

Non-prohibited donor determinations policy and procedures

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1. Abbreviations and definitions

Abbreviations

EF Act	<i>Electoral Funding Act 2018</i> (NSW)
EF Regulation	Electoral Funding Regulation 2018 (NSW)
Electoral Act	<i>Electoral Act 2017</i> (NSW)
Electoral Regulation	Electoral Regulation 2018 (NSW)
Electoral Commission	NSW Electoral Commission (three-member statutory authority)
Electoral Commissioner	NSW Electoral Commissioner
FDC&GC	Funding, Disclosure, Compliance and General Counsel Division of the NSW Electoral Commission
LG Act	<i>Local Government Act 1993</i> (NSW)

Definitions

Associated Entity – means a corporation or other entity that operates solely for the benefit of one or more registered parties or elected members.

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 Local Government 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 Part 2 of the Electoral Funding 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.

Close associate of a corporation – means each of the following:

- a director or officer of the corporation or the spouse of such a director or officer
- a related body corporate of the corporation
- a person whose voting power in the corporation or a related body corporate of the corporation is greater than 20% or the spouse of such a person
- if the corporation or a related body corporate of the corporation is a stapled entity in relation to that stapled entity
- in relation to a corporation that is a property developer – a person in a joint venture or partnership with the property developer in connection with a relevant planning application made by or on behalf of the property developer who is likely to obtain a financial gain if the development that would be or is authorised by the application is authorised or carried out
- if the corporation is a trustee, manager or responsible entity in relation to a trust-a person who holds more than 20% of the units in the trust (in the case of a unit trust) or is a beneficiary of the trust (in the case of a discretionary trust).

Close associate of an individual – means each of the following:

- the spouse of the individual
- in relation to an individual who is a property developer – a person in a joint venture or partnership with the property developer in connection with a relevant planning application made by or on behalf of the property developer who is likely to obtain a financial gain if development that would be or is authorised by the application is authorised or carried out.

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.

Election – means a State election or a local government election in NSW.

Electoral expenditure – means expenditure for or in connection with promoting or opposing, directly or indirectly, a party or the election of a candidate or candidates or for the purpose of influencing, directly or indirectly, the voting at an election, as defined in section 7 of the Electoral Funding Act.

Capped expenditure period – in the case of a State election means the period from and including 1 October in the year before which the election is to be held to the end of polling day for the election; in the case of a State by-election – the period from and including the day of the issue of the writ or writs for the election to the end of polling day for the election; in the case of a local government general election – the period from and including 1 July in that year to the end of polling day for the election; and for another local government election – the period from and including the day on which the date of the election is publicly notified by the person conducting the election to the end of polling day for the election.

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 Part 2 of the Electoral Funding 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.

Local government election – means an election under the LG Act for the office of councillor or mayor under that Act (other than an election of mayor by councillors).

Liquor or gambling industry business entity – means:

- a corporation engaged in a business undertaking that is mainly concerned with either or a combination of the following, but only if it is for the ultimate purpose of making a profit:
 - the manufacture or sale of liquor products
 - wagering, betting or other gambling (including the manufacture of machines used primarily for that purpose) or
- a person who is a close associate of a such a corporation
- a registered club within the meaning of the *Registered Clubs Act 1976*, if the business undertaken by the registered club includes wagering, betting or other gambling
- a person who, for a registered club, is
 - the secretary of the registered club or
 - a member of the governing body of the registered club or
 - the spouse of the secretary or member of the governing body or
 - a close associate of the registered club.

Officer – has the same meaning as in the *Corporations Act 2001* of the Commonwealth. Section 9 of that Act defines an *officer* of a corporation as:

- a director or secretary of the corporation or
- a person:
 - who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation or
 - who has the capacity to affect significantly the corporation’s financial standing or
 - 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
- a receiver, or receiver and manager, of the property of the corporation or
- an administrator of the corporation or
- an administrator of a deed of company arrangement executed by the corporation or
- a liquidator of the corporation or
- a trustee or other person administering a compromise or arrangement made between the corporation and someone else.

