

# STATEMENT By Chairperson, NSW Electoral Commission

23 March 2016

## **Liberal Party of Australia (NSW Division) ineligible for further public funding**

The NSW Electoral Commission has decided that the Liberal Party of Australia (NSW Division) is not eligible for payment of its current claims for about \$4.4 million in public funding because it failed to disclose the identity of all major political donors in its 2011 declaration.

Effective 23 March 2016, the Liberal Party will not receive further funding from the Election Campaigns Fund or the Administration Fund, administered by the Commission. The Party will remain ineligible until it discloses all reportable political donations in relation to its 2011 declaration. These donations include some made by donors identified during the ICAC's public hearings in Operation Spicer.

The Liberal Party did not submit a "requisite declaration" which is a breach of the *Election Funding, Expenditure and Disclosures Act 1981*.

The Commission considered the public evidence generated by ICAC's Operation Spicer and other information held by the Commission and information and submissions put forward on behalf of the Liberal Party and The Free Enterprise Foundation. Since 11 February 2016, the Liberal Party was given opportunities to rectify its declaration but it declined to do so.

"Integrity and public confidence in the electoral system are vital. The election funding and disclosure scheme promotes campaign finance transparency. This Party declaration concealed rather than disclosed the statutory information. Parties seeking public funding must play by the rules," said the Commission's Chairperson, the Hon Keith Mason AC QC.

The Chairperson of the 3 member NSW Electoral Commission has written to the Party Agent of the Liberal Party of Australia (NSW Division) to advise the Party of its decision.

## **Background and supporting information to this decision**

Information is being released with this Statement, including recent correspondence to and from the Liberal Party. The purpose of releasing this information with the Statement to the Commission's website is to assist with increasing public awareness about the work of the Commission, to understand how and why this decision was made and demonstrate to the public that NSW's electoral laws are enforced. This Statement and information is available at:

[http://www.office.elections.nsw.gov.au/about\\_us/work\\_of\\_the\\_commission/statements\\_issued\\_by\\_the\\_chair\\_of\\_the\\_commission](http://www.office.elections.nsw.gov.au/about_us/work_of_the_commission/statements_issued_by_the_chair_of_the_commission)

Oral and documentary evidence from Liberal Party officials and agents from The Free Enterprise Foundation that was provided to ICAC in the course of its Operation Spicer Inquiry led the 3 member Commission to conclude that there were significant breaches of election funding laws. Until rectified, claims for payments are



required to be withheld from the Elections Campaigns Fund and the Administration Fund (sections 70 (1) and 97L (1)) of the Act.

Some Liberal Party claims for 2011 election funding were paid by the then Election Funding Authority (EFA).

In April 2014 ICAC began public hearings in Operation Spicer. ICAC has not yet reported and the Commission is not required to wait for that report.

In December 2014, the EFA was abolished and the NSW Electoral Commission reconstituted to a 3 member statutory corporation, armed with regulatory and enforcement functions extending to matters previously regulated by the EFA.

In 2014 a constitutional challenge to key aspects of the Act was launched in the *McCloy* case. The Court ruled in October 2015 upholding validity.

Early in 2016, the Liberal Party was given further opportunities to update and disclose information but it declined to do so.

On 23 March 2016 the 3 member Commission made its decision. The precise value of the current claims for public funding affected by this decision is \$4,389,822.80.

The *Election Funding, Expenditure and Disclosures Act* 1981 requires parties, members, groups, candidates and third-party campaigners to disclose donations made and received and expenditure incurred during each relevant disclosure period. Disclosure of reportable political donations, that is, donations that are either singularly or in aggregate \$1000 or more, must include details about the recipient, the identity and address of the donor and particulars of the donation including the party to or for whose benefit the donation was made. Disclosures must be made in a declaration to the NSW Electoral Commission in the form and manner approved by the Electoral Commission.

#### **About the 3 member NSW Electoral Commission (the Commission)**

The 3 member NSW Electoral Commission was constituted in December 2014. It replaced the former Election Funding Authority and is separate to the NSW Electoral Commission Staff Agency, a public service agency established under the *Government Sector Employment Act* 2013 and led by the Electoral Commissioner. The Commission is an independent, statutory authority. It approves public funding to political parties and others and enforces provisions of three NSW Acts. These provisions govern election funding, expenditure and disclosures, the conduct of State elections and the lobbying of government officials. The Commission's Chairperson is the Hon Keith Mason AC QC, a former President of the NSW Court of Appeal (1997-2008). Information about this independent Commission's work is at:

[http://www.office.elections.nsw.gov.au/about\\_us/work\\_of\\_the\\_commission](http://www.office.elections.nsw.gov.au/about_us/work_of_the_commission)

**SUMMARY OF FACTS RELEVANT TO THE DECISION OF THE NEW SOUTH WALES ELECTORAL  
COMMISSION: LIBERAL PARTY OF AUSTRALIA (NSW DIVISION) CLAIM FOR PUBLIC  
FUNDING**

1. Oral and documentary evidence from Liberal Party officials and agents and from The Free Enterprise Foundation (the Foundation) that was provided to the Independent Commission Against Corruption (the ICAC) in the course of its Operation Spicer Inquiry led the 3 member NSW Electoral Commission (the Commission) to conclude there were significant breaches of election funding laws in the latter part of 2011. Those breaches require the Commission to withhold payments for claims by the Liberal Party of Australia, New South Wales Division (the Party) from the Election Campaigns Fund and the Administration Fund, in accordance with sections 70(1) and 97L(1) of the *Election Funding, Expenditure and Disclosures Act 1981* (the Act).
2. The Act's objects include the establishment of a fair and transparent election funding, expenditure and disclosure scheme; and facilitating public awareness of political donations (s 4A). In its recent *McCloy* decision the High Court accepted that the purpose of the Act was "to secure and promote the actual and perceived integrity of the Parliament and other institutions of government in New South Wales. A risk to that integrity may arise from undue, corrupt or hidden influences over those institutions, their members or their processes."
3. The Act defines "reportable political donations" to include political donations of or exceeding \$1000. Parties must disclose, in a declaration complying with section 91 of the Act, details of "reportable political donations" received, including donor names, donor addresses and amounts for donations over that sum where donations were made to or for the benefit of the party.
4. On 26 September 2011 the Party disclosed a list of reportable political donations for the period 1 July 2010 to 30 June 2011, including donations purportedly received from the Foundation on 16 August 2010 (\$94,000), 22 December 2010 (\$171,000), 23 December 2010 (\$358,000 and \$64,000) and 24 December 2010 (\$100,000). The disclosed list further declared that all political donations required to be disclosed for the disclosure period had been disclosed. The various donations were made in the context of the NSW State General Election held on 26 March 2011.
5. The Commission is of the view that the auditor that provided the audit certificate accompanying the Party's declaration was not aware of, or sought or was provided with the details supporting the donations from the Foundation.
6. In truth, the Foundation had been used by senior officials of the Party and an employed party fund-raiser to channel and disguise donations by major political donors some of whom were prohibited donors. No disclosure of the requisite details for those major donors has been made despite the Party having been requested to remedy the deficiency.



