3. Elections and the electoral system

Introduction

3.1. The Legislative Assembly is composed of 25 members representing five electorates,[1] each electorate returning five members for a term of four years. There is universal suffrage in the Territory for persons 18 years of age and over, voting is compulsory (as is enrolment), election day is on the third Saturday in October every fourth year under the secret ballot process, there is provision for electronic voting and vote counting,[2] and the election process is administered by an independent Electoral Commission. The electoral system in use since the election for the Third Assembly in 1995 (and now entrenched)[3] is known as Hare-Clark.[4]

3.2. The *Australian Capital Territory (Electoral) Act 1988* (Cth) made detailed provisions for the conduct of the first election for the Assembly, held on 4 March 1989. The electoral systems used at that election and at the election for the Second Assembly, held on 15 February 1992, were modifications of the d'Hondt system.[5] Under these arrangements, the Territory was a single electorate. That Act is no longer in force and control of electoral matters has been largely devolved to the Legislative Assembly, though Part VIII of the Self-Government Act still retains certain provisions relating to elections to the Assembly.[6]

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1 The boundaries of which are determined independently by the ACT Electoral Commission.

2 See ss 118A and 118B of the Electoral Act and https://www.elections.act.gov.au/elections_and_voting/electronic_voting_and_counting, accessed on 7 October 2020.

3 See under the heading 'Entrenchment of the Hare-Clark system in the Territory' in this chapter.

4 In fact, a variety of electoral systems have been considered for the Territory. Prior to the adoption of the modified d'Hondt system for the election of the First Assembly, the then Commonwealth Government had first proposed the adoption of single member electorates and then proposed a mixed system consisting of approximately half the members being elected from single member electorates (on the Australian House of Representatives model) and the balance of the members being chosen using a proportional Senate style election from one electorate. See House of Representatives Debates, 19 October 1988, pp 1926-1927; Joint Standing Committee on Electoral Matters, *Inquiry into the ACT Elections and Electoral System*, Report No 5, November 1989, pp 40-45. In addition, following the result of the 1992 ACT referendum on the electoral system, the then Territory Government introduced the Electoral (Amendment) Bill 1993. Division 2 of that bill—Ballot papers—provided for registration of a 'voting ticket' and made provision for voting either above the line (indicating the voting ticket the elector wished to vote for) or voting below the line—not unlike the then Senate ballot paper. The party ticket voting scheme was later removed from the bill by way of amendment. MoP, No 91, 16 December 1993, p 519; MoP, No 101, 19 April 1994, pp 566-567; Assembly Debates, 16 December 1993, pp 4679-4689. See also, Judith Homeshaw, 'Inventing Hare-Clark: The model Arithmetocrac*y*' in Marion Sawer (ed), *Elections Full, Free & Fair*, The Federation Press 2001, p 108.

5 The d'Hondt system at the time was as used in West Germany, Belgium and Scandinavia and the modification was a combination with the Australian Senate system. See Judith Homeshaw, pp 108-109.

6 The qualifications of candidates (shall be as provided by enactment) (s 67); general elections (s 67A); certain matters an electoral enactment must provide for (s 67B); qualifications of electors (s 67C), and the quota in relation to any electorate for the Territory (s 67D). The Assembly has enacted relevant provisions through the Electoral Act.

3.3. As part of the devolution process, and prior to the election for the Second Assembly, the Commonwealth Parliament made two significant legislative changes to the self-government legislation.[7] The first was that provision was made for a referendum to be held in the Territory to choose an electoral system. The choice was to be between two voting systems: a single-member electorate system or a proportional representation (Hare-Clark) system.[8] Voting on the referendum was to be conducted on the same day as the next Assembly general election after the commencement of that part.[9] In addition, the *Australian Capital Territory Self-Government Legislation Amendment Act 1992* (Cth) devolved to the Territory the power to control its own electoral system, following the election for the Second Assembly.

3.4. The referendum provided for by Part 4 of the Australian Capital Territory (Electoral) Amendment Act was held in conjunction with the general election for the Second Assembly, with 65.3 per cent of the electors voting for the proportional representation (Hare-Clark) electoral system.[10]

3.5. The Hare-Clark system was adopted in the ACT in two stages. The *Electoral Act 1992*, agreed to by the Legislative Assembly on 24 November 1992, established the ACT Electoral Commission and an independent procedure for the determination of electoral boundaries. The Assembly's first electoral boundaries (there were three electorates) were formally determined on 23 August 1993.

3.6. On 16 December 1993, the Electoral (Amendment) Bill 1993 was introduced into the Assembly. It was agreed to, with amendments, on 21 April 1994.[11] The bill provided for the election of 17 members of the Assembly from three multi-member electorates, using the Hare-Clark electoral system. Hare-Clark is a type of proportional representation electoral system in which:

- electors vote by showing preferences for individual candidates;
- to be elected, a candidate generally needs to receive a quota of votes;[12] and

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7 These, together with the dissatisfaction with the modified d'Hondt system, are discussed in more detail in the opening paragraphs of Chapter 3 in the First Edition of *The Companion to the Standing Orders of the Legislative Assembly for the Australian Capital Territory*.

8 *Australian Capital Territory (Electoral) Amendment Act 1991* (Cth). Schedule 5 of the Act, 'Referendum Options Description Sheet', detailed how the ballot papers for each option would look and that, in the Hare-Clark option, the seats would be allocated to the candidates using the Hare-Clark system of proportional representation, as used for elections for the Tasmanian House of Assembly.

9 Senate Debates, 4 June 1991, pp 4254-4266; House of Representatives Debates, 5 June 1991, pp 4739-4748.

10 34.7 per cent of those casting a valid vote voted in favour of single-member electorates; 5.57 per cent of votes were informal. See https://www.elections.act.gov.au/elections_and_voting/act_legislative_assembly_referendums/1992_referendum, accessed on 7 October 2020.

11 *Electoral (Amendment) Act 1994*. This Act was superseded by subsequent legislation and repealed by the *Statute Law Amendment Act 2000*.

12 See under the heading 'Voting and determination of successful candidates' in this chapter. Note that a candidate could be elected to the Assembly without receiving a quota of votes where the number of

- each elector has a single vote, which can be transferred from candidate to candidate according to the preferences indicated by an elector until all the vacancies are filled (that is, it uses the 'single transferrable vote' method).

Thomas Hare, Catherine Spence, and Andrew Inglis Clark

The Hare-Clark electoral system is a proportional representation system utilising a single transferable vote (STV) and is named after Sir Thomas Hare (1806-1891), an English lawyer and political reformer, and Andrew Inglis Clark (1846-1907), a Tasmanian barrister, politician and judge.

Key features of the system are that candidates are elected from multi-member constituencies, but not using the proportional representation methods common in European countries, and candidates are elected by achieving a quota of votes—they can be made up of votes cast for the candidate or votes transferred to the candidate as preferences. The system is often referred to as 'quota preferential'. Quota preferential systems are used in Australia for the Australian Senate,[13] certain other Australian upper Houses and local government elections in some States.[14]

Hare's original scheme (proposed in 1856—though he probably was not the first to propose such a scheme)[15] was an attempt to devise a system which would secure proportional representation of all classes in the United Kingdom, including minorities. He originally proposed that all electors would vote for any candidate in England and

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candidates remaining in the count who have not been already elected or excluded is equal to the number of vacancies that remain to be filled. Electoral Act, Schedule 4, Part 4.2, Clause 4. This situation has not arisen in ACT elections to date. See also https://www.elections.act.gov.au/publications/act_electoral_commission_fact_sheets/fact_sheets_-_general_html/elections_act_factsheet_hare-clark_electoral_system accessed on 7 October 2020.

