text above accompanying nn 57-71.

[135] See Joint Standing Committee on Electoral Matters, Parliament of NSW, „Public Funding of Local Government Election Campaigns" (Issues Paper, August 2010) 6.

[136] See NSW Electoral Commission, *Local Government Elections 2008* (13 August 2009) <http://www.elections.nsw.gov.au/local_government_elections/2008_local_government_elections>.

[137] This assumption is less strong when local government candidates also run in State elections. Councillors who are also state parliamentarians include Robert Furolo (Mayor, Canterbury City Council and Member of Legislative Assembly for Lakemba); Clover Moore (Mayor, City of Sydney and Member of Legislative Assembly for Sydney); Nick Lalich (Mayor, Fairfield City Council and Member of Legislative Assembly for Cabramatta); Ninos Khoshaba (Councillor, Fairfield City Council and Member of Legislative Assembly for Smithfield) and Greg Piper (Mayor, Lake Macquarie and Member of Legislative Assembly for Lake Macquarie).

funding patterns of political parties in relation to NSW local government elections cannot even be roughly identified.

- *Electoral expenditure made by local government candidates and political parties in the six-month disclosure period of 1 July 2008 to 31 December 2008 relate solely (or principally) to local government elections*

There are two reasons for this assumption: the disclosure period spans the election campaign of the 2008 local government elections; and no State election was held during this disclosure period.

A *Funding of Election Campaigns of Local Government Candidates*

One of the questions asked in the Joint Standing Committee on Electoral Matters" issues paper on its inquiry into public funding of local government elections is: What are the typical sources of funding for local government election campaigns?[138] Table 3 indicates that in relation to local government candidates, such funding primarily comprises self-funding with such funding coming close to 90% of total funding. A bit over one-tenth of total funding comes from donations but these donations are solely small donations of $1,000 or less.

Moreover, the total funding received by local government candidates is relatively modest with an average of $634.38 per candidate (see Table 3). There are, however, significant variations in relation to the amount of donations received – whilst many candidates in the 2008 NSW local government elections reported receiving nil donations, the largest amount of donations received by a candidate stood at $46 628 (see Table 4).

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[138] Joint Standing Committee on Electoral Matters, Parliament of NSW, „Public Funding of Local Government Election Campaigns" (Issues Paper, August 2010) 7.

Table 3: Funding of candidates according to small donations, reportable political donations and self funding (2008 NSW local government elections)

	Small Donations (Donations of $1000 or less)	Reportable Political Donations (Donations exceeding $1000)	Self Funding	Total Political Funding
Average Per Candidate	$66.15	$0.00	$568.24	$634.38
Total	$280,736.83	$0.00	$2,411,192.97	$2,691,929.80
% of Total Political Funding	10.43%	0.00%	89.57%	100%

Source: Data provided by NSW Electoral Commission (copy on file with author)

B *Electoral Expenditure by Local Government Candidates*

There was generally a low level of electoral expenditure by candidates in the 2008 NSW local government elections. The average spent by a candidate was $868.86 with total spending by candidates amounting to $3,688,304.71.[139]

A question asked in the Joint Standing Committee on Electoral Matters" issues paper on its inquiry into public funding of local government elections is: What level of expenditure, expressed as an amount per elector, is sufficient to conduct a reasonable local government election campaign?[140] Table 5 provides information on the average expenditure per elector by various types of candidates (excluding mayoral candidates). Table 6 indicates that there is significant variation in terms of the level of electoral expenditure (as with the amount of political donations) – many candidates reported nil electoral expenditure whilst the largest amount of such spending was $81,376.54.

[139] Data provided by NSW Electoral Commission (copy on file with author).

[140] Joint Standing Committee on Electoral Matters, Parliament of NSW, „Public Funding of Local Government Election Campaigns" (Issues Paper, August 2010) 6.

Table 4: Top five candidates according to amount of donations received (2008 NSW local government elections)

Area	Ward	Candidate Surname	Candidate Given Name	Small Donations	Reportable Political Donations	Total Donations	Self Funding
Canterbury	Canterbury Central	Furolo	Robert	$23,246.00	$0.00	$23,246.00	$23,382.00
North Sydney	North Sydney Wollstonecraft	Zimmerman	Trent	$19,535.68	$0.00	$19,535.68	$229.96
Hornsby	Hornsby B	Berman	Nicolas	$14,350.00	$0.00	$14,350.00	$2,000.00
North Sydney	North Sydney Victoria	McCaffery	Eugenia	$11,250.00	$0.00	$11,250.00	$28,444.57
Wingecarribee	Undivided	Gair	Thomas	$11,170.00	$0.00	$11,170.00	$11,170.00

Source: Data provided by NSW Electoral Commission (copy on file with author)

Table 5: Average electoral expenditure per elector (excluding mayoral candidates) (2008 NSW local government elections)

	Average expenditure per elector ($)
All candidates	0.85
Each candidate	0.06
Each elected candidate	0.12
Each major party-affiliated candidates	0.03
Each candidate (metropolitan councils)	0.05
Each candidate (non-metropolitan councils)	0.07

Source: Data provided by NSW Electoral Commission (copy on file with author)

Table 6: Top five candidates according to amount of expenditure (2008 NSW local government elections)

Ward	Candidate Surname	Candidate Given Name	Total Expenditure
Hornsby C	Isaac	Andrew	$81,376.54
North Sydney Victoria	McCaffery	Eugenia	$50,985.61
Willoughby Middle Harbour	Mustaca	Anthony	$45,671.28
Hornsby B	Berman	Nicolas	$39,098.86
Liverpool North	Sim	Philip	$35,702.68

Source: Data provided by NSW Electoral Commission (copy on file with author)

C *Electoral Expenditure by Political Parties*

Table 7 details the amount of electoral expenditure made by political parties in the 2008 NSW local government elections whilst Table 8 details the expenditure made by the major parties and their average expenditure per elector (note that National Party did not endorse any candidates in these elections).

Table 7: Electoral expenditure by political parties (2008 NSW local government elections)

PARTY NAME	TOTAL SPENDING
Albury Citizens and Ratepayers Movement	$4,589.20
Australia First Party (NSW) Incorporated (Councils)	$3,412.67
Australian Business Party	$7,835.46
Australian Labor Party (NSW Branch)	$784,378.51
Bob Thompson's Independent Team	$7,911.60
Burwood Community Voice	$14,586.00
Central Coast First	$37,501.00
Christian Democratic Party (Fred Nile Group)	$37,225.00
Clover Moore Independent Team	$61,407.50
Community Before Developers - Stop Over Development	$0.00
Community Development Environment Save Campbelltown Koalas	$28,643.55
Community First Alliance	$47,882.44
Country Labor Party	$15.00
Eurobodalla First	$27,942.67
Holroyd Independents	$26,576.36
Horse Riders Party	$0.00
Kogarah Residents' Association	$0.00
Leichhardt Council Community Independents	$0.00
Liberal Party of Australia New South Wales Division	$1,322,580.63
Liverpool Community Independents Team	$28,640.85
Lorraine Wearne Independents	$5,684.10
Manly Independents - Putting Residents First	$21,897.07
National Party of Australia - NSW	$313,439.00
No Parking Meters Party	$8,929.50
Our Sustainable Future	$343.50
Outdoor Recreation Party	$0.00
Parramatta Better Local Government Party	$9,956.94
Residents Action Group for Auburn Area	$4,494.00
Residents First Woollahra	$19,838.64
Restore The Workers' Rights Party	$0.00
Roads and Services Action Party	$5,291.95
Russell Matheson Community First Team	$22,354.71
Save Our State	$0.00
Save Tuggerah Lakes	$35,651.78
Shire Watch Independents	$18,307.00
Shire Wide Action Group	$6,559.35
Shoalhaven Independents Group	$93,284.36
Shooters and Fishers Party	$2,200.00
Socialist Alliance	$3,903.40
The Fishing Party	$592.00
The Greens	$372,840.00
The Parramatta Independents	$0.00
Totally Locally Committed Party	$27,554.58
Unity Party	$24,232.57
Wake Up Warringah	$46,390.41
Woodville Independents	$6,490.56
Yvonne Bellamy Independents	$3,545.30
TOTALS	**$3,494,909.16**

Source: Data provided by NSW Electoral Commission (copy on file with author)

Table 8: Electoral expenditure by major political parties (including average expenditure per elector) (2008 NSW local government elections)

Party	Total Spending (Electoral Expenditure)	Electors in Wards and Councils Contested	Average Spending per Elector in Contested Wards and Councils
Australian Labor Party (NSW Branch)	$784,378.51	2,744,160	$0.28584
Liberal Party of Australia NSW Division	$1,322,580.63	2,342,692	$0.56456
The Greens	$372,840.00	2,160,665	$0.17256
All Parties	$3,494,909.16	4,526,540	$0.77209

Source: Data provided by NSW Electoral Commission (copy on file with author)

D *The Distinctiveness of Funding of Local Government Election Campaigns*

The distinctiveness of the funding of local government election campaigns can be appreciated by comparing it with three central features of the funding of NSW State election campaigns. First, with State election campaigns, there is reliance on relatively large sums of political donations, specifically, sums of $1,500 or more.[141] With the 2008 local government elections, local government candidates are primarily self-funded and disclosed donations did not exceed $1,000.[142] It should be noted, however, that the funding patterns of political parties in relation to these elections is not known.[143]

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[141] Joint Standing Committee on Electoral Matters, Parliament of NSW, *Inquiry into the Public Funding of Election Campaigns* (2010) 84-87; Joo-Cheong Tham, *Towards a More Democratic Political Funding Regime in New South Wales* (Report for NSW Electoral Commission, February 2010) 26-30 <http://www.efa.nsw.gov.au/__data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Politic al_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf> („*Towards a More Democratic Political Funding Regime*").

[142] See text above accompanying n 138.

[143] See text above accompanying n 137.

Second, NSW State elections have experienced until now increasingly high level of electoral expenditure running into millions of dollars for each State election[144] contributing to what Premier Kristina Kenneally has described as „the political arms race".[145] With NSW local government elections, it is unclear whether there is an „arms race" because a comprehensive assessment of expenditure levels of past local government elections has yet to be undertaken. What is, however, clear from the 2008 NSW local government elections is a relatively low level of electoral expenditure: an average of $0.85 per elector by all candidates (see Table 5) and $0.77 per elector by all parties (see Table 8). This results in an average of $1.62 per elector being spent by all candidates and parties and total electoral expenditure of $7, 183, 213.87. Compare this with the total electoral expenditure of the major parties (Australian Labor Party, Liberal Party, National Party, Greens) in the 2007 NSW State elections, $24, 290, 043.[146]

With NSW State elections, spending is strongly party-centred. This is less so with NSW local government elections. In the 2008 NSW local government elections, total electoral expenditure by candidates ($3,688,304.71)[147] was greater than total expenditure by political parties ($3,494,909.16; see Table 8). Average spending per elector by all candidates ($0.85) was greater than the average for parties ($0.77). The major political parties, however, spent relatively larger amounts per elector. The average spent per elector by *each* candidate was $0.06 per elector while the corresponding average for *each* candidate endorsed by a major party was $0.03 (see Table 5). Spending per elector by the major parties, however, ranged from five times (Greens) to nearly ten times (ALP) the amount spent by their candidates (see Table 8).