7. The Commission has relied on the evidence provided to the ICAC by Mr Simon McInnes, the Finance Director and Party Agent of the Party; Mr Paul Nicolaou of Millennium Forum; and Mr Mark Neeham, State Director of the NSW Division of the Party between 2008 and 2013. Through them evidence was also given of the involvement of other senior Party officials constituting the Party's Finance Committee, including Mr Sinodinos the Finance Director/Treasurer, Mr Webster and others (ICAC transcript reference 7279T) in the arrangements touching the Foundation.
8. What follows is a bare summary of the ICAC evidence.
9. The Foundation was purportedly established by deed on 24 August 1981 between Denis Davis ("the Settlor") and Anthony Bandle and Charles Fox ('the Trustees"). Mr Fox was replaced by Peter Marlow in 1986, then Roderick Bustard and lastly Stephen McAnerny. The Trustees were also "the Council" of the Trust. All powers and discretions of the Council and Trustees were undertaken by the two individuals who were in those positions at the relevant time. No other individuals had any input into the decisions made by the Trustees (Reference Trust Deed; ICAC Transcript 3578 – 3580 & 3628 – 3629).
10. The Foundation commenced to be used well before 2010 as a means of offering anonymity to favourably disposed donors wishing to support the Liberal Party. This was not the sole function of the Foundation but it appears to have been a major part of its activities. Prior to 14 December 2009, donations from developers were not prohibited by New South Wales law. But disclosure requirements in relation to recipients of political donations have been in place, albeit subject to amendment, since 1981. Donors have been required to disclose donations since 1993 (once again this provision has been subject to amendment).
11. Mr Nicolaou was paid commission for donations raised, including money channelled through the Foundation. His practice was to solicit donations on behalf of the Party, frequently proposing to donors that they could donate via the Foundation. Cheques in favour of the Foundation were then passed by him to officers of the Foundation accompanied by a standard form letter requesting the Foundation to make an equivalent donation to the Party. This in turn would be done. He described the Foundation as "there to provide anonymity for donors who did not want to be disclosed as Liberal Party donors" (ICAC transcript reference 7279T).
12. Mr Neeham described the Foundation, "This was a body that could raise funds from, from prohibited donors to the division because it was, it was, it was a separate body... [and then it could] ... make a donation to the division" (ICAC transcript reference 7328T).
13. On some occasions amounts intended to be donated to the Liberal Party were entered into the Liberal Party's accounts before a cheque for that amount was paid to the Party from the Foundation.
14. The five large donations of August and December 2010 (stated in paragraph 4. above) purportedly from the Foundation were in reality sums aggregated from individual donors whose money was paid to the Foundation in the manner indicated.
15. Senior officers of the Party's NSW Division knew of the scheme and its use to disguise donations, including from property developers. See for example, ICAC transcript references 7266T-7273T, 7288T-7290T, 7298T, 7300T- 7301T, 7328T-7329T, 7334T-7340T.



16. Mr McInnes told ICAC that in early 2011 he had started to believe that using the Foundation was not within the spirit of the Act. Nevertheless “if [donations] happen to find their way back to the party [they] were completely legal”. He conceded that he expected that the money paid by the Party to the Foundation would come back. It always did (See ICAC transcript 7231T - 7237T).
17. The Commission was constituted in December 2014. It replaces the former Election Funding Authority and is armed with regulatory and enforcement functions extending to matters previously regulated by the Authority.
18. Having examined the ICAC evidence in 2015 and 2016, the Commission took its own steps to consider the legal implications. It has concluded that:
  - i. The Free Enterprise Foundation was never a validly constituted charitable trust because the purposes to which money it controlled could be paid were not exclusively charitable in the eyes of the law. As the Commission understands it, a valid trust must be for the benefit of entities with legal personality, or for charitable purposes (*Morice v Bishop of Durham (1804) 9 Ves Jun 399 at 404-405; 32 ER 656 at 658; in re Astors Settlement Trusts [1952] 1 Ch 534 at 540—547; Bacon v Pianta (1966) 114 CLR 635 at 638*). One consequence is that its Council did not have lawful authority to exercise any independent discretion to allocate funds for particular purposes. Accordingly, even if (which is denied by the Commission) “donors” to the Foundation purported to arm the Foundation’s Council with unfettered authority to decide as to the disposition of gifted moneys, the true legal position was that the money remained under the control of the “donors” because of a resulting trust consequent upon invalidity. When the Foundation purported to pay the money to the Liberal Party in the abovementioned five large tranches of money (see paragraph 4 above) it was in truth acting as agent for the donors. At all times they were the true donors and their details should have been disclosed by themselves and the Party if the sums involved made them “major political donors”.
  - ii. In any event, the evidence revealed that s 85(1)(d) of the Act was engaged. It stipulates that a gift made to or for the benefit of an entity [here The Free Enterprise Foundation, according to the Party’s position] which was used or intended to be used by the entity to enable the entity to make directly or indirectly a political donation is itself a political donation. Section 85(1)(d) is attracted in two separate ways. The gift was actually used by the Foundation to make a political donation. As well, the gift was intended to be used by the Foundation to make a political donation.
19. The above conclusions stem from the evidence revealed in 2014. And they address different legal issues and provisions of the Act to those considered by the Crown Solicitor in 2013 as well as resting on significantly different information made available through Operation Spicer in 2014.
20. On 11 February 2016 the Acting Electoral Commissioner wrote on behalf of the Commission to the Party Agent of the Party, Mr McInnes . The letter outlined the Commission’s tentative concerns and invited submissions directed to the two legal



issues mentioned above as well as the issue as to whether a final payment should be made under the Election Campaigns Fund in light of these matters.

