

Compliance and Enforcement Policy

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1 Definitions and abbreviations

Abbreviations

Electoral Act	<i>Electoral Act 2017 (NSW)</i>
Electoral Regulation	Electoral Regulation 2018 (NSW)
Electoral Commission agency	NSW Electoral Commission staff agency
NSW Electoral Commissioner	New South Wales Electoral Commissioner
EF Act	<i>Electoral Funding Act 2018 (NSW)</i>
EF Regulation	Electoral Funding Regulation 2018 (NSW)
Electoral Regulation	Electoral Regulation 2018 (NSW)
FDC	Funding, Disclosure, Compliance and General Counsel Division of the NSW Electoral Commission
LG Act	<i>Local Government Act 1993 (NSW)</i>
LG Regulation	Local Government (General) Regulation 2005 (NSW)
Lobbying Act	<i>Lobbying of Government Officials Act 2011 (NSW)</i>
Lobbying Regulation	Lobbying of Government Officials (Lobbyists Code of Conduct) Regulation 2014 (NSW)
NSW Electoral Commission	New South Wales Electoral Commission

Definitions

- 1.1 **Associated Entity** - means a corporation or other entity that operates solely for the benefit of one or more registered parties or elected members.
- 1.2 **Candidate** - in relation to an election, means a person nominated as a candidate at the election in accordance with the Electoral Act, or in accordance with the LG Act (as the case requires) and includes a person applying for registration as, or registered as, a candidate in the Register of Candidates for the election. For the purposes of the EF Act, a candidate includes an individual who accepts a gift for use solely or substantially for a purpose related to the proposed candidacy of the individual at a future election and an individual who makes a payment for electoral expenditure for the election of the individual at a future election.
- 1.3 **Elected member** - means a member of Parliament, or a councillor (including the mayor) of the council of a local government area, and includes a person who, during any period after ceasing to be a member of Parliament or a councillor, is entitled to remuneration as such a member or councillor.
- 1.4 **Election** - means a State election or a local government election in NSW.

- 1.5 **Group** - in relation to State elections means a group of candidates, or part of a group of candidates, for a Legislative Council election, or in relation to local government elections means a group of candidates, or part of a group of candidates, for a local government election. For the purposes of the EF Act, a group includes individuals who accept a gift for use solely or substantially for a purpose related to the proposed candidacy of the individuals at a future election and a group of individuals who make a payment for electoral expenditure for the election of the individuals at a future election.
- 1.6 **Lobbyist** - means:
- a. a third-party lobbyist, or
 - b. any other individual or body that lobbies Government officials (including an individual engaged to undertake lobbying for a third-party lobbyist).
- 1.7 **Lobbyists Code** - means the Lobbyists Code of Conduct prescribed by the Lobbying Regulations in accordance with Part 2 of the Lobbying Act.
- 1.8 **Lobbyists Register** - means the Register of Third-Party Lobbyists established under Part 3 of the Lobbying Act.
- 1.9 **Lobbyists Watch List** - means the Lobbyists Watch List established under Part 4 of the Lobbying Act.
- 1.10 **Party** - means a body or organisation, incorporated or unincorporated, having as one of its objects or activities the promotion of the election to the NSW Parliament or a local Council of a candidate or candidates endorsed by it or by a body or organisation of which it forms a part.
- 1.11 **Political Donor** - means a person who or entity that makes a gift.
- 1.12 **Registered party** - means a party registered in accordance with Part 6 of the Electoral Act, or in accordance with Chapter 10 Part 7 of the LG Act.
- 1.13 **Third-party campaigner** - means an entity or other person (not being an associated entity, party, elected member, group or candidate) who incurs electoral expenditure during the capped expenditure period for a State or local government election (as defined in Part 2 of the EF Act) that exceeds \$2,000 in total and includes an individual or entity that is registered as a third-party campaigner in accordance with Part 7 of the EF Act.

2 Introduction

- 2.1 The NSW Electoral Commission is responsible for promoting compliance by political and election participants with the requirements of the legislation it regulates.
- 2.2 Political and election participants are individuals and entities involved in politics and elections in NSW including:
- political parties, third-party campaigners, associated entities and their agents
 - candidates, groups of candidates and elected members

- political donors
- third-party lobbyists.

