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Reference 24.09

Hon Rosemary Armitage MLC  
Chair  
Government Administration Committee B  
Parliament House  
HOBART TAS 7000

Dear Mrs Armitage

### ***Inquiry into the Tasmanian Electoral Commission (TEC)***

Thank you for the invitation to make a submission to the Inquiry.

We trust the following submission will be helpful to the Committee, but we are more than willing to assist the Committee by providing evidence or further submissions on topics of particular interest.

#### ***The administration of the Electoral Act 2004 and other electoral legislation***

The TEC comprises the Chair, Ms Liz Gillam, the Electoral Commissioner, Mr Julian Type, and the third Member, Ms Christine Fraser. The functions and powers of the TEC are set out in section 9 of the Act, and the TEC's independence from ministerial direction or control is provided by section 10.

The TEC is matched only by the Australian Electoral Commission and the ACT Electoral Commission in having three permanent members. We believe that this provides important checks and balances by comparison to those jurisdictions where the Electoral Commissioner largely acts alone.

In general terms, the TEC has extensive powers to approve procedures, to delegate functions and powers, and to appoint returning officers, election officials and polling places. The TEC is responsible for strategic governance, whereas the Electoral Commissioner is responsible for day to day administration.

Since its establishment in February 2005 the TEC has provided nine annual reports to Parliament, and also publishes a "*Report on Parliamentary Elections*" following each general election of the House of Assembly.

In accordance with section 9(3) of the Electoral Act, the TEC may conduct elections for other organisations and charge fees for that service. These services are listed in the TEC's annual reports.

The Electoral Commissioner and TEC members have responsibilities in accordance with the *Legislative Council Electoral Boundaries Act 1995*.

The Electoral Commissioner and the TEC have responsibility for the conduct of local government elections, by-elections and recounts in accordance with the *Local Government Act 1993*.

The Electoral Commissioner has responsibility for elections of the Aboriginal Land Council of Tasmania under the *Aboriginal Lands Act 1995*.

The Electoral Commissioner has certain responsibilities under the *Water Management Act 1999*.

## ***The resourcing available to the Tasmanian Electoral Commission***

### **The current position**

In addition to the Electoral Commissioner, the TEC has 6.8 full-time equivalent (FTE) staff employed under the *State Service Act 2000*.

The TEC can also appoint election officials and returning officers as required.

The TEC operates within the Department of Justice, and depends on the department for the provision of corporate services. Similar arrangements exist for a number of other autonomous agencies, and they avoid what would otherwise be significant duplication of effort.

The TEC has three sources of funding, an annual departmental appropriation, reserved by law funding relating to particular functions, and earned income.

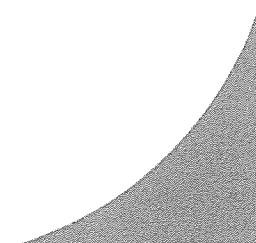
The 2014-15 appropriation stands at \$570,680,<sup>1</sup> a decrease of \$34,633 from 2013-14. A further reduction of \$95,000 is expected in 2015-16.

Reserved by law funding fluctuates with the electoral cycle and covers expenses of the TEC (\$267,000 in 2014-15), Legislative Council Electoral Boundaries Act (a redistribution is due in 2016-17), Aboriginal Land Council elections (\$25,000 in 2014-15), House of Assembly elections (\$107,000 in 2014-15), Legislative Council elections (\$549,000 in 2014-15, with three divisions going to election) and electoral roll management (\$280,000 in 2014-15).

Income is earned from local government elections, by-elections and recounts and from fee-for-service elections. The cost of the 2014 ordinary local government elections was \$2.108 million, an amount paid in full by Tasmania's 29 Councils. This figure dwarfs other earned income.

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<sup>1</sup> This figure is net of Department of Justice overheads



### **The future**

The coincidence of the current budgetary restraint with the move to quadrennial local government elections has left the TEC with something of a “perfect storm”, in that our earned income has become more irregular and our recurrent funding more constrained. It is expected that we will have to rely to a greater extent on reserved by law funding to simply fulfil our current statutory obligations, let alone undertake the research and development required to keep our systems robust and deal with emerging issues and policy initiatives.

Belt tightening is not a simple proposition for an electoral authority: it may sound trite, but it is impossible to conduct 85% of an election.

As mentioned above, the TEC has 7.8 FTE following voluntary separations of two long-standing staff members.

