Submission No 7

THE FINAL REPORT OF THE EXPERT PANEL – POLITICAL DONATIONS AND THE GOVERNMENT'S RESPONSE

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Joint Standing Committee on Electoral Matters
Parliament House
Macquarie Street
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Dear Committee Members

I thank the Joint Standing Committee on Electoral Matters for both the opportunity to present this written submission and attend the public hearing of the Committee for their Inquiry into the Expert Panel on Political Donations Final Report.

Election finance laws are very important. They operate to protect our system of representative democracy from corruptive influences and seek to create a fairer playing field in which all members of the community have a more equal opportunity to contribute to political campaigns in both a monetary capacity as well as by other means.

In preparing this submission, the NSW Nationals will address a number of recommendations made by the Expert Panel. A decision by the Party not to address a recommendation should not be considered either acceptance or opposition to the recommendation in question.

Reform of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) is needed. It is a difficult instrument to interpret, understand and administer. However, we must avoid the trap of recent years which was to enact ad hoc amendments to the Act on a regular basis.

An updated Act ought to be easier to understand not just for political parties and officebearers, but also for the general public. Those wishing to donate, and those concerned about donations that have been made, should know precisely where they stand under the law.

Thank you for taking the time to consider our submission.

Kind regards

[redacted]

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Recommendation 1

The Expert Panel, in their first recommendation, has recommended that the Act be immediately reviewed so that it is simple, easy to understand and has clear policy objectives.

This recommendation is supported by the NSW Nationals. The Act is a complicated legislative instrument that poses administrative challenges to larger Parties but results in a more substantial impact upon a minor Party or Independent's ability and desire to contest state elections and meet their legal obligations.

For example, section 83 in Part 6 of the Act states that:
"This Part applies in relation to:
(a) State elections and elected members of Parliament, and
(b) Local government elections and elected members of councils (other than Divisions 2A and 2B)."

On an ordinary reading, this would seem to indicate that the provisions of Part 6, which include sections relating to donation caps, disclosures and eligibility only apply to finances related to State and Local Government elections.

However, and as was submitted in the NSW Nationals submission to the 2012 Joint Standing Committee on Electoral Matters Inquiry into New South Wales electoral laws, further sections of the Part apply to political parties more generally.

For example a political donation is defined in section 85 to mean, amongst other things, "(a) a gift made to or for the benefit of a Party".

"Political donations", are then taken to be subject to the relevant caps[1] and prohibitions[2]. From reading Part 6 of the Act, it is not clear whether the law intends on capturing contributions towards a Party's administration costs, in addition to the costs associated with state campaigns. The argument that section 83 does not actually cover all circumstances under which the Part applies is strengthened by the presence of section 95B(2), which provides an explicit exception for federal campaign donations from the donation caps that apply to the "Party" under section 95A. This is an indication of legislative intent that all donations other than federal campaign donations be in some way regulated by Part 6 of the Act.

An additional complicating factor is that although it is strongly arguable that the prohibited donation provisions under Division 4A of Part 6 do not apply to federal donations, this is not made clear by the current form of the Act.

Many provisions of the Act would be made redundant if the administration accounts of parties are outside their operation. However, it is submitted that both the NSW Nationals and NSW Electoral Commission believe that administration accounts are subject to the same requirements as State Campaign Accounts and proceed on this basis in regards to compliance.

The NSW Nationals submit that these are just a few examples of the confusion that face parties operating within the New South Wales jurisdiction and its presence in significant parts of the legislation justifies the proposed review.

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[1] *Election Funding, Expenditure and Disclosures Act 1981* (NSW) s95A.
[2] *Election Funding, Expenditure and Disclosures Act 1981* (NSW) s96GA.

Legislative risk for political parties and elected members

As stated above, the NSW Nationals support a review of the Act in order to achieve simplification and an ease of understanding for those subject to it. However, the process of proposing a review of the Act separate to this Inquiry poses the risk that political parties and elected members could be subjected to two separate tranches of reform. This imposes a degree of legislative risk that is of concern, as political parties just like other non-profit organisations, require a degree of certainty of operating environment when making strategic plans.

Thus the NSW Nationals submit that any legislative reform of the Act implemented as a result of this Inquiry, be considered at the same time as any suggested as part of the review of the Act.

