LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

SELECT COMMITTEE ON AMENDMENTS TO THE ELECTORAL ACT 1992

(Reference: Amendments to the Electoral Act 1992)

Members:

MR M GENTLEMAN (Chair)
MR A COE (Deputy Chair)
MR S RATTENBURY

TRANSCRIPT OF EVIDENCE

CANBERRA

FRIDAY, 16 MAY 2014

Secretary to the committee:
Ms L Gell (Ph: 620 50435)

By authority of the Legislative Assembly for the Australian Capital Territory

WITNESSES

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Amended 20 May 2013

The committee met at 2.02 pm.

CORBELL, MR SIMON, Attorney-General, Minister for Police and Emergency Services, Minister for Workplace Safety and Industrial Relations and Minister for the Environment and Sustainable Development
ALDERSON, DR KARL, Deputy Director-General (Justice), Justice and Community Safety Directorate

THE CHAIR: Good afternoon everybody, and welcome to the second public hearing of the Select Committee on Amendments to the Electoral Act 1992. The select committee was established on 20 March this year to inquire into the proposed expansion of the size of the Assembly, the implications for the ACT of the High Court's decision in Unions NSW v New South Wales, Elections ACT's report on the 2012 ACT election and related issues as set out in the terms of reference. The committee has released a discussion paper that addresses many of these issues and has received and published 12 submissions to date. The committee is to report by the last day of June this year.

On behalf of the committee, I would like to welcome the Attorney-General, Mr Simon Corbell, and officials from Justice and Community Safety. As you would be aware, we have the protections and obligations afforded by privilege, and there is a pink statement on the table in front of you. Would you be able to confirm for the record that you understand the implications of the statement?

Mr Corbell: Yes, thank you, Mr Chairman.

THE CHAIR: I also remind witnesses that the proceedings are being recorded for Hansard for transcription purposes and are being webstreamed and broadcast live. Mr Corbell, the committee has your submission. We have received and published it as submission 9. Would you like to make an opening statement?

Mr Corbell: Thank you very much, Mr Chairman. I thank the committee for the opportunity to appear before you today. I will make a brief opening statement and then I am happy to try and answer your questions. This is an important inquiry with implications for the Assembly and for the people of the territory, who the Assembly represents. I will deal with a number of matters outlined in the government's submission.

First, in relation to the size of the Legislative Assembly, this select committee, as members would know, has been established to inquire into an increase in the size of the Assembly from 17 to 25 members, noting that the public position of both the Labor government and the Liberal opposition is to support such an increase. The committee has also been asked to inquire into the necessary legislative amendments required as a result of this majority position across the Assembly.

In 2013 an expert reference group chaired by the ACT Electoral Commissioner undertook a review of the size of the Assembly. That review, which was the subject of community, expert and stakeholder consultation, included consideration of the number of electorates and the number of members for each electorate. One of the matters considered by the expert reference group was the unique role of the ACT

Legislative Assembly, which, unlike parliaments in other states and the Northern Territory, is responsible, as we know, for making laws in relation to both territory and local government functions.

The expert reference group also considered the current population of the ACT, which has increased by some 100,000 residents since self-government commenced in 1989, and it compared the number of representatives per 100,000 head of population across other Australian jurisdictions. The conclusion of that group was that an increase in the size of the Assembly is warranted. The small size of the Assembly, and particularly the ministry, poses a significant risk to good government in the ACT, and it recommended that the size of the Assembly be increased to 25 members for the 2016 election, consisting of five electorates each returning five members. Both the Labor government and the Liberal opposition have publicly stated their agreement with this recommendation, and I think this forms a strong basis for your deliberations today.

I have received advice about the legislative reforms necessary to increase the size of the Assembly, including amendments to the Electoral Act. The first of the reforms required would be a stand-alone bill made under the Australian Capital Territory (Self-Government) Act. The self-government act sets the number of members at 17 or such number of members as provided for by enactment. The self-government act requires that any enactment to change the number of members must be passed by at least a two-thirds majority of members of the Assembly.

Further, any law to which the ACT Proportional Representation (Hare-Clark) Entrenchment Act 1994 applies, including a law which changes the number of members of the Assembly, requires either passage by a two-thirds majority of members of the Assembly or a majority of electors at a referendum.

Secondly, amendments would be required to amend the ACT Electoral Act to divide the ACT into five electorates with five members returned from each electorate. The Electoral Act currently provides for three electorates with seven members returned from one electorate and five members returned from the other two electorates.