By comparison, the next smallest state, South Australia, has a full-time establishment of 24 staff and, while volumes are different, the range of functions is not.

Whereas we can augment staff numbers, we cannot readily augment the skills and experience that accumulate in permanent staff in what is quite a specialised area of public administration. At 7.8 FTE, we simply do not have the critical mass for long-term institutional sustainability. It is imperative that in the years ahead, we are able to restore our permanent establishment to somewhere around the 13 FTE we had in 2007.

### ***Any deficiencies with the Electoral Act 2004***

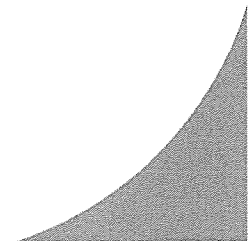
#### **General**

As evident from its title, the Act is one of the most modern electoral statutes in Australia, and is a credit to the first Electoral Commissioner, Bruce Taylor, who worked tirelessly to have it drafted. Rather than setting out overly prescriptive procedures, the Act allows the TEC to approve procedures as technological advances offer new opportunities to streamline election administration. Express voting and recording voters on netbook computers are two examples of improved procedures, which needed TEC approval, but did not require amendments to the Act.

#### **Lost or damaged ballot papers**

During the 2014 House of Assembly election for the division of Denison, 163 completed postal ballot papers were destroyed during the operation of a letter opening machine.

The episode had the potential to leave the fifth seat in unresolvable doubt. Because the election was conducted using proportional representation, any new election ordered by a Court may very well have involved all five Denison seats: see the Denison by-election of 1980, and the fresh election for Western Australian senators in April 2014.



Section 74 of the Electoral Act requires the Governor to issue a fresh writ where an Assembly election “fails or partially fails”. It could be argued that an unresolvable fifth seat is precisely a “partial failure”, but we are not certain that the Act would allow a partial declaration of the poll.

Of relevance are section 147...

(2) If any ballot papers that should have been counted at the election have been lost or destroyed and the returning officer is satisfied that those ballot papers could have affected the result of the election, the returning officer is not to declare the result of the election and is to report the matter to the Commission.

(3) If in accordance with subsection (2) a returning officer does not declare the result of an election and reports the matter to the Commission, the Commission is to review the decision of the returning officer and –

(a) instruct the returning officer to declare the result of the election; or

(b) make an application to the Supreme Court under section 205.

...and section 209(2)...

If a returning officer is unable to decide which candidate or candidates are to be declared elected, the Commission may make an application under section 205 [Election may be disputed] before the return of the writ.

...which could be read as requiring the TEC to dispute the outcome of the entire Denison poll prior to returning the writ to His Excellency the Governor.

Not only were the elections to the first four seats beyond dispute in any scenario, but section 12(4) of the *Constitution Act 1934* provides that:

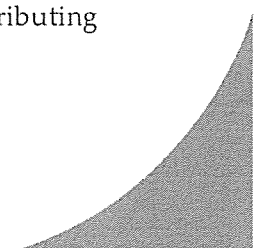
If any delay occurs in the return of any writ issued for the election of members of either House, and, in consequence of the non-return thereof, the number of Members of such House is not complete on the day for which Parliament is called together as aforesaid, such House may nevertheless proceed to business if duly summoned for that purpose so long as the deficiency in the number of Members thereby occasioned does not exceed 2 in the case of the Council or four in the case of the Assembly.

That is, were the TEC to have made an application under section 209, the Assembly would have been unable to proceed to business until the Supreme Court had determined the application and any consequential orders had been fulfilled.

Parliament may wish to consider amending the Act to put beyond doubt that a returning officer, as directed by the TEC, may return a writ certifying the election of a part of the number of members required to be elected for a division: in the thankfully averted Denison scenario, four of the five members. Whereas this might not avoid the need for those members subsequently to face a by-election, it would enable them to take their places in the Assembly and assume ministerial or parliamentary office, and for the Assembly itself to proceed to business.

### **Campaign regulation in the digital age**

Election campaigns are changing rapidly, and the statutory provisions which regulate them are struggling to keep up, certainly not only in Tasmania. Robocalling, push polling and the use of social media and Google Adwords are just a few examples of the new campaign environment. It could be argued that long-standing Tasmanian provisions, such as the prohibitions on canvassing within 100 metres of a polling place, and on distributing or publishing electoral matter on polling day, have become anachronistic.



