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INQUIRY INTO 2008 LOCAL GOVERNMENT ELECTIONS

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election funding authority

SUBMISSION TO THE JOINT STANDING COMMITTEE ON ELECTORAL MATTERS

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The Operation of the *Election Funding and Disclosures Act* 1981 in the Context of the 2008 Local Government Elections

Introduction

The Election Funding Authority of NSW welcomes the opportunity to make a submission to the Committee concerning the significant amendments made to the *Election Funding and Disclosures Act* 1981 ('the Act') shortly prior to the 2008 Local Government Election.

The Authority supports legislative measures that improve transparency and accountability in election funding and disclosure. However, the interrelationship between amendments introduced under the *Election Funding Amendment (Political Donations and Expenditure) Act* 2008 with the existing Act provisions has resulted in a disclosure regime that is complex and unclear. This has caused confusion and uncertainty for some stakeholders.

The Authority observes that the amendments go beyond bringing New South Wales into line with the proposals that were at the time – and remain - before the Commonwealth Parliament in the form of the *Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008 [2009].* Unlike the Commonwealth proposals, the New South Wales amendments are not confined to the introduction of bi-annual reporting periods and a uniform disclosure limit of $1,000. The amendments introduce changes to the appointment of 'official agents' and the management of campaign finances, with the result that in some instances it is unclear precisely who is liable for breaching the Act making it difficult for the Authority to administer the Act in a way that gives clarity and direction to stakeholders required to comply.

The complexity of the new disclosure legislation not only presents interpretive and administrative challenges for the Authority, but also clouds the obligations and responsibilities of individuals required to disclose. The commencement of the legislation some two months prior to the Local Government Election held on 13 September 2008 may have contributed to some stakeholder difficulties.

The Authority sets out the four most significant issues associated with the amended Act. In identifying these issues, the Authority draws on its experience since the amendments were introduced and observes that they are amongst some twenty (20) issues in total identified by the Authority to date and communicated to the Department of Premier and Cabinet ('DPC') in April 2009 (copy of table of issues attached).

The Authority would be pleased to provide the Joint Standing Committee with a proposal address the issues identified if and when requested to do so.

Brief overview of the principal amendments to the Act

The principal amendments to the Act may be summarised thus:

- An increase in the frequency of disclosures from once every four years to once every six months;

- The introduction of a uniform disclosure threshold of $1,000;

- The imposition of a disclosure obligation on local government councilors in their capacities as councilors;

- Alterations to the manner in which certain individuals assume office as 'official agents';

- The specification of a threshold amount of political donations below which an individual in receipt of those donations is deemed to be his or her own official agent; and

- A requirement on candidates and others to maintain bank accounts dedicated for campaign purposes in certain circumstances.

The issues associated with the amended Act

The Authority considers the following to be the four most significant issues associated with the amended Act

1. Difficulties in identifying persons capable of prosecution for failure to lodge disclosures

In the event that a candidate fails to appoint an official agent, the Authority's capacity to successfully prosecute that candidate for failure to disclose hinges upon its ability to prove that the candidate did *not* in fact accept in excess of a specified amount of money[1] as a political donation (proof of which establishes that the candidate is deemed to be his or her own official agent). It is very difficult in practice to prove matters of that kind in court.

The Act imposes responsibility for lodging disclosures not on those who directly participate in Local Government elections – but, rather, on the participants' respective 'official agents'. The official agents are responsible for managing political donations and electoral expenditure in the manner prescribed by the Act. The Act requires the official agents of candidates, groups and elected councillors to each maintain, in certain circumstances, a dedicated bank account (called a 'campaign account') into which all donations are to be deposited and out of which all expenditure is to be incurred. The official agents are liable not only for failure to lodge declarations by the due date, but also for failure to properly account for and manage donations and expenditure.

Having regard to Local Government elections only, the following outlines the manner in which official agents acquire office, depending upon individual circumstances:

[1] See detailed discussion later in this section on the $1,000 threshold amount.

- The official agents of Local Government candidates and groups are *appointed* by the respective candidates or groups;
- Candidates who fail to appoint an official agent, and provided that they have not accepted in excess of a specified amount of money as a political donation, are *deemed* to be their own official agents, as are the head candidates of groups who fail to appoint official agents; and
- Pursuant to a decision taken by the Authority on 13 February 2009, all elected councillors who for the time being are not also candidates, are *designated* to be their own official agents.

Subject to the matters discussed in (2) of the submission below, there are no legal barriers to the prosecution of official agents who hold office by way of appointment. That is because it is comparatively uncontroversial to identify appointed official agents. In the second half of 2008, approximately 90 official agents who failed to lodge declarations were appointed by candidates and groups at the Local Government Election.

However, some 400 of the Local Government candidates or head candidates who failed to lodge declarations for the second half of 2008 did *not* appoint official agents. The Authority's capacity to commence prosecution proceedings in these cases is contingent upon the operation of the s. 49 deeming provision. The deeming provision operates by force of the Act to deem individual candidates and head candidates to be their own official agents *subject to a threshold condition* specified in s. 96A(7) of the Act. In brief, the threshold condition is that the candidate has not accepted in excess of $1000 in political donations over the election period (as to the full complexity of the threshold condition, see the discussion under (4) of the submission below).

