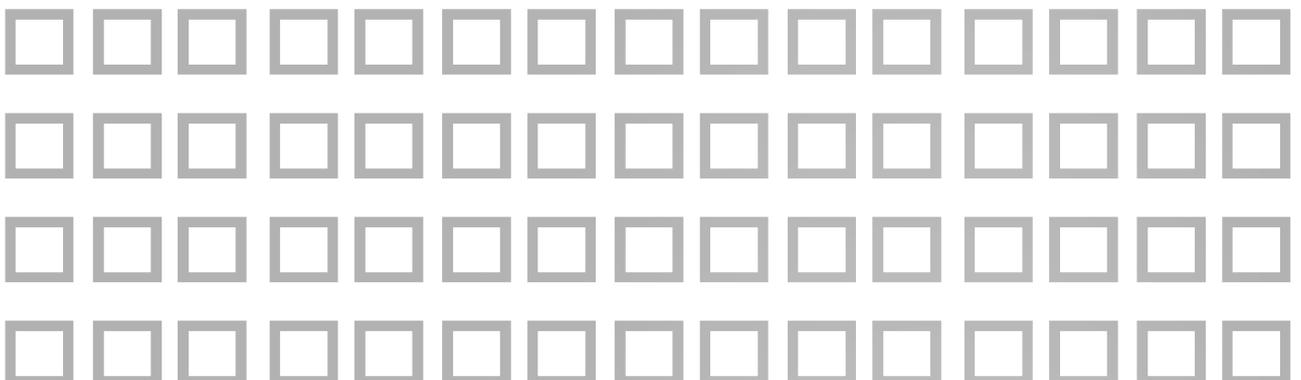


Election funding, expenditure and financial disclosure

Compliance enforcement policy

8 May 2018



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Produced by the
ACT Electoral Commission
PO Box 272, Civic Square ACT 2608.
Phone: 02 6205 0033
Web: www.elections.act.gov.au
Email: elections@act.gov.au

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Overview

The ACT Electoral Commissioner is responsible for the administration and enforcement of the ACT's electoral funding, expenditure and financial disclosure scheme as prescribed by Part 14 of the *Electoral Act 1992*.

As defined by the Act, this scheme includes the following components:

- Limits on the amount of electoral expenditure that may be incurred;
- Limits on the amount of anonymous gifts that may be received; and
- Disclosure of the financial transactions of registered political parties, political party groupings, MLAs, associated entities, candidates, third party campaigners and broadcasters and publishers.

This *Compliance enforcement policy* provides an overview of the decision-making framework employed by the Commissioner when addressing potential breaches of the Act.

This policy should be read in conjunction with the *Compliance review policy*, the *Criminal Code 2002* and the ACT Director of Public Prosecutions' *Prosecution Policy*.

Purpose of policy

This policy sets out the 3-stage framework followed by the Commissioner in monitoring, assessing and enforcing the funding and disclosure scheme:

- Preliminary review and assessment of potential breaches of the Act, including regular compliance monitoring conducted by Elections ACT;
- Formal investigation of suspected breaches; and
- The enforcement principles and methods applied to identified breaches after an investigation report has been finalised.

The purpose of this policy is to maintain public confidence in the integrity of the ACT's electoral funding and disclosure scheme, to promote transparency in the scheme's administration and enforcement, and to provide a standardised set of procedures to ensure that the Commissioner's interaction with all political entities operating in the ACT remains impartial, fair and consistent.

Objectives

Through compliance monitoring and enforcement, Elections ACT aims to:

- Maintain the integrity of the funding and disclosure regime;
- Further increase transparency of funding and disclosure by key stakeholders and of the compliance process overseen by the Commissioner;
- Assist political entities in understanding and meeting their requirements under the Act;
- Identify any instances of failure to comply with the requirements of the Act and address these with a proportionate response; and
- Deter non-compliance.