21. The letter in reply from Mr McInnes dated 18 February 2016 did not advance any response to the suggestion about the invalidity of The Free Enterprise Foundation "trust". The letter further asserted that the Party had and has no responsibility to disclose information relating to individual donors to the Foundation, a position that the Commission completely disputes. The invitation to remedy the deficient 2011 declaration was firmly declined.
22. On 24 February 2016 the Commission considered whether the Party was eligible for public funding taking into account sections 70(1) and 97L(1) of the Act. The Commission was not at that stage satisfied that the Party was eligible, because the Party had failed to disclose reportable political donations for the period ending 30 June 2011.
23. Since public monies totalling \$4,389,822.80 is at issue the Commission decided to give the Party a further opportunity to change its stance or satisfy the Commission that the Commission's tentative views were erroneous. A letter was sent to Mr McInnes on 26 February 2016 enclosing a draft Summary of Facts document and inviting the Party's response.
24. On 18 March 2016, Swaab Attorneys forwarded the Party's response. None of the Summary of Facts were disputed.
25. The Party's response contended that a declaration in requisite form had been lodged and that its adequacy in terms of detail was irrelevant to the decision confronting the Commission under sections 70(1) and 97L(1).
26. The Commission rejects this submission for the reasons already set out. Neither does the Commission accept the submission that the amount that must be withheld cannot exceed the total of unlawful donations involved. For one thing, this ignores the matters set out in paragraphs 2 and 3 above. On 23 March 2016 SWAAB Attorneys sent a further letter on behalf of the Party urging the Commission to release all but \$693,000 of the funding claimed. After careful consideration the Commission believes it does not have discretion in this matter having regard to the terms of sections 70(1) and 97(1) of the Act.
27. The Party further disputes the proposition that the Foundation was not a validly constituted charitable trust. Particular reference is made to *Attorney-General (NSW) v Henry George Foundation Ltd [2002] NSWSC 1128* and *Aid/Watch Incorporated v Commissioner of Taxation (2010) 241 CLR 539; 272 ALR 417*.
28. The Commission has considered this submission but remains of the view stated. Each of the cases cited in the Party's response involved a trust where the predominant purpose was charitable in the legal sense (educational in the former case, the relief of poverty in the latter). Even if one ignores entirely the activities of the Foundation, its Prescribed Purposes are not of this nature. Even if the purposes of the Foundation were beneficial to the community (which is not conceded) that would not be sufficient to make them charitable under the fourth head in Pemsel's case as it is only those purposes beneficial to the community which are "within the equity of the preamble to the Statute of Elizabeth" (*Aid/Watch* at [18]), or as it is sometimes put "within the spirit and intendment of the preamble to the statute of Elizabeth" (*Aid/Watch* at [28]) that are charitable. The purposes of *Aid/Watch* qualified as charitable within the fourth head



only because the debate that *Aid/Watch* fostered was debate concerning the relief of poverty, a matter clearly within the preamble to the Statute. In *Henry George Foundation* Young CJ also considered that the trust in question could have been saved by s 23 *Charitable Trusts Act (NSW)*. There is no question of applying s 23 to the Foundation as the law that applies to the Foundation trust deed is that of the Australian Capital Territory (ACT), and there is no equivalent of s 23 under the ACT law.

29. The Commission invited the principals of the Foundation to comment on the draft Summary of Facts. A letter received by the Commission today from the Foundation's solicitor did not respond to the substance of the Commission's stated concerns about the validity of the Trust. Its terms were noted.

23 March 2016

LM/2015/436

23 March 2016

Mr Simon McInnes  
Party Agent of the Liberal Party Australia NSW  
Locked Bag 2  
KINGS CROSS NSW 1340

Dear Mr McInnes

**Election Campaigns Fund Final Payment and Administration Fund Payment Q4  
2015 – Decision of the NSW Electoral Commission**

I refer to previous correspondence in relation to the above matter.

On 26 February 2016 you were advised that the Commission considered at its 24 February meeting whether the Liberal Party of Australia (NSW Division) (the Party) was eligible for public funding taking into account provisions of the *Election Funding, Expenditure and Disclosures Acts 1981* (the Act). Further you were advised that the Commission was not presently satisfied that the Party was eligible for funding from the Election Campaigns Fund or the Administration Fund because the Commission held the view that the Party had a requisite declaration outstanding. The Commission provided a summary of facts relevant to its view at that time.

The Commission has considered responses by the Party to the matters raised in that 26 February letter and the summary of facts, as well as evidence generated by the ICAC Operation Spicer Inquiry and other information before the Commission.

The Commission has today decided that the Party failed to disclose all reportable political donations in its 2011 declaration and, as such, did not submit a "requisite declaration" with the consequence that the Party is not eligible for payment of its current claims for \$4,389,822.80 pursuant to sections 70 (1) and 97L (1) of the Act.

The Commission notes that since 11 February 2016, the Party has been given opportunities to rectify its 2011 declaration but it has declined to do so.

The Party will remain ineligible for public funding until it discloses all reportable political donations for the relevant disclosure period ending 30 June 2011.

The Commission's decision is consistent with its view that integrity and public confidence in the electoral system are vital. The administration of the election funding, expenditure and disclosure scheme promotes campaign finance transparency.

The Commission will shortly publish a Statement on its website in relation to this decision and release supporting documents to assist with increasing public





awareness about the work of the Commission, to understand how and why this decision was made and demonstrate to the public that NSW's electoral laws are enforced.

Yours sincerely



The Hon Keith Mason AC QC  
**Chairperson**  
**NSW Electoral Commission**

CC Ms Michelle Harpur  
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SYDNEY NSW 2000

23 March 2016

The NSW Electoral Commissioner  
Electoral Commission NSW  
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Dear Ms Franklin

**Liberal Party of Australia (NSW Division) and Free Enterprise Foundation**

We refer to our letter dated 18 March 2016.

In the Response attached to the letter, at paragraph 5, we noted that funding due to our client from the Elections Campaign Fund for the 2015 State Election and the Administration Fund for the fourth quarter of 2015 totalled approximately \$4,361,878, (**Funding**) comprised as follows:

Election campaign fund	\$2,929,929
Administration fund	\$1,431,949

We also noted that the amount of the donations made by the FEF to our client in 2010 in relation to the campaign for the State Election in 2011 totalled \$693,000.