The threshold was introduced via the insertion of sub-section 1A into s. 49 as part of the amendments made to the Act in 2008. The result is that to establish that the deeming provision is engaged in a particular instance, it is necessary to prove that the candidate or group had *not* accepted in excess of $1000 in political donations over the election period.

The Authority is advised that it is particularly difficult in practice to prove beyond reasonable doubt that an individual has *not* received a specified amount of money. While the Authority is competent to issue notices under clause 32 of the *Election Funding and Disclosures Regulation* 2004 requiring candidates and others to supply any records of political donations made or received or electoral expenditure incurred, records of that kind may in a particular case be incomplete or inconclusive. An individual might simply not create full and accurate records as required under s. 96C of the Act and clauses 22-28 of the Regulation. Failure to supply full and accurate records would presumably be an inadequate basis for prosecuting the individual for failure to disclose in reliance on the deeming provision, as there is no obligation on an individual to accompany a response to a clause 32 request with an explanation as to precisely what any records indicate and what they do not indicate. In other words, the obligation to respond to a notice is discharged upon the supply of "records" alone. To obtain an explanation in connection with any records supplied (or the absence thereof), the Authority would have to engage the Act's resource-intensive inspection provisions. Conversely, an individual who *does* respond to a clause 32 notice by supplying records in his or her possession may well demonstrate that the deeming provision is *not* engaged in his or her case and that he or she is consequently immune from prosecution

for failure to disclose. That would be the case where the individual supplies records showing that he or she has in fact accepted at least $1000 in political donations. The anomalous result is that unless a candidate appoints an official agent, the candidate is immune from prosecution for failure to disclose; only candidates who accept comparatively insignificant donations are liable in that respect. With this in mind, a decision of the Authority to commence any prosecutions for failure to disclose might well bring the disclosure regime into disrepute.

An additional difficulty attends prosecuting a candidate for accepting donations without appointing an official agent or maintaining a campaign account. It would be necessary not merely to prove the relevant omission(s), but to prove that the candidate knew the omission(s) were unlawful in the circumstances. That is a consequence of the unusual wording of the Act's general offence provision (s. 96I), which presumably requires the prosecution to show that the individual charged had *actual* knowledge of the unlawfulness of his or her conduct, and not just constructive knowledge imputed, for example, from the contents of correspondence sent by the Authority to the individual. The 'knowledge' component of the general offence provision effectively confines prosecutions to instances in respect of which an admission has been made. Given that admissions are made very rarely (and may be inadmissible in the absence of a prior caution), it appears that the legislature wished to effectively foreclose the possibility of prosecuting individuals for offences other than those enumerated in s. 96H(1)(2), and (3) (namely, failure to lodge declarations, the making of a false statement in a declaration and misleading an official agent) except where it can be shown, beyond reasonable doubt, that the person knew and understood the law in the relevant respect and acted in defiance of it.

It therefore appears that, for practical purposes, the only charge to which the Authority could confidently consent is a charge for failure to respond to a clause 32 notice in the limited circumstances where the relevant individual fails to supply the receipt/acknowledgement book issued by the Authority. However, an individual who simply supplies a blank receipt/acknowledgement book would appear to have discharged his or her obligations under the notice. That is because an individual presumably has no obligation under clause 32 to supply "records" not in his or her possession (records that are not in his or her possession either because they were not retained or because they were never created), and nor does an individual have an obligation to give reasons for not supplying "records". And for precisely the same reasons, failure to respond in any manner to a clause 32 notice would not expose the individual to prosecution for failure to disclose in reliance on the deeming provision. Hence while failure to respond in any manner (including a failure to supply a receipt/acknowledgement book) would amount to evidence that the relevant individual had not complied with the clause 32 notice, the evidence would be of no use beyond a charge laid in respect of a failure to respond to the notice.

In February 2009, in an attempt to at least partially cure some of the difficulties identified above, the Authority considered exercising its power to *designate* certain individuals to be their own official agents. The Authority was then of the opinion that exercise of the designation power might, at least in some cases, overcome the obstacle to prosecution arising from the deeming provision discussed above (and it is also apparent that designation does not operate subject to any threshold condition). Hence the Authority considered designating the candidates who unsuccessfully contested the election held on 13 September 2008 and the candidates who were successful on that occasion and

who subsequently became elected councillors. However, the Authority subsequently obtained legal advice to the effect that there are two obstacles to this strategy. First, the designation power does not extend to *candidates*. That is because (a) – (f) inclusive of the s. 4 definition of 'official agent' operate to assign an official agent to *all* categories of candidate; hence the designation power, which is exercisable only in respect of "any other case", does not extend to any candidate (that advice is apparently notwithstanding the reference in (g) of the s. 4 definition to "the elected member or *candidate*"). And second, it is doubtful that the Authority has power to designate a person as his or her own official agent in February 2009 for the purposes of a disclosure period that was then concluded, as to do so could amount to a retrospective imposition of criminal liability (that is because the designation would have operated to impose the statutory obligations of an official agent on the person designated, without the consent of the person designated, after the conclusion of the period during which the person designated would have been obliged to discharge those statutory obligations). Hence the Authority decided to exercise the designation power *with prospective effect only* and in respect of all elected councillors who do not otherwise have official agents and who are not also candidates.

