VOTING MATTERS

SELECT COMMITTEE ON AMENDMENTS TO THE *ELECTORAL ACT 1992*

30 JUNE 2014

REPORT NUMBER 1

COMMITTEE MEMBERSHIP

Mr Mick Gentleman MLA	Chair
Mr Alistair Coe MLA	Deputy Chair
Mr Shane Rattenbury MLA	

SECRETARIAT

Ms Louise Gell	Secretary (from 7 April 2014)
Mr Andrew Snedden	Secretary (to 7 April 2014)

CONTACT INFORMATION

Telephone	02 6205 0435
Facsimile	02 6205 0432
Post	GPO Box 1020, CANBERRA ACT 2601
Email	committees@parliament.act.gov.au
Website	www.parliament.act.gov.au

RESOLUTION OF APPOINTMENT AND TERMS OF REFERENCE

That this Assembly:

(1) notes:

(a) the public position of the Labor Government and the Liberal Opposition that the membership of the Legislative Assembly be expanded to 25 members at the 2016 election;

(b) certain provisions of the *Electoral Act 1992* will require amendment as a result of this change;

(c) the recent High Court decision, *Unions NSW & Ors v NSW*, and that this decision also has implications for the operation of the *Electoral Act 1992*; and

(d) the Elections ACT's *Report on the ACT Legislative Assembly Election 2012* contains a number of recommendations pertaining to the *Electoral Act 1992*; and

(2) resolves:

(a) that a Select Committee be established to inquire into the above matters and any related issues;

(b) that the committee will be comprised of one member of the Government, one member of the Opposition and one member representing the ACT Greens with proposed members to be nominated to the Speaker by 6pm this sitting day; and

(c) the committee report by the last day of June 2014.

20 March 2014

On 5 June 2014 the Assembly agreed to amend the resolution by adding the following paragraph:

(d) if the Assembly is not sitting when the Committee has completed its inquiry, the Committee may send its report to the Speaker or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

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ABBREVIATIONS AND ACRONYMS

Commission	ACT Electoral Commission
EFED Act	*Election Funding, Expenditure and Disclosures Act 1981 (*NSW)
ERG	Expert Reference Group
MLA	Member of the Legislative Assembly
PRS	Proportional Representation Society of Australia (Australian Capital Territory Branch)
Self-Government Act	*Australian Capital Territory (Self-Government) Act 1988* (Cth)

RECOMMENDATIONS

RECOMMENDATION 1

3.31. The Committee recommends that the Government review and report on the appropriate number of representatives in the Legislative Assembly when the ACT population reaches 425,000, and subsequently after every increase in population of 50,000.

RECOMMENDATION 2

3.49. The Committee recommends that the electoral expenditure cap be calculated on the basis of $40,000 per candidate to a maximum of five candidates per five member electorate, indexed annually.

RECOMMENDATION 3

4.24. The Committee recommends that s 205I(4) of the Electoral Act be repealed.

RECOMMENDATION 4

4.66. The Committee recommends that the prescribed amount payable for each eligible vote (first preference vote) be increased to $8.00, indexed annually.

RECOMMENDATION 5

4.67. The Committee recommends that the Assembly debate the merits of the $10,000 limit on donations from a person (including a natural person, an unincorporated association and a corporation) in a financial year.

RECOMMENDATION 6

5.12. The Committee recommends that the lodgement of returns of gifts should be by quarterly reporting up to and including the quarter ending 30 June in an election year. From then until election day, returns of gifts should be required to be lodged within seven days.

RECOMMENDATION 7

5.18. The Committee recommends that references to an ACT election account be removed from the Electoral Act and replaced with references to a separately identified account or sub-account from which funds may not be used for an ACT election purpose, or in the case of administrative expenditure funding, for an ACT, federal, state or local government election purpose.

RECOMMENDATION 8

5.24. The Committee recommends that the definition of 'small anonymous gift' in s 216 and the Dictionary of the Electoral Act be removed and other references to small anonymous gifts in ss 216A, 220 and 222 be changed to 'anonymous gifts', with the result that anonymous gifts of up to $1,000 each may be received to a total of $25,000 in a financial year.

RECOMMENDATION 9

5.28. The Committee recommends that s 201(1)(c) and the definition of third party campaigner in s 198 be amended in line with the ACT Electoral Commission's recommendations 10-12.

RECOMMENDATION 10

5.34. The Committee recommends that if a party, MLA or candidate appoints a reporting agent:

- **only one reporting agent is able to be appointed;**
- **an appointment cancels the appointment of any previous reporting agent; and**
- **the reporting agent is responsible for all disclosure returns required under the Electoral Act.**

RECOMMENDATION 11

5.38. The Committee recommends that to avoid doubt, s 215G(1)(b) be amended to refer to 'local government election' rather than 'local election'.

RECOMMENDATION 12

5.46. The Committee recommends that the Electoral Commission's proposed amendments to clauses 7(3)(c) and 8(2) of Schedule 4 be made so as to maximise fairness in the counting of votes where two or more candidates are tied.

RECOMMENDATION 13

5.61. The Committee recommends that s 292 be amended to exempt private unpaid commentary on social media from the authorisation requirements and that the Attorney-General consider the legislation and findings of other jurisdictions when re-drafting the provision.

RECOMMENDATION 14

5.74. The Committee recommends that the penalty for failing to vote by way of default notice issued by the ACT Electoral Commissioner under s 161 be increased to $40.

RECOMMENDATION 15

5.75. The Committee recommends that the penalty in s 129 for failing to vote where the matter is determined in court be increased from one half to one penalty unit.

RECOMMENDATION 16

6.15. The Committee recommends that the limit in s 303 on canvassing around polling places be increased from 100 metres to 250 metres.

RECOMMENDATION 17

6.33. The Committee recommends that instructions on the ballot paper be amended to read: 'Write numbers from 1 onwards, up to as many numbers as you wish. Use numbers only and use each number only once.'

RECOMMENDATION 18

6.66. The Committee recommends that s 243A be amended to provide that the ACT Electoral Commissioner should not publish on the internet the full private address details of an individual who has made a donation but that the person's name and suburb, or a post office box if provided, is sufficient.

1 INTRODUCTION

1.1 On 20 March 2014 the Assembly agreed to the motion by the Attorney-General, Mr Simon Corbell MLA, to establish the Select Committee, with a reporting date of 30 June 2014. The Assembly agreed on 5 June 2014 to amend the Committee's terms of reference to allow the report to be tabled out of session.

1.2 This chapter outlines the conduct of the inquiry and the structure of the report, and presents background information on the ACT's electoral system and current representation.

CONDUCT OF THE INQUIRY

1.3 The Committee advertised the inquiry on its website and in *The Canberra Times* on Wednesday 2 April 2014, inviting public submissions by Friday 2 May 2014. More than 60 individuals and organisations, including those who had made submissions to the Expert Reference Group's 2013 *Review of the size of the Legislative Assembly*, were also contacted by email to invite them to make a submission.

1.4 The Committee also released a Discussion Paper on 6 May 2014 and extended the closing date for submissions to Monday 12 May 2014. Fourteen submissions were received and published on the Committee's website, and these are listed in Appendix A.

1.5 Public hearings were held on 9, 16 and 21 May 2014. Witnesses at the hearings are listed at Appendix B. The Committee held 12 private meetings during the inquiry.

STRUCTURE OF THE REPORT

1.6 A brief explanation of key elements of the ACT's electoral system that are relevant to the inquiry is in Chapter 2.

1.7 Chapters 3 to 5 focus on the three key areas in the Committee's terms of reference:

- the future size of the Legislative Assembly;
- the implications for the ACT of the High Court decision in *Unions NSW v NSW*; and
- recommendations by Elections ACT in its report on the 2012 ACT election.

1.8 Other issues raised during the inquiry are in Chapter 6. Chapter 7 presents the Committee's conclusions.

2 BACKGROUND TO ACT ELECTIONS

2.1 This chapter explains key elements of the ACT electoral system that are relevant to this inquiry. It sets out:

- how the ACT electoral system works; and
- the regulation of election funding and expenditure.

THE ACT ELECTORAL SYSTEM

THE HARE-CLARK SYSTEM

2.2 Members of the ACT's Legislative Assembly are elected by a proportional representation system known as the Hare-Clark electoral system. This system is based on single transferable votes. There are three electorates: Brindabella and Ginninderra have five representatives each, and Molonglo has seven representatives.

2.3 To be certain of election a candidate has to receive a quota of votes. A quota is a specific number of votes which is calculated using the number of formal votes cast and the number of vacancies. The following formula is used:

$$\frac{\text{total number of valid votes}}{\text{number of vacancies + one}} \quad \text{plus one vote}$$

2.4 The quota in the two five member electorates is one-sixth of the valid votes plus one vote, or about 16.67%. The quota in the seven member electorate is one-eighth of the valid votes plus one vote, or about 12.5%. The quota if nine member electorates were introduced would be one tenth plus one vote, or about 10%.

2.5 If a candidate receives a total number of votes equal to or greater than the quota, the candidate is elected. Any votes over the quota are the candidate's surplus. If all vacancies have not been filled by candidates who have received a quota, the value of the surplus of any candidate who has been elected is distributed to continuing candidates according to the further preferences shown on the ballot papers. If there are more continuing candidates than unfilled vacancies, the candidate with the fewest votes is excluded and their votes are distributed according to the preferences shown on the ballot papers. This process continues until all vacancies have been filled. Thus a candidate may be elected without receiving a quota.

2.6 The Expert Reference Group (ERG) commissioned in 2012 to consider the size of the Legislative Assembly (see Chapter 3) noted that a higher quota in percentage terms could be seen as a barrier to the election of minor party candidates and independents.[1] A lower quota in percentage terms could result in the election of a wider range of candidates representing minority views.

2.7 The ERG stated:

> ... some will see this as a strength and others will see it as a weakness. ... The ERG sees this as an issue of balance. The ERG accepts that 5 member electorates are less proportional than 7 or 9 member electorates. The ERG is also concerned that the quota for election in 9 member electorates may be too low. Therefore, the ERG concludes that 7 member electorates are preferable to either 5 or 9 member electorates as a general rule. However, as the overall size of the Assembly is also of paramount consideration, the ERG accepts that both 5 member and 9 member electorates are viable options to consider.[2]

THE LEVEL OF REPRESENTATION

2.8 Between 1989 and 2012 the ACT's population increased from approximately 275,000 to 375,000, while the size of the Assembly remained unchanged at 17 members.

2.9 Table 1 below, compiled by the ERG, compares the number of elected representatives in each State and Territory across the three levels of government in Australia. The ratio of elected representatives to the number of enrolled voters in the ACT is one representative to 12,247 voters, a ratio much higher than any other jurisdiction. The nearest jurisdiction is Victoria, where the ratio is one representative to 4,480 voters. In absolute terms, the ACT also has the smallest number of elected representatives.

2.10 As the Legislative Assembly has responsibilities at both the State and local government levels, the final column in Table 1 compares the level of representation at those levels across jurisdictions. The ACT has an even higher ratio than other States and Territories (one representative per 15,129 voters).

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[1] Expert Reference Group (ERG), *Review into the size of the Legislative Assembly*, 2013, para 177.
[2] ERG, paras 178, 179.

Table 1: Ratio of Commonwealth/State/Territory/local government representatives compared to electoral enrolment[3]

Commonwealth			State/ Territory		Local Govt	Total Reps	Enrolment at 30/9/2012	Ratio of all reps to enrolment	Ratio of State/local govt reps to enrolment
	House of Reps	Senate	Lower House	Upper House					
NSW	48	12	93	42	1,518	1,714	4,648,429	1:2712	1:2812
VIC	37	12	88	40	631	808	3,619,729	1:4480	1:4769
QLD	30	12	89	0	553	683	2,779,556	1:4070	1:4330
WA	15	12	59	36	1,232	1,354	1,387,350	1:1025	1:1045
SA	11	12	47	22	714	806	1,103,973	1:1370	1:1410
TAS	5	12	25	15	281	338	359,145	1:1063	1:1119
ACT	2	2	17	0	0	21	257,190	1:12247	1:15129
NT	2	2	25	0	148	177	126,762	1:716	1:733
TOTAL	150	76	443	155	5,675	5,901	14,282,134		

2.11 The ratio of members of the Legislative Assembly to ACT voters has changed significantly since self-government. At the first election in 1989 when there were approximately 169,500 voters, the ratio was one member per 10,000 voters, compared with the current ratio of one member per 15,129 voters.

2.12 Another way of measuring the level of representation is to compare the number of electoral representatives with the population. The ACT has 5.6 representatives per 100,000 people, much lower than the national average of 26 representatives per 100,000. The nearest jurisdiction is Victoria with 14.4 representatives per 100,000. The jurisdictions with smaller populations, Tasmania and the Northern Territory, have 66.0 and 75.4 representatives per 100,000 respectively.[4]

2.13 By any measure, the ACT has far fewer elected representatives than any other State or Territory. If the number of members were increased to 25, the ratio would only be 7.7 representatives per 100,000, and with 35 members only 10.4, clearly still far below the ratio in all other jurisdictions.[5]

[3] ERG, p. 35. Numbers of State and local government representatives were compiled in January 2013 from data supplied by the relevant Electoral Commission. Enrolment shown is Commonwealth enrolment as at 30 September 2012. State/Territory enrolment may differ. Population data was obtained from the ABS website: www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0 and excludes Jervis Bay Territory, Christmas Island and the Cocos (Keeling) Islands.

[4] See ERG, Table 3, p. 36.

[5] See ERG, Table 4, p. 36.

THE FUNCTIONS OF THE ASSEMBLY

2.14 The Legislative Assembly has two roles: first, it is responsible for State/Territory functions, such as health, education, law and order, and it has the power to make laws for the peace, order and good government of the Territory.[6] Ministers participate in the Council of Australian Governments (COAG) and other Commonwealth/State ministerial councils to represent the ACT's concerns in national issues. Second, the Assembly is also responsible for municipal functions, such as rates and roads, that are carried out in other jurisdictions by local governments.

2.15 In his 2011 review of the ACT Government, Dr Allan Hawke stated:

> In light of the importance of robust and accountable democratic processes in the ACT – characterised by high standards of parliamentary debate, a legislative program covering a range of complex issues, and an active Assembly Committee process – and the significant under-representation of the citizens of the ACT, there is an overwhelmingly sound case for increasing the size of the Assembly. This would enable Members to serve their constituents better, allow the Ministry to be expanded to seven thereby establishing a more reasonable spread of responsibilities, and enhance the capacity of the Legislature to scrutinise the activities of the Executive through a more active committee process.[7]

THE REGULATION OF ELECTION FUNDING AND EXPENDITURE

2.16 Amendments to the Electoral Act in 2012, following the report of the Standing Committee on Justice and Community Safety in 2011,[8] made significant reforms to electoral campaign financing. They provide for:

- limits on the value of gifts that may be received and used for electoral expenditure;
- caps on the amount of electoral campaign expenditure that may be incurred;
- disclosure of the financial transactions of registered political parties, political party groupings, MLAs, associated entities, candidates, third party campaigners, and broadcasters and publishers; and
- public funding of electoral campaign expenditure.

2.17 Each of these four elements is summarised briefly below.

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[6] *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 22(1).
[7] Hawke, A, *Governing the city state: One ACT government – one ACT public service*, 2011, p. 33.
[8] Standing Committee on Justice and Community Safety, *A review of campaign financing laws in the ACT,* Report 7, 2011.

LIMITS ON GIFTS

2.18 Gifts include:

- property, including money (other than property under a will);
- a service, other than volunteer labour, for free or inadequate consideration (such as free or discounted electoral advertising or room hire);
- the part of an annual party membership fee over $250; and
- the part of a fundraising contribution over $250 (s 198AA).

2.19 Gifts are limited in several ways. There is a cap of $10,000 on the total amount of gifts that may be received in a financial year from the same person and deposited into an ACT election account (s 205I(2)). A 'person' includes an unincorporated association (s 198) and a corporation.[9] Gifts from anyone other than an individual on the ACT electoral roll must be paid into a federal election account, except if the recipient is a third party campaigner (s 205I(4)). Since the ACT election account is the only financial account from which electoral expenditure may be incurred (s 205C), this means that gifts from companies and organisations cannot be used on an ACT election, except by third party campaigners. If the cap is exceeded, the penalty is twice the amount by which the cap is breached, payable as a debt to the Territory (s 205I(5)).

2.20 There are also restrictions on anonymous gifts. Political entities in the ACT, other than third party campaigners, must not accept anonymous gifts of $1,000 or more (s 222). If such a donation is received, it is payable to the Territory, and if it is not paid, it may be recovered as a debt. Small anonymous gifts of less than $250 must not be accepted where the total of such gifts received would be more than $25,000 for the financial year or, for candidates in an election, more than $25,000 for the disclosure period (s 222(3), (4)).

CAPS ON CAMPAIGN EXPENDITURE

2.21 The amount of money that can be spent on electoral campaign expenditure from an ACT election account is capped. The cap applies to electoral expenditure incurred during the 'capped expenditure period' for an ACT election, that is, from 1 January of an election year until the end of polling day (s 198).

2.22 Electoral expenditure is essentially advertising and publishing costs: it is defined as expenditure incurred in broadcasting, publishing, displaying and producing electoral advertisements or any electoral matter that requires authorisation, consultants' and advertising agents' fees in relation to electoral matter, and opinion polls and other research to

[9] By virtue of the *Legislation Act 2001*, s 160.

support the production of electoral matter. It does not include administrative expenditure (s 198).

2.23 Electoral expenditure is incurred when the service or product to which the expenditure relates is provided or delivered. The expenditure cap set out in the Electoral Act (and subject to annual indexing) is:

- for a party grouping: $60,000 multiplied by the number of party candidates contesting the election, to a maximum of five in a five member electorate and seven in a seven member electorate;
- for a non-party candidate grouping: $60,000;
- for a non-party Member of the Legislative Assembly (MLA) or an associated entity of a non-party MLA: $60,000; and
- for a third party campaigner: $60,000 (ss 205F, 205G).

2.24 A 'party grouping' means the party, an MLA for the party, an associated entity of either the party or the MLA; and party candidates and prospective party candidates (s 198). An 'associated entity' is an entity that is controlled by a party or MLA, or operates, completely or to a significant extent, for the benefit of a party or MLA (s 198). A 'third party campaigner' is a person or entity that incurs more than $1000 in electoral expenditure (s 198).[10]

2.25 The expenditure cap is adjusted annually, commencing on 1 July 2013, and the current rate is $62,530.[11] A penalty applies for breach of the expenditure cap, equal to twice the amount by which the cap is breached and payable as a debt to the Territory. For the 2012 election, two third party campaigners, the Australian Home Heating Association Inc and the Law Society of the ACT, paid penalties of $1,553.56 and $1,208 respectively under s 205G for breach of the cap relating to third party campaigners.

2.26 The expenditure cap for a party contesting all 17 seats in an ACT election would be $1,063,010 in 2014 terms plus indexation. If the number of members was increased to 25, the cap for a party contesting all seats would be $1,563,250 plus indexation.

DISCLOSURE OF GIFTS AND OTHER FINANCIAL TRANSACTIONS

2.27 A gift (or sum of gifts) totalling $1,000 or more must be reported within seven days of its receipt during the period from 1 January to polling day in an election year, or within 30 days of its receipt at any other time. These returns are made public as soon as practicable after their receipt.

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[10] Apart from those categories set out above. Broadcasters, news publishers, government agencies and the Legislative Assembly are also excluded from the definition.

[11] Electoral (Expenditure cap for 2014) Declaration 2013, NI2013 — 541.

2.28 Annual returns from parties, MLAs and associated entities are due no later than 31 July after the end of the relevant financial year, and will be made public at the beginning of September. Election returns from party groupings, non-party candidate groupings and third party campaigners are due within 60 days after polling day and will be made public at the beginning of the February after the election. The ACT Electoral Commissioner is empowered to conduct investigations into compliance with the financial disclosure provisions.

ELECTION FUNDING

2.29 Election funding (that is, public funding) is available under the Electoral Act to registered political parties and non-party candidates if they meet the following criteria:

- A registered political party is eligible for election funding for the votes received by its endorsed candidates who together polled at least 4% of the total number of formal first preference votes in an electorate.
- A non-party candidate is eligible to receive election funding if he or she polls at least 4% of the total number of formal first preference votes cast in the electorate.

2.30 The amount each vote is worth is calculated according to the formula in s 207 of the Electoral Act. For the 2012 election, the rate was $2.00 per eligible vote. The public funding amounts for the 2012 election are set out below.

Table 2 – Public funding for the 2012 election[12]

Political party	Amount
Australian Labor Party (ACT Branch)	$171,982
Australian Motorist Party	$9,588
Bullet Train for Canberra	$8,222
Liberal Party of Australia (A.C.T. Division)	$172,064
The ACT Greens	$47,546
TOTAL	**$409,402**

2.31 There is also provision for funding for administrative expenditure for MLAs (ss 215A-215F). It is paid in quarterly instalments at the rate of $20,000 per calendar year for each MLA (plus CPI increase beyond 2012). The quarterly amount for 2014 is $5,210.42. Where an MLA is not an MLA for the whole year, the amount payable is calculated on a pro rata basis. Funds for administrative expenditure must not be used for electoral expenditure (s 215G).

