Elections ACT

ACT ELECTORAL COMMISSION OFFICERS OF THE ACT LEGISLATIVE ASSEMBLY

Effect of Commonwealth Electoral Act amendments on the ACT funding and disclosure scheme

A special report by the ACT Electoral Commission

February 2020

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ACT ELECTORAL COMMISSION OFFICERS OF THE ACT LEGISLATIVE ASSEMBLY

Ms Joy Burch MLA
Speaker
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Madam Speaker

This report on the conduct of the effect of amendments to the Commonwealth Electoral Act on the ACT's funding and disclosure scheme is presented to you under section 10A of the *Electoral Act 1992*.

Section 10A(2) of the Electoral Act requires you to present a copy of this report to the Legislative Assembly on the next sitting day after the day you receive it.

Under Section 10A(3) of the Electoral Act the Minister must present a written response to this report to the Legislative Assembly within 3 months after the day the report was presented to the Legislative Assembly.

Yours sincerely

Dawn Casey	Damian Cantwell AM	Philip Moss AM
Chairperson	Electoral Commissioner	Member
19 February 2020	19 February 2020	19 February 2020

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Recommendations

The ACT Electoral Commission makes the following recommendations in this special report:

1. The *Electoral Act 1992* be amended to reintroduce a requirement for financial representatives of political entities to maintain a separate ACT election account.

2. The *Electoral Act 1992* be amended to mandate that any money spent on Territory electoral purposes must have been deposited in an ACT election account within a certain timeframe of its receipt. The Electoral Commission recommends a period of seven days.

3. The *Electoral Act 1992* be amended to mandate that only money from an ACT election account may be spent on Territory electoral purposes.

Introduction

In November 2018, the Commonwealth Electoral Act was amended via the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth) to clarify, *inter alia,* "the interaction between electoral disclosure regimes operating at the Commonwealth and other levels of government".[1] According to the explanatory memorandum accompanying the bill, the new section 314B of the Electoral Act (Commonwealth) was intended to ensure that State and Territory laws do not discourage the making of small donations for federal electoral purposes. The amendment was also intended to reduce the duplicative reporting requirements under State or Territory law.

The new provisions of the Commonwealth Electoral Act have a significant impact on the ACT's funding and disclosure scheme prescribed by ACT law in the *Electoral Act 1992* (ACT) by rendering a number of Territory provisions inoperative. Accordingly, the Commonwealth amendments have had a detrimental effect on the ability of the Electoral Commission to administer this central component of the ACT electoral laws and has reduced the means by which the ACT community is able to maintain critical oversight over whom and to what degree external third-parties are potentially impacting the ACT's political processes.

Without urgent legislative amendments to the *Electoral Act 1992*, the ACT community will have a diminished ability to identify the origin of private funding of the ACT political parties. The transparency of funding received by ACT political parties is paramount, especially in 2020 which is an ACT Legislative Assembly election year.

Aim

The aim of this special report is to outline the impact of recent amendments to the Commonwealth Electoral Act on the ACT's funding and disclosure scheme and to propose amendments to the *Electoral Act 1992* to reinstate the Assembly's legislative intent over campaign finance law in the ACT.

This special report and recommendations are based upon legal advice provided by the Solicitor-General for the ACT.

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[1] Electoral legislation amendment (Electoral funding and disclosure reform) Bill 2018, Revised explanatory memorandum, p.65

Scope

The scope of this special report encompasses:

- the ACT's funding and disclosure scheme as legislated through the *Electoral Act 1992;*
- the Commonwealth's capacity to provide for the exclusion of Territory law in circumstances in which an inconsistency arises;
- the specific provisions of the Commonwealth Electoral Act;
- the High Court of Australia judgment in *Spence v Queensland;*
- the effect of the amendments to the Commonwealth Electoral Act on the ACT's funding and disclosure scheme;
- data about ACT gift disclosures since 1 July 2015 to show the effect of the Commonwealth legislative amendments; and finally
- suggested legislative amendments to the *Electoral Act 1992* to enable the ACT's funding and disclosure scheme to operate as intended by the Legislative Assembly.

The ACT's funding and disclosure scheme

The ACT's funding and disclosure scheme has been in place since the ACT was granted self-government in 1989. Specific funding and disclosure legislation has been introduced and repealed on a regular basis since that time. However, the general concepts and objectives for a funding and disclosure scheme remain relatively constant.