If the Assembly were to agree to these reforms, the next step would be the redistribution process. The Electoral Act requires that a redistribution of electorates for the Assembly must begin as soon as practicable after the day two years before the next general election. That day is in October 2014. Based on previous experience and advice from the Electoral Commissioner, I understand that this process would be complete by the end of September 2015.

I turn to the issues relating to the decision of the High Court in Unions NSW & Ors v New South Wales. The committee has been asked to consider the implications of this High Court decision. In this case the High Court upheld a challenge by six unions who claimed that certain provisions in the New South Wales Election Funding, Expenditure and Disclosures Act 1981 relating to campaign donations and expenditure were invalid. The High Court found that certain campaign donation and expenditure provisions impermissibly burdened the freedom of political communication implicit in the commonwealth constitution. In making this finding, the High Court applied the test established in the High Court case of Lange v Australian Broadcasting Corporation as modified by Coleman v Power.

The Lange test has two stages. Firstly, having found that the provision effectively burdens the freedom of political communication, the court must take its mind to whether the provision is reasonably appropriate and adapted or proportionate to serve a legitimate end. The High Court found that the provisions in question impermissibly burdened the implied freedom of political communication because they were not reasonably appropriate and adapted or proportionate to serve the legitimate end of preventing corruption or undue influence.

There are provisions in the ACT Electoral Act which are similar in their effect to the invalid provisions in the New South Wales act. The fundamental difference between the impugned expenditure provisions in the New South Wales act and the ACT law is how they treat entities which are related to political parties and MLAs. I will turn to this specific issue shortly.

The first provision that I wish to bring to the committee's attention is section 205I(4) of the ACT Electoral Act, which is very similar, if not identical, in effect to section 96D of the New South Wales act, which was found by the High Court to be invalid. Both of these provisions prohibit donations from anyone other than individuals enrolled to vote in the jurisdiction. The only difference between the provisions is that the ACT provision allows the gift to be paid into the federal election account.

In applying the Lange test, the High Court found that section 96D of the New South Wales act in its entirety impermissibly burdened the implied freedom of political communication. In reviewing the application to the ACT, it seems clear to the government that section 205I(4) should be repealed on the grounds that it is likely to impermissibly burden the freedom of political communication implicit in the commonwealth constitution.

The other provision found to be invalid in the Unions NSW case is section 95G(6) of the New South Wales act. This provision has the effect of aggregating political expenditure of a political party with that of any affiliated organisation for the purpose of limiting campaign expenditure to the applicable caps in the legislation. In noting the New South Wales government's argument that section 95G(6) of the New South Wales act ensures that the effectiveness and fairness of the caps are not circumvented, the High Court said:

> Implicit in the notion of circumvention is that s 95G(6) is concerned with expenditure derived in fact by a single source, notwithstanding that it may be made by two legally distinct entities.

The aggregation provision was found by the High Court to impermissibly burden the implied right to political communication because the aggregation provision was not appropriate or adapted to serve a legitimate end—that being to prevent wider anti-corruption practices. The majority of the court was implicitly critical of the provision's treatment of political parties and their affiliates as being the same source of funds for electoral communication expenditure.

Sections 205F, 205G and 205H, which apply to electoral expenditure, are the sections in the ACT Electoral Act which most closely align with sections 95G(6) and 95G(7)

of the New South Wales act. Section 205F applies to electoral expenditure by or on behalf of a party grouping and prohibits the party grouping from exceeding the expenditure cap. Under section 198 of the ACT act, the definition of "party group" includes an associated entity which is, in turn, defined as an entity that (a) is controlled by one or more parties or MLAs or (b) operates completely or to a significant extent for the benefit of one or more registered parties or MLAs.

This means that the electoral expenditure of a party is aggregated with the expenditure of an associated entity for the purposes of the expenditure cap. Similar restrictions are imposed on non-party MLAs and non-party candidate groupings provided for in section 205G and third-party campaigners—section 205H.

The key difference between the New South Wales and ACT provisions is that the ACT term "associated organisation" is narrower than the New South Wales term "affiliated organisation". The New South Wales term requires only that the body be authorised to appoint delegates to the relevant party or participate in preselection of a candidate. This can be contrasted with the treatment of an associated entity to relevant parties and MLAs in the relevant sections of the ACT act.

While the connection between an associated entity and a political party or MLA in the ACT act is much closer than that between a political party and affiliated organisation in the New South Wales act, the question is whether the connection is so close that the entity should be considered as the same source of funds for electoral expenditure, notwithstanding that they are legally distinct entities.

It may be difficult to demonstrate that the aggregation of electoral expenditure by an associated entity with that of a political party or MLA in sections 205F and G as currently drafted is properly connected to the wider anti-corruption purpose of the expenditure provisions. On the other hand, it might be easier to see how an associated entity that is entirely controlled by a party or MLA might be treated as the same source of funds for the purposes of the applicable cap.