2.3 The NSW Electoral Commission administers and regulates legislation under four NSW Acts (and relevant supporting Regulations):

1. The *Electoral Funding Act 2018* ('EF Act') regulates election funding, expenditure and disclosure and registration for elections¹
 - Supported by the *Electoral Funding Regulation 2018* ('EF Regulation')
2. The *Electoral Act 2017* ('Electoral Act') regulates NSW State elections and the use of enrolment information²
 - Supported by the *Electoral Regulation 2018* ('Electoral Regulation')
3. The *Lobbying of Government Officials Act 2011* ('Lobbying Act') regulates the lobbying of government officials in New South Wales
 - Supported by the *Lobbying of Government Officials (Lobbyists Code of Conduct) Regulation 2014* ('Lobbying Regulation').
4. The *Local Government Act 1993* ("LG Act") regulates the conduct of local government elections in NSW
 - Supported by the *Local Government (General) Regulation 2005* ('LG Regulation')

2.4 Integrity and public confidence in the outcomes of elections and the decision-making processes of government are vital to our democracy. The NSW Electoral Commission is committed to working with everyone involved in the electoral process to:

- ensure that elections are conducted in a transparent, fair and impartial way and in accordance with the law
- administer and enforce a fair and transparent electoral funding, expenditure and disclosure scheme and
- ensure that the interactions between government officials and third-party lobbyists are transparent and accountable.

¹ The *Electoral Funding Act 2018* commenced 1 July 2018 and replaced the now repealed *Election Funding, Expenditure and Disclosures Act 1981*. References in this document to the *Electoral Funding Act 2018* apply to comparable provisions of the *Election Funding, Expenditure and Disclosures Act 1981*.

² The *Electoral Act 2017* commenced 1 July 2018 and replaced the now repealed *Parliamentary Electorates and Elections Act 1912*. References in this document to the *Electoral Act 2017* apply to comparable provisions of the *Parliamentary Electorates and Elections Act 1912*.

3 Purpose

- 3.1 The purpose of this policy is to:
- set out the principles and objectives of compliance and enforcement
 - provide a guide for the use of investigation and enforcement powers by the NSW Electoral Commission and its authorised officers
 - outline how the NSW Electoral Commission accounts for enforcement action taken.
- 3.2 This policy is supported by Compliance and Enforcement Procedures.
- 3.3 This document is not a guideline within the meaning of section 152 of the EF Act.

4 Scope and application

- 4.1 This policy applies to:
- the promotion of compliance with the requirements of the EF Act, Electoral Act, LG Act (electoral provisions only), Lobbying Act and related Regulations³
 - the investigation of potential incidents of non-compliance
 - the NSW Electoral Commission's enforcement of the law
 - officers of the NSW Electoral Commission staff agency ('Electoral Commission agency'), including contractors and third-party consultants, who are involved in identifying, investigating and undertaking enforcement action.

5 NSW Electoral Commission's Compliance and Enforcement Role

- 5.1 The NSW Electoral Commission monitors and enforces compliance with the legislation. Compliance monitoring provides information about potential breaches, which are assessed for possible review and investigation.

The NSW Electoral Commission's role in relation to the *Electoral Funding Act 2018*

- 5.2 The NSW Electoral Commission is responsible for regulating the management and disclosure of political donations and electoral expenditure by election participants for State and local government elections in New South Wales. The EF Act governs these matters from 1 July 2018.

³ The NSW Electoral Commission is responsible for regulating the provisions of the now repealed *Election Funding, Expenditure and Disclosures Act 1981* and the *Parliamentary Electorates and Elections Act 1912* in relation to any unlawful act that occurred prior to the repeal of those Acts on 30 June 2018.

The main funding and disclosure functions of the NSW Electoral Commission as prescribed by the EF Act are:

- to maintain a scheme of public funding to eligible political parties and candidates for the conduct of State election campaigns and, in the case of eligible political parties and independent members of Parliament, to maintain a scheme of public funding for administrative and policy development expenses
- to regulate the disclosure of the source and the amount of political donations received and the amount of electoral expenditure incurred for State and local government elections
- to foster compliance with the various campaign finance management requirements for State and local government elections
- to regulate the maximum amounts (or “caps”) on the value of political donations that can lawfully be accepted, and the electoral communication expenditure that can lawfully be incurred in connection with State and local government elections.

5.3 The NSW Electoral Commission is responsible for investigating non-compliance and for subsequent enforcement action that is in relation to:

- the registration of candidates, groups of candidates, third-party campaigners, associated entities, official agents and party agents
- claims for public funding
- the management and disclosure of political donations and electoral expenditure
- caps on political donations and electoral expenditure
- the prohibition of certain political donations
- the duties of senior office holders of registered political parties.