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[144] Joint Standing Committee on Electoral Matters, Parliament of NSW, *Inquiry into the Public Funding of Election Campaigns* (2010) 122-124; *Towards a More Democratic Political Funding Regime*, above n 141, 31-32.

[145] NSW, *Parliamentary Debates*, Legislative Assembly, 28 October 2010 (Kristina Kenneally, Premier).

[146] Joint Standing Committee on Electoral Matters, Parliament of NSW, *Inquiry into the Public Funding of Election Campaigns* (2010) 123.

[147] Data provided by NSW Electoral Commission (copy on file with author).

VI Central Principles to Govern the Funding of NSW Local Government Election Campaigns

One of the most important recommendations made by the NSW Joint Standing Committee on Electoral Matters in its report on public funding of election campaigns was the enactment of a new Act on political funding based on four governing principles:

1. Protecting the integrity of representative government;
2. Promoting fairness in politics;
3. Supporting parties to perform their functions;
4. Respect for political freedoms.[148]

All of these principles except for Principle 3) should apply to the funding of local government election campaigns,[149] taking account, of course, the distinctiveness of the structure of NSW local government, its electoral system and patterns of election funding.

Principle 3) (Supporting parties to perform their functions) should not, however, be a central principle of the funding of NSW local government election campaigns and its regulation. There are two reasons for Principle 3), both of which are not compelling with this level of government. The first is that political parties are the dominant

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[148] Joint Standing Committee on Electoral Matters, Parliament of NSW, *Inquiry into the Public Funding of Election Campaigns* (2010) 3, recommendation 3; for discussion of these principles, see Joo-Cheong Tham, *Money and Politics: The Democracy We Can't Afford* (UNSW Press, 2010) 1-20.

[149] Principles 1) and 2) are implicit in the following comments:

> Elected public officials are meant to represent, and be accessible to all their constituents, not just the ones who pay. They are meant to be fair, honest and objective when exercising their decision-making discretion, considering the merits of the matter in the context of policy, the law and with regard to the public interest.

NSW ICAC, „Report into Corrupt Conduct associated with Development Proposals at Rockdale City Council" (Investigation Report, NSW ICAC, 9 July 2002) 62.

Principle 2) informs the following statement:

> No public official should display favour or bias towards or against any person in the course of her official duty, even if there is no payment or return favour. Equality of opportunity, including equality of access, should be norm.

NSW ICAC, „Report on Investigation into North Coast Land Development" (Investigation Report, NSW ICAC, July 1990) 656.

political actors in State politics.[150] This is not true in relation to NSW local government where there is much lower level of party-affiliation.[151]

The second reason points to the political parties being essential to the democratic workings of State politics. Major parties have particularly important functions in this context. They should, firstly, bridge local and state citizenship. Second, major political parties are ideally inclusive and integrative. The former alludes to the process of drawing support from various and disparate groups while the latter refers to process of balancing and accommodating the wishes of the various groups as well translating these wishes into a coherent program. Third, major political parties have a function of comprehensiveness in that their policies should have a broad agenda for governing the State and not merely be based on a narrow set of issues.[152] It can be seen from these functions that major parties are most essential when the body of electors is large and diverse, and where there are different forms of citizenship (local and state). These premises, however, do not apply to NSW local government where the body of electors is relatively small (and therefore, much less diverse) and there are not multiple forms of citizenship.

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[150] See Dean Jaensch, *Power Politics: Australia's Party System* (Allen & Unwin, 1994) 1-2.
[151] See text above accompanying n 56.
[152] Nancy Rosenblum, „Political Parties as Membership Groups" (2000) 100 *Columbia Law Review* 813, 824-825.

VII KEY RISKS RELATING TO THE FUNDING OF NSW LOCAL GOVERNMENT ELECTIONS

A *Inadequate Transparency of Election Funding*

There are two deficiencies here. The first has already been alluded to – the absence of a requirement that candidates, political parties and third parties specifically disclose in their returns lodged under the *EFD Act* their funding and expenditure for local government elections.[153] The other concerns the absence of proper pre-election disclosure. The effect of such secrecy on the integrity of NSW local government elections was illustrated by the 2005 report by Emeritus Professor Daly on Tweed Shire Council. In documenting the activities of Tweed Directions, a group of councillor candidates, funded by property development interests, Professor Daly observed that:

> There is a high probability that, if the Tweed voters had understood the size and source of donations to Tweed Directions" group, the miniscule victory gained by the group would not have taken place. This points to a failure in a system where voters find out the level and source of donations to candidates some months *after* the election.[154]

Pre-election secrecy in this context quite possibly altered the outcome of the election.

B *Risk of Corruption and Undue Influence Especially in Relation to Land Development*

Distinctive features of local government give rise to significant risk of corruption and undue influence. Council election campaigns generally require much less expenditure by candidates or groups. Decisions made by councils, especially planning decisions, can, however, involve substantial amounts of money. These elements combine to create a risk that monied interests through the disbursement of several thousand

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[153] See text above accompanying nn 134-135.

[154] Maurice Daly, „Tweed Shire Council Public Inquiry" (Inquiry Commissioner"s Second Report, NSW Government, 16 August 2005) 926 (emphasis in original) („*Tweed Shire Second Report*"). The problem of pre-election secrecy also arose in relation to the 2004 Gold Coast City Council election: see Queensland Crime and Misconduct Commission, „Independence, Influence and Integrity in Local Government: A CMC Inquiry into the 2004 Gold Coast City Council Election" (Investigation Report, Queensland Crime and Misconduct Commission, May 2006) („*Gold Coast City Council Report*").

dollars can fully fund a candidate"s election campaign[155] (thereby creating the risk of corruption and undue influence).[156] As noted by the Queensland Crime and Misconduct Commission:

> The rudimentary nature of local government election campaigning can allow an interest group that is willing to fund a sophisticated campaign to effectively buy itself votes on a council.[157]

Moreover, at this level of government, legislative and executive functions are merged creating opportunity for corruption especially through political donations. As Professor Daly noted in his 2005 report on the Tweed Shire Council:

> The significance of electoral donations at council elections is much greater than at State or Federal elections because the range of policy areas is quite small, compared to other levels of government, but the fusion of legislative and executive functions within local government means that individual councillors, or associated groups of councillors, can establish policy settings or take actions that can provide immediate and substantial material benefits to those who support their campaign.[158]

Similarly, the Queensland Crime and Misconduct Commission has observed that:

> the fusion of legislative and executive functions within local government means that individual councillors, or associated groups of councillors, can establish policies or take action that can provide immediate and substantial material benefits to those who support their campaign.[159]

Further, key mechanisms of scrutiny and accountability that operate in relation to State politics apply with much less vigour to local government, for instance, scrutiny by the media. Competitive party politics also plays much less of a role here with the low levels of party-affiliation. This has the consequence in most situations of resulting in the lack of scrutiny by a formal opposition.[160] Moreover, the doctrine of

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[155] See text accompanying nn 138-147.
[156] *Tweed Shire Second Report*, above n 154, 951.
[157] Queensland Crime and Misconduct Commission, „The Local Government Electoral Process" (Discussion Paper, Queensland Crime and Misconduct Commission, December 2005) 6.
[158] *Tweed Shire Second Report*, above n 154, 951.
[159] Queensland Crime and Misconduct Commission, „The Local Government Electoral Process" (Discussion Paper, Queensland Crime and Misconduct Commission, December 2005) 6-7.
[160] *Tweed Shire Second Report*, above n 154, 947.

responsible government whereby the executive is to be accountable to the legislature does not apply to NSW local government - councillors and mayors in exercising their executive functions (e.g. approving planning applications) are not accountable to a separate legislative body.

These structural features of NSW local government („low-cost" election campaigns; fusion of legislative and executive functions; a diminished level of scrutiny) give rise to a heightened risk of corruption and undue influence. That such risk has eventuated is demonstrated by the various NSW ICAC reports on corruption in local government.[161]

There is a particular risk here with land development decisions made by NSW local councils. Extensive research by NSW ICAC into the corruption risks at NSW local government identified four foremost corruption risk areas including „(p)artiality, bribery and conflicts of interest, particularly by elected officials, in assessing development applications and rezoning".[162] The Queensland Criminal Justice Commission has similarly observed that „the nexus between developers and the role of Council, which enlivens the potential for purchasing influence by giving donations".[163] The truth of these observations is vividly illustrated by the number of recent episodes of corruption at NSW local government involving property development interests (North Coast Land Development;[164] Rockdale;[165] Strathfield;[166] Wollongong City Council (with council staff);[167] Tweed Shire Council in relation 2004 election,[168] Warringah Council[169]).

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[161] NSW ICAC, „Report on Investigation into Local Government, Public Duties and Conflicting Interests" (Report, NSW ICAC, March 1992); NSW ICAC, „Corruption Resistance Strategies: Researching Risks in Local Government" (Research Findings Summary, NSW ICAC, 2001).

[162] NSW ICAC, „Corruption Resistance Strategies: Researching Risks in Local Government" (Research Findings Summary, NSW ICAC, 2001) 26.

[163] Queensland Criminal Justice Commission, „Report on a Public Inquiry into Payments made by Land Developers to Aldermen and Candidates for Election to the Council of the City of Gold Coast" (Investigation Report, Queensland Crime and Misconduct Commission, November 1991) 10.

[164] NSW ICAC, „Report on Investigation into North Coast Land Development" (Investigation Report, NSW ICAC, July 1990).

[165] NSW ICAC, „Report into corrupt conduct associated with development proposals at Rockdale City Council" (Investigation Report, NSW ICAC, July 2002).

[166] NSW ICAC, „Report on investigation into the relationship between certain Strathfield Councillors & developers" (Investigation Report, NSW ICAC, June 2005).

[167] See NSW ICAC, „Report on an investigation into corruption allegations affecting Wollongong City Council" (Investigation Report, NSW ICAC, 2008).

[168] See Maurice Daly, „Tweed Shire Council Public Inquiry" (Inquiry Commissioner"s First Report, NSW Government, 25 May 2005); *Tweed Shire Second Report*, above n 154.

C *Risk of Corruption and Undue Influence Associated with Party Donations*

Donations to political parties which have endorsed local government candidates raise two problems:

- the problem of evasion - donations being used as a way to evade or minimise obligations on councillors under the *Local Government Act;*
- the problem of conflict of interest – the donations themselves giving rise to „conflict of interest" (whether or not used for evasion).

The problem of evasion occurs when donations are intended by donor to benefit the candidate but funnelled through the political party of the candidate which then uses it to campaign for the candidate.[170] This scenario can create difficulties in enforcing the disclosure obligations under *EFD Act* against the candidate. The donation in question is still a „political donation" received by the candidate that needs to be disclosed by the candidate as section 85(1)(c) of the *EFD Act* states that a „political donation" includes „a gift made to or *for the benefit* of a candidate or a group of candidates" (emphasis added). There may, however, be problems in proving that the donor intended for the gift to „benefit" candidate rather than the political party.