Given the real doubt as to the validity of the provisions relating to an associated entity, the government's view is that there is a good argument to remove all references to an associated entity. In its submission to the inquiry, the Electoral Commission also expresses the view that there is considerable legal uncertainty about whether the ACT provisions would survive the test used by the High Court. I look forward to hearing the committee's views on these matters.

Finally, I am aware that the committee has been asked to consider the Elections ACT report on the 2012 Legislative Assembly election. Given the large number of recommendations in that report, I will only make a few comments about it here. Firstly, I note that a number of the amendments recommended are technical and, in the absence of any other evidence, the government would generally take the view that the advice of the Electoral Commission on these matters should be agreed to.

Secondly, recommendations 4 and 8 of the report relate to aspects of section 205I(4) of the ACT Electoral Act, which I have discussed earlier. The commissioner has made a number of recommendations which suggest alternative arrangements to election accounts. The commissioner has also made two recommendations in relation to

anonymous donations, one of which is technical, the other of which relates to the threshold for anonymous gifts. The government will be supporting the proposal that there be an increase in this threshold to $1,000, which will restore the threshold to the original amount proposed in the 2012 bill.

In relation to recommendation 15, the government maintains its previously stated position about failure-to-vote fines. While I note the commissioner's concerns about the costs associated with administering the fine, the government continues to hold the view that the $20 fine is there to encourage compulsory attendance at the polling booth. The value of the fine is not set to be based on any cost recovery considerations. The government is also cognisant of the fact that the fine for failing to attend to vote is the same as that for failing to attend to vote in federal elections.

I would like to thank the committee for the opportunity to appear before you today. I am very happy to try and answer your questions.

THE CHAIR: Thank you, minister. That was a good technical presentation for the committee, but I would like to get some ideas off you that were canvassed at the last hearing and amongst the committee as well. Firstly, in regard to campaigning on election day, there has been some discussion about whether or not there should be a change in the 100-metre rule and whether or not perhaps we look at how campaigns have been run in other jurisdictions, for example, Tasmania, where there is no campaigning itself on election day. Do you have a view on that?

Mr Corbell: The government has not considered further this question from the review of the election before the last ACT election. When this question was raised previously, the government took the view that the 100-metre rule should be maintained, and at this point in time we have not concluded a different position on that rule.

THE CHAIR: There was quite a deal of resources used, I suppose, to manage campaign advertising or electoral advertising on the day. Territory officers had trouble trying to keep up to the advertising on the day.

Mr Corbell: Yes. The purpose of the 100-metre rule is effectively to discourage the handing out of how-to-vote cards. And it was put in place alongside the implementation of the Hare-Clark system, which is also demonstrably a system designed to weaken the capacity of parties to encourage or implement a party ticket vote. So I think when you look at the 100-metre rule, you have to view it in the context of the broader principles that sit behind Hare-Clark, which are to discourage and, indeed, reduce to the maximum extent possible the ability of parties to impose or recommend a ticket for a vote.

THE CHAIR: Colleagues, questions.

MR HANSON: Attorney-General, I am thinking about the time lines for some of this, particularly the impact of the High Court ruling and when you would envisage that the government would bring forward amendments to the ACT act based on the High Court ruling and perhaps the findings of this committee. Do you have a time frame for that?

Mr Corbell: Obviously the government is keen to first and foremost hear the recommendations of this committee. Given that you specifically asked the question about the Unions New South Wales decision and its implications for the ACT law, I would anticipate the government would be in a position in the second half of this year to bring forward amendments to the act that dealt with the campaign finance issues.

MR HANSON: And the other question about timings is the redistribution. So once there is a view to go to the five-by-five model, as it is called—and you just outlined your advice from the Electoral Commissioner is that September 2015 is the time frame by which that could be done; obviously this is a significant change and, to an extent, as you would appreciate, we are in limbo at the moment because the community does not know where those electorates are going to be—do you have a view on whether that process could be quickened so that we could all find out faster where the boundaries are going to be? Is there a view there that that could be amended to bring that forward quicker?

Mr Corbell: There is a statutory process set out in the act that the commissioner is obliged to follow when it comes to a redistribution. And these are rightly matters that are out of the hands of the government of the day, and deliberately out of the hands of elected members in toto, because they obviously will have a vested interest in where these boundaries are ultimately drawn, and that is the role of the Electoral Commissioner.

MR HANSON: I am not suggesting there be a change in the process, just the timings.

