

A Review of Campaign Financing Laws in the ACT

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

SEPTEMBER 2011

Report 7

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RESOLUTION OF APPOINTMENT

On 9 December 2008 the Legislative Assembly appointed a Standing Committee on Justice and Community Safety to perform the duties of a scrutiny of bills and subordinate legislation committee and to examine matters related to: community and individual rights; consumer rights; courts; police and emergency services; corrections including a prison; governance and industrial relations; administrative law; civil liberties and human rights; censorship; company law; law and order; criminal law; consumer affairs; and regulatory services.¹

TERMS OF REFERENCE

At its meeting on Thursday, 19 November 2009, the Assembly resolved:

That the Standing Committee on Justice and Community Safety inquire into electoral and political party funding in the ACT, including:

- (1) regulation of:
 - a) donation size;
 - b) political party campaign expenditure; and
 - c) third party campaign expenditure;
- (2) financial disclosure laws;
- (3) direct and indirect public funding of elections;
- (4) regulation of:
 - a) donations by private individuals, organisations and other contributors; and corporations, unions,
 - b) personal candidate funding;
- (5) enforcement of funding and financial disclosure law;
- (6) the relationship between ACT electoral law and Commonwealth electoral law; any Constitutional matters; and any other relevant matter.

¹ Legislative Assembly for the ACT, *Minutes of Proceedings No 2*, 9 December 2008, pp 12–15.

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RECOMMENDATIONS

RECOMMENDATION 1

4.30 The Committee recommends that donations to political parties, candidates or third parties be limited to \$7,000 in a reporting year, which shall be the financial year.

RECOMMENDATION 2

4.55 The Committee recommends that electoral expenditure by political parties, their candidates and their associated entities should be limited to \$60,000 per nominated candidate within the capped expenditure period, which shall commence on 1 January in an election year and close at the end of polling day.

RECOMMENDATION 3

4.57 The Committee recommends that there be an upper limit on electoral expenditure by parties or groups of \$60,000 times the number of seats in the Assembly, during the capped expenditure period.

RECOMMENDATION 4

4.60 The Committee recommends that an entity with formal connections with a political party, which empower it to contribute to policy development and/or the selection of candidates, should be included under a single applicable expenditure cap along with the political party, its candidates, and associated entities.

RECOMMENDATION 5

4.63 The Committee recommends that caps on electoral expenditure by parties, candidates and associated entities be indexed.

RECOMMENDATION 6

4.68 The Committee recommends that there be significant penalties for parties and / or candidates exceeding applicable caps on electoral expenditure.

RECOMMENDATION 7

4.83 The Committee recommends that that electoral expenditure in the ACT by third parties be capped at \$30,000 during the capped expenditure period, and that this figure be indexed.

RECOMMENDATION 8

4.85 The Committee recommends that the *Electoral Act 1992* be amended to insert the words 'third party' into the current definition in s 220, so that there is a more explicit definition in the Act.

RECOMMENDATION 9

4.114 The Committee recommends that parties and candidates shall be required to record the personal details of each donor, and the amount of the donation, but shall only be required to report donor details and amounts of donations to the Electoral Commission where donations meet or exceed \$1000 within a reporting year.

RECOMMENDATION 10

4.115 The Committee recommends that parties and candidates be required to report donations from a single donor where multiple donations from the donor, when summed, meet or exceed the threshold for a reporting year.

RECOMMENDATION 11

4.116 The Committee recommends that no political party or candidate be able to receive a total of \$25,000 or more in donations that are under the reporting threshold in a financial year.

RECOMMENDATION 12

4.117 The Committee recommends that if Recommendations 9-11 of this report are implemented, then donors be no longer obliged to provide returns to the Electoral Commission.

RECOMMENDATION 13

4.140 The Committee recommends that the Electoral Commission be empowered and required to establish an online reporting system, for parties and candidates to report donations and donors.

RECOMMENDATION 14

4.141 The Committee recommends that parties and candidates be required to report details of donations and donors, where they meet threshold requirements, on the online reporting system within one month of receipt and within one week during the capped expenditure period. Penalties for non-compliance should be created.

RECOMMENDATION 15

4.142 The Committee recommends that the Electoral Commission be required to publish details of donations to parties and candidates as soon as practicable after they are disclosed to the Commission.

RECOMMENDATION 16

4.143 The Committee recommends that the ACT Government increase the financial resources available to the Electoral Commission to allow it to adequately perform the audit and compliance functions defined under the *Electoral Act 1992*, and in recognition of the increased responsibilities created by the recommendations of this report.

RECOMMENDATION 17

4.187 The Committee recommends that the level of public funding provided to eligible candidates and parties per eligible vote be increased. The rate of funding should be pegged to the rate provided with respect to the per-eligible-vote amount for the Australian Senate, and should initially be 75% of that amount, increasing to 85% by 2016.

RECOMMENDATION 18

4.191 The Committee recommends that the ACT Electoral Commission conduct research on options to create Electoral Participation Grants and Party Development Grants.

RECOMMENDATION 19

4.193 The Committee recommends that Administrative Funding be provided to Members elected to the Legislative Assembly at a general election, based on the *Election Funding, Expenditure and Disclosures Act 1981* (NSW), Part 6A. All Administrative Funding should be subject to acquittal and audit.

RECOMMENDATION 20

4.207 The Committee recommends that an offence be created so that efforts to donate to other individuals or organisations on the understanding that they will donate to political parties and candidates, so as to evade caps on donations to parties or candidates, shall be unlawful.

RECOMMENDATION 21

5.13 The Committee recommends that the reforms outlined in this report should be operational for the 2012 ACT election.

1 INTRODUCTION

There are two things that are important in politics. The first is money and I can't remember the second. Mark Hanna, who ran the successful US Presidential campaign for William McKinley in 1896.²

Events leading to the inquiry

- 1.1 Following the 2008 ACT election, ACT Labor and the ACT Greens concluded a Parliamentary Agreement, which included a commitment to change legislation on the reporting of campaign funding for political parties. Specifically, the Agreement specified that all political donations were to be disclosed within one month of receipt, and on a weekly basis in an election period.³
- 1.2 Subsequently, on 19 November 2009, the Leader of the Opposition introduced a motion in the Assembly calling for the establishment of a select committee on campaign finance reform.⁴ The ACT Greens supported an inquiry, and successfully moved amendments which referred the inquiry to the Standing Committee on Justice and Community Safety. The Greens' amendments included a term of reference on Federal electoral law and constitutional implications.⁵ ACT Labor also supported the inquiry.⁶

² Quoted in Senator Nick Xenophon, submission to the Joint Standing Committee on Electoral Matters for its inquiry into the 2007 Federal Election, May 2008, p.1, provided as Submission No.4A to the present inquiry.

³ Appendix 2: Policy programme: Parliamentary Agreement for the 7th Legislative Assembly for the ACT, <http://www.actlabor.com.au/Documents/Documents/alp-greens-agreement.pdf>, viewed 2 February 2009.

⁴ ACT Legislative Assembly, *Hansard*, 19 November 2009, p.5306, <http://www.hansard.act.gov.au/hansard/2009/week14/5306.htm>, viewed 11 December 2009.

⁵ ACT Legislative Assembly, *Hansard*, 19 November 2009, pp.5346, 5353.

⁶ ACT Labor moved an amendment requiring that the inquiry have regard, specifically, to the *Commonwealth Government's Electoral Reform Green Paper: Donations, Funding and Expenditure* (December 2008), with a view to ensuring consistency with national reforms. However, this amendment was not carried by the Assembly, *Hansard*, 19 November 2009, pp.5348–9, 5353. The amendment referenced the Department of Prime Minister and Cabinet's, *Electoral Reform Green*

- 1.3 The Assembly debate on these motions discussed the rationale for the inquiry. Members noted that the need for reform had been identified by a wide range of stakeholders; that moves for reform were afoot in other Australian jurisdictions; and that reform in countries with comparable political systems, such as New Zealand, Canada and Britain, showed that that change was possible.⁷

The federal reform process

- 1.4 There have been initiatives to reform campaign finance in the federal sphere for some years.
- 1.5 In 2008 the Federal government released the *Electoral Reform Green Paper: Donations, funding and expenditure*.⁸ This was followed by the introduction of the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010 into the House of Representatives, on 20 October 2010. Although this was passed in the House, it was not subsequently passed in the Senate and there have been no further legislative developments to date.⁹
- 1.6 Since then, these matters have been taken up by the Federal Parliament's Joint Standing Committee on Electoral Matters, in its inquiry into the funding of political parties and election campaigns. The inquiry was referred to the Committee on 11 May 2010, and is to report by 30 September 2011.¹⁰

Paper: Donations, Funding and Expenditure, (December 2008),
<http://www.dpmc.gov.au/consultation/elect_reform/green_paper.cfm>, viewed 14 June 2011.

⁷ ACT Legislative Assembly, *Hansard*, 19 November 2009, pp.5306-7, viewed 11 December 2009
<http://www.hansard.act.gov.au/hansard/2009/week14/5306.htm>.

⁸ *Electoral Reform Green Paper: Donations, funding and expenditure*, 2008.

⁹ The third reading was moved and agreed to on 17 November 2010. The Bill was introduced in the Senate on the same day, and the second reading was moved. See the Bills homepage, Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbil_lhome%2Fr4477%22>.

¹⁰ Resolution of Appointment, Inquiry into the funding of political parties and election campaigns, <<http://www.aph.gov.au/house/committee/em/resolution-inquiryfunding.htm>>, viewed 14/06/2011.

States reform

- 1.7 Submitters to the present inquiry were critical of the pace of change on campaign finance in Australian jurisdictions.¹¹ Subsequently, New South Wales and Queensland both enacted legislation (within the past 12 months) to provide higher levels of regulation in this area.
- 1.8 In New South Wales these changes were made by the *Election Funding and Disclosures Amendment Act 2010*.¹² In Queensland, changes were made by the *Electoral Reform and Accountability Amendment Act 2011*.¹³
- 1.9 These Acts establish comprehensive regimes to regulate campaign finance. In both cases, measures include caps on donations and electoral expenditure, including donations to and by third party organisations, in addition to public funding of electoral expenses and obligations to disclose donations. They represent a considerable departure from previous practice in this area in Australia, which has relied on a combination of public funding and disclosure alone. These Acts are considered in greater detail below.

Conduct of the inquiry

- 1.10 The Assembly referred the inquiry to the Committee on 19 November 2009 without setting a reporting date. The Committee wrote to stakeholders including to Commonwealth, state and territory ministers, by letter and email in the third week of December 2009, and on 3 March 2010 the Committee invited submissions in a public advertisement. It also invited the ACT Electoral Commission to brief the Committee on ACT electoral law.¹⁴

¹¹ Democratic Audit of Australia, Submission No.3, p.2

¹² This Act, which amended the Election Funding, Expenditure and Disclosures Act 1981, received assent on 16 November 2010 and commenced on 1 January 2011. See notes to the *Election Funding, Expenditure and Disclosures Act 1981* No 78, 'Table of amending instruments', p.107.

¹³ The Act amended the *Electoral Act 1992* (QLD). The Act received assent and commenced on 19 May 2011. See Qld Legal Updater, *Electoral Reform and Accountability Amendment Act 2011* (Qld), <http://www.sclqld.org.au/lu/items/acts/176>, viewed 10/06/2011.

¹⁴ On 17 February 2010.

- 1.11 The inquiry received 11 submissions, held 5 public hearings, and deliberated at 10 private meetings. Submissions received and witnesses appearing before the Committee are listed in Attachments B and C of this report.

Structure of the report

- 1.12 The present chapter, Chapter 1, introduces the inquiry, describes its advent, and touches briefly on its context.
- 1.13 Chapter 2 deals with the background to the report, including:
- Broader concerns on campaign finance; and
 - Constraints on law-making in this area.
- 1.14 Chapter 3 considers the current arrangements on campaign finance in the ACT, as set out in Part 14 of the *Electoral Act 1992*.
- 1.15 Chapter 4 responds to each term of reference for the inquiry, which includes:
- The regulation of donation size and campaign expenditure;
 - Financial disclosure laws;
 - Public funding of elections;
 - Regulation of donations and personal candidate funding;
 - Enforcement of funding and financial disclosure law;
 - Relationship between ACT and Commonwealth electoral law; and
 - Constitutional matters and any other relevant matters.
- 1.16 Chapter 5 is Committee comment that concludes the report.

2 BACKGROUND TO THE INQUIRY

At its worst, selling access to party officials and spokespeople amounts to the prostitution of access to political power. ... Of gravest concern is the perception of the sale of governmental favours. Graeme Orr¹⁵

Introduction

- 2.1 This chapter summarises the views of submitters and witnesses to the inquiry regarding:
- contemporary concerns over campaign finance and models for reform;
 - constitutional constraints over the capacity of the ACT to reform campaign finance; and
 - other potential constraints on reform in this area.
- 2.2 These are considered below.

Concerns about campaign finance

- 2.3 A number of submitters to the inquiry noted the difficulties, risks, and complexities associated with campaign finance in Australia.¹⁶ In particular they highlighted the negative perceptions and consequences that these would have on participation in the democratic process in Australia if they were left un-managed.
- 2.4 Mr Tony Harris, former Auditor-General of New South Wales, advised the Committee that problems with campaign finance had produced a ‘growing divide between elected members and the electorate’. Where ‘past electorates would generally have trusted government to do the “right thing”’, such faith

¹⁵ Graeme Orr, “The currency of democracy: campaign finance law in Australia”, *University of New South Wales Law Journal* 2003, <http://www.austlii.edu.au/au/journals/UNSWLawJl/2003/1.html>.

¹⁶ These submissions were made before the enactment of the *Election Funding and Disclosures Amendment Act 2010* (NSW), and the *Electoral Reform and Accountability Amendment Act 2011* (QLD). These are discussed in detail in the report.

had been 'weakened'. This 'increasing cynicism' could be attributed to 'the increasing role of political donations'.¹⁷

2.5 While some 'companies and proprietors' asserted that they gave political parties donations 'in order to assist the workings of democracy', it was more likely, Mr Harris told the Committee, that donors 'make political contributions in order to advance their own interests'.¹⁸

2.6 Of particular concern were occasions when 'public officers allow their time to be sold in exchange for political donations': that is, at fundraising events. These were functions at which donors 'pay sometimes considerable monies to the relevant political party in order to dine or meet ministers'.¹⁹ This, Mr Harris suggested, was a clear case where political donations were corrupt:

It is clear that ministers may not obtain a private benefit from the exercise of their office (other than wages etc paid pursuant to law). It is also clear that ministers' families are not to obtain a private benefit from the exercise of ministers' public office. It is also unlawful for a minister to direct such private benefits to charities. Why then, when a minister dines with a person, is it acceptable that the person be charged a fee payable to a political party? When it is realised that ministers supports [sic] the party and the party supports ministers (that is, that there is a symbiotic relationship between a minister and his or her political party that is beneficial to each) the practice should be regarded as indelibly corrupt.²⁰

2.7 It was not donations from particular kinds of donor that placed the democratic process at risk, Mr Harris suggested. Improper influence could be exerted through political donations from private donors, companies, corporations, or trade unions.²¹

2.8 The effect of public funding for electoral expenditure by candidates and parties was also a matter of concern. While public funding had been

¹⁷ Mr Tony Harris, Submission No.1, p.1.

¹⁸ Mr Tony Harris, Submission No.1, pp.1-2.

¹⁹ Mr Tony Harris, Submission No.1, p.3.

²⁰ Mr Tony Harris, Submission No.1, p.3.

²¹ Mr Tony Harris, Submission No.1, pp.5-6.

‘introduced to solve the financial problems then facing major political parties’, it had led to ‘engorged advertising sprees by those parties in all subsequent elections’.²² A solution, Mr Harris suggested, was to adopt ‘*ex post* public funding of political parties and of all individual contenders’, on a ‘per vote basis, with no minimum number of votes required for eligibility’. This would mitigate the advantages enjoyed by incumbent and larger parties, and reduce the negative impact of election funding arrangements for ‘new or emerging parties’.²³

- 2.9 The Democratic Audit of Australia told the Committee that it regarded campaign finance as a serious problem for the democratic process in Australia. It described campaign finance as ‘one of the most complex, controversial and seemingly intractable problems currently on the Australian political agenda’.²⁴ It was also critical of the pace of change on campaign finance in Australian jurisdictions.²⁵

Constitutional constraints

- 2.10 There is a range of views on constitutional constraints on the power of Federal, State and Territory governments to legislate on campaign finance. This diversity of views hinges on different interpretations of significant Australian court cases, which led the Courts to state criteria on when, and how, valid laws could be made to constrain freedoms of speech and of political communication. Moves to increase the regulation of campaign finance may impinge on these freedoms.
- 2.11 The ACT Electoral Commission, in its submission, summarised the key court cases in this area, notably *Australian Capital Television Pty Ltd v Commonwealth*, (1992) 177 CLR 106; *Lange v Australian Broadcasting*

²² Mr Tony Harris, Submission No.1, p.5.

²³ Mr Tony Harris, Submission No.1, pp.4-5.

²⁴ Democratic Audit of Australia, Submission No.3, p.1

²⁵ ‘...while other democracies have taken serious steps in recent years to tighten up their political finance regulation, Australian governments have been slow to grasp the nettle. The steps taken so far have been relatively small and largely restricted to the area of disclosure. There are still remarkably few restrictions on the size or source of donations to political parties.’ Democratic Audit of Australia, Submission No.3, p.2.

Corporation, (1997) 189 CLR 520; and *Coleman v Power*, (2004) 220 CLR 1. In these the Court found:

- ‘that the *Political Broadcasts and Political Disclosures Act 1991*, which banned political advertising during election campaigns and introduced mandatory free to air time for political advertising, was invalid for breaching the implied freedom of political communication, because there were other, less drastic means to achieve the objectives of the law’.
- ‘that freedom of political communication is not an individual right, but rather a limit on the power of the Commonwealth to enact legislation that infringes that freedom. It also found that that freedom is not absolute, but limited to the extent necessary for the effective operation of representative and responsible government in Australia’; and provided
- ‘further explanation and clarification of the two-part test as outlined in *Lange v Australian Broadcasting Corporation*’.²⁶

2.12 Dr Anne Twomey, Associate Professor, Faculty of Law, University of Sydney, and author of *The Reform of political donations, expenditure and funding*, appeared before the Committee on 3 March 2010, where she advised the Committee on the capacity of Australian jurisdictions to legislate in this area.

2.13 In *The Reform of political donations, expenditure and funding* Dr Twomey gave the view that:

Laws that ban or impose limits upon political donations or election campaign expenditure are likely to be regarded as burdening the constitutionally implied freedom of political communication. This is because they have the effect of limiting the quantity and breadth of communication about political matters. Such laws will only be held valid by the courts if they are reasonably and appropriately adapted to serving a legitimate end in a manner which is compatible with the system of

²⁶ The Electoral Commission noted Dr Twomey’s interpretation of these decisions in *The Reform of political donations, expenditure and funding*, NSW Department of Premier and Cabinet, November 2008, <http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0015/33027/Twomey_Report.pdf>, p.1, quoted in ACT Electoral Commission, Submission No.2, pp.23-24.

representative and responsible government prescribed by the Commonwealth Constitution (the Lange test). Accordingly, reform proposals concerning party financing must be measured against this test, and special attention must be given to the types of issues that have concerned the High Court in the past, such as laws that unduly favour incumbents or unreasonably limit political communication by third parties.²⁷

- 2.14 When she appeared, Dr Twomey told the Committee that jurisdictions could legislate for caps on political donations and electoral expenditure, so long as such arrangements were able to be seen as ‘reasonably appropriate and adapted to achieve a legitimate end and adapted to achieve a legitimate end’.²⁸ In general, limits on donations and expenditure were likely to meet the High Court’s test in *Lange* so long as they were implemented ‘carefully and sensibly’.²⁹ Dr Twomey also advised the Committee that the High Court did not ‘like electoral laws that favour incumbents’.³⁰

Contrasts with overseas jurisdictions

- 2.15 Professor Twomey contrasted arrangements in Australia with those in the UK, New Zealand, Canada and the US, and drew conclusions about the capacity of Australian jurisdictions to legislate in this area.
- 2.16 In the UK and New Zealand, ‘certain amounts of political advertising’ were allocated to candidates and parties ‘for free or for cost’, together with ‘limitations on what you can spend’, thus striking a balance between constraints on financial aspects of political communication, and measures to support it.³¹

²⁷ Dr Anne Twomey, *The Reform of political donations, expenditure and funding*, NSW Department of Premier and Cabinet, November 2008, <http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0015/33027/Twomey_Report.pdf>, p.1. This was quoted in ACT Electoral Commission, Submission No.2, pp.23-24.

²⁸ Dr Twomey, *Transcript of Evidence* 3 March 2010, p.21.

²⁹ Dr Twomey, *Transcript of Evidence* 3 March 2010, p.21.

³⁰ Dr Twomey, *Transcript of Evidence* 3 March 2010, p.20.

³¹ Dr Twomey, *Transcript of Evidence* 3 March 2010, p.25.

- 2.17 In Canada the charter of rights and freedoms placed greater emphasis on 'equality and the level playing field', compared with Australia, where jurisprudence involved balancing protections on 'freedom of political communication' and 'trying to get some kind of a level playing field so that everybody is treated equally'.³²
- 2.18 In relation to the United States of America, Professor Twomey told the Committee, despite some similarities (such as the 'implied freedom of political communication'), the High Court of Australia had 'so far not been inclined' to extend the right of free speech to corporations, as had the US Courts.³³ As a result, such rights were not likely to be a significant influence on the legislative capacity of Australian jurisdictions.³⁴

Other constraints

- 2.19 There were other constraints, identified in submissions, which could have an influence on the Legislative Assembly's capacity to legislate in this area.
- 2.20 The ACT Human Rights Commission voiced concerns with respect to obligations under the *Human Rights Act 2004*. It suggested that proposals for reform which sought to 'limit expenditure on political campaigns, where this expenditure includes political broadcasts and other forms of political speech' were 'likely to engage the right to freedom of expression which is protected under s16 of the [*Human Rights Act 2004*]'.³⁵
- 2.21 Under these circumstances, the Commission suggested, such measures would 'require careful consideration'.³⁵ In voicing these concerns, the Commission raised 'particular concerns' about restrictions 'on political speech by individual third parties, as opposed to political parties and candidates'.³⁶

³² Dr Twomey, *Transcript of Evidence* 3 March 2010, p.20.