These interrelated difficulties impair the operation of the deeming provision, a provision that is crucial to the proper functioning of the penalty provisions of the Act.

2. Ambiguity in the term of office of official agents

The amended Act is unclear as to the precise time at which certain official agents cease to hold office, and hence whether those individuals are liable as official agents for failure to disclosure.

The initial policy consideration for 'official agents' appears to be that candidates, groups, elected councillors and political parties ought not to manage their own donations and expenditure where significant amounts of money are involved. The Act provides that donations and expenditure are instead to be managed by individuals either appointed by the candidate, group, elected councillor or political party or who hold office in accordance with the other procedures outlined above in (1). Once he or she assumes office, the official agent is responsible for depositing any political donations above the $1,000 threshold amount into a campaign account and for issuing receipts to donors. At the conclusion of the reporting period, the official agent is responsible for lodging a disclosure of donations received and expenditure incurred and including with the disclosure copies of receipts issued.

It is clear that an official agent ceases to hold office upon death, resignation or revocation by the individual responsible for the appointment. It is not clear, however, whether there are additional circumstances capable of terminating an official agent's term of office. The amended form of the Act retains provision for a non-continuous Register of Official Agents ('ROA'), into which the Authority must enter the names of the official agents. The ROA is non-continuous in so far as it expires the day before any subsequent general election, at which point a new ROA is created. Given that the non-continuity of the ROA is contrasted with a continuous Register of *Party* Agents ('RPA'), the Authority considers that the terms of office of the official agents whose names are recorded in the ROA expire upon the expiration of that register.

The immediate practical implication of this conclusion is that in the lead-up to a general election, the individuals who retain appointed official agents must be instructed to renew the appointment or to make a fresh one. Not only is the issuing of this kind of instruction administratively inconvenient both to candidates and to the Authority[2] (considering that the lead-up to an election is hardly the appropriate time to engage in the appointment of persons responsible for managing election finances), but it is likely to be met with a high degree of non-compliance. Many individuals will simply fail to renew the appointment. And in the event that a new appointment is in fact made and a prior official agent replaced, the original agent is presumably obliged to transfer to the new agent all necessary records and the control of any campaign account (even though the Act does not expressly so prescribe, which is a defect in itself).

It is also arguable that the term of office of an appointed official agent expires upon a change in the status of the principal (i.e. a change in the capacity in which the individual responsible for the appointment participates in an electoral event, such as an instance where a successful 'candidate' becomes an 'elected member'[3]). In the event that a candidate becomes an elected councillor at an election, the change in status corresponds with the expiration of the ROA and the consequential necessity to renew the appointment of any official agent; however, if a candidate is unsuccessful at the election, and ceases to be a 'candidate' 30 days after the poll pursuant to s. 84(3) (see the discussion in (3) below), it is unclear whether the official agent retains office until the conclusion of the disclosure period. And if the agent does retain office until that time, it is unclear whether the official agent retains office until the conclusion of the eight-week period within which the declaration must be lodged. These ambiguities obscure the identities of the individuals required to lodge a disclosure and, if necessary, to make any necessary amendments to a disclosure.

However, it *is* clear that the terms of s. 46 prevent an individual who is not a 'candidate' from either revoking the appointment of an official agent or appointing another. Similarly, given the terms of s. 49, an individual who is not a 'candidate' is ineligible to be deemed to be his or her own official agent (i.e. an elected member or an elected member who has since resigned).

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

The amended Act's lack of clarity with respect to the definition of 'candidate' obscures the scope of persons competent to appoint, and revoke the appointment of, official agents.

The Act employs three definitions of 'candidate', each applicable in different circumstances and for different purposes:

- s. 4: "candidate, in relation to an election, means a person nominated as a candidate at the election ... and includes a person ... registered as ... a candidate";

[2] The Authority did not issue this instruction prior to the 2008 Local Government Election because it was not certain that it had to.

[3] Which is the term used in the Act to refer to an elected councillor.

- s. 84(2): a candidate is a person who accepts political donations; and

- s. 84(3): a person nominated as a candidate ... remains a candidate until 30 days after polling day.

- Under s. 46 of the Act, the categories of persons empowered to appoint and revoke the appointment of official agents are limited to *candidates* and *groups*. As discussed in (2) above, this competency limitation may pose difficulties where a change occurs (between or within disclosure periods) to the status of the individual responsible for appointing the official agent.

Given that the latter two definitions of 'candidate' (above) are restricted in terms to Part 6 of the Act (and hence do not in terms apply to Part 4 of the Act, which provides for the appointment and revocation of official agents), it appears that only a 's. 4 candidate' is competent to appoint and revoke the appointment of an official agent. In other words, only a person nominated at, or registered for, an election is competent to appoint and revoke the appointment of an official agent.

In the event that an individual becomes a 'candidate' under s. 84(2) as a consequence of accepting political donations – and who for that reason assumes an obligation to register as a (s. 4) 'candidate' under s. 96A(2) – at what point does his or her 'candidacy' end? Does candidacy end:

(a) once the Register of Candidates expires;

(b) at the conclusion of whatever election for which monies were originally raised; or

(c) at whatever election monies are in fact expended?