Mr Corbell: This will be a major distribution, given the significance of the change associated with an increase in the size of the Assembly, and whilst it is the case that other redistributions, perhaps and indeed, have occurred in shorter time frames, given the scale of the proposed change, I would expect that the notice and public comment time frame that are set out in the act will have to be fully exercised because of the range of views and issues that may arise because of the scale of the proposed change. In terms of the time frame more specifically, I think those are matters best asked of the Electoral Commissioner, given his responsibilities. But the government does not have a view about changing that. In fact, if anything, I would have thought the full provisions of the act would need to be exercised because of the scale of the change.

MR RATTENBURY: I wanted to explore a little more this question of associated entities. As I understood, you said that some of the government's position is the preference to remove the provisions entirely?

Mr Corbell: That is correct.

MR RATTENBURY: The Electoral Commissioner in his submission has made the observation that he thinks that the ACT laws are framed in quite a different way to the New South Wales laws and seems to think that there is probably a distinction between entities that are controlled by a party or an MLA and others of a slightly different category. Have you had a chance to have a look at those comments from the Electoral Commissioner, and would you like to add any comments in light of those observations?

Dr Alderson: Certainly some aspects of the ACT provisions are very similar, almost word for word, to the New South Wales provisions; others are different. But I think the legal view informing the government's thinking about this is that you need to look at this definition of associated entity in section 198 of the ACT act. The reasoning in the Unions New South Wales case legally clearly points to, I think, at a minimum, two parts to that definition of associated entity. One is "controlled by one or more parties", or MLAs, and it would seem on the reasoning of the High Court that that provision is probably valid, that that is a sufficiently close connection to the purposes of the legislation.

But the second clause, which is para (b), operates completely or to a significant extent for the benefit of one or more registered parties or MLAs, although the limb in New South Wales is worded differently. The way in which the High Court talks about the problem with the New South Wales limb can certainly be seen as applicable and creating difficulty for the validity of para (b) of the ACT provision.

MR RATTENBURY: So is it your view that it would be possible to separate those two limbs of the ACT law?

Dr Alderson: As a matter of law and legislative drafting, yes.

MR RATTENBURY: That was the question I was asking, thank you. The Electoral Commissioner talks about those closely related entities being for the purpose of assisting the primary political entity and gives the examples of, for the Labor Party, the 1973 Foundation and the 250 Club for the Liberal Party as—

MR HANSON: That has long gone.

MR RATTENBURY: I know. And that is because no-one wants to give to you anymore. But that is not the point I am making. The observation I am making is that they were set up essentially as fundraising arms, and that part is covered by part (a) of the ACT law?

Dr Alderson: The part that I can perhaps more reasonably comment on is implicit in your question, which is: as a matter of law and legislative drafting, can the substantive provisions and controls remain with a different definition of associated entity, a narrower definition of associated entity? Yes.

MR HANSON: Where do affiliated unions sit within those two limbs?

Dr Alderson: What I know from my conversations with the Solicitor-General, for an informed legal view of any particular entity, given the nature of these provisions, you would actually have to look at the specific terms of the relationship between that entity and the political party. In a sense it is not a question that can be answered on the macro level. The nature of these provisions is such that it depends on the precise relationship between them. I think I could say, in terms of the first limb that the general view is that the entity is controlled by one or more parties or MLAs, you would not necessarily think that, as a matter of law, a given union was controlled by a party or an MLA.

MR HANSON: That is about the entire cap of Liberal Party, Labor Party, the Greens. Is there anything out of the Unions New South Wales action that suggests that a cap on an entity other than a political party is unconstitutional? If there are caps on a political party, at the moment it is about $1 million, a cap on a business group, a cap on a union, a cap on another entity, is that—

Dr Alderson: What I would say about that would be that that is moving on to territory where there is not an explicit statement by the High Court but from the terms of its decision, when you move away from the party itself or organisations directly connected with or controlled by the party onto restricting activities of others, you are moving into the territory where there is more legal doubt.

MR HANSON: So why is it, then, that there can be a cap put on a party perhaps that is constitutionally valid but not on another entity?

Dr Alderson: In essence, the High Court's test or reasoning it applies—again, I stress, this is the legal analysis as opposed to a kind of policy or political analysis—is that it starts from this presumption that there is this implied freedom of political communication and says it is legally and constitutionally open to a parliament to circumscribe that, but the court looks closely at: is it going any further than is necessary? And I think the court's reasoning there—in essence, the direct legal control of what the parties themselves can do to achieve objectives about the funds those parties can use to promote their cause in an election campaign et cetera—is that restricting what other people can do and how they can spend their money is not directly bearing on the sort of equality of arms or what have you in the electoral process. So it is less directly connected with protecting the electoral process and, therefore, gets stronger scrutiny from the court. I think that is the reasoning in the legal principle broadly.

