ELECTORAL REVIEW EXPERT PANEL

Report on Victoria's laws on political finance and electronic assisted voting

November 2023

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Table of contents

Acknowledgement

The Electoral Review Expert Panel (Panel) is pleased to deliver its report on Victoria's laws on political finance and electronic assisted voting.

The independent Panel was established under s. 222DC of the *Electoral Act 2002* (Vic) and was required to review the operation of new political finance and electronic assisted voting laws introduced in 2018. In addition, the Panel was required to consider recommendations one and two of the Independent Broad-based Anti-corruption Commission's 2022 *Special report on corruption risks associated with donations and lobbying*.

During the review, the Panel examined the operation of the 2018 amendments in detail and gained insights from a range of participants who were impacted or had a specific interest in these laws. This included registered political parties, independent candidates, third party campaigners, academics, electoral management bodies, integrity agencies and public policy think tanks.

The Panel very much appreciated the input by participants via submissions, participation in public forums, and in responding to requests for information directly from the Panel. A wide range of views and experiences were canvassed which greatly assisted the Panel's considerations.

The Panel would also like to thank the Secretariat for their unwavering support to the review. Their detailed research, analysis and exceptional organisational and report writing skills provided invaluable assistance to the Panel. The Secretariat was led by Lev Gutkin with the support of Cameron Cruwys. The Panel would also like to thank Alexandra Debeljakovic, Ruby Franklin and Ged Shearer who were seconded from the Department of Premier and Cabinet to support the early establishment of the Panel and the review process. The efforts, knowledge and skill of this dedicated team were greatly appreciated.

Elizabeth Williams (Chair) David Feeney Helen Kroger

Abbreviations and glossary

Term or abbreviation	Definition
2018 amendments	*Electoral Legislation Amendment Act 2018* (Vic)
Administrative Expenditure Return	Annual returns that must be submitted by registered officers of RPPs and registered agents of independent MPs in respect of their claimable administrative expenditure
AEC	Australian Electoral Commission
CEO	Chief Executive Officer
Charter	*Charter of Human Rights and Responsibilities 2006* (Vic)
EO&C Budget	Electorate Office and Communications Budget
DFAT	Department of Foreign Affairs and Trade
Donation Recipient	A recipient of political donations for State elections, which includes an: • RPP • candidate at an election • group • MP • associated entity • third party campaigner • nominated entity of an RPP
Donations and Lobbying Report	IBAC (2022), *Special report on corruption risks associated with donations and lobbying*
Electoral Legislation Amendment Bill	Electoral Legislation Amendment Bill 2018 (Vic)
group	Two or more candidates whose names are grouped on a ballot-paper in accordance with section 69A of the *Electoral Act 2002* (Vic)
GST	goods and services tax
IBAC	Independent Broad-based Anti-corruption Commission
ICAC	New South Wales Independent Commission Against Corruption
Infringements Design Guidelines	Department of Justice and Community Safety (2022), *Attorney-General's Guidelines to the Infringements Act 2006 for Legislating Agencies*
JSCEM	Joint Standing Committee on Electoral Matters
JSCEM Interim Report	Joint Standing Committee on Electoral Matters (2023), *Conduct of the 2022 federal election and other matters interim report*
LGA	Local Government Area
LGI	Local Government Inspectorate

Term or abbreviation	Definition
LGV	Local Government Victoria
Local Government Donation Recipient	Candidate at a local government election, candidate group, RPP that endorses candidates and/or incurs political expenditure for local government elections, associated entity or third party campaigner
MP	Member of Parliament
Panel	Electoral Review Expert Panel
RPP	registered political party
SCA	State campaign account
Social Media Impact Report	Parliament of Victoria Electoral Matters Committee (2021), *Inquiry into the impact of social media on Victorian elections and Victoria's electoral administration*
TAV	telephone-assisted voting
Unions NSW No 1	*Unions NSW v New South Wales* (2013) 252 CLR 530
Unions NSW No 2	*Unions NSW v New South Wales* (2019) 264 CLR 595
Unions NSW No 3	*Unions NSW v New South Wales* (2023) 407 ALR 277
VEC	Victorian Electoral Commission

Executive summary

The Electoral Review Expert Panel (Panel) was appointed in May 2023 to review the operation of the *Electoral Legislation Amendment Act 2018* (Vic) (2018 amendments).

The 2018 amendments introduced a broad political finance regulation scheme for Victoria's State elections, including disclosure, funding, reporting and enforcement provisions. They also introduced electronic assisted voting for a prescribed eligible class of electors. The Panel was required to examine and make recommendations in relation to the following:

- whether the *Electoral Act 2002* (Vic) should be further amended to provide for a cap on political expenditure and if so:
    - whether the cap should apply generally or to specific persons or entities
    - the value of the cap
    - the consequences of a failure to comply with the cap
- the impact of the 2018 amendments upon third party campaigners, small community groups and not-for-profit entities
- the operation of the disclosure scheme given effect to by the 2018 amendments including, but not limited to, the operation of disclosure returns
- the effectiveness of the 2018 amendments so far as they relate to electronic assisted voting.

The Panel could examine and make recommendations in relation to contemporary trends and issues in respect of electoral funding, and any other relevant matters.

The Panel's Terms of Reference also required it to consider recommendations one and two of the Independent Broad-based Anti-corruption Commission's (IBAC) *Special report on corruption risks associated with donations and lobbying* (Donations and Lobbying Report). In summary, those recommendations were to:

- review the existing regulatory regime for political donations to improve transparency and accountability of State and local governments through legislative reforms
- examine and develop best practice models for State and local governments on topics including:
    - campaign expenditure
    - monitoring of donations and enforcement of applicable laws, including where donations are received from political parties and associated entities registered in other jurisdictions
    - deterring donors and candidates from attempting to make in-kind contributions to circumvent the declaration requirements and donation caps.

Consultation

The Panel called for any interested persons to make a written or oral submission to the review and published a discussion paper to assist with the preparation of submissions. The Panel contacted over 200 key stakeholders to inform them of its review and consultation process. The Panel received 16 written submissions, which were published on its website.

The Panel held 12 public forums to further explore matters raised in submissions. Members of the public were invited to watch these forums online, and recordings and transcripts were made available on the Panel's website.

The Panel also met with representatives of relevant organisations, including electoral commissions and integrity and regulatory agencies.

Key principles, objectives and design considerations for political finance laws

The Panel examined the key principles and objectives of Victoria's political finance laws, as well as other design considerations and human rights that must be taken into account. The Panel confirmed key objectives with participants which include:

- keeping money in politics transparent — supporting electors to make informed decisions at elections and ensuring regulatory and integrity agencies can perform their functions
- protecting the public interest and reducing the risk of real or perceived undue influence affecting political decision-making
- supporting the equal right of Victorians to participate in the electoral process.

Design considerations for political finance laws identified by the Panel include:

- laws must be capable of enforcement and actually enforced in practice
- the administrative burden imposed by a regulatory scheme should be proportionate to the risks being addressed, and the scheme should be as simple as possible to reduce administrative, compliance and enforcement costs
- to the extent possible, laws should avoid causing unintended changes in the conduct of regulated parties, for example, due to the uneven or inequitable application of rules
- the objectives of Victoria's political finance laws must be balanced against the rights of individuals.

Review of political finance laws for State elections

The Panel comprehensively reviewed the regulatory scheme for political finance established by the 2018 amendments.

Generally, Victoria's political finance laws are working well and are achieving their objectives, while not unduly interfering with the rights of Victorians. Those laws have ensured political donations are transparent. They also support decision-making processes to be, and seen to be, free of any improper influence.

Some aspects of Victoria's political finance laws have caused uncertainty or confusion. At the time of the Panel's review, the 2018 amendments had only been in operation for one full election cycle and some of those issues may be addressed as participants become more familiar with the scheme.

The Panel's approach was to make recommendations where there was sufficient evidence that aspects of the legislative scheme were not meeting key objectives, or where greater clarity or administrative efficiencies could be achieved. Recommended changes were kept proportionate to the risks beings addressed.

The Panel's work was also constrained due to the time at which the review had to be conducted, given:

- the 2018 amendments had only been in operation for one full electoral cycle and key data for that period were not yet available
- several other Australian jurisdictions were concurrently reviewing or changing their political finance laws, making it challenging to predict what reforms would achieve greater harmonisation of laws across Australia.

The Panel considered additional reviews of Victoria's political finance laws by an independent panel of experts are required, once those laws have been in effect for a longer period of time and more data are available.

Several stakeholders raised concerns that political finance laws have an unequal and more onerous impact on independents and new political entrants. The Panel recommended changes to address potential gaps, including updating and clarifying rules regarding:

- fundraising event tickets (Recommendation 3.1)
- affiliation and membership fees (Recommendation 3.2)
- loans and uncharged interest (Recommendations 3.3 and 4.2)
- in-kind support (Recommendation 3.4)
- the definition of political expenditure (Recommendations 3.5 and 3.6).

The Panel noted that it is unavoidable that incumbent candidates are placed in an advantageous position compared to other candidates and considered that political finance laws cannot wholly 'equalise the playing field'. However, an appropriate objective for those laws is to not exacerbate or further contribute to inherent inequalities. The Panel recommended reforms to address concerns raised by stakeholders about the significant impact of the 2018 amendments on independents

and new entrants, while still preserving the integrity of the overall scheme. Recommended reforms include:

- establish a new type of registered political party (RPP), known as a 'single electorate RPP' (Recommendation 3.13)
- introduce an exemption from the general cap so that donors may allow RPPs, Members of Parliament (MPs) and candidates to use their premises as a campaign office, subject to applicable rules (Recommendation 5.6)
- changes to how eligible RPPs and MPs may claim, receive and spend funding administered by the Victorian Electoral Commission (VEC).

A majority of Panel Members also recommended that the power of registered political parties to appoint a nominated entity should be removed, subject to transitional arrangements (Recommendation 3.11).

The Panel was required to consider whether a cap on political expenditure should be introduced. Political expenditure caps exist in six other Australian jurisdictions and are designed to contain excessive political expenditure and support the right to equal participation in elections. The Panel was persuaded by submissions received from several RPPs that a cap on donations, if appropriately designed, can act as a de facto expenditure cap. That approach would minimise the complexity and administrative cost associated with the introduction of expenditure caps across all election participants.

Under existing rules, regulated donation recipients must use their State campaign account (SCA) to pay for any political expenditure. The Panel considered that if appropriate restrictions are placed on what funds may be paid into the SCA of RPPs, MPs, candidates and groups, then expenditure caps for those entities are not required. The Panel recommended those entities should only be able to contribute the following to their SCA (Recommendation 3.9):

- political donations received, subject to applicable donation caps
- public funding provided by the VEC
- a contribution by a candidate or an MP to their own election campaign (subject to applicable limits), which may include funds accessed by the candidate or MP through a loan

- investment returns generated using funds in the SCA, assets purchased using the SCA or the sale of assets purchased using SCA funds.

RPPs would no longer be able to move investment proceeds into their SCA unless those investments were purchased using SCA funds. RPPs would also not be able to move miscellaneous funds that they hold into the SCA, noting that it may not be practically possible to trace the historic origin of those funds.

However, the Panel considered that similar restrictions cannot be placed on what funds associated entities and third party campaigners may pay into their SCA. There is a greater need for those entities to use their own funds to pay for political expenditure, as they do not receive public funding for that purpose. For that reason, the Panel recommended expenditure caps are introduced for associated entities and third party campaigners.

If the Panel's proposed reforms to the SCAs of RPPs, MPs, candidates and groups are not made, further consideration of expenditure caps for those persons and entities may be necessary.

The Panel's review was comprehensive, canvassing every aspect of Victoria's political finance laws. It was informed by detailed stakeholder submissions. In addition to the matters discussed above, the Panel made a large number of recommendations addressing a wide range of specific, technical and administrative matters.

Political finance laws for local government

The Panel was required to review political finance laws for local government in Victoria, which consists of 79 municipalities.

Political finance laws for local government elections are currently less robust than those for State elections. After an election, candidates are required to disclose any political donations over a monetary threshold in an election campaign donation return submitted to the council's Chief Executive Officer.

It is clear that political finance laws for local government require significant reform. IBAC's Donations and Lobbying Report and *Operation Sandon Special Report* demonstrate that existing rules are insufficient and are not working.

The Panel recommended a series of reforms to strengthen and improve those laws and bring them into closer alignment with State political finance laws, including to:

- expand their application to candidates, candidate groups, RPPs that endorse candidates or incur political expenditure for local government elections, associated entities and third party campaigners (collectively referred to as Local Government Donation Recipients)
- give a central regulatory agency responsibility for receiving disclosures and administering and enforcing local government political finance laws
- introduce 'real-time' disclosure of donations and require donors as well as recipients to disclose donations over the relevant threshold
- cap political donations that Local Government Donation Recipients may receive from a donor.

The Panel did not believe there was sufficient evidence to support the introduction of campaign accounts, expenditure caps and/or public funding in local government at this time.

The Panel identified several areas of immediate reform and other areas which require more data and further consideration.

Electronic assisted voting

The 2018 amendments introduced electronic assisted voting for Victorian elections for particular classes of voters, including electors who:

- otherwise cannot vote without assistance because of blindness, low vision or a motor impairment
- cannot travel to a voting centre due to an emergency, provided an 'emergency declaration' is in force and subject to a Determination being issued by the VEC.

Electronic assisted voting involves electors authorising an election official to access and complete a ballot-paper on their behalf. Currently, the VEC delivers electronic assisted voting using a telephone-assisted voting (TAV) service.

The VEC's delivery of electronic assisted voting using its TAV service has been well-received and has provided a cost-effective voting option for eligible electors.

The VEC's submission suggested more classes of electors should be eligible for electronic assisted voting. However, the Panel noted that other voting channels are available for those classes of electors to vote independently and secretly. The Panel was also concerned that widespread use of electronic assisting voting or similar systems could not only undermine public trust in Victorian elections but also threaten the foundation of our democratic system. Internationally, the use of electronic voting systems has been used as the basis for challenging the integrity of election outcomes. In balancing competing concerns, the Panel was mindful that the electoral system is increasingly subject to political criticism and attack. The VEC must administer a system that not only is, but is seen to be, properly protected from any malign interference, domestic or foreign.

While Victoria's TAV system does not present the same security risks as other electronic systems, expanding its use could provide opportunities for election outcomes to be challenged or publicly attacked, which in turn could damage Victoria's democracy and system of government.

However, the Panel noted that existing voting methods may not be serving the needs of Victorians who are outside of the State during the election, leaving them disenfranchised. The Panel recommended allowing the VEC to run a limited trial of electronic assisted voting for that cohort. The Panel also recommended allowing Antarctic electors to use electronic assisted voting.

The Panel recommended making it easier for the VEC to make a Determination to extend access to electronic assisted voting in the case of an emergency, by removing the requirement for an 'emergency declaration' to be in force.

List of recommendations

Chapter 1, Introduction

N/A

Chapter 2, Key objectives and principles

Recommendation 2.1: Another review of Victoria's political finance laws by an independent panel should occur after the 2026 general election, once relevant data are available and annual returns for the election year have been published. Regular independent review of Victoria's political finance laws should occur thereafter every two election cycles.

Chapter 3, Key components and defined terms of State political finance laws

Recommendation 3.1: Amend the *Electoral Act 2002* (Vic) to state that the entirety of a ticket or fee paid to attend a fundraising event is considered a gift for the purposes of Part 12 of the Act, using s. 5(2) of the *Electoral Funding Act 2018* (NSW) as a model provision.

Recommendation 3.2: Amend the definition of gift in Part 12 of the *Electoral Act 2002* (Vic) so that the:

- annual value of a membership fee or an affiliation fee up to the 'disclosure threshold', in effect at the relevant time, is not considered a gift
- remainder is considered a gift.

In the case of an affiliation fee paid by an associated entity to an RPP based on the number of members of the associated entity, the relevant threshold should instead be calculated by multiplying the disclosure threshold by the number of members of the associated entity.

Recommendation 3.3: Amend the *Electoral Act 2002* (Vic) to require the VEC to make Determinations that set a threshold interest rate for an election period. If a Donation Recipient receives a loan with an interest

rate under the threshold rate, the difference between the interest charged and the interest that would have been accrued at the threshold rate should be considered a gift.

Recommendation 3.4: Amend the *Electoral Act 2002* (Vic) to clarify that all forms of volunteer labour performed by an individual, including 'the provision of a service', do not constitute a gift for the purposes of Part 12 of the Act. However, if an individual receives compensation from a third party to perform the relevant service, that constitutes a gift from the third party to the Donation Recipient.

Recommendation 3.5: Expand the definition of political expenditure in Part 12 of the *Electoral Act 2002* (Vic) so that it expressly encompasses the definition of electoral expenditure.

Review the drafting of Part 12 of the *Electoral Act 2002* (Vic) to remove duplicative uses of the terms political expenditure and electoral expenditure.

Recommendation 3.6: Amend the definition of political expenditure in Part 12 of the *Electoral Act 2002* (Vic) so that the same definition applies to all Donation Recipients.

Recommendation 3.7: Amend the definition of political expenditure in Part 12 of the *Electoral Act 2002* (Vic) to clarify that staff costs (e.g. wages) incurred by a Donation Recipient are only considered political expenditure if the dominant purpose of the staff member's employment is to undertake activities that are otherwise within the definition of political expenditure.

For the avoidance of doubt, political expenditure should exclude the employment costs of those RPP staff that conduct the normal day-to-day business of that party. The policy intent of this exception is to ensure that RPPs are not required to pay their core, regular staffing costs from their SCAs.

Recommendation 3.8: Amend the *Electoral Act 2002* (Vic) to give the VEC the power to make Determinations on the meaning of the term political expenditure, subject to the definition set in the Act.

Recommendation 3.9: Amend the *Electoral Act 2002* (Vic) to state that only the following funds may be placed into the SCA of an RPP, MP, group or candidate at an election:

- political donations received, subject to applicable donation caps
- public funding provided by the VEC
- contributions by candidates at an election or MPs to their own election campaigns, subject to applicable limits — which may include funds accessed by the candidate or MP through a loan
- investment returns generated using funds in the SCA, assets purchased using the SCA or the sale of assets purchased using SCA funds.

Recommendation 3.10: Amend the *Electoral Act 2002* (Vic) to allow associated entities and third party campaigners to elect to not maintain an SCA.

Make consequential amendments to the *Electoral Act 2002* (Vic) to ensure that the same obligations and restrictions apply to associated entities and third party campaigners (including their registered agents) that maintain an SCA and those that do not.

Recommendation 3.11: Amend the *Electoral Act 2002* (Vic) to remove the power of an RPP to appoint a nominated entity. References to nominated entities should be removed from the Act.

Transitional rules should apply so that affected RRPs can update their arrangements.

Recommendation 3.12: Amend the *Electoral Act 2002* (Vic) to require the registration of third party campaigners.

Set penalties for non-compliance and provide the VEC with enforcement powers.

Recommendation 3.13: Amend the *Electoral Act 2002* (Vic) to enable the registration of 'single electorate RPPs', with the following requirements:

- the application for registration must nominate the specific electorate that the 'single electorate RPP' will operate in

- the 'single electorate RPP' may endorse no more than one candidate at a time, and endorsed candidates may not stand for election in an electorate other than that nominated by the 'single electorate RPP'
- the 'single electorate RPP' must have at least 250 members, who must reside in the nominated electorate and not be members of another RPP (whereas RPPs are currently required to have 500 members)
- the registration fee should be 25 fee units (whereas it is currently 50 fee units for RPPs)
- otherwise, 'single electorate RPPs' should be treated the same as other RPPs.

The VEC should have the power to deregister a 'single electorate RPP' that does not comply with the second and third requirements listed above.

'Single electorate RPPs' should be provided with a process for changing into RPPs.

Rules should be introduced to address what is to occur if a nominated electorate is abolished or significantly changed due to a boundary redistribution, including providing the 'single electorate RPP' with the right to nominate a new electorate.

Legal advice should be obtained to inform amendments ensuring 'single electorate RPPs' receive equal treatment to other RPPs under Commonwealth law.

Chapter 4, Disclosure, reporting and enforcement

Recommendation 4.1: Amend the *Electoral Act 2002* (Vic) to provide that the relevant representative of a Donation Recipient must submit a disclosure return for the first, and any subsequent, donation that results in the sum of a single donor's political donations to that Donation Recipient reaching or exceeding the disclosure threshold.

Recommendation 4.2: Amend the *Electoral Act 2002* (Vic) to require each Donation Recipient's annual return to disclose the details of loans equal to or over the disclosure threshold received during the year, including:

- the value of the loan

- the details of the lender
- the loan's terms and conditions.

Recommendation 4.3: Insert provisions into the *Electoral Act 2002* (Vic) that:

- provide that a person or entity only makes or receives a gift (or loan) if they are the source or ultimate recipient of the gift or loan, modelled on s. 205A of the *Electoral Act 1992* (Qld)
- require intermediaries that make political donations or loans to a Donation Recipient to disclose the source of the gift or loan, including relevant particulars, modelled on s. 205B of the *Electoral Act 1992* (Qld).

Recommendation 4.4: That the Victorian Government further examine the proposal to introduce a donation portal administered by the VEC.

Recommendation 4.5: Amend the *Electoral Act 2002* (Vic) to state that, if the VEC is notified that a person has become a silent elector, the VEC is required to remove or redact confidential information of that person from documents and disclosures that have already been published.

The VEC should update its online portal to require users to notify it if documents lodged include the personal details of silent electors.

Recommendation 4.6: Amend the *Electoral Act 2002* (Vic) to require RPPs to submit, as part of their annual return (in addition to existing requirements):

- information on funds paid into the SCA (including source and nature of those funds, subject to relevant thresholds) and out of the SCA
- the total sum of political expenditure for the year.

Recommendation 4.7: Amend Part 12 of the *Electoral Act 2002* (Vic) to:

- give the VEC the power to make Determinations, in relation to the audit certificates currently required under ss. 207GD, 209 and 215B, that:
    - stipulate the form that audit certificates must take and/or make the use of particular templates mandatory

    - permit, in circumstances that the VEC considers appropriate, the inclusion of qualified opinions (or similar opinions or caveats) from the auditor in audit certificates
- define the meaning of the term 'independent auditor'
- correct references to the Australian Accounting Standards to references to the Australian Auditing Standards, where appropriate
- move the requirement for an annual return to be accompanied by an audit certificate, currently in s. 209(2) of the Act, into Division 3C, which contains other annual return requirements.

Recommendation 4.8: Amend the *Electoral Act 2002* (Vic) to grant the VEC and/or its compliance officers the power to issue cautions and official warnings, and enter into enforceable undertakings, in relation to breaches of Part 12 of the Act. Also allow the VEC and its compliance officers to issue infringement notices to persons who fail to provide a disclosure return or an annual return, as required under Part 12 of the Act.

Payment of an infringement notice should not absolve the requirement to still provide the annual return or disclosure return as soon as practicable.

Recommendation 4.9: That the Victorian Government review Part 12 of the *Electoral Act 2002* (Vic) with a view to:

- align offence provisions with the remainder of the Act and the *Sentencing Act 1991* (Vic)
- ensure appropriate penalties apply for rules and obligations imposed under that Part, including giving the VEC the power to issue infringement notices where appropriate
- clarify whether each offence is a summary or indictable offence.

Recommendation 4.10: Amend the *Electoral Act 2002* (Vic) to extend the period in which legal proceedings for an offence under Part 12 can be commenced, after the offence was allegedly committed, from three years to eight years.

Recommendation 4.11: Amend ss. 222B(1) and (2) of the *Electoral Act 2002* (Vic) to allow a compliance officer to require reasonable assistance as

part of issuing a coercive notice, including requiring a person to give all reasonable assistance in connection with an examination or investigation.

Ensure the coercive powers of the VEC's compliance officers are consistent with Part 3.10 of the *Evidence Act 2008* (Vic), including by making any required amendments to ss. 222B(1) and (2) of the *Electoral Act 2002* (Vic).

Recommendation 4.12: Amend the *Electoral Act 2002* (Vic) to allow the VEC to audit the SCA of a Donation Recipient at any time, including by requesting that a Donation Recipient or its auditor:

- provide information about the SCA
- provide documents related to the SCA, including bank statements.

RPPs should have the option to provide the VEC with live access to accounting ledgers as a way of reducing the compliance burden on RPPs.

If an audit certificate required under ss. 207GD, 209 or 215B of the Act includes a qualified opinion, the VEC should have the power to:

- request further information from the auditor and the Donation Recipient's representative
- undertake audits on how relevant funds have been disbursed.

Recommendation 4.13: Amend the *Electoral Act 2002* (Vic) to introduce a definition of the term 'scheme' for the purposes of s. 218B.

The Victorian Government or VEC should also issue guidance on:

- relevant principles to be taken into account when determining whether a course of conduct constitutes a scheme
- examples of prohibited and permitted activities.

Chapter 5, State donation caps and restrictions

Recommendation 5.1: Amend the *Electoral Act 2002* (Vic) to introduce a cap on the amount that a candidate or an MP may contribute to their own election campaign. The value of the cap, per election, should be equal to:

- 50 times the value of the general cap, or
- such higher amount as required for the cap to be lawful, according to independent legal advice provided to the Victorian Government.

Recommendation 5.2: Amend the *Electoral Act 2002* (Vic) to clarify that a 'contribution by a candidate or an elected member to their own election campaign' is considered a political donation for the purposes of Part 12 of the Act.

Recommendation 5.3: Update s. 217D(5) of the *Electoral Act 2002* (Vic) to clarify that the 'own-campaign' exemption from the general cap only applies if both of the following apply:

- the funds are paid into the SCA of the candidate or MP making the contribution, or the SCA of their RPP, and
- the funds are used for the dominant purpose of supporting that candidate's or MP's campaign.

Recommendation 5.4: Amend s. 207F(8) of the *Electoral Act 2002* (Vic) to state that, once all debts have been paid and obligations have been resolved, MPs, candidates and members of a group may retrieve any remaining funds that they contributed to their own campaign.

Recommendation 5.5: Update the definition of the term 'small contribution' in the *Electoral Act 2002* (Vic), so that it refers to a political donation that is equal to or less than the value of $100 (subject to future indexation).

Recommendation 5.6: Amend the *Electoral Act 2002* (Vic) to provide that the general cap does not apply to the political donation of the use of the donor's premises as a campaign office (for free or at a discounted rate of rent) to an RPP, MP, group or candidate at an election. The exemption should also apply to the initial establishment of those premises as a campaign office, to a reasonable standard. That exemption should only apply where the donor either:

- owns the property
- has an existing lease on the property for a business or enterprise.

Recommendation 5.7: Amend the *Electoral Act 2002* (Vic) to clarify that:

- separate divisions and branches of an organisation, such as a federally registered trade union, may each constitute a separate 'entity' for the purposes of the Act
- a gift includes the disposition of property from an RPP, a branch of an RPP or an associated entity, including but not limited to:
    - a disposition of property to a Victorian branch of an RPP from the federal branch of the party
    - a disposition of property to a Victorian branch of an RPP from another State or Territory branch of the party
    - a disposition of property from a political party to another political party.

Recommendation 5.8: Amend s. 217F of the *Electoral Act 2002* (Vic) to reduce the number of third party campaigners that a donor may donate to during the election period to:

- three, or
- such higher number as required for the limit to be lawful, according to independent legal advice provided to the Victorian Government.

Introduce an equivalent limit for donations to associated entities.

Recommendation 5.9: Amend the *Electoral Act 2002* (Vic) to introduce a ban on cash donations exceeding the value of the 'small contribution' amount (as indexed from time to time).

Recommendation 5.10: Amend the *Electoral Act 2002* (Vic) to require SCAs to be denominated in Australian dollars.

Recommendation 5.11: That the Victorian Government consider prohibiting or further regulating political donations made using cryptocurrency.

Chapter 6, Funding support

Recommendation 6.1: Amend s. 212A of the *Electoral Act 2002* (Vic) to:

- reduce the first advance public funding instalment for each election period from 40 per cent to 20 per cent
- increase the last instalment in each election period from 20 per cent to 40 per cent.

Recommendation 6.2: Amend s. 212A(6) of the *Electoral Act 2002* (Vic) so that the prohibition, on advance public funding instalments being used as a security or collateral for a loan, also applies to the first instalment paid in each election period.

Recommendation 6.3: Amend the *Electoral Act 2002* (Vic) to clarify that if an RPP or candidate receives advance public funding for an election under s. 212A, they cannot also receive public funding for that election under s. 212(3) or s. 212(4) of the Act.

Recommendation 6.4: Replace the phrase 'an election in writing to the Commission' in s. 212A(7) of the *Electoral Act 2002* (Vic) with a different phrase with the same intended meaning.

Recommendation 6.5: Amend the *Electoral Act 2002* (Vic) to require that if a recipient of advance public funding is required to have an SCA, advance public funding received under s. 212A must be paid by the relevant person (e.g. the registered officer or registered agent) into the SCA.

Recommendation 6.6: Amend the *Electoral Act 2002* (Vic) to provide an entitlement to public funding for supplementary elections, modelled on the rules that apply to by-elections.

Recommendation 6.7: Amend the *Electoral Act 2002* (Vic) to provide an entitlement to public funding for candidates at a failed election. A maximum fixed entitlement should apply for all candidates. Consistent with existing arrangements for public funding, the actual amount payable by the VEC should be the lesser of:

- that maximum entitlement
- political expenditure actually incurred, as set out in an audited statement of expenditure.

One option for setting the maximum fixed entitlement would be to calculate it for each failed election by multiplying:

- the 'per-vote' rate that was in effect at the time of the failed election, by
- half the number of electors enrolled for that electoral district.

Recommendation 6.8: Amend the *Electoral Act 2002* (Vic) to:

- extend the entitlement to advance public funding under s. 212A to a supplementary election held because an election, at the preceding general election, failed
- clarify that entitlement does not apply to a candidate that unsuccessfully contested a different electorate at the preceding general election, and who was already entitled to advance public funding as a result.

Recommendation 6.9: Amend the *Electoral Act 2002* (Vic) to clarify that RPPs that run a joint ticket for the Legislative Council may jointly nominate an agreed share of public funds associated with the joint ticket to be paid to each RPP.

Recommendation 6.10: Amend the *Electoral Act 2002* (Vic) to provide the VEC with discretionary powers to grant extensions to RPPs and MPs who fail to submit an Administrative Expenditure Return, 'statement of expenditure' for public funding or expenditure statement for policy development funding.

Recommendation 6.11: Amend s. 215A(3) of the *Electoral Act 2002* (Vic) to provide that, subject to other eligibility requirements, an RPP may be eligible for policy development funding if either:

- it has been an RPP for the whole of the calendar year for which policy development funding is claimed, or
- it applied for registration in the previous calendar year and was registered in the calendar year for which policy development funding is claimed.

Recommendation 6.12: Amend the *Electoral Act 2002* (Vic) to combine policy development funding and administrative expenditure funding into a single funding stream called Administrative and Policy Funding, which covers both administrative and policy development expenditure. Administrative and Policy Funding should be paid quarterly in advance.

Receipt of public funding by an RPP should not affect its eligibility for Administrative and Policy Funding or the amount that it may claim.

Note: In this Report, the Panel has discussed administrative expenditure funding and policy development funding as separate funding streams and made recommendations accordingly, consistent with existing arrangements. However, if administrative expenditure funding and policy development funding are combined into Administrative and Policy Funding, the Panel's recommendations regarding changes to administrative expenditure funding and policy development funding should be read as applying to Administrative and Policy Funding where required.

Recommendation 6.13: Amend the *Electoral Act 2002* (Vic) to state that:

- auditing expenses incurred in submitting an Administrative Expenditure Return can be included as claimable expenses in that Administrative Expenditure Return
- auditing expenses incurred in submitting a statement of expenditure, for public funding, can be included as claimable expenditure for that statement.

For the avoidance of doubt, it should be made clear that auditing expenses cannot be claimed more than once. For example, if auditing expenses are included in a statement of expenditure for public funding, those same expenses cannot also be included in an Administrative Expenditure Return.

Recommendation 6.14: That the *Electoral Act 2002* (Vic) be amended to give the VEC the power to set rules in its Determinations on how capital assets may be claimed and included in statements required under Divisions 1C, 2 and 2A of Part 12. Without limiting the rules the VEC may set, matters that Determinations should be able to address include:

- how capital costs should be amortised and the economic life of a capital asset
- information that must be provided to the VEC regarding the purchase of capital assets, if that expenditure is claimed.

Recommendation 6.15: Amend Part 12, Division 2 of the *Electoral Act 2002* (Vic) to rename the funding support stream currently titled 'public funding'.

Recommendation 6.16: Amend Part 12, Division 1C of the *Electoral Act 2002* (Vic) to provide a different name for 'annual returns' required under that Division.

Chapter 7, Expenditure caps

Recommendation 7.1: Amend the *Electoral Act 2002* (Vic) to introduce expenditure caps for third party campaigners and associated entities, with the following features:

- cap applies to political expenditure
- cap applies to each election period and resets at the start of each new election period
- initial value of the cap is $1,000,000 per election period, or such higher amount that may be required to ensure it is lawful according to independent legal advice provided to the Victorian Government
- value of the cap is to be indexed at the start of each election period, in line with movements in the all groups consumer price index for Melbourne in original terms as published by the Australian Bureau of Statistics.

Recommendation 7.2: Amend the *Electoral Act 2002* (Vic) to require third party campaigners and associated entities to report on political expenditure incurred for the year as part of their annual returns, in addition to existing requirements.

Recommendation 7.3: Amend the *Electoral Act 2002* (Vic) to give the VEC the power to issue infringement notices for breaches of expenditure caps

applying to third party campaigners and associated entities. The fine should be equal to the lesser of:

- double the amount of overspend
- 12 penalty units for an individual or 60 penalty units for a body corporate.

Make intentional or reckless breach of an expenditure cap applying to third party campaigners and associated entities a criminal offence, punishable by level 6 imprisonment (5 years maximum) or level 6 fine (600 penalty units).

For the avoidance of doubt, s. 218B of the *Electoral Act 2002* (Vic) should apply to schemes intended to circumvent expenditure caps applying to third party campaigners and associated entities.

Chapter 8, Timing, administrative and other matters

Recommendation 8.1: Change references to 'financial year' in Division 3 of Part 12 of the *Electoral Act 2002* (Vic), *Disclosure of political donations*, to references to 'calendar year'.

Change the definition of 'election period' in s. 206 of the *Electoral Act 2002* (Vic) to refer to each period commencing on 1 January following the previous general election and ending on 31 December of the year of the next general election.

Make the deadline for submitting a statement of expenditure under s. 208 of the *Electoral Act 2002* (Vic) 16 weeks from the end of the election period for that election.

Update Division 3C of Part 12, *Annual returns and other information*, to make annual returns apply to calendar years rather than financial years. Make the deadline for submitting an annual return 16 weeks from the end of each calendar year.

Recommendation 8.2: Amend s. 217Q of the *Electoral Act 2002* (Vic) so that the value of the general cap, disclosure threshold for political donations and small contribution amount are indexed at the start of each election period, rather than each financial year. Indexation should continue to be

based on the change in the all groups consumer price index for Melbourne in original terms, published by the Australian Bureau of Statistics, over the relevant period.

Values should be rounded down to the nearest:

- $500, in the case of the general cap
- $100, in the case of the disclosure threshold
- $10, in the case of the small contribution amount.

Recommendation 8.3: Amend Part 12 of the *Electoral Act 2002* (Vic) to allow registered agents to appoint deputy registered agents, similar to the process for appointing deputy registered officers of RPPs.

Recommendation 8.4: Amend s. 207E of the *Electoral Act 2002* (Vic) to give the VEC the power to remove a person from the Register of Agents, following the appointer ceasing to be a Donation Recipient, if the VEC is satisfied on reasonable grounds that all outstanding obligations of the registered agent under Part 12 of the *Electoral Act 2002* (Vic) have been fulfilled.

Recommendation 8.5: Review the obligations and responsibilities placed on candidates in Division 2 of Part 12 of the *Electoral Act 2002* (Vic) and make amendments to place those responsibilities on registered agents where appropriate.

Recommendation 8.6: Amend the *Electoral Act 2002* (Vic) to clarify that each Donation Recipient's SCA must consist of one or more accounts that are unique and separate to the accounts used by other Donation Recipients. Provide exceptions, as appropriate, for RPPs and endorsed MPs, candidates and groups.

Recommendation 8.7: Amend the *Electoral Act 2002* (Vic) to require accounts used as an SCA to be registered with the VEC, and for the VEC to be notified of changes to those accounts, within five business days of:

- the obligation to maintain an SCA arising
- a change being made to those accounts.

Recommendation 8.8: Undertake a technical review of Part 12 of the *Electoral Act 2002* (Vic), to identify required changes to ensure residual obligations and responsibilities of a former Donation Recipient and their relevant representative continue to apply and remain enforceable. The review should identify changes required to ensure that debts owed to the State by a former Donation Recipient remain recoverable.

The *Electoral Act 2002* (Vic) should be updated based on the outcome of that review.

Recommendation 8.9: Review and update Part 12 of the *Electoral Act 2002* (Vic) to specify its extraterritorial application.

Chapter 9, Local government

Recommendation 9.1: Extend the application of local government political finance laws to the following Local Government Donation Recipients:

- candidates and candidate groups
- RPPs that endorse candidates and/or incur political expenditure for local government elections
- associated entities
- third party campaigners.

Recommendation 9.2: Amend the *Local Government Act 2020* (Vic) to:

- give a central regulatory agency, such as the VEC or LGI, responsibility for administering and enforcing local government political finance laws
- require election campaign donation returns to be submitted by candidates and other Local Government Donation Recipients to that regulatory agency, and require that agency to publish returns on its website.

It is important that the regulatory agency is properly resourced to oversee, administer and enforce local government political finance laws, including by supporting Local Government Donation Recipients to understand and comply with their obligations.

In addition, the LGI should be responsible for managing a central database holding all personal interest returns submitted by councillors. This central register would then be online and available for inspection as is the situation for State and Commonwealth MPs.

Recommendation 9.3: Amend the *Local Government Act 2020* (Vic) to require 'real-time' disclosure of political donations at local government elections, similar to requirements that apply to State elections. Require both donors and recipients to submit a disclosure return for donations over the applicable disclosure threshold.

Recommendation 9.4: That caps on political donations to Local Government Donation Recipients are introduced and linked to the general cap for State elections, subject to further analysis and consultation on what an appropriate value for a donation cap would be.

Recommendation 9.5: That the regulatory agency responsible for administering local government political finance laws is granted the power to issue infringement notices, cautions, official warnings and enforceable undertakings for breaches of those laws, in addition to the power to bring criminal prosecutions.

Recommendation 9.6: Introduce bans on foreign and anonymous political donations for local government elections, analogous to existing bans for State elections.

Chapter 10, Electronic assisted voting

Recommendation 10.1: Amend the *Electoral Regulations 2022* (Vic) to enable the VEC to run a limited trial of electronic assisted voting for electors located outside of Victoria during an election.

Recommendation 10.2: Amend the *Electoral Regulations 2022* (Vic) to make Antarctic electors an eligible class for electronic assisted voting.

Recommendation 10.3: Amend regulation 52 of the *Electoral Regulations 2022* (Vic) to allow the Victorian Electoral Commissioner to make an emergency Determination even if an 'emergency declaration' is not in

force. That Determination would allow a specified class of electors affected by an emergency to access electronic assisted voting.

Recommendation 10.4: If additional classes of electors are made eligible for electronic assisted voting, the VEC should also have the power to provide those electors with electronic voting, if it considers that would be appropriate.

Recommendation 10.5: Add a provision into the *Electoral Act 2002* (Vic) that provides that an election is not to be held void due to the failure of an electronic assisted voting system, unless all of the following are satisfied:

- as a result of the failure, voters were prevented from voting throughout the voting period
- a recount has determined that an alternative result may have been achieved if those electors could have voted
- as a result, the election result was likely to be affected.

1 Introduction

In 2018, the Victorian Government passed the *Electoral Legislation Amendment Act 2018* (Vic) (2018 amendments). Those reforms required the responsible Minister to appoint an Expert Panel consisting of three Members to conduct an independent review of their operation.

In accordance with the Terms of Reference of the Electoral Review Expert Panel (Panel), this report provides the Panel's findings, observations and recommendations following its review of and inquiry into:

- the operation of the 2018 amendments
- recommendations one and two of the Independent Broad-based Anti-corruption Commission's (IBAC) *Special report on corruption risks associated with donations and lobbying* (Donations and Lobbying Report).

1.1 About the Electoral Review Expert Panel

The Panel consists of three independent Members who were appointed by the Minister for Government Services in May 2023. The Members of the Panel are:

- Elizabeth Williams PSM (Chair)
- Helen Kroger
- David Feeney.

In accordance with legislative requirements, the appointment of the Members of the Panel was considered by the Electoral Matters Committee of the Parliament of Victoria, which had the power to veto the proposed appointment of one or more of the proposed Members.

Panel Members were required to have experience in one or more of the following areas:[1]

- community advocacy and engagement
- legal and regulatory compliance

[1] *Electoral Act 2002* (Vic), s. 222DC(2).

- contemporary issues relating to electoral funding.

To be eligible for appointment, Panel Members were required not to be:

- a current employee of a public service body, a public entity or a special body (within the meaning of the *Public Administration Act 2004* (Vic))
- a current employee or executive of a registered political party (RPP)
- the current Electoral Commissioner or an employee or other member of staff of the Victorian Electoral Commission (VEC)
- a current or former Member of the Parliament of Victoria (MP).

In conducting its review, the Panel could inform itself as it saw fit, having regard to appropriate privacy considerations relating to electronic assisted voting.

The Panel's Terms of Reference are provided at Appendix A.

1.2 2018 amendments

The Parliament of Victoria passed the 2018 amendments in July 2018.

When introducing the Bill to the Parliament, the then Attorney-General, the Hon Martin Pakula, stated that:[2]

> *The legislation being introduced today will be one of the most significant reforms of the Electoral Act 2002 ... since its enactment. In addition to making Victoria's electoral system clearer and more efficient and accessible, the Bill gives Victoria a robust political donations and disclosure scheme that we can be proud of.*

The 2018 amendments introduced a broad political finance regulation scheme for Victoria's State elections, including disclosure, funding, reporting and enforcement provisions.

The Legislative Council made amendments (drafted by the Government, Opposition, and crossbench MPs) prior to passing the legislation. Notably, the amendments:

- allowed electronic assisted voting for a prescribed eligible class of electors, without requiring them to vote in person at a voting centre

[2] Victoria, *Parliamentary Debates*, Legislative Assembly, 10 May 2018, p. 1348.

- introduced administrative expenditure funding and policy development funding, and access to advance public funding
- required the Minister to appoint a Panel to conduct this Review.

Requirement for Review

The 2018 amendments included a requirement for the Panel to complete its review within the 12 month period after 25 November 2022 (the date of the 2022 State election). The review was required to examine and make recommendations in relation to the following:[3]

- whether the *Electoral Act 2002* (Vic) should be further amended to provide for a cap on political expenditure and if so
    - whether the cap should apply generally or to specific persons or entities
    - the value of the cap
    - the consequences of a failure to comply with the cap
- the impact of the 2018 amendments upon third party campaigners, small community groups and not-for-profit entities
- the operation of the disclosure scheme given effect to by the 2018 amendments including, but not limited to, the operation of disclosure returns
- the effectiveness of the 2018 amendments so far as they relate to electronic assisted voting.

The review could also examine and make recommendations in relation to contemporary trends and issues in respect of electoral funding including, but not limited to, the funding of political parties or candidates.

The Panel was required to deliver a report on its review to the Minister. The Minister is required to cause a copy of a report of the review to be laid before each House of Parliament, on or before 10 sitting days after the day on which the review is completed.[4]

The Minister is required to use their best endeavours to ensure that the *Electoral Act 2002* (Vic) is amended in accordance with

[3] *Electoral Act 2002* (Vic), s. 222DB(3).
[4] *Electoral Act 2002* (Vic), s. 222DB(5).

recommendations made in this report, before the general election to be held in November 2026. In October 2023, the Premier of Victoria became the Panel's responsible Minister.

1.3 Donations and Lobbying Report

In October 2022, IBAC published its Donations and Lobbying Report. IBAC noted that:[5]

> *A lack of transparency and accountability for donations and lobbying can cause the community to question whether decisions (particularly of elected decision-makers) have been made in the public interest or are the result of policy capture by influential donors with privileged access. …*
>
> *Victoria's current rules on political donations, which were introduced in 2018, do not place any limit on expenditure, meaning Victoria is one of only three Australian states in which there is no electoral campaign spending cap. At the local government level there is no requirement for donors to make a declaration of any kind, while the details of any donations received and declared by candidates are held locally by each council.*
>
> *Donations and lobbying can be used to gain privileged access to decision-makers within a party, especially if it is in government, by elevating a donor's or lobbyist's profile. Candidates and political parties also obtain donations through fundraising activities, requests for in-kind support, direct payments and via associated entities. Together these factors have the potential to compromise a member of parliament or councillor once elected.*
>
> *These are matters which can erode public trust in the people and institutions that are relied on to make decisions in the public interest.*
>
> *Repeated calls to strengthen donation regulations point to regulatory gaps and opportunities for improvement, while*

[5] Donations and Lobbying Report, pp. 6-7.

investigations in other jurisdictions highlight relative weaknesses of the Victorian framework. …

… political donations must be carefully scrutinised to deter political parties and their supporters from looking for new ways to supplement their income or identify loopholes.

IBAC explained that its decision to issue the report was prompted by:[6]

- a clear need to address the systemic corruption vulnerabilities associated with donations and lobbying
- the requirement for the Panel to deliver this report, suggesting that it was an opportune time to present options for reform
- IBAC's understanding that parliament may be considering other reforms in relation to donations and lobbying.

The Terms of Reference for the Panel requested that it consider the first two donations-related recommendations from the Donations and Lobbying Report as part of its Review and include its findings in this report.

In summary, the first recommendation was to review the existing regulatory regime for political donations to improve transparency and accountability of State and local governments through legislative reforms.

The second recommendation was to examine and develop best practice models for State and local governments, on topics including:

- campaign expenditure
- monitoring of donations and enforcement of applicable laws, including where donations are received from political parties and associated entities registered in other jurisdictions
- deterring donors and candidates from attempting to make in-kind contributions to circumvent the declaration requirements and donation caps.

[6] Donations and Lobbying Report, p. 7.

1.4 Consultation

On 9 June 2023, the Panel publicly called for any interested persons to make a written or oral submission to the Review. Submissions were open until 30 June 2023, although the opportunity for an extension was available if required. The Panel published a discussion paper to assist with the preparation of submissions. The Panel contacted over 200 key stakeholders to inform them of its review and consultation process, including:

- The electoral commission of each Australian jurisdiction
- relevant Victorian Government organisations and Ministers
- Members of Parliament (via the Clerks of the Parliament)
- Victorian RPPs and their associated entities
- third party campaigners
- Australian academics specialising in political finance, as well as research bodies and advocacy bodies
- organisations representing and advocating for disabled individuals.

The Panel received 16 written submissions, which were published on its website.

The Panel also invited key stakeholders to further explore matters raised in submissions at 12 public forums held in July and August 2023. Members of the public were invited to watch forums online, and recordings and transcripts were made available on the Panel's website.

Appendix B lists submissions received and details of public forums held, including stakeholders who attended.

To further inform its review, the Panel met with the:

- Electoral Commission of Queensland
- Electoral Commission of South Australia
- IBAC
- New South Wales Electoral Commission
- Local Government Inspectorate
- Local Government Victoria
- VEC.

1.5 Jurisdictional comparisons and concurrent reviews

As part of its review, the Panel considered relevant laws and practices in other Australian jurisdictions.

Several other jurisdictions undertook reviews of their political finance laws or progressed legislative reforms at the same time that the Panel conducted its work. These include:

- the Commonwealth Parliament Joint Standing Committee on Electoral Matters (JSCEM), with an inquiry to consider significant potential reforms to Commonwealth election and political finance laws — the Committee's interim report was released in June 2023 (JSCEM Interim Report)[7]
- the Parliament of Western Australia, commencing debate on the Electoral Amendment (Finance and Other Matters) Bill 2023, which includes reforms to provide greater transparency and accountability for political donations, introduce expenditure caps and ban foreign donations[8]
- the Parliament of Tasmania, commencing debate on the Electoral Disclosure and Funding Bill 2022, which provides a new disclosure and funding system for elections in Tasmania[9]
- the Electoral Commission of South Australia, conducting a review of political finance legislation following the 2022 State election, with a report expected to be in the Parliament of South Australia at the end of 2023.[10]

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[7] Joint Standing Committee on Electoral Matters (2023), *Conduct of the 2022 federal election and other matters interim report*.

[8] Parliament of Western Australia (n.d.), *Electoral Amendment (Finance and Other Matters) Bill 2023, https://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=26C7ADC5403D96D648258A2F002E1DA4*, accessed 28 October 2023.

[9] Parliament of Tasmania (2023), *Electoral Disclosure and Funding Bill 2022 (25 of 2022)*, https://www.parliament.tas.gov.au/bills/bills2022/25_of_2022, last updated 15 February 2023.

[10] Electoral Commission of South Australia submission, p. 2.

In addition, during 2023 the Parliament of Victoria Electoral Matters Committee progressed the *Inquiry into the conduct of the 2022 Victorian State election*.[11]

1.6 Structure of this Report

Chapter 2 of this report explains and discusses key objectives of political finance laws and relevant principles that the Panel took into account.

Chapters 3 to 8 of this report discuss Victoria's State political finance laws. The Panel's recommendations are split across chapters accordingly.

Chapter 3 considers key components and defined terms used in Victoria's State political finance laws, including recommended changes.

Chapter 4 addresses State political finance disclosure and reporting requirements. It also examines how State political finance laws have been enforced and whether legislative changes are required to support their enforcement.

Chapter 5 examines caps and restrictions on political donations, including their impact on third party campaigners, small community groups and not-for-profit entities.

Chapter 6 reviews funding provided to political parties, Members of Parliament and candidates under Part 12 of the *Electoral Act 2002* (Vic).

Chapter 7 considers whether expenditure caps should be introduced for State elections in Victoria.

Chapter 8 considers several potential reforms to Victoria's political finance laws related to timing, administrative and other matters.

Chapter 9 discusses Victoria's local government political finance laws and explores potential improvements, including whether these laws should be aligned with those for State elections.

Chapter 10 addresses electronic assisted voting in Victoria.

[11] Parliament of Victoria (n.d.), *Inquiry into the conduct of the 2022 Victorian State election*, https://new.parliament.vic.gov.au/2022electioninquiry, accessed 28 October 2023.

2 Key objectives and principles

The Panel examined key principles and objectives that support political finance schemes, design considerations that should apply to such schemes and the human rights that must be balanced with those objectives.

2.1 Objectives of political finance laws

When the Electoral Legislation Amendment Bill 2018 (Electoral Legislation Amendment Bill) was introduced into the Parliament of Victoria, the Government's key objectives for Victoria's political finance regime were explained by the then Attorney-General, the Hon Martin Pakula, in the second reading speech for the Bill. These are summarised in Box 2.1.

Box 2.1: Victorian Government's key objectives for the political finance regime

Increased Transparency

'voters have a right to know about who makes and receives political donations'

Protect the public interest and limit undue influence

'political donations should not unfairly or improperly influence the political process'

Equal right to participate in electoral process

'the [donation] cap will ensure a level playing field and provide equal participation in the electoral process, reducing the potential for those with 'deep pockets' to try and exert greater influence'

Source: Victoria, *Parliamentary Debates*, Legislative Assembly, 10 May 2018, p. 1348-1351.

In a 2021 report prepared for the Electoral Regulation Research Network, Dr Yee-Fui Ng listed several purposes in regulating money in politics, which were broadly consistent with the objectives listed above and included:[12]

- preventing corrupt behaviour by public officials
- increasing transparency in the disclosure of political donations to make government policy-making and decision-making processes fair — aimed at reducing the incidence of secret donations by vested interests and reducing the risk of regulatory capture by government
- improving the quality of government decision-making and policy-making in ensuring that government decisions are made according to merit, rather than skewed towards narrow sectional interests
- increasing public confidence in the integrity of political institutions.

During consultation, the Panel asked stakeholders what they viewed the relevant objectives and principles to be. Stakeholders broadly agreed with the objectives outlined in the second reading speech. During one of the Panel's public forums, Melissa Lowe, an independent candidate at the 2022 election, referred to principles set out by the Organization of American States.[13] These principles were also considered by the Parliament of Victoria Electoral Matters Committee in its *Inquiry into the conduct of the 2018 Victorian State election report*. The Organization lists competitive elections, meaning those that offer the electorate an unbiased choice among alternatives, as one of the four basic conditions of a democratic system, and lists four questions to be examined to assess whether elections are competitive:[14]

- Do candidates compete on a level playing field?
- Do the voters have access to the information needed to make an informed choice when they cast their votes?
- Is the physical security of all candidates and party personnel guaranteed?

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[12] Ng, Y. (2021), *Regulating Money in Democracy: Australia's political finance laws across the federation*, p. 8.

[13] Transcript of Electoral Review Expert Panel public forum held on 21 July 2023, 10 am to 12 pm.

[14] Parliament of Victoria Electoral Matters Committee (2020), *Inquiry into the conduct of the 2018 Victorian State election report*, p. 147.

- Are candidates for office and the electorate allowed to organise and interact freely?

The Panel noted that two of those conditions, ensuring a level playing field and ensuring voters have access to information to make informed choices, align with the Government's objectives for the Electoral Legislation Amendment Bill. The principle of allowing candidates and the electorate to organise and interact freely is also a relevant consideration, as political finance laws might partly limit the ability of candidates to canvass for support.

The Panel considered the objectives relevant to Victoria's political finance scheme. These objectives are discussed below.

Each element of a political finance scheme should contribute to achieving one or more of these objectives, although no single element can achieve all of them. The various elements of a well-designed political finance scheme should work together synergistically to achieve its objectives.

Transparency

Requiring money in politics to be kept transparent ensures the public can make informed decisions at elections. It also supports regulatory and integrity agencies that oversee government.

If information on key sources of funding provided to registered political parties (RPPs), Members of Parliament (MPs) and candidates is made public, voters are able to assess if and how these sources may potentially influence decision-making by current and future MPs and governments. Political finance laws can also allow voters to understand how political actors and other organisations are inter-connected — for example, whether a community group is independent or is financially connected to one or more MPs or candidates. The Victorian Trades Hall Council's submission stated:[15]

> *Victoria's thriving democracy depends on the accessibility and transparency of the Victorian electoral system. Every voter, no*

[15] Victorian Trades Hall Council submission, p. 2.

> *matter their language or education background, should have easy access to information in plain English about who has donated to whom. This critical information must be provided in a timely fashion so that everyday voters can find out about the flow of political funds in real time. It is this information that empowers working people with the ability to hold current and prospective decision-makers to account.*

Measures that provide transparency also support political finance laws being monitored and enforced. Professor Emerita Anne Twomey said in her submission:

> *Once caps are imposed upon donations and expenditure, mechanisms need to be put in place to ensure transparency so that the caps are not avoided or breached.*[16]

Transparency also ensures potential conflicts of interest of decision-makers can be identified and appropriately addressed.

Protect the public interest and limit undue influence

It is vital that decision-making processes of Government and the Parliament be, and be seen to be, free of any improper influence.

Hence, the Panel considers that an objective of political finance laws is to limit the perception that improper influence may be occurring. Professor Twomey stated in her submission:[17]

> *The whiff of corruption around political donations and donors is enough to put off many good people from seeking to be candidates for parties in election. That same whiff corrodes public trust in the system of government and damages the reputation of politicians.*

The New Zealand Independent Electoral Review expressed similar concerns in its 2023 Interim Report:[18]

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[16] Professor Emerita Anne Twomey submission, p. 4.
[17] Professor Emerita Anne Twomey submission, p. 1.
[18] Independent Electoral Review (2023), *Interim Report*, p. 16.

> *Even the perception of undue influence can undermine the perceived trustworthiness of our democratic processes.*

The High Court explained in the case of *McCloy v New South Wales* that political finance laws can address these risks, stating they can overcome:[19]

> *perceptions of corruption and undue influence, which may undermine public confidence in government and in the electoral system itself.*

Equal right to participate in electoral process

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter), which enshrines human rights into Victorian law, provides all Victorians with the right to take part in public life including the right to have access, on general terms of equality, to public office.[20]

As Professor Twomey explained in her submission, the High Court has also recognised that Australia's Constitution guarantees the right to equality of opportunity to participate in the exercise of political sovereignty.[21]

Political finance laws should support the right to equality of opportunity to run for political office. This may require ameliorating existing inequities in political participation. For example, the High Court has stated that:[22]

> *The risk to equal participation posed by the uncontrolled use of wealth may warrant legislative action to ensure, or even enhance, the practical enjoyment of popular sovereignty.*

When considering how Victoria's political finance laws achieve this objective, the Panel looked at potential or perceived inequalities between:

- incumbent MPs compared to other candidates
- RPPs, MPs and candidates who had run in previous elections compared to those running for the first time

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19 *McCloy v New South Wales* (2015) 257 CLR 178, [34].
20 *Charter of Human Rights and Responsibilities Act 2006* (Vic), s. 18.
21 Professor Emerita Anne Twomey submission, p. 2.
22 *McCloy v New South Wales* (2015) 257 CLR 178, [45].

- RPPs compared to independents
- candidates with access to significant resources compared to other candidates.

During consultation, some stakeholders raised concerns about the advantages of incumbency. For example, stakeholders discussed resources provided to MPs which can be used to communicate with constituents. Stakeholders also noted that MPs are paid a salary to carry out their duties, while another candidate may be required to forgo paid employment in order to campaign prior to an election.

The Panel noted that it is unavoidable that incumbent candidates may be placed in an advantageous position compared to other candidates. For example, by carrying out their role over the course of a parliamentary term, an MP may:

- gain experience and develop requisite skills
- demonstrate their competency in the role to their constituents
- achieve outcomes for their community, which the MP can refer to in future electoral campaigns.

The Panel considered that political finance laws cannot wholly 'equalise the playing field' between incumbents and other candidates. However, an appropriate objective for those laws is to not exacerbate or further contribute to inherent inequalities.

2.2 Additional design considerations

The Panel noted several additional design considerations when discussing recommendations to improve Victoria's political finance laws.

First, the Panel considered that laws must be capable of enforcement and actually enforced in practice. Consistent enforcement can discourage non-compliance and assist stakeholders in further understanding the scheme. Laws should be applied to all regulated parties, including those that seek to circumvent them and not only to those that comply.

Second, the administrative burden imposed by a regulatory scheme should be proportionate to the risks being addressed. A related principle

is simplicity — a simpler regulatory scheme is easier for regulators and regulated parties to understand, reducing administrative, compliance and enforcement costs. Consistency between regulatory schemes also achieves that purpose.

Third, a regulatory scheme should, to the extent possible, avoid causing unintended changes in the conduct of regulated parties, for example due to the uneven or inequitable application of rules.

Fourth, the objectives of political finance laws must be balanced against the rights of individuals. In her report, Dr Yee-Fui Ng explained that:[23]

> *Any regulation of political finance has to balance two competing interests. First, there is the freedom of individuals and corporations to express their political preferences, including giving money to political parties they support. … This has to be counterbalanced with the pernicious influence of money in politics.*

The Charter sets out various rights that the Parliament of Victoria seeks to protect and promote. Human rights that political finance laws may potentially interfere with include the right of:[24]

- freedom of thought, conscience, religion and belief
- freedom of expression
- peaceful assembly and freedom of association
- freedom from interference with privacy
- taking part in public life, which includes the right to have access, on general terms of equality, to public office.

The Panel also took into account the application of the following legal principles to political finance laws:

- the implied freedom of political communication
- jurisdictional limits under Australia's constitutional framework.

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[23] Ng, Y. (2021), *Regulating Money in Democracy: Australia's political finance laws across the federation*, p. 6.

[24] *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss. 14, 15, 16 and 18.

Implied freedom of political communication

The implied freedom of political communication is a long-standing constitutional principle in Australian law. The Victorian Government Solicitor's Office explained that the principle means that:[25]

> *a law can interfere with communication about government or politics without breaching the implied freedom, if the law does so for a legitimate aim, and is generally proportionate to that aim.*

Australian courts have previously found that certain elements of political finance regimes in Australian jurisdictions were invalid due to impermissibly burdening the implied freedom of political communication. For example:

- in *Unions NSW v New South Wales* (2019) 264 CLR 595 (Unions NSW No 2), the High Court held that a legislative provision substantially reducing the cap on electoral expenditure applicable to third party campaigners was invalid
- in *Unions NSW v New South Wales* (2013) 252 CLR 530 (Unions NSW No 1), the High Court held that the following were unlawful:
    - a requirement for all donors to be individuals enrolled on the roll of electors — effectively banning donations from any unenrolled individual, and any corporation, organisation or other entity
    - rules aggregating the expenditure of political parties and particular 'affiliated organisations'[26] for the purpose of political expenditure caps.

[25] Victorian Government Solicitor's Office, *The implied constitutional freedom of political communication*, https://www.vgso.vic.gov.au/implied-constitutional-freedom-political-communication, last updated 2 July 2021.

[26] Which included bodies or organisations authorised under the rules of the political party to appoint delegates to the governing body of that party or to participate in pre-selection of candidates for that party. The *Electoral Funding Act 2018* (NSW) includes aggregation rules for political parties and associated entities. However, a narrower definition of associated entity applies — that term means 'a corporation or another entity that operates solely for the benefit of one or more registered parties or elected MPs'.

The High Court has previously upheld bans on donations from particular industries introduced in New South Wales[27] and Queensland,[28] finding them consistent with the implied freedom of political communication.

Jurisdictional limits

Another relevant constitutional principle under Australian law is the doctrine of inter-governmental immunities. The principle means that:[29]

> *neither federal nor [state] governments may destroy the other nor curtail in any substantial manner the exercise of its powers or 'obviously interfere with one another's operations'.*

Practically speaking, the doctrine means that Victoria's political finance laws should not interfere with the operation of elections held by other jurisdictions.

The recent case of *Spence v Queensland*[30] examined the doctrine of intergovernmental immunities, and the limits of State and Commonwealth power, in the context of inconsistent State and Commonwealth political finance laws. The majority of the High Court held that the Commonwealth cannot make laws regarding political donations that override State legislative power merely because the political donation in question *may* be used for the purpose of influencing voting at a commonwealth election.

2.3 Limited period that laws have been operating

The time at which the Panel was required to undertake its review had several impacts.

First, at the time of the Panel's review, the 2018 amendments had only been in operation for one full electoral cycle. It is possible that some

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[27] *McCloy v New South Wales* (2015) 257 CLR 178.

[28] *Spence v Queensland* (2019) 268 CLR 355.

[29] *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31, p 74, quoting *Graves v New York; Ex rel O'Keefe* (1939) 306 US 466, p. 488.

[30] *Spence v Queensland* (2019) 268 CLR 355.

concerns raised by stakeholders, including those related to unclear interpretation of legislation and administrative challenges, would be resolved over time as the VEC, donors and Donation Recipients become more familiar with Victoria's legislative scheme.

The lodgement and publication period for the 2022-23 annual returns, including the 2022 State election, was still in progress during the Panel's review.[31] Hence critical data were simply unavailable to the Panel. These returns, submitted by organisations and candidates, will provide significant insight into financial operations and may further help to assess the efficacy of the current political finance laws.

Third, several other Australian jurisdictions were concurrently reviewing or changing their political finance laws. While the Panel noted the advantages of political finance laws being harmonised across Australia, it was challenging to predict what reforms would achieve greater harmonisation due to changes being proposed or considered in other jurisdictions.

Accordingly, the Panel took the approach of only making recommendations where there was sufficient evidence that a change was required. Where sufficient evidence was not available to support the case for some potential reforms, the Panel determined that they should be considered as part of a future review of Victoria's political finance laws.

While the Parliament of Victoria Electoral Matters Committee may consider the operation of political finance laws as part of its election reviews, that Committee consists of sitting MPs who are subject to those laws and it is not fully independent of government. Future reviews of Victoria's political finance laws should be conducted by an independent panel consisting of expert members who are not:

- Members of the Parliament of Victoria
- employed by the VEC or an RPP
- a Victorian public sector employee.

[31] While annual returns for each financial year must be submitted to the VEC within 16 weeks of the end of that year (i.e. by 20 October), the VEC is required to publish those annual returns within 6 months of the end of the financial year. VEC submission Part 1 – Background, pp. 13-14.

Recommendation 2.1: Another review of Victoria's political finance laws by an independent panel should occur after the 2026 general election, once relevant data are available and annual returns for the election year have been published. Regular independent review of Victoria's political finance laws should occur thereafter every two election cycles.

2.4 Impact on community

As part of its review, the Panel was required to examine 'the impact of the 2018 amendments upon third party campaigners, small community groups and not-for-profit entities'.[32]

For the 2018-19 to 2021-22 financial years, only six organisations lodged an annual return with the VEC as a third party campaigner. This may suggest that the additional obligations and rules for third party campaigners introduced by the 2018 amendments have had a limited impact on the vast majority of community groups and not-for-profit entities. However, it is also possible that some community groups or not-for-profit entities changed their activities to avoid being considered a third party campaigner (e.g. limited their political advocacy work).

The Victorian Trades Hall Council stated in their submission that the 2018 amendments had a significant adverse effect on third party campaigners, small community groups and not-for-profit entities:[33]

> *[Victorian Trades Hall Council] and affiliated unions work hard every election to ensure compliance with any regulations. However, these efforts have been challenged by the unintended contradiction, national inconsistencies, and ambiguity of the implementation of 2018 reforms. …*
>
> *… Some affiliated unions felt they had no choice but to not participate in the 2022 election for fear of running afoul of the new regulations. Other unions had staff responsible for managing VEC compliance and have consistently reported the difficulty and anxiety in ensuring compliance was unreasonable. That this is*

[32] *Electoral Act 2002* (Vic), s. 222DB(3)(b).
[33] Victorian Trades Hall Council submission, pp. 2-3.

happening in comparatively well-resourced and supported organisations such as unions brings into stark relief the direct and silencing impact the 2018 reforms and their unclear interpretation have had on small community organisations, reducing their capacity to participate in our democracy.

The Panel also noted that submissions to the JSCEM Interim Report expressed concerns about the impacts political finance laws could have on charities and not-for-profits. For example:[34]

- the Human Rights Law Centre considered real-time political donation disclosure requirements to be a significant barrier to charities engaging in political advocacy, and that donation caps might overburden third parties
- the Hands Off Our Charities Alliance commented that changes to Commonwealth political finance laws may create an administrative burden for those organisations, and may discourage people from donating to charities
- the Accountability Round Table commented on the significant administrative cost of complying with political finance laws, and suggested it may not be appropriate to apply additional requirements to charities as they:
    - are already heavily regulated
    - must act in the furtherance of their charitable purpose
    - are explicitly forbidden from a primary purpose of supporting a political party or candidate.

While the Panel made several recommendations in this report to address particular concerns raised by the Victorian Trades Hall Council, insufficient time had passed to fully assess the impact of the 2018 amendments. The effect of the 2018 amendments, and any future reforms, on third party campaigners, community groups and not-for-profit entities should be included in the terms of reference for future independent panels appointed to review Victoria's political finance laws (recommended above).