13 The key difference between Hare-Clark and the Senate style system being that the Senate system allows for a ticket or 'above the line' voting where parties determine the order in which their candidates appear on the ballot paper. Under Hare-Clark in Tasmania and the ACT there is no ticket voting, preferences are determined by voters, the order candidates appear on the ballot paper is randomised and the publication of agreed preference tickets is extremely difficult. The distribution of how-to-vote cards outside polling places on election day is also banned. These features together produce a system that gives greater weight to the vote for individual candidates rather than parties. See Antony Green, *Hare-Clark explained*, https://www.abc.net.au/elections/tas/2006/guide/hareclark.htm, accessed on 25 March 2021.

14 Judith Homeshaw, p 97, and Antony Green, *Hare-Clark explained*, https://www.abc.net.au/elections/tas/2006/guide/hareclark.htm, accessed on 25 March 2021. For a detailed chronology on the development of the Hare-Clark system see *Proportional Representation from an idea to implementation*, Appendix C in Terry Newman, *Hare-Clark in Tasmania: Representation of All Opinions*, Joint Library Committee of the Parliament of Tasmania, 1992, pp 296-301. See also Scott Bennett, *Inglis Clark's Other Contribution—A critical analysis of the Hare-Clark Voting System*, Volume 23, Samuel Griffith Society, Melbourne, July 1992, https://www.samuelgriffith.org/papers, accessed on 25 March 2021.

15 Judith Homeshaw, pp 97-98, points out that in Denmark in 1855 Carl Andre (1812-1893), a mathematician and politician, had devised a procedure for ranking candidates and transferring surplus votes, his system being used to elect members of the Danish lower House of Assembly from 1855 to 1863 and continuing to be used after its reformation in 1863. Hare's *The machinery of representation*, which outlined his proposals for electoral reform, was published in 1857. Hare later published several editions of his book *Treatise on the Election of Representatives* and became the most famous proportional representation advocate. He further adapted his system and in 1879 published *The distribution of seats in Parliament* (Newman, pp 296-297).

Wales and once candidates received a quota of around 1800 votes (the total number of (then registered voters divided by the number of seats (654)), they would decide which voters they wanted as their constituency and then tell their surplus supporters to transfer their votes to other candidates.

Hare's was a national model. However, in 1859 in South Australia, Rowland Hill proposed a voting system for municipal elections that would reproduce in representative bodies the range of opinion in the community by transferring both surplus votes and those assigned to less popular candidates.[16] These and Hare's ideas influenced Catherine Helen Spence, a South Australian novelist, journalist and political reformer.[17] She outlined her ideas in 1861 in a pamphlet, *A Plea for Pure Democracy. Mr Hare's Reform Bill Applied to South Australia*, and later, in the 1890s, propounded a modified Hare-Spence system (that she called 'effective voting') as the only way of attaining proportional representation of political parties.[18] Spence modified Hare's scheme to apply to multimember electorates of nine to 10 members, rather than a national electorate, and promoted it vigorously.[19]

In addition to Catherine Spence's proposals (and modifications by Hare himself), there were two significant mathematical modifications proposed to Hare's system prior to its adoption in Tasmania.

In 1868, H R Droop, a mathematician, realising that Hare's original formula allowed the quota to be set too high to ensure that candidates are elected proportionally, devised a different quota to ensure that no more candidates reach a quota than the number of seats available.[20] Also, in order to overcome the element of chance he saw as inherent in Hare's method of transferring votes from a random selection of surplus voting papers, he proposed that they should be transferred in the proportion in which they occurred in each candidate's total votes.[21] The mathematical solution to this problem was later worked out by a Tasmanian mathematician, J B Gregory. He proposed that, instead of transferring the value of a complete vote, the second-choice

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16 Hill was Secretary to the Colonisation Commissioner of South Australia and later the inventor of the British penny postage system (Judith Homeshaw, p 98). There was other Australian interest. In 1862, the Legislative Council of New South Wales passed a bill to make the Legislative Council an elected body, with the Hare model as the voting system, though the Legislative Assembly failed to pass the bill, and in South Australia two local MPs each introduced legislation to introduce the system, though with no success. Scott Bennett, p 36.

17 She had read about Hare's ideas in J S Mill's article 'Recent Writers on Reform' in *Fraser's Magazine* (1859), Judith Homeshaw, p 99.

18 http://adb.anu.edu.au/biography/spence-catherine-helen-4627, accessed on 25 March 2021.

19 See Judith Brett, *From Secret Ballot to Democracy Sausage: How Australia got Compulsory Voting*. Text Publishing Company, 2019, p 31. Homeshaw, p 100, refers to her undertaking a tour to rural South Australia having developed a series of electoral scenarios with mock ballot papers for six-member electorates which gave her an invaluable insight into the need to make any proposed electoral reform easy for voters to understand. She later formed The Effective Voting League.

20 Judith Homeshaw, 'Inventing Hare-Clark: The model Arithmetocracy' in Marion Sawer (ed), *Elections Full, Free & Fair*, The Federation Press 2001, pp 99-100, 108. The Droop Quota required that an electorate's votes be divided by the number of members to be elected, plus one, to which the figure of one was added: (votes/seats+1) +1.

21 Judith Homeshaw, p 99-100.

votes should have the value proportional to the choices on all successful candidates' ballot papers. Droop's quota and Gregory's transfer fraction are still used in the ACT and Tasmania.[22]

Andrew Inglis Clark, a strong advocate of proportional representation, was Tasmanian Attorney-General from 1888 to 1892 and it was he who introduced proportional representation into state law.[23] After several failed attempts by Clark, it was adopted on a trial basis in 1896 and in January 1897 it was used in the state elections for the House of Assembly—in the electorates of Hobart (six members) and Launceston (four members).[24] It was used, again as a trial, in Hobart and Launceston in the March 1900 Tasmanian state election and was used in the March 1901 elections for the Federal Parliament in Tasmania.[25] It has been used statewide for elections for the House of Assembly in Tasmania since 1909.[26]

In Tasmania, ballot papers listed all candidates alphabetically until 1941, when separate columns for political parties and other groupings were introduced.[27] In 1979 'Robson rotation' was introduced, which requires the rotation of candidates' names within columns—the use of Robson rotation and the lack of ticket voting emphasised the anti-party nature of the system and the stress is on voting for candidates.[28] Also, since 1922, by-elections for vacant seats in Tasmania have been determined by recounts of originally contesting candidates, using ballot papers from the previous election.[29] This is also the arrangement in the ACT.

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22 Judith Homeshaw, p 100.

23 Terry Newman, *Hare-Clark in Tasmania: Representation of All Opinions*, Joint Library Committee of the Parliament of Tasmania, 1992, p 2.

24 The Droop quota was not used. Newman, p 298 and 46-48. The remaining electorates were single member electorates.

25 Both Senate and House of Representatives. See http://exhibitions.senate.gov.au/pogg/election/first_election.htm, accessed on 25 March 2021.

26 Since Federation, Tasmania has had five House of Representatives seats, thus enabling the state to maintain five House of Assembly electorates based on the boundaries of the five House of Representatives electorates. From 1998, five members have been elected from each electorate. Scott Bennett, p 38.