³³ Dr Twomey, *Transcript of Evidence* 3 March 2010, p.24.

³⁴ Dr Twomey, *Transcript of Evidence* 3 March 2010, pp.23-24.

³⁵ ACT Human Rights Commission, No.6, p.1.

³⁶ ACT Human Rights Commission, No.6, p.1. Section 16 of the *Human Rights Act 2004* (ACT) reads: '(1) Everyone has the right to hold opinions without interference. (2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and

Committee comment

- 2.22 The Committee notes that through the comparisons Dr Twomey made, she appeared to suggest two things. First, that approaches adopted in the UK and New Zealand provided precedents for reasonable constraints on political communication by regulating its financial component. Second, that the approach taken in the US, where *freedom* of political communication is awarded higher priority than *equality* of political communication, does not create precedents that would prevent Australian jurisdictions from increasing regulation of campaign finance.
- 2.23 The Committee also notes that Dr Twomey's view on the law in this area is supported by Professor Charles Sampford in the advice he gave the Committee in its public hearing of 10 March 2010. He told the Committee that in his view the 'High Court would not be an ultimate barrier to sensible regulations', as there 'were plenty of dicta in [*Australian Capital Television Pty Ltd v Commonwealth* (1992)] that, whereas they thought that the arrangements [in that particular case] were flawed ... [other] arrangements could pass their test'.³⁷
- 2.24 In the Committee's view, this appears to suggest that the ACT Legislative Assembly is indeed capable of enacting legislation to constrain campaign finance, so long as it does so in a way that serves and enhances the ACT's (and indeed Australia's) system of democratic government consistent with key High Court decisions in the area.
- 2.25 In relation to the concerns of the Human Rights Commission over the application of s 16 of the *Human Rights Act 2004*, the Committee considers that the constraint represented by the Act is similar in nature to that considered in significant case law on freedom of political expression in Australia. The Committee takes the view that the right set out in s 16 is a

ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.'

³⁷ Professor Sampford, *Transcript of Evidence* 10 March 2010, p.33. The Canberra Liberals also advised the Committee, making reference to *Australian Capital Television Pty Ltd v Commonwealth* (1992), that 'Parliament may regulate the conduct of persons to prevent intimidation and undue influence, even though that regulation may fetter what otherwise would be free communication'.

qualified right, and that new statute which satisfied the Lange test would not place an undue burden on the right to freedom of expression framed in s 16.

- 2.26 In the Committee's view the points raised regarding freedom of expression and freedom of political communication do not signal dead-ends in the capacity of the Assembly to legislate for greater regulation of campaign finance. Rather, they signal a need for well-framed legislation in an area where balances must be struck between freedoms, probity, and equality of access to the political system.
- 2.27 That the legislation described in Chapter 4 of this report has been enacted, and has so far operated without giving rise to constitutional challenge, provides further support for this view.

3 THE ELECTORAL ACT 1992 (ACT)

Introduction

- 3.1 This chapter considers arrangements on campaign finance in the ACT under the *Electoral Act 1992* as it now stands. It describes current provisions in the Act which provide for disclosure of political donations; returns of donations; provisions on non-reportable donations; a responsible authority administering the provisions of the Act (that is, the ACT Electoral Commissioner); and the current model for public funding for participants in ACT elections. It then summarises comment on the present Act by the ACT Electoral Commission and the ACT Government.

Present regulatory framework

- 3.2 The regulatory framework for campaign finance in the ACT is set out in the *Electoral Act 1992*, Part 14, 'Election funding and financial disclosure'.³⁸
- 3.3 This imposes reporting obligations on candidates and parties receiving donations, and on those people and organisations making those donations. Among other things, it sets out reporting obligations for contributions to election campaigns, and provides for public funding calculated (s 207) on the basis of the number of first-preference votes attracted by candidates or (s 198), where the candidate or party attracts more than a threshold of 4% of 'eligible votes' (s 208).
- 3.4 The Act does not provide for caps on donations or electoral expenditure. Rather, in order to regulate campaign finance it relies on a combination of disclosure for donations and public funding support for electoral expenditure. This contrasts with provisions in the New South Wales, Queensland, Republic of Ireland, and Tasmania, considered in Chapter 4.

³⁸*Electoral Act 1992*, Republication No 31, effective 1 July 2011, <http://www.legislation.act.gov.au/a/1992-71/current/pdf/1992-71.pdf>

Disclosure of donations

- 3.5 Obligations to report arise under the Act when donations to candidates or parties exceed \$1,000 (ss 220, 221, 221A, 221B). The same threshold applies to debts incurred in order to assist the election of candidates or parties, or where loans are provided or credit card disbursements are made to the same end (s 218A).
- 3.6 Candidates, parties and donors are obliged to provide *returns* to the Electoral Commissioner, which specify certain *defined details* set out in s 216 of the Act. Returns during the *disclosure period* must include information set out in s 217(2).³⁹ For each donation (referred to as ‘gift’ in this part of the Act), returns must record defined details about the entity making the gift (set out in s 216(a)), and particulars of the gift (set out in s 220(3)).

Returns

- 3.7 Under the Act, there are two kinds of returns each for candidates, parties and donors:
- First, there are annual returns: for donors (s 221A); for parties and MLAs (s 230); and for ‘associated entities’ (s 231B), to be provided to the Electoral Commissioner within 16 weeks of the end of the financial year (s 230(1) and s 231B(1)).
 - Second, candidates, political parties, and ‘third parties’ are required to provide post-election returns to the Electoral Commissioner within ‘15 weeks after polling day’ (s 217, s 224).
- 3.8 Broadcasters and publishers are required to provide post-election returns within ‘8 weeks after polling day’, setting-out the details of ‘electoral advertisements’ as indicated in s 226.

³⁹ The disclosure period, under s 201, starts on *disclosure day*, which is either 31 days after the last election; the date of preselection for a party candidate; or the day a candidate publicly announces their candidacy (s201(2)). Under s 217(2), returns are required to detail: ‘(a) the total amount of any gifts received by the candidate; (b) the number of persons who made gifts to the candidate; (c) the date each gift was received; (d) the amount of each gift received; (e) the defined details of each gift received.’

Anonymous donations

- 3.9 The Act prohibits candidates, parties, MLAs or associated entities from accepting anonymous gifts over the prescribed amount, which is \$1,000 (s 222).
- 3.10 The Act also prohibits parties, MLAs, candidates or associated entities from receiving loans of more than \$1000 from any entity other than a financial institution (s 218A).

Responsible authority

- 3.11 Under s 205 of the Act, the ACT Electoral Commissioner is responsible for keeping a register of party, MLA, and candidate reporting agents (defined in s 198) for the purposes of disclosure.
- 3.12 Other powers and responsibilities held by the Electoral Commissioner under the Act are set out in Division 14.7, 'Compliance'. This provides penalties for not providing a return, or providing an incomplete or false return, to the Commission (s 236). This division also sets out investigatory powers for the Electoral Commissioner, in particular by means of 'investigation notices' (s 237). Failure to comply with investigation notices gives rise to offences defined in s 237B, and the Electoral Commissioner may apply to a magistrate for search warrants under s 238.

Public funding

- 3.13 Public funding to candidates and parties is provided for under Division 14.3 of the Act, 'Election funding'. This provides an initial (that is historical, as at 1994) amount of 100 cents payable for each 'eligible vote' (s 207(2)), defined as 'a first preference recorded on a formal ballot paper in the election' (s 198), and formulas for indexation of this sum, to maintain the value of payments-per-eligible-vote over time (s 207(3)(a), (3)(b) & (4)).
- 3.14 Conditions for eligibility for payments are set out in s 206, 'Who eligible votes are cast for', and s 208, 'Threshold'. In this last, the Act specifies that payments calculated on the basis of s 207 may only be made to candidates or parties who attract 'at least 4% of the number of eligible votes cast in the election by the electors of the electorate' (s 206).

Views on the Act

ACT Electoral Commission

- 3.15 The Electoral Commissioner appeared before the Committee at a public hearing on 17 February 2010.
- 3.16 In the hearing, the Electoral Commissioner told the Committee that present arrangements for reporting campaign finance in the ACT involve a high degree of complexity, and that this, in part, is due to requirements for annual and election-related returns, by parties, candidates, donors, broadcasters and ‘other participants’, that is: third parties.⁴⁰

Difficulties in administering the Act

- 3.17 The Commissioner in particular identified two areas for concern in present arrangements under the *Electoral Act 1992*.
- 3.18 First, the Commissioner told the Committee that there were difficulties with minimum thresholds for reportable donations where, he said, parties in receipt of donations had no obligation to report those under \$1000, regardless of the aggregate value of donations by individual donors. This was in contrast with the obligations of individual candidates.⁴¹
- 3.19 Second, the Commissioner noted difficulties with the definition of ‘gift’ under the Act, which characterises the receipt of gifts as ‘receiving income for no consideration or for inadequate consideration’ (s 198). The Commission told the Committee that this had become more problematic for fundraising functions, where it might be claimed that payments were being made in exchange for a service. If this were the case, such payments would not meet the Act’s criteria for ‘gift’, and so would not trigger requirements for disclosure.⁴²

⁴⁰ Mr Green, *Transcript of Evidence* 17 February 2010, pp.3-4.

⁴¹ Mr Green, *Transcript of Evidence* 17 February 2010, pp.5, 6, 7-8.

⁴² Mr Green, *Transcript of Evidence* 17 February 2010, p.8.

Un-reported donations

- 3.20 The Commissioner told the Committee that, under the present system, both of these cases amount to significant sums, for which dollar amounts and donors' details are not reported. As a result, there may be amounts of 'up to \$800,000 in a financial year from a particular party where you do not know where the money is coming from', and that this significantly reduced transparency in electoral funding.⁴³
- 3.21 The Electoral Commission also indicated concerns about the capacity to change ACT legislation, in view of constraints around 'the right to freedom of speech, the right to participate in the political process, and the right to privacy'.⁴⁴

ACT Government

- 3.22 The ACT Government put its views to the Committee in a public hearing and in a submission to the inquiry.
- 3.23 In the public hearing the Attorney-General told the Committee, on 8 September 2010, that:
- the present regulatory model, comprising public funding and disclosure, should continue to prevail in the ACT, and that improvements in the present regime should come by improving mechanisms for public funding and disclosure;⁴⁵
 - placing 'caps on expenditure potentially creates ... perverse incentives', and that 'if you are seriously worried about the level of expenditure that occurs in political campaigns then the only complete way to address it is through public funding';⁴⁶ and
 - establishing consistency between the ACT and the Commonwealth on the regulation of campaign finance was highly desirable.⁴⁷

⁴³ Mr Green, *Transcript of Evidence* 17 February 2010, pp.9-11.

⁴⁴ ACT Electoral Commission, Submission No.2, p.5.

⁴⁵ Mr Corbell, *Transcript of Evidence* 8 September 2010, p.68.

⁴⁶ Mr Corbell, *Transcript of Evidence* 8 September 2010, p.76.

⁴⁷ Mr Corbell, *Transcript of Evidence* 8 September 2010, p.78.

- 3.24 He also said that the ACT Government's capacity to legislate was constrained by 'implied rights of political communication',⁴⁸ and that 'banning political donations or advertisements may be unconstitutional'.⁴⁹
- 3.25 However the Attorney indicated the Government's support for further regulation of anonymous donations, 'particularly as regards aggregate figures of anonymous donations to political parties'.⁵⁰
- 3.26 These matters were also addressed in the ACT Government's submission to the inquiry. Amongst other things, the submission indicated imperatives to maintain: freedoms to participate in the political process;⁵¹ individuals' 'right to privacy';⁵² and reporting requirements which were 'the least burdensome possible' in order to 'maintain a strong, dynamic economy'.⁵³
- 3.27 In the submission the Government advised the Committee that it saw no 'cogent policy reason for limiting private donations',⁵⁴ and that it may drive political parties to seek money by other means.⁵⁵
- 3.28 In relation to the quantum of public funding for electoral expenditure, the Government advised that in its view there was 'no demonstrated need to transfer funding to this area at this difficult economic time'.⁵⁶
- 3.29 The Government also noted that 'as recently as 2008, the Assembly [had] endorsed the view that the practice of donating to election campaigns supports the freedom of ACT citizens to participate in political activity'. It suggested moreover that the ACT did not 'need to further regulate or restrict donations or expenditure, in advance of changes in other jurisdictions on these issues'.⁵⁷

⁴⁸ Mr Corbell, *Transcript of Evidence* 8 September 2010, p.68.

⁴⁹ Mr Corbell, *Transcript of Evidence* 8 September 2010, p.71.

⁵⁰ Mr Corbell, *Transcript of Evidence* 8 September 2010, pp.73-74.

⁵¹ ACT Government, Submission No.9, p.8.

⁵² ACT Government, Submission No.9, p.8.

⁵³ ACT Government, Submission No.9, p.8.

⁵⁴ ACT Government, Submission No.9, p.13.

⁵⁵ ACT Government, Submission No.9, p.13.

⁵⁶ ACT Government, Submission No.9, p.12.

⁵⁷ ACT Government, Submission No.9, p.10.

- 3.30 The submission also addressed the question of the ACT's capacity to legislate in this area, and it indicated a need for caution in relation to implied rights to freedom of expression and political communication. However the submission noted that while the High Court's 'implied constitutional guarantee of freedom of communication on political matters' had 'in the past resulted in Commonwealth legislation being found to be invalid', it was 'not absolute'.⁵⁸
- 3.31 The Government submission also suggested that it would 'support reasonable measures to ensure that large amounts of money cannot be anonymously donated in order to avoid disclosure or forfeiture'.⁵⁹

Committee comment

- 3.32 In summary, the *Electoral Act 1992* (ACT) regulates campaign finance by creating public funding and obligations to disclose electoral donations and expenditure. Under present arrangements, there are no *limitations* on donations or electoral expenditure, other than preventing anonymous donations over \$1,000 (s 222).
- 3.33 The Acts of other jurisdictions—New South Wales, Queensland, and the Republic of Ireland—make further provisions, notably to cap donations and electoral expenditure. The Committee believes that these provide important points of reference for how campaign finance may be reformed in the ACT.
- 3.34 Acts in these other jurisdictions are described in Appendix A, and are referenced in the sections of this report which respond to each Term of Reference. A brief account is also provided of relevant legislation in Tasmania, where there are limited controls on electoral expenditure for candidates in elections for the Legislative Council.

⁵⁸ ACT Government, Submission No.9, pp.10, 19-21.

⁵⁹ ACT Government, Submission No.9, p.12.

4 RESPONSE TO TERMS OF REFERENCE

Introduction

- 4.1 This chapter provides responses to each of the Terms of Reference provided by the Assembly in its resolution of 19 November 2009.
- 4.2 Submitters and witnesses to the inquiry made comment on present arrangements, either supporting or seeking to go beyond the current provisions of the Act. These comments appear below, under sub-headings which correspond to the inquiry's Terms of Reference. Following each, a further sub-section references relevant part of Acts in other jurisdictions, which are presented in-full in Appendix A. At the end of each section there is a *Committee comment* which presents the Committee's findings and recommendations.

1. Regulation

(a) Regulation of donation size

- 4.3 A number of contributors to this inquiry, including the ACT Greens, the Electoral Commission, the Democratic Audit of Australia, and the Canberra Liberals, were in favour of higher levels of regulation on the size of political donations.
- 4.4 Speaking against increased regulation, the ACT Government advised the Committee that it did not support the banning or capping of donations, or 'the banning of advertising'. It noted that there were few restrictions of this kind in any Australian jurisdiction, with the exception only of Victoria (preventing contributions above \$50,000 from entities associated with casinos) and Tasmania (capping expenditure in Legislative Council

elections).⁶⁰ For the ACT there were potential problems at a ‘practical level’, in that ‘capping and banning political donations, or capping expenditure on campaigning, may ... merely force political parties to find other means of conducting their campaigns’.⁶¹

4.5 Moreover, the ACT Government advised, there could be unintended consequences from caps and bans, including that it ‘may only serve to reduce the availability and quality of election information available to members of the community’.⁶² As a result, the ‘fairest and most effective way to regulate election campaigning is to have in place an appropriate system for disclosure of campaign financing, as is the case in the ACT at this time’.⁶³

4.6 These views were similar to those put forward by ACT Labor, which in its submission advised the Committee that donation caps had resulted, in the US, in a proliferation of:

third party organisations such as “election funds”, “political action committees” and “campaign committees” ... [which] are simply artificial fronts and vehicles for rich donors to circumvent the cap on direct donations and support their preferred candidate or Party.⁶⁴

4.7 Of this ACT Labor observed that the ‘US experience is that donation caps simply reduce accountability and transparency’:

This is because money is artificially funnelled into issue-specific “fighting funds” and “political action funds”, which are usually a veiled conduit to fund overtly negative campaigns directed at specific candidates in marginal electorates. These funds are much less accountable to the public than legitimate parties and publicly scrutinised candidates.⁶⁵

⁶⁰ ACT Government, Submission No.9, p.13.

⁶¹ ACT Government, Submission No.9, p.13.

⁶² ACT Government, Submission No.9, p.13.

⁶³ ACT Government, Submission No.9, p.13.

⁶⁴ ACT Labor, Submission No.8, p.3.

⁶⁵ ACT Labor, Submission No.8, p.3.

- 4.8 Moreover, this had had a distinctly negative effect on the quality and nature of campaigning:

It can be legitimately concluded that donation caps have effectively ensured more money is being spent on negative campaigning against specific candidates. Money that would otherwise be spent on legitimate party-wide and local efforts is instead funnelled into negative attack advertising, as third parties are much less likely to advocate on behalf of registered political parties or candidates.⁶⁶

- 4.9 There were further potential problems in implementing such a system in Australia, in that donation caps would ‘restrict the right of legitimate representative membership-based organisations such as trade unions, industry bodies, community groups and chambers of commerce to participate in and contribute to the democratic process’.⁶⁷

- 4.10 They may also ‘breach the “implied right of political communication” identified by the High Court in the 1992 Australian Capital Television case’.⁶⁸ As a result, donation caps ‘should only be contemplated as an option in conjunction with other reform measures such as regulation and disclosure of third party activities’.⁶⁹

Risks from un-capped donations

- 4.11 Contributors to the inquiry identified a number of risks from un-capped political donations. The ACT Electoral Commission suggested that ‘even where disclosure of the identities of donors takes place and there is some level of public funding’, risks arose from ‘the pressure of campaign expenditure and the corollary importance of campaign fund raising’. This, the Commission suggested, ‘can lead to significant donors having undue influence in the political process’.⁷⁰

⁶⁶ ACT Labor, Submission No.8, p.3.

⁶⁷ ACT Labor, Submission No.8, p.3.

⁶⁸ ACT Labor, Submission No.8, p.3.

⁶⁹ ACT Labor, Submission No.8, p.3.

⁷⁰ ACT Electoral Commission, Submission No.2, p.5.

- 4.12 The Democratic Audit of Australia expressed particular concern over the influence of large electoral donations on the electoral process. Larger donations, it suggested, created a perception that ‘the big end of town’ was favoured by political parties in receipt of such donations. Moreover, these donations were often used for negative advertising that further reduced public trust in the electoral process. This was, it suggested, part of the ‘arms race in electronic campaign advertising’ that made political parties ‘dependent’ on such donations.⁷¹

Responses

- 4.13 The Electoral Commission noted that other jurisdictions had responded to the risks posed by un-capped donations by placing ‘limits on the size of donations, the types of organisations that can make donations, and/or the amount of money that can be spent on political campaigning’.⁷²
- 4.14 Similarly, the Democratic Audit contrasted its description of Australian conditions with arrangements in Canada, where at the federal level individual donations by citizens or permanent residents had been capped, as had ‘the expenditure of parties and candidates and of third parties that wish to engage in campaign advertising’.⁷³ The Democratic Audit proposed that similar arrangements should be adopted in the ACT:

As the Territory’s electoral system is based on the principle of equality, including ‘one vote, one value’, the Audit similarly believes financial participation should be regulated to encourage equality of financial participation. The Audit recommends that individuals be limited to donating no more than \$1,000 to any political party during any one year.⁷⁴

- 4.15 The Democratic Audit also proposed that there should be specific limits on electoral expenditure during nominated election periods.

⁷¹ Democratic Audit of Australia, Submission No.3, p.2.

⁷² ACT Electoral Commission, Submission No.2, p.5.

⁷³ Democratic Audit of Australia, Submission No.3, p.2.

⁷⁴ Democratic Audit of Australia, Submission No.3, p.4.

- 4.16 The ACT Greens also took the view that '[c]orporate and individual financial contributions to political parties and individual candidates should be capped' as this would 'decrease the possibility of undue influence on the political process by individuals or organisations'.⁷⁵
- 4.17 The Canberra Liberals took a similar position, proposing 'caps per financial year on donations from individuals and corporations...[be] set at different levels', to remove 'the possibility of a perception of a conflict of interest' and to send a clear signal that 'democracy is not for sale'.⁷⁶

Balance between freedom and equality

- 4.18 Some contributors to the inquiry expressed concern that in legislating in this area it was important that a balance be struck between freedom of political expression and equality of access to the political system.
- 4.19 The Canberra Liberals noted that it was:
- ...important that the cap level should be a reasonable amount. Reasonable in that it is not so low as to overtly limit a person's right or ability to meaningfully participate in the political process, nor so high that the perception of entitlement or influence becomes problematic.⁷⁷
- 4.20 Similarly, the ACT Government noted constraints placed upon the regulation of electoral funding by the High Court. However it stated that the 'implied constitutional guarantee of freedom of communication on political matters', which emerged in the High Court, 'is not absolute, but has in the past resulted in Commonwealth legislation being found to be invalid'.⁷⁸ In view of this, the Government suggested, there remained 'a risk that an ACT law which limits or bans political donations or expenditure on political advertising will be invalid'.⁷⁹

⁷⁵ ACT Greens, Submission No.7, p.3.

⁷⁶ Canberra Liberals, Submission No.10, p.4.

⁷⁷ Canberra Liberals, Submission No.10, p.4.

⁷⁸ ACT Government, Submission No.9, p.21.

⁷⁹ ACT Government, Submission No.9, p.21.