The NSW Electoral Commission’s role in relation to the *Electoral Act 2017*

5.4 The Electoral Act constitutes the NSW Electoral Commission and empowers it to perform functions under the Electoral Act, the EF Act and the Lobbying Act. The Electoral Act also authorises the NSW Electoral Commission to regulate conduct at State elections including the use of enrolment information. The Electoral Act governs these matters as of 1 July 2018.

5.5 The NSW Electoral Commission is responsible for investigating non-compliance with the Electoral Act and for the subsequent enforcement action that is in relation to:

- the registration of political parties
- the enrolment of electors
- the use of enrolment information
- voting at a State election
- the conduct of candidates, groups, parties and electors at an election

- the conduct of scrutineers and others at an election.

5.6 The NSW Electoral Commission also has an educative role in preventing electoral malpractice and ensuring people are aware of their responsibilities and obligations under electoral legislation.

The NSW Electoral Commission's role in relation to the *Lobbying of Government Officials Act 2011*

5.7 The Lobbying Act applies a set of ethical standards to all third-party lobbyists and other individuals and organisations that lobby government. The NSW Electoral Commission is responsible for investigating non-compliance and for subsequent enforcement action that is in relation to:

- the registration of third-party lobbyists
- compliance with the Lobbyists Code.

5.8 The Lobbyists Code requires all lobbyists who seek to influence government policy or decision making to observe certain ethical standards.

5.9 All third-party lobbyists must be registered and must comply with additional standards and requirements set out in Part 3 of the Lobbyists Code.

The NSW Electoral Commission's role in relation to the *Local Government Act 1993*

5.10 The NSW Electoral Commission is empowered to institute proceedings for offences under the LG Act in connection with the conduct of local government elections and to exercise its investigative powers under the EF Act for that purpose.

6 Principles and Objectives of Compliance and Enforcement

Principles

Objectivity and impartiality

6.1 The facts of a case are identified and assessed objectively and impartially.

Evidence (to the required standard)

6.2 Depending on the case type, evidence to the required standard is obtained to assist in directing enforcement action.

Proportionality

6.3 Any enforcement action decided upon is proportionate to the seriousness of the breach and the circumstances surrounding it.

Due process

- 6.4 When assessing or investigating a matter, due process is exercised. This means identifying facts before deciding whether a breach has occurred; establishing that a breach has occurred before deciding on enforcement action. It also means being mindful of objectivity, fairness and ethical conduct.

Consistency

- 6.5 A review or investigation of a matter considers a broad range of evidence and conduct relative to the matter in question, as well as precedent matters across multiple jurisdictions (such as previous decisions by the NSW Electoral Commission and by other agencies). This promotes consistency in decision-making.

Consistent with the legislation

- 6.6 Decisions made are consistent with the intent, objectives and provisions of the relevant legislation.

Responsible use of powers

- 6.7 Enforcement powers are used within the scope and parameters of the law.

Timeliness

- 6.8 Matters will be reviewed, investigated (if applicable) and enforced in a timeframe that considers due process, the need for appropriate action, as well as meeting legislative requirements.

Prioritisation of matters

- 6.9 Matters are prioritised according to a number of considerations, including but not limited to legislative timeframes, the known or foreseeable impact on third parties of the particular breach.

Appropriate use of the NSW Electoral Commission's resources

- 6.10 Compliance matters are monitored, investigated and enforced in a way that uses the NSW Electoral Commission's resources appropriately.

Adequate record-keeping

- 6.11 Compliance matters and enforcement actions are recorded accurately with sufficient detail to enable peer or supervisor review of the conduct of a matter, and use as evidence in a court proceeding, if necessary. Record keeping of matters meets the requirements of the *State Records Act 1998*.

Objectives

Encouraging stakeholder compliance

6.12 The NSW Electoral Commission adopts a strategy of encouraging stakeholder compliance with the laws that the agency enforces by making full use of all appropriate means, including proactive communication and awareness raising, education programs, intelligence assessments, audits and reviews, risk assessment and strategic targeting. These strategies are applied to ensure the use of available sanctions (administrative, civil and criminal) is exercised reasonably, fairly and ethically.

Deterrence

6.13 Deterrence is at the heart of strategies to protect the transparency and integrity of political systems operating in New South Wales. An effective deterrence framework assures those engaged in misconduct that such behaviour will be detected, prosecuted and sanctioned. The NSW Electoral Commission applies workable strategies that maximise the prospects of delivering credible deterrence in a risk-based environment.

