

ACT Electoral Commission submission to the ACT Legislative Assembly

Select Committee Inquiry into 2016 ACT Election and the Electoral Act



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Contents

| | |
|---|-----------|
| Recommendations | 3 |
| Lowering the voting age | 4 |
| Improving donation rules and donation reporting timeframes..... | 12 |
| Legislative ban on all gifts from property developers | 12 |
| Any other relevant matter | 21 |
| Infringement penalties for late or incomplete disclosure returns | 21 |
| Infringement notices and discharge of liability..... | 22 |
| Appendix A: Extracts of relevant legislation – lowering the voting age ... | 24 |
| Appendix B: Extracts of relevant legislation – funding and disclosure scheme..... | 28 |
| Appendix C: Extracts of relevant legislation – Infringement penalties..... | 32 |
| Appendix D: Recommendations made in the ACT Electoral Commission’s report on the 2016 election | 33 |

Submission by the ACT Electoral Commission to the Select Committee - Inquiry into 2016 ACT election and the Electoral Act

Terms of reference

- a) select committee be established to review the operation of the 2016 ACT election and the Electoral Act and other relevant legislation and policies in regards to election-related matters, and make recommendations on:
 - a. lowering the voting age;
 - b. improving donation rules and donation reporting timeframes;
 - c. increasing voter participation in elections and encouraging political activity; and
 - d. any other relevant matter.

The ACT Electoral Commission (the Commission) makes this submission to the committee in response to the committee's terms of reference.

This submission is made pursuant to section 7(1)(d) of the *Electoral Act 1992* (the Electoral Act) which empowers the Commission to provide information and advice to the Legislative Assembly in relation to elections.

After every ACT Legislative Assembly, the Commission routinely prepares a report on the conduct of the election. These reports describe the conduct of the election by the Commission, present facts and figures about the election, analyse the operation of the electoral legislation and make recommendations or suggestions for changes to electoral legislation for future elections.

The Commission requests that the committee note the Commission's formal 2016 election report to the Assembly, tabled by the Speaker on 21 March 2017. The *Report on the ACT Legislative Assembly Election 2016* makes recommendations for changes to the Electoral Act and should be considered by the Select Committee in its deliberations. The recommendations made in *Report on the ACT Legislative Assembly Election 2016* can be found at Appendix D of this submission.

In addition to the recommendations made in the election report, the Commission makes the following submission addressing issues specifically related to the official terms of reference.

These discussions are based on the Commission's understanding of the relevant legal provisions. The Committee may wish to seek formal legal advice on these issues.

Recommendations

The Commission has made the following recommendations in this submission:

Recommendation 1

The Commission **recommends** retaining the minimum age of voting of 18.

Recommendation 2

The Commission **recommends** that the issue of banning or limiting gifts from property developers in the ACT await the outcome of the review of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) in New South Wales.

Recommendation 3

The Commission **recommends** that the *Magistrates Court (Electoral Infringement Notices) Regulation 2012* be amended to provide that the listed infringement penalties be set at 20% of the offence penalty unit set out in the Electoral Act.

Recommendation 4

The Commission **recommends** that the Electoral Act and/or the Magistrates Court (Electoral Infringement Notices) Regulation be amended to provide that where an offence continues beyond the date of payment of an infringement notice, a fresh liability will arise even if the notice is paid, unless the relevant disclosure return or a complete return is lodged, as the case may be.

Lowering the voting age

Summary

The Commission notes that the 2007 *Standing committee on education, training and young people – Inquiry into the eligible voting age* report concluded that the proposal to lower the eligible voting age should neither be supported or not supported at the stage of writing. Rather the Committee considered that the readiness of the community for an expanded franchise should be periodically reviewed by the Legislative Assembly.

Ten years on from the Commission's original submission to this Standing committee's inquiry, the Commission remains of the opinion that it is appropriate to retain the minimum voting age of 18.

Enrolment and voting age eligibility at present

In February 2012 the Electoral Act was amended to lower the age of entitlement to provisionally enrol to vote from 17 years old to 16 years old. This brought the ACT into line with changes at that time to Commonwealth entitlements. The requirement that an elector be 18 years old before they can vote was not affected.

As it now stands, a person is entitled to enrol on the joint Commonwealth/ACT electoral roll if he or she is 16 or over. A person is entitled to vote in an election for the ACT Legislative Assembly if he or she is 18 or over on polling day.

A person who enrolls at 16 is taken to be provisionally enrolled. The facility to provisionally enrol is primarily intended to ensure that people who turn 18 between the close of rolls for an election and polling day are able to enrol at 16 or 17 before the rolls close. As an ancillary benefit, allowing 16 and 17 year olds to enrol increases the number of people who are able to be encouraged to enrol while still at school.

Provisional enrolment at 16 and 17 is voluntary. Enrolment is compulsory for citizens who are 18 or over.

National conformity and consistency with other jurisdictions

The minimum voting age for all Federal, State and Territory elections is 18. Provisional enrolment for 16 and 17 year olds is also available nationally.

While the topic of lowering the voting age has been raised in other Australian jurisdictions and comments have been made recently by the current Leader of the Opposition Mr Bill Shorten MP¹, no other Australian jurisdiction appears to be formally moving towards such a change.

¹ Information sourced from: www.abc.net.au/news/2015-10-31/shorten-calls-for-voting-age-to-be-lowered-to-16/6901464

Reducing the minimum voting age to 16 in the ACT would therefore take the ACT out of line with all other Australian jurisdictions. This would lead to significant confusion, particularly for 16 and 17 year olds should they move into or out of the ACT from other States and for those ACT 16 and 17 year olds who would be eligible to vote in a Legislative Assembly election, but could not vote at a federal election were it to be held at a similar time – as recently occurred with the 2 July 2016 federal election and the ACT Legislative Assembly election held later in the year in October.

The legal implications of compulsory enrolment and voting for young people

The following discussion is based on the Commission's understanding of the relevant legal provisions. The Committee may wish to seek formal legal advice on these issues.

The ACT's electoral laws, insofar as they relate to enrolment and voting for Legislative Assembly elections, have three main elements. (Relevant extracts are shown in Appendix A.)

The Commonwealth enactment, the *Australian Capital Territory (Self-Government) Act 1988* (the Self-Government Act), gives the Assembly the power to legislate for electoral matters, but places limits on what may be enacted by the Assembly and provides for minimum requirements.

The Assembly enactment, the *Electoral Act 1992*, provides for the establishment of the ACT Electoral Commission and for the conduct of elections, within the constraints imposed by the Self-Government Act.

The Assembly enactment, the *Proportional Representation (Hare-Clark) Entrenchment Act 1994*, provides that various electoral principles are entrenched. This means that the Electoral Act cannot be amended in a way that is inconsistent with those principles without the amendments being passed either by a 2/3 majority in the Assembly, or by a simple majority in the Assembly and a majority of electors at a referendum.

Compulsory enrolment

The Self-Government Act provides in section 67B that "An electoral enactment is to provide, among other things: ... (c) that every person who is entitled to be enrolled on that roll and who is resident in the Territory is required to claim enrolment".

In effect, this provision requires the ACT to enact a scheme of compulsory enrolment for all those entitled to vote. This requirement is met by section 73 of the Electoral Act, which provides that enrolment is compulsory and that failure to enrol is subject to a penalty of 0.5 penalty units (currently \$75).