Preliminary review and assessment

Although the Commissioner has the authority to impose sanctions or commence prosecution action against political entities that appear to have committed an offence under the Act, the Commissioner considers that his or her primary role is to provide education and guidance in order to help political entities understand and meet their financial disclosure requirements. To this end, the emphasis at the preliminary review and assessment stage is on providing opportunities for the Commissioner to identify any discrepancies and/or failings made by entities engaging with the funding and disclosure scheme and to allow entities to redress such issues within a specified timeframe.

A preliminary review and assessment involves:

- Reviewing documents available to the Commissioner; and
- Seeking further information or clarification.

Note that the latter is on a co-operative basis and does not constitute a formal investigatory stage.

It is expected that the majority of issues will be resolved at this stage, with no further action deemed necessary. However, the Commissioner may decide to escalate a matter in line with the principles of enforcement (see **Enforcement** below) or if the Commissioner considers that a formal investigation is necessary in order to ascertain all the facts and circumstances surrounding a potential or suspected breach.

Similarly, a matter may progress immediately to the investigation stage if the matter is considered time critical or if the Commissioner considers it is in the public interest to do so.

The following sections of this policy outline the primary ways in which the Commissioner may become aware of a potential breach and the policies and procedures in place for each.

Becoming aware of a potential breach

The ways in which the Commissioner may be alerted to potential breaches of the Act include, but are not limited to:

- During the disclosure or compliance review processes;
- External allegations;
- Self-disclosure by political entities; or
- Media reports.

Disclosure process

Political entities operating in the ACT are required to submit regular financial disclosure returns to the Commissioner. These returns include electoral disclosures made by all political entities that contested an election or incurred electoral expenditure during the electoral period, annual returns made by political parties, MLAs and associated entities, and regular gift returns submitted by party groupings, non-party MLAs or candidate groupings.¹

¹ Part 14 of the *Electoral Act 1992*.

Elections ACT will prepare an itemised list for entities of any discrepancies noted during the processing of disclosure returns, including the remedial action required of the entity.

For more information on the disclosure process, see **Appendix A**.

Compliance review process

The Commissioner conducts routine biannual reviews of disclosures and financial records during non-election periods, with selected annual returns to be reviewed each November and gift returns reviewed each November and June. Additional reviews will be conducted in relation to each election. These reviews, although subject to the formal investigation procedures prescribed by the Act, are not generally considered part of the investigation stage of this policy. Rather, the role of these routine examinations is to serve as a risk minimisation strategy during the monitoring and assessment stage; although entities are legally obligated to follow the terms of an Investigation Notice, the emphasis remains on voluntary co-operation with the entities involved.

Elections ACT will prepare an itemised list for entities of any discrepancies arising from the review process, including the remedial action required of the entity.

The Commissioner may decide, based on the processing of regular disclosure returns, to extend the review process to additional entities. A distinction will always be made between any such review being treated as an extension of the routine monitoring and assessment process, and a review that constitutes part of the investigation stage.

For more information on the review process, see the *Compliance Review Policy*.

Allegations

Allegations of non-compliance should, where practicable, be made to the Commissioner. Allegations can be made in writing, in person or over the phone. Any person has the right to interact anonymously or pseudonymously with Elections ACT. In the event that the details of the person making the allegation are provided to Elections ACT, the Commissioner will not publically disclose the name of the individual or organisation making the allegation. Both the subject of the complaint and the complainant will be informed of the outcome of any initial assessment conducted by the Commissioner and/or of any decision made to escalate the matter to the investigation or enforcement stage.

Self-disclosure

If a person or organisation believes that they have made a breach of any kind, the entity is encouraged to approach Elections ACT with the specifics of the breach and the intended method of restoration. While this in itself may not negate a decision to impose sanctions in relation to the breach, any self-disclosure will be taken into account as a mitigating factor when deciding upon an appropriate method of enforcement in accordance with the **Enforcement** section of this policy.

