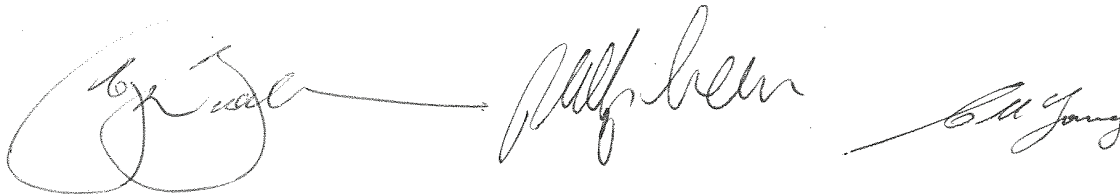


**ACT Electoral Commission submission to
the ACT Legislative Assembly Standing Committee
on Justice and Community Safety
in relation to its inquiry into Campaign Finance Reform**



**Roger Beale
Chairperson**

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Electoral Commissioner**

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3 March 2010

ACT Electoral Commission submission in relation to the inquiry into Campaign Finance Reform

Terms of reference of this inquiry

At its meeting on 19 November 2009, the ACT Legislative 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.

Introduction

The ACT Electoral Commission (the Commission) provides this submission in response to an invitation issued by the Chair of the Standing Committee on 3 December 2009.

Issues addressed in this submission include:

- An executive summary and suggestions for future directions;
- The rationale for implementing and maintaining an electoral funding and disclosure scheme;
- The origins of funding and disclosure provisions in the ACT;
- The current ACT political funding and disclosure scheme;
- A comparison of Commonwealth, State and Territory funding and disclosure schemes;
- Proposed legislative changes to the Commonwealth funding and disclosure scheme;
- The Australian Government's *Electoral Reform Green Paper: Donations, Funding and Expenditure*;
- Discussion on how the funding and disclosure scheme could be improved in the ACT;
- The timeliness of disclosure of political donations and expenditure;
- Audits of financial records;
- Discussion of direct and indirect means of public funding;
- Discussion on whether public funding should be by reimbursement or direct entitlement;
- Discussion on regulating political donations and expenditure in the ACT;
- Enforcement of funding and disclosure law; and
- The relationship between ACT electoral law and Commonwealth electoral law.

Consideration of these issues focuses on 3 main themes: disclosure of electoral receipts and expenditure; public funding of political parties and candidates; and restrictions on electoral donations or expenditure.

Executive summary and future directions

This submission addresses the Committee's terms of reference by examining the ACT's current electoral funding and disclosure scheme, discussing how well the current scheme meets a set of objectives for an effective scheme, and examining ways in which the current ACT scheme could be improved. It is made pursuant to section 7(1)(d) of the *Electoral Act 1992* which empowers the Commission to provide information and advice to the Legislative Assembly in relation to elections.

Electoral matters and campaign finance inevitably concern difficult judgements about the balance between transparency, privacy and freedom of speech and association, as well as practical issues in relation to the administration of any laws, in ensuring we retain a healthy democracy supported by the community. These are quintessentially policy issues and the Commission is sensitive that its best contribution to facilitating a well informed debate is to provide analysis and discussion of the issues, and in particular the practicalities.

This inquiry coincides with consideration of funding and disclosure issues at the Commonwealth level, through the Australian Government's *Electoral Reform Green Paper: Donations, Funding and Expenditure*, published in December 2008. One aspect of the Commonwealth's electoral reform agenda is to seek "harmonisation" of Commonwealth, State and Territory electoral laws, particularly disclosure laws.

This submission canvasses the rationale for implementing a political funding and disclosure scheme for the ACT Legislative Assembly. It categorises the objectives of a funding and disclosure scheme as facilitating the conduct of free and fair elections and maintaining voters' confidence in our democracy by:

- Enabling parties and candidates to present their policies to the electorate through the provision of public funding;
- Preventing corruption and undue influence by reducing parties' reliance on private funding through the provision of public funding;
- Preventing corruption and undue influence through disclosure of the sources of private funding; and
- Providing transparency in the finances of political participants to inform the electorate of the sources of political funding.

The submission describes the evolution of the ACT's current funding and disclosure scheme. It is noted that, for most of the ACT's history since self-government, the ACT's disclosure laws have remained largely in step with the Commonwealth scheme. However, the two schemes now differ with respect to disclosure thresholds. In 2006 the Commonwealth increased its disclosure of donations threshold from \$1,500 to over \$10,000, while the ACT reduced its disclosure threshold from \$1,500 to \$1,000 in 2008. A federal government Bill currently before the Australian Parliament, proposing to reduce Commonwealth threshold to \$1,000, has not been approved by the Senate.

The submission notes the desirability of a disclosure scheme that is consistent in its core principles at both levels of government, and harmonised among the states more broadly. This is one of the objectives of the Commonwealth review of electoral legislation. It is conducting the review in consultation with other jurisdictions. The submission points to difficulties that may arise for donors, political parties, candidates and other political participants if there were substantial deviation between the ACT and Commonwealth schemes. It notes that the Commission would require additional resources to ensure proper scrutiny if there were any significant tightening in the obligations for disclosure in the ACT.

Nevertheless the Commission notes that current disclosure schemes at both the ACT, and more so the Commonwealth, level allow for a significant proportion of parties' electoral funding to not be individually disclosed. This is because of the possibility of multiple donations (including repeat donations by one person or entity), of less than the threshold above which disclosure is required (\$1,000 at the ACT level, and over \$10,000 for the

Commonwealth) and because some funding is characterised by donors and parties as ‘payment for services’ rather than donations. Examples of this could include dinners where, for a considerable contribution, access is provided to leading candidates of government or opposition parties.. A requirement for parties and candidates to disclose all sources of income, regardless of the stated intent of the person or organisation making the payment, would provide greater transparency, albeit at a greater administrative cost to political participants and the Commission for oversight of the scheme, some loss of privacy and greater regulatory intrusiveness. 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 above in relation to increased costs and confusion about obligations arise.

The Commission notes that any proposals to ban or limit political donations or expenditure involve policy issues, legal constraints and practical implementation concerns. In particular, the Commission notes 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 under Commonwealth law.

The Commission observes that its current funding levels are barely adequate to enable it to scrutinize existing disclosure laws. 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 by an increase in resources if any new requirements are to be effectively implemented.

The Commission observes 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. While there are significant differences between parties, in general expenditure by the major parties has grown much more rapidly than public funding, but for smaller parties and independents public funding can still provide a significant proportion of their funding. The Committee may wish to address the following issues:

- Given that election expenditure has greatly outstripped public funding, particularly for the major parties, and given the absence of any cap on 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?

The rationale for implementing and maintaining an electoral funding and disclosure scheme

The ACT's funding and disclosure scheme has been in place since the ACT was granted self-government in 1989. That scheme was in turn based on the Commonwealth funding and disclosure scheme that was established in 1984. This section of the submission deals with the rationale for implementing and maintaining an electoral funding and disclosure scheme.

Disclosure of donations and expenditure

There is widespread agreement in many democratic countries that disclosure of the identities of those who give money or resources to political participants, and how that money is spent, is healthy for the democratic process. This view arises from the notion that there is considerable potential for large and undisclosed donations to distort the free and fair nature of the democratic process and, at the least, to degrade public trust in democratic government, and at worst, to lead to actual corruption. Disclosure alerts the public and other participants in the government and political process so that they can scrutinize whether the interests of significant donors receive preferential treatment from governments, opposition parties or candidates.

Public funding

Many 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.

Limits on donation size and campaign expenditure

Some hold the view that, even where disclosure of the identities of donors takes place and there is some level of public funding, there still remains a risk that the pressure of campaign expenditure and the corollary importance of campaign fund raising can lead to significant donors having undue influence in the political process. To address this risk, some jurisdictions have placed 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.

Striking a balance with fundamental freedoms and practicality

Other relevant considerations include the right to freedom of speech, the right to participate in the political process, and the right to privacy. Practical considerations include the regulatory burden imposed on political participants and the ability of regulators to investigate and prosecute breaches of disclosure laws.

Importantly, in relation to the ACT, another consideration for this inquiry is the extent to which the ACT can regulate its political campaigning in an environment where the main political players also operate at other levels of government, given constitutional constraints and Australia's federal system.

The rationale for the introduction of campaign funding and disclosure laws for Australian federal elections

The Australian parliament introduced a funding and disclosure scheme for federal elections for the first time in 1984.

In his Second Reading speech in the debate on the Commonwealth Electoral Legislation Amendment Bill 1983, Special Minister of State, the Hon Kim Beazley stated the rationale for introducing the scheme (House of Representatives, *Debates*, page 2213, 2 November 1983):

“The skyrocketing costs of modern election campaigns have threatened to create a situation where the national government can be delivered to the party with the best bagman. It is essential for public confidence in the political process that no suggestion of favours returned for large donations can be sustained. However, it is not only the potential for corruption in the financing of multimillion dollar campaigns that should be a matter for concern. A serious imbalance in campaign funding threatens the health of democracy.

“The cost of electioneering these days in any of the Western democracies would have been unthinkable to the politicians of, say 1949, let alone the founding fathers of Federation. The estimated cost of the Federal election campaign earlier this year was \$12m. It is simply naive to believe that no big donor is ever likely to want his cut some time. The price of public funding is a small insurance to pay against the possibility of corruption. The whole process of political funding needs to be out in the open so that there can be no doubt in the public mind. Australians deserve to know who is giving money to political parties and how much. ...

“Public funding ensures that different parties offering themselves for election have an equal opportunity to present their policies to the electorate. Without it, worthy parties and candidates might not be able to afford the considerable sums necessary to make their policies known. In this way, public funding contributes to the development of an informed electorate. As well, it helps counter the problem created by the mounting costs of political campaigning due to the increased use of television as a medium of communication between the people and the politicians seeking their endorsement. ...

“An essential corollary of public funding is disclosure. They are two sides of the same coin. Unless there is disclosure the whole point of public funding is destroyed. The legislation lays down that donations for Federal election purposes of \$200 or more to a candidate and \$1,000 to a party be disclosed and the donor identified. Radio stations, television stations, printers and newspapers are required to report electoral expenditure to the Electoral Commission. These organisations must identify the source of the funds. Anonymous donations above the set limits cannot be accepted by candidates or parties. If such donations are received, a matching amount must be paid by the recipient to the Commonwealth.”

Principles for evaluating regulation of electoral funding and disclosure in the Commonwealth Green Paper

In its *Electoral Reform Green Paper: Donations, Funding and Expenditure* (the Green Paper, page 17) the Australian Government suggests a number of “principles or values [that] may be considered to be reflected, to varying degrees, in the different approaches to regulation of electoral funding and disclosure in place throughout Australia and in comparable countries internationally.”