[12] From Elections ACT, *Report on the ACT Legislative Assembly Election 2012*, p. 61.

3 REVIEW OF THE SIZE OF THE LEGISLATIVE ASSEMBLY

3.1 On 13 December 2012 the Chief Minister, Ms Katy Gallagher MLA, commissioned an Expert Reference Group (ERG) to consider and report on options for increasing the size of the Assembly. The five-person group was chaired by the ACT Electoral Commissioner. The ERG presented its report on 28 March 2013.[13]

BACKGROUND TO THE EXPERT REFERENCE GROUP REVIEW

3.2 The Commonwealth *Australian Capital Territory (Self-Government) Act 1988* (the Self-Government Act) currently sets the size of the Legislative Assembly at 17 members (s 8(2)). In March 2013, the Commonwealth Parliament amended the Self-Government Act to give the Legislative Assembly the power to set its own size by enactment passed by at least a two thirds majority of members (s 8(2), (3)).

3.3 Eleven inquiries held between 1974 and 2012 considered the issue of the Assembly's size. Nine of those recommended that the Assembly should be increased, and two recommended the Assembly should remain at its present size of 17 members.[14]

3.4 In conducting its inquiry, the ERG adopted the following guiding principles:

- each electorate should have at least five members;
- each electorate should have an odd number of members;
- electorates should have the same number of members; and
- the total number of members should be an odd number.

3.5 The first two principles are enshrined in the *Proportional Representation (Hare-Clark) Entrenchment Act 1994*.[15] The principle that an odd number of members should be elected from each electorate seeks to ensure, as far as practicable, that a party that wins more than 50% of the votes will win at least half the seats in the electorate.[16] The ERG agreed with many submissions that it was 'important from a fairness perspective to ensure that each electorate returned the same number of members', noting that this was consistent with the operation of

[13] ERG, *Review into the size of the ACT Legislative Assembly*, 2013. The other members of the ERG were Anne Cahill Lambert AM, Meredith Edwards AM, John Hindmarsh AM and Louise Taylor.

[14] See ERG pp. 1, 45-56.

[15] s 4(1)(a), (b).

[16] ERG, para 165.

the Hare-Clark system in Tasmania.[17] The principle that the total number of members should be an odd number seeks to avoid a deadlock in the Assembly.

3.6 The ERG considered that factors relevant to the size of the Assembly included:

- the ability of the Assembly to provide for adequate and representation of the ACT community;
- the ability of the Assembly to fulfil legislative and executive functions;
- the size of the ACT ministry;
- the ability to scrutinise the government; and
- academic modelling of the size of representative parliaments.[18]

REVIEW RECOMMENDATIONS

3.7 The ERG recommended that:

- the ACT Legislative Assembly be increased to 25 members at the 2016 election, consisting of five electorates each returning five members; and
- the Assembly be increased to 35 members at the 2020 election, consisting of five electorates each returning seven members.

3.8 The ERG considered that moving directly to five electorates of seven members each would be too large an increase by the 2016 election. The ERG also considered that it would be appropriate to increase the size of the ACT ministry to between seven and nine members. The reasons for the ERG's recommendations are set out in its report at pp. 28-30.

3.9 If the Assembly did not accept those recommendations, the ERG suggested two alternatives: an increase to 27 members at the 2016 election, consisting of three electorates each returning nine members, and an increase to 35 members by the 2024 election (rather than 2020).

[17] ERG, para 168.
[18] ERG, para 72.

FINANCIAL IMPACT

3.10 The ERG noted that if the size of the Legislative Assembly was increased to 25 members with eight ministers, the estimated additional annual cost to the ACT Budget would be approximately $6.336 million, with one-off establishment costs of between $4.4 million and $6.8 million.[19] This estimate includes accommodation for the Executive outside the Legislative Assembly building (such as in the North Building) to provide space for offices for additional MLAs in the Assembly building.

3.11 The costs were estimated taking into account:

- salaries and entitlements of additional MLAs and their staff;
- modifying the Assembly chamber if necessary (noting that minimal change would be required to accommodate 25 MLAs);
- accommodation and fit-out costs for offices for additional MLAs and their staff;
- the cost of relocating ministers and their staff to another building; and
- administrative expenses such as additional office equipment and overheads.[20]

RESPONSE TO THE REVIEW'S RECOMMENDATIONS

3.12 The public position of both ACT Labor and the Canberra Liberals[21] is that the membership of the Legislative Assembly should be expanded to 25 members at the 2016 election. The ACT Greens support an increase in the size of the Assembly, but do not support the model of five members in five electorates, preferring electorates with larger numbers of representatives.

3.13 In moving that the Committee be established, the Attorney-General, Mr Simon Corbell MLA, foreshadowed that amendments to the Electoral Act to provide for an enlarged Assembly would be presented to the Assembly during the 2014 June Budget sitting week.[22] On 5 June 2014, the Attorney-General introduced the Australian Capital Territory (Legislative Assembly) Bill 2014, which requires passage by a two-thirds majority of the Assembly, and the Electoral Amendment Bill 2014, which makes consequential amendments to the Electoral Act.

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[19] ERG, p. 32. Costs were calculated by the Assembly Secretariat in consultation with the Chief Minister and Treasury Directorate.

[20] ERG, p. 31.

[21] See http://www.canberraliberals.org.au/LATEST-NEWS/JEREMY-HANSON-MLA/CANBERRA-LIBERALS-ENDORSE-ASSEMBLY-EXPANSION.asp, 5 March 2014.

[22] Legislative Assembly for the ACT, *Debates*, 20 March 2014, Mr Simon Corbell MLA, p. 664.

3.14 Professor George Williams, who supported the five member/five electorate model, stated:

> Having more politicians tends to be innately unpopular, in part because of the extra cost. However, the costs of inefficient, or even bad, government are far higher. Not having the strongest possible team to run areas like health and education can, over the longer term, have an enormous multiplier effect across the whole community through less effective hospitals and schools. ...
>
> It is long past time that the ACT had a parliament of an appropriate size.[23]

3.15 Professor John Warhurst also acknowledged there would be criticism of an increase in size, and pointed to the need for community education about why it is necessary:

> ... what we are dealing with is not an issue restricted to the ACT. This is not even restricted to Australia, I do not think, in terms of attitudes towards established democratic institutions and attitudes towards established political parties ...
>
> ... I think one of the problems is that the work of assemblies and members of parliament and ministers and oppositions is still largely a black box as far as the general community is concerned. They either do not know or they do not care. ... That is what we have to try and break down.[24]

3.16 Professor Warhurst suggested there was a role for others in the community to defend the increase and explain why it was necessary, since educational efforts by the Assembly or political parties would tend to be put down to self-interest.[25]

3.17 Most submissions to the inquiry supported an increase in the Legislative Assembly, with only two opposing the proposal.[26] Mr Greg Cornwell supported the five electorate/five member model.[27] Mr Chris Ansted supported three electorates of nine members each, arguing that five member electorates were less representative of the diversity of opinions within an electorate and would make it more likely that a major party could form government without entering into a coalition with other parties, leading to too much power in the Executive.[28] The ACT Greens also called for three electorates of between seven and nine members each.[29]

3.18 The Proportional Representation Society of Australia (Australian Capital Territory Branch) (PRS) argued that the seven member electorate had provided 'noticeably better matches of votes

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[23] Professor George Williams, Submission 3, p. 2.

[24] Professor John Warhurst, Transcript of evidence, 9 May 2014, pp. 26-27.

[25] Professor John Warhurst, Transcript of evidence, 9 May 2014, p. 26.

[26] Mr Simon Fisk, Submission 4; Proportional Representation Society of Australia (ACT Branch) (PRS) Submission 13. The PRS argued that the Assembly had not shown it was operating 'within its full capacity in a manner that most befits a small parliament' and that the Assembly could involve the community more effectively by giving greater resources to committees, forming working parties to tap into community expertise and through other measures.

[27] Mr Greg Cornwell, Submission 2, p. 1.

[28] Mr Chris Ansted, Submission 1, p. 2.

[29] ACT Greens, Submission 10.

and representation' than the five member electorates and had facilitated the election of a higher proportion of women.[30] The PRS argued that 'The most noticeable persistent feature of ACT experience has in fact been the large seat bonus achieved by the second party in five-member electorates,' because support through the flow of preferences meant that 'even slightly under 30% of first preferences [translated] into 40% of seats'.[31] The PRS said they:

> ... would therefore regard any arrangement consisting of only five-member electorates as inferior to the current set-up because of the likely lessening in number of candidates nominating in each electorate, the additional potential for votes being ineffective and the greater difficulty women have in getting elected.[32]

3.19 The Woden Valley Community Council Inc, the Weston Creek Community Council and Gungahlin Community Council supported an increase in the size of the Assembly but expressed concerns about electoral boundaries that cut across geographical districts[33] (discussed further in Chapter 6). The Woden Valley Community Council Inc called for proposed changes to be put to a referendum on the basis that 'there should be a direct democratic process to amend the democratic arrangements of the ACT'.[34] Another submission from Mr Tim Walshaw supported 25 single member electorates.[35]

3.20 The Committee notes that the Attorney-General introduced two bills to give effect to an increase to 25 members of the Legislative Assembly on 5 June 2014.

AMENDMENTS TO THE ELECTORAL ACT

3.21 If the number of members were increased, the Electoral Commission noted that a range of amendments to the Electoral Act would be required.

DISTRIBUTION OF ELECTORATES

3.22 Part 4 of the Electoral Act contains various provisions that would require amendment. The first is s 34, which provides that there are to be three ACT electorates, with seven members elected from one and five members elected from each of the other two electorates.

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[30] Proportional Representation Society of Australia (ACT Branch), Submission 13, p. 9. The submission noted that in the six Hare-Clark elections to date, women have taken 36% of the Molonglo vacancies and 28% of vacancies in five-member electorates, despite comprising between 30% and 43% of candidates.

[31] Proportional Representation Society of Australia (ACT Branch), Submission 13, p. 8.

[32] Proportional Representation Society of Australia (ACT Branch), Submission 13, p. 9. The submission said if there was an increase, there should be three electorates of seven, seven and nine members each, in part to lessen the likelihood of regular major electorate boundary changes.

[33] Woden Valley Community Council Inc, Submission 6; Weston Creek Community Council Submission 8; Gungahlin Community Council, Submission 11.

[34] Woden Valley Community Council Inc, Submission 6, p. 3.

[35] Mr Tim Walshaw, Submission 5.

3.23 The Commission noted that an enactment to increase the size of the Assembly to 25 members from the 2016 election must be passed by a special two-thirds majority of the Assembly. The Commission also recommended the following amendments to the Electoral Act:

- an amendment to s 34;
- amendments to ss 116 & 205 to remove references to seven member electorates; and
- a transition provision to ensure that the redistribution due to commence in 2014 (see below) will require the ACT to be redistributed into five electorates each returning five members (Recommendation 16).

3.24 Schedule 2 to the Electoral Act provides for the Robson rotation system for printing ballot papers for five and seven member electorates. The Commission advised that Schedule 2 would not create any practical problems if left as is, and that doing so would allow for a later increase to seven member electorates.[36]

COMMITTEE VIEW

3.25 The Committee notes that on 5 June 2014, the Attorney-General introduced the Australian Capital Territory (Legislative Assembly) Bill 2014 and the Electoral Amendment Bill 2014, which includes the amendments suggested by the Commission. The second bill also amends Schedule 2 to 'maintain the integrity of the Electoral Act and to make sure there is no ambiguity about the 5 by 5 electoral structure'.[37]

A TWO STAGED APPROACH

3.26 The ERG considered that seven member electorates would provide a better balance between proportional representation and stability than five member or nine member electorates. However, the ERG did not consider it appropriate for the Assembly to more than double in size from 17 to 35 members in 2016. Accordingly the ERG recommended an increase in two stages: to 25 members in the first stage (2016), and to 35 members in the second stage (2020), based on a projected ACT population of 410,000. The ERG suggested that the recommended increased Assembly size for the 2016 election and second increase for the 2020 election should be covered by one set of legislative amendments, so that no subsequent legislation would need to be made.[38] The ERG noted that a future parliament could amend the legislation if it chose.

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[36] ACT Electoral Commission, Submission 7, p. 8.
[37] Electoral Amendment Bill 2014, Presentation speech, p. 2.
[38] ERG, para 190.

3.27 The ACT Greens suggested that either the ERG's suggestion could be followed or a trigger be included in legislation to allow for an automatic review of the size of the Assembly when the ACT's population reached a certain size.[39]

3.28 However, most submissions and witnesses who commented on the ERG's suggestion were in favour of adopting a 'wait and see' approach following an initial increase to 25 members. The Gungahlin Community Council considered a move to 25 members was sufficient 'for at least two election cycles', and a second increase should not be considered until 2024 'when population levels are commensurate with a need for a far greater number of elected representatives'.[40] Professor John Warhurst said he could see a second increase as a longer term aspiration, but preferred 'to wait and see how the 25-member Assembly works and make a judgement at that time.'[41] Mr Greg Cornwell was more forthright:

> I would not like to see us commit ourselves to that. I think that it may grow to 35 eventually, but it depends on the population. I am conscious of the fact that Tasmania cut it back from 35 to 25 and the Northern Territory have been quite happy to operate at the 25 level. I think we can probably afford to leave it at 25 for a few elections and just see how the population grows.[42]

3.29 The Attorney-General told the Committee that the Government was not proposing a second increase at this stage:

> ... I think as the Chief Minister has said, that is a discussion that is yet to be had more broadly. Clearly, there is not a two-thirds majority in the Assembly either for such a change to legislation.[43]

COMMITTEE VIEW

3.30 The Committee considers that the size of the Legislative Assembly should be automatically reviewed as the ACT grows in size. The ACT's population is currently just over 384,000,[44] and the Committee believes it would be appropriate to re-examine the size of the Legislative Assembly when the ACT's population reaches 425,000, and that the issue should be automatically re-examined with every increase of 50,000 people.

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[39] ACT Greens, Submission 10, p. 6.
[40] Gungahlin Community Council, Submission 11, p. 11.
[41] Professor John Warhurst, Transcript of evidence, 9 May 2014, p. 25.
[42] Mr Greg Cornwell, Transcript of evidence, 9 May 2014, p. 22.
[43] Mr Simon Corbell MLA, Attorney-General, Transcript of evidence, 16 May 2014, p. 39.
[44] See Australian Bureau of Statistics *3101.0 - Australian Demographic Statistics, Dec 2013*, released 19 June 2014.

Recommendation 1

3.31 The Committee recommends that the Government review and report on the appropriate number of representatives in the Legislative Assembly when the ACT population reaches 425,000, and subsequently after every increase in population of 50,000.

THE REDISTRIBUTION PROCESS

3.32 Electoral redistributions occur before every ACT general election. They must begin as soon as practicable after the third Saturday in October two years before the next general election is due (the next one being due in October 2014) and be completed as soon as practicable (s 37(1)). Electorates are redistributed by a determination by the 'augmented commission', which comprises the ACT Electoral Commission and members of the redistribution committee (s 47). Members of the redistribution committee are the Commissioner, the ACT Planning and Land Authority, the ACT Commissioner for Surveys and an appointed member whose qualifications or experience the Commission considers would assist the committee (s 39(3)).

3.33 The augmented commission must follow a detailed consultation and consideration process set out in Part 4 of the Electoral Act, summarised below:

- Before the redistribution committee makes its first proposal, any interested persons or organisations who wish to make suggestions in writing regarding the redistribution are given 28 days to do so.
- Those suggestions are made available for public inspection at the office, with 14 days allowed for written comments.
- The redistribution committee considers the suggestions and comments before making a proposed redistribution, which is published in a newspaper, on the Commission's website and in the Commission office.
- Initial objections may be made within 28 days.
- The objections are considered by the augmented commission, which may hold public hearings.
- The augmented commission then makes a second proposed redistribution. If the second proposal is not significantly different from the first proposed by the redistribution committee, this becomes the final determination of electoral boundaries.
- If the proposal is significantly different from the first, the augmented commission invites further objections to be lodged within 28 days. Public hearings may again be held. Following consideration of all objections, the augmented commission makes a final determination.

3.34 Factors relevant to a redistribution (s 36) are that the augmented commission:

- ensures that the number of electors in an electorate is within the range permitted by the Self-Government Act;
- as far as practicable, endeavours to ensure that the number of electors in an electorate at the time of the next general election is within 5% of the expected quota for the electorate ascertained in accordance with the Self-Government Act;
- duly considers —
  - (i) the community of interests within each proposed electorate, including economic, social and regional interests;
  - (ii) the means of communication and travel within each proposed electorate;
  - (iii) the physical features and area of each proposed electorate;
  - (iv) the boundaries of existing electorates; and
  - (v) the boundaries of divisions and sections fixed under the *Districts Act 2002*.

3.35 The Self-Government Act provides that a distribution or redistribution must not result in any Territory electorate immediately having a number of electors greater than 110% or less than 90% of its quota (s 67D(1)). The quota is ascertained by calculating the number of Territory voters multiplied by the number of electorate members, divided by the number of Territory members (s 67D(2)). This aims to reflect the 'one vote, one value' principle.

TIMING OF THE REDISTRIBUTION PROCESS

3.36 The Committee asked how long the next redistribution process would take. The Attorney-General said the Electoral Commissioner had advised him it would be completed in September 2015, and that he expected that, given the scale of the proposed changes to electorates, the notice and public comment processes in the Electoral Act would need to be 'fully exercised because of the range of views and issues that may arise'.[45]

ELECTORAL EXPENDITURE

3.37 As noted in Chapter 2, the expenditure cap for a party contesting all 17 seats in an ACT election would be $1,063,010 in 2014 terms plus indexation. If the number of members was increased to 25, the cap for a party contesting all seats would be $1,563,250 plus indexation.

[45] Mr Simon Corbell MLA, Transcript of evidence, 16 May 2014, p. 37.

3.38 The ACT Electoral Commission noted:

> This is a considerable increase in the total expenditure cap available to parties.
>
> One way to address this might be to reduce the expenditure cap applicable per candidate, such that the total amount for 25 candidates summed to a lesser amount. It is noted that this would reduce the available expenditure cap for independent/non-party candidates. As the expenditure cap for third-party campaigners is also tied to the cap per candidate, such a change will also impact third-party campaigners, unless a different expenditure cap was applied to this class of candidate.[46]

3.39 In a public hearing the ACT Electoral Commissioner elaborated:

> . ... if what you are looking for with a cap is a level playing field, then I think the lower the cap the better, if that is the aim of having a cap.
>
> However, if you reduce the cap per candidate to achieve that, then arguably you are disadvantaging the independent candidates whose cap will go from whatever it is now to whatever that reduced amount would be. So arguably it is unfair to independent candidates to do that to them.
>
> I have not looked at this in any detail, but what you might be able to do is leave the per candidate cap at the current level but have a top floor on that so that no one party can spend more than 17 candidates' worth of expenditure.[47]

3.40 ACT Labor supported a reduced expenditure cap on the basis that the current rate per candidate:

> ... once accumulated by the three larger parties would create an unwanted incentive for a relatively massive increase in campaign expenditure ... The significant increase in campaign expenditure from 2001 to 2004 to 2008 was one of the factors which has been of concern in the past. Another significant jump in expenditure would have a destabilising effect on legislation which has been successful in constraining the arms race of past campaigns.[48]

3.41 ACT Labor said that in recent ACT campaigns candidates had been elected with a local campaign budget of $10,000-$20,000, and suggested a cap of around $45,000 per seat 'would still be over double what was needed in past campaigns for successful candidates'.[49]

3.42 The ACT Greens also supported a reduction of the cap per candidate to $45,000, which they saw as balancing 'limiting campaign expenditure and inhibiting the ability of independents to participate fully in the democratic process'. They suggested the same cap should apply to third

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[46] ACT Electoral Commission, Submission 7, p. 9.
[47] Mr Phil Green, Transcript of evidence, 9 May 2014, p. 5.
[48] ACT Labor, Submission 12, pp. 5-6.
[49] ACT Labor, Submission 12, p. 6.

party campaigners, and also proposed a reduction in the total expenditure cap for parties to $500,000.[50]

3.43 The Committee notes that the expenditure by the major parties in the 2012 election was significantly more than this (see Table 3 below).