The compulsory enrolment provision in the ACT's Electoral Act currently mirrors the compulsory enrolment provision in the *Commonwealth Electoral Act 1918*. However, if the ACT lowers the voting age to 16 it would be necessary, in order to comply with the provision of the Self-Government Act, for the ACT's Electoral Act to be amended to provide for compulsory enrolment for 16 and 17 year olds under the ACT enactment. This would have the effect of diverging from a situation where the legislative requirements in relation to all citizens is consistent across jurisdictions, to a scheme where 16 and 17 year old ACT residents are subject to an 'ACT only' imposed penalty for failing to enrol. An ACT imposed penalty would also apply for failure to vote.

The necessity of enforcing compulsory enrolment of 16 and 17 year olds would be a significant disincentive to lowering the voting age. It would have the effect of imposing a criminal penalty on minors, which could be seen as unacceptable.

The Self-Government Act requirement to provide for compulsory enrolment is the reason why the current 16 year old enrolment scheme is known as provisional enrolment, in order to allow for voluntary enrolment for 16 year olds.

If the Assembly wished to provide for voluntary enrolment of 16 and 17 year olds, the Commonwealth parliament would need to amend the Self-Government Act accordingly.

If the voting age was lowered to 16, it would be desirable to provide for provisional enrolment at 15, for the same reason that provisional enrolment at 16 and 17 is now available – to allow people to vote when they turn 16 after the close of rolls and on or before polling day for an election. Reflecting current law, provisional enrolment at 15 would not have to be compulsory.

In June 2012 amendments to the Commonwealth Electoral Act were passed providing for the direct update and direct enrolment of electors based on information from other government agencies and without the need for an elector to complete an enrolment application. According to the Australian Electoral Commission (the AEC), direct enrolment data is sourced from the National Exchange of Vehicle and Driver Information System (NEVDIS), Centrelink and the Australian Taxation Office (ATO). As many 15-17 year olds would not be included in these data sources, this method of enrolment may not be effective in securing the direct enrolment of many 15-17 year olds if the ACT's voting age, and consequently enrolment age, is lowered.

Under the Commonwealth provisions, electors can be directly enrolled for the first time based on information gathered from these trusted data sources. According to the AEC, its policy is to use data sources for direct enrolment that provide for a robust proof of identity regime.

At present, to manually enrol, citizens must provide proof of identity in the form of either an Australian driver's licence or Australia passport number, or they must have someone who is enrolled confirm their identity. At present, the AEC cannot accept any other forms of identification, such as 18+ or Proof of Age cards.

This lack of proof of identity documentation or data could be seen as an unreasonable hindrance to young people enrolling. It could be argued that for this class of citizen the process for enrolling would be significantly more onerous than the systems in place for older citizens. It could therefore be regarded as unfair if a fine for failure to enrol was applied.

Compulsory voting

While compulsory voting is not required under the Self-Government Act, it is entrenched under ACT law by the Proportional Representation (Hare-Clark) Entrenchment Act, which entrenches the principle that “voting in an election shall be compulsory”. The Electoral Act also provides for compulsory voting for all electors eligible to vote at an election. Accordingly if the voting age is lowered to 16, voting would be compulsory for 16 and 17 year olds.

Electors who fail to vote without a valid and sufficient reason may pay a \$20 penalty or, if convicted by a court, a \$75 penalty, plus court costs.

Any move to introduce voluntary voting for 16 and 17 year olds would require a specific clause to be inserted in the legislation. As compulsory voting is currently entrenched in ACT law to be effective such a measure would either have to be passed by a 2/3 majority of Assembly members or be passed by a simple majority in the Assembly and then put to electors at a referendum.

The fact that compulsory voting is entrenched in the ACT is an indicator that the concept of compulsory voting is supported by a majority of ACT electors. An argument could be mounted that it would be inappropriate to water down the compulsory voting principle by extending voluntary voting to a class of voters simply on the basis of youth.

As with compulsory enrolment, it is suggested that the necessity of enforcing compulsory voting of 16 and 17 year olds would be a significant disincentive to adopting a lowered voting age if it was to include compulsory voting. Again it would be imposing a criminal penalty on minors, which could be seen as unacceptable.

A further consequence of voluntary voting for 16 and 17 year olds may be some level of confusion by those electors in relation to the age at which voting does become compulsory, particularly as 16 and 17 year olds are currently ineligible to vote at all, federally.

Different electoral models

A survey of the minimum voting age in other countries indicates that the overwhelming majority of countries have set 18 as the minimum voting age. A small number of countries set 21 as the minimum voting age. Countries with a lower than 18 voting age have increased over the past decade. Countries with a voting age of 16 or 17 are²:

| Country | Voting age | Country | Voting age |
|----------------------|--------------------------------|---------------------|---|
| Argentina | 16 | Scotland | 16 (for Scottish parliament elections only) |
| Austria | 16 | Serbia & Montenegro | 16 (if employed, otherwise 18) |
| Brazil | 16 | East Timor | 17 |
| Bosnia & Herzegovina | 16 (if employed, otherwise 18) | Ethiopia | 17 |
| Croatia | 16 (if employed, otherwise 18) | Greece | 17 |
| Cuba | 16 | Indonesia | 17 |
| Ecuador | 16 | North Korea | 17 |
| Malta | 16 | Sudan & South Sudan | 17 |
| Nicaragua | 16 | | |

It should be noted that from the list above only the Greek legislation includes a voting compulsion for all citizens regardless of age. However, in practice there are no specified sanctions within the legislation for enforcing the compulsory system in Greece³. Argentina, Brazil and Ecuador have compulsory voting legislation for those 18 years or older, but voting for 16 and 17 year olds is non-compulsory.⁴

It is also noteworthy that in Iran prior to 2007 the voting age was 15; in 2007 the voting age was raised to 18 years.

It should be noted that a number of countries such as Germany and Switzerland allow voting at 16 for some state and municipal elections but not for federal elections.

It can be noted that no countries with political systems similar to Australia's have at this time reduced their voting age below 18. For example, Canada, Ireland, New Zealand, the United Kingdom and the United States of America have all set 18 as the minimum voting age.

² Information sourced from: en.wikipedia.org/wiki/Voting_age

³ Information sourced from: www.electoralcommission.org.uk/_data/assets/electoral_commission_pdf_file/0020/16157/ECompVotingfinal_22225-16484_ENSW.pdf

⁴ Information sourced from: www.thenews.com.pk/archive/print/628368-of-31-countries-with-compulsory-voting-a-dozen-actually-enforce-it

Eligibility for election to the ACT Legislative Assembly

At present, all electors who are eligible to vote are also eligible to stand as candidates and be elected as Members of the Assembly. That is, the Electoral Act specifically provides that any person aged 18 or over is eligible to be elected to the Assembly. In turn, any Member of the Assembly is eligible to be appointed as a Minister.

If the voting age was lowered to 16, the Assembly could choose to maintain a harmony between voting and candidacy by also lowering the age of candidacy to 16; or it could keep the age of candidacy at 18 irrespective of the voting age.

