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**IMPLICATIONS OF CHANGE IN ELECTORAL CAMPAIGN  
FINANCE LAWS IN NSW**

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## **Abstract**

In the last seven years the Election Funding, Expenditure and Disclosures Act 1981 has been subject to no fewer than eight substantial amendments. Not only have successive Parliaments implemented these changes, but individual Premiers have made such changes keynotes of their tenure. These successive changes have resulted in a funding and disclosure scheme which has become overly complex and impractical, as it attempts to be a 'one size fits all' system for all participants. This paper discusses areas the Electoral Commission believes are of vital importance in establishing a more transparent and effective scheme.

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“The only constant is change”; it’s a phrase that is often used and well defines the environment of campaign finance laws in NSW. In the last seven years the Election Funding, Expenditure and Disclosures Act 1981 has been subject to no fewer than eight substantial amendments. Indeed, even the name of the Act has changed three times in that period alone. Not only have successive Parliaments implemented these changes, but individual Premiers have made such changes keynotes of their tenure.

These successive changes have resulted in a funding and disclosure scheme which has become overly complex and impractical, as it attempts to be a 'one size fits all' system for all participants. We now have a scheme wherein many stakeholders have difficulty understanding and complying with the requirements. And with the available enforcement options so limited the NSW Electoral Commission experiences great difficulty in engendering compliance and enforcing breach provisions.

Two very public investigations were held by the Independent Commission Against Corruption (ICAC) in 2014, one of which resulted in the down fall of a Premier and more than 10 MP’s either resigning from Parliament or becoming cross-benchers. As a result the new Premier, Mike Baird, announced a panel of experts was to look into political donation laws in NSW and report back to the Government ahead of the 2015 State election. The Expert Panel made 50 recommendations and the Government responded earlier this year by announcing its “in-principle” support to all but one recommendation.

A number of the Expert Panel’s recommendations related to the functions and activities of the Electoral Commission, specifically that the Commission undertake a review of its operations for the purpose of making a strategic shift from an administrative to a regulatory focus. The Commission has spent the best part of this year undertaking a review and restructure of its funding and disclosure operations. We now have an audit and investigation function that is based on best practice risk based auditing and proactive investigations. We now also have a new client services function to deliver quality and professional services to our clients as well as a regulatory and education function to deliver advice and education services to the team and our clients.

In recent weeks the Joint Standing Committee on Electoral Matters has been re-established and has been tasked to inquire into the Expert Panel’s recommendations and the Government’s response and report back to the Government. One of the key messages coming from this inquiry so far is that Electoral Commission, parties and other election participants

do not want to see further ad-hoc changes to the legislation. Rather, all agree that a comprehensive review of the legislation is required to make the requirements more easily understood enabling parties and others to be more compliant thereby improving transparency.

I will now discuss three areas the Electoral Commission believes are of vital importance in establishing a more transparent and effective scheme. The first is a comprehensive review of the legislation.

In its current form, the Act is effectively self-defeating, in that it impedes compliance by political participants. Successive waves of reforms to the Act have resulted in unbalanced and convoluted legislation. The series of amendments have done little to modernise the funding and disclosure regime, which is paper-based and fails to recognise current business practices.

The amendments have substantially increased the obligations imposed on participants to properly manage their campaign finances and ensure donations are not being made or accepted by unlawful donors.

While the Commission has done and will continue to do more to educate our clients about their obligations there are still a number of deficiencies with the Act that affect the level of compliance.

First, non-compliance occurs where participants find it difficult to understand exactly what is required of them under the Act. The vast majority of participants want to comply with their statutory obligations. Often, however, the content and scope of those obligations cannot be easily determined.

Second, inconsistencies and omissions within the Act have led to failed enforcement attempts; these not only hamper the Act's deterrence effect, but also create negative perceptions of the Electoral Commission as a regulator. If it is known that the Electoral Commission cannot enforce the Act's provisions, some participants will deliberately flout the law.

Third, due to outdated offence provisions, participants are avoiding liability for responsibilities and obligations that should rightly fall on them. Instead, the position of "agent" has become a scapegoat for others' misdeeds.

Finally, offence provisions and penalties - both the range and type of penalties - do not reflect the environment and culture of modern elections and campaign finance. Soft penalties and unattainable burdens on the prosecution fail to support compliance in achieving the objectives of deterrence, protection and punishment.

