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**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

ELECTORAL AMENDMENT BILL 2014 (NO 2)

REVISED EXPLANATORY STATEMENT

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ELECTORAL AMENDMENT BILL 2014

Overview of the Bill

The *Electoral Amendment Bill 2014 (No 2)* amends the *Electoral Act 1992* (the Act) in response to recommendations made by the Select Committee on Amendments to the Electoral Act 1992 in its report *Voting matters* (June 2014) and by the Electoral Commission in its *Report to the ACT Legislative Assembly: Proposed changes to the Electoral Act 1992* (September 2014).

The amendments are intended to result in clearer electoral regulation, including less onerous reporting responsibilities, without diminishing the accountability of parties and electoral candidates.

Background

On 20 March 2014 the ACT Legislative Assembly established the Select Committee to enquire into a number of matters relating to the Act, including implications of the High Court decision in *Unions NSW & Ors v NSW* and the Commission's *Report on the ACT Legislative Assembly Election 2012*.

The Government tabled its responses to *Voting Matters* and the *Report to the ACT Legislative Assembly* on 27 November 2014. This Bill implements the legislative aspects of the Government responses to these two reports.

Human Rights implications

This Bill engages a number of human rights protected under the *Human Rights Act 2004*, including:

- the right to privacy and reputation (s 12);
- the right to freedom of expression (s16); and
- the right to take part in public life (s 17).

Right to privacy and reputation (s 12)

Section 12 of the Human Rights Act states:

Everyone has the right—

- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
- (b) not to have his or her reputation unlawfully attacked.

This Bill strengthens the protections under this section by limiting the existing provisions that allow publication of an individual's home address.

Any limits on the right to privacy are restricted to the inspection of records about individual's details at the Electoral Commission Offices during business hours.

This is an important limitation –ensuring transparency in relation to donations of over \$1,000 is an important element of protecting the electoral system from corruption and undue influence. The ability to inspect details of donors also ensures that there is no confusion about the identity of donors.

Right to freedom of expression (s 16)

Section 16 (2) of the Human Rights Act provides that:

Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

There is also an implied right under the Constitution of freedom of political expression. The implied right in the Constitution extends only to protect freedom of communication about government and political matters. It is not a personal right that can be claimed but, rather, acts as a restraint on the ability of Parliament to limit political communication.

In the 2013 case of *Unions NSW v New South Wales* ([2013] HCA 58 (18 December 2013)), the High Court applied the test established in the case of *Lange* of whether a provision impermissibly burdens the freedom of political communication. The two limbs of that test ask whether the impugned decision effectively burdens that freedom, either in its terms, operations or effect; and if so, whether the provision is reasonably appropriate to serve a legitimate end in a manner that is compatible with the maintenance of the prescribed system of representative Government.

It may be argued that the amendments reducing the caps on electoral expenditure further limit the right to freedom of expression. However, it may also be argued that the Bill promotes the right to freedom of expression of political campaigners who do not have the financial resources to run heavy media campaigns by providing them with more meaningful exposure during an election campaign.

Section 28 of the Human Rights Act provides that a right may be subject only to reasonable limitations that can be demonstrably justified in a free and democratic society. Section 28(2) of the Human Rights Act provides that in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including the following:

- ***The nature of the right affected.*** The right to freedom of expression is an essential element in the fabric of the democracy in all Australian jurisdictions, and is an implied right in the Australian Constitution.
- ***The importance of the purpose of the limitation.*** Lowered caps for electoral expenditure are being pursued for a number of legitimate objectives. These objectives include:
 - ensuring those of modest means can genuinely participate in the political process by constraining an arms race of electoral campaigns in combination with an increase in public funding (cl 23 of the Bill);