4.21 More positively, the Government noted that this risk was ‘significantly diminished if it can be seen that the measure is a proportionate response to policy challenges within the electoral system (such as measures to limit fraudulent or hidden benefits), or enhances representative democracy’.⁸⁰ As a result, any legislation impinging on political donations should strike ‘a balance between transparency and the right to participate in the political process’.⁸¹

Acts in other jurisdictions

4.22 The Committee notes relevant provisions in Acts in other jurisdictions.

4.23 The *Election Funding, Expenditure and Disclosures Act 1981* (NSW):

- caps limits donations to registered parties and ‘groups’ (in the NSW Legislative Council) at \$5000, and to un-registered parties, elected members, candidates, and third-party campaigners (s 95A) at \$2000 within a financial year (s 95A(2)); and
- provides that multiple donations from the same donor, within a financial year, are summed for the purposes of donation caps (s 95A(2)).

4.24 The *Electoral Act 1992* (Qld) creates caps on donations to:

- political parties of \$5,000 per financial year (s 252(1)(a)); and
- candidates or third parties of \$2,000 per financial year (s 252(1)(b)).

4.25 The Republic of Ireland’s *Electoral Act 1997* does not provide for caps on donations, and relies solely on caps on electoral expenditure. The *Electoral Act 2004* (Tas) does not cap donations. It creates limits on electoral expenditure for participants in Legislative Council elections only.

Committee comment

4.26 The Committee considers that there are strong arguments in favour of caps on political donations in the ACT. Neither the perceptions, nor the real-world consequences, arising from large donations to parties and candidates are

⁸⁰ ACT Government, Submission No.9, p.21.

⁸¹ ACT Government, Submission No.9, p.21.

good for the democratic process, and it appears that the combination of disclosure and public funding thus far employed in the ACT is not sufficient to counter these negative effects.

- 4.27 The Committee notes provisions in New South Wales and Queensland, to limit political donations by individual donors to a specified upper limit. It considers that similar provisions for the ACT would offer the best prospect for consistency with other Australian jurisdictions.
- 4.28 Recommendation 19 in this report seeks to prevent the splitting political donations amongst donors to evade the intent of Recommendation 1.
- 4.29 The Committee notes that other jurisdictions which have imposed caps on political donations, such as New South Wales and Queensland, have provided additional public funding to counter reductions in the freedom of political expression. This is detailed in Chapter 4, part 3 of this report, which deals with public funding, in particular the sub-section 'Acts in other jurisdictions'.

RECOMMENDATION 1

- 4.30 **The Committee recommends that donations to political parties, candidates or third parties be limited to \$7,000 in a reporting year, which shall be the financial year.**

(b) Regulation of political party campaign expenditure

- 4.31 ACT Labor noted that the ALP had 'previously supported an expenditure cap to be placed on parties and candidates'.⁸²
- 4.32 The ACT Greens told the Committee that limits 'should be imposed on campaign expenditure by political parties and candidates'. As for capping donations, this involved questions of balance. The Greens suggested that the 'exact limit must ensure that all candidates can promote their ideas and values to the community whilst at the same time ensuring that those with a

⁸² ACT Labor, Submission No.8, p.2.

significant revenue raising advantage are not able to ... exploit an inherently distortional advantage'.⁸³

- 4.33 The Canberra Liberals noted that Canada, New Zealand and the United Kingdom all place limits on campaign expenditure.⁸⁴ In terms of the application of such a system to the ACT, the Canberra Liberals suggested that 'a crucial element is the setting of a reasonable limit', and that 'there is a right and duty for political participants to disseminate information and an equal right and interest for electors to receive it'.⁸⁵

Statute in other jurisdictions

- 4.34 The Committee notes relevant provisions in Acts in other jurisdictions, to regulate electoral expenditure.

New South Wales

- 4.35 The *Election Funding, Expenditure and Disclosures Act 1981* (NSW) provides that for 'capped expenditure periods', defined under s 95H(b) of the Act, there are caps on electoral expenditure of:
- \$100,000 per electoral district for party-endorsed candidates in Legislative Assembly elections (s 95F (2)), and that the overall limit for party electoral expenditure is \$100,000 multiplied by the number of seats contested, resulting in an upper of \$9.3 million in a general election (s 95F(3));
 - \$1,050,000 overall for smaller parties, endorsing candidates in no more than 10 electoral districts (s 95F(4)); and
 - \$150,000 for independent candidates (s 95F(7)); of \$200,000 for candidates in by-elections, whether or not party-endorsed (s 95F(9)); and
 - \$1,050,000 for third-parties if registered (s 95F(10)(a)), or \$525,000 if not registered (s 95F(10)(b)).

⁸³ ACT Greens, Submission No.7, p.3.

⁸⁴ Canberra Liberals, Submission No.10, p.6.

⁸⁵ Canberra Liberals, Submission No.10, p.6. The Canberra Liberals proposed 'linking the expenditure to the electoral roll', as in Canada, and suggested that this 'may create a reasonable basis on which to set expenditure'. They went on to suggest that this 'figure should be high enough to enable a range of forms of communications in a variety of mediums yet no [sic] so much as to dominate all of them throughout a campaign'.

- 4.36 In addition the Act aggregates expenditure by related entities, or those bringing efforts to bear in a similar direction, so that expenditure is aggregated and counts toward amounts governed by the expenditure cap:
- parties and associated entities within the same electoral district (s 95G(2)(a));
 - for any group of candidates endorsed by 2 or more registered parties, under an overall cap of \$1,050,000 (s 95G(2)(b)); and
 - where more than one candidate is endorsed by a political party in an electoral district (s 95G(3)).
- 4.37 Caps on electoral communication expenditure are indexed according to a formula provided in Schedule 1 of the Act (s 95F(14)).

Queensland

- 4.38 The *Electoral Act 1992* (Qld) imposes a cap on electoral expenditure by political parties of \$80,000 for each electoral district (s 274 (1)(a)), during the ‘capped expenditure period’ defined in s 197. It provides a formula for indexation of this amount using the March quarter CPI rates of the two last financial years (s 274(4)-(7)).
- 4.39 For single candidates endorsed by political parties in an electoral district in a general election (that is, not a by-election), the cap on electoral expenditure is \$50,000, indexed according to the CPI formula set out in s 274(4)-(7), (s 274(1)(b)). When a political party fields more than one candidate for an electoral district in a general election, the candidates divide the \$50,000 expenditure cap equally between them, however many there are from that party (s 274(1)(c)).
- 4.40 For by-elections, single candidates contesting electoral districts have an expenditure cap of \$75,000, whether they are endorsed by a political party or are independent (s 274(1)(d),(e)&(f)). However, if there are multiple candidates from a political party they must, as above, divide the cap equally between them (s 274(1)(e)).
- 4.41 There are also caps on electoral expenditure for third parties, both registered and unregistered. For registered third parties, the cap is \$500,000 in a general election, with no more than \$75,000 to be spent in a particular electoral

district (s 274(1)(h)(i)). Unregistered third parties are limited to \$10,000 in a general election, with no more than \$2,000 to be spent in a particular electoral district (s 274(1)(h)(ii)).

Republic of Ireland

- 4.42 Under the Republic of Ireland's *Electoral Act 1997*, caps on electoral spending, for a capped expenditure period defined under s 31(3)), differ according to the size of the constituency. Constituencies have three, four or five members. In the case of a constituency returning three members the cap for electoral expenditure is £14,000; in the case of a constituency returning four members, £17,000; and in the case of a constituency returning five members, the cap is £20,000 (s 32(1)(a)).⁸⁶
- 4.43 Electoral expenditure by candidates who are affiliated with parties is subject to a written agreement between the candidate and the party ((32)(1)(b)(ii)). This sets out the amount, under the expenditure cap, that is to be spent within the constituency, and the amount to be spent by the party across all constituencies. Parties can spend up to 50% of the expenditure allocated for the constituency (s 32(1)(b)(i)).

Tasmania

- 4.44 For candidates for the Legislative Council the *Electoral Act 2004* (Tas) provides for caps on election expenditure by candidates, set at \$10,000 per *expenditure period* in 2005 and increasing by \$500 per year, resulting in a cap of \$13,000 in 2011 (s 160).⁸⁷ Candidates are obliged to submit a return within

⁸⁶ In response to an inquiry from the Committee regarding monetary figures in the Republic of Ireland's *Electoral Act 1997*, Mr Eamonn Waters of the Department of the Environment, Community and Local Government advised that 'the legislation was enacted before Ireland changed to the Euro (€) currency. At that time the Irish pound (IR£) was the country's currency. When Ireland changed to the Euro on 1 January 2002, all monetary references in legislation were then applied in the Euro equivalent. IR£1 = €0.787564. In implementing the provisions in the Act, the Standards in Public Office Commission applies the relevant Euro amounts'. He also advised that the Republic of Ireland was 'currently preparing legislation to change the donations limits and declaration thresholds. The General Scheme of the Electoral (Amendment) (Political Funding) Bill was published in June 2011'. Email from Mr Eamonn Waters to the Secretary of the Committee, 19 September 2011.

⁸⁷ See also Tasmanian Electoral Commission, *Tasmanian Legislative Council Elections: Information for Candidates*, <http://tec.tas.gov.au/pages/LegislativeCouncil/LC_PDF/2007%20-

60 days after an election is declared (ss 161, 164 & 199). For Legislative Council elections, political parties are forbidden from incurring electoral expenditure (s 162).

Capped expenditure periods

- 4.45 Each of the mechanisms to control expenditure, considered here, works by defining an expenditure period during which the cap applies. They are defined differently in each jurisdiction.
- 4.46 In New South Wales the capped expenditure period is defined for a number of scenarios. Under normal conditions, where the election is to be held 'following the expiry of the Legislative Assembly by the effluxion of time' under arrangements for fixed-term parliaments,⁸⁸ the capped expenditure period is defined as extending from 1 October of the year preceding the election until the 'end of polling day for the election' (s 95H(b)).
- 4.47 In Queensland the *Electoral Act 1992* (Qld) provides that a capped expenditure period ordinarily applies either from 'the day that is 2 years after the polling day for the last election' or 'the day of the issue of the writ for the election', whichever is earlier, until '6p.m. on the polling day for the election' (s 197).
- 4.48 In the Republic of Ireland the *Electoral Act 1997* provides for caps on electoral expenses for the period from when the writ or writs for an election are issued to polling day. Electoral expenses are defined by virtue of their having occurred within this period. Expenditure incurred outside the capped period is considered 'not to be election expenses' (s 31(3)).⁸⁹
- 4.49 In Tasmania, the expenditure *period* is defined as:
- (a) in the case of a Council periodic election, the period beginning on 1 January in the year in which the election is to be held and ending at the

[%20LC%20Handbook%20%28full%29.pdf](#)>, viewed 4 September 2011. The applicable *expenditure period* is defined in s 3 and s 5(1)(b)(ii) of the Act.

⁸⁸ See *Constitution Act 1902* (NSW) (s 7B)

⁸⁹ 'All election expenses incurred and all payments made by or on behalf of a political party or by or on behalf of a candidate, including election expenses so incurred or payments so made, in the case of a Da' il election, at any time before the issue of the writ or writs in relation to the election' (s 31(3)).

close of poll; or (b) in the case of a Council by-election, the period beginning on the day on which the seat of a Member of the Council becomes vacant and ending at the close of poll (s 3).

Committee comment

- 4.50 In the Committee's view, a cap on electoral expenditure should be an integral part of any new regime to regulate campaign finance in the ACT. As noted above, the present regime is regarded by many as being incapable of dealing with the 'electronic media arms race' identified by the Democratic Audit of Australia.
- 4.51 In the Committee's view, this can be dealt with by applying restrictions to all political parties and electoral participants. In this way none will be at a disadvantage with respect to any other. At the same time, a restriction on expenditure addresses inequalities that currently exist between candidates and parties with higher or lower access to resources, and between incumbent and non-incumbent participants in elections.
- 4.52 The Committee considers that an appropriate system of caps on expenditure would draw on the framework elements of legislation recently enacted in New South Wales and Queensland, considered in this report. As identified, the basic approach of that legislation is to provide for a cap on expenditure on a per-candidate basis; a 'capped expenditure period' defined in relation to Election Days; an overall limit on expenditure for groups and parties; indexation for caps; and penalties for spending beyond expenditure caps.
- 4.53 These are part of a holistic approach to limiting electoral expenditure, and the Committee addresses them in the following recommendations.
- 4.54 Recommendation 2 sets out the quantum of electoral expenditure available to participants in elections, and defines the capped expenditure period as extending from the first day of an election year and finishing at the close of polling day. The recommendation reflects the approach taken in the *Electoral Act 1992 (Qld)*, where expenditure by different entities, working to the same purpose, is aggregated for the purposes of caps on electoral expenditure. Provisions of this kind discourage participants from re-routing expenditure to avoid the intent of the Act.

RECOMMENDATION 2

- 4.55 **The Committee recommends that electoral expenditure by political parties, their candidates and their associated entities should be limited to \$60,000 per nominated candidate within the capped expenditure period, which shall commence on 1 January in an election year and close at the end of polling day.**
- 4.56 Currently there are 17 seats in the Assembly. For the present number of seats in the Assembly this would amount to a cap of 17 times \$60,000 (that is, \$1,020,000) for parties or groups. The same cap would apply if a party fielded 18 candidates for an election to a 17-seat Assembly. The intention of the following recommendation is to discourage parties from fielding more candidates than there are seats in order to increase the amount they can spend for an election.

RECOMMENDATION 3

- 4.57 **The Committee recommends that there be an upper limit on electoral expenditure by parties or groups of \$60,000 times the number of seats in the Assembly, during the capped expenditure period.**
- 4.58 The Committee has also considered the role of entities which have formal connections with political parties but which may not be considered associated entities under the Act. The *Electoral Act 1992* (ACT) defines an associated entity as an 'entity that— (a) is controlled by 1 or more parties or MLAs; or (b) operates, completely or to a significant extent, for the benefit of 1 or more registered parties or MLAs' (s 198).
- 4.59 The Committee is concerned that relying on this definition alone may not be sufficiently comprehensive to prevent non-compliance with caps on electoral expenditure. It is in particular concerned with entities which hold formal powers to contribute to policy development and / or to participate in the preselection of candidates. It considers that such entities should be included

under a single applicable expenditure cap, along with the political party with which it holds formal ties, its candidates, and associated entities.⁹⁰

RECOMMENDATION 4

- 4.60 **The Committee recommends that an entity with formal connections with a political party, which empower it to contribute to policy development and/or the selection of candidates, should be included under a single applicable expenditure cap along with the political party, its candidates, and associated entities.**
- 4.61 With regard to the following recommendation, the Committee believes that caps on electoral expenditure should be indexed. It does not wish to specify a particular mechanism for indexation, which should be developed by the ACT Government.
- 4.62 The Committee does, however, wish to note the current provisions of the *Electoral Act 1992* which contain a means to index public funding for electoral expenses based on a formula which averages Consumer Price Indexes for two different quarters (s 207). Legislation in New South Wales (see Schedule 1, 'Adjustment for inflation of monetary caps') and Queensland (s 274) provides similar means through which to maintain the value of levels set for caps on electoral expenditure.⁹¹

RECOMMENDATION 5

- 4.63 **The Committee recommends that caps on electoral expenditure by parties, candidates and associated entities be indexed.**

⁹⁰ Similar proposals have been put forward in New South Wales, in the Election Funding, Expenditure and Disclosures Amendment Bill 2011, which was introduced into the Legislative Assembly of New South Wales by Mr O'Farrell on 12 September 2011. See http://www.parliament.nsw.gov.au/prod/PARLMENT/hansArt.nsf/V3Key/LA20110912028?open&efNavID=HA8_1 for Mr O'Farrell's speech. For the Bill, see [http://www.parliament.nsw.gov.au/prod/parliament/nswbills.nsf/0/ef0fa9bfab5141eeca2578b80024329d/\\$FILE/b2011-013-d11-House.pdf](http://www.parliament.nsw.gov.au/prod/parliament/nswbills.nsf/0/ef0fa9bfab5141eeca2578b80024329d/$FILE/b2011-013-d11-House.pdf).

⁹¹ The *Electoral Act 1992* defines an associated entity (reference in Recommendation 4) as one 'controlled by 1 or more parties or MLAs; or ... (b) operates, completely or to a significant extent, for the benefit of 1 or more registered parties or MLAs' (s 198).

- 4.64 In the Committee's view, providing penalties for instances where participants fail to observe expenditure caps is an important part of achieving compliance.
- 4.65 In the *Election Funding, Expenditure and Disclosures Act 1981* (NSW), penalties for exceeding the expenditure cap (defined in Division 2B) are, for a political party to 200 penalty units or, 'in any other case', 100 penalty units (s 96HA).
- 4.66 In the *Electoral Act 1992* (Qld), penalties for exceeding expenditure caps set out in Part 11 Division 9 are whichever is greatest of two options: 'the amount that is equal to twice the amount by which the electoral expenditure incurred exceeded the cap', or 200 penalty units (s 281).
- 4.67 In the Republic of Ireland's *Electoral Act 1997*, the penalty for exceeding the expenditure cap for an election is that the Minister for Finance may 'deduct an amount equal to such excess from any amount which may be payable or become payable to the party under Part III', which provides for 'Payments to Political Parties and Reimbursement of Election Expenses of Candidates'.

RECOMMENDATION 6

- 4.68 **The Committee recommends that there be significant penalties for parties and / or candidates exceeding applicable caps on electoral expenditure.**

(c) Third party campaign expenditure

- 4.69 The *Electoral Act 1992* (ACT), in s 220, refers to 'a person (other than a party, candidate or associated entity) ... [who] 'incurs expenditure for a political purpose during the disclosure period for an election'.⁹² While it does not use the words 'third party' in this section, this is the definition for the purposes of the Act.
- 4.70 Where such persons provide gifts in excess of \$1000 to entities incurring expenditure for a political purpose, they are currently obliged to provide

⁹² *Electoral Act 1992* (ACT), s 220 (1) and (1)(a).

returns to the Electoral Commission. Similar obligations arise with respect to donations to candidates, as set out in s 221 of the Act.

- 4.71 In its submission to the inquiry, the ACT Electoral Commission advised the Committee that care would be ‘needed to ensure that bans or limits cannot be evaded by channelling activity through third parties’ in ‘designing and administering any ban or limit on political donations or expenditure’.⁹⁴
- 4.72 The Commission went on to provide a definition of third parties as ‘organisations with no formal links to the candidate or party but which share the same objective’. It noted problems in the United States, where a lack of controls over third parties had led to ‘a huge growth in ... parallel political advertising campaigns ... including in Presidential elections’.⁹⁵
- 4.73 ACT Labor also pointed to the need for an all-embracing framework, as caps on donations, in the absence of other controls, could lead to a situation similar to that in the United States, where donation caps without other measures
- have effectively ensured more money is being spent on negative campaigning against specific candidates. Money that would otherwise be spent on legitimate party-wide and local efforts is instead funnelled into negative attack advertising, as third parties are much less likely to advocate on behalf of registered political parties or candidates.⁹⁶
- 4.74 The Democratic Audit of Australia advised the Committee that the Canadian Supreme Court had ruled in favour of limiting third party election advertising, and that ‘the restriction of some voices’ had been deemed necessary ‘so that others might be heard’. It noted that in *Harper v Canada* (2004) ‘the Supreme Court found that while limiting third party election advertising did restrict freedom of expression, the restrictions were reasonable in the interests of electoral fairness’. In this sense, the Court found

⁹⁴ ACT Electoral Commission, Submission No.2, p.24.

⁹⁵ ACT Electoral Commission, Submission No.2, p.24.

⁹⁶ ACT Labor, Submission No.8, p.3.

that ‘restrictions were necessary to provide a level playing field for political discourse’, to ‘prevent wealthy voices from overwhelming others’.⁹⁷

- 4.75 The ACT Greens advised the Committee that limits ‘should also be imposed on third parties who participate in the electoral process’, and referenced Canadian statute (the *Electoral Act 2000* Part 17) as evidence that ‘another common law jurisdiction that had introduced such limits’.⁹⁸

Acts in other jurisdictions

- 4.76 In the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) the electoral expenditure of ‘third-party campaigners’ is capped at \$1,050,000 ‘if the third-party campaigner was registered under this Act before the commencement of the capped expenditure period for the election’ (s 95F(10)(a)). For third-parties not registered by that time, the cap is \$525,000 (s 95F(10)(b)). In addition, there is a specific limit on how much electoral expenditure parties and third-party campaigners can incur within each electorate. For parties this is capped at \$50,000, and for third parties \$20,000 (s 95F(12)).⁹⁹
- 4.77 The *Electoral Act 1992* (Qld) creates caps on electoral expenditure for third parties, both registered and unregistered. For registered third parties, the cap is \$500,000 in a general election, with no more than \$75,000 to be spent in any particular electoral district (s 274(1)(h)(i)). Unregistered third parties are limited to \$10,000 in a general election, with no more than \$2,000 to be spent in a particular electoral district (s 274(1)(h)(ii)).
- 4.78 The Republic of Ireland’s *Electoral Act 1997* sets out provisions for third parties:

Before incurring any expenses at an election a person (other than the national agent of a political party or the election agent of a candidate or a

⁹⁷ Democratic Audit of Australia, Submission No.3, p.3.

⁹⁸ ACT Greens, Submission No.7, p.3.

⁹⁹ In relation to this clause, ‘electoral communication expenditure is only incurred for the purposes of the election in a particular electorate if the expenditure is for advertising or other material that: (a) explicitly mentions the name of a candidate in the election in that electorate or the name of the electorate, and (b) is communicated to electors in that electorate, and (c) is not mainly communicated to electors outside that electorate’ (s 95F (13)).

person authorised by any such agent for the purpose of subsection (4) who proposes to incur election expenses (within the meaning of this Part), shall furnish to the Public Offices Commission in writing—

- (a) the name, address and description of the person proposing to incur the expenses,
- (b) a statement of the nature, purpose and estimated amount of such expenses, and
- (c) an indication of the person's connection, if any, with any party or candidate at the election (s 25(7)).

4.79 It is less clear how expenditure caps, such as that provided at s 32, apply to third parties during capped expenditure periods.