Even if it is argued that an individual retains, for the duration of a particular disclosure period, competence to appoint and revoke an official agent simply by virtue of having been a 'candidate' at some point within that period it remains unclear whether the individual's 'candidacy' continues up until the last date for lodging a declaration (or even beyond that date in the event that an extension is granted).

4. Confusion resulting from the complexity of the threshold condition that triggers an obligation to open a campaign account and appoint an official agent

The requirement to maintain a campaign account and appoint an official agent arises once the $1,000 threshold amount in political donations is accepted and/or electoral expenditure is incurred. However, the precise wording of the provisions that prescribe the threshold amount is so complex and ambiguous that it is difficult for its meaning to be accurately conveyed.

Subject to receiving political donations/ incurring electoral expenditure in excess of the threshold amount, the Act requires candidates, groups and elected councillors to maintain separate[4] 'campaign accounts'.. The threshold amount (or 'condition') was simplified in (1) above in the following terms: that the candidate (or relevant

[4] A joint campaign account can be maintained in certain circumstances where there is a joint official agent.

individual/entity) has not accepted in excess of $1000 in political donations over the election period. However, the threshold condition is in fact much more complex.

The threshold condition is expressed in s. 96A(7) as an exemption and is situated within a broader provision that imposes a general requirement to maintain a campaign account. The threshold condition has two limbs, namely:

(a) the political donations are not reportable political donations and the total amount of those donations for the election period does not exceed $1,000; or

(b) the political donations are not reportable political donations and the total amount of electoral expenditure for the election period does not exceed $1,000.

(And there is a third limb, not relevant here).

A superficial reading of the threshold condition might suggest that an individual who either receives more than $1000 in political donations or who incurs more than $1000 in electoral expenditure must maintain a campaign account. A conclusion to that effect might well be in accordance with a sensible policy as to the conditions under which individuals *ought* to be required to maintain campaign accounts. However, a closer reading of the section reveals:

1) that the two limbs are separated by a disjunctive 'or' (the result being that an individual need satisfy only one, and not necessarily both, to attract the exemption);

2) that each limb contains two sub-limbs joined by a conjunctive 'and' (the result being that an individual must satisfy both sub-limbs to satisfy the respective limb); and

3) that it is unclear whether there is a sequential relationship between the concepts referred to in the sub-limbs comprising limb (b): in other words, it is unclear whether the electoral expenditure refers to expenditure of 'reportable political donations' only.

Putting aside the lack of clarity outlined in (3), it appears that an individual or entity in fact attracts the exemption where:

- He/she/it does not receive any 'reportable political donations' (i.e. donations equalling or exceeding $1000 aggregated over a financial year if sourced from the one donor) *and* he/she/it does not also receive in excess of $1000 in total donations over the election period (i.e. $1000 aggregated over a different period – the *election period* - and *irrespective of the identity of the donor(s)*).

  Or

- He/she/it does not receive any 'reportable political donations' (i.e. donations equalling or exceeding $1000 aggregated over a financial year if sourced from the one donor) *and* his/her/its expenditure does not exceed $1000.

The Authority observes that an individual or entity is able to attract the exemption on the basis of (a) despite having incurred in excess of $1000 in electoral expenditure. Hence a candidate could spend $50,000 without opening a campaign account (or, indeed, appointing an official agent: see brief discussion below). That is not an absurd result if the object of the Act is to account for the use by candidates of money derived *from other people*. Whether the legislature in fact intended this result is, of course, another matter.

Additional and unnecessary complication also results from the combination of the concept of 'reportable political donation' in limbs (a) and (b) with, in the case of (a), 'donations ... [that do] not exceed $1,000', and in the case of (b), 'expenditure ... [that] does not exceed $1,000'. In the case of (a), receipt of exactly $1,000 might disqualify someone from satisfying the first sub-limb but not the second sub-limb (depending upon the timing and source(s) of the donation(s)).

As the s. 49 deeming provision applies only to those exempt from maintaining a campaign account, the complexity in the operation of the threshold condition reverberates through to the requirement of a group or candidate to have an appointed official agent – (and a member, group or candidate to have a campaign account) as a precondition to receiving donations, a requirement which is *not* subject to an exemption.

Conclusion

The recent level of non-compliance with the Act is at least in part explained by the Act's complexity in terms of legal interpretation and accessibility. For the first six-monthly disclosure period concluded on 31 December 2008, 360 Local Government candidates who had not appointed an official agent failed to lodge a declaration by the due date, as had 44 groups and 36 retired councillors. In the limited circumstances where enforcement action is possible, the level of resources required by the Authority and the Crown Solicitor's Office to take enforcement action (including prosecution) is considerable and disproportionate to the comparative seriousness of the relevant offences.

For the foregoing reasons, it is the view of the Authority that the amended Act is in need of considered and comprehensive revision.