Recommendation 5

The NSW Nationals made clear our position on the matters covered by the Expert Panel's recommendation five in our submission to the Joint Standing Committees Inquiry into the Conduct of the 2015 State Election.

The NSW Nationals fully support recommendation five, which in effect will help accommodate and support grassroots campaigning.

Currently it is unlawful to receive a donation of $1000 or more without knowing the name and address of the donor[3], which is then disclosed to the community as a reportable political donation[4]. Donations of less than $1000 from the same donor are aggregated over the course of a financial year, which means if the total of their donations for that year reaches $1000 it is then disclosed as a reportable political donation[5].

Whilst the NSW Nationals support the disclosure of political donations and the limit on anonymous donations, the practical application of the laws as they currently stand do not appreciate the practical implications of political campaigns. Raffles, sausage sizzles afternoon teas and other small grassroots campaign activities where participants may be required to donate a gold coin or another very small amount are caught by the aggregation provisions.

Thus each small donation must be recorded just like any other, with the address and name of each donor added to their record of donations for the relevant disclosure period. Although these amounts would fall far short of the $1000 disclosure limit and limit on anonymous donations, if a small donor like this were to have given a donation or a series of donations nearing that limit, the small contribution could in practice result in them exceeding a $1000 aggregated donation to the Party. This aggregation of very small donations does not serve an effective function in the combatting of corruption or the management of political donations, so it is suggested that it be considered to amend the Act in the manner proposed by the Expert Panel in this regard.

Recommendation 7

The NSW Nationals submit that the prohibitions on donations from certain persons and entities under Division 4A of Part 6 are appropriate, however reform needs to be considered to make them easier to understand.

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[3] *Election Funding, Expenditure and Disclosure Act 1981* (NSW) s 96F.

[4] *Election Funding, Expenditure and Disclosure Act 1981* (NSW) s 86.

[5] *Election Funding, Expenditure and Disclosure Act 1981* (NSW) ss 86(2), 95A(2).

As was elaborated upon more extensively in our submission to the Joint Standing Committee's Inquiry into the 2015 State Election, there are several significant areas of the current laws that create confusion.

A significant issue is the "close associate" aspect of the prohibition donor definitions under section 96GB(3). On a plain and general reading of the prohibition provisions, one can form a general understanding of what a "property developer", "liquor or gambling industry business entity" and a "tobacco industry business entity" are. It is submitted that this understanding would not extend to aspects of the close associate provision, which includes being an "officer". The definition of officer is then stated to be that contained with the Corporations Act 2001 (Cth), which is:

""officer " of a corporation means:

(a) a director or secretary of the corporation; or
(b) a person:
    (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
    (ii) who has the capacity to affect significantly the corporation's financial standing; or
    (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation); or
(c) a receiver, or receiver and manager, of the property of the corporation; or
(d) an administrator of the corporation; or
(e) an administrator of a deed of company arrangement executed by the corporation; or
(f) a liquidator of the corporation; or
(g) a trustee or other person administering a compromise or arrangement made between the corporation and someone else."[6]

The purpose of highlighting the definition of "officer" is not to pass judgment on whether it should be a part of section 96GB but to highlight an example of the difficulty that donors, political parties, elected members and candidates have in determining whether they are allowed to proceed with a donation. For example, a donor may have a different opinion on whether their decisions "affect the whole or a substantial part" of the corporation's business to that of a Party Agent or the NSW Electoral Commission.

Further problems exists when the definitions of the three classes are further examined. In regards to property developers, Corporations that are:
"engaged in a business that regularly involves the making of relevant planning applications by or on behalf of the corporation in connection with the residential or commercial development of land, with the ultimate purpose of the sale or lease of the land for profit"[7], are deemed to be property developers for the purpose of the prohibition in Division 4A of the Act.

What constitutes "regularly" is given no meaning or expansion by either the Act or any NSW Electoral Commission guidelines. Thus a strict reading of the section suggests that a corporation that lodges more than one relevant development application may be caught by the prohibition.

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[6] *Corporations Act 2001* (Cth) s 9.

[7] *Election Funding, Expenditure and Disclosure Act 1981* (NSW) s 96GB(1).

In addition there is the peculiarity that the section only captures corporations who are property developers for the purposes of Division 4A. People who may develop property as sole traders or in any capacity outside of the confines of a "corporation" will not be caught. Donors need to be able to understand whether they are eligible to make a donation and parties need to understand whether they are allowed to accept a donation. Under the current provisions of division 4A of Part 6, this is sometimes difficult and simplification is required.