The Green Paper suggests that “these principles may provide suitable criteria for evaluation of existing electoral regulation, and evaluation of options for changing the system.” The principles outlined in that Paper (page 17) are:

- Integrity – establishing conditions that minimise the risk or perception of undue influence or corruption in the system.
- Fairness – establishing, as far as possible, fairness in access to resources for participants in an election.
- Transparency – providing enough information to citizens about financial transactions of identified participants in the electoral process, including political parties and candidates, to inform their choice of representatives.
- Privacy – balancing citizens’ interests in obtaining information with respect for individuals’ right to privacy.
- Viability – ensuring that political parties and candidates have sufficient financial support to enable them to provide the electorate with a suitable choice of representatives.
- Participation – encouraging citizens to participate in the political process through a variety of different means.
- Freedom of political association and freedom of expression – avoiding unnecessary burdens or restrictions on these freedoms.
- Accountability and enforceability – ensuring participants in the electoral process are accountable for relevant financial information.
- Fiscal responsibility – ensuring the public costs involved in democratic processes, including election costs and public funding costs, are not unreasonable.
- Efficiency and effectiveness – ensuring that regulation balances these principles against the costs of compliance and administration.

Summarising the objectives for the introduction of campaign funding and disclosure laws

Drawing these strands together, the rationale for implementation of an electoral funding and disclosure scheme can be distilled into the following objectives:

- A funding and disclosure scheme can facilitate the conduct of free and fair elections by:
 - Enabling parties and candidates to present their policies to the electorate through the provision of public funding;
 - Preventing corruption and undue influence by reducing parties’ reliance on private funding through the provision of public funding;
 - Preventing corruption and undue influence through disclosure of the sources of private funding; and

- Providing transparency in the finances of political participants to inform the electorate of the sources of political funding.

Another element of a funding and disclosure scheme not currently adopted federally in Australia or in the ACT that could be considered could be to reduce inequalities between political participants by placing limits on expenditure and receipts.

The origins of campaign funding and disclosure in the ACT

As indicated above, the Commonwealth introduced a funding and disclosure scheme for federal elections for the first time in 1984.

Following the introduction of ACT self-government in 1989, the first two ACT Legislative Assembly elections held in 1989 and 1992 were conducted by the Australian Electoral Commission under Commonwealth legislation. At these elections, the then current Commonwealth disclosure scheme was adapted for ACT purposes. At the 1989 election only, public funding of 50 cents per vote was paid to parties and independent candidates receiving 4% of the formal votes. The Commonwealth did not provide public funding at the 1992 election, presumably on the basis that the Legislative Assembly could provide for public funding from its own resources if it wished to. No public funding was provided by the Assembly in 1992.

The Commonwealth gave the ACT Legislative Assembly the power to legislate for its own electoral affairs after the 1992 election. Election campaign funding and disclosure arrangements specific to the ACT were implemented by amendments to the *Electoral Act 1992* made by the *Electoral (Amendment) Act 1994*, with the relevant provisions commencing on 24 August 1994. These funding and disclosure arrangements in the ACT were largely based on the Commonwealth scheme.

The ACT scheme as introduced

As noted above, the campaign funding and disclosure arrangements for the ACT, introduced in 1994, were largely derived from the Commonwealth scheme in place at the time. The then ACT government's intention was to maintain consistency with the Commonwealth scheme. The main features of the ACT scheme as introduced were:

- Parties and independent MLAs were required to submit annual returns showing full details of amounts received, amounts paid and details of outstanding debts as at 30 June each year;
- Public funding was provided to candidates and political parties that reached a 2% threshold based on the percentage of votes received. Parties and candidates were required to prove electoral expenditure to the level of funding permitted to receive that level of funding;
- Candidates and non-party groups were required to submit election returns of gifts received and detailing electoral expenditure in relation to the election;
- Broadcasters and publishers were required to submit election returns detailing electoral expenditure in relation to the election;

- Persons incurring electoral expenditure who received gifts used to incur that expenditure were required to submit an election return detailing the gifts received and expenditure incurred;
- Donors to a political party, non-party group, candidate or other person were required to submit an election return detailing the gift(s) made;
- Anonymous donations above the relevant threshold to a candidate, non-party group, independent MLA or political party were prohibited;
- The thresholds for determining the requirements for a return or the level of detail to be included in the return were generally \$1,500 for parties and \$200 for candidates, non-party groups and other persons; and
- The Electoral Commissioner was given investigation and audit powers to enable compliance regulation.

Changes to the ACT scheme since introduction

Amendments made to the Electoral Act by the *Electoral (Amendment) Act 1996*, which took effect on 29 November 1996, made a number of changes to the ACT campaign funding scheme to reflect changes made to the Commonwealth scheme during 1995. The main provisions of that Amendment Act included:

- Simplifying the reporting requirements imposed on registered political parties and independent MLAs by reducing the amount of detail to be set out in their annual returns;
- Enabling parties to fulfil their ACT reporting obligations by submitting a copy of their Commonwealth annual returns to the ACT Electoral Commission, rather than submitting a separate return;
- Requiring organisations called “associated entities” to lodge returns;
- Requiring persons who donate more than \$1,500 to submit annual returns;
- Requiring donors to political parties and independent MLAs to report annually rather than after each election;
- Requiring political parties to submit returns of electoral expenditure after each election;
- Removing the need for political parties and candidates to prove electoral expenditure in order to receive public funding (thereby replacing the reimbursement scheme with a grant scheme).

Amendments made by the *Electoral (Amendment) Act 2000*, which took effect on 28 September 2000, limited the requirement for disclosure of gifts by independent MLAs to those gifts used solely or substantially for a purpose related to the MLA’s position, rather than requiring disclosure of all amounts received by independent MLAs during the year.

Amendments made by the *Electoral Amendment Act 2001*, which took effect on 29 June 2001, included the following changes to the campaign funding provisions of the *Electoral Act 1992*:

- Extending the disclosure requirements imposed on independent MLAs to all MLAs;
- Raising the threshold for the receipt of public funding from 2% to 4% of first preferences in an electorate; and
- Restoring the nexus between the Commonwealth and ACT schemes following amendments to the *Commonwealth Electoral Act 1918*.

Amendments made by the *Electoral Amendment Act 2004*, which took effect on 22 and 23 May 2004, made a number of minor changes to the funding and disclosure provisions of the *Electoral Act 1992*.

Amendments made by the *Electoral Legislation Amendment Act 2008*, which took effect on 21 May 2008, made a number of changes to the disclosure provisions of the *Electoral Act 1992*. Most notably, these changes included lowering all disclosure thresholds to \$1,000. These amendments were made following substantial amendments to the Commonwealth Electoral Act in 2006 that broke the nexus between the Commonwealth and ACT schemes. In particular, the disclosure thresholds of the Commonwealth scheme had been raised to over \$10,000. Another change made by these amendments was to remove the ability for candidates to form non-party groups.

In reducing the ACT thresholds to \$1,000, the ACT government was aware that the newly elected (in 2007) Australian government had foreshadowed further changes to the Commonwealth scheme to reduce their disclosure thresholds to \$1,000. Accordingly, the 2008 amendments made to the ACT Electoral Act included that foreshadowed Commonwealth amendment. As it transpired, the Commonwealth amendments were put on hold pending the outcome of wider ranging electoral reform discussions being led by the Commonwealth through its Green Paper process. Acknowledging that the Commonwealth amendments would not be made immediately, the ACT amendments also included the removal of the facility for political parties to use their Commonwealth disclosure returns for the purpose of meeting their ACT disclosure obligations.

The current ACT political funding and disclosure scheme

This section describes the ACT's political funding and disclosure scheme as it currently applies at March 2010. More detail can be found in Appendix A, including a description of the different types of returns, including annual returns (see Table 1) and election returns (see Table 2), and a description of the deadlines applying to the various returns (see Table 5). A glossary explaining relevant terms can be found at Appendix B.

Public funding of candidates and parties

Election funding is available to independent candidates and parties contesting Assembly elections, provided they meet the threshold requirement. A party is eligible to receive election funding for the votes obtained by its endorsed candidates who together polled at least 4% of the total number of formal first preference votes cast in an electorate. An independent candidate is eligible to receive funding if he or she polls at least 4% of the total number of formal first preference votes cast in the relevant electorate.

The amount of public funding payable 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. For the six-month period ending 30 June 2010, the rate is 153.551 cents per eligible vote. For the most recent election, in October 2008, the rate was 147.722 cents per vote.

There is no requirement for any eligible party or independent candidate to lodge a claim for their election funding entitlement. The Commissioner will automatically pay those eligible their entitlement once the voting figures are finalised. There is no obligation to accept public funding. In respect of a party, payment is made to the registered officer of that party. In the case of independent candidates, funding is paid directly to the candidate.

The disclosure scheme

The ACT's disclosure scheme provides for a complex series of election returns and annual returns. These returns show details of expenditure, donations, other income and loans received. Details of expenditure and income are generally required where a \$1,000 threshold has been reached or exceeded. A description of the various returns is included at Tables 1 and 2 at Appendix A.

Election returns by **parties** show election-related expenditure during the election period. Election returns by **candidates** show both election-related expenditure and gifts received. Election returns by **donors to candidates** show details of donations made and gifts received. **Broadcasters and publishers** are required to submit election returns showing details of electoral advertisements. **Political participants** other than parties or candidates (known as "**third parties**" – for example, interest groups distributing their own political advertisements) are also required to submit election returns showing details of electoral expenditure and gifts received, if any.

Annual returns for each financial year are submitted by **parties, MLAs and associated entities**. These show details of amounts received, including identifying details of those who provide funding of \$1,000 or more, total amounts paid and total debts. Annual returns are also submitted by **donors to parties, MLAs or associated entities**. These show details of payments made and of gifts received, if any.

Disclosure of donations

Under the disclosure of donations provisions, candidates, people who incur political expenditure and people who make donations to candidates are required to submit disclosure returns within 15 weeks of polling day of an election.

The agents of each candidate contesting an election must furnish a disclosure return setting out the total value of all gifts received, and the number of persons who made the gifts, during the disclosure period. For gifts of \$1,000 and over (or gifts adding up to \$1,000 or over), the return must also set out: the date on which each gift was received; the amount of each gift; and the name and address of the donor or, if the gift was made by an unincorporated association, a trust or a foundation, certain details relating to identity of the organisation. If there are no donations to disclose a nil return must be filed. Gifts that are made in a private capacity to a candidate and which are not used for election purposes do not have to be disclosed.

A person (other than a party, candidate or associated entity – referred to as a "third party") who incurs expenditure for a political purpose during the disclosure period and receives one or more gifts during the period may also have to disclose the details of the gift in a return. This is the case if the gift amounted to \$1,000 or more, and the whole or part of the gift was

used by the person to enable him or her to incur expenditure for a political purpose or to reimburse him or her for incurring expenditure for a political purpose.

People who make gifts totalling \$1,000 or more to a candidate or a 'specified body' (currently there are no specified bodies) during the disclosure period must also file a return.

A person who makes a gift of (or gifts totalling) \$1,000 or more to the same party, MLA or associated entity must file an annual return providing details of all the gifts made during the financial year. This includes a person who makes a gift to any person or body with the intention of benefiting a party, MLA or associated entity. If a person receives a gift of (or gifts totalling) \$1,000 or more, and the person uses all or part of the gift(s) to make a gift of (or gifts totalling) \$1,000 or more to a party, MLA or associated entity, that person must also furnish an annual return disclosing details of the gift(s).

Anonymous donations made in individual amounts of \$1,000 or more received by a candidate, party, MLA or associated entity are prohibited. If such an anonymous donation is received it must be paid to the ACT Government.