[34] JSCEM Interim Report, pp. 42-43.

3 Key components and defined terms of State political finance laws

The 2018 amendments introduced several key terms into the *Electoral Act 2002* (Vic), which are fundamental to the operation of Victoria's political finance laws. This Chapter discusses key components of those laws, the meaning of key terms and recommended changes to them.

Unless otherwise indicated, terms discussed in this Chapter are defined in s. 206 of the *Electoral Act 2002* (Vic).

3.1 Political donation

For the purposes of Victoria's political finance laws, a political donation is a 'gift' (meaning of gift is discussed further below) made to any of the following:

- registered political party (RPP)
- candidate at an election
- 'group', meaning two or more candidates for a Council election whose names are grouped on a ballot-paper
- Member of Parliament (MP)
- associated entity (note special rules explained below)
- third party campaigner (note special rules explained below)
- nominated entity of an RPP.

In this report, the above persons or bodies are collectively referred to as Donation Recipients.

Each RPP is required to have a registered officer, and other Donation Recipients are required to have a registered agent.[35] A registered officer or agent acts as the representative of their Donation Recipient for the

[35] *Electoral Act 2002* (Vic), Pts 4 and 12, Div 1A.

purposes of Victoria's political finance laws, and is responsible for a variety of matters, for example maintaining a State campaign account (SCA).[36]

Special rules apply to determining whether a gift to an associated entity or third party campaigner is considered a political donation. For these entities, a gift is only a political donation if it was used or was intended to be used to either:

- enable it to make, directly or indirectly, a political donation or incur political expenditure
- reimburse it for making, directly or indirectly, a political donation or incurring political expenditure.

3.2 Gift

The *Electoral Act 2002* (Vic) defines what a gift is for the purposes of Victoria's political finance laws. The meaning of gift is important because a payment or other contribution is only considered a political donation if it is a gift.

Gift is defined to mean:

> *any disposition of property[37] otherwise than by will made by a person to another person without consideration in money or money's worth or with inadequate consideration, including the following—*
>
> *(a) the provision of a service;*
>
> *(b) the payment of an amount in respect of a guarantee;*
>
> *(c) the making of a payment or contribution at a fundraising function;*
>
> *(d) the disposition of property from a registered political party, a branch of a registered political party or an associated entity*

[36] *Electoral Act 2002* (Vic), s. 207F.

[37] The term 'disposition of property' is defined in the *Electoral Act 2002* (Vic), s. 206. It covers a wide range of actions and transactions, including for example 'the making of a loan or a non-financial loan or the forbearance of any loan or non-financial loan'.

The *Electoral Act 2002* (Vic) lists matters that are considered to not be a gift. These include, among others:

- an annual subscription paid to an RPP by a person in respect of the person's membership
- an annual affiliation fee paid to an RPP by an associated entity
- a gift made by an RPP to its nominated entity, or vice versa
- a gift made for Commonwealth electoral purposes that is not paid into the SCA.

The concept of consideration and treatment of fundraising event tickets

In order for a disposition of property to be considered a gift under Part 12 of the *Electoral Act 2002* (Vic), it must be made without consideration or with inadequate consideration.

The Supreme Court of Victoria considered whether a payment was made for adequate consideration for the purposes of Part 12 of the *Electoral Act 2002* (Vic) in *Harris v Victorian Electoral Commission*.[38] That case concerned an agreement between the Liberal Party of Australia (Victorian Division) and the National Party of Australia - Victoria to run a joint ticket at the 2018 State election for three Legislative Council regions. The parties agreed to distribute public funding received from the VEC in agreed proportions. Justice Richards stated that:[39]

> *... a disposition of property will not be a 'gift', for the purposes of Pt 12 of the Electoral Act, if it is made in exchange for something of monetary value that is capable of being compared with the value of the property. ... The consideration need not carry a price tag or be a tradeable commodity; it may be in money's worth even if its precise value is difficult to determine.*
>
> *Whether the consideration is adequate or inadequate involves a separate inquiry, in which 'no more is required than a comparison*

[38] *Harris v Victorian Electoral Commission* (2020) 62 VR 460.
[39] *Harris v Victorian Electoral Commission* (2020) 62 VR 460, [76]-[77].

of the value of what was promised or paid with the value of what was given'.

The concept of consideration is particularly relevant to the treatment of tickets or entrance fees for fundraising events held by a Donation Recipient.

In its Donations and Lobbying Report, IBAC stated that fundraising events are not regulated as closely as other donations, and one reason is that payment to attend an event may avoid being labelled as a political donation because consideration is being provided in return (e.g. access to the event, catering, entertainment).[40]

IBAC noted that New South Wales specifically includes fundraising tickets, entrance fees and similar payments in the definition of political donation. The *Electoral Funding Act 2018* (NSW) states:[41]

> *An amount paid by a person as a contribution, entry fee or other payment to entitle that or any other person to participate in or otherwise obtain any benefit from a fundraising venture or function (being an amount that forms part of the gross proceeds of the venture or function) is taken to be a gift for the purposes of this section.*

IBAC recommended measures to deter donors and candidates from attempting to use fundraising events to circumvent political finance laws, including measures such as:[42]

- capping the amount that can be charged to enter a relevant event
- expressly stating that the entry fee to attend a fundraising event constitutes a political donation (with reference to the NSW approach).

In its submission, The Centre for Public Integrity also suggested that the treatment of fundraising tickets under the *Electoral Act 2002* (Vic) is currently unclear and recommended that the approach taken in New South Wales is adopted in Victoria.[43]

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[40] Donations and Lobbying Report, p. 29.
[41] *Electoral Funding Act 2018* (NSW), s. 5(2).
[42] Donations and Lobbying Report, p. 9.
[43] The Centre for Public Integrity submission, pp. 5-6.

The VEC made a similar recommendation in its submission, and stated that:[44]

> *Fundraising events, where ticket prices often include access to parliamentarians as well as political candidates, can raise considerable sums to fund ongoing political activities, and the VEC is concerned that these amounts may be unaccounted for in the donation disclosure scheme. …*
>
> *Without detailed cost-benefit analysis for each individual political fundraising event, it is difficult for donors, donation recipients and the VEC to determine what portion of each event should be classified as a gift, and what portion is involved with recovering appropriate costs involved in the hosting of such fundraising events.*

The Panel noted that some jurisdictions use monetary caps to regulate fundraising tickets:

- under Queensland's legislation, the first $200 of a fundraising entrance fee (or similar contribution) is generally not considered to be a gift (or, as a result, a political donation) but any amount over $200 is[45]
- South Australia's legislation states that 'it is unlawful for a registered political party to receive an amount of money of more than $500 for entry to a relevant event', which includes RPP events where it is advertised that access will be given to a Minister, South Australian MP or their staff[46]
- Tasmania's Electoral Disclosure and Funding Bill 2022 proposes that the first $200 of a fundraising entrance fee would similarly not be a gift or political donation.[47]

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[44] VEC submission Part 2 – Issues and recommendations, p. 2.

[45] However, for the purpose of Queensland's laws on political donations from prohibited donors, such a payment is considered a political donation to the extent the amount of the contribution forms part of the proceeds of the fundraising venture or function to which the contribution relates. *Electoral Act 1992* (Qld), ss. 200, 201, 250 and 274.

[46] *Electoral Act 1985* (SA), s. 130ZL.

[47] Electoral Disclosure and Funding Bill 2022 (Tas), s. 11.

The political finance laws of the other Australian jurisdictions do not specifically discuss the treatment of fundraising entrance fees, although fundraising fees and tickets were discussed as a topic of concern in the JSCEM Interim Report.[48]

In its submission, the Liberal Party of Australia (Victorian Division) argued that only the net profit from a fundraising event should be considered a gift, stating that:[49]

> *Candidates and political parties incur costs when running events. It is logical that amounts raised and paid towards the costs of running a fundraising event should not be considered gifts as they constitute a fee for service. It would be inappropriate to include amounts that are properly fees for service within the definition of a gift.*
>
> *It is also worth noting that there is no practical electoral or political benefit obtained by the candidate or political party from receiving the part of the gross revenue of any event that is used to meet the costs of running the event.*
>
> *The administrative burden of conducting cost-benefit analyses on each fundraising event to determine which part of the proceeds may properly have been used to meet costs, and which part should be considered a gift does not justify the imposition of a cap which would further inhibit political fundraising in Victoria.*
>
> *Imposing caps on the component of entry prices to a fundraising event that may be considered not to be a gift, either as a proportion of the entry price or in dollar terms, would not lead to the disclosure of any donations not already captured by the scheme, but would further inhibit candidates and party's ability to legitimately fundraise under the donation disclosure scheme.*

The Panel considered that it was not practicable to require or allow Donation Recipients to split the cost of fundraising tickets received into

[48] JSCEM Interim Report, pp. 37-41.
[49] Liberal Party of Australia (Victorian Division) submission, p. 4.

'expenditure' and 'profit' components, with only the profit component treated as a gift. Issues with that approach include that:

- it may not be possible to calculate the proportion of the payment that constitutes a profit until after the event is held, which may be some time after a ticket is purchased and/or the obligation to make a disclosure to the VEC arises
- the purchaser of the ticket would not know what proportion of their ticket needs to be declared to the VEC — the Assistant Secretary of the Victorian Trades Hall Council, Wilhelmina Stracke, explained at a public forum that they had never received an invoice from a candidate holding a fundraiser outlining a breakdown of costs and profits, meaning that the Victorian Trades Hall Council took the approach of declaring the entire ticket as a donation.[50]

The Panel considered that the appropriate solution is to require the entirety of a ticket or fee for attending a fundraising event held by a Donation Recipient to be treated as a gift for the purposes of Victoria's political finance laws, similar to the approach taken in New South Wales.

This approach will simplify and make clear the rules for Donation Recipients, donors and the VEC. It will also ensure that fundraising events are not perceived to be a way to circumvent political finance laws.

Further, this will not prevent Donation Recipients from holding fundraising events. It may stop Donation Recipients holding fundraisers with tickets that exceed the donation cap and would require disclosure returns to be submitted for tickets over the disclosure threshold (Chapter 4).

Recommendation 3.1: Amend the *Electoral Act 2002 (Vic)* to state that the entirety of a ticket or fee paid to attend a fundraising event is considered a gift for the purposes of Part 12 of the Act, using s. 5(2) of the *Electoral Funding Act 2018* (NSW) as a model provision.

[50] Transcript of Electoral Review Expert Panel public forum held on 4 August 2023, 10 am to 11 am.

IBAC suggested other measures that could be used to ensure fundraising events are not used as a way of circumventing political finance laws, such as requirements to:[51]

- publish information about fundraising events in real time
- submit audited returns to the VEC for each event
- transact all payments and expenses through a dedicated campaign account registered with the VEC.

The Panel considered that its recommendation should sufficiently address the potential and perceived risks related to fundraising events and additional amendments are not required at this stage. However, those measures may need to be examined further if evidence arises that the risks related to fundraising events have not been sufficiently mitigated.

Affiliation and membership fees

Under Victoria's legislation, membership fees and affiliation fees paid to an RPP by an associated entity are excluded from the definition of a gift.

In a submission to the JSCEM *Inquiry into the 2010 Federal election*, Professor Joo-Cheong Tham argued that political finance laws should ensure that political parties can continue to collect membership and affiliation fees.[52] However, in a 2018 article discussing Victoria's then proposed political finance reforms, Professor Tham stated in relation to affiliation fees:[53]

> *There are certainly compelling reasons for not treating these fees in the same way as other political contributions, but this bill goes too far by placing no limits on the fees.*

Victoria's exemption for membership and affiliation fees was the subject of media criticism in 2023, due to a $250,000 membership subscription paid by a company, GSA Capital, to the Victorians Party.[54]

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[51] Donations and Lobbying Report, p. 9.
[52] Tham, J. (2011), *Submission to JSCEM's inquiry into 2010 Federal election*, pp. 143-149.
[53] Tham, J. (Inside Story) (2018), *It depends what you mean by "political donations"*.
[54] Eddie, R. (The Age) (2023), *Questions on billionaire's $250,000 fee to join party*.

Several submissions commented on how membership and affiliation fees should be treated.

The Liberal Party of Australia (Victorian Division) recommended that:[55]

- membership fees continue to be excluded from the definition of gift, and that dollar caps or thresholds are not introduced
- the right of political parties to charge different levels of annual subscriptions should be affirmed and clarified under the law
- political parties should be required to make their membership fee amounts public, and that only those membership fees which are made public should be eligible to be treated as an annual subscription paid to an RPP.

The VEC stated that it is 'concerned that the legislative framework is currently insufficient to take into account the use of RPP membership fees to avoid the disclosure and general cap'. It recommended that a dollar cap, determined by the Panel, be placed on the amount of affiliation and membership fees that are exempt from being a gift.[56]

The Centre for Public Integrity stated that:[57]

> *The exclusion of subscription fees from the definition of 'gift' allows unscrupulous players to funnel unlimited funds to their party of choice, in flagrant breach of the spirit – if not letter – of Victoria's donations caps.*

As noted in The Centre for Public Integrity's submission, several jurisdictions place a limit on the amount of a membership or affiliation fee that is not treated as a gift.

While New South Wales expressly includes membership and affiliation fees in their definition of political donation, the first $2,000 of a membership or affiliation fee is disregarded for the purposes of caps on political donations. Where an affiliation fee is based on the number of

[55] Liberal Party of Australia (Victorian Division) submission, pp. 5-6.
[56] VEC submission Part 2 – Issues and recommendations, p. 3.
[57] The Centre for Public Integrity submission, p. 6.

members of the affiliate, the limit is instead $2,000 multiplied by the number of members.[58]

Western Australia only excludes membership fees of up to $200,[59] and the Australian Capital Territory excludes the first $250 of a membership fee.[60] Tasmania's Electoral Disclosure and Funding Bill 2022 proposes to exclude membership and association fees less than $5,000.[61]

The Panel considered that exempting membership and affiliation fees from the definition of gift, without limit, creates too high a risk of:

- these fees being used to circumvent political finance laws
- actual or perceived improper influence arising.

The Panel agreed that a limit should be placed on how much of an annual membership or affiliation fee is exempt from being considered a gift. The Panel considered a limit of approximately $1,000 would be appropriate. For administrative simplicity and ease, the Panel considered that the value of the limit should be tied to an existing value set under Part 12 of the *Electoral Act 2002* (Vic) — in particular, the disclosure threshold for political donations which is $1,170 for 2023-24 (Chapter 4).

In the case of affiliation fees based on the number of members of the associated entity, the annual limit should be calculated by multiplying the disclosure threshold by the number of members, similar to the approach taken in New South Wales.

Recommendation 3.2: Amend the definition of gift in Part 12 of the *Electoral Act 2002* (Vic) so that the:

- annual value of a membership fee or an affiliation fee up to the 'disclosure threshold', in effect at the relevant time, is not considered a gift
- remainder is considered a gift.

In the case of an affiliation fee paid by an associated entity to an RPP based on the number of members of the associated entity, the relevant

[58] *Electoral Funding Act 2018* (NSW), ss. 5(3) and 26.
[59] *Electoral Act 1907* (WA), s. 175.
[60] *Electoral Act 1992* (ACT), s. 198AA(2).
[61] Electoral Disclosure and Funding Bill 2022 (Tas), ss. 5 and 11(5).

threshold should instead be calculated by multiplying the disclosure threshold by the number of members of the associated entity.

Levies paid to a registered political party

The *Electoral Act 2002* (Vic) also states that a gift does not include an annual levy paid to an RPP by either an:

- MP or staff of the MP (including an electoral officer)
- employee or elected official of the RPP.

The issue of levies was considered by the New South Wales Panel of Experts in their *Political Donations Final Report*, which provided the following reasoning:[62]

> *At first glance, it appears arbitrary to impose a cap on political donations from elected Members to their parties while party levies remain uncapped. While it is true that a political donation from an MP to his or her own party does not by itself raise corruption risks, it is well-established that caps on donations tend to be more effective if they are universally applied. …*
>
> *The question then arises as to whether compulsory party levies should be capped in the same way as political donations. The Panel considers that compulsory party levies can be distinguished from political donations for the purposes of the caps. Party levies are compulsory fees charged at a prescribed rate to all elected Members under the rules of the party. The transparent, non-discretionary nature of levies means that they cannot be used as a conduit for illegal political donations in the same way that uncapped MP donations could.*

The Panel considered that, for the same reasons outlined by the New South Wales Panel of Experts in 2014, it is appropriate to maintain the current treatment of levies under the *Electoral Act 2002* (Vic).

[62] New South Wales Panel of Experts (2014), *Political Donations Final Report,* pp. 56-57.

Treatment of uncharged interest on loans

The VEC stated in its submission that the *Electoral Act 2002* (Vic) is not sufficiently clear about whether uncharged interest on a loan is a gift, and this may create a risk of loans being used to circumvent Victoria's political finance laws. Uncharged interest can arise as a result of:[63]

- interest being waived by the person or entity providing the loan
- a loan being provided with an interest rate that is discounted against the prevailing market interest rate.

Part 12 of the *Electoral Act 2002* (Vic) includes several provisions relevant to whether a loan, or uncharged interest on a loan, may constitute a gift. The definition of gift includes the disposition of property for no or inadequate consideration. The definition of disposition of property includes:

- the making of a loan or a non-financial loan or the forbearance of any loan or non-financial loan
- the release, discharge, surrender, forfeiture or abandonment, at law or in equity, of any debt, contract or chose in action, or of any interest in property.

These provisions suggest that if a creditor was to waive their entitlement to an interest payment, that would constitute a gift for the purposes of the Act.

In addition, if a loan was made with an unusually low interest rate, that may also be caught by the definition of gift. However, the *Electoral Act 2002* (Vic) does not specify what rate of interest on a loan would constitute adequate consideration for the purposes of the definition of gift.

As noted by the VEC, the political finance laws of Queensland and New South Wales are more prescriptive and clearer on the treatment of loans and uncharged interest (Box 3.1).

The Panel considered that greater clarity is needed on when uncharged interest would constitute a gift. If rules on that topic are left opaque,

[63] VEC submission Part 2 – Issues and recommendations, p. 6.

Donation Recipients may be uncertain about how loans should be treated and there is a risk that uncharged or waived interest could be used to circumvent political finance laws.

Box 3.1: Provisions on uncharged interest in Queensland and New South Wales

Queensland

Section 201 of the *Electoral Act 1992* (Qld) states that a gift includes an amount of uncharged interest on the loan or an amount forgiven on the loan. Uncharged interest on a loan means an amount that would have been payable on the loan if:

- for a loan made on terms requiring the payment of interest at less than the official cash rate plus 3% a year—the loan had been made on terms requiring the payment of interest at least at the official cash rate plus 3% a year; or
- for a loan for which interest payable is waived—the interest payable had not been waived; or
- for a loan for which interest payments are not capitalised—the interest payments were capitalised.

The definition of loan in s. 197 of the Act excludes a loan by a financial institution or use of a credit card.

New South Wales

Section 5(5) of the *Electoral Funding Act 2018* (NSW) states that uncharged interest on a loan to an entity or other person is taken to be a gift to the entity or person for the purposes of this section. Uncharged interest is the additional amount that would have been payable by the entity or person if:

- the loan had been made on terms requiring the payment of interest at the generally prevailing interest rate for a loan of that kind, and
- any interest payable had not been waived, and
- any interest payments were not capitalised.

The New South Wales Electoral Commission provides guidance on the 'generally prevailing interest rate' that applies at a particular time[a]

[a] New South Wales Electoral Commission (2023), *Guidelines under the Electoral Funding Act 2018*, https://elections.nsw.gov.au/about-us/legislation/funding-legislation/guidelines-under-the-electoral-funding-act-2018, last updated 07 November 2023.

To address those issues, the VEC should have the power to set a standard interest rate (threshold interest rate) for an election period. If a Donation Recipient receives a loan with a lower interest rate, the difference between interest actually accrued and the amount that would have

accrued under the applicable threshold interest rate should be considered a gift.

The Panel has also made a recommendation concerning the disclosure of loans in Chapter 4.

Recommendation 3.3: Amend the *Electoral Act 2002* (Vic) to require the VEC to make Determinations that set a threshold interest rate for an election period. If a Donation Recipient receives a loan with an interest rate under the threshold rate, the difference between the interest charged and the interest that would have been accrued at the threshold rate should be considered a gift.

3.3 In-kind support

As IBAC explained in its Donations and Lobbying Report, donors may provide support to Donation Recipients in ways other than making a direct financial contribution.[64] For example, a donor may:

- volunteer their time to perform services for a Donation Recipient
- allow a Donation Recipient to use their property and assets
- pay for services required by a Donation Recipient (e.g. printing).

This is often referred to as 'in-kind' support.

In-kind support may constitute a gift and/or political donation under Part 12 of the *Electoral Act 2002* (Vic). The *Electoral Regulations 2022* (Vic) state that the value of a gift other than money will be determined in accordance with the following principles:[65]

- the amount or value of the gift is the fair market value of the gift
- an explanation should be provided to the VEC to support the determination of the amount or value of the gift (and that amount or value should reflect the explanation).

[64] Donations and Lobbying Report, p. 19.
[65] *Electoral Regulations 2022* (Vic), reg. 55.

IBAC's Donations and Lobbying Report stated that while there is a requirement to declare any in-kind support that constitutes a political donation, the efficacy of this provision has not been reviewed:[66]

> *Obligations to declare details of in-kind support are unlikely to be effective in isolation. The current regulatory regime should be tested to help identify mechanisms that would promote better regulation of in-kind donations if the issue of underreporting is found to persist. This is likely to include other forms of reporting (such as expenditure returns) together with tailored monitoring and training, and targeted penalties. …*
>
> *Options to address this issue should cover:*
>
> - *how reporting can be enhanced to better identify support provided in kind in an attempt to circumvent cap or declaration requirements*
> - *whether the regulator is adequately resourced to monitor donations and expenditure (including in-kind contributions that have not been declared)*
> - *whether the training and penalties specified are appropriate to ensure awareness of obligations and deter donors and recipients from failing to declare support provided in kind.*

The Panel understood that IBAC's concerns regarding the treatment of in-kind donations may have been related to limited reporting of in-kind donations on the VEC's website at the time. That may have suggested that some in-kind donations were not being disclosed. IBAC's Donations and Lobbying Report stated that as of 11 September 2022, the VEC had received only six donation disclosures involving in-kind political donations in the period since 25 November 2018.[67]

[66] Donations and Lobbying Report, pp. 19-20.
[67] Donations and Lobbying Report, p. 19.

However, many more in-kind donations had been disclosed at the time of the Panel's review. The VEC's 'Disclosed Donations' website as at 10 November 2023 listed 68 declared in-kind donations, including:[68]

- 47 'service' type in-kind donations
- 21 'property' type in-kind donations.

In-kind donations may take many forms. Generally, members of the community offering in-kind support to RPPs and candidates is a sign of a politically engaged society and a healthy democracy, rather than a threat to it. Political finance laws should ensure that members of the community can continue to offer in-kind support while addressing potential risks. The Panel considered that existing rules for State elections are largely achieving that purpose, in particular by providing transparency of in-kind donations. In-kind donations are treated in a consistent manner with monetary donations, ensuring rules are simple and fair. A significant number of in-kind donations have been published, suggesting that donors and Donation Recipients understand their obligations and are complying with them.

In this Report, the Panel has proposed several improvements to the rules on in-kind donations that would ensure the right regulatory balance is achieved, including:

- clarifying the treatment of volunteer labour and services (discussed below)
- providing an exemption from the donation cap so that a donor may allow an RPP or candidate to use their premises as a campaign office (Chapter 5).

In July 2023, IBAC delivered its *Operation Sandon Special Report*, which investigated allegations of corrupt conduct involving councillors and property developers in Melbourne's south-east. The Report discussed a significant number of undisclosed, or improperly disclosed, payments and donations being made to councillors. Those donations included in-kind support such as engineering, planning and survey work undertaken

[68] VEC (n.d.) *Disclosed Donations*, https://disclosures.vec.vic.gov.au/public-donations/, accessed 10 November 2023.

by the donor's company.[69] The Report stated that 'IBAC identified circumstances where goods and services were provided instead of financial contributions to maintain the donor's anonymity and avoid public scrutiny'.[70]

In Chapter 9 of this Report, the Panel examined weaknesses in existing political finance laws for local government elections and proposed extensive reforms. If implemented, those reforms will address issues related to in-kind donations identified by IBAC.

Treatment of volunteer labour or services

Some stakeholders raised concerns that it is unclear whether a volunteer performing tasks to support a Donation Recipient constitutes a gift.

The *Electoral Act 2002* (Vic) states that the provision of a service without consideration or for inadequate consideration is a gift. However, it goes on to say that the provision of volunteer labour is not a gift. The VEC stated in its submission that:[71]

> *This has led to confusion and inconsistency in electoral participants' interpretation of volunteer labour (as opposed to the voluntary provision of a service).*

Stakeholders generally agreed that activities could be considered 'volunteer labour' and not 'provision of a service' if those activities were viewed as services that a Donation Recipient would not ordinarily pay for. Examples provided included doorknocking, phone canvassing and speaking at campaign events.[72] However, there was confusion and disagreement as to how professional services such as legal advice, social media services, advertising and marketing were to be treated.

In its submission, the Liberal Party of Australia (Victorian Division) stated that:[73]

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[69] IBAC (2023), *Operation Sandon Special Report*, p. 110.
[70] IBAC (2023), *Operation Sandon Special Report*, p. 197.
[71] VEC submission Part 2 — Issues and recommendations, p. 4.
[72] Australian Labor Party – Victorian Branch submission, p. 11.
[73] Liberal Party of Australia (Victorian Division) submission, pp. 6-7.

> *Volunteer labour is essential to the operation of political parties and campaigns. It would be appropriate to consider revising the Electoral Act to strengthen the exclusion of volunteer labour from the definition of a gift, in order to protect volunteers. …*
>
> *It should be recognised that the potential roles filled by volunteers on a campaign go well beyond participating in direct voter engagement activities. There is a raft of logistical, operational, support roles that volunteers can and often do fulfil including providing advice in relation to advertising and marketing, assisting with social media and digital marketing, building signs, data entry, installing signs, cleaning, painting, providing legal advice, sourcing and negotiating campaign office lease arrangements, co-ordinating and managing other volunteers, and advising on policy development among many other tasks.*
>
> *It would be appropriate to undertake any revisions necessary to ensure that volunteer labour was interpreted as broadly as possible, to avoid discouraging volunteer participation in Victorian elections.*

Some of the activities provided as examples of volunteerism, such as reaching out to members of the community in person or by phone, are in fact forms of paid employment undertaken by many Australians.

The Panel considered that genuine volunteers should be free to support a Donation Recipient in any way that they choose, and in the manner that best suits their abilities. Further, the Panel considered that the risk of improper influence due to an individual volunteering their services is low compared to the risk from a gift of money or goods.

The exception is where a 'volunteer' is paid by a third party, or receives some other form of compensation from a third party, to perform the relevant services for the Donation Recipient. In that case, the provision of services should be treated as a gift from the third party to the Donation Recipient. For example, an employee engaged by their employer to perform duties for an RPP's campaign does not constitute volunteer labour, regardless of whether they are a member of that RPP.

The *Public Administration Act 2004* (Vic) and the *Parliamentary Administration Act 2005* (Vic) allocates staff to MPs and political parties represented in the Parliament to support their legislative and constituent work. If necessary, it should be made clear that an MP and/or RPP does not receive a gift merely due to these staff performing their duties.

Recommendation 3.4: Amend the *Electoral Act 2002* (Vic) to clarify that all forms of volunteer labour performed by an individual, including 'the provision of a service', do not constitute a gift for the purposes of Part 12 of the Act. However, if an individual receives compensation from a third party to perform the relevant service, that constitutes a gift from the third party to the Donation Recipient.

3.4 Political expenditure and electoral expenditure

The *Electoral Act 2002* (Vic) includes two related key terms, political expenditure and electoral expenditure.

Political expenditure means any expenditure for the dominant purpose of directing how a person should vote at an election, by promoting or opposing any of the following:

- the election of any candidate at the election
- an RPP
- an MP.

Special rules apply to associated entities and third party campaigners. For these bodies, expenditure incurred is not considered political expenditure unless it is material that either:

- is published, aired or otherwise disseminated during the 'election campaigning period' — which is the period starting from 1 October (in the case of most general elections) or the day the writs are issued (in the case of by-elections) and ending on 6 pm on election day
- refers to a candidate or an RPP, and how a person should vote at an election.

These special rules were introduced as part of a house amendment during debate in the Legislative Council.[74]

The definition of electoral expenditure is more detailed and encompasses additional matters. It applies for the entire election period, that is, from the day after the previous election day to the election day for the current election. It includes:

- the broadcasting of an advertisement relating to the election
- the publishing in a journal of an advertisement relating to the election
- the display at a theatre or other place of entertainment, of an advertisement relating to the election
- the production of an advertisement relating to the election
- the production of any other material in relation to the election that includes 'electoral matter' — meaning matter which is intended or likely to affect voting in an election[75]
- the production and distribution of electoral matter that is addressed to particular persons or organisations
- fees or salaries paid to consultants or advertising agents for services provided, being services relating to the election or material relating to the election
- the carrying out of an opinion poll, or other research, relating to the election.

Almost every use of the term electoral expenditure in Part 12 of the *Electoral Act 2002* (Vic) is accompanied by a reference to political expenditure. However, there are several provisions that discuss political expenditure only, including:

- the definition of third party campaigner — meaning that, broadly speaking, an organisation can incur an unlimited amount of electoral expenditure without being considered a third party campaigner, provided that expenditure is not within the definition of political expenditure
- the definition of what is considered a political donation to an associated entity or third party campaigner — meaning that, for

[74] Victoria, *Parliamentary Debates*, Legislative Council, 22 June 2018, pp. 3075-3083.
[75] *Electoral Act 2002* (Vic), s. 4.

example, a gift that is accepted by an associated entity or third party campaigner will not be considered a political donation if its purpose is to enable the recipient to incur electoral expenditure but not political expenditure

- a requirement for political expenditure to be paid from the relevant SCA — electoral expenditure that is not caught within the definition of political expenditure is not required to be paid from the SCA.[76]

Political expenditure across jurisdictions

Victoria is the only Australian jurisdiction that uses two distinct terms to describe political finance expenditure. The definition of political expenditure in Victoria is narrower than that of the equivalent term used in several other Australian jurisdictions (in particular New South Wales, Queensland and South Australia).

New South Wales and Queensland both use the term electoral expenditure. In New South Wales, this broadly encompasses:[77]

> *… expenditure for or in connection with promoting or opposing, directly or indirectly, a party or the election of a candidate or candidates or for the purpose of influencing, directly or indirectly, the voting at an election …*

Queensland's definition captures various communication-related activities that are incurred for a 'campaign purpose'.[78] A 'campaign purpose' includes promoting or opposing a political party in relation to an election, promoting or opposing the election of a candidate or otherwise influencing voting at an election. It specifically encompasses:[79]

- expressly promoting or opposing political parties or candidates who advocate (or do not advocate) a particular policy or issue, or who have (or do not have) a particular position on a policy or issue

[76] *Electoral Act 2002* (Vic), s. 207F.
[77] *Electoral Funding Act 2018* (NSW), s. 7.
[78] *Electoral Act 1992* (Qld), s. 199.
[79] *Electoral Act 1992* (Qld), s. 199A.

- expressly or impliedly commenting about a political party, elected member or candidate in the election, or in relation to an electoral district
- expressing a particular position on a policy, issue or opinion if the position is publicly associated with a political party or candidate, regardless of whether the party or candidate is mentioned.

Unlike New South Wales, Queensland explicitly excludes expenditure incurred to employ staff for a campaign purpose in its definition.[80]

Like Victoria, South Australia uses the term political expenditure, although it does not use the term electoral expenditure. South Australia's definition encompasses expenditure incurred for the purposes of the public expression of views on a political party, candidate in an election, an elected MP, or an issue in an election. It expressly includes expenditure incurred for the purposes of the carrying out of an opinion poll, or other research, relating to an election or the voting intentions of electors.[81]

Varied interpretation of political expenditure

There is significant scope for differing interpretations of the meaning of the term 'political expenditure'. There has not yet been an opportunity for a court to make a ruling on its meaning in Victoria.

In its submission, the VEC explained that its 'position has been to consider electoral expenditure to be a subset of political expenditure'.[82] That would give the term 'political expenditure' a broad interpretation. For example, political expenditure would encompass the production of material that includes 'electoral matter', such as advertisements that were intended or likely to affect voting in an election by commenting on issues in connection with the election.[83]

However, it is unclear whether particular matters expressly within the definition of electoral expenditure, for example the carrying out of an

[80] *Electoral Act 1992* (Qld), s. 199 (4c).
[81] *Electoral Act 1985* (SA), s. 130A.
[82] VEC submission Part 2 — Issues and recommendations, p. 63.
[83] *Electoral Act 2002* (Vic), ss. 4 and 206.

opinion poll in relation to an election, would be captured by the current definition of political expenditure.

Other stakeholders have interpreted the meaning of the term political expenditure more narrowly. For example, Professor Joo-Cheong Tham stated during a Panel public forum that 'issues-based advocacy' would fall outside of the definition of political expenditure.[84] That interpretation is consistent with the second reading speech for the Electoral Amendment Bill, which stated:[85]

> *Advertising and raising awareness about issues, without promoting or opposing a candidate or political party, will not be considered political expenditure. Political expenditure has been defined narrowly in this way, to ensure that all Victorians will maintain their right to engage in public discussion on policy matters that are important to them.*

The Panel considered that the use of the terms political expenditure and electoral expenditure in the *Electoral Act 2002* (Vic) is duplicative and has created confusion.

Further, the potentially narrow definition of political expenditure that applies in Victoria creates a risk of the political finance scheme being circumvented. For example, particular campaign-related activities can be paid for by Donation Recipients using funds that are outside of their SCA (and which are effectively unregulated).

The Panel considered that these issues can be addressed by expanding the definition of political expenditure to expressly encompass electoral expenditure.

Recommendation 3.5: Expand the definition of political expenditure in Part 12 of the *Electoral Act 2002* (Vic) so that it expressly encompasses the definition of electoral expenditure.

[84] Transcript of Electoral Review Expert Panel public forum held on 20 July 2023, 10 am to 12 pm.
[85] Victoria, *Parliamentary Debates*, Legislative Assembly, 10 May 2018, p. 1351.

Review the drafting of Part 12 of the *Electoral Act 2002* (Vic) to remove duplicative uses of the terms political expenditure and electoral expenditure.

Rules for third party campaigners and associated entities

As explained above, special rules apply to the definition of political expenditure for third party campaigners and associated entities.

In establishing political finance rules for third party campaigners and associated entities, it is important to appropriately balance:

- the right of these organisations and persons to participate in political debate
- the risk that they are used to circumvent rules placed on RPPs and candidates, or that particular third party campaigners or associated entities 'drown out' the voices of others in political debate.

If a narrower definition of political expenditure applies for third party campaigners and associated entities than for Donation Recipients, it creates a risk that campaign activities are shifted to third party campaigners and associated entities to take advantage of that difference. For example, the 2014 New South Wales Panel of Experts' *Political Donations Final Report* stated:[86]

> *The Panel considers third-party regulation to be critical in addressing the 'hydraulics problem', which arises where changes are made in one area and lead to a need to tighten up in other areas. …*
>
> *Our consultations revealed a high level of concern about the increase in third-party campaigning. Stakeholders were alarmed by the prospect of New South Wales following the lead of the United States, where Political Action Committees have come to dominate election campaigns.*

[86] New South Wales Panel of Experts (2014), *Political Donations Final Report,* pp. 107-108.

Professor Twomey stated in her submission:[87]

> *In imposing caps on donations and expenditure, it is important also to impose caps on third-party campaigners (or at least, those that expend significant amounts, so as not to pick up small community groups and charities). If not, party political expenditure could shift so that it is made through a proliferation of third-party campaigners.*

In its submission, The Centre for Public Integrity stated that:[88]

> *We also have reservations about the s 206 definition of "political expenditure", insofar as it is used to determine when a payment to an associated entity or third party campaigner is a "gift" (paragraphs (e) and (f) of the s 206 definition of "political donation"). The narrow definition of "political expenditure" excludes issues-based campaigning: it should be broadened …*

To preserve the integrity of Victoria's political finance laws, the Panel considered that the same definition of political expenditure should apply to all Donation Recipients.

Recommendation 3.6: Amend the definition of political expenditure in Part 12 of the *Electoral Act 2002* (Vic) so that the same definition applies to all Donation Recipients.

Dominant purpose requirement for staffing costs

In its submission, the Victorian Trades Hall Council explained that the definition of political expenditure in Victoria is similar to the definition of 'electoral matter' under Commonwealth legislation because both definitions include a dominant purpose requirement. However, the VEC interpretation of the dominant purpose requirement in relation to staffing costs is different to the interpretation adopted by the Australian Electoral Commission (AEC):[89]

[87] Professor Emerita Anne Twomey submission, p. 3.
[88] The Centre for Public Integrity submission, p. 6.
[89] Victorian Trades Hall submission, p. 4; *Commonwealth Electoral Act 1918* (Cth), s. 4AA.

- according to the AEC's interpretation, the dominant purpose requirement applies to the overall purpose of a staff member's employment, rather than to specific activities those staff undertake
- according to the VEC's interpretation, the dominant purpose requirement applies to the specific activity being undertaken by a staff member.

The VEC's interpretation would means that if a staff member's employment is ordinarily not related to political activities, but that staff member undertakes a particular task to promote or oppose an RPP, MP or election candidate, the staff costs (e.g. wages) attributable to that particular activity would need to be calculated and treated as political expenditure.

The Victorian Trades Hall Council stated that:[90]

> *the resulting ambiguity and unreasonable bureaucratic burden to participation for [third party campaigners] ... has resulted in some unions and other [third party campaigners] choosing not to participate in the electoral process.*

The Panel considered that staff costs should only be considered political expenditure if the dominant purpose of the staff member's overall employment is to undertake political activities. This would provide administrative simplicity and clarity and reduce the risk of a Donation Recipient inadvertently breaching its legal obligations, for example by not paying a specific segment of an employee's wages from the SCA.

For the avoidance of doubt, political expenditure should exclude the employment costs of those RPP staff that conduct the normal day-to-day business of that party. The policy intent of this exception is to ensure that RPPs are not required to pay their core, regular staffing costs from their SCAs.

Recommendation 3.7: Amend the definition of political expenditure in Part 12 of the *Electoral Act 2002* (Vic) to clarify that staff costs (e.g. wages) incurred by a Donation Recipient are only considered political expenditure if the dominant purpose of the staff member's employment

[90] Victorian Trades Hall submission, p. 5.

is to undertake activities that are otherwise within the definition of political expenditure.

For the avoidance of doubt, political expenditure should exclude the employment costs of those RPP staff that conduct the normal day-to-day business of that party. The policy intent of this exception is to ensure that RPPs are not required to pay their core, regular staffing costs from their SCAs.

Power to make Determinations on the meaning of terms

The *Electoral Act 2002* (Vic) defines the term political expenditure in a broad manner, requiring the VEC and Donation Recipients to assess whether specific activities and costs fall within its scope. While the Panel's recommendations address several areas of confusion, there may be other areas of uncertainty.

The VEC stated in its submission that it:[91]

> *supports this absence of legislative prescriptiveness, as the kinds of expenditure which could be considered electoral and political expenditure are highly prone to change along with changes to the technological, cultural and electoral landscape. It is not desirable that regular legislative change be required to keep up to date with trends in political campaigning.*

However, the VEC also considered it important for expenditure captured by the definition of political expenditure (and electoral expenditure) to be comprehensively categorised and detailed. The VEC recommended that it is given the power to make Determinations that set out what matters are covered by those terms, subject to the requirements of the *Electoral Act 2002* (Vic).[92]

The VEC currently has the power to make Determinations on a variety of topics. For example, it can make Determinations on what several types of

[91] VEC submission Part 2 — Issues and recommendations, p. 26.
[92] VEC submission Part 2 — Issues and recommendations, p. 26.

VEC-administered funding can be claimed for, subject to the Act (Chapter 6).

The Panel agreed that the VEC should have the power to issue Determinations detailing what matters are and are not considered political expenditure, subject to the definition set in legislation.

The Panel has recommended above that the definition of political expenditure is updated to encompass the term electoral expenditure and duplicative uses of those terms are removed. That will remove the use of the term electoral expenditure in Part 12 of the *Electoral Act 2002* (Vic). Subject to those changes being made, the VEC should not require the power to make Determinations on the meaning of the term electoral expenditure to support the operation of Part 12.

Recommendation 3.8: Amend the *Electoral Act 2002* (Vic) to give the VEC the power to make Determinations on the meaning of the term political expenditure, subject to the definition set in the Act.

3.5 State campaign account

The registered officer or agent of each Donation Recipient is required to keep an SCA, which consists of one or more separate accounts with an authorised deposit-taking institution, such as a bank, building society or credit union. SCAs are kept for the purpose of State elections.[93]

Registered officers and agents are required to ensure that all political expenditure for a State election is paid out of the SCA.[94] While the *Electoral Act 2002* (Vic) states that SCAs consist of accounts kept for the purpose of State elections, it does not restrict Donation Recipients from using funds in the SCA for any other matter, at their discretion.

Registered officers and agents are required to ensure that each State political donation is paid into the SCA.[95]

[93] *Electoral Act 2002* (Vic), s. 207F.
[94] *Electoral Act 2002* (Vic), s. 207F(6).
[95] *Electoral Act 2002* (Vic), s. 207F(2).

In addition, registered officers and agents are required to pay public funding received from the VEC into the SCA, while administrative expenditure funding and policy development funding must not be paid into the SCA.[96] These sources of funding are explained in Chapter 6.

Funds for Commonwealth electoral purposes must not be paid into an SCA. In addition, registered officers are required to ensure that the following amounts are not paid into the RPP's SCA:[97]

- annual subscriptions paid in respect of a person's membership of the RPP
- annual affiliation fees paid by an associated entity
- annual levies paid by an elected MP or one of their staff, or an employee or elected official of the political party.

As explained above, these payments are not treated as political donations, as they are excluded from the definition of the term 'gift'.

The registered agents of other Donation Recipients are not prohibited from paying subscriptions, affiliation fees or levies into the Donation Recipient's SCA. However, if the registered agent of an associated entity or third party campaigner pays an annual subscription fee or levy into the SCA, that amount is then treated as a political donation.[98]

Proposed changes to what funds may go into and out of the State campaign account

In its submission, the VEC noted that while the *Electoral Act 2002* (Vic) requires Donation Recipients to keep an SCA for the purpose of State elections,[99] there are limited restrictions placed on how SCAs may be used and the funds that may be placed into or paid out of those accounts.[100]

The VEC raised the following concerns in its submission:[101]

[96] *Electoral Act 2002* (Vic), ss. 212(4A), 207GB(2)(e), 215A(6).
[97] *Electoral Act 2002* (Vic), ss. 207F(3)-(4).
[98] *Electoral Act 2002* (Vic), s. 207F(5).
[99] *Electoral Act 2002* (Vic), s. 207F.
[100] VEC submission Part 2 – Issues and recommendations, p. 53.
[101] VEC submission Part 2 – Issues and recommendations, pp. 53-54.

> *The VEC is concerned that if SCAs are not held exclusively for State electoral purposes, scrutiny of political donations and political expenditure may be undermined. Financial year annual returns under Division 3C of Part 12 and statements of expenditure under section 208 benefit from clear separation between relevant and irrelevant funds, to distinguish non-electoral funds and allow for transparent auditing*
>
> *The VEC is also concerned that unchecked usage of SCAs for non-electoral purposes may lead to improper usage of [public funding] (intended or unintended) and obfuscation of any improper activity. The VEC is concerned of the risk that the holder of an SCA could use instalment payments of [public funding] for non-electoral purposes, which may not be apparent to an auditor in circumstances where there is regular non-electoral use of the SCA.*

The VEC requested the Panel:[102]

> *consider whether any restrictions can be placed on the usage of the SCA to better reflect its express purpose under section 207F(1). These may include requiring that only political donations and payments received by recipients from the VEC can be paid into SCAs, and that only electoral expenditure or political expenditure can be paid out of SCAs.*

Payments into the State campaign account

The Panel agreed with the VEC's position that strengthened regulation of payments into the SCA would lead to greater transparency and assist with auditing and regulatory enforcement. Due to the fungibility of money held by an RPP, it may not be practically possible under current arrangements to ensure that funds moved into an SCA did not originate from a banned source. For example, an RPP might:

- use funds obtained from membership fees or levies (which must not be paid into the SCA) to acquire investments

[102] VEC submission Part 2 – Issues and recommendations, p. 54.

- hold any investment returns received in a general-purpose bank account
- after a significant number of years, propose to move funds from that general purpose account into the SCA.

Strengthening regulation of what funds may be paid into the SCA would achieve another important outcome — placing controls on political expenditure by Donation Recipients. As political expenditure by a Donation Recipient must be paid from its SCA, rules on what funds may be placed into the SCA directly impact on, and can be used to regulate, Donation Recipient political expenditure.

The benefits of placing controls on political expenditure are discussed in detail in Chapter 7. In summary, key benefits include:

- minimising the risk of real or perceived improper influence arising due to fundraising pressures placed on Donation Recipients
- achieving a more level playing field for participants in the political process and ensuring that excessive expenditure of some participants cannot 'drown out' the voices of others.

As part of its review, the Panel was required to examine whether the *Electoral Act 2002* (Vic) should be amended to provide for a cap on political expenditure.[103] During consultation, the Liberal Party of Australia (Victorian Division) and the Australian Labor Party – Victorian Branch argued that expenditure caps do not need to be introduced as existing laws already limit political expenditure by Donation Recipients, and the introduction of expenditure caps would introduce unnecessary additional administrative burden. For example, the Australian Labor Party – Victorian Branch stated in its submission:[104]

> *The strict requirements underpinning the donation cap effectively act as a de-facto expenditure cap because they necessarily limit the funding available to political parties and candidates in an election.*

[103] *Electoral Act 2002* (Vic), s. 222DB(3)(a).
[104] Australian Labor Party – Victorian Branch submission, p. 4.

The Panel agreed that it would be preferable to not introduce the additional administrative burden of expenditure caps into Victoria's regulatory scheme, provided that other elements of the regulatory scheme achieved the same objectives and practical outcomes. However, for those objectives and practical outcomes to be achieved, stricter rules need to be placed on what funds can be placed into the SCA and, accordingly, what is available for political expenditure.

The Panel requested information from the RPPs that made a submission or attended a public forum on funds paid into, and payments from, their SCAs.

The Liberal Party of Australia (Victorian Division) objected to further restrictions being placed on payments into and from the SCA, stating that there may be legitimate reasons for an RPP to pay various funds into the SCA, including:[105]

- branches, committees and electoral divisions of the party may do their banking within the SCA, so that the funds these volunteers raise can be contributed to their local State election campaigns, they may also want to use some of the funds raised for their own administration
- an RPP may wish to invest funds in its SCA, including advance public funding received from the VEC
- an RPP should be able to contribute its own assets to a campaign if it wishes to do so — the Liberal Party of Australia (Victorian Division) stated that restricting those contributions 'may well be unconstitutional, and would also be bad public policy as it would unnecessarily restrain the rights and liberties of law-abiding citizens in a democracy.'

The Australian Greens Victoria agreed with the VEC's suggested limits on payments into the SCA and stated that the only credits to an SCA that should be allowed include political donations, public funding and interest earned.[106]

[105] Correspondence from the State Director, Liberal Party of Australia (Victorian Division) to the Electoral Review Expert Panel, 13 August 2023.

[106] Correspondence from the State Director, Australian Greens Victoria to the Electoral Review Expert Panel, 3 August 2023.

The National Party of Australia – Victoria stated that, in addition to political donations (including contributions by a candidate to their own campaign) and public funding, the only funds placed into the SCA are:[107]

- interest earned on the SCA
- the non-donation portion of fundraising event tickets, which is used to pay for the cost of the event.

As part of its analysis the Panel also took into account comparable restrictions on what funds may be paid into the SCA in Queensland.[108]

Taking the above matters into account, the Panel considered that the *Electoral Act 2002* (Vic) should be updated to specify what funds may be paid by RPPs, MPs, groups and candidates into their SCAs. That would place a practical limit on the political expenditure that those Donation Recipients can incur and achieve the objectives generally associated with expenditure caps, explained above.

It would also support transparency, as well as auditing and regulatory enforcement by the VEC.

The Panel considered that deposits into the SCAs of RPPs, MPs, groups and candidates should be limited to the following funds:

- political donations received, subject to applicable donation caps
- public funding provided by the VEC
- contributions by candidates or MPs to their own election campaigns (subject to applicable limits, discussed in Chapter 5) which may include funds accessed by the candidate or MP through a loan
- investment returns generated using funds in the SCA, assets purchased using the SCA or the sale of assets purchased using SCA funds.

Those limits take into account feedback received from RPPs on what funds are typically paid into their SCA, although the Panel acknowledged that the Liberal Party of Australia (Victorian Division) objected to RPPs being prevented from contributing their own funds to its SCA.

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[107] Correspondence from the State Director, Nationals Party of Australia – Victoria to the Electoral Review Expert Panel, 3 August 2023.

[108] *Electoral Act 1992* (Qld), s. 216.

Under current rules, an RPP may move an unlimited amount of funds from their nominated entity into the RPP's SCA. Under the Panel's proposed changes, that would no longer be the case. Nominated entities are discussed further below.

The Panel considered that, using the above sources of funds, RPPs, MPs, groups and candidates would still be able to mount a reasonable political campaign. Available data on the reasonable cost of a political campaign are discussed in Chapter 5. While some RPPs may not be able to spend as much on a political campaign as they have in the past, that would be expected and would be consistent with the objectives of the proposed reforms.

However, the Panel considered that the same restrictions should not be placed on the SCAs of associated entities and third party campaigners. These Donation Recipients are not entitled to public funding (or other types of funding provided by the VEC), meaning that these entities have a greater need to draw upon their own funds if they wish to undertake political expenditure. Further, unlike candidates and MPs, associated entities and third party campaigners cannot make use of provisions related to own election campaign contributions.

The different treatment of associated entities and third party campaigners compared to other Donation Recipients is considered further in the Panel's examination of expenditure caps in Chapter 7.

Recommendation 3.9: Amend the *Electoral Act 2002* (Vic) to state that only the following funds may be placed into the SCA of an RPP, MP, group or candidate at an election:

- political donations received, subject to applicable donation caps
- public funding provided by the VEC
- contributions by candidates at an election or MPs to their own election campaigns, subject to applicable limits — which may include funds accessed by the candidate or MP through a loan
- investment returns generated using funds in the SCA, assets purchased using the SCA or the sale of assets purchased using SCA funds.

Payments from the State campaign account

As the VEC stated in its submission, the primary purpose of the SCA is holding funds for State electoral purposes. The Panel agreed with the VEC's suggestion that SCA funds should not, broadly speaking, be used for other purposes.

As all political expenditure must be paid from the SCA, there may be an incentive for RPPs, MPs and candidates to use the maximum amount of their SCA funds on political expenditure. However, the Panel heard from several stakeholders that there may be legitimate reasons for using SCA funds for other purposes:

- Melissa Lowe explained at a public forum that as independent candidates are not eligible for administrative expenditure funding, they may need to spend donations that are paid into the SCA on administrative requirements, such as auditing[109]
- the Australian Greens Victoria stated that SCA funds should be available for community engagement activities that may fall outside the definition of political expenditure, for example:[110]
    - engaging with and seeking to understand the needs of the community
    - holding a member forum or a public forum with a panel of experts to discuss a policy issue.

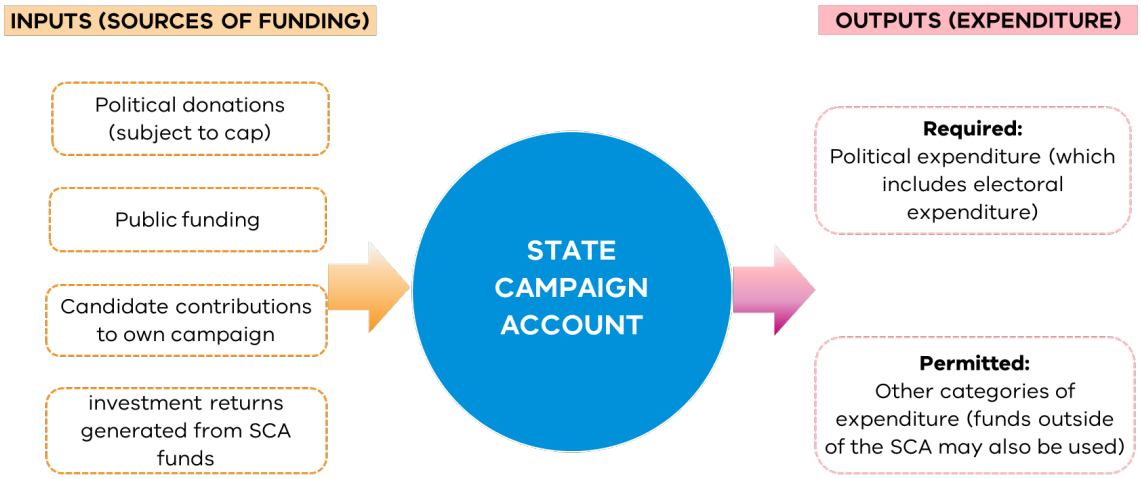
The Panel considered the use of the SCA for those types of activities should also be permitted, although funds outside of the SCA may also be used for that expenditure. For that reason the Panel considered further changes are not required.

To clarify, all political expenditure (as defined in this Report) must be paid from the SCA. Other categories of expenditure may be paid from the SCA at the discretion of the Donation Recipient.

Figure 3.1 summarises the Panel's proposed rules on what funds RPPs, MPs, groups and candidates may pay in to and out of the SCA.

[109] Transcript of Electoral Review Expert Panel public forum held on 21 July 2023, 10 am to 12 pm.
[110] Correspondence from the State Director, Australian Greens Victoria, to the Electoral Review Expert Panel, 3 August 2023.

Figure 3.1: Proposed inputs and outputs of the State campaign account for registered political parties, Members of Parliament, groups and candidates



Requirement for associated entities and third party campaigners to maintain a State campaign account

The Victorian Trades Hall Council stated in its submission that the requirement for third party campaigners to maintain a separate SCA 'is an additional and unnecessary impost on participation in electoral campaigns'.[111] The submission argued that, provided all political expenditure is reported, requiring that expenditure to be paid from a particular account is unnecessary.

At a public forum, the Assistant Secretary of the Victorian Trades Hall Council, Wilhelmina Stracke, further explained that the Council received donations for all purposes through a central portal, and the requirement to have an SCA meant that donations (or amounts) intended to support political expenditure had to manually moved into a dedicated SCA by staff.[112]

The Panel considered that requiring all associated entities and third party campaigners to maintain an SCA is unduly onerous. Participation in an election campaign or electoral process may form only a portion of the activities and objectives of these organisations or persons, although it may be inexorably linked to other undertakings. It may not be

[111] Victorian Trades Hall Council submission, p. 3.
[112] Transcript of Electoral Review Expert Panel public forum held on 4 August 2023, 10 am to 11 am.

practicable for these organisations to split funds to be used specifically for political expenditure into a separate account, particularly where this must occur well before the expenditure takes place.

The Panel considered that associated entities and third party campaigners should be given a choice as to whether to maintain an SCA.

Many sections of Part 12 of the *Electoral Act 2002* (Vic) currently refer to the SCA. For the Panel's recommended change to be made, separate provisions would need to be introduced for associated entities and third party campaigners (those that elect not to maintain an SCA) to ensure that, for all other practical purposes, the same obligations and restrictions apply.

For example, s. 207F(5) of *Electoral Act 2002* (Vic) currently states that if a registered agent of an associated entity of a third party campaigner pays an annual membership fee into the SCA, that fee is taken to be a political donation. A new provision could be introduced to instead state that, in the case of an associated entity or third party campaigner that elects not to maintain an SCA, any membership fee used or intended to be used for political expenditure is taken to be a political donation.

Recommendation 3.10: Amend the Electoral Act 2002 (Vic) to allow associated entities and third party campaigners to elect to not maintain an SCA.

Make consequential amendments to the Electoral Act 2002 (Vic) to ensure that the same obligations and restrictions apply to associated entities and third party campaigners (including their registered agents) that maintain an SCA and those that do not.

3.6 Nominated entity

Victoria's political finance regime permits each RPP to appoint an entity as its nominated entity. Each party may only have one nominated entity at any particular time, and parties cannot have the same nominated entity.[113]

[113] *Electoral Act 2002* (Vic), s. 222F(4).

A key feature of nominated entities is that the transfer of funds from the nominated entity to its party, or from the party to its nominated entity, is not considered a gift or political donation.

A nominated entity must:[114]

- be an incorporated body
- not have voting rights in the party.

A nominated entity appointed on or after 1 July 2020 must also:[115]

- be controlled, within the meaning of section 50AA of the *Corporations Act 2001* (Cth)[116]
- operate for the sole benefit of the members of the party, or be established or maintained (or the trustee of a trust established and maintained) for the sole benefit of the members of the party.

Special rules apply to the first appointment of a nominated entity made before 1 July 2020. The above two requirements do not apply. Instead the nominated entity must operate for the **principal** (rather than sole) benefit of the members of the party, or be established or maintained (or the trustee of a trust established and maintained) for the **principal** benefit of the members of the party.[117]

As of June 2023, three RPPs have appointed a nominated entity:[118]

- Liberal Party of Australia (Victorian Division) appointed Cormack Foundation Pty Ltd
- Australian Labor Party – Victorian Branch appointed Labor Services & Holdings Pty Ltd
- National Party of Australia – Victoria appointed Pilliwinks Pty Ltd.

The relationship between the Liberal Party and Cormack Foundation Pty Ltd and the Foundation's history was considered by the Federal Court as part of litigation commenced in 2017.[119] The Cormack Foundation was

[114] *Electoral Act 2002* (Vic), ss. 222F(2) and (3).
[115] *Electoral Act 2002* (Vic), s. 222F(2).
[116] Section 50AA(1) states that an entity controls a second entity if the first entity has the capacity to determine the outcome of decisions about the second entity's financial and operating policies.
[117] *Electoral Act 2002* (Vic), s. 222F(3).
[118] VEC (n.d.), *Registered nominated entities*, https://www.vec.vic.gov.au/candidates-and-parties/political-donations/registered-nominated-entities, accessed 19 October 2023.
[119] *Alston v Cormack Foundation Pty Ltd* (2018) 358 ALR 263.

established in 1988 and was initially funded through the sale of Station 3XY Pty Ltd, a company holding a radio license.[120]

Among Australian jurisdictions, nominated entities are a unique feature of Victoria's political finance scheme. The Explanatory Memorandum for the Electoral Legislation Amendment Bill explained that the inclusion of nominated entities in Victoria's political finance regime:[121]

> *... acknowledges the existing arrangements between political parties and separate entities that manage financial commitments and maintain assets for the sole benefit of the registered political party.*

The inclusion of nominated entities in Victoria's legislation was criticised by some MPs during debate on the Electoral Legislation Amendment Bill.

For example, Dr Ratnam, Leader of the Australian Greens Victoria, stated:[122]

> *In any event it is part of the architecture of this bill that is deliberately skewed towards the big old political parties. It entrenches the advantage of the Labor and Liberal parties over political diversity.*
>
> *While the bill as a whole goes some way to removing the influence of corporate donations on politics, it does not seek to level the playing field. Instead these nominated entity provisions are specifically designed to support the interests of the old political players.*

Mrs Peulich, Member of the Liberal Party, stated:[123]

> *The stated intention of the bill is to instil more transparency in our political donations system; however, the creation and application of nominated entities invites large-scale rorting to hide who influences campaigns. ...*

[120] *Alston v Cormack Foundation Pty Ltd* (2018) 358 ALR 263, [90].
[121] Electoral Legislation Amendment Bill 2018 Explanatory Memorandum, p. 18.
[122] Victoria, *Parliamentary Debates*, Legislative Council, 22 June 2018, p. 3005.
[123] Victoria, *Parliamentary Debates*, 22 June 2018, pp. 3026–3027.

This is Labor attempting to protect their donor base while crippling other parties' much more diverse range of donors. The nominated entities also undermine the common goal to prevent foreign money from pouring into elections, and again, I want to know whether this would be immune from IBAC investigations.

Several stakeholders also raised concerns about the rules for nominated entities in Victoria during consultation (Box 3.2).

Box 3.2: Comments in submissions about nominated entities

'The carve-out for gifts from parties' nominated entities is especially unfair. Only the Labor, Liberal and National parties have a 'nominated entity'— respectively, Labor Services and Holdings, the Cormack Foundation, and Pilliwinks Pty Ltd. The payments from these entities to their associated parties are not subject to Victoria's donation cap nor real-time transparency provisions.' (Climate 200 submission, p. 7)

'... nominated entities provide major parties with a legislatively unlimited source of funding that sits outside of donation caps. By comparison, minor party and independent candidates are funded solely within donation cap which sat at $4,320 at the 2022 State Election.' (Melissa Lowe submission, p. 2)

'The 'nominated entity' provisions operate to undermine the donation caps and give the ALP and the Liberals a significant advantage over all other parties and independents. These provisions allow unlimited fund transfers from a nominated entity to a party's state campaign fund. While donations into the nominated entity are covered by the donations cap, legacy funds are not. ... Newer parties and independents have no capacity to match the legacy assets of the two big parties. These provisions were designed to give the two big parties an advantage and undermine other attempts in the legislative reforms to better level the playing field. At the very least here should be a cap on donations from nominated entities to the State Campaign fund. It could arguably be a higher cap than the donations cap but unlimited transfer of funds is grossly unfair.' (Australian Greens Victoria submission, pp. 1-2)

'The operation of the nominated entity exemption means that currently, the Labor Party, the Liberal Party and the National Party are receiving payments that are not subject to the donations caps and disclosure requirements to which other payments are subject. Insofar as the 'nominated entity' exemption, unique amongst Australian jurisdictions, operates to the exclusive benefit of Victoria's 'legacy parties' and is therefore inequitable, it should be abolished.' (The Centre for Public Integrity submission, p. 6)

Following the Panel's public forums, the Panel wrote to each of the RPPs that have a nominated entity to:

- ask for further information about the movement of funds to and from the nominated entity, and how funds are used
- invite comment on transitional arrangements that may be required if the power to appoint a nominated entity was removed.

The Panel received a response from the State Director of the Liberal Party of Australia (Victorian Division). The letter stated that the Liberal Party of Australia (Victorian Division) strongly objected to RPPs no longer having the power to appoint a nominated entity. It further explained that:

- RPPs have often used separate incorporated entities to hold assets, because RPPs are ordinarily unincorporated entities which can only hold property at great legal risk to individuals
- the current rules were introduced in recognition of existing practices by RPPs
- transfers of funds from nominated entities should not create a risk of improper influence, as they are 'effectively familiar or intra-party transactions' rather than external donations
- nominated entities are not unfair as they are available to all RPPs.

The Panel was unable to reach a unanimous consensus on the topic of nominated entities. The majority and minority views are set out below.

Majority view

The majority view, of Panel Chair Elizabeth Williams and Member David Feeney, was that the *Electoral Act 2002* (Vic) should be amended to remove the power of RPPs to appoint a nominated entity.

The laws for nominated entities do not treat all RPPs equally and significantly benefit RPPs that were established prior to the 2018 amendments over other RPPs. Pre-2018 RPPs were able to place an unrestricted amount of funds from any source (including gifts from third parties) into an incorporated entity, and then select that entity as their nominated entity once the 2018 amendments took effect. In comparison,

the *Electoral Act 2002* (Vic) expressly prohibits new RPPs from funding future nominated entities in such a manner.[124]

As explained above, different rules apply depending on when an RPP appointed its nominated entity, with more flexible rules applying prior to 1 July 2020. That is another example of existing and new RPPs receiving unequal treatment. Existing rules on nominated entities provide some RPPs with significantly more funds that can be spent on political expenditure, creating a risk that those RPPs drown out other voices.

Further, as existing RPPs were able to appoint a body as a nominated entity despite not having control over it, gifts from those nominated entities also create a risk of real or perceived improper influence.

Nominated entities are a unique feature of Victoria's political finance laws. The successful operation of political finance laws in other Australian jurisdictions provides clear evidence that nominated entities are not required for RPPs to function. The majority of Victoria's RPPs do not have a nominated entity, which also supports that conclusion.

Removing the power of an RPP to appoint a nominated entity would bring Victoria's laws into greater harmony with the laws across Australia. RPPs would still be able to invest funds and use investment proceeds. For example, annual returns lodged by the three RPPs that have a nominated entity indicate that those RPPs already directly receive some interest and/or investment income.

In addition, the Panel recommended earlier in this Chapter that restrictions be placed on what funds an RPP may pay into its SCA. To meet the objectives of that recommendation, existing arrangements for nominated entities must be reformed.

If the power of RPPs to appoint nominated entities is removed, transitional rules should be put in place to ensure that affected RPPs can update their arrangements. RPPs may need to transfer legal ownership of assets held by nominated entities and/or update legal agreements in place.

[124] *Electoral Act 2002* (Vic), s. 218B.

Minority view

The minority view, of Panel Member Helen Kroger, was that reform of nominated entities was not required. Existing rules for nominated entities recognise long-standing practices by RPPs that stretch back many decades. Those entities hold assets that generations of party members have accumulated and preserved for the RPP's long-term prosperity and in support of its ideals. Removing nominated entities may prevent those assets being used for those goals, potentially having a pernicious effect on the way in which RPPs conduct operations and support their members.

Recommendation 3.11: Amend the *Electoral Act 2002* (Vic) to remove the power of an RPP to appoint a nominated entity. References to nominated entities should be removed from the Act.

Transitional rules should apply so that affected RRPs can update their arrangements.

3.7 Associated entity and third party campaigner

The *Electoral Act 2002* (Vic) defines an associated entity as an entity that meets at least one of the following criteria:

- is controlled by one or more RPPs
- operates wholly, or to a significant extent, for the benefit of one or more RPPs
- is a financial member of an RPP
- on whose behalf another person is a financial member of an RPP
- has voting rights in an RPP
- on whose behalf another person has voting rights in an RPP.

Fifty-three associated entities submitted an annual return for the 2021-22 financial year.[125]

A third party campaigner is any person or organisation, that is not otherwise a Donation Recipient, and that receives political donations or

[125] Analysis of data provided by the VEC to the Electoral Review Expert Panel.

incurs political expenditure which exceeds a set threshold in a financial year. The threshold was initially set at $4,000 and is indexed each year — it is equal to $4,670 for 2023-24.[126]

As explained above, special rules apply to what matters are considered a political donation to an associated entity or third party campaigner, or political expenditure undertaken by it.

Seven organisations submitted annual returns as third party campaigners at least once for the 2018-19 to 2021-22 financial years.[127]

Registration of third party campaigners

Currently third party campaigners are not required to register with the VEC and there is no public record of third party campaigners. It may not be clear that an organisation or person is, or was, a third party campaigner until their annual return for the relevant year is published.