The Act tries to be a "one size fits all" for all political parties. The Act does not take into account the fact that parties range in size and levels of professionalism. The same requirements are imposed on all parties and candidates regardless of their level of resources and regardless of the amount of their campaign finances.

I will now discuss the mandatory requirement of candidates to have an agent.

In July 2008, just two months before the 2008 local government elections it became mandatory for all candidates and groups of candidates to have an official agent. Previously it

was optional for a candidate or group to have an agent. The agent was responsible for managing the campaign finances of the candidate or group and for the disclosure of those donations and expenditures.

This policy change of the former Labor Government came as a result of a corruption scandal that had engulfed property developers and Wollongong Council. The Government seemed determined at the time to never allow candidates to get within arm's reach of donations and so it became mandatory for candidates and groups to have an official agent. The agent would need to complete an online training program provided by the Electoral Commission, be enrolled and be registered with the Commission. The agent would need to go down to the local bank with the candidate and open a campaign account by which all the campaign finances were to go through.

At the time the Electoral Commission was inundated with confused candidates and agents attempting to find out about these new laws in such a short period leading up to the election. Many candidates were ignorant as to what obligations were now placed upon them and were unaware of what had happened with Wollongong Council.

Since that time we have had two State elections and one local government general election with the next local government elections due in September next year. Over this time the Electoral Commission has been able to assess how candidates at the various elections have been able to comply with the obligation to appoint an agent.

At the 2012 local government elections there were approximately 5000 candidates and 1000 groups of candidates. More than 1,500 candidates and groups, or 25%, did not appoint an official agent. At the 2011 and 2015 State elections, around one third of those candidates who were required to appoint an agent failed to do so.

It is not unusual for candidates in country areas to think that such a requirement is only applicable to those in the metropolitan areas. Many people in country areas argue that they do not have the same issues and influences that exist in the city and that it is reasonable for them to manage and disclose their own donations and expenditures. In addition, many people are reluctant to impose the legal obligations of agents on another person, particularly when they are willing to take on those obligations themselves.

Despite the Electoral Commission's targeted efforts to inform people of this obligation a large proportion of people are unwilling or unable to comply. It is not uncommon for people to contact us in a state of panic to say they can't find a person who will agree to be their agent. Indeed many candidates have little choice in the end than to appoint a close family member or friend as their agent thereby exposing that person to the legal liabilities imposed upon agents. Likewise, many people advise us they are willing to accept the legal liability of managing their own campaign finances and are reluctant to appoint an agent.

The Expert Panel made a recommendation to the Government that candidates and elected members should be responsible and accountable for their campaign finances. The Electoral Commission supports this recommendation that the public would expect those running for office, and elected officials, be accountable for their campaign finances.

In contrast to what is considered to be the over regulation of requiring all candidates to have an agent I will now discuss an area which is currently unregulated – associated entities.

The Act does not contain any express provisions to regulate ‘associated entities’ of political parties. This is a major deficiency in the Act and reflects how the Act has not kept pace with the realities of modern day campaigning. The ICAC’s Operation Spicer has raised a question over the activities of associated entities such as the Free Enterprise Foundation and the Millennium Forum. The ICAC’s investigations have exposed a significant risk that donations can be received by associated entities and then donated to a political party without the original source of the donations being disclosed.

Currently, if an entity associated to a party makes a reportable donation it must be disclosed. However, political donors do not have ongoing disclosure obligations, and therefore an entity associated to a political party would only have a disclosure obligation when they make a reportable donation not when they receive donations.

The absence of an ongoing and comprehensive disclosure obligation for associated entities of political parties is out of step with other jurisdictions in Australia and creates loopholes for donations to be made and received which are not then disclosed. As these entities are closely related to political parties, it is our view the donations and expenditure of these entities should be properly disclosed, as is the case for parties, on an annual basis.

In conclusion...

It has been evident for a number of years that ongoing amendments to the Act in response to allegations of corruption and issues with enforcing the Act have not served the people of NSW well. We have been left with a scheme that is too complex for stakeholders to understand and comply with and we have an enforcement scheme that is at times too limiting for the Electoral Commission to leverage as a regulator. We believe that an effective, transparent and robust funding and disclosure scheme is possible. An important start has already been made in the last 12 months with the work of the Expert Panel and the Electoral Commission applying new methodologies and adopting a more regulatory focus. The Commission will continue to work with the Government to achieve a scheme that reflects modern day election campaigning while providing the public with the assurance that those who fund election campaigns, participate in elections and have potential influence over public officials are held to account.