Prohibited donor – means:

- a property developer or
- a tobacco industry business entity or
- a liquor or gambling industry business entity;
- and includes any industry representative organisation if the majority of its members are prohibited donors listed above.

Property developer – means:

- an individual or a corporation that carries on a business mainly concerned with the residential or commercial development of land, with the ultimate purpose of the sale of the land for profit, and in the course of that business:
- One relevant planning application has been made by or on behalf of the individual or corporation and is pending; or
- Three or more relevant planning applications made by or on behalf of the individual or corporation have been determined within the preceding 7 years.
- a person who is a close associate of an individual or corporation.

Any activity engaged in by an individual or corporation for the dominant purpose of providing commercial premises at which the individual or corporation or a related body corporate of the corporation will carry on business is to be disregarded for the purpose of determining whether the individual or corporation is a property developer unless that business involves the sale or leasing of a substantial part of the premises.

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.

Political Donor – means a person who makes a gift.

Political donation – means a gift made to, or for the benefit of, a political party, elected member, candidate, group of candidates, or other person or entity including an associated entity or third-party campaigner in New South Wales, as defined in section 5 of the [Electoral Funding Act](#).

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.

Related body corporate – has the same meaning as in the *Corporations Act 2001* (Cth) of the Commonwealth. Sections 9 and 50 of that Act defines a *related body corporate* as a body corporate that is related to another body corporate because it is one of the following:

- a holding company of the other body corporate
- a subsidiary of the other body corporate or
- a subsidiary of a holding company of the other body corporate.

Relevant planning application – has the same meaning as in section 10.4 (Disclosure of political donations and gifts) of the *Environmental Planning and Assessment Act 1979*.

Senior office holder (of a party) – means a person involved in the management or control of the party or the operations of the party.

Spouse of a person includes a de facto partner of that person.¹

Stapled entity – means an entity, the interests in which are traded, along with the interests in another entity as stapled securities and (in the case of a stapled entity that is a trust) includes any trustee, manager or responsible entity in relation to the trust.

Third-party campaigner – in the case of a State election – 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 Electoral Funding Act.

Tobacco industry business entity – means:

- a corporation engaged in a business undertaking that is mainly concerned with the manufacture or sale of tobacco products or
- a person who is a close associate of such a corporation.

Voting power – has the same meaning as in the *Corporations Act 2001* (Cth) of the Commonwealth.

¹ Note: “De facto partner” is defined in section 21C of the *Interpretation Act 1987*.

2. Introduction

- 2.1. The responsibilities of the New South Wales Electoral Commission ('NSW Electoral Commission') include regulating political donations in NSW, facilitating public awareness of those donations and helping to prevent corruption and undue influence in the government of the State.
 - 2.2. The EF Act prescribes rules in relation to political donations. One such rule is to prohibit political donations made by or on behalf of certain persons. It is an offence for a 'prohibited donor' to make a political donation, for a person to make a political donation on behalf of a prohibited donor, to solicit a political donation from a prohibited donor and to accept a donation made by or on behalf of a prohibited donor.
 - 2.3. In cases where uncertainty exists, a person may apply to the Electoral Commission for a determination that they or another person is not a prohibited donor.
 - 2.4. Officers of the NSW Electoral Commission staff agency ('the Electoral Commission agency') are responsible for reviewing such applications to enable the Electoral Commission to make a determination.
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3. Purpose

- 3.1. The purpose of this policy and procedure is to:
 1. describe the principles and objectives concerning prohibited donors and the power to determine that a person is not a prohibited donor
 2. provide a guide as to the process for making an application to the Electoral Commission that a person is not a prohibited donor and
 3. provide a guide as to the Electoral Commission's approach to determining applications.²
 - 3.2. This document is not a guideline within the meaning of section 152 of the Electoral Funding Act.
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4. Scope/application

- 4.1. This policy and procedure applies to:
 - persons who make an application for determination that a person is not a prohibited donor
 - persons (including entities) who are the subject of such an application
 - persons and entities who make and accept political donations as defined in the EF Act
 - persons who wish to view the Electoral Commission's register of such determinations
 - staff members of the Electoral Commission agency including contractors and third-party consultants.