Lowering the age of candidacy to 16 could be seen as unacceptable, if the view was taken that it would be inappropriate for a minor to be a Member of the Assembly, and/or a Minister. Given that the role of Member of the Assembly is taken to be a full-time occupation, it could also be seen as inappropriate for a 16 or 17 year old to take up a seat as a Member if he or she had not yet completed secondary schooling, and would be prevented from doing so by virtue of being elected.

Resource implications of extending and maintaining the ACT electoral roll

Allowing 16 and 17 year olds to enrol and vote would entail ongoing additional spending on a range of services related to the electoral roll, electoral education and elections.

Electoral roll costs

Extending the right to enrol to 16 and 17 year olds would require a separate “ACT-only electors” section of the joint Commonwealth and ACT roll. Under the terms of the joint roll arrangement with the Commonwealth, the ACT would need to negotiate this additional requirement. This would require changes to the current enrolment form and/or adoption of a special enrolment form specific to 16 and 17 year olds for ACT purposes. It is likely that there may also be software alterations required in relation to the AEC’s direct enrolment scheme and roll maintenance system.

The ACT currently pays the AEC a fee for maintaining the joint roll on the basis of a national per elector rate. At present, the ACT pays half of some of the costs of enrolling a person. If the voting age were to be lowered, the Commonwealth may require the ACT to pay for the full cost of enrolling a significant class of people who are not entitled to enrol for Commonwealth purposes.

Additional costs would include both the AEC’s costs of processing enrolment claims and the costs of printing and posting enrolment forms, targeted mail and acknowledgments. These would be significant costs not currently within the Commission’s budget.

Education campaigns

An important consideration would be the need for an initial intensive education campaign to publicise the change in the lead up to an ACT election and ongoing education campaigns and activities to inform new generations of 16 and 17 year olds of the special provisions for ACT legislative Assembly elections that are separate to their obligations federally.

Given the costs associated with information campaigns, additional and ongoing funding would be required to ensure these campaigns reached all of the target audience.

Election costs

Adding a significant number of voters to the electoral roll would lead to increases in the cost of running an ACT election.

Based on the number of 18 and 19 year olds enrolled for the 2016 election, it is estimated that around 9,000 16 and 17 year olds would enrol and vote at an Assembly election if they were entitled to and if voting was compulsory. Servicing these extra voters would require additional resources at an election. For example, additional vote issuing staff would need to be employed, extra ballot papers would need to be printed and extra voting equipment would be required. Additional funding would be required to cover these costs.

Issues affecting the electoral awareness of young people

The Youth Electoral Study commissioned by the AEC in 2004 gave an indication that high proportions of young people (Year 12 students were surveyed) felt unwilling and/or unable to participate in traditional electoral activity.

For example:

- 50% of students said they would not vote if it was not compulsory
- 52% said they had enough knowledge to understand political issues
- 49% said they had enough knowledge to understand political parties
- 49% said they had enough knowledge to make a decision when voting
- 48% said they had enough knowledge to be able to vote.⁵

These figures indicate that around half of all the Year 12 students surveyed (who would be expected to be in the 17 to 18 year old age group) felt ill-equipped to vote in elections. It is therefore highly likely that a higher proportion of 15 and 16 year olds would feel equally ill-equipped to participate. While the data is aged, the Commission considers that the results are unlikely to be significantly different if the survey was undertaken in 2017.

⁵ Murray Print, Larry Saha, Kathy Edwards, *Youth Electoral Study - Report 1: Enrolment and Voting*, 2004, pp 8, 12. See www.aec.gov.au/content/What/publications/youth_study_1/youth_electoral_study_01.pdf

Prior to the introduction of direct enrolment the under-enrolment of young people was a national problem that all electoral commissions around Australia continually worked to address. Historically young people only enrolled of their own accord when an election was imminent. Even then, the proportion of 18 year olds enrolled was still significantly below the participation rates of older age groups.

For example, at the time of the 2012 ACT election it was estimated by the AEC that only 67% of eligible 18 year olds and 56% of eligible 19 year olds were enrolled compared to 93.9% for the whole eligible population of the ACT. Four years of direct enrolment has significantly improved these figures to 96.7% and 103.7% respectively (noting that participation rates greater than 100% are likely to be due to the ageing nature of the census data on which the estimates are based); however these improved figures are unlikely to be an indication of increased political activity.

While there were a range of factors that impacted on the under-enrolment of young people prior to the direct enrolment scheme, the Commission considers that their relative lack of maturity and political awareness, as indicated by the Youth Electoral Study, must have been significant contributors. It can be expected that, given the choice, a high proportion of 16 and 17 year olds would also be inclined not to enrol and vote for the same reasons.

Conclusion

Given the challenges outlined above in relation to the introduction of voluntary enrolment and voting for the ACT Legislative Assembly, it would appear that lowering the voting age to 16 and providing for compulsory enrolment and voting would place a legal obligation, with a pecuniary penalty, on many young people who would not be willing or equipped to participate. This could be considered to be unreasonable and unjust.

Even if a way could be found to provide for voluntary enrolment and/or voting, this could be taken as watering down the importance of the concept of compulsory voting, entrenched in the ACT's voting system. It could also be seen as devaluing the contribution of 16 and 17 year olds.

Similarly, if 16 and 17 year olds could vote but not stand as a candidate or be elected to the Assembly, their contribution could be seen to be devalued. Conversely, if 16 and 17 year olds could stand as a candidate it would be reasonable to question the wisdom of allowing minors to be elected and serve as Assembly members or even Ministers.

Given the issues outlined above the Commission **recommends** retaining the minimum age of voting of 18.

Improving donation rules and donation reporting timeframes

Legislative ban on all gifts from property developers

Summary

While the Commission does not consider it appropriate to offer a view on policy objectives, the focus of this submission is on the potential impact that amendments to the Electoral Act may have on the practical enforceability of the Act and on the Commission's regulation and enforcement requirements in relation to the funding and disclosure scheme.

The parliamentary agreement between ACT Labor and the ACT Greens included agreement from the Government to bring to the Assembly a legislative ban on all gifts from property developers based on bans operating in other jurisdictions.

The only jurisdiction with such a ban in operation is New South Wales.

That legislation, the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (EFED), is currently undergoing a full review in response to a recommendation made in the Report from the *Expert Panel – Political Donations* and the *NSW Joint Standing Committee on Electoral Matters (JSCEM) Inquiry into the Expert Panel*.

The Commission notes that any proposals to ban or limit political donations involve policy issues, legal constraints and practical implementation concerns. The Commission notes that, if such bans or limitations were not applied at the national level under Commonwealth law, it may be difficult for the ACT to impose bans or limitations on political participants active at both the national and ACT level of politics.

If the proposed prohibition provision were to be adopted by the Legislative Assembly, care needs to be taken to ensure that changes do not have unintended consequences and that there is sufficient clarity to constitute a workable scheme. The drafting of ACT legislation might best be informed by awaiting the outcome of the NSW legislation review process. It may also be appropriate to consult with other relevant persons – such as the members of the Justice and Community Safety Directorate (JACSD) committee, other Members of the Legislative Assembly (MLAs) and ACT registered political parties in relation to the preparation of detailed specifications for the proposed scheme.

