**Submission No 31**

# ADMINISTRATION OF THE 2023 NSW STATE ELECTION AND OTHER MATTERS

**Organisation:** Liberal Party of Australia - NSW Division

**Date Received:** 1 March 2024

# LIBERAL PARTY OF AUSTRALIA

NEW SOUTH WALES DIVISION

**State Director**


1 March 2024

The Hon Peter Primrose MLC
Chair
Joint Standing Committee on Electoral Matter
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Primrose,

The Liberal Party of Australia, NSW Division (**the Party**) welcomes the opportunity to make a submission to the Joint Standing Committee on Electoral Matters (**JSCEM**) Inquiry into Administration of the 2023 NSW State Election.

Broadly speaking, the Party believes the election was conducted in a satisfactory manner, and we acknowledge the professionalism, experience and efforts of the NSW Electoral Commission (**NSWEC**) in preparing for and conducting the election.

The Party seeks to maintain an effective, professional and constructive relationship with the NSWEC, not only during election campaigns, but throughout the electoral cycle, and we view this relationship as critical to the ongoing conduct of elections.

Fair, democratic elections are the cornerstone of the Australian and NSW political systems and as such the Party is naturally concerned with ensuring that elections, including preparations, are undertaken to the highest standard, both to ensure ongoing community confidence in NSW electoral processes and in enabling and assisting political organisations and candidates to contest elections in a fair and easy manner.

With this in mind, the Party believes there are some elements of the election and the administration of the election that could be improved, and comments, suggestions and observations made in this submission are made as a constructive contribution within the framework of our relationship with the NSWEC.

Yours sincerely

[redacted]

Richard Shields
State Director


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**Terms of reference**

2. The Committee inquire into and report upon such matters as may be referred to it by either House of the Parliament or a Minister that relate to:

    (a) The following electoral laws:

        (i) Electoral Act 2017 (other than Part 3);

        (ii) Electoral Funding Act 2018; and

        (iii) Those provisions of the Constitution Act 1902 that relate to the procedures for, and conduct of, elections for members of the Legislative Assembly and the Legislative Council (other than sections 27, 28 and 28A);

    (b) The administration of and practices associated with the electoral laws described at (a).

3. All matters that relate to (2) (a) and (b) above in respect of the 25 March 2023 State Election, shall stand referred to the Committee for any inquiry the Committee may wish to make, including:

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

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

        (iii) Whether truth in political advertising laws for New South Wales state elections would enhance the integrity and transparency of the electoral system, taking into account any implications of the Commonwealth's Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023.

The Committee shall report on the outcome of any such inquiry within 18 months of the date of this resolution being agreed to by both Houses.

**(2) (a) The following electoral laws:**

**(i) Electoral Act 2017 (other than Part 3);**

**(ii) Electoral Funding Act 2018; and**

**(iii) Those provisions of the Constitution Act 1902 that relate to the procedures for, and conduct of, elections for members of the Legislative Assembly and the Legislative Council (other than sections 27, 28 and 28A);**

**(b) The administration of and practices associated with the electoral laws described at (a).**

## Handling of Potential Breaches of the Electoral Act

*Investigations and reporting*

During any election campaign, there will always be actions taken by some parties, candidates or third-party campaigners, which could potentially constitute a breach of electoral legislation and regulations. In our previous submission to this Committee's inquiry into the *Administration of the 2019 NSW State Election*, the Liberal Party raised concerns about the investigation of potential breaches and the need for investigations to be conducted quickly and a response provided to the complainant, be they a registered political party, candidate or individual.

We acknowledge that the JSCEM recommended in its report that the NSW Government make legislative amendments that would require the NSWEC to advise complainants of the outcome of complaints they have made to the Commission about non-compliance with electoral legislation.

This recommendation was implemented as part of the *Electoral Legislation Amendment Act 2022*, which amended section 268 of the *Electoral Act 2017* to give the Electoral Commissioner and the NSWEC the discretion to disclose information to a person who has reported a possible contravention of the Electoral Act or the *Electoral Funding Act 2018*, for the purpose of providing an update on the status or outcome of an investigation into the possible contravention, if satisfied that the disclosure is in the public interest.

Fair, transparent elections are critical for maintaining public trust and confidence in our electoral system, and with significant regulatory requirements for the conduct of NSW state elections it is important that potential breaches of the *Electoral Act 2017* or the *Electoral Funding Act 2018* are not just investigated by the NSWEC, but that this occurs quickly and the results of any investigation are disclosed where it is in the public interest to do so.

Notwithstanding this sensible amendment, the Liberal Party is concerned that lengthy delays could still permit actions, which constitute a breach of electoral rules, and which could have a material impact on the result of an election. We note that at the 2023 election, one district (Ryde) was decided by a margin of just 54 votes, while several others were decided by just a few hundred votes.