THE CHAIR: Minister, the expert reference group suggested a two-stage approach for increasing the size of the Assembly, the first stage for 2016 and then a second, subsequent increase for 2020. They have suggested that legislation should be done at the same time for those two increases. Has the government formed a view whether the ACT community is ready for the second stage yet?

Mr Corbell: I think, as the Chief Minister has said, that is a discussion that is yet to be had more broadly. Clearly there is not a two-thirds majority in the Assembly either for such a change to legislation. So the government is not proposing that.

THE CHAIR: Further questions, colleagues.

MR HANSON: On the ballot papers themselves, there has been some debate. I note, in the Greens submission, you have got to label it a certain way, 1 to 5 or 1 to 7 as it was in Molonglo. Have you given any thought to that issue? It might be a little below the line for you, but it has created a little interest because you can put just a 1 or you could go 1 through to 35. But it seems that we are told 1 to 5. Is there a legal reason for that? It is not mandated by law, is it?

Mr Corbell: My understanding is that the practice of the Electoral Commission is that they will count ballots to the extent that they can determine a valid vote. So if there is

a 1 and there are not any other numbers after 1, then that will count for 1 and then the ballot will exhaust. So that is my understanding of how the Electoral Commission deals with ballots that are not numbered 1 to 7 or 1 to 5. They will count as far as they can, based on being able to ascertain the wishes of the elector.

I think there are good public policy reasons why the ballot paper itself should indicate that voters should vote 1 to 7 or 1 to 5. And the reason for that is that it provides the most representative expression possible of whom electors wish to see in the Assembly. And obviously our system is a proportional representation system. It is not a first-past-the-post system. And it does rely on electors expressing a second, third, fourth, fifth and so on preference, not just a single preference. So if you want a representative Assembly, it is desirable that the full expression of the voter's view is captured on the ballot paper.

MR RATTENBURY: I wanted to ask about expenditure caps. I do not believe it is canvassed in the submission but at the moment there is an expenditure cap per candidate, which amounts to just over $1 million if a party runs 17 candidates at $60,000 a head. There is some discussion about what that cap might look like with an expanded Assembly, whether it would be 25 lots of $60,000 or whether the amount should be reduced per candidate to keep it at a commensurate number of around $1 million. I wondered if you wanted to express a view on that question.

Mr Corbell: The general view is that the existing caps are adequate and appropriate. So what it would mean is increasing the overall cap to reflect that you have got more candidates.

MR RATTENBURY: That is fine, no supplementaries on that.

Mr Corbell: So the expenditure effort is the same proportionally. It is just that you have got more people in the race.

THE CHAIR: There has also been a discussion about campaign funding from the view of whether election campaigns should be publicly funded. Has the government had a look at what the impact of that may be for the ACT?

Mr Corbell: We do have public funding at the moment, but it is paid after the expenditure has been incurred and it is based on the share of the vote. No, the government has not considered any changes to that, except to say that any change to broader public funding would obviously involve higher cost to the budget.

THE CHAIR: Are there any further questions, colleagues? Thank you very much, minister and officials, for coming in this afternoon. We will get a copy of the transcript over to you to have a look for any typographical errors. We will go to our next witness very shortly.

Mr Corbell: I beg your pardon, one other issue that I did mean to raise was the issue of pre-poll voting.

THE CHAIR: Yes.

Mr Corbell: As we know, in recent years we have seen a significant increase in the number of ballots cast before polling day through the pre-poll voting arrangements. Whilst the government does not have a concluded view on this, I think it is worth mentioning that there have been developments in other jurisdictions, particularly in South Australia where there has at least been commentary following the most recent South Australian election. I think there may have been either legislative change or the indication of possible legislative change around how early people can vote in the election period. The argument is being made that given the large number of people now who vote before polling day and often a number of weeks before polling day, whether or not that is having an impact on the ability for the campaign period as a whole to properly inform the elector as to all of the issues at play in the election, ie, if you vote early, there may be developments in the campaign that would have changed your vote or would have changed your view on a particular matter, but you have already voted so you cannot redress that.

This is an issue, I think, that should be potentially taken into account because of the very significant trend in the numbers of people voting before polling day. And whilst the government do not have a concluded view on it, we are aware that it is an issue and one that is worthy of some examination at the very least.

MR RATTENBURY: In what direction has the South Australian government gone? Are you able to elaborate on that?

