Submission No 24

ADMINISTRATION OF THE 2023 NSW STATE ELECTION AND OTHER MATTERS

Organisation: NSW Electoral Commission

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NSW Electoral Commission

Submission to the Joint Standing Committee on Electoral Matters inquiry

The Hon. Peter Primrose, MLC
Chair, Joint Standing Committee on Electoral Matters
Parliament of New South Wales
Macquarie Street
Sydney NSW 2000

21 February 2024

Dear Chair,

Administration of the 2023 NSW State election and other matters

We make the attached submission on behalf of Electoral Commissioner for New South Wales and the NSW Electoral Commission to the Joint Standing Committee on Electoral Matters Inquiry into the Administration of the 2023 NSW State election and other matters.

Thank you for the opportunity to make a submission to the Inquiry.

We are available to answer any further questions you have in relation to the administration of the 2023 NSW State election and other matters.

Yours sincerely

[redacted]

John Schmidt
Electoral Commissioner for NSW

[redacted]

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Chair, NSW Electoral Commission

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NSW Electoral Commission

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Scope of this submission

1. Under section 271 of the *Electoral Act 2017* (**Electoral Act**), the Electoral Commissioner for New South Wales (**Electoral Commissioner**) must conduct a review of the administration of each general election and provide a report on the outcome of that review to the Minister (**the Election Report**).

2. The Election Report for the 2023 NSW state election was provided to the Minister and tabled in the Legislative Council on 21 November 2023.

3. The three-member NSW Electoral Commission also submitted a report under section 154(3) of the *Electoral Funding Act 2018* (**Electoral Funding Act**) which provided an overview of the activities relating to electoral funding and the regulation of the 2023 NSW state election (the **Funding and Regulation Report**), which is available on the Parliamentary website. The Funding and Regulation Report was also tabled in the Legislative Council on 21 November 2023.

4. The proposals for legislative and process reform contained in the Funding and Regulation Report and the Election Report may be considered part of this submission of the Electoral Commission. These proposals are summarised below for the convenience of the Committee. In addition, two other proposals are submitted that were not mentioned in either report, relating to the registration of parties.

5. The remainder of this submission addresses the specific Terms of Reference concerning:
    a. The scope of regulation of political donations by property developers
    b. The regulation of truth in political advertising

6. The Electoral Commission and Electoral Commissioner appreciate the opportunity to make this submission to the inquiry. In this submission, "Electoral Commission" is used generally for ease of reading.

Part A Summary of proposals for legislative reform

7. The Electoral Commissioner put forward 13 proposals for legislative reform arising from matters that relate to the 25 March 2023 NSW state election on pages 16 to 21 of the Election Report. The Chair of the Electoral Commission also put forward 6 proposals for legislative reform on pages 14 to 16 of the Funding and Regulation Report on the public funding and regulation of the 2023 state election. The Electoral Commissioner's and Electoral Commission's legislative reform proposals are summarised below. Two additional proposals for consideration are also included, relating to party registration.

Election Report proposals

8. A number of potential improvements to electoral practice requiring legislative amendment have been identified in the course of the State election in March 2023. These proposals for change are summarised below with more detail provided in the Election Report.

    a. *To expand overseas voting options* - Remove the requirements for eligibility to be appointed as an election official to allow the Electoral Commissioner to appoint a person who is not an Australian citizen as an election official (p.16)

    b. *To support elector privacy* - Candidates should only be entitled to request a list of electors no later than 48 hours before the close of voting, to ensure the enrolment information is used for election-related purposes only (p.16).

    c. *To support elector privacy and election integrity* - Consideration should be given to whether the practice of distribution of postal vote applications by political participants should continue, having regard to both privacy and the potential for electors to be disenfranchised due to administrative issues relating to political participants and their offices resulting in applications not being received by the cut-off date (p.17).

    d. *To enable printing of postal votes* - The modifications to postal voting (with regards to specific printing requirements) in Schedule 8 of the Electoral Act, which applied for the 2023 State election and apply to by-elections conducted up to the 2027 State general election, should be made permanent in order to ensure ongoing postal fulfillment (p.18).

    e. *To support the inclusion of more overseas postal votes in the count* - Allow postal votes to be received by an election official located overseas by a prescribed date and time and for the forwarding of such postal votes to the Commission by courier (p.18).

    f. *To improve counting timelines* - Authorise additional processing of ballot papers from early voting centres and postal ballot papers prior to the close of voting on election day on a trial basis for the 2027 State election in districts determined by the Electoral Commissioner, to better manage counting timelines in the context of increased postal voting (p.18).