While the ACT has a number of facets within its funding and disclosure scheme that work together to facilitate the conduct of free, fair and transparent elections, this special report focuses only on the funding disclosure provisions. The aim of these provisions is to prevent corrupt and undue influence through the means of regular disclosure of the sources of private funding being received by political participants, including registered political parties and candidates.

Disclosure of gifts received

Public disclosure of the identity, and the amounts provided, of those who give money or resources to political participants, and how that money is spent, is largely considered to be the basis of healthy and transparent practice within a 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 cause the public to question the integrity of the parliamentary system, and at worst, to lead to corrupt conduct.

Disclosure of gifts provides the public and other political participants information allowing them to scrutinise whether the interests of significant donors receive preferential treatment from governments, opposition parties or candidates.

The ACT has arguably one of the tightest disclosure schemes in the country; requiring the details of gifts to be disclosed to the Electoral Commission on the following timeframes:

- In an election year, if the value of the gift or gifts received from a person reaches $1,000 in the financial year between 1 April and 30 June, the declaration must be made to the Electoral Commissioner by 7 July;

- In an election year, when the capped electoral expenditure period is applicable, if the value of the gift or gifts received from a person reaches $1,000 in the financial year after 30 June and before the end of polling day, the declaration must be made to the Electoral Commissioner within 7 days after the total amount received from the person reaches $1,000; and

- In a non-election year, or in the first quarter (1 January until 31 March) of an election year, if the value of the gift or gifts received from a person reaches $1,000 in the financial year, the declaration must be made to the Electoral Commissioner within 30 days of the end of the financial quarter in which the total amount received from the person reached $1,000.

The Commonwealth's capacity to take precedence over Territory law

The Commonwealth has the power to enact the Commonwealth Amending Act in order to override or limit the ACT Electoral Act.

The Commonwealth's power to take precedence over Territory law is derived from section 122 of the Australian Constitution, which provides that the Commonwealth parliament 'may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth' (**territories power)**. On 1 January 1911, the Australian Capital Territory was established geographically, having been surrendered to the Commonwealth by New South Wales.

In 1988, by exercising the territories power, the Commonwealth Parliament enacted the *Australian Capital Territory (Self-Government) Act 1988* (Cth) (**Self-Government Act**), establishing the ACT as self-governing body politic and providing the ACT's Legislative Assembly with the powers to make laws for the Territory. However, the ACT does not share identical constitutional status with the states and consequently it does not benefit from those constitutional principles which can operate to limit the Commonwealth's legislative power in respect of the states.

Section 28 (Inconsistency with other laws) of the Self-Government Act therefore provides guidance for when a Commonwealth and Territory law aim to govern in the same area.

> "A provision of an enactment has no effect to the extent that it is inconsistent with a law [of the Commonwealth]…, but such a provision shall be taken to be consistent with such a law to the extent that it is capable of operating concurrently with that law…" (section 28)

Accordingly, no effect is given to Territory laws that are inconsistent with Commonwealth law. In addition, any legislative provisions not capable of concurrent operation will be 'inconsistent'. If inconsistency is found, section 28 operates to deem the relevant Territory law to be 'of no effect'.

The relevant Commonwealth Electoral Act amendment provisions

On 27 November 2018, the Commonwealth Parliament enacted the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth) (**Commonwealth Amending Act**) to amend the Commonwealth Electoral Act. The amendments took effect from 1 January 2019.

There are two provisions included in the Commonwealth Amending Act that alter the way in which the ACT's funding and disclosure law operates.

Firstly, section 302CA, in general terms, permits the giving, receiving and retention of a gift if the gift 'is required to be, or may be, used for the purposes of incurring electoral expenditure, or creating or communicating electoral matter' (section 302CA(1)(e)), expressed in the provision to apply 'despite any State or Territory law'.

Subsection 302CA(2) prescribes that a gift 'is required to be, or may be, used' for a Commonwealth electoral purpose either because the donor of the gift explicitly states that the gift is to be used for federal election purposes, or because the gift donor fails to set such terms around the use of the gift. In effect, any gift received without instruction as to its intended use will characterise that gift as a gift that may be used for a federal electoral purpose.

The power to give, receive and retain gifts, as per subsection 302CA(1) does not apply however, in circumstances where the gift provider specifically states that the gift be used for Territory electoral purposes. It similarly does not apply when the recipient of the gift keeps or identifies the gift separately in order for it to be used only for a Territory electoral purpose. Without limiting when a gift is kept or identified separately for a Territory purpose, such an example may be where the amount is maintained in a separate account exclusively for a Territory electoral purpose.