Rationale for electoral funding and disclosure scheme

Electoral matters and campaign finance decisions need to achieve the balance between transparency, privacy and freedom of speech and association, and address the practical issues in relation to the administration of any laws, to ensure a robust democracy is retained and supported by the community. These are essentially policy issues and the Commission provides the following analysis and discussion of the issues and practicalities for the Committee's consideration.

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.

This submission categorises the objectives of a funding and disclosure scheme as facilitating the conduct of free and fair elections and maintaining voters' confidence in our democracy by:

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

Disclosure

Public disclosure of the identities, 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 a 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 actual corruption.

Disclosure of gifts and expenditure provides the public and other political participants with 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 **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.

Public funding

Public funding to political parties and candidates is often provided in order to reduce their reliance on funding from private donors and to provide for a more level political playing field.

The argument for public funding surrounds the notion that it ensures that different parties offering themselves for election have an equal opportunity to present their policies to the electorate. It is argued that without it parties and candidates may not be able to raise the necessary and often significant funds to develop and advertise their policies. In its absence parties and candidates may be forced to rely on private donations, increasing the risk of corruption and undue influence.

In March 2015 amendments to the Electoral Act introduced by the *Electoral Amendment Act 2015* came into effect raising the rate of public funding from the 2012 election rate of 200 cents per eligible vote to 800 cents per eligible vote for the 15 October 2016 election.

Limits on campaign expenditure

It is argued that, even where disclosure of the identities of donors and the amount of their gifts takes place and there is some level of public funding there still remains a risk that the pressure of campaign expenditure and the corollary importance of campaign fundraising can lead to significant donors having undue influence in the political process. Implementing limits on the amount of money that can be spent on political campaigning through a financial disclosure scheme goes some way towards addressing this risk.

Expenditure caps were introduced for the 2012 ACT election. At that time the expenditure cap was \$60,000 per candidate or entity. Following amendments to the Electoral Act that commenced in March 2015, the expenditure cap for the 2016 election was set at \$40,000, indexed annually thereafter.

Current provisions in the law to limit the scope of undue influence

It is assumed that the intent of a ban or limitation on gifts from property developers in the ACT would be to reduce or eliminate the undue influence that property developers may have on ACT public policy through donations of private funds to ACT registered political parties.

The Commission accepts that mechanisms to improve integrity within any electoral and parliamentary system are important, however it is worth noting that the current combination of electoral expenditure caps, public funding of election campaigns and a form of real-time disclosure arguably reduce the scope for undue influence from private donations.

Public election funding

Public election funding is available to independent candidates and parties contesting ACT Legislative Assembly elections, provided they meet the threshold requirement. A party is eligible to receive public election funding for the votes obtained by its endorsed candidates who together polled at least 4% of the total number of formal first preference votes cast in an electorate. An independent candidate is eligible to receive funding if he or she polls at least 4% of the total number of formal first preference votes cast in the relevant electorate. The amount of public funding payable is based on the number of eligible formal first preference votes obtained, multiplied by the rate of election funding applicable for that election. The rate differs from one election to another as it is adjusted by the all groups consumer price index.

For the 2016 election the rate was 800 cents per eligible vote. For the six month period January 2017 to June 2017 the public election funding rate is 808.872 cents per eligible vote.

Administrative funding

Non-party MLAs and political parties with elected MLAs are entitled to receive quarterly administrative funding payments from the ACT Electoral Commission. These payments are intended to help parties and non-party MLAs meet the administrative cost of running their offices and complying with the disclosure requirements of the Electoral Act.

These administrative funding payments cannot be used for electoral expenditure in relation to an ACT, federal, state or local government election.

Administrative funding is paid at the rate of \$20,000 per calendar year for each MLA, plus the consumer price index increase beyond 2012. The payment is made in quarterly instalments to the relevant party registered officer or non-party MLA. The quarterly amount for 2017 is \$5,480.96 per MLA.

Expenditure caps

An expenditure cap is a limit on the amount of money that can be spent on an election campaign for an ACT Legislative Assembly election.

The capped expenditure period for an ACT Legislative Assembly election is the period from 1 January in an election year until the end of polling day. Electoral expenditure incurred during this period is subject to a cap.

Expenditure caps were introduced for the 2012 ACT election. At that time the expenditure cap was \$60,000 per candidate or entity.

Following amendments to the Electoral Act that commenced on 3 March 2015, the expenditure cap for a party grouping for the 2016 election was set at \$40,000 per candidate (indexed annually thereafter), multiplied by the number of party candidates contesting the election, to a maximum of 25 candidates (5 candidates for each of the 5 electorates). For a party standing 5 candidates in each electorate, the maximum expenditure cap at the 2016 election was \$1,000,000 (\$40,000 x 25).

Expenditure caps also apply to non-party candidate groupings, associated entities, non-party MLAs and third party campaigners.

Triangulated approach

The explanatory statement that accompanied Electoral Amendment Bill 2014 (No 2) to establish an \$8 per first preference vote rate for public funding and altered the rate of electoral expenditure, stated that:

“The amendments in this Bill are part of a triangulated approach to ensuring a transparent and accountable electoral system. Capping the amounts that can be expended on election campaigns together with an increase in public funding and robust reporting requirements are a balanced approach to maintain the rights of candidates, campaigners and voters.”

Where once the aggregate level of public funding provided to political parties and candidates (based on a payment per vote) lagged well behind aggregate actual declared expenditure on election campaigning, the changes implemented prior to the 2012 ACT election and in March 2015, arguably introduced a suite of mechanisms that limit the scope for undue influence from gifts provided by private donors.

In general, electoral expenditure by the major parties, prior to the introduction of an \$8 public funding rate, grew much more rapidly than the rate of public funding. The gap between public funding amounts and political party electoral expenditure closed considerably at the 2016 election, as displayed in Table 1. Focusing just on ACT Labor and the Canberra Liberals, for the 2008 and 2012 elections, when the public funding amount per eligible vote was 147.722 cents and 200 cents respectively, the percentage difference between the amount incurred in electoral expenditure and the amount received through public election funding ranged between -77% and -92%. In contrast to this, following the 2016 election and the increase in public funding to 800 cents per eligible vote, the percentage difference dropped to between -24% and -25%. The earlier two elections show a greater reliance on private gifts to fund the expenditure gap, where as in 2016 the reliance on private gifts to fund the campaign dropped significantly. Accordingly, it could be argued that a single donor's potential for influence through the provision of private funds has also been significantly reduced.