THE *ELECTION FUNDING AND DISCLOSURES ACT* 1981
- ISSUES

EF&D Act	CURRENT PROVISIONS
1 Reliance on the deeming provision to prosecute persons for failure to disclose	
ss. 4, 49, 96A and the Election Funding and Disclosures Regulation 2004	Successful prosecution of a Local Government candidate for failure to disclose, where the candidate has not appointed an official agent, hinges upon the operation of the deeming provision provided for in s. 49(1). However, the deeming provision applies only to candidates who had not reached the donations/expenditure threshold specified in s. 96A(7) at the relevant time, and consequently, the provision is not engaged without affirmative proof by the prosecution that the candidate had *not* in fact reached the threshold. The Crown Solicitor has advised that it is particularly difficult in practice to prove beyond reasonable doubt matters of negative financial fact. To assist in proving the engagement of the deeming provision, the Authority is competent to issue notices under clause 32 of the Regulation requiring a candidate to lodge records of political donations made or received or electoral expenditure incurred. However, records lodged in response to a clause 32 notice might not cover the entirety of the relevant period (as there is no obligation to keep records for more than three years), and in any event would not necessarily be conclusive as to what they prove or do not prove. While failure to respond to a clause 32 notice in as offence in itself, it remains unclear precisely what would have to be shown to sustain a charge under that clause: presumably, the prosecution would have to prove that records existed and were not produced. A candidate who remains silent as to whether or not he or she reached the threshold at the relevant time will *not* thereby incriminate him or herself in respect of some other offence, such as failure to appoint an official agent when required to so. Prosecution for failure to appoint an official agent is subject to the requirement in s. 96I to prove that the accused *knew* that the relevant conduct was unlawful (a requirement which appears to contemplate *actual* knowledge of illegality, and not mere constructive knowledge imputed e.g. from the Authority's provision of literature to the accused). In any event, the two offences – failure of a deemed official agent to disclose, and failure to appoint an official agent when required to do so – cannot be charged in the alternative because the prima facie evidence required to support an element of the latter (namely, that the threshold *had* been reached) would undermine the evidentiary foundation for the corresponding element

	of the former The deeming provision also applies to independent candidates for State Parliament.
2 The scope of the deeming provision	
s. 49	Where a candidate or group fails to appoint an official agent, the candidate or head candidate within the group (as applicable) is deemed to be the official agent subject to the candidate or group not reaching or exceeding the donations/expenditure threshold. However, the provision does not operate in respect of persons whose only status is that of elected member (or, indeed, *former* elected member). This is an apparent oversight that mirrors the incompetence of elected members to appoint or revoke the appointment of official agents.
3 Persons competent to appoint and revoke the appointment of official agents	
ss. 46 and 4	The categories of persons empowered to appoint and revoke the appointment of official agents are limited to *candidates* and *groups*. This limitation may result in difficulty where a change occurs in the status of the 'principal' (i.e. the person on behalf of whom an official agent holds office) between or within disclosure periods. For example, it appears that a candidate who becomes a Local Government Councillor cannot revoke the appointment of his or her official agent and is required to retain the official agent he or she appointed at the time he or she was a candidate. Similarly, an elected member who unsuccessfully recontests an election (or resigns from office mid-term) may not satisfy the definition(s) of 'candidate' at the time a declaration for the relevant disclosure period is due, and will therefore be incompetent to appoint a fresh official agent at that time should it become necessary to do so. The precise nature of the difficulty here is dependent upon whether or not the term of office of an official agent survives the expiration of the Register of Official Agents and/or a change in the status of the principal (see discussion in (5)). Even if an agent's term of office does *not* survive either of those events, a candidate who becomes an elected member will be incompetent to appoint a fresh official agent if and when required.

ss. 4, 84(2) and 84(3)	The precise scope of the class of persons who satisfy the definition(s) of 'candidate' is relevant to an identification of those competent to appoint and revoke the appointment of an official agent. The Act employs several definitions of 'candidate' - found in ss. 4, 84(2) and 84(3) - each of which is applicable in different circumstances and for different purposes. Given that neither the s. 84(2) definition (a candidate is a person who accepts political donations) nor the s. 84(3) definition (a person remains a candidate until 30 days after polling day) *in terms* apply to Part 4 (which provides for the appointment and revocation of official agents), it is at least arguable that only the s. 4 definition bears upon the operation of that Part. The s. 4 definition provides: "candidate, in relation to an election, means a person nominated as a candidate at the election ... and includes a person ... registered as ... a candidate". It is nevertheless unclear whether the section 4 definition is restricted in scope by the phrase "at an election", and hence whether an individual is incapable of being a candidate by force of s. 4 at a time otherwise than "at an election". If an individual is incompetent to appoint a fresh official agent once his or her status as a 'candidate' has lapsed, it would not be possible to identify an official agent responsible for lodging a declaration by the due date. If an individual becomes a 'candidate' by force of S. 84(2) as a consequence of accepting political donations – and who for that reason assumes an obligation to register as a (s. 4) 'candidate' under s. 96A(2) - when does his or her 'candidacy' end? Upon the expiration of the Register of Candidates? At whichever election for which the funds were originally raised? Or at whichever election the funds are in fact expended? Even if it is argued that an individual's 'candidacy' at any point within a disclosure period establishes and preserves, for the entirety of that disclosure period, the individual's status as a 'candidate' for the (Part 4) purposes of revoking and appointing an official agent as required, it is still necessary to determine whether the provisions ought to be interpreted so that candidacy continues up until the last date for lodgement of a declaration (and even beyond that date if an extension is granted).
4 The mechanism for the appointment of group official agents	
s. 46	A group may appoint and revoke the appointment of an official agent for the group. However, the Act does not prescribe any method by which an appointment is effected. It is unclear whether appointment is made by unanimous vote of all members of the group, by majority vote or by the 'head' candidate.