Table 3 – Party expenditure for the 2012 ACT election

Name of party	Total expenditure
Australian Labor Party (ACT Branch)	$919,191.47
Australian Motorist Party	$49,106.97
Bullet Train for Canberra	$18,397.39
Liberal Democratic Party	$0.00
Liberal Party of Australia (A.C.T. Division)	$736,669.00
Marion Lê Social Justice Party	$8,328.00
The ACT Greens	$226,581.36
TOTAL	**$1,958,274.19**

3.44 The Commission suggested the Assembly should also consider, in the context of an increased number of MLAs:

- whether the expenditure cap for third party campaigners (currently at $62,500) should be changed; and
- whether the total amount paid for administrative funding to political parties should remain set at around $20,850 per MLA per year (in 2014 terms) to a total of about $520,000 for 25 members, or also be reduced (Recommendation 17).

COMMITTEE VIEW

3.45 The Committee notes that in considering how funding used for electoral purposes should be regulated, five sometimes competing goals have been identified:

- preventing corruption;
- promoting equality between competitors for votes;
- ensuring adequate funding to provide voters with the information they need to make an informed choice;
- promoting public participation in the political process; and

[50] ACT Greens, Submission 10, p. 4.

- protecting the freedom to advocate and participate in the election process.[51]

3.46 How much emphasis should be placed on each of these goals is a matter on which views will differ.

3.47 Electoral expenditure under the Electoral Act is essentially funds spent on advertising and publishing, and does not include administrative costs. The Committee has considered different ways of ensuring that electoral expenditure does not increase greatly if the size of the Assembly increases to 25 members. An increased cap of over $1.5m for parties that contest all 25 seats is too high.

3.48 Accordingly the Committee considers that the total electoral expenditure cap should be reduced to $40,000 per candidate to a maximum of five candidates per electorate, indexed annually. Mr Rattenbury does not agree with this view and has made additional comments.

Recommendation 2

3.49 The Committee recommends that the electoral expenditure cap be calculated on the basis of $40,000 per candidate to a maximum of five candidates per five member electorate, indexed annually.

3.50 The Committee does not see any compelling reason to change the expenditure cap for third party campaigners (s 205G), currently set at $62,530 (plus annual indexing - see Chapter 2).

3.51 Nor does the Committee see any reason to change the amount of administrative funding provided to each MLA, currently set at $20,000 per calendar year plus CPI increase beyond 2012 (see Chapter 2). Mr Rattenbury does not agree with this view and has made additional comments.

[51] K Ewing (2007), *The cost of democracy: Party funding in modern British politics*, Hart, Oxford, pp. 23-42. See also A Geddis, 'Regulating electoral finance in New Zealand, with particular reference to third parties', in J Tham, B Costar & G Orr (eds) (2011), *Electoral Democracy: Australian prospects*, Melbourne University Press, pp. 231-250.

4 THE IMPLICATIONS OF THE HIGH COURT'S DECISION IN *UNIONS NSW V NSW*

4.1 In December 2013 the High Court unanimously held that two provisions of NSW election legislation that restricted campaign funding were invalid because they impermissibly burdened the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution.[52]

THE NSW LEGISLATION

4.2 Section 96D of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (EFED Act) prohibits political donations to a political party, elected member, group, candidate or third-party campaigner by anyone other than an individual enrolled on the electoral roll for State, federal or local government elections.

4.3 The EFED Act also caps the total expenditure that political parties, candidates and third-party campaigners can incur for political advertising and related election material. For the purposes of this cap, s 95G(6) aggregates the amount spent on electoral communication by a political party and any affiliated organisation, that is, any body or organisation 'that is authorised under the rules of that party to appoint delegates to the governing body of that party or to participate in pre-selection of candidates for that party (or both)'.

4.4 The NSW Government recently introduced a bill to amend the EFED Act to take account of the High Court's decision. Amongst other measures it removes the ban on corporate donations and requires their disclosure to the electoral authority.[53] Donations will need to be made either by an individual on the NSW, Commonwealth or local government roll, or by an entity with a business number.[54]

THE HIGH COURT'S DECISION

4.5 In reaching its decision the Court emphasised that the Commonwealth Constitution does not protect a personal right or freedom to engage in political communication; rather it restricts legislative power to affect political communication more generally.

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[52] *Unions NSW & ors v NSW* [2013] HCA 58.
[53] Election Funding, Expenditure and Disclosures Consequential Amendment Bill 2014, introduced on 27 May 2014.
[54] Proposed new section 96D.

4.6 The Court stated:

> Political communication may be undertaken legitimately to influence others to a political viewpoint. It is not simply a two-way affair between electors and government or candidates. There are many in the community who are not electors but who are governed and are affected by decision of government ... it may be acknowledged that such persons have a legitimate interest in governmental action and the direction of policy ...[55]

4.7 The Court also held that political communication at a State level may have a federal dimension, in that discussion 'might bear upon the choice that the people have to make in federal elections and in voting to amend the Constitution, and upon their evaluation of the performance of federal Ministers and departments'.[56]

4.8 The Court applied the two stage test adopted in its 1997 decision, *Lange*[57]: first, does the provision effectively burden the freedom of political communication in its terms, operation or effects? Second, if it does, is the provision reasonably appropriate and adapted, or proportionate, to serve a legitimate end in a manner which is compatible with the maintenance of the system of representative government?

4.9 The Court determined that both provisions burdened the freedom of political communication, satisfying the first part of the *Lange* test. The Court noted:

> [Section 96D] effects a restriction on the funds available to political parties and candidates to meet the costs of political communication by restricting the source of those funds. The public funding provided by the EFED Act is not equivalent to the amount which may be paid by way of electoral communication expenditure under the Act. ... The party or the candidate will therefore need to fund the gap. It follows that the freedom is effectively burdened.[58]

4.10 The Court accepted that the EFED Act had general anti-corruption purposes, noting the defendant's identification of the potential risk to the integrity of the NSW Parliament, the NSW Government and local government bodies arising from undue, corrupt or hidden influences over those institutions, their members or their processes. However, the Court held that ss 96D and 95G(6) were not connected to those purposes or any other legitimate end.

4.11 In relation to the provision that aggregated electoral expenditure the Court noted:

> [T]he defendant identifies the purpose of s 95G(6) as being to render efficacious the cap on expenditure. It claims that it is legitimate to ensure that the effectiveness of and

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[55] *Unions NSW & ors v NSW* [2013] HCA 58, para 25 per French CJ, Hayne, Crennan, Kiefel & Bell JJ, para 30.
[56] Ibid para 25, citing *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 571-572.
[57] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[58] *Unions NSW & ors v NSW* [2013] HCA 58, para 38 per French CJ, Hayne, Crennan, Kiefel & Bell JJ.

> fairness of the generally applicable caps are not circumvented. Implicit in the notion of circumvention is that s 95G(6) is concerned with expenditure derived in fact by a single course, notwithstanding that it may be made by two legally distinct entities. ...
>
> It may be wondered how, logically, it could be said that affiliation of this kind is effective to identify an industrial organisation as the same source of funds for the making of electoral communication expenditure. Moreover it would appear to assume that the objectives of all expenditure made by the party on the one hand and the organisation on the other are coincident.[59]

4.12 In a speech in early 2014, constitutional law expert Professor Anne Twomey said that the Court hinted that caps on political donation and expenditure, while amounting to burdens on political communication, would be regarded as reasonably appropriate and adapted to achieve the legitimate end of avoiding the risk or perception of corruption and undue influence.[60] She noted that Justice Keane also referred to another possible legitimate purpose of such caps, in suggesting that caps imposed by other provisions might 'reasonably be seen to enhance the prospects of a level playing field'.[61] However, Professor Twomey noted that laws that capped political donations and expenditure would need to be 'carefully calibrated' to survive a challenge.[62]

4.13 At a public hearing during the Committee's inquiry, Professor Twomey outlined general considerations that should be kept in mind when drafting electoral legislation, arising from the High Court's recent decision and its earlier decision in the *Australian Capital Television* case[63]:

> ... there were two particular concerns that the High Court recognised in that case. The first one was that the legislation was unbalanced in nature because it favoured incumbents over others, and even though it was not biased in a particularly party political way, the fact that it treated parties in a way that could be seen to be trying to advantage some over others was something that the High Court had concerns about.
>
> The second thing in that case that the High Court had concern about was the fact that third parties that had a legitimate role in contributing to political communication and political debate were being excluded from access to the electronic media. And the court was particularly concerned that the voices of people other than parties and members of parliament, that those other voices should be able to be heard and to be able to make their point clearly.

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[59] *Unions NSW & ors v NSW* [2013] HCA 58, para 62-63 per French CJ, Hayne, Crennan, Kiefel & Bell JJ.

[60] A Twomey, *Unions NSW v State of NSW*, paper given at the Gilbert + Tobin Centre for Public Law's Constitutional Law Conference, 14 February 2014, p. 13, available at http://www.gtcentre.unsw.edu.au/events/papers.

[61] *Unions NSW v NSW* [2013] HCA 58, para 136 per Keane J.

[62] Twomey, op cit.

[63] *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.

> Both those issues arose again in the Unions New South Wales case, and both of them may be relevant perhaps to a lesser extent in the ACT. ... [Y]ou need to make sure that the legislation ... does not favour existing parties in a significantly greater way than new parties entering into the system of government and that it does not favour incumbents over other parties. ...
>
> The other thing to keep in mind is to make sure that the voices of third party campaigners and others can be heard and are not necessarily muzzled by the legislation. If both those principles are kept in mind when legislating, that will help ensure that the legislation ... [is] valid and acceptable to the High Court.[64]

THE ACT LEGISLATION

4.14 Two sets of provisions are called into question by the High Court's decision: those prohibiting gifts from certain persons or organisations, and those aggregating electoral expenditure by different entities for the purposes of calculating a cap.

RESTRICTIONS ON GIFTS

4.15 The ACT Electoral Commission submitted that s 205I(4) of the ACT's Electoral Act 'is very similar, if not the same, in its effect to s 96D of the EFED Act'. Section 205I(4) provides:

> Also, a receiver other than a third-party campaigner must not accept a gift from a person who is not an individual enrolled to vote in the ACT unless the gift is paid into the federal election account.

4.16 As noted in Chapter 2, only funds paid into an ACT election account may be used in an ACT election (s 205C). The Commission submitted that the effect of s 205I(4) was to prevent gifts from other than ACT electors from being used in ACT elections:

> [Its] effect ... appears identical in all material respects to the effect of section 96D of the EFED Act insofar as it relates to ACT elections. It follows that it is likely to impermissibly burden the freedom of political communication implied in the Constitution and would, if challenged, therefore likely be found to be invalid.[65]

4.17 The Commission recommended that s 205I(4) be repealed and that any provisions referring to that provision, including ss 205I(7), (8) and (9), be amended. The Attorney-General expressed a similar view about s 205I(4):

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[64] Professor Anne Twomey, Transcript of evidence, 16 May 2014, p. 42.
[65] ACT Electoral Commission, Submission 7, p. 11.

> Section 205I(4) has the effect of restricting sources of funds available to political parties to meet costs of political communication and it does nothing to promote the achievement of the legitimate purpose of addressing the possibility of undue or corrupt influence being exerted.
>
> Accordingly, it would appear that section 205I(4) should be repealed, as [it] is likely to be invalid.[66]

4.18 Professor George Williams tended to agree:

> You would have to say that there is a high probability that that would be struck down by the High Court, given the similarity to the New South Wales provision. It is fair to say, though, that it has not been struck down to this point; it continues to operate—and, in the absence of any challenge, it will continue to operate.[67]

4.19 Professor Twomey explained why the High Court had struck down s 96D:

> The court did clearly accept that it is a legitimate end for parliament to legislate in a way that reduces the perception or the risk of corruption and imposing expenditure caps and imposing donation caps indeed does just that, as, indeed, does the public funding as well.
>
> ... The problem in [the] Unions New South Wales case was that we had already put in place that system and then the further step was taken of preventing corporations and unions and, indeed, any body or individual that was not on the electoral roll from making a donation. That is where things went astray, because it was impossible to show in New South Wales that a $5,000 [donation] from a corporation is any more likely to be conducive to corruption than a $5,000 donation from an individual. So you could not show that this was in any way directed towards that ... legitimate end of preventing the risk or perception of corruption.[68]

4.20 Professor Twomey said the position in the ACT was similar:

> ... if the question is asked, well, why is a $10,000 donation of a corporation any more likely to be conducive of corruption than a $10,000 donation from an individual, you would have a real problem answering that question. It is the caps themselves to the extent that they lower the effective influence by either individuals or corporations or unions or anyone else ... that are directed at the legitimate end of preventing corruption. But the particular entities that are affected by those caps, whether or not they are unions or corporations or unincorporated bodies or partnerships or individuals is really neither here nor there. So what you need to be focused on is how does your

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[66] Mr Simon Corbell MLA, Attorney-General, Submission 9, p. 2.
[67] Professor George Williams, Transcript of evidence, 29 May 2014, p. 49.
[68] Professor Anne Twomey, Transcript of evidence, 16 May 2014, p. 45.

> law prevent the risk of corruption, and anything extra that you are doing to it, you have to make sure that that, too, is there for that particular legitimate end. If you cannot justify it, then you are going to have a problem.[69]

4.21 Professor Williams suggested another possible approach to limiting the extent of donations from companies and other organisations:

> I do not think there is any doubt you can impose caps. I think the High Court decision leaves room for that. That, of course, was not directly challenged but it seems to be part of the logic of the case—you can impose caps on expenditure and donations. You are able to move from a complete ban to what might be a rigorous system of caps. In particular, I know you already have a $10,000 cap there, but you could consider caps on people or organisations who are not electors of a lower level—maybe $1,000 or some lower level that is not a ban but still is restrictive enough that corporate, union or other interests cannot give a donation of a sufficient size that might give rise to the actuality or perception of undue influence.
>
> That is what I would be looking at. I would be looking at just a very low cap. You still have it being vulnerable to challenge, particularly if the cap is of a different size to your $10,000 cap, but we just do not know the answer to that.[70]

COMMITTEE VIEW

4.22 The Committee notes that advice from the Attorney-General, the ACT Electoral Commission and two experts in constitutional law is consistent in suggesting that it is highly likely that s 205I(4) would be found to be in breach of the implied freedom of political communication, on the basis that it is similar in effect to s 96D of the EFED Act in NSW. The Committee agrees with those views.

4.23 The Committee notes that if the restriction on the source of funds for use in an ACT election is removed, there is still a system of checks and balances through the $10,000 limit on gifts in a financial year from the same person (defined to include an individual, a corporation and an unincorporated association), and the caps on expenditure by parties, candidates and third party campaigners (discussed below).

Recommendation 3

4.24 The Committee recommends that s 205I(4) of the Electoral Act be repealed.

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[69] Professor Anne Twomey, Transcript of evidence, 16 May 2014, p. 45.
[70] Professor George Williams, Transcript of evidence, 29 May 2014, p. 51.

AGGREGATION OF EXPENDITURE

4.25 Sections 205F, 205G and 205H of the ACT Electoral Act aggregate the expenditure of various entities for the purpose of calculating compliance with expenditure caps. The provisions are expressed in different terms from s 95G(6) of the EFED Act, leading to 'considerable legal uncertainty' about their validity.[71]

THE AGGREGATION PROVISIONS

4.26 The provisions impose, during the capped expenditure period for an election (from 1 January in an election year):

- a cap on electoral expenditure by or on behalf of a party grouping (s 205F)
- a cap on electoral expenditure by or on behalf of: a non-party MLA and an associated entity of the MLA; a non-party candidate grouping; and a third-party campaigner (s 205G), and
- a prohibition on a third-party campaigner from acting in concert with another person to incur electoral expenditure that exceeds the expenditure cap for the third-party campaigner (s 205H).

4.27 The amount of the caps is explained in Chapter 2.

4.28 Section 198 defines the terms used in those provisions. A 'non-party candidate grouping' means a candidate for an election who is not a party candidate, and any other person who has incurred electoral expenditure with the candidate's authority to support the candidate in contesting the election. A 'party grouping' is a party; an MLA for the party; an associated entity of the party or of an MLA for the party; and a candidate or prospective candidate for the party. An 'associated entity' is an entity that (a) is controlled by one or more parties or MLAs, or (b) operates, completely or to a significant extent, for the benefit of one or more registered parties or MLAs. Associated entities are included in the caps on party groupings and non-party MLAs.

4.29 A 'third party campaigner' means a person or entity that incurs more than $1,000 in electoral expenditure in the disclosure period, but does not include:

- a party, MLA, candidate, prospective candidate, party grouping, non-party candidate grouping or non-party prospective candidate grouping;
- a broadcaster;
- a publisher of a news publication (except a publication published for, or for the benefit of, a political entity mentioned above);

[71] ACT Electoral Commission, Submission 7, p. 11.

- a government agency; or
- the Legislative Assembly.

4.30 'Acting in concert', for the purposes of s 205H, means acting under a formal or informal agreement to campaign with the principal object of having a particular party, MLA or candidate elected (s 205H(4)).

THE PURPOSE OF THE LEGISLATION

4.31 Central to consideration of the validity of the ACT's electoral laws is what their purpose is and whether that purpose is a legitimate one.

4.32 The Electoral Act does not contain an objects provision that clearly sets out the purpose of the legislation. However, the Explanatory Statement for the 2012 bill introducing the amendments stated in relation to the caps:

> These caps were developed after careful consideration of the need to balance the rights of political entities, against the concern that elections could be unduly influenced by disproportionate funding and donations.[72]

4.33 In his presentation speech for the 2012 bill, the Attorney-General said:

> These caps on electoral expenditure are aimed at lessening the capacity for election results to be excessively influenced by the candidates and parties' spending on election campaigns. In short, they provide a level playing field for all participants.[73]

4.34 In relation to the third party aggregation provision (s 205H), the Explanatory Statement said:

> The definition [of third party campaigner] has been designed to capture entities who incur electoral expenditure but are not the "major players" in the political sphere, such as single issue lobby groups.[74]

COMMENT ON THE PROVISIONS

4.35 The ACT Electoral Commission pointed out differences between the ACT and NSW provisions:

> The concept of an "associated entity" in the ACT's Electoral Act appears narrower than the concept of an "affiliated organisation" in the EFED Act. The key difference is the closeness of the connection between each such entity and the relevant party. In the case of the Electoral Act's "associated entity", the connection is one of control of the

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[72] Electoral Amendment Bill 2012, Explanatory Statement, p. 2.

[73] Legislative Assembly for the ACT, *Debates* 23 February 2012, Mr Simon Corbell MLA, Attorney-General, Presentation speech for the Electoral Amendment Bill 2012.

[74] Electoral Amendment Bill 2012, Explanatory Statement, p. 8.

> entity by the party or MLA, or the purpose of the operation of the entity being completely, or to a significant extent, for the benefit of the party or MLA.
>
> In contrast, to be considered an "affiliated organisation" under the EFED Act requires only that the body be authorised to appoint delegates to the relevant party or participate in pre-selection of candidates for the party. On this definition, an affiliated organisation may have a purpose entirely unrelated to the party in question.[75]

4.36 The Attorney-General expressed the same view about the closer connection between an associated entity and a party or MLA under the ACT legislation compared with the NSW EFED Act.[76]

4.37 While acknowledging the legal uncertainty, the Commission argued that it was appropriate to include associated entities within the cap on electoral expenditure by a party grouping or a non-party MLA, on the basis that their political objectives are coincident:

> The intention of inclusion of associated entities ... is to prevent parties and non-party MLAs from setting up legally separate but nevertheless closely related entities with the purpose of assisting the "primary" political entity. For example, the only two associated entities currently active in the ACT are the ACT Labor Club and the 1973 Foundation. Both of these entities were established by the ACT Branch of the Australian Labor Party, and profits from these enterprises return to ACT Labor. A notable associated entity previously active was the 250 Club, which was established in part to raise funds for the ACT Division of the Liberal Party.
>
> In the Commission's view, if associated entities are not included within a party or non-party MLA grouping, it is arguable that this could be a vehicle for circumventing the cap on expenditure to an unacceptable extent. The Commission considers that there is a significant difference between the ACT concept of "associated entity" compared to the concept of "affiliated organisation" under the EFED Act. As an ACT "associated entity" by definition must be controlled by, or be operating completely or to a significant extent for the benefit of, a party or MLA, the Commission suggests that it is appropriate to include such entities within a party grouping for the purpose of applying the cap on expenditure, as their political objectives are coincident. The Commission considers that this inclusion within a party grouping is consistent with the purpose of preventing the possibility of undue or corrupt influence being exerted. Nevertheless, the Commission accepts that this issue is not beyond legal doubt.[77]

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[75] ACT Electoral Commission, Submission 7, p. 13.
[76] Mr Simon Corbell MLA, Attorney-General, Submission 9, p. 3.
[77] ACT Electoral Commission, Submission 7, pp. 13-14.