² In accordance with section 56(7) of the Electoral Funding Act.

5. Objectives

- 5.1. The objectives of regulating political donations including the process of determining that a person is not a prohibited donor are based on section 3 of the EF Act. They are to:
- establish a fair and transparent electoral funding, expenditure and disclosure scheme, by validating appropriate donors through this process
 - facilitate public awareness of political donations, by publishing a register of the determinations
 - help prevent corruption and undue influence, by identifying potential prohibited donors
 - promote compliance by donors and all political donation recipients with the requirements of the law, by enabling and enforcing the determination process.
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6. Determination that a person is not a prohibited donor

Application for a determination

- 6.1. A person (being an individual or an entity)³ may apply to the Electoral Commission for a determination that they or another person is not a prohibited donor.⁴
- 6.2. A prohibited donor, pursuant to section 51 of the EF Act, is defined as:
- a) a property developer or
 - b) a tobacco industry business entity or
 - c) a liquor or gambling industry business entity
- and includes any industry representative organisation if the majority of its members are prohibited donors as listed above.
- 6.3. The definitions of the above types of prohibited donors are in the Definitions section below. It is unlawful for:
- a prohibited donor to make a political donation
 - a person to make a political donation on behalf of a prohibited donor
 - a person to accept a political donation that was made (wholly or partly) by a prohibited donor or by a person on their behalf
 - a prohibited donor to solicit another person to make a political donation
 - a person to solicit another person on behalf of a prohibited donor to make a political donation.⁵
- 6.4. It is an offence for a person to do any of the above unlawful acts if the person is, at the time of the act, aware of the facts that result in the act being unlawful.⁶

³ A person is defined in the *Interpretation Act 1987* (NSW) to include an individual, a corporation and a body corporate or politic.

⁴ Section 56(1) of the Electoral Funding Act.

⁵ Section 52 of the Electoral Funding Act.

⁶ Section 145 of the Electoral Funding Act.

- 6.5. An offence involving a prohibited donation can be enforced in a number of ways, including through recovery of the donation or prosecution of the donor and/or recipient in accordance with the Electoral Commission's Compliance and Enforcement Policy.

Basis of determination

- 6.6. The Electoral Commission will make a determination that a person is not a prohibited donor if it is *satisfied that it is more likely than not that the person is not a prohibited donor*. In other words, the Electoral Commission is satisfied that the person is most likely not a prohibited donor.
- 6.7. In light of the transparency objective under section 3 of the EF Act, the Electoral Commission may, in its discretion, publish on its website (in the register of determinations) all or part of the information provided by the applicant on which the Electoral Commission's decision was based.
- 6.8. The Electoral Commission must make its determination based solely on information provided by the applicant.⁷

Publication of determination

- 6.9. If the Electoral Commission makes a determination that a person is not a prohibited donor, the determination is published on a register of determinations available on the Electoral Commission's website.⁸

Duration of determination

- 6.10. A determination remains in force for 12 months after it is made unless it is revoked by the Electoral Commission. The Electoral Commission can revoke a determination at any time by notice in writing to the applicant.⁹
- 6.11. A determination is presumed to be correct for a person who makes or accepts a political donation while the determination is in force, even if the determination is later found to be incorrect.¹⁰
- 6.12. A determination is not presumed to be correct for a person who makes or accepts a political donation, knowing that the applicant provided information to the Electoral Commission that is false or misleading in a material particular (that is, false or misleading about a fact in the application that was relied on by the Electoral Commission to make a determination).¹¹

⁷ Section 56(2) of the Electoral Funding Act.

⁸ Section 56(6) of the Electoral Funding Act.

⁹ Section 56(3) of the Electoral Funding Act.

¹⁰ Section 56(4) of the Electoral Funding Act.

¹¹ Section 56(5) of the Electoral Funding Act.

