BRIEFING PAPER:
INQUIRY INTO RECOMMENDATIONS MADE BY THE INDEPENDENT COMMISSION AGAINST CORRUPTION'S (ICAC) REPORT ENTITLED 'INVESTIGATION INTO POLITICAL DONATIONS FACILITATED BY CHINESE FRIENDS OF LABOR IN 2015'

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This paper has been written for the purpose of informing the Joint Standing Committee on Electoral Matters on matters relevant to its inquiry into the recommendations made by the ICAC's report entitled *Investigation into Political Donations Facilitated by Chinese Friends of Labor in 2015*.

It is structured as follows:

- Part I outlines the terms of reference and background of the inquiry.
- Part II considers the history of legislative development of the regulation of political finance in New South Wales.
- Part III analyses and evaluates the recommendations made by ICAC.

Part I: Terms of Reference

The terms of reference provide:

> That the Joint Standing Committee on Electoral Matters inquire into and report on the policy recommendations regarding reforms to the regulatory framework for political donations and funding in NSW made by the Independent Corruption Against Corruption in its report: *Investigation into political donations facilitated by Chinese Friends of Labor in 2015*.

The ICAC investigation referred to in the terms of reference is Operation Aero, where the ICAC investigated whether, in 2015, Australian Labor Party (ALP) NSW Branch officials, members of Chinese Friends of Labor, political donors and others had entered into, or carried out, a scheme to circumvent political donations requirements under Part 6 of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW). This investigation began after a referral from NSW Electoral Commission (NSWEC) in January 2018.

Findings of ICAC Investigation

In Operation Aero, the ICAC found that Ernest Wong, a former member of the NSW Legislative Council, and Jonathan Yee, an active member of the Labor Party, orchestrated a scheme to circumvent statutory restrictions on political donations. As the principal organisers of a fundraising dinner hosted by Chinese Friends of Labor, they procured 12 fake donors to conceal the identity of the prohibited true donor of $100,000 to the Labor Party.

The ICAC found that the true source of the $100,000 cash donation, delivered to the NSW Labor head office on 7 April 2015, was businessman Huang Xiangmo. Mr Huang was a

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prominent political donor, donating more than a million dollars total to both the Coalition and Labor parties, until he was refused citizenship and his permanent residency was cancelled on national security grounds in 2019.

It was unlawful for NSW Labor and Country Labor to accept the $100,000 cash from Mr Huang because the donation exceeded the $5,000 cap on political donations that exists in NSW. Mr Huang was also a prohibited donor, as he was not enrolled on the electoral roll at the relevant time; thus, he was not a person from whom political donations could be accepted.

On 13 September 2019, due to the ICAC inquiry, NSW Labor and Country Labor amended their disclosures to omit reference to the 12 putative donors, and repaid $100,000 to the NSWEC on the basis that the donations were unlawful.

The ICAC made findings of serious corrupt conduct against Mr Wong for misusing the privileges to which he was entitled as a member of the Legislative Council by:

- participating in a scheme to circumvent electoral funding laws that required the true source of a reportable political donation be disclosed to the NSWEC; and
- attempting to procure a witness (Mr Tong) to give false testimony to investigating authorities in relation to whether or not Mr Tong had made a donation in connection with a 2015 Chinese Friends of Labor fundraising dinner.

The ICAC was also of the opinion that the advice of the Director of Public Prosecutions should be obtained regarding the prosecution of several other individuals who orchestrated or participated in the scheme to circumvent political donations.

In light of the breaches of electoral law, the ICAC made seven recommendations aimed at strengthening the laws, policies and procedures relating to political donations in NSW, including cash donations; the governance arrangements of registered political parties; penalties and sanctions; and public statements about the NSWEC's compliance activities. These will be further analysed in Part III. The next section will consider the history of legislative development of political finance regulation in NSW.

Part II: History of Major Legislative Development of Political Finance Regulation in New South Wales

Legislative History

The *Election Funding, Expenditure and Disclosures Act 1981* (NSW) was the first legislation regulating political finance in NSW. It was built upon two key planks: public funding of election campaigns, and post-election disclosure obligations on political parties, groups of candidates and candidates.[1]

The regulatory landscape began to profoundly change from 2008 onwards through a series of laws that significantly tightened requirements. As a result, NSW now has one of the most robust schemes to regulate political finance in Australia.

The *Election Funding Amendment (Political Donations and Expenditure) Act 2008* (NSW) required disclosure of donations and campaign expenditure of $1,000 or more every six

[1] Malcolm Anderson et al, 'Less Money, Fewer Donations: The Impact of New South Wales Political Finance Laws on Private Funding of Political Parties' (2018) 77(4) *Australian Journal of Public Administration* 797, 799.

months and banned anonymous donations and loans of $1,000 or more during the same period.

The *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009* (NSW) banned political donations from property developers. This was in response to a series of scandals from mid-2005 relating to political donations from property developers.[2]

A particularly significant piece of legislation was the *Election Funding and Disclosures Amendment Act 2010* (NSW). This Act provided a broad scheme for regulating political funding in NSW through caps on political donations and electoral expenditure, and a substantial increase of public funding. It also extended the ban on political donations from property developers to tobacco, liquor and gambling industry entities. These reforms were directed at reducing the advantages of money in dominating political debate, and sought to provide a more level playing field for candidates seeking election and for third parties who wish to participate in political debate. It aimed to put a limit on the political "arms race", where 'those with the most money have the loudest voice and can simply drown out the voices of all others'.[3] Thus, NSW led the way in providing for more comprehensive regulation of political finance in Australia.

The *Election Funding, Expenditure and Disclosures Amendment Act 2014* (NSW) increased offences under the Act. In particular it created a separate indictable offence (with a maximum penalty of 10 years' imprisonment) to enter into or carry out a scheme for the purpose of circumventing political donations or electoral expenditure prohibitions or requirements. It also increased the maximum penalty for existing summary offences under the Act relating to political donations and electoral expenditure.[4]

The current legislation, the *Electoral Funding Act 2018* (NSW), replaced the *Election Funding, Expenditure and Disclosures Act 1981* (NSW). It implemented a range of reforms recommended by an independent panel of experts and by the NSW Joint Standing Committee on Electoral Matters. This legislation is based on the key pillars of disclosure, caps on donations, limits on expenditure, and public funding. It also strengthened the previous framework. In particular it:

- required donations to be reported within 21 days after being received or made, rather than once a year,
- aggregated electoral expenditure of a political party and its associated entities for the purposes of the party's expenditure cap to remove opportunities to avoid the caps,
- prohibited third party campaigners from acting in concert with others to incur electoral expenditure that exceeds the expenditure cap,
- required senior office holders to report conduct they believe to be a breach of election funding laws to the NSWEC, and made it an offence to fail to do so without reasonable excuse, and
- doubled the penalties for certain offences, introduced a new offence of lodging an incomplete declaration without reasonable excuse, and increased the maximum monetary penalty that the Local Court may impose for offences from $4,400 to $22,000.