4.38 The Attorney-General expressed a more cautious view, arguing that the second part of the definition of 'associated entity' may raise problems. He viewed the issue in terms of whether the entities should be considered to be the same source of funds:

> ... [T]he question is whether [the connection between a party or MLA and an associated entity] is so close that they should be considered the same source of funds for electoral communication expenditure, notwithstanding that they are legally distinct entities, and moreover whether the treatment of them as the same organisation is appropriately connected to the legitimate purposes of the anti-corruption provisions of the ACT Act.
>
> While finely balanced, it may be difficult to demonstrate that this aggregation is in all circumstances properly connected ... in the sense of being reasonably appropriate and adapted to that purpose. Comparatively it might be easier to see how an associated entity that is entirely "controlled by a party or MLA" might be treated as the same source of funds for the purpose of the funding cap. That conclusion is not quite so obvious in relation to an associated entity that "operates completely or to a significant extent for the benefit of the party or MLA". This calls into question paragraph (b) of the definition of "associated entity".[78]

4.39 The Attorney-General stated in a public hearing:

> Given the real doubt as to the validity of the provisions relating to an associated entity, the government's view is that there is a good argument to remove all references to an associated entity.[79]

4.40 A senior officer of the Justice and Community Safety Directorate acknowledged that paragraph (b) of the definition of 'associated entity' could be removed, leaving paragraph (a) intact.[80]

4.41 Another potentially problematic provision is s 205G(1)(b), which aggregates the expenses of a non-party candidate with any person who has incurred electoral expenditure with their authority, by defining them as a 'non-party candidate grouping'. The Commission viewed the provision as appropriate, again on the basis that their political objectives were coincident. [81] The Attorney-General was again more cautious:

> ... the connection between members of a "non-party candidate grouping" (subsection 205G(1)(b)) is significantly less close ... It would perhaps, on balance, be more difficult to demonstrate that this aggregation is sufficiently close to be regarded as "the same source of funds" and properly connected to the wider anti-corruption purposes of the

[78] Mr Simon Corbell MLA, Attorney-General, Submission 9, p. 3.
[79] Mr Simon Corbell MLA, Attorney-General, Transcript of evidence, 16 May 2014, p. 35.
[80] Dr Karl Alderson, Transcript of evidence, 16 May 2014, p. 38.
[81] ACT Electoral Commission, Submission 7, p. 14.

> election expenditure provisions, in the sense of being reasonably appropriate and adapted to those purposes ...[82]

4.42 In relation to s 205H concerning the cap on third party campaigners and any other person acting in concert with them, the Commission stated:

> Given the requirement for the relevant entities to be acting in agreement for the principal object of promoting the election of a particular party, MLA or candidate, the Commission considers that this provision is also consistent with the purpose of preventing the possibility of undue or corrupt influence being exerted.[83]

4.43 However, the Commission noted that there was 'considerable legal uncertainty' about whether any of the aggregation provisions would satisfy the High Court's test if challenged. The Attorney-General submitted that s 205H was even more problematic than the other two provisions:

> Even further removed is the connection between a third party campaigner and an entity acting in concert with it (section 205H) ... It seems unlikely that a court would be satisfied that the purpose of this provision is connected to the wider anti-corruption purposes of the electoral expenditure provisions and may impermissibly burden the freedom of political communication.[84]

4.44 Two experts in constitutional law who gave evidence during the inquiry, Professor Anne Twomey and Professor George Williams, were less pessimistic about the validity of the ACT's aggregation provisions, while acknowledging there was doubt.

4.45 In relation to the two-part definition of 'associated entity' in s 198, Professor Twomey said:

> If the legislation as a whole is all about preventing corruption and if the expenditure limits are there for taking money out of the system and taking away the inducements to raise lots of money and all the rest of it, then making sure that the system is actually effective and you cannot avoid the system by simply setting up a whole lot of front bodies seems to me to be consistent with that legitimate end.
>
> In my personal view, I think an associated entity that is controlled by a party or an MLA should be under the expenditure cap. It is just in paragraph (b) where you have got "operates completely or to a significant extent for the benefit of one or more registered parties or MLAs". That might be moving a little bit outside it. It is probably okay.
>
> ... Where you have an issue ... is whether or not [paragraph (b)] is wide enough to incorporate pre-existing organisations that have their own legitimate interests of their

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[82] Mr Simon Corbell MLA, Attorney-General, Submission 9, p. 3.
[83] ACT Electoral Commission, Submission 7, p. 14.
[84] Mr Simon Corbell MLA, Attorney-General, Submission 9, p. 3.

> members and, although their interests may coincide with that of a political party, they are not controlled they are not controlled by that political party. If they still have a legitimate right to express the views of their members, that is where you might end up with some trouble. But certainly I think paragraph (a) is okay.[85]

4.46 When asked if she was suggesting that it would be impermissible to limit entities such as non-government organisations and businesses by including them in aggregated caps, Professor Twomey said:

> I think that is right. It does not matter what they are attached to. If you have, say, a business organisation, particularly if it has been in existence for a long time, it represents the views of its members and even if it has strong connections to the Liberal Party or whatever, it still has a legitimate voice and it should be able to express that voice. It is those sorts of things where you get in trouble.
>
> But if, on the other hand, members of the Legislative Assembly are simply creating organisations for the purposes of avoiding the cap, where those organisations have no real genuine existence in the community other than as a creature of, controlled by or acting in concert with a political party, well, it is those sorts of ones I think you can legitimately pick up in these types of aggregation provisions.[86]

4.47 Professor George Williams said in relation to the aggregation provisions in ss 205F, 205G and 205H:

> I agree with the view that has been expressed in the submissions, including by the Attorney, that I think there are sound reasons to say why these provisions are distinguishable from those struck down in the New South Wales legislation. They do operate much more narrowly and, critically, they do forge a strong link between the aggregated entities and the MLA or the political grouping. And that does mean you knock out the biggest concern to the court—that is, that you could have the aggregation of expenditure across groups that were quite disparate in their objects, and that is an inappropriate outcome that does not seem likely to occur in your more narrow drafting.
>
> There is certainly doubt about it, but I think there is certainly a real prospect that your aggregation provisions could survive.[87]

4.48 When asked whether he thought the High Court would be likely to consider the third party expenditure cap provision (s 205H) was reasonably appropriate and adapted to a legitimate end, Professor Williams said it was hard to say:

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[85] Professor Anne Twomey, Transcript of evidence, 16 May 2014, p. 46.
[86] Professor Anne Twomey, Transcript of evidence, 16 May 2014, pp. 46-47.
[87] Professor George Williams, Transcript of evidence, 29 May 2014, p. 49.

> The hard thing here is that the Unions NSW case does not itself actually answer that question. They do not get to that "appropriate and adapted" test for the New South Wales provisions, and that is because what you do with that test is to say, "Does it have a legitimate purpose?" If yes, "Is it appropriate and adapted to that purpose?" Here they simply said it did not have a legitimate purpose in the first place. So the case does not actually give you guidance on that. I think, clearly, you can identify a purpose here. I think this does fit into a grey area. I would acknowledge that, but I cannot give you any certainty of advice on that because, like many provisions, you would say, yes, it is potentially challengeable, as many areas dealing with caps in expenditure are, but you would also say that there are reasons to think that it could be successfully defended.[88]

COMMITTEE VIEW

4.49 The Committee acknowledges the legal uncertainty about the validity of the aggregated expenditure cap provisions in ss 205F, 205G and 205H, and notes that there are differences of opinion about the likelihood of each of those provisions surviving a challenge. The Committee also notes that those provisions are narrower than the NSW provisions found invalid by the High Court in 2013 on the basis that they had no legitimate purpose.

4.50 In particular, the Committee notes that different opinions were expressed in relation to the two parts of the definition of 'associated entity', that is, an entity that (a) is controlled by one or more parties or MLAs, or (b) operates, completely or to a significant extent, for the benefit of one or more registered parties or MLAs.

4.51 The Committee considers there are valid reasons to include associated entities in caps on electoral expenditure by parties and non-party MLAs, in order to prevent the limits being avoided through the setting up of an entity with the sole purpose of assisting in the election of an MLA or candidates from a political party. Even if the view is formed that paragraph (b) of the definition is problematic, the Committee considers there are sound policy reasons for at least including paragraph (a) within the expenditure cap for party groupings and non-party MLAs. The Committee notes the views of two experts in constitutional law, Professor Anne Twomey and Professor George Williams, suggesting the ACT's provisions are likely to survive a challenge.

4.52 The Committee believes that if s 205I(4) is repealed (Recommendation 3 above), with the effect that any person or entity may contribute to funding for ACT election campaigns, total donations are likely to increase, even if each source is still subject to the $10,000 limit per financial year. Professor Williams suggested that a 'sliding scale' of donations might be considered (that is, the cap on gifts from an ACT elector might be set at $10,000 and those

[88] Professor George Williams, Transcript of evidence, 29 May 2014, p. 50.

from other entities such as corporations might be lower). The Committee does not favour this suggestion, on the basis that it would be difficult to demonstrate that $5,000 from an individual would be more or less likely to unduly influence an election or a political party than $5,000 from a corporation or other body, particularly where individuals might make personal donations as well as corporate donations.

4.53 The Committee also considers that the aggregated expenditure provisions in ss 205G and 205H have a sound policy basis in terms of aiming to ensure that parties, non-party candidates and third party campaigners are not able to effectively avoid limits on campaign expenditure through affiliation with other entities whose purpose is to promote a particular candidate or party. The Committee considers that an important aim of the caps on campaign expenditure is to promote, as far as possible, a 'level playing field' for all candidates who aspire to be members of the Legislative Assembly. A second important aim is to minimise the risk or perception of undue influence in the political process. At the same time the freedom to participate in the election process must be protected.

4.54 In light of the views of Professor Twomey and Professor Williams, both of whom suggested that the ACT provisions might well survive a challenge given their narrower reach compared with the NSW provisions, the Committee considers that there is no need to amend ss 205F, 205G and 205H at this time.

FULL PUBLIC FUNDING OF ELECTIONS

4.55 An issue which has attracted attention in recent months is publicly funded election campaigns.

4.56 As explained in Chapter 2, election funding is currently available under the Electoral Act to registered political parties and non-party candidates that have polled at least 4% of the total number of formal first preference votes in an electorate. The amount each vote is worth is calculated according to the formula in s 207, being $2.00 per vote for the 2012 election. The total amounts paid for the 2012 election are set out in Chapter 2. There is no requirement to prove actual expenditure.

4.57 The Premier of New South Wales recently stated his support for public debate and action on the suggestion that political campaigns be fully publicly funded 'as a mechanism to address the corrosive culture of political donations'.[89] On 27 May 2014 the Premier announced the appointment of a panel to examine whether full public funding of state election campaigns is feasible and in the public interest, or what other models can be recommended.[90] The NSW

[89] The Hon Mike Baird MP, Premier of NSW, 28 April 2014, referring to the suggestion of counsel assisting the Independent Commission Against Corruption (ICAC) Geoffrey Watson SC, available at https://www.nsw.liberal.org.au/news/state-news/mike-baird-statement-icac, accessed 2 May 2014.

[90] S Gerathy, 'Former Sydney Water boss Kerry Schott to chair NSW political donation reform panel', at http://www.abc.net.au/news/2014-05-27/kerry-schott-to-chair-nsw-political-donation-reform-panel/5481688. The panel is to report by the end of 2014.

Opposition leader[91] and NSW Greens MP John Kaye[92] have also supported publicly funded election campaigns. By contrast, the Queensland Government has recently passed legislation that moves in the opposite direction.[93]

4.58 The majority of the High Court did not rule out the possibility that legislation banning all political donations might be valid:

> A complete prohibition might be understood to further, and therefore to share, the anti-corruption purposes of the EFED Act. On the other hand, if challenged, it would be necessary for the defendant to defend a prohibition of all donations as a proportionate response to the fact that there have been or may be some instances of corruption, regardless of source.[94]

4.59 Professor Twomey told the Committee she was against full public funding for a range of reasons:

> ... If you say that parties cannot receive political donations, that they have to be fully funded by the public, then if you got into a situation where you ended up not getting as many votes as you anticipated and you ended up with less money than you thought, how do you cover the extra part that is not covered by the public funding? ...
>
> Equally, if you have some kind of a formula that funds absolutely anyone who wants to participate in an election, it is going to be a very expensive exercise because you would have to fund pretty much any person who stuck their hand up at all, whether they had any public support whatsoever. ...
>
> For those reasons and for other reasons, I am actually against full public funding of election campaigns. I am concerned that it removes the impetus for parties to engage at the grassroots level with people. Parties do not have to get out the vote because we have compulsory voting, but here at least parties do have to engage with members in order to encourage donations. If you take that away too then the only engagement that parties have with the people is just trying to persuade them at election time to vote for them. It ends up distancing parties from the people and the need to have membership and the need to encourage participation in the system. I have some concerns that full public payment would cause that.[95]

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[91] See http://www.smh.com.au/nsw/public-election-funding-needs-bipartisan-approach-says-john-robertson-20140504-zr4bi.html, accessed 5 May 2014.

[92] See http://www.sbs.com.au/news/article/2014/05/05/labor-calls-taxpayer-funded-elections, accessed 6 May 2014.

[93] The *Electoral Reform Amendment Act 2014* (Qld) passed on 22 May 2014 cuts public funding to political parties, removes the expenditure limit on campaigning in each electorate and raises the threshold at which donations must be declared from $1,000 to $12,400, amongst other measures.

[94] *Unions NSW & ors v NSW* [2013] HCA 58, para 59 per French CJ, Hayne, Crennan, Kiefel & Bell JJ.

[95] Professor Anne Twomey, Transcript of evidence, 16 May 2014, p. 44.

4.60 Professor Twomey said she preferred a system like that in NSW, where most campaign funding was public funding:

> The good thing there, as in the ACT, is that if you have got fixed term elections you know exactly when your election will be. You can calculate exactly what your expenditure cap will be. You can calculate exactly how much money you need to raise and you have got four years to raise it. It does not seem to me to be completely unreasonable that parties should be required to raise some of that money, particularly where there are caps on donations as well which take away the possibility of donations being used to influence parties in inappropriate ways. ...
>
> I do not see why we need to move to full public funding simply because some people have deliberately tried to avoid the system, thwart the system or, indeed, deliberately break the law.[96]

4.61 Professor George Williams expressed a similar view, commenting on international comparisons:

> In terms of funding models, Australia seems to stack up pretty well. I see no suggestion that it does not fare well internationally when it comes to these models. When you look at funding within caps and expenditure, the New South Wales system itself is pretty good. It is quite rigorous and comprehensive. The problems in New South Wales at the moment actually do not relate to the law itself; they relate to enforcement of the law. The problem there that ICAC is suggesting is that what you have are suggestions that people are simply disobeying the law. That is not a problem with its design but with its enforcement.[97]

COMMITTEE VIEW

4.62 The Committee notes that full public funding for election campaigns is currently being examined in NSW. The Committee does not support full public funding at this time as no appropriate model has been identified.

4.63 However, the Committee believes that the amount of public funding should be increased, so as to reduce the possibility of undue influence by a person or organisation through reliance on their donations and to prevent the perception of corruption through improper influence.

4.64 As explained in Chapter 2, the rate of public funding in the 2012 election was $2.00 per eligible vote (based on the formula for calculating the prescribed amount for each first preference vote, set out in s 207) and the total amount provided to political parties was just over

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[96] Professor Anne Twomey, Transcript of evidence, 16 May 2014, p. 44.

[97] Professor George Williams, Transcript of evidence, 29 May 2014, p. 51. Professor Williams subsequently argued that full public funding was likely to be unconstitutional – see 'Public funding of elections unfair, expensive, and probably unconstitutional', *The Canberra Times*, 3 June 2014, Times 2, p. 4.

$400,000. The Committee considers that there should be a substantial increase in the rate of public funding to $8.00 per eligible vote, indexed annually. Mr Rattenbury does not agree with this view and has made additional comments.

4.65 If the recommendation is implemented, the Committee also considers that the need for the limit on individual donations (currently set at $10,000 by s 205I(2)) may require re-examination by the Assembly.

Recommendation 4

4.66 The Committee recommends that the prescribed amount payable for each eligible vote (first preference vote) be increased to $8.00, indexed annually.

Recommendation 5

4.67 The Committee recommends that the Assembly debate the merits of the $10,000 limit on donations from a person (including a natural person, an unincorporated association and a corporation) in a financial year.

5 RECOMMENDATIONS OF ELECTIONS ACT

5.1 The report by Elections ACT (the ACT Electoral Commission, also referred to in this report as the Commission) under section 10A of the *Electoral Act 1992* examined the conduct of the 2012 ACT election and the operation of the Electoral Act. The Commission recommended areas for amendment or further consideration by the Legislative Assembly. The recommendations are set out in full at Appendix C.

5.2 Most of the recommendations relate to the 2012 amendments concerning financial matters, including election funding. Many of the recommended amendments are minor, focusing on promoting consistency of language in different provisions and other measures to remove ambiguity. Several of them have been superseded by the implications of the High Court's decision. Three recommendations relate respectively to procedures for counting votes, authorisation of advertising and the penalty for failing to vote. Each of these is discussed below. More recent recommendations made in the Commission's submission to this inquiry are also included where relevant.

5.3 The Attorney-General noted that the Government would generally take the view that the Electoral Commission's advice on technical matters should be agreed to, in the absence of any other evidence.[98]

FINANCIAL MATTERS

5.4 Significant amendments were made to the Electoral Act in 2012 concerning election funding, expenditure and financial disclosure, as explained in Chapter 2. These commenced operation on 1 July 2012.

PROVISIONS RECOMMENDED FOR RE-EXAMINATION

TIME FOR LODGING RETURNS

5.5 One of the legislative changes in 2012 requires returns of gifts of $1,000 or more to be lodged with the Electoral Commission within seven days of receipt during election periods,[99] and 30 days during non-election periods. The Commission noted that parties reported difficulty meeting the seven day deadline because their usual accounting processes are geared to monthly reconciliation of accounts and manual intervention was required each week. In any

[98] Mr Simon Corbell MLA, Attorney-General, Transcript of evidence, 16 May 2014, p. 35.
[99] From 2016, this period is from 1 January in an election year to polling day.

case, there is a 30 day period of grace to amend errors and the Commission said that this arguably conflicted with the seven day reporting requirement. The Commission recommended that the Legislative Assembly re-examine the requirement for reporting of gifts received of $1000 or more within seven days of their receipt during the expenditure period (Commission Recommendation 3).

5.6 The ACT Greens, however, called for tighter reporting requirements in the week leading up to the election, noting that parties currently need not disclose those gifts until after polling day:

> We submit that any donations received up to 48 hours before Election Day should be required to be reported by 6am on Election Day itself. Elections ACT should endeavour to publish disclosures as soon as practicable on Election Day. Donations received within the final 48 hours ... should be subjected to the current disclosure rules.[100]

5.7 ACT Labor did not comment on the seven day deadline, but referred to 'very onerous reporting requirements' and called for an extension from 30 days to 60 or 90 days to improve the accuracy of reporting:

> As all party records are carefully audited on a regular basis and all parties seem to be making serious efforts to comply, a slightly lengthened reporting timetable could result in better compliance and less errors. Most MYOB-based accounting is done on a monthly basis and reconciliations between bank accounts and MYOB records often taken 2-3 months to complete.
>
> There are also many examples of where a temporary absence of an employee or an oversight in correspondence or reporting can result in unintended mistakes. Having an extra few weeks for checking and reconciliation can make the difference between a monthly financial report that is 100% accurate and 90% accurate.[101]

COMMITTEE VIEW

5.8 The Committee notes the Commission's advice of difficulties reported by some parties in meeting the seven day time limit for lodging returns of gifts during an election period, particularly because of their monthly accounting cycles.

5.9 The Committee is also conscious of the desirability of reporting of donations in real time to the extent that is possible. The closer to a polling day this is, the more important it is to have transparency in the extent and source of donations made to parties and non-party candidates. However, balanced against that goal is the extent of the imposition on parties and candidates to ensure that proper financial processes are followed. The period in which the seven day disclosure rule applies (from 1 January in an election year, that is, more than nine months

[100] ACT Greens, Submission 10, p. 5.
[101] ACT Labor, Submission 12, p. 5.

before polling day) may be considered to be too long for parties and candidates to comply with a seven day reporting requirement when 30 days applies for the rest of the four year election cycle.

5.10 The Committee notes the suggestion by the ACT Greens that any donations received up to 48 hours before polling day should be disclosed to the Electoral Commission by 6.00 am on polling day and that the Commission should try to publish those returns on polling day. The Committee does not believe this is practicable, given the small number of staff in the Electoral Commission and their other priorities in ensuring the smooth running of the election.

5.11 The Committee considers that the periods for lodging returns of gifts (30 days in non-election periods, and seven days from 1 January in an election year) are too short and impose requirements that are unnecessarily onerous. While transparency in political donations is important, the Committee considers that submission of quarterly returns should be sufficient until the last quarter before an election day, when the need for reporting that is closer to real time becomes more pressing. The Committee believes that reporting should be required on a quarterly basis up until 30 June in an election year, with a period of 30 days from the end of each quarter allowed for lodgement. Between that period and election day, reporting of gifts should be required to be made within seven days.

Recommendation 6

5.12 The Committee recommends that the lodgement of returns of gifts should be by quarterly reporting up to and including the quarter ending 30 June in an election year. From then until election day, returns of gifts should be required to be lodged within seven days.