The Party submits that the process for reviewing, investigating and responding to complaints of potential breaches of electoral rules could be improved and streamlined, especially during an election period, to ensure timely responses to any such complaints, and effective action is taken as early as possible to prevent any breaches from impacting the result of an election.

The Liberal Party commends the NSWEC and NSW Police for the swift action taken to investigate the distribution of unauthorised material in Holsworthy, which included racist and xenophobic statements, and attempted to appear to come from the Liberal candidate, now MP, Tina Ayyed. We

note that an individual has been charged and convicted of offences relating to the distribution of the fake flyer.

*Ability for candidates and parties to challenge a ruling*

Election Managers have significant authority to take action to address material that breaches the *Electoral Act 2017* around voting centres. During the early voting period or on election day, it is particularly important that any potentially non-compliant material is addressed quickly before it has a material impact on how electors cast their vote. However, it is equally important that candidates and registered political parties are able to challenge such rulings and get definitive decisions from the NSWEC so that material that is compliant is not ruled out.

On election day in 2023, the Liberal Party displayed outside some voting centres posters asking electors voting for another party to consider giving a second preference to the Liberal Party. Before the material was produced, we sought guidance from the NSWEC to ensure the material was compliant.

However, a local Election Manager in the District of Wollondilly indicated their belief that the material was in breach of the *Electoral Act 2017* and ruled that the material could not be displayed. Confident that our material did not breach of any provisions of the Act, the Party tried to contact the NSWEC compliance and enforcement team to seek clarification and ask that the local Election Manager be informed of the NSWEC's position.

When the Party contacted the Candidate Helpline, we were advised that we could not speak directly to the compliance and enforcement team and would need to abide by the decision of the Election Manager. By chance, one of our staff members eventually managed to contact the enforcement team, and they reaffirmed that our material was compliant, and the Election Manager was advised accordingly.

This incident highlights the need, especially on election day, for a dedicated enforcement team to be directly contactable by candidates and parties to ensure that rulings can be made by the senior staff of the NSWEC quickly to prevent the display or distribution of non-compliant material, and likewise, ensure that compliant material is not mistakenly determined to be in breach by local officials.

**Early Voting**

*Early Voting Generally and the One Week Early Voting Period*

We note that since the 2019 state election, amendments to section 114 of the *Electoral Act 2017* have reduced the period for early voting to one week prior to election day.

The Liberal Party strongly endorses that change and rejects any suggestion that early voting should be returned to a longer period.

Early voting is an important provision to assist voters who are legitimately unable to vote on election day. However, it should not be a means of allowing all voters to simply get voting 'out of the way' at a more convenient time.

Section 6 of the *Electoral Act 2017* details the circumstances for which a voter is deemed to be "unable to attend at a voting centre on election day", i.e. they:

- are not within New South Wales;

- are not within 8 kilometres by the nearest practicable route of any voting centre open for the purposes of an election;
- are travelling under conditions that will preclude the person from voting at any voting centre;
- are seriously ill or infirm, and by reason of such illness or infirmity will be precluded from attending at any voting centre to vote;
- in the case of a woman, will, by approaching maternity, be precluded from attending at any voting centre to vote;
- are, at a place other than a hospital, caring for a person who is seriously ill or infirm or approaching maternity and by reason of caring for the person will be precluded from attending at any voting centre to vote;
- are, by reason of the person's membership of a religious order or his or her religious beliefs:
    - precluded from attending at a voting centre;
    - precluded from voting throughout the hours of voting on election day or throughout the greater part of those hours;
- are, by reason of his or her being kept in a correctional centre (within the meaning of the *Crimes (Administration of Sentences) Act 1999*), precluded from attending at any voting centre to vote;
- are, by reason of being engaged for fee, gain or reward in any work throughout the hours of voting on election day, be precluded from attending at any voting centre to vote, or
- are a silent elector;
- are a person with a disability (within the meaning of the *Anti-Discrimination Act 1977*);
- believes that attending a voting centre on election day will place the personal safety of the person or of members of the person's family at risk.

As we have consistently argued in previous submissions, the electoral system in NSW (and indeed in Australia) is designed around a single election day when all electors are required to attend and cast their vote. Early voting is available as an acknowledgement that due to work, travel or other legitimate reasons, some electors may not be able to vote on election day, but it should not be used to facilitate a voting 'period' rather than a voting day. As such, we believe keeping early voting to only one week discourages the practice of electors voting early simply for convenience.

We note that the proportion of electors voting at early voting centres in 2023 increased to 29 per cent (up from 19 per cent in 2019). As such, it is clear the reduction of early voting to a single week did not disenfranchise any electors.

Despite early voting taking place over a reduced period, the NSWEC increased the number of early voting centres by 42 per cent to accommodate what it anticipated would be an increase in the number of early votes cast. The NSWEC has stated that this decision has led to increased costs associated with securing properties and engaging staff.