5 The term of office of official agents	
ss. 46, 44 and 47.	In consultation with the Department of Premier and Cabinet, the Authority has until very recently operated under two assumptions: 1) that the term of office of an official agent can carry-over from one election period to the next without a fresh appointment; and 2) that the term of office of an official agent is *not* contingent upon the recording of the name of the official agent in the Register of Official Agents ('ROA'), notwithstanding the Authority's statutory obligation under s. 47 to register an official agent upon receipt of a notice of appointment. The implication of these assumptions is that an official agent holds office until death, resignation or revocation. However, the Authority now has preliminary (verbal) advice from the Crown Solicitor to the effect that the term of office of an official agent expires upon the expiration of the ROA, which occurs the day before a given general election. According to the Crown Solicitor, that is a consequence of the express discontinuity of the ROA in contrast with the continuity of the Register of *Party* Agents. The Crown Solicitor has also advised that the term of office of an official agent expires upon a change in the principal's status. If these interpretations be correct, the term of office of an official agent extends from the time the Authority receives a notice of appointment until the death, resignation or revocation of the agent, or until the day before the next general election, or until a change in the principal's status (whichever occurs first), unless the agent is lawfully re-appointed for a fresh term.
s. 51	There does not appear to be any provision for the expiration of an ROA kept for a by-election.
6 The power of the Authority to designate persons as official agents	
s. 4	The Authority has recently attempted to at least temporarily resolve the incapacity of elected members to appoint official agents by exercising its implied power under the definition of 'official agent' in s. 4 of the Act to *designate* certain elected members to be their own official agents. The terms of the designation also permit elected members to nominate other persons as their official agents, whereupon the designation operates in respect of the persons so nominated. The Authority is aware of four limitations associated with the exercise of the designation power:

	1. It has no retrospective effect The Crown Solicitor has advised that a purported designation by the Authority of an elected member as his or her own official agent, for the purposes of establishing an obligation to lodge a declaration for a disclosure period concluded at the time of the designation, would amount to a retrospective imposition of criminal liability and would for that reason be inoperative without specific statutory authorisation. Hence the Authority has only exercised the designation power in respect of all Local Government members and independent members of State Parliament for the purposes of the current and future disclosure periods. In other words, it will not be able to rely on designation as a means for identifying official agents in respect of e.g. Local Government members for the disclosure period 1 July 2008 to 31 December 2008. 2. It does not extend to candidates The Crown Solicitor has advised that the designation power does not extend to the designation of 'candidates'. The Authority is therefore incompetent to designate e.g. a candidate in one of the up-coming by-elections as his or own official agent where the candidate has failed to appoint one, even if it does so *prospectively* upon receipt of an application by the individual to register for the by-election. While *successful* candidates at the by-elections in March 2009 will become elected members and hence subject to the designation, the *unsuccessful* candidates will remain outside the scope of the designation; hence it will not be possible to take action against anyone **for failure to disclose** in respect of any of the unsuccessful candidates who fail to appoint an official agent. Notwithstanding the advice we have received from the Crown Solicitor in this respect, it remains unclear precisely who satisfies the definition of 'candidate' for the purposes of an individual's ineligibility to be subject to a designation. Is a person who is a 'candidate' pursuant to s. 84(2) – and not a candidate by force of any other provision - a 'candidate' for the purposes of designation? Arguably, a person who is *not* a candidate for the purposes of the s. 4 definition of 'candidate' remains outside the terms of the designation by virtue of the fact that the designation power arises out of the terms of the s. 4 definition. 3. Ambiguity in the relationship between a purported designation and a prior appointment It is unclear whether a purported designation by the Authority overrides an appointment of an official agent made by a principal when he or she was a candidate. This issue is relevant if an assumption is made that the

	term of office of an appointed official agent prima facie survives a change in the principal's status from candidate to elected member, a view which was (as discussed above in (5)) until very recently favoured by the Authority but now controverted by the Crown Solicitor. Undoubtedly, anyone prosecuted as an official agent would wish to challenge the veracity of his or her appointment, designation or continuance in office. 4. It operates 'behind closed doors' The designation power is less than ideal in so far as the persons subject to it are not readily identifiable on the face of the legislation. One means by which persons are normally able to identify whether or not they are subject to an obligation that arises by virtue of being an official agent is registration in the ROA: however, the Act does not oblige or empower the Authority to register any *designated* official agents. The result is that designation imposes liability for a criminal offence on the basis of an executive decision - albeit one formally recorded - taken in closed session of the Authority. The comparative opacity surrounding designation is compounded by the ambulatory nature of the class of persons subject to it (a class that expands and contracts as people enter and leave it).
7 The definition of 'official agent'	
s. 4	The opinion of the Crown Solicitor (as discussed above in (6)) to the effect that the designation power does not extend to 'candidates' derives from the view that sub-parts (g) and (f) of the s. 4 definition of 'official agent' combine to exclude *all* 'candidates' from the scope of the designation power. However, the Authority observes that that conclusion is despite the inclusion of the word 'candidate' in sub-part (g); hence the s. 4 definition of 'official agent' is unclear with respect to its impact upon the scope of the designation power.
8 The scope of disclosure and other obligations in the light of changing and/or multiple capacities	
s. 94	With respect to some individuals in particular, it is unclear how many declarations must be lodged for each disclosure period. While s. 94 provides that an item disclosed in a person's capacity as an elected member need not also be disclosed in the person's capacity as a candidate (and vice versa), it is unclear whether a successful candidate who becomes an elected member is obliged to lodge a total of *two* declarations covering both his or her sequential capacities.