27 Lots being drawn to determine columns across the ballot and positions down the columns.

28 In Tasmania, this means that if there are five candidates on a party ticket, there will be five different versions of the ballot paper, each with a different candidate at the top. In the ACT, this process has been taken even further, with 60 different versions of five candidate tickets, also randomising the second position on each ticket. See https://www.abc.net.au/elections/tas/2006/guide/hareclark.htm, accessed on 7 October 2021.

Robson rotation is named after Neil Robson (1928-2013), a member of the Tasmanian House of Assembly, who introduced a private member's bill with the aim being to devise a procedure for printing and distributing ballot papers that would ensure as great a degree of fairness as possible. The procedure eliminates the effect of 'donkey votes', where a voter simply assigns their preferences (1, 2, 3, 4 et cetera) for candidates in the order that they appear on the ballot paper. For background on the adoption of the system in Tasmania, see Homeshaw, pp 106-107.

29 There has been one exception. A polling booth by-election for all seats in the electorate of Denison was held in 1980, following a Supreme Court challenge, a candidate having exceeded electoral spending limits. See Terry Newman, *Hare-Clarke System*, https://www.utas.edu.au/library/companion_to_tasmanian_history/H/Hare-Clark%20system.htm, accessed on 7 October 2021. Antony Green also refers to one by-election in Tasmania in 1929 that presented particular difficulties. The ballot papers from the 1928 election had been lost in a flood. Green comments that by chance (more likely design),

Entrenchment of the Hare-Clark system in the Territory

3.7. Section 26 of the Self-Government Act provides that the Assembly may pass an entrenching law prescribing restrictions on the manner and form of making particular enactments; the entrenching law is then submitted to referendum and, if approved by a majority of electors, it takes effect (see Chapter 12: Legislation). The Proportional Representation (Hare-Clark) Entrenchment Bill 1994 was introduced in the Assembly on 30 November 1994 as a private member's bill,[30] its long title being 'A Bill for An Act to entrench the principles of the proportional representation (Hare-Clark) electoral system'.

3.8. The bill, as amended by the Assembly, was enacted as the *Proportional Representation (Hare-Clark) Entrenchment Act 1994*. Section 4 provides that the Act applies to any law that is inconsistent with the following principles of the proportional representation (Hare-Clark) electoral system:

- at a general election, an odd number of Members of the Legislative Assembly shall be elected from each electorate;
- at a general election, at least five Members of the Legislative Assembly shall be elected from each electorate;
- voting in an election shall be compulsory;
- each voter has the right to a fully preferential vote;
- squares for the indication of preferences on each ballot paper shall appear only alongside the names of individual candidates;
- a voter shall not be taken to have marked any preferences beyond the numbers, starting with '1' for the candidate with the first preference, marked by the voter in the squares alongside the names of individual candidates;
- ballot papers shall be—(i) prepared and collated in accordance with the method known as Robson rotation; and (ii) distributed and issued; as set out in Schedule 2 of the Electoral Act, being that schedule as in force on 1 December 1994;
- a candidate whose total votes equal or exceed a relevant quota as defined in Schedule 4 of the Electoral Act, being that schedule as in force on 1 December 1994, shall be declared elected;
- unless the number of successful candidates is equal to the number of vacancies, any surplus votes for a successful candidate shall be transferred to continuing candidates in accordance with the next available preferences indicated on ballot papers that were counted for the successful candidate;

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only one candidate nominated for the vacancy, overcoming an embarrassing problem. See https://www.abc.net.au/elections/tas/2006/guide/hareclark.htm, accessed on 7 October 2021.

30 Introduced by Gary Humphries MLA; see MoP, No 130, Wednesday, 30 November 1994, p 789.

- if there are no surpluses to be distributed, the candidate with the least total votes shall be excluded and the ballot papers counted for the excluded candidate shall be transferred to continuing candidates in accordance with the next available preferences (if any) indicated on each ballot paper; and
- where there are two or more eligible candidates in relation to a casual vacancy, the vacancy shall be filled by a recount of the ballot papers counted for the person who, at the last election before the vacancy occurred, was elected to the seat in which the vacancy has occurred.

3.9. In addition, during its consideration of the bill, the Assembly added paragraph 2 to clause 4. The paragraph states:

> This Act applies to any law made pursuant to a power at any time vested in the Legislative Assembly to make a law with respect to the number of members of the Legislative Assembly.[31]

3.10. Section 5 of the Act sets out special procedures for making certain enactments. Specifically, the Act (that is the Proportional Representation (Hare-Clark) Entrenchment Act), or any amendment or repeal of the Act, has no effect unless it is passed by: (1) at least a two-thirds majority of the members of the Assembly; and (2) a majority of the electors at a referendum held in accordance with the *Referendum (Machinery Provisions) Act 1994*. Thus, the Act itself could not come into effect unless it met these conditions. Therefore, following the Assembly's agreement to the bill by a special majority on 8 December 1994,[32] the law was submitted to referendum in conjunction with the general election for the Third Assembly on 18 February 1995. The referendum result was declared on 16 March 1995—55.68 per cent of the electors entitled to vote at the referendum voted to approve the entrenching law. Of those electors casting a valid vote, 65.01 per cent voted to approve the entrenching law.[33]

3.11. A law to which the Act applies—that is, any law to make a law with respect to the number of members of the Assembly or any law that is inconsistent with the principles of the proportional representation (Hare-Clark) electoral system as set out in s 4 of the Act—has no effect unless it is passed by:

- the Assembly and a majority of the electors at a referendum held in accordance with the *Referendum (Machinery Provisions) Act 1994*; or
- at least a two-thirds majority of the Members of the Legislative Assembly.[34]

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31 Paragraph 4(1)(b) (Voting in an election shall be compulsory) and clause 4(2) were inserted on the initiative of the then government. See Assembly Debates, 8 December 1994, pp 4833-4838.

32 MoP, No 134, 8 December 1994, pp 824-826. Sixteen of the 17 members voted in favour of the question 'That this bill, as amended, be agreed to'.

33 https://www.elections.act.gov.au/elections_and_voting/act_legislative_assembly_referendums/1995_referendum, accessed on 29 March 2021. For a detailed account of the process, see Chapter 12: Legislation, under the heading 'Entrenching laws'.

34 See s 5(2) of the Proportional Representation (Hare-Clark) Entrenchment Act.

3.12. The two laws to effect an increase in the size of the Assembly passed on 5 August 2014 were agreed to by more than the two-thirds majority required. Thus, there was no need to submit the laws to a referendum.

Number of members

3.13. In 2013, the Self-Government Act was amended to grant to the Assembly the power to determine its own numbers without reference to the Commonwealth. Subsequently, the Assembly enacted laws to provide for the Assembly to consist of 25 members, to divide the Territory into five electorates (later named Brindabella, Ginninderra, Kurrajong, Murrumbidgee and Yerrabi) and to provide for five members to be elected from each electorate.

The ACT Electoral Commission

3.14. The Electoral Act establishes the Australian Capital Territory Electoral Commission. The Electoral Commission consists of the chairperson, the Electoral Commissioner, and one other member. Members of the commission are independent officers of the Legislative Assembly and, subject to the Electoral Act and other Territory laws, have complete discretion in the exercise of their functions.[35] The Act bestows on the commission a wide range of functions, including the conduct of elections for the Assembly and referendums in the Territory, the determination of electoral boundaries for the Territory and the provision of electoral advice and services.