Recommendation 9

As was stated in our submission to the Joint Standing Committee's Inquiry into the 2015 State Election, the NSW Nationals support the Expert Panel's recommendation for the removal of the inconsistency in the caps between monetary donations and indirect donations. The current provision in section 96E was implemented in 2008, meaning that it has in effect been superseded by the general donation caps that exist in section 95A.

Further, the section is strangely formulated in that it makes indirect campaign contributions unlawful but then explicitly states an exception for those that do not exceed $1000.[8]

As it was suggested in our election related submission to the Joint Standing Committee, it is submitted that a more effective means by which to regulate indirect donations is to amend section 95A to explicitly include a cap on indirect political donations, the amount of which should correspond to the current caps on Party and candidate donations.

Recommendation 10

In regards to recommendation 10 of the Expert Panel, the NSW Nationals have consistently argued for a higher cap to be applied to regional electorates due to the higher costs associated with undertaking campaigns in these areas. This is elaborated upon in more detail in our submission to the Joint Standing Committee's Inquiry into the conduct of the 2015 State Election.

Recommendation 11

The NSW Nationals addressed this recommendation of the Expert Panel in our submission to the Joint Standing Committee Inquiry into the conduct of the 2015 State Election. It was stated that;

"The NSW Nationals submit that the current distinction between electoral expenditure and electoral communication expenditure remain. The current formulation in section 87 is a suitable and effective means by which to limit expenditure that goes towards promoting a Party and candidate. This is particularly the case since the 2014 amendments to the Act that brought travel and campaign research within the applicable caps.

It is further submitted that expenditure incurred in raising funds for an election or in auditing accounts[9] continue to fall outside of the definition of electoral communication expenditure. As there is still a need for funds to be raised for New South Wales elections, the inclusion of fundraising expenditure within any cap would be improper and operate inequitably across different parties and candidates who have different means and different donors from whom they seek to raise election funds."

This remains the NSW Nationals submission on the matter.

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[8] *Election Funding, Expenditure and Disclosure Act 1981* (NSW) s 96E(3)(c).

[9] *Election Funding, Expenditure and Disclosure Act 1981* (NSW) s 87(2)(i).

Recommendation 12

The NSW Nationals put forward arguments in our submission to the Joint Standing Committee Inquiry into the conduct of the 2015 State Election for the removal of the distinction between the Party spending under the electorate specific $50,000 sub-cap[10] and the candidate $100,000 cap[11]. The Party remains supportive of this possible reform.

In relation to recommendation 12 of the Expert Panel, the NSW Nationals have significant concerns as to how such a proposal would operate in practice.
Currently under section 95F(13) of the Act, electoral expenditure by a Party is caught by the sub-cap when it:

(a) "explicitly mentions the name of a candidate in the election in that electorate or the name of the electorate, and
(b) is communicated to electors in that electorate, and
(c) is not mainly communicated to electors outside that electorate."

In practice, this is an appropriate formulation that works to capture candidate specific expenditure provided by a Party. It is clearly defined and provides certainty to political parties.

Under the formulation recommended by the Expert Panel, it is unclear whether some expenditure would fall within the Party general cap or candidate sub-cap.

For example, it is unclear whether a Party promotional advertisement featuring the Leader of that Party, but airing in their local electorate among others would be brought within the electorate specific sub-cap.

A further example is a Member of Parliament featuring in a Party advertisement that covers multiple electorates including their own. This may be a regional Parliamentary Secretary who has responsibility for a geographic area of the state.

In addition to this, would an advertisement outlining what a Party, Opposition or Government intends to deliver for a specific electorate if elected be considered encouraging or persuading a vote for a specific candidate?

Clearly, there are some serious concerns about how the New Zealand model proposed by the Expert Panel would operate in practice. These concerns are not present with the current model, which operates effectively to limit candidate specific electoral expenditure under a Party's expenditure cap, at the same time as operating within an overall Party cap. This operation under the Party cap is important because it limits all Party expenditure regardless of whether it is caught by the electorate specific sub-cap as contained in section 95F(13).

Recommendation 13

The NSW Nationals agree with this recommendation if the distinction between electoral communication expenditure and electoral expenditure is removed. Allowing for all expenditure incurred for the purpose of influencing voting to be reimbursable would provide consistency to the Act in the light of the removal of the distinction between expenditure types.

