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TERRITORY
ELECTORAL
COMMISSION**
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Information Paper

Gerry Wood MLA – Private Member's Bill
Electoral Amendment Bill 2016 (Serial 155)

INFORMATION PAPER: ELECTORAL AMENDMENT BILL 2016 (SERIAL 155)

On 10 February 2016, the Electoral Amendment Bill 2016 (Serial 155) was tabled by Mr Wood MLA.

The Bill proposes changes in respect to definitions contained in Section 3 of the *Electoral Act* (the Act) and Division 3A of the Act which will deal with Prohibited Donations.

As an independent agency, the Northern Territory Electoral Commission (NTEC) makes recommendations regarding electoral reform, primarily through its public reporting on general elections and submissions to public enquiries. Any changes to electoral legislation, however, rest with parliament.

In this context, this paper seeks only to touch on issues of clarification and the likely impacts associated with the implementation and administration of the proposed amendments. It does not put forward an opinion on their merits.

Application of Legislation

The Bill proposes to identify and prohibit donations from certain classes of prospective donors, including the liquor/gambling industry, property developers and the tobacco industry.

The prohibition of certain classes of prospective donors has recently been of interest in other jurisdictions. New South Wales has established legislation similar to the proposed NT changes, whilst at the Commonwealth level a private members bill, sponsored by Senator Rhiannon, proposed amendments along similar lines. It did not progress beyond the second reading speech. This private members bill listed the mining and fossil fuel industry as prohibited donors in addition to those identified in the proposed NT amendments.

A recent High Court ruling in the McCloy case (NSW) confirmed that parliament has the right to exclude classes of prospective donors and therefore such exclusions have been determined to be lawful.

There are a number of challenges associated with the management and enforcement of compliance with such exclusions. These include the ability to adequately identify excluded donors and the provision of additional resources to the administrators responsible for maintaining a management system and enforcing compliance.

Definitions

Generally speaking, electoral authorities have been continually challenged in managing reporting compliance and the prosecution of offenders in respect to political donations made through indirect channels. The identification of undisclosed donations and donors is not simply done, and any uncertainty regarding definitions can provide grounds for disputes.

The Electoral Amendment Bill 2016 (Serial 155) excludes certain classes of prospective donors and their associates as defined by the Act. In its definition of associates, the Bill includes directors and the secretary of a corporation (including the spouse or de facto partner of the director or secretary), a corporate body that is a related body corporate (including a director or secretary of such a body corporate) or another corporation with control rights over the other body as defined.

From an administrative perspective, it would be helpful if the reading speech, parliamentary debate or explanatory memorandum could provide additional clarification, where possible, as to those being targeted. For example, additional guidance in interpreting 'regularly' in the definition describing a property developer as 'regularly making of development applications under the *Planning Act*' would be useful to administrators. Similarly, in their current form, the proposed amendments may be construed as to allow identified office holders of excluded corporate bodies to donate as individuals, or through other persons who might not be ordinarily considered at arms-length from a banned body corporate such as an employee/contractor, or a relative other than a spouse or partner. The treatment of other potential providers, or funding mechanisms such as Trusts, may also need specific attention.

Management Resources

Australian electoral agencies continue to be heavily scrutinised, and sometimes criticised, about their level of proactivity in pursuit of compliance. Public, legal and political expectations have not always been clear or consistent, especially in regard to the identification and treatment of perceived minor or immaterial transgressions. As a consequence, it is difficult to estimate the potential resource implications for the NTEC from this Bill until its introduction and ensuing debate relating to its passage is complete.

It is clear, however, that the introduction of prohibited donors in an array of forms will generate a substantial increase in the amount of data and corporate record cross-checking and auditing compared to that currently taking place. It will also require the creation of a new line of specialised investigatory work involving a systemic approach to the analysis of corporate structures and their key personnel.

The tools to facilitate the management and investigative requirements of an increasingly complex financial disclosure system are quite significant. Those States and the Commonwealth which have substantial responsibilities in this regard are supported by specialised software, dedicated staff and their own in-house investigatory and legal expertise.

Whilst the NTEC currently has the full range of electoral body responsibilities, its staff numbers are small and its role in practice dominated by the operational demands of running its enrolment, education and election programs, which include local government and Legislative Assembly elections and by-elections. It does not currently have investigatory resources of note, and the undertaking of a more complex and specialised role will have significant human resource and other

implications for the agency. The NTEC currently engages an accounting firm to conduct compliance reviews in respect to financial disclosure. These reviews primarily focus on assessing the accuracy and completeness of returns that have been lodged by parties, candidates, associated entities and donors. They are also conducted on the basis of current legislation and would not usually involve a significant degree of highly specialised investigatory or detailed forensic work that may be required in the pursuit of more complex or sophisticated circumvention of the law.

It is also unknown as to whether accounting firms are appropriately equipped and willing to undertake investigatory work of the nature that might be necessary to detect prohibited donors and the potential complexities of their operating arrangements. If outsourcing this function is neither possible nor practical, the NTEC would need to establish in-house resources to meet its compliance enforcement responsibilities. Regardless, additional resources would be required to extend the current arrangements.