- ensuring more meaningful exposure of the campaign platforms of candidates and parties with fewer financial means by preventing wealthy candidates, parties and third party supporters from monopolising the election debate;
 - limiting the usefulness of excessive political donations, and in conjunction with increased public funding (cl 23 of the Bill), promoting the overall intention of the Act to reduce the risk that candidates and parties will be beholden to their financial supporters.
- ***The nature and extent of the limitation.*** Lowered caps for electoral expenditure will apply to candidate, party and third party expenditure. The definition of electoral expenditure targets commercial advertising and does not include administrative expenditure. Consequently, the proposed constraint only extends to one of the methods by which a particular category of political discourse (election campaigning) may occur. Importantly, the constraint does not limit the right to political discourse more broadly or prevent election campaigning that occurs through non-commercial means. The Bill does not, in any way, abrogate the fundamental right of a person to hold their own political opinions without interference or sanction.
 - ***The relationship between the limitation and its purpose.*** Limitations on electoral expenditure were included in the Act by the *Electoral Amendment Act 2012*. There is a rational connection between the limitation on political electoral expenditure and the legitimate purposes of reducing the risk that electoral debates will be dominated by the well-financed and reducing the related risk that candidates and parties will be beholden to their financial supporters. These purposes are inextricably connected to the wider purpose of discouraging corruption through a scheme of robust reporting of political donations, partial public funding and expenditure limits.
 - ***Whether any less restrictive means is reasonably available to achieve the purpose the limitation seeks to achieve.*** Electoral expenditure under the Act targets funds spent on advertising and publishing, and does not include administrative costs. The Select Committee on Amendments to the Act in its report *Voting Matters* (June 2014), considered different ways of ensuring that electoral expenditure does not increase greatly if the size of the Assembly increases to 25 members. The current rate of the cap for candidates for 2015 is \$63,973.

With the number of members of the ACT increasing to 25, the expenditure cap for a party contesting all seats in the next ACT election would be \$1,599,325 (plus indexation). An increased cap of over \$1.5 million for parties that contest all 25 seats is considered to be too high. A significant jump in expenditure would have a destabilising effect on the intent of the expenditure caps contained in the Act. It is on this basis that the electoral expenditure cap will be reduced to \$40,000 per candidate, indexed annually. In these circumstances, the Government considers there is not a less restrictive means that will address this issue.

Conclusion on section 28 factors

Caps on electoral expenditure were implemented by the *Electoral Amendment Act 2012*. At the time they were introduced it was noted that the amount that can be spent on election campaigns can have an obvious and tangible effect on voter preferences and, consequently, the outcomes of elections.

While electoral expenditure is an example of an individual's right to freedom of expression (and to participate in public life) the Government remains of the view that the amount of money spent on campaigns should not be an overriding factor in the outcome of an election. Candidates should not win seats simply because they have more, and can spend more, money on election campaigns than their rivals.

As the Select Committee noted at paragraph 3.45 of its report *Voting Matters* (June 2014), regulating electoral campaigning is a matter of balancing various, often competing, goals. An important goal is protecting the freedom of expression (and participation) in the election process. However, this goal must be balanced against other legitimate goals of a democratic society, including promoting an electoral system that:

- provides some degree of equality in participation between candidates;
- mitigates against corruption and undue influence by reducing the risk that candidates and parties will be beholden to their financial supporters; and
- facilitates a level playing field for candidates seeking election, as well as for third parties who wish to participate in the political debate.

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 designed to achieve the legitimate end of the avoiding the perception, and actuality, of undue influence and corruption and of promoting a level playing field.

The Government's view is that a targeted limitation on the right to freedom of expression regarding advertising expenditure on election campaigns is proportionate and necessary to support the integrity of the ACT electoral system and is reasonable and justifiable in a free and democratic society. These limits are compatible with a representative system of government and the fabric of Australia society, which seeks to afford everyone, regardless of their financial means, "a fair go". A reduction in expenditure caps is the most targeted way of allowing candidates, regardless of financial means, to express their policy positions and be visible to the public and voters. The limitations on electoral expenditure are further justified to the extent that they contribute to the overarching purpose of the Act in reinforcing the integrity of the electoral system by mitigating against corruption and undue influence.

Right to take part in public life (s 17)

Section 17 of the Human Rights Act provides that:

Every citizen has the right, and is to have the opportunity, to –

- a) take part in the conduct of public affairs, directly or through freely chosen representatives; and
- b) vote and be elected at periodic elections, that guarantee the free expression of the will of the electors; and
- c) have access, on general terms of equality, for appointment to the public service and public office.

As noted in the explanatory statement to the *Electoral Amendment Bill 2012*, this Bill may both limit *and* promote this right. The caps on electoral expenditure may disadvantage some candidates by limiting how much they spend on promoting their campaign.

On the other hand, by disaggregating associated entities, removing restrictions on sources of electoral campaign donations and lifting the caps on donations, this Bill promotes the ability of individuals and organisations to support the democratic electoral process. It supports the right of political campaigners to take part in public life. By capping the electoral expenditure at \$40,000 for individuals, there is now a more level playing field for candidates, regardless of the resources they have at their disposal. The limitations on electoral expenditure are further justified to the extent that they contribute to the overarching purpose of the Act in reinforcing the integrity of the electoral system by mitigating against corruption and undue influence.

