

17 August 2024

BY EMAIL

The Hon. Don Harwin
State President, NSW Liberal Party
L2, 131 Macquarie St
SYDNEY NSW 2000

By email: [REDACTED]

CC: [REDACTED]

Dear Mr Harwin,

I refer to your letter of 16 August 2024 outlining the reasons which you consider make it necessary for the nomination day for the upcoming Local Government elections to be extended from Wednesday 14 August 2024 to Wednesday 21 August 2024.

I understand the key reason you consider such extension to be necessary is that a notice complying with the requirements of cl 288(2) of the *Local Government (General) Regulation 2021* (the *Regulation*) was not published at least one week before the nomination day specified in that notice, as required by cl 288(1) of the *Regulation*. In those circumstances, you consider that the current nomination day is “invalid”, and that the only way to remedy that invalidity is for the election managers for the upcoming elections to exercise a discretion they are said to have under cl 286 of the *Regulation* to extend the nomination day.

In your letter, you have asked for confirmation by 4:00pm today that the nomination day will be extended in the manner you consider necessary. You have also indicated that, in the absence of such confirmation, urgent proceedings may be commenced in the Supreme Court of New South Wales challenging the validity of the existing nomination day, and seeking relief which would require an extension to be made to allow the New South Wales Division of the Liberal Party of Australia to nominate candidates for election.

I accept that, as noted in your letter, Election Notice 2 was published on the website of the New South Wales Electoral Commission (the Commission) on Friday 9 August 2024, two days later than the date required under cl 288(1) of the *Regulation*. However, as I explain below, information was available on the website and in the public domain which is relevant to whether any failure to comply strictly with cl 288(1) was material.

Non-compliance with the requirements of cl 288(1)-(2) of the *Regulation* could only impact the validity of subsequent aspects of the election process if that non-compliance was material, in the sense of there being a realistic possibility of a different outcome had the requirements of cl 288(1)-(2) been met.

It does not, for reasons outlined below, appear to me that there could have been a realistic possibility that officials of the New South Wales Division of the Liberal Party of Australia, or persons proposing to run as candidates endorsed by that party, could have, as a result of Election Notice 2 being published two days later than required by cl 288(1) of the *Regulation*, been unaware of the nomination day or of the processes by which nominations could be made. Quite apart from the information published in Election Notices on the Commission’s website, there are a number of reasons why the material before me does not suggest a realistic possibility that such persons could have been unaware of the deadline for nomination:

- The date of the nomination day for an ordinary election is, by the combined operation of s 287 of the *Local Government Act 1993* and cl 286 of the *Regulation*, set by statute *except* where the election manager for that election makes another determination.
- Election Notice 2 was published on the website for five out of the seven days required by cl 288(1).
- The nomination day and other relevant information was notified on the Commission's website in documents published more than one week before the nominations. See particularly the Candidate's Handbook, published on 17 July 2024; Bulletin 1, published on 10 May 2024; Bulletin 2, published on 25 June 2024; Bulletin 5, published on 1 August 2024; as well as the Election event calendar published in October 2023.
- Notice of the election process, including the nomination date, was published in newspapers and via an extensive social media campaign, as well as communicated in candidate webinars.
- The Commission corresponded extensively with officials of the New South Wales Division of the Liberal Party of Australia about the election process from 10 May 2024, including the Bulletins referred to above. In that correspondence, the nomination day and other relevant information was made clear.

I note that, as an additional reason said to support the making of the extension suggested in your letter, you also refer to "potential non-compliance" with cl 289(1) of the *Regulation*. The "potential non-compliance" is said to arise from the fact that the electronic nomination forms LG.202 and LG.203 are not in the same form as that specified in Form 2 and Form 3 in sch 11 to the *Regulation*.

Section 80(1) of the *Interpretation Act 1987* provides that if a form is prescribed by, or approved under, an Act or statutory rule, strict compliance with the form is not necessary but substantial compliance is sufficient.

You have not, in any event, pointed to any specific instances of "non-compliance" with cl 289(1) of the *Regulation*, or to any basis upon which such (unspecified) non-compliance could have made any material difference to whether or not proposed candidates were able to lodge their nomination by noon on the nomination day.

Your letter proceeds on the premise that I, as the election manager for most (but not all) of the elections scheduled to be held on Saturday 14 September 2024, would have the power, under cl 286 of the *Regulation*, to extend, or in effect, change, the current nomination day.

In all of the circumstances outlined above, and on the information available to me, I am not presently of the view that I could now lawfully exercise the power conferred by cl 286 of the *Regulation*, nor is it my view, if that power is available, that it would be appropriate to exercise it, bearing in mind (a) the absence of a realistic possibility that the outcome could have been different if the requirements of cl 288(1)-(2) had been met, and (b) the very significant ramifications that would have for the conduct of the elections.

For the foregoing reasons, I do not intend to take the action sought by you under cl 286 of the *Regulation* as suggested in your letter.

Yours sincerely


Matthew Phillips
NSW Electoral Commissioner (Acting)