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MEMBER FOR MOLONGLO



Mr Mick Gentleman MLA
Chair
Select Committee on Amendments to the Electoral Act 1992
Legislative Assembly for the ACT
GPO Box 1020
CANBERRA ACT 2601

Dear Mr ~~Gentleman~~ ^{Mick}

I write regarding the Inquiry into Amendments to the ACT *Electoral Act 1992* ('the ACT Act') and note the Inquiry terms of reference dated 20 March 2014 for the Select Committee on Amendments to the Act.

Expansion of membership of the Legislative Assembly to 25 members at the 2016 election

As noted by the Select Committee's terms of reference, both the Labor Government and the Liberal Opposition have publicly endorsed expanding the membership of the Assembly to 25 members at the 2016 election.

The *Commonwealth Australian Capital Territory Self-Government Act 1988* provides for the Legislative Assembly consisting of such number of members as provided for by enactment, or until provision is made, 17 members.

Section 34 of the *Electoral Act 1992* provides for the division of the ACT into 3 electorates with 7 members from one electorate and 5 members from two electorates, totalling 17 members.

The ACT Government anticipates introducing two Bills into the Assembly to increase the size of the Legislative Assembly to 25 members, with 5 members from 5 electorates.

A standalone bill will set the size of the Assembly to 25 members. As per the requirements in the *Commonwealth Australian Capital Territory (Self-Government) Act 1988* and the *ACT Proportional Representation (Hare-Clark) Entrenchment Act 1994*, the proposed standalone Bill will require a two-thirds majority vote to take effect.

A bill will also be introduced amending the Electoral Act to divide the ACT into 5 electorates with 5 members per electorate. The second bill will also include a number of minor consequential amendments, such as amendments to provisions dealing with printing of ballot papers and references to 5 and 7 member electorates.

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If the Assembly passes the bills to increase its size to 25 members and establish five electorates from the 2016 election, these changes will need to be reflected in the redistribution process. Section 37 of the Electoral Act provides that a redistribution of electorates for the Legislative Assembly must begin as soon as practicable after the day two years before the next general election is due (i.e. 15 October 2014). On previous experience, it can be expected that the redistribution process will be complete by the end of September 2015.

Elections ACT's website provides a detailed factsheet describing the redistribution process at: http://www.elections.act.gov.au/data/print_to_pdf.php?url=http%3A%2F%2Fwww.elections.act.gov.au%2Feducation%2Ffact_electoral_commission_fact_sheets%2Felections_act_factsheet_redistributions%3FSQ_DESIGN_NAME%3Dpdf%26SQ_PAINT_LAYOUT_NAME%3Dpdf

The High Court case of *Unions NSW & Ors v NSW* and its implications for the operation of the Act

Unions NSW v New South Wales [2013] HCA 58 was a case in which the High Court found that certain provisions in the *NSW Election Funding, Expenditure and Disclosure Act 1981* ('the NSW Act') were invalid on the basis that they impermissibly burdened the freedom of political communication implicit in the Commonwealth Constitution.

The plaintiffs in the case were six unions who had claimed, by writ of summons, declarations that sections 95F, 95G(6), 95I and 96D of the NSW Act were invalid, although the plaintiffs' challenge to sections 95F and 95I was abandoned prior to the hearing. The sections which the plaintiffs pursued in a challenge in the High Court, sections 95G(6) and section 96D, were found to be invalid.

Section 96D of the NSW Act and section 205I(4) of the ACT Act

In *Unions New South Wales v New South Wales* [2013] HCA 58, section 96D of the NSW Act in its entirety was found to be invalid as it impermissibly burdened the freedom of political communication implicit in the Commonwealth Constitution.

Section 96(D)(1) of the NSW Act prohibits political donations other than by individuals on the electoral roll. Section 96D(1) is very similar to section 205I(4) of the ACT Electoral Act (except that section 205I(4) permits the donation to be paid into the federal election account). Subsections (2) and (3) of the NSW Act do not have equivalent provisions in the ACT Act, however the effect of these sub-sections would appear to strengthen the operation of section 96D(1).