7. Application and determination procedures

Who can make an application for a determination?

- 7.1. Any person can apply to the Electoral Commission for a determination that the applicant or another person is not a prohibited donor.

Who can be the subject of an application?

- 7.2. The subject of the application can be an individual or an entity.
- 7.3. The determination made by the Electoral Commission concerns the subject of the application. The subject of the application may be a different person to the person who makes the application.

Why make an application for a determination?

- 7.4. If a person wishes to make or accept a political donation and is unsure whether their or the potential donor's employment, investments or relationships with other persons or entities makes them a prohibited donor it is prudent to make an application for a determination before making or accepting a donation. Making an application ensures that the person is complying with the EF Act. If an application is successful in receiving a determination it also shows any related political stakeholders and the NSW public that the donations made by that donor are not prohibited during the period the determination has effect.

How to make an application

- 7.5. An application for a determination that a person is not a prohibited donor must be made on the approved form (available on the Electoral Commission's website) and lodged with the Electoral Commission. There is no fee for making an application.
- 7.6. The Electoral Commission can only make a determination based on information provided by the applicant. A determination can only be made if the information shows that it is more likely than not that the person is not a prohibited donor. A determination will not be made if false or misleading information is included in an application. Accordingly, the application must be complete, accurate and provide sufficient information for the Electoral Commission to be able to consider making a determination. Supporting documents may be attached to the application. The applicant may provide further information in connection with the application after the application is lodged with the Electoral Commission or in response to the Electoral Commission's request for further information.
- 7.7. Examples of information to include in an application are:
 - the applicant's details
 - details of close associates of the subject corporation or individual, such as directors and related bodies corporate (see section 53(5) of the EF Act for the definition of 'close associates')
 - the purpose of, and business engaged in, by the subject corporation
 - other activities undertaken by the corporation.

How an application is dealt with

- 7.8. Officers of the Electoral Commission agency review the application for compliance with the EF Act and completeness and review the accuracy of the information contained within the application. Application details are recorded electronically. Officers reviewing the application then make a recommendation to the Electoral Commission as to whether a determination can be made.

- 7.9. The Electoral Commission may decline to make a determination if:
- the application is incomplete or
 - the information provided by the applicant is insufficient to show that the subject is most likely not a prohibited donor or
 - the information provided shows the subject of the application is more likely than not a prohibited donor or
 - the information provided by the applicant is inaccurate.

Timeframe for dealing with an application

- 7.10. There is no statutory timeframe for dealing with an application, however, the Electoral Commission aims to make a determination within 30 days of receiving a complete application, with the following considerations in mind:
- the number of subjects included in the application
 - if the application is not made by the subject, whether the subject wishes to be heard on the application
 - election dates and campaign periods
 - information, time, and resources available to the Electoral Commission and
 - the principles and objectives of making a determination.
- 7.11. If there is a delay in making a determination or further information is required from the applicant, officers from the Electoral Commission agency will inform the applicant.

Informing the applicant and subject

- 7.12. Once an application is received, officers of the Electoral Commission agency acknowledge receipt of the application. They will also inform any subject of the application, if they are not the applicant, and invite that subject to make a submission as a matter of procedural fairness.
- 7.13. Once the Electoral Commission has made a decision as to whether it will make a determination, it will notify the applicant (and, if the applicant is not the subject of the application, the subject) that a determination has been made, or conversely, that it has declined to make a determination.

Compliance matters related to an application

- 7.14. It is an offence to provide information to the Electoral Commission in an application if the applicant knows that the information is false or misleading in a material particular.¹² If any information in the application is suspected to be false or misleading in a material particular, the suspected false or misleading information will be subject to a review in accordance with the Electoral Commission's Compliance and Enforcement Policy and Procedures.
- 7.15. A review of a potential breach of the EF Act in relation to an application is separate to the assessment of the application, and if evidence is obtained to show a breach of the EF Act has occurred, the breach may be subject to enforcement action. In addition, the review of the application for the original purpose of recommending whether the Electoral Commission makes a determination or declines to do so will not continue.