Summary of amendments

The amendments made in this Bill include amendments to:

- Campaign finance matters, including expenditure caps and donations;
- Reporting requirements;
- Treatment of electoral matter published through social media; and
- Counting of votes to ascertain the result of a poll.

The Bill also makes a number of minor, technical amendments.

CLAUSE NOTES

Clause 1 Name of Act

This clause is a formal provision that sets out the name of the Act.

Clause 2 Commencement

This clause is a formal provision that provides for the commencement of the Act.

Clause 3 Legislation amended

This clause states that this Act amends the *Electoral Act 1992*.

Clause 4 Offences against Act—application of Criminal Code etc Section 3A, note 1

This clause removes references to offences under division 14.2A which the Bill omits.

Clause 5 Definitions for pt 14

Section 198, new definition of *Australian government body*

This section inserts a new definition of *Australian government body* for part 14 at section 198 to include government agencies in the definition. This is a technical amendment that supports the amendment that excludes Australian government bodies from the definition of third-party campaigner.

Clause 6 Section 198, definition of *party grouping*, paragraphs (c) and (d)

This clause omits reference to the term “associated entity” of a party or MLA for a party in the definition of “party grouping” in section 198 of the Act.

Clause 7 Section 198, definition of *third-party campaigner*, paragraph (a)

This clause replaces the reference in the definition to “more than \$1,000” with “\$1,000 or more”. This is consistent with other sections in the Act which refer to “\$1,000 or more.”

Clause 8 Section 198, definition of *third-party campaigner*, paragraph (b) (i)

This clause clarifies that an associated entity (defined in section 198 of the Act) is excluded from the definition of third-party campaigner.

Clause 9 Section 198, definition of *third-party campaigner*, paragraph (b) (iv)

This clause substitutes reference to a government agency with an Australian government body and clarifies that an Australian government body is excluded from the definition of a third-party campaigner.

Clause 10 Disclosure periods

Section 201 (2), definition of *disclosure day*, paragraph (c)

To address an anomaly of the Act, the reference to section 220 in the definition of ‘disclosure day’ in relation to third party campaigners in section 201(2)(c) is removed.

Clause 11 Appointed agents

New section 203 (2A)

This provision automatically cancels a previous reporting agent’s appointment where a new reporting agent is appointed under section 203.

Clause 12 Registers of reporting agents

Section 205 (4), new note

This section inserts a reference to the provision mentioned in clause 11 above.

Clause 13 ACT election accounts

Division 14.2A

This clause removes all requirements relating to an ‘ACT election account’ in the Act as while entities listed under section 205A will still be required to account for receipt and expenditure of electoral funds, it is not appropriate to legislate for mechanisms by which this is done.

Clause 14 Meaning of *expenditure cap*—div 14.2B

Section 205D (a)

This section amends the expenditure cap to be calculated on the basis of \$40,000 per candidate for an election held in 2016, indexed annually.

For a party contesting all 17 seats prior to the increase in the size of the Assembly to 25 members, the current total expenditure cap with a cap per candidate of \$60,000 would be \$1,063,010 in 2014 terms.

With the increase to 25 members (5 members returned from 5 electorates), the current expenditure cap of \$60,000 per candidate contesting all seats would be \$1,563,250 plus indexation, a significant increase in the electoral cap amount.

For a party contesting all 25 seats, the total expenditure cap with a cap per candidate of \$40,000 would amount to \$1,000,000.

An expenditure cap of \$40,000 per candidate was recommended by the Select Committee on Amendments to the *Electoral Act 1992* in its report *Voting Matters*.

Clause 15 New section 205D (2) and (3)

This is a transitional provision between commencement and the date by which the Electoral Commissioner must declare the expenditure cap for the 2016 election.

Clause 16 Section 205G heading

This clause substitutes the heading in section 205G with a new heading which includes reference to associated entities.

Clause 17 Section 205G (1) (a)

This clause substitutes existing section 205G(1)(a) with a new section 205(1)(a) and (aa). The revised section applies the expenditure cap to associated entities, whether they are associated entities of parties or MLAs.

Clause 18 New section 205G (4) (a) to (c)

This clause inserts new section 205(G)(4)(a) and (b) to clarify that expenders who are non-party MLAs, associated entities, non-party candidate groupings are people from who the commissioner may recover an amount for exceeding the expenditure cap under section 205G.