FEDERAL AND ACT ELECTION ACCOUNTS

5.13 In its report, the Commission recommended that the Assembly re-examine the requirement for a federal election account (Commission Recommendation 4), and the need for political participants to hold an ACT election account with a financial institution (Commission Recommendation 5). Gifts received by a party grouping or non-party candidate from someone other than an ACT elector must be paid into a 'federal election account' (s 205I(4)). The Commission considered that enforcement of this provision is problematic because 'federal election account' is not defined, and recommended the provision be re-examined 'with a view to improving [its] workability'. In its later submission to the Committee's inquiry,[102] the Commission recommended that the provision be repealed, following consideration of the High Court's decision (see Chapter 4). The Committee agrees (see Recommendation 3).

[102] ACT Electoral Commission, Submission 7, Recommendation 18.

5.14 The Commission reported that the requirement for political entities to maintain an ACT election account with a financial institution was not known by all third party campaigners, some of whom were only identified after they had incurred electoral expenditure. The Commission suggested this requirement was unnecessary and could be accommodated better through existing accounting methods, such as sub-accounts within party finances (Commission Recommendation 5).

5.15 In its subsequent submission to the inquiry, the Commission recommended the concept of an ACT election account be removed from the Electoral Act and the following amendments be made to refer to a 'separately identified account':

- Where one or more gifts are received by a political entity from a single source in a financial year totalling more than $10,000, the amount above $10,000 must be deposited in a separately identified account and must not ever be used for an ACT election purpose (including payment of a loan used to incur ACT election expenditure);
- Where a payment of more than $10,000 is made to a party by a related political party in a financial year, the amount above $10,000 must be deposited in a separately identified account and must not ever be used for an ACT election purpose; and
- Administrative expenditure funding paid to parties and non-party MLAs must be deposited in a separately identified account and must not ever be used for an ACT, federal, state or local government election purpose.[103]

5.16 The Commission suggested that a transition provision may be needed for funds received since 1 July 2012.

COMMITTEE VIEW

5.17 The Committee notes the Commission's advice that the requirement for an ACT election account is not necessary and that it would be sufficient for entities to have a separately identified account and be restricted from using funds in those accounts for election purposes.

Recommendation 7

5.18 The Committee recommends that references to an ACT election account be removed from the Electoral Act and replaced with references to a separately identified account or sub-account from which funds may not be used for an ACT election purpose, or in the case of administrative expenditure funding, for an ACT, federal, state or local government election purpose.

[103] ACT Electoral Commission, Submission 7, Recommendation 19.

PROVISIONS RECOMMENDED FOR AMENDMENT

5.19 In its report on the 2012 election, the Commission made a range of other recommendations about the funding provisions in the Electoral Act. These are largely technical in nature and are generally aimed at promoting consistency in terminology and removing possible ambiguities in the Act.

ANONYMOUS GIFTS

5.20 The Commission made three recommendations relating to anonymous gifts:

- That either s 222(1) be amended to cap anonymous donations at $250 (instead of $1,000), or s 216 be amended to raise the threshold for small anonymous gifts from $250 to $1,000 (Commission Recommendation 6);
- That the term 'small anonymous donations' be removed from the Electoral Act and replaced with 'anonymous donations' (Commission Recommendation 7);[104] and
- That s 205I(4) be amended to provide that it does not require anonymous donations to be paid into a federal election account (Commission Recommendation 8).

5.21 The Commission pointed to some anomalies in provisions referring to 'small anonymous gifts' of less than $250 (a new definition inserted in s 216 in 2012) and the provisions dealing with 'anonymous gifts' that were already in the Electoral Act. A party, MLA, non-party candidate or must not accept gifts of $1,000 or more unless they know the defined details of the gift, or the giver advises the defined details and the receiver has no grounds to believe at the time of receipt that the details are not true (s 222(1)). There is a cap on the total value of small anonymous gifts that may be received ($25,000 in a financial year – ss 222(3), (4)), but the Act contains no cap on 'anonymous gifts'. This would seem to indicate that where the value of each anonymous gift is between $250 and $1,000, no cap applies.[105] In addition, the requirement to record details of the giver and the amount of the gift excludes 'small anonymous gifts' but not 'anonymous gifts' (s 216A(2)). The Commission recommended that these provisions be amended as set out above.[106]

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[104] Recommendation 7 refers to anonymous 'donations' (a term not used in the Electoral Act) rather than anonymous 'gifts'. Recommendation 7 also overlaps with Recommendation 6 and both recommendations should be considered together.

[105] This is contrary to the recommendation of the Standing Committee on Justice and Community Safety, *A review of campaign financing laws in the ACT*, 2011, Report 7, Recommendation 11. The Committee recommended that no political party or candidate should be able to receive a total of $25,000 or more in donations that are under the reporting threshold in a financial year.

[106] The Bill originally introduced in 2012 defined 'small anonymous gift' as an anonymous gift of less than $1,000 – see Electoral Amendment Bill 2012, cl 25. This was changed in the Act as passed to mean an anonymous gift of less than $250.

5.22 The Attorney-General told the Committee that the Government would support the proposed increase of the threshold for anonymous gifts to $1,000, which will restore it to what was originally proposed in the 2012 bill.[107]

COMMITTEE VIEW

5.23 The Committee notes that the provisions in the Electoral Act relating to 'small anonymous gifts' and 'anonymous gifts' are not internally consistent. The Committee considers that the appropriate limit beyond which details of the giver should be disclosed should be up to $1000 rather than $250, and that the cap of $25,000 in a financial year (s 222) should apply to anonymous gifts. In reaching this view the Committee understands that anonymous gifts are gifts for which the giver's defined details are not known and do not include funds that are not considered 'gifts' under Part 14 of the Electoral Act (s 198AA).

Recommendation 8

5.24 The Committee recommends that the definition of 'small anonymous gift' in s 216 and the Dictionary of the Electoral Act be removed and other references to small anonymous gifts in ss 216A, 220 and 222 be changed to 'anonymous gifts', with the result that anonymous gifts of up to $1,000 each may be received to a total of $25,000 in a financial year.

THIRD PARTY CAMPAIGNERS

5.25 The Commission made three recommendations concerning third party campaigners, none of which appears controversial. The first was that in defining 'disclosure day' in s 201, the reference in s 201(2)(c) to s 220 in relation to third party campaigners should be removed, as s 220 applies only to a subset of all third party campaigners rather than including all of them (Commission Recommendation 9).

5.26 The second and third recommendations relate to the definition of third party campaigner in s 198:

- The term means a person or entity that incurs more than $1,000 in electoral expenditure. Because thresholds in the disclosure scheme generally start at $1,000, The Commission recommended that the reference to 'more than $1,000' be replaced by '$1,000 or more' (Commission Recommendation 10).
- The definition excludes a 'government agency' from the restrictions on third party campaigners. This is defined in the Dictionary to cover only ACT government agencies. The

[107] Mr Simon Corbell MLA, Attorney-General, Transcript of evidence, 16 May 2014, p. 36.

Commission recommended s 198 be extended to exclude agencies from any Australian government (Commission Recommendation 11).

COMMITTEE VIEW

5.27 The Committee agrees with the Electoral Commission's Recommendations 10, 11 and 12 concerning minor amendments to third party campaigner provisions in ss 198 and 201(1)(c).

Recommendation 9

5.28 The Committee recommends that s 201(1)(c) and the definition of third party campaigner in s 198 be amended in line with the ACT Electoral Commission's recommendations 10-12.

REPORTING AGENTS

5.29 A party, MLA or candidate may appoint a reporting agent (s 203). Reporting agents are responsible for making disclosures of receipts, expenditure and loans on behalf of the appointing entity, and their names are entered in a register kept by the ACT Electoral Commissioner.

5.30 The Commission recommended an amendment to ensure that only one reporting agent can be appointed at any time and that the appointment of an agent automatically cancels the appointment of any previous reporting agent (Commission Recommendation 12). The Commission noted that one registered party had two reporting agents and that it may be difficult to ascertain which agent is responsible if provisions of the Act are not complied with, for example, if disclosure returns are not lodged.

5.31 The ACT Greens supported the automatic cancellation of previous appointments by a new appointment, but suggested that allowing an alternative reporting agent would help to ensure compliance with the seven-day gift disclosure requirements if the first reporting agent was unavailable in the short term. The ACT Greens suggested allowing for a principal reporting agent, who would ultimately be responsible for lodging disclosure returns, and an alternate reporting agent, who could lodge returns on their part.[108]

5.32 The Commission also recommended that the Act should provide that reporting agents, if appointed, are responsible for the lodgement of *all* disclosure returns by parties, MLAs and candidates (Commission Recommendation 13). At present, a non-party MLA or candidate is personally responsible for lodging returns of election expenditure (ss 224(2) and (3)). Returns

[108] ACT Greens, Submission 10, p. 5.

of gifts received of $1000 or more must be lodged by the 'financial representative' (s 216A) – this is the non-party MLA or candidate (s 198), rather than the reporting agent.

COMMITTEE VIEW

5.33 The Committee considers that the Electoral Commission's recommendation that reporting agents, if appointed, should be responsible for the lodgement of all disclosure returns is a sensible one. The Committee also agrees with the Commission's recommendation that there should be only one reporting agent at any time for a party, MLA or candidate, so as to provide proper accountability, and that the appointment of a reporting agent should automatically cancel the appointment of any previous reporting agent. If a reporting agent is going to be absent for a significant period, a new reporting agent can be appointed. The Committee notes that the forms for appointment on the Commission's website require signatures by the secretary of the political party appointing the agent (or the MLA who is appointing the agent) as well as the person being appointed.

Recommendation 10

5.34 The Committee recommends that if a party, MLA or candidate appoints a reporting agent:

- **only one reporting agent is able to be appointed;**
- **an appointment cancels the appointment of any previous reporting agent; and**
- **the reporting agent is responsible for all disclosure returns required under the Electoral Act.**

PAYMENTS FOR ADMINISTRATIVE EXPENDITURE

5.35 The Commission stated that s 215G(1)(b), which provides that amounts paid for administrative expenditure should not be used for electoral expenditure 'in an ACT, federal, state or local election', is ambiguous in using the term 'local election' rather than 'local government election'. The Commission argued this term could be interpreted as including a local ballot and recommended it be amended (Commission Recommendation 14).

5.36 The Committee notes that the Supplementary Explanatory Statement for the 2012 amendments makes it clear that local government elections were intended to be covered by this provision.[109]

[109] Assembly Amendments – Electoral Amendment Bill 2012, Supplementary Explanatory Statement, p. 4.

COMMITTEE VIEW

5.37 The Committee agrees with the Electoral Commission's view that to ensure the Electoral Act is clear on its face, it would be preferable to change the reference to 'local election' in s 215G(1)(b) to 'local government election'.

Recommendation 11

5.38 The Committee recommends that to avoid doubt, s 215G(1)(b) be amended to refer to 'local government election' rather than 'local election'.

DETERMINING THE ORDER OF COUNTING VOTES

5.39 The Commission's Recommendation 2 refers to a 'drafting anomaly' in Schedule 4 of the Electoral Act, concerning the situation where two or more candidates who have obtained a surplus of votes are tied with the same number of votes and a decision needs to be made as to which candidate's surplus is to be dealt with first. Clause 7(3)(c)(i) and (ii) requires the identification of the most recent vote count in the scrutiny at which all those candidates had an unequal total of votes.

5.40 The Commissioner recommended a minor amendment to remove the word "all" from clause 7(3)(c)(i) and (ii) so as to ensure that scrutiny rules follow accepted Hare-Clark procedures.

5.41 The PRS submitted that the Commission's proposal might not always provide the best solution where more than two candidates are involved, and suggested an alternative approach.[110] After considering their submission, the Commission recommended adoption of their proposal, leading to the two revised recommendations below.[111]

5.42 First, the Commission recommended that clause 7(3)(c) of Schedule 4 be amended to provide that, when two or more candidates are tied with surplus votes (contemporary candidates) and it must be decided which candidate's surplus is to be next dealt with during the scrutiny:

- the total votes of the tied candidates are examined at each preceding count of the scrutiny until one of the following events occurs:
  - if a single contemporary candidate has more votes than any of the other tied candidates, that candidate's surplus shall be dealt with;

[110] Proportional Representation Society of Australia (Australian Capital Territory Branch), Submission 13, pp. 10-11.
[111] ACT Electoral Commission, Answers to questions on notice, 5 June 2014, pp. 3-4.

    - if two or more contemporary candidates remain tied but one or more contemporary candidates has fewer votes, that (or those) candidate(s) shall be removed from consideration;
  - the above steps are repeated until a candidate is identified; or
  - if it is not possible to break the tie using these steps, the Commissioner shall choose a candidate by lot, and that candidate's surplus shall be dealt with.

5.43 Second, the Commission recommended that clause 8(2) of Schedule 4 also be amended, following the same approach as for Clause 7(3). Clause 8(2) deals with the exclusion of candidates who have the same total of votes, with the order of exclusion affecting the flow of preferences. The Commission recommended an amendment to provide that, when two or more candidates are tied (contemporary candidates) with fewer votes than any other candidates and it must be decided which candidate is to be next excluded during the scrutiny:

  - the total votes of the tied candidates are to be examined at each preceding count of the scrutiny until one of the following events occurs:
    - if a single contemporary candidate has fewer votes than any of the other tied candidates, that candidate shall be excluded;
    - if two or more contemporary candidates remain tied, but one or more contemporary candidates has more votes than the first-mentioned candidates, the last mentioned candidate(s) shall be removed from consideration;
  - the above steps are to be repeated until a candidate is identified; or
  - if it is not possible to break the tie using these steps, the Commissioner shall choose a candidate by lot, and that candidate shall be excluded.

COMMITTEE VIEW

5.44 The Committee notes the Commission's advice that while the likelihood of the first situation occurring in the way described by the PRS is remote, the proposed solution maximises fairness. The Commission advised that the second situation addressed by the proposed amendment to clause 8(2), concerning the order in which candidates are excluded from the count where two or more are tied with the same number of votes, is potentially more significant because the order of exclusion of candidates has more impact on the flow of preferences.

5.45 The Committee accepts that these recommendations would enhance fairness in the counting of votes where two or more candidates are tied.

Recommendation 12

5.46 The Committee recommends that the Electoral Commission's proposed amendments to clauses 7(3)(c) and 8(2) of Schedule 4 be made so as to maximise fairness in the counting of votes where two or more candidates are tied.

OTHER CHANGES TO THE COUNTING RULES

5.47 The PRS made a range of other suggestions to refine how votes are counted in ACT elections.[112] These suggestions concern dealing with fractional remainders of votes when votes are transferred; possible deferment of a surplus transfer; not confining transfers of surpluses to the last parcel of votes received; reducing the quota whenever votes are exhausted; and adjusting the quota when the number of votes is small. The PRS also suggested that the remedies available when there are material errors during an election should be expanded, referring to the experience in the recent WA Senate election.

5.48 The Commission commented in relation to the suggestions about counting methods:

> Making some or all of these changes would require significant changes to the systems used to conduct the scrutiny by Elections ACT, particularly the eVACS computerised counting system.
>
> ... An election counting system such as the ACT's implementation of the Hare-Clark system is essentially a method for taking a very large number of preferences expressed by voters on ballot papers and using them to determine a relatively small number of most preferred candidates ... By the nature of the process, this will always involve making generalised assumptions, as it is arguably impossible to precisely and unambiguously identify the most preferred candidates in all cases.[113]

5.49 The Commission submitted that it was not apparent that many of the PRS's suggested changes were intrinsically fairer: in some cases, the Commission argued, 'making small mathematical adjustments would not lead to a fairer outcome, simply a different outcome in a very small number of cases'. [114] In response to the PRS's contention that more complex counting systems could now be used because Legislative Assembly scrutinies use a computerised counting system, the Commission noted that the same scrutiny system was used for elections that are still counted by hand, including fee-for-service elections, and supported keeping the same rules for both.

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[112] Proportional Representation Society of Australia (Australian Capital Territory Branch), Submission 13, pp. 12-20.
[113] ACT Electoral Commission, Answers to questions on notice, 5 June 2014, p. 4.
[114] ACT Electoral Commission, Answers to questions on notice, 5 June 2014, p. 5.

5.50 The Commission stressed that 'an electoral system should be easy to understand in order for election results to be accepted by the general public'.[115] The Commission also warned:

> Making these changes would involve considerable cost and time, as programs would need to be changed and extensively tested. Such changes would introduce considerable risks related to the conduct of the 2016 election and future ACT elections. The Commission is not satisfied that a case has been made that the suggested changes would be worth these risks.[116]

5.51 In relation to the PRS's suggestion that more flexible remedies should be available when something goes wrong in an election (for example, by allowing a limited number of ballot papers to be replaced rather than holding an entire new election), the Commission suggested that further consideration was needed in light of the complexity of the issues that were raised, and that obtaining legal advice and seeking further submissions on these issues would be appropriate. The Commission did not support the suggestion that rejected nominations should be able to be challenged in court before polling begins rather than after the election, as is currently the case, noting that ballot papers needed to be printed and pre-poll voting needed to commence within days of the declaration of nominations.[117]

COMMITTEE VIEW

5.52 Because of the short timeframe for this inquiry and the wide range of issues covered, the Committee did not have the opportunity to explore the ramifications of all the complex issues raised by the PRS, including those put in a late supplementary submission. The Committee notes the Commission's concerns about introducing potentially complex changes to counting methods in a very small number of cases.

5.53 The Committee notes the considerable difference in opinion on these issues and has declined to draw a final conclusion on the debate. The Committee makes no recommendation about further changes to the ACT's counting methods at this time.

AUTHORISING ELECTORAL ADVERTISEMENTS

5.54 Electoral matter that is intended or likely to affect voting must carry an authorisation statement setting out the name of the person who has authorised the electoral matter and, if relevant, a statement that the matter is published for or on behalf of a party or candidate (s 292). This requirement does not apply to letters to the editor of news publications (and electronic commentary 'of a similar kind') where the author's name and place of residence are

[115] ACT Electoral Commission, Answers to questions on notice, 5 June 2014, p. 5.
[116] ACT Electoral Commission, Answers to questions on notice, 5 June 2014, p. 5.
[117] ACT Electoral Commission, Answers to questions on notice, 5 June 2014, p. 6.

stated, or to certain other items such as cards and letters, T shirts, badges and business cards (ss 293, 294).

5.55 'Electoral matter' is defined as matter, in printed or electronic form, that is intended or likely to affect voting at an election (s 4(1)). Matter is taken to be intended or likely to affect voting at an election if it contains an express or implicit reference to, or comment on, the performance of the current or former Government or Opposition, a party, a current or former MLA, a candidate, or an issue that is before voters in relation to an election (s 4(2)).

5.56 The Commission noted that technological developments mean that it is not always practical to require authorisation statements, for example, in social media and user comments on news websites. They noted that it is difficult to enforce such provisions in a medium where many authors use pseudonyms, and argued that in light of the 'ephemeral nature of internet commentary', the need to identify authors of such material was arguably less than the need to ensure more formal campaign material is authorised. The Commission recommended that the Electoral Act be amended to remove from the authorisation requirements internet commentary by persons acting in a private capacity (Commission Recommendation 1).

5.57 The Electoral Act's reference to 'electoral matter' in its authorisation provisions is broad. Other jurisdictions have avoided this problem in two ways:

- by restricting the type of material for which authorisation is required (for example, the Commonwealth authorisation provisions are restricted to 'electoral advertisements' rather than the broader 'electoral matter'[118]); or
- by excluding personal views published on the internet for which no payment is made (for example, New Zealand legislation provides that election advertisements do not include personal political views published on the internet or other electronic medium by an individual who does not make or receive a payment in respect of the publication of those views.[119] Western Australian legislation specifically includes paid electoral advertisements on the internet as requiring authorisation, but excludes matter that 'forms part of a general commentary on an internet website'.[120])

5.58 The Committee did not receive any other submissions on this issue. The Committee notes that a Victorian parliamentary committee is currently conducting an inquiry into the impact of social media on that state's electoral process, including whether current regulation of the

[118] *Commonwealth Electoral Act 1918*, s 328A(1). The authorisation requirement also does not apply 'if the matter published on the internet forms part of a general commentary on a website' (s 328A(2)).

[119] *Electoral (Finance Reform and Advance Voting) Amendment Act 2010*, s 5. There is a similar exemption in British Columbia, Canada, where s 228 of the Election Act [RSBC 1996] excludes from the definition of election advertising 'the transmission by an individual, on a non-commercial basis on the internet, or by telephone or text messaging, of his or her personal political views'.

[120] *Electoral Act 1907*, s 187B, inserted in 2006. This exclusion is similar to the Commonwealth's (see above).

authorisation of political content on social media is appropriate.[121] Unfortunately the timing of that inquiry has not coincided with the Committee's examination of the issues.