Committee comment

4.80 In the Committee's view, this is an important area for campaign finance reform. The Committee notes the example of electoral expenditure in the USA, noted by the ACT Electoral Commission and ACT Labor, which shows the unfortunate consequences of regulating other areas of campaign finance while leaving third parties unregulated. It also shows that countries with comparable political systems (such as Canada) have sought to prevent the effects of unregulated third party activity, and have been able to frame legislation to that end.

4.81 Mindful of the situation in the USA, and of the seriousness with which this matter has been dealt with in other international jurisdictions, the Committee takes the view that regulating third parties is necessary in order to achieve fairness in electoral campaigning. Campaign finance reform is multi-factorial, and any absence of controls in one area, with an increase in regulation in another, will simply result in a displacement of campaign finance activity, resulting in an un-managed, and potentially unhealthy, electoral system.

4.82 In making recommendations in this area, the Committee notes that in New South Wales and Queensland caps on electoral expenditure by third parties are lower than those for political parties. It proposes that the ACT adopt provisions consistent with this approach.

RECOMMENDATION 7

- 4.83 **The Committee recommends that that electoral expenditure in the ACT by third parties be capped at \$30,000 during the capped expenditure period, and that this figure be indexed.**
- 4.84 While the current *Electoral Act 1992* employs a workable definition of third party, it does not use the explicit term. In the Committee's view, adding an explicit definition of 'third party' to the Act would provide a useful identifier for persons seeking to understand the Act.

RECOMMENDATION 8

- 4.85 **The Committee recommends that the *Electoral Act 1992* be amended to insert the words 'third party' into the current definition in s 220, so that there is a more explicit definition in the Act.**

2. Financial disclosure laws

- 4.86 Contributors to the inquiry agreed on the need for reform of financial disclosure provisions in the *Electoral Act 1992*, summarised in Chapter 2.
- 4.87 For the most part, their concerns centred on:
- thresholds for reporting, particularly for donations below the reporting threshold;
 - time-lines for reporting; and
 - the advisability of instituting an online reporting facility for through which to disclose donations.
- 4.88 These are detailed below.

Thresholds for reporting

- 4.89 In its submission to the inquiry, the ACT Electoral Commission advised the Committee that 'a number of aspects of the ACT's funding and disclosure scheme ... allow for a significant proportion of parties' electoral funding to not be individually disclosed'. As a result, the ACT's disclosure scheme

'does not provide for completely transparent disclosure of sources of funding of political parties and candidates'.¹⁰¹

4.90 This stemmed from current provisions in the Act:

The ACT scheme provides that parties are not required to take account of individual amounts of less than \$1,000 in determining whether a donor has given the party \$1,000 or more in a financial year. This provision means that donors can give a party significantly more than \$1,000 per year without needing to be named by the party, provided the payments were made in individual amounts of less than \$1,000 each.¹⁰²

4.91 The Commission had the means to verify some of these details, but this required a considerable expenditure of resources:

While individual donors are still required to submit a donor return where they give more than \$1,000 in a financial year, regardless of the size of the individual donations, where donors are not named in a party return there is no way for regulators to determine whether a donor has failed to submit a return other than by detailed auditing of a party's accounts.¹⁰³

4.92 The wider impact of current provisions was that:

...significant proportions of the income of [the three major parties] are derived from sources that are not publicly disclosed. In some years the parties shown in the table received many hundreds of thousands of dollars that were not attributed to disclosed sources. Assuming the parties correctly identified all sources of income of amounts received over the disclosure threshold, all of these amounts relate to individual amounts received of less than the relevant disclosure threshold.¹⁰⁴

4.93 The Democratic Audit of Australia had similar concerns. It told the Committee that the 'current situation where parties and candidates can receive anonymous donations of up to \$1,000 is a serious weakness in the

¹⁰¹ ACT Electoral Commission, Submission No.2, pp.15-16.

¹⁰² ACT Electoral Commission, Submission No.2, p.16.

¹⁰³ ACT Electoral Commission, Submission No.2, p.16.

¹⁰⁴ ACT Electoral Commission, Submission No.2, p.16.

ACT's electoral laws'. It was concerned in particular that a party could 'receive over half a million dollars of income from undisclosed sources'. This, said the Democratic Audit, was a 'serious affront to transparency'.¹⁰⁵ In view of this, it recommended that:

...parties not be allowed to accept more than \$50 in any single anonymous donation (to cover activities such as raffles), but that an overall cap on anonymous donations also be imposed (that is, the source of all income in any one year above the cap needs to be identified).¹⁰⁶

4.94 This, it suggested, would: '...prevent anonymous donations being received corruptly ... if someone wanted to get around the disclosure laws by giving someone a brown paper envelope filled with ...dollars every day or every week or every month'.¹⁰⁷

4.95 The ACT Greens expressed a similar view, recommending that:

- Cumulative donations from individuals over \$1500 in any one financial year should be disclosed by parties, individual candidates and third parties where the donations were made for the purposes of election influencing activities.
- All sources of funding to a political party should be reported.
- A \$50 cap be placed on the amount recorded under anonymous donations by political parties, MLAs and associated entities.¹⁰⁸

4.96 The ACT Government agreed with other submitters on the need to change the reporting threshold for 'anonymous' donations. However, as for other areas of campaign finance policy, it also emphasised the importance of legislation striking a balance between lowering the threshold, so as to tighten

¹⁰⁵ Democratic Audit of Australia, Submission No.3, p.6, here referencing the Electoral Commissioner Mr Green in *Transcript of Evidence* 17 February 2010, pp.9, 11 & 15.

¹⁰⁶ Democratic Audit of Australia, Submission No.3, p.6.

¹⁰⁷ Democratic Audit of Australia, Submission No.3, p.6. Senator Nick Xenophon, in his submission to the inquiry, advised the Committee that, in addition, individuals or organisations 'donating to more than one candidate endorsed by the same political party should have their cumulative donations assessed by the disclosure limit'. Under such arrangements, if an individual were to donate '\$900 each to two candidates endorsed by the same party, totalling \$1800 to one party', this 'should be declared by the party as it [would be] over the disclosure limit', Senator Nick Xenophon, Submission No.4, p.2.

¹⁰⁸ Verbatim quote from ACT Greens, Submission No.7, p.4.

up current loop-holes, and preserving a reasonable measure of privacy for donors. There was, the Government suggested, a direct link between privacy in this respect and freedom of speech as it has been interpreted in electoral and other political matters:

The Government's position is that any proposal to change the requirements relating to disclosure thresholds, or to the manner or extent of publication of the details of donors, must carefully consider whether the loss of privacy resulting from the requirement for disclosure and publication is proportionate to the benefits that flow to the citizens of the Territory, and whether the change is required to safeguard the rights of those citizens to free association and participation in public life through engaging in political activity.¹⁰⁹

Fundraising and donations below the reporting threshold

4.97 Fundraising and donations below the reporting threshold were a particular area of concern for contributors to the inquiry.¹¹⁰

4.98 The Electoral Commission advised the Committee that at present only those 'donors who make "gifts" to parties over the \$1,000 threshold are required to submit disclosure returns'.¹¹¹ However:

Increasingly, the practice of parties raising funds through fundraising events such as dinners and "meet the minister" functions has led to uncertainty as to whether payments to attend such events are "gifts" or payments for services received, which are not required to be disclosed by donors, and are only required to be disclosed by parties if the individual payments are for \$1,000 or more. As this source of funding is becoming increasingly important it would be desirable to consider clarifying the obligation to report individual payments that reach the threshold for

¹⁰⁹ ACT Government, Submission No.9, p.21.

¹¹⁰ The definition of 'gift' is integral to the operation of Part 14 of the *Electoral Act 1992*, since it is in relation to gifts that obligations to report and disclose arise under the Act.

¹¹¹ ACT Electoral Commission, Submission No.2, p.16.

reportable transactions, without limiting reporting requirements only to payments falling within a narrow definition of “gift”.¹¹²

4.99 Moreover, the Commission advised the Committee:

The operation of the definition of “gift” can also lead to amounts given totalling over the disclosure threshold not being disclosed. Where persons or organisations give money to a party for a claimed service, such as a fund-raising dinner, such payments might not be defined by the givers, or the party, as gifts. If a series of such payments are made, with each payment below the threshold, the identity of the giver is not required to be disclosed by the party or the giver, even where the total amount given is over the threshold.¹¹³

4.100 In the Commission’s view, this was a matter for concern because:

Regardless of the reason for these differences between the amounts received and the sources of income identified, there are absolutely, and for smaller parties relatively, large sums involved where the electorate is not aware of the sources of political funding.¹¹⁴

4.101 The Commission’s recommendation, to address these anomalies, was to require full transparency regardless of the nature of the payment, detaching reporting requirements from the currently narrow definition of ‘gift’:

Transparency would be increased if political parties, associated entities, MLAs and candidates were required to disclose all sources of income regardless of the purpose for which the payments were made, with all individual payments from a single source summed across the disclosure period. Whether or not to include a threshold, below which donors are not identified, and/or exemptions to protect personal privacy, are matters for judgement. Note that the current ACT scheme requires all sources of income of associated entities to be disclosed (with some privacy exceptions) with no threshold. If a threshold is to be applied, it would aid

¹¹² ACT Electoral Commission, Submission No.2, p.16.

¹¹³ ACT Electoral Commission, Submission No.2, p.17.

¹¹⁴ ACT Electoral Commission, Submission No.2, p.17.

the cause of transparency if the recipient were required to list the number of sources who contributed funds below the threshold.¹¹⁵

4.102 The implications of this approach, the Commission suggested, would be that it:

... would avoid the need for the distinction currently being drawn between funds received that are donations compared to funds provided at fund-raising events that are declared to be payments for services. Simply listing all sources of income would provide greater information about the sources of political funding than the present system.¹¹⁶

4.103 The Commission suggested ways in which returns generated under such a regime could distinguish between donors and other paying entities (such as leases of properties). It also flagged the need to identify the 'the identity of companies and individuals providing political funding' and to prevent 'organisations or persons being used as intermediaries in order to hide the true makers of payments' if such a scheme were introduced.¹¹⁷

4.104 In its submission, the Commission suggested that adopting this approach would have other positive implications for the scrutiny of campaign finance. Introducing an obligation for 'parties and other political participants' to report across all income would create more comprehensive returns from individuals and organisations who participate in the electoral process. The improved quality and quantity of information that would result would, argued the Commission, make it unnecessary for the Commission to receive returns from broadcasters and donors as a means to cross-check party and candidate returns.¹¹⁸

Acts in other jurisdictions

4.105 The Committee notes that the *Election Funding, Expenditure and Disclosures Act 1981* (NSW), at s 85, provides that:

¹¹⁵ ACT Electoral Commission, Submission No.2, p.17.

¹¹⁶ ACT Electoral Commission, Submission No.2, p.17.

¹¹⁷ ACT Electoral Commission, Submission No.2, p.17.

¹¹⁸ ACT Electoral Commission, Submission No.2, p.18.

An amount paid by a person as a contribution, entry fee or other payment to entitle that or any other person to participate in or otherwise obtain any benefit from a fund-raising venture or function (being an amount that forms part of the proceeds of the venture or function) is taken to be a gift for the purposes of this section.¹¹⁹

4.106 Definitions given in s 85(1) make this a ‘political donation’ in the terms of the Act.¹²⁰

4.107 In the *Electoral Act 1992* (Qld) these matters are dealt with by defining a ‘fundraising contribution’, which is:

an amount paid by a person as a contribution, entry fee or other payment to entitle that person or another person to participate in or otherwise obtain a benefit from a fundraising venture or function.¹²¹

4.108 The following section, s 201(4), provides that only fundraising contributions in excess of \$200 are considered to be ‘gifts’, and that only the amount in excess of \$200 is considered a gift. As such it is considered a political donation under the terms of the Act, and is subject to individual and aggregate donation caps.¹²²

Committee comment

4.109 In the Committee’s view, current loopholes for donations which are individually below the reporting threshold, but meet or exceed it in aggregate, are among the most important flaws in the current regulatory framework for campaign finance in the ACT.

4.110 The Acts considered above provide two models through which fundraising contributions could be regulated by an amended *Electoral Act 1992* (ACT). Both have the effect of drawing in donations which are currently regulated by statute in the ACT. In this case the Committee favours the model

¹¹⁹ *Election Funding, Expenditure and Disclosures Act 1981*, (NSW), s 85 (2).

¹²⁰ *Election Funding, Expenditure and Disclosures Act 1981*, (NSW), s 85 (1).

¹²¹ *Electoral Act 1992* (QLD), s 200.

¹²² *Electoral Act 1992* (QLD), s 201 (4).

presented in the Queensland *Electoral Act 1992* because it may be seen as placing a lesser burden on freedoms of political expression.

- 4.111 The Committee notes representations by the Electoral Commission, that this matter might be addressed by changing the definition of 'gift' in the *Electoral Act 1992* (ACT). In view of the similarity between this definition and those in comparable Acts in other jurisdictions, and the mechanisms provided by those Acts to capture fundraising donations, the Committee has decided on another solution (as stated in Recommendation 9).
- 4.112 The Committee also notes the Electoral Commission's suggestion that providing closer regulation in this area would make it unnecessary for donors and broadcasters to provide returns to the Commission.¹²³ In the Committee's view this would reduce complex cross-checking under the present system, and allow the Commission to focus its resources on auditing and compliance.
- 4.113 In addition, the Committee notes penalties that apply in New South Wales and Queensland where parties and candidates accept donations in excess of the applicable donation cap. In New South Wales the maximum penalty is, in the case of a party, '200 penalty units or in any other case, 100 penalty units' (*Election Funding, Expenditure and Disclosures Act 1981* (NSW), s 96HA). In Queensland the penalty on a donor providing a donation in excess of the applicable donation cap, to either a political party, a candidate or a third party, is 100 penalty units (*Electoral Act 1992* (Qld), ss 253, 255, 257).

RECOMMENDATION 9

- 4.114 **The Committee recommends that parties and candidates shall be required to record the personal details of each donor, and the amount of the donation, but shall only be required to report donor details and amounts of donations to the Electoral Commission where donations meet or exceed \$1000 within a reporting year.**

¹²³ ACT Electoral Commission, Submission No.2, p.18.

RECOMMENDATION 10

- 4.115 **The Committee recommends that parties and candidates be required to report donations from a single donor where multiple donations from the donor, when summed, meet or exceed the threshold for a reporting year.**

RECOMMENDATION 11

- 4.116 **The Committee recommends that no political party or candidate be able to receive a total of \$25,000 or more in donations that are under the reporting threshold in a financial year.**

RECOMMENDATION 12

- 4.117 **The Committee recommends that if Recommendations 9-11 of this report are implemented, then donors be no longer obliged to provide returns to the Electoral Commission.**

Time-lines for reporting

- 4.118 The Democratic Audit of Australia, in its submission to the inquiry, advised the Committee that in its view the 'major problem with the current donation disclosure laws is a lack of timeliness in disclosure'. It observed that the 'purpose of a donation disclosure regime is to allow electors to make an informed choice at election time', but disclosure thresholds 'intended to provide transparency are undermined if such transparency occurs well after the relevant event'.¹²⁴
- 4.119 The Democratic Audit advised the Committee that a timelier model was that adopted in the UK, where donations are required 'to be disclosed on a quarterly basis, and then on a weekly basis during an election campaign period'.¹²⁵
- 4.120 Taking a similar view, the ACT Greens recommended that all income 'received by a political party should be reported within one month of receipt

¹²⁴ Democratic Audit of Australia, Submission No.3, p.4.

¹²⁵ Democratic Audit of Australia, Submission No.3, p.4.

(within one week during the election period)', and that all 'parties, candidates and third parties should be required to report all details of political expenditure over the full four year electoral cycle and for the election period.¹²⁶

- 4.121 The ACT Electoral Commission advised the Committee as to how the timing of reporting requirements might be altered to good effect. It noted that a criticism of 'the ACT's disclosure scheme ... [was] that information disclosed is not made public until a considerable time after the activity takes place':

For example, annual returns for the period ending 30 June are not made public until February of the following year. This delay in publishing disclosure information arguably reduces the transparency of the disclosure scheme, particularly in an election year, when voters would not have before them on polling day any information about political finances during the preceding 15 months ...¹²⁷

- 4.122 The Electoral Commission advised the Committee of two ways in which this arrangement could be modified. The first involved standardising dates for reporting across the various entities regulated by the Act: parties, MLAs and donors. The second involved reducing 'lead-times' so that they are required to report earlier. The Commission suggested that they be required to report at 4 weeks after the end of the financial year rather than the current 16 weeks. Reporting after elections could occur at 30 days after Election Day, and disclosure at 60 days after Election Day.¹²⁸

An online reporting facility for donations

- 4.123 The Electoral Commission advised the Committee that a further means to facilitate more rapid reporting would be:

to provide for on-line lodgement and disclosure within a short period of time of transactions occurring, as suggested in the ACT Parliamentary

¹²⁶ ACT Greens, Submission No.7, p.4.

¹²⁷ ACT Electoral Commission, Submission No.2, p.19.

¹²⁸ ACT Electoral Commission, Submission No.2, p.20.

Agreement. This could be done in conjunction with the on-line system currently being considered by the Australian Electoral Commission.¹²⁹

4.124 A number of submitters envisaged a role for an online reporting facility in this respect. This included the Democratic Audit of Australia, which advised the Committee that:

An internet-based system of disclosure would be easy for parties and candidates to administer, as it would become part of the ordinary accounting functions of the organisation, and therefore a low threshold could be established.¹³⁰

4.125 The ACT Greens also recommended the implementation of an 'online lodgement and disclosure system', as part of a wider requirement for more timely, and more complete, reporting of donations and electoral expenditure.¹³¹ As noted by the Electoral Commission, this had been part of the ACT Parliamentary Agreement concluded between the Greens and the ALP following the ACT's 2008 election.¹³²

Acts in other jurisdictions

4.126 The Acts of other jurisdictions considered in this report create different schedules for reporting.

4.127 In New South Wales, under the *Election Funding, Expenditure and Disclosures Act 1981*, candidates are required to make a declaration of donations within 8 weeks of the completion of the *relevant disclosure period*, which is the '12-month period ending on 30 June (s 89). Candidates are required to file a declaration by the 31st day after polling day. Others with obligations to disclose under the Act must file a declaration 'within 8 weeks after the end of each relevant disclosure period' (s 91).¹³³

¹²⁹ ACT Electoral Commission, Submission No.2, p.20.

¹³⁰ Democratic Audit of Australia, Submission No.3, p.5.

¹³¹ ACT Greens, Submission No.7, p.4.

¹³² ACT Electoral Commission, Submission No.2, p.20.

¹³³ A note to s 91 states that 'disclosures are to be made before 26 August for the period ending 30 June in that year', excepting variations provided for under s 96L and s 96M of the Act.

- 4.128 In Queensland under the *Electoral Act 1992*, candidates are required to disclose donations within the 'prescribed time' (s 261), defined as 15 weeks after polling day in *Electoral Regulation 2002* (s 6D). The same reporting timeline applies for third parties receiving political donations or incurring 'expenditure for a political purpose' (s 263).
- 4.129 Political parties (s 290) and associated entities (s 294) are obliged to provide returns (which report both expenditure and donations) within 8 weeks of the end of each reporting period, as provided under *Electoral Regulations 2002* (Qld) s 6G and s 6H.¹³⁴ Broadcasters and publishers are required to lodge returns, detailing expenditure, 'before the end of 8 weeks after polling day' (s 284 & s 285).
- 4.130 In the Republic of Ireland, under the *Electoral Act 1997*, political parties must lodge a *donations statement* with the Public Offices Commission (POC) no later than 31 March each year (s 24(1)(b)). Members of either House of Parliament must lodge a donation statement by 31 January of each year. Unsuccessful candidates in elections must lodge a statement no later than the fifty-sixth day after polling day (s 24(2)(a) & s 24(2)(b)).

Online reporting and disclosure system

- 4.131 Regarding an online reporting and disclosure system, the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) provides for the disclosure of political donations 'on a website maintained by the Authority for that purpose' (s 92(3)).¹³⁵
- 4.132 The *Electoral Act 1992* (Qld), at s 316, provides that the Electoral Commission must publish on its website returns provided under specified sections of the Act, but does not provide for disclosure by parties, candidates and other participants to the Commission by means of an online reporting system.¹³⁶

¹³⁴ A reporting period means 'the first 6 months of a financial year; or ... a full financial year' (s 197).

¹³⁵ The Act also states: 'The regulations may make provision with respect to any such website' (s 92(3)). The *Election Funding and Disclosures Regulation 2009* and the *Election Funding and Disclosures Amendment Regulation 2011* do not refer to a website of this nature.

¹³⁶ These are returns regarding: donations to political parties (s 265); special reporting of large gifts (s 266); returns for reporting periods by registered political parties (s 290); and returns for reporting periods by associated entities (s 294).

4.133 The Republic of Ireland's *Electoral Act 1997* is silent on this matter.

Committee comment

4.134 In the Committee's view, much of the debate around financial disclosure centres on timing, and whether the distinctions and thresholds that currently characterise the law on financial disclosure should stand or be set aside.

4.135 The Committee notes discussion by the ACT Electoral Commission and others, as to whether it would detract from the public good to require all donors—regardless of the size of the donation—to have their details disclosed.

4.136 After due consideration, the Committee is persuaded by points raised by both the ACT Government and the Canberra Liberals, which propose that there should continue to be a threshold figure for reportable donations. This should be set at a figure that allows a reasonable level of privacy for small donors, while ensuring that hitherto un-reported donations, noted by the Electoral Commission, are in the future disclosed and reported. In the Committee's view the regulatory framework for campaign finance in the ACT should set a new threshold for reporting donations, and institute an overall cap for donations which fall, individually, beneath the reporting threshold, but meet or exceed it in-aggregate.

4.137 The Committee is also persuaded by the proposal by the Electoral Commission—echoed by the ACT Greens and the Democratic Audit of Australia—that all reportable donations be disclosed by way of an online system which interoperates with accounting software employed by parties and candidates.

4.138 In the Committee's view, this merits serious consideration, and should be implemented. A change in law to establish an online reporting system would streamline disclosure and increase transparency for electoral donations in the ACT.

4.139 The Committee also notes the Electoral Commission's remarks that such a system would require an increase in resources, to allow more thorough auditing of compliance within a system through which there is continuous on-line reporting. The Committee is sympathetic to these remarks, and takes

the view that it would be public money well-spent if the ACT could adopt such a system. This would place the ACT as one of the reforming Australian jurisdictions in the area of campaign finance. On the basis of the survey of legislation above, if such a system were to be put in place in the ACT, it would be the first jurisdiction to do so in Australia.