3.15. The members of the commission are appointed by the Speaker, who does so on behalf of the Territory. Any appointment must be done in consultation with the Chief Minister, the Leader of the Opposition and the leader of any other registered party if at least two members of the Assembly are members of that party.[36] The Speaker must not appoint a person unless the relevant Assembly committee agrees to the appointment.[37] The appointment of a commissioner is a disallowable instrument.[38]

3.16. The Electoral Commission may give to the Speaker a report on anything relating to elections, referendums and other ballots. If the Speaker receives such a report, they must present a copy of the report to the Assembly on the next sitting day after its receipt. The responsible minister must present to the Assembly a written

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35 Electoral Act, s 12.

36 Electoral Act, ss 5-7. The Act also sets out the functions of the Electoral Commission and the Electoral Commissioner (ss 7 and 11); provides that the appointment of a member is a disallowable instrument (s 12); sets out eligibility requirements for an Electoral Commission member (s 12B) and chairperson (s 12C); and sets out a range of other provisions applying to commission members (ss 14-18E).

37 Electoral Act, s 12(3)(b).

38 Electoral Act, s 12 (5).

response to the report within three months after the day the report was presented to the Assembly.[39]

3.17. The Speaker has a range of other responsibilities in relation to commission members, as does the relevant Assembly committee. For a fuller account of these procedures as they relate to commission members and other officers of the Assembly see Chapter 5: The Speaker and other officers, under the heading 'Officers of the Assembly'.

General elections and the election process

Electorates

3.18. Part 4 of the Electoral Act provides that the Territory must be divided into five electorates and that five members of the Assembly must be elected from each electorate. The Act sets out provisions for the establishment and functions of redistribution committees,[40] the establishment of an 'augmented Electoral Commission' for the purpose of redistribution,[41] the timing of redistributions, the factors to be taken into account in a redistribution and the redistribution process (including public consultation).

3.19. The augmented commission is required to redistribute electorates by determining the name[42] and boundaries of each electorate and the number of members of the Assembly to be elected from each electorate.[43] A determination can only be made after a process of investigation is concluded.[44] Following a redistribution, the report of the augmented commission must be submitted to the Speaker, who must present a copy of the report to Assembly on the first sitting day after the day of

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39 Electoral Act, s 10A.

40 Electoral Act, ss 39-45. The committee consists of the Electoral Commissioner, the Planning and Land Authority (the Chief Planning Executive; see s 10 of the Planning and Development Act), the Surveyor-General and a person appointed by the Electoral Commission with specified qualifications or experience.

41 Electoral Act, ss 49-53. The augmented commission consists of the members of the Electoral Commission and the other non-electoral commission members of the Redistribution Committee formed earlier for the purpose of the redistribution.

42 The name of each electorate is not determined by the Assembly; it is determined as part of the redistribution process. See ACT Redistribution Committee, ACT Legislative Assembly Electoral Boundaries Redistribution 2015, *Guidelines for submissions and current and projected electoral enrolment statistics*, p 4. https://www.elections.act.gov.au/__data/assets/pdf_file/0007/838546/Guidelines_for_submissions.pdf, accessed on 7 October 2020 and ACT Redistribution Committee, ACT Legislative Assembly Electoral Boundaries Redistribution 2015, pp 23-27 and 45-47, https://www.elections.act.gov.au/__data/assets/pdf_file/0010/838990/Final_Redistribution_Report_2015.pdf, accessed on 7 October 2020.

43 Electoral Act, s 35. It is s 34 of the Act that stipulates that the Territory be divided into five electorates and that five members be elected from each electorate.

44 Electoral Act, s 35. The determination is a notifiable instrument (see Legislation Act, s 10). There are provisions for objections to be lodged against a proposal by a redistribution committee and the augmented commission.

the Speaker's receipt of the report.[45] A decision of an augmented commission or a redistribution committee made pursuant to Part 4 of the Electoral Act is final and cannot be challenged or appealed against and cannot be subject to any proceeding or order of a court on any ground.[46]

Electoral rolls and enrolment

3.20. The commissioner is obliged to maintain a roll of the electors of the Territory, consisting of separate rolls for each electorate. The Electoral Act makes provision for the inspection of printed extracts[47] from each roll and the supply of printed and electronic copies to members and the registered office of each party. There are safeguards in place protecting privacy and prohibiting the improper use of information in respect of persons.[48] The Act also provides for the maintenance of a joint roll with the Commonwealth.[49]

3.21. Enrolment is compulsory for persons who are 18 years of age or over, who are Australian citizens and whose address is in the electorate.[50]

3.22. Part 6 of the Electoral Act deals with enrolment. With certain exceptions, a person is entitled to be enrolled to vote in an electorate if they are entitled to be enrolled on the Commonwealth electoral roll and the person's address is in the electorate.

Timing of elections

3.23. General elections for the Assembly must be held on the third Saturday in October in the fourth year after the year when the last ordinary election was held.[51] The Act contains provisions for an election to be deferred to the first Saturday in December of that year, should an election be held for senators or a general election of members of the House of Representatives on the nominated day.[52] In

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45 Electoral Act, ss 53 and 54.

46 Electoral Act, s 55. See also s 56 of the Act.

47 Electoral Act, s 59.

48 Electoral Act, ss 60-65.

49 Electoral Act, s 70.

50 Part 6 of the Electoral Act sets out the details of entitlement and links the Territory roll with that of the Commonwealth. Section 75 of the Act makes provision for the enrolment of a person who is at least 16 years old who makes a claim for enrolment and who would be entitled to be enrolled had that person attained the age of 18 years.

51 Electoral Act, s 100. See Appendix 1 for the dates of past elections. Prior to the commencement of the *Electoral Amendment Act 2003*, Assembly elections were held every three years. Elections have been held every four years since the commencement of the Sixth Assembly. However, the term of the Fourth Assembly extended over three and a half years following the change from a February election date to an October election date in 2001.

52 Electoral Act, s 100. This has not occurred to date. However, the 2004 Territory election for the Sixth Assembly occurred seven days after the federal election for members of the House of Representatives and for Territory senators.

addition, in the event of an extraordinary general election having been held in the six months before the election day (the third Saturday in October or the first Saturday in December), the election shall not be held.

3.24. Extraordinary elections are defined by the Act.[53] An extraordinary general election is a general election required by (a) s 16 of the Self-Government Act (Dissolution of the Assembly by the Governor-General), or (b) s 48 of the Self-Government Act (Resolution of no confidence in the Chief Minister).[54]

3.25. In addition to extraordinary *general* elections, s 101 of the Electoral Act provides for the holding of extraordinary elections of an MLA or MLAs where: (a) a supplementary election is required;[55] or (b) the Court of Disputed Elections has declared an election void.[56] The ACT Executive may, by written notice, make provision for (a) extending the time for holding an election or (b) meeting any difficulty that might otherwise interfere with the due conduct of an election.[57]

Nomination

3.26. Part 9 of the Electoral Act sets out the arrangements for elections in the Territory, including eligibility provisions for members of the Assembly (see Chapter 4: Membership of the Assembly, under the headings 'Eligibility for membership' and 'Ineligibility provisions').[58] A person is not eligible to be nominated for election unless, at the hour of nomination, the person is eligible to be a Member of the Legislative Assembly.[59]

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53 Electoral Act, s 101.

54 The circumstances would arise in the event that the Assembly, having passed a resolution of no confidence in the Chief Minister, failed to elect a Chief Minister within 30 days (and the Governor-General having not, within that period, dissolved the Assembly pursuant to s 16 of the Self-Government Act). In these circumstances, a general election must be held on a day specified by the Commonwealth minister, being not earlier than 36 days, nor later than 90 days, after expiration of the period of 30 days. The minister must not specify a day that is polling day for an election of the Senate or a general election of the House of Representatives, see Self-Government Act, s 48.