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[10] *Election Funding, Expenditure and Disclosure Act 1981* (NSW) s 95F(12)(a).
[11] *Election Funding, Expenditure and Disclosure Act 1981* (NSW) s 95F(7).

Recommendation 14

As stated in our submission to the Joint Standing Committee Inquiry into the conduct of the 2015 State Election, the NSW Nationals support the continuation of the model introduced by Premier Baird and contained within Part 7A of the Act for future state elections.

The Party elaborates on the reasons for this support in that submission, however it is important to briefly review the key elements of this argument.

A significant consequence of the introduction of Part 7A has been an increase in the campaign public funding for most major parties over that which had been provided in 2011 under the reimbursement model in Part 5 of the Act.

This in itself is not a negative outcome. In New South Wales there are spending caps, both electorate and candidate specific as well as an overall cap for the Party. There is thus a clear and determinable quantity of spending that can occur. With a system of increased public funding, the reliance of a Party or candidate on private donations is reduced, as the gap between expenditure and income is reduced. This is a positive outcome that further reduces the perception of undue influence that inherently exists when private donors contribute to a political campaign, candidate or party.

In addition to this, and as was elaborated upon in the initial submission to this Committee noted above, the dollar per vote system also ensures that the campaign public funding of parties and candidates is linked to their electoral performance. It is submitted that this is a more justifiable outcome to electors than the system of reimbursement available under Part 5 of the Act. It is also likely to be a public funding scheme that is more understandable to electors, a quality that ought not to be undervalued.

Under Part 5 of the Act, parties are eligible to claim reimbursement for actual campaign expenditure. For what is defined as an "eligible Assembly party", this equates to:
"100% of so much of the actual expenditure of the Party as is within 0-10% of the applicable cap, plus 75% of so much of the actual expenditure of the party as is within the next 10-90% of the applicable expenditure cap, plus 50% of so much of the actual expenditure of the party as is within the last 90-100% of the applicable expenditure cap."[12].

This means that a party that is registered and "in the case of an Assembly general election – the total number of first preference votes received by all those candidates endorsed by a party is at least 4% of the total number of first preference votes in all electoral districts in which the candidates were duly nominated for election,"[13] is eligible for funding. Alternatively the Party may not have achieved that threshold but had at least one candidate elected, which would also make them eligible for payment from the Election Campaigns Fund.

In considering this criteria, a Party with only a small degree of political support in the community, that either reaches the 4% criteria or has one member elected becomes eligible to a very large amount of public funding. All they would need to do, is spend it in the first instance. For a Party that contests every electorate and meets that criteria, if they spend up to the capped amount they would be eligible for over $13 million in public funding.
In an environment where New South Wales has seen minor parties like No Land Tax incur substantial electoral expenditure at a state election, the chance of this type of peculiarity above occurring is not unforeseeable.

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[12] *Election Funding, Expenditure and Disclosure Act 1981* (NSW) s 58.
[13] *Election Funding, Expenditure and Disclosure Act 1981* (NSW) s 57(3).

Recommendation 15

The NSW Nationals support an increase in advance payments from the Elections Campaign Fund from 30% to 50% of a Party's entitlement at the previous election. This will help reduce the dependency of parties on campaign loans and the consequent need to raise funding to cover the interest components of such arrangements.

Recommendation 16

The NSW Nationals do not support a return to the 2011 model for the disbursement of funding from the Election Campaigns Fund. The argument put forward by the Expert Panel that "it is the individual candidate level where there is the greatest corruption risk," is a valid one. That is why some parties have centralised operations, which involve experienced and appropriately trained staff determining compliance relating to both expenditure and income. Ensuring that donations and expenditure are held in one location is, for major parties at least, vital to ensuring that donation and expenditure caps are not breached.

This is an important control process because as has been previously referred to in this submission, the Act can be a difficult legislative instrument to understand.

As was stated in our election submission to the Joint Standing Committee, the NSW Nationals and other major parties often incur the majority of campaign expenditure on behalf of candidates, which is then invoiced to them subsequent to the campaign under the power to do so contained in section 84(7)(b) of the Act.

Thus it is submitted that a system of public funding disbursement that accounts for the varying accounting and campaign structures of different parties ought to be developed, as opposed to a one size fits all approach.