We would tend to argue that the prohibition on canvassing remains a welcomed feature of Tasmanian elections, enabling voters to enjoy a sociable sausage sizzle rather than running the gauntlet of party workers at a federal election. In contrast, the prohibition on printed matter may be simply discriminatory of the medium, given the practical impossibility of preventing the dissemination of electronic electoral matter.

There are a number of jurisdictional issues which, in our opinion, make it impossible or impractical to regulate some of these new forms of campaigning. Firstly, telecommunications (like broadcasting, which is regulated by the *Commonwealth Broadcasting Services Act 1992*) are constitutionally a Commonwealth responsibility and would need to be addressed by the federal parliament. Second, it is probably as easy to originate robocalls in Bangalore as in Sydney, in which case the jurisdictional issue becomes supranational: the same problem arises with Facebook, Twitter and their ilk.

In August 2014 the Victorian Electoral matters Committee released a discussion paper as part of its *Inquiry into the impact of social media on Victorian elections and Victoria's electoral administration*. This paper may assist the Committee if Honourable Members are of a mind to recommend the investigation of regulation in this sphere.

#### **Use of candidates' names**

A related issue is the use of candidate names without authority, which is prohibited on a limited range of printed items by section 196 of our Electoral Act, and was originally intended to inhibit the promulgation of how-to-vote cards. In recent years, at least two Honourable Members believe that they have been misrepresented, in one case in television advertisements, in another by an oblique reference in printed material.

Our own view is that, if the purpose of the provision is to prohibit how-to-vote cards, that is what it should prohibit. There are a multitude of ways to circumvent the provision; it is not intrinsically undesirable to name an opponent; and other robust statutes deal with defamation.

#### **Third party campaigning**

At two recent Legislative Council elections, third parties have undertaken significant expenditure to campaign against certain candidates. Because this expenditure did not support a *particular* rival candidate, it was not captured by the prohibition contained in section 159 of the Electoral Act:

(1) Subject to subsection (2), a person, other than a candidate or intending candidate or the election agent of a candidate or intending candidate, must not incur any expenditure with a view to promoting or procuring the election of the candidate or intending candidate as a Member of the Council.

It goes without saying that this defeats the level playing field established by the \$15,000 expenditure cap to which candidates are subject. It is not an easy issue, as interest groups have a right of political communication. Third parties are regulated as part of the funding and disclosure regimes operating federally and in New South Wales and Queensland, and in New South Wales their expenditure is capped.

### **Expenditure period**

Members have noted the practice of some candidates for election to the Legislative Council to incur expenditure in the calendar year prior to the election they intend to contest, thereby avoiding the expenditure cap commencing on 1 January.

It would be a straightforward matter to lengthen the expenditure period by amending the definition in section 3 of the Electoral Act.

### ***Any other incidental matters***

#### **Political donations and spending**

Tasmania imposes spending restrictions on Legislative Council, but not House of Assembly, candidates. Local government candidates are also subject to restrictions on both the quantity of, and expenditure on, advertising time and space. These restrictions seem to be well observed, and probably operate to ensure that most campaigns are self-funded, and that aspirants do not need substantial private wealth or external financial backing.

The fact remains that there is no requirement for parliamentary or local government candidates or parties to disclose donations, other than obligations to disclose which arise under the *Commonwealth Electoral Act 1918*.

The Department of Justice hosted a *Political Donations and Spending Project* in 2012. This had its sequel in the *Electoral Amendment (Electoral Expenditure and Political Donations) Bill 2013*, which was passed by the Assembly in 2013, but not debated in the Council prior to the prorogation of Parliament.

There was significant public and media interest in the issue in connection with the 2014 local government elections.

While the TEC has no position on these matters, we keep a watching brief on public funding and disclosure issues and stand ready to assist the Committee.

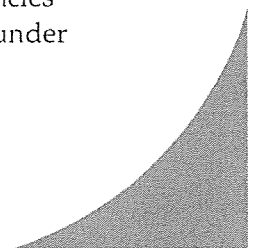
Any policy initiatives in this area would require commensurate resources.

#### **The electoral system**

Following a trial in the 1890s, Tasmania has used the Hare-Clark system of proportional representation to elect its lower house since 1907. Since 1979, ballot papers have been prepared using the "Robson rotation" of candidates' names.