Secondly, section 314B of the Commonwealth Amending Act regarding the disclosure of gifts, is expressed in similar terms to section 302CA by use of the words 'despite any State or Territory law' if the amount 'is required to be' or 'may be' used for federal electoral purposes (section 314B(1)(c) and (2)). Section 314B provides that a gift recipient or someone acting on behalf of a gift recipient, does not need to disclose, under Territory electoral law, any amount or information relating to a gift or loan if the amount is, or may be, used for federal electoral purposes and has not been used for Territory electoral purposes before the end of the period during which the amount is required to be disclosed under that Territory law.

As is the case with section 302CA, the provisions of section 314B prescribe that any amount received without instruction as to its intended may be used for a federal electoral purpose and is to be regulated under the Commonwealth statute unless it is subsequently used or kept separately for a Territory electoral purpose.

The High Court's decision in *Spence v Queensland*

In *Gary Douglas Spence v State of Queensland* [2019] HCA 15 (**Spence**), the High Court of Australia considered the validity and operation of Commonwealth and Queensland laws that regulate gifts made to political parties. The validity of section 302CA was challenged as part of this court action because:

> "The section is framed to permit a person to make a gift to a political party registered under the Commonwealth Electoral Act, and to permit that political party to receive and retain that gift, despite any State or Territory electoral law, if the gift, or a part of the gift, is required to be used or might be used to incur expenditure for the dominant purpose of influencing voting in an election to the House of Representatives or to the Senate."[2]

On 17 April 2019, the High Court found that section 302CA of the Commonwealth Electoral Act to be invalid as it was beyond the legislative power of the Commonwealth. However, following this ruling, the Commonwealth did not contend that section 302CA should be given its full operation

[2] *Gary Douglas Spence v State of Queensland* [2019] HCA 15 (15 May 2019). Para 4.

with respect to Territory electoral laws, if it could not have full operation with respect to State laws.[1]

Accordingly, section 302CA is no longer operative with respect to the Territory and therefore no longer effects the operation of Territory electoral laws.

However, the case of *Spence*, did not in argument or by ruling address the question of the validity of section 314B of the Commonwealth Electoral Act.

The effect of the amendments to the Commonwealth Electoral Act on the ACT's funding and disclosure scheme

As the Commonwealth has the constitutional power to make laws for the government of the Territory and to supersede Territory laws when concurrent laws are inconsistent, these new Commonwealth Electoral Act provisions, at introduction, were given full effect as they relate to gifts and gift disclosure in the Territory.

In *Spence,* section 302CA was found to be constitutionally invalid. In contrast, in the absence of a declaration as to the validity of section 314B of the Commonwealth Electoral Act, that provision remains valid law. As a result, any Territory electoral laws which purport to operate when section 314B applies, remain incapable of concurrent operation because of section 28 (*Inconsistency with other laws)* of the Self-Government Act*.*

Accordingly, with section 314B in full effect at a Commonwealth and Territory level, the provisions set out under Part 14 of the Electoral Act (ACT), governing the disclosure to the ACT Electoral Commissioner, of gifts of $1,000 or more, are now deprived of operation when:

- A person makes a gift or a series of gifts over this threshold, and does not explicitly state that the amount is for Territory electoral purposes; and

- A person makes a gift or a series of gifts over this threshold, and the gift is not used for a Territory electoral purpose before the end of the period during which the amount is required to be disclosed under the ACT's Electoral Act. (See above: *The ACT's funding and disclosure scheme* for the prescribed periods for disclosure in the ACT).

The practical effect is that unless the gift has been provided by the donor with the express designation that it be used for Territory electoral purposes, or it has been expended within the relevant disclosure period for Territory electoral purposes, or kept or identified separately for a Territory electoral purpose, the requirements in the Electoral Act for the disclosure of particulars to the ACT Electoral Commissioner do not apply.

In operation, section 314B continues to have the effect of superseding the ACT's funding and disclosure scheme and rendering it inoperable insofar as the disclosure of a gift or gifts exceeding the ACT's threshold ($1,000), but less than the Commonwealth's gift disclosure threshold ($14,000). Once a gift or series of gifts exceeds the Commonwealth's disclosure threshold the disclosure obligations must be met through a disclosure to the Australian Electoral Commission in accordance with Commonwealth timeframe yet remaining directly undisclosed to, and unpublished by, the ACT Electoral Commissioner.