In its Donations and Lobbying Report, IBAC noted that in 2020 Queensland introduced a requirement for a third party to register for an election if over $6,000 in electoral expenditure is incurred by it or with its authority.[128]

IBAC recommended Victoria's legislative framework be amended to require:[129]

- the registration of third party campaigners
- publication of the register of third party campaigners.

The Panel agreed with IBAC's recommendation. Establishing a public register of third party campaigners will make Victoria's elections more transparent.

[126] VEC (n.d.), *Indexation*, https://www.vec.vic.gov.au/candidates-and-parties/political-donations/indexation, accessed 20 October 2023.

[127] VEC (n.d.) *Public annual returns*, https://disclosures.vec.vic.gov.au/public-annual-returns/, accessed 20 October 2023.

[128] *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Act 2020* (Qld), s. 43.

[129] Donations and Lobbying Report, p. 8.

It will also ensure that the VEC can provide new third party campaigners with appropriate resources, educational materials and support, and monitor their compliance with political finance laws.

A public register would also help donors to check whether a Donation Recipient is a third party campaigner, for the purpose of ensuring they comply with relevant obligations and limits.

The VEC should also be empowered to take appropriate enforcement actions if a third party campaigner fails to register. Enforcement powers and penalties are discussed in Chapter 4.

Recommendation 3.12: Amend the *Electoral Act 2002* (Vic) to require the registration of third party campaigners.

Set penalties for non-compliance and provide the VEC with enforcement powers.

3.8 Registered political party

A political party may choose to become registered, although an unregistered party may still participate at elections. As explained by the VEC website, registration entitles a party to:[130]

- have the party's name printed on State election ballot papers next to the names of the party's endorsed candidates
- nominate all its candidates and register how-to-vote cards centrally, rather than individually with election managers
- receive public funding based on the number of votes it receives at a State election
- access enrolment information, not including phone numbers or email addresses, which it can use for permitted purposes.

During consultation, several stakeholders discussed other advantages provided to RPPs due to Commonwealth laws, including:[131]

- advantageous tax treatment of any public funding received

[130] VEC (n.d.), *Register a party*, https://www.vec.vic.gov.au/candidates-and-parties/registered-political-parties/register-a-party, accessed 9 August 2023.

[131] Climate 200 submission, pp. 3 and 7; transcript of Electoral Review Expert Panel public forum held on 21 July 2023, 10 am to 12 pm.

- donations (and membership subscriptions) of up to $1,500 per income year to an RPP are tax deductible.

Part 4 of the *Electoral Act 2002* (Vic) sets out how a political party becomes registered in Victoria. An application to register as a political party must be in writing signed by the party's secretary and include:[132]

- the party's name
- the name and address of the person who is to be the party's registered officer for the purposes of the Act
- a copy of the party's constitution (however described) – there are no requirements as to what the constitution states
- a list of the names and addresses of at least 500 members of the political party who are:
    - enrolled to vote in Victoria
    - members of the party in accordance with its rules
    - not a member of another RPP or a party applying for registration
- a statutory declaration from the party's secretary stating that at least 500 of its members satisfy the above criteria.

A registration application to register must be accompanied by a fee of 50 fee units (in 2023-24, $795).[133] An application cannot be made during the period starting 120 days before the day of a general election.[134]

The VEC must refuse to register a party if the proposed name meets certain criteria. For example, a proposed name cannot:[135]

- comprise the words 'Independent Party'
- comprise or contains the word 'Independent' and the name of an RPP, or matter that so nearly resembles the name of an RPP that the matter is likely to be confused with, or mistaken for, that name.

[132] *Electoral Act 2002* (Vic), s. 45(2).
[133] *Electoral Act 2002* (Vic), s. 45(2)(g); Victoria Government Gazette No. S 256 Tuesday 23 May 2023, p. 1.
[134] *Electoral Act 2002* (Vic), s. 45(1A).
[135] *Electoral Act 2002* (Vic), s. 47.

Suggested new entity type for independent candidates

Climate 200 and several individuals who ran as independent candidates at the 2022 State election raised concerns about the different treatment of RPPs and independent candidates. For example:

- while RPPs are able to access the electoral roll at all times, independent candidates are only able to request access once they are considered a 'candidate for an election' under the *Electoral Act 2002* (Vic),[136] which can only occur after the issue of the writ for the election[137]
- under Commonwealth law, while donations to RPPs made at any time may be tax deductible, donations to an independent candidate are only tax deductible if they are made after the candidates for the election are declared or publicly announced by the VEC.[138]

To 'level the playing field' between independents and RPPs, several stakeholders suggested that a new entity type be introduced that would enable independent candidates to receive the advantages and entitlements provided to RPPs. Climate 200 suggested this new entity type be called an Independent Community Campaigner, while other stakeholders suggested the name Independent Campaign Entity. It was proposed that this new entity type would operate within a single, specific electorate and would support and endorse no more than one candidate at a time.

It was suggested that this new entity type have several special features or exemptions compared to other Donation Recipients, for example, that it be able to fundraise a certain amount outside of the applicable donation cap.[139] Stakeholders who suggested the introduction of a new entity type to support independents agreed that registration requirements should apply to establish one. For example, it was

[136] *Electoral Act 2002* (Vic), s. 33.
[137] *Electoral Act 2002* (Vic), s. 69.
[138] *Income Tax Assessment Act 1997* (Cth), Subdivision 30-DA.
[139] Climate 200 submission, pp. 9-10; Transcript of Electoral Review Expert Panel public forum held on 21 July 2023, 10 am to 12 pm.

suggested that a registration application should be signed by around 100 electors who reside within the relevant electorate.[140]

The Panel sought further information from stakeholders on how the proposed new entity would differ from an RPP and why a new entity type was required. Hayden O'Connor replied that:[141]

> *... I'd argue that forcing independents to form a party to access the same structural benefits that the parties have damages their candidate identity as an independent ...*
>
> *And a lot of voters are actually looking to vote independent, so that's really important. ... there's no constitutional or legitimate reason why these structural benefits should belong purely to political parties, and I don't think an independent should be forced into creating a party to access them. You can't really put the same registration requirements such as 500 members that apply to a statewide organisation onto an entity that intends to only operate in a single electorate ...*

The Panel sought input on this idea during a public forum attended by academics and representatives of The Centre of Public Integrity. These stakeholders expressed some support for the rules being adjusted in some manner to accommodate independents. However, they cautioned against creating an entirely new entity type or providing that new entity with special exemptions from the political finance laws that apply to Donation Recipients. For example, Professor Graeme Orr stated:[142]

> *... maybe the answer would be to have an ability to register a party with a smaller number of members if the party was somehow ... limited to a constituency based party. ...*
>
> *So I'm not quite sure why we'd be creating a special vehicle for what is one emergent or existing style of being in politics when we already have this broad notion of political parties. ... it did feel like*

[140] Transcript of Electoral Review Expert Panel public forum held on 21 July 2023, 10 am to 12 pm.
[141] Transcript of Electoral Review Expert Panel public forum held on 21 July 2023, 10 am to 12 pm.
[142] Transcript of Electoral Review Expert Panel public forum held on 20 July 2023, 10 am to 12 pm.

> *special pleading … – you're inviting everyone in the future to say, "Oh, create new rules just for my style of politics or organisation."*

Professor Joo-Cheong Tham stated:[143]

> *… I think merely by self-defining as independent or strongly perceiving as an independent doesn't make you exempt from the corrupting risks of money in politics. So that's why we are opposed to the fundraising outside the cap because we don't see that – there is no special virtue of any – candidates of any kind, whether they call themselves independent or not …*

Political parties emerged in Victoria and other jurisdictions because of the inherent advantages provided by team-work and central coordination. The Panel acknowledged these benefits as being natural advantages inherent to a party structure. The formation of RPPs also benefits the democratic process. The Parliament of Victoria's website explains that:[144]

- there were no political parties in the Parliament of Victoria for most of the 1800s — instead, a factional system emerged, which was unstable and unpredictable
- the government was replaced 29 times between 1856 and 1901, with 19 different Premiers
- political parties began to form from the 1890s, which provided stability to the Parliament.

The formation of political parties also provided economies of scale in managing the parliamentary and legislative workload of MPs.

As explained above, a group is required to meet several requirements to register as an RPP. That reduces the risk of the entitlements provided to RPPs, such as ongoing access to the electoral roll, being misused. At a public forum, Director of The Australia Institute, Richard Denniss, stated that:[145]

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[143] Transcript of Electoral Review Expert Panel public forum held on 20 July 2023, 10 am to 12 pm.

[144] Parliament of Victoria (n.d.), *History of political parties in Victoria*, https://new.parliament.vic.gov.au/about/history-and-heritage/people-who-shaped-parliament/history-of-political-parties/, accessed 30 October 2023.

[145] Transcript of Electoral Review Expert Panel public forum held on 11 July 2023, 10 am to 12 pm.

... if any independent that wanted to run could get the roll, the odds that someone might want to abuse it, are going to [go] through the roof.

While RPPs may have some advantages, they are also required to comply with additional obligations and stricter rules, including more onerous reporting and auditing requirements (Chapter 4). It would not be appropriate to extend those advantages without the corresponding obligations and rules to a limited class of candidates.

For the reasons outlined above, the Panel's view was that it would not be appropriate to introduce a special entity type to accommodate the preferences of particular candidates. It would be disingenuous to allow candidates and their supporters to form what would effectively be a quasi-RPP, while claiming to be independent to take advantage of a perceived preference among electors.

However, the Panel considered that it should be easier for independent candidates and their supporters to form RPPs. In particular, the *Electoral Act 2002* (Vic) should be amended to allow for the establishment of 'single electorate RPPs' that operate in a single electorate and endorse no more than one candidate at a time. Different membership and registration-fee requirements should apply to 'single electorate RPPs' than for other RPPs, to reflect their smaller, electorate-specific focus. Otherwise, the same rules should apply to 'single electorate RPPs' as to other RPPs.

The Panel noted that s. 47 of the *Electoral Act 2002* (Vic) would remain in force.

Recommendation 3.13: Amend the *Electoral Act 2002* (Vic) to enable the registration of 'single electorate RPPs', with the following requirements:

- the application for registration must nominate the specific electorate that the 'single electorate RPP' will operate in
- the 'single electorate RPP' may endorse no more than one candidate at a time, and endorsed candidates may not stand for election in an electorate other than that nominated by the 'single electorate RPP'

- the ‘single electorate RPP’ must have at least 250 members, who must reside in the nominated electorate and not be members of another RPP (whereas RPPs are currently required to have 500 members)
- the registration fee should be 25 fee units (whereas it is currently 50 fee units for RPPs)
- otherwise, ‘single electorate RPPs’ should be treated the same as other RPPs.

The VEC should have the power to deregister a ‘single electorate RPP’ that does not comply with the second and third requirements listed above.

‘Single electorate RPPs’ should be provided with a process for changing into RPPs.

Rules should be introduced to address what is to occur if a nominated electorate is abolished or significantly changed due to a boundary redistribution, including providing the ‘single electorate RPP’ with the right to nominate a new electorate.

Legal advice should be obtained to inform amendments ensuring ‘single electorate RPPs’ receive equal treatment to other RPPs under Commonwealth law.

4 Disclosure, reporting and enforcement

The *Electoral Act 2002* (Vic) required the Panel to examine and make recommendations in relation to the operation of the disclosure and enforcement schemes given effect to by the 2018 amendments.

Disclosure and reporting rules are the primary contributors to transparency of political finance in Victoria. However, as Dr Yee-Fui Ng noted in her submission, simply having strict rules in place for compliance is insufficient — those rules must be underpinned by an appropriate enforcement mechanism to encourage compliance with the scheme.[146]

4.1 The current Victorian disclosure and reporting scheme

Victoria's political finance laws require information to be disclosed by donors and Donation Recipients using two key instruments:

- political donation disclosure returns
- annual returns by Donation Recipients.

Associated entities and nominated entities are also required to provide the VEC with copies of certain additional documents that they must prepare to comply with their obligations under other legislative schemes.

Political donation disclosure returns

A critical element of Victoria's political finance disclosure scheme is the disclosure return. Disclosure returns are required where a political donation is made during a financial year that is equal to, or in excess of, the disclosure threshold ($1,170 for 2023-24).[147] In those instances, both the donor and the recipient are required to provide the VEC with a disclosure

[146] Dr Yee-Fui Ng submission, p. 3.

[147] *Electoral Act 2002* (Vic), s. 216; VEC (n.d.), *Indexation*, https://www.vec.vic.gov.au/candidates-and-parties/political-donations/indexation, accessed 15 August 2023.

return containing the name and address of the donor, the title of the recipient, the amount of the political donation and the date on which the donation occurred. The disclosure return must be provided within 21 days of the donation being made (in the case of a donor) or received (in the case of a Donation Recipient).[148]

Further, it is the responsibility of the registered officer or agent of a Donation Recipient that receives a disclosable donation to notify the donor of their obligation to provide a return to the VEC.[149] Once the disclosure return is provided, the VEC is required to publish it on the Internet within seven days of receipt, subject to exceptions related to materially false or misleading particulars and confidential information.[150]

Aggregation rules for disclosure requirements

If a donor makes multiple donations to a Donation Recipient in a financial year, and the sum of those donations is equal to or exceeds the disclosure threshold, then the donor is required to submit a disclosure return for each of those donations.[151]

In its submission, the VEC noted that while there is a requirement for Donation Recipients to monitor the aggregate value of donations received from each donor, there is no requirement for the Donation Recipient to submit a disclosure return for donations beneath the disclosure threshold, regardless of the aggregate amount received from that donor. In that case, the requirement to submit a disclosure return rests solely with the donor.[152]

The *Electoral Act 2002* (Vic) provides an exemption for 'small contributions', which as at 2023-24 includes political donations that are equal to or under $58 in value. Small contributions are disregarded in determining whether the disclosure threshold has been exceeded in aggregate, unless those contributions are made with the intent of

[148] *Electoral Act 2002* (Vic), s. 216.
[149] *Electoral Act 2002* (Vic), s. 216(7).
[150] *Electoral Act 2002* (Vic), ss. 217 and 221A.
[151] *Electoral Act 2002* (Vic) s. 216(2).
[152] VEC submission Part 2 – Issues and recommendations, p. 15.

contravening the Act.[153] Recommended changes to the small contribution value and how it is indexed are discussed in Chapters 5 and 8.

Annual returns

The *Electoral Act 2002* (Vic) requires the registered officer or agent of a registered political party (RPP), nominated entity, associated entity or third party campaigner to submit an annual return for each financial year period. The annual return must be submitted to the VEC within 16 weeks after the end of each financial year and must include:[154]

- the total amount received by the Donation Recipient — the VEC requires this information to be broken down into the following categories:[155]
    - disclosed political donations
    - undisclosed political donations (and the number of donors)
    - amounts received other than political donations
- if the total amount received from a person or entity is equal to, or exceeds, the disclosure threshold, their name and address, the total amount received and whether the amount was a political donation or other receipt
- the total amount paid during that financial year
- the total outstanding amount of all debts
- if the outstanding debts owed to a particular person or entity are equal to or greater than the disclosure threshold, their name and address, the total amount of debt owed and whether the debt is owed to a financial institution.

For associated entities, third party campaigners and nominated entities, these reporting requirements only apply to the State campaign account (SCA). For example, a nominated entity's annual return might disclose no income and expenditure if no funds were paid into or spent from its SCA, even though other accounts may have been used for transactions.

[153] *Electoral Act 2002* (Vic), s. 216(8).
[154] *Electoral Act 2002* (Vic), ss. 217I – 217M.
[155] VEC (n.d.), *Annual returns*, https://www.vec.vic.gov.au/candidates-and-parties/annual-returns, accessed 31 October 2023.

In comparison, the reporting requirements apply to all of an RPP's accounts, although any amount that is a political donation made or received for Commonwealth electoral purposes and is not paid into the SCA is disregarded.

The registered agent of a candidate, group or Member of Parliament (MP) is only required to provide an annual return if the candidate, group or MP received political donations that were equal to or over the disclosure threshold in the financial year. The annual return for those persons is only required to provide particulars of the donors who made donations that reached the disclosure threshold.[156]

The annual return must be accompanied by the certificate of a registered company auditor (in the case of an RPP) or independent auditor (in the case of an associated entity, third party campaigner or nominated entity) confirming that they:[157]

- were given full access to the Donation Recipient's records that pertain to the annual return
- received any requested information from the Donation Recipient
- have no reason to believe that any matter stated in the annual return is not correct.

Audit certificate requirements do not apply to the annual return of a candidate, group or MP.

The VEC is required to publish all annual returns, and their accompanying audit certificates, on the Internet within six months of the end of the relevant financial year.[158]

Additional requirements for associated and nominated entities

Additional reporting requirements apply to associated and nominated entities. Their registered agent must provide a copy of the following to the VEC as soon as practicable after they have been prepared:[159]

[156] *Electoral Act 2002* (Vic), s. 217M.
[157] *Electoral Act 2002* (Vic), s. 209.
[158] *Electoral Act 2002* (Vic), s. 217P.
[159] *Electoral Act 2002* (Vic), s 217O.

- a loan, grant, or donation statement or general-purpose financial statement under the *Fair Work (Registered Organisation) Act 2009* (Cth)
- financial statements under the Associations Incorporation Reform Act 2012 (Vic)
- a financial report under the *Corporations Act 2001* (Cth).

The Explanatory Memorandum for the Electoral Legislation Amendment Bill explained that:[160]

> *This additional requirement acknowledges the close relationship that associated entities and nominated entities have with political parties, and assists the Commission in monitoring compliance with the scheme.*

4.2 Objectives and impacts of disclosure and reporting

The Panel acknowledged the critical role disclosure and reporting plays in maintaining the transparency and accountability of political finance laws. Necessary to the principle of responsible government, electors have the right to know which individuals, companies or corporations are donating significant amounts to particular Donation Recipients. These objectives must be balanced with the rights of Victorians, including:[161]

- the freedom of association
- the freedom of expression
- the freedom from arbitrary or unlawful interference with privacy
- the freedom of thought, conscience, religion and belief
- the right to take part in public affairs.

The Panel heard during consultation that the disclosure and reporting scheme may have a material impact on those rights.

[160] Electoral Legislation Amendment Bill 2018 Explanatory Memorandum, p. 39.
[161] *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Impacts on privacy of individuals

The requirement to identify those who donate over the disclosure threshold, operating in tandem with donation caps, reduces the risk of undue influence through political donations. However, some stakeholders have raised that this requirement has discouraged donors from making political donations, due to the consequences of having their names published.

For example, the Liberal Party of Australia (Victorian Division) discussed in its submission how the lower donation disclosure threshold, introduced by the 2018 amendments, has negatively impacted political donations from individuals: [162]

> *The Liberal Party notes that … the introduction of the lower donation disclosure threshold in Victorian politics has resulted in a significant number of donors receiving intimidatory pressure not to contribute to the Liberal Party.*

The National Party of Australia – Victoria stated in its submission:[163]

> *Without a doubt, the 2018 changes have discouraged participants in the electoral process. Examples cited by potential donors include: …*
>
> - *Fear that public disclosure of any donation would lead to them or their business being targeted by other candidates or parties, or by the government of the day.*

As the disclosure threshold resets each financial year, those who wish to donate to a Donation Recipient and retain their anonymity can do so by spreading their donations across the election period (four years).

Annual returns from the four financial years between 2018-19 and 2021-22 indicate that a majority of political donations are under the disclosure threshold. The Panel examined annual returns submitted by the four RPPs that have the most MPs in the current Parliament (Table 4.1).

[162] Liberal Party of Australia (Victoria Division) submission, p. 10.
[163] National Party of Australia – Victoria submission, pp. 2-3.

Table 4.1: Disclosed and undisclosed donations received during 2018-19 to 2021-22

Recipient Name	Disclosed donations ($)	Undisclosed donations ($)	No. disclosed donations	Total no. of undisclosed donors[(a)]
Australian Labor Party – Victorian Branch	510,784	292,865	214	2,653
Liberal Party of Australia (Victorian Division)	411,281	2,430,055	105	5,457
National Party of Australia – Victoria	35,540	136,393	21	526
The Australian Greens Victoria	23,840	82,898	12	318
Total	981,445	2,942,211	352	8,954

Note: (a) Calculated by adding the total number of undisclosed donors reported for each financial year.
Source: Panel analysis of published annual returns, available at VEC (n.d.), *Public Annual Returns*, https://disclosures.vec.vic.gov.au/public-annual-returns/, accessed 12 October 2023.

Table 4.1 shows that a large number of donors donate amounts under the disclosure threshold. Further, with the exception of the Australian Labor Party – Victorian Branch, the largest RPPs in Victoria are accepting significantly larger sums of undisclosed donations than disclosed donations. The Panel considered requiring a disclosure return for donations equal to or above $1,170 (threshold for 2023-24) to be a low-impost measure on political participation.

The Panel noted that there are also provisions in the *Electoral Act 2002* (Vic) to protect the personal information of 'silent electors'. Those rules were raised in several submissions and are discussed further below.

Administrative burden and impact on participation

Some stakeholders raised concerns that the administrative burden of complying with disclosure and reporting obligations was leading to individuals and organisations limiting their public participation. For example, the National Party of Australia – Victoria stated that some potential donors were unwilling to complete the additional paperwork to ensure compliance.[164]

[164] National Party of Australia – Victoria submission, pp. 2-3.

Disclosure and reporting requirements may disproportionately affect small community groups and new independent candidates, as:

- larger Donation Recipients have an economy of scale that enables them to navigate the requirements more easily
- independent candidates, associated entities and third party campaigners do not have access to administrative expenditure funding or policy development funding to reimburse them for their compliance costs.

The Panel sought to address these concerns through recommendations that would:

- allow the establishment of 'single electorate RPPs' (Chapter 3)
- provide associated entities and third party campaigners with the option to not maintain an SCA (Chapter 3)
- update eligibility requirements for some forms of funding (Chapter 6).

The Panel considered that the burden created by disclosure and reporting requirements was appropriate compared to the benefits provided — minimising the risk of undue influence and enhancing the transparency of political finance as it relates to elections.

4.3 Options for reforming disclosure and reporting requirements

During consultation, stakeholders suggested several amendments to the disclosure and reporting scheme. The Panel assessed those suggestions against the objectives of Victoria's political finance laws and relevant principles.

Donation disclosure threshold amount

During the Panel's consultation, there was limited discussion regarding whether the disclosure threshold should be adjusted.

In effect, the disclosure threshold functions as a ban on significant anonymous donations and as a measure to ensure compliance with the donation cap.

The disclosure threshold currently sits at $1,170 for the 2023-24 financial year. The lower the disclosure threshold, the more discouraged donors may be to donate, particularly those who wish to retain privacy.

Donors are able to donate up to the threshold without disclosing their identity.

Victoria's threshold for disclosing the details of political donations is broadly similar to that of New South Wales, Queensland and the Australian Capital Territory, which each use a fixed $1,000 threshold (Table 4.2). The JSCEM Interim Report recommended reducing the Commonwealth's disclosure threshold to $1,000.[165] Proposed legislative reforms in Western Australia would reduce their disclosure threshold to $1,000 as well.[166]

Table 4.2: Donation disclosure thresholds, jurisdictional comparison, as of 1 July 2023

Jurisdiction	Donation disclosure threshold ($)
Victoria	1,170
Commonwealth	16,300
New South Wales	1,000
Queensland	1,000
Western Australia	2,600
South Australia	6,299
Tasmania	N/A
Northern Territory	1,500 for RPPs, associated entities and third party campaigners, 200 for candidates[(a)]
Australian Capital Territory	1,000

Sources: AEC (2023), *Disclosure threshold*, https://www.aec.gov.au/parties_and_representatives/public_funding/threshold.htm, last updated 22 June 2023; *Electoral Act 2002* (NT), s. 192D; Electoral Commission of South Australia (n.d.), *Indexed amounts*, https://www.ecsa.sa.gov.au/parties-and-candidates/funding-and-disclosure-state-elections/indexed-amounts, accessed 14 October 2023; JSCEM Interim Report, p. 6; VEC submission, Part 1 – Background, pp. 32-62.

[165] JSCEM Interim Report, p. 65.

[166] Parliament of Western Australia, *Electoral Amendment (Finance and Other Matters) Bill 2023 Explanatory Memorandum*, p. 4.

The Panel considered the existing threshold draws an appropriate balance between relevant objectives and principles, and is sufficiently high to still allow those who wish to remain anonymous with an opportunity to participate in the electoral process.

Disclosure of aggregated donations

As explained above, there is currently no requirement for a Donation Recipient to submit a disclosure return for a donation which, on its own, is under the disclosure threshold but when aggregated brings the donor's total donations sum up to or over the disclosure threshold. However, the Donation Recipient is required to track these donations, include them in their annual return and notify the donor that they are required to submit a disclosure return for that, and any subsequent, donation.

The VEC stated in its submission that:[167]

> *This results in a mismatch between the disclosure requirements of donors and recipients, where donors are bound by more onerous obligations. … Since recipients already have to monitor donations in aggregate, the additional administration burden of disclosing these would be minimal. … Alignment of the disclosure requirements between donors and recipients would make Victoria's funding and disclosure system simpler to administer, and far more likely to be understood by donors, recipients and members of the public.*

The Panel agreed with the VEC that a Donation Recipient should be required to submit a disclosure return for the first, and any subsequent, donation that results in the sum a single donor's political donations reaching or exceeding the disclosure threshold.

Recommendation 4.1: Amend the *Electoral Act 2002* (Vic) to provide that the relevant representative of a Donation Recipient must submit a disclosure return for the first, and any subsequent, donation that results in the sum of a single donor's political donations to that Donation Recipient reaching or exceeding the disclosure threshold.

[167] VEC submission Part 2 – Issues and recommendations, p. 15.

Time period for donation disclosure

A donation is required to be disclosed within 21 days. Following receipt of the disclosure, the VEC has seven days to publish the disclosure return on the Internet. Although a donation disclosure could take up to 28 days to be made public, the Victorian disclosure period has been referred to as 'real-time' reporting.[168]

Victoria has a relatively short reporting timeframe compared to other jurisdictions, although Queensland's is even more stringent with a seven-business-day disclosure requirement. However, several jurisdictions provide shorter reporting timeframes before and during an election period, recognising that disclosure becomes more important as elections approach. For example:[169]

- in Queensland the usual seven-business-day disclosure requirement drops to 24 hours within one week of the election[170]
- South Australia requires weekly disclosure reports starting from February in an election year.

In Victoria, a donation made 27 days before election day could potentially not be made public until after the election occurs, which may prevent electors from casting an informed vote.

IBAC recommended in its Donations and Lobbying Report that Victoria's disclosure scheme should more closely resemble 'real-time' reporting, with reference to the Queensland approach.[171]

The Centre for Public Integrity stated in its submission:[172]

> *In our view, however, 21 days is substantially longer than is ideally required to promote transparency and accountability, and it would be preferable to adopt the standard set by Queensland …*

[168] Victoria, *Parliamentary Debates*, Legislative Assembly, 10 May 2018, p. 1351.
[169] Parliamentary Library (2022), *Research Paper Series, 2022-23, Election funding and disclosure in Australian jurisdictions: a quick guide.*
[170] *Electoral Regulation 2013* (Qld), regs. 8A-10A.
[171] Donations and Lobbying Report, p. 8.
[172] The Centre for Public Integrity submission, pp. 7 and 16.

There should be a requirement for real time disclosure as soon as is practicable by all entities incurring electoral expenditure. This allows the electorate to be informed about the sources and amounts of electoral expenditure.

However, some stakeholders opposed reporting timeframes being reduced:

- the National Party of Australia – Victoria stated that they 'consider that the current timelines are adequate and that any reduction would significantly increase compliance activities for no obvious benefit'[173]
- the Liberal Party of Australia (Victorian Division) stated that 'further reductions to reporting and transparency timelines or lowering the disclosure threshold would be counterproductive as these measures would unnecessarily increase compliance burdens without delivering a meaningful benefit in terms of the transparency achieved under the scheme.'[174]

The Panel considered that existing timeframes for donation disclosure returns remained appropriate and did not require amendment at this stage.

The shorter the disclosure period, the more administratively burdensome processing the disclosure is for Donation Recipients. The Panel acknowledged that there is some opportunity to reduce that period but also noted that Victoria's disclosure requirements are already quite stringent. It is difficult to quantify the administrative burden that would result from a shortening of the period, particularly for new entrants and independents who largely process their own administration.

While some jurisdictions have shortened disclosure timeframes prior to an election, the Panel considered that providing a consistent disclosure timeframe for all periods would be simpler for Donation Recipients and donors, reducing the risk of confusion and supporting compliance with political finance laws.

[173] National Party of Australia – Victoria submission, p. 2.
[174] Liberal Party of Australia (Victorian Division) submission, p. 10.

Existing reporting timeframes mean that a political donation might not be disclosed until after the relevant election occurs. However, the low value of Victoria's general cap makes it unlikely that a donation would exert influence over a Donation Recipient, reducing the risk of a delay in disclosure preventing electors from making informed decisions when voting.

Loan disclosure

Currently, limited disclosure rules apply to loans under Victoria's political finance laws. In their annual returns, RPPs are required to disclose details of amounts received from any person or entity, or of outstanding debts owed to any person or entity, if the relevant amount is equal to or over the disclosure threshold. Nominated entities, associated entities and third party campaigners must disclose that information in their annual returns as well, but only in relation to their SCA. However:

- Donation Recipients that receive a loan over the disclosure threshold are not required to submit a disclosure return
- MPs, groups and candidates are not required to disclose loans or debts in their annual returns
- the terms and conditions of the loan are not disclosed.

As discussed in Chapter 3, separate disclosure requirements may apply to uncharged interest on a loan, if it constitutes a political donation.

The VEC expressed concern that existing disclosure requirements for loans are insufficient and present an integrity risk, stating in its submission that:[175]

> *The VEC considers it a possibility and a potential risk that people are donating an unlimited amount anonymously to a political party or candidate through loans. …*
>
> *.. it is possible that loans are being made in contravention of other requirements of Part 12. For instance, it is possible that loans made by foreign donors are being accepted by Victorian political participants anonymously and for an unlimited amount. Since*

[175] VEC submission Part 2 – Issues and recommendations, p. 8.

foreign donations are banned in Part 12, this would provide the ability to contravene the Electoral Act against its intentions.

The VEC suggested that a donor might seek to make a secret donation over the disclosure threshold by disguising it as a loan, for example where a lender has no intention of being paid back by the recipient. While these acts may be caught by the anti-circumvention provision (s. 218B of the *Electoral Act 2002* (Vic), discussed below), the VEC stated that without appropriate reporting obligations for loans, it has limited ability to identify such activities.[176]

The VEC noted that all other Australian jurisdictions other than Western Australia and Tasmania require loans over the relevant threshold to be disclosed. For example, New South Wales:

- requires the disclosure of loans, including the amount, name and address of the party providing the loan, its terms and conditions and total repayments made during the disclosure period[177]
- prohibits loans, other than a loans from a financial institution, unless the recipient records certain information (e.g. name and address of person making the loan)[178]
- prohibits loans from sources that are prohibited from making political donations (unless they are a financial institution).[179]

The VEC recommended several amendments to the *Electoral Act 2002* (Vic) to address the potential risks it identified, which in summary include:[180]

- if a political donation from a particular source is prohibited (see Chapter 5), also prohibiting loans from that source
- requiring disclosure returns for loans over a given threshold, including details of the loan (e.g. terms, interest rate and repayment schedule)
- banning anonymous loans and requiring the name and address of the entity providing the loan to be recorded by the Donation Recipient

[176] VEC submission Part 2 – Issues and recommendations, p. 8.
[177] *Electoral Funding Act 2018* (NSW), s. 19(6).
[178] *Electoral Funding Act 2018* (NSW), s. 50.
[179] *Electoral Funding Act 2018* (NSW), s. 54.
[180] VEC submission Part 2 – Issues and recommendations, p. 9.

- requiring details of new, active and closed loans to be provided in annual returns.

The Panel acknowledged the importance of significant loans being disclosed to mitigate the potential risk of loans being used to circumvent political finance laws. The Panel considered that all Donation Recipients, including MPs, candidates and groups, should be required to disclose loans that are equal to or over the disclosure threshold. The terms and conditions of those loans should also be disclosed, to shed light on whether a political donation is being made by way of uncharged interest (Chapter 3). Further, loans should be disclosed if they were in place at any time during the relevant year, even if the debt was no longer outstanding at the end of the year.

However, the Panel did not consider that loans need to be disclosed in 'real-time', because:

- requiring 'real-time' disclosure of loans would increase the administrative burden placed on Donation Recipients
- the need for loans being disclosed in 'real-time' is lower than for political donations, as loans generally pose a lower risk (particularly if they are on arms-length terms)
- transparency would be achieved through the disclosure of loans in annual returns.

Recommendation 4.2: Amend the *Electoral Act 2002* (Vic) to require each Donation Recipient's annual return to disclose the details of loans equal to or over the disclosure threshold received during the year, including:

- the value of the loan
- the details of the lender
- the loan's terms and conditions.

Donation splitting or use of intermediaries

IBAC identified in its Donations and Lobbying Report that there is a risk that a donor could attempt to circumvent Victoria's political finance laws

using the practice of donation-splitting or making a donation through an intermediary.[181]

Examples of how this could occur are provided in the New South Wales Independent Commission Against Corruption's (ICAC) reports on Operation Aero, delivered in 2022, and Operation Spicer, delivered in 2016.

Operation Aero concerned an alleged unlawful scheme by the New South Wales Branch of the Australian Labor Party to obscure the size and source of a $100,000 cash donation, by making it appear that the donation came from a number of different donors.[182]

Operation Spicer involved a scheme for political donations to the New South Wales Liberal Party to be channelled through the Free Enterprise Foundation trust, so as to disguise the identity of the true donors.[183]

The risk of donors attempting to circumvent limits and prohibitions using intermediaries was also raised during parliamentary debate on the Electoral Legislation Amendment Bill.[184]

IBAC noted that Victoria's donation cap and declaration threshold already address, to some extent, the risk of donation splitting.[185] In addition, the Panel noted that the identified risks might already be partially addressed, as:

- it is an offence for a person to enter into or carry out a scheme with the intention of circumventing a prohibition or requirement under Part 12 of the *Electoral Act 2002* (Vic)[186]
- if an intermediary were to receive gifts for the purpose of making political donations, that could lead to them being considered a third party campaigner, with all the associated obligations, requirements and limits — although, as discussed below, this may have unintended effects.[187]

[181] Donations and Lobbying Report, pp. 18-19.
[182] ICAC (2022), *Investigation into political donations facilitated by Chinese Friends of Labor in 2015*.
[183] ICAC (2016), *Investigation into NSW Liberal Party electoral funding for the 2011 State election campaign and other matters*.
[184] Victoria, *Parliamentary Debates*, Legislative Council, 22 June 2018, p. 3026.
[185] Donations and Lobbying Report, p. 18.
[186] *Electoral Act 2002* (Vic), s. 218B.
[187] See discussion of the terms third party campaigner and political donation in Chapter 3.

IBAC noted additional measures in place in Queensland and New South Wales:

- Queensland requires donors to disclose the original source of a loan or political donation over the relevant disclosure threshold[188]
- Queensland's legislation clarifies that for the purpose of determining who made and received a gift or loan, intermediaries are to be disregarded[189]
- New South Wales requires donors to disclose particulars of any related corporation that has made a political donation to the same Donation Recipient in that financial year.[190]

IBAC recommended that the Victorian Government consider introducing similar measures (Box 4.1).

Box 4.1: Recommendations in Donations and Lobbying Report to address risk of donation splitting and use of intermediaries

Recommendation 1

IBAC recommends that the government review the existing regulatory regime for political donations to improve transparency and accountability at both the state and local levels of government through legislative reforms that: ...

(b) deter donors from attempting to split donations, and detect schemes designed to circumvent the general cap at the state and local level, using measures that include, but are not limited to, requiring that:

i) donor entities declare:
- the entity's Australian Business Number (ABN)
- the entity's registered address
- the names and addresses of executive committee members
- whether any donations have been made by other associated or related entities

ii) individual donors declare if the funds or resources being donated have been provided to the donor by a third-party for the purpose of making a donation (with reference to the Queensland provisions)

Source: Donations and Lobbying Report, p. 8.

The VEC raised another concern about how intermediates are treated under existing rules. It explained in its submission that an unintended

[188] *Electoral Act 1992* (Qld), s. 205B.
[189] *Electoral Act 1992* (Qld), s. 205A.
[190] *Electoral Funding Act 2018* (NSW), s. 34(6); *Electoral Funding Regulation 2018* (NSW), reg. 8.

effect of Victoria's laws is that organisations such as banks and fundraising platforms, which act as an intermediary for fund transfers, may be caught by the definition of third party campaigner. That does not appear to be the Parliament's intention. The VEC suggested that Victoria adopt Queensland's provisions, explained above, which clarify how intermediaries should be treated.[191]

The Panel agreed that reforms are required to:

- reduce the risk of Victoria's political finance laws being circumvented
- clarify that banks and fundraising platforms are not captured by the definition of third party campaigners solely because they receive funds on behalf of a Donation Recipient.

The Panel considered that adopting Queensland's provisions would adequately address the risks and concerns identified by IBAC and the VEC.

Although IBAC also proposed requiring donors to disclose additional information about themselves and related entities, the Panel's view was that its proposed changes would be sufficient and further reporting requirements would be an unnecessary administrative burden.

Recommendation 4.3: Insert provisions into the *Electoral Act 2002* (Vic) that:

- provide that a person or entity only makes or receives a gift (or loan) if they are the source or ultimate recipient of the gift or loan, modelled on s. 205A of the *Electoral Act 1992* (Qld)
- require intermediaries that make political donations or loans to a Donation Recipient to disclose the source of the gift or loan, including relevant particulars, modelled on s. 205B of the *Electoral Act 1992* (Qld).

Requirement for donors to make disclosure returns

Some stakeholders questioned the necessity of both the donor and the recipient submitting a disclosure return for the same donation. The Panel heard that there have been cases where this double disclosure process

[191] VEC submission Part 2 – Issues and recommendations, pp. 19-21.

has led to a false duplication of a donation which must be manually resolved. The Australian Greens Victoria submission noted:[192]

> *The reconciliation that occurs between party disclosure and donor disclosure is an important check and balance in the system. However, given the laws encourage smaller donations from individuals it is incumbent upon us to make the process of disclosure as easy as possible. For example, where a donation has been disclosed by the recipient and a donor is simply being asked by the VEC to verify the disclosure, it is unclear what purpose is served by requiring the donor to create an online account (a process that some donors find difficult and confusing).*

Simon Holmes à Court, Convenor of Climate 200, provided an example at a public forum of an instance where he provided his postcode when making a disclosure return but the recipient did not include that information in their disclosure return. As a result, the VEC disclosure return portal treated that as two separate donations and sent emails erroneously stating that the donation cap had been breached. Mr Holmes à Court suggested that one possible solution to that issue is to put the initial onus to make a disclosure return fall on only either the donor or the recipient, with the other party then required to confirm the information provided.[193]

Queensland has similar double disclosure requirements for donors who make political donations that exceed $1,000. Donors are required to submit a disclosure form through the online Electronic Disclosure System which requires registration to access.[194]

In comparison, New South Wales has less onerous disclosure requirements for donors than for recipients. Entities or persons who make a political donation of $1,000 or more in a financial year (referred to as major political donors) are required to make a single, annual disclosure, rather than lodging multiple disclosure returns. Annual disclosures must

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[192] Australian Greens Victoria submission, p. 5.

[193] Transcript of Electoral Review Expert Panel public forum held on 19 July 2023, 10 am to 12 pm.

[194] Electoral Commission of Queensland (n.d.), *Fact sheet 10: Information for donors to Queensland State elections,* https://www.ecq.qld.gov.au/__data/assets/pdf_file/0024/12786/Fact-sheet-10-Information-for-donors-to-Queensland-State-elections.pdf, accessed 28 August 2023.

be lodged with the New South Wales Electoral Commission within six weeks of the end of the annual disclosure period.[195]

Climate 200 stated that overall, they found Victoria's disclosure system to be more user friendly and simpler than that in New South Wales, and explained that the system in New South Wales effectively requires donors and recipients to reconcile donations a long time after the relevant event occurs.[196]

In its submission, the VEC suggested that disclosure by donors could instead be enhanced if recipients were required to provide those donors with more information about their disclosure obligations. Currently, the *Electoral Act 2002* (Vic) requires Donation Recipients that receive disclosable political donations to notify the donor of their disclosure requirement, but does not specify how or in what form that notification should occur.[197]

The VEC recommended that Donation Recipients should be required to:[198]

- outline the recipient and donor's respective obligations as part of the process of soliciting donations
- notify donors individually and in writing of the need to disclose the donation when the donation is made
- identify and advise donors of the individual donation amount and any aggregated amounts from the donor within the relevant financial year and election period, for example using a receipt issued to the donor
- provide copies of receipts to the VEC, in a form to be determined by the VEC.

In New South Wales, it is unlawful for a person to accept a reportable political donation unless they provide a receipt to the donor which outlines their disclosure obligations.[199] Queensland also requires Donation Recipients to provide the donor with a receipt with relevant particulars and information.[200]

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[195] *Electoral Funding Act 2018* (NSW), ss. 12-22.
[196] Transcript of Electoral Review Expert Panel public forum held on 19 July 2023, 10 am to 12 pm.
[197] *Electoral Act 2002* (Vic), s. 216(7).
[198] VEC submission Part 2 – Issues and recommendations, p. 61.
[199] *Electoral Funding Act 2018* (NSW), s. 45(1); *Electoral Funding Regulation 2018* (NSW), reg. 30.
[200] *Electoral Act 2002* (Qld), s. 258.

The Panel considered that the requirement for both donors and recipients to lodge disclosure returns is an important mechanism for boosting compliance. If the obligation fell only on donors or recipients, a donation may fail to be disclosed through an inadvertent mistake or misunderstanding of obligations. The making of accurate and timely disclosure returns is pivotal to ensuring donations are transparent and the VEC has the information it needs to perform its regulatory functions.

However, the Panel acknowledged that the requirement for both donors and recipients to lodge disclosure returns is currently creating administrative issues. The Panel encourages the VEC to look at updates to its processes and online disclosure portal to resolve those issues.

The Panel considered that including specific requirements in the *Electoral Act 2002* (Vic) about the manner and form in which Donation Recipients are required to provide information to donors and the VEC would be overly prescriptive. As updating legislation is ordinarily a time-intensive process, it is preferable that the Act does not include technical details that may frequently become obsolete and need to be updated, for example due to technological advancements. Instead, it would be preferable for the VEC to provide guidance materials and templates to Donation Recipients to help them adopt best practices.

Donation Portal

To aid compliance and minimise administrative burden, Professor Twomey suggested a donation portal operated by the VEC through which all donations were received:[201]

> *One way of avoiding these problems for political parties and candidates would be to create a central portal, administered by the Electoral Commission or another government agency, for all political donations above the disclosure amount. To donate, donors would need to register, providing appropriate identification information. Once registered, they could easily make donations through the portal to whichever political party or candidate the donor chose, and the money would then be transferred directly to*

[201] Professor Emerita Anne Twomey submission, p. 4.

> *the relevant campaign account through the portal. The portal would automatically identify when a donation limit had been reached by the donor, rejecting additional donations until the relevant donation period had expired. Donation details could be reported, consistently, on a real-time basis.*
>
> *Such an approach would have the advantages of: (a) efficiency; (b) reduced cost and administrative burdens on political parties – saving the need for additional public funding; (c) greater accuracy and capacity to enforce caps; and (d) greater transparency and the capacity to provide real-time donation information to the public.*

Victorian Trades Hall Council also recommended the VEC act as a donation intermediary:[202]

> *[Victorian Trades Hall Council] has long advocated for reforms that would prevent political parties and [third party campaigners] from accepting direct donations. Rather, donations should be made through the VEC and then distributed as directed by the donor from there. The VEC establishing a central hub for political donations would ensure that any donation to any political party or [third party campaigners] would be visible to the regulator in real time and therefore in compliance with electoral laws.*

The Panel understood that such a donations-portal model does not exist in any Australian jurisdiction. However, New Zealand has implemented a similar mechanism, albeit for limited kinds of donations. If a donor wishes to make an anonymous donation of more than $1,500 to a party, they can make a 'donation protected from disclosure'. A 'donation protected from disclosure' involves paying money directly to the New Zealand Electoral Commission who then pays it to the party in regular payments. The donor is prohibited from indicating to anyone that they have made a 'donation protected from disclosure'.[203]

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[202] Victorian Trades Hall Council submission, p. 6.

[203] Electoral Commission New Zealand. (n.d.) *How to Donate,* https://elections.nz/guidance-and-rules/donations-and-loans/how-to-donate/, accessed 28 August 2023.

The donation portal suggested by Professor Twomey and the Victorian Trades Hall Council would accept all donations, not just anonymous donations. The suggestion was discussed in a public forum with representatives of the VEC, who noted that the creation of such a portal would come with significant governance and administrative overheads, and would be a significant policy change and new role for the VEC.[204]

While the Panel considered the proposed donation portal may have merit, it has not recommended its implementation as part of this Report. While a donation portal might provide ease of disclosure and reduce the administrative burden for Donation Recipients, nonetheless its design, establishment, operation and maintenance would require significant additional resources.

Further, given the Panel's recommendation to include fundraising tickets as political donations, the donation portal would presumably also need to host and distribute tickets to Donation Recipient fundraising events. If not, parties would be required to process the monies raised from fundraising events and submit this through the portal with the donors' details.

A donation portal may also introduce additional cyber security risks to the political finance system. However, the Panel recommended that a donation portal is worthy of further consideration.

Recommendation 4.4: That the Victorian Government further examine the proposal to introduce a donation portal administered by the VEC.

Silent electors and confidentiality of addresses

A silent elector is a person whose address does not appear on the electoral roll because doing so would place their personal safety or that of their family at risk.[205]

Part 12 of the *Electoral Act 2002* (Vic) requires the VEC to publish information about individuals providing funds, for example political donations, to Donation Recipients.

[204] Transcript of Electoral Review Expert Panel public forum held on 21 July 2023, 2 pm to 4 pm.
[205] *Electoral Act 2002* (Vic), s. 31.

Section 221A of the *Electoral Act 2002* (Vic) states that the following is confidential information for the purposes of Part 12 of the Act, which the Commission must not, directly or indirectly, disclose unless required by law: [206]

- street address of a donor (but not the suburb and State)
- address of a silent elector (including suburb and State).

Further, the *Electoral Regulations 2022* (Vic) prescribe the street address of all natural persons who are not silent electors (not just of donors) to be confidential information.[207]

The Australian Labor Party – Victorian Branch's submission noted that there had been instances where the personal details of individuals, for example persons who paid a levy to an RPP, had been inappropriately disclosed in annual returns.[208] The Panel understood that updates to the *Electoral Regulations 2022* (Vic) had rectified that issue. While the submission recommended that s. 221A of the *Electoral Act 2002* (Vic) is amended to explicitly ensure the private information of levy payers is protected, the Panel considered no further changes are required at this stage as the Victorian Government has already addressed the identified issue.

The VEC also recommended a change to s. 221A in their submission, concerning retrospective redaction of silent electors' information:[209]

> *... the VEC has concerns around retrospective redaction when a person becomes a silent elector. The VEC has taken the position that 'disclosure' under section 221A is ongoing and the removal of newly confidential information (by redaction) is necessary if a person becomes a silent elector. However, this position is not enshrined in the legislation and is not an expressly permitted reason for which the VEC can amend a statement, donation return or financial year annual return under section 221(1) ...*

[206] *Electoral Act 2002* (Vic), s. 221A.
[207] *Electoral Regulations 2022* (Vic), reg. 57.
[208] Australian Labor Party – Victorian Branch submission, p. 12.
[209] VEC submission Part 2 – Issues and recommendations, p. 57.

The VEC would prefer that the implied duty to redact newly confidential information in documents that have already been published be an expressly legislated requirement.

The VEC noted in its submission that it may be unable to identify whether an individual that makes a disclosure return is a silent elector, for example as multiple people may have the same name. The VEC recommended that donation returns for persons include the donor's date of birth, to support the VEC with matching information on the electoral roll and identifying silent electors.

The Panel agreed that the VEC should be required to redact already published returns and disclosures when someone becomes a silent elector, to remove confidential information. However, to ensure that the VEC is made aware when a person becomes a silent elector, silent electors should be required to notify the VEC of their change in status before that obligation arises.

The Panel did not agree with the VEC's suggestion that all donation returns by persons include the donor's date of birth. That would involve an unnecessary capture of personal information for all donors, and there would be a risk of that personal data being disseminated and misused if a data breach occurred. Instead, the VEC's portal should require users to notify the VEC if documents lodged include the personal details of silent electors.

Recommendation 4.5 Amend the *Electoral Act 2002* (Vic) to state that, if the VEC is notified that a person has become a silent elector, the VEC is required to remove or redact confidential information of that person from documents and disclosures that have already been published.

The VEC should update its online portal to require users to notify it if documents lodged include the personal details of silent electors.

Information required in annual returns

In their annual returns, RPPs are required to report information for all of their accounts, not just for their SCA. In comparison, third party campaigners, associated entities and nominated entities are only

required to report on transactions from their SCA. This difference was legislated to recognise that entities other than RPPs should only be required to report on transactions related to political donations and activities related to Victorian State elections.[210]

However, as a result of Victoria's disclosure rules, the VEC and the public receive no information on:

- the amount of money paid into and out of an RPP's SCA
- an RPP's political expenditure.

The difficulty in ascertaining an RPP's political expenditure was discussed by The Centre for Public Integrity in their submission:[211]

> *It is impossible to estimate electoral expenditure in Victoria for political parties and their endorsed candidates, because no useful data are publicly available. While total expenditure is disclosed by parties and candidates in their annual returns, no distinction is made between electoral expenditure and other kinds of expenditure; in addition, data relating to the 2022 election does not need to be disclosed until 20 October 2023.*

The Panel recommended in Chapter 3 that restrictions are placed on the funds that may be paid in to an RPP's SCA. Clearer reporting on RPP SCAs in annual returns is required so that the VEC can oversee those rules.

In addition, clarity of the amount of political expenditure would enable the VEC to monitor Donation Recipient spending and broader political finance trends more accurately.

A future review of Victoria's political finance laws, as recommended in Chapter 2, would also benefit from improved reporting arrangements.

The Panel considered the lack of visibility of political expenditure to have adverse impacts on transparency. The Panel considered that, as part of their annual return, RPPs should be required to include (in addition to existing requirements):

[210] Electoral Legislation Amendment Bill 2018 Explanatory Memorandum, p. 39.
[211] The Centre for Public Integrity submission, p. 8.

- information on funds paid into the SCA (including source and nature of those funds, subject to relevant thresholds) and out of the SCA
- the total sum of political expenditure for the year.

Recommendation 4.6: Amend the *Electoral Act 2002* (Vic) to require RPPs to submit, as part of their annual return (in addition to existing requirements):

- information on funds paid into the SCA (including source and nature of those funds, subject to relevant thresholds) and out of the SCA
- the total sum of political expenditure for the year.

Purpose of donations and interjurisdictional issues

As discussed in Chapter 2, Victoria's political donation laws need to be designed to not interfere with the elections of other jurisdictions, including the Commonwealth.

However, IBAC noted in its Donations and Lobbying Report that inconsistencies in political finance laws across Australian jurisdictions create risks or potential opportunities for the circumvention of Victoria's laws. IBAC referred to ICAC's Operation Spicer as a relevant example — political donations from donors prohibited under New South Wales's legislation were initially instead made to an organisation regulated under Commonwealth law, and were not disclosed as they fell under the Commonwealth's disclosure threshold.[212]

IBAC recommended that the Government examine steps that can be taken to ensure donations from entities registered in other jurisdictions that are received by political parties registered in Victoria comply with the *Electoral Act 2002* (Vic).[213]

The Commonwealth Parliament's JSCEM examined potential risks due to interjurisdictional inconsistencies as part of a 2020 advisory report on proposed legislative amendments. The JSCEM heard during its consultation that:[214]

[212] Donations and Lobbying Report, pp. 27-28.
[213] Donations and Lobbying Report, p. 10.
[214] JSCEM (2020), *Advisory report on the Electoral Legislation Amendment (Miscellaneous Measures) Bill 2020*, pp. 17-18.

- in practice, it may be difficult to ascertain the purpose of some donations — a donation may be given without any conditions attached and assigned a purpose by the recipient later on
- due to the fungibility of money, contributions for a Commonwealth purpose could free up funds for State purposes, resulting in them indirectly supporting state election campaigns.

Part 12 of the *Electoral Act 2002* (Vic) seeks to ensure that political donations for Commonwealth electoral purposes are exempted from Victoria's laws and quarantined so that they cannot influence Victoria's elections:

- the definition of 'gift' for the purposes of that Part excludes a gift made for Commonwealth electoral purposes that is not paid into the SCA[215]
- registered officers and agents must ensure that any amount kept for Commonwealth electoral purposes is not paid into the SCA[216] (meaning that it cannot be used for political expenditure)
- disclosure return and annual return reporting requirements and the political donation cap (Chapter 5) do not apply to donations made or received for Commonwealth electoral purposes that are not paid into an SCA.[217]

However, the VEC stated in its submission that 'there is insufficient clarity and no suitable framework for determining the purpose of a political donation' and that:[218]

> *It is also unclear whether it is the intention of the donation or the way it is used by the recipient that determines whether the amount is 'for' Commonwealth electoral purposes or not, or whether that intention or use can legitimately change.*

Lack of clarity of the purpose of a donation also makes it more difficult to determine whether a gift given to a third party campaigner or associated entity is a political donation for the purposes of Victoria's political finance laws.

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[215] *Electoral Act 2002* (Vic), s. 206.
[216] *Electoral Act 2002* (Vic), s. 207F(3).
[217] *Electoral Act 2002* (Vic), ss. 216(9), 217D(4) and 217I-217M .
[218] VEC submission Part 2 – Issues and recommendations, p. 64.

The VEC recommended that donors and recipients be required to specify if a political donation is to be used for State or Commonwealth purposes, and if it is to be used for political expenditure.[219]

Based on the information received, the Panel considered that Victoria's existing laws in relation to this topic are appropriate and changes are not required at this stage. Donors may not mind how a Donation Recipient uses a donation. In such instances, Donation Recipients should be free to determine how donated funds will be spent.

To be spent on political expenditure, donations must be paid into the Donation Recipient's SCA, meaning that they will be captured by disclosure requirements. That guarantees that donations are made transparent and should ensure other regulatory regimes cannot be used to circumvent Victoria's political finance laws.

Auditing requirements and certificates

As discussed in Chapter 6, the *Electoral Act 2002* (Vic) requires audit certificates to be provided to the VEC for several funding-related documents, as well as for annual returns.

The VEC made several recommendations concerning auditing requirements and certificates.[220]

The Panel considered each of those proposed changes and made a recommendation below on changes that it considered appropriate.

Auditing of annual returns of candidates, groups and MPs

The *Electoral Act 2002* (Vic) currently does not require candidates, groups and MPs to submit an audit certificate along with their annual return.

The VEC suggested in its submission that auditing of those annual returns may be warranted in some cases, for example where a high profile candidate attracts a significant number of donations and has a complex annual return.[221]

[219] VEC submission Part 2 – Issues and recommendations, p. 64.
[220] VEC submission Part 2 – Issues and recommendations, pp. 41-44.
[221] VEC submission Part 2 – Issues and recommendations, p. 41.

However, the VEC noted that introducing an audit requirement for those individuals would represent another barrier to participation for new entrants for whom the audit may provide little insight to the VEC. The VEC's submission stated that this risk could be addressed by only requiring auditing of annual returns for candidates, groups and MPs who receive funding from the VEC, which could be used to cover auditing costs.[222]

The Panel considered that it was not necessary to require candidates, groups and MPs to submit an audit certificate. As acknowledged by the VEC, introducing that requirement would create another hurdle to political participation, especially to new entrants. While some candidates, groups and MPs may receive funding from the VEC, available data suggest that many are still paying for at least some costs out-of-pocket. The VEC's proposed change would put a further strain on the limited financial resources of those individuals.

The Panel also noted that the annual returns of candidates, groups and MPs currently only include information that is already captured in disclosure returns. As discussed above, information in disclosure returns is verified because both donors and recipients are required to submit a return for each donation equal to or over the disclosure threshold. That makes independent audits of that information less necessary.

The Panel has recommended changes to the VEC auditing and enforcement powers below. Those changes would ensure that the VEC is able to take appropriate steps to verify the information included in the annual returns, where necessary.

Form of auditing certificates

While the VEC provides an audit certificate template, its use is not mandatory. The VEC recommended that use of its template is made mandatory, explaining that:[223]

> *The VEC's experience has been that when the audit certificate template is not used, the audit certificate submitted rarely meets*

[222] VEC submission Part 2 – Issues and recommendations, p. 41.
[223] VEC submission Part 2 – Issues and recommendations, p. 41.

the requirements set out in legislation. This causes additional time and effort for the VEC to engage with participants to ensure compliance with legislative requirements.

The Panel agreed that the VEC should be empowered to make Determinations that set out the form that audit certificates must take, or to make the use of particular templates mandatory. That will help ensure submitted audit certificates comply with legislative requirements.

Who may conduct an audit

While RPPs are required to have audit certificates prepared by registered company auditors, other Donation Recipients are instead required to have certificates prepared by an independent auditor. The term independent auditor is not defined and the VEC stated that it is unclear what standards or requirements a person would need to meet to be considered one.[224] In comparison, registered company auditors are required to meet minimum standards of education, experience, and skill.

The VEC suggested that all uses of the term 'independent auditor' should be replaced by the term 'registered company auditor'.

The Panel noted that registered company auditors may command a significant fee for their services, which some Donation Recipients may be unable to afford. Some Donation Recipients, including third party campaigners, associated entities and new candidates, do not receive funding from the VEC in respect of auditing costs. Requiring all Donation Recipients to use a registered company auditor may place an unfairly high financial burden on those Donation Recipients. For that reason, the Panel considered that it would be appropriate to continue allowing Donation Recipients other than RPPs to rely on the services of other auditors.

However, the Panel considered that further guidance is required on who may be considered an independent auditor for the purposes of the *Electoral Act 2002* (Vic). For example, it is unclear:

[224] VEC submission Part 2 – Issues and recommendations, pp. 43-44.

- what, if any, experience or qualifications the auditor is required to have
- whether a past personal or professional relationship between the auditor and the Donation Recipient (or one of its members) would affect the auditor's independence.

Applicable standards

Where an audit certificate is required from an independent auditor, the certificate must advise that the relevant statement has been audited in accordance with Australian Accounting Standards as specified in s. 334(1) of the *Corporations Act 2001* (Cth).

The VEC explained that the Accounting Standards do not apply to auditing, and reference should instead be made to Auditing Standards set under s. 336(1) of the *Corporations Act 2001* (Cth).[225]

During its review, the Panel also received correspondence from the Auditing and Assurance Standards Board suggesting that change is made.

The Panel has included that correction to the *Electoral Act 2002* (Vic) in its recommendation below.

Qualified audit opinions

Currently, audit certificates are required to state that the auditor was given access to all required information and has no reason to believe that any matter stated in the relevant statement or return is not correct.

The VEC states that it is significantly concerned about the provision of audit certificates containing qualified opinions. Under Australian Auditing Standards, a qualified opinion is required if an auditor either:[226]

[225] VEC submission Part 2 – Issues and recommendations, p. 42.

[226] Auditing and Assurance Standards Board (2020), *Auditing Standard ASA 705 Modifications to the Opinion in the Independent Auditor's Report*, p. 9.

- having obtained sufficient appropriate audit evidence, concludes that misstatements, individually or in the aggregate, are material, but not pervasive,[227] to the financial report
- is unable to obtain sufficient appropriate audit evidence on which to base the opinion, but the auditor concludes that the possible effects on the financial report of undetected misstatements, if any, could be material but not pervasive.

The VEC recommended allowing audit certificates to include a qualified opinion and expressly giving the VEC the power to request additional information from the auditor and the relevant Donation Recipient in circumstances where one is provided. The VEC explained in its submission that:[228]

> *The VEC sees value in the provision of qualified opinions, as it is a risk indicator. To that end, the VEC considers that an express power to request additional information where a qualified opinion is provided may be appropriate.*

A recent example of an audit certificate containing a qualified opinion is that for the Liberal Party of Australia (Victoria Division) 2021-22 annual return, which stated:[229]

> *Political donations are a significant component of the Return. The controls implemented over the collection of political donations are limited and as such, we were unable to perform test of controls and substantive procedures that are necessary to reduce the risks associated with completeness of political donations to an acceptable level. Accordingly, as the evidence available to us regarding political donations from this source was limited, our audit procedures with respect to political donations had to be restricted to the amounts recorded in the financial records. We*

[227] Pervasive effects are those that in auditor's judgement are either not confined to specific elements, accounts or items of the financial report, if so confined, represent or could represent a substantial proportion of the financial report, or in relation to disclosures, are fundamental to users' understanding of the financial report.

[228] VEC submission Part 2 – Issues and recommendations, pp. 42.

[229] SW Accountants & Advisors (2022), *Independent auditor's report to the registered officer of the Liberal Party of Australia (Victoria Division) and the Victorian Electoral Commission*, p. 1.

therefore are unable to express an opinion whether political donations of the Entity recorded are complete.

As explained above, the Panel considered that the VEC should be given the power to make Determinations about the form of audit certificates. Those Determinations should also be able to address whether qualified opinions may be given.

The Panel considered the VEC's auditing and information gathering powers below and has recommended in Sub-chapter 4.4 changes to strengthen them. Subject to those changes being implemented, the VEC would be in a position to take appropriate action in circumstances where an audit certificate includes a qualified opinion.

Drafting amendments

The VEC suggested that the *Electoral Act 2002* (Vic) should be amended, to move the requirement for an audit certificate for an annual return into Division 3C of Part 12 of the Act. Division 3C contains most of the provisions relevant to annual returns.

The Panel agreed that change would make Part 12 of the Act easier to understand.

Recommendations

The Panel made the following recommendations regarding auditing requirements and certificates.

Recommendation 4.7: Amend Part 12 of the *Electoral Act 2002* (Vic) to:

- give the VEC the power to make Determinations, in relation to the audit certificates currently required under ss. 207GD, 209 and 215B, that:
    - stipulate the form that audit certificates must take and/or make the use of particular templates mandatory
    - permit, in circumstances that the VEC considers appropriate, the inclusion of qualified opinions (or similar opinions or caveats) from the auditor in audit certificates
- define the meaning of the term 'independent auditor'

- correct references to the Australian Accounting Standards to references to the Australian Auditing Standards, where appropriate
- move the requirement for an annual return to be accompanied by an audit certificate, currently in s. 209(2) of the Act, into Division 3C, which contains other annual return requirements.

4.4 Current Victorian enforcement system

Disclosure and reporting rules are the primary contributors to political finance transparency in Victoria. However, Dr Yee-Fui Ng noted in her submission that having strict rules in place for compliance is insufficient and that these rules must be underpinned by appropriate enforcement mechanisms.[230]

Victoria's enforcement system can be broadly divided into two components:

- the VEC's powers to conduct audits and investigate potential non-compliance
- penalties for non-compliance.

Victorian Electoral Commission's investigatory powers

The VEC has the power to conduct compliance investigations where it has reasonable grounds to believe information provided is materially incorrect.

For example, as explained in Chapter 6, RPPs, MPs and candidates are required to provide certain statements and audit certificates in order to receive various forms of funding support from the VEC. If the VEC is satisfied on reasonable grounds that information provided is materially incorrect, it may request further information from the auditor who provided the audit certificate. If the auditor fails to provide that information, the VEC can make the same request of the registered officer or agent of the Donation Recipient. If the requested information is still not

[230] Dr Yee-Fui Ng submission, p. 3.

provided, the VEC can withhold or recover any payment of the relevant funding.[231]

Other compliance investigations under Part 12 of the *Electoral Act 2002* (Vic) can be conducted by VEC-appointed compliance officers. A compliance officer can issue a notice which compels a Donation Recipient or donor to produce documents or things or to appear before the compliance officer to give evidence.[232]

A compliance officer can also issue a notice to any other person requiring them to produce documents or other things or to give evidence. However, in order to do so, the officer must have reasonable grounds to believe the matters requested relate to a possible contravention of Part 12 of the *Electoral Act 2002* (Vic).[233]

A person or entity that is served the notice can request a review of the decision by the VEC within 14 days of receiving the notice.[234]

Penalties

Part 12 of the *Electoral Act 2002* (Vic) makes it an offence to breach particular rules and requirements of the political finance scheme, and sets out the penalties that apply. For example, it is an offence to:[235]

- fail to provide a disclosure return or annual return when required — penalty: 200 penalty units
- provide an annual return or disclosure return that contains particulars that are to the knowledge of the person, false or misleading in a material particular — penalty: 300 penalty units and/or 2 years imprisonment
- make or accept a political donation that is unlawful — penalty: 300 penalty units and/or 2 years imprisonment

[231] *Electoral Act 2002* (Vic), ss. 207GE, 210 and 215C.
[232] *Electoral Act 2002* (Vic), s. 222B(1).
[233] *Electoral Act 2002* (Vic), s. 222B(2).
[234] *Electoral Act 2002* (Vic), s. 222C.
[235] *Electoral Act 2002* (Vic), ss. 218, 218A and 217O(2).

- in the case of an associated entity or nominated entity, fail to provide to the VEC the required additional reports produced under other legislation (explained in Sub-chapter 4.1) – penalty: 200 penalty units.

Section 218B(1) of the *Electoral Act 2002* (Vic) sets out the following broad anti-circumvention provision:[236]

> *A person must not enter into, or carry out, a scheme, whether alone or with any other person, with the intention of circumventing a prohibition or requirement under this Part.*
>
> *Penalty: 10 years imprisonment*

The Act provides one specific example of what would constitute a prohibited scheme — gifts being given to an entity which subsequently becomes a nominated entity, if it would be unlawful for those gifts to be received by a nominated entity.[237]

4.5 Regulatory approach to enforcement

Enforcement measures are integral to encouraging compliance with the Act and actively addressing and deterring non-compliance. This section of the Panel's report explains the VEC's regulatory approach of 'constructive compliance', flexibility in enforcement and the VEC's capacity to provide advice.

Constructive compliance

The VEC has adopted a constructive compliance approach for its regulatory activities. The constructive compliance model aims to enhance compliance primarily through pre-emptive education and emphasises compliance action that is proportional to the level of harm. Working with stakeholders, the VEC will resolve minor, unintentional offences in a supportive manner and, where no significant harm has occurred, the VEC will likely not take further action.[238]

[236] *Electoral Act 2002* (Vic), s. 218B(1).
[237] *Electoral Act 2002* (Vic), s. 218B(2).
[238] VEC (2022), *Our regulatory approach*.

However, constructive compliance also escalates to more stringent enforcement actions such as formal investigations, cautions, injunctions and prosecution. Prosecution is the final option the VEC will take for non-compliance and is typically preceded by other compliance actions.