[2] NSW Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales* (2008) 7–10.
[3] Second Reading Speech, Election Funding and Disclosures Amendment Bill 2010.
[4] Explanatory Note, Election Funding, Expenditure and Disclosures Consequential Amendment Bill 2014 (NSW).

Current Regulation

There are two major Acts that currently govern electoral regulation and political finance in New South Wales:

- The *Electoral Act 2017* (NSW) regulates the conduct of elections in New South Wales and establishes the NSW Electoral Commission; and
- The *Electoral Funding Act 2018* (NSW) provides for the disclosure, capping and prohibition of certain political donations and electoral expenditure for State parliamentary and local government election campaigns, and for the public funding of State parliamentary election campaigns.

In short, the key features of the current regulation of political finance in NSW are as follows:

- disclosure of donations of $1,000 or more by parties, elected members, candidates, groups and associated entities within 21 days of the donation being received or made,
- aggregated yearly donations cap for registered parties or groups, and unregistered parties, elected members, candidates, third-party campaigners, or associated entities,
- caps on expenditure by political parties, party candidates, independent candidates, and third party campaigners,
- bans on political donations, loans or indirect campaign contributions from (a) property developers, (b) tobacco industry or business entities, (c) liquor or gambling industry business entities, and any close associates,
- bans on foreign political donations,
- public funding of candidates or parties in an election who received more than 4% of the total first preference votes cast in the election, and
- a range of offences with varying severity, including failure to lodge declaration within time, failure to provide complete declaration, offences relating to assisting others in lodging claims or disclosures, unlawful acts regarding the caps on donations and expenditure, and entering into a scheme to circumvent political donation or expenditure restrictions.

In short, NSW has the strongest regulation of political finance in the Australian federation. It has caps on donations and expenditure, bans on donations from property developers, tobacco, liquor and gambling industry, bans on foreign donations, combined with strong offence and enforcement provisions.

Part III: Analysis of Recommendations made by ICAC

In the final report of Operation Aero, the ICAC made seven policy recommendations. These related to tightening rules on cash donations, external scrutiny of the internal governance of political parties, and increasing penalties and the powers of the NSWEC. Each recommendation will be analysed separately.

Recommendation 1

That the NSW Government amends the Electoral Funding Regulation 2018 to provide for the NSWEC to issue penalty notices for less severe breaches of the prohibition on cash donations under s 50A of the Electoral Funding Act 2018.

In response to Operation Aero, since 1 January 2020, it has been unlawful for a person to make or receive a political donation of more than $100 in cash under s 50A *Electoral Funding Act 2018* (NSW). This requirement was introduced to increase transparency and confidence in the political donations system, by ensuring that donations can be properly traced to their true source.

The penalty for breach of the cash donations prohibition is set out in the offence provision (s 145(1)), which has a maximum penalty of 400 penalty units or imprisonment for two years, or both.

In general, there are three types of penalties that apply to breaches of electoral laws: criminal penalties, civil penalties and administrative penalties.[5]

- **Criminal penalties** are penalties imposed by a court in criminal proceedings (including imprisonment) with the standard of proof of 'beyond reasonable doubt'.
- **Civil penalties** are also imposed by courts, but are typically pecuniary penalties and do not include imprisonment. These penalties are imposed through civil proceedings with a less stringent standard of proof, i.e. the balance of probabilities (and also less strict rules of evidence).
- **Administrative penalties** are penalties that can be imposed by an administrative agency, such as the NSWEC, with the availability of review by a court. Under the *Electoral Funding Act 2018* (NSW), these are referred to as **penalty notices**, which involves imposing a fine.[6]

The cash donation breach under s 145(1) can currently be prosecuted as a **criminal** (maximum two years' imprisonment) or **civil penalty** (maximum 400 penalty units). For these penalties, prosecution in court is required to enforce the offence.

This penalty (400 penalty units or imprisonment for 2 years, or both) is equivalent to the maximum penalties for comparable offences involving prohibited donations, such as:

- offences relating to assisting others in lodging claims or disclosures (s 142),
- offences relating to caps on donations and expenditure (s 143),
- other offences relating to political donations and electoral expenditure (s 145); and
- false or misleading information (s 146).

However, as the ICAC points out, less severe offences may not warrant the costs and taxpayer expense involved in taking such cases to prosecution. For instance, the value of the cash donation may be low (e.g. $102), which makes it less feasible to proceed to court, given the cost of prosecution. Further, the role and responsibility of the person who accepted the cash donation should be considered, e.g. whether it was a volunteer who inadvertently accepted a

[5] Joo-Cheong Tham, *Establishing A Sustainable Framework for Election Funding and Spending Laws in New South Wales: A Report Prepared for the New South Wales Electoral Commission* (2012) 207-8.
[6] Penalty notice offences are listed in the *Electoral Funding Regulation 2018* (NSW).

cash donation exceeding the cap, compared to a party official who is required to be aware of donation rules.

Allowing the NSWEC to issue penalty notices for less severe offences would allow flexibility for the NSWEC to tailor penalties to the gravity of the breach and the amounts of money involved. Under a penalty notice, the NSWEC can impose a fine up to the maximum amount of penalty that can be imposed by a court.

Currently the NSWEC can issue penalty notices under s 148 of the *Electoral Funding Act 2018* (NSW) for breaches of other provisions of the Act, including offences relating to contraventions of various sections in Part 3 Division 5 of the Act (the management of donations and expenditure), which carry similar penalty units and terms of imprisonment.[7] Increasing the NSWEC's power to issue penalty notices for breaches of the cash donations rules would be in line with these existing offences.

Conclusion

Enhancing the power of the NSWEC to impose penalty notices for breaches of cash donation requirements, in addition to the current civil and criminal penalty regime, would provide more flexibility for enforcement of the rules and ensure that more breaches of donations law are pursued, and may improve compliance by political parties.

Recommendation 2

That the NSW Government, in consultation with affected parties, initiates an amendment to the Electoral Funding Act 2018 so that payments from the Administration Fund are contingent on the achievement of acceptable standards of party governance and internal control. A working group should be established to determine the relevant governance and control standards, which could relate to:

- ***accounting for, receipting and banking donations***
- ***the organisation of fundraising events***
- ***identifying prohibited donors and donations that exceed statutory caps***
- ***the roles and responsibilities of staff, including volunteers***
- ***risk management and internal audit***
- ***whistleblowing and complaint-handling***
- ***management of gifts and conflicts of interest***
- ***compliance and ethical obligations of senior party officials.***

The ICAC's proposal in Recommendations 2-4 is to empower the NSWEC to audit and enforce compliance with political parties' standards of party governance and internal control. This form of regulation does not currently exist in any Australian jurisdiction.