As is clear from the Response attached to our letter of 18 March 2016, our client denies that it has in any way given an incorrect disclosure for the year ended 30 June 2011. Nevertheless, at paragraph 12 of our response, we suggested that at the very least the NSWEC should release the Funding, but withhold \$693,000 pending resolution of the matters in issue concerning the donations from the FEF (**Balance Funding**).

Provision of the Funding, or the Balance Funding, is of critical importance to our client. We are instructed that our client requires the Funding or the Balance Funding in order to continue its operations. If the Balance Funding is not received by 30 April 2016 our client will be forced to take emergency measures, the most likely of which will be forced retrenchment of staff. Even then, retrenchment of staff will only allow it to carry on its operations for a relatively short period of time thereafter.

You are also aware that there will be a federal election this year, perhaps as early as 2 July 2016, placing further pressure on our client's financial position, and our client requires provision of the Funding or the Balance Funding as a matter of urgency.

We reiterate that that our client is prepared for you to withhold the amount of \$693,000 pending resolution of that dispute, but there is no reason why the Balance Funding should be withheld.

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We require that the NSWEC pay to our client the Balance Funding by 30 March 2016.

If this request is not met, our client has no choice but to apply to the Supreme Court of New South Wales for urgent relief that, inter alia, the monies be paid to our client without further delay.

This is an open letter and will be tendered on any application made to the Supreme Court, including on the question of costs.

Yours sincerely



**Michelle Harpur**



23 March 2016

By email: [Helen.Robinson@elections.nsw.gov.au](mailto:Helen.Robinson@elections.nsw.gov.au)

Our Reference  
140429

Linda Franklin  
New South Wales Electoral Commission  
Level 25, 201 Kent Street  
SYDNEY NSW 2000

Your Reference  
LM2015/436

Dear Ms Franklin

**FREE ENTERPRISE FOUNDATION | NSW LIBERAL PARTY FUNDING ELIGIBILITY**

We refer to the above matter and to your letter of 17 March 2016.

We advise that the Free Enterprise Foundation (**the Foundation**) will not be making substantive submissions to the NSW Electoral Commission (**the Commission**) on the above matter beyond this letter.

We make the following observations with respect to the matter currently before the Commission:

1. It is our view that the Foundation is a properly constituted trust, unambiguously vesting the gifts given to the Trustees "in the Trustees" for dealing by the Council; whether that capacity to deal constitutes a discretionary trust or some other form of commitment would appear to attract your negative observations, yet the first step in dealing with the gift would appear to be plain.
2. The Foundation's Trust Deed was prepared by the firm of Freehill, Hollingdale & Page, now known as Herbert Smith Freehills, one of the preeminent law firms in Australia. The trustees were and remain entitled to rely on the particular expertise of that firm in their establishment of a valid and enforceable trust, and that reliance has continued for over 34 years.
3. The Foundation is subject to regular annual audits of its accounts and disclosures by the Australia Electoral Commission (**AEC**) during the course of which the AEC inspects the Foundation's books and financial records to determine whether appropriate disclosure has been made. Upon concluding its investigations, the AEC issues a verbal and/or written Compliance Review Report certifying the Foundation's compliance with the relevant disclosure obligations. In the entirety of its existence, the Foundation has never once been the subject of any adverse finding by the AEC after any of its financial disclosure audits and has been held without exception to have complied with all electoral disclosure obligations.
4. The validity of the Foundation's trust and the legality of its donations and disclosures were the subject of examination by the NSW Crown Solicitors Office in 2013. This examination was conducted at the request of the (now abolished) NSW Election Funding Authority (**EFA**). In its advice to the EFA, it was the clear, conclusive and expert opinion of the NSW Crown Solicitors Office that gifts made to the Foundation could not be characterised as political donations.
5. Any funds received by are vested in the trustees, as the "Foundation". Those funds are then subject to the absolute and unfettered discretion of the Council. At no time are those funds subject to control or direction by the original donor. This view is affirmed by the Crown Solicitors and also the evidence before ICAC.

23 March 2016

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On behalf of our client, we thank the Commission for allowing our client an extension of time within which to seek advice and the opportunity to make submissions.

Should the Commission have any queries regarding the above matters, or require any further information, please contact this office.

Yours sincerely  
BRADLEY ALLEN LOVE



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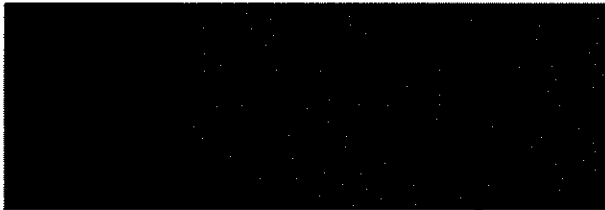
18 March 2016

The NSW Electoral Commissioner  
Electoral Commission NSW  
Level 25  
201 Kent Street  
SYDNEY NSW 2000

Dear Ms Franklin

**Free Enterprise Foundation**

We refer to your letter dated 26 February 2016, and the Statement of Alleged Facts enclosed with that letter. **Attached** is our client's Response



Michelle Harpur



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**Response to the New South Wales Electoral Commission (NSWEC) in relation to donations received by the Liberal Party of Australia (NSW Division) (Division) from the Free Enterprise Foundation (FEF)**

1. We refer to your letter dated 26 February 2016.
2. The reason stated in that correspondence for withholding the Election Campaigns Fund Final Payment and the Administration Fund (**Payment**) from the NSW Division is a failure to comply with s 70 and 97L of the *Election Funding and Disclosures Act 1981 (EFED Act)*, namely the failure to lodge a requisite declaration which it is said “continues in respect of the [NSW Division].”
3. We understand from the correspondence that support for this alleged failure is drawn from two sources, namely:
  - a. The fact that the FEF is a not a valid trust;
  - b. The monies paid *to the* FEF are a political donation within the meaning of s.85(1)(d).
4. If some other reason exists for withholding payment to the NSW Division as a matter of administrative fairness it ought to be clearly stated.
5. In summary the NSW Division responds as follows:
  - a. the FEF was and is a valid charitable trust;
  - b. the donations made *by the* FEF to the Division were properly disclosed in its return for the financial year 2010/11;
  - c. the obligation to disclose political donations made *to the* FEF is that of the FEF, not the Division;
  - d. the NSWEC has no basis to withhold funding from the Elections Campaign Fund and the Administration Fund totalling approximately \$4,361,878.00.