Clause 19 Limit on electoral expenditure – third party campaigner acting in concert with others

Section 205H

This clause omits section 205H which prohibits a third party campaigner acting ‘in concert with’ another person to incur electoral expenditure that is more than the expenditure cap for the third party campaigner as this provision may be invalid.

Clause 20 Division 14.2C heading

This clause substitutes a new heading for division 14.2C.

Division 14.2C Limit on payments within parties

Clause 21 Sections 205I and 205J

This clause omits sections 205I and 205J relating to gifts and other payments. This removes the limit on gifts and other payments, however these must still be reported under the Act.

Clause 22 Limit on payments within parties

Section 205K (2)

This clause omits reference to the ACT election account as the requirements relating to an ACT election account are being omitted by clause 13 above.

The words “pay into the ACT election account for the party” are substituted with the word “receive”.

Clause 23 Entitlement to funds

Section 207 (2) (a)

The Act currently provides the prescribed amount payable for each eligible vote received in an election is ‘200 cents’.

This clause amends this section to increase this amount to \$8.00 per eligible vote. This amendment increases public funding for ACT elections.

Clause 24 New section 207 (8) and (9)

This clause includes transitional provisions to deal with the possibility that an election may be held before the next scheduled election in October 2016 by providing that the election fund provisions apply until 30 June 2016.

**Clause 25 Payments for administrative expenditure not to be used for electoral expenditure
Section 215G(1)**

To provide clarity, section 215G (1) is amended to refer to ‘local government election’ rather than ‘local election’.

The clause also omits reference to the ACT election account as the requirements relating to an ACT election account are omitted by clause 13 above.

Clause 26 Section 215G (2)

This section is amended to remove the words ‘deposited or’ to clarify that the penalty amount is based on the amount used. This is a technical amendment.

Clause 27 Definitions – div 14.4

Section 216, new definition of *anonymous gift*

An anomaly exists in relation to the definition of a ‘small anonymous gift’. This section removes the concept of ‘small anonymous gift’ from the Act and changes the reference to ‘anonymous gifts’, with the result that anonymous gifts of up to \$1,000 each may be received to a total of \$25,000 in a financial year.

Clause 28 Section 216, definition of *small anonymous gift*

An anomaly exists in relation to the definition of a ‘small anonymous gift’. This section removes the concept of ‘small anonymous gift’ from the Act, and other amendments to the Act change references to ‘anonymous gifts’, with the result that anonymous gifts of up to \$1,000 each may be received to a total of \$25,000 in a financial year.

Clause 29 Records and regular disclosure of gifts

Section 216A (1) (b)

This clause substitutes existing section 216A(1)(b) with new sections 216A(1)(b) and (1)(ba) to remove the link between associated entities and non-party MLAs but still ensure that associated entities are still caught by the provision.

Clause 30 Section 216A (2)

This clause amends section 216A (2) to ensure that free facilities use is not included in the definition of gift for the purposes of financial disclosure.

Clause 31 Section 216A (2)(c) and (d)

This clause is a consequential amendment following removal of ‘small anonymous gift’ from the Act.

Clause 32 Section 216A(4), except note

This clause amends the Act to require quarterly reporting, with more frequent reporting for the two quarters leading up to an election. This amendment is in response to recommendation 6 of the Select Committee which found that the existing reporting requirements were overly onerous.

Clause 33 Section 216A (6), new definition of *free facilities use*

This clause defines ‘free facilities use’ for the purpose of excluding free use of facilities for a routine meeting from reporting requirements relating to gifts.

Clause 34 Section 216A (6), definition of *relevant period*, paragraph (a)

This amendment makes references to ‘associated entity’ more consistent.

Clause 35 Disclosure of gifts by third party campaigners Section 220 (3) (c) and (d)

This clause is a consequential amendment following removal of ‘small anonymous gift’ from the Act.

Clause 36 Section 222 heading

This clause substitutes a new heading to better reflect the substance of the section.

Clause 37 Section 222 (3)

This amendment omits redundant language and makes references to ‘associated entity’ more consistent.

Clause 38 Section 222 (3)

This clause is a consequential amendment following removal of ‘small anonymous gift’ from the Act.

Clause 39 Section 222 (3)

This clause is a consequential amendment following removal of ‘small anonymous gift’ from the Act.

Clause 40 Section 222 (4)

This clause is a consequential amendment following removal of ‘small anonymous gift’ from the Act.

Clause 41 Section 222 (4) and (7)

This clause is a consequential amendment following removal of ‘small anonymous gift’ from the Act.

Clause 42 Returns of electoral expenditure Section 224 (2)

This clause amends the responsibilities for returns or electoral expenditure consistent with amendments relating to reporting agents.