Mr Corbell: My understanding is—I cannot recall whether there has been legislative change—certainly my counterpart in South Australia has indicated there may be argument to suggest that pre-polls not open too early in the campaign. I think in South Australia, at least, the pre-polls open quite early in the campaign, as they do here in the ACT. So there may be an argument for looking at when should pre-poll centres open. But as I say, I do not have, nor does the government have, a concluded view on it.

Obviously people are taking advantage of pre-polling because they see convenience in getting their civic duty out of the way, particularly if they are unable to vote on polling day itself. But often this is occurring well in advance of polling day and in significant numbers. I think the report from the last ACT election suggests that it is quite a large percentage now of ballots being cast in pre-poll centres. So I think it is a trend to watch, at the very least. Whilst the government does not have any proposal or any suggestion to change it at this time, it is a trend that is emerging.

THE CHAIR: Thank you again, Minister Corbell. The committee will take a short recess until we organise our next witness. Thank you very much.

Short adjournment

TWOMEY, PROFESSOR ANNE, University of Sydney, private capacity

THE CHAIR: Good afternoon, Professor Twomey, and welcome to this afternoon's committee hearing via telephone conference. Can I remind you of the protections and obligations afforded by parliamentary privilege and draw your attention to the privilege statement which the secretary has sent to you. Could you confirm for the *Hansard* that you have read the privilege statement?

Prof Twomey: Yes, I have.

THE CHAIR: Thank you. We understand that you have not made a submission to the inquiry but the committee has noted with interest your paper on the High Court's decision in Unions New South Wales. The implication of that decision for the ACT's Electoral Act is one of the committee's terms of reference. Before we proceed to questions, Professor Twomey, would you like to make an opening statement to the committee?

Prof Twomey: I might just say that I have to concede that I am not terribly familiar with all the ins and outs of the ACT Electoral Act. I have just had a bit of a look at it. I gather it is fairly similar to the New South Wales one, but I apologise in advance if I do not follow all the nuances along the way.

The second thing to note is that the Unions New South Wales case and the legislation that was involved there in some ways relates back to the concerns that the High Court raised in 1992 in relation to the Australian Capital Television case. There were two particular concerns that the High Court recognised in that case. The first one was that the legislation was unbalanced in nature because it favoured incumbents over others, and even though it was not biased in a particularly party political way, the fact that it treated parties in a way that could be seen to be trying to advantage some over others was something that the High Court had concerns about.

The second thing in that case that the High Court had concern about was the fact that third parties that had a legitimate role in contributing to political communication and political debate were being excluded from access to the electronic media. The court was particularly concerned that the voices of people other than parties and members of parliament should still be able to be heard and able to make their point clearly. Both those issues arose again in the Unions New South Wales case and both of them may be relevant perhaps to a lesser extent in the ACT.

The thing to be aware about is that you need to make sure that the legislation does not favour one side more than the other or does not favour existing parties in a significantly greater way than new parties entering into the system of government or that it does not favour incumbents over other parties. So that is one thing to keep in mind.

The other thing to keep in mind is that you need to make sure that the voices of third-party campaigners and others can be heard and that they are not necessarily muzzled by the legislation. If both those principles are kept in mind when legislating that will help ensure that the legislation comes out the other end as valid and acceptable to the High Court. I think that is all I really want to say.

THE CHAIR: Thanks very much, professor. I wonder if I could just ask you then, perhaps on that first point, which was that they found the legislation unbalanced and that it favoured incumbents, to go into a little bit more detail for me? How would it have favoured incumbents?

Prof Twomey: This is the legislation back from 1992. It was the legislation that banned political advertising on the electronic media for everyone and then gave free advertising to political parties on the electronic media, but it calculated it by reference to the proportion of votes they had achieved in the previous election. So if you were the party that had won government the previous time—although it is not always necessarily the case that the people who get the most votes actually win government, but usually it is—if you were the incumbent, you had the advantage of having received the most votes last time and that proportionately raised the amount of free air time you had this time. It was that that disturbed the High Court, as well as issues about new entries into the political scene and whether they were capable of being given enough free advertising as well in that mix.

THE CHAIR: Thank you. Questions for Professor Twomey?

MR HANSON: Professor, thanks very much for joining us. Just as a side note, I come from a party that did secure the most number of votes but did not form government. We have been following what has been happening in the ICAC in New South Wales, and I note that the Premier and the opposition leader have both come out calling for public funding. I was just wondering if you have a view on how that could possibly work, based on what you are saying about making sure that you are not favouring incumbents over non-incumbents and making sure that you provide a balance of making it fair? Have you got any thoughts on that?