RECOMMENDATION 13

- 4.140 **The Committee recommends that the Electoral Commission be empowered and required to establish an online reporting system, for parties and candidates to report donations and donors.**

RECOMMENDATION 14

- 4.141 **The Committee recommends that parties and candidates be required to report details of donations and donors, where they meet threshold requirements, on the online reporting system within one month of receipt and within one week during the capped expenditure period. Penalties for non-compliance should be created.**

RECOMMENDATION 15

- 4.142 **The Committee recommends that the Electoral Commission be required to publish details of donations to parties and candidates as soon as practicable after they are disclosed to the Commission.**

RECOMMENDATION 16

- 4.143 **The Committee recommends that the ACT Government increase the financial resources available to the Electoral Commission to allow it to adequately perform the audit and compliance functions defined under the *Electoral Act 1992*, and in recognition of the increased responsibilities created by the recommendations of this report.**

3. Direct and indirect public funding of elections

Present arrangements

- 4.144 As detailed above, public funding of election expenses, subject to certain criteria, in combination with a disclosure regime, currently forms the basis of the contemporary regulatory regime on election finance in the ACT.
- 4.145 The ACT Electoral Commission, in its submission to the inquiry, defined ‘direct’ public funding schemes as those—similar to that currently in force in the ACT—where election expenses are, to a degree, funded prospectively out of the public purse. ‘Indirect funding’ was seen as comprising ‘in-kind funding such as the provision of free broadcasting time, parliamentary entitlements of sitting MLAs, and government advertising’.¹³⁸
- 4.146 The Electoral Commission provided an account of current arrangements, including the threshold at which parties and candidates become eligible for public funding (4% of ‘eligible’ or first-preference votes) and formulae by which to calculate payments to parties and candidates which have incurred election expenditure.¹³⁹
- 4.147 As to the amount of public funding given to parties or candidates that meet this criterion, the Commission advised the Committee that this:
- is based on the number of eligible formal first preference votes obtained, multiplied by the rate of election funding applicable for that election. The rate differs from one election to another as it is adjusted by the Consumer Price Index.¹⁴⁰
- 4.148 In the submission, the Commission noted that ‘for the six-month period ending 30 June 2010’, the rate was ‘153.551 cents per eligible vote’, while for the ‘most recent election, in October 2008, the rate was 147.722 cents per vote’.¹⁴¹ The rate in the ACT rate for the period ending 30 June 2011 was

¹³⁸ ACT Electoral Commission, Submission No.2, p.21.

¹³⁹ ACT Electoral Commission, Submission No.2, p.10.

¹⁴⁰ ACT Electoral Commission, Submission No.2, pp.10-11.

¹⁴¹ ACT Electoral Commission, Submission No.2, pp.10-11.

157.832 cents per eligible vote, and the current Federal rate is 238.880 per eligible vote.¹⁴²

Direct entitlement or reimbursement

4.149 In its submission the Commission also addressed the *means* of providing public money to those who incur election expenditure. It noted that a 'direct-entitlement' scheme was currently in place in the ACT and distinguished this from 'reimbursement' schemes used in some other jurisdictions, 'where payments are only made up to the set entitlement to reimburse specified electoral expenditure'. This had previously operated in the federal jurisdiction.¹⁴³

4.150 Regarding the history of this arrangement, the Commission advised the Committee that the ACT's direct entitlement scheme was 'adopted ... in the light of the Commonwealth experience with an earlier reimbursement scheme'. While the intention of reimbursement schemes was to provide greater accountability, the Commission suggested that in practice they had created administrative difficulties:

Under a reimbursement scheme, considerable effort must be expended to prove expenditure up to the level of entitlement, particularly for smaller parties and independents with smaller budgets. The justification put forward for reimbursement schemes is that such schemes would prevent parties or candidates from making a profit from the public funding scheme. In practice, however, it is rare for parties and candidates to achieve the significant milestone of 4% of the vote without having expended substantial amounts of money.¹⁴⁴

¹⁴² ACT Electoral Commission, <<http://www.elections.act.gov.au/page/view/451/title/election-funding>>, viewed 21 September 2011, and Australian Electoral Commission, <http://www.aec.gov.au/Parties_and_Representatives/public_funding/Current_Funding_Rate.htm>, viewed 21 September 2011.

¹⁴³ ACT Electoral Commission, Submission No.2, p.22. Reimbursement schemes still operate in Queensland, New South Wales and Western Australia.

¹⁴⁴ ACT Electoral Commission, Submission No.2, p.22.

4.151 The Commission also advised the Committee ‘that all the 2008 election ACT parties and candidates that received public funding reported spending more on their campaigns than the public funding they received’. Seen in this light, the Commission considered that ‘the large additional burden that would be imposed on parties, candidates and Elections ACT by a reimbursement scheme would not be warranted’.¹⁴⁵

Rationales for public funding

4.152 The ACT Electoral Commission advised the Committee that in its view the present funding and disclosure scheme facilitated ‘the conduct of free and fair elections’ and maintained ‘voters’ confidence in our democracy’ by:

- Enabling parties and candidates to present their policies to the electorate through the provision of public funding; and
- Preventing corruption and undue influence by reducing parties’ reliance on private funding through the provision of public funding.¹⁴⁶

4.153 The Commission also noted that many other ‘jurisdictions, national and sub-national, provide public funding to political parties and candidates in order to reduce their reliance on funding from donors and to provide for a more level political playing field’.¹⁴⁷

Future directions

4.154 Other submitters to the inquiry also spoke in favour of public funding for electoral expenses. ACT Labor advised the Committee that ‘ultimately’ there was ‘no substitute for public funding as the best way to ensure a level political campaigning playing field’, and noted that it had been introduced by a Labor government in the federal jurisdiction as ‘an essential platform for political participation and equality in our electoral system’.¹⁴⁸

¹⁴⁵ ACT Electoral Commission, Submission No.2, p.22.

¹⁴⁶ ACT Electoral Commission, Submission No.2, p.3.

¹⁴⁷ ACT Electoral Commission, Submission No.2, p.5.

¹⁴⁸ ACT Labor, Submission No.8, p.3.

- 4.155 The ACT Greens also proposed that public funding should remain an integral part of arrangements in the ACT, and that it should continue to be channelled through a direct entitlement scheme. The ACT Greens proposed that the ‘pro rata public funding rate should be increased to the same amount that is paid under the Commonwealth scheme and tied to that rate’.¹⁴⁹
- 4.156 The ACT Government, however, suggested that there was ‘no demonstrated need to transfer funding to this area at this difficult economic time’, and that: ‘a fiscally prudent government in the current financial climate would not draw on consolidated revenue except to address matters of demonstrated and pressing need’.¹⁵⁰ In view of this, there should continue to be a ‘capacity for private entities to make political donations’.¹⁵¹

Public funding, donation and expenditure caps

- 4.157 Some contributors to the inquiry identified a link between donation and expenditure caps. These contributors also indicated the need for careful consideration of the degree to which public funding, alone, was able to achieve its stated objective of providing a fairer, more level field for electoral competition.
- 4.158 The ACT Electoral Commission raised its concern on this matter, pointing out that ‘the aggregate level of public funding provided to political parties and candidates (based on a payment per vote) has lagged well behind aggregate actual declared expenditure on election campaigning’ and that in general ‘expenditure by the major parties has grown much more rapidly than public funding’.¹⁵²
- 4.159 In view of this, the Commissioner considered that there were important questions to be asked, which are quoted:
- Given that election expenditure has greatly outstripped public funding, particularly for the major parties, and given the absence of any cap on

¹⁴⁹ ACT Greens, Submission No.7, p.4.

¹⁵⁰ ACT Government, Submission No.9, p.12.

¹⁵¹ ACT Government, Submission No.9, pp.12-13.

¹⁵² ACT Electoral Commission, Submission No.2, p.4.

election expenditure, is public funding effective in reducing the dependence of the parties most likely to form government on political donations?

- Alternatively should public funding be increased, and would this have the effect of reducing dependence on donations or lead to an increase in overall election expenditure?
- Is the importance of public funding to some minor parties and independent candidates of value in broadening the range of participation in the electoral process?¹⁵³

4.160 These matters were also addressed by the Democratic Audit of Australia. It advised the Committee that ‘the combination of public funding with unlimited private funding’ did not create a level field for electoral competition. Rather, it created ‘an imbalance in electoral competition’,¹⁵⁴ because:

Unlike public funding, private funding is not necessarily proportionate to the level of public support that parties receive. This is particularly the case where incumbent parliamentarians and governments can utilise their positions to raise funds.¹⁵⁵

4.161 The Democratic Audit, in response to this, recommended that restrictions be put in place ‘on the size and source of private donations’. This would ‘necessitate a larger contribution from the public purse’. However, this ‘should not be calculated to replace existing levels of campaign expenditure’ because expenditure had ‘grown exponentially due to unrestricted private donating’, and the ‘absence of caps on campaign expenditure or limits on the purchase of electronic advertising’.¹⁵⁶

4.162 As a result, the Democratic Audit advised the Committee, it supported ‘a moderate increase to public funding together with restrictions and limits on private funding’.¹⁵⁷

¹⁵³ Verbatim quote from ACT Electoral Commission, Submission No.2, p.4.

¹⁵⁴ Democratic Audit of Australia, Submission No.3, p.5.

¹⁵⁵ Democratic Audit of Australia, Submission No.3, p.5.

¹⁵⁶ Democratic Audit of Australia, Submission No.3, p.5.

¹⁵⁷ Democratic Audit of Australia, Submission No.3, p.6.

4.163 Other contributors identified a link between public funding and the need to ensure that new forms of campaign finance regulation were constitutionally sustainable. In the report prepared for the New South Wales Government Dr Twomey, who as noted gave evidence to the Committee,¹⁵⁸ found that increased public funding was an important factor in ensuring that the reforms to arrangements for campaign finance were a proportionate response, consistent with constitutional limitations on legislative power.

4.164 Dr Twomey suggested that:

Public funding itself does not burden freedom of political communication, but rather enhances opportunities for political communication. However, if it forms part of a scheme which involves limits on political donations or expenditure and therefore potentially burdens political communication, the whole scheme will need to be reasonably appropriate and adapted to serve a legitimate end, as required by the Lange test. Accordingly, great care would have to be taken with setting thresholds for receiving public funding and with setting the level of funding in a manner that does not unduly favour incumbents or discriminate against minor parties or new parties.¹⁵⁹

4.165 These matters are considered in *Committee comment* below.

Acts in other jurisdictions

New South Wales

4.166 The *Election Funding, Expenditure and Disclosures Act 1981* (NSW) provides for public funding to support electoral expenditure by political parties and candidates (in Part 5, Division 2), and to support Administrative and Policy Development functions of political parties (in Part 6A).

¹⁵⁸ Dr Anne Twomey, *Transcript of Evidence*, 3 March 2010.

¹⁵⁹ Dr Anne Twomey, *The reform of political donations, expenditure and funding*, NSW Department of Premier and Cabinet, November 2008, p.2, <http://www.dpc.nsw.gov.au/data/assets/pdf_file/0015/33027/Twomey_Report.pdf>, viewed 15 September 2011.

- 4.167 The Act creates an *Election Campaigns Fund* (s 56), kept by the Election Funding Authority of New South Wales, in s 5 of the Act. Entities eligible for public funds are paid out of the Fund (s 57).
- 4.168 The Act provides that *registered political parties* are eligible to receive public funding for electoral expenditure if they attract 4% or more of first-preference votes in either an Assembly general election or a periodic Council election (s 57(3)). Political parties are registered by the NSW Electoral Commission under the *Parliamentary Electorates and Elections Act 1912* (NSW) Part 4A, subject to requirements that they have a certain number of members (750) and a party platform, however expressed.¹⁶⁰
- 4.169 Parties are reimbursed for electoral expenditures, expressed as percentages of the *applicable expenditure cap*. For the Legislative Assembly, the Act provides that eligible Legislative Assembly parties are to be reimbursed for:
- 100% of so much of the actual expenditure of the party as is within 0–10% of the applicable expenditure cap, plus
 - 75% of so much of the actual expenditure of the party as is within the next 10–90% of the applicable expenditure cap, plus
 - 50% of so much of the actual expenditure of the party as is within the last 90–100% of the applicable expenditure cap (Table, s 58).
- 4.170 Reimbursement of electoral expenditure in the Legislative Council is provided for on a similar basis, with a lower rate of reimbursement for the upper component of expenditure under the cap.¹⁶¹ In this way the Act ties public

¹⁶⁰ The *Parliamentary Electorates and Elections Act 1912* requires that a political party wishing to register must, among other things, be able to demonstrate to the Electoral Commission that it has more than 750 members for which it can provide names and addresses, and who can provide declarations of membership (s 66D (2)) and that the party 'is established on the basis of a written constitution (however expressed) that sets out the platform or objectives of the party' (s 66A (1)(b)). The Act also provides timelines and an objections procedure for the registration of new political parties (s 66DA) and that the 'entitlements resulting from party registration' are 'not available until (the) first anniversary of registration' (s 66FA).

¹⁶¹ Eligible Legislative Council parties are reimbursed on the same basis, except that the 75% reimbursement applies to expenditure between one third and two thirds of the applicable expenditure cap (rather than 10-90% of the cap, for Assembly parties), and the 50% reimbursement applies to 'the last two thirds to 100% of the applicable expenditure cap' rather than 'the last 90-100%' as for eligible Assembly parties (Table, s 58).

funding and reimbursement for electoral expenditure to caps for electoral expenditure.

- 4.171 Similar provisions apply for candidates, with different arrangements for Assembly party and independent candidates and for Council candidates, with 100% reimbursement of the first component of electoral expenditure (the first 10% in the case of eligible Assembly party candidates), and progressively decreasing rates of reimbursement for the remainder of the 'applicable expenditure cap' (Table, s 60). Different variations of this scheme apply for an eligible 'Assembly independent candidate' and an eligible 'Council candidate' (Table, s 60).
- 4.172 In addition to providing for reimbursement of a component of electoral expenses, the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) provides funding to political parties and independent members in support of administrative expenses, to be paid out of an *Administration Fund* (Part 6A, 'Administrative and policy development funding'). There are similar provisions for independent members (s 97F).
- 4.173 Funding is calculated on the basis of 'the amount of actual administrative expenditure incurred by or on behalf of the party during the calendar year to which the payment relates, but not exceeding: (a) \$80,000 for each elected member endorsed by the party, or (b) \$2,000,000, whichever is the lesser' (s 97E).
- 4.174 The Act also provides funding for policy development funding 'for parties not entitled to administrative funding' (Part 6A, Division 3). This is paid from a *Policy Development Fund* created by the Act (s 97H), and payments are calculated on the basis of 'the amount of actual policy development expenditure incurred by or on behalf of the party during the calendar year to which the payment relates', to a maximum calculated on the basis of an 'amount of 25 cents for each first preference vote received by any candidate at the previous State election who was endorsed by the party' (s 97I).

Queensland

- 4.175 The *Electoral Act 1992* (Qld) also provides a sliding scale of reimbursement of candidates for election expenditure, expressed as proportion of expenditure to be reimbursed within the cap on electoral expenditure. In brief, it provides for

100% reimbursement of the first 10% of a candidate's expenditure under the cap; 50% reimbursement of a candidate's expenditure which is between 10% and 90% of the expenditure cap; and 25% reimbursement of expenditure between 90% and 100% of the expenditure cap (s 224).

- 4.176 A registered candidate or political party may apply for an *advance payment* before an election (s 225) and must place a *claim* in order to receive their full entitlement of public funding after an election (s 226). The claim must furnish a statement of election expenditure incurred for the election (s 228). Payments have to be made either into a candidate's *State campaign account* or, under the direction of the candidate, into the State campaign account of a nominated political party (s 236).
- 4.177 In addition to public funding for electoral expenditure, the Act provides for *administrative funding* for registered political parties, initially set at \$40,000 per electoral district and then indexed (s 241), and for independent members, initially set at \$20,000 per electoral district and then indexed (s 242).

Republic of Ireland

- 4.178 Under the Republic of Ireland's *Electoral Act 1997* parties must meet a number of criteria to be reimbursed for electoral expenditure:
- First, the party must be registered in the Register of Political Parties, and must have attracted at least 2% of first preference votes in the constituency concerned (s 16).
 - Second, electoral expenditure must be incurred by certain persons specified under the Act. This is done by means of provisions which make contracts with political parties over £500 in value only enforceable if they are 'incurred by or on behalf of' the party's *national agent* (s 30(1)).¹⁶² Similarly, in relation to candidates, contracts over £500 are enforceable if made with the *electoral agent* nominated by the candidate (s 30(1)(b)).¹⁶³

¹⁶² Electoral expenditure may also be incurred by other persons who inform the Public Offices Commission of specified details of the expenditure within fourteen days (s 31 (7)).

¹⁶³ Candidates may be national agents and electoral agents (s 30 (1)) and (s 30 (1) (b)).

- Third, reimbursement for electoral expenditure is restricted to candidates who are successfully elected as members of parliament, and those who receive at least ‘one quarter of the quota’ for a seat (s 21(1)).

4.179 The Act provides mechanisms for calculating and providing public funding. In each constituency, payments are made to candidates on the basis that:

The amount payable to qualified parties under subsection (2) shall be allocated to each qualified party in the same proportion as the total number of first preference votes obtained by every candidate of each such qualified party at the preceding general election bears to the total number of first preference votes obtained by candidates of all qualified parties at that election (s 17(3)).

4.180 Payments to parties cannot exceed £1M in-aggregate within ‘any twelve month period’ (s 17(2)(a)). Candidates are reimbursed for ‘the actual expenses incurred by the candidate or five thousand pounds, whichever is the less’ (s 21(b)(i)).

4.181 These payments made out of a *Central Fund* created for the purpose (s 17(1)). The payments paid to eligible parties and candidates are indexed, by being linked to the Consumer Price Index (s 3(1) & (2)) and to rates of remuneration in the Civil Service (s 17(2)(b)). The Act provides that these changes are made by order of the Minister for Finance through disallowable instruments (s 3(1) & (3)).

Tasmania

4.182 The *Electoral Act 2004* (Tas) does not provide for public funding for electoral expenditure.

Committee comment

Public Funding

4.183 Contributions to the inquiry supported the continuation of public funding for political parties and candidates. The provision of further public funding is an important part of new regulatory schemes for campaign finance in New South Wales and Queensland.

- 4.184 The Committee notes Dr Twomey's remarks on the link between adequate public funding and framing constitutionally-sustainable legislation,¹⁶⁴ and considers it important that these matters are addressed in framing a new regulatory scheme for campaign finance in the ACT.
- 4.185 In the Committee's view, the current public funding regime in the ACT should be adjusted to compensate for the restrictions on revenue recommended in the report, and to improve equality of access to the electoral system. The 4% threshold for public funding should remain, and the amount paid per-eligible-vote should be increased and tied to the amount paid per-eligible-vote in the Senate.
- 4.186 The Committee considers that the rate should be expressed as a percentage of the amount for the Senate. It should initially be 75% of that amount, increasing to 85% in 2016. This would bring public funding per vote in the ACT into parity with that of Tasmania, a comparable jurisdiction which employs a Hare-Clark electoral system, as does the ACT.

RECOMMENDATION 17

- 4.187 **The Committee recommends that the level of public funding provided to eligible candidates and parties per eligible vote be increased. The rate of funding should be pegged to the rate provided with respect to the per-eligible-vote amount for the Australian Senate, and should initially be 75% of that amount, increasing to 85% by 2016.**

Administrative Funding

- 4.188 The Committee considers it important, as indicated by Dr Twomey, that modified regulatory frameworks for campaign finance ensure equal access to the electoral system, including for newer and emerging parties and groups.
- 4.189 Initially, the Committee considered two ways of providing support for emerging political parties:
- Electoral Participation Grants, which could be paid in an election year to a registered political party that does not have any Members in the Legislative

¹⁶⁴ Dr Anne Twomey, *Transcript of Evidence*, 3 March 2010.

Assembly and did not receive any public funding at the previous election, but has at least 200 members, to assist the party to present its ideas to the electorate.

- Party Development Grants, which could be paid to a political party that contested the previous election and received at least 10% of the total vote in any electorate, to assist in the further development of the party.

4.190 The Committee considers that there is some merit in these ideas, however it takes the view that the practicalities of implementation require further investigation. To this end, it proposes that the Electoral Commission conduct research on these options as part of wider discourse on public funding for political participation in the ACT.

RECOMMENDATION 18

4.191 **The Committee recommends that the ACT Electoral Commission conduct research on options to create Electoral Participation Grants and Party Development Grants.**

4.192 More immediately, the Committee considers that Administrative Funding should be provided to political parties, similar to that set out in Part 6A of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW). This is considered in Part Three of this Chapter, 'Direct and indirect public funding of elections', in the sub-section 'Acts in other jurisdictions', as are comparable arrangements under the *Electoral Act 1992* (Qld).

RECOMMENDATION 19

4.193 **The Committee recommends that Administrative Funding be provided to Members elected to the Legislative Assembly at a general election, based on the *Election Funding, Expenditure and Disclosures Act 1981* (NSW), Part 6A. All Administrative Funding should be subject to acquittal and audit.**

4. Donations by particular kinds of donor

- 4.194 The fourth Term of Reference for the inquiry asks the Committee to consider the regulation of ‘donations by private individuals, organisations and other contributors; and corporations [and] unions’.
- 4.195 The Democratic Audit of Australia advised the Committee that, increasingly, voters believed that big businesses ‘have too much power’, and that ‘government is run for the benefit of a few big interests, and not for all interests’. In view of this it was important to reduce the negative effects of large political donations on ‘the health of Australian democracy’.¹⁶⁵
- 4.196 With this in mind, the Democratic Audit argued that Assembly elections are held to choose representatives of ACT citizens. As a result, ACT citizens alone (not corporations or companies) ‘should be entitled to participate in election campaigns through making donations to parties and candidates’.¹⁶⁶ It also proposed that ‘smurfing’ (that is, ‘the splitting of large donations among directors, employees, members, etc’) should attract ‘appropriate penalties’.¹⁶⁷
- 4.197 The submission by the ACT Greens took a similar view, recommending to the Committee a ‘model where all corporate and union donations be banned from the electoral process’, along similar lines to arrangements adopted in Canada for federal Parliament and two of its state parliaments.¹⁶⁸ Moreover, donations ‘from individuals to political parties, candidates and third parties should be restricted to those registered to vote in the ACT’.¹⁶⁹
- 4.198 In a further recommendation, the ACT Greens advised the Committee that ‘entities that have contracts with the ACT Government’ should be ‘prohibited from making donations to political parties, candidates or third parties’, thus forestalling conflicts of interest in the political process.¹⁷⁰

¹⁶⁵ Democratic Audit of Australia, Submission No.3, p.6.