The scenario involved in the problem of evasion is likely also to lessen the obligations applying to the candidate if elected as councillor. The obligations relating to „non-pecuniary" interest are far less strict with donations received by the political party that has endorsed the councillor as distinct from donations directly received by the councillor (or the councillor"s agent). Under the Model Code of Conduct, donations received by the councillor (or the councillor"s agent) that benefit the councillor"s campaign have to be disclosed as a „non-pecuniary" interest if in excess of $1,000 whereas it is up to the councillor determine whether donations received his or her political party is a „non-pecuniary interest" that should be disclosed.[171]

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[169] Maurice Daly, „Warringah Council Public Inquiry: Findings and Recommendations" (Inquiry Report vol 1, NSW Government, July 2003). See also Robert Stokes, „Councillors" Conflicts of Interest in Development Assessment: Lessons from Warringah" (2004) 9 *Local Government Law Journal* 165.

[170] See Australian Greens, Submission No 21 to NSW Joint Standing Committee on Electoral Matters, *Inquiry into Public Funding of Local Government Election Campaigns*, 22 September 2010, 5.

[171] See text above accompanying nn 125-132.

The problem of conflict of interest arises through a combination of the political party receiving financial benefit through political donation and candidate"s affiliation with the political party (compare this with donations received by the candidate where the conflict arises from the direct financial benefit to the candidate). The risk of such conflict does not seem to have been fully appreciated in relation to NSW local government councils. It is illustrated by the absence of an automatic requirement to disclose political donations made to political parties of councillors when the donor has interest in matter before council. As just noted, the *Local Government Act* only requires the councillor to disclose such donations if s/he forms the view that such donations gives rise to a „non-pecuniary" conflict of interest. Moreover, the disclosure obligations under *Environmental Planning and Assessment Act 1979* (NSW) extends only to donations to councillors.[172]

D *Unfairness in Elections*

The risk of unfairness in NSW local government elections arises in the context of two paradoxes. The first paradox stems from the „low-cost" character of NSW local government election campaigns. On one hand, this means NSW local government elections are more accessible (and competitive). At the same time, it also means that these campaigns can be more easily dominated by groups or individuals, whether candidates or not, who are prepared to make reasonably modest outlays. As

Queensland Crime and Misconduct Commission observed, „because local government election campaigns are not well funded the marginal utility of available funds is greater".[173] It follows that „(c)andidates at local government elections do not generally spend large amounts of money campaigning, and a candidate can therefore make a big impact on the electorate by spending more than an opponent spends".[174]

The second paradox relates to the low-level of party-affiliated candidates. This suggests greater accessibility for candidates as the parties do not have a virtual monopoly over candidacy. At the same time, this creates the risk that non-party

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[172] Contrast this with the disclosure obligations under same Act in relation to Minister who has to disclose all political donations: *Environmental Planning and Assessment Act 1979* (NSW) s 147(3).
[173] *Gold Coast City Council Report*, above n 154, 122.
[174] Queensland Crime and Misconduct Commission, „The Local Government Electoral Process" (Discussion Paper, Queensland Crime and Misconduct Commission, December 2005) 6.

affiliated candidates, without access to the resources of the major political parties, will be overwhelmed by major party-affiliated candidates. This risk have materialised to some extent given the relatively higher levels of electoral expenditure per elector being made by the major political parties.[175]

[175] See text above accompanying n 147.

VIII Reform Options

The reforms options recommended by this report will be examined in four sections:

- increased transparency of election funding;
- improved measures to deal with the risk of corruption and undue influence;
- promoting fair elections through expenditure limits; and
- no demonstrated case for public funding of local government elections.

A *Increased Transparency of Election Funding*

A question asked in the Joint Standing Committee on Electoral Matters" issues paper on its inquiry into public funding of local government elections is: If public funding for local government elections were introduced, are the current disclosure requirements adequately transparent?[176]

This report would argue that, regardless of whether public funding is introduced for NSW local government elections, the current disclosure requirements are inadequate. The question of adequacy should be approached in light of the structural features of NSW local government that give rise to a significant risk of corruption and undue influence.[177] Given this risk, a stringent approach to disclosure should be taken. As Professor Daly correctly reasoned in his 2005 report on the Tweed Shire Council, „(s)ince the level of scrutiny of councils is weak . . . it is important that there be a very high level of transparency of electoral processes".[178] In a similar vein, the Queensland Crime and Misconduct Commission has advanced the case for „unique disclosure provisions"[179] applying to Queensland local government given „the significant differences between federal and state elections, on one hand, and the local government electoral process on the other".[180]

A key element of this stringent approach to disclosure is to require candidates, political parties and third parties to identify the funding and expenditure that relates to

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[176] Joint Standing Committee on Electoral Matters, Parliament of NSW, „Public Funding of Local Government Election Campaigns" (Issues Paper, August 2010) 6.
[177] See text accompanying nn 155-161.
[178] *Tweed Shire Second Report*, above n 154, 947.
[179] *Gold Coast City Council Report*, above n 154, 122.
[180] Ibid 123.

local government elections as distinct from State elections in the returns they lodge under the *EFD Act.*

Recommendation One: Candidates, political parties[181] and third parties[182] to separately disclose funding and spending for State and local government elections.

There is also a compelling case for pre-election disclosure of political donations. This rests on a general argument for such disclosure in both State and local government elections.[183] It is also justified by the stringent approach to be taken towards disclosure at the level of local government. Various recommendations have been made for pre-election disclosure at the level of local government. Professor Daly in his 2005 report on the Tweed Shire Council has recommended the following in relation to NSW local government elections:

- mandatory declaration of political donations five days before election day;
- the declarations being made available at the offices of returning officers and polling places;
- the NSW Electoral Commission to advertise in the press that declarations available; and
- a prohibition on accepting donations 12 months after declaration is made.[184]

The Queensland Crime and Misconduct Commission in its report on 2004 Gold Coast City Council Election has proposed a „system of continuous disclosure of gifts"[185] with two central elements: disclosure of gifts exceeding $200 within three business days of receipt; and a prohibition on receiving gifts from the week before the election until six months after the election.[186]

While most Australian jurisdictions have a system of post-election disclosure in relation to local government elections,[187] there is precedent for pre-election disclosure

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[181] For an argument for disclosure by political parties, see Queensland Crime and Misconduct Commission, „The Local Government Electoral Process" (Discussion Paper, Queensland Crime and Misconduct Commission, December 2005) 22.
[182] For an argument for third-party disclosure, see ibid 16.
[183] *Towards a More Democratic Political Funding Regime*, above n 141, 51.
[184] *Tweed Shire Second Report*, above n 154, 950.
[185] *Gold Coast City Council Report*, above n 154, 130-131.
[186] Ibid xxvi.
[187] See *Local Government Act 2009* (Qld) s 427; *Local Government (Elections) Act 1999* (SA) s 80; *Electoral Act 2004* (Tas) s 161(e); *Local Government Act 1989* (Vic) s 62(1).

in local government elections. Since 1998, candidates in Western Australian local government elections have to disclose to Chief Executive Officers of councils gifts received of $200 or more within three days of receipt once nominations are made (and for gifts received before nominations are disclosed, within three days of nominations being announced) in six months leading up to election day. Breach of this obligation is punishable by a maximum fine of $5 000.[188]

The Western Australian provisions provide a good model for NSW local government. There are, however, limitations. The disclosure obligations only apply to candidates when they should also extend to political parties and third parties. A 12-month ban on receiving political donations relating to local government elections dating from the last disclosure should also apply (as an adaptation of one of Professor Daly"s recommendations).

Disclosure should be made to the NSW EFA which should be obliged to publish the disclosure on-line rather than being disclosed to general managers of NSW local councils. General managers are not only appointed by councillors[189] but are also accountable to them.[190] Without in anyway impugning the integrity of general managers, entrusting general managers with the responsibility to administer and enforce disclosure obligations of councillors clearly involves a structural conflict of interest.

It is true that these obligations, if introduced, will intrude into right to privacy of donors (thereby implicating the principle of respect for political freedoms). The following comments made by NSW ICAC Commissioner Ian Temby in his report on the North Coast Land Development two decades ago remain persuasive:

> Those who speak against compulsory disclosure of political donations, argue that donors have a right to confidentiality, and that other people have no greater right to know which party or parties they support financially, than they have to know how they cast their secret ballot.

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[188] *Local Government (Elections) Regulations 1997* (WA) regs 30B-D. For discussion of local government disclosure schemes in other jurisdictions, see Joo-Cheong Tham, *Money and Politics: The Democracy We Can't Afford* (UNSW Press, 2010) 49-50.

[189] *Local Government Act 1993* (NSW) s 334(1).

[190] See *Local Government Act 1993* (NSW) s 335.

> . . .
>
> (L)ike all rights, that right to confidentiality, or privacy, in people"s affairs, cannot be absolute. There is a competing public right to know what influences might be brought to bear on public officials.
>
> Quite apart from that, there is a difference between the principle of the secret ballot, and the "secret" donation as it is known in practice. With the secret ballot, not even the favoured party or candidate knows how it has been cast. On the other hand, with the secret donation, the donor always wants the party or candidate to know, but not the general public. What satisfactory answer can he give if he (sic) is asked why?[191]

Recommendation Two: Pre-election disclosure obligations should be introduced based the Western Australian provisions and with the following modifications:

- the obligations should apply to candidates, political parties and third parties;
- disclosure should be made to the NSW EFA which is required to publish such details on-line;
- candidates, political parties and third parties should be prohibited from receiving political donations relating to local government elections for 12 months from the date of the last disclosure.

B *Improved Measures to Deal with the Risk of Corruption and Undue Influence*

Four elements are key to addressing the heightened risk of corruption and undue influence at NSW local government:

- limits on political contributions;
- disclosure of all political donations above a nominal amount by councillors;
- significant political donations to lead to recusal of councillors;
- additional transparency measures in relation to land development decisions.

1 *Limits on Political Contributions*

There are two reasons for limits on political contributions. They deal with the risk of corruption and undue influence by *removing* the source of the risk stemming from large political contributions. They also promote fairness in politics as they prevent the

[191] NSW ICAC, „Report on Investigation into North Coast Land Development" (Investigation Report, NSW ICAC, July 1990) 536-537.

wealthy from using money to secure a disproportionate influence on the political process.[192] Threading through both rationales is the importance of public confidence in the political system.[193]

Both rationales are reflected in the *EFDA Act* which introduces (indexed)[194] caps on political donations in relation to State elections.[195] On 1 January 2011, following caps will take effect:

- political donations to registered political parties will be capped at $5,000 per financial year[196] and $2,000 per financial year for unregistered political parties;[197]
- political donations to candidates[198] and elected members[199] will be capped at $2,000 per financial year (donations to candidates and elected members endorsed by a political party will be aggregated for this purpose);[200]
- political donations to groups of candidates will be capped at $5,000 per financial year;[201]
- third parties (referred to in Act as „third-party campaigners") may not receive more than $2,000 per financial year from each donor;[202] and
- each donor is limited to no more than three donations of up to $2,000 per financial year to „third-party campaigners".[203]

Should similar measures apply to NSW local government given that no contribution limits currently apply? The answer is yes given that both the anti-corruption and fairness rationales apply to this level of government. In fact, the case for contribution limits is stronger at this level of government given the heightened risk of corruption and undue influence. The sole reliance of local government candidates on donations

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[192] *Towards a More Democratic Political Funding Regime*, above n 141, 64-65.