55 Section s 126 of the Act provides that a supplementary election shall be held if, in relation to an election, there are no candidates or the number of candidates declared elected under s 111 or 112 is less than the number of vacancies.

56 Electoral Act, s 275.

57 Electoral Act, s 159. The notice is a notifiable instrument. The provision was originally inserted by the *Electoral (Amendment) Act 1994*, the explanatory memorandum to the originating bill stating that 'This power would only be exercised in exceptional circumstances'. Notwithstanding this proviso, such a power is extraordinary in that an election could be delayed by the executive without reference to the Assembly.

58 See also https://www.elections.act.gov.au/__data/assets/pdf_file/0005/1459661/Candidate-Information-Handbook-2020.pdf, accessed on 29 March 2021.

59 Electoral Act, s 103. See also Chapter 4: Membership of the Assembly, under the headings 'Eligibility for membership' and 'Ineligibility provisions'.

3.27. Detailed provisions of the nomination process are set out in the Act, including the requirement that a person may be nominated by the registered officer of a registered party that endorses the person as a candidate or 20 electors entitled to vote at the election.[60] Provision is also made for the payment of a deposit.[61]

3.28. Should the number of candidates for an election be no greater than the number required to be elected (or should a candidate die before polling day and the number of candidates remaining not be greater than the number required to be elected), the commissioner must declare the candidates elected and a poll shall not be held.[62]

Ballot papers

3.29. The form of the ballot paper for elections to the Assembly is set out in Schedule 1 of the Electoral Act and detailed provisions for the printing of names on the ballot papers and the collation of the ballot papers are set out in Schedule 2.

3.30. A key feature of the provisions of the Act is that, if there are two or more candidates for a registered political party, their names are grouped in a separate column on the ballot paper for the relevant electorate. The order of the groups from left to right is determined by the Electoral Commissioner by lot. The names of the ungrouped candidates are printed in a single column to the right of the last column of the grouped candidates.[63]

3.31. The critical provision is that the order of the names of the candidates in each column varies. This listing process is known as 'Robson rotation'. The intent of Robson rotation is to give each candidate an equal share of each position in a column, thus ensuring that political parties are not able to influence the voting outcome by asking for candidates to be listed in a particular order, and thus allowing voters to choose which candidates they want to represent them in an order of their own choosing rather than an order chosen by a political party.[64]

3.32. Schedule 2 to the Act sets out in tabular form the order in which the names are printed (there are 60 different orders for an electorate electing five members). It also provides that particular steps must be taken in the collation of the ballot papers distributed and that the person in charge of a polling place must ensure that, as far as practicable, the form of ballot paper distributed to a person claiming to vote is different from the previous ballot paper issued.

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60 Electoral Act, s 105(2)(6).

61 Electoral Act, s 105.

62 Electoral Act, ss 111, 112 and 189. The declaration cannot be made before the day that would have been polling day for the election. See also ss 181 and 214 of the Act in relation to the death of a candidate.

63 Section 116 of the Electoral Act makes provision for when there are more than five candidates in a group or when there are no groups of candidates.

64 https://www.elections.act.gov.au/__data/assets/pdf_file/0007/831463/BallotPapers.pdf, accessed on 29 March 2021.

Voting and determination of successful candidates

3.33. The Hare-Clark proportional representation system is a single transferable vote system (thus allowing the direct election of representatives).[65] Electors vote by showing preferences for individual candidates by putting the number '1' next to the name of their preferred candidate (the 'first preference vote') and numbering the remaining candidates sequentially (2, 3, 4, 5 …)[66] in the order of their preference. Voters are not required to indicate a preference for every candidate.

3.34. Since the 2016 election, there have been five electorates, each electing five members—Brindabella, Ginninderra, Kurrajong, Murrumbidgee and Yerrabi. To be declared elected, a candidate generally needs to receive a quota of votes in the electorate they are contesting.

3.35. A quota for an electorate is calculated by dividing the total number of valid votes cast by the number of vacancies plus 1 and adding 1 to the result (disregarding any remainder). In each electorate, those candidates whose first preference (or No '1') votes are equal to or greater than the quota are declared elected. If all vacancies have been filled at this stage, the election is completed.[67]

3.36. If all vacancies are not filled, there is, firstly, a downward distribution of the surplus votes (those votes in excess of the quota) of the successful candidates. Should there still be vacancies after all surplus votes have been dealt with, a process of excluding the lowest scoring candidates commences.

3.37. The successful candidates' surplus votes are distributed to continuing candidates at a reduced value (a fractional transfer value)[68] according to the preferences shown on the ballot papers. After the surplus votes from each elected candidate have been distributed, the total number of votes received by each continuing candidate is recalculated. Those continuing candidates who have votes equal to or greater than the quota are elected, and if vacancies remain to be filled, the surplus votes of newly elected candidates are then distributed in the same manner.

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65 See https://www.elections.act.gov.au/__data/assets/pdf_file/0006/831471/Hare-Clark.pdf, accessed on 29 March 2021.

66 Electors must at least express five preferences (that is, equivalent to the number of vacancies). They may show as many further preferences as they wish. See Electoral Act, Schedule 1.

67 See https://www.elections.act.gov.au/__data/assets/pdf_file/0006/831471/Hare-Clark.pdf, accessed on 29 March 2021.

68 See ACT Electoral Commission fact sheet on Hare-Clark: See https://www.elections.act.gov.au/__data/assets/pdf_file/0006/831471/Hare-Clark.pdf, accessed on 29 March 2021. The fractional transfer value is determined by dividing the number of surplus votes the successful candidate received by the total number of ballot papers for that candidate with further preferences shown. Following a transfer (either from successful candidates or from an excluded candidate (see below)), should a candidate receive more votes than the required quota, it is only the 'last parcel' of ballot papers the candidate received (that is, the transferred votes that 'got the candidate over the line') that are transferred to continuing candidates at the fractional transfer value.

3.38. Should there still be vacancies after all the surplus votes from elected candidates are distributed, the process of excluding the lowest scoring candidate begins. The candidate with the lowest number of votes is excluded and the preferences indicated on their ballot papers are distributed to continuing candidates. Ballot papers received by the excluded candidate as first preference votes have a value of '1' whilst ballot papers received following a distribution of a surplus have the appropriate fractional transfer value applied.

3.39. At each stage after preferences have been distributed from an excluded candidate, the total votes received by each continuing candidate are recalculated to determine whether any candidate has received votes equal to or greater than the quota. The process of distributing surplus votes from elected candidates and excluding the candidate with the fewest votes continues until all vacancies are filled.

3.40. As soon as practicable after the result of an election has been ascertained, the Electoral Commissioner must declare each of the successful candidates elected, declare the result of the election and notify the Clerk of the Assembly of the names of each of the candidates elected.[69] The Clerk is required to present to the Assembly the official notification prior to the members making and subscribing the prescribed oath or affirmation on the first day of meeting of an Assembly for the dispatch of business after an election.[70]

Casual vacancies

Selection by recount

3.41. A casual vacancy occurs when a member of the Assembly vacates their place or is declared ineligible to sit as a member by the Court of Disputed Elections (see under the heading 'Disputed elections' in this chapter) during the term of the Assembly. Under the Hare-Clark system as it operates in the ACT, a casual vacancy is not filled through a by-election but is instead filled through a process of re-counting the votes cast for the vacating member at the previous general election in order to choose a replacement candidate from among those candidates for the electorate who were unsuccessful at the preceding general election and who wish to be considered for the vacancy.[71]

3.42. The Assembly and the Speaker have specific roles and duties in relation to the filling of casual vacancies.[72] Should the Speaker notify the Electoral Commissioner

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69 Electoral Act, s 189.