[1] Australian Government Solicitor, Attorney-General of the Commonwealth's Note on Severance, Filed 28 March 2019 in B35/2019 (Spence v Queensland), 5 [10].

The consequence of these changes to the ACT community is a less transparent, less accountable democratic system. The public disclosure of the amounts and the identities involved in the gifting of resources to political participants is critical to the electorate's ability to have oversight and therefore confidence in the democratic processes that ultimately have jurisdiction over their broader lives.

Disclosure of gifts provides members of the public and other political participants with information to scrutinise whether the interests of significant donors receive preferential treatment from governments, opposition parties or candidates. Without publication of gift related data at an appropriate, informative threshold, the resultant opaque nature of political party funding provides the opportunity for undisclosed political gifts to skew the free and fair nature of the ACT's democratic processes. This situation in turn could ultimately result in the integrity of the parliamentary system being questioned by the community it governs, and at worst, result in corrupt conduct.

ACT gift disclosures

Many major political parties in Australia operate at both the federal and State/Territory level. It is common for major political parties in the ACT to receive and expend funds in support of Territory elections as well as on behalf of the national party in support of federal election campaigns.

Prior to 1 January 2019, when an ACT registered political party, associated entity or non-party MLA received a gift, or sum of gifts, totalling $1,000 or more during the relevant disclosure period from the same individual or organisation, the financial representative for that entity was required to submit a return to the ACT Electoral Commissioner. The return was required to detail the name and address of the donor, the amount of each gift that contributed to the total sum and the date each amount was received.

Following the commencement of section 314B (Cth) on 1 January 2019, unless a donor specifies that the gift is for Territory purposes alone, these same political entities are required to disclose these same prescribed gift details only if a single amount was received in excess of the Commonwealth disclosure threshold of $13,800 (in the 2018/2019 FY) or $14,000 (in the 2019/2020 FY).

Alternatively, under current law as affected by the Commonwealth Amendment Act, if the amount received meets or exceeds the $1,000 threshold and the amount is expended by the political entity during the relevant defined Territory disclosure period, a requirement for disclosure to the ACT Electoral Commissioner is triggered. In practical terms however, this means that if a gift is received between 1 April and 30 June in an election year and expended after 7 July, no disclosure is required. Disclosure under this circumstance is only required if the amount is expended prior to 7 July.

If a gift is received after 30 June in an election year and before the end of polling day, disclosure is only required if the gift is used for a Territory purpose within 7 days of the gift having been received. If the gift is expended for a Territory purpose, 8 or more days after having received the gift, during this critical election period, no disclosure is required. The same issue is evident in the final reporting disclosure period which, during non-election years and the first quarter of an election year, disclosure, under Territory law, is required within 30 days of the end of the relevant financial quarter. Under current law, if the gift received is expended after the 30 day period following the relevant quarter, no disclosure is required.

In the period 1 July 2015 through to 30 June 2018 (that is the conclusion of the financial year prior to the commencement of the Commonwealth Amendment Act on 1 January 2019), 1,512 transactions were recorded by registered political parties or non-party candidates for gifts or sums

of gifts of $1,000 or more. Over the same time period, only 25 of these disclosures were for amounts in excess of the Commonwealth disclosure cap at the time of the transaction ($13,000 in 2015/2016, $13,200 in 2016/2017 or $13,500 in 2017/2018). The current disclosure threshold for 2019/2020 is $14,000).

If current law as affected by the Commonwealth Amendment Act, had been in place during this period, 1,487 individual gift donations, unless disclosed by the political party at their own discretion, would not have been visible to the ACT's electorate.

Of these disclosures, 726 were made during the critical 2016 election period, that is from 1 January 2016 through to the end of election day, which was 15 October 2016. These disclosures were fundamental to the ACT community's ability to scrutinise whether the interests of donors received preferential treatment from the government, opposition or party and non-party candidates.

If current law as affected by the Commonwealth Amendment Act, had been in place during this period, only 13 disclosures would have exceeded the Commonwealth disclosure threshold, requiring disclosure to the Australian Electoral Commission, under timeframes controlled by the Commonwealth Electoral Act.

Without legislative amendment to the ACT's Electoral Act, aimed at countering the impact of the Commonwealth Amendment Act and reinstating the legislative intent of the ACT's funding and disclosure scheme, the ACT community is likely to continue to be without full visibility of the sources of private funding being received by political participants, including registered political parties and candidates, during the critical 2020 ACT Legislative Assembly election year.