[193] See Joint Standing Committee on Electoral Matters, Parliament of NSW, *Inquiry into the Public Funding of Election Campaigns* (2010) 89-91.

[194] *EFED Act* s 95A(5) (upon the amendments made by *EFDA Act* taking effect).

[195] *EFDA Act,* inserting *EFED Act* div 2A.

[196] *EFED Act* ss 95A(1)(a), 95B(1) (upon the amendments made by *EFDA Act* taking effect).

[197] *EFED Act* ss 95A(1)(b), 95B(1) (upon the amendments made by *EFDA Act* taking effect).

[198] *EFED Act* ss 95A(1)(e), 95B(1) (upon the amendments made by *EFDA Act* taking effect).

[199] *EFED Act* ss 95A(1)(c), 95B(1) (upon the amendments made by *EFDA Act* taking effect).

[200] *EFED Act* s 95A(3) (upon the amendments made by *EFDA Act* taking effect).

[201] *EFED Act* ss 95A(1)(d), 95B(1) (upon the amendments made by *EFDA Act* taking effect).

[202] *EFED Act* ss 95A(1)(f), 95B(1) (upon the amendments made by *EFDA Act* taking effect).

[203] *EFED Act* s 95C (upon the amendments made by *EFDA Act* taking effect).

of $1,000 or less[204] also means that the impact of such limits on the freedom to contribute can be significantly tempered (see discussion below).

In terms of the design of contribution limits applying to NSW local government, key elements of the contribution limits introduced by *EFDA Act* should be adopted: the limits should apply to candidates, political parties and third parties and operate through dedicated campaign accounts;[205] donors should also be restricted in the number of donations they make to third parties.

The following modifications, however, should be made. The limits should be set at a lower level given the stronger risk of corruption and undue influence – not much money is necessary for such a risk to materialise with NSW local government. $1 000 per financial year is an appropriate limit given that local government candidates do not receive any political donations above this amount (thereby, minimising the impact of these contribution limits on these candidates). There should be equivalent limits for candidates and parties because NSW local government elections are more candidate-centred.[206] Third parties should be subject to lower contribution limits. The *EFDA Act* subjects third parties to limits that 2/5 those applying to political parties. This ratio is also appropriate to NSW local government elections hence, contribution limits of $400 per financial year should apply to third parties in these elections.

Recommendation Three: Candidates, political parties and third parties be required to establish separate local government campaign accounts

Recommendation Four: In relation to funding for local government election campaigns:

- political donations to political parties should capped at $1,000 per financial year;
- political donations to candidates should be capped at $1,000 per financial year;

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[204] See text above accompanying n 138.
[205] *EFED Act* ss 96-96B (upon the amendments made by *EFDA Act* taking effect).
[206] See text above accompanying n 147.

- third parties may not receive more than $400 per financial year from each donor;[207] and
- each donor is limited to no more than three donations of up to $400 per financial year to third parties.

2 *Disclosure of all Political Donations above a Nominal Amount by Councillors*

Putting aside the disclosure obligations under *Environmental Planning and Assessment Act 1979* (NSW) (which will be discussed later), the key disclosure obligations on councillors in relation to political donations are as follows:

- under the *EFD Act,* councillors have to disclose „reportable political donations", i.e. political donations exceeding $1,000 per annum, on a bi-annual basis (after 1 January 2011, on an annual basis);[208]
- under the Model Code of Conduct of the *Local Government Act*, councillors are required to declare political donations exceeding $1,000 that directly benefited campaign of councillor because such donations are considered to give rise to a „non-pecuniary" conflict of interest.[209]

There are serious weaknesses with these laws. First, the disclosure threshold is too high in the context of the heightened risk of corruption and undue influence with NSW local government. The principle in this context is that all political donations except those above a nominal amount should be disclosed.

What should be considered a nominal amount? Here again, guidance can be usefully sought from Western Australian provisions. The *Local Government (Rules of Conduct) Regulations 2007* (WA) requires councillors to disclose to the Chief Executive Officer of the council of details of gifts between $50 and $300 made in a period of six months from a person who is undertaking, seeking to undertake or who it is reasonable to believe is intending to undertake an activity involving the discretion of local government, within 10 days of receiving such gifts[210] (It should be noted that the $300 limit is due to a prohibition on receiving gifts exceeding this amount from

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[207] *EFED Act* ss 95A(1)(f), 95B(1) (upon the amendments made by *EFDA Act* taking effect).
[208] See text above accompanying nn 57-71.
[209] See text above accompanying nn 125-132.
[210] *Local Government (Rules of Conduct) Regulations 2007* (WA) reg 12(3).

such persons;[211] this is discussed below). This disclosure threshold of $50 should be adopted in relation to NSW local government but extended to all political donations and not just to individuals involved in an activity involving the discretion of local government.

The other problem with the current disclosure regime is that it does not ensure adequate transparency of donations made to political parties which have endorsed councillors. As was explained earlier, such donations can give rise to the problems of evasion and conflict of interest.[212] In order to deal with the problem of evasion, councillors should be under an obligation to take reasonable steps to determine whether political donations to their political parties can be reasonably considered to be intended to benefit their campaign and, if so, such donations will be treated as donations to the councillors for the purpose of disclosure obligations. As with the problem of conflict of interest, measures will be proposed in the next section to deal with this risk.

Recommendation Five:

- Disclosure obligations of councillors under the *EFD Act* should be amended in order to introduce obligations based on the *Local Government (Rules of Conduct) Regulations 2007* (WA) with these obligations, however, extended to all political donations;
- councillors to take reasonable steps to ascertain whether political donations to their political parties can be reasonably considered to be intended to benefit the councillor and his or her campaign;
- if reasonably considered to be intended to benefit the councillor and his or her campaign then donations to the political parties should be treated as donations to councillor for purpose of disclosure obligations.

3 *Significant Political Donations to Lead to Recusal of Councillors*

Under the *Local Government Act,* the conflict of interest relating to political donations is principally managed through the „non-pecuniary" interest provisions. These

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[211] Ibid reg 12(2).

[212] See text above accompanying nn 170-172.

provisions oblige the councillor to disclose political donations of $1,000 or more that is received by the councillor (or his or her agent) and benefits the councillor"s campaign. The duty to remove her or himself from the council (or committee) meeting only arises when the councillor judges these donations to give rise to a „significant" conflict of interest.[213]

There are significant deficiencies with these provisions. At the outset, it is odd to manage the conflicts of interest arising from political donations through „non-pecuniary" interest provisions simply because political donations, whether to councillors or their political parties, can clearly give rise to a „pecuniary" interest.[214] This may have the consequence of a lackadaisical attitude to the obligations relating to political donations as „non-pecuniary" conflicts tend to be seen as less serious.[215] So much seem reflected in the content of the *Local Government Act* – as the NSW ICAC has observed „(w)hile LG Act has detailed provisions about pecuniary interests it does not deal with non-pecuniary conflicts".[216]

Another deficiency – and one that generally arises in this area – is that these laws do not effectively deal with donations to political parties that endorse councillors. In particular, they fail to adequately address the conflict of interest that may arise from such donations. Also, these provisions are too relaxed and unclear as they allow the judgment of councillors to determine when the duty to remove is enlivened in relation to political donations. Here, they stand in contrast with the corresponding provisions in Victoria and Western Australia. In Victoria, councillors have a conflict of interest under the *Local Government Act 1989* (Vic) if they have an „indirect interest" in a matter.[217] An „indirect interest" includes gift/s totalling $500 or more received in the past five years from individuals who have a „direct interest"[218] in the matter before

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[213] See text above accompanying nn 130-131.
[214] See text above accompanying n 107.
[215] Gerard Kelly, *Bias in Local Government Law and Policy* (Butterworths, 1995).
[216] NSW ICAC, „Taking the Devil out of Development: Recommendations for Statutory Reform" (Position Paper, NSW ICAC, December 2002) 7.
[217] *Local Government Act 1989* (Vic) s 77A(1).
[218] The Act states that „(a) person has a direct interest in a matter if there is a reasonable likelihood that the benefits, obligations, opportunities or circumstances of the person would be directly altered if the matter is decided in a particular way": ibid s 77B(1).

council.[219] In such situations, the councillor is under a duty to disclose the „indirect interest" and remove her or himself from the council (or committee) proceedings.[220] In Western Australia, councillors are prohibited from receiving gifts over $300 in a six-month period from anyone who is undertaking, seeking to undertake, or it is reasonable to believe intends to undertake an activity involving local government discretion.[221]

The Victorian provisions should be adopted in NSW. This can be easily effected by deeming receipt by councillors of gifts totalling $500 or more in the past five years from individuals who have an interest in a matter before council as a „pecuniary interest" under the *Local Government Act.* Gifts to parties of councillors exceeding a specified amount should also be deemed a „pecuniary interest". This amount should be more than the amount that applies to donations given directly to councillors given that the source of the conflict is more removed with party donations. An amount of $1000 is not unreasonable in this context. Through these deeming provisions, political donations exceeding these specified amounts will enliven the duties to disclose and remove oneself from council (or committee) proceedings.[222]

Recommendation Six: The following should be treated as a „pecuniary" interest under the *Local Government Act:*

- receipt by councillors of gifts totalling $500 or more in the past five years from individuals and entities who have an interest in a matter before council;
- receipt by political parties of councillors of gifts totalling $1,000 or more in the past five years from individuals and entities who have an interest in a matter before council.

4 *Additional Transparency Measures in Relation to Planning Decisions*

In recognition of the particular risk of corruption and undue influence relating to planning decisions by councils,[223] there are currently additional disclosure obligations

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[219] Ibid s 78C.
[220] Ibid s 79.
[221] *Local Government (Rules of Conduct) Regulations 2007* (WA) reg 12(2).
[222] See text above accompanying n 109.
[223] See the *Environmental Planning and Assessment Act 1979* (NSW) s 147(1).

under the *Environmental Planning and Assessment Act 1979* (NSW) with persons making a planning application or planning submission under various obligations to disclose „reportable political donations" (donations exceeding $1,000) made to councillors in the past two years.[224]

There are two weaknesses to these obligations. The disclosure threshold of $1,000 is too high - there should be a threshold of gifts of $50 or more made in the past six months (corresponding with general disclosure obligations proposed above).[225] Further, the disclosure obligations only apply to donations made to councillors when they should also extend to donations made to political parties of councillors.

Recommendation Seven: The disclosure obligations under the *Environmental Planning and Assessment Act 1979* (NSW) be amended to require disclosure of political donations to:

- councillors of $50 or more made in the past six months;
- political parties of councillors of $50 or more made in the past six months.

A question arises here whether the ban on political donations by „property developers" to local government candidates and political parties should remain in addition to the measures proposed above. While the rationale underlying the ban – addressing the risk of corruption and undue influence relating to council planning decisions – is sound, there are problems with this regulatory measure: it is both under-inclusive and over-inclusive.