Prof Twomey: I do. I have to say it is a really good question, and it is a very hard question. It is one that I have been concerned about too. As you know, in New South Wales—I am not sure whether this is replicated on the ACT or not; I have not got quite this far in looking through your act—the way they calculate the public funding aspect at the moment is by reference to the amount of money that you have actually spent in your campaigning as a proportion of the relevant expenditure cap.

In New South Wales, if you are a party that has run a candidate in each of the electorates in the lower house, you end up with a cap—at least under the original legislation—of $9.3 million. Within that cap approximately 75 per cent is returned through public funding. It is done on a slightly different basis so that you get, for example, 100 per cent of your first 10 per cent of spending and then 75 per cent of, I think, the next 80 per cent or so of spending and then a smaller proportion of the last part of your expenditure. It is loaded up at the beginning.

That works fairly for everybody because everybody has a different cap according to where they were running candidates and how many candidates they were running. It is also based upon expenditure within that cap. So you do not have the problem that you get with the commonwealth system where people are actually getting money in when they have not actually spent the money out. You cannot profit from the system.

That is a different way of doing it from the other way, which is often based on a proportion of how many votes you received at the election and then calculated after the election, but you do not know in advance how much you have got so you then have a risk in terms of how much you spend. That is another way of doing it.

The real problem, however, is that if you go to full public funding of elections, my imagination is not good enough to work out how you would actually do that in a fair way and in a way where people could be confident about how much they were having to spend before the election rather than counting it all out and working it out after. If you say that parties cannot receive political donations, that they have to be fully funded by the public, then if you got into a situation where you ended up not getting as many votes as you anticipated and you ended up with less money than you thought, how do you cover the extra part that is not covered by the public funding? It is a complete mess.

Equally, if you have some kind of a formula that funds absolutely anyone who wants to participate in an election, it is going to be a very expensive exercise because you would have to fund pretty much any person who stuck their hand up at all, whether they had any public support whatsoever. Normally public funding has some kind of a threshold. You need to get, for example, four per cent of the first preference votes in order for anyone to fund you. So you end up with all sorts of difficulties there.

For those reasons and for other reasons, I am actually against full public funding of election campaigns. I am concerned that it removes the impetus for parties to engage at the grassroots level with people. Parties do not have to get out the vote because we have compulsory voting, but here at least parties do have to engage with members in order to encourage donations. If you take that away too then the only engagement that parties have with the people is just trying to persuade them at election time to vote for them. It ends up distancing parties from the people and the need to have membership and the need to encourage participation in the system. I have some concerns that full public payment would cause that.

That is why I have a preference for a system similar to what we have in New South Wales where most funding of the campaign—it is 75 per cent in New South Wales—is funded by the public. The good thing there, as in ACT, is that if you have got fixed term elections you know exactly when your election will be. You can calculate exactly what your expenditure cap will be. You can calculate exactly how much money you need to raise and you have got four years to raise it. It does not seem to me to be completely unreasonable that parties should be required to raise some of that money, particularly where there are caps on donations as well which take away the possibility of donations being used to influence parties in inappropriate ways.

I think the current system in New South Wales in that regard is pretty good. I do not see why we need to move to full public funding simply because some people have deliberately tried to avoid the system, thwart the system or, indeed, deliberately break the law.

MR HANSON: Thanks.

MR RATTENBURY: Professor Twomey, thank you for joining us. I just wanted to

clarify, from both your paper that I have read and also the comments you have made today, that you are essentially putting the case that legislation can put some restrictions in place around donations and expenditure, but the key factor is that they have to be equal; they have to not favour anybody. That is the essence of it?

Prof Twomey: Yes, I think it is. After the Unions New South Wales case, there is of course a question as to the constitutional validity of expenditure caps and caps on donations. The court accepted that those sorts of things do burden political communication, and that is the first step in what is known as the Lange test. The second test is: are those laws reasonably appropriate and adapted to achieve a legitimate end? The court clearly accepted that it is a legitimate end for parliament to legislate in a way that reduces the perception or the risk of corruption. Imposing expenditure caps and imposing donation caps indeed does just that, as, indeed, does the public funding.

All of those things, to the extent that they are directed to the legitimate end of avoiding any kind of risk or perception of corruption, are all fine. The problem in the Unions New South Wales case was that we had already put in place that system and then the further step was taken of preventing corporations and unions—and indeed any body or individual that was not on the electoral roll—from making a donation. That is where things went astray, because it was impossible to show in New South Wales that a $5,000 donation from a corporation is any more likely to be conducive to corruption than a $5,000 donation from an individual. You could not show that this was in any way directed towards that legitimate end of preventing the risk or perception of corruption. That is where that particular problem lay.