Flexibility of enforcement

Constructive compliance allows the regulator flexibility in responding to non-compliance given the diversity of political participants and the range in magnitude and intent of offences under the Act. For example, a candidate who works constructively with the VEC but accidentally makes an error on their annual return should be treated differently to a candidate who deliberately falsifies their annual return. Empowering the regulator to flexibly consider each case based on its unique set of circumstances can encourage both compliance and political participation.

Advice from the VEC

In submissions and public forums, stakeholders have raised difficulties with receiving definitive advice on the correct interpretation of the *Electoral Act 2002* (Vic) from the VEC. Victorian Trades Hall Council noted:[239]

> *... it was the common experience that on a wide range of matters, the VEC could not provide adequate advice that could be relied upon. In many instances the VEC went so far as to advise [Victorian Trades Hall Council] and affiliated unions that they could not provide definite advice and campaigners would have to wait to see the outcome of any potential court actions to determine how the Act should be interpreted.*
>
> *This lack of clarity or certainty created by the new reforms and their interpretation has several adverse impacts on Victoria's democratic process.*

[239] Victorian Trades Hall Council submission, p. 3.

Hayden O'Connor, campaign director for independent Sophie Torney at the 2022 Victorian State election, shared a similar experience at a public forum with the Panel:[240]

> *… they don't give legal advice. And from our perspective, it's like, "Well, you're the regulator. Tell me what to do." I put in an email to the VEC, and they took 21 days to respond, and, in that time … we could've actioned what they said a bit earlier.*

The Victorian Trades Hall Council recommended that the VEC should be resourced appropriately to ensure that it can provide sound advice on matters of legislative interpretation, and that reliance on its advice should be a defence in proceedings.[241]

As a regulatory agency, the VEC powers are limited. The VEC was asked about its ability to provide advice to Donation Recipients at a public forum to which they responded:[242]

> *… our advice will always be limited to the application of the administration of the Electoral Act and how we have interpreted it … We come into difficulty with questions where people want to fit the Electoral Act, make it work for their particular circumstance …*
>
> *It's about providing a response, a response that is accurate, that's complete as we can make it, and often, where there are complexities [that relate] to their particular entity, we will say, "You need to test this out with your own legal advice."*
>
> *So ultimately, the compliance obligation rests with the entity, and we can't excuse non-compliance.*

The Panel noted that the VEC's interpretation of the law may differ from that of other parties or of the judiciary, which may make it inappropriate for the VEC to have the power to issue binding and unchallengeable interpretations. For example, the recent case of *Torney vs VEC* concerned a VEC decision to not register how-to-vote cards for several candidates. The cards in question did not place numbers next to each candidate's

[240] Transcript of Electoral Review Expert Panel public forum held on 21 July 2023, 10 am to 12 pm.
[241] Victorian Trades Hall Council submission, p. 4.
[242] Transcript of Electoral Review Expert Panel public forum held on 21 July 2023, 2 pm to 4 pm.

name, which the VEC argued was likely to mislead electors. The Victorian Civil and Administrative Tribunal ruled in the independents' favour and the how-to-vote cards were approved for use on election day.[243]

It is common for regulators and regulated-parties to interpret legislation differently, and to resolve differences through legal proceedings when required. To minimise confusion, the *Electoral Act 2002* (Vic) should be as clear as possible to reduce scope for differing interpretations. The Panel has recommended several changes in this report to clarify the Act.

The Panel did not consider that the *Electoral Act 2002* (Vic) should be amended to expressly make reliance on the VEC's advice an absolute defence to criminal proceedings. There is a risk that making such a change would lead to the VEC being less willing to provide advice and would require it to word any advice provided in a more legalistic and technical manner. However, it is likely that any advice provided by the VEC would be a relevant factor in legal proceedings, for example in determining an appropriate penalty and whether the element of *mens rea* can be made out. Nonetheless, the Panel is of the view that it is important that the VEC provides as much guidance to Donation Recipients as possible, so as to assist them in navigating through what is quite a complex regulatory regime. Such guidance should be illustrated with examples and be as definitive as practicable.

4.6 Options for reforming penalties and enforcement and investigation powers

The VEC recommended several enforcement-related changes to Part 12 of the *Electoral Act 2002* (Vic), including reforms that would provide it with additional powers to enforce rules, seek penalties that are proportionate to the misconduct alleged, undertake investigations, and deter non-compliance.

[243] *Torney v Victorian Electoral Commission (Review and Regulation)* [2022] VCAT 1337.

Infringement notices and other enforcement powers

Currently, the VEC is only able to enforce most penalties under Part 12 of the *Electoral Act 2002* (Vic) through court proceedings, which are often costly and time consuming. This makes enforcement of minor offences more unlikely as it may be considered not worth the legal cost to the taxpayer for prosecution. For example, the Panel heard from another agency that the cost of putting together a brief of evidence for a straight-forward matter, and having it assessed by the Victorian Government Solicitor's Office, would be approximately $5,000.

The penalties provided in Part 12 of *Electoral Act 2002* (Vic) may also be disproportionately severe for minor or inadvertent breaches. For example, as noted above, the penalty for failing to submit a disclosure return or annual return is currently 200 penalty units (equal to almost $38,500 in 2023-24).[244] On the other hand, the lack of prosecution for small offences can foster non-compliance.

The VEC suggested that its enforcement powers would be improved if it were given the power to issue infringement notices, cautions, official warnings and enforceable undertakings, in particular for breaches of the requirement to produce an annual return or disclosure return within the required timeframe.

It noted in its submission:[245]

> *The absence of infringement notices in this area means that the VEC's only recourse for enforcing minor non-compliance is engaging in significant, costly and time-consuming enforcement actions in court, which is not in the public interest in most cases.*

The *Attorney-General's Guidelines to the Infringements Act 2006 for Legislating Agencies* (Infringements Design Guidelines) provide guidance to Victorian Government agencies about the design and operation of infringement offences in Victoria. The Guidelines explain that an

[244] Victoria Government Gazette No. S 256 Tuesday 23 May 2023, p. 1.
[245] VEC submission Part 2 – Issues and recommendations, p. 33.

infringement notice will give the person to whom the notice is issued the option to either:[246]

- pay the fine specified in the notice in full, or enter into a payment arrangement
- apply for a review of the fine
- elect to have the offence heard by a court.

The Infringements Design Guidelines list a number of advantages of the infringements system, including, among others:[247]

- certainty of the penalty amount needed to finalise a matter
- lower maximum fine levels than may apply if the offence is prosecuted in court
- cost and time efficiencies for enforcement agencies, courts, and defendants.

However, infringement offences are not appropriate in all circumstances. The Guidelines lists key questions to be considered in determining whether a proposed infringement offence would be appropriate, including:[248]

- Should the behaviour be criminalised, and would enforcement agencies gain the administrative benefits of the infringements system?
- Is the offence of sufficiently low severity to be an infringement offence?
- Is the offence sufficiently clear and simple to establish?
- Are the consequences for the offence appropriate if enforced by infringement — noting that the maximum penalty for an infringement under the Guidelines is 12 penalty units for an individual or 60 for a body corporate?

The Infringements System Oversight Unit, part of the Department of Justice and Community Safety, is responsible for providing advice and guidance on the operation of the infringements system.

[246] Department of Justice and Community Safety (2022), *Attorney-General's Guidelines to the Infringements Act 2006 for Legislating Agencies*, p. 5.
[247] Infringements Design Guidelines, p. 6.
[248] Infringements Design Guidelines, pp. 15-26.

The New South Wales Law Reform Commission examined infringement-type penalties in its 2012 report, *Penalty notices*. It stated that:[249]

> *[Penalty notices] save considerable time and money for the agencies that issue them, for courts that avoid lengthy lists of minor offences, and for recipients who do not have to take time off work to attend court or pay court or legal costs. The penalty is immediate and certain and is usually significantly lower than the maximum penalty available for the offence if it were to be dealt with by a court.*

However, the New South Wales Law Reform Commission also noted potential disadvantages of infringement notices:[250]

- the ease with which they are issued and their revenue-raising capacity may lead to overuse, for example where a warning or caution may be more appropriate
- individuals who believe they are not guilty may choose to not contest the notice because they are apprehensive about the court system or wish to avoid the expense of going to court
- the penalty is fixed and cannot be tailored to the circumstances of the recipient.

As noted by the VEC in its submission, officers of the New South Wales Electoral Commission have the power to issue infringement notices for breaches of funding and disclosure rules.[251] There is also precedent in the VEC being able to issue infringement notices, namely for the offence of not voting.[252]

The introduction of infringement notices as an enforcement mechanism for breaches of cash-donation prohibitions was recently recommended by ICAC in its report on Operation Aero, and was considered in an issues paper on ICAC's recommendations prepared by Dr Yee-Fui Ng for the

[249] NSW Law Reform Commission (2012), *Report 132 - Penalty notices*, p. 11.
[250] NSW Law Reform Commission (2012), *Report 132 - Penalty notices*, pp. 11-12.
[251] *Electoral Funding Act 2018* (NSW), s. 148.
[252] VEC submission Part 2 – Issues and recommendations, p. 33.

Parliament of New South Wales Joint Standing Committee on Electoral Matters. Dr Yee-Fui Ng stated in her paper that: [253]

> *Enhancing the power of the [New South Wales Electoral Commission] to impose penalty notices for breaches of cash donation requirements, in addition to the current civil and criminal penalty regime, would provide more flexibility for enforcement of the rules and ensure that more breaches of donations law are pursued, and may improve compliance by political parties.*

The Panel agreed that the VEC should be given a broader range of enforcement powers, including the use of cautions, warnings and enforceable undertakings. These would bolster its ability to ensure compliance and provide proportionate responses to breaches of the *Electoral Act 2002* (Vic).

The Panel also agreed that the VEC should have the power to issue an infringement notice when a Donation Recipient or donor had failed to submit an annual return or disclosure return within required timeframes. That change would support the VEC's constructive compliance approach, as it would provide the VEC with an intermediate enforcement option, between issuing a warning and commencing criminal proceedings.

Recommendation 4.8: Amend the *Electoral Act 2002* (Vic) to grant the VEC and/or its compliance officers the power to issue cautions and official warnings, and enter into enforceable undertakings, in relation to breaches of Part 12 of the Act. Also allow the VEC and its compliance officers to issue infringement notices to persons who fail to provide a disclosure return or an annual return, as required under Part 12 of the Act.

Payment of an infringement notice should not absolve the requirement to still provide the annual return or disclosure return as soon as practicable.

[253] Ng, Y. (2023), *Briefing paper: inquiry into recommendations made by the Independent Commission Against Corruption's (ICAC) report entitled 'investigation into political donations facilitated by Chinese Friends of Labor in 2015'*, p. 6.

Sentencing consistency and clarity of the nature of offences

The VEC noted in its submission that the offence provisions in Part 12 of the *Electoral Act 2002* (Vic) are inconsistent with those found in other Parts of the Act. For example, provisions outside Part 12 refer to section 112 of the *Sentencing Act 1991* (Vic) to outline levels of imprisonment and levels of maximum fine. Provisions in Part 12 do not refer to the *Sentencing Act 1991* (Vic) and do not state whether the offence is an indictable or a summary offence.

Generally, an offence will be considered a summary offence where:[254]

- the offence provision does not refer to specific levels of punishment listed in s. 112(1) of the *Sentencing Act 1991* (Vic)
- the provision does not specify that the offence is indictable, and
- no contrary intention appears.

The VEC stated the issue of inconsistency is particularly notable when considering the broad anti-circumvention provision in s. 218B(1) of the *Electoral Act 2002* (Vic):[255]

> *In particular, the VEC notes that an offence against section 218B(1) has a maximum penalty of 10 years imprisonment (as opposed to a Level 5 term of imprisonment). Whilst neither the second reading speech nor the explanatory memorandum for the Amendment Act expressly state whether section 218B(1) is a summary or indictable offence, the seriousness of the offence suggests that the offence is more appropriately suited for consideration by a Judge and jury in the higher courts as an indictable offence.*

Further, some provisions within Part 12 of the *Electoral Act 2002* (Vic) that carry compliance obligations do not include penalties for non-compliance. The VEC stated that it does not have the necessary powers to ensure these requirements are being met.[256]

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[254] *Sentencing Act 1991* (Vic), s. 112.
[255] VEC submission Part 2 – Issues and recommendations, p. 37.
[256] VEC submission Part 2 – Issues and recommendations, p. 35.

The Panel considered that the Victorian Government should review Part 12 of the *Electoral Act 2002* (Vic) to address these inconsistencies.

Recommendation 4.9: That the Victorian Government review Part 12 of the *Electoral Act 2002* (Vic) with a view to:

- align offence provisions with the remainder of the Act and the *Sentencing Act 1991* (Vic)
- ensure appropriate penalties apply for rules and obligations imposed under that Part, including giving the VEC the power to issue infringement notices where appropriate
- clarify whether each offence is a summary or indictable offence.

Starting proceedings for offences

Under the *Criminal Procedure Act 2009* (Vic), the default time limit for commencing proceedings for a summary offence is 12 months from when the alleged offence was committed, while proceedings for indictable offences can ordinarily be commenced at any time.[257]

The *Electoral Act 2002* (Vic) requires legal proceedings for certain offences to commence within three years. In brief, those offences include:[258]

- giving information or statements that contain, to the relevant person's knowledge, false or misleading material particulars
- making or accepting unlawful political donations
- failing to provide a disclosure return or annual return
- making a disclosure return or annual return that contains, to the relevant person's knowledge, false or misleading material particulars
- providing information to someone who is required to make a disclosure return or annual return information that to the relevant person's knowledge, is false or misleading in a material particular
- failing to comply with document retention requirements.

[257] *Criminal Procedure Act 2009* (Vic), s. 7.
[258] *Electoral Act 2002* (Vic), ss. 218 and 218A.

The VEC recommended that the limitation period be increased from three years to a longer timeframe, arguing that a longer prosecution window would enhance the VEC's ability to perform its regulatory role.[259]

The Panel understood that the above offences would ordinarily be considered summary in nature based on the maximum applicable penalty, and noted that the current period for bringing proceedings is longer than the default period under the *Criminal Procedure Act 2009* (Vic), 12 months.

Queensland generally uses a four year period for breaches of its political finance laws.[260] Queensland increased the period for bringing proceedings from three years to four years in 2019.[261] This change was made to reflect that parliamentary terms are four years long, and to align with the applicable period for other similar offences.[262]

New South Wales has a significantly longer period of 10 years in which to commence legal proceedings for offences against the relevant Act.[263]

The Panel considered the potential for undue influence and breaches of political finance laws to have lasting effects on Victoria's political system.

The Panel recognised that the period to commence legal proceedings for offences should be proportional to the offence itself and thus should be increased from three years to eight years. Eight years is a more appropriate period as it encompasses two four-year electoral cycles.

Recommendation 4.10: Amend the *Electoral Act 2002* (Vic) to extend the period in which legal proceedings for an offence under Part 12 can be commenced, after the offence was allegedly committed, from three years to eight years.

[259] VEC submission Part 2 – Issues and recommendations, pp. 35-36.
[260] *Electoral Act 1992* (Qld), s. 307AA.
[261] *Electoral and Other Legislation Amendment Act 2019* (Qld), s. 67.
[262] Queensland Parliament Economics and Governance Committee (2019), *Report No. 27, 56th Parliament, Electoral and Other Legislation Amendment Bill 2019*, p. 7.
[263] *Electoral Funding Act 2018* (NSW), s. 147(3).

Reasonable assistance requirement for compliance officer notices

Effective enforcement relies on the ability to procure evidence of non-compliance, particularly when prosecuting in court. As explained above, the VEC's compliance officers currently have the power to issue notices requiring persons or organisations to produce documents or give evidence.

The VEC noted in its submission that the effectiveness of its coercive notices could be improved, notably by requiring recipients to provide 'reasonable assistance' from an agent to produce information for the compliance officer.[264]

For example, while a notice might compel the production of a laptop which holds relevant information, a 'reasonable assistance' requirement would also require the laptop's owner to provide any password needed to in order to access that information.

However, the VEC stated that if such a change was made, recipients of a notice should be excused from providing information if it is protected by a privilege in Part 3.10 of the *Evidence Act 2008* (Vic) (e.g. the privilege against self-incrimination). The VEC explained that its 'prospects of bringing information ascertained through a coercive notice before a court may be hampered if the information would have ordinarily been protected by a privilege'.[265]

Several examples of 'reasonable assistance' requirements are available. The VEC noted that the Chief Municipal Monitor may require a person to give all reasonable assistance in connection with an examination or investigation.[266]

The Queensland Electoral Commission's authorised officers also may require persons to provide 'reasonable help' when exercising powers to enter or search a place.[267]

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[264] VEC submission Part 2 – Issues and recommendations, p. 38.
[265] VEC submission Part 2 – Issues and recommendations, p. 39.
[266] *Local Government Act 2020* (Vic), s. 183(3).
[267] *Electoral Act 1992* (Qld), s. 343.

The Panel agreed that the VEC's compliance officers should have the power to require reasonable assistance as part of issuing a coercive notice.

Recommendation 4.11: Amend ss. 222B(1) and (2) of the *Electoral Act 2002* (Vic) to allow a compliance officer to require reasonable assistance as part of issuing a coercive notice, including requiring a person to give all reasonable assistance in connection with an examination or investigation.

Ensure the coercive powers of the VEC's compliance officers are consistent with Part 3.10 of the *Evidence Act 2008* (Vic), including by making any required amendments to ss. 222B(1) and (2) of the *Electoral Act 2002* (Vic).

Form of coercive notices

The VEC suggested that the *Electoral Act 2002* (Vic) require coercive notices to be in a form prescribed in regulations, as that would boost the legal standard and defensibility of notices.[268]

The Panel noted that prescribing the form of a coercive notice may prevent a compliance officer from adapting a notice to suit any special circumstances that may apply.

The Panel did not recommend the VEC's suggested change in this Report as it did not have evidence that existing arrangements were causing issues. The Victorian Government may wish to consider appropriate reforms in the future if legal disputes regarding the form of coercive notices arise.

Audit powers for statements and audit certificates

As explained above, RPPs, MPs and candidates that access funding streams administered by the VEC are required to provide statements and audit certificates regarding their claimable expenditure.

[268] VEC submission Part 2 – Issues and recommendations, pp. 39-40.

Donation Recipients are also required to submit annual returns, which for some Donation Recipients must be accompanied by an audit certificate.

The VEC explained in its submission that its ability to administer Part 12 of the *Electoral Act 2002* (Vic) and audit information is impeded by limited information gathering powers. In particular, the VEC is only able to request further information about statements and audit certificates if it is satisfied on reasonable grounds that information provided in a statement or certificate is materially incorrect. As the *Electoral Act 2002* (Vic) only requires statements and certificates to include very limited information, it is extremely challenging for the VEC to satisfy the requirement that it is 'satisfied on reasonable grounds'. The VEC stated in its submission that:[269]

> *The current limitations on the information the VEC can seek significantly constrains the VEC's ability to request sufficient information to thoroughly assess the validity of an expenditure return or claim in the first place. The VEC considers that, where necessary, access to profit/loss statements, bank statements, transaction details and other relevant documents would enhance its ability to properly review annual returns and statements of expenditure related to funding applications and ensure the compliance and quality of statements and returns provided by entities.*

The Panel heard that the electoral commissions of New South Wales and Queensland have significantly greater auditing powers.

The Electoral Commission of Queensland may appoint an auditor to audit a participant in an election whether or not the commission suspects the election participant has contravened a provision. The person or entity being audited is required to give reasonable assistance to the auditor or face a penalty of 200 penalty units.[270]

The New South Wales Electoral Commission is permitted to undertake audits for disclosures and claims for funding. The Donation Recipient is

[269] VEC submission Part 2 – Issues and recommendations, p. 44-45.
[270] *Electoral Act 1992* (Qld), ss. 319A – 319B.

required to provide full and free access to any information related to the audit.[271]

The Panel considered that the auditing powers of the VEC should be materially strengthened. In particular, the VEC should be able to undertake audits of SCAs, regardless of whether it has a reasonable belief of wrong-doing or error.

In Chapter 3, the Panel recommended that third party campaigners and associated entities have the option to not maintain an SCA. If a third party campaigner or associated entity chooses to not maintain an SCA, the VEC's expanded auditing powers should apply to accounts used by those entities to receive political donations and incur political expenditure.

The Panel considered it appropriate that, consistent with existing arrangements, the VEC can only audit other accounts held by a Donation Recipient if it is satisfied on reasonable grounds that information provided in a relevant statement or certificate is materially incorrect. That would ensure that Donation Recipients can ordinarily maintain confidentiality over business not directly related to political campaigning.

Sub-chapter 4.3 discusses qualified opinions that may be given by auditors. A qualified opinion indicates that the audited document includes *misstatements or information that could not be verified*.[272] When a qualified opinion is given by an auditor, the VEC should have the power to:

- request further information from the auditor and the Donation Recipient's representative
- undertake audits on how relevant funds have been disbursed.

The option should exist for RPPs to provide the VEC with live access to accounting ledgers, as a way of reducing the compliance burden on RPPs. The Panel notes this is an effective practice in New South Wales.

[271] *Electoral Funding Act 2018* (NSW), ss. 59 and 74.

[272] Auditing and Assurance Standards Board (2020), *Auditing Standard ASA 705 Modifications to the Opinion in the Independent Auditor's Report*, p. 9.

Recommendation 4.12: Amend the *Electoral Act 2002* (Vic) to allow the VEC to audit the SCA of a Donation Recipient at any time, including by requesting that a Donation Recipient or its auditor:

- provide information about the SCA
- provide documents related to the SCA, including bank statements.

RPPs should have the option to provide the VEC with live access to accounting ledgers as a way of reducing the compliance burden on RPPs.

If an audit certificate required under ss. 207GD, 209 or 215B of the Act includes a qualified opinion, the VEC should have the power to:

- request further information from the auditor and the Donation Recipient's representative
- undertake audits on how relevant funds have been disbursed.

Meaning of scheme

Section 218B of the *Electoral Act 2002* (Vic) states that a person must not enter into, or carry out, a scheme, whether alone or with any other person, with the intention of circumventing a prohibition or requirement under this Part. An offence against this provision carries a penalty of 10 years imprisonment. As explained above, the Act provides only one specific example of what may constitute a scheme. The potential scope of the term 'scheme' is unclear and the term is not defined anywhere else in the Act.

The VEC's submission stated that:[273]

> *The VEC notes that greater legislative clarity of the definition of a 'scheme' and elements of the offence is needed to assess prospects of conviction and avoid the extensive testing of statutory interpretation in court.*

Assistant Secretary of the Victorian Trades Hall Council, Wilhelmina Stracke, also expressed concern about the ambiguous application of s. 218B, stating that it appears to prohibit third party campaigners and

[273] VEC submission Part 2 – Issues and recommendations, p. 67

associated entities from coordinating activities related to a particular political or policy cause:[274]

> *… the advice we've gotten, says if we coordinate those two things then we're effectively acting in concert and that's a way to try and get around the limitations on donations. …*
>
> *… we don't want to be the test case that gets found to have been attempting to get around the regulations for our donations. …*

Queensland and New South Wales have similar anti-avoidance provisions to Victoria. Queensland provides additional guidance on the definition of the terms 'participate in' and 'scheme' in its legislation, which states:[275]

- *participate in, a scheme, includes—*

(a) enable, aid or facilitate entry into, or the carrying out of, a scheme; and

(b) organise or control a scheme.

- *scheme includes arrangement, agreement, understanding, course of conduct, promise or undertaking, whether express or implied.*

New South Wales also explicitly defines a scheme to include 'an arrangement, an understanding or a course of conduct'.[276]

The Panel noted that for a period of time New South Wales also specifically prohibited third party campaigners from 'acting in concert' with other persons to incur electoral expenditure above the applicable expenditure cap. That prohibition was subject to legal challenges, including in the recent case of *Unions NSW v New South Wales* (2023) 407 ALR 277 (Unions NSW No 3), although the prohibition was repealed before the judgment for that case was delivered.[277] In Unions NSW No 2, Justice Edelman considered that prohibition unlawful as it inappropriately

[274] Transcript of Electoral Review Expert Panel public forum held on 4 August 2023, 10 am to 11 am.
[275] *Electoral Act 1992* (Qld), s. 307B.
[276] *Electoral Funding Act 2018* (NSW), s. 144.
[277] *Unions NSW v New South Wales* (2023) 407 ALR 277; *Electoral Legislation Amendment Act 2022* (NSW).

sought to disadvantage third parties relative to RPPs, MPs and candidates.[278] Victoria does not have an equivalent 'acting in concert' prohibition.

Another example of a broad anti-avoidance provision that refers to 'schemes' is Part IVA of the *Income Tax Assessment Act 1936* (Cth), which concerns schemes to reduce income tax. That Act defines scheme to mean:[279]

- any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings
- any scheme, plan, proposal, action, course of action or course of conduct.

Australian courts have examined the meaning of 'scheme' for the purposes of Part IVA in several cases, and the Australian Taxation Office has issued guidance summarising relevant legal principles.[280] Those principles may also be relevant to understanding s. 218B of the *Electoral Act 2002* (Vic). For example, the Australian Taxation Office's guidance explains that a 'dominant purpose' test and the effect of the conduct in question have guided previous court decisions when examining if a prohibited scheme was entered into.

The Panel considered that, given the current confusion about what conduct may constitute a scheme and the significant penalties that may apply, greater guidance should be provided. A definition of the term 'scheme' should be added to the *Electoral Act 2002* (Vic). Further, the Victorian Government or the VEC should also issue guidance on:

- relevant principles to be taken into account when determining whether a course of conduct constitutes a scheme
- examples of prohibited and permitted activities.

Recommendation 4.13: Amend the *Electoral Act 2002* (Vic) to introduce a definition of the term 'scheme' for the purposes of s. 218B.

[278] *Unions NSW v New South Wales* (2019) 264 CLR 595, [220]-[223].
[279] *Income Tax Assessment Act 1936* (Cth), s. 177A.
[280] Australian Taxation Office (2020), *Practice Statement Law Administration 2005/24, Application of General Anti-Avoidance Rules.*

The Victorian Government or VEC should also issue guidance on:

- relevant principles to be taken into account when determining whether a course of conduct constitutes a scheme
- examples of prohibited and permitted activities.

5 State donation caps and restrictions

The 2018 amendments introduced a cap on political donations that could be made by a single donor to a Donation Recipient, referred to in the *Electoral Act 2002* (Vic) as the general cap.

The 2018 amendments also prohibited foreign donations and anonymous donations over the disclosure threshold, and placed a limit on the number of third party campaigners a donor could make a political donation to.

The Statement of Compatibility for the Electoral Legislation Amendment Bill recognised that bans and limits on political donations materially affect Victorians' rights, including the right to take part in public life and freedom of expression. These bans and limits were considered necessary and reasonable to:[281]

- reduce the risk and public perception of corruption and undue influence in the political process, and ensure equal participation in the electoral process
- address concerns about foreign influences on the political process
- prevent the proliferation of third party campaigners as a means to exceed the general cap.

However, some stakeholders vehemently opposed political donations being capped or limited. For example, Member for Western Metropolitan Moira Deeming stated in her submission:[282]

> *I believe this legislation contradicts several United Nations covenants designed to protect democracy and equality, as well as several Australian High Court decisions which have ruled in favour of the principle of freedom of communication. Every voter should have the same opportunities to partake in the democratic political*

[281] Victoria, *Parliamentary Debates*, Legislative Assembly, 10 May 2018, p. 1345-1346.
[282] Moira Deeming MP submission, p. 1.

process. I believe that the VEC and the State Government have turned their backs on political freedom and equality in Victoria.

Nick McGowan, Member for the North-Eastern Metropolitan, stated at a public forum:[283]

Any Australian citizen, much less a Victorian, should have a democratic right to … gift to a candidate … any money they see fit. The cornerstone of good democracy is not denying a person their rights, but ensuring rights are accompanied by corresponding responsibilities. What kind of craven society removes the rights of its people on the assumption they are all wrongdoers and should be treated as such?

The Panel examined Victoria's political donation caps and limits, taking into account their purposes, impacts and concerns about their effects on democracy.

5.1 Current rules for the general cap

A political donation made to a Donation Recipient or for the benefit of a Donation Recipient must not exceed the general cap for the election period, which is currently defined as the period between one general election and the next.[284] A general election is ordinarily held every four years.

The value of the general cap was initially set at $4,000. Its value is indexed each financial year and is equal to $4,670 for 2023-24.[285]

All donations made by a single donor to the same Donation Recipient are aggregated and the sum of these donations in an election period cannot exceed the general cap.

[283] Transcript of Electoral Review Expert Panel public forum held on 13 July 2023, 2 pm to 3 pm.
[284] *Electoral Act 2002* (Vic), ss. 206 and 217D.
[285] VEC (n.d.), *Indexation*, https://www.vec.vic.gov.au/candidates-and-parties/political-donations/indexation, accessed 15 August 2023.

Aggregation of donations by a donor

For the purposes of the general cap, the value of all political donations made by a single donor to the same Donation Recipient within an election period is aggregated.[286] In other words, a donor cannot make multiple donations to a Donation Recipient within an election period if the total value of those donations would exceed the general cap, even if the value of each individual donation is below the general cap.

This ensures the general cap cannot be circumvented through donation splitting.[287]

However, it is not unlawful for a Donation Recipient to receive a political donation from a donor that exceeds the general cap solely because of the aggregation provisions provided that both of the following apply:[288]

- the Donation Recipient did not know and could not have reasonably known of the other political donation(s) included in the aggregation
- the amount exceeding the general cap was returned by the recipient to the donor or otherwise forfeited to the State.

The Panel understood that this provision recognises that a Donation Recipient may initially not know that a donation exceeds the general cap as a result of donation aggregation. For example, this may occur where a donor makes anonymous donations under the disclosure threshold.

Attribution of donations to a registered political party or group

Under the *Electoral Act 2002* (Vic), donations to the following Donation Recipients are also considered to be donations to the relevant registered political party (RPP):[289]

- a candidate who has been selected by the RPP to be a candidate in an election

[286] *Electoral Act 2002* (Vic), s. 217E.
[287] Electoral Legislation Amendment Bill 2018 Explanatory Memorandum, p. 37.
[288] *Electoral Act 2002* (Vic), s. 217D(3).
[289] *Electoral Act 2002* (Vic), s. 217D(6).

- an elected Member of Parliament (MP) who is an endorsed candidate of the RPP
- a group that is endorsed by the RPP
- a nominated entity of the RPP.

A political donation to a candidate or MP who is a member of a group must also be included as a donation to that group for the purposes of the general cap.[290]

These rules help to ensure that the general cap cannot be circumvented by donations being split across several linked Donation Recipients.

Exceptions from the general cap

Under current rules, certain political donations or other payments are not subject to the general cap. These include:

- a contribution by a candidate at an election or an elected MP to their own election campaign[291]
- certain 'small contributions', which are political donations that are equal to or less than $50 in value subject to indexation (value for 2023-24 is $58),[292] provided those donations are not used as part of a scheme to circumvent the political finance laws[293]
- political donations that are made for Commonwealth electoral purposes and are not paid into the State campaign account (SCA).[294]

5.2 Options for reforming the general cap and related exemptions

During consultation, stakeholders suggested several changes to the rules for the general cap, on topics including:

- the value of the general cap
- contributions by candidates or MPs to their own election campaign

[290] *Electoral Act 2002* (Vic), s. 217D(7).
[291] *Electoral Act 2002* (Vic), s. 217D(5).
[292] VEC (n.d.), *Indexation*, https://www.vec.vic.gov.au/candidates-and-parties/political-donations/indexation, accessed 15 August 2023.
[293] *Electoral Act 2002* (Vic), ss. 217D(9) and (10).
[294] *Electoral Act 2002* (Vic), s. 217D(4).

- special rules for 'small contributions'
- additional matters that should be exempt from the general cap.

The value of the general cap

Several stakeholders argued that the value of the general cap is too low.

The National Party of Australia – Victoria stated in their submission:[295]

> *... we recognise that there is a delicate balance between supporting Victorians' right to participate in the democratic process and to be able to financially support parties or candidates with their own money, and ensuring that the State's political system is able to operate in such a way that actual or perceived corruption is reduced or eliminated.*
>
> *The Nationals note that the current donations caps are the lowest in the country and believe that the Panel should give consideration to raising the cap to at least the average of other jurisdictions in Australia.*

The submission also stated the party would support separate donation caps for RPPs and candidates, similar to the approach taken in Queensland, but noted that would increase the compliance burden for RPPs.

The Liberal Party of Australia (Victorian Division) recommended that the current value of the general cap should apply to each financial year, rather than to each election period. As each election period is typically four years long, that change would effectively increase the value of the general cap fourfold. The submission stated:[296]

> *Victoria's donation caps are the lowest of any state in the country. There has been no clear justification for the specific limits imposed in Victoria, other than a general belief that reducing the role of private fundraising in Victorian politics reduces the opportunity for individual citizens to wield influence over Victorian politics.*

[295] National Party of Australia – Victoria submission, p. 1.
[296] Liberal Party of Australia (Victorian Division) submission, p. 2.

Victoria's donation laws balance limitations on the freedom of Victorians to spend their own money to support causes or political parties of their choosing with the promotion of transparency and reduction of perceived corruption in Victoria's political system. However, it is not clear that Victoria's spending caps are necessary or proportionate to achieving their stated objective. Queensland, New South Wales, and South Australia all have higher limits on private fundraising than Victoria. There is no evidence that those jurisdictions are corrupt, or that the difference in donation caps has significantly changed the culture of their politics compared to Victoria, or that the introduction of strict fundraising caps has eliminated corrupt conduct in Victoria's public life.

The Liberal Party of Australia (Victorian Division) also recommended adopting separate caps for an RPP and its endorsed candidates.[297] That change would have the practical effect of increasing the amount that a donor could donate to their preferred party and its members.

Professor Twomey stated at one of the Panel's public forums that the general cap was 'surprisingly low'. Professor Twomey said that political parties should still be expected to fulfill part of their funding requirements using community political donations, to ensure they are engaging with, and genuinely representing, the community. The value of the general cap should be high enough to allow that engagement.[298]

New South Wales and Queensland also have caps on political donations for State elections (Table 5.1). The dollar value of donation caps is broadly similar across jurisdictions. However, donation caps in New South Wales apply to and reset each financial year, while in Queensland and Victoria, donation caps apply to each election period (typically four years).

[297] Liberal Party of Australia (Victorian Division) submission, p. 2.
[298] Transcript of Electoral Review Expert Panel public forum held on 20 July 2023, 2 pm to 3 pm.

Table 5.1: Donation caps in other Australian jurisdictions, as of 1 July 2023

Jurisdiction	Value ($)	Applicable period
New South Wales	• RPP or group of candidates — 7,600 • unregistered party (or registered for < 12 months), MP or candidate — 3,600 • associated entity or third party campaigner — 3,600	Financial year
Queensland	• registered political party — 4,000 • independent candidate — 6,000 • endorsed candidates of a registered political party — 6,000[(a)]	'Donation cap period,' i.e. period starting 30 days following the poll for an election and ending 30 days after the poll for the next election

Notes (a) applies collectively to all endorsed candidates.
Sources: New South Wales Electoral Commission (2023), *Caps on political donations*, https://elections.nsw.gov.au/funding-and-disclosure/political-donations/caps-on-political-donations, last updated 18 October 2023; Electoral Commission of Queensland (2023), *Election and disclosure obligations for State election candidates*, pp. 11-12; *Electoral Act 1992* (Qld), s. 247.

The Panel saw little evidence to suggest that Donation Recipients, as a whole, are unable to raise sufficient funds to finance an effective election campaign due to the general cap. However, the data available on political expenditure incurred for Victorian elections were very limited.

The Panel also noted that Victoria provides a generous rate of public funding to RPPs and candidates, which offsets the potential reduction in privately-donated campaign funds following the introduction of the general cap. The value of the general cap cannot be re-examined without public funding also being re-examined.

The Panel considered that a change to the value of the general cap was not required. However, the Panel recommended changes to how the cap is indexed in Chapter 8.

Impact on new entrants and independents

The Panel heard through consultation that some independent candidates asserted that the donation cap, while applying evenly to all Donation Recipients contesting an election, disadvantages independents, new entrants and smaller political parties. The Panel heard that established MPs and larger RPPs are less reliant on donations as

they have greater access to other sources of funds (which are not subject to the cap), including:[299]

- contributions from nominated entities
- membership fees, affiliation fees and levies
- public funding.

Simon Holmes à Court, Convener of Climate 200, stated at a public forum:[300]

> *But if you put fundraising constraints on an [independent] and you put similar ones on a party, it doesn't matter to the party but it really matters to the independent. So, when you put constraints on, if they adversely constrain one set of players but not another, then you've tilted the playing field further in favour of the status quo.*

The Panel acknowledged that the general cap may disproportionately affect some Donation Recipients. The Panel has made several recommendations elsewhere in this Report to address the difficulties facing new entrants, independents and smaller parties.

Contributions to own election campaign

Section 217D(5) of the *Electoral Act 2002* (Vic) states that:

> *A contribution by a candidate at an election or an elected member to their own election campaign is not included in the general cap in respect of that candidate or member.*

The Panel received several submissions concerning that provision, regarding:

- the maximum amount that a candidate should be able to contribute to their own election campaign
- clarifying whether an own-campaign contribution is a political donation for the purposes of the *Electoral Act 2002* (Vic)
- who can receive an own-campaign contribution
- own-campaign contributions made by a way of a loan.

[299] Climate 200 submission, pp. 7-8.
[300] Transcript of Electoral Review Expert Panel public forum held on 19 July 2023, 10 am to 12 pm.

Cap on own-campaign contributions

Under existing rules, there is no limit on the amount that a candidate or an MP may contribute to their own campaign. Several stakeholders voiced concerns and suggested that some limit be imposed (Box 5.1).

Box 5.1: submissions on risks of own-campaign contributions and potential limits

'It may be possible for a wealthy individual to make excessive financial contributions to 'their own campaign' pursuant to section 217D(5) of the Act, and utilising said funds to bankroll a disproportionate amount of a political party's campaign. Victorian Labor therefore recommends the Expert Panel consider whether section 217D(5) of the Act could be improved.' (Australian Labor Party – Victorian Branch submission, p. 5)

'Victoria's political donations caps should apply to candidates after the 2026 election in order to limit what individuals can contribute towards their own campaigns to be elected to the Victorian Parliament.

This would require amending the Electoral Act 2002 to impose the same donations caps currently in place ($4,320 in the 4 years between general elections) to state election candidates.' (Health and Community Services Union submission, p. 1)

'Similarly, under the existing laws a candidate for election has no limit on donations to their own campaign. This leaves open the possibility of wealthy individuals using their wealth to get elected. … We [propose] there should be a cap on donations from individuals to their own campaign. It could be a higher cap but there should be some limit.' (Victorian Greens submission, p. 2)

Placing limits on own-campaign contributions is necessary as it supports several of the objectives of political finance laws.

Submissions received by the Panel explained that if an MP or candidate spent disproportionately large sums of money on their own campaign, there is a risk that they would 'drown out' the voices of other Donation Recipients. As discussed in Chapter 2, the High Court has observed that legislative action may be required to address the risk to equal participation posed by uncontrolled use of wealth.[301]

Limits on own-campaign contributions may help to ensure equality of opportunity for political participation.

[301] *McCloy v New South Wales* (2015) 257 CLR 178, [45].

Those limits may also support the objective of protecting the public interest and limiting undue influence. At first glance, own-campaign contributions may appear to not pose the same corruption risks as other political donations — political donations are generally seen as a matter of concern due to the risk of a *third party* influencing, or being perceived to be influencing, an MP, candidate or RPP. However, on closer consideration, disproportionately large own-campaign contributions may still pose several risks.

Potentially, an own-campaign contribution may be used to benefit other candidates, MPs or RPPs, meaning that a risk of actual or perceived undue influence remains. Alternatively, a candidate could potentially run a self-funded campaign for the purpose of opposing the political opponents of another candidate or RPP, rather than for the purpose of being elected.

As discussed in Chapter 3, while some stakeholders suggested expenditure caps could achieve similar objectives and address the identified risks, the Panel considered that a preferable approach would be to regulate and limit the funds that RPPs, MPs, candidates and groups could pay into their SCAs. For the Panel's proposed approach to be effective, reasonable limits on own-campaign contributions need to be introduced.

The Panel considered that to provide administrative simplicity, the value of the own-campaign contribution cap should be set as a multiple of the general cap.

The Health and Community Services Union submitted that the value of own-campaign contribution cap should be the same as the general cap.[302] However, the Panel considered that such a limit would be too low. Some candidates and RPPs, for example those who do not receive advance public funding or who are not eligible for public funding, may need to rely primarily on own-campaign contributions to pay for political expenditure. Further, the risk of undue influence from external donors is greater than the risk posed by own-campaign contributions.

[302] Health and Community Services Union submission, p. 1.

The Panel considered that a candidate should be able to run a reasonable political campaign using own-campaign contributions. That approach is consistent with the right of Victorians to take part in public life, enshrined in the *Charter of Human Rights and Responsibilities 2006* (Vic). Further, it ensures that a new candidate is not forced to spend a significant amount of time fundraising political donations to fund their campaign if they would prefer to instead use their own funds.

Limited information is available on the political expenditure incurred by RPPs and candidates in Victoria. However, some relevant information is provided by data published by the VEC on statements of expenditure submitted by independent candidates for the 2022 State election (Table 5.2). As explained in Chapter 6, those statements must state whether the candidate has incurred political and electoral expenditure that is:

- equal to or above their maximum public funding entitlement
- a lower amount, which must be specified in the statement of expenditure.

Table 5.2 shows that:

- 31 independent candidates submitted a statement of expenditure
- 27 candidates had expenditure equal to or greater than their maximum entitlement, and data on their precise expenditure are not available
- six candidates had expenditure less than the maximum entitlement, which ranged from around $4,240 to $68,973.

Table 5.2: Statements of expenditure submitted by independent candidates at the 2022 State election

Candidate	Maximum public funding entitlement ($)[a]	Stated expenditure ($)[b]
ALTMANN, Carol	42,600.36	≥42,600.36
BARTON, Huntly	14,602.50	9,112.89
BINGHAM, Jarrod James	14,187.14	≥14,187.14
BIRCHALL, Ian	22,085.47	≥22,085.47
BOLTON, Sue	10,961.61	≥10,961.61
COOK, Ian	44,378.62	≥44,378.62
CUPPER, Ali	83,805.37	≥83,805.37
DOUKAS, Jim	12,103.85	≥12,103.85
DRAGWIDGE, Georgie	14,888.06	≥14,888.06
ERCIYAS, Fatma	15,679.84	≥15,679.84
ESLER, Clay	15,666.86	≥15,666.86
FREDERICO, Felicity	24,331.01	≥24,331.01
GARRA, Joe	17,600.88	≥17,600.88
GIBSON, Sharon	16,322.35	≥16,322.35
GRECO, Gaetano	35,519.77	35,261.42
HAWKINS, Jacqui	84,616.62	68,973.35
HOPPER, Paul	14,784.22	≥14,784.22
KALTMANN, Nomi	17,153.07	≥17,153.07
LARDNER, Kate	61,213.68	≥61,213.68
LOWE, Melissa	57,442.99	≥57,442.99
MARTIN, Clarke	18,172.00	≥18,172.00
MEAD, Amanda	15,472.16	≥15,472.16
MILNE, Glenn	11,136.84	4,240.80
O'DONNELL, Sarah	21,027.60	≥21,027.60
OWEN, Brett	20,488.93	14,661.07
PURCELL, James	17,763.13	≥17,763.13
SEYMOUR, Nicole	33,949.19	30,961.95
SHEED, Suzanna	78,827.54	≥78,827.54
SKELTON, Johanna	14,466.21	≥14,466.21
TORNEY, Sophie	59,708.00	≥59,708.00
WHITE, Caroline	20,553.83	≥20,553.83

Notes: (a) Maximum entitlement to public funding is calculated based on the number of first-preference votes received at the election. (b) Expenditure statements must state that the political and electoral expenditure incurred is either equal to or above their maximum public funding entitlement, or a lower amount that must be specified in the statement of expenditure.
Source: VEC (2023), *VEC funding entitlements and payments post-State election 2022*.

At a public forum, Dr Tim Read, Member for Brunswick, suggested that a strong and informative political campaign for an electorate could be run for approximately $100,000.[303]

[303] Transcript of Electoral Review Expert Panel public forum held on 31 July 2023, 11 am to 12 pm.

As data for Victorian elections were limited, the Panel also considered available relevant information from other Australian jurisdictions.

The New South Wales Electoral Commission publishes disclosures submitted by candidates, including annual disclosures of electoral expenditure. The latest general election year for which data were available was 2018-19 (data for 2022-23 were not available at the time of the Panel's review). Disclosures of independent candidates for 2018-19 show:[304]

- the highest amount spent by an independent candidate was approximately $177,000
- only two candidates spent over $150,000, none spent between $100,000 and $150,000, and three spent between $50,000 and $100,000
- 19 candidates spent between $10,000 and $50,000
- the majority spent under $10,000 (noting that a significant number made a nil return).

The Panel also took into account the values of campaign expenditure caps that apply to independent candidates in other Australian jurisdictions, which represent an estimate of what a reasonable political campaign may cost. The values of those caps were:

- for the New South Wales 2027 State election — $225,800 (although a cap of $301,200 applies to Legislative Assembly by-elections held prior to it)[305]
- for the Queensland 2023 State election — $90,748.65[306]
- for South Australian State independent candidates who elect to receive public funding, as at 2023-24 — $125,976 for a House of

[304] New South Wales Electoral Commission (2023), *View disclosures*, https://elections.nsw.gov.au/funding-and-disclosure/disclosures/view-disclosures, last updated 31 August 2023.

[305] New South Wales Electoral Commission (2023), *What are the expenditure caps for state elections?* https://elections.nsw.gov.au/funding-and-disclosure/electoral-expenditure/caps-on-electoral-expenditure/what-are-the-expenditure-caps-for-state-elections, last updated 28 March 2023.

[306] Electoral Commission of Queensland (2023), *Election and disclosure obligations for state election candidates*, p. 20.

Assembly candidate and $157,470 for a Legislative Council candidate[307]

- for the Australian Capital Territory 2020 election — $42,750[308]
- for the Northern Territory, as at 2023-24 — $45,600.[309]

As the population size of electorates varies significantly between jurisdictions, the expenditure caps of New South Wales and Queensland are more relevant comparators for the purposes of Victoria's elections than those of other jurisdictions.[310]

In its submission, Climate 200 noted media reports stating that senior members of the Labor party had estimated that the cost for a 'strong campaign' in a by-election for the district of Warrandyte would cost up to $500,000, which would not include the value of the RPP's brand and use of its headquarters.[311] The Panel considered that figure should be treated with caution, because it was not attributed to a particular person or supported by data. The Panel also noted that RPPs might spend more funds for a by-election than on a typical campaign for a single district, for example because by-elections are perceived as a test of the community's opinion of the Government of the day and because RPPs are able to focus their resources on a single district.

The Panel's analysis of donation returns for the 2018-2022 election period indicated that the largest and second largest own-campaign contributions were $136,000 and $110,000, respectively.[312]

Taking the above information and data into account, the Panel considered that the cap on own-campaign contributions for each election should be equal to 50 times the general cap, or $233,500 as at

[307] *Electoral Act 1985* (SA), s. 130Z; Electoral Commission of South Australia (n.d.), *Indexed amounts*, https://www.ecsa.sa.gov.au/parties-and-candidates/funding-and-disclosure-state-elections/indexed-amounts, accessed 17 August 2023.

[308] *Electoral (Expenditure cap for 2023) Declaration 2022* (ACT).

[309] *Electoral Act 2004* (NT), s. 203B; Northern Territory Government (n.d.), *Monetary units*, https://justice.nt.gov.au/attorney-general-and-justice/units-and-amounts/monetary-units, accessed 17 August 2023.

[310] Victorian Independent Remuneration Tribunal (2023), *Members of Parliament (Victoria) Determination No. 01/2023*, p. 72.

[311] Climate 200 submission, p. 13.

[312] VEC (n.d.) *Disclosed Donations*, https://disclosures.vec.vic.gov.au/public-donations/, accessed 8 November 2023.

2023-24. That cap would be high enough to ensure that candidates are not prevented from running a strong election campaign, provided they administer and spend funds reasonably.

For candidates that only contest a general election, the cap would apply to the entire four-year election period. However, if a candidate also contested a by-election (or supplementary election), they would separately be able to contribute up to the cap to their campaign for that election.

However, the Victorian Government will need to obtain independent legal advice to confirm what value of own-campaign contribution cap would be constitutional under Australian law.

Recommendation 5.1: Amend the *Electoral Act 2002* (Vic) to introduce a cap on the amount that a candidate or an MP may contribute to their own election campaign. The value of the cap, per election, should be equal to:

- 50 times the value of the general cap, or
- such higher amount as required for the cap to be lawful, according to independent legal advice provided to the Victorian Government.

Whether a contribution is considered a political donation

In its submission, the Australian Labor Party – Victorian Branch stated the wording of s. 217D(5) is a source of confusion, including because:[313]

> *It is not clear why "contribution" and not "political donation" is used, and we query whether the difference in language is intentional.*

The VEC also recommended that the ambiguity caused by that wording is clarified, and stated in its submission that s. 217D(5) of the *Electoral Act 2002* (Vic) implies that a contribution by a candidate or MP to their own election campaign is a political donation for the purposes of the Act. The VEC took the position that own-campaign contributions are political donations and that the standard disclosure requirements (explained in Chapter 4) apply to them.[314]

[313] Australian Labor Party - Victorian Branch, p. 11.
[314] VEC submission Part 2 – Issues and recommendations, pp. 4-5.

That implication arises because the general cap does not apply to payments that are not political donations — if own-campaign contributions were not political donations, it could be argued that s. 217D(5) is redundant.

The Panel agreed with the VEC's suggestion that the *Electoral Act 2002* (Vic) be updated to clarify that own-campaign contributions are considered political donations. This would be consistent with the VEC's current approach, which ensures transparency about:

- the amount of funds that individual MPs and candidates are contributing to their election campaigns
- the sources of funds used to pay for political expenditure.

Recommendation 5.2: Amend the *Electoral Act 2002* (Vic) to clarify that a 'contribution by a candidate or an elected member to their own election campaign' is considered a political donation for the purposes of Part 12 of the Act.

Who can receive an own-campaign contribution

In its submission, the VEC noted that a candidate or MP might assert that their election campaign is being funded through a combination of entities, including, for example, one or more associated entities or third party campaigners. Based on publicly available data, the Panel understood that there has been at least one instance where an own-campaign contribution, above the general cap, has been made to an associated entity.

It is unclear whether the exemption in s. 217D(5) applies, or was intended to apply, to a donation made by a candidate or MP to an associated entity or third party campaigner involved in their campaign.

The VEC recommended that if a candidate or MP is endorsed by an RPP, s. 217D(5) should only apply to contributions made to that RPP.[315]

The Panel considered that, for the exemption in s. 217D(5) to apply, an own-campaign contribution should only be paid into the SCA of the candidate or MP making the contribution or the SCA of their RPP. That

[315] VEC submission Part 2 – Issues and recommendations, pp. 5-6.

recognises that the exemption is only meant to apply to candidates and MPs contributing funds to their own campaign, rather than funding the activities of other persons or organisations.

The Panel also considered, that, for the avoidance of doubt, it should be specified that an own-campaign contribution can only be spent on that candidate's campaign.

Recommendation 5.3: Update s. 217D(5) of the *Electoral Act 2002* (Vic) to clarify that the 'own-campaign' exemption from the general cap only applies if both of the following apply:

- the funds are paid into the SCA of the candidate or MP making the contribution, or the SCA of their RPP, and
- the funds are used for the dominant purpose of supporting that candidate's or MP's campaign.

Return of own-campaign contributions to candidates

Section 207F(8)(a) of the *Electoral Act 2002* (Vic) specifies what must happen to funds remaining in the SCA of an MP when they leave the Parliament, or in the SCA of an unsuccessful candidate. After debts have been paid:

- remaining funds in the SCA of MPs and candidates who are members of an RPP are returned to the RPP for payment into its SCA
- remaining funds in the SCA of other MPs and candidates must be paid to a charity nominated by the candidate or MP or their registered agent.

Comparable provisions apply to members of a group — i.e. two or more candidates for a Council election whose names are grouped on a ballot-paper.[316]

The VEC stated in its submission that:[317]

> *The VEC is concerned that if [own-campaign contributions] cannot be recovered by the candidate or member, then this may discourage transparency in the SCA and political expenditure*

[316] *Electoral Act 2002* (Vic), s. 207F(8)(b).
[317] VEC submission Part 2 – Issues and recommendations, p. 5.

scheme. The VEC also considers that if unexpended money of a candidate's own contribution is unable to be recovered if the candidate is unsuccessful, this may be seen as a higher financial risk to independent candidates than desirable and could contribute to disenfranchisement and barriers to participation.

The VEC seeks legislative clarity that if a candidate at an election or an elected member contributes to their own campaign as a 'loan', then this amount can be recovered by the candidate or member as a 'debt' under section 207F(8) upon the closure of their SCA.

The Liberal Party of Australia (Victorian Division) also raised a related concern in its submission to the Electoral Matters Committee's *Inquiry into the conduct of the 2018 Victorian State election*. It explained that as commercial invoices may not become payable until some period after the relevant supply, candidates may still need to pay for political expenditure incurred up to approximately a month after election day. The Liberal Party of Australia (Victorian Division) advised that candidates should be able to use their funds (e.g. the funds in their SCA) to pay for political expenditure incurred for their campaign for up to 30 days after the election, and those payments should not be treated as a political donation to their RPP.[318]

The Panel considered that following an election, former MPs, candidates and members of a group should be entitled to retrieve any remaining funds in their SCA that they contributed, provided all debts and obligations have been resolved.

The Panel also observed that the rationale for requiring certain Donation Recipients to empty their SCAs of funds following an election is currently not clear.

[318] Liberal Party of Australia (Victorian Division) (2019), *Submission to the inquiry into the conduct of the 2018 Victorian State election*, p. 3.

Recommendation 5.4: Amend s. 207F(8) of the *Electoral Act 2002* (Vic) to state that, once all debts have been paid and obligations have been resolved, MPs, candidates and members of a group may retrieve any remaining funds that they contributed to their own campaign.

Small contributions

Small contributions do not count towards the general cap. As at 2023-24, small contributions are political donations equal to or under $58 in value.

The Explanatory Memorandum for the Electoral Amendment Bill explained:[319]

> *The purpose of the small contribution exclusion is to allow small, ad hoc donations to be made without risking donors or recipients being in breach of the disclosure threshold or general cap by the donation of token amounts.*

The Panel understood that New South Wales and Queensland do not provide comparable exclusions in respect of their donation caps. However, New South Wales provides an exemption from its political donation aggregation provisions for small donations that are:[320]

- equal to $100 or less
- made by a person at a fundraising venture or function
- the only donation made by that person at that venture or function.

An exemption for small donations made at fundraisers or functions was introduced in New South Wales as the aggregation of small, anonymous donations was viewed as onerous and of little benefit.[321]

The National Party of Australia – Victoria stated in their submission:[322]

> *The Panel may wish to consider a raising of the small donation threshold …. Increasing this relatively small limit to around $100 would have no material impact on the transparency of our political*

[319] Electoral Legislation Amendment Bill 2018 Explanatory Memorandum, p. 37.
[320] *Electoral Funding Act 2018* (NSW), s. 57. The *Electoral Legislation Amendment Act 2022* (NSW) increased the small donation threshold from $50 to $100.
[321] Parliament of New South Wales Joint Standing Committee on Electoral Matters (2020), *Administration of the 2019 NSW State Election*, p. 133.
[322] National Party of Australia – Victoria submission, pp. 2-3.

system but would allow volunteer supporters of candidates and parties to conduct low level fundraising events – such as local party branch raffles – without being required to comply with burdensome red tape designed to provide transparency of much larger donations.

The submission provided the example of a party member who bought pizzas for a team of volunteers and was concerned that they had breached the donation rules.

The Panel agreed that an exemption for small contributions is appropriate. The exemption recognises that keeping track of small payments, which are likely impromptu, is administratively burdensome and would not reflect the low risk posed. As explained in submissions, the exemption also a acknowledges that campaign volunteers may be required to, or choose to, spend small amounts of their own funds as part of supporting a candidate or RPP.

The Panel considered that the small contribution value should be set as a round value, equal to a banknote. That would make Victoria's political finance laws easier to understand and make it easier for community members to remember the value. The Panel has recommended that the small contribution threshold be increased to $100. The Panel also recommended changes to how that value is indexed in Chapter 8 to ensure it remains a round number.

Recommendation 5.5: Update the definition of the term 'small contribution' in the *Electoral Act 2002* (Vic), so that it refers to a political donation that is equal to or less than the value of $100 (subject to future indexation).

Campaign office premises as an exemption

The Panel considered whether any other exemptions should apply to the general cap.

A particular topic of concern raised by some stakeholders during consultation was that the general cap prevented donors from allowing a

candidate's use of a donor's premises as a campaign office. For example, Climate 200's submission stated:[323]

> *When one of the independent candidates [that] Climate 200 supported was offered free use of an office space from which to run her campaign, she had to turn it down because the lease was worth more than $4,320 over the course of the campaign.*

Large, established RPPs will generally operate a central campaign office, and may own the real estate that the office is based in. In contrast, new entrants and independent candidates may be unable to afford the hiring of commercial premises to operate a campaign office, in particular as:

- they may not be eligible for VEC-administered funding
- their ability to raise private funds is constrained by the general cap.

As a result, those individuals may be required to use their own home as their campaign office, which raises privacy and security risks.

The Panel considered that the risks posed by a donation-in-kind of a campaign office are manageable, provided sufficient information about the donation is disclosed. Further, providing an avenue for candidates and RPPs to be provided with a campaign office would provide significant benefits including:

- ensuring political finance laws don't exacerbate inequalities in the 'playing field' between new and well-established candidates and RPPs
- supporting the security and personal privacy of candidates.

The Panel considered that the general cap should not apply to a political donation of free or discounted use of premises as a campaign office, including initial establishment of the office to a reasonable standard.

However, to ensure the exemption only accommodates genuine offers of support rather than attempts to circumvent the general cap, it should only apply if the donor either:

- owns the property
- has an existing lease on the property for a business or enterprise.

[323] Climate 200 submission, p. 6.

For example, the general cap should continue to apply if a donor pays a recipient's rent or deliberately rents a premises for the recipient to use.

Recommendation 5.6: Amend the *Electoral Act 2002* (Vic) to provide that the general cap does not apply to the political donation of the use of the donor's premises as a campaign office (for free or at a discounted rate of rent) to an RPP, MP, group or candidate at an election. The exemption should also apply to the initial establishment of those premises as a campaign office, to a reasonable standard. That exemption should only apply where the donor either:

- owns the property
- has an existing lease on the property for a business or enterprise.

Treatment of divisions and branches of federally registered organisations

In its submission, the Australian Labor Party – Victorian Branch explained that trade unions registered under Commonwealth legislation[324] may be comprised of multiple unincorporated divisions and State branches. Relevant divisions and State branches may be associated entities of the Australian Labor Party – Victorian Branch, although the federally registered union may not be.

The Australian Labor Party – Victorian Branch stated that there is a misunderstanding as to how the general cap and aggregation rules should apply to federally registered unions and sub-branches and divisions. The submission stated that the VEC has treated a registered union and all of its sub-branches and divisions as one entity (i.e. subject to a single general cap), whereas the Australian Labor Party – Victorian Branch has argued that branches and divisions should be treated as separate entities.[325]

Part 12 of the *Electoral Act 2002* (Vic) defines the term 'entity' as an incorporated or unincorporated body, or the trustee of a trust,[326] which

[324] *Fair Work (Registered Organisations Act) 2009* (Cth).
[325] Australian Labor Party – Victorian Branch submission, pp. 15-17.
[326] *Electoral Act 2002* (Vic), s. 206.

recognises that unincorporated bodies may be treated as separate entities.

The Panel noted that disclosure returns and annual returns are generally made in the name of the Victorian branch or division of the relevant political party, union or organisation, rather than in the name of the parent Commonwealth entity.

The VEC raised a similar concern in its submission, explaining it is unclear in Victoria how transfers of funds between branches of an RPP are to be treated. The VEC explained that issue had been considered and addressed in New South Wales as part of 2018 legislative changes, and suggested equivalent provisions be introduced in Victoria to clarify that a 'gift' includes the disposition of property from a branch of an RPP or associated entity, for example a disposition of property:[327]

- to a Victorian branch of an RPP from the federal branch of the party
- to a Victorian branch of an RPP from the branch of another State or Territory
- from a political party to another political party.

It is currently unclear how separate divisions and branches of an unincorporated entity should be treated for the purposes Part 12 of the *Electoral Act 2002* (Vic) and legislative amendments are required to clarify this. The Panel agreed with the suggestions made by the Australian Labor Party – Victorian Branch and the VEC. Those changes would recognise the autonomous and independent manner in which divisions and branches operate.

While branches and divisions would be able to separately donate up to the general cap to a recipient, they would also be required to separately comply with disclosure obligations. Further, as branches and divisions would be treated as separate entities, movements of funds between them may constitute a political donation.

[327] VEC submission Part 2 – Issues and recommendations, p. 21.

Recommendation 5.7: Amend the *Electoral Act 2002* (Vic) to clarify that:

- separate divisions and branches of an organisation, such as a federally registered trade union, may each constitute a separate 'entity' for the purposes of the Act
- a gift includes the disposition of property from an RPP, a branch of an RPP or an associated entity, including but not limited to:
    - a disposition of property to a Victorian branch of an RPP from the federal branch of the party
    - a disposition of property to a Victorian branch of an RPP from another State or Territory branch of the party
    - a disposition of property from a political party to another political party.

5.3 Prohibited donations

In addition to the general cap, the *Electoral Act 2002* (Vic) includes three prohibitions on political donations.

First, political donations can only be accepted if the donor is an Australian citizen or an Australian resident, or in the case of a donor who is not a natural person, has an Australian Business Number (or similar identifying number allocated or recognised by the Australian Securities and Investments Commission).[328] As a result, political donations from foreign donors are prohibited.

The Explanatory Memorandum for the Electoral Legislation Amendment Bill explained that:[329]

> *This is to address public concerns about the influence of foreign donations on political processes and Government decision making more generally.*

Second, anonymous political donations over the disclosure threshold (discussed in Chapter 4) are prohibited.[330] That prohibition was

[328] *Electoral Act 2002* (Vic), ss. 206 and 217A.
[329] Electoral Legislation Amendment Bill 2018 Explanatory Memorandum, p. 19.
[330] *Electoral Act 2002* (Vic), s. 217B.

introduced to support transparency and address concerns about donations having an actual or perceived influence on decision-making.[331]

Third, it is unlawful for a donor to make political donations to more than six third party campaigners during the election period.[332]

A political donation that is accepted in contravention of those prohibitions is forfeited to the State.[333]

The Panel considered whether any improvements could be made to Victoria's existing prohibitions, and whether additional prohibitions were required.

Donations from particular industries

Several Australian jurisdictions ban political donations from particular industries:

- both the Australian Capital Territory and Queensland ban donations from property developers[334]
- New South Wales bans donations from property developers and the gambling, tobacco and liquor industries.[335]

In their submission, the Australian Greens Victoria called for donations from property developers and gambling industries to be banned, stating:[336]

> *With their bans the NSW and Queensland governments have recognised the power of the gambling and property industries within politics. The Victorian Greens have long argued similar restrictions should be in place in Victoria.*
>
> *After the almost $1 million the Hotels Association gave the Labor and Liberal parties before the last 2018 election, on top of the millions donated by Crown Casino over the years, it is no surprise Victorian governments have been so reluctant to address the*

[331] Electoral Legislation Amendment Bill 2018 Explanatory Memorandum, p. 20.
[332] *Electoral Act 2002* (Vic), s. 217F.
[333] *Electoral Act 2002* (Vic), ss. 217C and 217G.
[334] *Electoral Act 1992* (Qld), Pt 11, Div 8, Subdiv 4; *Electoral Act 1992* (ACT), Div 14.4A.
[335] *Electoral Funding Act 2018* (NSW), Pt 3, Div 7.
[336] Australian Greens Victoria submission, p. 4.

scourge of poker machines in the community or predatory behaviour of Crown Casino.

Similarly the millions of dollars that can be made by property developers just by the stroke of the Planning Minister's pen, justifies a ban on any political donations from property developers and associated entities.

The ban should extend to all forms of political donations from property developer and gambling entities, including fundraising dinners and other events that sell access to government Ministers or Opposition spokespeople.

Dr Yee-Fui Ng noted in her submission that the High Court found the New South Wales property developer ban consistent with the implied freedom of political communication and that a distinguishing factor of property developers is their dependence on decisions of government about the zoning of land and development approvals. However, Dr Ng stated that:[337]

Sector donation bans are less necessary if general yearly donation caps at a low threshold apply to that jurisdiction.

The Victorian Trades Hall Council stated in their submission:[338]

As with limits on political expenditure the focus of political expenditure and donations should be on transparency rather than limitation of participation.

Instead of banning or limiting how specific industries can participate in the democratic electoral process, a more appropriate reform would be to create a requirement for real time declarations of donations.

IBAC's *Operation Sandon Special Report* recommended examining whether Victoria's political finance laws would be strengthened if political donations from 'high-risk' groups, such as property developers, were banned.[339]

[337] Dr Yee-Fui Ng submission, p. 5.
[338] Victorian Trades Hall Council submission, p. 6.
[339] IBAC (2023), *Operation Sandon Special Report*, p. 209.

The Panel considered that Victoria's disclosure requirements and low general cap on political donations make it unnecessary to introduce bans on donations from particular industries.

Further, introducing industry-specific bans would introduce significant policy and administrative challenges:

- at the moment, there does not appear to be a clear, established policy rationale for determining which industries a ban should apply to
- it may be difficult in practice to determine whether a particular organisation belongs to a particular industry — for example, it is unclear whether a supermarket that sells liquor products would be considered part of the liquor industry for the purpose of donation bans
- based on its discussions with other jurisdictions, the Panel understood that it would be administratively burdensome and costly for a regulator to conduct a background check on each donor to assess whether they are associated with a particular industry (e.g. whether a natural person may be a director or senior employee of a company operating in a banned industry)
- industry-specific bans may unreasonably slur or stigmatise an industry.

Donations to multiple third party campaigners and associated entities

The *Electoral Act 2002* (Vic) limits the number of third party campaigners that a donor can donate to during an election period to six.

The Explanatory Memorandum for the Electoral Legislation Amendment Bill explained that:[340]

> *This is to prevent the proliferation of third party campaigners as a means to exceed the general cap, by donors seeking to provide political donations among a large number of third party campaigners.*

IBAC stated in its Donations and Lobbying Report that:[341]

[340] Electoral Legislation Amendment Bill 2018 Explanatory Memorandum, p. 38.
[341] Donations and Lobbying Report, p. 22.

... the current provision that allows an individual to donate to up to six third-party campaigners appears to provide a means to circumvent the general donation.