[7] *Electoral Regulation 2018* (NSW) Sch 1: The NSWEC can issue penalty notices under section 145(1)— in relation to a contravention of sections 36(3)(a) and (b), 38(3)–(6), 39(3)–(5), 40(1), 42(1)–(3), 43(1) and (2): $2,750 if the offence was committed by a party or a party agent, and $1,100 in any other case.

Recommendation 2 relates to making public funding via the Administration Fund subject to acceptable standards of internal party governance and control.

In order to assess this recommendation, it is necessary to consider:

- the governance of political parties,
- public funding of political parties, and
- the appropriateness of linking governance standards to public funding.

The Governance of Political Parties

It is undeniable that the Australian political landscape is dominated by political parties. As Jaensch noted: 'There can be no argument about the ubiquity, pervasiveness and centrality of party in Australia ... Government is party government ... Politics in Australia, almost entirely, is party politics'.[8]

Political parties are recognised in the Australian *Constitution*,[9] and the NSW *Constitution*,[10] which is an indication of their importance in the political system.

Since the 1980s, political parties have been legislatively recognised through electoral laws. The *Electoral Act 2017* (NSW) provides for the formal registration of political parties to contest NSW elections.[11]

To register with the NSWEC, a party must have at least 750 members, appoint a registered officer, provide a party constitution, and pay a $2,000 registration fee.[12] Party registration allows recognition of the party on the ballot paper, access to the electoral roll for campaign purposes, and eligibility for public funding (if other eligibility requirements are met).

Yet the legal status of political parties in Australia is unclear. There is a question about whether political parties should be regarded as:

- 'voluntary associations', akin to a sports club, and thus immune from external scrutiny by regulators or the courts; or
- whether the public nature of political parties should be recognised, due to public funding and recognition in electoral law, and a higher level of regulation should thus apply.

[8] Dean Jaensch, *Power Politics* (Allen & Unwin,1994) 1–2.
[9] Political parties received federal constitutional recognition in 1977 following the Whitlam dismissal, where section 15 of the Constitution, relating to casual Senate vacancies, was amended to ensure so far as is practicable that a casual vacancy in the Senate is filled by a person of the same political party as the Senator chosen by the people and for the balance of their term. See Anika Gauja, 'From Hogan to Hanson: The Regulation and Changing Legal Status of Australian Political Parties' (2006) 17 *Public Law Review* 282.
[10] *Constitution Act 1902* (NSW) ss 3 (interpretation); 22D (filling of casual vacancies in seats of Members of Legislative Council by joint sitting of both Houses); 22E (members elected at joint sittings of both Houses of Parliament). See Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 391-3: 'Section 22E is a rare instance where political parties are recognised by the *Constitution Act*, and their actions have constitutional effect. Traditionally, constitutions in the Westminster style do not recognise the existence of political parties, despite their dominance in the parliamentary system'.
[11] *Electoral Act 2017* (NSW) Pt 6.
[12] Ibid.

As of December 2022, there are 15 political parties registered in NSW.[13] The major political parties (Labor Party, Liberal Party, National Party) are unincorporated (or voluntary) associations. This means they are not legal entities and their governance is not subject to the rigorous statutory duties required of company directors or the less onerous statutory duties imposed under the *Associations Incorporation Act 2009* (NSW).

By contrast, the NSW Greens, Christian Democratic Party and the Shooters and Fishers Party are incorporated associations under the *Associations Incorporation Act 2009* (NSW) and are legal entities.

Despite the centrality and importance of political parties, their legal status remains contested:

- In 1934, the High Court found that internal party rules were unenforceable by the courts, unless property rights are involved. As voluntary associations, political parties are essentially private entities.[14]
- In 1993, a Queensland Court found that internal party rules were enforceable, due to the legal recognition of parties through statutory registration in electoral laws, and the fact that these voluntary associations fulfil substantial public functions in our society.[15]
- In 2022, New South Wales and Victorian Courts held that internal party rules are rarely enforceable, unless property rights are involved, or the question closely intersects with electoral acts.[16]

As the governance of political donations by political parties closely intersects with electoral acts, there is a strong argument that the internal governance of parties in that area should be subject to external scrutiny.

Public Funding

There are several reasons to publicly fund political parties. The first is to ensure parties are adequately resourced in an era of declining party membership and increasingly expensive political campaigns.[17] Another reason to publicly fund political parties is to enhance political integrity and equality. As Briffault stated:

> Public funding is necessary to bring our campaign finance system more in line with our central value of political equality … Public funding can break the tie between private wealth and electoral influence while simultaneously supplementing campaign resources. Money from the public fisc comes from everyone and, thus, from no one in particular.[18]

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[13] NSW Electoral Commission, 'State Register of Parties' <https://elections.nsw.gov.au/funding-and-disclosure/public-register-and-lists/register-of-parties/state-register-of-parties>.
[14] *Cameron v Hogan* (1934) 51 CLR 358,
[15] *Baldwin v Everingham* [1993] 1 Qd R 10.
[16] *Setka v Carroll* [2019] VSC 571; *Asmar v Albanese* [2022] VSCA 19, [211]–[213]; *Camenzuli v Morrison* [2022] NSWCA 51. See Graeme Orr, 'It's My Party: The Enforceability of Political Party Rules' (2022) 47(4) *Alternative Law Journal* 248.
[17] Graeme Orr, 'Putting the Cartel before the House? Public Funding of Parties in Queensland' in Anika Gauja and Marian Sawer (eds), *Party Rules?: Dilemmas of Political Party Regulation in Australia* (ANU Press, 2016) 123.
[18] Richard Briffault, 'Public Funding and Democratic Elections' (1999) 148 *University of Pennsylvania Law Review* 563, 577–8.

Political parties and candidates in NSW receive public funding to cover part of their campaign expenses in the six months leading up to an election. Parties and independent MPs also receive some public funding for administration and ongoing costs each year.

There are three separate types of public funding in NSW:

- Election Campaigns Fund: for reimbursing election campaign expenditure;
- Administration Fund: for reimbursing the administrative expenses of parties; and
- Policy Development Fund: a small fund to assist new parties with policy development.