Findings

After the preliminary review and assessment has concluded, it may be determined that:

- Sufficient information has been provided to determine that no breach has occurred, and that no investigation or enforcement is required; or
- There is insufficient information to determine whether a breach has occurred and/or the Commissioner suspects that a breach has occurred, and that the matter should proceed to the investigation stage; or
- The Commissioner is satisfied beyond reasonable doubt that a breach has occurred and proceedings for enforcement may be initiated.

An investigation report will be prepared in accordance with the **Investigation** section of this policy if a decision is made to issue monetary sanctions.

Investigation

An investigation will be commenced in circumstances where the Commissioner:

- Has reasonable grounds to suspect that a person or organisation has committed an offence under the Act; and
- Considers that it is necessary to examine and assess relevant records and/or interview relevant individuals.

The purpose of an investigation is to obtain sufficient evidence to establish:

- Whether or not a breach of the Act has occurred; and, if so
- The facts surrounding the breach.

If the investigation establishes a breach, the evidence collected will assist the Commissioner to determine whether an enforcement response is warranted and what form any such enforcement action should take.

Under sections 237 and 237A of the Act, the Commissioner is authorised to issue an Investigation Notice to an entity's financial representative requiring the financial representative to produce documents or other evidence at a set time and place, or to attend at a set time and place for a formal interview. The time prescribed in such notices must be no earlier than 28 days after the notice is given.²

Alternatively, if the Commissioner believes that a matter is of a critical or time sensitive nature or believes it to be in the public interest to do so, he or she may apply to a Magistrate for a warrant and thus expedite the investigation process.³

The recipient of an Investigation Notice has 28 days after the notice has been issued in which to apply to the Electoral Commission, setting out his or her reasons in writing, for an internal review to be conducted of the decision to issue the notice.⁴ The Commission will confirm the original decision, vary the decision or set aside the decision and substitute its own, as soon as practicable after the appeal has been received.⁵

The timeframe involved in conducting an investigation is dependent upon a number of factors, including the complexity and severity of the suspected breach. However, the Commissioner will generally endeavour to conclude any investigation within 90 days of instigating proceedings.

Investigation report

At the completion of an investigation, a report will be prepared which must include:

- The circumstances that led the Commissioner to commence an investigation;
- A detailed description of the evidence collected; and
- A view as to whether or not a breach has occurred.

² Section 237(5) of the *Electoral Act 1992*

³ Section 238 of the *Electoral Act 1992*

⁴ Section 247 of the *Electoral Act 1992*

⁵ Section 249 of the *Electoral Act 1992*

Once the investigation report and evidence has been reviewed, a decision will be made on an appropriate enforcement response.

Enforcement

Once a breach has been identified (through either a preliminary review and assessment of the matter or an official investigation) a decision must be made on the appropriate enforcement response. This decision will be influenced by a number of variables, including the severity or duration of the breach, public interest considerations and any aggravating or mitigating factors. Such factors may include, but are not limited to:

- The entity's past compliance history;
- Any material/financial advantage gained by the entity as a result of the non-compliance;
- The level of co-operation exhibited by the entity during the assessment and/or investigatory stages, including self-disclosure of potential breaches;
- Whether the non-compliance was intentional – for example, the Commissioner will differentiate between a breach of the Act brought on through dishonesty or negligence, and non-compliance caused by genuine misunderstanding of the Act's requirements or non-compliance that is of a technical nature;
- Restorative action undertaken by the entity to address any harm caused by the non-compliance; and
- Substantiated evidence that the disclosure process was adversely affected by circumstances beyond the entity's control.

The applicability of, and weight to be given to, each of the above factors will depend on the particular circumstances of each case.

Note that it is always the entity's responsibility to inform Elections ACT of any change in contact details. It is the responsibility of Elections ACT to maintain effective and accurate record-keeping of past disclosures and correspondence, particularly when monitoring repeated non-compliance or late submission of returns.