70 Standing order 1(d).

71 Part 13 of the Electoral Act deals with the filling of casual vacancies; s 192 refers to the eligibility of candidates.

72 For the purposes of Part 13, should there be a vacancy in the office of Speaker it is the Deputy Speaker who performs the duties; should there be vacancies in both offices, it is the Clerk (see Electoral Act, s 190).

in writing that the seat of an MLA has become vacant[73] and if the commissioner is satisfied that it is practicable to fill the vacancy in accordance with the provisions of s 194 of the Electoral Act, the commissioner must publish a notice on an ACT government website or in a newspaper circulating in the Territory which contains a statement to the effect that there is a casual vacancy and that a person may apply to be a candidate if that person was an unsuccessful candidate at the last election for the relevant electorate and is an eligible person.[74] The commissioner must also, as far as is practicable, give a copy of the notice to any person who may be entitled to make an application in relation to the vacancy.

3.43. If there is only one candidate in relation to the casual vacancy, the commissioner declares that candidate elected. If there is more than one candidate, the commissioner must fix a time and place for a re-count of the ballot papers for the former MLA and so notify each candidate. The commissioner then conducts a re-count of the ballot papers of the vacating member in order to determine which candidate for the casual vacancy was the next most favoured candidate chosen by the voters who elected the vacating member.[75] To date, each candidate appointed to fill a vacancy has been of the same political affiliation as the vacating member.

Selection by the Legislative Assembly

3.44. Should the Electoral Commissioner not be satisfied that it is practicable to fill a casual vacancy using this method—for example, if no candidates from the previous election come forward wishing to contest the vacancy—the commissioner must inform the Speaker accordingly.[76] The Legislative Assembly then chooses a person to fill the vacancy for the remainder of the term of the former MLA. The Speaker must notify the commissioner that the Assembly has chosen a person to hold the vacant office as an MLA for the remainder of the term of the former MLA and the commissioner must declare elected the person chosen.[77]

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73 Otherwise than because of the dissolution of the Assembly, the expiration of the term for which MLAs were elected or the failure or partial failure of an election. Interestingly, it appears that there is no statutory provision, or order of the Assembly, requiring the Speaker to activate the process.

74 Electoral Act, s 192. An 'eligible person' is a person who is eligible to be an MLA or would, apart from the provisions of s 103(2)(b) of the Electoral Act, be eligible to be an MLA. Paragraph 103(2)(b) provides that a person is not eligible to be an MLA if the person holds an office, appointment or employment under a law of the Territory, the Commonwealth or a state or another territory and is eligible for certain remuneration or allowance in relation to the office, appointment or employment (see Chapter 4: Membership of the Assembly).

75 Electoral Act, Schedule 4, Part 4.3.

76 Electoral Act, s 193.

77 Electoral Act, s 195.

3.45. As far as is practicable, a person chosen by the Assembly to fill a casual vacancy must be of the same political affiliation as the member they are replacing.[78] Where the name of the outgoing member appeared on the ballot paper for the last election as a party candidate, the person chosen to hold the vacant office must be a member of that party who is nominated by the party. If there is no member of the relevant party available to be chosen, or if the vacating member was elected as an independent (to date, neither circumstance has occurred), the person chosen to fill the vacancy cannot be a person who has been a member of a registered political party within the 12 months preceding the filling of the vacancy.[79]

3.46. The term of office of a member declared elected to fill a casual vacancy begins at the end of the day when the election of the MLA is declared and, unless sooner ended by resignation or disqualification or by dissolution of the Assembly, ends on the polling day for the next election.[80]

3.47. The commissioner may not take any action (or any further action) under Part 13 of the Electoral Act in relation to a casual vacancy after the Assembly is dissolved or a pre-election period begins in relation to the electorate in which the casual vacancy has occurred.[81] 'Pre-election period' means the period of 37 days ending on the end of polling day for an election.[82]

Disputed elections

3.48. The Supreme Court, as the Court of Disputed Elections, has jurisdiction to hear and determine:

- applications disputing the validity of elections; and
- questions referred to the court by the Assembly relating to the eligibility of persons declared elected to be Members of the Legislative Assembly or vacancies in the membership of the Assembly.

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78 Electoral Act, s 195. Should the person chosen cease to be a member of the party before the Assembly next meets after the Speaker has notified the commissioner that the Assembly has chosen the person to hold the office vacated, the person shall be taken not to have been chosen. A person shall not be taken to have ceased to be a member of the party merely because the party has ceased to exist or has been removed from the register of political parties.

79 Electoral Act, s 195. Should the person chosen become a member of a registered party before the Assembly next meets after the Speaker has notified the commissioner that the Assembly has chosen the person to hold the office vacated, the person shall be taken not to have been chosen.

80 Electoral Act, s 196.

81 Electoral Act, s 191(4) and s 197.

82 Electoral Act, dictionary. For example, on 14 September 2004, Ms Tucker resigned her office as a Member of the Legislative Assembly and the Speaker, pursuant to the provisions of s 191(1) of the Electoral Act, notified the Electoral Commissioner of the vacancy that day (see copies of correspondence presented on 7 December 2004, MoP, No 2, 7 December 2004, pp 16-17). As Ms Tucker had resigned within the 37 days of the pre-election period (polling day was 16 October 2004), and the pre-election period having commenced on 10 September, the Electoral Commissioner took no action in relation to the vacancy pursuant to the provisions of s 197 of the Electoral Act.

3.49. In exercising this jurisdiction, the Supreme Court has the same powers as it has in exercising its original jurisdiction; any decision of the court is final and conclusive, is not subject to appeal and shall not be called into question.[83]

3.50. The validity of an election can be disputed only by application to the Court of Disputed Elections within 40 days after the result of the election is declared[84] and, without limiting the grounds upon which an election can be challenged, s 256 of the Act sets out certain matters which cannot be questioned in a court except by application to the Court of Disputed Elections. The Act also sets out the persons entitled to dispute elections, the requirements in relation to an application and matters in relation to declarations and orders by the court.

3.51. After an application is filed, the Registrar of the Supreme Court is required to serve a sealed copy of the application on the Speaker.[85] If the court finds any illegal practice in connection with the election, the registrar is to report the findings to the Speaker,[86] as well as any declarations and orders of the court.

3.52. In December 2016, following the general election for the Ninth Assembly, a person lodged an application with the Court of Disputed Elections disputing the election result in the electorate of Yerrabi on the basis of the rejection of his nomination to stand for election by the commissioner. On 28 March 2017, the applicant sought leave to withdraw his application. Leave to withdraw was granted on the same day.[87] To date, this is the only occurrence of an Assembly election being disputed in the court in the ACT.

3.53. Where the Assembly resolves to refer to the court a question relating to the eligibility of a person who has been declared elected to be a member or a vacancy in the membership of the Assembly, the Speaker gives the registrar a statement setting out the question referred, together with any documents in the possession of the Assembly that relate to that question. The court is required to hear and determine a question referred to it. It may determine that a person who is declared elected is not eligible to be an MLA; declare a vacancy in the membership of the Assembly or refuse to make a declaration; and make the orders in relation to the referral that it considers appropriate. The registrar must serve a copy of the declaration and any orders on the Speaker and each party to the referral.[88]

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83 Electoral Act, ss 252-255.