The ban operates on the definition of „property developer" found in section 96GB of the *EFD Act:*

> a "property developer" for the purposes of this Division:
>
> (a) a corporation engaged in a business that regularly involves the making of relevant planning applications by or on behalf of the corporation in connection with the residential or commercial development of land, with the ultimate purpose of the sale or lease of the land for profit,

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[224] See text above accompanying n 90.

[225] See text above accompanying nn 210-211.

(b) a person who is a close associate of a corporation referred to in paragraph (a).

This definition does not cover the range of individuals and companies that have an interest in planning applications which may wish to make political donations (thereby, posing the risk of corruption and undue influence). A large company which is not in the business of property development that makes a planning application and donates thousands of dollars to councillors will not be caught by this ban as it is not a „property developer". The ban is also over-inclusive as it bans political donations even when no conflict of interest with planning decisions, for instance, a „property developer" donating to councillor of a council where it does not intend to make a planning application.

It is preferable to have regulation that applies specifically to where the risk is, that is to the planning decision-making process, for instance, through the additional disclosure obligation proposed in Recommendation Seven. Moreover, the measures proposed in Recommendations Three to Six further obviate the need for a ban on political donations from „property developers".

Recommendation Eight: In the event that Recommendations Three to Seven being adopted, the ban on political donations from „property developers" under the *EFD Act* should be repealed.

C *Promoting Fair Elections through Expenditure Limits*

Question Eight of the Joint Standing Committee on Electoral Matters" issues paper on its inquiry into public funding of local government elections asks: If public funding were introduced for local government elections, would expenditure caps required?[226] This question has particular salience given the *EFDA Act* introduces caps on electoral expenditure in relation to State elections.[227] The question that naturally arises in this context: should such caps also apply to NSW local government elections?

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[226] Joint Standing Committee on Electoral Matters, Parliament of NSW, „Public Funding of Local Government Election Campaigns" (Issues Paper, August 2010) 7.

[227] *EFDA Act*, inserting *EFED Act* div 2B.

There are two possible rationales for expenditure caps: they can prevent corruption and undue influence as they deal with the demand for campaign funds that drives fund-raising practices; they can also promote fair elections by reducing or containing the costs of elections, thereby facilitating open access to elections and increasing their competitiveness.[228]

How do these rationales apply to NSW local government elections? While the anti-corruption rationale has theoretical plausibility, it is of less force with such elections compared with NSW State elections given the much lower levels of electoral expenditure.[229] Given this, it is strongly arguable that the measures proposed in Recommendations Three to Seven adequately deal with risk of corruption and undue influence. The more compelling justification for expenditure caps in NSW local government elections is the promotion of fair elections. As explained earlier, the „low-cost" character of NSW local government elections paradoxically gives rise to risk of unfairness as modest outlays can distort electoral contests.[230]

Question Eight of the Joint Standing Committee on Electoral Matters" issues paper on its inquiry into public funding of local government elections also asks: What would be an appropriate method for determining expenditure caps?[231] Caps introduced by *EFDA Act* operate by subjecting political parties, candidates, groups of candidates and „third party campaigners" to „applicable caps" in relation to „electoral communication expenditure"[232] during the „capped expenditure period".[233] Table 9 sets out the „applicable caps".[234]

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[228] *Towards a More Democratic Political Funding Regime*, above n 141, 52-53.
[229] See text accompanying nn 144-146.
[230] See text accompanying nn 173-174.
[231] Joint Standing Committee on Electoral Matters, Parliament of NSW, „Public Funding of Local Government Election Campaigns" (Issues Paper, August 2010) 7.
[232] For definition of „electoral communication expenditure", see *EFED Act* s 87(2) (upon the amendments made by *EFDA Act* taking effect).
[233] *EFED Act* s 95I(1) (upon the amendments made by *EFDA Act* taking effect).
[234] *EFED Act* s 95F (upon the amendments made by *EFDA Act* taking effect).

Table 9: Spending caps under *Election Funding, Expenditure and Disclosures Act 1981* (NSW)

Political actor	Applicable cap
Political parties with Legislative Assembly candidates	• $100,000 x number of electoral districts in which a candidate is endorsed; • Additional cap of $50,000 for each electorate.
Political parties that have 10 or fewer Legislative Assembly candidates	$1, 050, 000
Group of Legislative Council candidates not endorsed by any party	$1,050,000
Party-endorsed Legislative Assembly candidates	$100,000
Legislative Assembly candidates not endorsed by any party	$150,000
Third-party campaigners	• $1 • $5 • Ac
	Source: *EFED Act* s 95F (upon the amendments made by *EFDA Act* taking effect).

Key elements of this regulatory model should also apply to electoral expenditure caps at the level of NSW local government. There should be caps on political parties, candidates and third parties. Overall and constituency-specific (councils, wards) caps should also apply to political parties and third parties. However, the caps for NSW local government election campaigns should be much lower to correspond with the level of spending in such campaigns. Further, it is not appropriate to have standard caps for each ward and council given different number of electors. In this respect, the approach taken by the only Australian jurisdiction that has election spending limits applying to local government elections, Tasmania, should not be followed. Regulation 22 of the *Local Government (General) Regulations 2005* (Tasmania) states that:

> (5) The total expenditure for the purchase of advertising time or space by or on behalf of a candidate must not –

(a) in respect of a single election, exceed a total amount of $5 000; and

(b) in respect of an election for a councillor and an election for a mayor or deputy mayor, exceed a total amount of $8 000.

The same regulation also places various restrictions on what a candidate can purchased in terms of advertising time on television and radio and advertising space in newspapers.[235]

The preferable approach is for caps to be determined according to the number of electors. This is the approach in the United Kingdom where the *Representation of People Act 1983* (UK) puts in place spending limits in British local government elections that are calculated in the following way: 50 pounds + 0.5p for every elector in the particular local government area.[236] The principle of calculating spending limits in this way is also reflected in New Zealand (see Appendix Five) and most of the Canadian provinces (see Appendix Six).

At what level should these caps be set? Caps on spending can be remedial or prophylactic.[237] In the context of „low-cost" election campaigns, the caps applying to NSW local government elections should primarily be prophylactic and directed at maintaining the low levels of electoral expenditure. Given the spending patterns in the 2008 NSW local government elections, a cap on candidate spending of $0.15 per elector and an overall cap of $0.50 per elector for political parties are not unreasonable. Political parties should also be subject to an additional cap for wards and councils with party spending in particular ward or council counted towards cap on candidate spending.

As with caps on third party spending, the *EFDA Act* provides for two ways to determine the level of such caps:

- its sets an overall limit of $1.05 million for third parties registered before the capped expenditure period – in essence, third parties are being treated like a group of candidates for Legislative Council;

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[235] *Local Government (General) Regulations 2005* (Tas) regs 22(2), (4).
[236] *Representation of People Act 1983* (UK) s 75(1ZA)(b).
[237] *Towards a More Democratic Political Funding Regime*, above n 141, 54.

- it sets an additional cap at constituency level of $20,000 (compared with $150,000 for candidate not endorsed by political party).

The first method is not applicable to NSW local government elections given its different electoral system. Given this, the second method which sets third party spending limits at 1/7.5 of the spending limits of candidates not endorsed by party is not unreasonable.

Recommendation Nine: Spending limits should be enacted in relation to NSW local government elections with the following features:

- caps should apply to candidates, political parties and third parties;
- the level of these caps should be determined according to the number of electors involved;
- caps on candidate spending should be determined on the basis of $0.15 per elector;
- overall caps on party spending should be determined on the basis of $0.50 per elector;
- party spending in particular wards and councils should count towards the caps on candidate spending;
- caps on third party spending should be 1/7.5 of the caps on candidate spending.

D *No Demonstrated Case for Public Funding of Local Government Elections*

Question One of the Joint Standing Committee on Electoral Matters" issues paper on its inquiry into public funding of local government elections asks: Is public funding for local government elections in NSW supported?[238] Again this question has particular significance given that there is currently no public funding for NSW local government elections while the *EFDA Act* increases and reconfigures public funding of political parties and candidates in State elections.[239]

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[238] Joint Standing Committee on Electoral Matters, Parliament of NSW, „Public Funding of Local Government Election Campaigns" (Issues Paper, August 2010) 3.
[239] *EFDA Act*, inserting *EFED Act* pt 5.

There are three possible rationales for the introduction of public funding for NSW local government elections:

- anti-corruption rationale: by reducing reliance on private funding, thereby lessening the risk of corruption and undue influence;
- fairness rationale: by ensuring the electoral contests is open to „worthy parties and candidates [that] might not [otherwise] be able to afford the considerable sums necessary to make their policies known";[240]
- compensatory rationale: to compensate for reduced private income resulting from introduction of contribution limits.

All three rationales lack persuasiveness in relation to NSW local government elections. The anti-corruption rationale is generally not strong in relation to public funding of elections (at whatever level).[241] In the context of „low cost" election campaigns, the fairness rationale is not compelling in relation to NSW local government elections. Indeed, there is a risk of undermining fair elections if public funding inflates election spending.[242] The compensatory rationale is clearly weak in relation to political donations to local government candidates – contributions limits of $1,000 per financial year will have a minimal impact on these candidates.[243] At the same time, it should be acknowledged that the impact of such limits is not clear in relation to political parties given the lack of information relating to the pattern of contributions they receive in relation to NSW local government elections.[244]

All this suggests that there is no demonstrated case for public funding of local government election campaigns.

Recommendation Ten: Public funding for NSW local government election campaigns should not be introduced.

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[240] Commonwealth, *Parliamentary Debates,* House of Representatives, 2 November 1983, 2215 (Kim Beazley, Special Minister of State, 2nd Reading Speech to Commonwealth Electoral Legislation Amendment Bill 1983).

[241] Joo-Cheong Tham, *Money and Politics: The Democracy We Can't Afford* (2010) 133-134.

[242] Ibid 132-133.

[243] See text above accompanying n 206.

[244] See text above accompanying n 137.

IX Conclusion

This report began by highlighting the general neglect of the challenges posed by money politics to local government. One can see by the end of the report how problematic this lacuna is. Not only is local government of vital importance to the lives of Australian citizens, there are also acute risks posed by election funding to this level of government. Moreover, in NSW, the regulatory framework governing such funding is seriously deficient and in need of broad-ranging reform.

The inquiry by the NSW Joint Standing Committee on Electoral Matters into the public funding of NSW local government elections presents an important opportunity to grapple with these issues. It also presents an opportunity of a different kind. The NSW Parliament has been a pioneer in the regulation of money politics in Australia. The *Election Funding Act 1981* (NSW) was the first statute in Australia to provide for election funding and disclosure of political donations. There is no doubt that the scheme introduced by the *EFDA Act* is the first of its kind. A similar opportunity now arises in the regulation of local government election campaigns.