Given the legislative requirement that early voting be only made available in circumstances where an elector is not able to vote on election day, the Liberal Party believes that increasing the number of early voting centres is, in fact, encouraging early voting by making it more widely accessible.

The use of the term 'early voting', which is enshrined in the *Electoral Act 2017*, contributes to the problem. Notwithstanding the eligibility criteria set out in the Act, the term infers that voters can vote early for convenience, not just because they are genuinely unable to vote on election day.

We acknowledge that in its communications, the NSWEC does make clear that voters who are unable to vote on election day may be eligible to vote early. However, the widespread use of the term 'early voting', from media releases issued by the Commission to the signage outside 'Early Voting Centres', which of themselves are defined in section 4 of the Act, is normalising this change in voting patterns. Moreover, it means that more people are casting their vote at a point-in-time when many aspects of an election campaign - such as the release of key policies, campaign launches and 'free-time' election broadcasts - may not yet have taken place.

While we believe the one-week period for 'early voting' allows a reasonable opportunity to support voters with legitimate reasons for not being able to attend a polling place on election day, the number and extended opening hours of early voting centres, making it ever more accessible and convenient, is indirectly encouraging this change in voting patterns.

Broadly speaking, we believe there should be a single early voting centre in each metropolitan electorate, while acknowledging the need for multiple locations in rural and regional electorates, as well as the usual state-wide early voting centre in the Sydney CBD, which in our view, should be located at the Sydney Town Hall – a central and iconic building - where it has been situated historically. This would ensure early voting remains accessible without becoming the option of convenience.

We also believe that further education about, and enforcement of, early voting eligibility requirements is needed.

*Publishing of Early Voting Centre Locations*

The Liberal Party also wishes to draw attention to the process of releasing details about the location and opening hours of early voting centres.

Prior to the 2019 state election, a provisional list of early voting centres was made available to electoral participants in December 2018, through its bulletins. While there were a few changes to the final list of locations, they were minor. The NSWEC also ensured that registered political parties and candidates were made aware that the list of early voting centres had been published online.

However, in the lead up to the 2023 state election, and despite numerous requests by the Liberal Party (and presumably other registered political parties and candidates) for a list of early voting centres and opening hours, the NSWEC did not release this information until 3 February 2023. These details were not made available until 6.00pm on a Friday evening, and there was advice that it had been published. Furthermore, the information published on the NSWEC website stated that early voting centres would commence operating on Monday 13 March 2023, contrary to section 114(2) of the Act.

The Liberal Party wrote to the Electoral Commissioner on Saturday 4 February 2023 and we were unable to reach the NSWEC over the weekend to clarify the matter, which created significant confusion for our candidates and campaign teams, as we imagine it did for other electoral

participants. We acknowledge the NSWEC rectified its error quickly and informed stakeholders via a bulletin on Monday 6 February 2023 accordingly.

Registered political parties are voluntary organisations. Our members and supporters give up their time to support their local Liberal candidate, running their campaigns and handing out how-to-vote cards outside polling places, in an effort to persuade voters. They are fundamental to the electoral process. Coordinating these volunteer efforts is a large logistical exercise, which requires planning and communication with thousands of members and supporters across NSW. These same challenges would be experienced by other registered political parties, independent candidates and third-party campaigners.

The Liberal Party suggests that at future elections a provisional list be provided by the NSWEC to electoral participants well in advance, as occurred prior to the 2019 state election. While we acknowledge that some locations may need to change, knowing the number and general location of early voting centres allows candidates and their volunteers to plan their early voting and election day activities in advance. Our suggestion of fewer early voting centres in electoral districts would, no doubt, simplify this process.

*Location of Early Voting Centres and Voting Centres*

Elections in NSW take place on a set date every four years, so it is not unreasonable to expect that leases for Early Voting Centres would have been negotiated and be in place in good time before an election.

On this point, the Liberal Party was surprised to find that the NSWEC chose the Penrith Paceway as an Early Voting Centre and Voting Centre in the District of Penrith. There had been significant public debate and local media coverage in relation to the site, and a proposed development by the NSW Government. Proposals of this nature often attract a high volume of political and media commentary, and it would have been reasonable to assume that proposal would become a political issue that could be taken into consideration by voters at the election.

The Liberal Party raised its concerns about the venue with the Electoral Commissioner on 10 March 2023. In his response on 15 March 2023, the Commissioner stated:

> "The NSWEC was unaware of any development proposals for the Penrith Paceway until receiving your letter. A possible future redevelopment, however, is not a matter that would form part of the usual checks undertaken by NSWEC when leasing premises."
>
> ...
>
> "At this late stage in preparations for the election, I remain satisfied there are no viable alternatives to the Penrith Paceway and that it is appropriate to continue to use the venue."