Disclosure of loans

A party, MLA, candidate or associated entity may only receive a loan of \$1,000 or more, from a person or entity that is not a financial institution, if certain information about the loan is recorded. The receiver of the loan must immediately make a record of the terms of the loan and details of the identity of the lender. If the lender is a registered industrial organisation, an unincorporated body, a trust fund or a foundation, other specific details are to be provided. A financial institution for the purposes of this requirement includes a bank, credit union, building society or an entity prescribed under the regulations. A loan has a broad definition and includes an advance of money, the provision of credit or any other form of financial accommodation if there is an express or implied obligation to repay the amount.

Disclosure of election expenditure

Each candidate in an election must lodge a return with the Commissioner within 15 weeks of an election, specifying details of the electoral expenditure incurred by or with the authority of the candidate. The reporting agents of parties must also lodge an election return. If no election expenditure has been incurred by a candidate or a party, a nil return must still be filed.

Where election expenditure was incurred by or with the authority of a person, and the expenditure was not incurred with the written authority of a party, candidate or an associated entity, that person must also lodge a return unless the expenditure was less than \$1,000.

'Electoral expenditure' in this context includes expenditure related to activity in the pre-election period including: broadcasting, publishing or displaying an electoral advertisement; producing electoral matter that needs to be authorised; producing and distributing electoral mailouts; consultants or advertising agent's fees; and opinion polling.

Broadcasters and publishers who broadcast or publish electoral advertisements during the pre-election period with the authority of a participant in an election are also required to submit returns of advertisements that contain electoral matter. The return must be filed within 8 weeks after polling day.

Annual returns by parties, MLAs and associated entities

Parties, MLAs and associated entities must also provide annual returns to the Commission within 16 weeks of the end of each financial year. The return must state the amount received and relevant particulars of those amounts during the financial year as well as the amount paid out during the financial year. It must also include details of the outstanding amount, at the end of the financial year, of debts incurred together with their particulars.

Parties and MLAs are required to disclose the identities of those persons or organisations who have given them \$1,000 or more in the financial year. However, in working out whether they have received \$1,000 or more from a particular person or organisation, an amount received of less than \$1,000 need not be counted.

A summary of receipts, payments and debts of ACT registered political parties derived from annual returns from 1993 to 2009 is included at Table 3 of Appendix A.

Associated entities are required to disclose the identities of those persons or organisations who have given them any income in the financial year, with the exception of amounts received from the supply of liquor and food under the *Liquor Act 1975* for not more than reasonable consideration for the supply, amounts received for the playing of gaming machines under the *Gaming Machine Act 2004*, and amounts received for membership of the entity, if the sum of the amounts per individual is less than \$50 per financial year.

Comparison of Commonwealth, State and Territory funding and disclosure schemes

The Commonwealth's Green Paper provides a detailed comparison of the provisions that exist across the Commonwealth, State and Territory jurisdictions with regard to funding and disclosure (see the tables from the Green Paper reproduced at Appendix C).

Notably, South Australia, Victoria and Tasmania have no requirement for disclosure of donations, although Victoria prohibits donations above \$50,000 annually from holders of casino and gambling licences (including related companies) and also requires the submission of a copy of the returns lodged with the AEC. Tasmania places restrictions on expenditure on Legislative Council elections. In particular, there is a requirement for candidates for Tasmanian Legislative Council elections, with some exceptions, to disclose all items of expenditure and provide receipts for items above \$20. Election expenditure is capped for candidates (\$11,500 for 2008) and political parties are prohibited from incurring election expenditure for Legislative Council elections

South Australia, Tasmania and the Northern Territory have no public funding scheme.

New South Wales, Victoria, Queensland and Western Australia operate a reimbursement public funding scheme, whereas the Commonwealth and the ACT operate a direct entitlement scheme. As noted below, the Commonwealth has before the Australian parliament a proposal to reintroduce a reimbursement scheme. The two types of scheme are discussed below.

The Commonwealth, Western Australia, the ACT and the Northern Territory require annual reporting by political parties, whereas New South Wales and Queensland require reporting each 6 months. However in Queensland, donations that total more than \$100,000 in any 6 months must be reported within 14 days of the total being reached.

Donors to political parties and candidates are not required to lodge returns in Western Australia, and election returns are not required from publishers and broadcasters by the Commonwealth, New South Wales and Western Australia.

The difference in reporting requirements across jurisdictions has the potential to result in confusion for political parties as to their obligations, particularly where the parties are registered for both Commonwealth and State or Territory purposes. Such confusion and the inherent duplication that may arise in record keeping and reporting obligations underlines the desirability of having uniformity in requirements. In particular, political parties registered in both the ACT and the Commonwealth tend to be smaller organisations, and accordingly a single set of requirements for reporting would be of benefit.

Clearly the alignment of requirements for reporting by political parties and other participants across jurisdictions would be highly desirable to those parties and other participants, including the Commission.

Proposed legislative changes to the Commonwealth funding and disclosure scheme

The Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009, currently before the Australian parliament, proposes changes to the Commonwealth scheme. It is understood that the Bill has not been progressed at this stage, awaiting the outcome of the Commonwealth Green Paper process.

As described in the outline to the Bill's Explanatory Memorandum, this Bill contains provisions that will:

- “reduce the disclosure threshold from ‘more than \$10,000’ (indexed to the Consumer Price Index annually) to \$1,000 (non-indexed);
- require people who make 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. Agents of candidates and groups have a similar timeframe to furnish a return in relation to gifts received during the disclosure period;
- if they fall within the relevant provision, require people who make gifts, agents of registered political parties, the financial controller of an associated entity, or people who have 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;
- ensure that for the purposes of the \$1,000 threshold and the disclosure of gifts, related political parties are treated as the one entity;
- make unlawful the receipt of a gift of foreign property by political parties, candidates and members of a Senate group. It will also be unlawful in some situations for associated entities and people incurring political expenditure to receive a gift of foreign property;
- extend the current prohibition on the receipt of anonymous gifts above the threshold 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. The receipt of an anonymous gift of \$50 or less may only be received in two specified situations [“The first of these is at some general public activity, such as a fete, where people passing by might, for example, place a donation into

a tin. The second situation is at a private event, such as a trivia night, where attendees might donate small sums of money.” Page 24 of the Explanatory Memorandum of the Bill.];

- provide that public funding of election campaigning is limited to declared expenditure incurred by the eligible political party, candidate or Senate group, or the sum payable calculated on the number of first preference votes received where they have satisfied the 4% threshold, whichever is the lesser;
- add, with specified restrictions, five additional categories of electoral expenditure. These additional categories are the rental of premises, the payment of additional staff, the purchase and hire of office equipment, consumables and running costs for that equipment and travel and accommodation;
- prevent sitting members of Parliament from claiming electoral expenditure if allowances, entitlements or benefits received by a member of Parliament in his or her capacity as a member are used to meet that expenditure;
- exempt unendorsed candidates and unendorsed members of Senate groups from reporting against the four new categories of electoral expenditure;
- provide for the recovery of gifts of foreign property that are not returned, anonymous gifts that are not returned and undisclosed gifts; and
- introduce new offences and penalties related to the new measures and increase the penalties for existing offence provisions.”

Insofar as these proposed Commonwealth amendments are relevant to the ACT scheme, the Commission suggests that the ACT should consider adopting these amendments if and when they are adopted by the Commonwealth parliament. As these amendments are aimed at improving the transparency of the disclosure scheme, their adoption by the ACT would achieve the two objectives of increased transparency and keeping in step with the national disclosure scheme.

The Australian Government's *Electoral Reform Green Paper: Donations, Funding and Expenditure*

The Australian Government's *Electoral Reform Green Paper: Donations, Funding and Expenditure* was published in December 2008. The purpose of the paper was to encourage public debate about options for improving and modernising Australia's electoral funding and disclosure requirements. Comments on the paper were invited until 23 February 2009. To date (3 March 2010) no further announcements have been made regarding reform in this area at the Commonwealth level. The Green Paper extensively canvasses a range of issues related to electoral funding and disclosure requirements in Australia. This submission does not attempt to summarise the issues raised in the Green Paper and readers are directed to that Paper.

Improving the funding and disclosure scheme in the ACT

There are a number of aspects of the ACT's funding and disclosure scheme that allow for a significant proportion of parties' electoral funding to not be individually disclosed. To this extent the ACT's disclosure scheme does not provide for completely transparent disclosure of

sources of funding of political parties and candidates. This is also true at the Commonwealth level, and to a greater degree reflecting the higher current threshold.

Disclosure of amounts received by parties of less than \$1,000

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. 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.

The definition of "gift"

An additional issue is the interpretation placed in the ACT and Commonwealth schemes on the meaning of "gift". Only those donors who make "gifts" to parties over the \$1,000 threshold are required to submit disclosure returns. 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 reportable transactions, without limiting reporting requirements only to payments falling within a narrow definition of "gift".

The level of income received from undisclosed sources

Table 4 at Appendix A shows sources of funding received from July 2001 to June 2009 by the 3 parties currently represented in the Legislative Assembly, the Australian Labor Party (ACT Branch), the Liberal Party of Australia (A.C.T. Division) and The ACT Greens. The table shows, for each financial year, the total amount of income declared by the party in its annual return, broken down into income received as public funding (that is, payments from either the ACT Electoral Commission or the Australian Electoral Commission) and income received from private sources. This private income is in turn broken down into income where the source of the income is identified, and where the source of the income is not identified.

It can be seen that significant proportions of the income of these 3 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 (\$1,500 up to 2007/2008; \$1,000 in 2008/2009). This income may have derived from membership fees, parliamentary levies, individual donors who each gave less than the threshold amount per year, individual donors who gave more than the threshold amount in total in the year but where the party is not required to disclose the source as each individual donation was below the threshold, or from fund-raising events. Because of the operation of the provision that amounts of less than the threshold do not need to be taken into account by a party in determining whether a donor has given more than the

threshold in a financial year, some significant donors do not need to be identified by the parties. However, in these cases donors are required to submit donor returns.

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.

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.

Options for increasing disclosure

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

Such an approach 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.

In order to allow those who provide funds to political participants through business transactions to be able to put this information on the public record, and thereby avoid being labelled as “donors” (such as organisations renting a party-owned property), the disclosure requirements could include an option of listing the purpose for which the payment was made on the published return.

For this approach to work effectively, processes would need to be in place to ensure that the actual sources of the funds are disclosed. Currently, particularly in relation to fund-raising events, it is difficult to determine whether the named source of income is the actual source of the income, or whether the funds have been transferred through an intermediary. Fully identifying the identity of companies and individuals providing political funding is challenging. It could require greater disclosure from those giving money to political participants in relation to membership and/or ownership of organisations and their sources of funding. For this to be effective it would be necessary to prevent organisations or persons being used as intermediaries in order to hide the true makers of payments.

The Commission notes that increasing transparency in these ways would come at a greater administrative cost to political participants and the Commission for oversight of the scheme, as well as some loss of privacy and greater regulatory intrusiveness. 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, considerations in relation to increased costs and confusion about obligations arise.

The need for donors' returns

An element of the current disclosure scheme that adds to its complexity is the requirement that donors must submit annual returns. At present, this process primarily serves as a cross-check of the accuracy of the party and associated entity returns and to identify donors who have given more than the \$1,000 threshold in individual amounts of less than \$1,000. As noted above these donors do not have to be disclosed by the party.