APPENDIX ONE: COUNCILS DIVIDED / NOT DIVIDED INTO WARDS AND NUMBER OF ELECTORS[245]

LGA Unique Name	Ward Unique Name	Electors 30 June 2008
Albury City Council	UNDIVIDED	31961
Armidale Dumaresq Council	UNDIVIDED	15343
Ashfield Municipal Council	EAST WARD	6245
Ashfield Municipal Council	NORTH EAST WARD	6449
Ashfield Municipal Council	NORTH WARD	6617
Ashfield Municipal Council	SOUTH WARD	6227
Auburn Council	FIRST WARD	18896
Auburn Council	SECOND WARD	18851
Ballina Shire Council	A WARD	9821
Ballina Shire Council	B WARD	9663
Ballina Shire Council	C WARD	9149
Balranald Shire Council	UNDIVIDED	1586
Bankstown City Council	EAST WARD	31028
Bankstown City Council	NORTH WARD	28616
Bankstown City Council	SOUTH WARD	29072
Bankstown City Council	WEST WARD	27078
Bathurst Regional Council	UNDIVIDED	24330
Baulkham Hills Shire Council	CENTRAL WARD	28340
Baulkham Hills Shire Council	EAST WARD	28436
Baulkham Hills Shire Council	NORTH WARD	27567
Baulkham Hills Shire Council	WEST WARD	29598
Bega Valley Shire Council	UNDIVIDED	23174
Bellingen Shire Council	UNDIVIDED	8987
Berrigan Shire Council	UNDIVIDED	5785
Blacktown City Council	FIFTH WARD	33078
Blacktown City Council	FIRST WARD	35805
Blacktown City Council	FOURTH WARD	33353
Blacktown City Council	SECOND WARD	35015
Blacktown City Council	THIRD WARD	34960
Bland Shire Council	UNDIVIDED	4336
Blayney Shire Council	UNDIVIDED	4755
Blue Mountains City Council	FIRST WARD	12961
Blue Mountains City Council	FOURTH WARD	13612
Blue Mountains City Council	SECOND WARD	14205
Blue Mountains City Council	THIRD WARD	13559
Bogan Shire Council	UNDIVIDED	2019
Bombala Council	UNDIVIDED	1898
Boorowa Council	UNDIVIDED	1814
Botany Bay City Council	A WARD	8843
Botany Bay City Council	B WARD	7204
Botany Bay City Council	C WARD	8118
Bourke Shire Council	UNDIVIDED	1791
Brewarrina Shire Council	UNDIVIDED	913
Broken Hill City Council	UNDIVIDED	13912

[245] Data provided by NSW Electoral Commission (copy on file with author).

LGA Unique Name	Ward Unique Name	Electors 30 June 2008
Burwood Council	UNDIVIDED	19015
Byron Shire Council	UNDIVIDED	20399
Cabonne Shire Council	BELUBULA WARD	1437
Cabonne Shire Council	CANOBOLAS WARD	1538
Cabonne Shire Council	GOOBANG WARD	1472
Cabonne Shire Council	NANGAR WARD	1350
Cabonne Shire Council	OPHIR WARD	1693
Cabonne Shire Council	YURANIGH WARD	1637
Camden Council	CENTRAL WARD	11142
Camden Council	NORTH WARD	11600
Camden Council	SOUTH WARD	10769
Campbelltown City Council	UNDIVIDED	92436
Canada Bay City Council	UNDIVIDED	47080
Canterbury City Council	CENTRAL WARD	29064
Canterbury City Council	EAST WARD	28684
Canterbury City Council	WEST WARD	26699
Carrathool Shire Council	A WARD	379
Carrathool Shire Council	B WARD	379
Carrathool Shire Council	C WARD	378
Carrathool Shire Council	D WARD	384
Carrathool Shire Council	E WARD	383
Central Darling Shire Council	A WARD	315
Central Darling Shire Council	B WARD	480
Central Darling Shire Council	C WARD	405
Cessnock City Council	A WARD	8741
Cessnock City Council	B WARD	7818
Cessnock City Council	C WARD	8701
Cessnock City Council	D WARD	8141
Clarence Valley Council	UNDIVIDED	34772
Cobar Shire Council	UNDIVIDED	3119
Coffs Harbour City Council	UNDIVIDED	46924
Conargo Shire Council	A WARD	288
Conargo Shire Council	B WARD	300
Conargo Shire Council	C WARD	296
Conargo Shire Council	D WARD	294
Coolamon Shire Council	UNDIVIDED	2899
Cooma-Monaro Shire Council	UNDIVIDED	6873
Coonamble Shire Council	UNDIVIDED	2761
Cootamundra Shire Council	UNDIVIDED	5501
Corowa Shire Council	UNDIVIDED	8016
Cowra Shire Council	UNDIVIDED	8953
Deniliquin Council	UNDIVIDED	5310
Dubbo City Council	UNDIVIDED	25224
Dungog Shire Council	A WARD	1915
Dungog Shire Council	B WARD	2110
Dungog Shire Council	C WARD	2001
Eurobodalla Shire Council	UNDIVIDED	26321
Fairfield City Council	CABRAVALE WARD	39684
Fairfield City Council	FAIRFIELD WARD	41152
Fairfield City Council	PARKS WARD	41612

LGA Unique Name	Ward Unique Name	Electors 30 June 2008
Forbes Shire Council	UNDIVIDED	6584
Gilgandra Shire Council	UNDIVIDED	3074
Glen Innes Severn Council	UNDIVIDED	6321
Gloucester Shire Council	UNDIVIDED	3659
Gosford City Council	UNDIVIDED	113448
Goulburn Mulwaree Council	UNDIVIDED	18541
Great Lakes Council	UNDIVIDED	25574
Greater Hume Shire Council	EAST WARD	2472
Greater Hume Shire Council	NORTH WARD	2309
Greater Hume Shire Council	SOUTH WARD	2169
Greater Taree City Council	UNDIVIDED	33276
Griffith City Council	UNDIVIDED	15535
Gundagai Shire Council	UNDIVIDED	2666
Gunnedah Shire Council	UNDIVIDED	8201
Guyra Shire Council	A WARD	1003
Guyra Shire Council	B WARD	979
Guyra Shire Council	C WARD	1024
Gwydir Shire Council	UNDIVIDED	3887
Harden Shire Council	UNDIVIDED	2769
Hawkesbury City Council	UNDIVIDED	41423
Hay Shire Council	UNDIVIDED	2245
Holroyd City Council	EAST WARD	15429
Holroyd City Council	NORTH WARD	15173
Holroyd City Council	SOUTH WARD	14346
Holroyd City Council	WEST WARD	13837
Hornsby Shire Council	A WARD	36652
Hornsby Shire Council	B WARD	35305
Hornsby Shire Council	C WARD	35333
Hunters Hill Council	NORTH WARD	4623
Hunters Hill Council	SOUTH WARD	4650
Hurstville City Council	HURSTVILLE WARD	17144
Hurstville City Council	PEAKHURST WARD	17825
Hurstville City Council	PENSHURST WARD	16537
Inverell Shire Council	UNDIVIDED	10852
Jerilderie Shire Council	UNDIVIDED	1195
Junee Shire Council	UNDIVIDED	3673
Kempsey Shire Council	UNDIVIDED	19028
Kiama Municipal Council	UNDIVIDED	14840
Kogarah Municipal Council	EAST WARD	10167
Kogarah Municipal Council	MIDDLE WARD	8863
Kogarah Municipal Council	NORTH WARD	9002
Kogarah Municipal Council	WEST WARD	8646
Ku-ring-gai Council	COMENARRA WARD	14713
Ku-ring-gai Council	GORDON WARD	14432
Ku-ring-gai Council	ROSEVILLE WARD	14851
Ku-ring-gai Council	ST IVES WARD	14925
Ku-ring-gai Council	WAHROONGA WARD	15245
Kyogle Council	A WARD	2061
Kyogle Council	B WARD	2280

LGA Unique Name	Ward Unique Name	Electors 30 June 2008
Kyogle Council	C WARD	2029
Lachlan Shire Council	A WARD	991
Lachlan Shire Council	B WARD	959
Lachlan Shire Council	C WARD	925
Lachlan Shire Council	D WARD	906
Lachlan Shire Council	E WARD	918
Lake Macquarie City Council	EAST WARD	46844
Lake Macquarie City Council	NORTH WARD	43977
Lake Macquarie City Council	WEST WARD	46299
Lane Cove Municipal Council	CENTRAL WARD	6987
Lane Cove Municipal Council	EAST WARD	6911
Lane Cove Municipal Council	WEST WARD	7399
Leeton Shire Council	A WARD	2395
Leeton Shire Council	B WARD	2516
Leeton Shire Council	C WARD	2379
Leichhardt Municipal Council	BIRRABIRRAGAL/BALMAIN	8304
Leichhardt Municipal Council	EORA/LEICHHARDT-LILYFIELD	9152
Leichhardt Municipal Council	GADIGAL/ANNANDALE-LCHHRDT	8718
Leichhardt Municipal Council	WANGAL/ROZELLE-LILYFIELD	8968
Lismore City Council	UNDIVIDED	29607
Lithgow City Council	UNDIVIDED	14133
Liverpool City Council	NORTH WARD	50940
Liverpool City Council	SOUTH WARD	54297
Liverpool Plains Shire Council	UNDIVIDED	5425
Lockhart Shire Council	A WARD	792
Lockhart Shire Council	B WARD	740
Lockhart Shire Council	C WARD	879
Maitland City Council	CENTRAL WARD	11602
Maitland City Council	EAST WARD	10902
Maitland City Council	NORTH WARD	10733
Maitland City Council	WEST WARD	11560
Manly Council	UNDIVIDED	25057
Marrickville Council	CENTRAL WARD	12521
Marrickville Council	NORTH WARD	13739
Marrickville Council	SOUTH WARD	12827
Marrickville Council	WEST WARD	12138
Mid-Western Regional Council	UNDIVIDED	15017
Moree Plains Shire Council	UNDIVIDED	8041
Mosman Municipal Council	BALMORAL WARD	6171
Mosman Municipal Council	MIDDLE HARBOUR WARD	6393
Mosman Municipal Council	MOSMAN BAY WARD	6206
Murray Shire Council	UNDIVIDED	4621
Murrumbidgee Shire Council	EAST WARD	765
Murrumbidgee Shire Council	WEST WARD	786
Muswellbrook Shire Council	UNDIVIDED	9695
Nambucca Shire Council	UNDIVIDED	13200
Narrabri Shire Council	UNDIVIDED	8842
Narrandera Shire Council	UNDIVIDED	4326

