

Funding and Disclosure – Compliance and Enforcement Policy

Version 2.0

Approval



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Electoral Commissioner

01 / 12 / 2020

Version history

| Version | Notes | Author | Date of Change |
|---------|--------------------------------------|------------------------------|----------------|
| 1.0A | Draft | Director Compliance | November 2018 |
| 1.0 | Issued for use | Electoral Commissioner | November 2018 |
| 2.0A | Update for legislative amendments | Senior Compliance Officer | November 2020 |
| 2.0 | Issued for use | Electoral Commissioner | December 2020 |

Review

This policy has been considered to ensure compatibility with the 23 protected rights under the *Human Rights Act 2019* and is deemed compatible.

This policy will be reviewed **triennially** from the approval date, or if the relevant regulatory framework changes in a way that means this policy is no longer contemporary for the ECQ.

About this policy

This policy sets out the underlying principles that the Electoral Commission of Queensland (ECQ) uses to regulate and help to achieve compliance with the *Electoral Act 1992* (EA), the *Local Government Electoral Act 2011* (LGEA), and the *Referendums Act 1997* (RA) by outlining the ECQ's compliance and enforcement functions, regulatory strategies and tools. This policy identifies the ECQ's compliance and enforcement activities and likely responses when working with stakeholders and the public, using collaborative and cooperative approaches to help achieve desired compliance outcomes.

The ECQ is an impartial and independent statutory authority that impartially serves the public interest. All the ECQ's funding and disclosure compliance and enforcement related work is performed under the authority held in the EA, LGEA and the RA.

The ECQ uses a range of compliance and enforcement tools to prevent funding and disclosure related non-compliance, including:

- promoting public awareness of electoral matters via education and information programs;
- providing information and advice on electoral matters to stakeholders including the Legislative Assembly, the government, political parties, elected officials, candidates and the community;
- publishing material on matters that relate to its funding and disclosure related functions; and
- working proactively with stakeholders and also other regulators to refer relevant matters.

The EA, LGEA and RA provides the ECQ with a range of enforcement remedies to address non-compliance with statutory obligations, including:

- formal warning notice with sufficient details so that the alleged offender is left in no doubt about what action needs to be taken or what activity must cease to comply with the law.
- compliance agreement between the ECQ and a person on whom an obligation is placed to ensure their compliance with all election funding and financial disclosure requirements.
- referral to another agency where an offence against another law or regulation has been identified, which may take precedence over the EA, LGEA, or RA.
- penalty infringement notice issued in accordance with the State Penalties Enforcement Regulation 2014, usually for minor offences.
- civil debt recovery to recoup monies that are owed to the State arising from compliance matters under the EA or the LGEA.
- criminal prosecution if such a prosecution would be in the public interest, including when a person's actions erodes the public's confidence in the regulation of electoral matters.

Approaches underlying this policy

The ECQ's vision is to provide electoral excellence with integrity for Queensland. To meet its regulatory responsibilities under law, the ECQ exercises its compliance and enforcement powers impartially, independently, in the public interest, and with integrity and professionalism.

Guiding compliance principles

The ECQ exercises its regulatory powers through authority in the EA, LGEA and RA. These principles direct the ECQ's compliance work:

1. **Accountability** – the ECQ's decision-making takes place within rigorous governance processes as the ECQ's actions and decisions may be subject to internal review and also external review by the Queensland Ombudsman or the courts. All ECQ compliance actions comply with *Public Records Act 2002* recordkeeping requirements.
2. **Confidentiality** – the ECQ generally conducts investigations in confidence and does not comment on matters it may or may not be investigating.
3. **Evidence-based enforcement** – decisions on compliance and enforcement action are proportional and based upon the collection of evidence and material facts.
4. **Fairness and impartiality** – fairness has a number of aspects, and the ECQ seeks to:
 - 4.1. practice due process to assess facts, balancing voluntary compliance by stakeholders with the ECQ's enforcement activity, while responding to many competing interests
 - 4.2. exhibit integrity to ensure a consistent approach and to take into account the ECQ's regulatory approach to one matter when deciding how to pursue a similar matter
 - 4.3. balance fairness to persons and entities that are subject to the ECQ's enforcement action(s), informing stakeholders and the public about the ECQ's work, while being impartial and transparent about what action the ECQ is taking and why.
5. **Procedural fairness** – procedural fairness applies to any decision that can affect the rights, interests or reasonable expectations of a person in a direct or immediate way. Procedural fairness is a legal safeguard for a person whose rights or interests are being affected by an investigation. Procedural fairness obligations are not regarded as a burden or impediment to an investigation as it (1) provides a means of checking facts and identifying issues; and (2) exposes any weaknesses in the investigation and evidence that has been captured to date.
6. **Proportionality** – the ECQ's enforcement responses are proportionate to the conduct and the resulting harm or potential harm which may be reflected in the severity of any penalty. Compliance matters and enforcement actions are monitored, investigated (as required) and enforced in a way that uses the ECQ's resources efficiently, effectively and economically.
7. **Risk-focused** – apply risk-based methods to notifications to identify and assess the likelihood and consequence of any alleged breaches to reduce the actual risk posed by infractions.
8. **Selectivity** – the ECQ promotes self-regulation to work cooperatively with stakeholders to use public resources to secure the most effective, efficient and economical outcomes.
9. **Timeliness** – the ECQ's investigations and the resolution of enforcement matters are done as efficiently as possible to avoid costly delays and uncertainty for stakeholders and the public. The ECQ considers due process and timeliness in all actions to meet statutory requirements.
10. **Transparency** – the ECQ makes open and accountable decisions in the public interest within the law. The ECQ's enforcement actions that are finalised by litigation are made public because the ECQ is transparent about what action it takes and the factual reasons why.