However, the requirement for donor disclosure often leads to confusion, as it is common for recipients of funds to declare a different name for the donor than the name used by the donor on the donor's return (for example, a party will declare a donation received from an individual person, while a company to which that person is associated will put in a donor's return), or a donation might be incurred (and therefore declared) by the donor in one reporting period, but reported by the recipient in the next period. The requirement for donors to lodge returns if they give over \$1,000 in a financial year is the area where compliance with the disclosure laws is poorest. This would appear to stem from an ignorance of the disclosure laws (despite an ACT Electoral Act requirement that parties, MLAs and associated entities advise donors of the disclosure laws) and from the view that a payment made at a fundraising event where some services are received is not a gift that must be disclosed. Commission staff routinely follow up cases where donors have been identified in party returns but a donor return has not been received. However, not all donors comply with the requirements, or they claim that they are not donors as their payments were for services received and they were not gifts. Where the party, MLA or associated entity has already placed the payments received in these cases on the public record, there is little public interest in pursuing such cases of failure to lodge a disclosure return through the courts.

If the disclosure scheme is recast to provide for disclosure by parties and other political participants of all sources of income, regardless of the size of individual payments, there would arguably be little need for donors' returns.

The need for broadcasters' and publishers' returns

Similarly, under the current ACT scheme, broadcasters and publishers are required to submit returns of electoral activity during an ACT election period. Again, these returns tend to duplicate information already contained in returns by political participants, and primarily serve as cross-checks on that information. Other jurisdictions, including the Commonwealth, have removed the requirement for broadcasters and publishers returns. If the quality of political participant returns could be improved, it can be expected that there would be no need for broadcasters and publishers returns.

Anonymous donations

More rigorous disclosure of receipts by political participants would also permit more exposure of "anonymous" donations.

Under the current disclosure laws in the ACT, a party, MLA or associated entity is not allowed to retain an anonymous donation from a single source of \$1,000 or more. However, there is no limit to the number of anonymous donations that a party can retain, provided each anonymous donation is below the \$1,000 disclosure threshold. This is a potential loophole that could be used to enable recipients to retain large sums made up of anonymous donations.

This potential loophole could be addressed by adopting the proposed Commonwealth amendment that addresses this issue. A provision in the Commonwealth Electoral

Amendment (Political Donations and Other Measures) Bill 2009 would extend the current prohibition on the receipt of anonymous gifts above the threshold to prohibit the receipt of all anonymous gifts above \$50 by registered political parties and candidates. 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. The receipt of an anonymous gift of \$50 or less may only be received in two specified situations. The first of these is at some general public activity, such as a fete, where people might, for example, place a donation into a tin. The second situation is at a private event, such as a trivia night, where attendees might donate small sums of money. In the ACT, these provisions could be extended to cover associated entities and MLAs.

Timeliness of disclosure of political donations and expenditure

One criticism of the ACT's disclosure scheme (and the Commonwealth's scheme) is 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, as the most recent disclosure prior to an October election day would refer to the financial year ending on 30 June in the previous year.

Table 5 at Appendix A summaries the timeframe for lodgement and publication of the various returns from participants in the electoral process.

In addition to this current Legislative Assembly inquiry, there are currently 3 processes underway that could impact on the timeliness of the ACT's disclosure provisions. The Parliamentary Agreement between the ACT Government and The ACT Greens includes a clause that the parties agreed to pass legislation that will require all political donations to be disclosed within 1 month of receipt and, in an election period, on a weekly basis.

Second, the Commonwealth Green Paper may lead to reform of the Commonwealth disclosure scheme in the near future. One aspect of the Commonwealth's reform agenda is to seek "harmonisation" of Commonwealth, State and Territory electoral laws, particularly disclosure laws.

Third, as noted above, the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009, currently before the Australian parliament, includes proposals to the Commonwealth scheme relating to lodgement deadlines as follows:

- to require people who make 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; agents of candidates and groups have a similar timeframe to furnish a return in relation to gifts received during the disclosure period; and
- to require donors, registered political parties, associated entities, or people who have 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

The various current deadlines for submitting disclosure returns for the ACT are based on the deadlines that applied under the Commonwealth Electoral Act when the ACT's disclosure scheme was established. If the ACT does not bring itself back into line with disclosure

reforms at the Commonwealth level, it would be timely for the ACT to re-examine the disclosure deadlines in order to achieve more timely publication of disclosure returns.

There are two broad approaches that could be adopted to achieve earlier disclosure. One would be to bring forward the deadlines for the current regime of annual returns and election returns. If the Commonwealth was to introduce earlier deadlines, and/or six-monthly returns, the ACT could be brought into line with those. Another approach could be to provide for on-line lodgement and disclosure within a short period of time of transactions occurring, as suggested in the ACT Parliamentary Agreement. This could be done in conjunction with the on-line system currently being considered by the Australian Electoral Commission.

Looking first at the current annual return and election return model, it can be noted that annual returns fall due 16 weeks after the end of the financial year. In an election year this due date falls in the week after polling day. This is a problematic time for electoral participants and Elections ACT alike. Further, the information disclosed in annual returns is not made public until the first day of February the following year. In the age of electronic record-keeping, it would be unusual for participants not to be in a position to provide the disclosure information much earlier, perhaps as early as 4 weeks after the end of the financial year, and for disclosure to occur within say 8 weeks.

While the deadline for donors' annual returns is currently after the deadline for the submission of party and MLA returns, to allow Elections ACT time to contact any donors identified in party returns, it would arguably be reasonable to require donors to submit annual returns at the same time as parties and MLAs, given that parties and MLAs are required to inform their donors of their obligation to submit a return. Such a change would also require a change to the deadline for parties and MLAs advising donors of the need to submit a return, to say no later than 1 week after the end of the financial year. Note that the requirement for donor returns would be removed if the Commission's suggestion to remove the need for these returns is accepted.

Similarly, the deadlines for lodgement of election disclosure returns appear to be unnecessarily late, and there appears to be no logical reason for an earlier deadline for broadcasters and publishers. The deadline for reporting for all participants could be say 30 days after polling day and for publication of the returns, say 60 days. Currently, the extended deadlines for lodgement of returns appear to lead to a propensity for those obliged to submit returns to overlook their obligation. The task of follow-up of those required to complete returns by Elections ACT then becomes more difficult as the distance from the election, or the end of financial year, becomes greater. This is especially relevant to donors and independent candidates.

Adopting an automated system where those responsible for lodging returns would complete their returns on-line could both speed disclosure and make the data sets more readily available to the public. While an approach requiring continuous disclosure is possible, it would be costly to ensure compliance. Continuous disclosure could require more frequent audits of compliance, particularly early on. The Commission would need additional funding in order to set up an automated system and undertake such a compliance regime.

The Commission notes that Elections ACT staff have been in discussion with the Australian Electoral Commission regarding the possibility of establishing a joint Commonwealth/State/Territory on-line disclosure system. Such a system would if established facilitate more frequent disclosure and may be able to be used in a continual disclosure environment. For such a system to work effectively, it would be desirable to maintain consistency with the Commonwealth disclosure scheme if possible to minimise the amount of

duplicated effort that would be required, particularly for political parties active at both the Commonwealth and ACT levels.

With regard to the Parliamentary Agreement's proposal to require all political donations to be disclosed within 1 month of receipt and, in an election period, on a weekly basis, the Commission suggests that this proposal be considered in the light of the Commonwealth's Green Paper reform process. Again, it would be desirable to maintain consistency with the Commonwealth disclosure scheme if possible to minimise the amount of duplicated effort that would be required.

Audits of financial records

The Commission considers that a regulatory system such as the ACT's disclosure scheme requires regular compliance audits if the community is to be assured that disclosure is being made in accordance with the law. It has been Commission policy to conduct audits of compliance with the disclosure provisions at least once in the life of each parliament. The last audit was conducted after the 2004 election. The Commission intends to conduct an audit of compliance with the disclosure provisions for the period leading up to and including the 2008 election. However, the Commission is concerned that budgetary constraints are limiting the Commission's ability to adequately resource audits of this nature, as the Commission does not have the specialist auditing skills required to conduct audits in-house, and has in the past engaged professional auditors for this task.

Public funding – direct and indirect

The terms of reference for this inquiry include "direct and indirect funding of elections". The Commission presumes that "direct funding" refers to the ACT's existing funding scheme (discussed in the next section) and "indirect funding" refers to in-kind funding such as the provision of free broadcasting time, parliamentary entitlements of sitting MLAs, and government advertising.

The Commission considers that the desirability of providing indirect funding is essentially a policy issue and that it is not appropriate for the Commission to express an opinion.

Public funding – reimbursement or direct entitlement?

In the ACT, registered political parties and non-party candidates who receive a prescribed minimum number of formal votes are eligible to receive public funding.

To qualify, a group of candidates endorsed by a registered party in an electorate must receive at least 4% of the formal first preference votes counted in that electorate. Each candidate that is not endorsed by a registered political party must also receive 4% of the formal first preference votes counted in that electorate to qualify.

The ACT scheme for public funding is a formula based direct entitlement scheme, involving automatic payments to parties and candidates calculated by multiplying the total number of first preference votes received by a prescribed amount, adjusted each six months by the all groups consumer price index issued by the Australian Bureau of Statistics. The prescribed amount for the 2008 election was 147.722 cents per eligible vote. The amount that applies for the January to June 2010 period is 153.551 cents per eligible vote.

By comparison, public funding rates for other jurisdictions cited in the Commonwealth Green Paper (page 34) as at December 2008 included: Commonwealth \$2.1894; NSW \$2.69; Victoria \$1.3746; Queensland \$1.54737; Western Australia \$1.56888. Note that all of these jurisdictions other than Queensland have upper and lower houses; so that, for example, where

an elector voted for the same party in both houses, that party could receive two public funding payments for that one elector. South Australia, Tasmania and the Northern Territory do not provide public funding.

The public funding payments made with respect to the each ACT election since 1995 are provided in Table 6 at Appendix A.

The Commonwealth Green Paper discusses the relative merits of the existing Commonwealth and ACT schemes, which are direct entitlement schemes involving the automatic payment of set amounts, compared to reimbursement schemes, where payments are only made up to the set entitlement to reimburse specified electoral expenditure.

The Commission notes that the direct entitlement scheme was adopted in the ACT in the light of the Commonwealth experience with an earlier reimbursement scheme. 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. The Commission notes 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. In this light, the Commission considers that the large additional burden that would be imposed on parties, candidates and Elections ACT by a reimbursement scheme would not be warranted. Table 6 at Appendix A indicates that in almost all cases parties and candidates spent more than their public funding, with the exception of the Osborne Independent Group in 1998 and Paul Osborne and Dave Rugendyke in 2001.

Does public funding meet the objective of reducing reliance on external funding?

The objectives identified by this submission for the need for a funding and disclosure scheme include 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.