Recommendations 17, 18 and 19

The NSW Nationals addressed the substance of recommendation 18 in our submission to the Joint Standing Committee Inquiry into the conduct of the 2015 State Election, however it is of sufficient importance that those arguments are repeated here with additional supplementary comments.

Party Administrative Funding is an important element of political party administration. It enables eligible parties and Independent Members of Parliament to develop their policy platforms, engage with the community on a much broader scale, mitigate the effect of the donation caps and restrictions and importantly, put in place the staff and systems required to ensure compliance in a difficult regulatory environment.

The prohibition on the use of these funds for election campaigning means that they are primarily invested in creating a healthy, grassroots political discourse – precisely the kind of discourse that would otherwise suffer for lack of funding in an environment limited by donation caps.

The Expert Panel acknowledged that one view taken of political parties is that they "are central to parliamentary democracy and our system of government. It is in the public interest that they are funded to develop policies, communicate with the community..."[14]
The NSW Electoral Commission is also quoted as supporting the public financing of political parties in order to develop their "party platform, raise issues for debate and ideas for

[14] Panel of Experts, Political Donations Final Report – Volume 1, page 87.

consideration" and act as a "vehicle for citizens to become involved in the political process."[15]

This is particularly true for citizens in regional areas. In the electorates of Barwon, Murray and Northern Tablelands, Nationals Members of Parliament represent geographic areas larger than many sovereign countries. Across regional New South Wales more broadly, electors have less access to their local state Member of Parliament than an elector in Sydney, the Central Coast or the Illawarra.

The Party Administration Fund allows the NSW Nationals to supplement the activities and resources of local Members of Parliament and undertake community engagement at shows, field days and online.

With the NSW Nationals representing such a large geographic area also comes the challenge of administering a Party with members across regional centres and throughout the most rural and remote areas of New South Wales.

Most importantly and as has already been referred to in this submission and the submission to the Joint Standing Committee Inquiry into the conduct of the 2015 State Election, the Party Administration Fund also ensures that eligible parties and Independent Members of Parliament have the resources to comply with the substantial regulatory burden that the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) sets down. This will almost certainly mean professional staff with relevant legal or accounting expertise, regular legal and financial advice from third parties and the provision of specific training for staff are required. Further, recommendations 25, 26, 29, 30, 33, 34, 36 and 38 of the Expert Panel further increase the regulatory burden at the same time as this recommendation proposes cutting administration funding.

In examining the Expert Panel's Report and suggestion that public funding levels be brought back to their pre-2014 amendment levels, no persuasive reasons are given for doing so. Arguably, the Expert Panel contends that the lack of oversight of the Party Administration Fund means that it ought to be wound back. However, the NSW Nationals submit that by enacting recommendations 17 and 19 that concern can be mitigated and the use of the funding better monitored by the NSW Electoral Commission. Further, these recommendations will also ensure that the funding is used in the manner that the Parliament intended, this being to ensure compliance with the law and to promote healthy political parties, which they agree to be an important part of the New South Wales political system. It is absolutely critical that the general public have a high degree of confidence that the public funding of political parties is being utilised and administered effectively and with sufficient oversight from a regulatory body. Recommendations 17 and 19 will work towards that end.

It is further submitted that any cut to the Party Administration Fund will disproportionally and unfairly affect small and minor parties. These parties generally attract lower membership numbers (thus reducing administrative income) as well as smaller private contributions.

Recommendations 20, 21 and 22

The NSW Nationals support the Expert Panel's recommendations 20, 21 and 22 in order to promote the development of new and minor parties.

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[15] Panel of Experts, Political Donations Final Report – Volume 1, page 87.

Recommendation 23

The NSW Nationals noted our support for a movement away from paper based disclosure forms towards an online platform in our submission to this Committee on the 2015 election. These forms are complicated and burdensome and there is no compelling reason why all disclosure requirements cannot be met through the introduction of an online system.

Recommendation 24

The concept of supplying additional explanatory material and analysis to supplement disclosures in order to make them more understandable is an admirable one, however the recommendation that it be the NSW Electoral Commission's role to provide analysis is opposed.

As is referred to in the Expert Panel's report[16], a Party may direct donations to its Head Office and then account for the candidate's campaign costs through that centralised Head Office. Alternatively, a more traditional campaign where income and expenditure is handled locally may well operate for other parties and Independent candidates. Essentially, different parties and candidates may operate an array of different campaign structures.