**The Donations from the FEF**

6. A total of four relevant donations were made by the FEF to the NSW Division in 2010, namely:
  - a. 6 December 2010 in the amount of \$64,000;
  - b. 22 December 2010 in the amount of \$171,000;
  - c. 23 December 2010 in the amount of \$358,000;
  - d. 24 December 2010 in the amount of \$100,000.
7. We note that there was a donation received from the FEF dated 13 August 2010 in the amount of \$94,000 which related to the Federal Election Campaign and is irrelevant for present purposes as the Act does not apply to it.

8. On 26 September 2011, in compliance with the EFED Act, the NSW Division lodged its declaration in relation to donations received in the period 1 July 2010 to 30 June 2011 which included the FEF donations referred to above.
9. Having lodged that declaration, it is unclear how it could be contended by the NSWEC that it has authority to withhold the Payment.
10. Sections 70(1) and 97L(1) relate to the ineligibility to receive a payment if there is a **failure to lodge a requisite declaration**. A declaration in the requisite form has clearly been lodged. The fact that there may be a dispute between the NSWEC and the intended recipient of the funding as to whether the disclosures were adequate is not a matter which engages ss 70(1) and 97L(1). The sanctions and remedies for incorrect declarations are set out elsewhere in the legislation.
11. Furthermore, assuming the donations from the FEF to the NSW Division were for some reason unlawful, as appears to be the suggestion in the Summary of Facts annexed to the NSWEC letter dated 26 February 2016, the amount which the NSWEC would be entitled to withhold from the NSW Division under ss 70 and 97L(2) would only amount to approximately 15 per cent of the Payment.
12. It is asserted, therefore, that there is no valid reason why the NSWEC should not release the balance of the Payment but withhold \$693,000 pending resolution of the matters in issue, to which we now turn.

### **The Summary of Facts**

13. We refer to the Summary of Facts attached to the NSWEC's letter dated 26 February 2016. As was clear from the hearings in Operation Spicer, there is a distinction between some person's subjective view of legality, and the objective position. What the NSWEC's letter (to which the Summary of Facts is attached) appears to focus upon is the objective legal requirements under the EFED Act, and not some witness's subjective understanding of the position. Be that as it may, it is worth noting that neither the Finance Director of the Party, nor the trustee of the FEF, conceded that there was any breach of the EFED Act.
14. In any event, even assuming for argument's sake prohibited donors paid monies to the FEF, which monies were political donations within the meaning of s. 85(d) of the EFED Act because they were intended to be used by the FEF to make a political donation, that does not give rise to an obligation on the part of the NSW Division to disclose those payments to the FEF. Section 88(2) of the EFED Act relevantly provides:



### **Major political donors**

*Disclosure is required under this Part of reportable political donations made or received ... by an entity or other person (not being a party ...) who has, during the relevant disclosure period:*

- (a) made a reportable political donation of or exceeding \$1000, or*
- (b) incurred electoral expenditure of or exceeding \$1000.*

15. The obligation to disclose any political donation **received by** the FEF lies with the FEF, not with the NSW Division. The obligation on the NSW Division is, in the circumstances, to disclose the political donation made to it by the FEF.

### **Trust Law**

16. The NSWEC relies on the decisions in *Morice v Bishop of Durham (1804) 9 Ves Jun 399*, and *Bacon v Pianta (1966) 114 CLR 635* in asserting that the FEF was not a validly constituted charitable trust and must fail. As a statement of general principle the proposition in those decisions remains correct, in the sense that a trust must be for the benefit of persons (including entities with legal personality such as corporations and incorporated associations) or, if not for the benefit of persons but rather for the benefit of a purpose, the trust, to be valid, must be for the benefit of a purpose recognized as charitable at law.

17. However, this represents a basic analysis of the law relating to charitable trusts, and does not account for the development of the law in Australia so far as it concerns trusts for charitable purposes.

18. The Trust Deed for the FEF sets out its Prescribed Purposes as meaning:

- (i) to promote the principle of free enterprise;*
- (ii) to promote a society in which the individual has maximum equality of opportunity and maximum freedom of choice in pursuing his own way of life;*
- (iii) to promote the economic system of free enterprise within which system individuals have the opportunity to experience achievements by the exercise of choice and initiative;*
- (iv) to promote the principle of freedom of enquiry choice association and trade;*
- (v) to promote or in any way advance in the opinion of the Council the above objects by:*
  - (aa) publishing, advertising or otherwise making known the principles and advantages of the above objects;*

- (bb) *fostering or assisting in the advancement of education relating to the above objects by the provision of prizes, scholarships and other assistance whether to persons or schools, universities or other educational institutions or otherwise;*
- (cc) *assisting by donations grants of money or otherwise persons companies societies associations groups of people parties institutions or any group or body whose philosophy or objects are in accordance with the above objects;*
- (dd) *generally to do any such things and make any grant donation contribution of money or otherwise provide assistance as the Council shall in its absolute and unfettered discretion deem necessary or desirable to promote or advance in any way whatsoever the above objects.*

19. The starting point in Australia for the development of the law relating to trusts for political purposes in the law of charity was considered by Young J in *Attorney-General for NSW v Henry George Foundation Ltd* [2002] NSWSC 1128. In that case the court had to consider whether a trust known as the 'Carr trust' was a valid charitable trust. The purposes of the trust, as set out in a deed dated 15 September 1941, were, in particular, *'the purpose of promulgating and spreading knowledge of the teachings and economic principles elaborated by Henry George ...'* and, in doing so, the trustees were to provide financial assistance to the Henry George League for furthering the teachings of Henry George on political economy, land rent and freedom of trade, commerce and industry *'with the object of establishing the said teachings and economic principles in practical operation by legislation and common usage'*.
20. Young J noted that there was a line of authority in which gifts had been upheld as charitable where the primary purpose was the pursuit of some charitable purpose of public benefit with a subsidiary aim of seeking legislative change in aid of the primary purpose: *Commissioners of Inland Revenue v Yorkshire Agricultural Society* [1928] 1 KB 611 at 622 per Lord Hanworth MR and at 632 per Atkin LJ.
21. On that view, a trust that has as its *main or dominant purpose* effecting a change in the law, will fail on the political ground. Young J noted that in some cases it would be difficult to determine whether one purpose or another is dominant, and the answer to that question may change over time. Young J cited Dal Pont, 2000 (at 208–9) as setting out a fair summary of the current law in Australia on the issue and included the following principles:
- a. The mere fact that political means may be employed in furthering non-political objects does not necessarily render the gift or institution non-charitable: *McGovern v Attorney-General* [1982] Ch 321 at 340 and 343;