IBAC recommended reducing the number of third party campaigners, to whom a person can donate to, to three.[342] IBAC noted that in New South Wales, it is unlawful for a donor to donate to more than three third party campaigners in the same financial year — in New South Wales the donation cap applies to each financial year rather than to each election period.[343]

The Panel noted that similar risks would apply if an individual were to donate to multiple associated entities.

As discussed in Chapter 3, only seven third party campaigners lodged annual returns for the 2018-19 to 2021-22 years. According to analysis undertaken by the VEC of published disclosed donation data as at 7 July 2023, only 19 donors had made a disclosed donation to more than one third party campaigner, and none had donated to more than three. The data provided by the VEC also show that:[344]

- only two associated entities received disclosable political donations during 2018-19 to 2021-22
- the highest amount raised by an associated entity through undisclosed donations over that period was $71,654, which was received by the Outer Eastern Platinum Club.

Data available to the Panel suggest that there is not currently a practice in Victoria of donations to multiple third party campaigners or associated entities being used to circumvent the general cap. However, the Panel considered that there remains a material risk of this occurring in the future. For example, a donor could, in theory, donate up to the general cap to an RPP and to six associated entities related to that RPP. Based on the value of the general cap for 2023-24, that would enable a donor to donate almost $33,000 to a particular political movement within an

[342] Donations and Lobbying Report, p. 8.
[343] *Electoral Funding Act 2018* (NSW), s. 25.
[344] Data provided by the VEC to the Electoral Review Expert Panel.

electoral period, which the Panel considered would create an unacceptably high risk of actual or perceived undue influence.

The Panel noted that the risk of actual or perceived undue influence needs to be balanced against the rights of Victorians, including the right to support chosen organisations and participate in political activity. The Panel considered that reducing the limit on the number of third party campaigners that a donor can donate to three, rather than six, would not unduly burden those rights. For example, as explained above, available data suggest that donors do not generally donate to more than three third party campaigners in an election period.

The Panel agreed with IBAC's recommendation and also considered that donors should be limited to donating to no more than three associated entities in each election period.

Recommendation 5.8: Amend s. 217F of the *Electoral Act 2002* (Vic) to reduce the number of third party campaigners that a donor may donate to during the election period to:

- three, or
- such higher number as required for the limit to be lawful, according to independent legal advice provided to the Victorian Government.

Introduce an equivalent limit for donations to associated entities.

Suggested limit on cash donations

In its submission, the VEC recommended that cash donations over a certain limit be made unlawful. The VEC stated:[345]

> *In practice, the disclosures scheme under Part 12 is centred around assessing electronically transferred funds. Problematically, cash donations are inherently difficult to trace since the making or accepting of a cash donation confers anonymity.*
>
> *The VEC believes that a cap on cash donations would make the administration of Victoria's donation and disclosure scheme more effective and transparent. A reasonable cap on cash donations*

[345] VEC submission Part 2 – Issues and recommendations, p. 10.

would improve integrity and compliance with the scheme, as a shift towards more electronically transferred funds of large amounts would require improved record-keeping and disclosure on the part of donors and recipients.

The VEC noted that following ICAC's report on Operation Aero, New South Wales made it unlawful for a person to make or accept a political donation in the form of cash over $100.[346]

The Panel agreed that cash donations pose a heightened integrity risk, as they are harder to track and audit.

The Panel also considered that imposing a limit on cash donations would have limited impact on political participation. According to research published by the Reserve Bank of Australia, the use of cash in Australia is declining, with the share of in-person transactions made with cash halving to 16 per cent over the three years to 2022. That research study also indicates that the largest decline in the use of cash is among demographics that traditionally used cash more frequently — such as the elderly, those on lower incomes and those in regional areas.[347]

The Panel considered that the value of the limit on cash donations should be aligned with the 'small contribution' amount. As explained above, the Panel recommended the 'small contribution' amount is increased to $100. Setting the cash donations limit to $100 would also provide consistency with New South Wales.

Indexation of the 'small contribution' amount is discussed in Chapter 8.

Recommendation 5.9: Amend the *Electoral Act 2002* (Vic) to introduce a ban on cash donations exceeding the value of the 'small contribution' amount (as indexed from time to time).

[346] *Electoral Funding Act 2018* (NSW) s. 50A.

[347] Mulqueeney, J. and Livermore, T. (2023), *Cash use and Attitudes in Australia,* p. 1.

Suggested prohibition on foreign currency and cryptocurrency political donations

The VEC recommended that political donations made in foreign currency should be banned, as foreign currency donations create additional administrative burdens and challenges in ensuring relevant threshold and limits are complied with, for example because it is unclear what exchange rate should be applied.[348]

New South Wales requires SCAs to be denominated in Australian dollars.[349] That requirement may mitigate the issues identified by the VEC, as political donations would need to be converted into Australian dollars to be paid into the SCA.

The Panel considered that a Donation Recipient's SCA should be required to be denominated in Australian dollars. That would effectively require foreign currency donations to be converted into Australian dollars when deposited into the SCA, avoiding confusion about the value of the donation.

Recommendation 5.10: Amend the *Electoral Act 2002* (Vic) to require SCAs to be denominated in Australian dollars.

The VEC also recommended that cryptocurrency political donations be prohibited, defining cryptocurrency in its submission as:[350]

> *Any form of digital currency in which transactions are verified and records maintained by a decentralised system using cryptography, rather than by a centralised banking authority.*

Cryptocurrency political donations pose similar administrative burdens and challenges to foreign currency donations. However, the VEC stated that allowing cryptocurrency donations also 'increases the risk of donations being made or received that are ultimately untraceable'.[351]

[348] VEC submission Part 2 – Issues and recommendations, p. 11.
[349] *Electoral Funding Act 2018* (NSW), ss. 37, 41 and 44.
[350] VEC submission Part 2 – Issues and recommendations, pp. iv and 11.
[351] VEC submission Part 2 – Issues and recommendations, p. 11.

The Panel understood that the term cryptocurrency is not clearly defined under Australian law, and at least for tax purposes, cryptocurrency is treated as property rather than currency.[352] The Reserve Bank of Australia explained in its 2021 submission to the Parliament of Australia Senate Select Committee on Australia as a Technology and Financial Centre:[353]

> *Cryptocurrencies or crypto-assets are loosely defined terms that refer to a broad range of privately issued digital assets. They have their own 'currency' unit and are not denominated in the currency of any sovereign issuer. … While the term 'cryptocurrency' may suggest that they are a form of money, the consensus is that existing cryptocurrencies do not provide the key attributes of money. … The effect of the Currency Act 1965 is that crypto-assets are not legal tender, though this does not prevent their use where both parties wish to do so.*

The Panel agreed that political donations made using cryptocurrency would currently pose an increased risk to integrity and transparency.

However, the Panel noted that imposing a ban on cryptocurrency political donations may be challenging, because of the:

- lack of a single, precise definition under Australian law
- continuing development of new forms of digital assets.

The Victorian Government should consider prohibiting cryptocurrency political donations or introducing additional safeguards for them, while taking into account their evolving nature and the regulatory challenges cryptocurrency poses.

Recommendation 5.11: That the Victorian Government consider prohibiting or further regulating political donations made using cryptocurrency.

[352] Australian Taxation Office (2023), *What are crypto assets?*, https://www.ato.gov.au/individuals/Investments-and-assets/crypto-asset-investments/what-are-crypto-assets-/, last updated 30 June 2023.

[353] Reserve Bank of Australia (2021), *Inquiry into Australia as a Technology and Financial Centre – Submission,* p. 3.

6 Funding support

The 2018 amendments made significant reforms to the funding support provided to registered political parties (RPPs), Members of Parliament (MPs) and candidates, including:

- substantially increasing the amount of public funding that eligible recipients may claim, which reimburses eligible RPPs and candidates for political expenditure that they incur for an election
- introducing two new types of funding, administrative expenditure funding and policy development funding.

Electoral funding support is broadly accepted as one mechanism to enhance the integrity of elections.[354] Where RPPs and candidates have an alternative source of funding, their dependence on donations is reduced. If properly designed, funding support should complement private donations and fundraising, rather than wholly replace them.

Professor Twomey said at a public forum:[355]

> *I've always been opposed to 100% public funding … Because it stops parties engaging with their own grassroots and their own constituency. Parties don't then focus their policies on what the people actually want because then they can be a niche political thing, they're just going to get their funding from the government, and they don't have to engage with people.*

6.1 Existing funding arrangements

Part 12 of the *Electoral Act 2002* (Vic) provides three types of funding support for RPPs, MPs and candidates, referred to in the Act as public funding, administrative expenditure funding and policy development funding. Each funding type is administered by the VEC.

[354] Dr Yee-Fui Ng submission, p. 4.
[355] Transcript of Electoral Review Expert Panel public forum held on 20 July 2023, 2 pm to 3 pm.

Eligibility criteria apply to each type of funding. An RPP, MP or candidate cannot receive all three types of funding and might be ineligible for all, depending on its circumstances.

Each type of funding operates on a reimbursement basis — broadly speaking, the amount received cannot exceed the claimable expenses incurred.

This Sub-chapter discusses how funding arrangements currently operate. Recommendations for reform are discussed in the following Sub-chapters.

Public funding

Subject to eligibility requirements, public funding is provided to RPPs, and to candidates who are not endorsed by an RPP. Public funding is not provided to RPP endorsed candidates, as it is received by the RPP on their behalf.

Public funding is provided to cover (partly or in full) the cost of political expenditure and electoral expenditure incurred for an election and must be paid into the recipient's State campaign account (SCA).

For a candidate (or their RPP) to be eligible for public funding for an election, they must either:[356]

- receive at least four per cent of the first preference vote at the election
- be elected to the Parliament at that election.

The amount of public funding that may be claimed for each candidate is proportionate to the number of first preference votes that the candidate receives.

The 2018 amendments significantly increased the public funding entitlement. For the 2018 State election, the entitlement was equal to $1.79 per first preference vote.[357]

[356] *Electoral Act 2002* (Vic), s. 211(3).

[357] Victoria, *Parliamentary Debates*, Legislative Council, 22 June 2018, p. 3045 (Special Minister of State).

Following that election, the entitlement was equal to:[358]

- $6 for each first preference vote given for a candidate for election to the Legislative Assembly, subject to indexation — equal to $7.01 for 2023-24
- $3 for each first preference vote given for a candidate for election to the Legislative Council, subject to indexation — equal to $3.50 for 2023-24.

The second reading speech for the Electoral Legislation Amendment Bill explained that public funding entitlements were increased to:[359]

- reflect the current national trend to increase public funding for elections to reduce the reliance on private donations
- recognise that the introduction of donation caps reduced how much money can be raised.

Statement of expenditure and payment

To receive public funding for an election, an RPP's registered officer or an independent candidate must provide the VEC with a statement of expenditure that specifies that their political and electoral expenditure in relation to the election was either:[360]

- equal to or greater than their maximum entitlement, based on the number of first preference votes received — in which case the amount of public funding paid is equal to the entitlement
- a specified amount that was less than their maximum entitlement — in which case the amount of public funding paid by the VEC is equal to the specified amount.

However, the amount of public funding payable is reduced by double the amount of any political donation that is received in contravention of Part 12 of the *Electoral Act 2002* (Vic).[361]

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[358] *Electoral Act 2002* (Vic), s. 211(2A); VEC (n.d.), *Indexation*, https://www.vec.vic.gov.au/candidates-and-parties/political-donations/indexation, accessed 15 August 2023.
[359] Victoria, *Parliamentary Debates*, Legislative Assembly, 10 May 2018, p. 1351.
[360] *Electoral Act 2002*, (Vic), s. 208.
[361] *Electoral Act 2002* (Vic), s. 212(2A).

A statement of expenditure must be provided before the expiration of 20 weeks after election day.[362] If a statement of expenditure is not provided within that period, public funding is not provided and any advance public funding that was provided for the election must be returned.

Advance public funding

An RPP or candidate that receives public funding for a general election may choose to receive advance public funding for the next general election. The total amount of advance public funding paid, for the upcoming election, is equal to the amount of public funding paid to that RPP or candidate for the previous general election. Advance public funding is paid in the following instalments:[363]

- 40 per cent within 30 days after the VEC is given the expenditure statement for the previous election
- 20 per cent on 30 April of each of the next three calendar years.

Following the election to which the entitlement is related, the amount of advance public funding paid is reconciled against the amount of public funding that should have been paid to that RPP or candidate (e.g. based on the statement of expenditure lodged for that election):[364]

- if the total amount of advance public funding paid for that election was lower than the public funding entitlement, the VEC is required to pay the difference
- if the amount of advance public funding paid was greater than the entitlement, the excess must be repaid by the RPP or candidate, or the VEC may deduct the excess from the next payment of advance public funding.

Administrative expenditure funding

Administrative expenditure funding was introduced as part of the 2018 amendments to the *Electoral Act 2002* (Vic) to help RPPs and MPs meet

[362] *Electoral Act 2002* (Vic), ss. 208(1) and (2).
[363] *Electoral Act 2002* (Vic), s. 212A.
[364] *Electoral Act 2002* (Vic), ss. 212A(3) and (4).

the administrative costs of running their offices and complying with the new disclosure and reporting requirements.[365]

Administrative expenditure funding is only provided to independent MPs and to RPPs with elected MPs. As of 2023-24, the maximum annual entitlement is equal to:[366]

- for an independent MP, and for an RPP's first MP — $233,490
- for an RPP's second MP, $81,710
- for each additional MP of an RPP, up to 45th — $40,870

There is no further entitlement beyond the 45th MP of an RPP, meaning that the maximum annual entitlement is currently $2,072,610.

The VEC is required to pay administrative expenditure funding quarterly, in advance.[367]

To receive administrative funding, the registered agent of an RPP or the registered agent of an independent MP must provide the VEC with a written request, in the form determined by the VEC. The request must acknowledge that funding that is not used to incur 'claimable expenditure' must be repaid to the VEC. It must also acknowledge that administrative expenditure funding must not be paid into the SCA, or be used for:[368]

- political expenditure or electoral expenditure
- expenditure for which an MP has claimed a parliamentary allowance
- expenditure that is incurred substantially in relation to the election of a member of a party to another Parliament.

If the VEC becomes aware that an amount of administrative expenditure funding has been paid or used in a prohibited manner (e.g. paid in to the SCA), it must impose a penalty on the RPP or MP equal to double of that amount.[369]

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[365] Victoria, *Parliamentary Debates*, Legislative Assembly, 10 May 2018, p. 1351.

[366] *Electoral Act 2002* (Vic), s. 207GA(1); VEC (n.d.), *Indexation*, https://www.vec.vic.gov.au/candidates-and-parties/political-donations/indexation, accessed 15 August 2023.

[367] *Electoral Act 2002* (Vic), s. 207GA(2).

[368] *Electoral Act 2002* (Vic), s. 207GB(4).

[369] *Electoral Act 2002* (Vic), s. 207GG.

If a request for administrative expenditure funding is not provided to the VEC before the payment is due, the entitlement is not affected, although the VEC cannot make the payment until the request is provided.[370]

Special rules for general election periods

In an October quarter in which a general election is held, the payment is split on a pro-rata basis, for the period before and after the election. From 1 July in a general election year: [371]

- independent MPs are only entitled to receive administrative expenditure funding if they stand at that election
- RPPs are only entitled to receive administrative expenditure funding for MPs that stand at that election as endorsed candidates.

Independent MPs and RPPs are required to confirm that they, or their MPs, intend to stand at the election as part of their request to receive funding for that quarter.

Claimable expenditure

Administrative expenditure funding must be spent on claimable expenditure or repaid to the VEC. Claimable expenditure is defined to mean expenditure for administrative expenses as determined by the VEC. Certain matters are automatically included as claimable expenditure, for example:[372]

- administration or management of the RPP's or MP's activities
- conferences, seminars, meetings or similar functions at which their policies are discussed or formulated
- audit of the financial accounts of, or claims for payment or disclosures under the *Electoral Act 2002* (Vic) of, the RPP or MP
- remuneration of staff, to the extent that it relates to time spent on the above matters
- equipment or vehicles used by staff in relation to the above matters, and office and accommodation for staff and equipment
- interest payments on loans.

[370] *Electoral Act 2002* (Vic), s. 207GB(11).
[371] *Electoral Act 2002* (Vic), ss. 207GA(3)-(5).
[372] *Electoral Act 2002* (Vic), s. 207G.

The VEC's *Determination No 7 of 2018, Claimable Administrative Expenditure*, provides further information on the matters that may be claimed. It states that:[373]

> *the VEC considers expenditure associated with the general running of the registered political party, or the office of the independent elected member to be claimable expenditure.*

Claimable Expenditure (annual) Returns for administrative expenditure

Registered officers of RPPs and registered agents of independent MPs are required to submit an 'annual return' in respect of their claimable administrative expenditure within 16 weeks of the end of each calendar year.[374] Those returns will be referred to as Administrative Expenditure Returns in this Report, to distinguish them from Donation Recipient annual returns discussed in Chapter 4.

An Administrative Expenditure Return must specify that the RPP or MP spent on claimable expenditure in the calendar year either:[375]

- an amount equal to or higher than the administrative expenditure funding entitlement
- some lower amount, in which case the difference must be repaid to the VEC or deducted from a future payment.

Policy development funding

Policy development funding is only available to RPPs who do not receive administrative expenditure funding and did not receive public funding for the last general election or for any election held during the calendar year. In addition:[376]

- the RPP must have been registered for the whole of the calendar year
- the VEC must be satisfied that the RPP operates as a genuine party.

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[373] VEC (2018), *Determination No 7 of 2018, Claimable Administrative Expenditure.*
[374] *Electoral Act 2002* (Vic), s. 207GC.
[375] *Electoral Act 2002* (Vic), s. 207GF.
[376] *Electoral Act 2002* (Vic), s. 215A(3).

As at 2023-24, the maximum entitlement for an RPP is the greater of:[377]

- $1.17 for each first preference vote given for a candidate who was endorsed by the RPP at the previous general election
- $29,180.

For an RPP to receive policy development funding, its registered officer must submit a statement within 20 weeks of the end of the calendar year, stating whether the RPP incurred 'policy development expenditure' that was:[378]

- equal to or greater than the maximum entitlement
- an amount lower than the maximum entitlement, in which the VEC will only provide funding up to that amount.

The VEC has the power to determine what expenses are considered policy development expenditure, although political expenditure or electoral expenditure cannot be included. The VEC's *Determination No 1 of 2019* sets out the principles that the VEC uses to determine which matters are considered a policy development expense. Claimable expenses include the following, provided they are incurred for policy development:[379]

- office accommodation and utilities
- staff and equipment
- interest charges on loans
- travel and cost of activities (e.g. conferences and meeting)
- advertising.

Audit certificates

A public funding statement of expenditure, Administrative Expenditure Return or policy development funding expenditure statement must be accompanied by an audit certificate.[380]

[377] *Electoral Act 2002* (Vic), s. 215A(2); VEC (n.d.), *Indexation*, https://www.vec.vic.gov.au/candidates-and-parties/political-donations/indexation, accessed 15 August 2023.
[378] *Electoral Act 2002* (Vic), s. 215A(4).
[379] VEC (2019), *Determination no 1 of 2019, Policy development expenditure statement submitted to the Victorian Electoral Commission by eligible registered political parties*.
[380] *Electoral Act 2002* (Vic), ss. 207GD, 209 and 215B.

An RPP's audit certificate must be prepared by a registered company auditor.[381] A candidate's or MP's certificate must be prepared by an 'independent auditor' and must advise that the statement has been audited in accordance with the Australian Accounting Standards.[382]

The audit certificate must state that the auditor:[383]

- was given full and free access at all reasonable times to all accounts, records, documents and papers relating directly or indirectly to any matter required to be specified in the statement
- examined the material referred to above for the purpose of giving the certificate
- received all information and explanations that the auditor requested in respect of any matter required to be specified in the statement
- has no reason to believe that any matter stated in the statement is not correct.

The Panel discussed changes to audit certificates in Chapter 4.

6.2 Available data on funding

The VEC published data on funding provided to RPPs and independent candidates and shared it with the Panel.[384] Data on public funding show that:

- 14 RPPs and 31 independent candidates claimed public funding for the 2022 election
- 71 per cent of those RPPs (10 of 14) and 81 percent of those independent candidates (25 of 31) had claimable expenditure up to or over their maximum entitlement based on first preference votes received, and the remainder claimed expenditure under the maximum
- The amount of public funding paid to independent candidates ranged from $4,241 to $83,805, and the amount paid to individual RPPs ranged from $24,422 to $12,655,133

[381] The definition of 'registered company auditor' is provided in s. 9 of the *Corporations Act 2001* (Cth).
[382] *Electoral Act 2002* (Vic), ss. 207GD and 209.
[383] *Electoral Act 2002* (Vic), ss. 207GD(3), 209(3) and 215B(2).
[384] VEC (2023), *VEC funding entitlements and payments post-State election 2022.*

- three independent candidates who met the four per cent first preference vote eligibility threshold did not claim public funding
- the total public funding entitlement payable for the 2022 State election was approximately $30.4 million, with approximately $29.5 million going to RPPs and approximately $900,000 going to independent candidates
- about 76 per cent of public funding went to the largest RPPs, the Australian Labor Party – Victorian Branch and the Liberal Party of Australia (Victorian Division)
- ten RPPs and 14 independent candidates received advance public funding for the 2022 election
- five of those RPPs and two independent candidates received less advance public funding than their entitlement, based on first preference votes received and expenditure incurred, meaning that the VEC paid the remainder in 2023
- three RPPs and two independent candidates received more in advance public funding than their entitlement (if any) for the 2022 election — the amount of overpayment must be repaid or deducted from future payments
- eight independents received advance public funding for the 2022 election but were not eligible for public funding as they did not contest the 2022 election, meaning that all of the advance public funding received must be repaid to the VEC
- two RPPs and two independents who received advance public funding for the 2022 election had to repay it because they did not meet the eligibility threshold
- the VEC paid out almost $12 million in advance public in 2023 for the 2026 election.

The VEC's latest annual report, for the 2022-23 financial year, reported that it paid approximately:[385]

- $6.2 million in administrative expenditure funding to 15 RPPs and five independent MPs
- $151,000 in policy development funding to two RPPs.

[385] VEC (2023), *2022-23 Annual Report*, p. 70.

The Australia Institute provided an analysis of public funding data in their submission, which showed that larger RPPs (Australian Labor Party – Victorian Branch, Coalition parties and the Australian Greens Victoria) each received, on average, a higher amount of funding per vote received than other RPPs. The lower average rate for other RPPs reflects that:[386]

- they are likely to receive more votes in the Legislative Council than the Legislative Assembly, and a lower per-vote funding rate applies for Legislative Council candidates
- their endorsed candidates are more likely to fall below the four per cent eligibility threshold.

6.3 Principles and design of public funding

Public funding is the greatest source of funding support provided to RPPs and candidates and was a key topic raised by stakeholders during consultation.

Dr Yee-Fui Ng explained in her submission, with reference to legal scholar Richard Briffault, that public funding can:[387]

- ensure RPPs are adequately resourced during a period of declining party membership and increasingly expensive campaigns
- enhance political integrity and equality, by breaking the link between private wealth and electoral influence while supplementing campaign resources.

The Australia Institute stated in an August 2023 discussion paper that public funding is an important measure to reduce the influence of private money in politics, although to be effective it needs to replace private money, not be in addition to it.[388]

The Centre for Public Integrity stated in its submission that the three key motives for funding RPPs are:[389]

- restricting the influence of private money

[386] The Australia Institute submission, pp. 13-14.
[387] Dr Yee-Fui Ng submission, pp. 3-4.
[388] Browne, B. (The Australia Institute) (2023), *Principles for fair political finance reform,* pp. 8-9.
[389] The Centre for Public Integrity submission, p. 21.

- enhancing political equality and fair competition
- ensuring adequate funding to meet the rising cost of electioneering.

However, The Centre for Public Integrity also explained that academic research has identified several risks with public funding, in particular the existing per-vote funding model, including:[390]

- fuelling excessive electoral expenditure
- sapping the internal vitality of RPPs and atrophying their 'grassroot' links, by making them less reliant on community support and small donations
- entrenching incumbents, as Australia's public funding schemes reward previous electoral success.

Several stakeholders criticised the concept of public funding. Moira Deeming, Member for Western Metropolitan, questioned whether public funding was consistent with principles of democratic government and accountability for the use of public funds.[391]

At a public forum, Nick McGowan MP criticised public funding, stating:[392]

> *Public funding of elections should cease. It is abhorrent. It is complete misuse of taxpayers' money. …*
>
> *The public's money should not be used to bankroll political aspirants like myself no matter how noble the cause. …*
>
> *This system we have in Victoria today lends itself to contempt for public purse, and ultimately corruption, ironically. This should never have been acceptable for the taxpayers' money to be used to advance partisan agendas. It is the very definition of corruption, personal profit from the public purse. …*

The Panel examined the design of Victoria's public funding model, including the following elements:

- basis for determining value provided
- eligibility threshold

[390] The Centre for Public Integrity submission, pp. 22-23.
[391] Moira Deeming MP submission, p. 1.
[392] Transcript of Electoral Review Expert Panel public forum held on 13 July 2023, 2 pm to 3 pm.

- difference in value between houses
- advance public funding.

Basis for determining amount of funding provided

In Victoria, an RPP's or candidate's public funding entitlement is determined based on the number of first preference votes they receive.

All Australian jurisdictions other than Tasmania and the Northern Territory provide public funding or an equivalent funding stream, and use a dollar-per-vote model.[393]

However, some stakeholders criticised the per-vote public funding model. A common criticism is that per-vote funding exacerbates inequalities between incumbents and new entrants (Box 6.1).

The Panel identified another risk with the 'per-vote' public funding model — RPPs and candidates are required to incur claimable expenditure before the election but cannot know how much public funding they are eligible for until after the election. The 'per-vote' model may incentivise RPPs and candidates to maximise their political expenditure (e.g. using borrowed funds), on the assumption that higher expenditure will lead to more votes and a greater public funding entitlement for the election. However, this exposes RPPs and candidates to high levels of financial risk, in particular if they perform worse than expected at the election.

[393] Ng, Y., (2021), *Regulating money democracy: Australia's political finance laws across the federation*, p. 110.

Box 6.1: Statements that per-vote public funding exacerbates inequalities

'As implemented, per-vote public funding is unfair as it skews significantly in the favour of major parties.' (Climate 200 submission, p. 3)

'As it stands, the Electoral Legislation Amendment Act (2018) provides new and existing major party candidates a significant funding advantage through the provision of millions of dollars in public funding. By comparison, a new minor party or independent candidate begins with no public funding – providing a barrier to competitive participation in democracy that sees them at a six-figure disadvantage to even a first-time major party candidate before they have even decided to run.' (Melissa Lowe submission, p. 2)

'... The Labor Party and the Coalition received $17,055,984 and $13,589,731 in public funding respectively heading into the 2022 election. This provides the major parties with a significant head start over first-time Independent candidates who do not receive any advanced public funding for their campaigns.' (Lowe, M. et al. (2023), *Independent candidates' submission: Making Victorian Elections Safer and Fairer*, p. 9)

'All of Australia's public funding regimes reward previous electoral success, whether in the form of reimbursing electoral expenditure according to first preference votes or providing funds for incumbent members' administrative expenses. Both measures arguably serve to entrench incumbents and exacerbate their already heightened advantage, ensuring that "established parties are very likely to enjoy a financial advantage over newer parties." Graeme Orr and Joo-Cheong Tham have both observed that public funding may serve to exacerbate political inequality and will often "reward incumbents more than challengers".' (The Centre for Public Integrity submission, p. 23)

'Political finance rules that reward parties and candidates for prior performance risk locking out new entrants, cruelling their chances before the campaign even begins. New entrants already face higher fixed campaign costs because their infrastructure and name recognition start from zero.' (Browne, B. (The Australia Institute) (2023), *Principles for fair political finance reform*, p. 3)

The Panel considered three alternative public funding models, which are summarised below.

Multiple matching model

In its submission, The Centre for Public Integrity recommended that Victoria work towards a 'multiple-matching' model of public funding, acknowledging that:[394]

- no Australian jurisdiction has used such a model
- it would take considerable resources to implement.

[394] The Centre for Public Integrity submission, pp. 25-26.

Broadly speaking, a multiple-matching model would involve government contributions matching political donations made to RPPs and candidates by electors, who must be natural persons. For example, under a 4X multiple-matching model, if a candidate were to receive a $100 political donation from a constituent, they would receive $400 in public funds.

A limit would be placed on the maximum amount of a donation (e.g. $200) that would be matched, with no further public funding provided for donations over that amount.

As noted in The Centre for Public Integrity submission, the 'multiple-matching' model was briefly considered by the New South Wales Panel of Experts in their 2014 *Political Donations Final Report*, which concluded that the model:[395]

> *would be very difficult to implement, and would lead to further complication in an already complicated system.*

The Panel has not recommended the introduction of multiple-matched public funding in this Report, for the following reasons.

First, such a model would require RPPs and candidates to devote a significant amount of time to fundraising. The Panel heard from some stakeholders that requiring candidates to devote a large amount of time to seeking a large number of small donations, from numerous individuals, undermines the democratic process and leaves less time for meaningful policy analysis and discussions. The Hon Dr Ken Coghill, who spoke at a public forum on behalf of the Accountability Round Table, stated:[396]

> *As things presently are, there is a strong incentive for people to raise funds in order to spend even more on campaign expenses. And our concern is … that the focus of members, Members of Parliament, and people like public Secretaries, is diverted away from policy development, and very much in the direction of fundraising.*

[395] New South Wales Panel of Experts (2014), *Political Donations Final Report — Volume 1,* p. 79.
[396] Transcript of Electoral Review Expert Panel public forum held on 11 July 2023, 10 am to 12 pm.

Second, introducing such a model in Victoria would lead to greater inconsistency in Australia's political finance laws.

Third, a multiple-matching model would create significant risks of impropriety or misuse. For example, a candidate or RPP could provide potential donors with financial or non-financial inducements to make political donations. The Centre for Public Integrity acknowledged those risks in its submission, stating that the VEC and IBAC would require additional monitoring and compliance resources to address them and penalties for impropriety would need to be introduced.[397]

Funding linked to expenditure model

New South Wales used a 'funding linked to expenditure' public funding model for the 2011 election, before moving to the per-vote model for the 2015 election.[398] Under that model, RPPs and candidates were reimbursed for a fixed proportion of their expenditure, up to a cap. The proportion of the expenditure reimbursed would reduce as the amount of expenditure approached the cap.[399]

Queensland also briefly moved to a 'funding linked to expenditure' model as part of 2011 reforms to its political finance laws.[400] However, 2014 legislative amendments reintroduced the 'per-vote' funding model.[401]

In their 2014 report, the New South Wales Panel of Experts expressed a preference for the 'funding linked to expenditure' model over the 'per-vote' model. However, the New South Wales Electoral Matters Committee recommended the 'per-vote' model be used and that recommendation was accepted by the New South Wales Government.[402]

The Panel did not receive any submissions suggesting that the 'funding linked to expenditure' model should be considered further.

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[397] The Centre for Public Integrity submission, pp. 29-30.

[398] New South Wales Panel of Experts (2014), *Political Donations Final Report — Volume 1,* pp. 76-78.

[399] New South Wales Panel of Experts (2014), *Political Donations Final Report — Volume 2,* p. 17.

[400] *Electoral Reform and Accountability Amendment Act 2011* (Qld), ss. 177DA-177DC.

[401] *Electoral Reform Amendment Act 2014* (Qld), ss. 36-38.

[402] Parliament of New South Wales Joint Standing Committee on Electoral Matters (2016), *Inquiry into the final report of the expert panel – political donations and the government's response*, p. 26; Office of the Premier of New South Wales (2016), *Inquiry into the final report of the expert panel – political donations and the government's response (report 1/56 – June 2016), Government response*, pp. 3-4.

Democracy dollars model

In their submission to the Electoral Matters Committee's *Inquiry into the conduct of the 2022 Victorian State election*, The Australia Institute discussed the 'democracy voucher' or 'democracy dollar' model of public funding. Under that model, eligible voters are sent vouchers for public funding which they can provide to the candidate or RPP of their choice.[403]

The Panel did not support the introduction of such a public funding model, as:

- it would significantly increase the administrative cost of providing public funding, as the VEC would be required to distribute vouchers and instructions to all electors and then collect information from RPPs and candidates about the vouchers given to them
- additional oversight measures would need to be introduced to prevent fraudulent conduct
- the amount of public funding provided to RPPs and candidates would reflect their level of support among electors, which is broadly consistent with the outcome achieved by the existing 'per-vote' model.

Panel's conclusion

While acknowledging the risks identified and concerns raised, the Panel considered that Victoria's existing per-first-preference-vote model remains appropriate and should be retained, as it provides:

- consistency with other Australian jurisdictions
- an incentive for RPPs and candidates to achieve public support, consistent with principles of democracy and public participation
- a ceiling on the maximum amount of public funding that the government is required to pay for an election, based on the number of voters at that election, helping to prevent uncontrolled growth in political expenditure and the government's financial liabilities.

The Panel also considered that, compared to some alternative models, there are fewer risks of the per-vote model being misused through schemes to maximise the amount of public funding provided.

[403] The Australia Institute (2023), *Submission: 2022 Victorian State election inquiry*, p. 17.

Value of 'per-vote' funding

For 2023-24, the public funding entitlement is equal to:

- $7.01 for each first preference vote given for a candidate for election to the Legislative Assembly
- $3.50 for each first preference vote given for a candidate for election to the Legislative Council — half of the per-vote rate of the Assembly.

During consultation, stakeholders raised two key issues concerning these values:

- the appropriateness and fairness of the different treatment of Legislative Council and Assembly votes was questioned
- the introduction of 'tranche' public funding was proposed, under which a higher rate would be paid to RPPs and candidates for votes received up to a certain percentage of all available first preference votes.

Difference between Legislative Council and Assembly

The difference in per-vote public funding amounts between the Legislative Assembly and Legislative Council was raised by stakeholders. One concern was that the Legislative Council is more often contested by minor parties and independents than the Legislative Assembly. As such, setting a lower amount per first preference vote in the Council would disadvantage minor parties and independents, particularly when that figure is doubled in the Assembly.

The Centre for Public Integrity noted this concern in their submission:[404]

> *We are concerned that by providing a rate of return for Assembly seats that is double the rate of return for Council seats, Victoria in effect disadvantages the minor parties that focus on the Council.*

[404] The Centre for Public Integrity submission, p. 21.

Richard Denniss of The Australia Institute also noted this challenge for those contesting Legislative Council seats at a public forum:[405]

> *... I think it probably makes it harder for new entrants. It would be easier in most state parliaments, including Victoria, for new parties to get a seat in the upper house, than it is for them to win seats in the lower house. I think if there was uniform funding of upper house and lower house, it would slightly advantage – well, that would be a smaller disadvantage to minor parties.*

The Australia Institute also stated in its submission:[406]

> *Making Legislative Council votes worth half as much as Legislative Assembly votes reflects that major parties tend to spend more on lower house campaigns. However, because minor parties usually focus on upper house races, the effect would in practice be to reduce their funding relative to their share of the sum of Legislative Assembly and Legislative Council votes.*

During parliamentary debate on the Electoral Legislation Amendment Bill, the then Special Minister of State was asked about why different per-vote rates were proposed and stated:[407]

> *The last issue in relation to the quantum of the difference is that government is formed in the lower house, and for better or for worse in terms of how the Parliament works that is always going to be the focus of attention. It is the focus of attention in relation to the community's expectation of the high-profile nature of the campaigning that takes place in the Assembly seats compared to the Council seats. When push comes to shove it is in accordance with the campaigning activity that is associated with the election of MPs in the Victorian Parliament, and ultimately, at the end of the day, it is campaign-focused with the importance of forming government in the Assembly.*

[405] Transcript of Electoral Review Expert Panel public forum 11 July 2023, 10 am to 12 pm.
[406] The Australia Institute submission, p. 12.
[407] Victoria, *Parliamentary Debates*, Legislative Council, 22 June 2018, p. 3046.

Victoria's different treatment of the Assembly and Council is inconsistent with practices in other Australian jurisdictions. Four other Australian jurisdictions with a bicameral parliament provide public election funding, the Commonwealth, New South Wales, South Australia and Western Australia. Each of these jurisdictions except for New South Wales provides the same per-vote funding rate for both houses of Parliament. New South Wales has a unique system of rules that takes into account both the house that the candidate is contesting and the seats being contested by the RPP overall.[408]

The Panel noted that Victoria's approach appears sound once differences between the Legislative Assembly and Council are taken into account:[409]

- the Legislative Assembly consists of 88 MPs, elected by 88 single-member electoral districts
- the Legislative Council consists of 40 MPs, elected to represent eight electoral regions — each region elects five MPs using optional preferential voting.

Each electoral region has significantly more voters than an electoral district (on average 11 times more). If the 'per-vote' public funding rate was the same for both Legislative Assembly and Council candidates, a Legislative Council candidate could potentially be eligible for significantly more public funding than a Legislative Assembly candidate (Box 6.2). In summary, as there are roughly half as many seats in the Legislative Council than in the Legislative Assembly, groups of Council candidates that have the same vote outcome in percentage terms as Assembly candidates receive roughly twice the number of first preference votes.

Setting the per-vote rate for the Legislative Council at half the rate for the Legislative Assembly reflects that difference and broadly ensures that all candidates are eligible for roughly the same amount of public funding relative to the percentage of first preference votes received.

[408] New South Wales Electoral Commission (2023), *Amounts payable for parties*, https://elections.nsw.gov.au/funding-and-disclosure/public-funding/election-campaigns-fund/amounts-payable-for-parties, last updated 14 August 2023.

[409] VEC (2019), *Report to Parliament on the 2018 Victorian State election*, p. 10.

Based on its analysis, the Panel did not consider that the difference in per-vote public funding between houses should be changed at this time.

Box 6.2: Impact of different structures of the houses of Parliament on first preference votes received by candidates

- Each electoral region is made up of 11 electoral districts, meaning that an electoral region has on average 11 times more voters than an electoral district.
- That means that if a Legislative Council candidate and Legislative Assembly candidate both receive a given percentage (e.g. 10 per cent) of the first preference votes cast in their electorate, the Legislative Council candidate would receive around 11 times more votes than the Legislative Assembly candidate.
- However, it also needs to be taken into account that each electoral region elects five MPs and it is common for candidates for election to run as groups of up to five members, whereas Legislative Assembly candidates run individually as each electoral district elects a single MP.
- For the above reason, when examining public funding entitlements, it is more accurate to compare the number of first preference votes for a group of five Legislative Council candidates with those provided to five Legislative Assembly candidates.
- If a group of five candidates running for an electoral region received a given percentage (e.g. 10 per cent) of the first preference votes cast in the region, they would collectively receive approximately twice as many votes (11/5) as five Legislative Assembly candidates who each received that percentage of first preference votes in their district.

Tranche funding

Several stakeholders recommended that Victoria introduce a tranche model for public funding, with reference to the approach taken in South Australia. Tranche public funding involves providing a higher per-vote rate, up to a fixed percentage of the total first preference votes cast.

South Australia has introduced a tranche model for public funding for new candidates, groups and RPPs. The tranche model does not apply to candidates who were an MP immediately prior to the election, or to RPPs or groups that had an MP immediately prior to the election. Under the model, a higher per-vote rate applies to votes up to ten per cent of the total primary vote.[410]

[410] *Electoral Act 1985* (SA), s. 130P.

Professor Graeme Orr has previously written that South Australia's approach:[411]

> *... provides an element of affirmative action, because it weights public funding towards minor parties. Such parties, being less likely to wield executive power, attract fewer wealthy or corporate donors.*

In her submission, Dr Yee-Fui Ng described South Australia's tranche model as a more progressive and preferable approach.[412]

The Centre for Public Integrity stated in its submission that:[413]

> *The current dollar-per-vote model does not discriminate between the funding allocated for the first vote received and the millionth vote received. The promotion of political equality requires that these votes are discriminated against in terms of their pecuniary value to candidates and parties.*

The Panel noted that the New Zealand Electoral Review recommended the introduction of tranche public funding in that jurisdiction in its June 2023 interim report.[414]

The Panel did not support the introduction of tranche public funding in Victoria. First, such a model would be inconsistent with the fundamental democratic principle of each vote being equal. Second, the introduction of tranche funding may create a perverse incentive for RPPs to split into smaller parties, or for politically aligned candidates to run as independents, for the purpose of increasing their combined public funding entitlement.

Eligibility for public funding

Currently, public funding is only provided for candidates that either:

- are elected at the election

[411] Orr, G. (Handbook of Political Party Funding) (2018), *Full public funding: cleaning up parties or parties cleaning up?*, p. 92.
[412] Dr Yee-Fui Ng submission, p. 4.
[413] The Centre for Public Integrity submission, p. 30.
[414] Independent Electoral Review (2023), *Interim Report: Our Draft Recommendations for a Fairer, Clearer, and More Accessible Electoral System*, pp. 214-215.

- receive at least four per cent of first preference votes at the election.

Several stakeholders suggested that the four per cent threshold should be lowered. The Centre for Public Integrity suggested that the threshold should be two percent, stating in its submission that:[415]

> *While the four per cent threshold in Victoria is intended to prevent frivolous candidacies, it can serve to dissuade bona fide candidates who are hesitant about making a potentially non-recoupable financial investment in their campaign which larger players can otherwise recover.*

The Australia Institute stated in its submission:[416]

> *While it makes sense to limit public funding based on vote share to (a) discourage people from running if they do not have a base of popular support, (b) limit administration costs for the VEC and (c) discourage people from running for office just to raise money, the use of a threshold means that a few votes can make the difference between a candidate receiving almost $15,000 versus receiving nothing (and losing their deposit).*

Stephen Capon, independent candidate for Narre Warren North at the 2022 election, stated in a submission to the Parliament of Victoria Electoral Matters Committee that the four per cent threshold should be scrapped arguing that:[417]

- there is no legitimate reason for it, and it is used to enfranchise major parties and disenfranchise minor parties and independents
- it does not prevent 'nuisance nominations' or proxy candidates, as costs for those candidates may be paid by donors and they are unlikely to incur significant costs
- the number of election candidates is increasing, meaning that the number of first preference votes is being split among more individuals, and genuine candidates are less likely to reach the four per cent threshold

[415] The Centre for Public Integrity submission, p. 23.
[416] The Australia Institute submission, p. 15.
[417] Stephen Capon (2023), *Submission to the inquiry into the conduct of the 2022 Victorian State election*.

- the four per cent threshold is a barrier for entry into the political process.

Every Australian jurisdiction that provides public funding uses a four per cent eligibility threshold, with some exceptions:[418]

- South Australia sets a four per cent threshold for Legislative Assembly candidates and a two per cent threshold for Legislative Council candidates[419]
- in New South Wales, the threshold for an RPP is four per cent of the first preference votes cast in electorates contested by endorsed candidates.[420]

Queensland previously had a six per cent threshold since 2014, but reduced it to four per cent from July 2022.[421] In a submission discussing Queensland's changes, Professor Graeme Orr described a four per cent threshold as 'the Australian norm.'[422]

Setting a threshold on public funding recognises that taxpayer funds should be administered with prudence and must only be provided for genuine campaigns. If no threshold applied, candidates would be able to run frivolous campaigns at the taxpayer's expense. Candidates expecting reimbursement should be able to demonstrate a reasonable level of public support, and be willing to take on some financial risk to demonstrate that they believe there is a real possibility that they may be elected.

A threshold also helps to ensure that the VEC's administration burden of managing the public funding is manageable. Without a threshold, the VEC may be required to administer and oversee small amounts of public funding to an enormous number of candidates and RPPs, making it impossible for the VEC to provide adequate regulatory oversight and

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[418] *Electoral Act 1992* (Qld), ss. 223-224; *Commonwealth Electoral Act 1918* (Cth), ss. 293-295; *Electoral Act 1907* (WA), s. 175LF.

[419] *Electoral Act 1985* (SA), s. 130Q.

[420] *Electoral Funding Act 2018* (NSW), ss. 66-70.

[421] *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Act 2020* (Qld).

[422] Orr, G. (2019), *Submission to the Inquiry by the Queensland Parliament, Economics and Governance Committee into the Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019 (Qld)*, p. 5.

support. Therefore, the Panel considered that a threshold requirement for public funding was required.

Victoria's four per cent threshold is consistent with that used by other Australian jurisdictions, and the Panel considered it provided an appropriate balance between relevant objectives and risks. The Panel considered that the case for the threshold being changed has not been made at this time.

Advance public funding

RPPs and MPs are currently able to elect to receive public funding in advance, in which case an amount equal to 80 per cent of their entitlement for the previous general election is paid in advance of a general election year. The remaining 20 per cent is paid in the year of the general election. The VEC identified this as a significant financial risk in its submission:[423]

> *If an overpayment is made and spent by a recipient who expected a similar entitlement at the next election, then the amount must be recovered which may result in significant financial impacts for the recipient and difficulty for the VEC in recovering public money. Similarly, there have been instances where a candidate opted to receive advance [public funding] but subsequently decided not to contest the following election, in which case they had to repay the full amount of advance [public funding].*

At the 2022 State election, five RPPs and 12 independent candidates received more than their entitlement in advance public funding and were required to pay some or all of it back to the VEC. According to data published by the VEC, as at 25 August 2023, repayments for three candidates and two RPPs were outstanding and/or overdue.[424] The financial risks of advance public funding are greater for independent candidates than for RPPs as:

- they may not have the economy of scale required to bear an unexpected debt repayment

[423] VEC submission Part 2 – Issues and recommendations, p. 23.
[424] VEC (2023), *VEC funding entitlements and payments post-State election 2022.*

- if they receive advance public funding and are subsequently unable to personally contest the election, all of it must be repaid (i.e. it cannot be transferred to a successor candidate).

Considering those risks, an independent candidate may decide not to apply for advance public funding. However, that would then leave them in a disadvantaged position relative to RPPs.

A candidate or RPP that is required to repay advance public funding received for one election (e.g. the 2022 general election) might instead be able to have that amount deducted from their advance public funding payment for the following election (e.g. the 2026 general election). The Panel noted that a candidate may be perversely incentivised to contest a future election to avoid paying a substantial public funding debt back to the VEC.

The only other Australian jurisdiction that provides public funding in advance of the election is New South Wales.[425] Those eligible for public funding can receive up to 50 per cent of their entitlement (calculated based on their entitlement for the previous election) six months prior to an election, and a further 25 per cent after the issue of the writs (an advance public funding rate of 75 per cent in total).[426]

In their 2014 *Political Donations Final Report,* the New South Wales Panel of Experts explained that it heard during consultation that advance public funding reduced the risk of a 'fundraising arms race', as it ensured RPPs and candidates would have some way to pay for up-front costs. The Panel of Experts recommended that the advance public funding rate in New South Wales should be increased from 30 per cent to 50 per cent.[427] Advance public funding was further increased to 75 per cent, as per current arrangements, in 2022.[428] That change was described as 'one of the ways to smooth the payments to political parties' and 'a minor integrity measure.'[429]

[425] VEC submission Part 2 – Issues and recommendations, p. 24.
[426] *Electoral Funding Act 2018* (NSW), s. 72.
[427] New South Wales Panel of Experts (2014), *Political Donations Final Report,* pp. 79-80.
[428] *Electoral Legislation Amendment Act 2022* (NSW), Schedule 3, s. 19.
[429] New South Wales, *Parliamentary Debates*, Legislative Council, 18 October 2022, p. 7246.

The VEC considered that adopting several elements of the New South Wales advance public funding scheme would mitigate the risks of Victoria's scheme:[430]

- paying a lower rate of advance public funding would reduce the risk that a recipient is required to pay back funds
- paying advance public funding closer to the election makes it more likely that it will be spent on claimable expenditure, again reducing the risk that funds must be paid back to the VEC.

The Panel acknowledged that the current design of advance public funding in Victoria is inconsistent with its intended purpose — supporting RPPs and candidates to pay for political expenditure related to the next general election. In particular, paying 40 per cent of that funding three years in advance appears inappropriate. A greater proportion of advance public funding should be paid closer to the date of the general election that it is intended to support.

The Panel considered that the first instalment of advance public funding paid in each election period should be reduced from 40 per cent to 20 per cent. The final instalment should be increased from 20 per cent to 40 per cent.

Recommendation 6.1: Amend s. 212A of the *Electoral Act 2002* (Vic) to:

- reduce the first advance public funding instalment for each election period from 40 per cent to 20 per cent
- increase the last instalment in each election period from 20 per cent to 40 per cent.

Currently, recipients of advance public funding cannot use the second, third or fourth instalment of advance public funding paid in each election period 'as security or collateral (however described) for a loan'.[431]

When the Electoral Legislation Amendment Bill was first introduced into the Parliament, it prohibited all instalments being used as security or collateral for a loan, including the first. However, the Government successfully moved an amendment to allow for the first instalment of

[430] VEC submission Part 2 – Issues and recommendations, p. 24.
[431] *Electoral Act 2002* (Vic), s. 212A(6).

advance public funding to be used in that manner. The then Special Minister of State explained that would allow an RPP or candidate to use that instalment as collateral for a loan leading up to the preceding election for political purposes.[432]

The Panel considered that as advance public funding is provided to support the next general election, it should not be used as security or collateral for a loan related to a past election. The Panel has recommended that the use of the first instalment of advance public funding as security or collateral for a loan is prohibited.

Recommendation 6.2: Amend s. 212A(6) of the *Electoral Act 2002* (Vic) so that the prohibition, on advance public funding instalments being used as a security or collateral for a loan, also applies to the first instalment paid in each election period.

6.4 Other proposed reform options

The Panel considered several options for reforming public funding, administrative expenditure funding and policy development funding, including suggestions raised by stakeholders.

Use of public funding in support of other electorates

Climate 200 explained in its submission that Victoria's public funding model allows RPPs to spend the majority of their public funding on specific target electorates, effectively cross-subsidising campaigns in those seats using public funding provided for votes in other electorates.[433]

The Australia Institute stated that 'this gives parties that run in seats they are guaranteed to lose (or guaranteed to win) a larger war chest in key races than the independent or minor party candidates that they face.'[434] The Australia Institute noted in its submission that available data for the 2023 New South Wales election suggest that larger RPPs focus the majority of their Meta (Facebook and Instagram) advertising on specific seats. It identified the top 18 seats (20 per cent of seats) by Meta spending

[432] Victoria, *Parliamentary Debates*, Legislative Council, 24 July 2018, p. 3180.
[433] Climate 200 submission, pp. 3-4.
[434] Browne, B. (The Australia Institute) (2023), *Principles for fair political finance reform*, p. 7.

per party and showed that each party spent far more in those seats than it did in the remaining 80 per cent of seats.[435]

Climate 200 suggested that issue could be addressed by separately calculating the public funding entitlement based on the first preference votes received and expenditure incurred for each seat.[436]

Climate 200 also suggested that RPPs that endorse candidates for Legislative Assembly and Council seats with overlapping boundaries, and receive public funding for those candidates, are unfairly advantaged compared to independents. Due to the overlap in boundaries and electors, political expenditure supporting one candidate and their RPP also builds support for the candidate in the other house.

The Australia Institute explained in its submission that:[437]

- larger RPPs appear to campaign mostly for Legislative Assembly votes, and can rely on the fact that most voters vote for the same RPP on ballots for both houses
- independents effectively receive less funding as they run in one house, but must reach out to the same number of voters.

An option proposed by Climate 200 was to not provide public funding for Council votes to RPPs that endorse candidates in at least 20 per cent of Assembly seats.[438] The Panel noted that while no other Australian jurisdictions use such an approach, New South Wales provides a lower per-vote rate of public funding for Council votes to RPPs that endorse candidates in at least ten Assembly electorates.

While the Panel acknowledged that cross-subsidisation may occur, it did not agree with the proposed changes.

Overall, the Panel considered that RPPs and candidates should be able to focus political expenditure in the areas that they consider it will be most impactful.

[435] The Australia Institute submission, p. 18.
[436] Climate 200 submission, p. 9.
[437] The Australia Institute submission, p. 12.
[438] Climate 200 submission, pp. 3-4 and 10.

The proposed changes would also significantly increase the administrative burden of complying with political finance laws. If RPPs were to receive public funding separately for each contested seat, they would effectively be required to submit a separate statement of expenditure for each seat or candidate.

Further, it can be challenging to determine which electorate some types of expenditure, such as television, radio and digital advertising, relate to. For example, a television advertisement may be aired state-wide, or in a particular area that doesn't correspond to electorate boundaries, and not support a particular candidate. A candidate may also choose to undertake campaign activities outside of the boundaries of their electorate, for example if many constituents use a shopping centre or health service located outside of the electorate. As a result, that candidate's campaign materials will likely be distributed to constituents of several electorates and benefit the RPP's other candidates.

The phenomenon of cross-subsidisation is not limited to candidates of a single RPP. Aligned independent candidates and RPPs may politically benefit from each other's campaigns. For example, media interest in a high-profile independent candidate may result in greater awareness and publicity of candidates in other electorates with similar policy objectives.

Clarity of advance public funding provisions

The VEC stated in its submission that due to ambiguity in the wording of the *Electoral Act 2002* (Vic), an RPP or candidate could potentially attempt to claim both advance public funding (subject to reconciliation following the election) and public funding for the same general election. That would effectively double the amount of public funding provided to them, which would be clearly contrary to the intended operation of the Act.[439] The Panel considered the wording of the Act should be updated to remove that potential ambiguity.

Recommendation 6.3: Amend the *Electoral Act 2002* (Vic) to clarify that if an RPP or candidate receives advance public funding for an election

[439] VEC submission – Part 2: issues and recommendations, p. 25.

under s. 212A, they cannot also receive public funding for that election under s. 212(3) or s. 212(4) of the Act.

The VEC also noted in its submission that s. 212A(7) of the *Electoral Act 2002* (Vic) requires an RPP or candidate to make 'an election in writing to the Commission' if they wish to receive advance public funding. That use of the word 'election' is inconsistent with how it is defined in s. 3 of the Act and its use in the rest of the Act.[440] To enhance legislative clarity, the Panel agreed with the VEC that the wording of s. 212A(7) should be updated.

Recommendation 6.4: Replace the phrase 'an election in writing to the Commission' in s. 212A(7) of the *Electoral Act 2002* (Vic) with a different phrase with the same intended meaning.

Section 212(4A) of the *Electoral Act 2002* (Vic) requires public funding to be paid into the relevant SCA. However, an equivalent requirement is not provided for advance public funding. The Panel considered that instalment payments of advance public funding should be treated in the same manner as public funding.

Recommendation 6.5: Amend the *Electoral Act 2002* (Vic) to require that if a recipient of advance public funding is required to have an SCA, advance public funding received under s. 212A must be paid by the relevant person (e.g. the registered officer or registered agent) into the SCA.

Public funding for failed elections and supplementary elections

The Liberal Party of Australia (Victorian Division) and VEC explained in their submissions that existing rules for public funding do not appropriately address failed and supplementary elections.

A failed election occurs if either:[441]

[440] VEC submission – Part 2: issues and recommendations, p. 69.
[441] *Electoral Act 2022* (Vic), s. 72.

- a candidate for the Assembly dies after noon on the final nomination day and before 6 pm on election day, or the successful candidate dies before being declared elected
- no candidate is nominated or declared elected.

If a failed election occurs, a new writ must be issued for a supplementary election to be held.[442] The candidates that nominate to stand for a supplementary election may be different to those that nominated previously.

The *Electoral Act 2002* (Vic) does not discuss how public funding entitlements for failed and supplementary elections are to be determined. However, when an election fails and a supplementary election must occur, the Governor in Council may make Orders in Council to make, modify or adapt sections of the *Electoral Act 2002* (Vic) as necessary.[443]

During the 2022 State election, the election for the Narracan District failed due to the death of a candidate and a supplementary election was held. An Order in Council was made to clarify that RPPs and candidates could have a public funding entitlement for political and electoral expenditure incurred in relation to the supplementary election.[444] Table 6.1 sets out the public funding paid for that election.

[442] *Electoral Act 2002* (Vic), s. 72(2)(c).
[443] *Electoral Act 2002* (Vic), s. 72(4)(b).
[444] Victoria Government Gazette, No. S 715 Monday 19 December 2022, Schedule, Item 6.

Table 6.1: Public funding for Narracan 2023 supplementary election

Recipient Name	Maximum Entitlement[a]	Amount paid[b]
WOLFE, Tony	$26,673.90	$26,673.90
Australian Greens Victoria	$26,816.68	$26,816.68
Pauline Hanson's One Nation	$14,576.54	$971.88
Freedom Party of Victoria	$14,628.46	$9,851.00
Liberal Party of Australia (Victorian Division)	$108,649.09	$108,649.09
Democratic Labour Party[c]	$17,140.09	$0.00
Total	**$208,484.76**	**$172,962.55**

Notes: (a) Maximum entitlement based on the number of first preference votes each candidate received at the election. (b) Based on audited statement of expenditure in relation to political and electoral expenditure incurred. (c) Did not apply for public funding.
Source: VEC (2023), *VEC funding entitlements and payments post-State election 2022*.

Supplementary elections are an infrequent occurrence. For example, a supplementary election for the Commonwealth Parliament has not been held since 1998.[445] The Panel sought information from the Commonwealth, New South Wales, Queensland and South Australia about whether they have special arrangements in-place to provide public funding in the case of a failed election, and was not advised of any special arrangements.

The Panel heard that existing rules are unfair, for example as candidates and RPPs are unable to receive public funding for expenditure incurred in relation to an election that fails. Even if a candidate chooses to stand for the supplementary election, they can only receive public funding for costs incurred for the supplementary election, and not for the failed election.

Public funding for supplementary elections

The *Electoral Act 2002* (Vic) does not automatically provide an entitlement to public funding for a supplementary election, and a Governor in Council Order was required to provide candidates at the Narracan supplementary election with public funding. The VEC

[445] AEC (2023), *By-elections and supplementary elections*, https://www.aec.gov.au/elections/supplementary_by_elections/, last updated 2 August 2023.

suggested the Panel consider whether that public funding entitlement should be set in legislation.[446]

The Panel agreed with the VEC's suggestion, as that would provide certainty and clarity as to the public funding entitlements of participants at a supplementary election.

Recommendation 6.6: Amend the *Electoral Act 2002* (Vic) to provide an entitlement to public funding for supplementary elections, modelled on the rules that apply to by-elections.

Reimbursement for expenditure incurred for a failed election

Under current rules, RPPs and candidates are not provided with public funding for expenditure incurred for a failed election. Candidates and RPPs could have incurred political expenditure for an entire election period, only to be unexpectedly left with no recourse to reimbursement through public funding. This was noted in the submission from the Liberal Party of Australia (Victorian Division):[447]

> *In the case of supplementary elections, the difficulties of funding two election campaigns within a single election period are compounded by the fact that candidates who participate in a failed election are unable to use the costs incurred in relation to the failed election to make a claim for public funding.*

The VEC noted in its submission that this issue may particularly affect independent candidates, as it may impact on their personal capacity to incur further political expenditure and dissuade them from re-nominating. The VEC explained that votes in a failed election are not counted, and therefore it is impossible to determine the public funding entitlement for an RPP or candidate in a failed election.[448]

The number of votes received at a supplementary election could, in theory, be used as a proxy. However, the candidates who stood for a failed election may differ from those who stand for a supplementary election. In

[446] VEC submission Part 2 – Issues and recommendations, pp. 30-31.
[447] Liberal Party of Australia (Victoria Division) submission, p. 3.
[448] VEC submission Part 2 – Issues and recommendations, pp. 30-31.

particular, a candidate at a failed election may be unable to stand at the supplementary election due to death or incapacity.

The VEC suggested that one possible amendment to address those issues is to introduce a maximum fixed public funding entitlement payable to all candidates at a failed election, regardless of the number of votes received. The VEC encouraged the Panel to consider whether other solutions may exist.

Potential alternative solutions identified by the Panel include to:

- reimburse the political and electoral expenditure costs incurred for a failed election by candidates that the VEC is reasonably satisfied are unable to run at the supplementary election, due to death or incapacity (subject to a fixed cap)
- allow the statement of expenditure for a supplementary election to include expenditure incurred for the failed election
- increase the per-vote funding rate for a supplementary election for candidates that also stood at the failed election.

An advantage of those alternatives is that, for most candidates and RPPs, the link between public funding entitlements and votes received would be preserved. However, candidates at a failed election would be required to re-nominate for the supplementary election in order to qualify for public funding. That may be unfair to some candidates and lead to undesirable results. For example, a candidate at the failed election may prefer to not contest the supplementary election as:

- they consider their chances at the supplementary election lower because of new candidates entering the contest
- due to the general election result, they no longer believe they have a genuine chance of winning the seat.

Having considered alternative options, the Panel considered the VEC's proposed approach was preferable. That approach would require setting a maximum ceiling on the public funding payable for each candidate at the failed election. One option for calculating that ceiling would be to multiply:

- the 'per-vote' rate that was in effect at the time of the failed election, by
- half the number of electors enrolled for that electoral district.

The Panel believed that would ensure that all candidates and RPPs receive public funding that is at least equal to the amount that they could have reasonably expected to receive had the election not failed.

The VEC's proposed model may result in some candidates and RPPs having a significantly higher maximum public funding entitlement than otherwise expected, for example if they have low levels of elector support. The Panel considered that issue was low risk as:

- the amount of public funding actually paid by the VEC will continue to be based on the amount of political expenditure actually incurred
- supplementary elections occur very infrequently and their occurrence cannot be predicted in advance.

Recommendation 6.7: Amend the *Electoral Act 2002* (Vic) to provide an entitlement to public funding for candidates at a failed election. A maximum fixed entitlement should apply for all candidates. Consistent with existing arrangements for public funding, the actual amount payable by the VEC should be the lesser of:

- that maximum entitlement
- political expenditure actually incurred, as set out in an audited statement of expenditure.

One option for setting the maximum fixed entitlement would be to calculate it for each failed election by multiplying:

- the 'per-vote' rate that was in effect at the time of the failed election, by
- half the number of electors enrolled for that electoral district.

Advance funding following supplementary elections

Under s. 212A of the *Electoral Act 2002* (Vic), advance public funding is only provided following a general election, and not following a by-election or supplementary election.

The VEC stated that while it is clear that the legislative intention was to not provide advance public funding following a by-election, it is unclear what the intention was for supplementary elections and depriving candidates at a supplementary election of advance public funding may unfairly disadvantage them.

However, the VEC stated the rules should also make clear that candidates cannot simultaneously claim two sets of advance public funding. For example, four candidates at the Narracan supplementary election had been candidates in other electorates at the 2022 State election, and it would be unfair for those candidates (or their RPPs) to receive advance public funding for both elections.[449]

The VEC recommended amendments to:[450]

- extend the entitlement to advance public funding under s. 212A of the *Electoral Act 2002* (Vic) to a supplementary election held because an election, at the preceding general election, failed
- clarify that entitlement does not apply to a candidate that unsuccessfully contested a different electorate at the preceding general election, and who was already entitled to advance public funding as a result.

The Panel agreed with the VEC's reasoning and proposed changes.

Recommendation 6.8: Amend the *Electoral Act 2002* (Vic) to:

- extend the entitlement to advance public funding under s. 212A to a supplementary election held because an election, at the preceding general election, failed
- clarify that entitlement does not apply to a candidate that unsuccessfully contested a different electorate at the preceding general election, and who was already entitled to advance public funding as a result.

[449] VEC (n.d.), *Narracan District supplementary election results,* https://www.vec.vic.gov.au/results/state-election-results/state-by-elections-timeline/narracan-district-supplementary-election-results, accessed 4 September 2023.

[450] VEC submission Part 2 – Issues and recommendations, p. 32.

Proposed exemption from the general cap

The Liberal Party of Australia (Victorian Division) recommended in its submission that a specific exemption from the general cap should be introduced for political donations made for the purpose of political expenditure relating to a by-election or supplementary election. The submission stated:[451]

> *There is no mechanism that provides relief from the general cap where the recipient of an individual's donations is forced to contest a by-election or supplementary election. This means that a donor who supports a candidate at a by-election or supplementary election to the value of the general cap will not be able to support that party or candidate financially in the lead up to the next general election.*
>
> *This gives rise to inequities under the caps between those candidates and parties who have to ask donors to support them to fund two elections during an election period, and those parties and candidates who do not have to contest a second electoral event during an election period.*
>
> *This also further limits the freedoms of affected Victorians to participate in the political process for no valid reason.*

The Panel's view was that the proposed exemption from the general cap would significantly increase the complexity of Victoria's political finance laws. Donors, Donation Recipients and the VEC would have to determine which donations relate to supplementary elections and by-elections and separately track how those donations are spent. Further, the proposed exemption would allow donors to make large donations, creating a risk of real or perceived improper influence and an avenue for political finance laws being circumvented.

As public funding is provided for by-elections, the Panel considered that adequate support is already provided to RPPs and candidates that participate.

[451] Liberal Party of Australia (Victorian Division) submission, p. 3.

The Panel's proposed reforms, set out above, would ensure that adequate support is also provided in the case of failed and supplementary elections.

Split of public funding for groups endorsed by multiple parties

The *Electoral Act 2002* (Vic) allows for a group, for a Legislative Council election, to consist of candidates endorsed by more than one RPP. Candidates in a group have their names listed on the ballot-paper in a specific order (although a group can request to have up to three alternative orders or 'tickets' for its candidates included in the ballot-paper).[452]

Most voters in Victoria's Legislative Council elections vote 'above the line' on the ballot-paper. For the purpose of calculating public funding entitlements, when a constituent casts an 'above-the-line' first preference vote for a group, that counts as a vote for the first candidate listed for that group's ticket.[453] As shown by the case of *Harris v Victorian Electoral Commission*,[454] summarised below, that can lead to inequitable results for RPPs that jointly endorse a group.

In 2008, the National Party of Australia – Victoria and the Liberal Party of Australia (Victorian Division) entered into a coalition agreement. The parties agreed to stand a joint group ticket for particular electoral regions at general elections. A Liberal Party candidate would hold the first position in each group ticket. Separately, the RPPs agreed that one third of the public funding for the group tickets would be paid to the National Party of Australia – Victoria, and two thirds would be paid to the Liberal Party of Australia (Victorian Division). The VEC paid public funding in those proportions for the 2010 and 2014 elections.

However, following the 2018 election, the VEC stated that as a result of the 2018 amendments to the *Electoral Act 2002* (Vic) it was unable to apportion the public funding entitlement as requested. The VEC

[452] *Electoral Act 2002* (Vic), ss. 69A and 69B.
[453] *Electoral Act 2002* (Vic), s. 112B.
[454] *Harris v Victorian Electoral Commission* [2020] VSC 676.

explained it was required to make payments based on first preferences votes received by candidates endorsed by each RPP in the group, meaning that almost of all the public funding would go to the Liberal Party of Australia (Victorian Division). Further, the VEC stated that in its view, the RPPs could not redistribute public funds between each other in accordance with the terms of their coalition agreement as that would constitute a political donation in excess of the general cap.[455]

The National and Liberal Party State Directors brought legal proceedings to resolve the disagreement. As discussed in Chapter 3, the Supreme Court of Victoria held that the Liberal Party of Australia (Victorian Division) could lawfully pay a portion of its public funding to the National Party of Australia – Victoria in accordance with their agreement, because that payment would not be a political donation as it was made for adequate consideration.[456]

The National Party of Australia – Victoria recommended in its submission that RPPs jointly endorsing a group be permitted to nominate an agreed share of public funding for first-preference-votes cast for that group to be paid to each RPP, stating that:[457]

> *The VEC [has] written to both parties that given the judgement in Harris v Victorian Electoral Commission (2020) they will not consider any future transfer between the two parties as a donation, however this remains unsatisfactory given the clear intention of the Act is to allow joint tickets.*

The Liberal Party of Australia (Victorian Division) made a similar recommendation in its submission.[458]

The Panel agreed that the *Electoral Act 2002* (Vic) should be updated to reflect the Supreme Court's decision and current practices, including so that it is made clear to all RPPs what agreements and arrangements are permitted.