The Liberal Party acknowledges that the NSWEC needs to lease over 2,500 venues across the state for use as voting locations, election managers' offices and its centralised operation centres. In doing so, the NSWEC needs to seek out venues that are in convenient and safe locations, of sufficient size and where possible, fully accessible. It is not unreasonable to suggest that any current issues or public debate associated with a prospective venue, ought to be part of the criteria considered by the NSWEC.

**Indexation of Electoral Funding and Expenditure Caps**

Schedule 1 of the *Electoral Funding Act 2018* provides for the adjustment for inflation of monetary amounts specified in the Act. This includes caps on political donations, electoral expenditure as well as public and administrative funding.

While the caps on political donations and administrative funding are calculated with reference to the CPI in the previous financial and calendar years respectively, the caps on electoral expenditure and on public funding in respect of a general election are calculated based on the CPI during the election period prior to the commencement of the current one.

As such, the general expenditure cap for a candidate, for example, was adjusted in April 2019 and increased from $122,900 to $132,600, an almost 8% increase. This adjustment was calculated and made well before the COVID-19 pandemic were known. This economic shock (and others due to more recent geo-political events such as the wars in Ukraine and Gaza) saw significant price increases flow through the economy, including for electoral activities – for example, the cost of paper stock for print material increased by approximately 30% between 2019 and 2023 – in effect reducing the capacity of candidates and parties to produce campaign collateral.

No one could have foreseen a global pandemic occurring during the last electoral cycle and the resulting inflationary pressures. However, this example highlights the problems associated with the current provisions, setting electoral expenditure public funding caps so far in advance of an election.

The Liberal Party suggests that these adjustments be reviewed or set annually, in line with adjustments made to political donation caps and administrative funding. This would ensure the real values of the adjusted amounts are appropriate and reflect the economic conditions, whilst still allowing sufficient time for candidates and registered political parties to plan their campaigns.

**Voter Identification**

In its report into the *Administration of the 2011 NSW Election and Related Matters*, this Committee considered the matters of multiple voting by an individual and impersonating another elector for the purposes of voting. It noted evidence from the NSW Electoral Commission which stated that instances of these offences had occurred, that they were difficult to prosecute, and that they had the potential to lead to fraud.

In its *Second Interim report on the inquiry into the conduct of the 2013 election: An assessment of electronic voting options*, the Australian Parliament's JSCEM also noted evidence by the Australian Electoral Commission (AEC) to the Senate's Finance and Administration Legislation Committee at the 2013-14 Additional Estimates hearings that during the 2013 federal election, 18,770 multiple marks (persons marked off the electoral roll more than once) were identified, with 10,671 of these being attributable to polling official error, 2,013 being instances of electors admitting to multiple voting, and 6,000 instances remaining unresolved.

Indeed, the AEC noted in its submission to the Australian Parliament's JSCEM *Inquiry into and report on the conduct of the 2013 election and matters related thereto* that at that election, three separate voters in NSW were recorded as having their names marked off 15, 12 and 9 times.

In October 2021, the Morrison Government introduced the *Electoral Legislation Amendment (Voter Integrity) Bill 2021*, which was a response to recommendations of the Australian Parliament's JSCEM and its reports into the conduct of the 2013, 2016 and 2019 elections. The Bill sought to amend the *Commonwealth Electoral Act 1918* and *Referendum (Machinery Provisions) Act 1984* to require voters to provide an acceptable form of identification, or alternatively an attestation from another

enrolled person who does have an acceptable form of identification, in order to cast an ordinary pre-poll or polling day vote in federal elections and referendums. However, the Bill was withdrawn by the Government in December 2021.

The 2023 state election result was close. The Liberal Party is currently in a comparable position to that of the Labor Party after the 2019 election, with just 24,231 votes in marginal electorates required to form a majority government.

The Liberal Party believes the introduction of a requirement for voters to present some form of photo identification at a polling place before voting would help reduce the occurrence of multiple voting and would also reduce the potential for fraud.

Currently, an individual needs to provide proof of identity to enter a registered club for a Chicken Parmigiana meal or a beer but not to undertake their most important civic duty; to cast a vote at a Federal, State or Local Government election. Introducing the requirement for voters to provide identification would not only provide a further check and balance but would serve to enhance the public's confidence in the integrity of the state's electoral processes.

Queensland introduced a requirement to produce identification to vote before the July 2014 state by-election in the district of Stafford.

At that by-election, voters presenting at a polling place would only be issued with an ordinary vote if they could provide one of the following pieces of identification:

- a current driver's licence;
- a current Australian passport;
- a voter information letter issued by the commission;
- a recent document evidencing electoral enrolment;
- an identification card issued by the Commonwealth or State evidencing the person's entitlement to a financial benefit;
- an adult proof of age card issued by the State;
- a recent account or notice issued by a local government or a public utility provider;
- a recent account statement, current account card or current credit card issued by a financial institution;
- a recent account statement issued by a carriage service provider as defined under the Commonwealth Telecommunications Act 1997; and
- a recent notice of assessment issued under the Commonwealth Income Tax Assessment Act 1997.