(a) Campaign Funding

All Australian jurisdictions, apart from Tasmania and the NT, provide public campaign funding for elections.[19]

The total level of public funding of election campaigns varies considerably across jurisdictions, with about half of election campaign costs covered at the Commonwealth level, while in the ACT, NSW and Queensland, the level of public funding has approached full funding of election campaigns.[20]

Public funding for election campaigns for most jurisdictions in Australia is available on a 'dollars per vote' basis, i.e. a fixed-dollar amount for every first preference vote received subject to a minimum vote share. In NSW, candidates or parties in an election who received more than 4% of the total first preference votes cast in the election are eligible for election funding.[21]

NSW has the most generous amount of campaign funding compared to other Australian jurisdictions, apart from the Commonwealth (see Table 1 below).[22]

	NSW (2019 Election)	**Cth (2019 Election)**	**VIC (2022 Election)**	**QLD (2020 Election)**	**SA (2018 By Election)**	**WA (2017 Election)**	**Tas**
Campaign funding	$29,430,700.94	$69,622,617.44	$28,678,450.90	$15,922,000	$94,765	$4,497,586.58	N/A

Table 1: Level of Campaign Funding by Jurisdiction[23]

[19] Yee-Fui Ng, 'Regulating Money in Democracy: Australia's Political Finance Laws across the Federation' Report for Electoral Regulation Research Network (2021) <https://law.unimelb.edu.au/centres/errn/research/research-projects/regulating-money-in-democracy>.
[20] Graeme Orr, 'Full Public Funding: Cleaning up Parties or Parties Cleaning Up?' in Jonathan Mendilow and Edward Eric Phélippeau (eds), *Handbook of Political Party Funding* (Edward Elgar Publishing, 2018) 84, 124-5.
[21] *Electoral Funding Act 2018* (NSW) ss 67-8.
[22] NSW Panel of Experts, *Political Donations: Final Report – Volume 1* (2014) 5.
[23] Data chosen based on most recent general election where full data has been released. New South Wales Electoral Commission, *Annual Report 2019-20* <https://elections.nsw.gov.au/NSWEC/media/NSWEC/Reports/Annual%20reports/NSW-Electoral-Commission-Annual-Report-2019-20-(PDF-4-1MB).pdf>; Australian Electoral Commission, *Election Funding and Disclosure Report: Federal Election 2019* <https://www.aec.gov.au/parties_and_representatives/financial_disclosure/files/reports/funding-disclosure-2019.pdf>; Victorian Electoral Commission, *Funding Register* <https://www.vec.vic.gov.au/candidates-and-

(b) Administrative and Policy Funding

Annual funding for parties through an Administration and/or Policy Development Fund is comparatively rare, with only NSW, Victoria, Queensland and South Australia providing such funding.

NSW has an amount of administrative or policy funding that greatly exceeds other Australian jurisdictions, which amounts to more than double the next comparator jurisdiction (Victoria) (see Table 2 below)

Type of Funding (2021)	**NSW**	**VIC**	**QLD**	**SA**
Administrative/ Special Assistance Fund Payments	$13,674,249.88	$6,605,090.19	N/A	$421,222
Policy /New Parties Fund Payments	$344,143.24	$32,152.37	$3,000,000	N/A
Total	**$14,018,393.12**	**$6,637,242.56**	**$3,000,000**	**$421,222**

Table 2: Level of Administrative/Policy Funding by Jurisdiction[24]

The purpose of the Administration Fund is to reimburse eligible political parties and independent members of parliament for administrative and operating expenditure incurred. This includes the cost of meeting the party's funding and disclosure obligations.

parties/funding/funding-register>; Queensland Electoral Commission, *Annual Report 2020-21* <https://www.ecq.qld.gov.au/__data/assets/pdf_file/0030/28776/2020-21-ECQ-Annual-Report_v2.1Interactive.pdf>; Western Australian Electoral Commission, *Political Finance Annual Report: Report on the operation of Part VI of the Electoral Act 1907 for the period ended 30 June 2017* <https://www.elections.wa.gov.au/sites/default/files/political_funding/2016-17%20Political%20Finance%20Report/2016_2017_WAEC_Political_Finance_Report_Online.pdf>; South Australian Electoral Commission, *Year in Review 2018–19* <https://www.ecsa.sa.gov.au/annual-reports-and-other-corporate-publications> (Note: data not provided in annual reports for 2018 SA general election).

[24] NSW Electoral Commission, *2021 Administration Fund Entitlements and Payments* <https://elections.nsw.gov.au/about-us/reports/funding,-disclosure-and-compliance-reports-and-sta/2021-administration-fund-entitlements-and-payments>; NSW Electoral Commission, *2021 New Parties Fund Entitlements and Payments* <https://elections.nsw.gov.au/about-us/reports/funding,-disclosure-and-compliance-reports-and-sta/2021-new-parties-fund-entitlements-and-payments>; Victorian Electoral Commission, *Annual Report 2021-22* <https://www.vec.vic.gov.au/about-us/publications/annual-reports>; Electoral Commission of Queensland, *Annual Report 2021-22* <https://www.ecq.qld.gov.au/__data/assets/pdf_file/0025/57553/2021-22-ECQ-Annual-report.pdf>; South Australian Electoral Commission, *Special Assistance Funding* <https://www.ecsa.sa.gov.au/parties-and-candidates/funding-and-disclosure-state-elections/special-assistance-funding>.

Auditing and Reporting Requirements

Given the generous annual level of funding of administrative costs of parties in NSW, there is a strong argument for imposing reciprocal obligations on parties for the receipt of this funding, which is in addition to campaign funds for their elections.

Despite this, in NSW there is currently minimal legislated governance requirements on parties that receive public funds. This is exacerbated by the fact that the major parties are unincorporated associations with voluntary membership. This means that the major parties are not legal entities and, other than as discussed below, are not subject to general financial reporting and auditing requirements.

The *Electoral Funding Act 2018* (NSW) imposes very limited requirements that link eligibility conditions for public funding with obligations imposed under the Act: parties and candidates that have not lodged the requisite declaration and/or audited annual financial statement are not eligible for payments from the Election Campaigns Fund, the Administration Fund or the Policy Development Fund.[25] The annual financial statements must be prepared in accordance with the Australian Accounting Standards.[26] The NSWEC may waive compliance if it considers the cost of compliance would be unreasonable.[27]

Disclosure of electoral expenditure and donations and claims for payment from public funds are audited by the NSWEC.[28] Claims for payment require receipts to certify the expenditure.[29]

In addition, parties are required to maintain the following records at their headquarters in NSW: a receipt book, an acknowledgment book, a deposit book, a cash book, or a receipts cash book and payments cash book, a cheque book, a journal, and a ledger.[30] Failure to do so will incur a maximum penalty of 20 penalty units.

Despite these requirements, the governance standards of political parties fall below those of corporations and charities. The senior officeholders in the major parties are not subject to the statutory duties required of company or not-for-profit directors. These include the duty to:

- act in good faith and for a proper purpose,
- act with reasonable care and diligence,
- prevent an improper use of position,
- avoid all misuse of information, and
- prevent conflicts of interest.[31]

[25] *Electoral Funding Act 2018* (NSW) ss 78, 96, 97.
[26] Ibid s 97(2).
[27] Ibid s 97(4).
[28] Ibid ss 59, 74. This is a lesser requirement than under previous legislation, where disclosure of electoral expenditure and donations and claims for payment from public funds by parties were required to be audited by a registered company auditor before being submitted to the NSWEC, and accompanied by an audit certificate by that auditor: *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ss 65, 96K(1)). However, the double auditing requirement was criticised by the Panel of Experts. NSW Panel of Experts, *Political Donations: Final Report – Volume 1* (2014) 125-7.
[29] *Electoral Funding Regulation 2018* (NSW) reg 10.
[30] Ibid reg 12.
[31] *Corporations Act 2001* (Cth), s 180-3.