COMMITTEE VIEW

5.59 The Committee notes that the requirement in s 292 for electoral matter to carry an authorisation statement was enacted before the advent of social media, and that the definition of electoral matter is broad. The Committee considers that an offence that is not able to be effectively enforced must be updated to reflect technological change.

5.60 The Committee notes that there is a range of models in other jurisdictions, including the Commonwealth, WA and New Zealand, to take account of these circumstances, and that a Victorian parliamentary committee is currently conducting an inquiry into this issue. The Committee considers that those alternative models and any relevant findings should be considered in redrafting s 292.

Recommendation 13

5.61 The Committee recommends that s 292 be amended to exempt private unpaid commentary on social media from the authorisation requirements and that the Attorney-General consider the legislation and findings of other jurisdictions when re-drafting the provision.

THE PENALTY FOR FAILING TO VOTE

5.62 It is an offence for an enrolled elector to fail to vote at an ACT election without a valid and sufficient reason (s 129). The penalty is 0.5 penalty units (currently $70). If the person chooses to pay a default notice issued by the Electoral Commissioner rather than having the matter proceed to court (where they will also be liable for court costs if convicted), the penalty is $20[122] (s 161).

5.63 The number and percentage of apparent non-voters increased in the 2012 election (10.7% or 27,577 electors, compared with 9.6% or 23,452 electors in 2008). This is the highest proportion over the last six ACT elections, and is significantly higher than the proportion in recent NSW and Victorian elections (7.4% and 7.0% respectively) or the last federal election (6.2%).[123]

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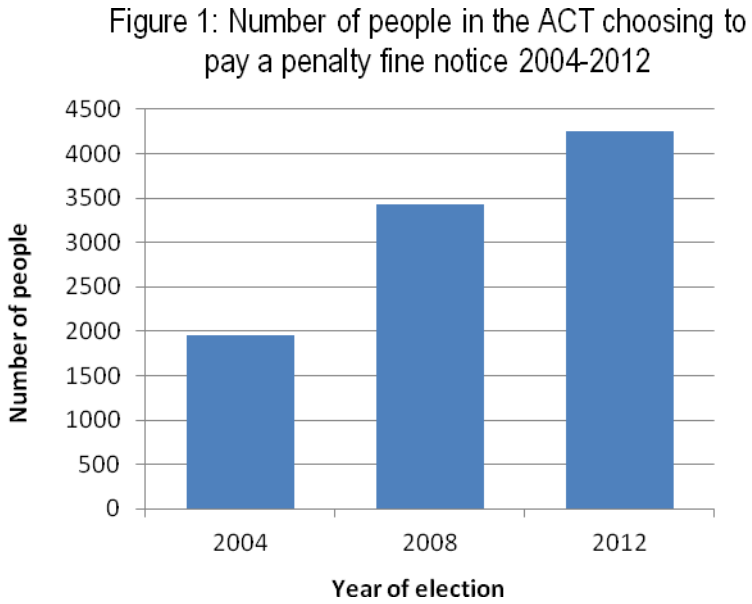
[121] Electoral Matters Committee, Parliament of Victoria. Details of the inquiry are at: http://www.parliament.vic.gov.au/emc/inquiries/article/2251.

[122] Or a higher amount prescribed by regulations. No regulation has been made.

[123] For a comparison of recent elections in all Australian jurisdictions, see Elections ACT, *Report on the ACT Legislative Assembly Election 2012*, p. 68.

5.64 Just over a third of the apparent non-voters in 2012 notified a valid and sufficient reason for failing to vote, had transferred their enrolment to another jurisdiction or had their postal or declaration votes rejected. Of the remainder (19,097) who were sent a 'failure to vote' notice, 4,250 people paid the $20 penalty for failing to vote. This is a marked increase compared with the last two elections (3,422 in 2008 and 1,953 in 2004), as shown below.



5.65 The Commission speculated that the $20 penalty may not be a sufficient incentive to encourage some electors to vote, noting that only WA and the Commonwealth have a similar $20 penalty, with the fine in WA increasing to $50 for repeat instances by the same person. The Commission also noted that the Commonwealth fine of $20 had not increased since 1984. The Commission advised that penalty notice fines in other States and Territories range from $25 to $70: in the Northern Territory it is $25, in Tasmania $26, in NSW and Queensland $55, and in South Australia and Victoria $70.[124]

5.66 The Commission recommended that the default notice fine be increased, without specifying a level (Commission Recommendation 15).

5.67 The Attorney-General did not support an increase to the default fine notice, stating that raising the penalty in ACT elections above the Commonwealth penalty of $20 would attract considerable criticism.[125] In a public hearing, the Attorney-General also said:

> While I note the commissioner's concerns about the costs associated with administering the fine, the government continues to hold the view that the $20 fine is

[124] ERG, p. 70.
[125] Mr Simon Corbell MLA, Attorney-General, Submission 9.

> there to encourage compulsory attendance at the polling booth. The value of the fine is not set to be based on any cost recovery considerations.[126]

5.68 The ACT Electoral Commissioner stressed that the Commission's aim was not to recover costs:

> [A]dministrative costs associated with the fine ... are not our concerns. We have not expressed our concerns in that context. Our concern is with the deterrent impact of a $20 fine on the turnout of electors at ACT elections. It does appear to us that the $20 penalty is not as strong a deterrent as it might have been in 1983 when that penalty was first set.[127]

5.69 In responding to questioning about what level of fine might be appropriate, the Electoral Commissioner noted that a person who chose to contest the matter in court faced significantly higher costs (half a penalty unit ($70) plus court costs of $69). He said:

> As far as I am aware, it is the only penalty anywhere in the ACT law that is less than one penalty unit. I suggest it would be appropriate to make it a penalty unit if you go to court, but that is not really the figure that deters people. I think the figure that deters people is the fact that you can pay a $20 penalty when you are sent your first notice and you deal with the matter. Therefore, you are free of the obligation to spend an hour on election day to go out and vote. I suspect, if you look at the numbers, that more and more people are reaching the conclusion that $20 is not too high a price to pay to get a few hours back on a Saturday. If what you are really wanting to do is provide a deterrent effect to make people who may otherwise think that they do not need to vote—if you want to make them go and vote—it needs to be something more than $20; maybe $40, maybe $50. I think anything less than $40 means you are probably in the situation where we are now where it is not a sufficient deterrent.[128]

5.70 The Gungahlin Community Council supported an increased default notice fine, suggesting it should be equivalent 'at least with a parking infringement but be less than the lower range of traffic infringements'.[129] Mr Greg Cornwell also supported an increase, suggesting that $200 would be appropriate 'in recognition of the importance of Assembly decisions in the life of ACT residents – on a day-to-day basis probably of more importance than Federal pronouncements'.[130]

5.71 Professor George Williams also supported an increase:

> I am a strong believer in compulsory attendance. It is not compulsory voting. People can attend and fill in a ballot paper however they want, and they can vote informal if

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[126] Mr Simon Corbell MLA, Transcript of evidence, 16 May 2014, p. 36.
[127] Mr Phil Green, Transcript of evidence, 9 May 2014, p. 2.
[128] Mr Phil Green, Transcript of evidence, 9 May 2014, p. 17.
[129] Gungahlin Community Council, Submission 11, p. 2.
[130] Mr Greg Cornwell, Submission 2.

> they want. I see voting in your elections, as elsewhere in Australia, as a bit like jury duty. It is the price you pay to live in a civilised democracy. I think there ought to be consequences, so I do support the idea that non-attendance leads to a fine. Twenty dollars does seem to me to be very low. I would not support, if you like, a crippling or significant fine. It needs to be of a level that particularly people of modest means can easily pay. Maybe if it is 20 bucks you should be looking at increasing it to $100 or $200, in that order, so that there are consequences, without it being of the same order as many other fines within the statute book.
>
> ... Twenty dollars may have made sense 20 years ago, but I imagine it is just something that has not been increased.[131]

COMMITTEE VIEW

5.72 The Committee notes the proportion of enrolled electors who choose to pay a default fine notice issued by the Electoral Commissioner is increasing, and considers that the penalty of $20, which has not changed since it was put in place in 1994,[132] is not a sufficient deterrent. Voting is compulsory in the ACT, and a person who does not wish to vote for any candidate may cast an informal vote. The Committee notes the Commission's advice that the ACT default notice penalty is lower than in any other jurisdiction except the Commonwealth and WA, although in WA repeat instances of failing to vote attract a higher penalty of $50.

5.73 The Committee also notes that submissions and witnesses who commented on this matter suggested a significantly increased penalty of up to $200. The Committee does not believe that the penalty should be that high, but considers that $20 is too low. The Committee also notes the Government's intention to increase the value of penalty units from $140 to $150.[133] This will put the low level of the default notice even more at odds with other penalties.

Recommendation 14

5.74 The Committee recommends that the penalty for failing to vote by way of default notice issued by the ACT Electoral Commissioner under s 161 be increased to $40.

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[131] Professor George Williams, Transcript of evidence, 29 May 2014, pp. 52-53.
[132] *Electoral (Amendment) Act 1994*.
[133] Legislation (Penalty Unit) Amendment Bill 2014, introduced on 5 June 2014.

Recommendation 15

5.75 The Committee recommends that the penalty in s 129 for failing to vote where the matter is determined in court be increased from one half to one penalty unit.

OTHER ISSUES RAISED BY THE ACT ELECTORAL COMMISSION

5.76 In its submission to the Committee's inquiry, the Commission raised several additional issues for consideration (Commission Recommendations 20-26). All relate to aspects of financial reporting. The Commission noted that it is currently preparing a report to the Assembly on the operation of the campaign finance reforms that commenced in 2012, scheduled for completion later in 2014, and that these issues may either be canvassed in a separate report or included in the Commission's annual report for 2014/15. The Attorney-General also referred to the Commission's forthcoming report when presenting the bills concerning the size of the Assembly on 5 June 2014.[134]

5.77 In the short time available for this inquiry, the Committee did not have time to seek submissions on the later suggestions put forward by the Commission. Accordingly the Committee considers that the Assembly should examine these and any other issues raised by the Commission when the Commission presents its report on the campaign finance reforms later in 2014. The Commission's recommendations are set out below for information.

DISPUTED DEBTS

5.78 The Commission recommended that the Electoral Act be amended to require the details of disputed debts totalling $1,000 or more, held by a registered party, MLA or associated entity at 30 June, to be disclosed as a new category in the entity's annual return for the relevant financial year (Commission Recommendation 20).

REPORTING BY ASSOCIATED ENTITIES

5.79 The Commission recommended that the current need for associated entities to disclose the details of all persons and organisations making payments to the entity of any value, with some exemptions, be amended to provide that associated entities do not need to disclose the identities of persons or organisations giving the entity less than $1,000 in a financial year

[134] Legislative Assembly for the ACT, *Debates*, 5 June 2014, Electoral Amendment Bill 2014, Mr Simon Corbell MLA, Attorney-General, p. 1823.

(retaining the exemptions for income related to supply of food, liquor and gambling) (Commission Recommendation 21).

5.80 Other entities, such as registered political parties and MLAs, only need disclose details of those from whom $1,000 or more is received (either as gifts or other receipts). Candidates and third party campaigners only need disclose details of those from whom gifts of $1,000 or more is received.

DEFINING GIFTS

5.81 The Commission recommended that the Assembly consider whether a fee for affiliation with a political party should be treated as a subscription for membership to the party (and therefore should be treated as a gift if the amount is greater than $250). The Commission further recommended that, whatever the outcome of that consideration, the Electoral Act be amended to put the matter beyond doubt (Commission Recommendation 22).

5.82 The Commission also recommended that the Electoral Act be amended to clarify whether any part of a compulsory levy imposed by a political party on its elected representatives should be considered a gift to the party, or whether the whole of the levy should be exempt from the definition of gift (Commission Recommendation 23).

INFRINGEMENT NOTICE PENALTIES

5.83 The Magistrates Court (Electoral Infringement Notices) Regulation 2012 permits the Electoral Commissioner to issue infringement notices where a person has failed to provide a return in the required time or provides an incomplete return (s 236).

5.84 The Commission recommended that the regulation be amended to provide that the listed infringement penalties be set at 20% of the offence penalty unit set out in the Electoral Act (Commission Recommendation 24). The infringement penalties in the regulations are fixed amounts rather than penalty units. The Commission notes those infringement penalties represented 20% of the offence penalty at the time the regulations were made.

5.85 The Commission recommended that the Electoral Act and/or the Magistrates Court (Electoral Infringement Notices) Regulation be amended to provide that where an offence continues beyond the date of payment of a notice (that is, where the person has not lodged a completed return), a fresh liability will arise even if the notice is paid unless the relevant disclosure return or a complete return is lodged (Commission Recommendation 25).

ANNUAL RETURNS

5.86 The Commission recommended that the Assembly reconsider the 31 July deadline for submission of annual returns with a view to determining the effectiveness of the current

arrangement. In this context, the Commission recommends that the Assembly seek the views and experiences of the parliamentary parties and the associated entities (Commission Recommendation 26).

6 OTHER ISSUES

6.1 A range of other issues were raised during the inquiry. They include:

- the 100 metre limit on canvassing;
- the use of how to vote cards;
- pre-poll voting;
- instructions on ballot papers;
- the boundaries and names of electorates; and
- details of donors .

6.2 Each of these is discussed below.

THE 100 METRE LIMIT

6.3 It is an offence to do anything for the purpose of influencing the vote of an elector, or inducing them not to vote, within 100 metres of a pre-poll centre or a polling place on polling day within the hours of polling (s 303). This includes handling out how to vote cards and exhibiting signs containing electoral matter (other than those signs authorised by the Electoral Commissioner).

6.4 To help in identifying the 100 metre boundary in the 2012 election, the Commission published on its website maps of each polling place and pre-poll centre with the boundary. The Commission noted that around 18 allegations of breaches of the rule were received for the 2012 election, compared to 30 complaints for the 2008 election. The Commission noted:

> These complaints were dealt with by electoral staff asking campaigners to move outside the 100 limit and by asking party workers to remove signs within the 100 metre limit.[135]

6.5 The Commission also noted that there were some practical problems in applying the rule, particularly where polling places and pre-poll centres were located in shopping centres and party campaign offices fell within the 100 metre limit. They stated that such cases 'are dealt with using a common sense approach to ensure that electors approaching the polling place are not subject to canvassing'.[136] While noting there were some complaints that campaigners at

[135] Elections ACT *Report on the ACT Legislative Assembly Election 2012*, p. 47.
[136] Elections ACT *Report on the ACT Legislative Assembly Election 2012*, p. 48.

the 100 metre rule presented a traffic hazard, the Commission did not suggest any change to the provisions.

6.6 Some submissions criticised the 100 metre rule, pointing to the fact that in federal elections the ban extends to only six metres from the entrance of a polling booth.[137] Mr Greg Cornwell suggested the rule could be abandoned if how to vote cards were allowed in polling booths, and suggested that the rule needed to be reconsidered in any case because voters at many schools were channelled through school gates beyond the 100 metre limit, 'defeating the purpose of the original ban'.[138]

6.7 The ACT Greens supported extending the boundary to 200 metres or further to provide an additional buffer for voters.[139] As an alternative, they supported aligning the boundary with the federal limit of six metres on the basis that it was easier to enforce, and introducing restrictions on advertising bunting, the number of party volunteers or signage per polling booth 'to moderate party presence on Election Day, and ensure a less confronting environment for those would come to vote'.[140]

6.8 ACT Labor supported extending the limit to 200m, 500m or further, stating it could make the situation 'less disruptive and dangerous on Polling Day':

> The current 100m limit creates confusion on Polling Day and encourages attempts to breach it as signs and structures (and volunteers) are placed anywhere from 50m to 100m away from a booth where the line of allowance may be hazy or in dispute.[141]

6.9 ACT Labor alleged several breaches of the 100m rule in the 2012 election, referring to a hot air balloon and large signs on trucks and trailers 'well within 100m'. As an alternative, ACT Labor suggested banning campaign material on polling day 'as it is effectively banned in Tasmania and New Zealand, without any detrimental effect to the democratic process'.[142] ACT Labor submitted that 'candidates and parties will then resort to the less dangerous practice of canvassing for votes at community gatherings or by doorknocking'.

6.10 The ACT Greens also argued that additional enforcement should also be considered, such as on the spot fines and additional resources for Elections ACT to provide more staff to monitor the revised boundary.[143]

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[137] *Commonwealth Electoral Act 1918* (Cth), s 340.
[138] Mr Greg Cornwell, Submission 2, p. 2.
[139] ACT Greens, Submission 10, p. 3.
[140] ACT Greens, Submission 10, p. 2.
[141] ACT Labor, Submission 12, p. 6.
[142] ACT Labor, Submission 12, p. 6.
[143] ACT Greens, Submission 10, p. 3.

6.11 The Committee notes that in Tasmania, it is an offence to distribute a how to vote card, sign, advertisement or other electoral matter on polling day.[144] Canvassing for votes within 100 metres of a polling place is also banned.[145] The Tasmanian Electoral Commission advises that legal advice on the interpretation of that provision indicates that the restriction does not apply to static signs in place before polling day.[146] This can lead to a rush of signs being put in place late the night before.

COMMITTEE VIEW

6.12 The Committee notes the concerns raised about the 100 metre limit around polling places, including complaints about breaches of the limit and disruption (and even danger) to some voters in the 2012 election. The Committee does not consider that providing additional resources to the Electoral Commission to 'police' the limit at polling places across the ACT on polling day is the answer, particularly in light of the growing proportion of pre-poll voters (discussed below).

6.13 The Committee notes that there are various alternatives to address these issues, including reducing the limit to six metres in line with the limit in federal elections. However, the Committee considers that the aim of the 100 metre limit was to avoid disruption to voters as they approach a polling place, and that this is not achieved by reducing the distance.

6.14 Instead the Committee considers there are two options: increasing the limit and/or banning canvassing on polling day. The Committee considers that candidates and parties should be free to advertise, erect signs, distribute electoral material or canvass for votes up to and including polling day. However, disruption around polling places should be minimised, and this is best achieved by extending the limit. The Committee considers that 250 metres would be an appropriate distance to decrease congestion around entrances to polling places, and that this limit should apply during polling hours on election day and at pre-poll centres in the pre-poll period.

Recommendation 16

6.15 The Committee recommends that the limit in s 303 on canvassing around polling places be increased from 100 metres to 250 metres.

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[144] *Electoral Act 2004* (Tas), s 198.
[145] *Electoral Act 2004* (Tas), s 177.
[146] Tasmanian Electoral Commission, *Candidate guide: House of Assembly elections,* 2013, p. 19.

HOW TO VOTE CARDS

6.16 An issue that is closely connected with consideration of limits on campaigning outside polling places is the use of how to vote cards. The Robson rotation system is used for ACT ballot papers, meaning that variations of ballot papers are produced with candidate names listed in different order within a column. The system is intended to give each candidate an equal share of each position in a column and allows voters to decide which candidates they want to represent them in an order of their own choosing, rather than in the order urged by a political party.

6.17 The Electoral Commissioner noted:

> ... the intention of the 100-metre ban originally both in the ACT and Tasmania is to combine Robson rotation effectively with a ban on how-to-vote cards, therefore giving a lot of power to voters to be able to choose the candidates they want to vote for in the order of their own choice without being influenced by party how-to-vote cards. If parties hand out how-to-vote cards at the 100-metre limit, then one of the intents of having a 100-metre ban is not really being very effective.
>
> At various times [the Electoral Commission has] suggested in our reports on the various elections over the years that the Assembly think long and hard about why we have got a 100-metre ban and whether they really want the 100-metre ban or whether they want to hand out how-to-vote cards. I think if you want to hand out how-to-vote cards and you have got to stand at the 100-metre limit, that is not really achieving the objectives of the 100-metre rule and you might do away with it and go back to the six-metre limit that the Commonwealth has.[147]

6.18 The Committee notes that the Electoral Commission recommended in its report on the 2004 ACT election that the 100 metre ban be replaced by a six metre ban like the Commonwealth's.[148]

6.19 Mr Cornwell suggested that how to vote cards should be placed inside polling places, either as posters on the walls or in polling booths, and that all canvassing outside polling places could then be banned.[149] He acknowledged, however:

> ... even in regard to putting signs around the booths, I am not convinced that they have much effect. The problem that we are facing is that we have always done it this way. We do not know whether it has any effect or not. All that effort might be quite useless.

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[147] Mr Phil Green , Transcript of evidence, 9 May 2014, p. 12.
[148] Elections ACT, *Review of the Electoral Act 1992: ACT Legislative Assembly Election 2004,* 2005, p. 9.
[149] Mr Greg Cornwell, Submission 2, p. 2.

> But nobody—and I can understand it, it is human nature—is game to attempt the alternative.[150]

6.20 The ACT Greens supported the placement of how to vote material within booths or in a general space inside a polling place 'for voters to consider if they wish', subject to those materials being approved by Elections ACT.[151] The ACT Greens suggested consideration needed to be given to the specific size, format and content of the material, including not allowing other parties or candidates to be mentioned.