LGA Unique Name	Ward Unique Name	Electors 30 June 2008
Narromine Shire Council	UNDIVIDED	4512
Newcastle City Council	FIRST WARD	25731
Newcastle City Council	FOURTH WARD	27164
Newcastle City Council	SECOND WARD	25624
Newcastle City Council	THIRD WARD	25263
North Sydney Council	CREMORNE WARD	10308
North Sydney Council	TUNKS WARD	10075
North Sydney Council	VICTORIA WARD	9912
North Sydney Council	WOLLSTONECRAFT WARD	10239
Oberon Council	UNDIVIDED	3526
Orange City Council	UNDIVIDED	24717
Palerang Council	UNDIVIDED	9384
Parkes Shire Council	UNDIVIDED	10062
Parramatta City Council	ARTHUR PHILLIP WARD	19214
Parramatta City Council	CAROLINE CHISHOLM WARD	17740
Parramatta City Council	ELIZABETH MACARTHUR WARD	20352
Parramatta City Council	LACHLAN MACQUARIE WARD	18813
Parramatta City Council	WOODVILLE WARD	18806
Penrith City Council	EAST WARD	38986
Penrith City Council	NORTH WARD	36607
Penrith City Council	SOUTH WARD	38814
Pittwater Council	CENTRAL WARD	13888
Pittwater Council	NORTH WARD	13153
Pittwater Council	SOUTH WARD	13178
Port Macquarie-Hastings Council	UNDIVIDED	51807
Port Stephens Council	CENTRAL WARD	15295
Port Stephens Council	EAST WARD	14923
Port Stephens Council	WEST WARD	14370
Queanbeyan City Council	UNDIVIDED	25464
Randwick City Council	CENTRAL WARD	15775
Randwick City Council	EAST WARD	15152
Randwick City Council	NORTH WARD	16155
Randwick City Council	SOUTH WARD	14945
Randwick City Council	WEST WARD	15906
Richmond Valley Council	UNDIVIDED	14996
Rockdale City Council	FIFTH WARD	11913
Rockdale City Council	FIRST WARD	11954
Rockdale City Council	FOURTH WARD	11936
Rockdale City Council	SECOND WARD	12961
Rockdale City Council	THIRD WARD	13187
Ryde City Council	CENTRAL WARD	22397
Ryde City Council	EAST WARD	21631
Ryde City Council	WEST WARD	22902
Shellharbour City Council	A WARD	7401
Shellharbour City Council	B WARD	7162
Shellharbour City Council	C WARD	6765
Shellharbour City Council	D WARD	7036
Shellharbour City Council	E WARD	7458
Shellharbour City Council	F WARD	7344

LGA Unique Name	Ward Unique Name	Electors 30 June 2008
Shoalhaven City Council	FIRST WARD	20815
Shoalhaven City Council	SECOND WARD	21869
Shoalhaven City Council	THIRD WARD	23106
Singleton Council	A WARD	5056
Singleton Council	B WARD	4669
Singleton Council	C WARD	4920
Snowy River Shire Council	UNDIVIDED	4323
Strathfield Municipal Council	UNDIVIDED	19557
Sutherland Shire Council	A WARD	30920
Sutherland Shire Council	B WARD	31549
Sutherland Shire Council	C WARD	30236
Sutherland Shire Council	D WARD	30144
Sutherland Shire Council	E WARD	30337
Sydney City Council	UNDIVIDED	88912
Tamworth Regional Council	UNDIVIDED	38056
Temora Shire Council	UNDIVIDED	4334
Tenterfield Shire Council	A WARD	959
Tenterfield Shire Council	B WARD	922
Tenterfield Shire Council	C WARD	897
Tenterfield Shire Council	D WARD	929
Tenterfield Shire Council	E WARD	924
Tumbarumba Shire Council	UNDIVIDED	2414
Tumut Shire Council	UNDIVIDED	7780
Tweed Shire Council	UNDIVIDED	57218
Upper Hunter Shire Council	UNDIVIDED	9349
Upper Lachlan Shire Council	UNDIVIDED	5433
Uralla Shire Council	A WARD	1510
Uralla Shire Council	B WARD	1283
Uralla Shire Council	C WARD	1431
Urana Shire Council	A WARD	290
Urana Shire Council	B WARD	305
Urana Shire Council	C WARD	282
Wagga Wagga City Council	UNDIVIDED	39188
Wakool Shire Council	A WARD	960
Wakool Shire Council	B WARD	982
Wakool Shire Council	C WARD	1000
Walcha Council	A WARD	411
Walcha Council	B WARD	653
Walcha Council	C WARD	589
Walcha Council	D WARD	669
Walgett Shire Council	UNDIVIDED	3884
Warren Shire Council	A WARD	439
Warren Shire Council	B WARD	557
Warren Shire Council	C WARD	496
Warren Shire Council	D WARD	543
Warringah Council	A WARD	30564
Warringah Council	B WARD	32729
Warringah Council	C WARD	30895
Warrumbungle Shire Council	UNDIVIDED	7090
Waverley Council	BONDI WARD	9601

LGA Unique Name	Ward Unique Name	Electors 30 June 2008
Waverley Council	HUNTER WARD	9615
Waverley Council	LAWSON WARD	10146
Waverley Council	WAVERLEY WARD	10044
Weddin Shire Council	A WARD	550
Weddin Shire Council	B WARD	548
Weddin Shire Council	C WARD	567
Weddin Shire Council	D WARD	376
Weddin Shire Council	E WARD	711
Wellington Council	UNDIVIDED	5625
Wentworth Shire Council	UNDIVIDED	4261
Willoughby City Council	MIDDLE HARBOUR WARD	10973
Willoughby City Council	NAREMBURN WARD	10336
Willoughby City Council	SAILORS BAY WARD	10667
Willoughby City Council	WEST WARD	10657
Wingecarribee Shire Council	UNDIVIDED	30903
Wollondilly Shire Council	CENTRAL WARD	9188
Wollondilly Shire Council	EAST WARD	9929
Wollondilly Shire Council	NORTH WARD	8949
Wollongong City Council	1ST WARD	21609
Wollongong City Council	2ND WARD	22970
Wollongong City Council	3RD WARD	22786
Wollongong City Council	4TH WARD	22841
Wollongong City Council	5TH WARD	20794
Wollongong City Council	6TH WARD	20835
Woollahra Municipal Council	BELLEVUE HILL WARD	7065
Woollahra Municipal Council	COOPER WARD	7093
Woollahra Municipal Council	DOUBLE BAY WARD	7134
Woollahra Municipal Council	PADDINGTON WARD	7002
Woollahra Municipal Council	VAUCLUSE WARD	7508
Wyong Shire Council	A WARD	52020
Wyong Shire Council	B WARD	47623
Yass Valley Council	UNDIVIDED	9725
Young Shire Council	UNDIVIDED	8476

APPENDIX TWO: COUNCILS WITH NON-RESIDENTIAL ELECTORAL ROLLS (2008 LOCAL GOVERNMENT ELECTIONS)[246]

Council	Residential Roll	Non-Residential Roll	Total Roll	% of Roll Non-Resident
Albury City Council	32,098	4	32,102	0.01%
Armidale Dumaresq Council	15,443	7	15,450	0.05%
The Council of the Municipality of Ashfield	25,607	8	25,615	0.03%
Auburn Council	38,030	6	38,036	0.02%
Balranald Shire Council	1,593	1	1,594	0.06%
Bankstown City Council	116,154	1	116,155	0.00%
Bathurst Regional Council	24,414	10	24,424	0.04%
The Council of the Shire of Baulkham Hills	114,275	2	114,277	0.00%
Bega Valley Shire Council	23,299	42	23,341	0.18%
Bellingen Shire Council	9,014	2	9,016	0.02%
Blacktown City Council	172,834	4	172,838	0.00%
Blayney Shire Council	4,769	7	4,776	0.15%
Blue Mountains City Council	54,520	8	54,528	0.01%
Bogan Shire Council	2,015	1	2,016	0.05%
Bourke Shire Council	1,797	1	1,798	0.06%
Burwood Council	19,088	20	19,108	0.10%
Byron Shire Council	20,495	61	20,556	0.30%

[246] Data provided by NSW Electoral Commission (copy on file with author).

Council	Residential Roll	Non-Residential Roll	Total Roll	% of Roll Non-Resident
Cabonne Shire Council	9,109	3	9,112	0.03%
Campbelltown City Council	92,723	2	92,725	0.00%
City of Canada Bay Council	47,253	6	47,259	0.01%
Central Darling Shire Council	1,199	16	1,215	1.32%
Cessnock City Council	33,532	3	33,535	0.01%
Clarence Valley Council	34,916	3	34,919	0.01%
Cobar Shire Council	3,121	1	3,122	0.03%
Coffs Harbour City Council	47,200	2	47,202	0.00%
Conargo Shire Council	1,179	2	1,181	0.17%
Corowa Shire Council	8,026	3	8,029	0.04%
Dungog Shire Council	6,045	1	6,046	0.02%
Eurobodalla Shire Council	26,456	421	26,877	1.57%
Fairfield City Council	122,850	3	122,853	0.00%
Glen Innes Severn Council	6,330	1	6,331	0.02%
Gloucester Shire Council	3,672	3	3,675	0.08%
Goulburn Mulwaree Council	18,633	4	18,637	0.02%
Great Lakes Council	25,663	14	25,677	0.05%
Greater Hume Shire Council	6,970	13	6,983	0.19%
Greater Taree City Council	33,430	3	33,433	0.01%
Guyra Shire Council	3,007	4	3,011	0.13%

Council	Residential Roll	Non-Residential Roll	Total Roll	% of Roll Non-Resident
Gwydir Shire Council	3,892	2	3,894	0.05%
Harden Shire Council	2,791	1	2,792	0.04%
Hawkesbury City Council	41,555	38	41,593	0.09%
Hay Shire Council	2,245	1	2,246	0.04%
Holroyd City Council	59,086	5	59,091	0.01%
The Council of the Shire of Hornsby	107,584	1	107,585	0.00%
Hurstville City Council	51,760	5	51,765	0.01%
Jerilderie Shire Council	1,195	1	1,196	0.08%
Kempsey Shire Council	19,118	1	19,119	0.01%
The Council of the Municipality of Kiama	14,910	4	14,914	0.03%
Kogarah Municipal Council	36,716	4	36,720	0.01%
Lake Macquarie City Council	137,630	1	137,631	0.00%
Lane Cove Municipal Council	21,315	5	21,320	0.02%
Leichhardt Municipal Council	35,283	88	35,371	0.25%
Lismore City Council	29,754	7	29,761	0.02%
City of Lithgow Council	14,163	1	14,164	0.01%
Liverpool City Council	105,603	8	105,611	0.01%
Liverpool Plains Shire Council	5,438	2	5,440	0.04%
Manly Council	25,121	10	25,131	0.04%

Council	Residential Roll	Non-Residential Roll	Total Roll	% of Roll Non-Resident
Marrickville Council	51,336	88	51,424	0.17%
Mid-Western Regional Council	15,086	14	15,100	0.09%
Moree Plains Shire Council	8,063	2	8,065	0.02%
Mosman Municipal Council	18,776	1	18,777	0.01%
Murray Shire Council	4,634	4	4,638	0.09%
Murrumbidgee Shire Council	1,549	1	1,550	0.06%
Nambucca Shire Council	13,240	1	13,241	0.01%
Narromine Shire Council	4,529	1	4,530	0.02%
Newcastle City Council	104,017	5	104,022	0.00%
North Sydney Council	40,619	11	40,630	0.03%
Oberon Council	3,540	2	3,542	0.06%
Palerang Council	9,415	10	9,425	0.11%
Parkes Shire Council	10,062	1	10,063	0.01%
Parramatta City Council	95,198	2	95,200	0.00%
Penrith City Council	114,816	3	114,819	0.00%
Pittwater Council	40,355	1	40,356	0.00%
Port Stephens Council	44,822	2	44,824	0.00%
Queanbeyan City Council	25,512	1	25,513	0.00%
Randwick City Council	78,180	18	78,198	0.02%
Richmond Valley Council	15,057	6	15,063	0.04%