¹² Section 146 of the Electoral Funding Act.

- 7.16. If information in the application shows that a person is likely to be a prohibited donor, and political donations have already been made by and accepted from that donor, the making and/or acceptance of a donation may constitute an offence. Potential offences are reviewed in accordance with the Electoral Commission's Compliance and Enforcement Policy and Procedures.

How a determination is recorded and published

- 7.17. If the Electoral Commission determines that a person is not a prohibited donor, that determination is recorded electronically in the Electoral Commission's records management system along with the application details.
- 7.18. The details of the Electoral Commission's determination are included on a register which is published on the Electoral Commission's website.

Revoking a determination and incorrect determinations

- 7.19. The Electoral Commission may revoke a determination at any time by notice in writing to the applicant. If a determination is revoked, the Electoral Commission will write to the applicant to notify the applicant of the revocation.
- 7.20. The Electoral Commission will revoke a determination if it becomes aware that the application contained false or misleading information in a material particular or if the subject of the determination subsequently makes regular planning applications.
- 7.21. This doesn't mean that the subject of the determination is a prohibited donor. It just means that there is no valid determination that the person or other entity is not a prohibited donor.

8. Associated documents

- 8.1. Compliance and Enforcement Policy
- 8.2. Compliance and Enforcement Procedures

9. Reference

- 9.1. *Corporations Act 2001* (Cth), sections 9 and 50
- 9.2. *Environmental Planning and Assessment Act 1979*, section 10.4
- 9.3. *Interpretation Act 1987*, section 21C
- 9.4. *Electoral Funding Act 2018* (NSW)

10. Roles and responsibilities

Who	How
NSW Electoral Commission	<ul style="list-style-type: none">• Approve this policy and associated documents
Executive Director and Directors Funding, Disclosure and Compliance and General Counsel	<ul style="list-style-type: none">• participate in the consultation process• determine policy instrument content and compliance with electoral funding laws• communicate policy development and revision with Governance 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
Policy and Project Officer	<ul style="list-style-type: none">• develops or 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

11. Monitoring, evaluation and review of this policy

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

12. Document control

Document management

Approved by:	Date
NSW Electoral Commission	9 August 2023
Executive Director Review:	Date
Rachel McCallum Executive Director, Funding, Disclosure & Compliance and General Counsel	21 July 2023
Director Review:	Date
Hugo Bergeron Director, Compliance	30 June 2023

Publication details

Document Type:	<input checked="" type="checkbox"/> Policy <input type="checkbox"/> Standard <input checked="" type="checkbox"/> Procedure <input type="checkbox"/> Guidelines		
Responsible Business Unit: Funding, Disclosure & Compliance and General Counsel	<table border="1"> <tr> <td>Author: Policy and Project Officer</td> <td>Publication: <input type="checkbox"/> Not for publication <input type="checkbox"/> Internal catalogue <input type="checkbox"/> Intranet only <input checked="" type="checkbox"/> Intranet and website</td> </tr> </table>	Author: Policy and Project Officer	Publication: <input type="checkbox"/> Not for publication <input type="checkbox"/> Internal catalogue <input type="checkbox"/> Intranet only <input checked="" type="checkbox"/> Intranet and website
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Revision record

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
01 October 2017	V 1.2	Legislative change – <i>Environmental Planning and Assessment and Electoral Legislation Amendment (Planning Panels and Enforcement) Act 2017</i>
12 December 2018	V 1.3	Legislative change – <i>Electoral Act 2017, Electoral Funding Act 2018</i>
13 February 2019	V 1.4	Minor amendment to include the publication of information supplied by applicants on the NSW Electoral Commission website (the register of determinations).

Date	Version	Revision description
9 February 2022	V 1.5	Minor amendment to add “the subject of the application is more likely than not a prohibited donor” to the reasons why the Electoral Commission may decline to make a determination.
9 August 2023	V 1.6	Legislative change – Amendment of <i>Electoral Funding Act 2018</i> . Update to definition of “Liquor or gambling industry business entity”.