    g. *To support telephone voting* - The availability of technology assisted voting should continue to be limited by legislation to telephone voting for electors who are blind or have low vision for all by-elections conducted up to the 2027 State general election, to allow sufficient time for any new technology assisted voting solution to be identified, developed and appropriately tested before wider application is considered (p.19).

h. *To simplify provision of overseas voting* – Absent early attendance declaration voting should be considered for all districts at all voting centres appointed outside of Australia by the Electoral Commissioner (p.19).

i. *To simplify provision of interstate voting* - Similar provisions to those that applied to overseas voting, should be adopted for interstate voting at future elections (p.19).

j. *To maintain safety at and around voting centres* - Legislation should be amended to expressly provide for directions to be issued by an election official to maintain safety at any place where voting is occurring, to remove ambiguity about whether directions to maintain "order" extend to circumstances where there is no violence or verbal abuse from supporters or election participants (p.19).

k. *To mitigate growing risks to the physical safety and wellbeing of election officials* - Consideration should be given to prohibiting a person from filming or photographing an election official in the course of their duties, and any other supportive measures that may be appropriate including prohibitions on serious harassment (p.20).

l. *To protect the security of enrolment information* - The legislation should be amended to allow the Electoral Commission to prepare and provide statistical data to eligible political participants allowing them to identify voting trends and behaviours, without disclosing the personal information of individual electors (p.21).

m. *To prepare for and respond to major disruptions* – The legislation should be amended to clarify how the Electoral Commissioner is to conduct an election in the face of major disruptions to an election event, especially where the disruption may lead to a failure of the election (p.21).

Funding and Regulation Report proposals

9. The Electoral Commission also identified gaps in NSW electoral funding and enforcement-related legislation during the 2023 NSW state election. It highlighted six key proposals for legislative reform, which are summarised below with more detail provided in the Funding and Regulation Report:

    a. *To protect election officials and election integrity* - Consideration should be given to expanding the offence of hindering or obstructing an election official to prohibit a person from filming or photographing an election official in the course of their duties, and other measures, to facilitate a safe working environment for election officials and to support election integrity (this is detailed on p.14 of the Funding and Regulation Report and is related to the Electoral Commissioner's proposals 6, 10 and 11).

    b. *To align rules for campaigning during early voting with election day* - Consideration should be given to amending the Electoral Act to require material distributed during the early voting period to be registered by the Electoral Commissioner as per the requirements for material distributed on election day, to respond to the trend of increasing numbers of electors casting early votes (p.14 of the Funding and Regulation Report).

    c. *To align rules for withholding advance public funding payments with final payments* - The Electoral Commission should be able to determine that a party or candidate is not eligible to receive an **advance** payment from the Election Campaigns Fund where there continues to be a failure to lodge a disclosure declaration or annual financial statement (p.15 of the Funding and Regulation Report), as is the case with final payments.

d. *To clarify the electoral funding consequences of a late dis-endorsement of a candidate by a party* – particularly for the purpose of establishing the applicable cap on electoral expenditure for the affected party and candidate, their eligibility to claim from the Election Campaigns Fund and for the purpose of section 9(9) of the Electoral Funding Act (which allows electoral expenditure incurred by the party for the candidate to be invoiced to the candidate) (p.15 of the Funding and Regulation Report).

e. *To improve compliance with disclosure obligations of groups* - Section 14 of the Electoral Act should be amended to provide that the lead candidate of a group of independent candidates is responsible for the disclosures of the candidates in the group, to reduce confusion and non-compliance (p.15 of the Funding and Regulation Report).

f. *To clarify defences available in a prosecution for not voting* - Consideration should be given to amending section 207 of the Electoral Act (the offence provision) to put beyond doubt in court proceedings that it is not a defence that the elector did not know that an election was being conducted, to avoid unnecessary litigation and related costs for all parties (p.15 of the Funding and Regulation Report).

Other proposals about party registration

6. Since tabling the two reports, the Electoral Commission also identified three anomalies regarding party registration that may be useful to address for fairness and integrity. The first two concern the twelve months rule in NSW state and local electoral legislation. The third relates to the use of the word "independent" in a party name.

7. The twelve months rule prevents a party only registered in the twelve months prior to an election from being able to nominate candidates (and therefore have their name appear on a ballot paper). The first potential anomaly is that, despite this rule, the Electoral Act does not prevent a registered party changing its name, its constitution/platform and all its registered officers in the twelve months prior to an election.