We further note that at the 2015 general election, the Electoral Commission of Queensland sent every enrolled elector a Voter Information Letter soon after the close of rolls, which informed them of voting requirements. The letter itself could also be used as acceptable identification for voting purposes.

Apart from the range of forms of identification able to be used, there was also an ability for electors to cast a declaration vote should they not be able to produce identification at the polling place.

The small proportion of votes cast as uncertain identity declaration votes (0.6 per cent of the total vote at the 2015 general election) indicates that the system impacted only a small number of voters.

Sadly, the requirement to produce identification to vote was repealed following the election of a Labor Government in 2015.

Most adults have at least one form of government-issued identification - be it a driver's licence, a proof of age card or Australian passport - that could be produced when they attend a polling place.

Indeed, to register to vote, you need to provide evidence of your identity, which must be a document issued by an Australian Government, namely an Australian driver's licence, an Australian passport or Medicare card. To apply for a postal vote, an elector needs to make a statutory declaration in the presence of an authorised witness and if they have not known the elector for at least 12 months, they need to confirm their identity with an approved identification document.

The Liberal Party believes it is not unreasonable to suggest that if an elector attends a polling booth, they ought to be required to produce one of a number of pieces of identification to have their name marked off the roll and be issued a ballot paper.

**(3)(i) Whether other entities and individuals whose business relates to property development should be prohibited from making political donations.**

Division 7 of the *Electoral Funding Act 2018* prohibits donations from property developers or tobacco, liquor or gambling industries.

Section 53 of the Act sets out the meaning of "property developer":

*(1) Each of the following persons is a property developer for the purposes of this Division—*

*(a) an individual or a corporation if—*

*(i) the individual or a corporation carries on a business mainly concerned with the residential or commercial development of land, with the ultimate purpose of the sale or lease of the land for profit, and*

*(ii) in the course of that business—*

*(A) 1 relevant planning application has been made by or on behalf of the individual or corporation and is pending, or*

*(B) 3 or more relevant planning applications made by or on behalf of the individual or corporation have been determined within the preceding 7 years,*

*(b) a person who is a close associate of an individual or a corporation referred to in paragraph (a).*

*Note—*

*If a person makes a political donation within 12 months before becoming a property developer, the person must pay double that amount to the State—see section 58(3).*

*(2) Any activity engaged in by an individual or corporation for the dominant purpose of providing commercial premises at which the individual or corporation, or a related body corporate of the corporation, will carry on business is to be disregarded for the purpose of*

*determining whether the individual or corporation is a property developer unless that business involves the sale or leasing of a substantial part of the premises.*

...

*(5) In this section—*

*close associate of a corporation means each of the following—*

*(a) a director or officer of the corporation or the spouse of such a director or officer,*

*(b) a related body corporate of the corporation,*

*(c) a person whose voting power in the corporation or a related body corporate of the corporation is greater than 20% or the spouse of such a person,*

*(d) if the corporation or a related body corporate of the corporation is a stapled entity in relation to a stapled security—the other stapled entity in relation to that stapled security,*

*(e) if the corporation is a trustee, manager or responsible entity in relation to a trust—a person who holds more than 20% of the units in the trust (in the case of a unit trust) or is a beneficiary of the trust (in the case of a discretionary trust),*

*(f) in relation to a corporation that is a property developer referred to in subsection (1)(a)—a person in a joint venture or partnership with the property developer in connection with a relevant planning application made by or on behalf of the property developer who is likely to obtain a financial gain if development that would be or is authorised by the application is authorised or carried out.*

*close associate of an individual means each of the following—*

*(a) the spouse of the individual,*

*(b) in relation to an individual who is a property developer referred to in subsection (1)(a)—a person in a joint venture or partnership with the property developer in connection with a relevant planning application made by or on behalf of the property developer who is likely to obtain a financial gain if development that would be or is authorised by the application is authorised or carried out.*

***officer** has the same meaning as in the Corporations Act 2001 of the Commonwealth.*

***related body corporate** has the same meaning as in the Corporations Act 2001 of the Commonwealth.*

***relevant planning application** has the same meaning as in section 10.4 (Disclosure of political donations and gifts) of the Environmental Planning and Assessment Act 1979.*

***spouse** of a person includes a de facto partner of that person.*

*Note—*

*"De facto partner" is defined in section 21C of the Interpretation Act 1987.*

***stapled entity** means an entity the interests in which are traded along with the interests in another entity as stapled securities and (in the case of a stapled entity*

*that is a trust) includes any trustee, manager or responsible entity in relation to the trust.*

***voting power** has the same meaning as in the Corporations Act 2001 of the Commonwealth.*

The tests set out in section 53(1) have gone some way to assisting participants in the electoral process to better understand who is or is not considered a property developer for the purposes of the Act. The previous definition in the *Election Funding, Expenditure and Disclosures Act 1981* was vague and left open to interpretation a prospective donor's standing.