Hare-Clark has consistently delivered strong proportionality of representation to electoral support, and the absence of "above the line" voting has ensured that Tasmania has remained immune to micro-party preference harvesting and the quirky outcomes of some recent Senate elections.

Hare-Clark has been a correlate of a number of minority governments. The TEC has no position on Tasmania's choice of electoral system: that is entirely a matter for Parliament. We would note, however, that an Assembly elected from single member constituencies would be just as exposed to the possibility of minority government as one elected under current arrangements.



### **Internet voting**

There are frequent calls in the public arena for the provision of internet voting options, either as an alternative, or supplement, to attendance ballots for parliamentary elections and postal ballots at local government elections.

This matter was considered by the House of Assembly Standing Committee on Community Development in the local government context in its Report No 2 of 2012, which found “Given the current concerns in relation to security, resources and education, the Committee does not consider it appropriate to recommend a move to electronic voting at this stage.”

More recently, the Commonwealth Joint Standing Committee on Electoral Matters found<sup>2</sup>:

4.89 The foundations of Australia’s voting system—compulsory voting, widespread and easy access to polling booths and polling day held on a Saturday—are robust. Electronic voting would fundamentally change not just the method, but the nature of voting in Australia.

4.90 The Committee believes that it is likely that technology will evolve to the point that it will be possible to vote electronically in federal elections. At that stage the question for a future Parliament, and the voting public, will be whether the convenience of electronic voting outweighs the risks to the sanctity of the ballot.

4.91 The view of this Committee is that the answer to this question at this time is that no, it does not.

Our view is that a small jurisdiction such as Tasmania simply cannot afford to be at the forefront of the introduction of internet voting, however irresistible the proposition becomes in the years ahead.

We have taken the step of introducing “express voting” at parliamentary and, since 2014, local government elections. This enables Tasmanians who are overseas or interstate and otherwise unable to vote in the allowed time to upload a completed ballot paper and declaration as an attachment to a return e-mail. The procedure necessarily compromises the secrecy of the ballot, although only to the extent of two carefully selected TEC staff members. The system, essentially adapted from New Zealand, utilises the internet where traditional channels of voting are impractical at a minuscule fraction of the cost of on-line voting.

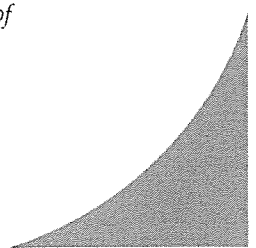
### **Eligibility of candidates**

In previous discussions, Honourable Members have expressed interest in the steps taken by TEC returning officers to validate the eligibility of candidates. This issue has become topical with the revelation that an undischarged bankrupt candidate contested in relation Ferny Grove district at the Queensland state election of 31 January 2015.

In *Nile v Wood* (1988) 167 CLR 133 the High Court made comment that “the ministerial officer who accepts nominations has no general power to refuse a nomination in due form. “

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<sup>2</sup> *Second interim report on the inquiry into the conduct of the 2013 federal election: An assessment of electronic voting options*



Nor could it be otherwise. Whereas it may just be practicable for a returning officer to be satisfied that a candidate had the required period of residence in Tasmania required by section 14(1) of the *Constitution Act 1934*, whether a candidate is of "unsound mind" (s 14(2)), holds an Office of profit (s 32) or is a Contractor (s33) are complex legal matters properly determined by the Supreme Court if and when an issue arises.

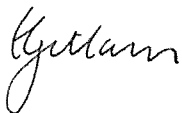
Our candidate information guides contain information relating to the qualifications of candidates, including extracts from the Electoral and Constitution Acts, and candidates are required by section 78 of the *Electoral Act 2004* to declare that they are qualified to stand in accordance with the Constitution Act. There may be as little as 24 hours between the time a nomination is lodged and the returning officer is required to announce it.

### *Concluding remarks*

We welcome the Committee's determination to inquire into the Tasmanian Electoral Commission as recognition of the importance of sound and fearless electoral administration.

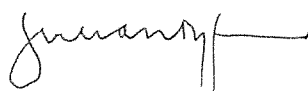
We will endeavour to provide further information as requested by the Committee, and are available to provide evidence at Committee hearings.

Yours sincerely



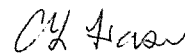
Liz Gillam

CHAIRPERSON



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ELECTORAL COMMISSIONER



Christine Fraser

MEMBER

25 February 2015