It seems that you have got a similar position in relation to the ACT, although your caps seem to be higher. I think I saw they were $10,000. Nonetheless, if the question is asked, "Why is a $10,000 donation of a corporation any more likely to be conducive of corruption than a $10,000 donation from an individual?" you would have a real problem answering it. It is the caps themselves, to the extent that they lower the effective influence by individuals or corporations or unions or anyone else, that are directed at the legitimate end of preventing corruption.

The particular entities that are affected by those caps, whether or not they are unions or corporations or unincorporated bodies or partnerships or individuals, is really neither here nor there. What you need to be focused on is: how does your law prevent the risk of corruption? With anything extra that you are doing to it, you have to make sure that that too is there for that particular legitimate end. If you cannot justify it then you are going to have a problem.

MR RATTENBURY: That then brings us to the question: in the ACT the notion is one of associated entity in the act. In New South Wales it talks about an affiliated organisation, but in the ACT the law speaks of an associated entity. That, in the first instance, seeks to pick up groups that are controlled by a party or an MLA. So they are seen as almost a direct extension of the political party. The advice from the Electoral Commission here is that that should be valid under the New South Wales decision. Do you have a comment on that at all?

Prof Twomey: I think the Electoral Commission is probably right. Certainly,

paragraph (a) seems to me to be justifiable. I would be fairly optimistic about paragraph (b) surviving as well, although paragraph (b) is just a little bit more difficult. What you are trying to do, presumably, by this aggregation type of provision is to prevent political parties from thwarting the expenditure limits by effectively establishing front organisations to be able to expend money on their behalf.

That is what you are trying to do. That would seem to me to be a law that is reasonably appropriate and adapted to achieve the legitimate end. If the legislation as a whole is all about preventing corruption, and if the expenditure limits are there for taking money out of the system and taking away the inducements to raise lots of money and all the rest of it, then making sure that the system is actually effective and you cannot avoid the system by simply setting up a whole lot of front bodies seems to me to be consistent with that legitimate end.

In my personal view, I think an associated entity that is controlled by a party or an MLA should be under the expenditure cap. It is just in paragraph (b) where you have got "operates completely or to a significant extent for the benefit of one or more registered parties or MLAs". That might be moving a little bit outside it. It is probably okay.

The issue in the Unions New South Wales case, of course, was first of all that the legislation was directed only at one particular party structure that affected one particular party. So it had that imbalance aspect to it. The other problem in Unions New South Wales was that the High Court recognised that unions, like any other third-party campaigners, legitimately have a right to have a voice in public discussion.

It is difficult to argue that the ALP has just set up unions for the purposes of thwarting an electoral funding system. Clearly, the unions have an existence of their own. They have views of their own. Their views do not necessarily always coincide with a political party. Therefore, they have the right to be able to represent those views and to campaign in support of those views and do so without necessarily having an impact on the expenditure cap of the ALP.

Where you have an issue here in terms of your associated entity paragraph (b) is whether or not that is wide enough to incorporate pre-existing organisations that have their own legitimate interests of their members and, although their interests may coincide with that of a political party, they are not controlled by that political party. If they still have a legitimate right to express the views of their members, that is where you might end up with some trouble. But certainly I think paragraph (a) is okay.

What you are trying to pick up here are circumstances where parties and front organisations are running campaigns in concert with each other or the front organisation has been created purely for the purposes of avoiding the caps—those sorts of things. I think if you pick up those, you should be fine.

MR RATTENBURY: It seems very clear from your remarks and my understanding of the case that any sort of control on third parties—NGOs, business organisations and the like—is clearly well outside the bounds and there is no room to limit those.

Prof Twomey: I think that is right. It does not matter what they are attached to. If you

have, say, a business organisation, particularly if it has been in existence for a long time and it represents the views of its members, even if it has strong connections to the Liberal Party or whatever, it still has a legitimate voice and it should be able to express that voice. It is those sorts of things where you get in trouble.

But if, on the other hand, members of the Legislative Assembly are simply creating organisations for the purposes of avoiding the cap, where those organisations have no real genuine existence in the community other than as a creature of, controlled by or acting in concert with, a political party, well, it is those sorts of ones I think you can legitimately pick up in these types of aggregation provisions.

MR RATTENBURY: Thank you.

THE CHAIR: Thank you very much Professor Twomey for your time this afternoon. The committee secretary will get a copy of the transcript over to you to see if there are any transcription errors.

Prof Twomey: Thank you very much.

THE CHAIR: That concludes the hearing for this afternoon, ladies and gentlemen.

The committee adjourned at 3.07 pm.