As a result of this diversity of structure and added complexity, the NSW Electoral Commission may not be the best body to provide the additional information. The NSW Nationals submit that this can be provided, under clear guidelines, by the disclosing body or person instead.

Recommendation 25

It is submitted that before a system of real-time disclosure is implemented that the NSW Electoral Commission have an online system for ordinary disclosures that has been proven to be suitable to that task.

Further, it is not clear from the Expert Panel's report whether a $1,000 real time disclosure threshold relates to single donations of $1,000 or more or alternatively, aggregated donations from the same donor that then go on to meet or exceed the disclosure threshold.

Recommendation 26

Electors in New South Wales deserve to have a system where they can see and understand what donations have been received by political parties and candidates.

However, this recommendation by the Expert Panel is unsuited to that task. First, donations can be received as a direct result of a fundraising venture where there may be a number of Members of Parliament, Party luminaries or guest speakers in attendance. In this circumstance, it is unclear who the solicitor of the donation would be.

Further, it will be difficult to administer such a requirement if a donation is not immediately given after a function or meeting, for example, a donor attended a fundraising dinner with a specific candidate but then donates through the Party website later in the week as a result.

Additional issues exist, such as what constitutes "solicited" or "for the direct benefit of". There are a wide range of thresholds for both terms.

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[16] Panel of Experts, Political Donations Final Report – Volume 1, page 99.

Recommendations 28 and 29

The NSW Nationals support the legitimate object of these recommendations to make disclosures easier to understand and further, to make it easier to determine compliance with the various expenditure restrictions under the Act.

It is critically important however that what constitutes "electoral expenditure aimed at influencing the voting in a specific electorate" is consistent with whatever the definition of the Party electorate specific sub-cap is at that time.

Recommendation 30

The NSW Nationals support recommendation 30 although it ought to be noted that if this is a provision to prevent the kinds of conduct seen in the ICAC Operations Spicer and Credo with donations being "washed" through an associated entity, the caps on political donations at that time did not apply. Thus under the Act as it currently stands, the extent of the behaviour seen in these disturbing cases cannot be repeated (without breaching the cap).

Recommendation 31

The NSW Nationals submitted in our submission to the Joint Standing Committee's Inquiry into the conduct of the 2015 State Election that the cap for third-party campaigners be reduced to $500,000 and this remains our position on the matter.

Third-party campaigns are, as the Expert Panel indicates, an important part of a vibrant democracy and ought to be accommodated within the election finance regulatory system.

However, there should be a fair playing field in regards to political involvement for both political parties and third-parties and this reduction in the cap, supplemented by the donation caps that already exist strikes the right balance between promoting an engaging and free political environment and one which is limited only by the amount of funds able to be expended.

Recommendation 32

The NSW Nationals strongly support recommendation 32 of the Expert Panel's Report. Reform in the manner suggested will help prevent "front organisations", being Party controlled entities, from incurring electoral expenditure in excess of its cap. The formulation put forward by the Expert Panel allows for independent organisations, such as Unions, to continue to be able to run campaigns with their own caps and budgets, away from political parties that they may have an affiliation with. Further, it is recommended that due consideration be given to ensuring any such provision is worded so as to withstand Constitutional challenge.

Recommendation 33

The NSW Nationals understand the importance of sufficient oversight over political parties that receive public funding under the Act. It must be ensured that public funding is used in the manner set down by Part 6A of the Act. The NSW Nationals are open to providing the NSW Electoral Commission details on our governance and accountability processes.

However, it is submitted that it should not be the role of the NSW Electoral Commission to approve these processes. The Commission is an Independent Statutory Body that is charged with many powers and responsibilities relating to the proper administration of the electoral process and system. They are not business or not for profit organisation experts or

advisers and to grant them a role in approving governance structures in which they have no expertise is therefore inappropriate.

Further, the Expert Panel has not suggested how oversight of the Electoral Commission's use of these new powers would be implemented.

Arguably, the media may take a leading role in determining whether a Party's governance structures and processes are appropriate. If they are published, the media will no doubt relentlessly pursue those parties that enact inadequate governance procedures.