I note that section 96D(4) of the NSW Act provides for annual or other subscriptions paid to a party by a person (including an industrial organisation) for affiliation with that party are taken to be political donations. An equivalent to this provision does not exist in the ACT Electoral Act.

In any case, it would appear that section 96D was impugned in its entirety because it satisfied both limbs of the *Lange* test - the provision effectively burdens the implied freedom of political communication (by restricting the source of funds to meet the costs of political communication) and it is not reasonably appropriate and adapted, or proportionate, to serve a legitimate end (to regulate the acceptance and use of political donations in order to address the possibility of undue or corrupt influence being exerted).

In this respect, section 205I(4) of the ACT Act is likely to also satisfy both limbs of the *Lange* test, as its effect is identical in all material respects to the effect of section 96D of the NSW Act. Section 205I(4) has the effect of restricting sources of funds available to political parties to meet costs of political communication and it does nothing to promote the achievement of the legitimate purpose of addressing the possibility of undue or corrupt influence being exerted.

Accordingly, it would appear that section 205I(4) should be repealed, as the subsection is likely to be invalid.

Section 95G(6) of the NSW Act and sections 205F, 205G and 205H of the ACT Act

Section 95G(6) of the NSW Act aggregates the electoral communication expenditure incurred by a party with that of an affiliated organisation (such as an industrial organisation). Section 95G(6) was also found by the High Court to be invalid as it impermissibly burdened the freedom of political communication implicit in the Commonwealth Constitution.

Sections 205F, 205G and 205H of the ACT Act are the Territory provisions whose operation most closely align with subsection 96G(6), though they appear to differ in a material respect. The NSW Act refers to an 'affiliated organisation' and sections 205F and 205G of the ACT Act refer to an 'associated entity' and these terms differ in their definitions. The concept of an 'associated entity' in the ACT Act appears narrower than the concept of an 'affiliated organisation' in the NSW Act, the key difference being in the closeness of the connection between each such entity and the relevant party. In the case of an 'associated entity', the connection is one of control of the entity by the party, or purpose of the operation of the entity being completely, or to a significant extent, for the benefit of the party. In contrast, to be considered an 'affiliated organisation' under the NSW Act required only that the body be authorised to appoint delegates to the relevant party or participate in pre-selection of candidates for the party. On this definition, an affiliated organisation may have a purpose unrelated to the party in question. This was the case in relation to the union plaintiffs in *Unions NSW & Ors v NSW*. Unions would not be considered 'associated entities' under the ACT Act.

The closeness of this connection was the subject of comment by the majority at paragraphs 62-63 of the High Court's decision:

'... [T]he defendant identifies the purpose of s 95G(6) as being to render efficacious the cap on expenditure. It claims that it is legitimate to ensure that the effectiveness and fairness of the generally applicable caps are not circumvented. *Implicit in the notion of circumvention is that s 95G(6) is concerned with expenditure derived in fact by a single source, notwithstanding that it may be made by two legally distinct entities.* The criterion chosen to identify the single source is affiliation in the way defined: namely, that an organisation is authorised under the rules of the party to appoint delegates to the governing body of the party or to participate in the preselection of candidates for that party.

It may be wondered how, logically, it could be said that affiliation of this kind is effective to identify an industrial organisation as the same source of funds for the making of electoral communication expenditure. Moreover, it would appear to assume that the objectives of all expenditure made by the party on the one hand and the organisation on the other are coincident. The criterion applied for the operation of s 95G(6) may be useful to identify industrial organisations as affiliates of political parties, but it does not reveal why or how they are to be treated as the same organisation for the purposes of expenditure on electoral communications...'

It seems that the majority was implicitly critical of the provision's treatment of parties and their affiliates as being the same source of funds for electoral communication expenditure, and the underlying assumption that the objectives of the expenditure of each were coincident. This may be contrasted with the treatment of associated entities under the ACT Act and the relevant parties or MLAs, whose connection is much closer. The question is whether that connection is so close that they should be considered the same source of funds for electoral communication expenditure, notwithstanding that they are legally distinct entities. Similar considerations apply in relation to the closeness of the connection between the other entities whose electoral expenditure is aggregated under sections 205F, 205G and 205H, and in particular whether it is appropriate that these be considered the same source of funds for electoral communication expenditure, and whether this satisfied the *Lange* test.