Table 1 – Sources of funding and expenditure by ACT parliamentary parties

| | 2016 election | 2015/16 | 2014/15 | 2013/14 | 2012 election | 2012/13 | 2011/12 | 2010/11 | 2009/10 | 2008 election | 2008/09 | 2007/08 | 2006/07 | 2005/06 |
|---|-------------------|------------------|------------------|------------------|-------------------|------------------|--------------------|------------------|------------------|---------------------|--------------------|------------------|------------------|------------------|
| ACT Labor | | | | | | | | | | | | | | |
| Electoral expenditure | \$985,342 | | | | \$919,191 | | | | | \$1,392,643 | | | | |
| Public election funding ¹ | \$750,488 | | | | \$171,982 | | | | | \$116,887 | | | | |
| Gap between funding and expenditure | -\$234,854 | | | | -\$747,209 | | | | | -\$1,275,756 | | | | |
| Percentage difference | -24% | | | | -81% | | | | | -92% | | | | |
| Gifts and receipts from Assoc entities | | \$575,930 | \$262,684 | \$257,662 | | \$114,942 | \$1,481,864 | \$624,712 | \$664,567 | | \$554,732 | \$558,128 | \$238,553 | \$385,923 |
| Private - Other gifts and receipts ² | | \$377,082 | \$250,183 | \$301,390 | | \$255,093 | \$391,120 | \$263,996 | \$224,105 | | \$519,539 | \$157,967 | \$6,500 | \$61,476 |
| Total | | \$953,012 | \$512,867 | \$559,052 | | \$370,035 | \$1,872,984 | \$888,708 | \$888,672 | | \$1,074,271 | \$716,095 | \$245,053 | \$447,399 |
| Canberra Liberals | | | | | | | | | | | | | | |
| Electoral expenditure | \$962,020 | | | | \$736,669 | | | | | \$727,767 | | | | |
| Public election funding ¹ | \$717,056 | | | | \$172,064 | | | | | \$98,760 | | | | |
| Gap between funding and expenditure | -\$244,964 | | | | -\$564,605 | | | | | -\$629,007 | | | | |
| Percentage difference | -25% | | | | -77% | | | | | -86% | | | | |
| Gifts and receipts from Assoc entities | | \$0 | \$0 | \$0 | | \$0 | \$0 | \$0 | \$0 | | \$0 | \$0 | \$0 | \$0 |
| Private - Other gifts and receipts ² | | \$753,754 | \$600,658 | \$890,173 | | \$521,180 | \$430,819 | \$500,034 | \$470,303 | | \$361,662 | \$223,327 | \$160,139 | \$204,526 |
| Total | | \$753,754 | \$600,658 | \$890,173 | | \$521,180 | \$430,819 | \$500,034 | \$470,303 | | \$361,662 | \$223,327 | \$160,139 | \$204,526 |
| ACT Greens | | | | | | | | | | | | | | |
| Electoral expenditure | \$320,687 | | | | \$226,581 | | | | | \$63,282 | | | | |
| Public election funding ¹ | \$200,768 | | | | \$47,546 | | | | | \$48,832 | | | | |
| Gap between funding and expenditure | -\$119,919 | | | | -\$179,035 | | | | | -\$14,449 | | | | |
| Percentage difference | -37% | | | | -79% | | | | | -23% | | | | |
| Gifts and receipts from Assoc entities | | \$0 | \$0 | \$0 | | \$0 | \$0 | \$0 | \$0 | | \$0 | \$0 | \$0 | \$0 |
| Private - Other gifts and receipts ² | | \$111,742 | \$63,109 | \$261,241 | | \$197,550 | \$148,644 | \$179,129 | \$24,457 | | \$28,984 | \$77,550 | \$43,988 | \$6,114 |
| Total | | \$111,742 | \$63,109 | \$261,241 | | \$197,550 | \$148,644 | \$179,129 | \$24,457 | | \$28,984 | \$77,550 | \$43,988 | \$6,114 |

Note 1 - excludes ACT provided administrative funding

Note 2 - excludes ACT provided administrative funding and federal party funding

Legal considerations

Legality of applying bans and caps

In *Unions NSW & Ors v New South Wales* [2013] HCA 58 (18 December 2013) the High Court examined the question of whether it is permissible to regulate political donations and expenditure by applying bans and caps on donations that may be given by entities to political parties, and caps on expenditure by political parties and others.

In this case industrial associations brought proceedings against the State of New South Wales challenging the constitutional validity of sections of the EFED Act. Section 96D made it unlawful for 'a party, elected member, group, candidate or third-party campaigner' to accept a political donation unless it was from an individual enrolled to vote. In effect, this prohibited political donations from individuals not enrolled, as well as individuals and entities not qualified to enrol, such as corporations.

While the court found that a number of provisions, such as s96D, included in the EFED Act were invalid because they impermissibly burdened the freedom of political communication implied by the Commonwealth Constitution, it accepted that “it is the legitimate aim of the EFED Act [as a whole] to regulate the acceptance and use of political donations in order to address the possibility of undue or corrupt influence being exerted” (at [51]).

This view is notable, as it indicates the Electoral Act’s imposition of caps on expenditure and the potential introduction of any ban or cap on gifts, may not be of themselves invalid, provided they are aimed at the purpose of preventing the possibility of undue or corrupt influence being exerted and are proportionate to that purpose.

More recently, in *McCloy v New South Wales* [2015] HCA 34, the High Court upheld the validity of provisions in the EFED Act that impose caps on political donations, specifically prohibiting donations from property developers and restricting indirect campaign contributions in New South Wales.

The challenge was brought on the basis that those provisions were invalid for impermissibly infringing the freedom of political communication implied in the Commonwealth Constitution. The court found that while the provisions did burden the implied freedom of communication on political matters, the intent of the provisions was to promote and secure the actual and perceived integrity of the system by preventing corruption and ensuring political equality. The provisions were therefore deemed reasonable and appropriate to advance the legitimate object of the provisions.

In determining whether banning donations is a proportionate response to justify limiting freedom of political communication, the High court in *McCloy v New South Wales* devised a three pronged test based on suitability, necessity and adequateness.

“The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test – these are the enquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:

suitable — as having a rational connection to the purpose of the provision;

necessary — in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;

adequate in its balance — a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.”⁶

⁶ [McCloy v New South Wales](#) [2015] HCA 34

This view is again notable, as it indicates that if the proposed prohibition on gifts from property developers in the ACT does not meet these criteria of proportionality testing, the provision may be legally deemed to exceed the implied limitation on legislative power.

Constitutional constraints and the federal system

A major obstacle to any scheme in the ACT that is tighter than the disclosure regime nationally will be the impact on the different levels of government. 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 campaigns. It is difficult to envisage the ACT having the power to impose its own bans or limitations on political parties undertaking political activity in the ACT for Commonwealth purposes, given constitutional constraints and Australia's federal system.

Under legislation aimed at prohibiting gifts to political parties from property developers, it may still be possible for the ACT party to receive gifts from prohibited donors if those funds are intended for federal election purposes. It is also currently possible for an ACT party to receive funds from the national party for local purposes. Once provided to the national party, or the local party, it is eminently possible that funds are fungible between the entities and potentially between purposes. This raises the potential for complexity in regulating and enforcing legislation aimed at prohibiting gifts from certain sections of the community.

For the proposed restriction scheme to work effectively in the ACT, it will be necessary to provide careful measures to prevent parties from receiving such prohibited gifts for use in incurring ACT electoral expenditure, and potentially for administrative purposes, while still allowing political entities the ability to accept such gifts and to make uncapped electoral expenditure for federal campaigns.

Without the implementation of potentially complex legislation to enforce a statutory separation of Territory and federal functions in ACT political parties, or the imposition of legally questionable legislation to provide for a complete prohibition of these gifts to ACT political parties, the Commission is concerned that gifts accepted by a party for supposedly federal purposes will be fungible to ACT purposes without a clear breach of legislation. This could be seen to undermine the intent of the law and could expose the Commission to difficulties in regulating and enforcing it.