Recommendation 34

(a) (b) The NSW Nationals accept that the general public ought to be able to ascertain the senior officeholders of a political party. Further, it is accepted that senior officeholders should be required to be submitted to the NSW Electoral Commission. However, as was argued earlier in relation to recommendation 33, it ought not to be the role of the Electoral Commission to approve these officeholders. It is again submitted, that the Electoral Commission has no particular expertise in regards to corporate governance and no history in fulfilling such a role. Further, the diversity in officeholders across different political parties who have decision making authority and ultimate responsibility for legislative compliance will be significant. A somewhat prescriptive list or understanding of what the senior officers of a major political party may be completely different to how a minor, newly registered party is structured. For some, paid officials will be ultimate decision makers in regards to budgets and strategic direction, for others, it could be a volunteer working from their lounge room. Both structures are just as legitimate as each other, but the law must be able to accommodate both and it ought not to be for the NSW Electoral Commission to say which is acceptable.

Further,

(c) The NSW Nationals support Part C of recommendation 34, as greater transparency will contribute to rebuilding faith in our political party system.

Recommendation 35

In New South Wales, there is currently a diversity of corporate structures used by parties, registered and non-registered.[17] Many of the larger parties, including the NSW Nationals are unincorporated associations. This is a natural structure for movements that bring people together in order to achieve a shared ideal, in a voluntary capacity.

As the Expert Panel details, there are currently two common law fiduciary duties applicable to "Committee Members"[18]. The first is a duty of loyalty and the second a duty of avoiding conflicts of interest. It seems that the Expert Panel is recommending these to be codified in legislation for the purpose of promoting adherence to them. In effect however, a mere codification changes nothing in this regard as the common law duties exist and apply now. If the codification is to make the officers and directors of unincorporated political parties explicitly liable for breaches of these duties then the exact manner in which this is to occur needs to be carefully considered, particularly considering the diversity of Party structures that has already been referred to in this submission. Determining who the duties would apply to is also of significant concern, as once again the point must be made that the NSW Electoral Commission are not the appropriate body to determine this.

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[17] Panel of Experts, Political Donations Final Report – Volume 1, page 123.

[18] Panel of Experts, Political Donations Final Report – Volume 1, page 123.

Recommendation 36

The NSW Nationals support the introduction of a duty of self-reporting of election funding law breaches or suspected breaches. Currently, if a suspected prohibited donation is received by the Party (inadvertently) it is voluntarily self-reported to the NSW Electoral Commission. However, the suggestion of the Expert Panel that "suspected" breaches be mandatorily referred to the Commission is of some concern when the term "suspected" is open to varying interpretations. In principle though, the NSW Nationals support a requirement to self-report breaches of election funding law.

Recommendations 37 and 38

The NSW Nationals support the simplification of the audit process. As the Expert Panel recommends, removing the need for double auditing of political donations, electoral expenditure and claims for payment of public funding is a responsible means to achieve this.

Recommendation 39

As previously mentioned, many political parties including the NSW Nationals are unincorporated associations which due to issues of legal personality, makes enforcement action against the Party difficult. Although section 112 of the Act provides for enforcement action to be taken against an officer of an unincorporated Party, the NSW Nationals support the Expert Panel's recommendation that registered political parties be deemed to be legal entities or the purposes of prosecutions and the imposition of penalties under the Act.

Recommendation 40

In regards to Party Agents, it is submitted that empowering an individual within a Party with ultimate responsibility for compliance ensures that there is no shifting of blame between senior officials and officers of the Party and there is one point of contact for the NSW Electoral Commission.

The suggestion made by Dr Tham contained within the Expert Panel's report that there is a potential "lack of control [by party and official agents over compliance with funding laws] makes the imposition of liability on agents unfair but also ineffective,"[19] is not necessarily correct. As the person responsible for legislative compliance, they ought to be satisfying themselves as to the circumstances surrounding income and expenditure and making a judgment as to their compliance with the legislation.

However, the concerns of the Expert Panel have certainly been found to be valid in some instances and ought to be addressed. It is thus submitted that an alternative approach to removing the Party Agent scheme is to modify it so the Registered Officer is required to counter-sign and attest for the accuracy of items disclosed by the Agent. As to the liability for legislative compliance, this could be shared between the Agent and the Registered Officer.

In regards to the recommendation that members and candidates be responsible for compliance is at odds with recommendations 34, which recommends that a list of senior office holders be accepted by the NSW Electoral Commission as being ultimately responsible for compliance. It is submitted that the Expert Panel's intent is to recommend that candidates and elected members be responsible for compliance in regards to expenditure under the candidate cap and income into their own campaign accounts.