It may be appropriate to have a regulator oversee the internal governance standards for political parties for financial and auditing matters. Such standards exist for comparable bodies such as charities. Like political parties, charities are set up for public purposes, rely on volunteer labour, and are bodies with a variety of legal structures, sizes and level of sophistication in governance. The minimum governance standards of charities are regulated by the Australian Charities and Not-for-profits Commission (ACNC). Charities must meet the ACNC's Governance Standards to be registered and remain registered with the ACNC.[32]

Relevant internal governance standards for political parties identified by the ICAC include:

- accounting for, receipting and banking donations
- the organisation of fundraising events
- identifying prohibited donors and donations that exceed statutory caps
- the roles and responsibilities of staff, including volunteers
- risk management and internal audit
- whistleblowing and complaint-handling
- management of gifts and conflicts of interest
- compliance and ethical obligations of senior party officials.

It is reasonable to expect political parties to have proper processes for these matters relating to the financial management of political donations, including the identification of unlawful donations and proper accounting for fundraising events, the roles and responsibilities of staff, and dealing with conflicts of interests. These are all matters of probity that would enable compliance with the requirements of political finance legislation.

Linking Governance Standards to Public Funding

Arguments can be made for linking public funding to appropriate party governance and compliance practices. This is because:

- Political parties carry out essential public functions, regardless of their legal structure,
- NSW political parties receive a generous amount of public funding, including a comparatively high level of administration funding ($14 million total in 2021) to enable them to comply with legislative requirements on political donations and electoral expenditure,[33]
- Parties are required to comply with electoral laws, including the management of political donations, and their internal governance is crucial towards meeting these obligations, and

[32] *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 45-1. Australian Charities and Not-for-profits Commission, *ACNC's Governance Standards* <https://www.acnc.gov.au/for-charities/manage-your-charity/governance-hub/governance-standards>.

[33] Joo-Cheong Tham, *Establishing A Sustainable Framework for Election Funding and Spending Laws in New South Wales: A Report Prepared for the New South Wales Electoral Commission* (2012) 202.

- Linking public funding to acceptable governance standards will provide a strong financial incentive for parties to improve their internal governance arrangements and will thus promote compliance by political parties to electoral law requirements.

This proposal has significant advantages. It promotes pro-active compliance by focusing on the 'systems required for broader compliance rather than measures dealing with specific breaches; in doing so, it requires parties receiving public funding to deal internally with issues relating to compliance'.[34]

Conclusion

Political parties receive a substantial amount of public funding, and the level of public funding (both campaign and administration funds) is very generous in NSW, compared to other Australian jurisdictions. The internal governance of political parties is fundamental to enabling parties to meet their obligations under electoral legislation.

Making the receipt of public funding in the Administration Fund subject to acceptable standards of party governance and internal control would provide a strong financial incentive for parties to enhance their standards of internal governance and improve compliance with political finance laws.

Establishing a working group and consulting with affected parties would be beneficial in achieving these aims.

Recommendation 3

That the newly established working group should seek input from the NSWEC to ensure the efficient administration and implementation of standards. That is, consideration should be given to:

- ***applicable minimum standards***
- ***whether the standards should take the form of model rules, which an individual party would be free to modify only if the NSWEC agreed that the modified rule did not adversely affect the party's governance. This would prevent small, or new, parties from incurring the expense of drafting rules from scratch***
- ***the limits on the type of standards that could be required. That is, in order to avoid topics and areas that the state has no legitimate interest in regulating (for example, the way a political party formulates its policies)***
- ***the desirability, or extent to which, the standards take the form of specific rules, so as to meet the reasonable satisfaction of the NSWEC***
- ***the need for a proportionate approach that does not unreasonably penalise small, new political parties or independents***
- ***providing political parties with reasonable opportunities to address shortcomings in their governance and internal control frameworks before administration funding is withheld.***

[34] Ibid.

Recommendation 3 is linked to the previous recommendation to amend the *Electoral Funding Act 2018* to make payments from the Administration Fund contingent on the achievement of acceptable standards of party governance and internal control.

As part of this recommendation, the ICAC suggested that a working group be established to determine the relevant governance and control standards.

Recommendation 3 provides that the working group should consult with the NSWEC on the efficient administration and implementation of standards, including consideration of the following factors:

- Applicable minimum standards,
- Model rules,
- Limits on standards,
- Specificity of rules,
- Proportionality, and
- Opportunities for political parties to address shortcomings.

Applicable Minimum Standards

In order to ascertain the acceptable standards of party governance and internal control, a set of applicable minimum standards would be a useful guide to political parties.

Minimum standards have been prescribed by regulators in other comparable sectors, such as charities. As discussed above, the minimum governance standards of charities are regulated by the Australian Charities and Not-for-profits Commission (ACNC), and charities must meet the ACNC's Governance Standards to be registered and remain registered with the ACNC.[35] These standards include the duties of not-for-profit directors, including the duties of care and diligence, to disclose conflicts of interest, and to ensure that the financial affairs of the charity are managed responsibly.

The objective of the system of standards is to provide a minimum level of confidence that charities 'will promote the effective and efficient use of their resources, will meet community expectations about managing their affairs and the use of public money, volunteer time and donations, and will minimise the risk of mismanagement and misappropriation'.[36] A similar objective would apply to regulating the internal governance of political parties.

Model Rules

The ICAC also recommended consideration of whether governance standards for political parties should take the form of model rules, which an individual party would be free to modify only if the NSWEC agreed that the modified rule did not adversely affect the party's governance.

[35] *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 45-1. Australian Charities and Not-for-profits Commission, *ACNC's Governance Standards* <https://www.acnc.gov.au/for-charities/manage-your-charity/governance-hub/governance-standards>.
[36] *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 45-1.

Model rules would provide a template that would be useful to political parties, particularly small or new parties, who may otherwise find the expense of seeking legal advice to draft rules to be prohibitive.

For instance, the Australian Charities and Not-for-profits Commission (ACNC) have drafted template rules for charities, which are intended to be a starting point for unincorporated associations seeking to register as a charity with the ACNC.[37] These rules were developed with Justice Connect Not-for-profit Law, in consultation with the Australian Taxation Office, state and territory government agencies and professional advisers. If adopted, the rules become the association's governing document, establishing a governance structure and processes for decision-making, and member involvement.

Similarly, NSW Fair Trading has developed a model constitution for incorporated associations under the *Associations Incorporation Act 2009* (NSW) to assist them in drafting their constitution.[38]

However, having strict model rules that an individual party can only modify with the approval of the NSWEC could be seen as unduly restrictive.