Regulation, enforcement and budget implications

Should the ACT introduce more stringent disclosure requirements, there are a number of practical considerations that would need to be addressed. Of significance would be the need to resource an appropriate regulatory body. While the ACT Electoral Commissioner is currently responsible for implementing the ACT's funding and disclosure scheme, the staffing and funding levels available for this function are minimal. As a minimum, additional funding would be needed and a greater level of regulation, investigation and enforcement required.

Analysis of the NSW scheme and discussions with the NSW Electoral Commission (NSWEC) on the implementation and regulation of the NSW prohibited donors legislation indicates that the resource implications for such legislation in the ACT are likely to be considerable.

It appears from the NSWEC experience that great complexity comes with the requirement to determine whether a political donor falls within the stated definition of either 'property developer' or 'close associate'. As much of the definition centres around the often complex business activities of the entity involved, the NSWEC has found that for accurate determinations to be made, complex forensic investigations are often required. This expertise is currently outside of the current staffing structure of the Commission.

For the regulation and enforcement of such legislation to work, the regulatory body would need to engage in complex and time consuming investigations to ensure that each gift was not connected to a property developer in any way either through a business link or domestically.

Should a prohibition on gifts from property developers be implemented, the Commission is of the view that regular access to legal and/or forensic accounting experts and the recruitment of, at a minimum, one full time investigator, would be required. This would have a considerable and ongoing impact on the budgetary requirements of the Commission.

It should also be noted that current accommodation for Elections ACT is barely adequate to undertake its ongoing functions. The addition of any additional staff would render the current accommodation inadequate. Alternative accommodation would be required. This has capital and recurrent budget implications.

If the Assembly were to agree to the need to specifically limit the scope of undue influence of property developers, it may wish to consider the concept of caps as an alternative to a full ban on donations. Such legislation would have the effect of requiring the regulator to only inquire into a gift, or series of gifts, that reach the determined threshold, eliminating the need to review all gifts received. Arguably, it may also be seen to comply with, to a larger degree, the judgement delivered by the High Court in *Unions NSW & Ors v New South Wales* which ruled that some bans within a funding and disclosure scheme may be invalid because they impermissibly burdened the freedom of political communication implied by the Commonwealth Constitution, while also ruling that it is a legitimate aim [of legislation] to regulate the acceptance and use of political donations in order to address the possibility of undue or corrupt influence being exerted.

Conclusion

In its *Electoral reform green paper: Donations, funding and expenditure*⁷ the Australian Government commented that "A relatively strong and comprehensive system of transparency might make bans unnecessary. That is something to be weighed against the goal of reducing the scope for undue influence".

The NSW Government commented in its response to a JSCEM recommendation following the expert panel report, that it "will consider whether the policy objectives of the prohibited donor provisions are still valid in light of [caps on political donations in relation to local government elections]".

⁷ Information sourced from: <http://australianpolitics.com/2008/12/17/electoral-reform-green-paper.html>

If the concept of a prohibition on gifts from property developers is adopted by the Legislative Assembly, care needs to be taken to ensure that changes do not have unintended consequences and that there is sufficient clarity to constitute a workable scheme.

With consideration of the above two comments and the discussion provided above in relation to current provisions in the ACT funding and disclosure scheme and the complexity of regulating and enforcing such legislation, the Commission **recommends** that the issue of banning or limiting gifts from property developers in the ACT await the outcome of the review of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) in New South Wales.

Any other relevant matter

Infringement penalties for late or incomplete disclosure returns

Prior to 1 July 2012, the only way in which the Electoral Commissioner could enforce the various offences related to the campaign finance provisions of the Electoral Act was by taking prosecution action through the courts.

The campaign finance reforms that commenced on 1 July 2012 included new provisions related to straightforward offences such as failure to provide disclosure returns by the due date. To enable a simpler process for enforcing these offences than court action, a regulation was made under the Magistrates Court Act 1930 to enable the Commissioner to issue infringement notices.

The Magistrates Court (Electoral Infringement Notices) Regulation became effective from 1 July 2012. It allows the Electoral Commissioner to issue infringement notices for offences against sections 236(1) and 236(2) of the Electoral Act. Section 236(1) provides that it is an offence to not give the Commissioner a disclosure return when required to do so within a stated time, and section 236(2) provides that it is an offence when a person who is required to give a return to the Commissioner does so, but the return is incomplete.

The penalty for an offence against sections 236(1)(a), 236(1)(b) and 236(2) is 50, 20 and 20 penalty units, respectively. The infringement penalty listed in the Regulation is a fixed amount originally based on 20% of the amount of the penalty for the offence at the time of making the Regulation (\$1,100, \$440 and \$440 respectively). At the time of making the Regulation, a penalty unit was worth \$110. The current value of a penalty unit is \$150, and this amount increases periodically.

As the infringement penalties are not linked to the value of a penalty unit, the relative value of the infringement penalties will decrease over time. The Commission suggests it would be appropriate to amend the Regulation to link the infringement penalties to the value of a penalty unit, to avoid the need to manually adjust the infringement penalty as the value of a penalty unit changes.

Accordingly, the Commission **recommends** that the Magistrates Court (Electoral Infringement Notices) Regulation be amended to provide that the listed infringement penalties be set at 20% of the offence penalty unit set out in the Electoral Act.

Infringement notices and discharge of liability

There is potential for uncertainty to arise under the infringement penalty system through the Magistrates Court (Electoral Infringement Notices) Regulation in relation to whether payment of a penalty discharges the liability to submit the required disclosure return.

The payment of an infringement penalty in many situations will discharge the liability for the offence. For example, payment of a traffic infringement penalty discharges the liability for the offence to which the infringement applies. In the example of a traffic infringement, a further infringement penalty cannot be issued for that same offence where the penalty is paid.

The situation of an offence against sections 236(1) (failure to lodge a disclosure return on time) or 236(2) (failure to lodge a complete return) is different in that even though an infringement penalty may be paid, the offence continues unless a disclosure return is subsequently lodged. While sections 152 (Continuing effect of obligations) and 193 (Continuing offences) of the *Legislation Act 2001* provide some assistance in interpreting situations where obligations and offences are continuing, issuing infringement notices for continuing offences can create uncertainty as to whether payment will discharge liability.

Section 152 of the Legislation Act provides:

152 Continuing effect of obligations

If, under a provision of an Act or statutory instrument, an act is required to be done, the obligation to do the act continues until the act is done even if—

- (a) the provision required the act to be done within a particular period or before a particular time, and the period has ended or the time has passed; or
- (b) someone has been convicted of an offence in relation to failure to do the act.

Section 193 of the Legislation Act provides:

193 Continuing offences

(1) This section applies to a requirement to do an act if—

- (a) the act is required to be done under an ACT law within a particular period or before a particular time; and
- (b) failure to comply with the requirement is an offence against the law.

(2) A person who fails to comply with the requirement commits an offence for each day until the act is done.

(3) A day mentioned in subsection (2) includes any day of conviction for an offence and any later day.

Amending the provisions related to electoral infringement notices in the Electoral Act and/or the Magistrates Court (Electoral Infringement Notices) Regulation may help to remove any uncertainty.