Creating good precedents

6.14 Matters are assessed and enforced in a way that sets a model for future matters.

Promoting accountability

6.15 Enforcement of breaches (or the power to do so) encourages political participants to remain accountable to the NSW public.

Promoting fairness

6.16 Where the law has been breached in a way that creates an unfair situation for voters or other political participants, the enforcement of that breach upholds fairness.

Justice

6.17 Enforcement achieves justice to the people of New South Wales for breaches of the law.

Education

6.18 Compliance monitoring and enforcement educates stakeholders, and informs FDC of areas where education and awareness raising activities should be focussed.

7 Compliance monitoring and enforcement

Compliance monitoring tools

7.1 The NSW Electoral Commission utilises a number of compliance monitoring tools including:

- implementing processes to identify non-compliance
- surveillance and risk based assessments
- sharing and receiving information with other agencies
- receiving complaints, referrals and feedback from the public
- compliance audits and reviews
- undertaking inspections
- conducting investigations.

Compliance and enforcement actions

7.2 Depending on the type of breach, options to promote compliance or to enforce the law in relation to an identified offence/s are as follows:

- no further action
- communication with stakeholders
- education
- a written warning or advice of breach (recorded against the person who committed the breach)
- a written caution (recorded against the person)
- penalty notice (applicable to penalty notice offences listed in Schedule 1 of the EF Regulation, and Schedule 1 of the Electoral Regulation)
- recovery of monetary amount (applicable to unlawful political donations, indirect campaign contributions and loans)
- compliance agreements (applicable to the EF Act)
- Supreme Court injunction (applicable to the EF Act)
- prosecution (applicable to the Electoral Act, the EF Act, the LG Act and the Lobbying Act)
- suspension or cancellation of the registration of a third-party lobbyist (applicable to Lobbying Act)
- inclusion of a lobbyist on the Lobbyists Watch List (applicable to Lobbying Act).

7.3 **Note:** though not enforcement actions, the NSW Electoral Commission is:

- i. obligated to withhold public funding where a party or candidate has failed to lodge a declaration of disclosure or any annual financial statements
- ii. authorised to deduct from a public funding payment to recover an amount from a party, party agent or candidate.

Selection of enforcement action

7.4 The selection of the most appropriate enforcement action is based on:

- the severity or seriousness of the breach
- frequency
- public interest considerations
- antecedents (history)
- aggravating and mitigating factors.

7.5 **Severity or seriousness of the breach**

- the degree of harm or potential harm resulting from the breach. This includes consideration of the likely harm caused to public confidence in the effectiveness of the Acts and Regulations
- the magnitude or degree of non-compliance
- the duration of non-compliance.

7.6 **Public interest**

- whether or not the alleged offence is of considerable general public concern
- the necessity to maintain public confidence in the NSW Electoral Commission
- the prevalence of the alleged offence and any need for deterrence, both personal (i.e. of the alleged offender) and general (i.e. of the community at large) or both
- the cost to the general community of the breach, including the cost of imposing and ensuring compliance with enforcement option
- the degree of culpability of the alleged offender in connection with the offence
- whether or not the consequences of any enforcement action would be unduly harsh or oppressive
- whether enforcement action is required to achieve the objectives of the law (Acts and Regulations)
- the youth, age, maturity, intelligence, physical health, mental health or special disability or infirmity of the alleged offender or witness
- the alleged offender's antecedents and background, including language ability.

7.7 **Aggravating factors**

Aggravating factors which may warrant the taking of more serious enforcement action include, but are not limited to:

- the known or foreseeable consequences of the breach
- whether the alleged offender used a position of authority to commit the offence

- a history of non-compliance by offender
- the breach is continuing
- financial gain or other advantage to the offender as a result of non-compliance
- uncooperative conduct of offender
- disadvantage (financial or reputational) to other stakeholders.

7.8 **Mitigating factors**

Mitigating factors which may warrant the taking of less serious enforcement action include, but are not limited to:

- a good compliance record of offender (first time offence)
- any action that has been taken by the offender to eliminate or reduce the risk of damage resulting from the non-compliance
- cooperative conduct of the offender
- a long period of time has elapsed since the breach occurred/staleness of the offence.

7.9 The applicability of, and weight to be given to, each of the above factors will vary widely and will depend on the particular circumstances of each case.

7.10 It is likely that any particular case may have some factors in favour of a particular enforcement action and some against. In each case, an overall assessment will be made based on consideration of the importance of each relevant factor in the circumstances.