The Commission observes 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. While there are significant differences between parties, in general expenditure by the major parties has grown much more rapidly than public funding, but for smaller parties and independents public funding can still provide a significant proportion of their funding. The Commission notes that Table 6 and Graphs 1 and 2 at Appendix A show that, particularly at the most recent elections, the level of public funding provided has been considerably outstripped by the level of expenditure in most cases. Table 6 shows the public funding payments and declared expenditure of all parties and independents that qualified for public funding from 1995 to 2008. Graph 1 shows a graphical comparison of the overall public funding payments and election expenditure at ACT elections from 1995 to 2008. This Graph indicates that the gap between public funding provided and expenditure incurred has increased dramatically over time, with this gap growing from \$164,773 in 1995 to \$2,054,119 in 2008. Graph 2 shows a graphical comparison of the public funding received by each party and candidate at the 2008 election compared to their declared

expenditure. This Graph shows that the bulk of the expenditure undertaken in addition to the public funding provided was made by the Australian Labor Party and the Liberal Party.

The Committee may wish to address the following issues:

- Given that election expenditure has greatly outstripped public funding, particularly for the major parties, and given the absence of any cap on 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 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?

Regulating political donations and expenditure in the ACT

The terms of reference for this inquiry give particular prominence to regulation of political donations and expenditure. The Commission presumes that “regulation” in this context includes contemplation of limiting donations and expenditure through caps or bans.

This issue raises questions related to policy, law and practical considerations. As noted at Attachment 1, there are no caps on donations in place in Australia with the exception that Victoria prohibits donations above \$50,000 from holders of casino and gambling licences, including related companies, being made to a registered political party in a financial year. Similarly, there are no caps on expenditure in any jurisdiction other than those applying to Tasmanian Legislative Council elections.

Policy considerations

Whether or not it is desirable to limit or ban donations and expenditure is a policy issue that is essentially a matter for the Legislative Assembly and not a matter on which the Commission considers it appropriate to express an opinion. Arguments for and against limiting donations and expenditure are extensively canvassed elsewhere. For example, the issues are discussed in the Commonwealth’s Green Paper and in the NSW Parliament’s Select Committee on Electoral and Political Party Report on *Funding, Electoral and Political Party Funding in New South Wales* (NSW Parliament, June 2008

[http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/1ca6d5a89fabd975ca25746d00063640/\\$FILE/Final%20report%20080619.pdf](http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/1ca6d5a89fabd975ca25746d00063640/$FILE/Final%20report%20080619.pdf)).

Legal considerations

The Commission suggests that the Committee carefully investigates whether it is legally possible for the ACT to ban or limit political donations and expenditure. Limiting or banning political donations and expenditure may raise Constitutional issues, by limiting the implied freedom of political communication. There have been three High Court cases that have established and clarified the implied freedom of political communication:

- *Australian Capital Television Pty Ltd v Commonwealth* ((1992) 177 CLR 106), in which 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.

- *Lange v Australian Broadcasting Corporation* ((1997) 189 CLR 520), in which the court found 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
- *Coleman v Power* ((2004) 220 CLR 1), which provided further explanation and clarification of the two-part test as outlined in *Lange v Australian Broadcasting Corporation*.

The relevant constitutional issues are extensively examined by Associate Professor Dr Anne Twomey 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).

Dr Twomey concluded (page 1):

“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 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.”

While the Commission is not qualified to give any formal advice on the legal issues raised above, the Commission suggests that there is sufficient weight to the reservations expressed above to indicate caution if the Legislative Assembly is considering bans or limitations on political donations and expenditure.

Practical considerations

There are practical challenges in designing and administering any ban or limit on political donations or expenditure. Care will be needed to ensure that bans or limits cannot be evaded by channelling activity through third parties, for example. It might be practically difficult to ban action by organisations with no formal links to the candidate or party but which share the same objective – there has been a huge growth in such parallel political advertising campaigns in the US, including in Presidential elections.

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. For this reason, it is highly desirable that the ACT should endeavour to adopt a disclosure regime that

is consistent with a national scheme. It may be advisable for the ACT to wait for developments at the national level arising from the Commonwealth's Green Paper process before acting to unilaterally introduce any bans or limitations on donations or expenditure, should that be desired by the Assembly.

Another practical consideration that would arise should the ACT introduce more stringent disclosure requirements would be the resourcing of an appropriate regulatory body. While the ACT Electoral Commissioner is currently responsible for implementing the ACT's funding and disclosure scheme, the staffing and funding levels available for this function are minimal. At the least, additional funding would be needed if a tighter disclosure scheme was to be introduced and a greater level of regulation, investigation and enforcement was required. However, given the specialist auditing skills that would be needed for this task, consideration might be given to establishing a separate agency dedicated to regulating the disclosure scheme, along the lines of the NSW Election Funding Authority.

If the Commonwealth's Green Paper process was to lead to a uniform national disclosure scheme, another option might be to give the responsibility for maintaining a national disclosure scheme for all levels of government to one agency, such as the Australian Electoral Commission or a new stand-alone authority.

Enforcement of funding and disclosure law

Another specific topic included in the Committee's terms of reference is enforcement of funding and disclosure law.

As discussed above, the most common area of non-compliance apparent in the ACT is with donors not submitting returns. Despite the requirement for parties that have received reportable donations to advise their donors of the obligation on the donor to provide the Commissioner with a return detailing donations made above the threshold of \$1,000, it is clear that a number of donors do not comply with their obligation. This is not a suggestion that parties do not provide the required advice to donors. Indeed, evidence suggests that they do.

The follow-up of these donors is made more difficult because entries in the party returns do not distinguish between those that are donations and those that are other forms of receipt and because some donors change their address during the period between the donation being made and the time that party returns are submitted and cross-matched (this cannot effectively occur until a month after party returns are due because the due date for donor returns is 4 weeks after that for party returns).

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.

The Commission observes that its current funding levels are barely adequate to enable it to scrutinize existing disclosure laws. 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 by an increase in resources if any new requirements are to be effectively implemented.

The relationship between ACT electoral law and Commonwealth electoral law

Another specific topic included in the Committee's terms of reference is the relationship between ACT electoral law and Commonwealth electoral law.

This submission sets out above the history of the ACT's funding and disclosure laws, indicating how the ACT attempted to remain consistent with the Commonwealth scheme, until the Commonwealth raised its disclosure thresholds to over \$10,000 in 2006. Even then, the ACT's reduction of disclosure thresholds to \$1,000 was made in anticipation of a similar reduction in threshold at the Commonwealth level, which was subsequently not passed by the Senate.

The Commonwealth Green Paper process has as one of its stated aims the "harmonisation" of electoral arrangements in Australia at the various levels of government. 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. 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.

The Commission notes the desirability of a disclosure scheme that is consistent in its core principles at both levels of government, and harmonised among the states more broadly. Therefore the Commission notes that it would be desirable for the ACT to take account of developments that may arise at the Commonwealth level as a result of the Commonwealth Green Paper process and other developments, with a view to keeping the ACT in step with a national disclosure scheme. If a national scheme is adopted that addresses the identified objectives of a disclosure scheme, the Commission suggests that adopting national disclosure standards would be the most appropriate option for the ACT Legislative Assembly to pursue.

Appendix A

Table 1 – Summary of annual disclosure return detail, lodgement and display requirements

	Parties	MLAs	Associated entities	Candidates	Donors	Broadcasters and publishers	Political participants
Annual returns detail required	• Total amounts received • Details of any person or organisation from whom \$1,000 or more is received (but ignoring amounts received less than \$1,000) • Total amounts paid • Total debts	• Total amounts received • Details of any person or organisation from whom \$1,000 or more is received (but ignoring amounts received less than \$1,000) • Total amounts paid • Total debts	• Total amounts received • Details of any person or organisation from whom an amount is received • Total amounts paid • Details of all persons and organisations who deposited capital • Total debt • Details of persons and organisations to whom \$1,000 or more is owed	N/A	• Details of party, MLA or associated entity to whom a gift of \$1,000 or more is given, and the amount given • Details of any person or organisation from whom a gift of \$1,000 or more is received, where all or part of that gift is used to make a gift to a party, MLA or associated entity	N/A	N/A
Annual returns due	16 weeks after end of financial year	16 weeks after end of financial year	16 weeks after end of financial year	N/A	20 weeks after end of financial year, except in an election year when it is 24 weeks	N/A	N/A
Annual returns made public	Beginning of February in following year	Beginning of February in following year	Beginning of February in following year	N/A	Beginning of February in following year	N/A	N/A

Table 2 – Summary of Election disclosure return detail, lodgement and display requirements

	Parties	MLAs	Associated entities	Candidates	Donors	Broadcasters and publishers	Political participants
Election returns detail required (for 2012 election)	List expenditure during the election period on specific items including advertising, electoral matter, consultant fees, opinion polls	N/A	N/A	- List expenditure during the election period on specific items including advertising, electoral matter, consultant fees, opinion polls - Total of gifts received - Details of any person or organisation from whom \$1,000 or more is received since the 2008 election	- Details of candidate to whom a gift of \$1,000 or more is given, and the amount given, during the period since the 2008 election - Details of any person or organisation from whom a gift of \$1,000 or more is received, where all or part of that gift is used to make a gift to a candidate	- Details of persons or organisations who requested an advertisement be placed, the broadcasting service that broadcast the advertisement or news publication in which the advertisement was published, details of the person who authorised the advertisement, the dates/times of broadcast or publication, page number and space occupied, and the charge made - For publications only, no return required if total charge is less than \$1,000	- List expenditure during the election period on specific items including advertising, electoral matter, consultant fees, opinion polls - Details of any person or organisation from whom \$1,000 or more is received since the last election, where the gift was used in whole or part to incur total electoral expenditure of \$1,000 or more (this includes making gifts to a party, candidate, MLA or associated entity)
Election returns due	15 weeks after polling day	N/A	N/A	15 weeks after polling day	15 weeks after polling day	8 weeks after polling day	15 weeks after polling day
Election returns made public	25 weeks after polling day	N/A	N/A	25 weeks after polling day	25 weeks after polling day	25 weeks after polling day	25 weeks after polling day

Table 3 – Summary of receipts, payments and debts of ACT registered parties from annual returns

	Australian Labor Party			Liberal Party			ACT Greens			Australian Democrats (1)			Other Parties		
	Receipts	Payments	Debts	Receipts	Payments	Debts	Receipts	Payments	Debts	Receipts	Payments	Debts	Receipts	Payments	Debts
1993/94	489,926	353,720	8,334	214,739	176,305	37,201	22,265	20,354	1,042	4,694	3,725	1,949	663	362	0
1994/95	676,883	587,556	14,897	453,499	426,481	139,875	72,335	73,258	8,288	21,871	21,439	1,223	2,102	4,604	0
1995/96	559,692	406,534	1,708	598,661	605,621	47,850	77,897	58,787	3,143	10,090	7,528	0	899	0	0
1996/97	561,543	456,999	10,221	194,304	184,269	0	33,697	29,507	3,093	7,841	8,773	0	6,075	4,884	83
1997/98	652,511	694,311	14,165	574,944	590,613	77,438	100,209	115,942	14,413	29,541	31,981	5,209	49,291	50,557	67
1998/99	433,101	368,603	8,866	510,215	449,366	57,108	54,162	51,595	2,474	56,820	56,470	799	31,291	30,616	0
1999/2000	311,903	239,749	223	240,997	275,534	205,322	22,387	16,840	740	3,757	2,261	1,358	1,188	855	0
2000/01	533,838	393,686	4,001	282,958	355,357	577,150	38,559	37,989	740	8,781	5,110	0	1,073	736	0
2001/02	1,038,445	902,577	14,411	981,884	868,538	458,919	165,550	144,568	4,747	148,150	139,622	184	41,985	31,716	0
2002/03	566,041	357,768	580	316,393	312,644	428,866	46,855	56,053	8,031	2,868	1,994	48	3,290	532	0
2003/04	684,328	540,743	3,120	646,958	646,491	124,161	114,835	56,053	30,861	19,742	10,732	0	5,775	3,124	0
2004/05	988,905	1,320,432	4,274	1,090,667	1,048,712	122,329	274,699	295,464	15,338	18,478	48,387	0	16,890	14,190	0
2005/06	587,123	535,472	0	433,654	320,813	31,000	154,057	135,861	40,436	1,791	808	0	3,361	3,391	0
2006/07	700,595	533,073	12,668	233,061	264,062	118,929	52,460	48,662	14,915	2,079	475	0	1,651	1,780	0
2007/08	1,183,748	802,740	24,929	967,823	895,075	11,428	410,939	304,992	14,025	2,008	0	0	21,033	3,615	195
2008/09	1,286,311	2,179,795	10,768	1,037,540	1,271,655	208,368	200,837	267,606	1,029	na	na	na	141,570	150,204	0