Accordingly the Commission **recommends** that the Electoral Act and/or the Magistrates Court (Electoral Infringement Notices) Regulation be amended to provide that where an offence continues beyond the date of payment of an infringement notice, a fresh liability will arise even if the notice is paid, unless the relevant disclosure return or a complete return is lodged, as the case may be.

Appendix A: Extracts of relevant legislation – lowering the voting age

Australian Capital Territory (Self-Government) Act 1988 (Commonwealth)

67A General elections

- (1) The members to be elected at a general election are to be elected as provided by sections 67, 67C and 67D and by an enactment that:
- (a) provides for general elections; and
 - (b) complies with section 67B; and
 - (c) was made after polling day for the second general election.

67B Electoral enactment

An electoral enactment is to provide, among other things:

- (a) for the times of general elections; and
- (b) for a Roll of the electors of the Territory for the purposes of general elections; and
- (c) that every person who is entitled to be enrolled on that Roll and who is resident in the Territory is required to claim enrolment; and
- (d) if the electoral enactment provides for the distribution of the Territory into electorates—that a redistribution of the Territory into electorates is to commence not later than 6 years after the previous distribution or redistribution.

67C Qualifications of electors

- (1) At a general election held on a particular day, a person is entitled to vote if:
- (a) on that day, the person's name is on the Roll of the electors of the Territory for the purposes of general elections; and
 - (b) the person would be entitled to vote at an election held on that day to choose a member of the House of Representatives for the Territory.
- (2) A person's name is taken not to be on the Roll for the purposes of paragraph (1)(a) if an electoral enactment so provides.
- (3) This section does not prevent an electoral enactment from providing that other persons, in addition to persons entitled under subsection (1), be entitled to vote at a general election.

Electoral Act 1992 (ACT)

72 Entitlement

- (1) A person is entitled to be enrolled for an electorate if—
 - (a) the person is entitled to be enrolled on the Commonwealth roll otherwise than under the Commonwealth Electoral Act, section 100 [which provides for 16 year old provisional enrolment]; and
 - (b) the person's address is in the electorate.
- (2) A person is also entitled to be enrolled for an electorate if—
 - (a) the person is not entitled to be enrolled on the Commonwealth roll only because the person is serving a sentence of imprisonment; and
 - (b) the person's address is in the electorate.
- (3) A person is not entitled to be enrolled for more than 1 electorate.

73 Compulsory enrolment etc—residents

- (1) A person who—
 - (a) is entitled to be enrolled for an electorate; and
 - (b) is not enrolled on any roll;shall, subject to subsection (5), make a claim for enrolment within 21 days after the day the person became so entitled.
- (2) An elector who—
 - (a) is enrolled for an electorate; and
 - (b) is entitled, following a change of address, to be enrolled for another electorate;shall, subject to subsections (4) and (5), make a claim for a transfer of enrolment within 52 days after the date of the change of address.
- (3) An elector who changes address within an electorate shall, subject to subsections (4) and (5), give the commissioner written notice setting out the particulars of the new address within 52 days after the date of the change of address.

Note For how documents may be given, see *Legislation Act 2001*, pt 19.5.
- (4) Subsections (2) and (3) do not apply to an eligible overseas elector, an Antarctic elector or a person who is not at least 18 years old.
- (5) If a person is enrolled on the Commonwealth roll otherwise than under the Commonwealth Electoral Act, section 100 and the address recorded on that roll in relation to the person is an address in an electorate—
 - (a) the person shall be taken—
 - (i) to have made a claim under subsection (1) or (2), or given notice under subsection (3), whichever is appropriate; and
 - (ii) to be enrolled for the electorate; and
 - (b) the particulars recorded on the Commonwealth roll in relation to the person shall, so far as practicable, be taken to be the particulars recorded on the roll for the electorate.

- (6) A person who, without reasonable excuse, contravenes subsection (1), (2) or (3) commits an offence.

Maximum penalty: 0.5 penalty units.

75 Age 16 enrolment

- (1) The commissioner shall enrol a person on the roll for an electorate if the person—
- (a) is at least 16 years old; and
 - (b) would, had the person attained the age of 18 years, be entitled to be enrolled for the electorate; and
 - (c) makes a claim for enrolment.
- (2) If a person is enrolled on the Commonwealth roll under the Commonwealth Electoral Act, section 100 and the address recorded on that roll is an address in an electorate—
- (a) the person shall be taken—
 - (i) to have made a claim for enrolment under this section; and
 - (ii) to be enrolled under this section on the roll for the electorate; and
 - (b) the particulars recorded on the Commonwealth roll in relation to the person shall, so far as practicable, be taken to be the particulars recorded on the roll for the electorate.

128 Entitlement to vote

- (1) Subject to subsection (2), an elector enrolled for an electorate is entitled to vote at an election for the electorate.
- (2) A person who is enrolled is not entitled to vote at an election unless he or she will be at least 18 years old on the day the poll for the election is required to be held.

...

129 Compulsory voting

- (1) An elector who is entitled to vote at an election shall not, without a valid and sufficient reason, fail to vote at the election.
- Maximum penalty: 0.5 penalty units.
- (2) Subsection (1) does not apply to—
- (a) an eligible overseas elector; or
 - (b) an Antarctic elector; or
 - (c) an elector who is serving a sentence of imprisonment outside the ACT; or
 - (d) an elector who is enrolled because of his or her enrolment on the Commonwealth roll as an itinerant elector.
- (3) Without limiting subsection (1), an elector shall be taken to have a valid and sufficient reason for failing to vote at an election if the elector believes it to be part of his or her religious duty to abstain from voting.

Proportional Representation (Hare-Clark) Entrenchment Act 1994 (ACT)

4 Entrenchment of electoral system

- (1) This Act applies to any law that is inconsistent with any of the following principles of the proportional representation (Hare-Clark) electoral system:

...

- (c) voting in an election shall be compulsory;

...

5 Special procedures for making certain enactments

- (1) This Act, or any amendment or repeal of this Act, has no effect unless it is passed by—
- (a) at least a $\frac{2}{3}$ majority of the members of the Legislative Assembly; and
 - (b) a majority of electors at a referendum held in accordance with the *Referendum (Machinery Provisions) Act 1994*.
- (2) A law to which this Act applies by virtue of section 4 has no effect unless it is passed by—
- (a) the Legislative Assembly and passed by a majority of electors at a referendum held in accordance with the *Referendum (Machinery Provisions) Act 1994*; or
 - (b) at least a $\frac{2}{3}$ majority of the members of the Legislative Assembly.

Appendix B: Extracts of relevant legislation – funding and disclosure scheme

Electoral Act 1992 (ACT)

Division 14.2B Limitations on electoral expenditure

205D Meaning of expenditure cap—div 14.2B

For this division, the expenditure cap is—

- (a) for an election held in 2016—\$40 000; or
- (b) for an election held in a later year—the amount declared under section 205E for the year.

...

205F Limit on electoral expenditure—party groupings

- (1) This section applies to electoral expenditure in relation to an election that is incurred by or on behalf of a party grouping in the capped expenditure period for the election.
- (2) The electoral expenditure must not exceed the expenditure cap for the election multiplied by the sum of, for each electorate, the lesser of—
 - (a) 5; and
 - (b) the number of candidates for the party for election in the electorate.
- (3) If the electoral expenditure exceeds the amount allowed under subsection (2), the party grouping is liable to pay a penalty to the Territory equal to twice the amount by which the electoral expenditure exceeds the amount allowed under subsection (2).
- (4) The commissioner may recover an amount payable under subsection (3) from the party.