- b. The mere fact that the purposes of a charity may involve seeking amendments to the law does not operate to deny charitable status: *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 at 76;
22. Young J postulated that it should not be impossible for a judge to say whether some proposed change in the law would be of benefit to the public but thought that, sitting as a single judge at first instance, he could not go that far. In the circumstances he held that the Carr Trust was a valid charitable trust for the advancement of education and applied s23 of the Charitable Trusts Act 1993 to sever the non-charitable purpose of seeking to introduce legislation to give effect to Henry George's ideas from the stated purposes of the trust.
23. The provisions of the FEF Trust Deed, certainly the Prescribed Purposes, compare well with the stated purposes of the Carr Trust.
24. Importantly, the law on charitable trusts in Australia must now be viewed in the light of the decision of the High Court in *Aid/Watch Incorporated v Commissioner of Taxation* (2010) 272 ALR 417. The High Court was called on to consider the tax exempt status of Aid/Watch Incorporated, and thus, in particular, the question of whether its objects were charitable. Aid/Watch was an organisation primarily concerned with promoting the effectiveness of Australian and multinational aid provided in foreign countries. The Full Court of the Federal Court noted that the primary concern of Aid/Watch in pursuing effective delivery of aid was aimed at the relief of poverty. However, having said that, the Full Court concluded that in attempting to persuade the government to its point of view, and in attempting to bring about changes in government activity and policy, Aid/Watch was engaging in political activity such that, while its ultimate purpose may have been to relieve poverty, that did not diminish its political purpose: (2009) 178 FCR 423; [2009] FCAFC 128 at 430.
25. Having reviewed the case law on the subject, including the apparent divergence between English and Australian authority on the point, the majority of the High Court, French CJ, Gummow, Hayne, Crennan and Bell JJ, took the view that in Australia the foundation of a 'coherent system of law' is the Constitution under which communication between electors and legislators, and between electors themselves, on matters of government and politics is an 'indispensable incident' of that constitutional system. For those reasons, the majority accepted the submissions of Aid/Watch that its activities in generating public debate as to the best methods for the relief of poverty by the provision of foreign aid were charitable because either:
- a. they contributed to the public welfare, under the fourth head in *Pemsel*, as a purpose beneficial to the community; or

- b. whatever might be the scope for the exclusion of 'political objects' as charitable under Australian law, the purposes and activities of Aid/Watch did not fall within that exclusion.
26. While the *Henry George Foundation case* was decided before *Aid/Watch* the High Court's decision in the latter is not at odds with the former. Both support the proposition that debate on matters of government and politics (and economics, inevitably) is an 'indispensable incident' of Australia's democratic system of government and of our constitution.
27. The theory and aim behind free enterprise is to maximise market efficiency, thereby improving economic growth and living standards. Attainment of such goals clearly bring with them social benefits, which outcomes are of course no less valid in a trust law sense than the charitable purpose upheld in *Aid/Watch*.
28. Applying the law of trusts as it currently stands in Australia, the FEF is a valid charitable trust.

**18 March 2016**

PF2014/114

26 February 2016

Mr Simon McInnes  
Party Agent of Liberal Party Australia NSW  
Locked Bag 2  
KINGS CROSS NSW 1340

[Simon.McInnes@nsw.liberal.org.au](mailto:Simon.McInnes@nsw.liberal.org.au)

Dear Mr McInnes

**Election Campaigns Fund Final Payment and Administration Fund Payment Q4 2015**


I refer to our letter of 11 February 2016 and your response of 18 February 2016 in which the question of approval of the final payment to the Liberal Party of Australia New South Wales Division (the party) in respect of its claim under the Election Campaigns Fund was discussed. We note that since our correspondence, the Commission received the party's claim for payment from the Administration Fund for the fourth quarter 2015.

The NSW Electoral Commission considered at its meeting of 24 February whether the party is eligible for public funding taking into account the terms of sections 70 and 97L of the *Election Funding, Expenditure and Disclosures Act 1981* (the Act). The Commission considered the evidence generated by the ICAC inquiry, Operation Spicer, information held by the Commission and the information put forward by the party in your response of 18 February 2016.

The Commission is not presently satisfied that the party is eligible for funding from the Election Campaigns Fund and the Administration Fund, as it is of the view that the party has failed to disclose reportable political donations for the relevant disclosure period ending 30 June 2011. We enclose a statement of facts which details the Commission's reasons for considering that the party has a requisite declaration outstanding.

We invite your response to the statement of facts by 4pm 11 March 2016. The Commission will consider your response before determining the party's eligibility for funding from the Election Campaigns Fund and Administration Fund.

Yours sincerely



Linda Franklin  
**Acting Electoral Commissioner**  
On behalf of the  
**New South Wales Electoral Commission**