84 Electoral Act, s 259.

85 As well as the person whose election is being disputed and the commissioner (if the person is not an applicant), see Electoral Act, s 261. The Act (s 251) also makes provision for the unavailability of the Speaker and Deputy Speaker due to being absent from duty, where there is a vacancy in the office, or where the office-holder is the subject of a proceeding. If both the Speaker and the Deputy Speaker are unavailable, another MLA may be appointed by the Assembly and if both the Speaker and the Deputy Speaker are unavailable, and no MLA is appointed, the Clerk of the Assembly may perform the functions of the Speaker (s 251(1)(c)).

86 As well as the minister, the commissioner and the Director of Public Prosecutions; see Electoral Act, s 266.

87 Annual Report of the ACT Electoral Commission 2016-2017, p 11.

88 Electoral Act, ss 276-279.

3.54. Where the court declares a vacancy in the membership of the Assembly or declares that a person elected to the Assembly is not eligible to be a member, a vacancy in the membership of the Assembly arises at the conclusion of the day on which the declaration is made. The vacancy is to be filled in accordance with Part 13 of the Electoral Act (Casual vacancies).

3.55. It must be noted that s 16 of the Referendum (Machinery Provisions) Act provides that Part 16 (Disputed elections, eligibility and vacancies) applies to ensure that, as far as is practicable, the validity of a referendum may be disputed in the same way as the validity of an election and not otherwise.

Registration of political parties

3.56. In the Territory, a political party is defined by the Electoral Act as 'an organisation, incorporated or unincorporated, an object or activity of which is the promotion of the election to the Assembly of a candidate or candidates endorsed by it'.[89] Part 7 of the Act sets out provisions for the registration of political parties in the Territory. Party registration ensures that the party's candidates for the Assembly can be nominated by the party's registered officer, the party name or abbreviation can be printed on the ballot paper, and the names of two or more of the party's candidates can appear under the party name on the ballot paper in a dedicated column.[90]

3.57. The Electoral Commissioner is required to maintain a register of political parties, and the Act sets out the method by which a party may lodge an application, including the requirement that an application must be accompanied by a copy of the party's constitution and a list of the names and addresses of at least 100 members of the party who are electors of the Territory.[91] The Electoral Commissioner may, by written notice, require an applicant to give to the commissioner (within a stated period) stated information or a stated document, relating to the application.[92]

3.58. On the receipt of an application for registration of a political party, the commissioner must prepare and publish a written notice of the application, and the Electoral Act makes provision for written objections to be lodged with the

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89 Electoral Act, dictionary.

90 www.elections.act.gov.au/__data/assets/pdf_file/0006/831408/How-to-register-political-party-factsheet.pdf accessed on 7 October 2020.

91 Electoral Act, ss 88 and 89. This requirement has been seen as militating against the registration of frivolous, vexatious or fraudulent parties. During debate on the Electoral Amendment Bill 1993, the Assembly was apprised of the fact that, for the election for the First Assembly, it was believed that the owner of one political party may have registered some five parties or stood for five different parties; Assembly Debates, 19 April 1994, p 973.

92 Electoral Act, s 90. See also Part 19.5 of the Legislation Act.

commissioner within 14 days of the date of notification of the notice.[93] Part 7 of the Act also contains provision for the timing of applications, for their amendment and cancellation, and for objections to be lodged to an application for registration and for the commissioner to refuse an application for registration.

Election funding, expenditure and financial disclosure

3.59. Part 14 of the Electoral Act makes detailed provision for: (a) limitations on electoral expenditure by registered political parties, members, candidates and associated entities; and (b) the public funding of parties and candidates. It also sets out detailed reporting requirements for these entities and a number of offences and penalties for infringement of the rules.[94]

3.60. Key features of the provisions are:

- electoral expenditure is limited, there being indexed caps on expenditure by party groupings, associated entities,[95] non-party candidates and third-party campaigners, as well as limits on the payments that can be made by related parties;
- a prescribed amount of money is payable to candidates and political parties contesting an election for each eligible vote cast in an election in the candidate's or party's favour;[96]
- registered parties and non-party members are eligible for payments for administrative expenses (not to be used for electoral expenditure) on a quarterly basis;

93 Electoral Act, s 91. In addition to the notice being a notifiable instrument under the Legislation Act, the commissioner is required to publish the notice on an ACT government website or in a daily newspaper circulating in the Territory. See also https://www.elections.act.gov.au/__data/assets/pdf_file/0006/831408/How-to-register-political-party-factsheet.pdf, accessed on 30 March 2021.

94 The website for Elections ACT sets out detailed guides on these matters for parties and candidates and others. For example, see https://www.elections.act.gov.au/__data/assets/pdf_file/0006/920265/Election-funding-expenditure-and-financial-disclosure-handbook-2018-2019.pdf, accessed on 30 March 2021.

95 An associated entity is an entity that is controlled by one or more parties or members or operates completely or to a significant extent for the benefit of one or more registered parties or members; see Electoral Act, s 198. See also https://www.elections.act.gov.au/__data/assets/pdf_file/0006/920265/Election-funding-expenditure-and-financial-disclosure-handbook-2018-2019.pdf, accessed on 30 March 2021, p 22.

96 The amount is subject to a threshold. Payment can only be made if the number of eligible votes is at least 4 per cent of the number of eligible votes cast in the election by the electors of the particular electorate (See Electoral Act, s 208). For the six-month period beginning on 1 July 2016, the amount was $8 per vote (indexed by CPI for subsequent elections).

- the receipt of gifts and certain loans must be documented and disclosed, certain loans are not to be received and there are restrictions on the acceptance of gifts, including the acceptance of gifts from property developers;[97]
- each party or candidate is required to submit returns of electoral expenditure as are relevant broadcasters and publishers; and
- parties, MLAs and associated entities are required to submit detailed annual returns for each financial year.

Commonwealth Electoral Act—Casual vacancies in the Senate

3.61. If the place of a senator for the Australian Capital Territory becomes vacant before the end of the senator's term, it is the Assembly's duty under the Commonwealth Electoral Act to choose a person to hold the place until the expiration of the term.[98]

3.62. Since 1975, the Australian Capital Territory and the Northern Territory have each been represented in the Senate by two senators. The senators are elected at the same time as each general election for the House of Representatives, with their term of office commencing on the day of their election and expiring at the close of the day immediately before polling day for the next general election.[99]

3.63. If the place of a senator representing the Territory becomes vacant before the term expires, the President of the Senate notifies the Chief Minister of the vacancy. The Assembly then chooses a person to hold the place until the expiration of the term. If the Assembly is not in session[100] when the vacancy is notified, the Chief Minister may appoint a person to hold the place for 14 days from the beginning of the next session of the Assembly, or until the term expires, whichever happens first.[101] It is the role of the Chief Minister to certify the name of the senator chosen or appointed to fill the vacancy, to the Governor-General.

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97 A prohibition on the giving of donations to a political entity in the ACT by property developers, close associates of a property developer or a person acting on their behalf, as well as the accepting of such gifts by a political entity took effect in the ACT on 1 July 2021.

98 Commonwealth Electoral Act, s 44.

99 Commonwealth Electoral Act, ss 40-44. If the number of members of the House of Representatives representing the Territory is six or more, the Territory shall be represented by one senator for every two (Territory) members of the House of Representatives. The original legislation for the election of Territory senators was contained in the *Senate (Representation of Territories) Act 1973* (Cth). *Odgers'* (p 142) states that the legislation was not enacted without controversy, it being one of the bills cited as a ground for the 1974 simultaneous dissolution of the Senate and the House of Representatives and being eventually passed into law at the joint sitting of that year. Subsequently, it has been twice challenged in the High Court.