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[455] *Harris v Victorian Electoral Commission* [2020] VSC 676, [4].
[456] *Harris v Victorian Electoral Commission* [2020] VSC 676, [104]-[107].
[457] Nationals Party of Australia – Victoria submission, p. 4.
[458] Liberal Party of Australia (Victorian Division) submission, p. 11.

Recommendation 6.9: Amend the *Electoral Act 2002* (Vic) to clarify that RPPs that run a joint ticket for the Legislative Council may jointly nominate an agreed share of public funds associated with the joint ticket to be paid to each RPP.

Calculation of entitlement of administrative expenditure funding

An RPP's maximum administrative expenditure funding entitlement is calculated based on the number of MPs that it has, with no additional entitlement provided beyond the 45th MP. The National Party of Australia – Victoria suggested that the Panel consider whether that number should be lowered and the funding per MP up to that number should be increased, stating:[459]

> *This would recognise that the marginal cost of supporting additional members over a lower cap is significantly less than the current per member rate.*

Funding for administrative expenses is also provided by New South Wales, South Australia and the Australian Capital Territory (Table 6.2). The funding entitlement varies greatly between jurisdictions, with New South Wales providing a significantly higher entitlement than other jurisdictions. The value of administrative expenditure funding in Victoria was changed as part of amendments moved during debate on the Electoral Legislation Amendment Bill. Administrative expenditure funding arrangements were debated and scrutinised in detail, in an attempt to develop a model that was considered fair to all MPs and RPPs.[460]

[459] Nationals Party of Australia — Victoria submission, p. 3.

[460] Victoria, *Parliamentary Debates*, Legislative Council, 22 June 2018, pp. 3089-3093; Victoria, *Parliamentary Debates*, Legislative Council, 24 July 2018, pp. 3161-3178.

Table 6.2: Administrative funding in Australian jurisdictions, as of 1 July 2023

Jurisdiction	Annual value ($)
Victoria	• 233,490 for independent MP, and for an RPP with one MP • additional 81,710 for the second endorsed MP of an RPP • 40,870 for each additional MP after the 2nd, up to the 45th MP
New South Wales	• 259,600 for independent MP • 410,600 for RRP with one MP • 687,600 for RPP with two MPs • 858,800 for RPP with three MPs • additional 138,000 for each MP after the 3rd, up to the 22nd MP
South Australia[a]	• 88,184 for RPP with up to five MPs • 151,172 for RPP with more than five MPs
Australian Capital Territory	• 25,731.44 per MP

Note: (a) Referred to as special assistance funding.
Sources: *Electoral Act 2002* (Vic), s. 207GA(1); VEC (n.d.), *Indexation*, https://www.vec.vic.gov.au/candidates-and-parties/political-donations/indexation, accessed 15 August 2023; New South Wales Electoral Commission, *Administration fund*, https://elections.nsw.gov.au/funding-and-disclosure/public-funding/administration-fund, last updated 14 August 2023; *Electoral Regulations 2009* (SA), reg. 21A; *Electoral Act 1985* (SA), s. 130U; Electoral Commission of South Australia (n.d.), *Indexed amounts*, https://www.ecsa.sa.gov.au/parties-and-candidates/funding-and-disclosure-state-elections/indexed-amounts, accessed 31 August 2023; Elections ACT (2023), *Administrative funding*, https://www.elections.act.gov.au/funding_and_disclosure/funding/administrative_funding, last updated 30 March 2023.

The Panel has not seen data or evidence that would suggest that Victoria's existing administrative expenditure model inadequately covers the expenses of RPPs with less than 45 MPs, or provides a windfall benefit to larger RPPs. The Panel decided to not recommend changes to the model at this stage.

Late submission of an Administrative Expenditure Return

Administrative expenditure funding involves the payment of significant amounts of funds to RPPs and independent MPs. RPPs and independent MPs are required to submit an Administrative Expenditure Return for claimable expenditure in relation to that calendar year. If the return is not submitted within the legislated timeframe, that RPP or independent MP is considered to have incurred no claimable expenditure and must repay the full amount of administrative expenditure funding received in that calendar year.[461]

[461] *Electoral Act 2002* (Vic), s. 207GC.

The VEC claimed that the consequences of not submitting an Administrative Expenditure Return within legislated timeframes can disproportionately penalise RPPs and MPs, and suggested that the *Electoral Act 2002* (Vic) should allow for alternative outcomes. For example, the VEC could have discretionary powers to grant an extension, and/or the claimable amount could be reduced based on the lateness of the return.[462]

The VEC noted in its submission that:

- the New South Wales Electoral Commission has the power to extend deadlines related to political finance laws, if it is satisfied that proper reasons exist[463]
- Queensland's legislation permits persons required to submit returns to apply for an extension of time of up to one month.[464]

The Panel considered the requirement to repay the full amount of administrative expenditure funding to be a disproportionate punishment for submitting a late Administrative Expenditure Return. Similarly, an RPP, MP or candidate should not automatically lose an entitlement to receive (or retain) other forms of funding merely due to a small delay in submitting the relevant expenditure statement, particularly where a reasonable excuse is provided. Therefore, the Panel recommended giving the VEC discretion in granting extensions to those deadlines where appropriate.

Recommendation 6.10: Amend the *Electoral Act 2002* (Vic) to provide the VEC with discretionary powers to grant extensions to RPPs and MPs who fail to submit an Administrative Expenditure Return, 'statement of expenditure' for public funding or expenditure statement for policy development funding.

[462] VEC submission Part 2 – Issues and recommendations, p. 23.
[463] *Electoral Funding Act 2018* (NSW), s. 153.
[464] *Electoral Act 1992* (Qld), s. 313.

Eligibility requirements for policy development funding

The Panel understood that policy development funding is designed to support new or small RPPs, which do not receive other types of funding. Similar arrangements exist in New South Wales, where policy development funding comes from the New Parties Fund kept by the New South Wales Electoral Commission. Eligibility criteria for receiving payments for the New Parties Fund are broadly the same as those for Victoria's policy development funding.[465]

Queensland also has policy development funding though it is only available to independent MPs and RPPs with at least one elected member, and the value varies depending on the number of first preference votes received at the last election.[466]

Based on available data, policy development funding is provided to very few RPPs, and the amount of policy development funding paid by the VEC is much lower than the amount of public funding and administrative expenditure funding paid. The Panel was concerned that policy development funding may not be sufficiently supporting new and small RPPs.

To receive policy development funding for a calendar year, an RPP must have been registered for the whole of the calendar year. An application for registration cannot be lodged within 120 days (4 months) of a general election day and the registration process can take up to four months to be finalised. A registration application that is in progress at the issue of the writ for an election will be suspended until the election has been completed.[467] This means, for example, that an RPP that attempts to submit an application for registration in the second half of 2026 may not receive policy development funding until part way into 2029.

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[465] New South Wales Electoral Commission (2023), *New Parties Fund*, https://elections.nsw.gov.au/funding-and-disclosure/public-funding/new-parties-fund, last updated 13 November 2023.

[466] *Electoral Act 1992* (Qld), Pt 11 Div 5.

[467] VEC (n.d.), *Register a political party*, https://www.vec.vic.gov.au/candidates-and-parties/registered-political-parties/register-a-party, accessed 7 September 2023.

The length of time required for registration may be preventing RPPs from accessing policy development funding. To address that issue, the Panel considered that an RPP should be eligible for policy development funding for a calendar year if they applied successfully for registration prior to that calendar year, even if it was not registered for that entire year.

The Panel noted that independent candidates are not eligible for policy development funding, which may disadvantage them relative to RPPs. However, the Panel considered that this issue would be at least partly addressed by the introduction of 'single electorate RPPs', which the Panel recommended in Chapter 3.

Recommendation 6.11: Amend s. 215A(3) of the *Electoral Act 2002* (Vic) to provide that, subject to other eligibility requirements, an RPP may be eligible for policy development funding if either:

- it has been an RPP for the whole of the calendar year for which policy development funding is claimed, or
- it applied for registration in the previous calendar year and was registered in the calendar year for which policy development funding is claimed.

Simplifying funding streams

There is a degree of overlap between the expenditure that policy development funding and administrative expenditure funding can be spent on. Both types of funding can be used to cover:[468]

- office accommodation and equipment
- conferences, seminars, meetings, and information distribution costs
- certain staff costs
- interest charged on loans.

However, consistent with the requirements of the *Electoral Act 2002* (Vic), the VEC has specified in its Determinations that policy development funding must be spent on expenditure related to policy development (e.g. interest charges on loans *for policy development*).

[468] VEC (2019), Determination No 1 of 2019*, Policy development expenditure statement submitted to the Victorian Electoral Commission by eligible registered political parties;* VEC (2018), *Determination No 7 of 2018, Claimable Administrative Expenditure*.

As no RPP, MP or candidate can receive both administrative expenditure funding and policy development funding, it is unclear why those two types of funding cover different types of expenses.

To address that issue, the Panel considered that policy development funding and administrative expenditure funding should be combined into one funding stream called Administrative and Policy Funding, which would cover both administrative and policy development expenses.

Under the Panel's proposed change, the eligibility criteria and overall maximum claimable amount should remain the same, subject to other recommendations in this Report. For example, if Administrative and Policy Funding had been in place for 2023, the maximum claimable amount for an RPP:

- with no elected MPs would be the greater of $1.17 for each first preference vote given for an endorsed candidate at the previous general election, or $29,180
- with one elected MP would be $233,490
- with two elected MPs would be $315,200 ($233,490 plus $81,710).

Currently, administrative expenditure funding is paid quarterly in advance to those eligible to receive it while policy development funding is not. The Panel considered that, consistent with existing arrangements for administrative expenditure funding:

- the Administrative and Policy Funding stream should be paid quarterly in advance
- the recipient should be required to submit a statement of expenditure following the end of the relevant year, with overpaid funds to be returned to the VEC.

That approach ensures new RPPs are provided with timely access to funds required to establish themselves and support compliance with Part 12 of the *Electoral Act 2002* (Vic). However, the VEC should stringently pursue the recovery of any overpayments, given the importance of community funds not being misappropriated.

A further issue identified by the Panel is that, under existing arrangements, an RPP becomes ineligible to receive policy development

funding if it receives public funding. That means the RPP receives no funding for policy development expenses. Corey Oakley, Secretary of the Victorian Socialists' Party, stated at a public forum:[469]

> *There's a question about why that's the case because they're totally different things. Like policy development, we have to do policy development even if we get enough votes to get public funding. We're not allowed to use the public funding for policy development in any case.*

The Panel considered that receipt of public funding by an RPP should not affect its eligibility for Administrative and Policy Funding, as those funding streams are distinct and cover different types of expenditure.

Recommendation 6.12: Amend the *Electoral Act 2002* (Vic) to combine policy development funding and administrative expenditure funding into a single funding stream called Administrative and Policy Funding, which covers both administrative and policy development expenditure. Administrative and Policy Funding should be paid quarterly in advance.

Receipt of public funding by an RPP should not affect its eligibility for Administrative and Policy Funding or the amount that it may claim.

Note: In this Report, the Panel has discussed administrative expenditure funding and policy development funding as separate funding streams and made recommendations accordingly, consistent with existing arrangements. However, if administrative expenditure funding and policy development funding are combined into Administrative and Policy Funding, the Panel's recommendations regarding changes to administrative expenditure funding and policy development funding should be read as applying to Administrative and Policy Funding where required.

In a submission to the Electoral Matters Committee's *Inquiry into the conduct of the 2022 Victorian State election*, former independent candidate for Brighton, Sally Gibson, recommended that administrative

[469] Transcript of Electoral Review Expert Panel public forum held on 28 July 203, 10 am to 11 am.

expenditure funding and policy development funding are abolished.[470] The Panel did not agree with that suggestion as administrative expenditure funding and policy development funding are a key source of funds for those eligible to receive them and offset the additional compliance costs imposed by the 2018 amendments.

Those funding streams are a particularly important source of support for new RPPs, which may not be eligible to receive public funding. The Panel has made recommendations in this Report that would make it easier for new RPPs to access those funds.

Reimbursement of audit expenses

The VEC's submission stated that it has observed confusion around how professional fees incurred in relation to fulfilling auditing requirements can be claimed using available funding.

Auditing expenses are claimable expenditure for the purposes of administrative expenditure funding. However, it is unclear if the cost of an audit of an Administrative Expenditure Return for a given calendar year can be included in the Administrative Expenditure Return for that year, as those audit costs are incurred in the following year. If the cost of auditing an Administrative Expenditure Return cannot be included within it, RPPs and MPs who lose their entitlement to administrative expenditure funding (e.g. following an election) may be unable to claim reimbursement for those costs.

In addition, the VEC's submission explained:[471]

> *The VEC is concerned that audit expenses incurred in relation to a statement of expenditure under section 208 do not appear to be claimable under [public funding]. The VEC takes this position because audit expenses:*
>
> - *fall within the definition of 'claimable expenditure' in relation to administrative expenditure funding under section 207G;*

[470] Gibson, S., (2023), *Submission to inquiry into the conduct of the 2022 Victorian State election*, pp. 3 and 5.

[471] VEC submission Part 2 – Issues and recommendations, p. 27.

- *appear not to be considered political or electoral expenditure; and*
- *are not incurred 'in relation to an election' as required by section 208(3).*

The VEC was concerned that this would 'dissuade independent candidates from engaging an appropriately qualified and reputable independent auditor.'

The Panel recommended a provision be added to explicitly state that auditing expenses related to the submission of a statement of expenditure can be included as claimable expenditure for that statement.

Recommendation 6.13: Amend the *Electoral Act 2002* (Vic) to state that:

- auditing expenses incurred in submitting an Administrative Expenditure Return can be included as claimable expenses in that Administrative Expenditure Return
- auditing expenses incurred in submitting a statement of expenditure, for public funding, can be included as claimable expenditure for that statement.

For the avoidance of doubt, it should be made clear that auditing expenses cannot be claimed more than once. For example, if auditing expenses are included in a statement of expenditure for public funding, those same expenses cannot also be included in an Administrative Expenditure Return.

Treatment of capital assets

Funding streams can be used to purchase capital assets. For example, computers and vehicles are included as claimable expenditure for administrative expenditure funding. Section 207G of the *Electoral Act 2002* (Vic) states that claimable expenditure for administrative expenditure funding includes:[472]

[472] *Electoral Act 2002* (Vic), s. 207G(a)(v).

expenditure on equipment or vehicles used by staff whilst engaged in [specified matters] for the eligible party or elected member to the extent that that expenditure relates to use of the equipment or vehicles by the staff whilst engaged in those matters.

Some of these capital assets have an expected economic life beyond the year or election period for which the funding entitlement applies.

The VEC stated that, when funding is claimed for the purchase of a capital asset, it is unclear whether the full-price can be claimed, or only part of the price which is attributable to the relevant period (e.g. due to depreciation). The Panel noted that the wording of s. 207G, set out above, appears to suggest that only that part of capital expenditure that can be attributable to specific activities (which would need to be undertaken in the relevant period) can be claimed, which would support the latter interpretation.

The VEC noted that if an RPP or candidate was able to claim the entire cost of a capital asset and then keep that asset for personal or business use (e.g. after an election), that may provide them with a windfall gain and represent an improper use of public funds.[473]

New South Wales has rules dealing with the treatment of capital assets, which are relevant to whether they can be claimed under public funding. In that jurisdiction, the definition of electoral expenditure excludes the purchase (or acquisition of a right to use) of various types of capital assets. An exception applies where the item is purchased and sold within a ten week period which includes an election day (or the right to use is acquired and disposed of in that period), in which case the electoral expenditure is equal to the price difference.[474]

Queensland does not allow public funding to be claimed for capital expenditure, including computer equipment.[475]

The VEC recommended amendments to clarify and state that: [476]

[473] VEC submission Part 2 – Issues and recommendations, pp. 28-29.
[474] *Electoral Funding Regulation 2018* (NSW), reg. 4.
[475] Electoral Commission of Queensland (2023), *Election and disclosure obligations for State election candidates*, p. 39.
[476] VEC submission Part 2 – Issues and recommendations, p. 29.

- where a capital asset (over a fixed value) has been purchased outright, the expenditure will only be treated as claimable to the extent that it is referable to the period during which the asset is used for the purposes of the funding
- the VEC has an express power to recover asset-related expenditure that has ceased to be claimable by reason that the asset is no longer being used for the purposes of the funding
- the VEC can make Determinations in relation to the economic life of a capital asset for the purposes of calculating the period over which different types of assets are amortised.

As discussed above, the VEC has the power to make Determinations on what expenditure can be claimed using administrative expenditure funding and policy development funding. In Chapter 3, the Panel recommended the VEC is also given the power to make Determinations on the meaning of the term 'political expenditure', which would set out what expenses may be claimed using public funding.

The Panel considered that the treatment of capital assets is a technical, administrative matter that is best addressed in the VEC Determinations. The *Electoral Act 2002* (Vic) should be amended to ensure that the VEC is able to set rules on how capital assets are to be claimed and included in relevant statements.

Recommendation 6.14: That the *Electoral Act 2002* (Vic) be amended to give the VEC the power to set rules in its Determinations on how capital assets may be claimed and included in statements required under Divisions 1C, 2 and 2A of Part 12. Without limiting the rules the VEC may set, matters that Determinations should be able to address include:

- how capital costs should be amortised and the economic life of a capital asset
- information that must be provided to the VEC regarding the purchase of capital assets, if that expenditure is claimed.

Renaming terms for legislative clarity

Currently, there is no word or phrase that refers to all streams of funding support received by RPPs, MPs and candidates.

Current use of the term 'public funding' may be a cause of confusion because, while it is the name given to a specific stream of funding, administrative expenditure funding and policy development funding are also forms of publicly-provided funding. The Panel considered that 'public funding' should be renamed. Example alternative names include:

- political expenditure funding
- public campaign funding.

The term 'public funding' could then be used to refer to the three funding streams administered by the VEC in general, in accordance with its natural meaning.

Recommendation 6.15: Amend Part 12, Division 2 of the *Electoral Act 2002* (Vic) to rename the funding support stream currently titled 'public funding'.

Further, the term 'annual return' in the *Electoral Act 2002* (Vic) is used to refer to two entirely separate types of document:

- Donation Recipient annual returns, discussed in Chapter 4
- Administrative Expenditure Returns, explained above.[477]

The VEC explained in its submission that the double use of the term 'annual return' is problematic and creates ambiguities. For example, while s. 218A of the *Electoral Act 2002* (Vic) makes it an offence to fail to provide an annual return, it does not specify which of the two types of annual returns is being referred to.[478]

The Panel considered that annual returns related to administrative expenditure funding (i.e. Administrative Expenditure Returns) should be renamed.

Recommendation 6.16: Amend Part 12, Division 1C of the *Electoral Act 2002* (Vic) to provide a different name for 'annual returns' required under that Division.

[477] The term Administrative Expenditure Return is not used in the *Electoral Act 2002* (Vic) and has been used in this Report to distinguish those returns from annual returns submitted by Donation Recipients.

[478] VEC submission Part 2 – Issues and recommendations, p. 68

Other resources provided to incumbents

Sitting MPs are paid a salary and are allocated resources and payments that support them with their work, including:

- offices, furnishings and equipment provided by the Parliament of Victoria
- allowances and an Electorate Office and Communications Budget (EO&C Budget).

The Panel heard from several stakeholders that those resources provide an MP with a significant incumbency advantage. The Australia Institute stated in its submission that:[479]

> *... sitting MPs (independent and party-affiliated) receive incumbency advantages. In Victoria, the Australia Institute calculates the financial advantages at starting from $556,000 per MP per year, or over $2 million over an election cycle. The electorate office and communications budget alone is worth $460,000 per election cycle.*

An area of particular concern was the use of the EO&C Budget by MPs close to the start of the election period. In their submission to the Electoral Matters Committee's *Inquiry into the conduct of the 2022 Victorian State election*, a group of independent candidates at the 2022 election suggested prohibiting all spending from that Budget four months from a general election. They stated:[480]

> *Whilst the communications budget is not for campaigning, an MP can use the budget to promote their work. Electorate-wide mail outs and other forms of communication highlighting an MP's achievements and the policies of their party are campaigning in all but name.*

Climate 200's submission recommended prohibiting the use of the EO&C Budget six months before an election, stating:[481]

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[479] The Australia Institute Submission, pp. 19-20.

[480] Lowe, M. et al. (2023), *Independent candidates' submission: Making Victorian Elections Safer and Fairer*, p. 11.

[481] Climate 200 submission, pp. 5 and 9.

Over the last Victorian election cycle, the publicly funded Electorate Office and Communications budget delivered over $30.5m to Labor members and $15.9m to Coalition members. There are limits on the use of this budget for overt campaigning, but it can be used for advertisements, mail-outs and office signage, all of which raise the profile of the elected official.

The Victorian Independent Remuneration Tribunal issues guidelines on the use of the EO&C Budget, which are administered by the Department of Parliamentary Services. The Tribunal's Guidelines restrict the use of the EO&C Budget for party political activity. Broadly speaking, the Guidelines prohibit the EO&C Budget being used for political and electoral expenditure. They also prohibit the EO&C Budget being used:[482]

- for any costs incurred and/or activity undertaken to communicate during the period between the issuing of the writs for a general election and the declaration of the poll for the electorate
- within an electorate for which a by-election is being held.

The operation of the EO&C Budget and similar resources was out-of-scope of the Panel's Report, noting that guidelines on their use are set by an independent organisation.

[482] Victorian Independent Remuneration Tribunal (2023), *Members of Parliament (Victoria) Guidelines No. 01/2023*, pp. 12-14.

7 Expenditure caps

The *Electoral Act 2002* (Vic) required the Panel to examine and make recommendations in relation to whether the Act should be amended to provide for a cap on political expenditure, and if so:[483]

- whether the cap should apply generally or to specific persons or entities
- the value of the cap
- the consequences of a failure to comply with the cap.

IBAC's Donations and Lobbying Report also recommended that the Victorian Government examine and make recommendations that identify a best practice model for campaign expenditure, including:[484]

- expenditure declaration requirements that provide sufficient transparency and accountability
- expenditure caps that can be applied in a way that helps to address the corruption risks that result from pressure to raise funds, and avoidance of donation caps and disclosure thresholds by providing in-kind support that is not declared.

The Panel first considered arguments in favour and against the introduction of expenditure caps. Second, the Panel considered what features expenditure caps should have if they were to be introduced, and what reporting and enforcement mechanisms would need to be introduced.

The Panel considered regulatory schemes in other Australian jurisdictions as part of its review. Expenditure caps are currently in place in New South Wales, Queensland, Tasmania, the Northern Territory and the Australian Capital Territory. South Australia has expenditure caps in place for political parties, groups and candidates that opt-in to the public funding scheme. The JSCEM Interim Report recommended the introduction of expenditure caps for Commonwealth elections.[485]

[483] *Electoral Act 2002* (Vic), s. 222DB(3).
[484] Donations and Lobbying Report, p. 10.
[485] JSCEM Interim Report, p. 67.

The Australian Greens Victoria argued:[486]

> *With the federal government seemingly moving towards both donations reform and an expenditure cap, it is even more important Victoria is not left behind in ensuring fairer electoral processes.*

However, the Panel also heard from stakeholders who opposed expenditure caps, such as the Victorian Trades Hall Council, who stated:[487]

> *The focus of political expenditure and donations should be on transparency, rather than capping the amount of spending.*
>
> *A cap on expenditure is a direct attack on workers in unions participating in democratic elections. Expenditure caps that limit the financial and non-financial contributions of working people to the political debate during elections silences working people.*

7.1 Arguments for and against expenditure caps

During consultation, the Panel received mixed feedback about expenditure caps. Arguments for and against the introduction of expenditure caps broadly concerned the following topics:

- minimising potential for undue influence due to fundraising pressures
- effect of 'excessive' political expenditure on the voting public
- importance of providing a 'level playing field' for political participants
- administrative burden and overlap with effect of the existing general cap on donations.

Minimising the risk of undue influence

Several stakeholders explained that there was a widely acknowledged political expenditure 'arms race' occurring where Donation Recipients attempt to outspend each other at elections, leading to ever-growing

[486] Australian Greens Victoria submission, p. 3.
[487] Victorian Trades Hall Council submission, p. 5.

amounts being spent on election campaigns. Concerns about an electoral arms race have been raised for many years. In a 2008 Commonwealth Government *Electoral Reform Green Paper,* then Cabinet Secretary and Special Minister of State John Faulkner observed:[488]

> *Spiralling costs of electioneering have created a campaigning 'arms race' – heightening the danger that fundraising pressures on political parties and candidates will open the door to donations that might attempt to buy access and influence.*

A key risk of a political expenditure 'arms race' is that it may place pressure on election participants to circumvent donations rules and/or enter into improper *quid pro quo* arrangements so that they can raise more funds and remain competitive with other Donation Recipients.

The Accountability Round Table stated in its submission:[489]

> *The expenditure of huge sums in the political campaign arms race drives the imperative to raise donations to at least be competitive if not outdo political rivals. Putting a moderate cap on expenditure can reduce the pressure to raise funds and for senior political representatives to demean themselves and potentially breach the public trust principle.*

The Centre for Public Integrity observed in its submission:[490]

> *... as campaign costs increase and the 'low hanging fruit' of campaign funds dries up, the search for more campaign funds may leave candidates and incumbents facing re-election vulnerable to quid pro quo corruption from large donors with ulterior motives.*

Professor Twomey said at a public forum:[491]

> *... one of the big problems in campaigns is what I call the ratcheting effect and that is there's always a war between both sides and the*

[488] Department of Prime Minister and Cabinet (2008), *Electoral Reform Green Paper: Donations, funding and expenditure,* p. 1.
[489] Accountability Round Table submission, p. 3.
[490] The Centre for Public Integrity submission, p. 9.
[491] Transcript of Electoral Review Expert Panel public forum held on 20 July 2023, 2 pm to 3 pm.

general view is the more advertising you have out there, the more likely you are to win … the effect of it is that parties believe they need to raise more and more money and of course that leads to the prospect of attempting to get amounts of money in ways that may not necessarily meet the requirements.

Based on available data, it is unclear whether political expenditure is increasing in Victoria. As discussed in Chapter 4, under Victoria's political finance laws registered political parties (RPPs) are currently only required to report on their overall expenditure, and not on expenditure specific to an election campaign. However, The Centre for Public Integrity stated that data from Western Australia, which does not have expenditure caps, show growing levels of electoral expenditure that is suggestive of an arms race taking place.[492] The JSCEM Interim Report also stated that there is evidence of a significant rise in election spending and an arms race, 'where whoever has the deepest pockets wins'.[493]

The State Director of the National Party of Australia – Victoria, Matthew Harris, suggested at a public forum that winning elections is not about excessive political expenditure or spending the most money:[494]

And some would argue, and probably some of my members would argue, that if you spend too much money, it's actually to a detriment in a campaign because you're overwhelming the community with things in a letterbox or TV ads or radio ads. And it actually has a negative effect. So running a successful campaign isn't purely about money. It's about having a good candidate who is talking about things that the community cares about and is engaged with and listening to the people that they're trying to represent. It's not just a race to the top I suppose in terms of how much money you can spend. You can spend too much money.

[492] The Centre for Public Integrity submission, p. 12.
[493] JSCEM Interim Report, p. 44.
[494] Transcript of Electoral Review Expert Panel public forum held on 14 July 2023, 10 am to 12 pm.

However, Professor Graeme Orr explained at another forum that while money cannot necessarily buy an election, it can skew the agenda:[495]

> *... it isn't necessarily the case that someone can come along and be a billionaire and sweep an election. What they tend to do, we saw, is they upset the deliberative nature of ... the campaign, because they skew the agenda and the media focuses on this bright new shooting star.*

Effect of high levels of political expenditure on voters

Another concern stakeholders raised with uncapped electoral spending being allowed was that money is often not spent genuinely informing the electorate. Relatively expensive forms of political advertising, such as large billboards and television commercials, are less likely to outline or discuss policy in detail. Dr Tim Read, Member for Brunswick, spoke to this at a public forum:[496]

> *The more expensive the thing is, the more it's a slogan, the more it's a dumbing down. It seems to me that really expensive spending ... goes onto those things, digital advertising, broadcast media, billboards, and obviously employing staff and so on. But these things tend to soak up the cash but don't really inform the electorate. They often repeat slogans, put up ugly pictures of the opponent. They don't enrich our democracy in a way that actual information does.*

Professor Twomey stated in her submission:[497]

> *The excessive amount spent on political advertising does not have the effect of creating a better informed voting public. It just results in repetitive advertising which annoys the public and frequently turns them off, causing them to cease to pay any attention to the campaign. More could be done to help inform the electorate with much less being spent.*

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[495] Transcript of Electoral Review Expert Panel public forum held on 20 July 2023, 10 am to 12 pm.
[496] Transcript of Electoral Review Expert Panel public forum held on 31 July 2023, 11 am to 12 pm.
[497] Professor Emerita Anne Twomey submission, p. 1.

Introducing spending caps may force Donation Recipients to make greater use of advertising methods which involve policy discussion and community input, such as attendances at public forums and events and distribution of pamphlets with proposed policies.

Some submissions also suggested that RPPs, Members of Parliament (MPs) and candidates currently spend too much time on fundraising activities, and introducing expenditure caps would allow them to spend more time speaking and consulting with communities:

- Professor Twomey's submission stated that expenditure caps would have 'the benefit of freeing up party structures from the high administrative and time burdens of perpetual fund-raising'[498]
- The Centre for Public Integrity's submission stated that if MPs 'are focussed on raising funds for the next campaign on the "permanent campaign" — then they are distracted from their core responsibility as representatives.'[499]

Levelling the playing field

As discussed in previous chapters, well-resourced candidates, incumbent MPs and larger (or established) RPPs may be in an advantaged position in electoral contests because they have more funds available to spend on political campaigns.

An argument that was raised in support of expenditure caps is that it would level the playing field and place election participants on a more equal footing. For example, The Centre for Public Integrity stated in its submission:[500]

> *Large amounts of spending by established players may dissuade potential candidates from entering the race and serve to entrench incumbents with more established fundraising networks. An election must be, to the greatest practical extent, a competition of ideas rather than of dollars. A plurality of competitive candidates should and would be promoted by capping expenditure. …*

[498] Professor Emerita Anne Twomey submission, p. 1.
[499] The Centre for Public Integrity submission, p. 9.
[500] The Centre for Public Integrity submission, pp. 9 and 12.

Research in overseas jurisdictions suggests that caps on electoral expenditure increase the size of the pool of candidates, the diversity of candidates, and competitiveness of elections.

The Australian Greens Victoria stated:[501]

... there are strong arguments that both donations caps and expenditure caps are necessary to level the playing field and the spending gulf between established parties and incumbents, and smaller parties and independents.

Dr Yee-Fui Ng stated in her submission:[502]

... caps on expenditure level the playing field between political parties, by removing the ability of parties to mount expensive electoral campaigns. By disassociating the amount of funds raised by parties from the ability to spend these funds to pursue political campaigns, expenditure caps ensure that minor parties and independents are not disproportionately disadvantaged in their ability to promote their political agenda.

However, several stakeholders argued that the 2018 amendments have exacerbated inequalities between election participants and expenditure caps, unless properly designed, would further worsen that issue.

Melissa Lowe stated in her submission that:[503]

Should the Act be further amended to provide for a broad-based cap on political expenditure (i.e. one that applies across the entire political spectrum) there is a significant risk that these existing issues of inequality ... will be further compounded.

Melissa Lowe further explained at a public forum that:[504]

The risk of [adding] a spending cap into the mix is that independents have the potential to be doubly disadvantaged and equally hamstrung in both their ability to raise funds as they

[501] Australian Greens Victoria submission, p. 2.
[502] Dr Yee-Fui Ng submission, p. 2.
[503] Melissa Lowe submission, p. 2.
[504] Transcript of Electoral Review Expert Panel public forum held on 21 July 2023, 10 am to 12 pm.

already are, while also facing a set of expenditure [limits] that also entrench the pre-eminence of major parties.

Climate 200 stated in its submission:[505]

If the details aren't right, expenditure caps could easily tilt the electoral playing field even further against independents, especially challengers.

At a public forum, Richard Denniss, Director of The Australia Institute stated:[506]

... in principle, I don't think expenditure caps are a good idea. I think having a level playing field is a good idea. The question that needs to be examined is do expenditure caps help create a level playing field?

Now, I would say the answer is very hard, it depends. ...

But I think things like uniform donation caps, and uniform spending caps, can potentially create an uphill battle for new entrants. ...

So I think that uniform caps on spending are potentially quite dangerous. I think that's been the case in New South Wales.

Some stakeholders argued that New South Wales's expenditure cap model, in particular, is a poor design and should not be adopted in Victoria, as it exacerbates inequalities.[507]

The Panel heard that expenditure caps, if introduced, would need to account for advantages available to incumbents and well-established RPPs and MPs, such as:

- use of previously acquired assets, such as campaign offices and equipment, for an election campaign — in comparison, new entrants would be required to use a significant part of their expenditure cap on purchasing or leasing those assets
- the inherent advantages of incumbency, discussed in Chapter 2.

[505] Climate 200 submission, p. 12.
[506] Transcript of Electoral Review Expert Panel public forum held on 11 July 2023, 10 am to 12 pm.
[507] See for example Climate 200 submission, p. 12.

Expenditure caps would also need to take into account potential advantages available to RPPs compared to independent candidates, such as:

- economies of scale, which broadly mean that RPPs can incur a lower rate of expenditure per electorate[508]
- the ability to focus expenditure on key electorates and cross-subsidise those costs using funds derived from other electorates, as discussed in Chapter 6.

If an expenditure cap was applied to all Donation Recipients, a complicated, multitiered design might be required to ensure inequalities are not exacerbated. For example, The Australia Institute suggested that:[509]

> *... a fair spending cap for an independent new entrant might need to be over $1,000,000 if the cap for political party candidates were $151,000 per district as it is in NSW.*
>
> *This apparent unequal treatment of independent candidates compared to party-affiliated candidates would probably be politically unpalatable, but it follows logically from enumerating just one of the advantages of incumbency and the likely way political parties would react to state-wide spending caps.*

The Centre for Public Integrity similarly advocated for expenditure caps to apply differently to independents than endorsed candidates and RPPs, including a higher cap for independents and for RPPs to account for the positive externalities of general party advertising.[510]

Administrative burden and regulatory duplication

The introduction of expenditure caps would increase the administrative burden placed on Donation Recipients and the VEC. The Panel considered that expenditure caps should only be introduced if the potential benefits outweigh the administrative costs.

[508] As noted in The Australia Institute submission, pp. 22-24.
[509] The Australia Institute submission, p. 20.
[510] The Centre for Public Integrity submission, p. 14.

Some stakeholders suggested that expenditure caps are a missing piece in Victoria's political finance laws and are needed to complement and support donation caps. For example, the Hon Dr Ken Coghill said at a public forum:[511]

> *What we say is that a donations limitation is necessary, but not sufficient. The reason that it is not sufficient is that it doesn't counter the incentives which are there to raise enormous amounts of money to spend on highly expensive and highly competitive election campaign activities.*

However, as discussed in Chapter 3, other stakeholders suggested that Victoria's donation caps already operate as a de facto limit on political expenditure. In other words, by reducing the amount of money accessible through donations to Donation Recipients, expenditure has, by default, already been capped. Cameron Petrie, Assistant State Secretary of the Australian Labor Party Victorian Branch, stated at a public forum:[512]

> *In Victoria, the heavy lifting is done, we think, by the donations and disclosures regime … we're not 100% sure on what the problem that is being solved is with expenditure caps, given the incredibly robust donations and disclosures framework. So I understand what the New South Wales Electoral Commission says about hand in glove and they work together.*
>
> *But I actually don't know what the problem is that we are trying to solve.*

Stuart Smith, State Director of the Liberal Party of Australia (Victorian Division), asked at another forum:[513]

> *… you can't have expenditure without income. It's just not able to happen. So, if we've already effectively capped expenditure by having income caps, why are we adding this complex, cumbersome regulation to regulate and track when we've already limited the amount of money in politics to begin with?*

[511] Transcript of Electoral Review Expert Panel public forum held on 11 July 2023, 10 am to 12 pm.
[512] Transcript of Electoral Review Expert Panel public forum held on 13 July 2023, 10 am to 12 pm.
[513] Transcript of Electoral Review Expert Panel public forum held on 14 July 2023, 10 am to 12 pm.

Panel's analysis

Taking into account the arguments and issues raised, the Panel considered that expenditure caps should not be introduced at this time for RPPs, MPs, candidates and groups, subject to the implementation of other recommendations made in this Report.

The Panel agreed that the practical effect of expenditure caps for those Donation Recipients could be achieved using established elements of Victoria's political finance scheme, including donation caps, to limit the amount of funds available to be spent on political expenditure. That would mean that the introduction of expenditure caps would be an unnecessary administrative burden.

However, as discussed in previous chapters, the Panel considered that changes to existing laws are required to ensure that the amount of money available for political expenditure is, in fact, constrained, including:

- limits being placed on what funds may be paid into the State campaign account (SCA) of an RPP, MP, group or candidate, and consequently used for political expenditure
- changes to existing rules concerning nominated entities
- limits being placed on the amount that a candidate can contribute to their own campaign.

If those reforms are not made, expenditure caps for RPPs, MPs, candidates and groups may still be required.

The Panel was also concerned with the potential for expenditure caps to exacerbate inequalities between Donation Recipients, and with criticisms levelled at expenditure caps in other Australian jurisdictions. The Panel considered that if expenditure caps were to be introduced for RPPs, MPs, candidates and groups, further analysis and research would need to be undertaken to ensure they are consistent with democratic and constitutional principles.

While the Panel's recommendations set out in previous chapters would practically limit political expenditure by RPPs, MPs, candidates and

groups, the same practical limits would not apply to expenditure by third party campaigners and associated entities. That would create a risk that:

- a third party campaigner or associated entity could engage in exorbitant political expenditure, which, as the High Court has noted, could 'drown out' the voices of other participants in the political process
- third party campaigners or associated entities could be used to circumvent Victoria's political finance laws.

For example, an RPP or candidate could attempt to bypass the operation of Victoria's political finance laws by undertaking unlimited levels of expenditure through a third party campaigner or associated entity, which is indirectly controlled by them or their affiliates. Such behaviour could both influence voting outcomes and occupy all available advertising resources at an election, stifling the voices of other Donation Recipients.

That would also give rise to an imbalance in the playing field. Professor Twomey discussed the potential implications of this imbalance during a public forum:[514]

> *So, you don't want [a situation] like in the United States, where third party [political action committees] … are actually the ones spending all the money and dominating the debate. So, for very good reasons, [you] don't want third party campaigners to have no cap or a higher cap than a political party. That would be bad. So, you need to make sure that they do have caps and that the cap takes into account differences between a third party campaigner and a political party.*

The Centre for Public Integrity also stated in its submission:[515]

> *… excessive third-party expenditure allows interested third parties to exercise a disproportionate and undue influence on the preferences of electors. While third party participation should be largely welcomed – specifically from civil society – unions and*

[514] Transcript of Electoral Review Expert Panel public forum held on 20 July 2023, 2 pm to 3 pm.
[515] The Centre for Public Integrity submission, p. 10.

large corporations protecting their pecuniary interests should not be able to shut down potentially good public policy to protect their bottom line.

If expenditure by third party campaigners and associated entities is left uncapped, exorbitant expenditure by those bodies could be used to exert improper influence on political decision makers. For example, a third party campaigner might indicate, or imply through past practice, that it will incur exorbitant levels of political expenditure that either:

- benefits a particular RPP, if its MPs support policies that benefit the third party campaigner
- harms a particular RPP, if its MPs pursue a particular reform agenda.

For the above reasons, the Panel considered that expenditure caps should be introduced for third party campaigners and associated entities.

The *Electoral Act 2002* (Vic) treats third party campaigners and associated entities in an analogous manner. The risks identified above apply equally to both types of bodies. The Panel considered that, for the purpose of determining whether expenditure caps are required and how they should be designed, issues and evidence related to third party campaigners apply equally to associated entities and vice versa.

The Panel noted that introducing expenditure caps for third party campaigners and associated entities, but not for other Donation Recipients, may appear at first glance to be an unequal treatment of election participants. The Panel was mindful that the plurality judgment of the High Court in Unions NSW No 2 explained that, under Australia's Constitution, candidates and political parties do not have a privileged right to political communication, and all people of the Commonwealth have the right to equal participation in the exercise of political sovereignty.[516] The purpose of the Panel's proposed approach is not to place any persons or Donation Recipients in a privileged position. On the contrary, the proposed reforms seek to ensure:

[516] *Unions NSW v New South Wales* (2019) 264 CLR 595, [39]-[40].

- all Donation Recipients are treated fairly and in a practically equivalent manner, while recognising differences in how different Donation Recipients operate and their objectives
- Victoria's political finance laws are as simple as possible and the administrative burden placed on Donation Recipients is no greater than that which is absolutely required.

The High Court has also stated that a cap on expenditure is a more direct burden on political communication than one on political donations.[517] The Victorian Trades Hall Council stated in its submission that it and its affiliated unions were strongly opposed to the introduction of expenditure caps, and described them as a 'direct attack on workers in unions participating in democratic elections'.[518] The Panel took these matters into account when considering the design features of its proposed expenditure caps for third party campaigners and associated entities, aiming to balance their right to engage in meaningful political communication with the risks being addressed.

7.2 Design considerations

Having concluded that expenditure caps are required for third party campaigners and associated entities, the Panel considered how those expenditure caps should be designed, including:

- what expenditure should be subject to the cap
- for what period of time caps should apply
- whether caps should apply to spending for specific electorates and whether an overall cap should apply
- what the value of the cap should be.

Expenditure subject to the cap

As explained in Chapter 3, Australian jurisdictions typically define a term, such as 'political expenditure' or 'electoral expenditure', which identifies what expenditure is in-scope of their political finance laws. The Panel recommended that Part 12 of the *Electoral Act 2002* (Vic) is revised to

[517] *Unions NSW vs New South Wales* (2019) 264 CLR 595, [15].
[518] Victorian Trades Hall Council submission, p. 5.

consistently use the term political expenditure and for the meaning of that term to be clarified and expanded.

The Centre of Public Integrity recommended in its submission that the scope of expenditure caps should be sufficiently broad to capture 'third-party issues-based advertising campaigns which seek to influence voting at an election' and referred to definitions used in New South Wales and Canada as useful examples.[519]

However, the Panel noted that New South Wales excludes certain types of electoral expenditure from its rules for expenditure caps, including expenditure incurred:[520]

- in raising funds for an election
- on travel and travel accommodation for candidates and staff engaged in electoral campaigning
- for office accommodation for a single campaign office for a candidate or a party engaged in an election campaign, including for the campaign headquarters of a party, but only to a maximum amount of $20,000 (subject to indexation) for each capped expenditure period.

Climate 200 recommended that only communications expenditure be capped. It argued that otherwise expenditure caps may unfairly advantage major RPPs over new entrants, who are required to incur expenditure to purchase campaign assets and replicate functions provided by an RPP's headquarters, but without the benefit of economies of scale.[521] However, as the Panel's proposed expenditure caps will not apply to RPPs and candidates, those potential risks are less relevant.

The Panel considered that expenditure caps in Victoria should apply to all political expenditure, subject to changes to the meaning of that term recommended in this Report. That approach would keep Victoria's political finance laws consistent and simple.

[519] The Centre of Public Integrity submission, p. 15.
[520] *Electoral Funding Act 2018* (NSW), ss. 7(4)-7(4F).
[521] Climate 200 submission, p. 14.

Capped expenditure period

Australian jurisdictions with expenditure caps typically apply those caps to a specific time period commencing before an election and ending on election day or shortly after. The capped expenditure period typically varies depending on the type of election.

Table 7.1 summarises the capped expenditure period for the most recent general/periodic election in each Australian jurisdiction where caps are in place. The periods ranged from 126 to 292 days, with an average duration of 228 days.

Table 7.1: Jurisdictional comparison of capped expenditure period for most recent State and Territory general/periodic elections

Jurisdiction	Commencement	End	Duration (days)
New South Wales	1 October 2022	25 March 2023	176
Queensland	30 March 2020	31 October 2020	216
South Australia	1 July 2021	18 April 2022	292
Tasmania[(a)]	1 January 2023	6 May 2023	126
Northern Territory	1 January 2020	21 September 2020	265
Australian Capital Territory	1 January 2020	17 October 2020	291

Note: (a) The dates in the table are for the 2023 Legislative Council periodic election. There is no capped expenditure period for Legislative Assembly periodic elections.
Sources: *Electoral Funding Act 2018* (NSW), s. 27; *Constitution Act 1902* (NSW), ss. 22A and 24A; *Electoral Act 1992* (Qld), s. 280; *Constitution of Queensland 2001* (Qld), s. 19B; *Electoral Act 1985* (SA), s. 130A; *Constitution Act 1934* (SA), s. 28; *Electoral Act 2004* (Tas), s. 70; *Constitution Act 1934* (Tas), s. 19; *Electoral Act 2004* (NT), s. 203A; *Electoral Act 2004* (NT), s. 23; *Electoral Act 1992* (ACT), ss. 100 and 198.

The Centre for Public Integrity recommended Victoria's capped expenditure period for a general election should commence 12 months prior to the election day.[522] The Australian Greens Victoria also suggested in their submission that caps apply to a period of at least 12 months from election day.[523]

However, the Panel considered that applying expenditure caps to only part of the electoral cycle creates several risks and issues:

- Donation Recipients may attempt to circumvent expenditure caps by undertaking campaign activities prior to the capped period — only

[522] The Centre for Public Integrity submission, pp. 12-13.
[523] Australian Greens Victoria submission, p. 3.

regulating expenditure close to an election appears to assume that expenditure incurred earlier does not affect political decision-making or election outcomes, but the Panel is unaware of supporting evidence for that conclusion

- if expenditure caps are to apply to all elections, including by-elections and supplementary elections, applying caps to only a limited period of time before each election may lead to a complex and confusing system for third party campaigners and associated entities in which they frequently transition between capped and uncapped periods
- third party campaigners, associated entities and the VEC may be required to assess which specific election each instance of political expenditure relates to in order to determine whether the cap for that election applies, for example in cases where capped periods for elections overlap.

The Panel came to the view that expenditure caps should instead apply to all time periods. The Panel considered that expenditure caps should apply to, and reset at the end of, each election period, consistent with the way that the general cap on political donations operates. The *Electoral Act 2002* (Vic) currently defines an election period as the period commencing on the day after election day for a general election and ending on the next general election day.[524]

The same expenditure cap would apply to all political expenditure incurred by a third party campaigner or associated entity in that four-year election period, including expenditure associated with any by-elections and supplementary elections.

Structure of expenditure caps

While jurisdictions with expenditure caps typically apply a state-wide or territory-wide cap for RPPs, New South Wales, Queensland and South Australia also have additional rules that restrict expenditure relating to a specific electorate.

[524] *Electoral Act 2002* (Vic), s. 206.

The Australian Greens Victoria recommended that Victoria introduce expenditure caps for individual seats.[525] Climate 200 also recommended that if expenditure caps were to be introduced, seat-specific caps should apply, stating that otherwise:[526]

> *... parties can focus the majority of their spending on priority seats, significantly outspending an independent challenger.*

New South Wales and Queensland set electorate specific expenditure sub-caps for RPPs, with similar rules for third party campaigners.[527] Expenditure by an RPP or third party campaigner is taken to be incurred for the purposes of, or relating to, the election in a particular electoral district if it is for advertising or other material that is:[528]

- communicated to electors in that district
- not mainly communicated to electors outside that district.

In New South Wales, the advertisement or other material must also explicitly mention either the name of the candidate in that district or the name of the district to count towards the sub-cap.[529] Queensland provides that expenditure on opinion polls or research does not relate to an electoral district.[530]

In South Australia, a 'global cap' applies to expenditure incurred by an RPP and its candidates depending on the number of endorsed Assembly candidates. Within the global cap, the applicable caps for an RPP and individual Assembly candidates are determined by agreement between the candidates and the party agent. This enables RPPs to allocate more or less expenditure to the elections in particular electoral districts or state-wide campaigning, depending on their priorities. However, the amount allocated to each Assembly candidate cannot exceed $100,000.[531]

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[525] Australian Greens Victoria submission, p. 3.
[526] Climate 200 submission, p. 12.
[527] *Electoral Act 1992* (Qld), ss. 280 – 281E.
[528] *Electoral Funding Act 2018* (NSW), s. 29(13); *Electoral Act 1992* (Qld), s. 281B.
[529] *Electoral Funding Act 2018* (NSW), s. 29(13)(a).
[530] *Electoral Act 1992* (Qld), s. 281B(2).
[531] Electoral Commission of South Australia (n.d.), *Candidates, political expenditure caps*, https://www.ecsa.sa.gov.au/parties-and-candidates/funding-and-disclosure-state-elections/candidates, accessed 21 September 2023; Electoral Commission of South Australia (2019),

Similar to New South Wales, South Australia provides that political expenditure relates to an electoral district in a House of Assembly election if it is for election material that:[532]

- expressly mentions the name, or displays the image of, the candidate or expressly mentions the name of the district
- is communicated to electors in that district
- is not mainly communicated to electors outside that district.

The Centre for Public Integrity suggested in its submission that Victoria take a similar approach to South Australia in structuring expenditure caps for RPPs and candidates. It explained that third parties must also be captured by a limit on in-electorate spending to prevent the flooding of specific races.[533]

The Panel noted that introducing seat specific expenditure sub-caps would come with significant administrative costs. For example, instead of third party campaigners and associated entities being required to monitor their expenditure against a single cap, they would have to assign expenditure across 88 sub-caps and ensure each of those caps is not exceeded. Further, as discussed in Chapter 6, determining which electorate political expenditure relates to can be extremely challenging in practice.

While the Panel acknowledged concerns raised in submissions regarding the risk of a Donation Recipient 'flooding' an electorate with its political expenditure, it considered that the risk of a third party campaigner or associated entity engaging in such activity was lower than for an RPP. Third party campaigners and associated entities are more likely to incur political expenditure as part of issues-based campaigns targeting the broader community.

The Panel's view was that electorate specific sub-caps were not required.

Report into the Operation and Administration of South Australia's Funding, Expenditure and Disclosure Legislation, p. 41; Electoral Commission of South Australia (n.d.), *Indexed Amounts*, https://ecsa.sa.gov.au/parties-and-candidates/funding-and-disclosure-state-elections/indexed-amounts, accessed 2 November 2023..

[532] *Electoral Act 1985* (SA), s. 130ZB(3).

[533] The Centre for Public Integrity submission, pp. 14-15.

Suggested aggregation rules for associated entities

New South Wales and Queensland do not set expenditure caps for associated entities, and instead count expenditure incurred by an associated entity within the relevant period towards the expenditure cap of the associated RPP, MP or candidate.[534]

The Centre for Public Integrity suggested that Victoria should also capture expenditure by an associated entity within its RPP's cap.[535]

However, New South Wales and Queensland define the term associated entity more narrowly than Victoria. For example, in Queensland an entity is an associated entity of an RPP if it either:[536]

- is controlled by the RPP or a group of endorsed candidates
- operates wholly, or to a significant extent, for the benefit of the RPP or a group of endorsed candidates
- operates for the dominant purpose of promoting the RPP in elections, or a group of endorsed candidates in an election.

New South Wales defines associated entity to mean as a corporation or another entity that operates solely for the benefit of one or more RPPs or MPs.[537]

In comparison, in Victoria an RPP's associated entities also include entities that are a financial member of the RPP or that have voting rights in it.[538]

Taking into account Victoria's expanded definition of associated entity, it would not be appropriate for it to introduce aggregation rules for associated entities similar to those in place in New South Wales and Queensland. Introducing aggregation rules might also be unconstitutional.[539]

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[534] *Electoral Funding 2018* (NSW), s. 30(4); *Electoral Act 1992* (Qld), ss. 204-204A.
[535] The Centre for Public Integrity submission, p. 14.
[536] *Electoral Act 1992* (Qld), s. 204(2).
[537] *Electoral Funding Act 2018* (NSW), s. 4.
[538] *Electoral Act 2002* (Vic), s. 206.
[539] *Unions NSW v New South Wales* (2013) 252 CLR 530.

Expenditure cap values

The Centre for Public Integrity drew the Panel's attention to relevant principles provided by the High Court of Australia, including the following statement by Justice Gageler:[540]

> *To be justified as no more than is reasonably necessary to achieve a level playing field for all participants in political discourse during an election period, the amount of the cap must, at the very least, leave a third-party campaigner with an ability meaningfully to compete on the playing field. The third-party campaigner must be left with a reasonable opportunity to present its case to voters. It is not self-evident, and it has not been shown, that the cap set in the amount of $500,000 leaves a third-party campaigner with a reasonable opportunity to present its case.*

The Centre for Public Integrity suggested that:[541]

> *Irrespective of the final amount, [the expenditure cap for a third party campaigner] should be considerably lower than the cap for a party contesting all electoral divisions – as was the New South Wales cap before it was halved and subsequently voided.*

The Panel examined how high the proposed expenditure cap should be to ensure third party campaigners and associated entities can reasonably compete and present their case to voters, while still achieving the objectives of the cap explained above.

At a public forum, the Panel asked Wilhelmina Stracke, the Assistant Secretary of the Victorian Trades Hall Council, to comment on the typical expenditure of a third party campaigner. Wilhelmina Stracke stated that expenditure will differ significantly between organisations and depending on the topic and election. Wilhelmina Stracke conjectured that in relation to Commonwealth elections, Victorian Trades Hall Council's expenditure may typically be between $100,000 to $250,000.[542]

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[540] *Unions NSW v New South Wales* (2019) 264 CLR 595, [101].
[541] The Centre for Public Integrity submission, p. 15.
[542] Transcript of Electoral Review Expert Panel public forum held on 4 August 2023, 10 am to 11 am.

Limited information is available on the political expenditure of third party campaigners and associated entities in Victoria:

- the annual returns of those bodies currently include information on all expenditure from the SCA, which may include payments other than political expenditure
- annual returns for 2022-23, the financial year in which the 2022 Victorian State election was held, were not available at the time of the Report.

Table 7.2 summarises the expenditure disclosed by third party campaigners in their annual returns for 2018-19 to 2021-22.

Table 7.2: Disclosed expenditure of third party campaigners in Victoria

Third party campaigner	Financial year			
	18-19 ($)	19-20 ($)	20-21 ($)	21-22 ($)
Victoria Forward Pty Ltd	N/A	N/A	12,218	25,624
Gender Awareness Australia Ltd	N/A	N/A	N/A	0
Advance Aus Ltd	N/A	N/A	N/A	0
Victorian Trades Hall Council	N/A	N/A	N/A	0
AUSTRALIAN CHRISTIAN LOBBY	5,021	N/A	N/A	0
GetUp Limited	20,007	N/A	N/A	N/A
Australian Education Union Victorian Branch	N/A	N/A	N/A	0

Source: VEC (n.d.), *Public Annual Returns*, https://disclosures.vec.vic.gov.au/public-annual-returns/, accessed 12 October 2023.

The recommendations contained in this Report would mean that third party campaigners engaging in political expenditure are now required to disclose over the entirety of the four-year cycle, and as a consequence the Panel expects the reported number of third party campaigners to increase. In addition, the recommended broadening of the definition of political expenditure may mean that additional expenditure is captured by the disclosure obligations.

The Panel also looked at relevant data from other Australian jurisdictions.

Under Commonwealth legislation, 'significant third parties' are required to register with the AEC and lodge annual returns, which disclose the total

amount of electoral expenditure incurred by the third party in the year.[543] The Panel analysed annual returns lodged by significant third parties for the 2018-19 to 2021-22 four-year period. Annual returns were lodged by 50 significant third parties in that period. In total, significant third parties incurred approximately $97 million in electoral expenditure and the majority (39 or approximately 80 per cent) incurred less than $1 million in electoral expenditure over the four year period. The electoral expenditure of some third parties significantly exceeded that of others, for example the expenditure of:[544]

- the Australian Council of Trade Unions was almost $28 million, which was approximately 29 per cent of all electoral expenditure by significant third parties
- Climate 200 Pty Limited was almost $13 million
- Advance Australia was over $9 million.

The New South Wales Electoral Commission publishes the reported political expenditure of third party campaigners in that State. The Panel examined data for 2018-19, the year in which the 2019 New South Wales general election was held — data for the year of the 2023 general election were not yet available. The data indicate:[545]

- NSW Minerals Council Ltd spent almost $2 million on political expenditure, whereas all other third party campaigners each spent less than $700,000
- three third party campaigners spent between $500,000 and $700,000
- eleven spent between $100,000 and $500,000
- 21 spent between $10,000 and $100,000
- 13 spent up to $10,000
- 15 reported no expenditure.

The Panel also took into account the value of expenditure caps set for third party campaigners and associated entities in other Australian jurisdictions (Table 7.3). New South Wales, Queensland and the Australian

[543] AEC (2023), *Financial disclosure guide for significant third parties - 2022-23 financial year,* p. 22.

[544] AEC (n.d.), *AEC Transparency Register – significant third party returns*, https://transparency.aec.gov.au/AnnualSignificantThirdParty, accessed 26 September 2023.

[545] New South Wales Electoral Commission (2023), *View disclosures*, https://elections.nsw.gov.au/funding-and-disclosure/disclosures/view-disclosures, last updated 31 August 2023.

Capital Territory each set an expenditure cap for third party campaigners. Only the Australian Capital Territory sets an expenditure cap for associated entities.

New South Wales and Queensland both provide a higher expenditure cap for a third party campaigner if it is registered. Generally speaking, the Australian Capital Territory's expenditure caps are much lower than those in New South Wales and Queensland. However, that reflects the jurisdiction's lower population and smaller geographic size.

Table 7.3: Jurisdictional comparison of third party campaigner and associated entity expenditure caps, as of 1 July 2023

Jurisdiction	Cap value
New South Wales[(a)]	Third party campaigner registered prior to the start of the capped expenditure period – $1,464,200 Other third party campaigner – $732,000
Queensland	Registered third party campaigner – $1,043,088, subject to a maximum spend of $90,749 per electoral district Unregistered third party campaigner – $6,000
Australian Capital Territory	Third party campaigner or associated entity — $43,050

Note: (a) Within the overall applicable cap, expenditure incurred substantially for the purposes of the election in a particular electoral district is capped at $30,400.
Sources: *Electoral Funding (Adjustable Amounts) (Electoral Expenditure) Notice 2023* (NSW); Electoral Commission Queensland (2023), *Election and disclosure obligations for third parties;* Elections ACT (2023), *Election funding, expenditure and financial disclosure handbook,* p. 37.

The NSW Minerals Council's reported political expenditure for 2018-19 appears to exceed the New South Wales expenditure cap, and it vastly exceeded the expenditure of other third party campaigners. However, that may have been permitted as the New South Wales cap only applies to a limited period — for the 2019 general election the period was 1 October 2018 to 23 March 2019.[546] The Panel considered that evidence supports its conclusion that applying expenditure caps to only a limited period of time may not support a level playing field, prevent excessive expenditure or address the risk of improper influence.

The Panel also reviewed the value of expenditure caps for RPPs and candidates in other Australian jurisdictions. A high level summary is provided in Table 7.4.

[546] *Electoral Funding Act 2018* (NSW), s. 27.

Table 7.4: Jurisdictional comparison of RPP and candidate expenditure caps, as of 1 July 2023

Jurisdiction	RPPs	Candidates
New South Wales[a]	Endorsed candidates in 10+ districts $150,700 × number of electoral districts in which a candidate is endorsed Otherwise $1,579,400 **Note:** sub-caps apply to each electoral district.	Endorsed LA candidates $150,700 Unendorsed LA candidates $225,800 Ungrouped LC candidates $225,800
Queensland	$95,964 × number of electoral districts in which a candidate is endorsed **Note:** sub-caps apply to each electoral district.	Endorsed candidates $60,499 Unendorsed candidates $90,749
South Australia[b]	Endorsed candidates in LC only $629,877 Otherwise The sum of: • $94,482 × number of electoral districts in which a candidate is endorsed, less the sum of caps for individual candidates[c] • $125,976 × number of endorsed candidates in the LC (up to five).	Endorsed LA candidates $40,000 – $100,000[c] Unendorsed LA candidates $125,976 Unendorsed LC candidates $157,470
Tasmania	N/A	LC candidates $19,000
Northern Territory	$45,600 × number of endorsed candidates	$45,600
Australian Capital Territory	$43,050 × number of endorsed candidates	$43,050

Key: LA = Legislative Assembly. LC = Legislative Council.
Notes: (a) A cap of $1,579,400 applies to Legislative Council groups. (b) A cap of $629,877 also applies to Legislative Council groups. (c) An RPP is required to allocate an amount to each Assembly candidate, within a set range. The RPP's cap is reduced by the amount allocated to those candidates.
Sources: *Electoral Funding (Adjustable Amounts) (Electoral Expenditure) Notice 2023* (NSW); Electoral Commission Queensland (2023), *Election and disclosure obligations for State election candidates*; *Electoral Act 1985* (SA), s. 130Z; Electoral Commission of South Australia (n.d.), *Indexed amounts*, https://www.ecsa.sa.gov.au/parties-and-candidates/funding-and-disclosure-state-elections/indexed-amounts, accessed 17 August 2023; Tasmanian Electoral Commission (2023), *2023 Legislative Council Elections Candidate Handbook,* p. 21; *Electoral Act 2004* (NT), s. 203B; Northern Territory Government (n.d.), *Monetary units*, https://justice.nt.gov.au/attorney-general-and-justice/units-and-amounts/monetary-units, accessed 17 August 2023; Elections ACT (2023), *Election funding, expenditure and financial disclosure handbook,* p. 37.

Based on the above matters, the Panel considered that the expenditure cap for third party campaigners and associated entities should initially be set at $1 million across the four-year election period. That cap value

reflects available data and would permit third party campaigners and associated entities to finance strong campaigns in relation to an election.

The Panel has made a recommendation to change the definition of election period in Chapter 8.

Indexation

In all jurisdictions besides Tasmania, the values of expenditure caps are generally indexed in line with changes in the all groups consumer price index for the relevant capital city as published by the Australian Bureau of Statistics. In Tasmania, the cap for Legislative Council candidates increases by $500 each year.[547]

The indexation of monetary values set in Part 12 of the *Electoral Act 2002* (Vic) is discussed in Chapter 8.

The Panel considered that the value of Victoria's expenditure caps should be indexed at the start of each election period, in line with movements in the all groups consumer price index for Melbourne. That will ensure that expenditure cap values are maintained in real (inflation-adjusted) terms.

Recommendation 7.1: Amend the *Electoral Act 2002* (Vic) to introduce expenditure caps for third party campaigners and associated entities, with the following features:

- cap applies to political expenditure
- cap applies to each election period and resets at the start of each new election period
- initial value of the cap is $1,000,000 per election period, or such higher amount that may be required to ensure it is lawful according to independent legal advice provided to the Victorian Government
- value of the cap is to be indexed at the start of each election period, in line with movements in the all groups consumer price index for Melbourne in original terms as published by the Australian Bureau of Statistics.

[547] *Electoral Act 2004* (Tas), s. 160(2).

7.3 Reporting, enforcement and penalties

As explained in Chapter 4, for a regulatory scheme to be effective, it must be underpinned by enforcement mechanisms and penalties for non-compliance.

The Panel considered:

- whether the introduction of expenditure caps may require additional reporting requirements for third party campaigners and associated entities
- additional resources or powers the VEC may require to administer expenditure caps
- what penalties should apply to breaches.

Reporting of political expenditure

The VEC stated in its submission that, if expenditure caps were introduced, the *Electoral Act 2002* (Vic) would need to clearly set out how expenditure is disclosed by Donation Recipients and what expenditure needs to be included. Consideration would need to be given to expenditure return deadlines and how they would align with other reporting requirements. The VEC noted that one option would be to require Donation Recipients subject to expenditure caps to include detailed information on political expenditure as part of their annual returns, which 'would allow the VEC to streamline and combine time and resources to effectively administer the cap'.[548]

The Panel agreed that it would be preferable for information on political expenditure to be provided in reports that third party campaigners and associated entities are already required to submit to the VEC. The Panel considered that these entities should be required to provide information on political expenditure incurred in their annual returns.

In Chapter 8 of this Report, the Panel has recommended changes to align the timing of rules and requirements under Part 12 of the *Electoral Act 2002* (Vic), including that:

[548] VEC submission Part 2 – Issues and recommendations, pp. 70-71.

- the definition of election period is changed, so that an election period begins at the start of a calendar year and ends at the end of another calendar year
- annual returns relate to calendar years, rather than financial years.

Those changes should ensure that each election period ordinarily consists of four calendar years, and the annual returns submitted by a third party campaigner or associated entity for those years will, together, provide information on political expenditure incurred across the entire election period.

Recommendation 7.2: Amend the *Electoral Act 2002* (Vic) to require third party campaigners and associated entities to report on political expenditure incurred for the year as part of their annual returns, in addition to existing requirements.

Powers and resources of the VEC

The VEC's submission discussed the powers it would require to properly administer expenditure caps:[549]

> *The VEC would require sufficient legislative ability to effectively and thoroughly audit statements and accounts with regard to the expenditure cap. The VEC would also require the ability to conduct risk reviews on compliance issues that need a more in-depth investigation and response. This would help the VEC understand how payments are made to prove that they were made accordingly and not in contravention of the cap. The VEC believes that ensuring compliance with the expenditure cap would be dependent on whether coercive notices can be issued and other information requested for the sake of transparency.*

The VEC also explained that it would need greater resourcing in order to administer and regulate expenditure caps, as:[550]

- there would be an increased need to train and retain staff in order to ensure compliance

[549] VEC submission Part 2 – Issues and recommendations, p. 70.
[550] VEC submission Part 2 – Issues and recommendations, p. 70.

- the capability of the VEC's current technological systems would need to be assessed and additional investment may be required.

The Panel has examined the VEC's auditing and enforcement powers in Chapter 4 of this Report, and recommended changes to improve and strengthen those powers. The Panel considered that, subject to those changes being made and information on political expenditure by third party campaigners and associated entities being included in their annual returns, the VEC should have the powers and information required to administer expenditure caps.

If the *Electoral Act 2002* (Vic) is amended to introduce expenditure caps, the VEC should be given sufficient time to hire and train staff and upgrade its systems before those expenditure caps take effect. The Victorian Government should also undertake further consultations with the VEC about its resourcing requirements and ensure that those requirement are met.