That said, conducting due diligence to determine who has a development application pending, or has had three or more development applications determined in the past 7 years is a very challenging task. Registered political parties and candidates spend considerable time and resources searching ASIC's databases and those provided by the state's 128 local Councils on their websites, to satisfy themselves as to whether a potential donor is, or is not, eligible to make a political donation.

The NSWEC provides little guidance, beyond making determinations for those persons or organisations who apply to the Commission for a ruling. This process requires applicants to provide extensive details relating to their personal and business interests, which is, of itself, a disincentive for anyone who may be unsure of their standing. Therefore, clarity as to the tests for determining who may, or may not, donate is important to everyone who participates in the electoral process.

On this point, the Liberal Party again suggests that the NSW Government develops a centralised online directory of pending development applications across the state, which includes details about the applicant themselves, and any previous applications that have been determined. We can see other applications for such a directory, particularly for those individuals and businesses involved in the property development and construction process, beyond determining one's eligibility to make political donations.

The question of whether other entities and individuals, whose business relates to property development, should be prohibited from making political donations is, in our view, a policy matter for the NSW Parliament. It is the responsibility of registered political parties, including the Liberal Party, to comply with their obligations under relevant legislation or regulations in force as determined by the parliament. Again, we stress that if further categories of individuals or businesses are to be prohibited from making political donations in NSW, the legislation needs to set out clear definitions as to who is, or is not, prohibited and the NSWEC needs to provide clear guidance to all electoral participants to assist with compliance.

**(3)(ii) Whether it is necessary to address the risk of property developers making political donations through shell companies.**

A shelf or shell company is commonly described as being a company that, at the time of incorporation, has no significant assets or operations. Shelf or shell companies can be set up domestically or offshore and the ownership structure of a shell company can take several forms. These companies have no physical presence, employees or products and may be owned by corporations, nominee owners and bearer shares, obscuring beneficial ownership.

While shelf or shell companies can serve legitimate purposes within the legal framework, including for asset protection, confidentiality, and tax planning, their use has drawn scrutiny from regulators and policymakers due to their potential misuse in illicit activities. Often concerns have been raised about the ease of setting up a shelf or shell company in Australia and the potential for tax evasion.

To enhance transparency and combat financial crime, the Australian Government has implemented various regulatory measures, including requiring companies to disclose to regulators their beneficial owners, strengthening anti-money laundering laws as well as monitoring and scrutinising their tax-related activities to ensure compliance and deter tax evasion.

The Liberal Party supports, in-principle, any legislative measures to amend section 53(5) of the *Electoral Funding Act* that may serve to close loopholes that could be exploited by prohibited donors to circumvent NSW's electoral funding and disclosure laws.

However, it would be difficult, if not impossible, for registered political parties and candidates to conduct due diligence on shell or shelf companies, particularly when beneficial owners may not be obvious through publicly available ASIC director and shareholder searches. It is the Liberal Party's strong view that, in such circumstances, there would need to be an exemption from any offence for the recipient of a donation made by such a company.

As previously stated, any amendment would also need to set out clear definitions as to what constitutes a shell or shelf company, given there is no strict legal definition of such companies, and the NSWEC would need to provide clear guidance to all electoral participants to assist with compliance.

**(3)(iii) Whether truth in political advertising laws for New South Wales state elections would enhance the integrity and transparency of the electoral system, taking into account any implications of the Commonwealth's Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023.**

No specific proposal has been put forward by the NSW Labor government (or its federal counterpart) in this area – either before or since the 2022 federal election or 2023 state election. Therefore, Labor does not have a mandate to introduce what could be a significant change to these respective electoral systems.

The Liberal Party urges this Committee to carefully consider previous consideration of 'truth in political advertising' legislation by other parliamentary committees.

In 1983, the Parliament introduced a truth in political advertising clause into the *Commonwealth Electoral Act 1918*. This section of the Act was repealed just a year later on the recommendation of the Australian Parliament's JSCEM.

A Parliamentary Library research paper summarises the Committee's work in the following way:

> "A majority of the Committee expressed the following criticisms of the section:
>
> 1. While fair political advertising is a legitimate objective, it is not one properly to be sought through legislation. Political advertising involves 'intangibles, ideas, policies and images' which cannot be subjected to a test of truth, truth itself being inherently difficult to define.
>
> 2. As evidence was given the even predictions and opinions may imply statements as to present fact, and thus be subject to the section, the section was considered to be so broad as to be unworkable.
>
> 3. The section would have a disproportionate impact on publishers, who would need to seek legal advice before publishing. This would inhibit political advertising and thus limit the information received by the public.