...

Division 14.3 Election funding

206 Who eligible votes are cast for

For this division, an eligible vote cast for a party candidate is taken to be cast for the party and not for the candidate.

207 Entitlement to funds

- (1) The prescribed amount is payable for each eligible vote cast for a candidate or party in an election.

(2) The prescribed amount is—

(a) for an election held in the 6-month period beginning on 1 July 2016—\$8;
and

(b) for an election held in a subsequent 6-month period—the prescribed
amount for the period worked out under this section.

(3) The commissioner must work out the prescribed amount for the 6-month
period beginning on 1 January 2013 and for each subsequent 6-month period.

...

208 Threshold

(1) A payment under this division may only be made for the votes cast for a
candidate in an election if the number of eligible votes cast in the candidate's
favour is at least 4% of the number of eligible votes cast in the election by the
electors of the electorate for which the candidate was nominated.

(2) A payment under this division may only be made for the votes cast for a party
in an election by the electors of an electorate if the number of eligible votes cast
in the party's favour is at least 4% of the number of eligible votes cast by those
electors in that election.

...

Division 14.3A Administrative expenditure funding

215A Period between polling day and declaration of poll

For this division, a person is taken to have been an MLA between polling day
for an election and the declaration of the poll for the election if the person—

(a) was an MLA whose term ended on the polling day; and

(b) was declared re-elected on the declaration of the poll.

215B Eligibility of party for payment for administrative expenditure

A party is eligible for payment for administrative expenditure for a quarter if,
for all or part of the quarter, at least 1 MLA is a member of the party.

215C Payment to eligible parties for administrative expenditure

(1) This section applies if a party is eligible for payment for administrative
expenditure for a quarter.

(2) The commissioner must pay the party the quarterly entitlement of each MLA
who was a member of the party in the quarter.

(3) The quarterly entitlement of an MLA who was a member of the party in the
quarter is worked out as follows:

$$\frac{A \times D}{Q}$$

A means—

- (a) for a quarter in 2012—\$5 000; or
- (b) for a quarter in a later year—the quarterly amount for the year declared under section 215F.

D means the number of days in the quarter that the MLA was a member of the party.

Q means the number of days in the quarter.

215D Eligibility of non-party MLAs for payment for administrative expenditure

A non-party MLA is eligible for payment for administrative expenditure for a quarter if the MLA is an MLA for all or part of the quarter.

215E Payment to non-party MLAs for administrative expenditure

- (1) This section applies if a non-party MLA is eligible for payment for administrative expenditure for a quarter.
- (2) The commissioner must pay the non-party MLA the MLA's quarterly entitlement worked out as follows:

$$\frac{A \times D}{Q}$$

A means—

- (a) for a quarter in 2012—\$5 000; or
- (b) for a quarter in a later year—the quarterly amount for the year declared under section 215F.

D means the number of days in the quarter that the MLA is non-party MLA.

Q means the number of days in the quarter.

...

215G Payments for administrative expenditure not to be used for electoral expenditure

- (1) If an amount is paid to a party or non-party MLA for administrative expenditure under this division, the party or non-party MLA must not use any part of the amount for electoral expenditure in relation to an ACT, federal, state or local government election.

(2) If a party or non-party MLA contravenes subsection (1), the party or MLA is liable to pay a penalty to the Territory equal to twice the amount used.

(3) The commissioner may recover an amount payable under subsection (2) from the party or non-party MLA.

Appendix C: Extracts of relevant legislation – Infringement penalties

Magistrates Court (Electoral Infringement Notices) Regulation 2012

7 Infringement notice offences

The Magistrates Court Act 1930, part 3.8 applies to an offence against a provision of the Electoral Act 1992 mentioned in schedule 1, column 2.

8 Infringement notice penalties

(1) The penalty payable by an individual for an offence against the Electoral Act 1992, under an infringement notice for the offence, is the amount mentioned in schedule 1, column 4 for the offence.

(2) The penalty payable by a corporation for an offence against the Electoral Act 1992, under an infringement notice for the offence, is 5 times the amount mentioned in schedule 1, column 4 for the offence.

(3) The cost of serving a reminder notice for an infringement notice offence against the Electoral Act 1992 is \$34.

...

Schedule 1 Electoral Act 1992 infringement notice offences and penalties

| column 1 item | column 2 offence provision | column 3 offence penalty (penalty units) | column 4 infringement penalty (\$) |
|---------------|----------------------------------|--|--|
| 1 | 236 (1) | (a) 50 (b) 20 | (a) 1100 (b) 440 |
| 2 | 236 (2) | 20 | 440 |

Appendix D: Recommendations made in the ACT Electoral Commission's report on the 2016 election

The Commission made the following recommendations in its report:

Recommendation 1

The Commission **recommends** that the Assembly notes that the Commission will investigate a limited electronic voting option for electors who are overseas and will report back to the Legislative Assembly at a later date.

Recommendation 2

The Commission **recommends** that the Electoral Act be amended to provide that any elector may vote at a pre-poll voting centre, without the need to declare that they are unable to attend a polling place on polling day.

Recommendation 3

The Commission **recommends** that the Electoral Act be amended to require the full given name and surname of a person be shown in an authorisation statement.

Recommendation 4

The Commission **recommends** that the Electoral Act be amended to require the name of an entity to be shown in an authorisation statement, where electoral matter is published on behalf of an entity.

Recommendation 5

The Commission **recommends** that, subject to consultation with Transport Canberra and City Services, the moveable signs code of practice be amended to provide that electoral signs displayed on public land may not be placed on suburban streets and may only be placed on specified stretches of major arterial roads, outside designated areas that have the special characteristics of the national capital.

Recommendation 6

The Commission **recommends** that Schedule 4 of the Electoral Act be amended to provide that vote values calculated by multiplying ballot paper totals by fractional transfer values should be rounded down to 6 decimal places, rather than the nearest whole number. The Commission further **recommends** that this amendment should apply to elections for the ACT Legislative Assembly and the Aboriginal and Torres Strait Islander Elected Body.

Recommendation 7

The Commission **recommends** that the Assembly consider whether it should amend the Electoral Act to increase the expenditure cap applied to ungrouped candidates to avoid the risk of impermissibly burdening the freedom of political communication implied by the Commonwealth Constitution.

Recommendation 8

The Commission **recommends** that the Assembly consider whether it should amend the Electoral Act to increase the expenditure cap applied to third-party campaigners to avoid the risk of impermissibly burdening the freedom of political communication implied by the Commonwealth Constitution.

Recommendation 9

The Commission **recommends** that section 243(5) of the Electoral Act should be amended to alter the reference to “information about a gift made by an individual” to “information about an amount received from an individual”.

Recommendation 10

The Commission **recommends** that the penalty notice fine for failing to vote at ACT Legislative Assembly elections should be increased and linked to a fraction of a penalty unit. The Commission further **recommends** that the penalty should be set at $\frac{1}{4}$ of a penalty unit, rounded down to the nearest \$5.