Methods of enforcement

Enforcement options available to the Commissioner include:

- A formal warning letter;
- An infringement notice in the form of a fine or forfeiture of funds;
- Referring the matter to the Australian Federal Police for further investigation; and/or
- Referring the matter to the ACT Director of Public Prosecutions in accordance with the DPP's Prosecution Policy.

Note that the payment of any penalty as required by an infringement notice does not discharge an entity's liability to provide an outstanding or amended return to the Commissioner.

In all cases, the Commissioner will select an enforcement response which is proportionate to the seriousness of the offence and which:

- Sets an appropriate precedent for future cases;

- Is consistent with the intent and objectives of the Act;
- Is an appropriate use of resources;
- Is consistent with responses previously adopted for similar incidents; and
- Conforms with the Model Litigant Guidelines under the *Law Officers Act 2011*.

The decision regarding the appropriate enforcement action is not to be influenced by the race, religion, sex, national origin, social affiliation or political association, activities or beliefs of the alleged offender or any person involved (unless they have special significance to the particular offence or should otherwise be taken into account objectively); or the personal feelings of the investigating officers or prosecutor concerning the offence, the alleged offender, or victim.

Appeals process

The recipient of a formal warning letter has 14 days after the letter has been issued in which to show cause as to why the outcome of an investigation report is incorrect and/or why the Commissioner or his or her delegate should not issue an infringement notice in relation to a breach.

The recipient of an infringement notice has 28 days after the notice has been issued in which to apply to the administering authority, setting out his or her reasons in writing, for the withdrawal of the notice.⁶ The Commissioner will notify the entity of the final outcome within 14 days of receiving the appeal.

If an entity fails to pay a penalty within the timeframe set out in the infringement notice, the entity may be served with a reminder notice, with the initial penalty increased by the amount payable by the person for the cost of serving the reminder notice.⁷ The Commissioner may also refer the matter to the courts for prosecution action.⁸

⁶ Section 126 of the *Magistrates Court Act 1930*

⁷ Section 8(3) of the *Magistrates Court (Electoral Infringement Notices) Regulation 2012*

⁸ Section 131(1)(k) of the *Magistrates Court Act*

Publication policy

Elections ACT will publish a report at the end of each financial year, either as part of its Annual Report or as a report to the Legislative Assembly, providing a general overview of:

- The number and type of entities who submitted an annual or election return during the financial year;
- The number of entities who submitted regular gift returns during the financial year, as well as the number of gifts represented in these returns;
- A generalised overview of the assessment process, including the number and type of discrepancies noted by Elections ACT during processing and the number of issues satisfactorily resolved at either the disclosure or compliance review stage;
- The number and types of discrepancies that were escalated to an investigatory stage; and
- A general overview of the number and type of potential breaches that were brought to the Commissioner's notice outside of the disclosure and compliance review processes, including the manner in which they were raised and any subsequent action undertaken.

Elections ACT will also maintain a webpage on www.elections.act.gov.au that will list the outcome of compliance review findings in relation to Part 14 of the Electoral Act. This webpage will record the name of the entity, the timeframe and nature of the compliance issue, the section of the Act to which the compliance issue pertained, the Commissioner's decision as to whether a breach occurred, the sanction issued (if any) and a brief summary of the Commissioner's reasons.

Responding to media requests

In response to media enquiries made during the assessment or investigatory stages, Elections ACT will confirm general facts about a case or matter, but will not speculate or comment on the investigation's outcome.

Elections ACT may issue a media release at the enforcement stage if it believes it is in the public interest to do so.

Review of policies and procedures

This policy is subject to ongoing revisions to reflect legislative amendments and to adopt the best monitoring and compliance practices. The policy is to be published on the Elections ACT official website. The online policy is considered to be the current version.

Appendix A: Disclosure process

Annual returns

Annual returns for registered political parties, MLAs and associated entities are due to be submitted to the Commissioner by 31 August after the end of the relevant financial year. Elections ACT will process the returns during the first week of September before publishing the information on its website by 7 September.