7.11 **Factors which do not influence the selection of enforcement action**

- the race, religion, sex, national origin, social affiliation or political associations, activities or beliefs of the alleged offender or any other person involved (unless they have special significance to the commission of the particular offence or should otherwise be taken into account objectively)
- the personal feelings of the investigating officers or prosecutor concerning the offence, the alleged offender, or a victim
- the possible effect of the decision on the personal or professional circumstances of those responsible for the investigation or prosecution, or otherwise involved in its conduct
- the possible media or community reaction to the decision.

Accounting for enforcement action

7.12 The NSW Electoral Commission accounts for investigation and enforcement functions in accordance with its Compliance and Enforcement Publication Policy and Procedures. Except where authorised or permitted by law, the NSW Electoral Commission does not report on, or disclose, detailed information about compliance matters and enforcement actions. Examples of what may be disclosed include:

- reporting statistical information about the use of its enforcement powers in its Annual Report to the NSW Parliament
- publishing on its website enforcement actions undertaken and outcomes from such actions including convictions and amounts recovered (unless there is a preclusion to publication)
- acknowledging receipt of allegations of suspected breaches of legislation from members of the public and advising relevant individuals when a compliance matter has concluded
- providing submissions to the NSW Parliament's Joint Standing Committee on Electoral Matters (JSCEM) in response to JSCEM inquiries into the NSW Electoral Commission's functions.

Working with other agencies

7.13 The NSW Electoral Commission has agreements with other agencies:

- to share relevant information
- to receive referrals of potential breaches of the laws administered by the NSW Electoral Commission
- to coordinate investigation and enforcement.

7.14 Regulatory action taken by another authority does not prevent the NSW Electoral Commission from taking enforcement action in response to a breach of the legislation. However, where an offence is identified which involves conduct that another regulatory agency may also be addressing, the NSW Electoral Commission in appropriate cases will consult with the responsible authority to facilitate a coordinated, constructive and proportionate enforcement approach.

8 Roles and responsibilities

Who	How
NSW Electoral Commission	<ul style="list-style-type: none">• Approves this policy and associated documents
Executive Director and Directors FDC & GC	<ul style="list-style-type: none">• participates in the consultation process• determines policy instrument content and compliance with electoral funding laws• communicates policy development and revision with the Legal Unit and the Policy Coordinator
Policy Coordinator	<ul style="list-style-type: none">• coordinates administration of the policy development and review process• manages the publication, amendment or archiving of approved policy instruments in the Policy Library
Senior Advisor Regulatory Advice and Analysis	<ul style="list-style-type: none">• develops and amends policy instruments as required• forwards approved policy instruments to the Policy Coordinator for registration and publication• forwards approved policy instruments to the Policy Implementer (if not also the Policy Author) for implementation

9 Monitoring, evaluation and review of this policy

- 9.1 This policy will be reviewed every three years, or whenever it becomes apparent that a revision is needed.

10 Associated documents

- 10.1 Compliance and Enforcement Procedures
- 10.2 Compliance Audit Policy
- 10.3 Compliance and Enforcement Publication Policy and Procedures

- 10.4 Disclosure Policy and Procedures
- 10.5 Registration of Political Participants Policy
- 10.6 Non-Prohibited Donor Determinations Policy and Procedures
- 10.7 Party Registration Policy and Procedures
- 10.8 Penalty Notice and Caution Procedures
- 10.9 Identification of Potential Political Donors Policy and Procedures
- 10.10 Prosecution Policy
- 10.11 Public Funding Policy

11 Document control

Document management

Approved by:	Signature:
The NSW Electoral Commission	<div style="border: 1px solid black; background-color: #f4a460; padding: 5px; text-align: center; margin-bottom: 5px;">Signature Redacted</div> Date approved: 10 June 2020
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Publication details

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Date	Version	Revision description
01 December 2014	V 1.0	Legislative change – <i>Electoral and Lobbying Legislation Amendment (Electoral Commission) Act 2014</i>
29 June 2016	V 1.1	Periodic review
11 October 2017	V 1.2	Legislative change – <i>Environmental Planning and Assessments and Electoral Legislation Amendment (Planning Panels and Enforcement) Act 2017</i>
12 December 2018	V 1.3	Legislative change – <i>Electoral Act 2017 and Electoral Funding Act 2018</i>
14 August 2019	V1.4	Periodic review
10 June 2020	V1.5	Periodic review