Note: 1. Australian Democrats deregistered during 2007/08

Table 4 – Sources of funding received by the Australian Labor Party, the Liberal Party and the ACT Greens for 2001-02 to 2008-09

	Source of funding	LP	% of total received	ALP	% of total received	GREEN	% of total received	Total	% of total received
2008-09	Total received	1,037,539.54		1,334,279.00		200,837.00		2,572,655.54	
	Private	938,780.54	90.48	1,213,392.49	90.94	150,254.52	74.81	2,302,427.55	89.50
	Public	98,759.00	9.52	120,886.51	9.06	50,582.48	25.19	270,227.99	10.50
	Private - disclosed	314,343.00	30.30	1,029,995.45	77.19	25,359.00	12.63	1,369,697.45	53.24
	Private - undisclosed	624,437.54	60.18	183,397.04	13.75	124,895.52	62.19	932,730.10	36.26
2007-08	Total received	967,823.09		1,183,748.00		410,939.00		2,562,510.09	
	Private	967,823.09	100.00	1,183,748.00	100.00	244,939.00	59.60	2,396,510.09	93.52
	Public	0.00	0.00	0.00	0.00	166,000.00	40.40	166,000.00	6.48
	Private - disclosed	228,327.00	23.59	716,095.49	60.49	77,550.00	18.87	1,021,972.49	39.88
	Private - undisclosed	739,496.09	76.41	467,652.51	39.51	167,389.00	40.73	1,374,537.60	53.64
2006-07	Total received	433,653.50		587,123.49		154,057.00		1,174,833.99	
	Private	433,653.50	100.00	587,123.49	100.00	154,057.00	100.00	1,174,833.99	100.00
	Public	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
	Private - disclosed	160,139.35	36.93	245,052.00	41.74	43,987.94	28.55	449,179.29	38.23
	Private - undisclosed	273,514.15	63.07	342,071.49	58.26	110,069.06	71.45	725,654.70	61.77
2005-06	Total received	233,061.00		700,594.81		52,460.00		986,115.81	
	Private	233,061.00	100.00	700,594.81	100.00	52,460.00	100.00	986,115.81	100.00
	Public	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
	Private - disclosed	204,525.72	87.76	447,398.99	63.86	6,144.00	11.71	658,068.71	66.73
	Private - undisclosed	28,535.28	12.24	253,195.82	36.14	46,316.00	88.29	328,047.10	33.27
2004-05	Total received	1,090,667.00		988,904.89		274,699.00		2,354,270.89	
	Private	993,380.51	91.08	857,297.34	86.69	249,768.10	90.92	2,100,445.95	89.22
	Public	97,286.49	8.92	131,607.55	13.31	24,930.90	9.08	253,824.94	10.78
	Private - disclosed	469,649.11	43.06	559,642.15	56.59	13,500.00	4.91	1,042,791.26	44.29
	Private - undisclosed	523,731.40	48.02	297,655.19	30.10	236,268.10	86.01	1,057,654.69	44.92
2003-04	Total received	646,958.00		684,328.11		114,835.00		1,446,121.11	
	Private	646,958.00	100.00	684,328.11	100.00	114,835.00	100.00	1,446,121.11	100.00
	Public	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
	Private - disclosed	568,157.95	87.82	409,273.84	59.81	8,000.00	6.97	985,431.79	68.14
	Private - undisclosed	78,800.05	12.18	275,054.27	40.19	106,835.00	93.03	460,689.32	31.86
2002-03	Total received	316,393.43		566,040.71		46,855.00		929,289.14	
	Private	316,393.43	100.00	566,040.71	100.00	46,855.00	100.00	929,289.14	100.00
	Public	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
	Private - disclosed	258,839.67	81.81	413,044.06	72.97	0.00	0.00	671,883.73	72.30
	Private - undisclosed	57,553.76	18.19	152,996.65	27.03	46,855.00	100.00	257,405.41	27.70
2001-02	Total received	981,883.57		1,038,445.35		165,550.00		2,185,878.92	
	Private	663,098.91	67.53	937,976.23	90.33	90,254.89	54.52	1,691,330.03	77.38
	Public	318,784.66	32.47	100,469.12	9.67	75,295.11	45.48	494,548.89	22.62
	Private - disclosed	358,369.69	36.50	611,136.66	58.85	29,493.00	17.82	998,999.35	45.70
	Private - undisclosed	304,729.22	31.04	326,839.57	31.47	60,761.89	36.70	692,330.68	31.67

Note 1: Liberal return for 2006-07 was the AEC return requiring disclosure only of amounts over \$10,300.

Note 2: Disclosure threshold for 2008/09 = \$1000; and for other years = \$1500

Note 3: Public funding is received from the ACT or Australian Electoral Commissions under relevant election public funding schemes

Note 4: Private funding - disclosed is the total amount declared where the person making the payment, and the amount, is disclosed

Note 5: Private funding - undisclosed is the total amount of funding received where the persons making the payments are not disclosed

Table 5 – Summary of Election and Annual disclosure return lodgement and display requirements

	Parties	MLAs	Associated entities	Candidates	Donors	Broadcasters and publishers	Political participants
Annual returns due	16 weeks after end of financial year	16 weeks after end of financial year	16 weeks after end of financial year	NA	20 weeks after end of financial year, except in an election year when it is 24 weeks	NA	NA
Annual returns made public	Beginning of February in following year	Beginning of February in following year	Beginning of February in following year	NA	Beginning of February in following year	NA	NA
Election returns due	15 weeks after polling day	NA	NA	15 weeks after polling day	15 weeks after polling day	8 weeks after polling day	15 weeks after polling day
Election returns made public	25 weeks after polling day	NA	NA	25 weeks after polling day	25 weeks after polling day	25 weeks after polling day	25 weeks after polling day

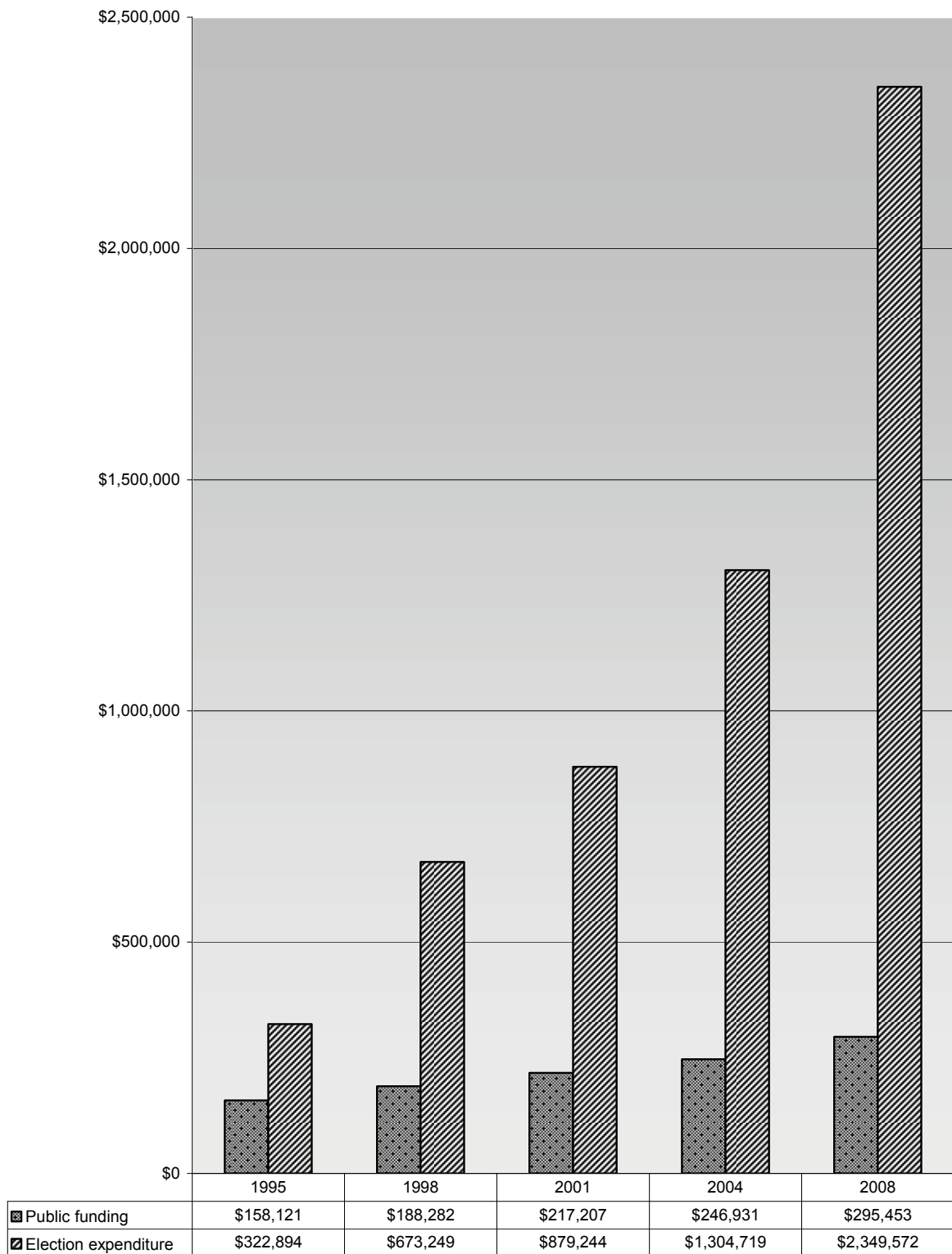
Table 6 – Public funding payments and declare election expenditure at ACT Legislative Assembly election 1995-2008