8. The second potential anomaly is that the Electoral Commissioner cannot retain a party's registration for local government elections if the party was originally registered for State elections where its membership falls below the required 750 for State registration but remains above the 100 required for local government elections. It appears that a new application for local government registration is required and if this occurs in the twelve months prior to an ordinary council election, the party would not be entitled to nominate candidates.

9. The third potential anomaly is that the naming provisions of the Electoral Act allow parties to register with names that include the word "independent", providing they do not also contain a reference to an existing registered party. The Electoral Commission notes that the Register of Parties, which lists the names and abbreviations of all parties registered for State and Local Government elections, currently contains a number of registered political parties that have the word 'independent' in the registered name: https://elections.nsw.gov.au/funding-and-disclosure/public-register-and-lists/register-of-parties. The Electoral Commission queries whether this aligns with the ordinary understanding of the word "independent", or the use of that term in the Electoral Funding Act, where it refers to candidates and elected members who are not endorsed by political parties.

PART B: Property developers

1. As the independent regulator of the electoral funding scheme in New South Wales, the Electoral Commission does not express views about whether specific entities or individuals connected with particular business endeavours should be prohibited from making political donations. The Electoral Commission notes that all statutory limits on making and receiving political donations must be developed consistently with constitutional limits[1] on burdening the implied freedom of political communication.

2. The Electoral Commission can provide information, however, about aspects of its experience of administering the current prohibited donor provisions in the Electoral Funding Act to assist the Committee in considering potential legislative changes.

Whether other entities and individuals whose business relates to property development should be prohibited from making political donations

3. The number of alleged unlawful donations by property developers in the recent State election year was low. As reported in its latest annual report, during the year ending June 2023 the Electoral Commission reviewed only three matters involving allegations of prohibited donations by a property developer. Following the 2021 Local Government elections, the Electoral Commission also reviewed 34 allegations of false information on a candidate information sheet, the majority relating to a candidate's status as a property developer.

4. The Electoral Commission does not consider, however, that the number of allegations made indicates whether there is a need to introduce additional statutory limits. Very few such allegations have, since 2009, been found to be substantiated. Greater insights may be available from funding research into the industry groups to which corporate donors belong, if data such as Australian and New Zealand Standard Industrial Classification (ANZIC) or business industry codes for corporate donors is available. The Electoral Commission notes there is no requirement for donors or recipients to describe their industry in their regular disclosures and that company and trust names are mostly not descriptive of their service/industry sector.

5. The Electoral Commission has also noted a common misunderstanding in allegations and queries about property developer donations that anyone connected to property development is prohibited from making political donations in NSW. A number of allegations and queries have been received about donors that do not own land or do not make planning applications. These include allegations and queries in relation to real estate agents and construction companies, which may work closely with a property developer but are not themselves landowners or applicants under planning law and are not a close associate of a property developer.

6. It is a matter for the Parliament to determine whether it is desirable and lawful to extend the existing prohibition to donors with business connections to property developers that are not already regulated as a close associate. If such changes are contemplated, however, the Electoral Commission recommends precise descriptions of any new categories, to support effective enforcement and duty-holders' understanding of their fundraising obligations. Given the criminal (rather than administrative) context of such a prohibition, and the ongoing public interest in the issue during election periods, it is appropriate to take a careful approach. For example, the 2018 Electoral Funding Act removed the original 2009 definition which required that development

[1] *McCloy & Ors v. State of New South Wales & Anor* (2015) 257 CLR 178

applications be made "regularly" and replaced it with a specified number of applications within specific timeframes. This increased level of detail has assisted the Electoral Commission to respond to alleged breaches of the Electoral Funding Act, supporting consistency in compliance action, as well as providing clearer guidance to election participants and potential donors about their statutory obligations. A recent decision in Queensland, where the prohibition still follows the "regularly" approach of the 2009 NSW law, may be of interest if this issue is given further consideration by the Committee[2].

7. It is also noted that the definition of "property developer" in the Electoral Funding Act is referenced at section 290 of the *Local Government Regulation 2021*. This provision requires candidates at local government elections to declare whether they are a property developer, including a close associate of a property developer, but does not prevent them from contesting the election. Any changes made to the definition of property developer will need to take into account the potential impact on the obligations of local government candidates when filling out their candidate information sheet.