The ECQ's compliance and enforcement strategy

To achieve the ECQ's compliance objectives under the EA, LGEA and RA, the ECQ uses four flexible and integrated compliance strategies:

- encourage compliance with the law by promoting public awareness as well as educating and informing stakeholders about their rights and responsibilities under the electoral acts;
- monitoring and reporting on activities the ECQ regulates including identifying and analysing likely breaches to engage in proportionate proactive and reactive compliance;
- enforcement of the law, including resolution of possible non-compliance with the electoral acts administratively, by litigations and by other formal enforcement measures; and
- leverage the power of external responsible agencies to enforce funding and disclosure electoral laws and refer matters to another responsible agency for their consideration.

To bring greater integrity to the electoral system requires a sound compliance and enforcement regime. To be effective, the ECQ administers the electoral laws through two regulatory functions:

1. Deter people from contravening the law (the preventative function); and
2. Impose penalties on persons contravening the law (the enforcement function).

The ECQ engages in a differentiated enforcement strategy that is informed by previous behaviour and history of engagement and the responses it obtains from its stakeholders and the community. The ECQ's responsive enforcement promotes proactive compliance through public awareness, educating and informing stakeholders of their rights and responsibilities under the electoral laws. When informed about their legal obligations, stakeholders have an incentive to improve their own compliance and to cooperate to reduce the ECQ's escalation to use stronger corrective options.

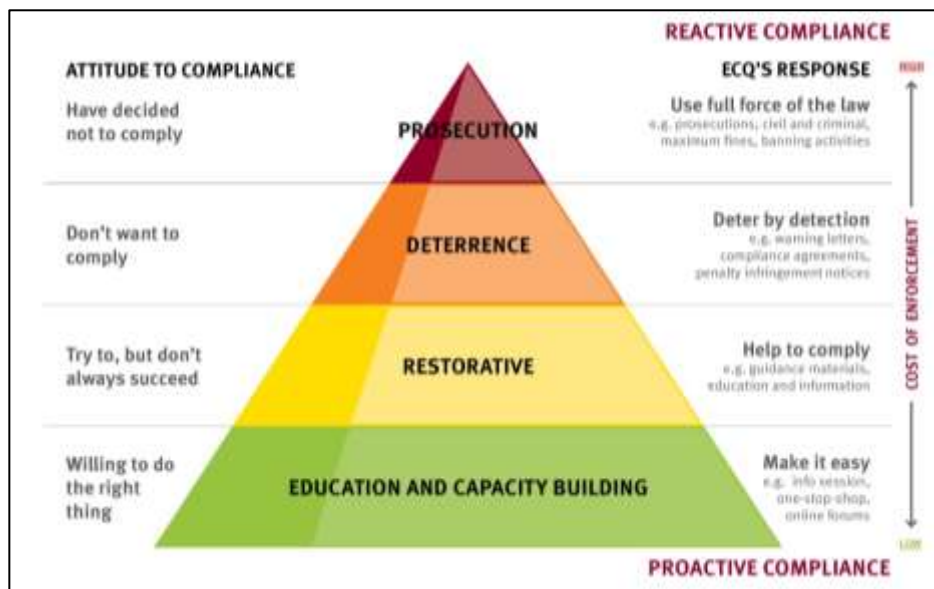


Figure 1: ECQ Compliance and Enforcement Pyramid

The ECQ uses a range of compliance and enforcement responses to encourage compliance with electoral laws (refer to Figure 1).