¹⁶⁶ Democratic Audit of Australia, Submission No.3, p.6.

¹⁶⁷ Democratic Audit of Australia, Submission No.3, p.6.

¹⁶⁸ ACT Greens, Submission No.7, p.4.

¹⁶⁹ ACT Greens, Submission No.7, p.4.

¹⁷⁰ ACT Greens, Submission No.7, p.4.

4.199 The Canberra Liberals also spoke in favour of placing constraints on different kinds of donor. It recommended that there be ‘caps per financial year on donations from individuals and corporations’ and that the ‘caps may be set at different levels’. This, it was argued, would remove ‘the possibility of a perception of a conflict of interest ... as well as restoring the perception that “democracy is not for sale”’.¹⁷¹ Also, ‘Corporations and Unions should be subject to the same laws noted in our submission on the caps to donations and expenditure’, and that both of these should be ‘monitored to ensure they are not used as a mechanism to circumvent or frustrate the reforms currently being considered’.¹⁷²

Acts in other jurisdictions

4.200 The *Election Funding, Expenditure and Disclosures Act 1981* limits legitimate political donations (to parties, Members, groups, candidates or third-party campaigners) to: ‘an individual who is enrolled on the roll of electors for State elections, the roll of electors for federal elections, or the roll of electors for a local government election, or ... an entity that has a relevant business number’ (s 96D).¹⁷³

4.201 Division 4A, ‘Prohibition of property developer donations’ makes it an offence to receive donations from a prohibited donor defined as ‘a property developer’; a ‘tobacco industry business entity’; or a ‘liquor or gambling industry business entity’ (s 96GAA). These donations are made unlawful in s 96GA of the Act, and the individual categories of prohibited donor are defined in s 96GB.

4.202 The *Electoral Act 1992 (Qld)* does not make discriminations between kinds of donors in this way. The Republic of Ireland’s *Electoral Act 1997* provides for specific mechanisms by which companies, trade unions and similar entities—including building societies—should report all donations they make

¹⁷¹ Canberra Liberals, Submission No.10, p.4.

¹⁷² Canberra Liberals, Submission No.10, p.9.

¹⁷³ There are also prohibitions on ‘certain indirect campaign contributions’ (s 96E); on ‘political donations by parties etc to independent candidates’ (s 96EA); on ‘receiving gifts of unknown source’ (s 96F); and on ‘receiving loans unless details recorded’ (s 96G).

exceeding £4,000 in the year to which the report relates, but makes no discrimination regarding the legality of these donations as distinct from those of other donors (s 26). The *Electoral Act 2004* (Tas) makes no specific provisions for different kinds of donors and makes no reference to companies, corporations or trade unions.

4.203 The Committee notes the ban on donations from collective entities in Canada where, under the *Canada Elections Act*:

No person or entity other than an individual who is a citizen or permanent resident as defined in subsection 2(1) of the Immigration and Refugee Protection Act shall make a contribution to a registered party, a registered association, a candidate, a leadership contestant or a nomination contestant.¹⁷⁴

Committee comment

4.204 The Committee wishes to note the absence of any ban on political donations from non-natural persons in other Australian jurisdictions.¹⁷⁵ It notes the specific arrangements that have been made to prevent donations from particular types of donor in other jurisdictions.

4.205 However, as noted elsewhere, the Committee takes the view that it is important that any reform of the *Electoral Act 1992*, with regard to campaign finance, adopts an all-embracing posture to discourage perverse incentives

¹⁷⁴ *Canada Elections Act*, s 404(1). Regarding this, Elections Canada states that as of January 1, 2007, 'only citizens and permanent residents of Canada can make political donations to registered parties, registered electoral district associations, candidates, nomination contestants and leadership contestants. Corporations, trade unions and unincorporated associations may no longer make political donations to candidates, registered electoral district associations or nomination contestants of registered parties'. Elections Canada, 'New Rules for Federal Political Donations', <<http://www.elections.ca/content.aspx?section=vot&dir=bkg&document=ec90557&lang=e>>.

¹⁷⁵ However, proposals have been put forward in the Parliament of New South Wales to ban donations from non-natural persons. The Bill containing these measures, the Election Funding, Expenditure and Disclosures Amendment Bill 2011, was introduced into the Legislative Assembly of New South Wales by Mr O'Farrell on 12 September 2011. See <http://www.parliament.nsw.gov.au/prod/PARLMENT/hansArt.nsf/V3Key/LA20110912028?open&efNavID=HA8_1> for Mr O'Farrell's speech.

For the Bill, see

<[http://www.parliament.nsw.gov.au/prod/parliament/nswbills.nsf/0/ef0fa9bfab5141eeca2578b80024329d/\\$FILE/b2011-013-d11-House.pdf](http://www.parliament.nsw.gov.au/prod/parliament/nswbills.nsf/0/ef0fa9bfab5141eeca2578b80024329d/$FILE/b2011-013-d11-House.pdf)>

and unintended consequences. If one component of campaign finance is left un-managed while others are more highly regulated, campaign activity will simply move to less regulated parts of the system. As a result, the Committee believes it important to forestall attempts to evade the intention of an amended Act by splitting and re-routing political donations.

- 4.206 The following recommendation is framed to preserve the intention of the first recommendation of the report.

RECOMMENDATION 20

- 4.207 **The Committee recommends that an offence be created so that efforts to donate to other individuals or organisations on the understanding that they will donate to political parties and candidates, so as to evade caps on donations to parties or candidates, shall be unlawful.**

Regulation of personal candidate funding

- 4.208 The second part of this Term of Reference asks the Committee to consider personal candidate funding as part of the broader picture on the regulation of donations. ‘Personal candidate funding’ occurs when a candidate provides funding for his or her campaign out of personal resources.
- 4.209 Of the submissions made to the inquiry, only that lodged by the Canberra Liberals specifically addressed this term, advising the Committee it supported ‘the introduction to limits of personal candidate funding, for the same reasons outlined for party funding’ and that limits to party funding ‘would be nugatory if it were not part of the matrix’.¹⁷⁶

Committee comment

- 4.210 In relation to this Term of Reference, the Committee notes that present arrangements under the Act are that personal candidate funding does not trigger requirements for the disclosure of donations. It considers that, in view of difficulties in drafting provisions to control personal candidate funding,

¹⁷⁶ Canberra Liberals, Submission No.10, p.9.

without unduly constraining freedoms of political communication, that this should remain the case.

- 4.211 The Committee notes however that under the framework proposed in this report, all candidates are subject to applicable expenditure caps, including those funding their campaign through personal resources.

5. Enforcement of funding and financial disclosure law

Enforcement

- 4.212 The Committee notes that in each of the comparable jurisdictions referenced in this report, enforcement of the applicable legislation is conducted by an Electoral Commission or similar body, either created under electoral legislation or, in the case of the Republic of Ireland, pre-existing but charged with responsibilities under the relevant provisions of the *Electoral Act 1997*.
- 4.213 The Committee notes the enforcement provisions provided by these Acts, referenced in this report.
- 4.214 For the *Electoral Act 1992 (ACT)* these include, as noted above, penalties for not providing a return, or providing an incomplete or false return, to the Commissioner (s 236); investigatory powers for the Electoral Commissioner, by means of ‘investigation notices’ (s 237); offences which arise from failure to comply with investigation notices defined in s 237B, and the capacity for the Electoral Commissioner to apply to a magistrate for search warrants under s 238.
- 4.215 For other Acts considered here these include penalties for:
- exceeding expenditure caps, in the *Election Funding, Expenditure and Disclosures Act 1981 (NSW)*, s 96HA and the *Electoral Act 1992 (Qld)*, (s 281);
 - late lodgement of declarations for disclosure under the *Election Funding, Expenditure and Disclosures Act 1981 (NSW)*, s 96H and the *Electoral Act 1992 (Qld)*, s 307(1).

Resourcing

- 4.216 The *Electoral Act 1992* identifies the ACT Electoral Commission as the body responsible for auditing and compliance, among other things, for the regulation of campaign finance in the ACT. As a result, a number of submitters to the inquiry addressed the implications of legislative reform on the Commission, in particular the resources with which the Commission discharges its obligations under the *Electoral Act*.
- 4.217 The ACT Government, in its submission to the inquiry, stated that the funding of ‘ACT Government agencies to undertake statutory functions’ was ‘an important matter for the Government to consider’. This, it said, needed to be seen in a perspective of ‘having regard to the need to address wider whole-of-government issues, within a Budget context’.¹⁷⁷
- 4.218 It advised the Committee that in its opinion the ‘present level of funding’ for the Electoral Commission was ‘sufficient to provide for desk audits of returns and a formal book audit once in the life time of each parliament’.¹⁷⁸
- 4.219 In addition, the ACT Government emphasised the high cost, for parties or candidates, of ‘the negative ramifications of the discovery of fraudulent or corrupt behaviour through such processes’ if these came to light through the Commission’s audit process.¹⁷⁹
- 4.220 In its submission to the inquiry, the ACT Electoral Commission offered a different perspective, advising the Committee that its ‘current funding levels are barely adequate to enable it to scrutinize existing disclosure laws’.¹⁸⁰ As a result:

Any tightening in these laws to provide for a greater level of disclosure and/or bans or limitations on expenditure would have to be accompanied

¹⁷⁷ ACT Government, Submission No.9, p.14.

¹⁷⁸ ACT Government, Submission No.9, p.14.

¹⁷⁹ ACT Government, Submission No.9, p.14. The submission continued: ‘Depending on the nature of a breach, implications might include the disqualification of a member from the Legislative Assembly (section 14 of the Australian Capital Territory (Self-Government) Act 1988) or prosecution for breach of the criminal law. Not only would any member found transgressing the existing legislative scheme face serious consequences, but the member’s party would attract the odium of association with corrupt practices’.

¹⁸⁰ ACT Electoral Commission, Submission No.2, p.25.

by an increase in resources if any new requirements are to be effectively implemented.¹⁸¹

4.221 The Commission also indicated that its present level of resources might not allow it to provide sufficiently comprehensive investigative capabilities to discover deliberate attempts to evade regulation:

While past audits of compliance with the ACT's disclosure laws have not uncovered any breaches that have warranted prosecution action, this cannot necessarily be taken as an indication that the laws have not been deliberately broken, or that they will not be so broken in future. Given that the resources of the Commission only permit desk audits of returns as they are submitted and formal book audits once in the life of each parliament, there is no guarantee that such audits would uncover deliberate avoidance of disclosure.¹⁸²

4.222 The ACT Greens, in its submission to the inquiry, advised the Committee that, in its view:

- The ACT Electoral Commission must be adequately resourced to investigate electoral activity.
- All ACT registered political parties should be audited annually to ensure compliance with the disclosure rules.
- Additional funding should be provided to the ACT Electoral Commission in order to implement an online disclosure system.¹⁸³

4.223 The Democratic Audit of Australia did not address the issue of the quantum of resources for the Commission, but noted the efficiencies possible from changes to the regulatory regime. It suggested that 'if a greater emphasis were placed on parties needing to fully disclose their sources of their

¹⁸¹ ACT Electoral Commission, Submission No.2, p.25.

¹⁸² ACT Electoral Commission, Submission No.2, p.25.

¹⁸³ In the submission the ACT Greens also recommended that 'Small ACT registered political parties be supported by ACTEC in their utilisation of online reporting requirements'. ACT Greens, Submission No.7, p.4.

donation income, this would alleviate the need to audit and investigate donor returns'.¹⁸⁴

Committee comment

- 4.224 The Committee notes the diversity of opinions expressed on the level of resources necessary for the ACT Electoral Commission to adequately discharge its obligations under the *Electoral Act*, with respect to campaign finance.
- 4.225 While the Committee wishes to express its approval of the Government's budgetary restraint, it appears from comments provided by the Electoral Commission that there are insufficient resources for it to do the tasks defined for it under the Act. If this were proven, resources would certainly be insufficient if there were any increase of the regulatory burden on the Commission.
- 4.226 Judging from the wider pool of evidence provided to the inquiry, the Committee believes that an increase of regulatory powers is, in fact, warranted. It is true that more comprehensive, simplified reporting obligations for parties and candidates will generate efficiencies, providing a more complete picture that obviates donor or broadcaster returns and the cross-checking currently needed to provide a more considered audit of donations.
- 4.227 In the Committee's view, however, there should be sufficient capacity, in a statutory authority with clear, stated obligations under the Act, to perform consistent yearly audits. It should also be in a position to administer the online reporting system through which, it is recommended in this report, parties and candidates would provide ongoing updates of donations.
- 4.228 The Committee wishes to note the relevance of Recommendations 14-19 for this Term of Reference. In particular it notes Recommendation 17, which provides for penalty notices for failure to comply with recommended

¹⁸⁴ Democratic Audit of Australia, Submission No.3, p.7. The Democratic Audit also noted that if its recommendation 'that donations should only be received from individual citizens, and that if a donation cap of \$1,000' were introduced, 'this would make for a far easier and clearer audit trail' with resultant efficiencies for the Commission.

reporting obligations by parties and candidates, and Recommendation 18, which provides for an increase in resources for the Electoral Commission, in view of increased responsibilities.

6. Relationship between ACT and Commonwealth electoral law

- 4.229 Submitters to the inquiry spoke strongly in favour of the ACT's adopting a regulatory regime on campaign finance that achieved a high degree of consistency with that of the Commonwealth and other jurisdictions.
- 4.230 At the time submissions were being received by the Committee, the Federal Government was pursuing a process toward electoral reform which included campaign finance reform. In connection with this the Government produced two Green Papers, one of which specifically addressed campaign finance reform.¹⁸⁵ It also introduced two Bills amending the *Electoral Act* which were not passed in the 42nd Parliament. One of these, the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009, specifically addressed campaign finance reform.¹⁸⁶
- 4.231 The ACT Government, in its submission, advised the Committee that it was in favour of consistency. From a practical point of view, compliance would be more readily attained if there were consistency, as individuals and organisations in the ACT could readily find themselves contributing to candidates and parties in both the ACT and the federal sphere. Moreover, if there were consistency, the systems maintained for the ACT, by entities with

¹⁸⁵ *Electoral Reform Green Paper: Donations, funding and expenditure*, 2008.

¹⁸⁶ Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009, <http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r4073_first/toc_pdf/Commonwealth%20Electoral%20Amendment%20%28Political%20Donations%20and%20Other%20Measures%29%20Bill%202009_09032b01.pdf;fileType%3Dapplication%2Fpdf>, viewed 9/06/2011. The Bill was introduced in the House of Representatives on 20/10/10 and had its second and third readings in the House on 17/11/10. It was introduced in the Senate on 17/11/10 and had its second reading on the same day, without further action. See Bills Homepage, <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbilhome%2Fr4477%22>>, viewed 23/06/2011.

reporting obligations, could readily be applied to those obligations incurred by virtue of their contributions to federal candidates and parties.¹⁸⁷

- 4.232 In short, the Government submitted that consistency between the ACT and the Commonwealth would ‘minimise confusion about the statutory obligations with which organisations must comply’; improve ‘ease of reporting’, minimise errors and reduce costs of compliance ‘under different legislative regimes’.¹⁸⁸
- 4.233 The Government also advised the Committee that consistency was significant in terms of privacy protections for donors, in that any new arrangements would, if applied in the ACT, need to comply with both ACT's *Human Rights Act 2004* and the Commonwealth's *Privacy Act 1988*.¹⁸⁹
- 4.234 The ACT Electoral Commission also placed strong emphasis on the desirability of consistency between the Act and other jurisdictions, particularly the Commonwealth. In relation to this, the Commission noted that the reform process, comprising Green Papers and Bills seeking to amend the Commonwealth *Electoral Act 1918*, had the “‘harmonisation” of Commonwealth, State and Territory electoral laws, particularly disclosure laws’ as one of its chief objectives.¹⁹⁰
- 4.235 The Commission’s submission to the inquiry summarised aspects of the approach taken in the relevant Green Paper and the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009. In doing so, it noted the principles proposed in the Green Paper to ‘provide suitable criteria for evaluation of existing electoral regulation, and evaluation of options for changing the system’. These included principles of: integrity; fairness; transparency; privacy; viability; participation; freedom of political association and freedom of expression; accountability and enforceability; fiscal responsibility; and efficiency and effectiveness.¹⁹¹

¹⁸⁷ ACT Government, Submission No.9, p.9.

¹⁸⁸ ACT Government, Submission No.9, p.14.

¹⁸⁹ ACT Government, Submission No.9, p.14.

¹⁹⁰ ACT Electoral Commission, Submission No.2, p.3.

¹⁹¹ *Electoral Reform Green Paper: Donations, funding and expenditure*, 2008, p.17, quoted in ACT Electoral Commission, Submission No.2, p.7.

4.236 The Commission also advised the Committee of features of the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009, which was at that time before the Federal Parliament. The Commission quoted from the Bill's Explanatory Memorandum to show that these included amendments to:

- reduce the disclosure threshold from 'more than \$10,000' (indexed to the Consumer Price Index annually) to \$1,000 (non-indexed);
- require people who made gifts above the threshold to candidates and members of groups during the election disclosure period to furnish a return within 8 weeks after polling day;
- require people who made gifts, agents of registered political parties, the financial controllers of associated entities, or people who had incurred political expenditure to furnish a return within 8 weeks after 31 December and 30 June each year rather than following the end of each financial year;
- make unlawful the receipt of a gift of foreign property by political parties, candidates and members of a Senate group; and
- to prohibit the receipt of all anonymous gifts above \$50 by registered political parties, candidates and members of a Senate group. It will also be unlawful in some situations for people and candidates to incur political expenditure if an anonymous gift above \$50 enabled that political expenditure.¹⁹²

4.237 Considering the position mapped out in the Green Paper and amending Bill, the Commission advised the Committee that:

There is sound logic to the ACT remaining in step with the Commonwealth disclosure scheme, provided the Commonwealth scheme meets the objectives of a transparent disclosure scheme.¹⁹³

4.238 As a result, the Commission advised the Committee:

If a national scheme [were] adopted that [addressed] the identified objectives of a disclosure scheme, the Commission suggests that adopting

¹⁹² ACT Electoral Commission, Submission No.2, pp.14-15.

¹⁹³ ACT Electoral Commission, Submission No.2, p.26.

national disclosure standards would be the most appropriate option for the ACT Legislative Assembly to pursue.¹⁹⁴

4.239 Conversely, the Commission expressed concern at the consequences if, on the other hand, the ACT scheme were out of step with other jurisdictions:

If the principles on which disclosure is required by the ACT differ significantly from those adopted by the Commonwealth, and possibly other States and Territories, following the current national review, the considerations outlined in relation to increased costs and confusion about obligations arise.¹⁹⁵

4.240 The Commission particularly noted the consequences of disparities in the level of regulation between the ACT and other jurisdictions:

A major obstacle to any scheme in the ACT that is tighter than the national disclosure regime will be the impact of the different levels of government. It is difficult to envisage the ACT having the power to impose its own bans or limitations on political parties registered at the national level undertaking political activity in the ACT for Commonwealth purposes.¹⁹⁶

4.241 In any case:

As the ACT's major political parties are registered and active at both the ACT and the national level, as indicated above there are legal and practical difficulties in the ACT imposing more stringent disclosure requirements at the ACT level only.¹⁹⁷

4.242 As a result, and for this reason, it was seen by the Commission as 'highly desirable' that 'that the ACT should endeavour to adopt a disclosure regime that is consistent with a national scheme', and the Commission advised the Committee that:

It may be advisable for the ACT to wait for developments at the national level arising from the Commonwealth's Green Paper process before

¹⁹⁴ ACT Electoral Commission, Submission No.2, p.26.

¹⁹⁵ ACT Electoral Commission, Submission No.2, p.4.

¹⁹⁶ ACT Electoral Commission, Submission No.2, p.24.

¹⁹⁷ ACT Electoral Commission, Submission No.2, p.26.

acting to unilaterally introduce any bans or limitations on donations or expenditure, should that be desired by the Assembly.¹⁹⁸

4.243 The Commission also advised the Committee that 'it may be difficult for the ACT to impose bans or limitations on political participants active at the national level of politics', if 'such bans or limitations were not also applied at the national level'.¹⁹⁹

4.244 One submitter to the inquiry adopted a different position from the ACT Government and the ACT Electoral Commission. The Democratic Audit of Australia also advised the Committee of the importance of consistency across jurisdictions, but suggested that if this was not attainable, it should not prevent the ACT from pursuing reform:

Ideally, there should be the highest degree of uniformity of campaign finance regimes across federal, state and territory jurisdictions by way of mirror legislation. However, if such uniformity is not possible, this should not be used as an excuse not to implement much-needed reforms in this critically important electoral area. The ACT has led Australia in many electoral system initiatives in recent decades (for example, electronic voting), and it would be encouraging to see the Assembly adopt the same attitude in terms of campaign finance reform.²⁰⁰

Committee comment

4.245 In the Committee's view, the emphasis on consistency with other jurisdictions by the ACT Government and the ACT Electoral Commission was based on an expectation that the Commonwealth reform process would take place within the term of the inquiry. This has not proved to be the case, although the recent announcement of an inquiry by the Joint Committee on

¹⁹⁸ ACT Electoral Commission, Submission No.2, pp.24-25.

¹⁹⁹ ACT Electoral Commission, Submission No.2, p.4.

²⁰⁰ Democratic Audit of Australia, Submission No.3, p.7.