Political parties are structured in a multiplicity of different legal forms, from unincorporated associations to corporate structures. Parties are also structured with varying levels of sophistication, from the relatively simple structures of new or small parties, to the complexity of major parties with central state offices and between 30 and 800 intra-party units, and separate parliamentary and administrative arms.[39] For the major parties, there are national, branch and sub-branch constitutions, as well as a miscellany of resolutions and rulings of various bodies such as party executives, conventions and councils.[40]

In this vein, it may be undesirable to have one set of model rules that parties are not allowed to deviate from, unless the modified rule is approved by the NSWEC. It would make the NSWEC an arbiter of party rules and may reduce the flexibility of political parties with diverse sizes and structures to adopt different governance rules and models to meet their particular needs.

Model rules developed by the NSWEC, in consultation with stakeholders, would assist parties to maintain governance standards. However, deviation from these model rules should not be contingent on the approval of the NSWEC.

Limits on Standards

The ICAC also recommended that the working group consider the limits on the type of standards that could be required, to avoid topics and areas that the state has no legitimate interest in regulating.

As discussed on pp 7-8 above, there is uncertainty as to whether political parties should be regarded as public or private entities. There is thus no consensus as to what aspects of internal governance of political parties should be regulated.

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[37] Australian Charities and Not-for-profits Commission, *Rules for a Charitable Unincorporated Association* <https://www.acnc.gov.au/tools/templates/rules-for-charitable-unincorporated-association>.

[38] Fair Trading NSW, *Model Constitution* <https://www.fairtrading.nsw.gov.au/associations-and-co-operatives/associations/starting-an-association/model-constitution>.

[39] NSW Panel of Experts, *Political Donations: Final Report – Volume 1* (2014) 118-119.

[40] Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (Federation Press, 2nd ed, 2019) 123.

Political parties have the main objective of endorsing and promoting candidates for election, but also fulfil subsidiary purposes of aggregating viewpoints in a plural society, offering 'avenues of political participation, deliberation and fellowship' and generating policy debates and proposals.[41] The next section will consider the desirability of these aspects of parties' functions being scrutinised by regulators.

(a) Electoral and Political Finance Matters

There is an argument based on recent case law that internal party governance should be scrutinised for issues that closely intersect with electoral acts.[42] This would include the registration of parties for elections, as well as financial and auditing processes for parties in meeting their political finance obligations. This is justified by the public interest in knowing that money is not misspent.

(b) Policy Formulation

Parties, as a form of mass movement, have a role in formulating grassroots policy, as part of their election platforms. There should arguably not be interference in the way a political party formulates its policies. As ideological organisations promoting particular beliefs and values, state interference in the policy formation of parties may hamper freedom of association and dampen the diverse voices in society.

(c) Internal Democracy

Australian political parties operate with broad discretionary rules allowing executive overruling, and even abandonment, of pre-selections.

There are opposing arguments as to whether the internal democratic principles (e.g. party pre-selections of candidates for election) or membership rights of parties (e.g. classes of members with different voting rights) should be externally regulated.

On one hand, there is an argument for state intervention based on the desirability for democratisation of political parties and the public interest in open and fair pre-selections.[43] This would enhance political equality by creating a level playing field in party pre-selections and policy debate within the party, and improving the 'quality of public debate by fostering inclusive and deliberative practices within parties'.[44] As Professor Keith Ewing argued:

> If public money is being used to support political parties because political parties play an indispensable role in the democratic process, is the public not entitled to expect that the bodies that spend its money themselves meet some basic democratic criteria?[45]

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[41] Ibid 113.
[42] *Setka v Carroll* [2019] VSC 571; *Asmar v Albanese* [2022] VSCA 19, [211]–[213]; *Camenzuli v Morrison* [2022] NSWCA 51. See Graeme Orr, 'It's My Party: The Enforceability of Political Party Rules' (2022) 47(4) *Alternative Law Journal* 248.
[43] Graeme Orr, 'Overseeing the Gatekeepers: Should the Preselection of Political Candidates be Regulated?' (2001) 12(2) *Public Law Review* 89.
[44] Anika Gauja, 'Enforcing Democracy? Towards a Regulatory Regime for the Implementation of Intra-Party Democracy' (2006) <https://apo.org.au/sites/default/files/resource-files/2006-04/apo-nid3963.pdf>.
[45] K D Ewing, *The Cost of Democracy: Party Funding in Modern British Politics* (Hart Publishing, 2007) 244.

Certain comparable jurisdictions regulate the internal democracy of parties. In Queensland, party pre-selections for State candidates can be audited by the Electoral Commission of Queensland, to be in accordance with 'general principles of free and democratic elections'.[46] New Zealand also prescribes 'democratic procedures in candidate selection'.[47] However, these provisions have not been interpreted in an intrusive way; for instance, Queensland party rules can still provide for the executive override of pre-selection ballot outcomes and processes, and for bloc voting, such as by unions affiliated to the Labor Party.[48] In New Zealand, the democratic preselection legislative requirement has never been enforced.[49]

The argument against regulating the internal democracy of parties is that parties are ideological organisations that seek to 'advance their beliefs, policies or ambitions through competitive elections'.[50] Thus, there may not be consensus on what internal democracy means for such partisan organisations. For instance, certain parties are centred on the identity of the leader (e.g. Pauline Hanson's One Nation); communist or socialist parties may be run with strict internal solidarity, consistent with their beliefs; and the Labor Party is built upon trade unions as representatives of working people, rather than a 'one member, one vote' system. Each of these diverse parties have different modes and classes of voting rights of members. The NSW Expert Panel on political finance was of the opinion that interference in the internal democratic processes of parties was unwarranted.[51]

(d) Conclusion

Thus, it is arguable that regulators should avoid intruding in certain internal governance matters of political parties, such as policy formulation, and possibly internal democracy, and membership rights.

Specificity of Rules

The ICAC proposed that the working group consider the desirability, or extent to which, the standards take the form of specific rules, to meet the reasonable satisfaction of the NSWEC.

As discussed on p 14 above, having minimum governance standards is desirable to assist small or new parties to meet internal governance obligations.

The standards could potentially be expressed as specific legislative rules. For instance, the Electoral Act of Queensland provides standards required for the constitution of a political party, including requiring:

- specification of the party's objects,
- the procedure for amending the constitution,

[46] *Electoral Act 1992* (Qld) ss 75(5), 76, 78(2)(e) (duty to maintain complying constitution), Pt 9 (commission oversight of pre-selection ballots).
[47] *Electoral Act 1993* (NZ) s 71.
[48] Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (Federation Press, 2nd ed, 2019) 136-7.
[49] Raymond Miller, *Party Politics in New Zealand* (Oxford University Press, 2005) 110.
[50] Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (Federation Press, 2nd ed, 2019) 116-7.
[51] NSW Panel of Experts, *Political Donations: Final Report – Volume 1* (2014) 122.