Whether it is necessary to address the risk of property developers making political donations through shell companies

8. The Electoral Funding Act seeks to prevent property developers and donation recipients avoiding the ban on property developer donations through funnelling of donations through third parties in the following ways:

    a. the prohibition extends to close associates. The definition of a *close associate* differs, however, depending on whether the property developer is an individual or corporation

    b. under section 52 of the Electoral Funding Act, it is unlawful for:

        - a person to make a political donation on behalf of a prohibited donor,
        - a prohibited donor to solicit another person to make a political donation, and
        - a person to solicit another person on behalf of a prohibited donor to make a political donation.

    c. section 144 makes it an offence for a person to enter or carry out a scheme for the purpose of circumventing the prohibition on property developers making political donations.

9. None of these existing measures, however, make it unlawful for a company to make a political donation on the basis only that the individual owner of that company is connected with property development or is a property developer. The two main scenarios where this might arise may be summarised as follows:

    Scenario 1

    An individual personally owns the totality of the shares in both Corporation A and Corporation B. Corporation A is a property developer because it meets the conditions set out at section 53(1)(a) of the Electoral Funding Act, but Corporation B is not. Despite being owned by an individual who also owns a property development

[2] Electoral Commission of Queensland v Palmer Leisure Australia Pty Ltd [2022] QSC 169

company, Corporation B can lawfully make political donations. Corporation B does not fall within the definition in section 53(5) of a close associate of a property developer as it is not a 'related body corporate' of Corporation A under the *Corporations Act 2001* (Cth).

Scenario 2

An individual personally owns the totality of the shares in Corporation A. The individual is a property developer because they meet the conditions set out at section 53(1)(a) of the Electoral Funding Act, but Corporation A does not. Despite being wholly owned by an individual who is a property developer, Corporation A can lawfully make political donations. Corporation A does not fall within the definition in section 53(5) of a close associate of its individual owner.

10. In relation to both scenarios, the Electoral Commission notes that to act lawfully, the donor company would still have to use its own funds and the decision to make the donation would have to be made independently, to avoid contravening section 52.

11. The Electoral Commission does not express any view about whether there is a risk to the integrity of the legislative scheme arising from these scenarios that would justify extending the definition of a property developer to include such companies and their owners or to prohibit them from making political donations in some other way. The risk a donor would incur the cost of setting up and maintaining a corporate structure for the sole purpose of making political donations should be considered, however, in the context of the existing caps on political donations in NSW.

12. It should also be noted that an electoral commission cannot be resourced to investigate every donation disclosed to it and would do so only when it has formed a reasonable suspicion the donor is prohibited, either from open-source information or from details contained in an allegation. In particular, the detection and investigation of donations made on behalf of or solicited by others can require significant resources. [3] If there is any expansion of the categories of prohibited donors in NSW, additional funding for the Electoral Commission to undertake compliance and enforcement activities should accompany such a change. Consideration should be given to funding the Electoral Commission to identify and analyse potentially useful data sets to inform future policy-making and to engage in research about elections more generally in the public interest.

[3] See, for example, previous ICAC investigations: https://www.icac.nsw.gov.au/investigations/past-investigations/2016/nsw-public-officials-and-members-of-parliament-operation-spicer

PART C: Truth in political advertising

There are risks in making the Electoral Commission the regulator of truth in political advertising

1. Consistent with its responsibilities of impartiality, the Electoral Commission does not express a view about whether truth in political advertising (in addition to the existing statutory rules about electoral processes that apply to electoral material) should be regulated at all or regulated separately from any national rules that may be adopted around online disinformation and misinformation more generally. The Electoral Commission notes, however, that a new scheme could be structured in a number of ways, with varying degrees of "regulator" involvement and risk. Some of those options include:

    a. election participants have a right to take proceedings in a court or tribunal seeking redress for statements made by an election participant in an advertising campaign that are alleged to be factually incorrect, with no regulator involvement

    b. election participants have a right to take proceedings in a court or tribunal as above, but only after a regulator has made a determination, based on material provided to it by the complainant, that a preliminary threshold of some kind has been met.

    c. election participants only have a right to make allegations to a regulator, which can make binding determinations

    d. election participants can agree between themselves to participate in a non-statutory scheme, which can receive and deal with allegations about the truth of political advertising