Penalties

The Panel was required to consider what the consequences should be for a third party campaigner or associated entity failing to comply with an expenditure cap.

The Panel considered penalties set by other Australian jurisdictions with expenditure caps, which are summarised in Table 7.5. Broadly speaking, penalties set by other Australian jurisdictions fall within three categories:

- a fine, set in penalty units
- imprisonment
- a fine set as a multiple of the amount spent over the cap.

New South Wales, Queensland, South Australia and the Northern Territory have penalties for election participants who enter into or carry out a scheme to circumvent expenditure caps, including with the involvement of a third party. In Tasmania, a member of the Legislative Council who is found to have exceeded the cap by more than $1,000 may also have their election voided as a result.[551]

[551] *Electoral Act 2004* (Tas), s. 199(5)(a).

Table 7.5: Jurisdictional comparison — penalties for non-compliance with cap

Jurisdiction	Penalty for exceeding cap	Penalty for engaging in scheme to circumvent cap
New South Wales	Maximum penalty of 400 penalty units or two years imprisonment, or both.[a]	Maximum penalty of 10 years imprisonment
Queensland[a]	**Unregistered third party campaigners**: maximum penalty equal to the greater of: • twice the amount by which the expenditure exceeded the cap • 200 penalty units.	Maximum penalty of 1,500 penalty units or 10 years imprisonment
	Other election participants: maximum penalty of 1,500 penalty units or 10 years imprisonment.[b]	
South Australia	If expenditure exceeds the cap by not more than the amount of public funding ordinarily payable to the participant — their public funding is reduced by an amount equal to 20 times the excess amount. Otherwise, no public funding provided.	$25,000 fine
Tasmania	If the expenditure exceeds the cap by: • $1,000 or less – a fine not exceeding 0.05 penalty units for every $1 in excess of the cap • more than $1,000 – a fine not exceeding 150 penalty units.[c]	N/A
Northern Territory	**Candidates**: maximum penalty of 300 penalty units or 18 months' imprisonment, or both.	Maximum penalty of 10 years imprisonment
	RPPs and associated entities: maximum penalty of 1,500 penalty units.	
Australian Capital Territory	Twice the amount by which the expenditure exceeded the cap.	N/A

Notes: (a) An election participant who exceeds the cap is also liable to pay the State an amount equal to twice the amount by which their expenditure exceeded the cap. (b) An election participant who incurs expenditure in excess of the cap due to aggregated expenditure does not commit an offence if they did not know, and could not reasonably have known, about the aggregated expenditure. (c) If the court finds that an elected member of the Legislative Council is guilty of having incurred expenditure that exceeded the cap by more than $1,000, and is satisfied of the correctness of that finding, it is to declare that candidate's election void unless it is satisfied that there are special circumstances that would make it undesirable or inappropriate to do so.
Sources: *Electoral Funding Act 2018* (NSW), ss. 58(4) and 143-144; *Electoral Act 1992* (Qld), ss. 281G-J and 307B; *Electoral Act 1985* (SA), ss. 130Q(4) and 130ZC; *Electoral Act 2004* (Tas), s. 199; *Electoral Act 2004* (NT), ss. 203C-D; *Electoral Act 1992* (ACT), ss. 205F-G.

Queensland also imposes differing penalties between unregistered and registered third party campaigners. Unregistered third party campaigners must pay the greater of:[552]

- twice the amount by which the expenditure cap was exceeded
- 200 penalty units.

Registered third party campaigners, and all other Donation Recipients, are subject to a maximum penalty of 1,500 penalty units or 10 years imprisonment for breaching the expenditure cap.[553]

In its submission, the VEC recommended that the public funding entitlement of a Donation Recipient should be reduced by twice the amount by which the expenditure cap was exceeded.[554] Since third party campaigners and associated entities do not receive public funding, that penalty cannot be applied to them. However, an equivalent alternative would be to impose a financial penalty equal to twice the overspend.

The Centre for Public Integrity suggested in its submission that the following penalties apply:[555]

- for unintentional or negligent breaches, a requirement to pay double the amount of overspend
- for intentional breaches, a multiple repayment penalty, as well as a fine and possible imprisonment
- if the Court of Disputed Returns is satisfied that breach changed the outcome of an election, it should be empowered to void the relevant election.

Principles and considerations relevant to the design of penalty provisions are discussed in Chapter 4. The Panel noted that penalties should be proportionate to the harm caused and the gravity of the misconduct. Further, criminal prosecution of minor forms of misconduct may be inappropriate and may be avoided by regulators in practice, for example due to the cost. Alternative penalties can include infringement notices, cautions, official warnings and enforceable undertakings.

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[552] *Electoral Act 1992* (Qld), s. 281H.
[553] *Electoral Act 1992* (Qld), s. 281G.
[554] VEC submission Part 2 – Issues and recommendations, p. 71.
[555] The Centre for Public Integrity submission, p.16.

The Panel also noted that Dr Yee-Fui Ng recommended, in her 2021 report for the Electoral Regulation Research Network, that penalties for breaches of political finance laws should be confined to fines or civil penalties, rather than imprisonment or criminal penalties which may be too harsh.[556]

The Australian Law Reform Commission explained in a 2015 report that an important common law legal principle is that a person should not be criminalised for committing an act without an accompanying 'guilty mind' (referred to as *mens rea*). However, some criminal offences do not require *mens rea*:[557]

- strict liability offences do not require *mens rea* to be shown but the defence of reasonable mistake is available
- absolute liability offences do not require *mens rea* to be shown and the defence reasonable mistake is not available.

The Panel considered that criminal penalties should not apply to inadvertent breaches of expenditure caps applying to third party campaigners and associated entities, and civil penalties would be a more appropriate enforcement mechanism. While it was suggested in submissions that the penalty should be equal to double the amount of overspend, Victoria's Infringements Design Guidelines state that the maximum fine for an infringement should be 12 penalty units for an individual or 60 penalty units for a body corporate. For that reason, the Panel considered the appropriate fine should be the lesser of:

- double the amount of overspend
- 12 penalty units for an individual or 60 penalty units for a body corporate.

Criminal penalties should only apply where an expenditure cap applying to third party campaigners and associated entities is intentionally or recklessly breached. The *Electoral Act 2002* (Vic) imposes a penalty of

[556] Ng, Y. (2021), *Regulating Money in Democracy: Australia's Political Finance Laws across the Federation*, p. 112.

[557] Australian Law Reform Commission (2015), *Traditional Rights and Freedoms— Encroachments by Commonwealth Laws*, pp. 286-287.

level 6 imprisonment (5 years maximum) or level 6 fine (600 penalty units) for most election related offences, such as:[558]

- forging election papers
- voting in the name of another person, or more than once
- election-related bribery
- tampering with electoral materials.

The Panel considered that imposing the same penalties for intentional or reckless breaches of expenditure caps applying to third party campaigners and associated entities would be appropriate.

Section 218B of the *Electoral Act 2002* (Vic), which prohibits schemes intended to circumvent a prohibition or requirement of Part 12 of the Act and imposes a penalty of 10 years imprisonment, should also apply to expenditure caps.

In addition to having the power to issue infringement notices and undertake criminal prosecutions, the VEC should be able to take alternative enforcement actions where appropriate, such as issuing cautions and official warnings and entering into enforceable undertakings.

The Centre of Public Integrity recommended that the Court of Disputed Returns should be able to overturn the result of an election affected by a breach of an expenditure cap.

The Panel considered that it would ordinarily be unjust for an MP's election to be overturned due to the conduct of a third party campaigner or associated entity. Further, the voiding of an election result is a momentous and extremely serious action, which may come with significant financial costs (e.g. if a new election must be held).

Under Victoria's Constitution, a person is not qualified to be an MP if they are convicted or found guilty of an indictable offence punishable by a term of imprisonment of at least five years. If an MP ceases to be qualified person, for example due to a criminal conviction, their seat becomes vacant.[559] That means that if an MP was convicted or found guilty of

[558] *Electoral Act 2002* (Vic), Pt 9, Div 1.
[559] *Constitution Act 1975* (Vic), ss. 44-46.

participating in a scheme to circumvent Part 12 of the *Electoral Act 2002* (Vic), including any future rules about expenditure caps, they would lose their seat. The Panel considered that those existing rules sufficiently address when an election result should be overturned, and additional rules specifically related to expenditure caps are not required.

Recommendation 7.3: Amend the *Electoral Act 2002* (Vic) to give the VEC the power to issue infringement notices for breaches of expenditure caps applying to third party campaigners and associated entities. The fine should be equal to the lesser of:

- double the amount of overspend
- 12 penalty units for an individual or 60 penalty units for a body corporate.

Make intentional or reckless breach of an expenditure cap applying to third party campaigners and associated entities a criminal offence, punishable by level 6 imprisonment (5 years maximum) or level 6 fine (600 penalty units).

For the avoidance of doubt, s. 218B of the *Electoral Act 2002* (Vic) should apply to schemes intended to circumvent expenditure caps applying to third party campaigners and associated entities.

8 Timing, administrative and other matters

During consultation, the Panel received feedback on several aspects of Victoria's political finance laws related to timing, administration and similar topics. While some of these matters are technical in nature, the Panel noted that they have a significant impact on the operation and effectiveness of Victoria's political finance scheme.

Several submissions also discussed the potential benefits of introducing 'truth in political advertising' laws in Victoria. That topic is outside the Panel's Terms of Reference. However, it is linked to the operation of political finance laws, in particular as there is a risk that public funding provided to registered political parties (RPPs) and candidates may be used to spread misinformation. The Panel reviewed those proposed reforms and the Victorian Government's consideration of them.

8.1 Reporting timeframes and reset of caps and thresholds

As explained in previous chapters, Part 12 of the *Electoral Act 2002* (Vic) sets out several relevant time periods that requirements and limits apply to, as well as deadlines for actions being taken. The Panel heard that some of these time periods and deadlines are inconsistent with each other, causing confusion.

The VEC illustrated the complexity of existing timelines in its submission, highlighting that:[560]

- annual returns must be submitted within 16 weeks of the end of the financial year, while Administrative Expenditure Returns must be submitted within 16 weeks of the end of the calendar year — a potential cause of confusion

[560] VEC submission Part 2 – Issues and recommendations, pp. 58, 59 and 109.

- the deadline for annual returns is particularly problematic in an election year, as it falls very close to the election day, an already busy period for RPPs, candidates and the VEC.

The VEC submitted that:[561]

> *Consolidating all relevant annual reporting requirements to one submission deadline 16 weeks after the end of each calendar year would streamline reporting requirements and optimise administrative resources. This would also allow for more timely and transparent reporting of funding and donation activities following State elections.*

The Australian Labor Party – Victorian Branch also explained in its submission that the general cap for political donations resets after each election, which ordinarily occurs in November every four years. However, the disclosure threshold resets each financial year (i.e. on 1 July). The submission stated that this discrepancy leads to additional administrative burden and causes confusion for donors, who assume that both the general cap and the disclosure threshold reset after an election.[562]

The Panel noted that another timing-related issue is that, as discussed in Chapter 5, an RPP or candidate may pay for political expenditure relating to an election some time after the election occurs. The *Electoral Act 2002* (Vic) states that political and electoral expenditure is incurred in relation to a general election if is incurred during the election period for the election,[563] which currently ends on the day of the election.

The Panel considered that political finance laws could be simplified and streamlined if the following changes were made:

- the disclosure threshold should reset at the end of each calendar year, rather than each financial year
- the general cap should reset at the end of the calendar year in which a general election is held and the definition of 'election period' should

[561] VEC submission Part 2 – Issues and recommendations, p. 59.
[562] Australian Labor Party – Victorian Branch submission, p. 13.
[563] *Electoral Act 2002* (Vic), s. 208(3).

be updated accordingly, aligning the reset date with that for the disclosure threshold
- the deadline for submitting a statement of expenditure for public funding should be changed to 16 weeks from the end of the relevant election period, which would mean it would fall in mid-April, consistent with the existing deadline
- annual returns should apply to calendar years rather than financial years and the deadline for submitting one should be 16 weeks from the end of the calendar year, consistent with arrangements for Administrative Expenditure Returns and ensuring the deadline does not fall too close to the date of a general election.

Recommendation 8.1: Change references to 'financial year' in Division 3 of Part 12 of the *Electoral Act 2002* (Vic), *Disclosure of political donations*, to references to 'calendar year'.

Change the definition of 'election period' in s. 206 of the *Electoral Act 2002* (Vic) to refer to each period commencing on 1 January following the previous general election and ending on 31 December of the year of the next general election.

Make the deadline for submitting a statement of expenditure under s. 208 of the *Electoral Act 2002* (Vic) 16 weeks from the end of the election period for that election.

Update Division 3C of Part 12, *Annual returns and other information*, to make annual returns apply to calendar years rather than financial years. Make the deadline for submitting an annual return 16 weeks from the end of each calendar year.

8.2 Indexation

Monetary values set in Part 12 of the *Electoral Act 2002* (Vic) are indexed each financial year based on changes in the all groups consumer price index for Melbourne in original terms, published by the Australian Bureau of Statistics.[564]

[564] *Electoral Act 2002* (Vic), s. 217Q.

In its *Report to Parliament on the 2018 Victorian State election*, the VEC stated that annual adjustments risk contributing to non-compliance as a result of changing values that add ambiguity and complexity over time.[565]

The VEC reiterated its concerns in its submission to the Panel, stating that annual indexation of the donation disclosure threshold, general cap and small contribution amount was leading to confusion and accidental non-compliance. The VEC noted that annual indexation of the general cap appeared inconsistent with the general cap applying to each four-year election period. Under current arrangements, a political donation that would unlawfully breach the general cap for a four-year period if made in one financial year may be lawful if made the following financial year. That means the timing of when a donation is considered 'made' may be the determining factor for whether the general cap has been breached. The VEC also suggested that it would be simpler and clearer for the small contribution amount to be a round number tied to a banknote. [566]

The VEC recommended that indexation for the disclosure threshold, general cap and small contribution be either removed or changed to instead occur once every election period.[567]

IBAC raised similar concerns in its Donations and Lobbying Report and stated that:[568]

> *In IBAC's view, the cap and threshold should remain the same throughout each state and local election cycle, to ensure the requirements are clear and consistent for all donors and candidates.*

Most Australian jurisdictions (New South Wales, Queensland, Australian Capital Territory and Northern Territory) do not index their disclosure threshold.[569] While the Commonwealth disclosure threshold is currently indexed annually, the JSCEM Interim Report recommended it be lowered

[565] VEC (2019), *Report to Parliament on the 2018 Victorian State election*, p. 110.
[566] VEC submission Part 2 – Issues and recommendations, p. 13.
[567] VEC submission Part 2 – Issues and recommendations, p. 14.
[568] Donations and Lobbying Report, p. 25.
[569] VEC submission Part 2 – Issues and recommendations, p. 13.

and fixed to $1,000.[570] Tasmania's Electoral Disclosure and Funding Bill 2022 would also set a fixed threshold for reportable political donations.[571] Western Australia indexes its disclosure threshold each election period, rounded to the nearest $100.[572]

The two other Australian jurisdictions that have a political donation cap are Queensland and New South Wales. Queensland indexes its donation cap once each election period.[573] While New South Wales indexes its cap annually, the VEC noted that Queensland is a better comparator for Victoria, because in New South Wales the donation cap applies to and resets each financial year.[574]

The Panel considered that periodic indexation should continue to occur to account for the effects of inflation and preserve the real value of monetary amounts set in Part 12 of the *Electoral Act 2002* (Vic). However, the Panel considered that the disclosure threshold, general cap and small contribution threshold should only be indexed once every four years. Values should be rounded and increased in set increments.[575] Those changes would simplify the administration of Victoria's political finance laws, help donors and Donation Recipients to understand them and reduce the risk of accidental non-compliance.

Recommendation 8.2: Amend s. 217Q of the *Electoral Act 2002* (Vic) so that the value of the general cap, disclosure threshold for political donations and small contribution amount are indexed at the start of each election period, rather than each financial year. Indexation should continue to be based on the change in the all groups consumer price index for Melbourne in original terms, published by the Australian Bureau of Statistics, over the relevant period.

Values should be rounded down to the nearest:

- $500, in the case of the general cap

[570] JSCEM Interim Report, p. 65.
[571] Electoral Disclosure and Funding Bill 2022 (Tas), s. 13.
[572] *Electoral Act 1907* (WA), s. 175ZF(1)(2); *Electoral (Political Finance) Regulations 1996* (WA), reg. 3.
[573] *Electoral Act 1992* (Qld), s. 253.
[574] VEC submission Part 2 – Issues and recommendations, p. 13.
[575] An example of how values can be indexed in set increments is provided in the *Income Tax Assessment Act 1997* (Cth), s. 960-285.

- $100, in the case of the disclosure threshold
- $10, in the case of the small contribution amount.

8.3 Administrative and other matters

In its submission, the VEC discussed several topics related to the administration of Victoria's political finance laws, including:

- registered officers and agents of Donation Recipients
- State campaign accounts (SCAs) of Donation Recipients
- actions required when a Donation Recipient ceases to operate
- determining the date on which a political donation is made and received
- treatment of the goods and services tax (GST) for the purpose of determining the value of expenditure
- extraterritorial application of laws and powers.

Registered agents

The *Electoral Act 2002* (Vic) requires an RPP to have a registered officer. A candidate, group, Member of Parliament (MP), associated entity or a third party campaigner are required to have a registered agent.

Most of the obligations and responsibilities relating to Donation Recipients under Part 12 of the *Electoral Act 2002* (Vic) are placed on their registered officer or agent.

If a Donation Recipient appoints a person as their registered agent, that person's name and address are added to a Register of Agents maintained by the VEC.[576]

In the case of an endorsed candidate, group or an MP who is a member of an RPP, the registered officer of the RPP is taken to be the registered agent.[577]

Otherwise, if no-one is appointed as the registered agent, the *Electoral Act 2002* (Vic) specifies a default registered agent (Table 8.1).

[576] *Electoral Act 2002* (Vic), s. 206.
[577] *Electoral Act 2002* (Vic), s. 207B(4).

Table 8.1: Default registered agent if appointment not made

Donation Recipient	Default registered agent
Candidate	The candidate
MP	The MP
Group	The candidate whose name appears first in the group on the ballot-paper
Associated entity	The entity's financial controller[(a)]
Third party campaigner	• If the third party campaigner is a natural person – that person • Otherwise, the financial controller[(a)]
Nominated entity	Registered officer of the nominated entity's RPP

Note: (a) financial controller means, in the case of a corporation, the secretary of the corporation; in the case of a trustee who is a natural person, that person; in any other case, the person responsible for keeping the financial records of the organisation.
Source: *Electoral Act 2002* (Vic), ss. 207B and 207C.

The VEC suggested the Panel consider:

- allowing for the appointment of deputy registered agents
- giving the VEC the power to remove a person from the Register of Agents when the person or entity who appointed them ceases to have an agent under the Act
- whether the authority, responsibilities and obligations of a registered agent should be exclusive or shared
- addressing drafting inconsistencies relating to registered agents.

Appointment of deputy registered agents

The VEC noted that while the *Electoral Act 2002* (Vic) provides for the appointment of deputy registered officers for RPPs, it does not provide for the appointment of deputy registered agents. While registered agents may be appointed on an interim or acting basis,[578] the VEC recommended that registered agents be given the express power to appoint deputies, similar to arrangements for registered officers.[579]

The Panel agreed with that recommendation.

Recommendation 8.3: Amend Part 12 of the *Electoral Act 2002* (Vic) to allow registered agents to appoint deputy registered agents, similar to the process for appointing deputy registered officers of RPPs.

[578] *Interpretation of Legislation Act 1984* (Vic), s. 41.
[579] VEC submission Part 2 – Issues and recommendations, p. 47.

In its submission, the Australian Labor Party – Victorian Branch requested that the position of deputy registered officer is recognised in Part 12 of the *Electoral Act 2002* (Vic).[580]

However, the VEC's submission explained that s. 44(2) of the *Electoral Act 2002* (Vic) allows for the appointment of deputy registered officers.[581] The Panel considered that no further changes to the Act were required.

Removal of registered agents from the Register of Agents

The appointment of a registered agent takes effect when the VEC enters their name and address on the Register of Agents and ceases when the name and address are removed.[582]

The *Electoral Act 2002* (Vic) specifies the circumstances when the VEC may remove a person from the Register of Agents, including where they provide a written notice of resignation, or the appointer provides the VEC with a written revocation of appointment.[583]

However, the VEC noted that it does not appear to have the power to remove persons from the Register of Agents when the person or entity that appointed them ceases to be a Donation Recipient, and sought clarification of when a person or entity ceases to have a registered agent.[584]

The Panel noted that registered agents may resign and request to be removed from the Register of Agents at any time, including for example following the appointing person or entity ceasing to be a Donation Recipient.

As discussed below, the obligations of a former Donation Recipient (and its registered officer or agent) should continue in force until they have been discharged, and should not be automatically discharged simply because the Donation Recipient ceases to operate.

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[580] Australian Labor Party – Victorian Branch submission, p. 12.
[581] VEC submission Part 2 – Issues and recommendations, p. 46.
[582] *Electoral Act 2002* (Vic), s. 207E.
[583] *Electoral Act 2002* (Vic), s. 207E(3).
[584] VEC submission Part 2 – Issues and recommendations, p. 47.

The Panel considered that the VEC should be given the power to remove a person from the Register of Agents, following the appointer ceasing to be a Donation Recipient, if the VEC is satisfied that all outstanding obligations of the registered agent under Part 12 of the *Electoral Act 2002* (Vic) have been fulfilled.

Recommendation 8.4: Amend s. 207E of the *Electoral Act 2002* (Vic) to give the VEC the power to remove a person from the Register of Agents, following the appointer ceasing to be a Donation Recipient, if the VEC is satisfied on reasonable grounds that all outstanding obligations of the registered agent under Part 12 of the *Electoral Act 2002* (Vic) have been fulfilled.

Whether powers and responsibilities of a registered agent are exclusive

The VEC explained in its submission that the *Electoral Act 2002* (Vic) appears to make the powers, responsibilities and functions granted to a registered agent exclusive of all other individuals, and suggested that the Panel consider whether that ought to be the case. For example, it currently appears that a candidate who appoints a registered agent is no longer able to submit their own returns.[585]

The *Electoral Act 2002* (Vic) places significant obligations on registered agents and imposes substantial penalties for non-compliance. For example:[586]

- registered agents are required to provide disclosure returns if their Donation Recipient received a political donation over the relevant threshold
- the penalty for failing to provide a disclosure return is 200 penalty units
- the penalty for providing a disclosure return that, to the knowledge of the person, contains materially false or misleading particulars is 300 penalty units and/or 2 years imprisonment.

[585] VEC submission Part 2 – Issues and recommendations, pp. 47-48.
[586] *Electoral Act 2002* (Vic), ss. 216(4) and 218A.

The Panel considered that Donation Recipients should be able to nominate a particular individual to bear their regulatory compliance obligations. For instance, a new candidate who is not familiar with their regulatory obligations should be able to hire and rely on a specialist to carry-out those obligations on their behalf, without fear of prosecution for any mistakes that specialist may make.

Further, given the substantial penalties for non-compliance that registered agents may be required to bear, it is appropriate for corresponding powers to be granted to them to the exclusion of all others. Otherwise, a registered agent may face prosecution for an action taken by another individual.

If registered agents are given the power to appoint deputies (as recommended above), registered agents will be able to share the exercise of their powers with others, including those appointing them. That would allow registered agents and Donation Recipients to allocate powers, responsibilities and risks in the manner most appropriate to their circumstances.

Drafting inconsistencies

In most cases, Part 12 of the *Electoral Act 2002* (Vic) places obligations on a candidate's registered agent, rather than on the candidate themselves, although if a candidate does not appoint a registered agent they are deemed to be their own agent. However, Division 2 of Part 12, which concerns public funding, is an exception as it places obligations on candidates rather than on their registered agents.

It is unclear why that approach was taken in Division 2, and the Panel considered that it should be reviewed and aligned with the remainder of Part 12 if appropriate.

Recommendation 8.5: Review the obligations and responsibilities placed on candidates in Division 2 of Part 12 of the *Electoral Act 2002* (Vic) and make amendments to place those responsibilities on registered agents where appropriate.

State campaign accounts

The VEC had several questions and concerns related to the operation and administration of SCAs:

- whether an SCA can be shared or controlled by several persons or entities
- when an amount is considered 'paid from' an SCA.

As explained in Chapter 3, a registered officer or agent of a Donation Recipient is required to keep an SCA, consisting of a separate account or accounts with an authorised deposit-taking institution for the purpose of State elections.

Sharing of accounts

The VEC noted that there is no express requirement for a Donation Recipient's SCA to be separate to that of any other person or entity, including the SCA of another Donation Recipient. The VEC expressed significant concern about this, as it allows for the co-mingling of funds, undermines transparency and the integrity of the political finance scheme, and blurs the lines in terms of who is receiving political donations and incurring political expenditure. The VEC stated that sharing of SCAs allows for 'unintended but lawful circumvention of the donation cap'. Further, it could effectively allow for public funding intended for a candidate or RPP to be instead paid to a third party campaigner.[587]

The VEC recommended requiring that a Donation Recipient's SCA consists of accounts (or sub-accounts) that are unique and separate from the SCAs of other Donation Recipients. An exception would be that an RPP and its MPs and endorsed candidates and groups could share SCAs.[588]

The Panel agreed that it was the policy intent of the 2018 amendments that each Donation Recipient maintain a separate SCA and that should be made clear.

[587] VEC submission Part 2 – Issues and recommendations, p. 55.
[588] VEC Submission Part 2 – Issues and recommendations, p. 56.

The Panel also agreed that an exception to the above rule should apply if an RPP shares an SCA with its MPs and endorsed candidates. RPPs are required to monitor political donations received by their endorsed MPs, candidates and groups, as those donations count towards the RPP's general cap.[589] The Panel understood that in practice some RPPs operate dedicated accounts or sub-accounts on behalf of their candidates, so that administrative and reporting obligations can be addressed centrally.

Recommendation 8.6: Amend the *Electoral Act 2002* (Vic) to clarify that each Donation Recipient's SCA must consist of one or more accounts that are unique and separate to the accounts used by other Donation Recipients. Provide exceptions, as appropriate, for RPPs and endorsed MPs, candidates and groups.

Multiple accounts used as State campaign account

The VEC also recommended limiting each Donation Recipient's SCA to one account, stating that the use of multiple accounts:[590]

> *... impacts upon the simplicity and effectiveness of the audit requirements for statements of expenditure ...*

While restricting each Donation Recipient's SCA to a single account may improve simplicity, the Panel noted that Donation Recipients may have legitimate reasons for using several accounts, for example:

- separating and keeping track of funds for particular purposes
- placing some funds into investment accounts and other funds into spending accounts
- operating accounts related to credit facilities.

The Panel considered that it would not be appropriate to limit each Donation Recipient's SCA to a single account. The way in which a Donation Recipient structures its finances should be left to its discretion, provided that Victoria's political finance laws are otherwise complied with.

[589] *Electoral Act 2002* (Vic), s. 217D(6).
[590] VEC submission Part 2 – Issues and recommendations, p. 56.

Payment of political expenditure from other accounts

As discussed in Chapter 3, Donation Recipients are required to pay for all political expenditure from their SCA. The VEC stated that it is unclear whether a Donation Recipient could pay for political expenditure using a credit card and then repay that credit card using funds from their SCA, and suggested that if permitted, 'robust record-keeping requirements' should be introduced so that use of funds can be clearly identified.[591]

The Panel considered that the *Electoral Act 2002* (Vic) is clear that a Donation Recipient's political expenditure must be paid from its SCA. It would not be sufficient, or consistent with the legislative intention of the 2018 amendments, for political expenditure to be paid for using a different account simply because funds are then moved into that other account from the SCA. For example, such an approach would render existing rules and prohibitions on the payment of affiliation fees, subscriptions and levies into the SCA moot.

A Donation Recipient may nominate more than one account held with an authorised deposit-taking institution as their SCA. A Donation Recipient wishing to use a credit card for political expenditure should nominate the account for that credit card as an SCA.

For the avoidance of doubt, those rules should not prohibit a volunteer who supports a Donation Recipient from making a payment using their own funds and then being reimbursed by the relevant Donation Recipient. In that case, the relevant political expenditure incurred by the Donation Recipient would be the payment made to the volunteer to reimburse them.

Registration of State campaign account

Currently, Donation Recipients are not required to register the accounts used for the SCA with the VEC, or notify the VEC of changes to those accounts.

[591] VEC submission Part 2 – Issues and recommendations, p. 54.

In comparison, Queensland requires RPPs, candidates and third party campaigners to provide details of the SCA within five business days of:[592]

- an RPP registering
- a person announcing their candidacy
- a third party campaigner registering for an election (or being required to register due to electoral expenditure incurred).

The electoral commission must also be notified of changes to the SCA within five business days.

The VEC recommended requiring accounts to be registered and for any changes to be reported within 30 days.[593]

The Panel agreed that Donation Recipients should be required to register accounts used for their SCA with the VEC and notify the VEC of changes to those accounts. The VEC needs access to that information in order to carry out its auditing and enforcement responsibilities. Requiring each Donation Recipient to register their accounts will also allow the VEC to check that those accounts are distinct from those used by other Donation Recipients unless an exception to that requirement applies (as recommended by the Panel above).

The Panel considered that the deadline for registering accounts or notifying the VEC of changes should be five business days, consistent with arrangements in Queensland. As Donation Recipients are ordinarily unlikely to make frequent changes to the accounts used for the SCA, the administrative burden created by that requirement should be low.

Recommendation 8.7: Amend the *Electoral Act 2002* (Vic) to require accounts used as an SCA to be registered with the VEC, and for the VEC to be notified of changes to those accounts, within five business days of:

- the obligation to maintain an SCA arising
- a change being made to those accounts.

[592] *Electoral Act 1992* (Qld), s. 221B.

[593] VEC submission Part 2 – Issues and recommendations, p. 56.

Actions required when a Political Donation Recipient ceases to operate as one

A Donation Recipient may cease to be classified as such for the purpose of Part 12 of the *Electoral Act 2002* (Vic) from a particular point in time:

- an RPP may be deregistered
- the appointment of a nominated entity for an RPP may be revoked or withdrawn
- an associated entity or third party campaigner may be wound-up, dissolved or cease to meet the applicable definition under the Act
- an MP may resign or lose their seat
- a candidate may withdraw their candidacy, or be unsuccessful for election and choose to not contest the next election.

The VEC sought clarity on whether and how the obligations of Donation Recipients and their registered officers and agents continue to apply once they cease to be a Donation Recipient. The VEC considered it in the public interest for the following obligations to continue to apply:[594]

- submission of returns and statements, such as disclosure returns for political donations received
- repayment of funds and forfeiture of unlawful political donations
- providing information to the VEC regarding expenditure statements and audit certificates for funding, and giving evidence or producing documents or other things specified in a notice from a VEC compliance officer.

The VEC suggested that a Donation Recipient, and their registered officer or agent, should be required to acquit their obligations within 16 weeks of the Donation Recipient ceasing to be one and the relevant obligations under the Act should continue to apply to them until those obligations are acquitted.

[594] VEC submission Part 2 – Issues and recommendations, pp. 48-50.

The VEC also raised that clarity is required about who is responsible for ongoing obligations, in particular where a registered officer's or agent's appointment has come to an end. It stated that:[595]

> *It may not be fair or justifiable for persons appointed as registered officers or agents to retain responsibility once their employment has ceased. However, there needs to be clarity about who has this ongoing responsibility.*

In order for Victoria's political finance laws to operate effectively, obligations and responsibilities must continue to apply even if a Donation Recipient changes status before they are fulfilled. Debts owed to the State must also be recoverable, particularly where those debts relate to overpayment of taxpayer funds.

The Panel noted that a number of technical drafting changes to Part 12 of the *Electoral Act 2002* (Vic) may be required to address both the specific concerns identified by the VEC and related issues that might arise in the future. A review of the Act by legal and legislative drafting experts, in consultation with the VEC, needs to be undertaken to identify required changes.

Recommendation 8.8: Undertake a technical review of Part 12 of the *Electoral Act 2002* (Vic), to identify required changes to ensure residual obligations and responsibilities of a former Donation Recipient and their relevant representative continue to apply and remain enforceable. The review should identify changes required to ensure that debts owed to the State by a former Donation Recipient remain recoverable.

The *Electoral Act 2002* (Vic) should be updated based on the outcome of that review.

Closure of State campaign accounts

As explained in Chapter 5, the *Electoral Act 2002* (Vic) sets out rules on what must happen to remaining funds in the SCA of former candidates, MPs and groups. However, there are no rules on what must occur to the remaining funds in the SCA of a former RPP, nominated entity, associated

[595] VEC submission Part 2 – Issues and recommendations, p. 50.

entity or third party campaigner. The VEC suggested requiring those funds to be paid to a charity, although it noted that there may be circumstances where an RPP should be exempt from surrendering funds (e.g. it begins to operate as another type of Donation Recipient).[596]

The Panel did not agree that former RPPs, nominated entities, associated entities and third party campaigners should be required to empty remaining funds in their SCA. Those bodies should be able to decide how remaining funds would be best spent, including how any preferences of donors who gifted those funds should be recognised. An associated entity or third party campaigner might choose to pay its own funds into their SCA. It would be inequitable to force those bodies to lose those funds if their status under Part 12 of the *Electoral Act 2002* (Vic) changes.

Determining when a donation is made and received

The VEC explained in its submission that, in some circumstances, it may not be clear on what date a donation was made for the purposes of the *Electoral Act 2002* (Vic). For example, some crowdfunding platforms will place a hold on funds pledged by a donor but only transfer funds from the donor to the recipient at the end of the fundraising campaign.[597]

The date on which a donation is considered made affects which time period the donation is attributed to, for example for the purpose of the disclosure threshold and general cap — which may in-turn determine whether the donation is lawful or must be disclosed. It also determines the donor's timeframe for lodging a disclosure return, if one is required.

The VEC suggested that it would be preferable for the date that a donation is made and received to be the same date, to assist with matching and reconciling donation disclosures. The VEC recommended that the date on which a donation is made by a donor and received by a recipient is prescribed to be the date on which the donation is debited from the donor.[598]

[596] VEC submission Part 2 – Issues and recommendations, pp. 51.
[597] VEC submission Part 2 – Issues and recommendations, pp. 17-18.
[598] VEC submission Part 2 – Issues and recommendations, p. 18.

The precise date on which a political donation is considered to have been made, for the purposes of Part 12 of the *Electoral Act 2002* (Vic), is a technical issue that may depend on the particular circumstances of the donation. The Panel observed that a donation should generally be considered to have been made on the day that it is received by the Donation Recipient, as it cannot be spent by them before that time.

Goods and services tax and input tax credits

As discussed in Chapter 6, RPPs, MPs and candidates are able to claim or receive funding to reimburse them for particular types of expenditure incurred.

The VEC explained that Donation Recipients that are registered for GST are able to claim input tax credits for some purchases, effectively reducing the price paid. However, it is unclear how input tax credits are treated when calculating expenditure incurred for the purposes of Part 12 of the *Electoral Act 2002* (Vic).[599]

The VEC noted that the New South Wales Electoral Commission has issued guidelines explaining that input tax credits are taken into account when calculating reimbursable expenditure, using its powers to make binding Determinations.

The VEC currently has the power to issue Determinations on what expenditure is claimable under the 'administrative expenditure' and 'policy development' funding streams.[600] In Chapter 3, the Panel recommended that the VEC is also given the power to make Determinations on the meaning of political expenditure, which public funding may be claimed for.

However, the VEC's preference was for the treatment of GST and input tax credits to be specifically addressed in the *Electoral Act 2002* (Vic), rather than through its Determinations.[601]

[599] VEC submission Part 2 – Issues and recommendations, p. 65.
[600] *Electoral Act 2002* (Vic), ss. 207G and 215A.
[601] VEC submission Part 2 – Issues and recommendations, p. 66.

GST and input tax credits are matters of Commonwealth law and the responsibility of the Commonwealth Parliament. The Panel considered that it would not be appropriate for it to make recommendations on that topic.

Extraterritorial application

The VEC requested in its submission that the extraterritorial application of Part 12 of the *Electoral Act 2002* (Vic) and the VEC's powers are expressly set out in the Act, noting that topic is addressed in the legislation of New South Wales and Queensland.[602]

The Parliament of Victoria may make laws for the peace, order and good government of that State that have extraterritorial operation.[603] However, laws are presumed to not have extraterritorial application unless the contrary intention appears, although that principle carries less weight when considering the effect of State laws within Australia.[604]

To operate effectively, Victoria's political finance laws need to apply beyond the State's borders. For example, an individual located outside of Victoria could still engage in a scheme to unlawfully circumvent Victoria's political finance laws, so the relevant prohibition for such conduct needs to apply outside of Victoria.

While a court might interpret Part 12 of the *Electoral Act 2002* (Vic) (or a specific provision within it) to have extraterritorial effect, it would be preferable for that to be made explicit in the legislation.

Recommendation 8.9: Review and update Part 12 of the *Electoral Act 2002* (Vic) to specify its extraterritorial application.

8.4 Truth in political advertising

During consultation, some stakeholders suggested that reforms are required to ensure that the information being provided to voters, and

[602] VEC submission Part 2 – Issues and recommendations, p. 66.
[603] *Australia Act 1986* (Cth), s. 2.
[604] *Interpretation of Legislation Act 1984* (Vic), s. 48; Pearce, D. (2009), *Statutory Interpretation in Australia (9th ed)*, p. 218.

disseminated as part of electoral campaigns, is accurate and informative. The risk of voters being influenced by disinformation or misinformation is of even greater concern when it may have been paid for using public funds. The Centre for Public Integrity stated in its submission:[605]

> *... the majority of electoral expenditure is on advertising that is increasingly false and misleading. Without truth in political advertising laws, public funding may be doing no more than subsidising lies.*

The risks posed by false or misleading political advertising were considered in detail by the Parliament of Victoria Electoral Matters Committee as part of its 2021 report, *Inquiry into the impact of social media on Victorian elections and Victoria's electoral administration* (Social Media Impact Report).

The Electoral Matters Committee stated that:[606]

> *Inaccurate information poses a serious threat to elections. Democracy relies on people being able to make informed decisions about which candidates will best represent their interests. Inaccurate information about candidates and issues can make that more difficult. Inaccurate information about voting can also disrupt electoral processes.*

That topic has also been raised in submissions to the Committee's *Inquiry into the 2022 Victorian State election*.[607]

The *Electoral Act 2002* (Vic) currently provides very limited prohibitions on misleading or deceptive communications, and equivalent Commonwealth rules have been interpreted by the High Court to only apply to statements about obtaining, marking and depositing ballot papers. The Electoral Matters Committee observed that 'it is possible to

[605] The Centre for Public Integrity submission, p. 23.
[606] Social Media Impact Report, p. 107.
[607] See for example: Lowe, M. et al. (2023), *Independent candidates' submission: Making Victorian Elections Safer and Fairer*, p. 22.

say many untrue things in relation to politics or elections without there being any legal penalty'.[608]

Truth in political advertising laws have been introduced in South Australia and the Australian Capital Territory. Broadly speaking, these laws involve:[609]

- making it an offence to disseminate or authorise political advertisements containing a purported statement of fact that is inaccurate or misleading to a material extent
- appointing an independent arbiter (such as the electoral commissioner) to receive and assess complaints about political advertisements that are alleged to be inaccurate or misleading
- allowing that independent arbiter to request political advertisements found to be inaccurate or misleading to be retracted and withdrawn from further circulation, with further enforcement steps available if the request is not complied with.

The Panel noted that the Commonwealth Government has publicly indicated that it is considering truth in political advertising laws.[610]

The Australian Greens Victoria stated in their submission to the Panel that Victoria should follow South Australia and the Australian Capital Territory in introducing truth in political advertising laws.[611]

Surveys conducted by The Australia Institute suggest that the vast majority of Australians and Victorians support truth in political advertising laws.[612]

The Electoral Matters Committee recommended in its Social Media Impact Report that the Victorian Government introduce truth in advertising laws. The Government supported that recommendation in principle, stating that it would consult with the VEC and the Department

[608] Social Media Impact Report, p. 113.

[609] *Electoral Act 1985* (SA), s. 113; *Electoral Act 1992* (ACT), s. 297A.

[610] Brown, A. and Ikonomou, T. (The Standard), *Government defends misinformation laws exemption*, https://www.standard.net.au/story/8397905/government-defends-misinformation-laws-exemption/, last updated 24 October 2023.

[611] Australian Greens Victoria submission, p. 5.

[612] The Australia Institute (2020), *Polling – Truth in political advertising*, pp. 1-5.

of Justice and Community Safety regarding the appropriate means for overseeing inaccurate advertising.[613]

The Panel understood that the Victorian Government is continuing to consider and work on the Electoral Matters Committee's proposed reforms.

While truth in political advertising laws were outside of the Panel's Terms of Reference, the Panel observed that recent events, domestically and abroad, demonstrate that such laws may be required. As RPPs and candidates may use taxpayer funds for political expenditure, it is important that such expenditure does not encompass misinformation or disinformation.

Other advertising reforms

Professor Twomey suggested that a voter pamphlet should be published for each electorate, online and in physical form, with information about candidates and their policies, stating that:[614]

> *Currently, it is surprisingly difficult to find sufficient information, prior to an election, about every candidate in one's electorate and their policies, in order to allocate an informed preference to each candidate. Political advertisements provide little or no substantive information. There is no single website that one can visit to find adequate information on the candidates and policies in each electorate. One has to search individually for each party and Independent, and their websites are often uninformative …*

The Electoral Matters Committee made the following, similar recommendation in its Social Media Impact Report:[615]

> *That the Government explore options for funding an independent organisation to develop online resources bringing together*

[613] State Government of Victoria (2022), *Government response to the recommendations made by the Electoral Matters Committee in its 2021 report on its Inquiry into the impact of social media on Victoria's State elections and electoral administration*.
[614] Professor Emerita Anne Twomey submission, p. 2.
[615] Social Media Impact Report, p. 137.

trustworthy information about candidates, parties and their policies in an accessible way.

The Government supported that recommendation in principle, stating that it required further analysis and would be considered against the Government's broader funding priorities.[616]

The Panel formed the view that any form of voter pamphlet would entail further regulation with unclear benefit to voters.

[616] State Government of Victoria (2022), *Government response to the recommendations made by the Electoral Matters Committee in its 2021 report on its Inquiry into the impact of social media on Victoria's State elections and electoral administration*.

9 Local government

The Panel was required to analyse and make recommendations on political finance for local government elections. This Chapter examines:

- local government in Victoria
- local government political finance laws in Australian jurisdictions
- issues that have been identified and calls for reform, particularly those made in IBAC's Donations and Lobbying Report and *Operation Sandon Special Report*.

The Chapter also sets out the Panel's recommendations for reforming local government political finance laws.

9.1 Local government in Victoria

Local government is provided for in Victoria's Constitution, which states that:[617]

> *Local government is a distinct and essential tier of government, consisting of democratically elected Councils having the functions and powers that the Parliament considers are necessary to ensure the peace, order and good government of each municipal district.*

Local government consists of democratically elected councils, with each council representing a municipal district. Each council ordinarily consists of between five and 12 council members.[618] At the most recent general elections for local government held in October 2020, there were 2,186 candidate nominations for 622 vacancies. Victoria has 79 local government municipalities.[619]

The members of each council elect one to be Mayor and may also elect a Deputy Mayor.[620] One exception is the Melbourne City Council, whose

[617] *Constitution Act 1975* (Vic), s. 74A(1).
[618] *Local Government Act 2020* (Vic), ss. 12-13.
[619] VEC (2021), *Report to Parliament on the 2020 Local Government elections*, p. 27; State Government of Victoria (2023), *Know Your Council,* https://www.vic.gov.au/know-your-council, last updated 29 May 2023.
[620] *Local Government Act 2020* (Vic), ss. 25-27.

Lord Mayor and Deputy Lord Mayor are directly elected for four-year terms.[621]

In total, Victorian councils had over $12 billion in revenue and over $10 billion in expenditure in 2021-22.[622]

Variation among councils in Victoria

Council municipalities vary greatly in terms of population, geographical size and revenue. For example:

- as at 30 June 2022, the most populous municipality was that of Casey City Council with 378,831 residents, and the Borough of Queenscliffe had the smallest population with 3,220 residents.[623]
- the largest councils by geographic size, Mildura Rural City Council and East Gippsland Shire Council, each cover over 20,000 km^2, while the Borough of Queenscliffe covers an area of under 9 km^2, significantly below the average council size of 3,000 km^2.[624]
- the City of Casey Council received approximately $603 million over the 2021-22 financial year in total revenue while the West Wimmera Council received $26 million.[625]

Due to these disparities, comparing councils with one another is challenging. To account for this, Local Government Victoria groups councils into five categories:[626]

- metro — 22 councils
- interface — 9 councils, representing municipalities that surround metropolitan Melbourne, forming the interface between it and regional Victoria
- regional cities — 10 councils
- large rural shires — 19 councils

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[621] *City of Melbourne Act 2001* (Vic), ss. 12 and 14.

[622] Victorian Local Government Grants Commission (n.d.), *Local Government Accounting & General Information for the year ending 30 June 2022*.

[623] Australian Bureau of Statistics (2023), *Regional population, 2021-22*.

[624] Australian Bureau of Statistics (2020), *Australian Statistical Geography Standard (ASGS): Volume 3 – Non ABS Structures*.

[625] Victorian Local Government Grants Commission (n.d.), *Local Government Accounting & General Information for the year ending 30 June 2022*.

[626] State Government of Victoria (2023), *Know Your Council comparison dashboard,* https://www.vic.gov.au/know-your-council-comparison-dashboard, last updated 26 June 2023.

- small rural shires — 19 councils.

Melbourne City Council operates differently to other councils and has its own governing legislation, the *City of Melbourne Act 2001* (Vic), recognising the Melbourne central business district's unique status and role. As explained above, the Lord Mayor and Deputy Lord Mayor are elected directly by residents of the City of Melbourne for a four-year term. Another unique feature of the Melbourne City Council is that a corporation that owns or occupies a property within the municipality is able to appoint two people to vote at an election on its behalf.[627]

Local government electoral structures

Another key area of variation between councils is their electoral structures. The *Local Government Act 2020* (Vic) sought to standardise electoral structures across councils, with the following three models available:[628]

- single member wards — involving a local government area (LGA) being split into wards with each ward being represented by a single councillor
- uniform multi-member wards — having multiple councillors representing each ward.
- unsubdivided — all elected councillors represent the LGA as a whole.

The *Local Government Act 2020* (Vic) made single-member wards the default structure, with each council required to use that model unless the Minister has gazetted a notice specifying that it can have another. The Minister has gazetted a notice permitting alternative structures for 31 rural councils.[629]

The Victorian Government has appointed two Electoral Representation Advisory Panels to conduct a review into the remaining councils with

[627] *City of Melbourne Act 2001* (Vic), s 9C.

[628] VEC (n.d.), *Local council elections,* https://www.vec.vic.gov.au/voting/types-of-elections/local-council-elections, accessed 2 October 2023.

[629] *Local Government Act 2020* (Vic), s. 13; Local Government Victoria (n.d.), *Electoral structure and ward boundary reviews,* https://www.localgovernment.vic.gov.au/council-governance/electoral-representation-advisory-panels-eraps, accessed 2 October 2023.

non-compliant structures prior to the October 2024 local government general elections.[630]

9.2 Existing political finance laws

Compared to Victoria's political finance laws for State elections, political finance laws for local government elections are less robust.

There are no caps on political donations and no funding support is provided to candidates. However, limited disclosure rules are in place.

A candidate at a local government election is required to give an election campaign donation return to the Chief Executive Officer (CEO) of the council within 40 days after election day.[631] The election campaign donation return is required to list any gifts received during the 'donation period' that exceed the gift disclosure threshold, which is $500.[632] The donation period starts on the later of:[633]

- 30 days after the last general election for the council
- 30 days after the last election for the council at which the person required to give the election campaign donation return was a candidate

The donation period ends 30 days after election day.[634]

Candidates who receive no disclosable gifts are still required to make a return including a statement to that effect, commonly referred to as a 'nil return'.[635] Box 9.1 lists the prescribed details that must be included in election campaign donation returns.

However, gifts do not have to be disclosed if both of the following apply:[636]

- they were made in a private capacity for the candidate's personal use

[630] Local Government Victoria (n.d.), *Electoral structure and ward boundary reviews,* https://www.localgovernment.vic.gov.au/council-governance/electoral-representation-advisory-panels-eraps, accessed 2 October 2023.
[631] *Local Government Act 2020* (Vic), s. 306.
[632] *Local Government Act 2020* (Vic), ss. 3 and 306(2).
[633] *Local Government Act 2020* (Vic), s. 3.
[634] *Local Government Act 2020* (Vic), s. 3.
[635] *Local Government Act 2020* (Vic), s. 306(8).
[636] *Local Government Act 2020* (Vic), s. 306(3).

- the candidate has not used, and will not use, the gift solely or substantially for a purpose related to the election.

Box 9.1: Prescribed details for election campaign donation returns

The name of the relevant council and ward (if applicable).

The full name and address of the candidate.

A declaration signed and dated by the candidate which states that:

- the election campaign donation return includes a complete record of all gifts required to be disclosed
- the details provided in the election campaign donation return are a true and accurate record.

In respect of each gift received during the donation period:

- the full name and address of each person who made the gift to the candidate
- the date on which the gift was given to the candidate.

In respect of a gift in the form of money:

- the exact value of the gift
- the form in which the gift was given

in respect of each gift in the form of goods or services:

- a description of the gift
- the estimated market value of the gift.

Source: *Local Government (Electoral) Regulations 2020* (Vic), reg. 46.

The CEO of each council is required, within 14 days of the final day for submission of returns, to submit a report to the Minister on the names of candidates at the election and which of those candidates submitted an election campaign donation return. CEOs are also required to make summaries of election campaign donation returns available on the council's website.[637]

Candidates and those acting on their behalf are prohibited from receiving anonymous gifts over the disclosure threshold. If they accept such a gift, they forfeit an amount equal to twice the value of the gift to the State.[638]

[637] *Local Government Act 2020* (Vic), s. 307.
[638] *Local Government Act 2020* (Vic), ss. 309-310.

A person who fails to provide a return or provides a return containing information that is false or misleading in a material particular is guilty of an offence and is subject to a fine of up to 60 penalty units.[639]

The Local Government Inspectorate (LGI), which is headed by the Chief Municipal Inspector, is responsible for monitoring and enforcing election campaign donation return requirements.[640]

Disclosure requirements for gifts related to local government election campaigns are not in place for registered political parties (RPPs), associated entities and third party campaigners.

The *Local Government Act 2020* (Vic) also sets rules regarding gifts received by councillors and the management of potential conflicts of interest:[641]

- each council is required to adopt a gift policy, including procedures for maintaining a gift register
- councillors are prohibited from accepting anonymous gifts over the value of the gift disclosure threshold
- councillors are required to lodge personal interest returns, including details of gifts received over $500 or another amount as set by the Secretary of the relevant Department.

Available data on the operation of local government political finance laws

Unlike for State elections, there is no centralised system for collecting and publishing data about donations relating to local government elections. Instead, election campaign donation returns are published without central coordination on the separate websites maintained by each of Victoria's 79 councils. That created a significant obstacle to the Panel's examination of the operation of the Victoria's existing local government political finance laws (as well as to other agencies).

[639] *Local Government Act 2020* (Vic), s. 306(6).

[640] Local Government Inspectorate (2023), *Council election campaigns and donation returns*, https://www.lgi.vic.gov.au/councillor-campaign-donation-returns, last updated 20 April 2023.

[641] *Local Government Act 2020* (Vic), ss. 137 and 138 and Pt 6, Div 3; *Local Government (Governance and Integrity) Regulations 2020* (Vic), regs. 9(1)(k) and 9(2).

However, Local Government Victoria was able to share with the Panel a summary analysis of election campaign donation returns submitted for the 2016 local government general elections (Table 9.1). According to that analysis:

- less than 15 per cent of all candidates disclosed donations over $500
- over six per cent of disclosed donations exceeded $5,000 — greater than the donation general cap for State elections
- three per cent of disclosed donations were greater than $10,000.

Table 9.1: Election campaign donation returns data for Victoria's 2016 local government general elections

Data		No.
Total no. candidates		2,133
Total candidates who submitted 'disclosable' donations (donations $500 or over)		316 (*14.8% of all candidates)*
Total elected councillors who submitted disclosable donations		107 (*16.8% of all elected councillors)*
Total amount of disclosable donations		$1.40 million
Total donors who gave disclosable donations		481
Total number disclosable donations		591
Value of donation:	**No.**	**% of all donations**
$500 – 1,000	337	57.0
$1,001 – 2,000	121	20.4
$2,001 – 5,000	94	15.9
$5,001 – 10,000	21	3.6
$10,000 +	18	3.0

Source: Data provided to the Electoral Review Expert Panel by Local Government Victoria.

To better understand who is making significant donations to candidates, the Panel examined information published by the Melbourne City Council for the 2020 election. While some donations over $5,000 were own-campaign contributions, several came from businesses and other third parties.[642]

In a report released following the 2020 election, the LGI stated that:[643]

[642] City of Melbourne (n.d.), *Election Campaign Donation Returns,* https://www.melbourne.vic.gov.au/about-council/governance-transparency/council-information/registers-inspection/pages/election-campaign-donation-returns.aspx, accessed 9 October 2023.

[643] LGI (2021), *Social media fuels rise in complaints during 2020 council elections*, p. 22.

In 2020, 2,042 candidates handed in a compliant return and 144 were considered non-compliant, a non-compliance rate of 6.6 per cent. This was almost half the non-compliance rate for the 2016 election period.

In comparison, following the 2016 general local government election, over 13 per cent of candidates (288 candidates) failed to submit their election campaign donation return to the relevant CEO by the 1 December 2016 deadline. This led LGI to prosecute 15 candidates who were unable to provide a valid reason for non-submission. Two more candidates were prosecuted for providing false or misleading information, following a complaint being received, with one receiving a 12-month good behaviour bond and the other case withdrawn.[644]

9.3 Local government political finance laws across Australian jurisdictions

The Panel considered local government political finance laws in other Australian jurisdictions, including requirements relating to:

- disclosure of donations
- account keeping
- donation caps and prohibitions
- caps on expenditure.

Donation disclosure requirements

Almost every Australian jurisdiction with a system of local government has laws regarding the disclosure of political donations, which are summarised in Table 9.2.

Victoria's gift disclosure threshold is broadly comparable with that in other jurisdictions. Some jurisdictions have significantly shorter timeframes for disclosing donations. For example, Queensland ordinarily requires donations to be disclosed within seven business days and Western Australia requires donations to be disclosed within three days.

[644] LGI (2021), *Social media fuels rise in complaints during 2020 council elections*, p. 22.

Table 9.2: Summary of local government disclosure laws for political donations in Australian jurisdictions, as of 1 July 2023

Jurisdiction	Who is required to disclose	Disclosure threshold ($)	Due date for disclosure or return
Victoria	Candidates	500	Within 40 days after election day
New South Wales	RPPs, elected members, groups, candidates, associated entities, third party campaigners, major political donors	1,000	Within 6 weeks after the end of the half-year within which the political donation was received or made.
Queensland	Candidates, groups, third party campaigners, donors	500	7 business days from receipt. During the 7 business days prior to election day, gifts and loans must be disclosed within 24 hours of receipt.
Western Australia	Candidates and donors	300	3 days from receipt (or promise being made), or 3 days from nomination for gifts made prior to nomination.
South Australia	Candidates	500	Once between 22 and 28 days after close of nominations and again within 30 days after the election[(a)]
Tasmania[(b)]	N/A	N/A	N/A
Northern Territory	Candidates	200	70 days after election day

Notes: (a) Timeframes apply to periodic elections. For other elections, the first return must be lodged between eight to 14 days after the close of nominations. Separate disclosure rules apply to gifts over the value of $2,500 — during an election year, they must be disclosed within 5 days of receipt. (b) Tasmania does not require candidates to disclosure political donations or gifts. However, elected councillors are required to disclose gifts of more than $50 within 14 days of receipt.

Sources: *Local Government Act 2020* (Vic), ss. 3 and 306; *Electoral Funding Act 2018* (NSW), ss. 6, 12 and 15(2); Electoral Commission of Queensland (2023), *Election and disclosure guide for candidates for local government elections; Local Government (Elections) Regulations Act 1997* (WA), ss. 30A, 30B and 30D; Electoral Commission of South Australia (n.d.), *Candidate returns – council elections,* https://ecsa.sa.gov.au/parties-and-candidates/candidate-returns-council-elections, accessed 15 September 2023; *Local Government (Elections) Act 1999* (SA), s. 80; *Local Government Act 1993* (Tas), s. 56A; *Local Government (General) Regulations 2015* (Tas), reg. 29A; *Local Government Act 2019* (NT), ss. 148-149.

Campaign Accounts

Candidates in Victorian local government elections are not required to have a separate bank account for receiving donations and incurring expenditure. This stands in contrast to rules for Victorian State elections, as well as arrangements in New South Wales and Queensland for their local government elections.

Queensland requires candidates, candidate groups, RPPs and third party campaigners to establish a dedicated campaign bank account with a financial institution and use this account to:[645]

- pay for all electoral expenditure
- receive all gifts and loans for the election.

The account cannot be used for any other purposes during the relevant disclosure period and entities required to maintain a campaign bank account are prohibited from using a credit card to pay for electoral expenditure.[646]

New South Wales also requires candidates in a local government election to maintain a campaign account into which all donations are paid and from which all electoral expenditure is incurred. These campaign accounts function in the same way as those for State elections and are administered under the same Act.[647]

Donation rules

New South Wales is the only jurisdiction to have a donation cap for local government elections. The value of the cap for the year 2023-24 is $7,600 for an RPP and $3,300 for an unregistered party, elected council member, candidate, associated entity or third party campaigner.[648]

All jurisdictions except Tasmania have bans on anonymous donations over the disclosure threshold. While some jurisdictions do not explicitly

[645] *Local Government Act 2011* (Qld), Pt 6, Div 5.
[646] *Local Government Act 2011* (Qld), Pt 6, Div 5.
[647] *Electoral Funding Act 2018* (NSW), s. 41.
[648] NSW Electoral Commission (2023), *Caps on political donations,* https://elections.nsw.gov.au/funding-and-disclosure/political-donations/caps-on-political-donations, last updated 18 October 2023.

prohibit anonymous donations, the requirement to include donor details in disclosure returns effectively make receiving anonymous donations unlawful.[649]

Queensland and New South Wales both prohibit donations from property developers and their associates. New South Wales also prohibits donations from the tobacco, liquor and gambling industries as well as receiving political donations in cash that exceed the value of $100.[650]

Expenditure caps

Local government election expenditure caps are in place in New South Wales, Queensland and Tasmania.

Those jurisdictions have multi-tiered caps based on who is undertaking the expenditure and the population of the relevant electorate. For example, New South Wales has:[651]

- eight different expenditure cap bands based on the enrolled electors in the municipality
- different expenditure caps among mayoral candidates, non-mayoral candidates and third party campaigners.

Table 9.3 summarises expenditure caps in New South Wales for the LGAs with the smallest and largest populations.

The capped expenditure period begins on 1 July of an election year and ends at the conclusion of the election day.[652]

[649] New South Wales Electoral Commission (2023), *Political Donations*, https://elections.nsw.gov.au/faqs/candidate-faqs/political-donations, last updated 29 August 2023; *Local Government Electoral Act 2011* (Qld), s. 119; *Local Government Act 1995* (WA), s. 5.87C(3); *Local Government (Elections) Act 1999* (SA), s. 82(1); Northern Territory Electoral Commission (n.d.), *Information sheet – Donation disclosure for local government,* p. 1.

[650] *Local Government Electoral Act 2011* (Qld), ss. 113 and 113B; *Electoral Funding Act 2018* (NSW), ss. 50A, 51 and 52.

[651] NSW Electoral Commission (2023), *What are the expenditure caps for local government elections?,* https://elections.nsw.gov.au/funding-and-disclosure/electoral-expenditure/caps-on-electoral-expenditure/expenditure-caps-for-local-government-elections, last updated 14 November 2023.

[652] NSW Electoral Commission (n.d.), *Fact Sheet – Expenditure caps at the 2021 Local Government elections*.

Table 9.3: New South Wales local government expenditure caps, smallest and largest councils compared, as of 1 July 2021

Number of enrolled voters	RPDP Type	Cap amount ($)
1-5,000	Non-mayoral candidates	6,000
	Mayoral candidates	7,500
	Third party campaigners	2,000
125,001 or more	Non-mayoral candidates	72,000
	Mayoral candidates	90,000
	Third party campaigners	24,000

Source: NSW Electoral Commission (2023), *What are the expenditure caps for local government elections?* https://elections.nsw.gov.au/funding-and-disclosure/electoral-expenditure/caps-on-electoral-expenditure/expenditure-caps-for-local-government-elections, last updated 14 November 2023.

Queensland's expenditure caps apply to a longer period. The capped expenditure period for the 2024 local government election applies from 14 August 2023 and ends at 6 pm on election day, 16 March 2024. An RPP's expenditure is aggregated with that of their endorsed candidates. Third party campaigners that have registered with the Electoral Commission of Queensland have a cap equal to that of a mayoral candidate within the relevant LGA and unregistered third party campaigners must not exceed $6,000 in electoral expenditure across the State.[653]

Tasmania is the only other jurisdiction that has an expenditure cap for local government elections. For the 2022 Tasmanian local government elections the expenditure limits applied from 4 August to election day on 25 October 2022, and were equal to:[654]

- $18,000 for all candidates contesting Clarence City, Glenorchy City, Hobart City, Launceston City or Kingborough elections
- $11,500 for all candidates contesting an election for any other Tasmanian local government council.

[653] *Local Government Act 2011* (Qld), s. 123F; Electoral Commission of Queensland (n.d.), *Notice of electoral expenditure caps and number of electors,* https://www.ecq.qld.gov.au/__data/assets/pdf_file/0025/60298/Notice-of-expenditure-caps-and-number-of-electors.pdf, accessed 15 September 2023.

[654] Tasmanian Electoral Commission (2022), *Information for candidates – local government elections,* p. 17.

9.4 Issues and calls for reform

In recent years, IBAC has uncovered potential weaknesses in Victoria's local government political finance laws as part of its investigations and recommended improvements. The Panel discussed issues, potential changes and relevant considerations as part of its consultation with stakeholders, including RPPs, the VEC, Local Government Victoria, IBAC and the LGI.

The Victorian Government previously proposed and consulted on a comprehensive set of legislative reforms, although as explained below those reforms were ultimately not introduced.

Donations and Lobbying Report and Operation Sandon

The Panel's Terms of Reference required it to look at several recommendations from IBAC's Donations and Lobbying Report. While the Panel was conducting its review, IBAC also released its report on Operation Sandon which outlined examples of alleged corrupt conduct involving political donations to councillors.

IBAC's Donations and Lobbying Report recommended reviewing the existing regulatory regime for political donations to improve transparency and accountability at the local government level. Recommended reforms related to local government included:[655]

- donors and candidates being required to declare donations over $500 to a central authority, through a 'real-time' donation disclosure scheme
- ensuring that campaign donations and expenditure are reported in a manner that provides sufficient information to monitor compliance, including campaign bank accounts being maintained and candidates submitting statements on campaign expenditure
- deterring donors and candidates from attempting to use fundraising events to circumvent declaration requirements.

[655] Donations and Lobbying Report, pp. 8-10.

Operation Sandon exposed a significant number of in-kind donations and improperly disclosed payments being made to councillors in the City of Casey by persons with vested interests. The report noted:[656]

- that donors and candidates were concealing donations
- poor compliance with donation regulations
- a lack of timely public reporting on donations
- RPPs and candidates soliciting donations from developers.

The investigation also showed that donations could be used to gain access to key decision-makers, influence planning decisions and progress private interests. IBAC stated that:[657]

> *Operation Sandon exposed a range of deficiencies in planning processes, donation and lobbying regulation, and council governance. These corruption vulnerabilities are not unique to the individuals and matters that were the subject of IBAC's investigation, so it is important for all state and local government decision-makers to be alert to them.*
>
> *Operation Sandon demonstrated the need for significant reform to minimise these corruption risks. IBAC highlighted several of these risks in its 2022 Donations & Lobbying special report.*

IBAC made 34 recommendations in the *Operation Sandon Special Report* on topics including planning, political donations, lobbying and council governance, which built on the recommendations made previously in the Donations and Lobbying Report. IBAC stated that the conduct exposed in Operation Sandon provides further evidence of the need for reforms, including:[658]

- aligning local government donation cap and disclosure requirements with amended State provisions where possible
- working towards 'real-time' public reporting of donations
- improving monitoring of donations by requiring dedicated campaign accounts
- creating more effective enforcement mechanisms

[656] IBAC (2023), *Operation Sandon Special Report*.
[657] IBAC (2023), *Operation Sandon Special Report*, p. 22.
[658] IBAC (2023), *Operation Sandon Special Report,* p. 209.

- limiting campaign expenditure.

IBAC also recommended consideration is given to whether high-risk groups (such as property developers) should be prohibited from making political donations to State and local government candidates.[659]

The former Premier of Victoria stated in July 2023 that:[660]

> *The IBAC report's 34 recommendations will be given appropriate consideration, but it is the clear position of the Government that the role of local councils in significant planning decisions should be reduced and we will have more to say on this matter.*

Previous reform proposals

The Victorian Government has previously proposed and consulted on reforms to local government political donation laws.

In late 2015, the Government commenced consultation as part of a review of the *Local Government Act 1989* (Vic).[661] During the consultation and analysis process local government political donation laws were added as a topic under consideration.

After extensive consultation, the Government introduced the Local Government Bill 2018 in May 2018, which included 'real-time' disclosure obligations for local government candidates who received political donations of $500 or more. However, that Bill was not passed as it lapsed at the end of the 58th Parliament.[662]

The Government undertook further consultation as part of their work on the Local Government Bill 2019, and proposed the following reforms:[663]

- banning foreign donations by requiring donors to be an Australian citizen or resident or a business with an Australian Business Number

[659] IBAC (2023), *Operation Sandon Special Report*, pp. 207-209.

[660] Premier of Victoria (2023), *Statement from the Premier*, https://www.premier.vic.gov.au/statement-premier-118, last updated 27 July 2023.

[661] Premier of Victoria (2015), *Consultation Begins On Local Government Act Review*, https://www.premier.vic.gov.au/consultation-begins-local-government-act-review, last updated 07 September 2015.

[662] Victorian Legislation (n.d.), *Local Government Bill 2018*, https://www.legislation.vic.gov.au/bills/local-government-bill-2018, accessed 9 October 2023.

[663] Local Government Victoria (2019), *Local Government Bill – A reform proposal,* p. 10.

- capping donations to individual candidates and candidate groups from a single donor at $1,000 per election period ($4,000 for the Melbourne City Council)
- lowering the 'gift disclosure threshold' to $250 ($500 for the Melbourne City Council).