## SUMMARY OF FACTS RELEVANT TO THE FREE ENTERPRISE FOUNDATION

1. Oral and documentary evidence from Liberal Party officials and agents and from The Free Enterprise Foundation that was provided to ICAC in the course of its Operation Spicer has led the NSWEC to conclude that there were significant breaches of election funding laws in the latter part of 2010. Until rectified, they require the Commission to withhold payments from the Election Campaigns Fund and the Administration Fund, in accordance with sections 70 and 97L of the *Election Funding, Expenditure and Disclosures Act 1981* (the Act).
2. The Act's objects include the establishment of a fair and transparent election funding, expenditure and disclosure scheme; and facilitating public awareness of political donations (s 4A). In its recent *McCloy* decision the High Court accepted that the purpose of the Act was "to secure and promote the actual and perceived integrity of the Parliament and other institutions of government in New South Wales. A risk to that integrity may arise from undue, corrupt or hidden influences over those institutions, their members or their processes."
3. The Act defines "reportable political donations" to include political donations of or exceeding \$1000. Parties must disclose, in a declaration complying with section 91 of the Act, details of "major political donors", including donor names, donor addresses and amounts for donations over that sum where donations were made to or for the benefit of the party.
4. On 26 September 2011 the Liberal Party of Australia, New South Wales Division disclosed a list of reportable political donations for the period 1 July 2010 to 30 June 2011. Included were donations purportedly received from The Free Enterprise Foundation on 16 August 2010 (\$94,000), 22 December 2010 (\$171,000), 23 December 2010 (\$358,000 and \$64,000) and 24 December 2010 (\$100,000). The Disclosure further declared that all political donations required to be disclosed in relation to the disclosure period had been disclosed. The various donations were made in the context of a State general election that took place in the State on 26 March 2011.
5. The NSWEC is of the view that the auditor that provided the audit certificate accompanying the party's declaration was not aware of, or sought or was provided with the details supporting the donations from The Free Enterprise Foundation.
6. In truth, the Foundation had been used by senior officials of the party and an employed party fund-raiser to channel and disguise donations by major political donors some of whom were prohibited donors. No disclosure of the requisite details for those major donors has been made despite the Party having been requested to remedy the deficiency.
7. The NSWEC has relied on the evidence provided to ICAC by Mr Simon McInnes, formerly the Finance Director of the Party, currently the party agent and State Director; Mr Paul Nicolaou of Millennium Forum; and Mr Mark Neeham, State Director of the NSW Division of the Party between 2008 and 2013. Through them evidence was also given of the involvement of other senior Party officials constituting the Finance Committee, including Mr Sinodinos the Finance Director/Treasurer, Mr Webster and others (7279T) in the arrangements touching The Free Enterprise Foundation. What follows is a bare summary of the evidence.
8. The Free Enterprise Foundation commenced to be used well before 2010 as a means of offering anonymity to favourably disposed donors wishing to support the Liberal Party. This

was not the sole function of The Free Enterprise Foundation but it appears to have been a major part of its activities. Prior to 14 December 2009, donations from developers were not prohibited by New South Wales law. But disclosure requirements in relation to recipients of political donations have been in place, albeit subject to amendment, since 1981. Donors have been required to disclose donations since 1993 (once again this provision has been subject to amendment).

9. Mr Nicolaou was paid commission for donations raised, including money channelled through The Free Enterprise Foundation. His practice was to solicit donations on behalf of the Party, frequently proposing to donors that they could donate via the Foundation. Cheques in favour of the Foundation were then passed by him to officers of the Foundation accompanied by a standard form letter requesting the Foundation to make an equivalent donation to the Party. This in turn would be done. He described The Free Enterprise Foundation as “there to provide anonymity for donors who did not want to be disclosed as Liberal Party donors” (7279T).
10. Mr Neeham described the Foundation, “This was a body that could raise funds from, from prohibited donors to the division because it was, it was, it was a separate body... [and then it could] ...make a donation to the division” (7328T).
11. On some occasions, cheques in favour of the Liberal Party were banked and cleared before an equivalent sum was paid by cheque from the Liberal Party to the Foundation with a request for the same amount to come back to the Party, as it did.
12. The five large donations of August and December 2010 purportedly from the Foundation were in reality sums aggregated from individual donors whose money was paid to the Foundation in the manner indicated.
13. Senior officers of the Party’s NSW Division knew of the scheme and its use to disguise donations, including from property developers. See eg 7266T-7273T, 7288T-7290T, 7298T, 7300T- 7301T, 7328T-7329T, 7334T-7340T.
14. Mr McInnes told ICAC that in early 2011 he had started to believe that using the Foundation was not within the spirit of the Act. Nevertheless “if [donations] happen to find their way back to the party [they] were completely legal”. He conceded that he expected that the money paid to the Foundation would come back. It always did. (7231T, 7237T)
15. The NSWEC was constituted in 2014 and armed with regulatory and enforcement functions extending to previous matters.
16. Having examined this evidence in 2015 and 2016, the NSWEC took its own steps to consider the legal implications. It has concluded that:
  - a. The Free Enterprise Foundation was never a validly constituted charitable trust because the purposes to which money it controlled could be paid were not exclusively charitable in the eyes of the law. As we understand it, a valid trust must be for the benefit of entities with legal personality, or for charitable purposes (Morange v Bishop of Durham (1804) 9 Ves Jun 399 at 404-405; 32 ER 656 at 658; in re Astors Settlement Trusts [1952] 1 Ch 534 at 540—547; Bacon v Pianta (1966) 114 CLR 635 at 638). One consequence is that its Council did not have lawful authority to exercise any independent discretion to allocate funds for particular purposes. Accordingly, even if (which is denied) “donors” to the Foundation purported to arm the Foundation’s Council with unfettered authority to decide as to the disposition of gifted moneys, the true legal position was that the money remained under the

control of the “donors” because of a resulting trust consequent upon invalidity. When the Foundation purported to pay the money to the Liberal Party in the abovementioned five large tranches of money it was in truth acting as agent for the donors. At all times they were the true donors and their details should have been disclosed by themselves and the Party if the sums involved made them “major political donors”.

- b. In any event, the evidence revealed that s 85 (1) (d) of the Act was engaged. It stipulates that a gift made to or for the benefit of an entity [here The Free Enterprise Foundation, according to the Party’s position] which was used or intended to be used by the entity to enable the entity to make directly or indirectly a political donation is itself a political donation. Section 85(1) (d) is attracted in two separate ways. The gift was actually used by the Foundation to make a political donation. As well, the gift was intended to be used by the Foundation to make a political donation.
17. The above conclusions stem from the evidence revealed in 2014. And they address different legal issues and provisions of the Act to those considered by the Crown Solicitor in 2013 as well as resting on significantly different information made available through Operation Spicer in 2014.
  18. On 11 February 2016 the Acting Electoral Commissioner wrote to the Party Agent of the Party, Mr McInnes. The letter outlined the NSWEC’s tentative concerns and invited submissions directed to the two legal issues mentioned above as well as the issue as to whether a final payment should be made under the Election Campaigns Fund in light of these matters.
  19. The letter in response from Mr McInnes dated 18 February did not advance any response to the suggestion about the invalidity of The Free Enterprise Foundation “trust”. The letter further asserted that the Party had and has no responsibility to disclose information relating to individual donors to The Free Enterprise Foundation, a position that the NSWEC completely disputes. The invitation to remedy the deficient declaration was firmly declined.
  20. The NSWEC remains open to consider further information and submissions from the Party both as to the facts and the legal situation. However, as presently advised it does not consider that the Party is eligible for a further payment from the Election Campaigns Fund or the Administration Fund while the failure to lodge a requisite declaration continues. Subject to any further submissions or legal advice received the NSWEC proposes to finalise its views and announce its position within 14 days.