Clause 43 New section 224 (2A)

This clause inserts a section requiring associated entities to provide a return on electoral expenditure within 60 days after polling day, as is required for other entities.

Clause 44 Section 224 (3)

This amendment amends the section to be consistent with the term ‘reporting agents’.

Clause 45 Annual returns by parties and MLAs Section 230 (1)

This clause extends the deadline for submission of annual returns from 31 July to 31 August. This follows recommendation 20 in the Electoral Commission's report to address concerns that a 31 July deadline required returns to be prepared before audited statements or bank statements were available. Extending the date to 31 August will still allow the electorate to be aware of disclosures prior to an election while allowing obligated parties to include more accurate and verified information.

Clause 46 Section 230 (4) (c)

The clause amends reporting requirements in relation to debts to require all debts outstanding at the end of the financial year, including disputed debts, to be disclosed. This amendment responds to recommendation 14 in the Electoral Commission's report.

Clause 47 Section 230 (5)

This amendment clarifies that gifts given to MLAs in their capacity as a Minister are to be treated as gifts for the purposes of the campaign finance reform provisions of the Electoral Act. This amendment responds to recommendation 11 in the Electoral Commission's report.

Clause 48 Section 230 (5), example 2

This clause amends the example to be consistent with the amendment in clause 44.

Clause 49 Section 231B heading

This amendment omits redundant language and makes references to 'associated entities' more consistent.

Clause 50 Section 231B (1)

Consistent with clause 42, this clause extends the deadline for submission of annual returns from 31 July to 31 August for associated entities.

Clause 51 Amounts received Section 232 (2)

This clause makes reporting requirements consistent. This amendment responds to recommendation 15 in the Electoral Commission's report.

Clause 52 Section 232 (3) (c)

This clause removes a redundant provision relating to exemptions for amounts of less than \$250.

Clause 53 Section 232 (4)

This clause sets out the requirements for reporting free facilities use in annual returns.

Clause 54 Copies of returns to be available for public inspection

New section 243 (5)

This clause provides that the Electoral Commissioner must not publish details of an individual donor's address, other than a postcode of an individual's home address or post office box details.

This is consistent with amendments to section 243A (3) in clause 53 below.

Clause 55 Section 243A heading

This clause amends the section heading to better reflect the content of the clause.

243A Commissioner must publish certain information given under s 216A**Clause 56 New section 243A (3)**

This clause provides that the ACT Electoral Commissioner must not publish details of an individual donor's address, other than a postcode of an individual's home address or post office box details. The note provides that an individual's private address details may, on request be inspected at the commissioner's office during ordinary business hours.

Clause 57 New section 293A

This clause exempts private unpaid commentary on social media from authorisation requirements. This amendment reflects changes in technology and addresses the difficulties of enforcing existing requirements in this area. It implements recommendation 13 of *Voting matters*.

**Clause 58 Ascertaining result of poll
Schedule 4, clause 7 (3) (c)**

This is a technical amendment relating to counting of votes of 2 or more successful candidates who obtained a quota at the earliest count and have the same surplus. This is consistent with recommendation 7 in the Electoral Commission's report.

Clause 59 - Schedule 4, clause 7 (4) (a)

This clause replaces the reference to clause 3 (c) (ii) with a reference to clause 3 (c) (ii) (B).

Clause 60 - Schedule 4, clause 8 (2)

This is a technical amendment relating to counting of votes where 2 or more candidates are tied and a decision is required to identify which tied candidate is to be next excluded. This is consistent with recommendation 8 in the Electoral Commission's report.

Clause 61 -Schedule 4, clause 8 (3) (a)

This is a consequential amendment replacing the reference to clause 8 (2) (b) with a reference to clause 8 (2) (c).

Clause 62 Dictionary, note 2

This clause inserts the word 'individual' into note 2 which refers to terms defined in the Legislation Act. This Bill inserts a number of clauses which refer to an 'individual'.

Clause 63 Dictionary, definition of *ACT election account*

This clause omits the definition of 'ACT election account' consistent with the removal of all requirements relating to an 'ACT election account' from the Act.

Clause 64 – Dictionary, new definitions

A new definition of Australian government body is inserted to align with section 198.

A new definition of anonymous gift is inserted for division 14.4 (Gifts and certain loans—records and disclosure).

Clause 65 - Dictionary, definition of *small anonymous gift*

This clause omits the term 'small anonymous gift' from the dictionary, consistent with its removal from the Act.