100 The Commonwealth Electoral Act does not define 'session'. See Chapter 8: Sittings of the Assembly, under the heading 'Term of the Assembly'.

101 Commonwealth Electoral Act, s 44(1). Prior to self-government, should a vacancy have occurred it would have been the Senate and the House of Representatives, sitting and voting together, that would have chosen a person to hold the place until the expiration of the term. See, for example, *Senate (Representation of Territories) Act 1973*, s 9(2).

3.64. If a vacancy occurs and the vacating senator was, when chosen, publicly recognised by a particular political party as being an endorsed candidate of that party and they publicly represented themselves as such, the person chosen or appointed for the vacancy (and any subsequent vacancy for that place in the same term) must also be a member of that party, unless there is no member of that party available to be chosen or appointed.[102]

3.65. The Assembly has chosen persons to fill casual vacancies in the Senate on two occasions: in February 2003 (appointment of Mr Humphries, following the resignation of Senator Reid); and in March 2015 (appointment of Ms Gallagher, following the resignation of Senator Lundy).[103]

3.66. Prior to choosing Mr Humphries to fill the casual vacancy in 2003, the Assembly adopted procedures for electing a senator in the event of a vacancy in the office (since embodied in continuing resolution 9). A key feature of this continuing resolution is that a member, when moving a motion proposing a person to fill the vacancy, must present a statutory declaration from that person declaring that (1) they are eligible to be chosen as a senator and (2), where relevant, that they are a member of the same party as the outgoing senator.[104]

3.67. The provision relating to declaration of eligibility in paragraph 2(b) of the continuing resolution occupied the attention of the Assembly, after questions were raised as to whether Ms Gallagher was qualified to serve as a senator, having been chosen by the Assembly to fill a vacancy in 2015.[105]

3.68. On 30 November 2017, the Assembly referred continuing resolution 9 to the Standing Committee on Administration and Procedure. The committee was asked to examine, among other things, what role the Assembly had to ensure the eligibility of persons seeking to fill casual vacancies; the processes undertaken in other jurisdictions; whether, in hindsight, previous appointments made by the Assembly might be considered unsound; and whether the Assembly needed to adopt new practices.[106]

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102 Commonwealth Electoral Act, s 44(3). Should a person so chosen or appointed cease to be a member of the party before commencing to hold the place (otherwise than by reason of the party having ceased to exist), the person shall be deemed not to have been appointed and the vacancy shall again be notified.

103 MoP, No 45, 18 February 2003, pp 528-530; MoP, No 95, 25 March 2015, pp 1061-1062.

104 The terms of the motion, stipulated in continuing resolution 9, are 'that [the candidate], a person who is eligible to be a senator and is of the same party of [the senator] whose place has become vacant, be chosen to fill the casual vacancy for senator for the Australian Capital Territory until the expiration of the term of the outgoing senator'.

105 It should be noted that, at the time the matter arose, Senator Gallagher had already served as a senator from 26 March 2015 (having filled the vacancy following the resignation of Senator Lundy) and had stood for re-election and been returned as an elected senator for the Territory on 2 August 2016.

106 The referral followed a Court of Disputed Returns decision that led to the disqualification of a number of senators and members of the House of Representatives, due to ineligibility to serve under s 44 of the Commonwealth Constitution. MoP, No 43, 30 November 2017, pp 624-626; Assembly Debates, 30 November 2017, pp 5393-5397.

3.69. On 6 December 2017, prior to the committee reporting to the Assembly, the Senate resolved, pursuant to s 376 of the Commonwealth Electoral Act,[107] to refer to the Court of Disputed Returns the question of whether, by reason of s 44(i) of the Constitution, there was a vacancy in the representation of the Territory in the Senate for the place for which Ms Gallagher was returned, and certain other questions.[108] On 9 May 2018, the court found that when she had nominated for election to the Senate on 31 May 2016, Ms Gallagher was a 'citizen of a foreign power'. Therefore, she was incapable of being chosen, or sitting, as a senator by reason of s 44(i) of the Constitution. Accordingly, the court found that there was a vacancy in the representation for the Territory for the place which Ms Gallagher was returned, and that the vacancy should be filled by a special count of the ballot papers.[109]

3.70. The committee reported on 15 February 2018,[110] concluding that the Assembly appeared to have one of the more robust procedures to select a senator when compared to the practices in other state and territory legislatures. In its report, the committee noted that the requirement for a statutory declaration was the same as that imposed on a candidate seeking election for the Senate or the House of Representatives.[111] Further, the committee noted that it was arguable that the only changes needed were for the individuals and parties involved to undertake more rigorous checks before declarations are made. The committee also noted that the matter of the eligibility of an ACT senator was (then) before the High Court of Australia and agreed to consider the findings of the High Court in the context of its then upcoming review of standing orders and the Assembly's continuing resolutions.[112]

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107 The Senate may refer any question relating to the qualifications of a senator to the Court of Disputed Returns, which has the jurisdiction to hear and resolve the matter.

108 The questions were—(a) whether, by reason of s 44(i) of the Constitution, there is a vacancy in the representation of the Australian Capital Territory in the Senate for the place for which Katy Gallagher was returned; (b) if the answer to Question (a) is "yes", by what means and in what manner that vacancy should be filled; (c) what directions and other orders, if any, should the court make in order to hear and finally dispose of this reference; and (d) what, if any, orders should be made as to the costs of these proceedings. Senate Journals, 6 December 2017, pp 24712472; Senate Debates, 6 December 2017, pp 9795-9805.

109 See http://eresources.hcourt.gov.au/downloadPdf/2018/HCA/17/ and https://www.hcourt.gov.au/assets/publications/judgment-summaries/2018/hca-17-2018-05-09.pdf, accessed on 18 March 2021.

110 MoP, No 46, 15 February 2018, p 677; Assembly Debates, 15 February 2018, pp 264-265. Standing Committee on Administration and Procedure of the Ninth Assembly, *Review of Continuing Resolution 9 – Senator for the Australian Capital Territory – Procedures for Election*, Report 5, February 2018.

111 The committee noted, at paragraph 2.5 of its report, that the Constitution and the Commonwealth Electoral Act only required that the Assembly choose a senator who was of the same political party as the previous senator.

112 The committee also addressed the use of Senate proceedings in its inquiry, it being considered likely that reference would need to be made to certain Senate proceedings. The committee recommended that the Assembly note the difficulties posed by the requirements of the *Parliamentary Privileges Act 1987* (Cth) and the need for comity between the Legislative Assembly and the Senate. In light of these issues, and noting that the Senate had referred the senator's eligibility to serve to the High Court (sitting as the Court of Disputed Returns) since the matter had been referred to the committee, the committee took the view that it should not further investigate this aspect of its terms of reference.

3.71. Subsequently, the Assembly noted the decision of the court and the earlier finding of the Standing Committee on Administration and Procedure (that the Assembly had one of the more robust procedures to select a senator in the event of a vacancy). It recognised that: (a) in its decision, the court had now provided further guidance on eligibility that would assist in the selection of candidates for the Senate in the future; and (b) the decision of the court would be considered in the review of standing orders.[113]

113 MoP, No 60, 6 June 2018, pp 860-862; Assembly Debates, 6 June 2018, pp 2143-2148. The October 2018 report of the Standing Committee on Administration and Procedure (Report No 8 – *Review of the standing orders and continuing resolutions of the Assembly*) did not address the issue.