The High Court found that the purpose of section 95G(6) of the NSW Act could not be connected with the wider anti-corruption purposes of the NSW Act. While it is possible that sections 205F, 205G and 205H of the ACT Act could be invalid for the same reasons, the NSW and ACT provisions differ in the type of entity which is captured in the aggregation of election expenditure.

It is appropriate to turn briefly to each of the relevant provisions in the ACT Act. The connection between a party or MLA and an associated entity is much closer than in the NSW Act. The question is whether that connection is so close that they should be considered the *same source of funds* for electoral communication expenditure, notwithstanding that they are legally distinct entities, and moreover whether the treatment of them as the same organisation is appropriately connected to the legitimate purposes of the anti-corruption provisions of the ACT Act.

While finely balanced, it may be difficult to demonstrate that this aggregation is in all circumstances properly connected to the wider anti-corruption purposes of the election expenditure provisions, in the sense of being reasonably appropriate and adapted to that purpose. Comparatively it might be easier to see how an associated entity that is entirely "controlled by a party or MLA" might be treated as the same source of funds for the purposes of the funding cap. That conclusion is not quite so obvious in relation to an associated entity that "operates completely or to a significant extent for the benefit of the party or MLA". This calls into question paragraph (b) of the definition of "associated entity".

In contrast, the connection between members of a "non-party candidate grouping" (subsection 205G(1)(b)) is significantly less close, the connection being "incurring electoral expenditure with the authority of the candidate to support the candidate in contesting the election". It would perhaps, on balance, be more difficult to demonstrate that this aggregation is sufficiently close to be regarded as the "same source of funds" and properly connected to the wider anti-corruption purposes of the election expenditure provisions, in the sense of being reasonably appropriate and adapted to those purposes and the provision therefore may impermissibly burden the freedom of political communication.

Even further removed is the connection between a third party campaigner and an entity acting in concert with it (section 205H), requiring only that they "act under an agreement (formal or informal) to campaign with the object, or principal object, of having a candidate, MLA or party elected". It seems unlikely that a court would be satisfied that the purpose of this provision is connected to the wider anti-corruption purposes of the electoral expenditure provisions and may impermissibly burden the freedom of political communication.

Whilst the High Court was dealing with a specific legislative scheme, it made clear that it regarded laws that excluded persons from contributing to an electoral campaign but which had no rational connection to protecting against corruption as unlawful. The lawfulness of a provision that endeavours to draw in funding of another entity within electoral funding limits is open to less certainty, depending on the analysis of the particular statutory provisions. The High Court's decision suggests that only the most direct connections are likely to survive a legal challenge.

While the analysis above suggests the need for amendment, the Government will take account of the Select Committee's findings before settling any proposed amendments.

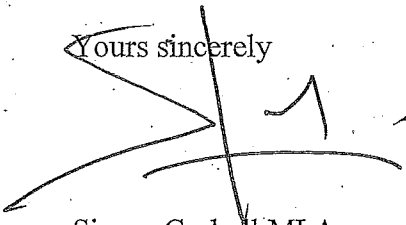
The Elections ACT's *Report on the Legislative Assembly Election 2012* contains a number of recommendations pertaining to the *Electoral Act 1992*

While the Government will await the outcome of the Committee inquiry before offering substantive comment on the Electoral Commissioner's recommendations, the Government observes that recommendations 4 and 8 (which address aspects of section 205I(4)) may be redundant in light of the High Court decision.

The Government also maintains its previously stated position regarding 'failure to vote' fines (see recommendation 15). While noting the Commissioner's concerns regarding administrative costs associated with the fine, the Government continues to hold the view that the purpose of this penalty is to encourage compulsory voting and the value of the penalty should not be set based on cost recovery considerations. Additionally, the penalty for failing to vote in a Commonwealth election is still \$20, and the Government believes that raising the penalty for ACT elections above the level of the Commonwealth penalty would attract considerable criticism.

I look forward to the findings of the Select Committee.

Yours sincerely



Simon Corbell MLA
Attorney-General

6.5.14