Election	1995 (1)		1998 (2)		2001		2004		2008	
Party	payment	expenditure	payment	expenditure	payment	expenditure	payment	expenditure	payment	expenditure
Australian Labor Party	53,275.50	132,733.54	54,287.29	189,034.42	96,219.12	448,591.30	125,507.56	707,772.26	116,886.51	1,392,643.00
Liberal Party	68,174.03	128,575.15	74,371.12	248,099.04	72,983.73	345,668.75	93,286.48	489,842.88	98,759.54	727,766.77
ACT Greens	15,253.17	23,950.63	17,896.99	51,429.00	20,991.13	32,268.00	24,930.90	64,389.00	48,832.46	63,281.62
Australian Democrats	6,580.46	9,858.14	11,758.36	63,449.00	18,536.59	46,560.00	3,206.10	42,715.00		
Moore Independents	11,867.65	24,806.95	5,735.28	8,625.98						
Paul Osborne	1,817.56	1,817.56			4,698.80	3,190.00				
Osborne Independent Group			17,906.80	14,839.30						
Smokers are Voters and Civil Rights	641.71	641.71								
Kevin Connor	510.44	510.44								
Alice Chu			1,187.17	9,655.35						
Helen Szuty			1,337.61	8,577.55						
Manual Xyrakis			2,023.32	24,627.00						
Noel Haberecht/Jacqui Rees (non-party group)			1,778.03	54,912.62						
Dave Rugendyke					3,777.90	2,966.07				
Australian Motorist Party									11,968.44	75,234.51
Pangallo Independents Party									6,281.14	25,059.38
The Community Alliance Party (ACT)									7,133.50	16,807.54
Mark Parton - Independent									5,591.28	48,779.00
TOTAL	158,120.52	322,894.12	188,281.97	673,249.26	217,207.27	879,244.12	246,931.04	1,304,719.14	295,452.87	2,349,571.82

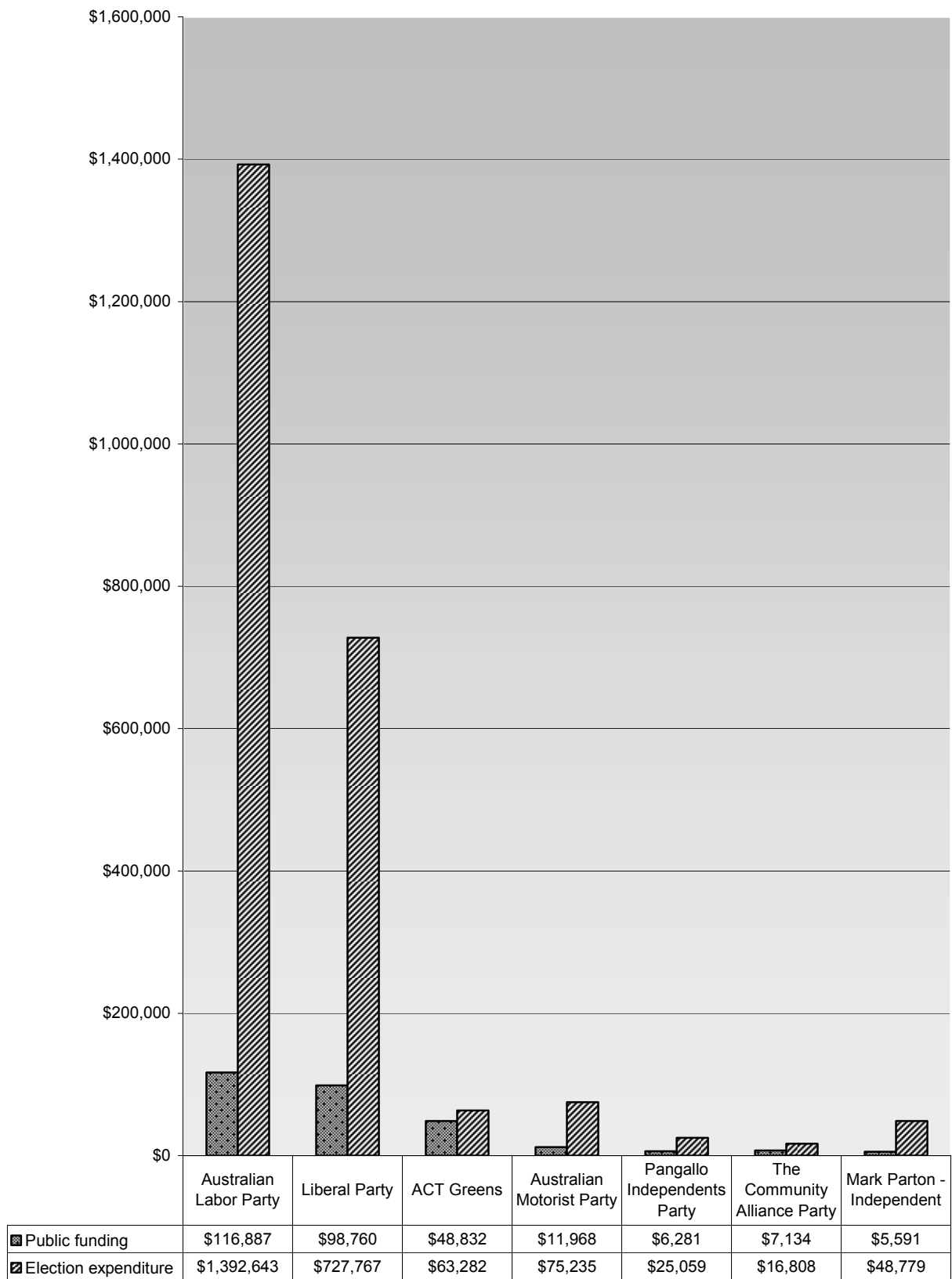
Note 1: 1995 election funding payments required substantiation. Amounts shown may represent only that amount required to cover the payment.

Note 2: 1998 and later elections parties and candidates required to lodge expenditure returns showing expenditure on advertising and similar expenses only.

Graph 1 – Total public funding compared to election expenditure, 1995-2008 elections



Graph 2 – Public funding compared to election expenditure by party, 2008 election



Appendix B

Glossary of definitions and terms used

advertisements relating to an election

An advertisement relates to an election or referendum if it contains electoral or referendum matter, whether or not consideration (payment) was given for the publication or broadcasting of the advertisement.

anonymous donations

Anonymous donations are gifts where the defined particulars of a donor are not known to the person receiving the gift on behalf of a registered political party, MLA, candidate or associated entity at the time the gift is made.

A registered political party, MLA, candidate or associated entity is not permitted to accept anonymous donations of \$1,000 or more. If such a donation is received, it is payable by the recipient to the Territory. If it is not paid to the Territory, it may be recovered as a debt to the Territory.

associated entity

An organisation that is controlled by, or operates, completely or to a significant extent for the benefit of, one or more registered political parties or Members of the Legislative Assembly.

Organisations that commonly fall within this definition include:

- companies that hold assets for a political party or MLA;
- trust funds or fundraising organisations; and
- certain groups (or clubs) of which the majority of distributed funds are received by a party, or MLA.

Authorisation statement

Electoral matter (whether in printed or electronic form) that is printed, published, distributed, produced or broadcast must (with some exceptions) include an authorisation statement. This usually relates to the electoral advertisements. Further details on authorisation of electoral matter can be found in the Elections ACT Factsheet "authorising electoral material" on its website www.elections.act.gov.au under publications.

capital deposits

Persons who have deposited capital with an associated entity must be disclosed where any funds generated from those deposits are used to make a payment to a registered political party or MLA.

Only capital deposits made in the relevant financial year need to be included. All deposits made during that period must be disclosed whether or not they directly generated the payment to a political party or MLA.

Capital deposits include monies held in trust.

Commission

ACT Electoral Commission

defined particulars

In relation to a sum or amount, means:

- if the sum was received from, paid, or owed to an unincorporated association, other than a registered industrial organisation;
- the name of the association; and

- the names and addresses of the members of the executive committee (however described) of the association;
- if the sum or amount was paid out of or into or incurred as a debt to a trust fund or the funds of a foundation;
- the names and addresses of the trustees of the fund or foundation; and
- the name, title or description of the trust fund or foundation; or
- In any other case, the name and address of the person or organisation that paid, received or is owed the sum or amount.

Elections ACT

The office of the Electoral Commissioner and the staff appointed to assist the Commissioner.

Electoral Act

Electoral Act 1992 of the Australian Capital Territory.

electoral matter

Electoral matter is matter that is intended to affect or is likely to affect voting in an election. It is taken to be intended or likely to affect voting if it contains an express or implicit reference to, or comment on:

- the election;
- the performance of the Government, the Opposition, a previous Government or a previous Opposition of the ACT Legislative Assembly;
- the performance of an MLA or former MLA;
- the performance of a political party, candidate or a group of candidates in an election; or
- an issue submitted to, or otherwise before, the electors in connection with an election.

financial institution

Financial institution is defined as a bank, a credit union, a building society or an entity prescribed under the regulations.

gifts

The definition of gift includes cash or gifts-in-kind, but specifically excludes:

- a personal gift;
- volunteer labour;
- a disposition of property under a will;
- a payment under the election funding scheme; and
- an annual subscription paid to a party by a person in relation to the person's membership of the party.

Where a gift is made by a client through a solicitor's or an accountant's trust account, the return must include the name and address of the client who made the donation. The relationship between solicitor/accountant and client is that of agent and principal. For the purposes of the disclosure provisions, a gift paid by an agent at the direction of his/her principal is a gift made by the principal and not the agent.

If a person makes a gift to any person or body with the intention of benefiting a particular candidate, party, MLA or associated entity, the person shall be taken to have made that gift directly to that candidate, party, MLA or associated entity.

A gift made to, or received by, a candidate for the benefit of a party, of which the candidate is a member, is considered to be a gift to the party.

A gift made to a campaign committee of a candidate endorsed by a political party is considered to be a gift to the party.

The matter of whether a payment to attend a political party function or event (including dinners) constitutes a donation requiring disclosure is not clearly prescribed. As a guide:

- if a payment for attendance at a function or event is considered a donation, that is, the person making the payment did not receive services or adequate services equal to the value of the payment, the payment should be disclosed on the donor disclosure return.
- Payment for attendance at a function or event with the intention of contributing to the party (that is, where the function or event is primarily a fundraiser), or where the amount paid is in excess of the value of the function or event, is a donation and must be disclosed.

gifts-in-kind

Non-cash gifts are to be treated as cash gifts for disclosure purposes.

The definition of gifts-in-kind includes:

- any disposition of property for no payment, in cash or kind, or where the payment made, in cash or kind, is less than the value of the property; or
- provision of a service free of charge or for a charge less than the normal commercial rate.

Some examples are:

- rent free use of commercial premises;
- free use of a motor vehicle (unless associated with volunteer labour);
- free legal advice given by a law firm;
- the donation of items or services as raffle prizes;
- printing undertaken for no charge or at a cost less than normally charged; and
- work undertaken for a candidate by an employee during normal working hours where the employer continues to pay salary or wages (but not if the employee takes paid leave to undertake work for the candidate).

Broadcasters (other than the ABC) or publishers providing a service (including community service announcements) for no charge, or for less than the normal commercial rate, are considered to be making a gift. However, interviews, news items, or political speeches broadcast on a current affairs program, a news program, or any other topical program, or published in a journal, are not considered to be gifts.

A monetary value should be assigned to any gift-in-kind and shown in a disclosure return where appropriate. A gift-in-kind should be valued at the normal commercial rate. For example, a gift of free use of a car should be valued on the basis of commercial car hire rates.