The Act	The Act does not clearly specify whether or not the several capacities (or statuses) that an individual might have are sequential or coterminous. For example, it is unclear whether becoming an elected member precludes an individual from assuming the status of 'candidate' at the same time by force of s. 84(2) (i.e. as a consequence of receiving political donations). Arguably, the use of the word 'individual' in s. 84(2) contemplates an elected member becoming a 'candidate' as a consequence of receiving political donations, and hence imposes an obligation on the elected member as a *candidate* under s. 96A(2) to register as a candidate. That is despite the fact that s. 96A(1) does *not* require an elected member to register as a candidate as a precondition to accepting political donations. As a matter of policy, the Authority observes that it is likely the extended definition of 'candidate' in s. 84(2) is intended to only encompass persons who are not elected members and who for that reason lack a disclosure obligation; however, the apparent application of s. 84(2) to elected members appears to beneficially impact upon the operation of the official agency provisions of the Act, by - at least arguably, given the qualification in s. 84(2) "for the purposes of this Part" - conferring on elected members the capacity to appoint and revoke official agents.
9 The disclosure of small donations that become reportable by aggregation	
ss. 86(1) and (2), and 92(3)	The Act requires disclosure of 'reportable political donations', defined as political donations of or exceeding $1000. The Act provides for the aggregation of two or more political donations of less than $1000 if they are made by the same entity to the same recipient within one financial year. In the event that a recipient of an aggregated reportable political donation has already declared one or more 'small donations' constituting that aggregate total, it is unclear whether the recipient must again disclose each and every component part of the aggregate total.
10 The scope of the 'relevant disclosure period' for a candidate	
s. 89	This section sets out the basic six-month disclosure periods for which disclosures must be lodged. It also stipulates a 'first relevant disclosure period' applicable to *candidates* only, and does so by reference to the relevant individuals' political history. There is scope for confusion in the section's utilisation of the phrase 'the first relevant disclosure period', which is the same as the phrase used in the transitional provisions contained in Schedule 2, Part 5, s. 17. It is unclear whether s. 89(2) is an-ongoing provision designed to catch

	first-time candidates at every future election and by-election, or merely a transitional provision designed to 'sunset' at a specified point in time.
11 The scope of 'electoral expenditure' that must be disclosed	
ss. 88(1) and (2), 87, 93 and 86	There is no express obligation on a party, elected member, group or candidate to disclose political donations *made*. Thus a candidate who makes a political payment to the group of which he or she is a member is under no express obligation to disclose it, unless the payment is somehow subsumed under the rubric of 'electoral expenditure incurred'. The general definition of 'electoral expenditure' in s. 93 is expressed to encompass all expenditure incurred in connection with a State or Local Government election, and is complemented by the items of electoral expenditure listed in s. 87. While the list in s. 87 does not include 'political donations made', it appears that the list is not exhaustive (a view supported by the general terms of s. 93). The list also makes reference under part (i) to "expenditure classified as electoral expenditure by the Authority". The Authority has published in its *Funding and Disclosure Guide* a remark to the effect that 'electoral expenditure' includes a donation made by a candidate to the group of which he or she is a member. However, it is clearly unsatisfactory for a disclosure obligation to rest upon either the arguable open-endedness of the definition of 'electoral expenditure' or upon remarks published by the Authority in a guide.
12 Exemptions with respect to the maintenance of a campaign account and/or an official agent	
s. 96A	The Act requires an elected member, group or candidate to maintain a 'campaign account' kept in accordance with s. 96B as a precondition to receiving donations and incurring expenditure. An exemption from this requirement is attracted where the relevant person fails to reach a specified threshold in respect of donations received and/or expenditure incurred. The problem identified by the Authority concerns the complexity in the threshold(s) on the basis of which the exemption is attracted, as set out in s. 96A(7)(a): it is difficult (bordering on impossible) to explain to people precisely under what conditions the exemption is attracted. The exemption has two limbs, namely: (a) the political donations are not reportable political donations and the total amount of those donations for the election period does not exceed $1,000; or