Electoral Matters, into *the funding of political parties and election campaigns* (referred 11 May 2011) shows that the process is still alive.²⁰¹

- 4.246 The Committee agrees with the representations made to it that consistency with other jurisdictions, particularly with the Commonwealth, is highly desirable for campaign finance regulation in the ACT. However it is persuaded by the views of the Democratic Audit of Australia that if consistency is not directly attainable at this time then the ACT should not shy away from legislative reform in this area.
- 4.247 As noted, while the implementation of the model outlined in this report would place the ACT at the leading edge of jurisdictions in Australia as regards campaign finance reform, it would hardly put it at the forefront of international jurisdictions—such as Canada, New Zealand, and the UK—which enjoy both a comparable political system and regulation of campaign finance that seems to address many of the concerns widely expressed in Australia.
- 4.248 Public funding and disclosure regimes, alone, can in the Committee’s view, be seen as part of an earlier attempt to control this area of activity and maximise the benefits of the democratic process. Now is the time to adopt an all-embracing regime that will allow legislative mechanisms to achieve more of the goals of that original attempt, and in doing so support public confidence and on-going engagement in the political process of the ACT.
- 4.249 In the absence of a final outcome from the Commonwealth reform process, the Committee believes that the best option through which to achieve consistency with Australian jurisdictions is to adopt a legislative model that mirrors as closely as possible the model shared by statute in NSW and Queensland.

²⁰¹ Standing Committee on Electoral Matters, ‘Resolution of Appointment - Inquiry into the funding of political parties and election campaigns’, <<http://www.aph.gov.au/house/committee/em/resolution-inquiryfunding.htm>> , viewed 17/05/2011.

Constitutional and other relevant matters

4.250 Constitutional matters have been considered above, in the second chapter of this report under the sub-headings ‘Constitutional constraints’, ‘Other constraints’ and in the subsequent ‘Committee comment’.

4.251 For ‘other relevant matters’, the Greens in their submission proposed that:

A mechanism should be created to ensure that all proposed changes to the electoral laws are subject to committee inquires [sic] to ensure adequate community consultation. The purpose of such a mechanism is to minimise the perceived bias inherent in elected Members determining the future requirements and constraints on election activity and to assess how effective amendments and changes to practice are in: (a) improving the integrity, accountably and fairness of the system; (b) strengthening public confidence in the system; and (c) facilitating their participation in it.²⁰²

4.252 The Greens also proposed that the Government should:

- Investigate a means to financially support emerging political movements/parties prior to an election taking into account other measures of public support, including opinion polling, the size of party membership, and the need to provide a fair opportunity for election candidates to convey their policies to the public; and
- Explore the possibility of linking public funding to social objectives as per models used in other countries As the report *Deepening Democracy* states, ‘this could support a refocusing on grass-roots democracy and deliberative democracy including community consultation and campaigns, policy development, and party building; countering the current tendency in Australia for political parties to spend the majority of their funds on election advertising in the election period’.²⁰³

²⁰² ACT Greens, Submission No.7, p.5.

²⁰³ ACT Greens, Submission No.7, p.5. Archon Fung and Eric Olin Wright (eds.), *Deepening Democracy: institutional innovations in empowered participatory governance*, Verso, London, 2003.

Committee comment

- 4.253 In relation to its first proposal, the Committee's view is that amendments to electoral law should be referred to committees for review when, as for any other part of law, the proposed changes are significant and have the capacity to attract sufficient public interest. A blanket requirement for committees to review all changes to the *Electoral Act 1992*, in addition to the consideration such amendments would receive in the Chamber, might result in an undue burden on parliamentary process.
- 4.254 In relation to the second and third proposals, the Committee's view is that while it sympathises with the sentiment of the proposals, it is less clear how they might be implemented in ways that would produce precise and reliable regulation and procedure.

5 COMMITTEE CONCLUSION

- 5.1 The Committee finds that it is possible to limit the ‘freedom of speech’ and ‘freedom of political expression’, under the Australian Constitution, so long as the limitations are, as stated in the Lange test, ‘reasonably and appropriately adapted to serving a legitimate end in a manner which is compatible with the system of representative and responsible government prescribed by the Commonwealth Constitution’.²⁰⁴
- 5.2 The Committee finds that this opens up avenues through which the ACT may legislate to cap or otherwise limit political donations and expenditure in order to ensure a level field for electoral competition. The passage of legislation in NSW and Queensland, to this end, supports this view.
- 5.3 In the Committee’s view, the passage of this new legislation in other states is a significant development. At the start of the present inquiry a number of statements were made that implied that it might not be possible to cap donations and election expenditure in Australia due to the High Court’s interpretation of the Constitution in certain key cases. It now appears less likely that that this would be considered any kind of insurmountable barrier.
- 5.4 In fact, both the NSW and Queensland legislation have specifically sought to anticipate and overcome possible problems in this area by ensuring that an increase in public resourcing of election expenditure, and of political parties and candidates in other respects, is sufficient to forestall arguments that freedom of speech is being inordinately curtailed by caps on donations and expenditure.
- 5.5 The Committee is also aware that the other chief objection to curbing donations and expenditure is that it might produce ‘perverse incentives’: that is, that introducing stronger regulation in one area might produce

²⁰⁴ Dr Anne Twomey, *The Reform of political donations, expenditure and funding*, NSW Department of Premier and Cabinet, November 2008, <http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0015/33027/Twomey_Report.pdf>, p.1, quoted in ACT Electoral Commission, Submission No.2, pp.23-24.

commensurate increases in activity in another. This was mentioned in relation to third-party activity. In the Committee's view, the best response to the risk that this would be the outcome of stronger regulation would be to adopt an all-embracing regulatory framework, which would not only prevent loopholes and perverse incentives, but also prevent public funding from simply assisting in the electioneering 'arms race' alluded to by some contributors to the inquiry.

- 5.6 It is clear to the Committee that this latter kind of development is corrosive for the public's trust in the democratic process, and that the higher election expenditure goes, the less political parties, or candidates, can realistically claim to be maintaining a true level of independence from their financial supporters.
- 5.7 For these reasons, the Committee has, in its recommendations, outlined a legislative framework that encompasses for all of the components of campaign finance. The Committee looks forward to joining NSW and Queensland in adopting a modern legislative regime on electoral finance, and expects that in time this style of legislation will come to be considered the conventional, most effective, approach across Australia.

Implementation

- 5.8 Integral to the new framework on campaign finance described in this report is a new online reporting and disclosure system. When implemented, this will be an Australian first which makes use of the advantages of contemporary technology to shorten timelines for disclosure and reporting, so as to give the electorate a more immediate picture on how elections are financed. The Committee considers this an important development, and looks forward to the system being put in place at the first opportunity.
- 5.9 The Committee is of the view that the caps on electoral expenditure and political donations recommended in this report should be in force for the next ACT election, in 2012. In the Committee's view there are pressing concerns regarding campaign finance to be addressed in the ACT, which should not wait until the next election year under the ACT's fixed parliamentary terms, which is 2016.

- 5.10 The Assembly may wish to adopt transitional arrangements for the first period when donations and electoral expenditure are capped. The Committee notes that in other jurisdictions where caps on donations and electoral expenditure have been put in place, the relevant Acts provide for transitional arrangements for the first election to be held under the new regime.
- 5.11 Under the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) there is a definition of the capped expenditure period specifically for the first election under the new arrangements: ‘from and including 1 January 2011 to the end of polling day’ (s 95H(a)). The *Electoral Act 1992* (Qld) provides that for the first election under amended arrangements, the capped expenditure period is ‘from and including 1 January 2011 to the end of polling day’ (s 197).²⁰⁵
- 5.12 In the Committee’s view, it would assist implementation of a new framework if the ACT were to follow suit, since for the first election under a new framework, the legislation’s date of implementation would be unlikely to match the regular dates provided for capped periods under an amended Act. One-time-only clauses such as those adopted in New South Wales and Queensland offer an effective means to resolve such problems.

RECOMMENDATION 21

- 5.13 **The Committee recommends that the reforms outlined in this report should be operational for the 2012 ACT election.**

²⁰⁵ The Electoral Act 1992 (Qld) states that for all subsequent elections the capped expenditure period is to start ‘on the earlier of the following days— (A) the day that is 2 years after the polling day for the last election; (B) the day of the issue of the writ for the election’ and to end ‘at 6p.m. on the polling day for the election’ (s 197).

Vicki Dunne MLA

Chair

September 2011

6 DISSENTING COMMENT – JOHN HARGREAVES MLA

- 6.1 I offer the following comments because I believe that there are inconsistencies in the approaches taken and in some of the recommendations, there has been a neglect to put in the report a counter view and a deliberate omission of aspects of the NSW legislation which are relevant to the discussion. Further, the Canberra experience is ignored in favour of cherry picking from other jurisdictions to suit the bias of the Committee majority.
- 6.2 The report recommends limits on expenditure on “electoral” or campaigning activities during an electoral period. However, the report also departs from this timeline in relation to donations. It suggests that income can be limited with no time limits but expenditure can be limited to a specified period.
- 6.3 This is an inconsistency which can only limit the non campaigning yet legitimate activities of a political party in periods where it is not in election mode. More than inconsistent, this is fundamentally undemocratic.
- 6.4 Professor Joo-Cheong Than, Associate Professor Law Faculty at La Trobe University in Victoria, advised that donation caps will create a preference for pressure groups over party politics as it will strongly encourage political groups to engage in independent third party activity. Such a preference may favour issue politics over broader and more inclusive forms of politics that are more likely to emerge through the interest-aggregation performed by political parties.
- 6.5 The Professor further indicated that demand-side measures like spending limits are most crucial as it is clear that unsavoury practices in selling access and influence is largely driven by perceived need to match spending of competing parties in the context of rising campaigning costs.
- 6.6 The Professor went on to say that the impact of uniform contribution limits on the freedom of expression of party association is quite severe. Such

measures while not directly banning indirect parties, generally make them unviable unless such parties are able to secure sufficient public funding.²⁰⁶

- 6.7 The inconsistency I described above is exactly what Professor Than is speaking about. The inconsistency continues with the recommendations only addressing donations and not other forms of revenue reaped by political parties.
- 6.8 If these recommendations on donations are accepted, donations will be capped to the intended detriment of one party and yet revenue from return on assets through, for example rental property, will not be capped, to the advantage of another party.
- 6.9 The intention of these recommendations around capping of donations is clear.
- 6.10 They reveal that the real target is the income for the Labor Party. The revenue from rental property of the Liberal Party will not be affected.
- 6.11 The outcome of this will be as predicted by Professor Than. All parties will be forced to engage in revenue raising which is considerably less transparent than is currently the case.
- 6.12 It must be noted in the context of the above, and in relation to other aspects in this report, that there is a reliance on legislation in NSW, Qld and the Republic of Ireland.
- 6.13 There is also reliance on some movement, as yet unarticulated, in other jurisdictions. There is also reliance on movement at the federal level. To rely on two of 9 jurisdictions is academically invalid.
- 6.14 Also the reliance on NSW omits a significant plank in that legislation's controls over donations.
- 6.15 This is the presence of "prohibited donors". The NSW legislation describes two classes of donor.

²⁰⁶ *Money and Politics: The democracy we can't afford*, Professor Joo-Cheong Than, Associate Professor, Law Faculty at La Trobe University in Victoria.

- 6.16 They are:
- Tobacco industry business entities; and
 - Liquor or gambling business entities engaged in activities principally for the purpose of making a profit.
- 6.17 The rejection of my suggestion that such provisions be included as a recommendation can only mean that the receipt of these donations is deemed acceptable, but the receipt of donations from a legitimate not for profit business entity, such as a community club group, is not.
- 6.18 More inconsistency exists.
- 6.19 The provision of administrative and operational funding through Consolidated Revenue has three effects:
- It removes the discretionary nature of funding of political parties by transference from legitimate businesses or individuals to the taxpayer.
 - It rewards parties who are unable to raise funds and penalises parties who can.
 - It removes the right of businesses and individuals to exercise their right to support whichever party they wish to.
- 6.20 The NSW model of public funding allows \$80,000 per elected Member, with a ceiling of \$2 million per party. If the ACT accepts the recommendation that a denial of donations could be compensated through the public purse, this would mean that each and every year, the taxpayer would spend \$1,360,000 on supporting the operations of political parties and independents, which in any other country, would be regarded as a business. I am sure that many businesses in the ACT would like that amount to assist them in their business operations. I'm also unsure that the Canberra Community would be prepared to pay to support the day to day operations of political parties.
- 6.21 If a political party, properly registered, such as the Australian Democrats, the Motorists Party or the Community Alliance Party did not achieve an elected member, that party would receive absolutely nothing.

Conclusion on Dissenting Comments

- 6.22 Democracy is not enhanced by limiting one player – it is enhanced by encouraging and enabling other players.
- 6.23 The ‘reforms’ in this report do not enhance democracy in the ACT. Rather they diminish democracy in the ACT.
- 6.24 This report is about the political disadvantage of one party in the limiting of a legitimate source of revenue, to the advantage of another.
- 6.25 It is also about limiting political activity at all times by restricting a party’s financial viability whilst only limiting its expenditure during an election campaign. A gross inconsistency exists.
- 6.26 The current system of disclosure can be reformed to ensure greater transparency. However, the system should not be reformed to reduce the right of freedom of speech, political association nor to reduce a political organisation’s financial viability to ensure that all political parties operate on the lowest common resource denominator.
- 6.27 As indicated earlier, there have not been the electoral scandals in the ACT as have occurred in other jurisdictions which have given rise to response legislation.
- 6.28 To mimic these other jurisdictions is an insult to the Canberra community.

This inquiry is merely a way to attack the receipt of donations to the ALP by a legitimately licensed not for profit community business. It’s omission of other sources of revenue by the Liberal Party shows what the real motives here have found expression.

John Hargreaves MLA

7 ADDITIONAL COMMENTS – MEREDITH HUNTER MLA

- 7.1 In addition to the recommendations made by the committee, and in response to the claim by Mr Hargreaves that no other Member of the Committee was concerned about the prohibition of certain groups from making political donations it is important to place on the record that I proposed an additional recommendation that political donations be restricted to natural persons enrolled to vote in the ACT. This would of course mean that all corporations, unions and other entities would be prohibited from making political donations.
- 7.2 Members of the Legislative Assembly have an obligation to act in what they see as the best interests of the community. Removing the capacity for corporations or other bodies to make political donations removes the perception that a Member may be acting in a manner that reflects the commercial interests of an entity they depend upon, or owe some debt to, rather than the broader public interest.
- 7.3 The former Auditor General of Mr Tony Harris submitted to the inquiry that improper influence could come about from donations by a range of different entities, he said that for example a ‘Labor government might be tempted to make decisions which are not in the public interest but in the union movement’s interest’.²⁰⁷ In Mr Harris’ view the ‘simplest cure’ for the problem was to ‘ban donations (in money or in kind) from nonnatural persons’.²⁰⁸

²⁰⁷ Mr Tony Harris, Submission No.1, pp 5 and 6.

²⁰⁸ Mr Tony Harris, Submission No.1, p.3.

7.4 It is important to note that the NSW Liberal Government has recently proposed this exact initiative. The Election Funding, Expenditure and Disclosures Amendment Bill 2011 proposes a new section 96D that provides that:

It is unlawful for a political donation to a party, elected member, group, candidate or third-party campaigner to be accepted unless the donor is an individual who is enrolled on the roll of electors for State elections, the roll of electors for federal elections or the roll of electors for local government elections.

7.5 Undue or improper influence or motivation is not just a problem in the context of tobacco or development companies; it can exist in all industries. Rather than focus on any particular activity or industry the better public policy is to prevent all donations from nonnatural persons.

7.6 The ability to make a donation should not be equated with freedom of speech and we should be very cautious about any argument that suggests that corporations should enjoy these types of rights. The experience in the United States following the Supreme Court decision in *Citizens United v. Federal Election Commission* 558 U.S. 08-205 (2010) demonstrates the negative effects such a view can have on democracy.

7.7 Professor Twomey in her evidence to the committee said:

The other thing to remember is that our freedom of speech rights, at least at the national level, to the extent that they are constitutional, are confined to freedom of political communication, whereas the United States obviously has a broader first amendment. That does make a difference for us as well. I think you would find it would be hard pressed for the High Court of Australia to come out and give rights to freedom of political communication to corporations per se because corporations cannot vote. Ultimately, it comes down to the notion that these rights that we are talking about relate to the informing of people and the way they vote. So there are much stronger connections towards voters than towards corporations themselves.

7.8 There can be little doubt that it is in the best interests of democracy to ensure that it is the interests of the people they represent that prevail in the minds of

our elected representatives and not the interests of the corporations who fund their campaigns.

Meredith Hunter MLA

APPENDIX A: Acts in other jurisdictions

The Election Funding, Expenditure and Disclosures Act 1981 (NSW)

The New South Wales *Election Funding, Expenditure and Disclosures Act 1981* controls electoral expenditure, public funding, donations and related matters. Amendments to the Act came into force on 1 January 2011. These put in place new arrangements for the regulation of campaign finance in New South Wales, including caps on political donations and electoral donations and expenditure.²⁰⁹

It also provides mechanisms for public funding to support electoral expenditure. There are measures in the amended Act to support administration and policy functions of political parties and candidates. The Act also includes provisions to regulate electoral expenditure by third parties. These are considered in detail below.

Caps on expenditure for electoral communication

The *Election Funding, Expenditure and Disclosures Act 1981* provides for caps on 'electoral communication expenditure' for participants in State general elections.

For a 'party that endorses candidates for election to the Assembly' the cap on electoral expenditure is \$100,000 per electoral district. The overall cap (across the State) on electoral expenditure is '\$100,000 multiplied by the number of electoral districts in which a candidate is so endorsed' (s 95F (2)). Under these provisions the 'total cap for a party that endorses candidates in all 93 electorates at a general election is \$9.3 million' (s 95F(3)).

²⁰⁹ The *Election Funding and Disclosures Amendment Act 2010*. The Bill was passed by the New South Wales Parliament on 11 November 2010, received assent on 16 November 2010 and commenced on 1 January 2011.

There are other provisions for smaller parties. For a party that does not 'does not endorse candidates in more than 10 electoral districts' the cap on electoral expenditure is \$1,050,000 (s 95F(4)).²¹⁰

For candidates, in particular independent candidates, the applicable cap for a candidate not endorsed by any party for election to the Assembly is \$150,000 (s 95F(7)). In a by-election for the Assembly, the 'applicable cap for a candidate (whether or not endorsed by a party) is \$200,000' (s 95F(9)).

Third-party expenditure

For 'third-party *campaigners*', electoral expenditure is capped at \$1,050,000 'if the third-party campaigner was registered under this Act before the commencement of the capped expenditure period for the election (s 95F(10)(a)). For third-parties not registered by that time, the cap is \$525,000 (s 95F(10)(b)).

In addition, there is a specific limit of how much electoral expenditure parties and third-party campaigners can incur within *each* electorate. For parties this is capped at \$50,000, and for third-parties \$20,000 (s 95F(12)).²¹¹

Definitions of expenditure

The Act provides definitions of 'electoral expenditure' and 'electoral communication expenditure'.

The Act, in s 93, defines electoral expenditure as: 'expenditure for or in connection with promoting or opposing, directly or indirectly, a party or the election of a candidate or candidates or for the purpose of influencing, directly or indirectly, the voting at an election' (s 87(1)).

²¹⁰ The same cap applies to a party which 'endorses candidates in a group for election to the Council, but does not endorse any candidates for election to the Assembly' (s 95 F(4)).

²¹¹ In relation to this clause, 'electoral communication expenditure is only incurred for the purposes of the election in a particular electorate if the expenditure is for advertising or other material that: (a) explicitly mentions the name of a candidate in the election in that electorate or the name of the electorate, and (b) is communicated to electors in that electorate, and (c) is not mainly communicated to electors outside that electorate' (s 95F (13)).

The caps on ‘electoral communication expenditure’ in the Act (in Division 2B), provide the basis for public funding of electoral expenses (in Part 5, Division 2) and are defined in s 87(2).²¹²

Aggregation of applicable caps

As noted, the Act provides for a cap of \$100,000 in any one electorate for electoral communication expenditure by parties. Where there are associated parties who also incur this expenditure within an electorate, the Act sums their expenditure and that of the party with whom they are associated for the purposes of the applicable expenditure cap (s 95G(2)(a)).

To the same purpose, expenditure is aggregated for the overall cap of \$1,050,000 for any group of candidates endorsed by 2 or more registered parties (s 95G (2) (b)). This references provisions elsewhere in the Act for parties which endorse fewer than 10 candidates in the Assembly, or who only endorse candidates in the Legislative Council (s 95F(4)).

If more than one candidate is endorsed in an electoral district by a party or associated entity, the campaigns of the candidates must share the \$100,000 cap on electoral communication expenditure (s 95G(3)). Along similar principles, the overall cap for expenditure by parties specified in s 95F is also shared between parties (and / or associated entities) and its endorsed candidates seeking election to seats in the Legislative Council (s 95G (4)). If these sum to a great amount than the cap, then the participants are in breach of the Act (s 95I).

²¹² Electoral communication expenditure is defined in the Act as electoral expenditure on advertising, in various forms (s 87(2)(a)); the production and distribution of election material (s 87(2)(b)); the Internet, telecommunications, stationery and postage (s 87(2)(c)); employing staff engaged in election campaigns (s 87(2)(d)); and office accommodation for any such staff and candidates (s 87(2)(e)). The Act specifically excludes from these constraints expenditure on: travel and travel accommodation (s 87(2)(g)); research associated with election campaigns (s 87(2)(h)); expenditure incurred in raising funds for an election or in auditing campaign accounts (s 87(2)(i)), and elections for another Parliament; ‘factual advertising’ for meetings for pre-selection of candidates; ‘meetings for organisational purposes of parties’; and ‘any other matter involving predominantly the administration of parties’ (s 87(3)). The caps on ‘electoral communication expenditure’ in the Act (in Division 2B), provide the basis for public funding of electoral expenses (in Part 5, Division 2). Electoral communication expenditure is defined in the Act as electoral expenditure on advertising, in various forms (s 87(2)(a)); the production and distribution of election material (s 87(2)(b)); the Internet, telecommunications, stationery and postage (s 87(2)(c)); employing staff engaged in election campaigns (s 87(2)(d)); and office accommodation for any such staff and candidates (s 87(2)(e)).

Indexation for capped amounts

The Act provides that caps on electoral communication expenditure are indexed according to a formula provided in Schedule 1 of the Act (s 95F(14)).