Valuations placed on gifts-in-kind will generally be accepted provided there is sufficient description shown on the return of the goods or services donated. This enables Commission officers to assess the value attributed. It is recommended that a value be placed on a gift-in-kind when they are received to avoid the onerous task of trying to assign values during preparation of the return.

incurring expenditure for a political purpose

Incurring expenditure for a political purpose is incurring expenditure in relation to:

- publishing electoral material (including by radio or television);

- otherwise publishing a view on an issue in an election;
- making a gift to a party or candidate;
- making a gift to a person on the understanding that the person or another person will apply, either directly or indirectly, the whole or part of the gift in a way referred to above.

A person is taken to have incurred expenditure for a political purpose if, during the disclosure period in relation to an election, the person incurs expenditure in relation to that or any other election.

loan

A loan may be any of the following:

- an advance of money;
- a provision of credit or any other form of financial accommodation;
- a payment of an amount for, on account of, on behalf of or at the request of the receiver, if there is an express or implied obligation to repay the amount; or
- a transaction (whatever its terms or form) that is, in substance, a loan of money.

Where a loan has been received from a source other than a financial institution, the name and address of the person or organisation from whom the loan was received and details of the terms and conditions of that loan must be recorded by the candidate. Such terms and conditions would include the interest rate being charged and the period of the loan.

In the case of a loan received from a registered industrial organisation or an unincorporated association, the name and address of each of the members of the executive committee must be recorded along with that of the organisation. In the case of a trust or foundation, the names and addresses of the trustees must be recorded along with the title or description of the trust or foundation.

Where a record of such information is not kept, an amount equivalent to the value of the loan is forfeited to the Territory.

Details of loans must be recorded by the person receiving it. These details do not need to be included in the return.

MLA

A Member of the Legislative Assembly.

normal commercial rate

The normal commercial rate is considered to be the rate that is generally charged for similar broadcasting time or space in a publication.

Where a special rate is allowed to all purchasers of a set amount of advertising time or space, the special rate is considered to be the normal commercial rate.

A rate struck specifically for one particular party, candidate, referendum participant or special interest group, and not available to other advertisers, is considered to be a gift to the party, candidate, or other election or referendum participant.

participant in an election or referendum

A participant in an election means:

- a political party;
- a candidate; or
- a third party.

A participant in a referendum is a person who incurs expenditure for the purposes of a referendum.

An advertising agency is not a participant in an election or a referendum unless it incurs or gives authority to incur electoral expenditure on its own behalf.

party unit

A generic term used to describe all sections of a political party including its state branch/division, local branches and campaign committees.

personal gifts

A gift made in a private capacity to an MLA, candidate or specified body who is a natural person, for his or her personal use, being a gift that the receiver has not used, and will not use, solely or substantially for a purpose related to an election or referendum.

The transfer or loan of funds from an account containing gifts received in a personal capacity to an account from which election or referendum-related expenses were paid is considered to be a use of those funds for election or referendum purposes. This could render disclosable all gifts in that account.

political party

See registered political party.

pre-election period

The pre-election period commences 36 days before polling day and ends on polling day.

referendum matter

A referendum matter is a matter that is intended or likely to affect voting in a referendum and includes any matter that contains an express or implied reference to a referendum or to any of the matters on which electors are required to vote in a referendum.

registered officer

The person identified in the register of political parties, who has the authority to nominate and verify the endorsed candidates of the party.

The registered officer is deemed to be the reporting agent if the party does not have an appointed agent.

The registered officer cannot be replaced except by a formal written application made under the Electoral Act.

registered political party

A political party registered with the Commission under the Electoral Act. Political parties not registered with the Commission are treated as third parties for disclosure purposes.

volunteer labour

Volunteer labour does not need to be disclosed. The donation of time by a member of a party is volunteer labour. The donation of time by a person who is not a party member is only considered volunteer labour where it does not constitute a service for which that person normally charges.

For example, the donation of legal advice by a solicitor who is a party member is volunteer labour, but the donation of legal advice by a solicitor who is not a party member is a gift-in-kind. If, however, a solicitor who is not a party member delivers voting material, then that constitutes volunteer labour because it is not a service for which that person normally charges.

Appendix C

Comparison of Commonwealth, State and Territory Election Funding and Disclosure Systems¹

South Australia has no election funding or financial disclosure scheme.

Victoria has a reimbursement scheme (with parties and candidates providing election expenditure returns) but no disclosure scheme although political parties are required to provide a copy of the return they lodge with the AEC. Victoria prohibits donations above \$50,000 from holders of casino and gambling licences, including related companies, being made to a registered political party in a financial year.²

Tasmania has no election funding scheme or a requirement for the disclosure of donations made or received. There is, however, a requirement for candidates for Legislative Council elections, with some exceptions, to disclose all items of expenditure and provide receipts for items above \$20. Election expenditure is capped for candidates (\$11,500 for 2008)³ and political parties are prohibited from incurring election expenditure for Legislative Council elections.⁴

	Commonwealth	Queensland	New South Wales	Western Australia	ACT	NT
Public Funding	Yes – a direct entitlement scheme. 4% threshold of first preference votes cast. (The Political Donations Bill seeks to reintroduce a reimbursement scheme).	Yes – reimbursement scheme. 4% threshold of first preference votes cast.	Yes – reimbursement scheme. 4% threshold of first preference votes cast or being elected.	Yes – reimbursement scheme. 4% threshold of first preference votes cast.	Yes – a direct entitlement scheme as currently operates in the Commonwealth. 4% threshold of first preference votes cast.	None.

¹ This attachment is a copy of Appendix B of the Australian Government's *Electoral Reform Green Paper: Donations, Funding and Expenditure*, published in December 2008. Appendix B was produced from information provided by the AEC.

² *Electoral Act 2002* (Vic), section 216.

³ Tasmanian Electoral Commission, *Tasmanian Legislative Council Election Information for Candidates*, February 2007, p. 15.

⁴ *Electoral Act 2004* (Tas), section 162.

Financial Disclosure	Commonwealth	Queensland	New South Wales	Western Australia	ACT	NT
Political parties	Yes. Registered parties and their State branches report annually on total receipts, expenditure and debts, and details of receipts and debts of \$10,900 or more.	Yes. Report every six months on total receipts, expenditure and debts, and details of receipts, expenditure and debts of \$1,000 or more. Report after every election totals of specified electoral expenditure for which election funding is sought. Report donations from any single donor which reach \$100,000 within a half-year period. Report to be made within 14 days after \$100,000 is reached. Returns published by the Queensland Electoral Commission within 10 business days.	Yes. Report every six months on the total value of 'small donations' (those valued at less than \$1,000) and the total number of people who made small donations. Report every six months on the details of 'reportable donations' (those valued at \$1,000 or more). 'Donation' includes subscription and membership fees, and entry fees to fundraising events. Mandatory reporting of loans.	Yes. Report annually on number and value of donations below \$1,800, details of donations of \$1,800 or more, and sum of income from other sources. Report after every election totals of specified electoral expenditures. Accepts copies of disclosure returns lodged with the AEC.	Yes. Report annually on total receipts, expenditure and debts, and details of receipts and debts of \$1,000 or more.	Yes. Report annually on total receipts, expenditure and debts, and details of receipts and debts of \$1,500 or more. Accepts copies of disclosure returns lodged with the AEC.

Financial Disclosure	Commonwealth	Queensland	New South Wales	Western Australia	ACT	NT
Candidates	Yes. Report after every election on total donations, details of all donations of more than \$10,900; and sums expended on specified electoral expenditure.	Yes. Report after every election on donations and loans of \$1,000 or more and on sums of specified electoral expenditure.	Yes. Report every six months on the total value of 'small donations' (those valued at less than \$1,000) and the total number of people who made small donations. Report every six months on the details of 'reportable donations' (those valued at \$1,000 or more). 'Donation' includes subscription and membership fees, and entry fees to fundraising events.	Yes. Report after every election on number and value of donations below \$1,800, details of donations of \$1,800 or more, sums expended on specified electoral expenditure.	Yes. Report after every election on total receipts, expenditure and debt, and details of receipts and debts of \$1,000 or more. In addition to election returns, MLAs report annually on these details.	Yes. Report after every election on total number and value of donations, details of donations of \$200 or more, sums expended on specified electoral expenditure.

Financial Disclosure	Commonwealth	Queensland	New South Wales	Western Australia	ACT	NT
Groups (e.g. Senate groups)	Yes. Report after every election on total donations, details of donations of more than \$10,900, and sums expended on specified electoral expenditure.	Not applicable.	Yes. Report every six months on total number and value of contributions of \$1,000 or more (including from fundraising events), details of contributions of \$1,000 or more (including from fundraising events), and sums of specified electoral expenditure, along with details of advertising expenditure.	Yes. Report after every election on number and value of donations below \$1,800, details of donations of \$1,800 or more, sums expended on specified electoral expenditure.	Not applicable.	Not applicable.
Associated entities	Yes. Report annually as for political parties plus details of capital contributions used to generate funds donated to a political party.	Yes. Report every six months as for political parties.	No.	Yes. Report annually as for political parties.	Yes. Report annually as for political parties except that no threshold applies – all amounts are to show individual details.	Yes. Report annually as for political parties, plus details of capital contributions used to generate funds donated to a political party.

Financial Disclosure	Commonwealth	Queensland	New South Wales	Western Australia	ACT	NT
Donors to political parties	Yes. Report annually on donations above \$10,900.	Yes. Report every six months on donations of \$1,000 or more. Report donations which reach \$100,000 within a half-year period. Report to be made within 14 days after \$100,000 is reached. Returns published by the Queensland Electoral Commission within 10 business days.	Yes. Report every six months on donations of \$1,000 or more.	No.	Yes. Report annually on donations of \$1,000 or more.	Yes. Report annually on donations of \$1,500 or more.
Donors to candidates	Yes. Report after every election on donations above \$10,900.	Yes. Report after every election on donations of \$1,000 or more.	Yes. Report every six months on donations of \$1,000 or more.	No.	Yes. Report after every election on donations of \$1,000 or more made to candidates and groups. Report annually on donations made to MLAs of \$1,000 or more.	Yes. Report on donations totalling above \$200 to a candidate or \$1,000 to an organisation.

Financial Disclosure	Commonwealth	Queensland	New South Wales	Western Australia	ACT	NT
'Third parties' (people who incur expenditure)	Yes. Report annually where they have incurred political expenditure of above \$10,900. Disclose donations received.	Yes. Report after every election where they have incurred \$200 or more of specified electoral expenditure. Disclose donations received of \$1,000 or more.	Yes. Report every six months where they have incurred \$1,000 or more of specified electoral expenditure. Disclose donations received.	Yes. Report after every election on sums of specified electoral expenditure where the total is \$200 or more. Disclose donations received.	Yes. Report after every election on sums of specified electoral expenditure where the total is \$1,000 or more. Disclose donations received.	Yes. Report after every election on sums of specified electoral expenditure where the total is \$200 or more. Disclose donations received.
Publishers and broad-casters	No.	Yes. Publishers report after every election on electoral advertisements with a value of \$1,000 or more. Broadcasters report on electoral advertisements after every election.	No.	No.	Yes. Report on electoral advertisements after every election.	Yes. Report on electoral advertisements after every election.