	(b) the political donations are not reportable political donations and the total amount of electoral expenditure for the election period does not exceed $1,000. (There is a third limb, not relevant here). It is plain from the employment of the word 'or' between the two limbs that the limbs are *disjunctive*: one need only satisfy one of the two (and not necessarily both) to attract the exemption. It is also plain that both limbs contain two *conjunctive* elements, *both* of which must be satisfied as relevant. Thus a candidate would attract the exemption where: • He or she does not receive any 'reportable political donations' (i.e. donations equalling or exceeding $1000 aggregated over a financial year if sourced from the one donor) *and* he or she does not also receive in excess of $1000 in total donations over the election period (i.e. $1000 aggregated over a different period – the *election period* - and *irrespective of the identity of the donor(s)*). **Or** • His or her expenditure does not exceed $1000 *and* he or she does not also receive any 'reportable political donations' (i.e. donations equalling or exceeding $1000 aggregated over a financial year if sourced from the one donor). Reliance on (a) to attract the exemption is not precluded by expenditure incurred in excess of $1000: e.g. a candidate could spend $100,000 without opening a campaign account (or appointing an official agent: see box immediately below). That result is not an absurdity if one considers that the object of the Act is to account for the use by candidates of *other people's money* only; however, it may not reflect the policy intention underlying the Act. The relationship between the two elements in (b) is unclear. Does 'electoral expenditure' here refer only to expenditure *of the donations received*? In limbs (a) and (b), the concept of 'reportable political donation' is combined with, in the case of (a), 'donations … [that do] not exceed $1,000', and in the case of (b), 'expenditure … [that] does not exceed $1,000'. In the case of (a), receipt of exactly $1,000 might disqualify someone from satisfying the first sub-limb but not the second (depending upon the timing and source(s) of the donation(s)).

s. 49	As the deeming provision applies only to those exempt from maintaining a campaign account, the problems associated with the complexity in the threshold reverberate through to the requirement of an elected member, group or candidate to have an official agent - i.e. appointed, *ex officio*, deemed or designated - as a precondition to receiving donations (a requirement which is *not* subject to an exemption).
13 Disbursement of surplus funds in campaign accounts	
s. 96B	The section provides that surplus funds in a campaign account are to be disbursed to a party of which the relevant individual was a 'member' (and by which the individual was not necessarily endorsed). In the case of an individual who was a member of, but not endorsed by, a party, it is possible that the provision could frustrate the wishes of a donor by affecting the disbursement of surplus donations to the party. The Authority notes that the matter appears capable of satisfactory resolution by way of the regulation making power under s. 96B(7).
s. 96B	The section does not appear to contemplate the distribution of surplus funds in a group campaign account to the candidates who comprised it where the candidates do not have their own campaign accounts. It is unclear whether in that situation any surplus funds would be distributed to a party of which the candidates were 'members' (endorsed or otherwise), to the members of the group, despite the fact that they lack their own campaign accounts (a result that would not contravene 96A(7) if the donations were below the threshold), or to a charity nominated by the members of the group. If it is the final alternative, the Act does not appear to specify a mechanism in accordance with which the members of the group could nominate a charity (mirroring the defect identified in (4)).
s. 96B	The Act is silent as to whether campaign accounts must be *closed* at any particular point in time.
s. 96B	The lack of a precise and comparatively restrictive definition of 'charity' may open the possibility that individuals establish their own 'charities' purely for the purpose of syphoning distributions.

s. 96B(5)	The sub-section does not appear to permit a candidate or group to return an unwanted political donation.
14 The making of joint donations	
ss. 86, 92(3) and 96D	The Act does not contemplate the making and disclosure of joint political donations. In the event that a donation is made jointly by two natural persons (perhaps out of a joint bank account), there is no provision for the aggregation of that donation (or part thereof) with any subsequent donation made by one of the individuals comprising the joint donors.
15 Extension of due date for lodgement	
ss. 96L and 106	Section 96L(3) imposes an eight-week limit on the extension the Authority may grant "under this section" for the lodgement of a declaration. However, no consequential amendment has been made to s. 106, which still provides that "The Authority may … extend the time for doing anything under this Act … notwithstanding any other provision of this Act, and whether or not the time for doing the thing under any such provision has expired".
16 Breach of the Act for failure to register as a candidate	
ss. 4, 84(2), 31, 96A(2) and 96B(6)	It is unclear whether an individual who retains surplus political donations in a campaign account for the purposes of a future election is under an obligation to register as a s. 4 candidate once a new register is created.
17 Conflation of party 'membership' and party 'endorsement'	
s. 4	The s. 4 definition of 'official agent' assigns the Party Agent of a party to State MPs and State candidates who are 'members' of the party. Hence a State candidate who is a member of, *but not endorsed by*, a party is required to have the party agent as his or her official agent.

18 Discrepancy between due dates	
ss. 74, 76, 88, 91 and clause 6 of the Regulation.	Claims for public funding for a state election campaign must be lodged before the expiration of 120 days after the day for the return of the writs. Claims must be "vouched for in the prescribed manner", which entails, by virtue of clause 6 of the Regulation, attaching a Part 6 declaration to the claim. In the event that an election is held at the beginning of a six-month disclosure period, a claim for public funding would have to be lodged before the Part 6 declaration is capable of being lodged.
19 Discrepancies in threshold amounts of money	
ss. 86(1), 96A (7) and 96E(3).	The amount of $1000 is employed frequently throughout the Act as a threshold upon which certain benefits and obligations hinge. However, at times the Act specifies "$1000 or more" and at others "in excess of $1000". The distinction is idiosyncratic and compounds the confusion in certain provisions of the Act. For example, s. 86 defines 'reportable political donation' with reference to an amount "of or exceeding $1000", while s. 96A requires the establishment of a campaign account with reference to an amount that "does not exceed $1000".