Capped expenditure period

These constraints apply for what the Act terms the ‘capped expenditure period’ which is under normal conditions, where the election is to be held ‘following the expiry of the Legislative Assembly by the effluxion of time’ under arrangements for fixed-term parliaments.²¹³ These are defined as extending from 1 October of the year preceding the election until the ‘end of polling day for the election’ (s 95H(b)).²¹⁴

When expenditure is incurred

For the capped expenditure period, the Act defines when electoral communication is considered to be incurred, that is, ‘when the services for which the expenditure is incurred are actually provided or the goods for which the expenditure is incurred are actually delivered’ (s 95J(1)). This principle embraces expenditure on advertising; production and distribution of election material; and the employment of staff so that, for these things, expenditure is considered to be incurred when ‘advertising is broadcast or published’; election material is distributed; and during the period of employment of staff for election purposes (s 95J(2)).

Caps on donations

The Act provides caps which limit donations to \$5000 to registered parties and ‘groups’ (in the NSW Legislative Council) and \$2000 to unregistered parties; elected members; candidates; and third-party campaigners (s 95A).

²¹³ See *Constitution Act 1902* (NSW) (s 7B)

²¹⁴ There is also a provision in the *Election Funding, Expenditure and Disclosures Act 1981* for ‘other cases’, in which the capped expenditure period is defined as ‘the period from and including the day of the issue of the writ or writs for the election to the end of polling day for the election’ (s 95H (c)). This would come into play if a proposal to alter the term of Parliament was put to, and passed, by a referendum under the *Constitution Act 1902* (NSW) s 7B.

In addition the Act provides that donations from the same donor are to be summed within the financial year. In this way multiple donations that meet or exceed the applicable cap are made reportable under the Act (s 95A(2)).

The meaning of ‘political donation’

Under the Act, a political donation is a gift made for the benefit of a political party; an elected member; or a candidate or a group of candidates. This definition also includes gifts to a person in order to enable a person to make (‘directly or indirectly’) a political donation or incur electoral expenditure, or to reimburse them for making such a donation or incurring such expenditure (s 85(1)).²¹⁵

Disclosure of donations

Political donations thus defined under the Act from a party; elected member; group; candidate; third-party campaigner; or ‘major political donor’²¹⁶ become reportable once they reach a threshold of \$1000 within a financial year (s 86(1)).²¹⁷

Where individual donations are less than the amount of the threshold for reporting, the Act provides donations from persons or entity that are given to the same to the same party, elected member, group, candidate, third-party campaigner or person for electoral expenditure, that they should be reported if, in aggregate, they reach or exceed the \$1000 threshold (s 86(2)). This also

²¹⁵ Further instances of political donations in the Act take the form of monies paid to participate in fund-raising events (s 85(2)); subscriptions paid to parties by individuals, or organisational entities, in order to affiliate with the party (s 85(3)); ‘dispositions of property’ from federal parties; those of other States or Territories; or ‘from a party to another associated party’ (s 85 (3A)); and uncharged interest on loans (s 85(3B)).

²¹⁶ ‘Major political donor’ is defined under s 84 (1) as ‘an entity or other person (not being a party, elected member, group or candidate) who makes a reportable political donation of or exceeding \$1,000.’

²¹⁷ Where electoral expenditure is reported and capped within a ‘capped expenditure period’ under the Act, the reporting period for reportable political donations is the calendar year.

applies to amounts given by donors to parties and associated parties if they reach or exceed the \$1000 threshold set by the Act (s 86 (3)).²¹⁸

Administering authority

When donations reach thresholds for disclosure, participants are obliged to disclose donations to the Election Funding Authority created under Part 2 of the Act.²¹⁹ The Authority processes applications for registration (from parties, third-parties, and donors); accepts claims for payments under the public funding regime; deals with disclosures and caps on donations and electoral expenditure; and deals with applications for administrative and policy development funding under part 6A of the Act. The role of the Authority is set out in Part 3 of the Act, and its 'particular functions' are prescribed in s 23.

Public funding

The *Election Funding, Expenditure and Disclosures Act 1981* provides for public funding to support electoral expenditure by political parties and candidates (in Part 5, Division 2), and to support the administrative and policy development functions of political parties (in Part 6A).

The Act creates an Election Campaigns Fund (s 56), kept by the Election Funding Authority of New South Wales, in s 5 of the Act. Entities eligible for public funds are paid out of the Fund (s 57).

The Act provides that registered political parties are eligible to receive public funding for electoral expenditure if they attract 4% or more of first preference votes in either an Assembly general election or a periodic Council election (s 57(3)). Political parties are registered by the NSW Electoral Commission under the *Parliamentary Electorates and Elections Act 1912* (NSW) Part 4A,

²¹⁸ At this point the Act provides that parties are to be considered 'associated parties' if 'endorsed candidates of both parties were included in the same group in the last periodic Council election' or 'are to be included in the same group in the next periodic Council election' (s 86(4)).

²¹⁹ The responsibility of the Authority to deal with disclosures and caps on donations, among other things, is specified in s 23 (1) (c) of the Act.

subject to requirements that they have a certain number of members (750) and a party platform, however expressed.²²⁰

Parties are reimbursed for electoral expenditures, expressed as percentages of the applicable expenditure cap. For the Legislative Assembly, the Act provides that eligible Legislative Assembly parties are to be reimbursed for:

100% of so much of the actual expenditure of the party as is within 0–10% of the applicable expenditure cap, plus

75% of so much of the actual expenditure of the party as is within the next 10–90% of the applicable expenditure cap, plus

50% of so much of the actual expenditure of the party as is within the last 90–100% of the applicable expenditure cap (Table, s 58).

Reimbursement of electoral expenditure in the Legislative Council is provided for on a similar basis, with a lower level of reimbursement for the upper component of expenditure under the cap.²²¹ In this way the Act ties public funding and reimbursement for electoral expenses to caps for electoral expenditure.

Similar provisions apply for candidates, with different arrangements for Assembly party and independent candidates and for Council candidates, with 100% reimbursement of the first component of electoral expenditure (the first 10% in the case of eligible Assembly party candidates), and progressively decreasing rates of reimbursement for the remainder of the ‘applicable expenditure cap’ (Table, s 60). Different variations of this scheme apply for an

²²⁰ The *Parliamentary Electorates and Elections Act 1912* requires that a political party wishing to register must, among other things, be able to demonstrate to the Electoral Commission that it has more than 750 members for which it can provide names and addresses, and who can provide declarations of membership (s 66D (2)) and that the party ‘is established on the basis of a written constitution (however expressed) that sets out the platform or objectives of the party’ (s 66A (1)(b)). The Act also provides timelines and an objections procedure for the registration of new political parties (s 66DA) and that the ‘entitlements resulting from party registration’ are ‘not available until (the) first anniversary of registration’ (s 66FA).

²²¹ Eligible Legislative Council parties are reimbursed on the same basis, except that the 75% reimbursement applies to expenditure between one third and two thirds of the applicable expenditure cap (rather than 10-90% of the cap, for Assembly parties), and the 50% reimbursement applies to ‘the last two-thirds to 100% of the applicable expenditure cap’ rather than ‘the last 90-100%’ as for eligible Assembly parties (Table, s 58).

eligible 'Assembly independent candidate' and an eligible 'Council candidate' (Table, s 60).

Other provisions for public funding

A number of other subsidiary arrangements apply to public funding for electoral expenditure in New South Wales. Where expenditure is 'claimed by both party and candidate', the Act provides that 'the expenditure is taken to be that of the party and not the candidate' (s 61(2)). Where more than one party endorses the same candidate or (Council) group, 'those parties are taken for the purposes of this Part to constitute one registered party' and the amount payable 'is payable instead to those two or more registered parties as shared funding' (s 62(1)(a) & (b)). The manner of this shared payment is also specified (in s 62(2), (3) & (4)).²²²

The Electoral Act 1992 (Qld)

The *Electoral Act 1992* provides a package of measures on campaign finance, including caps on expenditure; caps on donations; disclosure of donations and electoral expenditure; and provision of public funding to reimburse parties and candidates for electoral expenditure (in Part 11 of the Act).²²³

The Act establishes the Electoral Commission of Queensland as the authority over campaign finance in the Queensland jurisdiction (created in s 6 of the Act).

Caps on electoral expenditure

The Act imposes caps on electoral expenditure by political parties, candidates and third parties.

²²² The Act also provides a mechanism for advance payments, in s 63. Other mechanisms, such as for the verification of electoral expenditure and manner of reimbursement, and review of claims, are provided in Part 5, Division 3, 'General provisions relating to funding'.

²²³ *Electoral Act 1992 (QLD)*, <<http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/E/ElectoralA92.pdf>>, viewed 19 August 2011.

The cap on electoral expenditure by political parties is \$80,000 for each electoral district (s 274 (1)(a)). The Act provides a formula for indexation of this amount using the March quarter CPI rates of the two last financial years (s 274(4)-(7)).

For single candidates endorsed by political parties for an electoral district in a general election (that is, not a by-election), the cap on electoral expenditure is \$50,000, indexed according to the CPI formula set out in s 274(4)-(7), (s 274(1)(b)). When in a general election a political party fields more than one candidate for an electoral district, these candidates divide the \$50,000 cap equally among them (s 274(1)(c)).

For by-elections, single candidates contesting electoral districts have an expenditure cap of \$75,000, whether they are endorsed by a political party or are independent (s 274(1)(d),(e)&(f)). However, if there are multiple candidates from a political party, they must, as above, divide the cap equally between them (s 274(1)(e)).

There are also caps on electoral expenditure for third parties, both registered and unregistered. For registered third parties, the cap is \$500,000 in a general election, with no more than \$75,000 to be spent in a particular electoral district (s 274(1)(h)(i)). Unregistered third parties are limited to \$10,000 in a general election, with no more than \$2,000 to be spent in any particular electoral district (s 274(1)(h)(ii)).

The capped expenditure period

The *Electoral Act 1992* (Qld) provides that a capped expenditure period ordinarily applies either from 'the day that is 2 years after the polling day for the last election' or 'the day of the issue of the writ for the election', whichever is the earlier, until '6p.m. on the polling day for the election' (s 197).

Caps on donations

The *Electoral Act 1992* (Qld) provides caps on donations to:

- Political parties of \$5,000 per financial year (s 252(1)(a)); and
- Candidates or third parties of \$2,000 per financial year (s 252(1)(b)).

These amounts are linked to the Consumer Price Index according to provisions in s 252 (2)-(5).

Other provisions make it an offence for donors to make donations which exceed these amounts (s 253) or for parties or candidates to accept them (s 254 & s 255). Third parties cannot accept amounts in excess of applicable caps on donations (s 258).

Definitions of political donation

The Electoral Act 1992 (Qld) provides definitions of political donations. These include gifts to political parties ‘accompanied by a statement from the person making the gift ... that the gift is intended for use for campaign purposes during the capped expenditure period for an election’ (s 250(1)(a); ‘dispositions of property’ to a political party from another branch or division of the party, again with a statement that it is for campaign purposes during a capped expenditure period (s 250(1)(b); dispositions of property from federal or interstate branches political party (s 250(1)(c); and gifts made ‘intended to be used by the recipient to enable the recipient to make a gift (s 250(1)(d).

For political parties, candidates and third parties, political donations also include paying incurred electoral expenses on behalf of the parties, candidate or third party; ‘waiving of all or part of payment’ of expenditure ‘incurred or to be incurred’; and ‘allowing an unpaid debt to be incurred’ (s 255(3), s 256(3), s 257(3), and s 258(3)).

State campaign accounts

The Act provides that political parties, candidates, and third parties must establish and maintain ‘State campaign accounts’ (s 218). All political donations must be paid into these accounts (s 219).

Other monies must also be paid into the account, including payments by the Electoral Commission; own-contributions by candidates; money left to parties or candidates in wills; amounts borrowed by parties or candidates; and amounts which are returns on investments by parties or candidates (s 220). Fundraising contributions, annual subscriptions to parties, and compulsory levies by parties on Members must also be paid into these accounts (s 220).

The Act provides that nominated agents (provided for under Part 11, Division 2) must ensure that: 'the party, candidate or third party does not pay an amount of money for electoral expenditure unless the amount is paid from the party's, candidate's or third party's State campaign account' (s 275).²²⁴

Public funding

The Act provides a sliding scale of reimbursement of candidates for election expenditure, expressed as proportion of expenditure to be reimbursed within the cap on electoral expenditure. In brief, it provides for 100% reimbursement of the first 10% of a candidate's expenditure under the cap; 50% reimbursement of a candidate's expenditure which is between 10% and 90% of the expenditure cap; and 25% reimbursement of expenditure between 90% and 100% of the expenditure cap (s 224).

A registered candidate or political party may apply for an advance payment before an election (s 225) and must place a claim in order to receive their full entitlement of public funding after an election (s 226). The claim must furnish a statement of election expenditure incurred for the election (s 228). Payments have to be made either into a candidate's State campaign account or, under the direction of the candidate, into the State campaign account of a nominated political party (s 236).

In addition to public funding for electoral expenditure, the Act also provides for administrative *funding* for registered political parties, initially set at \$40,000 per electoral district and then indexed (s 241), and for independent members, initially set at \$20,000 per electoral district and then indexed (s 242).

Disclosure of donations

Under the Act, registered candidates (s 261) and political parties and associated entities (ss 288-296) are obliged to provide returns on donations. These disclose details of donations during reporting periods, defined as 'the first 6 months of a financial year'; or 'a full financial year' (s 197).

²²⁴ **In combination with provisions under s 250 of the Act, this means that only monies expressly donated by donors for campaign purposes can be used for electoral expenditure.**

Donors must lodge returns

Under the Act, third parties (s 264) and other donors must provide returns (s 265) for donations equal to or exceeding \$1000. There are also specific provisions for 'special reporting of large gifts' under s 266 of the Act.

The Republic of Ireland's Electoral Act 1997

The Republic of Ireland is similar to the ACT in that it employs a Proportional Representation - Single Transferrable Vote (PR-STV) system with multi-member electorates. The provisions of the Act include:

- caps on electoral expenditure;
- public funding for electoral expenses;
- assigning the right to incur electoral expenditure to national agents and electoral agents;
- disclosure obligations for companies, unions and building societies donating more than £4000 in a reporting year; and
- provisions to prevent parties or candidates accepting anonymous donations over £100.

These are considered below.

Caps on electoral expenditure

Under the *Electoral Act 1997*, caps on electoral spending differ depending on the size of the electorate. Electorates have three, four or five members to be elected. In the case of a constituency returning three members the cap for electoral expenditure is £14,000; in the case of a constituency returning four members, £17,000; and in the case of a constituency returning five members, the cap is £20,000 (s 32(1)(a)).²²⁵

Electoral expenditure by candidates who are affiliated with parties is subject to a written agreement between the candidate and the party ((32)(1)(b)(ii)). This

²²⁵ At time of writing these amounts were AUD \$20,813; \$25,267; and \$ 29,726 respectively (rounded-off to whole dollars), according to OzForex, < <http://www.ozforex.com.au/cgi-bin/currency-converter.asp> >, viewed 2/08/2011.

sets out the amount, under the expenditure cap, that is to be spent within the constituency, and the amount to be spent by the party across constituencies. Parties can spend up to 50% of the expenditure for the constituency ((32)(1)(b)(i)).

Definition of ‘election expenses’

The Act makes provision to control ‘election expenses’. These are defined as ‘all expenditure incurred in connection with an election’ (s 31(1)(a)). This includes expenses incurred in order to ‘to promote or oppose, directly or indirectly’, the ‘interests of a political party or a political group’ (s 31(1)(a)(i)).

It also includes expenses incurred to ‘promote or oppose’ the ‘election of a candidate at the election or to solicit votes for or against a candidate’, or to present candidates’ views on matters relating to an election (s 31(1)(a)(ii)). Further, election expenses are defined as any expenditure incurred ‘otherwise to influence the outcome of the election’, which includes opinion polls ‘or other similar survey relating to an election within the period of 60 days before polling day at the election by or on behalf of a political party, a political group or a candidate at the election’ (s 31(1)(a)(iii)).

Capped expenditure period

The Act provides caps on election expenses for the period from when the writ or writs for an election are issued and polling day. It does this by deeming ‘not to be election expenses’:

All election expenses incurred and all payments made by or on behalf of a political party or by or on behalf of a candidate, including election expenses so incurred or payments so made, in the case of a Da’ il election, at any time before the issue of the writ or writs in relation to the election (s 31(3)).

Caps on donations

The *Electoral Act 1997* does not provide for caps on donations. There are specific provisions for disclosure of donations for certain types of donor, for donations beyond a specified value, as described below.

Disclosure of donations

Disclosure provisions in the *Electoral Act 1997* oblige companies and unions to declare donations 'exceeding £4,000 in value' under provisions of the Companies Act (for companies), to the Registrar of Friendly Societies (for a trade union) or, for a building society, under the Industrial and Provident Societies Acts, Friendly Societies Acts, or Building Societies Acts (s 26(1)).

Parties and candidates are obliged to disclose by providing statements of donations to the Public Offices Commission (s 24(1)(a)). The timing and manner of these statements is set out in the sub-sections of s 24.

The statements also include details of the written agreements between parties and candidates, determining the proportion of expenditure, under the cap, to be spent in constituencies or in national campaigns (s 31(1)(b) and s 31(1)(c)).

Under the Act it appears that natural persons who are donors do not have obligations to report or disclose: the burden of disclosure falls on recipients of political donations and organisational donors.

Limits on anonymous donations

The Act makes provision to limit anonymous donations to parties and candidates above £100. The Public Offices Commission must be advised in writing of any such donations 'exceeding £100 in value' in writing within fourteen days (s 23(2)), and all 'moneys, property or goods received' in excess of this figure are disposed of as 'directed by the Minister for Finance' (s 23(3)).

Under the Act, donations from a donor to a particular party or candidate within a reporting year must be aggregated in terms of the disclosure threshold. This influences the operation of the Act in relation to the £4,000 threshold for reporting of donations by companies, trade unions or building societies (s 26 (1)), and the £100 threshold beyond which parties and candidates are obliged to report anonymous donations (s 22(2)(d)).

Public funding

Conditions for funding

For parties to be reimbursed for electoral expenditure, a number of criteria must be met.

- First, the party must be registered in the Register of Political Parties, and must have attracted at least 2% of first preference votes in the constituency concerned (s 16).
- Second, electoral expenditure must be incurred by certain persons specified under the Act. This is put into effect by means of provisions under which contracts with political parties over £500 in value are only enforceable if they are 'incurred by or on behalf of' the party's national agent (s 30(1)).²²⁶ Similarly, in relation to candidates, contracts over £500 are enforceable if made with the electoral agent nominated by the candidate (s 30(1)(b)).²²⁷
- Third, reimbursement for electoral expenditure is restricted to candidates who are successfully elected as members of parliament, and those who receive at least 'one quarter of the quota' for a seat (s 21(1)).

Calculating and providing public funding

In each constituency, payments are made to candidates on the basis that:

The amount payable to qualified parties under subsection (2) shall be allocated to each qualified party in the same proportion as the total number of first preference votes obtained by every candidate of each such qualified party at the preceding general election bears to the total number of first preference votes obtained by candidates of all qualified parties at that election (s 17(3)).

Payments to parties cannot exceed £1M in aggregate within 'any twelve month period' (s 17(2)(a)). Candidates are reimbursed for 'the actual expenses incurred by the candidate or five thousand pounds, whichever is the less' (s 21(b)(i)).

²²⁶ Electoral expenditure may also be incurred by other persons who inform the Public Offices Commission of specified details of the expenditure within fourteen days (s 31 (7)).

²²⁷ Candidates may be national agents and electoral agents (s 30 (1)) and (s 30 (1) (b)).

These payments made out of a Central Fund created for the purpose (s 17(1)). The payments paid to eligible parties and candidates are indexed, by being linked to the Consumer Price Index (s 3(1) & (2)) and to rates of remuneration in the Civil Service (s 17(2)(b)). The Act provides that these changes are made by order of the Minister for Finance through disallowable instruments (s 3(1) & (3)).

The Electoral Act 2004 (Tas)

For candidates for the Legislative Council the *Electoral Act 2004* (Tas) provides for caps on election expenditure by candidates, set at \$10,000 per expenditure period in 2005 and increasing by \$500 per year, resulting in a cap of \$13,000 for 2011 (s 160).²²⁸ Candidates are obliged to submit a return within 60 days after an election is declared (ss 161, 164 & 199). For Legislative Council elections, political parties are forbidden from incurring electoral expenditure (s 162).

²²⁸ See also Tasmanian Electoral Commission, Tasmanian Legislative Council Elections: Information for Candidates, <http://tec.tas.gov.au/pages/LegislativeCouncil/LC_PDF/2007%20-%20LC%20Handbook%20%28full%29.pdf>, viewed 4 September 2011. The applicable *expenditure period* is defined in s 3 and s 5(1)(b)(ii) of the Act.

APPENDIX B: Witnesses to the inquiry

Wednesday 17 February 2010

- Mr Phillip Green, Electoral Commissioner, ACT Electoral Commission
- Mr Andrew Moyes, Deputy Electoral Commissioner, ACT Electoral Commission

Wednesday 3 March 2010

- Dr Anne Twomey, Associate Professor, Faculty of Law, University of Sydney

Wednesday 10 March 2010

- Professor Charles Sampford, Foundation Dean and Professor of Law, Griffith University; and Director, Institute for Ethics, Governance and Law, a joint initiative of the United Nations University, Griffith, QUT and ANU

Wednesday 28 April 2010

- Professor Diana Dwyre, Professor of Political Science and Fulbright ANU Distinguished Chair in American Political Science, Australian National University and California State University

Wednesday 8 September 2010

- Mr Simon Corbell, Attorney-General, Minister for the Environment, Climate Change and Water, Minister for Energy and Minister for Police and Emergency Services

APPENDIX C: Submissions to the inquiry

- Submission No.1 – Mr Tony Harris
- Submission No.2 – ACT Electoral Commission
- Submission No.3 – Democratic Audit
- Submission No.4 – Senator Nick Xenophon
- Submission No.4a – Attachment
- Submission No.5 – Prof Diana Dwyre
- Submission No.6 – ACT Human Rights Commission
- Submission No.7 – ACT Greens Party
- Submission No.8 – ACT Labor
- Submission No.9 – ACT Government
- Submission No.10 – Canberra Liberals