In deciding which compliance or enforcement tool (or the combination of such tools) to use, the ECQ's first priority is always to achieve the best possible outcome for the community and to manage risk proportionally.

The ECQ's enforcement actions seek to maximise the greatest degree of stakeholder and public compliance with electoral laws at the lowest cost to all parties. For example, the ECQ publishes guidance materials to help its stakeholders and the public engage in relevant activities to meet the standards of compliance.

The ECQ uses risk to manage and assess complaints and notifications of alleged breaches of funding and disclosure laws. The prioritisation of complaints and notifications helps to deploy limited resources to ensure compliance and enforcement of all requirements in electoral laws. The ECQ focuses on circumstances that will, or have the potential to, harm public confidence in the integrity of Queensland's electoral system or result in the detriment of the community's expectations. Therefore, the ECQ exercises its lawful discretion to direct its resources to the matters that will protect the legitimacy of electoral processes that provide the greatest overall benefit to the public.

The ECQ's proactive compliance activities

Compliance activities can help stakeholders and the public to understanding how to comply with the law, or provide a quick intervention that may address issues of any potential non-compliance. ECQ engagement in proactive compliance activities is particularly useful where stakeholders or the public are keen to ensure they are doing the right thing. The ECQ's compliance activities are set out below.

Advice and education

The ECQ encourages compliance with the electoral laws by promoting public awareness, educating and informing stakeholders and the public about their rights and responsibilities. The ECQ considers the prevention of a breach of electoral laws as preferable to taking enforcement action after a breach has occurred. The ECQ also seeks to ensure its stakeholders and the public are aware of their rights and responsibilities under the electoral laws through clear and targeted communications including the media, social media, the ECQ website and the ECQ call centre.

The ECQ provides information, guidance and tools to help stakeholders through a wide range of communication channels. The ECQ liaises with state and local governments, representative bodies and the community about how to comply with electoral laws and the ECQ's regulatory role to enforce law. The ECQ promotes public awareness of funding and disclosure matters through compliance and enforcement of electoral laws to ensure that electors have access to information which supports them to make an informed choice when casting their vote.

Peak body and stakeholder engagement

The ECQ maintains impartial and professional relationships across all levels of government, representative bodies and the public to help them with queries they may have about complying

with electoral laws, as well as attending events, meetings and providing information sessions. Where mandatory requirements are in place, the ECQ conducts compliance reviews to inform compliance and enforcement activities.

Proactive monitoring, research and reporting

The ECQ conducts environmental scanning on emerging trends e.g. through case law monitoring, or any increasing number of alleged breaches reported about the same or similar non-compliant behaviour. Resources are allocated to monitor the performance and results of compliance activities, and of any voluntary cooperation to identify problems which require escalation to ensure compliance. Importantly, the information obtained from the environmental scanning on compliance activities enables the ECQ to give robust and informed advice to the government on any future proposals for electoral reform.

Compliance audits

The ECQ's compliance activities seek to prevent non-compliance by any stakeholders by first educating and informing those affected about their obligations under the law. The ECQ conducts regular compliance audits to ensure disclosures are being made in accordance with the law.

The ECQ's compliance audits are standardised and comprehensive to ensure impartiality, fairness and consistency.

After reviewing the information provided, the ECQ may contact the financial representative of an entity to seek clarification or additional information regarding a funding or disclosure matter, or require an amendment to what has been provided, before the compliance review is completed.

Investigations

An ECQ compliance investigation focuses on fact-finding. It is a process of gathering information and evaluating it, and then recommending appropriate, proportionate, effective and fair action to resolve the matter that is under investigation. The ECQ secures evidence that will establish material facts and assist the ECQ in making good, robust and sound administrative decisions. The ECQ's compliance investigations must be able to withstand both internal and external scrutiny and must contain only the information needed to establish the facts by securing the relevant evidence, identifying the applicable law and recommending any proportionate response.

The ECQ's reactive enforcement action

The ECQ has a range of remedial enforcement measures available to manage its compliance and enforcement functions as the regulator administering Queensland's electoral laws.

Warnings

The ECQ's enforcement measures also include the discretion to issue verbal warnings and warning letters in response to potential breaches of Queensland's electoral laws.