6.21 The Electoral Commissioner noted that how to vote cards could cause confusion because of the Robson rotation system:

> Whatever order of candidates you have got on your how-to-vote card, it is almost certainly going to be different to the order of preferences on the ballot paper in front of the voter.[152]

COMMITTEE VIEW

6.22 The Committee considers that how to vote cards may confuse some voters given the ACT's use of the Robson rotation system, which results in most voters receiving a ballot paper that lists candidates in a different order within columns. The ballot papers clearly indicate the names of parties or indicate ungrouped candidates at the top of each column. However, the Committee does not consider that how to vote cards should be banned, nor that they should be placed within polling places for voters to consult if the 100 metre limit on canvassing is extended.

6.23 The Committee makes no recommendation on this issue.

INSTRUCTIONS ON BALLOT PAPERS

6.24 The ACT Greens submitted that voting instructions on the ballot paper should be made clearer:

> ... to avoid the potential unintended consequences of encouraging voters to only number the inferred minimum required of 5 or 7 candidates ... [T]he instructions to voters should not imply that full preferences would not flow beyond the number of members in each electorate or that voting beyond 5 or 7 has no value.[153]

6.25 They also stressed that it was important to avoid people numbering 1 to 5 in each column, making their vote invalid.

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[150] Mr Greg Cornwell, Transcript of evidence, 9 May 2014, p. 23.
[151] ACT Greens, Submission 10, p. 2.
[152] Mr Phil Green , Transcript of evidence, 9 May 2014, p. 13.
[153] ACT Greens, Submission 10, p. 3.

6.26 A sample ballot paper for the Molonglo electorate[154] has the following instructions at the top:

> Number seven boxes from 1 to 7 in the order of your choice.
>
> You may then show as many further preferences as you wish
> by writing numbers from 8 onwards in other boxes.

6.27 The ACT Greens suggested the following wording:

> Write numbers from 1 onwards, up to as many numbers as you wish.
> Use numbers only and use each number only once.

6.28 The pattern of use of ballot papers was discussed during the public hearings. The Electoral Commission reported that about 72% of formal voters in the 2012 ACT election indicated exactly as many preferences as there were vacancies in the electorate (that is, they recorded only five preferences in the five member electorates and only seven preferences in the seven member electorate). One in four formal voters (26%) indicated more than that minimum number.[155] (A ballot paper that records at least a unique first preference is counted as formal, even if it does not record the recommended minimum number of preferences for that electorate.)

6.29 The rate of informal voting in 2012 was 3.5% (6518 votes), slightly down from 3.8% in 2008. Of these, 1945 were completely blank; 1657 contained writing or marks but no number; and 2460 contained ticks, crosses and some numbers but no unique first preference. There were smaller numbers of votes that were informal for other reasons, including 100 that had a first preference in every box.[156]

6.30 The Committee asked the Electoral Commissioner to provide statistics on the number of voters in 2012 who completed only the recommended number of preferences and did so across columns. Of the voters who completed only the recommended number of preferences, the vast majority in each electorate voted for all the candidates in a party or ungrouped column before moving onto another column if necessary (74% in Brindabella, 65% in Ginninderra and 69% in Molonglo). The remainder of voters in each electorate (26% in Brindabella, 35% in Ginninderra and 31% in Molonglo) moved to other columns rather than numbering all the candidates in the column they first chose (that is, they split their preferences between parties or groupings).

6.31 The Electoral Commission also provided statistics that show some insight into the operation of the Robson rotation system, as set out in the table below. About one in four voters (one in five in Molonglo) voted along party lines (or in an ungrouped column) in a linear fashion, that is,

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[154] Elections ACT, *Factsheet: Ballot Papers*, available at http://www.elections.act.gov.au/education/act_electoral_commission_fact_sheets/.

[155] Elections ACT, *Report on the ACT Legislative Assembly Election 2012*, p. 76.

[156] See Elections ACT, *Report on the ACT Legislative Assembly Election 2012*, Table 28.

they listed the first candidate as their first preference and moved down the column to the bottom numbering sequentially. About 6-7% of voters listed the candidate at the top of the column as their first preference and continued in the party (or ungrouped) column, but did not number the votes sequentially (a non-linear progression). Between 32% and 40% of voters in each electorate chose as their first preference a candidate who was not at the top of the column and continued numbering their preferences within the same column. The rest of the voters moved across columns when allocating their preferences.

Table 4: Pattern of voters' preferences within and across columns in the 2012 ACT election

Electorate	First preference: candidate at top, party linear	First preference: candidate at top, party non-linear	First preference: candidate not at top, party non-linear	Preferences across columns
Brindabella	24.14%	7.37%	40.09%	28.40%
Ginninderra	25.34%	6.46%	32.86%	35.34%
Molonglo	21.89%	6.39%	39.02%	32.70%

COMMITTEE VIEW

6.32 The Committee considers that the instructions on the top of ballot papers may be misleading to voters in that they suggest that a minimum number of votes (five in a five member electorate, seven in a seven member electorate) must be recorded for the vote to be valid. The Committee notes that over 70% of voters in 2012 recorded the recommended number of preferences. The Committee considers that the form of words suggested by the ACT Greens more accurately describes what is required for a valid vote. The Committee also considers that the suggested words give more prominence to the point that voters can record as many preferences as they wish. The more preferences a voter records, the longer their vote will remain in the count as surpluses are transferred.

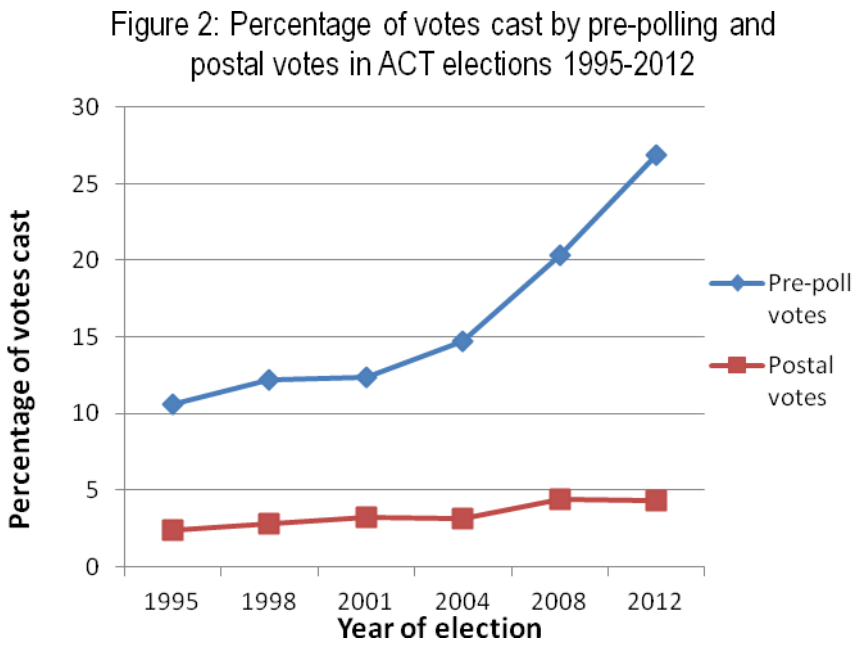
Recommendation 17

6.33 The Committee recommends that instructions on the ballot paper be amended to read: 'Write numbers from 1 onwards, up to as many numbers as you wish. Use numbers only and use each number only once.'

PRE-POLL VOTING

6.34 A voter who declares that he or she expects to be unable to attend a polling place on election day, or whose address is suppressed from the roll, is entitled to vote before election day or to be given a postal vote (ss 136B, 136C). Pre-poll voting for the 2012 ACT election was available at six places (Downer and the five town centres of Belconnen, Civic, Gungahlin, Woden and Tuggeranong), for three weeks before polling day. The relevant period for pre-poll and postal votes begins on the third Monday before polling day, or the next day if that Monday is a public holiday (ss 136B, 136C).

6.35 The Electoral Commission reported that 31% of voters in the 2012 election voted before polling day (26.9% by pre-polling and 4.3% postal votes). More than four fifths (82.3%) of the pre-poll votes were cast electronically. The proportion of pre-poll votes has increased markedly in recent elections, as shown below in Figure 2. Over the same period there has also been a slight increase in the proportion of postal votes.



6.36 The Attorney-General raised this issue for consideration, referring to commentary in other jurisdictions including South Australia after that State's election in March 2014:

> [G]iven the large number of people now who vote before polling day and often a number of weeks before polling day, whether or not that is having an impact on the ability for the campaign period as a whole to properly inform the elector as to all of the issues at play in the election, ie, if you vote early, there may be developments in the

> campaign that would have changed your vote or would have changed your view on a particular matter, but you have already voted so you cannot redress that.
>
> ... [W]hilst the government does not have a concluded view on it, we are aware that it is an issue and one that is worthy of some examination at the very least.[157]

6.37 The South Australian Electoral Commissioner flagged that she would recommend legislative change in that State to provide for a different way of counting pre-poll votes. Unlike the ACT where most pre-poll votes are cast electronically and results are available very soon after the close of the polls, pre-poll votes in South Australia are not treated as ordinary votes. They must be placed in declaration envelopes which go through a different and longer counting process, including checking against the electoral roll. There were about 250,000 absentee and pre-poll votes in the March 2014 election. The South Australian Electoral Commissioner said processing of those votes almost quadrupled the total time to count them.[158]

6.38 Mr Nathaniel Reader, who is undertaking a PhD focusing on pre-poll voting, noted that the rise in pre-poll voting was a national trend, with the ACT leading and Victoria, NSW and Queensland also recording significant increases since the early 2000s.[159] He advised that evidence from the Australian and Victorian electoral commissions to parliamentary inquiries suggested that the reason was convenience: people expect to engage more flexibly with electoral processes due to work, weekend activity and travel. US-based research supported this analysis.

6.39 Mr Reader identified gaps in research about pre-poll voting in Australia, including:

- the demographic profile of early voters;
- whether the demand for early voting has been driven by voters, policymakers or electoral commissions making the process easier; and
- whether early voting periods affect how parties campaign.

6.40 Mr Reader also suggested the declining rate of electoral participation (with 89.3% of enrolled voters voting in the 2012 ACT election) meant that allowing further opportunities to vote was important.

6.41 The Electoral Commissioner said he thought that part of the reason for the increase in pre-poll voting was:

> ... because we make it easy for people to do it. It is more convenient.

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[157] Mr Simon Corbell MLA, Attorney-General, Transcript of evidence, 16 May 2014, p. 41.

[158] Daniel Wills, 'Ballot papers cast before South Australian polling day and outside voters' home electorates to be counted', *The Advertiser*, March 19, 2014, accessed on 19 May 2014 at http://www.adelaidenow.com.au/news/south-australia/ballot-papers-cast-before-south-australian-polling-day-and-outside-voters-home-electorates-to-be-counted/story-fnl3k6uz-1226859651443.

[159] Mr Nathaniel Reader, Submission 14, p. 2.

> I think also there is a greater tendency among people to not think of Saturday as a day of rest where they can get up, have breakfast and not have much else to do but to wander down to the polling place during the day. I do not think those days, if ever they existed, exist now. ...
>
> To try to resist that trend, I think, would be very difficult.[160]

6.42 The Electoral Commissioner said that another possibility that the Commission had raised in its past reports was not to have a polling day:

> Have a three-week polling period and have a voting centre in every shopping centre across the territory for three weeks. That is probably cheaper than having polling day with 80 polling places, and you could provide electronic voting to every voter.[161]

6.43 Mr Reader also called for the ACT to move to a 'voting period' rather than a polling day, suggesting a period of four weeks:

> This is an opportunity for electoral innovation, in a place that is comfortable with it (Elections ACT has a good reputation for being ahead of the game, electronic voting is one example) and at a time when there are widespread calls for Australia's electoral commissions to embrace technology and modernise the voting experience. ... [T]he enthusiasm we are seeing for early voting may well signify a new kind of electoral participation, one which is driven by electors and not forced upon them by legislation.[162]

6.44 In answer to questions on notice from the Committee, the Commission described the provision of extensive pre-poll voting facilities as 'maximising the franchise', and expressed concern about any changes that would lower voter turnout, given that voter participation in ACT elections was less than in federal elections.[163] As the following graph shows, most pre-poll voters vote in the last week before polling day, with the Commission advising that the busiest day was the last day (Friday). Younger people form a large proportion of pre-poll voters, particularly in the last week.

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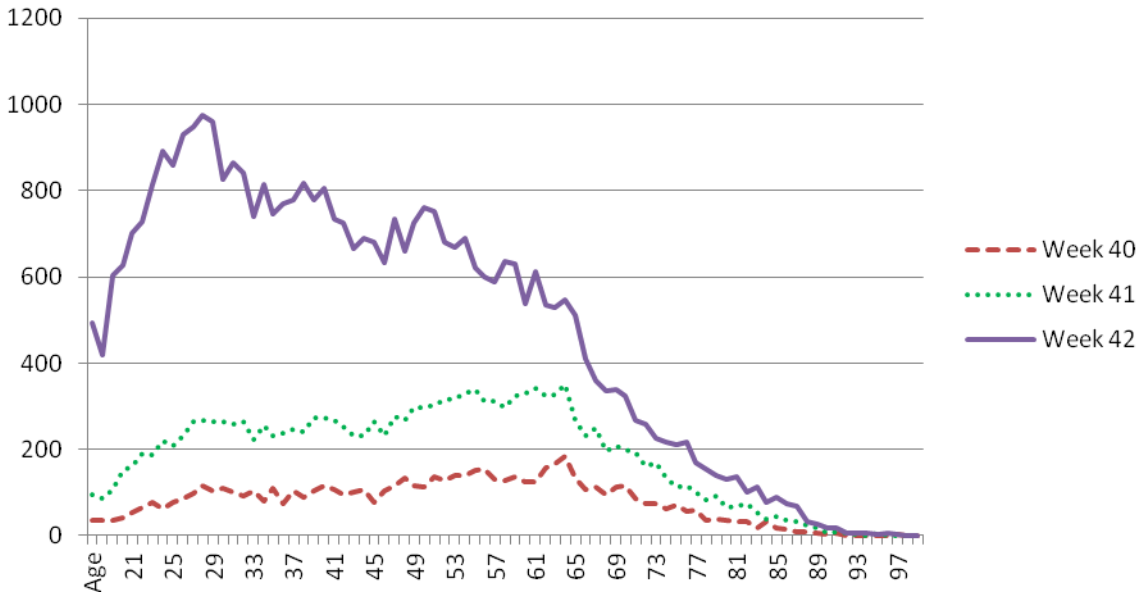
[160] Mr Phil Green, Transcript of evidence, 9 May 2014, p. 11.
[161] Mr Phil Green, Transcript of evidence, 9 May 2014, p. 11.
[162] Mr Nathaniel Reader, Submission 14, p. 5.
[163] ACT Electoral Commission, Answers to questions on notice, 5 June 2014.

Figure 3 - Pre-poll voting by age and week before the 2012 ACT election



Note: Week 40 commences three weeks before the election, Week 41 is two weeks before the election and Week 42 is the week before the election.

6.45 The Commission also commented that if the pre-poll period was decreased to two weeks and the postal vote period remained at three weeks (so as to provide sufficient time for voters in remote locations or overseas), a substantial change in early voting patterns was unlikely, as voters who wished to vote more than two weeks ahead could be expected to cast a postal vote. There would, however, be an increased administrative burden on voters and the Commission, as well as an increased risk of a postal vote failing to be included in the count.

COMMITTEE VIEW

6.46 The Committee notes that one in four voters at the 2012 election voted before polling day and that this proportion has increased significantly in the past decade. The Committee also notes that this is a trend across jurisdictions. The Committee can see benefits in allowing flexibility for those voters who are constrained by work, family responsibilities or travel on polling day, and notes also the advantage in having a significant proportion of electronic votes in counting the ballot, given that most pre-poll votes are cast in this way.

6.47 The Committee considers that this trend should continue to be monitored, and notes that further research on individual motives for voting before polling day and the impact of this trend on electoral campaigns would be useful in determining an appropriate policy response. The Committee does not make any recommendation in the absence of such information.

ELECTORATE BOUNDARIES

6.48 As noted earlier in this report, the model recommended by the ERG was five electorates of five members each. This arrangement would mean that some geographical districts, such as Belconnen, would almost certainly need to be split between electorates (as Gungahlin and Woden are at present). The current electorate boundaries are shown in Appendix D. The Molonglo electorate comprises suburbs in Gungahlin, inner north Canberra, inner south Canberra and Weston Creek.

6.49 The three community councils that made submissions to the inquiry were concerned about the implications for their district, and called for electorates that reflected the geographical boundaries as much as possible. The Gungahlin Community Council strongly supported a reconfiguration of boundaries to reflect the current needs of Gungahlin residents and the continuing rapid growth in the area. They did not consider the electorate of Molonglo, which extends to Woden and Weston Creek, adequately reflects their interests:

> ... [N]ot one 'true local' candidate was elected in the 2012 round. Residents can therefore feel somewhat disenfranchised with that result![164]

6.50 The Council supported the inclusion of Gunghalin suburbs and the north Belconnen suburbs of Giralang, Kaleen, McKellar and potentially Evatt to constitute a new electorate. They also called for the establishment of local electorate offices or a shared office for the electorate 'so that residents could develop a closer relationship' with their elected representatives in the Assembly.[165]

6.51 The Woden Community Council submitted that the splitting of Woden between the Molonglo and Brindabella electorates was a longstanding concern and had resulted in inadequate representation by members of the Assembly.[166] The Council suggested that the Electoral Act is limited in that while the redistribution committee can produce a 'statistically' adequate outcome, its ability to duly consider the community of interests within each proposed electorate, as required by the Act, is hampered.[167]

6.52 The Weston Creek Community Council suggested that electorates should be based on the seven geographical districts of Canberra, with between two and six representatives for each district depending on the population size.[168] This would ensure that people had representation from their own district.

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[164] Gungahlin Community Council, Submission 11, p. 4.
[165] Gungahlin Community Council, Submission 11, pp. 5, 6.
[166] Woden Valley Community Council Inc, Submission 6, p. 2.
[167] Woden Valley Community Council Inc, Submission 6, p. 2.
[168] Weston Creek Community Council, Submission 8, p. 6.

6.53 The Electoral Commissioner did not support this suggestion because it would result in different quotas for election in each district (as explained in Chapter 2), and because an even number of members did not result in fair representation:

> If you have an electorate that has only two [representatives] in it, it is almost inevitable that you will get a Labor member and a Liberal member elected every time, simply because of the way people in the ACT vote.
>
> It is a principle in the Proportional Representation (Hare-Clark) Entrenchment Act that each electorate should have an odd number of members and that the smallest electorate should have five members in it. The reason those principles are enshrined in the entrenchment act [is] to do with the mathematics of Hare-Clark and the notion of what is a fair outcome and what is a proportional outcome using the Hare-Clark system. The argument was put forward in proposing that those things be entrenched that an electorate smaller than five is not proportional enough to give effect to the proportional elements of the Hare-Clark system.
>
> It is also important with the Hare-Clark system for an electorate to have an odd number of members in it because that ensures that a party that gets more than half of the votes will get more than half of the seats. If you have an even number of members elected in an electorate, you cannot guarantee that more than half the votes will give you more than half the seats, which is inherently unfair. I think there are a variety of different reasons why, unfortunate as it may be, it is more important to provide for one vote, one value and for electorates of at least five members than it is to give a higher priority to the boundaries of the various divisions around Canberra districts.[169]

6.54 The Electoral Commissioner also noted that it was common practice in other jurisdictions to split districts and suburbs:

> If you look at the redistribution process anywhere other than in the ACT, it is extremely common, particularly in the larger metropolitan areas, to split suburbs ... It is very common to split what we call districts—Woden, Belconnen, Tuggeranong and so forth—simply because the urban sprawl in the larger cities is such that to get the numbers to add up to the one vote, one value principle you have essentially got to draw boundaries that split ideal communities.[170]

6.55 The Electoral Commissioner noted that two different tests needed to be met in a redistribution:

- The Self-Government Act requires each electorate to be within 10% of the average at the time the redistribution is made.

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[169] Mr Phil Green, Transcript of evidence, 9 May 2014, p. 7.
[170] Mr Phil Green, Transcript of evidence, 9 May 2014, p. 7.

- The Electoral Act requires each electorate, as far as practicable, to be within 5% of the expected quota at the time of the next election (s 36(b)). As this can only be calculated on population projections, it is a more difficult task.

6.56 When asked whether the aim of redistribution was to be as close as possible to zero difference between electorates, or to work within the permissible 5% variation with the aim of causing minimum disruption to boundaries, the Electoral Commissioner noted that the view that had prevailed in the augmented commission in the past had been to minimise change to boundaries where possible. He noted one proposed redistribution of a suburb to move closer to a zero tolerance difference had been changed back after the objection phase so that the variation was 'closer to four or five per cent'.[171]

ELECTORATE NAMES

6.57 The Electoral Commissioner was asked for his views on whether all electorates should be re-named if new electorates were created, so as to avoid a perception of representatives abandoning their former electorates if the current names continued with changed boundaries.