Suggested legislative amendments

Despite the High Court declaration of section 302CA of the Commonwealth Electoral Act as wholly invalid, as it was deemed beyond the legislative power of the Commonwealth, section 314B remains valid law. If section 314B were challenged by a State, there is a real possibility that it could be found to be invalid on the same basis as the High Court's finding in relation to section 302CA.

With section 314B in force, the current legislative milieu would still see the ACT Electoral Act operating to full effect in circumstances when:

1. A person makes a gift which is specified to be used only for a Territory electoral purpose.[2]

2. A person makes a gift and does not specify whether it is for a Commonwealth or Territory electoral purpose, but the gift recipient *immediately* keeps or identifies the amount separately in order to be used exclusively for a Territory electoral purpose.[3]

3. A person makes a gift and does not specify whether it is for a Commonwealth or Territory electoral purpose, but the effect of the Territory Electoral Act is to require the amount to

[2] Section 314B(1) of the Commonwealth Electoral Act does not apply 314B(6(a)) and the provisions of *Electoral Act 1992* will be of full effect.

[3] Section 314B(1) of the Commonwealth Electoral Act does not apply 314B(6(b)(ii)) and the provisions of *Electoral Act 1992* will be of full effect.

be kept or identified separately *immediately upon receipt* in order to be used for a Territory electoral purpose.[4]

The *Electoral Act 1992* previously provided for the concept of 'ACT election accounts' under Division 14.2. It was introduced in 2012 by the *Electoral Amendment Act 2012* for the purpose of ensuring that a separate account was held by the financial representative of a political entity and kept for electoral-related expenditure to enable the Electoral Commissioner to monitor expenditure and compliance with the concurrently introduced donation and expenditure caps.[5] The requirement to maintain a separate ACT election account was removed from the Electoral Act in 2015, when the limit on donations was removed and there was no longer any need to legislate the mechanism by which the accounting of receipts and expenditure of electoral funds was to occur.[6]

It is the third dot point above that provides the most effective means of overcoming the effect of the Commonwealth electoral amendments and revert to an environment where the legislative intent of the Assembly is once more provided with the powers to enforce the disclosure of gifts of $1,000 or more within the timeframes expressed in the ACT's Electoral Act. If the *Electoral Act 1992* was to legislatively mandate the immediate transfer and keeping of gifts into a separate bank account for the purpose to Territory electoral purposes, the stricter limitations presently in place in the Electoral Act regarding disclosure of gifts would remain legally effective.

The ACT Electoral Commission therefore **recommends**:

1. The *Electoral Act 1992* be amended to reintroduce a requirement for financial representatives of political entities to maintain a separate ACT election account.

2. The *Electoral Act 1992* be amended to mandate that any money spent on Territory electoral purposes must have been deposited in an ACT election account within a certain timeframe of its receipt. The Electoral Commission recommends a period of seven days.

3. The *Electoral Act 1992* be amended to mandate that only money from an ACT election account may be spent on Territory electoral purposes.

As 2020 is an ACT election year, it is the recommendation of the Electoral Commission that the above legislative amendments be implemented as soon as possible to ensure the ACT community has appropriate transparency of funds received by ACT political parties and candidates at a time when it is paramount.

Conclusion

By operation of section 314B(1) of the Commonwealth Electoral Act, an ACT registered political party is not required to disclose gifts of $1,000 or more if the donor has either stated that the gift is for Commonwealth electoral purposes or if no purpose is identified and it has not been expended within the relevant disclosure period for Territory electoral purposes.

[4] Section 314B(1) of the Commonwealth Electoral Act does not apply 314B(6(b)(i)) and the provisions of *Electoral Act 1992* will be of full effect.

[5] Electoral Amendment Bill 2012 Explanatory Statement. p11

[6] ACT Legislative Assembly, Hansard, Week 13, 27 November 2014, 4156 per Mr Corbell MLA

Without legislative amendment, the *Electoral Act 1992* will continue to hold provisions that have become inoperative as a result of a Commonwealth law. The effect is to limit significantly the legislative intent of the Electoral Act over the ACT's funding and disclosure scheme.

By reintroducing ACT election accounts to require that any money spent on Territory electoral purposes be deposited into the account and to restrict all expenditure on Territory electoral purposes unless the funds emanate from that account, the Assembly would re-instate the *Electoral Act 1992's* effectiveness. The result would be to provide full legislative governance over campaign finance law in the ACT. In addition, these proposed provisions would operate concurrently with the Commonwealth Electoral Act.