# LIBERAL PARTY OF AUSTRALIA

NEW SOUTH WALES DIVISION

State Director

18 February 2016

Ms Linda Franklin  
Acting Electoral Commissioner  
NSW Electoral Commission  
Level 25, 201 Kent Street  
SYDNEY NSW 2000

Dear Ms Franklin

## Election Campaign Fund Final Payment

Thank you for your letter dated 11 February 2016, reference PF2014/114.

As I understand your letter, you imply that the Liberal Party has not provided disclosure of all donations received by it for the financial year 30 June 2011, as it did not disclose the names of donors to the Free Enterprise Foundation (**Trust**), despite the Trust being the actual donor to the Liberal Party. On that basis, you have further implied that you may withhold the final payment due to the Liberal Party under section 70 of the *Election Funding, Expenditure and Disclosures Act 1981 (Act)*.

The Electoral Commission may only withhold payment under s70(1) of the Act if the Liberal Party has failed to lodge the requisite declaration under Part 6 for a past period. The Liberal Party has lodged the required declaration for the financial year ended 30 June 2011, which disclosed all donations made to the Liberal Party during that period, including donations received from the Trust. Furthermore the Liberal Party has lodged disclosure returns for every other past period and has responded to all queries raised by the Commissioner regarding these disclosure returns. It is therefore incorrect to imply that there has been a failure to lodge the requisite declaration, and there are **no** grounds to withhold the final payment.

In your letter you assert that the true source of the donations made by the Trust were individual donors to the Trust for whom disclosure was required. With respect, you do not address the issue of from **whom** disclosure was required. The Liberal Party has disclosed the donations from the Trust. Whether or not the Trust, or the individual donors to it, were required to lodge declarations is not a matter for the Liberal Party. I reiterate that the Liberal Party has done all that is required of it and to assert otherwise ignores the basic tenets of trust law.

# LIBERAL PARTY OF AUSTRALIA

NEW SOUTH WALES DIVISION

State Director

I enclose a copy of an advice given by the Crown Solicitor to the Election Funding Authority in July 2013, which considered the nature of the donations made to the Liberal Party by the Trust for the period under discussion. I assume you have seen this advice. As you will see, at paragraphs 5.6 to 5.9, the Crown Solicitor notes that the Trust was a discretionary trust. The Crown solicitor concluded that as the Trust was a discretionary trust, it would be difficult to establish that donors to the Trust intended the Trust to use the monies to enable the trustee to make a political donation to the Liberal Party, and thus they were not political donations under s85(1)(d)(i) of the Act.

The Party requests the final payment to be made to it from the Elections Campaign Fund.

Yours sincerely,



**Simon McInnes**  
Acting State Director

PF2014/114

11 February 2016



Mr Simon McInnes  
Party Agent of Liberal Party Australia NSW  
Locked Bag 2  
KINGS CROSS NSW 1340

[Simon.McInnes@nsw.liberal.org.au](mailto:Simon.McInnes@nsw.liberal.org.au)

Dear Mr McInnes

### **Election Campaigns Fund Final Payment**

The question of approval of the final payment to the Liberal Party of Australia New South Wales Division in respect of this claim will be placed before the Commission at its meeting of 24 February 2016. Section 70 of the *Election Funding, Expenditure and Disclosures Act 1981* provides that a party is not eligible for any payment from the Fund in respect of a general election while any failure to lodge a requisite declaration continues in respect of the party.

On 26 September 2011 the Party disclosed a list of reportable political donations received in the period 1 July 2010 to 30 June 2011. Included were donations purportedly received from The Free Enterprise Foundation on 22 December 2010 (\$171,000) and 23 December 2010 (\$358,000 and \$64,000). The Disclosure declared that all political donations required to be disclosed in relation to the disclosure period had been disclosed.

Oral and documentary evidence generated by the ICAC inquiry known as Operation Spicer and published on the ICAC website discloses that the true sources of the Foundation's purported donations were a series of individual donors most of whom were major political donors for whom disclosure was required (see ss 88(2) and 92(2)).

The Electoral Commission's ongoing inquiries indicate that these donations should have been disclosed. Without being definitive at this stage, there would appear to be two independent broad legal bases for this suggestion (supplemented by some particular factual circumstances based on the evidence of Mr Nicolaou in some instances). These are:

- 1) The "trust" created by the deed establishing the Free Enterprise Foundation is not a valid charitable trust because the purposes listed in the definition of "the Prescribed Purposes" are not purposes that are charitable in the eyes of the law. One consequence is that the individual donors who purported to make an outright gift to the Foundation (something that is not conceded) coupled with a request that their money be passed on to the Party may be taken to have authorised the gift that was made in accordance with their instructions or request to the Party; and
- 2) Section 85 (1) (d) stipulates that a gift made to or for the benefit of an entity [FEF] which was used or intended to be used by the entity to enable the entity to make directly or indirectly a political donation is itself a political donation.

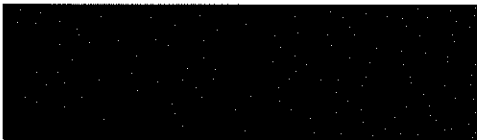


I would emphasise that the Commission has formed no concluded position on these matters and I would not want you to be under any misapprehension that these are the only matters under consideration by the Commission. Nevertheless, the Commission would be assisted by any information or submissions the Party may care to advance on these matters and the issue as to whether a final payment should be made under the Election Campaigns Fund.

Even better, the Commission would welcome an amended declaration that discloses the relevant details of the major political donors in question.

Since the Commission will be addressing these issues at its meeting on 24 February, we would be grateful to receive your response by no later than noon on 23 February 2016. The Commission does not wish to delay payment of entitlements but needs to be satisfied that the necessary requirements are met.

Yours sincerely



Linda Franklin  
**Acting Electoral Commissioner**