- the rules of membership of the party,
- a statement of how the party manages its internal affairs, including the party structure and process for dispute resolution,
- the rules for selecting a person to hold an office in the party and candidate selection for election, and
- a rule requiring that a preselection ballot must satisfy the general principles of free and democratic elections.[52]

As noted above, the rules should not be unduly prescriptive, given the complexity of major parties with central state offices and between 30 and 800 intra-party units, and separate parliamentary and administrative arms.[53] The major parties also have complex rules that include national, branch and sub-branch constitutions, as well as resolutions and rulings of various bodies such as party executives, conventions and councils.[54]

Proportionality

The ICAC highlighted the need for a proportionate approach that does not unreasonably penalise small, new political parties or independents.

The regulation of the internal affairs of political parties requires a balance between 'party autonomy and freedom of association, and other regulatory goals such as transparency, accountability and internal democracy'.[55]

A main challenge is to design a framework that would allow new political movements to organise without imposing excessive administrative burdens.

In doing so, the proportionality test of the High Court in *McCloy v New South Wales* may be instructive.[56] The Court outlined three elements, i.e. that the regulation be:

- Suitable: having a rational connection to the purpose of the regulation;
- Necessary: there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom; and
- Adequate in its balance: balancing between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.

In this context, a proportionate approach would arguably seek to regulate only the necessary aspects of the internal governance and controls of parties that affect electoral and political finance regulation. It would also provide adequate support or concessions to small, new parties or independents, and not impose excessive restrictions on the freedom and autonomy of parties to organise themselves based on their ideological beliefs.

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[52] *Electoral Act 1992* (Qld) s 76.
[53] NSW Panel of Experts, *Political Donations: Final Report – Volume 1* (2014) 118-119.
[54] Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (Federation Press, 2nd ed, 2019) 123.
[55] Graeme Orr, 'Justifications for Regulating Public Affairs: Competition Not Public Funding' in Keith D Ewing, Joo-Cheong Tham, Jacob Rowbottom (eds), *The Funding of Political Parties: Where Now?* (Routledge, 2011) 245.
[56] (2015) 257 CLR 178.

Opportunities for Political Parties to Address Shortcomings

The ICAC noted that consideration should be given to providing political parties with reasonable opportunities to address shortcomings in their governance and internal control frameworks before administration funding is withheld.

Given the significant financial impact of administrative funding being withheld from political parties, the NSWEC should certainly provide political parties with adequate opportunities to address any deficiencies in their internal governance frameworks before taking enforcement action to withhold administration funding.

The NSWEC should comply with the principles of procedural fairness, which is an administrative law principle of giving those adversely affected by a decision an opportunity to respond.[57] This includes providing parties with notice on what specific aspects of their internal governance is deficient, the opportunity to make oral or written submissions as to why funding should not be withheld, advice on how parties may modify their governance and internal control frameworks to be compliant, and time to rectify any deficiencies.

Recommendation 4

That the NSW Government amends the Electoral Funding Act 2018 to provide the NSWEC with the necessary powers to assess, audit and enforce non-compliance with standards of party governance and internal control.

The discussion in Recommendation 2 above highlighted the importance of external scrutiny of the standards of party governance and internal control.

In light of this, the NSWEC is the best-placed body to assess, audit and enforce non-compliance with internal standards of party governance, given their role as regulator of the administration of political finance within the legislative scheme of the *Electoral Funding Act 2018* (NSW).

The following legislative amendments are required to give effect to the proposal:

- The NSWEC has to be empowered to audit the internal affairs of political parties, as this power does not currently exist in the Act; and
- The NSWEC has to be given the power to enforce non-compliance with internal standards of party governance, potentially through amending s 58 of the Act, which allows recovery of unlawful donations and expenditure (up to double the amount if the person knew the act was unlawful).

As this proposal requires the NSWEC to undertake additional functions, it is likely that the NSWEC would require additional funding and resources to undertake this new role effectively.

Recommendation 5

That the NSW Government amends the Electoral Funding Act 2018 to require the NSWEC to publish findings regarding political parties' adherence to established governance and controls standards.

[57] *Kioa v West* (1985) 159 CLR 550, 585.

The discussion in Recommendations 2 and 4 considered the scrutiny by NSWEC of the standards of party governance and internal control.[58] This was on the basis of the importance of political parties to the democratic system, the substantial public funds received by parties, and the concomitant imperative by parties to comply with political finance laws.

The ICAC's proposal to require the NSWEC to publish findings regarding parties' adherence to governance and controls standards would promote transparency in informing the public about the level of compliance by parties with acceptable standards of internal governance.

Transparency in government is a democratic ideal, based on the concept that an informed citizenry is better able to participate in government, thus providing an obligation on government to provide public disclosure of information.[59] It also reduces the risk of corruption and abuses of power, by exposing the activities of political parties receiving substantial amounts of public funding to public scrutiny, by both vertical (parliamentary committees, audit institutions) and horizontal (civil society organisations, the media, the public) networks of accountability.[60] In addition, it provides an additional incentive for parties to improve their standards of internal governance and controls, in order to avoid negative publicity.

Recommendation 6

That the NSW Government, in consultation with the NSWEC, gives consideration to:

a) amending s 100(1) of the Electoral Funding Act 2018 to require senior office holders of political parties to report reasonably suspected contraventions of the Act

b) increasing penalties associated with the offence under s 100(1) of the Electoral Funding Act 2018 to bring it into line with the penalties set out in sections 141 to 146 of the Act.

(a) Duty of Senior Office Holders of Parties to Report

Section 100(1) of the *Electoral Funding Act 2018* (NSW) makes it an offence if senior office holders[61] of a registered party fail to report to the NSWEC any conduct in connection with the party that the office holder knows or reasonably believes constitutes a contravention of the Act, without reasonable excuse.

The offence carries a maximum penalty of 50 penalty units.

Section 100(2) of the Act states that a reasonable excuse may exist if the person knows or reasonably believes a report about the conduct has already been made to the NSWEC.

An alternative regulatory option is to impose specific duties on senior office holders of parties, equivalent to the statutory duties required of company or not-for-profit directors. These include the duty of care, duty to act in good faith and for a proper purpose, duty to avoid improper use of position and improper use of information, and duty to disclose to the other directors material personal interests in matters that relate to the affairs of the company. However, the imposition

[58] See text above pp 6-20.
[59] Daniel J Metcalfe, 'The History of Government Transparency' in Padideh Ala'i and Robert G Vaughn (eds), *Research Handbook on Transparency* (Edward Elgar, 2014) 247, 249.
[60] Albert Meijer, 'Transparency' in Mark Bovens, Robert Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press, 2014) 507.
[61] Parties must provide the NSWEC with a list of senior office holders: *Electoral Funding Act 2018* (NSW) s 98.

of directors' duties on senior office holders of political parties has been subject to criticism because of the uncertainty about to whom the duties are owed.[62]

The ICAC noted that there are challenges in being able to prove what a senior office holder should reasonably understand about the lawfulness of the specific conduct. The NSWEC has previously stated that offences in the Act that require the prosecution to prove that the accused was aware of the facts that result in the act being unlawful are rarely prosecuted.[63] This is because it is difficult to prove knowledge of each element of offences under the Act, and it is also difficult to prove knowledge when the accused is an official agent who is responsible for the acts and omissions of others.