However, when that Bill was introduced, the previously proposed political donation reforms were not included. The then Minister for Local Government explained that those reforms were being postponed due to IBAC's investigation examining local government political donations, as it was anticipated that IBAC would recommend legislative changes in its report.[664] The Government stated in a media announcement that:[665]

> *The Government remains committed to reform of Council donation laws and will continue to work on this matter.*

The Panel understood that while stakeholders were broadly supportive of political finance laws being updated and strengthened, some sought more detailed information and further consultation. For example, the Victorian Local Governance Association stated in a 2019 submission responding to the Victorian Government's consultation paper:[666]

> *The majority of VLGA survey respondents supported the proposed donation reform outlined in the paper. However, it was not clear in the paper what penalties will apply to candidates and councillors who breach the proposed lowered donation thresholds.*
>
> *The VLGA offers its qualified support for the proposed donation reforms, pending further details about donation cap breaches.*

The Municipal Association of Victoria stated in a submission:[667]

> *This [real-time disclosure] provision is supported subject to review of the arrangements for the lodgement of a nil return.*

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[664] Victoria, *Parliamentary Debates*, Legislative Council, 28 November 2019, pp. 4437-4438.

[665] Premier of Victoria (2019), *New Laws For Local Government*, https://www.premier.vic.gov.au/site-4/new-laws-for-local-government-0, last updated 13 November 2019.

[666] Victorian Local Governance Association (2019), *Local Government Bill – A Reform Proposal - 2019 Submission by the Victorian Local Governance Association*, p. 7.

[667] Municipal Association of Victoria (2018), *Local Government Bill Exposure Draft MAV Submission*, pp. 48-49.

> *Further consideration needs to be given to the arrangements to deal with campaign donations received after candidates cease to be candidates (30 days after the day of the election).*

During debate on the Local Government Bill 2019, Stuart Grimley, then Member for Western Victoria and member of the Derryn Hinch's Justice Party, stated:[668]

> *On donation reform, the majority of councils I have spoken to support the need for consistency between state and local governments regarding donations. However, they state the need for further consultation about the thresholds for donations before they are enforced.*

Local Government Inspectorate report on the 2020 elections

In its report on the 2020 local government general elections, the LGI noted it was initially proposed that the Local Government Bill 2019 would increase the responsibilities of the Chief Municipal Inspector in relation to election campaign donation returns. The Chief Municipal Inspector would have been required to publish summaries of gifts recorded in an election donation report within two days of lodgement. The LGI stated that:[669]

> *The immediacy of this proposal would have heightened transparency in local government and the election process. It also received strong support from the local government sector. However, the proposal … was not passed by the Victorian Parliament and did not become law.*

The LGI recommended those reforms be introduced and that the LGI is resourced to manage and scrutinise the election campaign donation returns process.

The LGI also recommended that it is given the power to issue infringement notices for breaches of various requirements under the

[668] Victoria, *Parliamentary Debates*, Legislative Council, 3 March 2020, p. 639.
[669] LGI (2021), *Social media fuels rise in complaints during 2020 council elections*, p. 23.

Local Government Act 2020 (Vic), including the requirement to submit an election campaign donation return. The LGI explained that:[670]

> *Our experience … indicates that the use of the criminal justice system is a particularly blunt instrument for ensuring compliance with these regulatory provisions. The cost and delay in conducting prosecutions in the court system are disproportionate to the nature and seriousness of the offences.*
>
> *In addition, we consider that the criminal justice system does not provide an adequate deterrent for candidates who breach their statutory obligations under Part 8 of the Act (either carelessly or deliberately) and that there is a pressing need to amend the Act to allow the [Chief Municipal Inspector] to issue infringement notices to persons believed to have committed these offences.*

Australian Greens Victoria submission

During the Panel's consultation, the Australian Greens Victoria and its members were strong proponents of strengthening local government political finance laws.

The Australian Greens Victoria submission argued that the donation caps and transparency measures for local government elections should be similar to those for State elections. The submission stated:[671]

> *Local councils are responsible for making decisions that can deliver huge profits to corporations and individuals, such as granting planning permits, rezoning land and managing poker machines. This means the local government sector is a perfect ground for corruption and exploitation where big business, property developers and the gambling industry can use their significant wealth to influence councilors, manipulate decision-making and distort outcomes to benefit themselves over our communities.*

[670] LGI (2021), *Social media fuels rise in complaints during 2020 council elections*, p. 23.
[671] Australian Greens Victoria submission, p. 3.

Dr Tim Read MP stated at a public forum:[672]

> *It seems logical and almost, I think definitely scandalous now, that the caps applying at state government level haven't also applied at local government.*

Administrative burden on candidates and the regulator

A key challenge for local government political finance laws is management of administrative burden and cost.

Compared to State government general elections, there are significantly more vacancies at local government general elections and significantly more candidates contesting. The Panel heard that local government candidates, may, generally speaking, have less experience in political and regulatory processes.

Further, local government election campaigns typically have less resources and support. During consultation, the Panel heard that candidates in local government elections receive limited or no support from RPPs and most are not formally endorsed. Most RPPs don't endorse candidates at the local government level which means responsibility for complying with political finance laws falls on the candidate. Nicola Castleman, Assistant Secretary of the Australian Labor Party – Victorian Branch, said:[673]

> *I think we had something like 11, 12 of the LGAs opting to endorse candidates under a Labor brand. …*
>
> *If there were a framework for the kind of management of donations and disclosure that exists now for state, if that was to exist for council, it would remove us even more so from that. We just would not have the capacity to look after that sort of admin. I don't think any party would. I don't think it's something that we are, anyone is ready for because of the sheer number of people.*

[672] Transcript of Electoral Review Expert Panel public forum held on 31 July 2023, 11 am to 12 pm.
[673] Transcript of Electoral Review Expert Panel public forum held on 13 July 2023, 10 am to 12 pm.

The Australian Labor Party – Victorian Branch's submission stated that while it is supportive of local government donation and expenditure disclosure schemes:[674]

> *It is critical however, that any such reforms both recognise and accommodate the differences between the level of involvement, control and influence that registered political parties have over candidates in local government elections. …*
>
> *With 79 municipal councils across Victoria, the establishment of additional obligations will require comprehensive consultation, a period of transition and commensurate funding. …*
>
> *Victorian Labor queries whether the regulatory scheme applied to state elections would be suited to local government elections. We recommend a nuanced approach be applied that is targeted and proportionate, including ensuring obligations to make disclosures, attend to any administrative requirements and comply with expenditure procedures fall to the candidates themselves.*
>
> *We also recommend that any such scheme ensure that it does not have the unintended consequences of deterring democratic participation by diverse groups within the community.*

Even though the Liberal Party of Australia (Victorian Division) does not typically endorse candidates at the local government level, State Director Stuart Smith raised the heightened risk to political participation posed by a greater compliance burden:[675]

> *I think we've got to be very careful about imposing similar compliance obligations on local council candidates. I'm not sure they have the time resources or capacity in many cases to be able to do the things that we have to do as professional political parties. I think we would be potentially restricting the opportunity for people to put their hand up for local government if we were to overly burden people with compliance.*

[674] Australian Labor Party – Victorian Branch submission, pp. 8-9.
[675] Transcript of Electoral Review Expert Panel public forum held on 14 July 2023, 10 am to 12 pm.

The number of candidates in a general local government election would require a centralised regulatory body to have access to sufficient resources to administer, and enforce, political finance rules. Director of Electoral Integrity and Regulation at the VEC, Keegan Bartlett, mentioned at a public forum:[676]

> *Any extension of the VEC's funding and disclosure responsibilities to also capture local government elections will need to be properly resourced. It would also place additional administrative and compliance requirements on election participants for local government elections who are less likely to have access to the sophisticated support structures operated by most registered political parties.*

An administratively complex political finance regime for local government elections would pose a greater threat to participation than for State elections.

Due to the sheer number of candidates, most of which are not endorsed by a central body such as an RPP, a central regulator of political donations would require significant resources to administer the regime and support candidates with their compliance obligations.

9.5 Recommended reforms

It is clear that political finance laws for local government require significant reform. This is evident from IBAC's findings and previous consultation undertaken by the Victorian Government.

The Panel recommended reforms to local government political finance laws, which are explained below. However, the Panel was not in a position to make recommendations regarding the design of some specific elements of a new political finance regime, as:

- under Victoria's existing, decentralised local government political finance laws, very little information is available about the current funding and expenditure of candidates

[676] Transcript of Electoral Review Expert Panel public forum held on 21 July 2023, 2 pm to 4 pm.

- the Panel received very limited input from the local government sector during its review, and stakeholders should be provided with an adequate opportunity to respond to a detailed reform proposal.

Further, following IBAC's *Operation Sandon Special Report*, the Victorian Government is looking into changes to local government planning powers and governance arrangements. Those changes will impact on the potential risks that political donations to local government candidates may pose — for example, if councils are afforded few powers, then there is a lower risk of the community being harmed as a result of secret donations and undue influence. As explained in Chapter 2, the design of political finance laws needs to draw an appropriate balance between the administrative burden imposed and the risks being addressed.

Melbourne City Council differs significantly from other councils in terms of function and scale, and it presents unique challenges and corruption risks. Local government political finance laws may need to be tailored to take those matters into account — for example, the value of thresholds or caps that apply to the Melbourne City Council may need to be higher than for other councils.

The Panel did not believe there was sufficient evidence to support the introduction of campaign accounts, expenditure caps and/or public funding in local government at this time.

Persons and bodies that laws apply to

Currently, political finance laws for local government elections only apply to candidates that stand for election. RPPs that endorse candidates, associated entities and third party campaigners are not regulated.

As explained in previous chapters, that creates opportunities for political finance laws to be circumvented. An RPP, associated entity or third party campaigner could receive donations and incur expenditure to support a candidate's campaign, bypassing applicable disclosure rules and limits.

IBAC stated in the Donations and Lobbying Report:[677]

> *Third-party campaigners should be regulated in a consistent manner at the state and local government levels to the extent possible. For this reason, the provisions relating to third-party campaigners in the Electoral Act should be applied to local government as part of the reforms to harmonise state and local government donation regulations.*

The Panel considered that local government political finance laws should apply to:

- candidates and candidate groups
- RPPs that endorse candidates and/or incur political expenditure for local government elections
- associated entities
- third party campaigners.

The above persons and bodies are referred to as Local Government Donation Recipients in the remainder of this Chapter.

The terms associated entity and third party campaigner would need to be defined for the purposes of local government elections. The definitions that apply for State elections should be used as a starting point.

Recommendation 9.1: Extend the application of local government political finance laws to the following Local Government Donation Recipients:

- candidates and candidate groups
- RPPs that endorse candidates and/or incur political expenditure for local government elections
- associated entities
- third party campaigners.

[677] Donations and Lobbying Report, p. 22.

Consolidation of reporting and oversight

Victoria's political finance laws currently operate in a devolved manner:

- election campaign donation returns are submitted to the CEO of the relevant council, meaning 79 different individuals may receive returns following a general election
- donation returns are not collected or published in a central location
- the requirement to lodge a return is overseen and enforced by the LGI.

This approach makes central enforcement and oversight extraordinarily difficult.

Further, the Panel noted that council CEOs are not independent of councillors, as the CEO is appointed by, and reports to, the elected councillors. As a result, it is not appropriate for CEOs to play a central role in the local government political finance legal framework.

The Panel considered that legislative reforms should be introduced to require candidates to submit election campaign donation returns to a central government agency, which should be responsible for publishing and analysing those returns.

In addition, the LGI should be responsible for managing a central database holding all personal interest returns submitted by councillors. This central register would then be online and available for inspection as is the situation for State and Commonwealth MPs.

Under the Victorian Government's previous reform proposals, the Chief Municipal Inspector and LGI would play the central regulatory role, rather than the VEC.

However, IBAC's Donations and Lobbying Report recommended that the VEC play that role. IBAC stated that it understood the LGI is only able to audit a small sample of returns due to resourcing issues, and:[678]

> *Regardless of how oversight is structured, it is clear that the donation regime must be properly monitored and enforced in a consistent manner at the state and local level. Careful*

[678] Donations and Lobbying Report, p. 15.

> *consideration must be given to the funding and resources required to give effect to these legislative reforms, particularly those that seek to expand the VEC's administrative and regulatory responsibility with respect to local council elections, … to ensure that the VEC is able to manage and enforce an expanded legislative scheme effectively.*

The Panel considered the need for a central political finance regulatory agency to be the paramount objective, regardless of which agency is given that responsibility. However, given the VEC's expertise and experience in regulating State elections, the Panel acknowledged that it would likely be the most effective agency to take responsibility for local government elections as well. That would allow the VEC to draw upon existing expertise for a more robust and consistent regulatory approach.

However, the VEC is not currently resourced to regulate local government election political finance laws. Several stakeholders noted the extensive resources required to administer political finance rules in local government elections, due to the significant number of candidates and limited role played by RPPs. If the VEC was to become the central agency responsible for managing local government political finance laws, it would require significant additional resources and funding. Without significant investment, effective regulation of local government elections is not possible.

Recommendation 9.2: Amend the *Local Government Act 2020* (Vic) to:

- give a central regulatory agency, such as the VEC or LGI, responsibility for administering and enforcing local government political finance laws
- require election campaign donation returns to be submitted by candidates and other Local Government Donation Recipients to that regulatory agency, and require that agency to publish returns on its website.

It is important that the regulatory agency is properly resourced to oversee, administer and enforce local government political finance laws, including by supporting Local Government Donation Recipients to understand and comply with their obligations.

In addition, the LGI should be responsible for managing a central database holding all personal interest returns submitted by councillors. This central register would then be online and available for inspection as is the situation for State and Commonwealth MPs.

Donation disclosure reform

Local government electoral laws currently state that candidates only need to disclose donations in a single campaign donation return submitted after the election has taken place. That means information on donations accepted by candidates cannot be used by electors to inform their voting choices. The *Operation Sandon Special Report* stated that giving voters access to donation information prior to elections reduces the risk of improper influence.[679] The Panel also noted that, as an election campaign donation return may be submitted long after a donation is received, there is an increased risk that a return includes errors or is incomplete.

The Panel considered that Local Government Donation Recipients should be required to submit 'real-time' disclosure returns for donations received over the relevant threshold, similar to arrangements in place for State elections.

Political finance laws for State elections require donors to also submit disclosure returns for donations over the relevant threshold. As explained in Chapter 4, those 'double disclosure' rules for State elections help to ensure donations are reported accurately and on time, by ensuring the reporting regime does not suffer from a single point of failure. The Panel considered that double disclosure rules are an integral measure in boosting compliance and ensuring transparency.

In the Donations and Lobbying Report, IBAC recommended introducing double disclosure rules for local government elections, stating that:[680]

> *While local government candidates are required to disclose details of election campaign donations received (including in-kind donations), donors are not required to declare donations made at*

[679] IBAC (2023), *Operation Sandon Special Report,* p. 209.
[680] Donations and Lobbying Report, p. 23.

> *the local government level. The onus is entirely on the candidate, which is inconsistent with state regulations. …*
>
> *Dual reporting obligations would help to promote transparency around donations and in turn 'enhance the fairness of the democratic system by correcting the information asymmetry that may develop where individuals and corporations can hide their activities behind closed doors'.*

The Panel agreed that donors to Local Government Donation Recipients should be required to submit a disclosure returns, for donations over the applicable disclosure threshold.

Recommendation 9.3: Amend the *Local Government Act 2020* (Vic) to require 'real-time' disclosure of political donations at local government elections, similar to requirements that apply to State elections. Require both donors and recipients to submit a disclosure return for donations over the applicable disclosure threshold.

Donation caps

As part of its investigations, IBAC has identified a need for a cap on political donations to local government candidates.[681] The *Operation Sandon Special Report* stated:[682]

> *At the local government level, the issues observed in Operation Sandon show that donation caps are required, and that timely public reporting must be supplemented with declarations.*

Available data suggest that while most donations to local government candidates are low in value, some are significant, creating a material risk of real or perceived improper influence.

The Panel did not have sufficient evidence and information available to determine what the appropriate value for a donation cap should be. Making the local government donation cap the same as the general cap for State elections would provide the benefits of consistency and

[681] Donations and Lobbying Report, p. 8.
[682] IBAC (2023), *Operation Sandon Special Report,* p. 203.

simplicity. However, equivalent values may not account for relevant differences between State and local government, including:

- the number of voters in each LGA differs significantly, whereas redistributions for State elections ensure electorates contain roughly the same number of voters, which may make a one-size-fits-all approach less appropriate for local government
- local government candidates do not receive public funding support, which may make candidates more reliant on private donations to finance political campaigns
- less money is typically spent on local government election campaigns, although there are exceptions
- as local government candidates receive less support from RPPs than State candidates and may be less acquainted with political processes, the risk of local government candidates inadvertently breaching caps is greater.

Nevertheless, the value of the donation cap can be linked to the general cap for State elections for administrative ease. For example, the local government donation cap could be set to half of that for State elections.

Laws on what matters are, and are not, considered a political donation can also be modelled on those for State elections, including for example the Panel's recommended rules on how fundraising tickets should be treated.

Recommendation 9.4: That caps on political donations to Local Government Donation Recipients are introduced and linked to the general cap for State elections, subject to further analysis and consultation on what an appropriate value for a donation cap would be.

Enforcement powers

As explained above, the LGI identified that its enforcement powers may not be well suited to ensuring compliance with the *Local Government Act 2020* (Vic), including donation disclosure requirements. The LGI recommended in its report on the 2020 election that it is given the power to issue infringement notices.

The VEC made a similar recommendation concerning its enforcement powers, which the Panel considered in Chapter 4. For the reasons outlined in that Chapter, the Panel considered that the regulatory agency responsible for overseeing and enforcing local government political finance laws should be granted a variety of enforcement powers, including powers to issue infringement notices, cautions, official warnings and enforceable undertakings.

This would enhance compliance and enforcement of local government political finance laws. It would also ensure the regulatory agency can take enforcement actions that are tailored and proportionate to the alleged offence and to the harm caused.

Recommendation 9.5: That the regulatory agency responsible for administering local government political finance laws is granted the power to issue infringement notices, cautions, official warnings and enforceable undertakings for breaches of those laws, in addition to the power to bring criminal prosecutions.

Bans on certain donations

As explained above, IBAC's *Operation Sandon Special Report* recommended examination of:[683]

> *... whether the regulatory regime governing donations in Victoria would be strengthened by identifying and prohibiting high-risk groups (such as property developers) from making political donations to political entities and state and local government candidates.*

IBAC's investigation focussed on donations linked to property developers being used to unduly influence planning decisions.

As explained by the Panel in Chapter 5, the introduction of industry-specific donation bans would involve significant policy and administrative challenges. Industry-specific donation bans are not

[683] IBAC (2023), *Operation Sandon Special Report*, p. 209.

required, as long as political finance laws are sufficiently robust and include:

- disclosure requirements that provide transparency for significant donations
- caps on donations that minimise the risk of improper influence.

The *Operation Sandon Special Report* also noted that banning donations from specific industries could be counterproductive as it may lead to such contributions being made more covertly and will necessitate consistent redefinition and policing of banned sectors.[684] Subject to implementation of the reforms discussed in this Chapter, the Panel did not recommend the introduction of industry-specific donation bans at this time.

In addition, the Panel was of the view that the bans on foreign donations and anonymous donations over the disclosure threshold that apply to State elections should also apply to local government elections.

Recommendation 9.6: Introduce bans on foreign and anonymous political donations for local government elections, analogous to existing bans for State elections.

Concluding remarks

Greater harmonisation of political finance laws for State and local government elections would make Victoria's laws easier to understand and administer. Strengthening local government political finance laws in line with laws for State elections would also improve transparency and reduce the risk of real or perceived improper influence. However, there are significant differences between State and local government that must be taken into account.

In this Chapter, the Panel has identified several areas of immediate reform and other areas which require more data and further consideration. Once that data are available, the Victorian Government may wish to consider whether further reform and closer alignment between local government and State laws is necessary.

[684] IBAC (2023), *Operation Sandon Special Report*, p. 208.

10 Electronic assisted voting

The 2018 amendments introduced electronic assisted voting for Victorian State elections for particular classes of voters, who otherwise could not vote independently and in secret and found accessing a voting centre to be challenging.

The Panel was required to examine the effectiveness of the 2018 amendments as they relate to electronic assisted voting.

10.1 What is electronic assisted voting

The *Electoral Act 2002* (Vic) states that electronic assisted voting 'includes voting by the use of electronic equipment, telephone or other technology.'[685] Electors eligible for electronic assisted voting may authorise an election official to access and complete a ballot-paper on their behalf.[686]

The VEC may approve a computer program or system to enable electronic assisted voting, provided that the VEC is satisfied that certain criteria are met (Box 10.1). Broadly speaking, those criteria make the electronic assisted voting process analogous to voting in-person at a voting centre — for example, voters are still able to vote informally. The VEC is required to designate a voting centre as an electronic assisted voting centre.[687]

Currently, the VEC delivers electronic assisted voting using a telephone-assisted voting (TAV) service. To use the service, electors are required to make two phone calls in order to preserve the secrecy of their ballot:[688]

- the first phone call to establish eligibility and to register to vote using TAV
- a second phone call to cast their vote.

[685] *Electoral Act 2002* (Vic), s. 110HA.
[686] *Electoral Act 2002* (Vic), s. 110HE(2).
[687] *Electoral Act 2002* (Vic), s. 110F.
[688] VEC submission Part 1 – Background, p .19.

Box 10.1: Required criteria for electronic assisted voting computer program or system

The proper use of the computer program or system will give the same result in the recording of votes in an election as would be obtained if no computer program or system was used in the recording of votes.

The computer program or system will enable a visual display or auditory description (including the names and order of the candidates and other details about the candidates as they appear on the ballot-paper) of the ballot-paper and voting instructions to be provided to an elector so that the elector may vote using a touch screen or a keypad.

The computer program or system will enable an elector to select consecutive preferences beginning with the figure "1" or, in the case of an election for the Legislative Council, to select only one party or group.

The computer program or system allows an elector to correct a mistake before the vote is processed by the computer program.

The computer program or system allows an elector to give an informal vote by selecting no preferences for any candidate or by voting for less than the number of vacancies to be filled at the election.

The computer program or system allows an elector to abandon for any reason the electronic ballot-paper without completing the vote.

The computer program or system can produce a paper record of each vote cast using an electronic ballot-paper to enable the counting of votes in the election.

The computer program or system will prevent any person from ascertaining the vote of a particular elector.

Source: *Electoral Act 2002* (Vic), s. 110HB.

The registration and vote-taking call centres are separately located and staffed by different teams of VEC election officials to ensure secrecy of the vote is maintained. During the final hour of voting on election day only, TAV officials transfer electors directly from the registration call centre to the vote taking call centre, to avoid electors being required to make a second call.

The VEC's TAV registration application, in conjunction with the approved script that is read out by TAV operators, provides electors with an auditory description of the ballot paper and voting instructions so they can cast their vote over the phone. The application enables electors to select consecutive preferences and make a correction before their vote is cast. It also enables electors to cast an informal vote or abandon the process at any stage should they choose to do so.

The application, script and approved procedures provide a written record of the elector's vote by way of the TAV operator filling out an ordinary ballot paper in real time during the call on behalf of the elector.[689] This process can be observed by a second election official or scrutineer.

The VEC is required to ensure that arrangements are in place to ensure that:[690]

- systems, computer programs and electronic devices used or intended to be used for or in connection with electronic voting and electronic assisted voting are kept secure from interference
- the integrity of voting is maintained while electronic voting and electronic assisted voting is being used.

The VEC explained in its submission that it ensures that relevant security arrangements are in place to prevent interference or inappropriate use of the application and to maintain the integrity of the voting process for eligible electors. Although the application is computer-based, the voting process itself is a manual process involving the completion of physical ballot papers, which remain secure at all times consistent with existing procedures at voting centres.[691]

The *Electoral Act 2002* (Vic) separately discusses and provides for:

- electronic voting (Part 6A, Division 1)
- electronic assisted voting (Part 6A, Division 2).

Electronic voting involves an elector being given access to an electronic ballot-paper, rather than the elector authorising an election official to complete the ballot-paper on their behalf.[692] An example of an electronic voting system is an electronic voting kiosk available at a voting centre.

Who may use electronic assisted voting

The *Electoral Regulations 2022* (Vic) prescribe which groups may access electronic assisted voting, including:[693]

[689] VEC submission Part 1 – Background , p .19.
[690] *Electoral Act 2002* (Vic), s. 110HC.
[691] VEC submission Part 1 – Background, p .19.
[692] *Electoral Act 2002* (Vic), s. 110HE(1).
[693] *Electoral Regulations 2022* (Vic), reg. 50.

- electors who otherwise cannot vote without assistance because of blindness or low vision
- electors who otherwise cannot vote without assistance because of a motor impairment.

In addition, electronic assisted voting may be available to electors who are unable to travel to a voting centre because of a declared emergency. The Electoral Commissioner can issue a Determination specifying a class of electors who may access electronic assisted voting if each of the following apply:[694]

- an 'emergency declaration' is in force
- the Electoral Commissioner considers that electors of that class may be unable to travel to a voting centre to vote because of the declared emergency
- the Electoral Commissioner considers that the VEC has the ability to deliver electronic assisted voting to electors of that class.

The term 'emergency declaration' means:[695]

- an emergency in respect of which a national emergency is declared under s. 11 of the *National Emergency Declaration Act 2020* (Cth)
- an emergency in respect of which a state of disaster is declared under s. 23 of the *Emergency Management Act 1986* (Vic)
- the action in respect of which the Governor in Council makes a proclamation of emergency under s. 3 of the *Public Safety Preservation Act 1958* (Vic).

The Victorian Government has amended the *Electoral Regulations 2022* (Vic) on several occasions to temporarily extend access to electronic assisted voting. In August 2022, the Government provided access to constituents who were unable to vote in person due to orders made in response to the COVID-19 pandemic because they were required to isolate. Those regulations expired in August 2023 and did not apply at the 2022 State election as there were no relevant orders in effect at the time.

[694] *Electoral Regulations 2022* (Vic), regs. 50 and 52.
[695] *Electoral Regulations 2022* (Vic), reg. 5.

In November 2022, the Government provided access to voters affected by flooding — those regulations expired in May 2023.[696]

History of electronic and electronic assisted voting in Victoria

Prior to 2018, the VEC used electronic voting systems to support electors who otherwise could not vote without assistance due to blindness, low vision or motor impairment. Use of electronic voting systems enabled this group of voters to vote independently and in secret. The *Electoral Act 2002* (Vic) states that while the VEC may make electronic voting available to those cohorts (and to individuals who require assistance to vote due to insufficient literacy skills), the Act does not create an entitlement to electronic voting.[697] Table 10.1 summarises the history of electronic voting systems in Victoria.

The *Electoral Act 2002* (Vic) and *Electoral Regulations 2022* (Vic) also provide that the VEC may make electronic voting available at overseas and interstate early voting centres.[698]

[696] VEC submission Part 2 – Issues and recommendations, p. 75.
[697] *Electoral Act 2002* (Vic), ss. 110A-110D.
[698] *Electoral Act 2002* (Vic), s. 100; *Electoral Regulations 2022* (Vic), Pt 6.

Table 10.1: Summary of the history of electronic voting in Victoria

Year	Event
2005	The Parliament of Victoria Scrutiny of Acts and Regulations Committee tabled its report on its *Inquiry into electronic democracy*, which recommended that the VEC develop a trial of electronic voting machines for a limited cohort of electors with disabilities, including vision impairment and linguistic impairment.
2006	The *Electoral and Parliamentary Committees Legislation (Amendment) Act 2006* (Vic) allowed for the VEC to provide electronic voting to electors who otherwise could not vote without assistance due to a vision impairment. Electronic voting was trialled for a limited cohort of electors at the State election through a pilot run at six 'E-Centres' and was used to cast 199 votes. Electors were able to vote using either a touchscreen kiosk, telephone or keypad.
2010	Legislation was passed to expand eligibility for electronic voting to additional cohorts. Electronic voting was available at all early voting centres at the State election, as well as eight interstate voting centres and locations in the United Kingdom. 961 votes were cast using electronic voting.
2014	The VEC deployed a new custom-made electronic voting system called vVote. Electronic voting was offered at a reduced number of early voting centres, 24 in Victoria and one location in London. 1,121 votes were cast using electronic voting.
2018	Electronic assisted voting delivered via the VEC's TAV system was introduced and used for eligible electors in Victoria, instead of the previous vVote electronic voting system. TAV allowed eligible electors to vote without having to attend a voting centre in person.

Sources: Parliament of Victoria Electoral Matters Committee (2017), *Inquiry into electronic voting*, pp. 13, 14, 25 and 26; VEC (2019), *Report to Parliament on the 2018 Victorian State election*, p. 59; VEC (2015), *Report to Parliament on the 2014 Victorian State election*, p. 32.

In 2017, the Parliament of Victoria Electoral Matters Committee delivered a report on its *Inquiry into electronic voting*. The report noted that there were low levels of use of electronic voting by eligible electors and this appeared to be related to accessibility. Victorians with low-vision or vision impairment found travelling to a static polling place to use voting kiosks an inconvenience, citing transport and accessibility issues. The Committee also noted that changes to Australia Post's mail service increased the cost of administering postal voting services and increased the time taken to deliver mail. The Committee heard that this may 'make the ongoing viability of postal voting tenuous.'[699]

[699] Parliament of Victoria Electoral Matters Committee (2017), *Inquiry into electronic voting*, pp. 16 and 133.

While noting risks and concerns about electronic remote voting systems, the Committee supported in principle the introduction of a system of remote voting at Victorian elections available to a limited category of electors, such as those who are blind or have low vision or who are outside of Victoria on election day.[700]

The Committee also recommended that the VEC work closely with other Australian electoral commissions to develop agreed principles of integrity and security for any electronic voting system, as part of a coordinated effort to develop a national electronic voting capability in Australia. The Committee observed that:[701]

> *it makes little commercial or economic sense to implement a state-by-state based approach to remote voting. Developing a national, electronic voting capability is, for the committee, and indeed the NSW JSCEM and the Commonwealth JSCEM, a major priority for the future of Australia's electoral administration.*

The 2018 amendments introduced electronic assisted voting, starting from the 2018 State election. Since then, the VEC has used its TAV system for eligible electors in Victoria instead of the previous vVote electronic voting system.

The Panel noted that, across Australia, several previous reviews have called for a national approach to the development of voting technology and the topic was considered at a February 2018 meeting of the Council of Australian Governments.[702]

Data on the use of electronic assisted voting

According to the VEC, 5,476 votes were taken using TAV at the 2022 State election, including 3,384 during early voting and 2,092 on election day. There were 6,183 registrations to use the service. In comparison, 1,199 voters were cast using TAV at the 2018 State election.[703]

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[700] Parliament of Victoria Electoral Matters Committee (2017), *Inquiry into electronic voting*, p. 135.
[701] Parliament of Victoria Electoral Matters Committee (2017), *Inquiry into electronic voting*, p. 134-135.
[702] See for example New South Wales Electoral Commission (2023), *Technology assisted voting – Paper 2 Interim review report*, p. 58.
[703] VEC (2023), *Report to Parliament on the 2022 Victorian State election and 2023 Narracan District supplementary election*, pp. 63-64.

The VEC reported that there was low use of the previous electronic voting service since its introduction in 2006.[704] Electronic assisted voting was substantially more popular than the previous in-person electronic voting service — the number of voters using electronic assisted voting within Victoria at the 2018 State election was over five times higher than the number of voters that used the previous system.[705]

TAV has been significantly more cost-efficient than prior electronic voting systems. At the 2014 State election the cost per vote:[706]

- for the vVote system was $2,262 if both capital development and implementation costs are considered, and $397 if only implementation costs are considered
- was $4.46 for postal votes and $3.36 for ordinary votes.

In comparison, the VEC has reported that the incremental cost of TAV is $1 per vote above the cost of an ordinary vote.[707] The VEC commissions a survey after each State election to receive feedback from voters, candidates and RPPs. The survey for the 2022 State election showed particularly high levels of satisfaction with the VEC's TAV services — 85 per cent of voters using that service were satisfied with it. In comparison, the overall satisfaction rate for the VEC's services among all surveyed voters was 82 per cent. Of the surveyed voters that had a disability, 69 per cent said that they did not require assistance to vote and 27 per cent said that they did. Of those that received assistance, 73 per cent were satisfied with the support they received.[708]

10.2 Other available voting methods

In addition to electronic assisted voting, the *Electoral Act 2002* (Vic) allows electors to vote at an election in the following ways:

[704] VEC (2019), *Report to Parliament on the 2018 Victoria State election*, p. 59.
[705] VEC submission Part 2 – Issues and recommendations, p. 75; VEC (2019), *Report to Parliament on the 2018 Victoria State election*, p. 58.
[706] Parliament of Victoria Electoral Matters Committee (2017), *Inquiry into electronic voting*, p. 118.
[707] VEC (2023), *Submission to the Electoral Matters Committee inquiry into the conduct of the 2022 Victorian State election,* p. 48.
[708] Victorian Electoral Commission (2023), *Submission to the Electoral Matters Committee inquiry into the conduct of the 2022 Victorian State election*, p. 68.

- at an election day voting centre
- at an early voting centre (static and mobile)
- by post.

Election day voting centres

Electors are ordinarily able to vote at an election day centre from 8 am on election day until 6 pm on the same day. Once the elector's identity is confirmed by an election official, the elector casts their vote by marking their ballot-paper which is then deposited into the ballot-box.[709] If an elector requires assistance, they can appoint a person to assist them to vote. If an elector who requires assistance has not appointed a person to assist them, the election official must assist the elector to vote in the presence of a scrutineer or other person.[710]

Early voting centres

More electors are opting to vote early at early voting centres, with the 2022 Victorian State election seeing early voting rates rise to 1.87 million.[711] Early voting is available from 9 am on the Monday after the final nomination day and ends at 6 pm on the day immediately before election day. The identity confirmation and ballot casting processes are the same as voting at an election day centre.[712]

Early voting centres may be operated interstate and overseas. The VEC explained in its submission that at the 2022 State election early voting was available at the head office of every State and Territory electoral commission in Australia. However, overseas in-person voting centres were not used due to changed security requirements at Australia's diplomatic posts.[713]

The Electoral Commissioner may appoint a variety of locations as early voting centres, such as aged care facilities, homelessness support

[709] *Electoral Act 2002* (Vic), ss. 89-93.
[710] *Electoral Act 2002* (Vic), s. 94.
[711] Parliament of Victoria (2023), *Every Victorian election is more demanding than the last: Commissioner,* https://new.parliament.vic.gov.au/news/general-news/commissioners-appearance, last updated 18 April 2023.
[712] *Electoral Act 2002* (Vic), s. 99.
[713] VEC submission Part 2 – Issues and recommendations, p. 76.

agencies and Aboriginal community locations. Mobile voting teams can then visit those facilities and locations to support electors.[714]

The VEC's submission to the Electoral Matters Committee's *Inquiry into the conduct of the 2022 Victorian State election* stated that after extensive stakeholder consultation, including with the Victorian Department of Health, the number of mobile voting centres for the 2022 State election was reduced due to concerns relating to infection control. Facilities that were not identified for a mobile voting team were provided with postal vote applications. A total of 22,411 electors mobile voted across 321 sites.[715]

As public health orders relating to the COVID-19 pandemic expired prior to the 2022 State election, the VEC was no longer able to provide access to electronic assisted voting for those who tested positive to COVID-19 after the close of postal vote applications. To mitigate health risks associated with COVID-19 positive electors attending voting centres, the VEC established a drive-through mobile voting centre in Melton for those electors and their families. A total of 519 votes were cast at that centre. However, the VEC noted in its submission to the Electoral Matters Committee that the incremental cost-per-vote for operating the drive-through service was $373, compared to $1 per vote for TAV.[716]

Postal voting

An elector can submit an application to vote by post to the VEC after the issue of a writ for an election and before 6 pm on the Wednesday immediately preceding election day. Once approved, the VEC will post the ballot-paper to the elector and record that the elector has been issued with a ballot-paper.[717]

Postal ballot-papers must be posted back to the VEC (or delivered to the VEC or an election official at a voting centre) before 6 pm on election day.

[714] VEC (2022), *2022 State Election Service Plan,* p. 30.
[715] VEC (2023), *Submission to the Electoral Matters Committee inquiry into the conduct of the 2022 Victorian State election,* p. 44.
[716] VEC (2023), *Submission to the Electoral Matters Committee inquiry into the conduct of the 2022 Victorian State election,* p. 48.
[717] *Electoral Act 2002* (Vic), ss. 101-104.

To be admitted for counting, completed ballot papers must be received on, or before, 6 pm on the Friday following election day.[718]

Certain classes of electors may apply to the VEC to be a general postal voter, including for example those that:[719]

- have a principal place of residence over 20 km by the nearest practicable route from an election day voting centre
- are unable to travel to an election day voting centre due to being seriously ill or infirm, or because they are caring for such a person
- are serving a sentence of imprisonment or are otherwise in lawful custody or detention
- are at least 70 years of age.

Although the VEC ordinarily sends ballot materials to postal voters by post, it provides an email solution for accepting and distributing ballot material for eligible electors. However, completed ballot papers must still be returned to the VEC by post. At the 2022 Victorian State election, overseas electors could drop off their ballot papers at one of 27 specified overseas locations, which were then returned to the VEC.[720]

Programs to support voter participation

The Panel noted that the VEC has several initiatives in place to support voter participation and to accommodate the needs of electors. Some of these initiatives are summarised below.

The VEC works with Vision Australia and Blind Citizens Australia to identify and contact electors who require election information in an accessible format, and makes information available in email, audio, braille and Digital Accessible Information System formats.[721]

The VEC's community outreach programs deliver initiatives aimed at communities facing barriers to electoral participation, including:[722]

[718] *Electoral Act 2002* (Vic), ss. 106(2)(e) and (3).
[719] *Electoral Act 2002* (Vic), s. 24.
[720] VEC submission Part 2 – Issues and recommendations, p. 76.
[721] VEC (2022), *2022 State Election Service Plan,* p. 27.
[722] VEC (2023), *Submission to the Electoral Matters Committee inquiry into the conduct of the 2022 Victorian State election,* p. 39.

- people experiencing homeless
- younger Victorians
- Aboriginal and Torres Strait Islander communities
- culturally and linguistically diverse communities
- incarcerated persons.

The VEC's community newsletter, *BeHeard*, provides information on the availability of the VEC's resources for communities that may require electoral support. Its Democracy Ambassador Program provides training and support to a state-wide team of peer leaders to deliver electoral information and enrolment outreach to areas with lower levels of electoral participation and higher rates of informal voting.[723]

At the 2022 State election the VEC conducted, in partnership with Reconciliation Victoria, a project to support the engagement of Aboriginal communities across Victoria, including by providing mobile voting within designated Aboriginal community locations.[724]

10.3 Policy objectives and concerns

The Panel considered the key objectives and benefits of electronic assisted voting, as well as concerns regarding the security of electronic assisted voting systems which allowed eligible electors to cast their vote independently and secretly without having to attend a voting centre in person.

The Panel also considered key findings and issues identified in recent reports and related documents.

Objectives of electronic assisted voting

The *Charter of Human Rights and Responsibilities 2006* (Vic) states that every eligible person has the right, and is to have the opportunity, without discrimination, to vote at periodic State and municipal elections.[725]

[723] VEC (2023), *Submission to the Electoral Matters Committee inquiry into the conduct of the 2022 Victorian State election,* pp. 39-40.
[724] VEC (2022), *2022 State Election Service Plan,* p. 17.
[725] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s. 18(2).

However, conventional voting methods may not be accessible to some Victorians, meaning that their voting rights would be limited as a matter of practice if alternatives were not available. Electronic assisted voting by telephone is designed to at least partly address that issue.

Further, the *Electoral Act 2002* (Vic) makes voting compulsory for most Victorians on the electoral roll. Some electors are exempt from voting requirements, for example if the VEC is satisfied they had a valid and sufficient excuse for not voting or were:[726]

- absent from Victoria on election day
- ineligible to vote at the election
- an itinerant elector.

As failing to vote is an offence, it is imperative that Victorian electors are given a genuine and fair opportunity to cast a vote.

The Panel noted that electronic assisted voting should also maintain other key principles of democratic elections. For example, in a 2013 report, *Internet voting in Australian election systems*, the Electoral Council of Australia and New Zealand considered the following key election principles:[727]

- the absolute right to a secret ballot and the uniform priority given to it
- the need for any balloting process to guarantee free expression of the will of the electors, without fear or intimidation
- the need for states to take all necessary and appropriate measures to ensure the transparency of the entire electoral process
- the need to ensure universal and non-discriminatory access to the right to vote, with particular reference to persons with disabilities.

As explained below, some stakeholders have argued that the use of TAV may undermine the secrecy of ballots and lead to ballots cast using that system not reflecting the free expression of the voter's will.

[726] *Electoral Act 2002* (Vic), Pt 9, Div 2.
[727] Electoral Council of Australia and New Zealand (2013), *Internet voting in Australian election systems*, p. 47.

Security and verifiability of electronic assisted voting

A key concern that is often raised about electronic and electronic assisted voting, including Victoria's TAV system, is that it may be less secure than in-person or postal voting (Box 10.2). A related issue is that it may be more difficult for electors, scrutineers and electoral agencies to verify that votes have been recorded and counted correctly.

Box 10.2: Submissions on security of electronic and electronic assisted voting

'The use of traditional paper ballots contributes significantly to the fairness, security, and transparency of Victorian elections. We do not support an expansion of electronic assisted voting as it would unnecessarily weaken public confidence in the system.' (Liberal Party of Australia (Victorian Division) submission, p. 10)

'There has also been discussion of the use of TAV to accommodate voters who are overseas. We hold concerns about the security and appropriateness of this, particularly in the context of Australia's diplomatic network returning to full functioning following the pandemic.' (Australian Labor Party – Victorian Branch submission, p. 14)

'... undetectable fraud is a far greater risk than obvious crashes. There is currently no reasonably usable solution for paperless voting that allows voters to verify that their votes are cast as they wished and scrutineers to verify that the votes they see are the ones that the voters cast. The secret ballot is also substantially at risk, even more so than for postal voting (which in turn is not ideal).' (Teague, V. et al. (2023), *Submission to the Electoral Matters Committee Inquiry into the 2022 Victorian State election*, p. 6.)

During parliamentary debate, the then Special Minister of State explained that the 2018 amendments provided a 'limited and controlled' process for testing and assessing electronic assisted voting methods, to inform possible future reforms.[728]

The Panel wrote to several Commonwealth agencies responsible for security or electoral matters to seek further information on the security risks of electronic assisted voting, including potential risks if it was made available to persons overseas.

[728] Victoria, *Parliamentary Debates*, Legislative Council, 22 June 2018, p. 3068.

The Director-General of Security of the Australian Security Intelligence Organisation explained in their response that:

- Australia is facing an unprecedented challenge from espionage and foreign interference
- some governments intercept their citizen communications and may prioritise international communications
- electronic assisted voting is broadly subject to the same cyber security concerns as any other internet/telecommunications activity
- it is the security of the electoral systems supporting electronic assisted voting, rather than the location of the individual who is voting, that matters most.

The Panel also received a letter from the Chair of the Electoral Integrity Assurance Taskforce. The Taskforce provides information and advice to the AEC on matters that may compromise the real or perceived integrity of elections, and provides support and advice to State and Territory electoral management bodies on request. In summary, the letter stated:

- accessibility and enfranchisement benefits of TAV must be weighed against cyber security challenges
- electronic and online voting, including TAV, provides malicious actors with more opportunities to compromise election-related networks
- expanded eligibility for TAV also increases the risk of voter fraud, for example because visual cues cannot be used to verify an elector's identity
- as eligibility for TAV expands, so does the impact of a system failure and the potential threat to electoral integrity
- greater use of TAV is likely to increase opportunities for misinformation and disinformation being circulated contesting the integrity of the election
- unless the actual and perceived integrity of TAV is assured, it being made broadly available presents a reputational risk for all Australian electoral management bodies.

The Panel noted that some concerns regarding the security of electronic voting systems may be less applicable to TAV. For example, as votes are

still recorded using paper ballots, election outcomes cannot be changed as a result of unauthorised access to computer systems.

Recent experiences and findings of the New South Wales Electoral Commission

The Panel took into account recent issues and findings regarding the use of electronic voting systems in New South Wales.

Between 2011 and 2021, the New South Wales Electoral Commission provided electronic and electronic assisted voting for State elections using a specially adapted internet voting system called iVote, which featured:[729]

- operator assisted telephone voting
- independent telephone voting using interactive voice recording
- internet voting through a web browser.

Voters were eligible to use the iVote system if either:[730]

- they had a disability that would make it difficult to vote, or to vote without assistance
- they were illiterate and would be unable to vote without assistance
- their residence was not within 20 km of a voting centre, by the nearest practicable route
- they were a silent elector
- they would not be within New South Wales on election day.

The iVote system was first used for local government elections in 2021. The iVote system experienced performance issues at those elections and some electors entitled to use iVote were not able to do so, which led to the results of three councillor elections being voided.[731]

Shortly after the 2021 elections, the New South Wales Electoral Commissioner was advised by the commercial supplier of iVote software that an updated version of the software was required. The Commissioner

[729] New South Wales Electoral Commission (2023), *Technology assisted voting review – context and background*, https://elections.nsw.gov.au/technology-assisted-voting-review/context-and-background, last updated 30 August 2023.

[730] *Electoral Act 2017* (NSW), s. 152.

[731] *NSW Electoral Commissioner v Kempsey Shire Council (No 2)* [2022] NSWSC 282.

formed the view that there was insufficient time for customisation and testing of the updated software before the 2023 State election, and determined that iVote would not be available for that election.[732] Instead, an operator assisted telephone voting service was made available to blind or low vision voters at that election, but not to other cohorts.[733]

In 2022 the New South Wales Electoral Commissioner commenced a review of electronic and electronic assisted voting (referred to as 'technology assisted voting' in New South Wales). An Interim Report on the review was published in 2023. The Commissioner's findings and observations included that:[734]

- paper-based voting continues to provide the strongest foundation for secure and accurate elections in New South Wales due to the physical security attributes of ballot papers and the transparency of voting and counting paper based votes
- global experience demonstrates that 'technology assisted voting' has inherent risks that, if they were to materialise, could impact the integrity of an election process, including risks around technical non-performance, transparency, verifiability of votes and cyber security
- the risk to the integrity of an election from the technical failure of a 'technology assisted voting' system becomes greater as the size of the user cohort increases.

While iVote's performance issues have been attributed to an increase in the cohort eligible to use it, the Panel noted that other jurisdictions provide technology assisted voting options to a broad cohort. For example, the Queensland Electoral Commission offers telephone voting, similar to the TAV service offered in Victoria, to voters that:[735]

[732] New South Wales Electoral Commission (2022), *Technology assisted voting review – Paper 1 Issues and questions*, p. 8.

[733] New South Wales Electoral Commission (2023), *Technology assisted voting – Paper 2 Interim review report*, p. 3.

[734] New South Wales Electoral Commission (2023), *Technology assisted voting – Paper 2 Interim review report,* pp. 4 and 16.

[735] Electoral Commission of Queensland (n.d.), *Telephone voting – how it works*; *Electoral Act 1992 (Qld),* s. 121A; *Electoral Regulation 2013 (Qld)*, reg. 4AA.

- cannot vote without assistance due to an impairment or an insufficient level of literacy
- cannot vote at a polling booth because of an impairment
- are special postal voters not detained in lawful custody
- are distance voters whose enrolled address is more than 20 km from a polling booth
- during the election period, are located interstate or overseas, or are directed to quarantine or isolate.

In addition, paper-based voting systems may also be affected by errors. For example, 1,375 ballot papers were lost during a recount as part of a 2013 Commonwealth election, leading to Western Australian Senate seats being voided by the High Court of Australia and a special election being held in 2014.[736]

10.4 Options for reform

There is significant interest across Australian jurisdictions in the development of electronic voting solutions more broadly. For example, in its 2022 submission to the Commonwealth Parliament's JSCEM, Vision Australia stated that:[737]

> *Vision Australia and other organisations in the blindness and low vision sector are unwavering in our strong view that human-assisted telephone voting, used in isolation, does not constitute a way for people who are blind or have low vision to cast an independent, secret and verifiable vote.*
>
> *The lack of progress in providing more equitable voting options represents a failure by politicians and bureaucrats to embrace the principles of access and inclusion that are promoted by initiatives such as the National Disability Strategy and most comprehensively expressed in the UN Convention on the Rights of Persons with Disabilities.*

[736] Parliament of Victoria Electoral Matters Committee (2017), *Inquiry into electronic voting,* pp. 39-40.
[737] Vision Australia (2022), *Submission to Joint Standing Committee on Electoral Matters*, p. 2.

Concerns raised by Vision Australia with existing TAV systems included that:[738]

- the process is not secret as voters have to disclose voting preferences to another person, even though separate registration and voter recording processes are in place to minimise the risk of individual voters being identified
- voting preferences may not be recorded and submitted correctly
- it may be impractical to vote 'below the line' for an upper house election using the telephone assisted voting system because of the time that would require, and a voter may feel discouraged from doing so out of concern about the amount of electoral staff time being occupied.

The VEC stated in a 2019 submission to the Parliament of Victoria Electoral Matters Committee that its preferred approach to expanding voter access is the introduction of an internet voting channel as a part of a national internet voting service.[739]

However, in accordance with its Terms of Reference, the Panel has confined its considerations to the electronic assisted voting provisions introduced in 2018.

The VEC's delivery of electronic assisted voting using its TAV service has been well-received and has provided a cost-effective voting option for eligible electors. The Panel noted that there may be opportunities for the VEC to further improve the service, for example by:

- distorting the elector's voice to address concerns that the elector may be identified by the VEC staff recording their vote
- automating part of the call.

The VEC recommended reforms to electronic assisted voting in its submission, particularly in relation to expanding eligibility to additional classes of electors.

[738] Vision Australia (2022), *Submission to Joint Standing Committee on Electoral Matters*, pp. 4-5.
[739] Parliament of Victoria Electoral Matters Committee (2020), *Inquiry into the conduct of the 2018 Victorian State election,* p. 105.

The Panel considered several other potential reforms, including:

- making it easier for the VEC to provide electors affected by an emergency or natural disaster with access to electronic assisted voting
- aligning eligibility for electronic and electronic assisted voting
- Provisions for elections affected by technical difficulties.

Expanding eligibility to additional classes of electors

As explained above, eligibility for electronic assisted voting was initially restricted to limited categories of electors.

The VEC explained in its submission that its objectives for the delivery of elections include driving election engagement, maximising voter turnout and providing accessible voting opportunities for all Victorian electors. Currently, there may be barriers preventing some members of the community from voting and the VEC stated that 'providing an accessible channel to those that would otherwise be potentially disenfranchised is foundational to the principles of democracy'.[740]

The VEC recommended in its submission that eligibility for TAV is extended to additional classes of electors including those that are:

- outside of Victoria, including Australian Antarctic electors
- ill or infirm or those with caring responsibilities
- neurodivergent
- experiencing homelessness or family or domestic violence.

The VEC stated that it would be able provide electronic assisted voting via telephone to these additional groups, noting that it had planned to offer TAV to a significant number of electors at the 2022 State election who might have been required to stay home due to the COVID-19 pandemic.[741]

However, the Panel did not support the eligibility criteria for electronic assisted voting being significantly expanded.

[740] VEC submission Part 2 – Issues and recommendations, pp. 75-76.
[741] VEC submission Part 2 – Issues and recommendations, p. 76.

As explained by the Chair of the Electoral Integrity Assurance Taskforce, expanded eligibility for TAV would increase opportunities for the spread of misinformation and disinformation. Internationally, the use of electronic voting systems has been used as the basis for challenging the integrity of election outcomes.

The Panel was mindful that any expansion of electronic assisted voting could lend credence to the spurious claims of election deniers. The denial of the results of a fair election is threatening to the electoral process and our democracy. Protecting the actual and perceived legitimacy of election outcomes is of paramount importance.

The Panel was also of the view that a TAV system, which utilises paper ballots and does not store electronic data, provides an efficient voting channel of relatively low risk to cohorts who are potentially disenfranchised from other suitable voting options.

For the above reasons and as explained below, the Panel considered that a limited, cautious expansion of eligible classes would be appropriate at this stage. The Panel considered that other voters recommended for inclusion by the VEC have access to other reasonable means of voting.

Proposed pilot for voters outside of Victoria

The Panel noted that existing voting channels are not serving the needs of many Victorians who are outside of the State, which may leave those electors disenfranchised. Generally, electors outside of Victoria may currently vote by either:

- attending a limited number of in-person voting locations outside of Victoria — this option is not practicably available to many Victorians because of the travel distance required
- voting by post.

The VEC explained that due to changed security requirements for Australia's diplomatic post, no overseas in-person voting locations could be operated for the 2022 State election. However, 27 consulate locations were available for overseas electors to drop off their postal votes.[742]

[742] VEC submission Part 2 – Issues and recommendations, p. 76.

In practice, many postal votes arrive too late to be included in the count for the election. Even though postal votes dropped-off at consulate locations are sent to the VEC using the diplomatic mail service, approximately 20 per cent of those votes cast at the 2022 State election did not arrive in time. According to VEC data, the vast majority of Victorians who are outside of Victoria during the election period do not vote. The number of interstate and overseas Victorians who are voting has steadily declined over the last three elections.[743]

The VEC stated in its submission to the Parliament of Victoria Electoral Matters Committee's *Inquiry into the conduct of the 2022 Victorian State election*:[744]

> *Even with in-country voting options, overseas electors heavily rely on offshore postal services to carry their ballot pack in at least one direction back to Australia. As a result, the timeline for issuing and returning postal votes is increasingly incompatible with the decline in global postal service timeframes and risking disenfranchisement of overseas voters.*

At an Electoral Matters Committee hearing, Warwick Gately AM, then Victorian Electoral Commissioner, stated:[745]

> *I think if there is one area that concerns me, it is still our inability to service overseas electors … I am not advocating an electronic voting solution, but for this election a telephone-assisted voting solution would have worked for electors that were overseas. We do not always have those that are travelling in the larger overseas centres – they will be well dispersed. The … venues that we operated were predictably in London, in Hong Kong, in America, for example, but we cannot get to the bulk of the people that are travelling overseas. And those numbers were quite low. … there could have been 300,000 eligible Victorians out of the state and out of the*

[743] VEC submission Part 2 – Issues and recommendations, pp. 76-77.

[744] VEC (2023), *Submission to the Electoral Matters Committee inquiry into the conduct of the 2022 Victorian State election*, p. 48.

[745] Transcript of Parliament of Victoria Electoral Matters Committee hearing on 27 March 2023.

country that were not able to cast a vote, and our email solution is not really viable.

The Department of Foreign Affairs and Trade (DFAT) made a submission to the New South Wales review into technology assisted voting, which stated that:[746]

- it is increasingly challenging to provide in-person overseas voting, and DFAT recognises that technology assisted voting offers unique solutions to overcome these challenges
- the United States, United Kingdom and Canada have discontinued in-person overseas voting
- the cost of DFAT's services in supporting in-person overseas voting is likely to increase
- DFAT supports the implementation of technology assisted voting and its benefits include enhanced voter enfranchisement, improved voting reliability, and lower reputational risks to government.

The Panel considered that the VEC should run a limited trial of electronic assisted voting for electors outside of Victoria. For example, the VEC could run a pilot during a by-election and/or only for voters in a particular geographic area. Future use of electronic assisted voting for electors outside of Victoria should be considered following the outcomes of the trial, including the public's response to it.

Recommendation 10.1: Amend the *Electoral Regulations 2022* (Vic) to enable the VEC to run a limited trial of electronic assisted voting for electors located outside of Victoria during an election.

Australian Antarctic electors

Under the *Electoral Act 2002* (Vic), an Antarctic elector means an elector who, in the course of the elector's employment, is in the Australian Antarctic Territory on election day.[747]

[746] DFAT (n.d.), *Submission of the Department of Foreign Affairs and Trade to the New South Wales Electoral Commissioner's review into technology assisted voting.*

[747] *Electoral Act 2002* (Vic), s. 3.

Nine Antarctic electors voted at the 2022 State election and eleven voted at the 2018 State election. The VEC stated in its submission:[748]

> *The logistics and costs of facilitating in-person voting for Antarctic voters across multiple research bases for such a small number of votes is also a complex process and involves extensive planning and coordination with the Commonwealth Department of Climate Change, Energy, the Environment and Water. Allowing Antarctic electors to access TAV would provide a much more efficient process and voting experience for this small group of electors.*

The Panel considered that Antarctic electors should be eligible to use electronic assisted voting, as this will make it easier and cheaper to provide voting services.

Recommendation 10.2: Amend the *Electoral Regulations 2022* (Vic) to make Antarctic electors an eligible class for electronic assisted voting.

Electors impacted by an emergency

As explained above, the *Electoral Regulations 2022* (Vic) allow for the VEC to extend electronic assisted voting to electors impacted by an emergency where an 'emergency declaration' is in force.

However, the making of an 'emergency declaration' has significant legal consequences and they are rarely implemented. For example, the Panel heard from Emergency Management Victoria that the threshold for declaring a State of Disaster under the *Emergency Management Act 1986* (Vic) is very high, and since the commencement of the Act declarations have only been made in response to two emergencies:

- 2019-20 bushfires
- COVID-19 pandemic.

Those declarations might be required where normal systems of government or emergency management have broken down or are insufficient to respond to the emergency, such as where:

- laws must be suspended

[748] VEC submission Part 2 – Issues and recommendations, pp. 77-78.

- the government must take possession of property and the existing laws allowing the taking of possession of property are inappropriate or insufficient
- agencies must restrict and control entry to a particular area and the existing laws are inappropriate or insufficient
- the Minister for Emergency Services must direct government agencies
- the government must compel evacuation.

The VEC advised that it should be able to extend electronic assisted voting to any electors who are impacted by an emergency or disaster, as determined by the VEC in consultation with the Emergency Management Commissioner, regardless of whether an 'emergency declaration' is in place.[749]

The Panel noted that the Victorian Government has temporarily extended access to electronic assisted voting to Victorians affected by emergencies on several occasions. However, the Government was required to amend or make new regulations to do so, which may be too cumbersome and time-consuming a process, particularly in an emergency situation.

The Australian Labor Party – Victorian Branch stated in its submission:[750]

> *During the Federal Election, TAV was utilised as a means of ensuring persons with COVID-19, then under a legal direction to isolate, were able to vote. We consider that it would be appropriate to incorporate a surge capacity into the service in the event of future pandemics or natural disasters that prevent electors from exercising their right, and obligation, to vote, particularly given the existing provisions of the Act that allow the VEC to extend TAV to those affected by natural disasters. The application of TAV to electors affected by flooding was a beneficial first use of the new powers relating to TAV.*

The Panel agreed that access to electronic assisted voting for electors affected by an emergency should not be contingent on an 'emergency

[749] VEC submission Part 2 – Issues and recommendations, pp. 79-80.
[750] Australian Labor Party – Victorian Branch submission, pp. 13-14.

declaration' being made. Although that restriction is currently in place, the Victorian Government has had to update regulations on several occasions in recent years to ensure that electors affected by an emergency can still vote. A less administratively burdensome and longer-term approach is required.

Recommendation 10.3: Amend regulation 52 of the *Electoral Regulations 2022* (Vic) to allow the Victorian Electoral Commissioner to make an emergency Determination even if an 'emergency declaration' is not in force. That Determination would allow a specified class of electors affected by an emergency to access electronic assisted voting.

Aligning eligibility for electronic and electronic assisted voting

Under the *Electoral Act 2002* (Vic) and *Electoral Regulations 2022* (Vic), the classes of electors eligible for electronic assisted voting are different to the classes eligible for electronic voting.

For example, electronic voting can be provided to electors who otherwise cannot vote without assistance due to insufficient literacy skills (whether in the English language or in their primary spoken language).[751] The VEC is not permitted to make electronic assisted voting available to that group. The VEC recommended that the eligible classes of electors for electronic and electronic assisted voting be aligned. In particular, the VEC stated that given the potential for significant overlap between the two schemes, should in-person technology allow, any additional classes of electors eligible for electronic assisted voting should also be able to use electronic voting. The VEC noted aligning eligibility criteria would also make electors with lower literacy skills eligible for electronic assisted voting, although that was not expressly pursued in their submission.[752]

The Panel agreed that the VEC should be able to provide electronic voting to classes of electors who are eligible for electronic assisted voting. If eligibility for electronic assisted voting is expanded in the future to

[751] *Electoral Act 2002* (Vic), s. 110D.

[752] VEC submission Part 2 – Issues and recommendations, p. 80.

additional groups, the VEC should have the option of also serving the needs of those voters using electronic voting systems if appropriate.

However, the Panel did not agree that eligibility for electronic assisted voting should be expanded to encompass all individuals that may be provided with electronic voting. In particular, it would not be practicable to provide a large number of electors who belong to diverse language groups, and require the assistance of an interpreter with scrutineer oversight, with access to the existing TAV service.

Recommendation 10.4: If additional classes of electors are made eligible for electronic assisted voting, the VEC should also have the power to provide those electors with electronic voting, if it considers that would be appropriate.

Provisions for elections affected by technical difficulties

Recent events in New South Wales have demonstrated that a technical failure of an electronic voting system may lead to disagreement regarding whether an election result remains valid.

Section 139 of the *Electoral Act 2002* (Vic) states that:

> *The Court of Disputed Returns must not declare an election to be void on account of any act, matter or thing which in the opinion of the Court of Disputed Returns did not affect the result of the election.*

However, further clarity is required in the context of electronic assisted voting.

In a submission to the New South Wales Electoral Commission's review, the Law Society of New South Wales recommended the introduction of a specific provision on that topic. In general, the proposed provision would clarify that an election is not invalid due to the failure of an electronic or electronic assisted voting system, unless:[753]

[753] The Law Society of New South Wales (2023), *Submission to the technology assisted voting review,* pp. 2-3.

- as a result of the failure, voters were prevented from voting throughout the voting period
- a recount has determined that an alternative result may have been achieved if those electors could have voted
- as a result, the election result was likely to be affected.

The Panel considered that a similar provision should be added to the *Electoral Act 2002* (Vic).

Recommendation 10.5: Add a provision into the *Electoral Act 2002* (Vic) that provides that an election is not to be held void due to the failure of an electronic assisted voting system, unless all of the following are satisfied:

- as a result of the failure, voters were prevented from voting throughout the voting period
- a recount has determined that an alternative result may have been achieved if those electors could have voted
- as a result, the election result was likely to be affected.

10.5 Electronic assisted voting for local government elections

Electronic assisted voting is not available for local government elections. Although that topic was outside of the Panel's Terms of Reference, the Panel received a request from the VEC to consider it. The VEC explained that the lack of electronic assisted voting may be negatively impacting elections and voters.

The next local government general elections are scheduled to take place in October 2024.

For reasons of consistency, the Panel considered that there would be merit in making electronic assisted voting available to limited cohorts of electors at local government elections, in line with arrangements for State elections.

Appendix A, Terms of Reference for the Report

The Victorian Parliament passed the *Electoral Legislation Amendment Act 2018* (2018 Electoral Amendments) to:

- improve the operation of Victoria's electoral processes; and
- enhance the integrity of the electoral system by prohibiting political donations from certain sources and to introduce a political donations disclosure and reporting regime.

Under section 222DB of the *Electoral Act 2002* (Vic) (Electoral Act) a review must be undertaken of the operation of the 2018 Electoral Amendments. According to the Electoral Act, under this review:

- The Panel is required to examine and make recommendations in relation to:
    - whether the Electoral Act should be further amended to provide for a cap on political expenditure and if so –
        - whether the cap should apply generally or to specific persons or entities;
        - the value of the cap; and
        - the consequences of a failure to comply with the cap;
    - the impact of the 2018 Electoral Amendments upon third party campaigners, small community groups and not-for-profit entities;
    - the operation of the disclosure scheme given effect to by the 2018 Electoral Amendments including, but not limited to, the operation of disclosure returns; and
    - the effectiveness of the 2018 Electoral Amendments so far as they relate to electronic assisted voting.
- The Panel may examine and make recommendations in relation to contemporary trends and issues in respect of the electoral funding including, but not limited to, the funding of political parties or candidates (however described).

In addition to those matters that require consideration under the Electoral Act:

- The Panel is required to examine and make recommendations in relation to the legislative and operational implementation of recommendations 1 and 2 of the Independent Broad-based Anti-corruption Commission's (IBAC) *Special report on corruption risks associated with donations and lobbying* (October 2022).
- The Panel may examine and make recommendations in relation to any other relevant matters.

The Panel must submit a copy of the review into these matters to the Minister by 24 November 2023.

Appendix B, Submissions and public forums

Written submissions

Written submissions were received from the following:

- Professor Emerita Anne Twomey
- Dr Yee-Fui Ng
- Victorian Electoral Commission
- Moira Deeming MP
- Australian Greens Victoria
- Health and Community Services Union
- Electoral Commission of South Australia
- The Centre for Public Integrity
- Climate 200
- Australian Labor Party – Victoria
- Victorian Trades Hall Council
- Liberal Party of Australia (Victorian Division)
- National Party – Victoria
- Melissa Lowe
- Accountability Round Table
- The Australia Institute.

Public forums

Date and time	Stakeholders who attended
11 July 2023, 10 am to 12 pm	• Accountability Round Table, represented by the Hon Dr Ken Coghill • The Australia Institute, represented by Dr Richard Denniss
13 July 2023, 10 am to 12 pm	• Cameron Petrie, Assistant State Secretary, Australian Labor Party – Victorian Division • Nicola Castleman, Assistant State Secretary, Australian Labor Party – Victorian Division
13 July 2023, 2 pm to 3 pm	• Nick McGowan MP
14 July 2023, 10 am to 12 pm	• Stuart Smith, State Director of the Liberal Party of Australia (Victorian Division) • Matthew Harris, State Director of the National Party of Australia – Victoria
19 July 2023, 10 am to 12 pm	• Simon Holmes a Court, Convener of Climate 200 • Alex Rantino, Chief of Staff, Climate 200
20 July 2023, 10 am to 12 pm	• Dr Yee-Fui Ng • Professor Graeme Orr • Professor Joo-Cheong Tham and Catherine Williams on behalf of The Centre for Public Integrity
20 July 2023, 2 pm to 3 pm	• Professor Emerita Anne Twomey
21 July 2023, 10 am to 12 pm	• Melissa Lowe, independent candidate for Hawthorn at the 2022 State election • Hayden O'Connor, Campaign Director for Sophie Torney at the 2022 State election • Felicity Frederico, independent candidate for Brighton at the 2022 State election
21 July 2023, 2 pm to 4 pm	• Keegan Bartlett, Hannah Hage and Simon Ho on behalf of the Victorian Electoral Commission
28 July 2023, 10 am to 11 am	• Corey Oakley, Secretary of the Victorian Socialists Party
31 July 2023, 11 am to 12 pm	• Dr Tim Read MP, Member for Brunswick
4 August 2023, 10 am to 11 am	• Wilhelmina Stracke, Assistant Secretary of the Victorian Trades Hall Council • Clare Elliot, Political Organiser of the Victorian Trades Hall Council