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[19] Panel of Experts, Political Donations Final Report – Volume 1, page 128.

If this is what is meant, it is argued that it fails to take into account the manner in which campaigns are undertaken and how donations are processed by some parties. As previously stated, some parties including the NSW Nationals, direct donations into a centralised Head Office campaign account. This provides certainty that checks have been completed as to their compliance with the legislative requirements by properly trained and experienced staff. Expenditure is also directed out of that centralised account and candidates subsequently invoiced as provided by section 84(7), again to ensure compliance. Thus deeming a candidate and elected member to be responsible in these circumstances is grossly inappropriate. However, consideration should be given to making candidates and elected members who have a greater degree of control over these matters responsible for their compliance.

Recommendation 41

The intention behind this recommendation is admirable, although presents difficulties in application. Although it is not explicitly clear in the Report, it is suggested that this recommendation aims to make a senior officeholder legally responsible for the content of a disclosure. This ought to only be the case if the Party Agent system is removed or reformed in such a way that the position is required to be held by a relevant senior officeholder.

Part b of the recommendation states that the person nominated to lodge disclosures on behalf of a Party be approved by the Electoral Commission as being of sufficient seniority and standing within the Party. The NSW Nationals again submit that it ought not to be the role of the NSW Electoral Commission to be approving matters of this nature but further that if the recommendation is adopted then the senior officeholder should be one of those named under what is proposed by recommendation 34 (if that recommendation is adopted).

Recommendation 43

The NSW Nationals support recommendation 43.

Recommendation 44

The NSW Nationals support part a of the recommendation.

Part b of recommendation 44 is well intentioned, however it must be noted that with larger parties, particularly those with sub-entities spread across the state, Party Head Offices are often reliant on these sub-entities returning disclosure forms details their expenditure and income for inclusion in the overall Party disclosure. A difficulty is posed if a sub-entity fails to return a form on time and therefore the overall Party disclosure requires amending. Further, some sub-entities may return to activity after a period of inactivity or a new sub-entity formed with the Head Office unaware to their existence.

It ought not to be the case in such circumstances outlined above that a person or Party be held responsible for lodging an 'incomplete disclosure' although arguably it is a mistake as to fact and therefore a defence to a strict liability offence.

Recommendation 45

The Expert Panel make it rightfully clear in their report that "the current offences that require the prosecutor to prove beyond reasonable doubt that, at the time of the act, the accused was aware of the facts that resulted in the act being unlawful."[20]

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[20] Panel of Experts, Political Donations Final Report – Volume 1, page 136.

This is not a negative aspect of the Act. In fact, it is a reflection of the core values of the New South Wales criminal justice system in which persons are entitled to be presumed innocent and further, the case against them ought to be proved beyond reasonable doubt. To differentiate electoral funding law offences to other offences contained in the broader criminal law is unjustifiable.

The NSW Electoral Commission have broad powers under section 110A of the Act to order the production of a variety documents and information and under section 110 have an inspector enter a premises (without a warrant) to ascertain whether the Act is being or has been contravened. It is submitted that with these extensive powers, they have sufficient opportunity and power to collect evidences relating to the offences as they currently stand.

Recommendation 46

The NSW Nationals support the Expert Panel's determination that the NSW Electoral Commission ought to have additional mid-level enforcement options available to it. As Dr Tham is identified as stating on page 137 of the Report, breaches of the Act "do not always warrant criminal sanctions: they are not necessarily accompanied by requisite knowledge or intention; they could have involved limited amounts of money; they could have been inadvertently committed by volunteers."

The mid-level enforcement options must be proportionate to the breach committed, thus the withdrawal of public funding ought not be considered an appropriate option for smaller, accidental breaches of the Act.

Further, post breach conduct such as self-reporting should be considered as a mitigating factor in the consideration of enforcement actions.

Recommendation 50

The NSW Nationals support the recommendation, although submit that the withdrawal of a portion of a party's administration funding for a Member of Parliament's failure to attend an annual seminar as being inappropriate in light of a Party's inherent lack of coercion available to ensure a Member of Parliament attends. A more effective means, also recommended by the Expert Panel would be to withdraw a portion of their Member entitlements, alternatively that Member of Parliament could have a portion of their pay withheld.