It is ***unclear whether further legislative amendment is required*** to implement the ICAC's recommendation to require senior office holders of parties to report reasonably suspected contraventions of the Act. The duty to report offence in section 100 was inserted in 2018, following Operation Aero, which already makes it an offence for senior office holders not to report known or reasonably suspected contraventions of the Act.

(b) Increasing Penalties

The ICAC also recommended increasing penalties for office-holders not reporting suspected contraventions in section 100 to the levels of offences in sections 141 to 146 of the Act.

There are various offences for breaking election funding laws.

- Minor offences are dealt with by **administrative penalties** (or penalty notices) imposed by the NSWEC, with fines ranging from $275 to $2,750.
- There are also **civil penalties**, which are larger financial penalties imposed by courts.
- The most serious are the **criminal penalties**, which are prosecuted in courts, and can lead to prison sentences of up to a maximum of 10 years (for the offence of entering into a scheme to circumvent election funding law).

The offence in section 100 is a **civil penalty** of a maximum of 50 penalty points.

The ICAC recommended increasing the penalty in section 100 to the levels of offences in sections 141 to 146 of the Act. The penalties under sections 141-146 include:

- 100 penalty units (failure to keep records— non-party),
- 200 penalty units (failure to lodge a declaration, lodgement of an incomplete declaration, failure to keep records— party),
- 400 penalty units or imprisonment for 2 years, or both (offences relating to assisting others in lodging claims or disclosures, offences relating to caps on donations and expenditure, other offences relating to political donations and electoral expenditure, false or misleading information); and
- imprisonment for 10 years (scheme to circumvent political donation or expenditure prohibitions or restrictions).

[62] See discussion in NSW Panel of Experts, *Political Donations: Final Report – Volume 1* (2014) 122-4.
[63] Ibid 133-4.

It is reasonable for the failure to report a suspected breach to fall within this range, as it reflects the duty that senior office holders of a party have to ensure compliance with political finance laws— although arguably the penalty should be lower than the criminal offences, as these duties are less serious than actively engaging in schemes to circumvent political finance laws (400 penalty units and imprisonment terms).

Conclusion

It is *unclear* whether section 100(1) of the *Electoral Funding Act 2018* (NSW) needs further amendment, as it already requires senior office holders of political parties to report reasonably suspected contraventions of the Act.

There should be consultation with the NSWEC about the efficacy of prosecuting this offence, to ascertain whether further legislative amendment is needed.

It is reasonable to *increase the penalties* associated with the failure of duty to report offence in section 100(1), as the ICAC recommended.

Recommendation 7

That the NSW Government amends the Electoral Funding Act 2018 to give the NSWEC power to publish the results of its compliance audits, investigations and regulatory actions.

Section 268 of the *Electoral Act 2017* (NSW) provides that a person must not disclose any information obtained in connection with the administration or execution of the Electoral Act (or any other Act conferring or imposing functions on the Electoral Commission or Electoral Commissioner) unless that disclosure is made—

- with the consent of the person from whom the information was obtained, or
- in connection with the administration or execution of this Act (or any such other Act), or
- for the purposes of any legal proceedings arising out of this Act (or any such other Act) or of any report of any such proceedings, or
- in accordance with a requirement imposed under the *Ombudsman Act 1974* (NSW), or
- with other lawful excuse.

The maximum penalty for breaching this section is 1,000 penalty units.

The ICAC has suggested that this provision may prevent the NSWEC from publishing or disclosing information about the existence or outcomes of specific investigations and enforcement actions, except with the agreement of the individuals concerned or where there has been a public enforcement action (for example, court proceedings).

However, it is considered that recent law reform and existing disclosure practices and requirements mean that no further legislative reform is necessary.

Recent Law Reform

In October 2022, the *Electoral Legislation Amendment Act 2022* (NSW) was passed by the NSW Parliament. The amendments permitted the disclosure of information concerning investigations and other enforcement action in certain circumstances, in the public interest.

It provides that the Electoral Commission or the Electoral Commissioner may disclose information if—

- the information concerns a possible contravention of the Electoral Act or the Funding Act or a regulation under one of the Acts, and
- the disclosure is for the purpose of reporting to the public about the progress or outcome of an investigation into the possible contravention, and
- the Electoral Commission or the Electoral Commissioner is satisfied the disclosure is in the public interest.[64]

The amendment also provides that the Electoral Commission and the Electoral Commissioner have qualified privilege in proceedings for defamation arising out of a permitted disclosure made under the Electoral Act.

It is considered that these amendments remedy any potential deficiency in the ability of the NSWEC to report publicly on enforcement actions in the public interest.

Additional Reporting Requirements

It is noted that the NSWEC is required to report statistical information each year to the NSW Parliament about the use of its enforcement powers.[65] These include issuing statutory notices to require the provision of documents or information, or require a person to attend an interview and to undertake an inspection.

In addition, statistical information of all enforcement actions and outcomes (such as convictions and amounts recovered, unless there is a non-disclosure order) are published in the NSWEC's annual reports and on its website. Enforcement actions and outcomes may also be published as statistics, case studies or statements, without naming persons or entities involved.

Summary and Conclusion

Although NSW has one of the strongest political finance frameworks in the Australian federation, Operation Aero has revealed weaknesses in governance processes of NSW Labor and Country Labor, which are currently beyond legal regulation.

This briefing paper has analysed ICAC's seven recommendations towards strengthening the laws, policies and procedures on political donations in NSW, including cash donations; the governance arrangements of registered political parties; penalties and sanctions; and public statements about the NSWEC's compliance activities. It agrees that reform along these lines would achieve more robust regulation of political finance in NSW.

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[64] *Electoral Act 2017* (NSW) s 268. The Electoral Commission or the Electoral Commissioner may also disclose information to a person who has given information to the Electoral Commission or Electoral Commissioner about a possible contravention of the Electoral Act or the Funding Act or a regulation under these Acts to report progress, give information about the actions and outcomes of the investigation if the Commission or Commissioner is satisfied that disclosure is in the public interest: *Electoral Act 2017* (NSW) s 268.

[65] See eg NSW Electoral Commission, *Report to the NSW Parliament 2021-22* (2022) <https://elections.nsw.gov.au/NSWEC/media/NSWEC/Reports/Annual%20reports/NSW-Electoral-Commission-Report-to-the-NSW-Parliament-2021-22.pdf>