4. The Committee expressed concern that injunctions might be misused to disrupt campaigns of other parties and candidates. In the context of an election campaign, the grant of an interim injunction could have the same effect as a final order.

Consequently, the final recommendation of the Committee was as follows:

*the Committee concludes that even though fair advertising is desirable it is not possible to control political advertising by legislation. As a result, the Committee concludes that s 329(2) [161(2)] should be repealed. In its present broad scope the section is unworkable and any amendments to it would be either ineffective, or would reduce its scope to such an extent that it would not prevent dishonest advertising. The safest course, which the committee recommends, is to repeal the section effectively leaving the decision as to whether political advertising is true or false to the electorates and to the law of defamation.*

A similar view was repeated in 1994 by the Joint Standing Committee on Electoral Matters in its Report of Inquiry into the Conduct of the 1993 Federal Election and Matters Related Thereto."[1]

The Australian Parliament's JSCEM *Inquiry into the 2022 Federal election* heard evidence from the Electoral Commissioner of South Australia in respect of the 'truth in political advertising' regime that is in place in that state.

Section 113 of the *Electoral Act 1985 (SA)* states:

*(1) This section applies to advertisements published by any means (including radio or television).*

*(2) A person who authorises, causes or permits the publication of an electoral advertisement (an "advertiser") is guilty of an offence if the advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent.*

*Maximum penalty:*

*(a) if the offender is a natural person—$5 000;*

*(b) if the offender is a body corporate—$25 000.*

*(3) However, it is a defence to a charge of an offence against subsection (2) to establish that the defendant—*

*(a) took no part in determining the content of the advertisement; and*

*(b) could not reasonably be expected to have known that the statement to which the charge relates was inaccurate and misleading.*

*(4) If the Electoral Commissioner is satisfied that an electoral advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent, the Electoral Commissioner may request the advertiser to do one or more of the following:*

*(a) withdraw the advertisement from further publication;*

[1] G. Williams, 'Truth in Political Advertising Legislation in Australia', Australian Department of the Parliamentary Library, Research Paper 13, 1996-97.

*(b) publish a retraction in specified terms and a specified manner and form,*

*(and in proceedings for an offence against subsection (2) arising from the advertisement, the advertiser's response to a request under this subsection will be taken into account in assessing any penalty to which the advertiser may be liable).*

*(5) If the Supreme Court is satisfied beyond reasonable doubt on application by the Electoral Commissioner that an electoral advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent, the Court may order the advertiser to do one or more of the following:*

*(a) withdraw the advertisement from further publication;*

*(b) publish a retraction in specified terms and a specified manner and form.*

South Australia is one of the few jurisdictions in the world that has in place legislation of this kind, with the Australian Capital Territory (ACT) having implemented similar legislation in 2020.

In his oral evidence to the Australian Parliament's JSCEM, the Electoral Commissioner of South Australia, Mick Sherry made the following observations about the challenges of administering section 113 of his state's Act:

*"Misleading advertising is a particularly challenging piece of legislation to administer coupled with the fact that the number of complaints has dramatically increased from 38 at the 2018 state election to 122 at the recent state election in March this year."*

*...*

*"When you run an election, you are responsible for the conduct of so many different parts of an election. I'm drawn away from the many other important aspects of the election to focus on administering this piece of legislation. I find that quite challenging because there are so many other things occurring, particularly during the early voting period. We have a two-week period in South Australia and on polling day. It is safe to say that the vast majority of my time is dealing with these matters to the exception of all these other matters happening."*

*...*

*"...in 2018, we had only two people dealing with our complaint area. That has now jumped up. In the recent South Australian election, we had five. It is safe to say that we are way short of that again. For future elections, we will be having at least 10 people. Again, we need to understand the Crown Solicitor's office. There are probably in excess of five solicitors on standby just helping us out. That tells you the magnitude of the resourcing required for South Australia, with 1.2 million electors. When you start considering that from a national perspective, the resourcing challenges become quite significant."*

*...*

*"...I could delegate this responsibility to someone else. As I said at the start of this hearing, in my view, the making of this decision is critically important. You are determining what should be out in the public domain for electors to consider and what should not. It's a really important decision. Even if I had the ability within legislation to delegate it, I would be reluctant to do so. There might be some legislative change that could enable it. That might be something that this committee could set about for the Commonwealth aspect. It would*

*free up the electoral commissioner from dealing with this. There are so many other important matters that you have to be across that currently prevents you from doing so."*[2]

In his evidence to the Australian Parliament's JSCEM, the Australian Electoral Commissioner, Tom Rogers made clear he did not want that responsibility:

> *"The second part of your question, Chair, is: 'What do you think about the AEC's role in mis- and disinformation?' We're pretty comfortable that our role is to defend the electoral system, to defend and make citizens aware of the process of voting. In terms of truth in advertising, any involvement of any electoral administration body, I think, runs counter to the principles of neutrality and non-partisanship. The moment the commissioner makes a ruling about a fact, that someone said, you're alienating a large proportion of the population, because at election time, in particular, it's a contest of ideas. One's person's fact is another person's falsehood. I think there is a role for some form of truth in advertising, and I wish every success to whoever is doing that, but I prefer not the AEC to be the organisation involved in that process."*[3]

It is the Liberal Party's strong view that the power to determine whether statements in political advertising are factual or not should not rest in the hands of the Electoral Commissioner or any other unelected official. Clearly, administering such legislation would distract from the Electoral Commissioner's primary responsibilities and fundamentally, it is a matter for voters to weigh the arguments made by candidates in political discourse anyway. That's their right - and their responsibility - in a democracy.

There is a clear distinction between the contest of ideas between candidates or political parties in a campaign and misinformation or disinformation that seeks to undermine the electoral process.

However, the proposal this Committee is being asked to consider appears to extend far beyond the reasonable provisions that already exist in section 180 of the *Electoral Act 2017,* which deals with misleading information that seeks to undermines confidence in the election process. The Liberal Party supports the protections this section already provides.

We note that in government, the Liberal Party increased the penalty for committing the equivalent offence under section 329 of the *Commonwealth Electoral Act 2018* from six months to three years as part of the *Electoral Legislation Amendment (Foreign Influences and Offences) Act 2022*. The Committee may wish to consider recommendations that seek to align the penalty for committing such an offence as set out in section 183, with those applicable under Commonwealth legislation.

In June 2023 the Albanese Government released an exposure draft of the *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023* (the Draft Bill) which it argues would provide further protections against misinformation or disinformation more generally.

The Draft Bill would give the Australian Communications and Media Authority (ACMA) reserve powers to act if industry efforts in respect of misinformation and disinformation are inadequate. The proposed powers would:

- enable the ACMA to gather information from, or require digital platform providers to keep certain records about matters regarding misinformation and disinformation;

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[2] Public Hearing, *Inquiry into the 2022 federal election*, JSCEM, Parliament of Australia, 30 November 2022.
[3] Public Hearing, *Inquiry into the 2022 federal election*, JSCEM, Parliament of Australia, 28 September 2022.

- enable the ACMA to request industry develop a code of practice covering measures to combat misinformation and disinformation on digital platforms, which the ACMA could register and enforce; and
- allow the ACMA to create and enforce an industry standard (a stronger form of regulation), should a code of practice be deemed ineffective in combatting misinformation and disinformation on digital platforms.

Importantly, it is worth noting that the ACMA would not have the power to request specific content or posts be removed from digital platform services.

The Draft Bill defines misinformation and disinformation as follows:

- misinformation is online content that is false, misleading or deceptive, that is shared or created without an intent to deceive but can cause and contribute to serious harm.
- disinformation is misinformation that is intentionally disseminated with the intent to deceive or cause serious harm.
- serious harm is harm that affects a significant portion of the Australian population, economy or environment, or undermines the integrity of an Australian democratic process.

The powers apply to digital platform services that are accessible in Australia, including social media, search engines, instant messaging services (although the content of private messages will be out of scope), news aggregators and podcasting services.

The Draft Bill includes protections for privacy and freedom of speech:

- it is directed at encouraging digital platform providers to have robust systems and measures in place to address misinformation and disinformation on their services, rather than the ACMA directly regulating individual pieces of content;
- the ACMA will not have the power to request specific content or posts be removed from digital platform services;
- rules made under the Bill may require digital platform services to have systems and processes in place to address misinformation or disinformation that meets a threshold of being likely to cause or contribute to serious harm;
- the code and standard-making powers will not apply to authorised electoral and referendum content and other types of content such as professional news and satire; and
- private messages sent on instant messaging services will not be within scope of the powers.

The Liberal Party notes that the government received nearly 2,500 submissions on the exposure draft, with mixed views as to its utility or effectiveness. The Draft Bill is yet to be introduced into the Australian Parliament.

It is certainly strange that the Labor Party appears to be considering a proposal for 'truth in political advertising' given the dishonest and deceptive statements it has engaged in during recent state and federal election campaigns. For example:

- In 2016, Federal Labor claimed it was Coalition policy to privatise Medicare. This was blatantly untrue.

- In 2022, Federal Labor claimed that the Coalition would force pensioners onto the cashless debit card. This was blatantly untrue.
- In 2023, NSW Labor claimed that the Liberals & Nationals would privatise Sydney Water. This was blatantly untrue.

Should the Labor Party wish to have an honest discussion about truth in political advertising, it should begin with an acknowledgment of these lies, which helped it to win office nationally and here in NSW.