The majority of minor non-compliance can be dealt with by way of educating the stakeholders and the public regarding their obligations under the law. Warnings are an effective means to ensure that a person is made aware of their responsibilities. A warning is suitable for minor

instances of non-compliance where the warning is likely to encourage voluntary and prompt compliance. Written warnings are a useful tool in addressing first time or minor non-compliance and allegations devoid of sufficient evidence and also establish a valuable record of compliance.

Recovery action

The EA and LGEA regulate donations to all electoral participants. The ECQ may seek to recover an unlawful donation (e.g. a donation from a prohibited donor) where the evidence suggests that recovery action is warranted. The ECQ may deem recovery action as an adequate regulatory measure in some instances because a debt due to the State has been successfully recovered.

The EA also allows for the ECQ recover amounts of electoral expenditure which exceed the electoral expenditure cap.

Compliance Agreement and Court Orders

The ECQ can enter into a written compliance agreement with a person on whom an obligation is placed to ensure the person complies with election funding and financial disclosure obligations. An agreement may state the specific measures to be taken by the person to whom it applies to ensure the person understands their obligations and the consequences of non-compliance. A court may, on application by the ECQ, make a declaration that a person contravened a compliance agreement and make ancillary orders to enforce the agreement. The ECQ, despite any court orders, is still able to pursue proceedings for an offence for a contravention of the law.

Penalty Infringement Notice (PIN)

A PIN is normally issued in lieu of commencing prosecution action and no conviction results for such action. Whilst procedurally simpler than a prosecution, it is important to note that onus and standard of proof are no different. The process of gathering evidence and issuing a PIN for an offence reinforces that the ECQ view the matter seriously and consideration was given to taking the matter to the courts. When the ECQ issues a PIN the person has 28 days to pay the fine or can elect to contest the matter in court. If the person elected to have the matter heard in court then the matter becomes a prosecution and a full brief of evidence is prepared accordingly. The effect of pursuing the prosecution matter reinforces with the recipient that the ECQ views the matter seriously and that consideration was given to taking the non-compliance matter to court.

Prosecution

Prosecution in the courts is the most severe form of remedial action available to the ECQ. The ECQ is likely to take prosecution action as the final outcome of any investigation where a breach of the Queensland electoral laws has been sustained to establish the relevant and material facts. A recommendation to pursue a prosecution in the courts requires the production of a brief of evidence to establish that a *prima facie* case exists against the defendant. Upon completion of a successful prosecution a defendant may be convicted and in most cases issued with a fine as a penalty, although some offences are so serious that they can result in a person being imprisoned. In practice, however, prosecution is contemplated only as a last resort, and the ECQ's preference is for a conciliatory rather than a confrontational approach to enforcement, while taking seriously its duty to enforce electoral laws if reasonable voluntary compliance attempts fail.

Reporting of ECQ's compliance and enforcement actions

The ECQ reports on its compliance and enforcement actions by reporting information about the use of its compliance and enforcement powers in its Annual Report tabled in the Legislative Assembly.

The ECQ's compliance work with external agencies

The ECQ's work may intersect with different regulators and government agencies in Queensland and their counterparts across the Australian, state and territory governments including equivalent electoral commissions in all Australian Commonwealth, State and Territories jurisdictions.

The ECQ is not always the agency best placed to deal with particular types of regulatory issues, particularly when doing so may create duplication or questions on the most relevant jurisdiction.

Some of the ECQ's compliance work may involve alleged breaches across legislation administered in part by the ECQ and also by another relevant agency. In such cases, the ECQ must decide whether the issues are of sufficient substance for further consideration, or whether it is more effective, in securing a successful compliance outcome, to refer the matter to another responsible agency for their consideration and action.

Other responsible agencies may also have an interest, or already be involved, in the issue or a closely related matter. It is important to note that the ECQ has information-sharing arrangements with relevant agencies to enable agencies to perform their functions.

Some types of issues or contraventions of the law may be more appropriately investigated and addressed by other integrity, government or law enforcement agencies, including but not limited to the:

- Crime and Corruption Commission (CCC);
- Queensland Police Service (QPS);
- Office of the Independent Assessor;
- Queensland Ombudsman;
- Clerk of the Legislative Assembly; or
- A local government authority.

The ECQ continues to work closely with law enforcement agencies where they are better placed to seek effective sanctions, including criminal penalties, against those involved in unlawful acts.

The ECQ works closely with the Department of Local Government, Racing and Multicultural Affairs in the administration of the LGEA and the *Local Government Act 2009* as they are impacted by electoral matters.

The ECQ is a member of the Electoral Council of Australia and New Zealand (ECANZ) which enables member electoral commissions to consult on the management of various types of electoral matters relating to Commonwealth, State and Territory and local government elections.