Council	Residential Roll	Non-Residential Roll	Total Roll	% of Roll Non-Resident
Rockdale City Council	62,066	8	62,074	0.01%
Ryde City Council	66,975	2	66,977	0.00%
Shoalhaven City Council	66,076	222	66,298	0.33%
Singleton Council	14,689	1	14,690	0.01%
Snowy River Shire Council	4,346	3	4,349	0.07%
Strathfield Municipal Council	19,635	6	19,641	0.03%
Sutherland Shire Council	153,649	4	153,653	0.00%
Council of the City of Sydney	89,172	396	89,568	0.44%
Temora Shire Council	4,368	9	4,377	0.21%
Tenterfield Shire Council	4,649	22	4,671	0.47%
Tumbarumba Shire Council	2,418	2	2,420	0.08%
Tweed Shire Council	57,484	10	57,494	0.02%
Upper Hunter Shire Council	9,383	5	9,388	0.05%
Upper Lachlan Shire Council	5,457	11	5,468	0.20%
Uralla Shire Council	4,230	1	4,231	0.02%
Urana Shire Council	872	3	875	0.34%
Wagga Wagga City Council	39,379	1	39,380	0.00%
Walgett Shire Council	3,889	7	3,896	0.18%
Warringah Council	94,448	6	94,454	0.01%
Warrumbungle Shire Council	7,134	3	7,137	0.04%

Council	Residential Roll	Non-Residential Roll	Total Roll	% of Roll Non-Resident
Waverley Council	39,466	7	39,473	0.02%
Wentworth Shire Council	4,258	4	4,262	0.09%
Willoughby City Council	42,723	25	42,748	0.06%
Wingecarribee Shire Council	31,085	8	31,093	0.03%
Wollondilly Shire Council	28,164	1	28,165	0.00%
Woollahra Municipal Council	35,894	1	35,895	0.00%
Wyong Shire Council	100,122	8	100,130	0.01%
Yass Valley Council	9,743	1	9,744	0.01%
Young Shire Council	8,505	1	8,506	0.01%

APPENDIX THREE: NUMBER OF CANDIDATES WITH PARTY AFFILIATIONS (2008 NSW LOCAL GOVERNMENT ELECTIONS)[247]

Registered Political Party	No Candidates
Albury Citizens and Ratepayers Movement	6
Australia First Party (NSW) Incorporated (Councils)	15
Australian Business Party	22
Australian Labor Party (NSW Branch)	413
Bob Thompson's Independent Team	9
Burwood Community Voice	4
Central Coast First	6
Christian Democratic Party (Fred Nile Group)	9
Clover Moore Independent Team	9
Community Development "Environment" Save Campbelltown Koalas	10
Community First Alliance	32
Country Labor Party	11
Eurobodalla First	13
Holroyd Independents	13
Kogarah Residents' Association	3
Liberal Party of Australia New South Wales Division	379
Liverpool Community Independents Team	10
Lorraine Wearne Independents	3
Manly Independents - Putting Residents First	6
No Parking Meters Party	6
Our Sustainable Future	10
Parramatta Better Local Government Party	6
Residents Action Group for Auburn Area	10
Residents First Woollahra	15
Roads and Services Action Party	5
Russell Matheson Community First Team	9
Save Our State	9
Save Tuggerah Lakes	10
Shire Watch Independents	15
Shire Wide Action Group	10
Shoalhaven Independents Group	18
Socialist Alliance	9
The Fishing Party	1

[247] Data provided by NSW Electoral Commission (copy on file with author).

The Greens	342
The Parramatta Independents	5
Totally Locally Committed Party	12
Unity Party	56
Wake Up Warringah	10
Woodville Independents	3
Yvonne Bellamy Independents	3
Total Candidates with Party Affiliation	**1537**

APPENDIX FOUR: NUMBER OF CURRENT COUNCILLORS WITH PARTY AFFILIATIONS[248]

Registered Political Party	No of Endorsed Councillors
Albury Citizens and Ratepayers Movement	1
Australian Labor Party (NSW Branch)	150
Bob Thompson"s Independent Team	1
Burwood Community Voice	1
Central Coast First	1
Christian Democratic Party (Fred Nile Group)	1
Clover Moore Independent Team	6
Community Development Environment Save Campbelltown Koalas	1
Community First Alliance	7
Country Labor Party	3
Eurobodalla First	3
Holroyd Independents	4
Liberal Party of Australia New South Wales Division	133
Liverpool Community Independents Team	2
Lorraine Wearne Independents	1
Manly Independents – Putting Residents First	3
No Parking Meters Party	1
Our Sustainable Future	2
Parramatta Better Local Government Party	1
Residents Action Group for Auburn Area	1
Residents First Woollahra	4
Roads and Services Action Party	1
Russell Matheson Community First Team	2
Shire Watch Independents	5
Shire Wide Action Group	1
Shoalhaven Independents Group	4
Shooters and Fishers Party	1
The Greens	72
Totally Locally Committed Party	1
Unity Party	4
Wake Up Warringah	4
Woodville Independents	1
Yvonne Bellamy Independents	1
Total	**424**

[248] Data provided by NSW Electoral Commission (copy on file with author).

APPENDIX FIVE: SPENDING LIMITS IN NEW ZEALAND LOCAL GOVERNMENT ELECTIONS

Population Size	Maximum Amount
0 – 4,999	$3,500
5,000 – 9,999	$7,000
10,000 – 19,999	$14,000
20,000 – 39,999	$20,000
40,000 – 59,999	$30,000
60,000 – 79,999	$40,000
80,000 – 99,999	$50,000
100,000 – 149,999	$55,000
150,000 – 249,999	$60,000

Source: *Local Electoral Act 2001* (NZ) s 111

APPENDIX SIX: SPENDING LIMITS IN CANADIAN LOCAL GOVERNMENT ELECTIONS[249]

Province	Calculation Method (Candidate)	Calculation Method (Party)
British Columbia	$70,000 in 60 days before campaign period[250] (indexed)[251] $70,000 during campaign[252] (indexed)	$1.1million in 60 days before campaign period[253] (indexed) $4.4million during campaign[254] (indexed)
Manitoba	See table below	E x $1.79[255] (indexed)[256]
Newfoundland and Labrador	E x $3.125[257] (indexed)[258] Never less than $12,000[259]	Aggregate of E in which have candidates x $3.125[260] (indexed) Never less than $12,000[261]
Northwest Territories	$30,000[262]	NA
Nova Scotia	See table below	Aggregate of E in which have candidates x $0.40[263] (indexed)[264]
Nunavut	$30,000[265]	NA
Ontario	E x $0.96[266] (indexed)[267] Maximum increases for certain northern electoral districts[268]	E x $0.60[269] (indexed)
Prince Edward Island	E x $1.75[270]	E x $6.00[271]

[249] In these tables and following footnotes: Consumer Price Index („CPI"); electors („E").

[250] *Election Act*, RSBC 1996, c 106, s 199(1)(a).

[251] The amount is adjusted according to the ratio between the CPI as it stood on 1 January, 2010 and the CPI 60 days before the election is called: ibid s 204(a).

[252] Ibid s 199(1)(b).

[253] Ibid s 198(1)(a).

[254] Ibid s 198(1)(b).

[255] *Election Finances Act*, SM 1987, c E32, s 50(1)(a).

[256] The amount is adjusted according to the percentage change between the CPI of June 2008 to the CPI of the second month immediately preceding the writs of election: ibid s 52.

[257] *Elections Act 1991*, SNL 1992, c E-3.1, s 310(2).

[258] The amount is adjusted each year on 1 January according to a complex formula: ibid s 311. Essentially, this involves taking the CPI of each month of the year, dividing by 12, and then rounding the sum up to the nearest 1/1000. This sum is then compared to the sum achieved using the same formula in the previous year, which results in the ratio by which the maximum amount is adjusted.

[259] Ibid s 310(3).

[260] Ibid s 310(1)(a).

[261] Ibid s 310(3).

[262] *Elections and Plebiscites Act*, SNWT 2006, c15, s 251(1).

[263] *Elections Act*, RSNS 1989, c 140, s 181(1).

[264] The amount is adjusted according to the ratio between the CPI of 1969 and the current annual CPI: ibid s 181(5).

[265] *Nunavut Elections Act*, SNu 2002, c 17, s 177(1).

[266] *Election Finances Act*, RSO 1990, c E.6, ss 38(3)-(3.1).

[267] The amount is adjusted every five years (beginning with period 2004-08) according to the ratio between the CPI as it stood in the last five-year period and the CPI of the current period: ibid s 40.1(1).

[268] The maximum is $7,000 per elector for the electoral districts of Algoma-Manitoulin, Kenora-Rainy River, Nickel Belt, Thunder Bay-Atikokan, Thunder Bay-Superior North, Timiskaming-Cochrane, and Timmins-James Bay: ibid ss 38(3.3)-(3.4).

[269] Ibid ss 38(1)-(2).

[270] *Election Expenses Act*, RSPEI 1988, c E-1.1, s 18(2).

[271] Ibid s 18(1).

Quebec	E x $1.00[272] (indexed)[273] Maximum increases for some electoral divisions[274]	E x $0.60[275]
Saskatchewan (Northern divisions)	Greater of either amount[276] (indexed):[277] A) $52,108; OR B) $5.21 x E	$673,783[278] (indexed) Note variation for elections other than general elections[279]
Saskatchewan (Southern divisions)	Greater of either amount[280] (indexed): A) 39,082 B) $2.60 x E	$673,783[281] (indexed) Note variation for elections other than general elections[282]

Manitoba[283]

Size of Electorate (Square miles)	Calculation
< 30,000	E x $2.72 (indexed)[284]
> 30,000	E x $4.33 (indexed)

Nova Scotia[285]

Population Size	Calculation
0 – 4,999	E x $1(indexed)[286]
5,000 – 9,999	E x $0.85 (indexed)
> 10,000	E x $0.75 (indexed)

[272] *Election Act*, RSQ 1991, c 64, s 426.

[273] The amount is adjusted on 1 April each year according to the ratio between the CPI as it stands on 1 April compared to the CPI at the same date the previous year: ibid.

[274] Increase of $0.25 per elector applies to electoral divisions of Duplessis, Rouyn-Noranda-Témiscamingue, Saguenay and Ungava – while for Ilesde-la-Madeleine, the maximum is increased by $0.70: ibid.

[275] Ibid.

[276] *The Election Act 1996*, SS 1996, c E-6.01, s 252(1)(a).

[277] The amount is adjusted each year according to the a ratio achieved by comparing the aggregate CPI of the current year with the CPI of the previous year. The sum is then rounded up to the nearest dollar: ibid s 221.

[278] Ibid s 243(1)(a).

[279] If the election is one other than a general election, the amount is changed to $39,082: ibid s 243(1)(b)(i).

[280] Ibid s 252(1)(b).

[281] Ibid s 243(1)(a).

[282] If the election is one other than a general election, the amount is changed to the greater of either: a) $32,567; or b) E x $2.60: ibid s 243(1)(b)(ii).

[283] *Election Finances Act*, SM 1987, c E32, s 51(1).

[284] See above n 256.

[285] *Elections Act*, RSNS 1989, c 140, s 181(3).

[286] See above n 264.