6.58 Mr Green noted that responsibility for naming electorates belonged solely to the augmented Electoral Commission and said that this was appropriate. He said that the requirement to consider electorate boundaries in a redistribution arguably extended to electorate names. He also commented that it was preferable not to use place names for electorates, noting that the development of the Molonglo Valley as a new region of Canberra might now present an issue with the Molonglo electorate.[172] Mr Greg Cornwell said he did not consider it would be 'a major consideration' for people in a new electorate:

> After all, think of the federal electorates where chopping and changing goes on all the time. You are in electorate X once and the next election you are in electorate Y. It does not seem to be a major problem.[173]

6.59 The Gungahlin Community Council suggested potential names for new electorates: Gungaderra or Mulanggari for the Gungahlin region, Inner Canberra and Ngambri. [174] The Electoral Commissioner commented that there had been a preference since 1992 to use Aboriginal names.[175]

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[171] Mr Phil Green, Transcript of evidence, 9 May 2014, p.8.
[172] Mr Phil Green, Transcript of evidence, 9 May 2014, pp. 9-10.
[173] Mr Greg Cornwell, Transcript of evidence, 9 May 2014, p. 22.
[174] Gungahlin Community Council, Submission 11, p. 11.
[175] Mr Phil Green, Transcript of evidence, 9 May 2014, p. 11.

COMMITTEE VIEW

6.60 The Committee notes that the Electoral Act specifies an extensive consultation process for the redistribution of electoral boundaries and that if the proposed increase to a five electorate/five member model is adopted, the process is likely to cause significant comment.

6.61 The Committee also notes the Electoral Commissioner's advice that adherence to the 'one vote, one value' principle that is fundamental to the Hare-Clark proportional representation system may mean that some geographical districts will need to be split between electorates. However, the Committee considers that the increase to five electorates will represent an improvement over the current geographical distribution in the Molonglo electorate, and notes that in other jurisdictions electorate boundaries have split districts and even suburbs. The Committee also notes that the Electoral Act requires the augmented commission to duly consider the community of interests within each proposed electorate, including economical, social and regional interests, as well as the means of communication and travel within each electorate. This factor should not, however, be considered more important than the 'one vote, one value' principle.

6.62 The Committee notes that determining the names of electorates is the responsibility of the Electoral Commission and considers this is appropriate.

6.63 Accordingly, the Committee makes no recommendation on these issues.

DETAILS OF DONORS

6.64 Details of gifts, including the 'defined details' for other than anonymous gifts,[176] must be recorded and provided to the Electoral Commissioner by way of return (ss 216A, 217). 'Defined details' include the name and address of an individual who made a gift, or where a gift was made on behalf of an unincorporated association, trust fund or foundation, the names and addresses of the members of the association's executive committee or the trustees of the fund or foundation, as the case may be. Copies of the returns of gifts (as well as annual returns and electoral expenditure returns) must be made available for public inspection (s 243). In addition, the Electoral Commissioner must, as soon as practicable, publish the information received in relation to gifts under s 216A in the way the Commissioner considers appropriate (s 243A).

6.65 The Committee notes that the returns are published on Election ACT's website and that therefore the details of individual residential addresses that are provided to the Commissioner

[176] S 216A(2)(c) currently refers to 'small anonymous gifts', but the Committee has recommended this provision should apply to anonymous gifts – see Recommendation 8.

are freely available via that means. The Committee considers that it is important to accountability that donors' addresses are recorded and provided to the Electoral Commissioner and that those details are available for public inspection at the Commissioner's office if requested. However, in the interests of privacy, the Committee believes that the address details of individuals should not be published in returns on the internet. The person's name and their suburb, or a post office box if provided, should be sufficient for scrutiny via the website.

Recommendation 18

6.66 The Committee recommends that s 243A be amended to provide that the ACT Electoral Commissioner should not publish on the internet the full private address details of an individual who has made a donation but that the person's name and suburb, or a post office box if provided, is sufficient.

7 CONCLUSION

7.1 The Committee has had only a short time to conduct its inquiry into a wide range of issues concerning the election of representatives to the Legislative Assembly. It appears from the ACT Electoral Commission's report on the 2012 ACT election that the new provisions introduced in 2012 concerning regulation and disclosure of political donations and electoral expenditure are generally working well, and an increased level of transparency in political funding has been the result. Some amendments, mainly of a technical nature, are required to fine tune the legislation. However, a major implication of the High Court's 2013 decision that certain provisions in NSW's electoral legislation impermissibly burdened freedom of political communication is that it appears clear that donations towards ACT election campaigns will no longer be able to be restricted to ACT electors.

7.2 The Committee considers it important that expenditure by political parties and candidates for election should be regulated so as to promote equality between competitors for votes, as far as that is possible. The Committee considers that with an increase to 25 members, the amount of electoral expenditure will be too high unless the rate is reduced, and accordingly has recommended a reduction from the current rate of $62,530 to $40,000. The Committee believes that third parties who have an interest in how the ACT is governed should not be unnecessarily constrained from advocating on political issues; however, because they can have a significant impact on electoral campaigns, the Committee believes the system of public disclosure of details of their expenditure and a limit on how much they can spend is soundly based. The Committee has not recommended a reduction in the expenditure cap for third party campaigners.

7.3 The Committee notes evidence from the ACT Electoral Commission and two experts in constitutional law suggesting that the ACT aggregated expenditure cap provisions, being more narrowly drafted than those held to be invalid in NSW, may well be considered to be reasonably appropriate and adapted to the legitimate purposes of preventing corruption in the electoral process and facilitating a level playing field between electoral contestants. Accordingly the Committee has not recommended any change to these provisions.

7.4 The Committee does not support full public funding of election campaigns at this stage, noting that this issue is being examined in New South Wales. However, to prevent corruption or the perception of corruption through improper influence, the Committee considers that the amount of public funding should be increased to $8.00 per eligible vote (Mr Rattenbury expressing a different view).

7.5 There are two trends that should continue to be monitored in ACT elections: the growing trend to pre-poll voting chosen by one in four voters in the 2012 election (much of it occurring in the last few days prior to election day), and the lower level of voter turnout in ACT elections compared with federal elections and elections in other jurisdictions. The Committee notes that

community disenchantment with the political process is by no means confined to the ACT; it may well be that more efforts need to be made to ensure that the community understands the Assembly's functions in terms of both municipal and State/Territory responsibilities.

7.6 Towards the end of the Committee's inquiry, the Attorney-General introduced bills to increase the size of the Assembly to 25 members, in line with the recommendations of the Expert Reference Group in 2013 and the public position of the major parties. The Committee notes that there will be differences of opinion on the size of electorates due to the quota that candidates must achieve to succeed in gaining a seat, and also notes the strength of some views that electorate boundaries should reflect geographical districts.

7.7 Increasing expenditure on political representation is never popular. However, one level of government in the ACT carries out the functions that two levels of government fulfil in other jurisdictions. The ACT community deserves the highest level of service by its elected representatives and, given that the size of the Assembly has not increased in the 25 years since self-government while the population and scale of required services have grown markedly over the same period, it is time for augmentation to ensure that the both the Assembly and the Executive can carry out their functions.

7.8 The Committee thanks all those who participated in the inquiry for their contributions.

Mick Gentleman MLA
Chair

30 June 2014

DISSENTING REPORT FROM SHANE RATTENBURY MLA

INTRODUCTION

I support the majority of the Committee Report recommendations, and welcome the collaborative manner in which the Committee has worked. I would also like to acknowledge that the Committee has worked effectively under what are reasonably tight time frames.

However, I wish to make some dissenting comments with regards to issues of electoral expenditure, caps on donations, and public electoral funding, and also including administrative funding.

In summary, there were two specific Committee recommendations that I was unable to agree to, the reasons for which are discussed in my report:

Recommendation 2

3.49 The Committee recommends that the electoral expenditure cap be calculated on the basis of $40,000 per candidate to a maximum of five candidates per five member electorate, indexed annually.

Recommendation 4

4.66 The Committee recommends that the prescribed amount payable for each eligible vote (first preference vote) be increased to $8.00, indexed annually.

I also make **four further recommendations** that were not supported by the Committee:

Additional recommendation:

That the Electoral Act is amended to cap party campaign expenditure to $500,000.

Additional recommendation:

That the cap on donations be reduced from $10,000 to $5000.

Additional recommendation:

That public funding should only be increased in the context of other electoral reforms that seek to minimise the prospect of undue or corrupt political influence by limiting the size of donations, and reducing overall election campaign spending.

Additional recommendation:

That administrative funding for parties is capped at that for five MLAs once the party has five or more eligible MLAs in the Assembly.

CAMPAIGN FINANCE

The Greens have a long history of campaigning for electoral reform to ensure that Australian electoral processes remain democratic and transparent.

Of relevance to this Committee's deliberation as it reviewed the ACT's Electoral Act in light of a proposed 25 Member Assembly and the High Court's decision in *Unions NSW v NSW* is the issue of campaign finance.

At the heart of the policy objective of campaign finance reforms instituted in the changes to the Electoral Act in 2011 is ensuring that our political system is not susceptible to inappropriate influence from large corporations or wealthy individuals who seek to influence political outcomes through making donations to candidates.

I believe that the Committee should also be mindful of a second consideration – to ensure a diversity of individuals and parties to be represented in our political and electoral processes, and to be able to campaign for election on a level playing field.

The issue of campaign finance reform needs to be addressed in a holistic way to ensure the right levers are being used to achieve the desired outcome. Tightening up campaign finance rules in one area while effectively reducing restrictions in another area does nothing to tackle the risk of our electoral system being at risk of corruption and undue influence.

There are three key levers available that can be shifted to ensure the most equitable outcomes:

- campaign expenditure caps
- donation caps
- public funding of elections.

These levers should be adjusted as a package. For example, tighter restriction on campaign expenditure and on donations must go hand in hand with any increase in public funding of election campaigns in order to achieve the necessary objectives of protecting our electoral system from undue or corrupt influence. Conversely an increase in public funding without restricting expenditure and donations will result in a financial windfall for political parties without improving anti-corruption measures.

CAPS ON EXPENDITURE

Reducing campaign expenditure is an important way to ensure a more level playing field in election campaigning. It is also important when considered in the context of public funding for elections, particularly in regards to the proportion of the campaign that is publicly funded.

Under the existing legislation, caps on campaign expenditure are $60,000 per candidate (indexed) with a limit to the number of seats (17) being contested. In the proposed 25 member Assembly, the Committee has recommended that the expenditure cap for candidates be reduced to $40,000 per

candidate. This is appropriate given that the increase in the size of the Assembly is not accompanied by an increase in the number of voters, only a potential increase in candidates.

The change in individual spending caps will mean that the larger parties, which run 25 candidates, will have a party expenditure cap of $1 million.

I support a cumulative "party cap" for parties. Large parties are offered a significant advantage in their spending as they are able to pool multiple candidate allocations of $40,000 and reap an efficiency benefit. Large parties, already entrenched in the political system, will continue to be able to outspend smaller parties and dominate the media landscape. Smaller parties and independents that do not have the advantage of pooling resources will be significantly disadvantaged.

Election campaigns in the ACT could be effectively run on smaller budgets, and placing a limit on the cumulative party budgets would ensure that parties are on a more level playing field.

The ACT Greens submitted to the inquiry that $500,000 would be sufficient for an effective and visible campaign, and note that this would create a level playing field for all parties.

Additional recommendation:

That the Electoral Act is amended to cap party campaign expenditure to $500,000.

CAPS ON DONATIONS

The ACT currently has a donations cap of $10,000 and a restriction that these donations can only be made by people enrolled to vote on the ACT Electoral Roll.

The Committee has recommended that section 205I(4) of the Electoral Act be repealed as it is considered to be vulnerable to a High Court challenge. Repeal of this section will allow corporations and individuals inside and outside the ACT to make donations, rather than just those who are enrolled on the ACT electoral roll as is currently in the legislation.

The Committee has recommended that the merits of the $10,000 cap are debated by the Legislative Assembly.

Under the circumstance of section 205I(4) being repealed, I believe it is appropriate to lower the cap on donations further. A donation of $10,000 can carry significant influence. The policy intent of the campaign finance reform undertaken in the last Assembly was ostensibly to reduce undue influence or the risk of corruption (perceived or real) on those elected to the ACT Legislative Assembly. Now that the High Court decision in *Unions NSW v NSW* has given rise to the removal of what is a significant provision in this legislation, it would be appropriate for the Assembly to lower the cap on donations in response.

Additional recommendation:

That the cap on donations be reduced from $10,000 to $5000.

PUBLIC FUNDING

Around the world, approximately 70% of all countries provide some public funding of elections. The intent of public funding of election campaigns is to ensure that parties are able to run an effective election campaign, without relying on large, private donations. The intent is to ensure that candidates are not beholden to donors who make large donations, and to limit corruption and inappropriate influence of elected officials.

The Greens have a long-held position of supporting an increase in public funding to reduce the risk of corruption and undue influence in politics. The Greens support public funding at a level that allows parties to run an effective campaign. Full public funding may not necessarily be the best model however as it removes an imperative for political parties to legitimately engage with their constituents and communities, and to demonstrate a level of (financial) support. A full ban on donations may also arguably impinge on the implied right of political expression that people exercise through the funding of political candidates that they support.

However, in order to achieve the policy objective of reducing influence or the risk of corruption, increases in public funding should only occur when there is a corresponding decrease of the influence that could be bought through making political donations to candidates and parties. There is little benefit in increasing public funding when there is still significant opportunity for corporations or wealthy individuals to buy influence through making sizeable donations. If the policy intent of public funding is to reduce the risk of undue influence and corruption, then the cap on donations is a crucial parameter to consider.

Any increase in the public funding of elections in the ACT should only be undertaken in concert with a decrease in donation caps from the current $10,000 limit. There is no doubt that $10,000 is a significant amount of money, and while it is difficult to determine an amount that “buys influence”, a lower limit on donations is recommended. This is especially important given that the removal of s 205I(4) of the Electoral Act will open up donations to corporations, and individuals outside the ACT. Without a reduction in the donation cap, an increase in public funding would result in a net financial gain to political parties without any net increase to democratic protections. This could reasonably be interpreted by the public as an unjustifiable transfer of public wealth to the political class, and serve to compound the cynicism that the public have in politicians and the electoral process.

Electoral expenditure caps are also an important consideration when looking at a public funding model. The total party expenditure cap for parties running 25 candidates in the 2016, under the model proposed by the Committee, will be $1 million. If the party cap were smaller, then all parties would spend less and would therefore require less public funding for electoral campaigning.

The ACT currently has electoral funding of $2 per vote (indexed). The Committee recommends increasing public funding to $8 per vote. In the context that the Committee did not recommend a reduction in the cap on donations, or a reduction in the cap on electoral expenditure, I do not support this recommendation.

Had the Committee considered dropping donation caps and expenditure caps for parties, I may have been able to support a modest increase in the public electoral funding. However the four-fold

increase in public funding recommended in the Committee report is untenable. It will take the approximate amount of public funding for ACT elections from around $400,000 to around $1.6 million.

Additional recommendation:

That public funding should only be increased in the context of other electoral reforms that seek to minimise the prospect of undue or corrupt political influence by limiting the size of donations, and reducing overall election campaign spending.

ADMINISTRATIVE FUNDING

Administrative funding is currently paid to parties and non-party MLAs to cover the costs of administering the reporting requirements for political expenditure. Each party or each non-party MLA is required by the Electoral Act to closely monitor and report all donations, income and expenditure, and Administration funding is currently paid under the Act to cover accounting and bookkeeping administration costs. It is specifically not to be used for funding of elections.

Currently the administrative payment made to each MLA is $20,000 per annum (indexed). In a 17 member Legislative Assembly, this amount totals $340,000.

In the proposed 25 member Assembly, this total amount would climb to $500,000.

As this payment is to cover administrative costs, it would be reasonable to assume that there would be efficiencies for a party required to manage administrative tasks for a larger number of MLAs.

As such I would support a cap on administrative funding to parties to the value of five MLAs. This would be equivalent to $100,000 plus indexation, which would be an adequate amount to cover the necessary bookkeeping, accountant or legal fees required to fulfil the reporting requirements under the Act. To not cap administrative funding will simply deliver a windfall gain for parties with more than five MLAs elected. A party with ten members (a reasonable scenario for the ALP and Liberal parties after the next election) will receive $200,000, seemingly well beyond the cost recovery of the reporting requirements.

This is likely to deliver a saving on the annual costs of a larger Legislative Assembly, possibly up to an amount of around $300,000 per annum.

Additional recommendation:

That administrative funding for parties is capped at that for five MLAs once the party has five or more eligible MLAs in the Assembly.

Appendix A SUBMISSIONS

1 Mr Chris Ansted

2 Mr Greg Cornwell

3 Prof George Williams AO

4 Mr Simon Fisk

5 Mr Tim Walshaw

6 Woden Valley Community Council Inc

7 ACT Electoral Commission

8 Weston Creek Community Council

9 Mr Simon Corbell MLA, Attorney-General

10 ACT Greens

11 Gungahlin Community Council

12 ACT Labor

13 Proportional Representation Society of Australia (Australian Capital Territory Branch)

13A Proportional Representation Society of Australia (Australian Capital Territory Branch)

14 Mr Nathaniel Reader

Appendix B WITNESSES TO THE INQUIRY

Friday 9 May 2014

- Mr Phil Green, ACT Electoral Commissioner
- Mr Greg Cornwell AM
- Emeritus Professor John Warhurst

Friday 16 May 2014

- Mr Simon Corbell MLA, Attorney-General
- Dr Karl Alderson, Deputy Director-General, Justice, Justice and Community Safety
- Ms Julie Field, Executive Director, Legislation, Policy and Programs, Justice and Community Safety
- Ms Pam Jenkins, Director Civil Law, Legislation, Policy and Programs, Justice and Community Safety
- Professor Anne Twomey, University of Sydney

Thursday 21 May 2014

- Professor George Williams AO, University of New South Wales

Appendix C RECOMMENDATIONS OF THE *REPORT ON THE ACT LEGISLATIVE ASSEMBLY ELECTION 2012*

*Note: Recommendations 4, 5 and 8 were superseded by the High Court's decision discussed in Chapter 4. The Electoral Commission made further recommendations in Submission 7, and these are noted in Chapter 5.

Recommendation 1

The Commission **recommends** that the Electoral Act be amended to remove internet commentary by persons acting in a private capacity from the authorisation requirements.

Recommendation 2

The Commission **recommends** that clause 7(3)(c)(i) and (ii) of Schedule 4 of the Electoral Act be amended to delete the word "all" to ensure that the scrutiny rules follow accepted Hare-Clark procedures.

Recommendation 3

The Commission **recommends** that the requirement for reporting of gifts received of $1000 or more within 7 days of their receipt during the expenditure period (from 1 January in an election year until polling day from 2016) be re-examined by the Assembly.

Recommendation 4

The Commission **recommends** that the requirement for a federal election account be re-examined by the Assembly with a view to improving the workability of section 205I(4) of the Electoral Act.

Recommendation 5

The Commission **recommends** that the need for political participants to hold an ACT election account with a financial institution be re-examined by the Assembly.

Recommendation 6

The Commission **recommends** that either section 222(1) be amended to cap anonymous donations at $250, instead of $1,000, or section 216 be amended to raise the threshold for small anonymous gifts from $250 to $1,000.

Recommendation 7

The Commission **recommends** that use of the phrase "small anonymous donations" be removed from the Electoral Act and replaced with the phrase "anonymous donations".

Recommendation 8

The Commission **recommends** that section 205I(4) of the Electoral Act be amended to provide that it does not require anonymous donations to be paid into a federal election account.

Recommendation 9

The Commission **recommends** that the reference to section 220 in the definition of "disclosure day" in relation to third-party campaigners in section 201(2)(c) of the Electoral Act be removed.

Recommendation 10

The Commission **recommends** that the definition of third-party campaigner in section 198 of the Electoral Act be amended to replace the reference to "more than $1,000" with "$1,000 or more".

Recommendation 11

The Commission **recommends** that the definition of third-party campaigner in section 198 of the Electoral Act be amended to exclude from the definition government agencies from any Australian government.

Recommendation 12

The Commission **recommends** that section 203 of the Electoral Act be amended to make it clear that only one reporting agent can be appointed at any one time for the same entity, and that the appointment of an agent automatically cancels the appointment of any previously appointed agent.

Recommendation 13

The Commission **recommends** that the Electoral Act be amended to make reporting agents, where appointed, responsible for the lodgement of all disclosure returns by parties, MLAs and candidates.

Recommendation 14

The Commission **recommends** that section 215G(1)(b) of the Electoral Act be amended to replace "local election" with "local government election".

Recommendation 15

The Commission **recommends** that the penalty notice fine for failing to vote at ACT Legislative Assembly elections should be increased.

Appendix D ACT ELECTORATE BOUNDARIES