2. If such a scheme was introduced, no functions should be conferred on the Electoral Commissioner or the Electoral Commission without a clear understanding of the potential significant risks and impacts for the administration of elections in NSW. The Electoral Commission notes that, in contrast to its current responsibility for ensuring the integrity of the electoral process, focusing on complaints about the veracity of statements made by political adversaries would risk compromising public trust in its political neutrality, which is critical to maintaining confidence in the NSW electoral system. Such a function would be materially different to any others presently exercised by the Electoral Commission: for example, for regulating statements in electoral material about the process of voting. Any size of new function would likely require intense resource allocation during the election period, creating inefficiencies and potentially putting at risk the successful administration of the election. Even if funding was increased to take into account the additional burden, accountability requirements would inevitably require the Electoral Commissioner and other senior staff to focus on the resolution of complaints about truth in political advertising, at a time when they should be administering and regulating the election.

3. The Electoral Commission notes that the Committee previously examined truth in advertising in its I*nquiry on the Administration of the 2019 NSW State election,* concluding in the Final Report (p.16) "There should be no changes to the law regarding negative campaigning and truth in advertising". The views of the Electoral Commissioner given to the Committee in the course of that Inquiry are unchanged.

The South Australian experience

4. The Electoral Commission of South Australia [**ECSA**] has reported recently on the experience of regulating political advertising. It is an offence under section 113 of the *Electoral Act 1985* (SA) *Misleading advertising* for an electoral advertisement to contain 'a statement purporting to be a statement of fact' that is 'inaccurate and misleading to a material extent'. On this point, the ECSA report on the 2022 state election noted as follows.

> For a breach of this section to be determined and for the Electoral Commissioner to intervene, a number of elements must be established. The subject of the complaint must be an electoral advertisement that contains electoral matter, defined as matter calculated to affect the result of an election. The electoral advertisement must contain a statement purporting to be a statement of fact. Opinions and predictions of the future cannot be considered statements of fact, as neither a person's opinion nor the future can be proven. For the Electoral Commissioner to intervene, the statement must be shown to be both inaccurate and misleading to a material extent; one of these alone is insufficient.[4]

5. The 2022 South Australian Election Report details operational issues with regulating misleading political advertising. The Electoral Commission urges the Committee to consider these operational issues in its deliberations.

Proposed Commonwealth misinformation and disinformation laws

6. Although the Electoral Commission does not support being a regulator of truth in political advertising, it remains committed to action to counter the risks of disinformation and misinformation about electoral processes and institutions. It makes significant efforts to maintain ongoing public trust in the integrity of democratic processes by:

   - **Increasing transparency**: publication of a Disinformation Register ahead of the 2023 NSW state election (here: https://elections.nsw.gov.au/integrity/disinformation-register).

   - **Raising public awareness through education**: the Australian Electoral Commission's "Stop and consider" campaign was adapted for the March 2023 NSW State election

   - **Regulating electoral material**: where a post containing disinformation is also non-compliant with NSW electoral material rules or raises safety and wellbeing concerns about NSW election officials, online platforms are requested to remove it. Publication of non-complying electoral material is an offence under NSW law, but there is no general offence of "being misleading" or a "take down" power and no "truth in advertising" laws.

[4] 2022 South Australian State Election Report and 2022 Bragg By-Election Report, p 16.

7. In 2023 the Electoral Commission contributed to a submission of the Electoral Council of Australia and New Zealand (**ECANZ**) to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (DITRDCA) during consultation on the exposure draft Communications Legislation Amendment (Combating Misinformation and Disinformation) Bill. ECANZ emphasised three matters:

    (i) both misinformation and disinformation regarding electoral processes, whether it be authorised or unauthorised electoral and referendum content, poses a threat to Australian democracy. This Bill should treat misinformation and disinformation as equally threatening to the integrity of Australian democratic processes and institutions.

    (ii) electoral commissions are the primary experts on whether electoral or referendum content regarding electoral processes constitutes misinformation or disinformation. The interrelationship between the Australian Communications and Media Authority (ACMA) and electoral commissions, for the administration of this proposed legislation, should be given careful consideration especially in the context of existing electoral laws on misleading and deceptive content.

    (iii) electoral commissions have existing relationships with some online platforms which the Bill should aim to complement and support. Despite these working relationships helping to address instances of misinformation and disinformation during recent electoral events, a matured regulatory framework should enhance the effectiveness of these relationships and improve the ability for electoral commissions to protect the integrity of Australian electoral processes.

8. If truth in political advertising laws were introduced in NSW, any overlap with new Commonwealth laws should be carefully considered to avoid jurisdictional issues.