

# Determination Person or Entity is not a Prohibited Donor Policy and Procedures

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## 1. Introduction

The responsibilities of the New South Wales Electoral Commission ('NSWEC') 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.

The *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ('the EFED 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.

In cases where uncertainty exists, a person may apply to the NSWEC for a determination that they or another person is not a prohibited donor.

Officers of the NSW Electoral Commission staff agency ('the Electoral Commission agency') are responsible for reviewing such applications to enable the NSWEC to make a determination.

## 2. Purpose

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 NSWEC that a person is not a prohibited donor; and
3. provide a guide as to the NSWEC's approach to determining applications.<sup>1</sup>

This document is not a guideline within the meaning of section 24 of the EFED Act.

## 3. Scope and application

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 EFED Act;
- persons who wish to view the NSWEC's register of such determinations; and
- staff members of the Electoral Commission agency including contractors and third-party consultants.

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1. In accordance with section 96GE(8) of the EFED Act.

## 4. Objectives

The objectives of regulating political donations including the process of determining that a person is not a prohibited donor are based on section 4A of the EFED Act. They are to:

- establish a fair and transparent election 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; and
- promote compliance by donors and all political donation recipients with the requirements of the law, by enabling and enforcing the determination process.

## 5. Determination that a person is not a prohibited donor

### 5.1 Application for a determination

A person (being an individual or an entity)<sup>2</sup> may apply to the NSWEC for a determination that they or another person is not a prohibited donor.<sup>3</sup>

A prohibited donor 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.

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; or
- a person to solicit another person on behalf of a prohibited donor to make a political donation.<sup>4</sup>

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.<sup>5</sup>

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 NSWEC's Compliance and Enforcement Policy.

### 5.2 Basis of determination

The NSWEC 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 NSWEC is satisfied that the person is most likely not a prohibited donor.

The NSWEC must make its determination based solely on information provided by the applicant.<sup>6</sup>

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

3. Section 96GE(1) of the EFED Act.

4. Section 96GA of the EFED Act.

5. Section 96I of the EFED Act.

6. Section 96GE(2) of the EFED Act.

### 5.3 Publication of determination

If the NSWEC makes a determination that a person is not a prohibited donor, the determination is published on a register of determinations available on the NSWEC's website.<sup>7</sup>

### 5.4 Duration of determination

A determination remains in force for 12 months after it is made, unless it is revoked by the NSWEC. The NSWEC can revoke a determination at any time by notice in writing to the applicant.<sup>8</sup>

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.<sup>9</sup>

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 NSWEC 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 NSWEC to make a determination).<sup>10</sup>

## 6. Application and Determination Procedures

### 6.1 Who can make an application for a determination?

Any person can apply to the NSWEC for a determination that the applicant or another person is not a prohibited donor.

### 6.2 Who can be the subject of an application?

The subject of the application can be an individual or an entity.

The determination made by the NSWEC concerns the subject of the application. The subject of the application may be a different person to the person who makes the application.

### 6.3 Why make an application for a determination?

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 EFED 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.

### 6.4 How to make an application

An application for a determination that a person is not a prohibited donor must be made on the approved form (available on the NSWEC's website), and lodged with the NSWEC. There is no fee for making an application.

The NSWEC 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 NSWEC 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 NSWEC or in response to the NSWEC's request for further information.

7. Section 96GE(6) of the EFED Act.

8. Section 96GE(3) of the EFED Act.

9. Section 96GE(4) of the EFED Act.

10. Section 96GE(5) of the EFED Act.

Examples of information to include in an application are:

- the applicant's details;
- details of close associates of the subject corporation, such as directors and related bodies corporate (see section 9 for the definition of 'close associates');
- the purpose of, and business engaged in, by the subject corporation;
- other activities undertaken by the corporation.

## 6.5 How an application is dealt with

Officers of the Electoral Commission agency review the application for compliance with the EFED 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 NSWEC as to whether a determination can be made.

The NSWEC may decline to make a determination if:

- the application is incomplete; or
- the information provided by the applicant is insufficient to show that the person is most likely not a prohibited donor; or
- the information provided by the applicant is inaccurate.

### 6.5.1 Timeframe for dealing with an application

There is no statutory timeframe for dealing with an application, however, the NSWEC 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 NSWEC; and
- the principles and objectives of making a determination.

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.

### 6.5.2 Informing the applicant and subject

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.

Once the NSWEC 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.

### 6.5.3 Compliance matters related to an application

It is an offence to provide information to the NSWEC in an application if the applicant knows that the information is false or misleading in a material particular.<sup>11</sup> 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 NSWEC's Compliance and Enforcement Policy and Procedures.

A review of a potential breach of the EFED 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 EFED 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 NSWEC makes a determination or declines to do so will not continue.

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11. Section 96GE(7) of the EFED Act.

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 NSWEC's Compliance and Enforcement Policy and Procedures.

## 6.6 How a determination is recorded and published

If the NSWEC determines that a person is not a prohibited donor, that determination is recorded electronically in the NSWEC's records management system along with the application details.

The details of the NSWEC's determination are included on a register which is published on the NSWEC's website.

## 6.7 Revoking a determination and incorrect determinations

The NSWEC may revoke a determination at any time by notice in writing to the applicant. If a determination is revoked, the NSWEC will write to the applicant to notify the applicant of the revocation.

The NSWEC 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.

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.

# 7. Definitions and abbreviations

## 7.1 Definitions

**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; and
- 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).

**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.

**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:

- a corporation engaged in a business that regularly involves the making of relevant planning applications by or on behalf of the corporation in connection with the residential or commercial development of land, with the ultimate purpose of the sale or lease of the land for profit; or
- a person who is a close associate of such a corporation.

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

**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 147 (Disclosure of political donations and gifts) of the Environmental Planning and Assessment Act 1979.

**Spouse** of a person includes a de facto partner of that person.<sup>12</sup>

**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.

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12. Note: "De facto partner" is defined in section 21C of the Interpretation Act 1987.

**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.

## 7.2 Abbreviations

<b>EFED Act</b>	<i>Election Funding, Expenditure and Disclosures Act 1981</i>
<b>Electoral Commission agency</b>	NSW Electoral Commission staff agency
<b>FDC</b>	Funding, Disclosure and Compliance Branch of the Electoral Commission
<b>NSWEC</b>	New South Wales Electoral Commission

## 8. Associated documents

1. Compliance and Enforcement Policy
2. Compliance and Enforcement Procedures

## 9. Reference

*Corporations Act 2001 (Cth), sections 9 and 50*

*Environmental Planning and Assessment Act 1979, section 147*

*Interpretation Act 1987, section 21C*

## 10. Document control

### 10.1 Approval authority

The approval authority for this document is the NSWEC.

### 10.2 Branch responsible for content and implementation

Funding, Disclosure and Compliance (FDC) Branch of the Electoral Commission agency.

### 10.3 Review Record

Date	Version	Revision description
10/08/2016	V1.0	New procedures

### 10.4 Review frequency

This document will be reviewed by the FDC branch every 3 years following the anniversary of the date of approval or as required due to legislative change, whichever is the earliest.