Processing of these returns includes crosschecking the disclosed receipts of \$1,000 or more against gift returns submitted by party groupings and non-party MLAs for the past financial year.

Financial representatives may be contacted after the lodgement of the returns to clarify any noted discrepancies, the remedial action required of the entity and references, if applicable, to relevant sections of the Act. Financial representatives will be given at least five working days to rectify any such discrepancies, thus allowing Elections ACT enough time to finalise the amended returns for publication.

Such issues may include:

- Gifts reported on a gift return but not recorded on the annual return, and vice versa;
- Incomplete defined details, such as the missing address or ABN of a payer; and
- Inconsistencies in the total figures presented on the return.

Note that this is not considered an investigatory stage, although Elections ACT may request additional information from entities on a co-operative basis. Serious breaches, such as reporting of gifts outside the reporting period, will be properly examined via a compliance review or by escalating the matter to the investigation stage. After the processing of annual and gift returns, the Commissioner may choose to extend the routine compliance review process to additional political entities. A distinction will always be made between a compliance review being treated as an extension of the routine monitoring and assessment process and a review that constitutes part of an investigation.

Sanctions are unlikely to be issued for matters arising from the disclosure process alone. However, at the Commissioner's discretion, and in line with the **Enforcement** section of the *Compliance enforcement policy*, enforcement action may be undertaken if:

- A financial representative has shown consistent disregard for submission deadlines; and/or
- A financial representative fails to address recurring issues in their reporting over an extended period of time.

Gift returns

Party groupings and non-party MLAs or candidate groupings are required to submit returns for gifts totalling \$1,000 or more received during the relevant disclosure period.

Gift returns must be submitted:

- In an election year, if the value of the gift or gifts received from a person reaches \$1,000 in the financial year between 1 April and 30 June, the declaration must be made to the Electoral Commissioner by 7 July;

- In an election year, when the capped electoral expenditure period is applicable, if the value of the gift or gifts received from a person reaches \$1,000 in the financial year after 30 June and before the end of polling day, the declaration must be made to the Electoral Commissioner 7 days after the total amount received from the person reaches \$1,000; and
- In a non-election year, or in the first quarter (1 January until 31 March) of an election year, if the value of the gift or gifts received from a person reaches \$1,000 in the financial year, the declaration must be made to the Electoral Commissioner within 30 days of the end of the financial quarter in which the total amount received from the person reached \$1,000.

Gift returns are processed by Elections ACT and published on its website as soon as practicable after they are received.

Elections ACT may request amendments or clarifications from a financial representative regarding the defined details of gifts.

Sanctions are unlikely to be issued at this stage. However, at the Commissioner's discretion, and in line with the **Enforcement** section of the *Compliance enforcement policy*, enforcement actions may be undertaken if:

- A financial representative has shown consistent disregard for the submission deadlines; and/or
- A financial representative fails to address recurring issues in their reporting over an extended period of time.

Election returns

Party groupings that have contested an election, non-party candidate groupings, associated entities and third party campaigners are required to submit an election return within 60 days after the polling day for an election. These returns require entities to state specific details regarding electoral expenditure, when such expenditure is incurred during the capped expenditure period.

Elections ACT has a limited ability to conduct compliance reviews of election returns for party groupings and associated entities until the following annual return for the entity has been completed and reviewed, approximately one calendar year later. However, Elections ACT may choose to escalate a submitted election return to the formal investigation stage if the Commissioner has reason to suspect that an entity may have breached the electoral expenditure provisions outlined in the Act.

Gift returns submitted by third party campaigners and non-party candidate groupings

As part of their election return, third party campaigners and non-party candidate groupings are required to submit a gift return covering their respective disclosure periods.

The processing of gift returns submitted by third party campaigners and non-party candidate groupings will follow a similar processing and escalation policy to that exercised on gift and annual returns submitted by other entities. In the case of non-party candidate groupings, this will include the cross-checking of the return against any individual gift returns submitted by the candidate during his or her relevant disclosure period.