

Electoral cycle issues

- 6.1 While election day and the surrounding period is naturally the focus for most people when considering the conduct of the election, a range of critical activities occur throughout the electoral cycle that have a direct impact on the operation of any electoral event.
- 6.2 These issues include election funding and disclosure, redistributions of electorates and the operation of the legislative framework in which elections are delivered. This Chapter considers these issues.

Election funding and disclosure

- 6.3 Election funding – how individuals and parties fund their campaigns and party machinery through public and private financing – and the public disclosure of this funding is, and should be, a scrutinised feature of elections. This funding is to be distinguished from the funding received by the Australian Electoral Commission (AEC) for the purposes of conducting elections.
- 6.4 The Electoral Matters Committee of the 43rd Parliament undertook a wide-ranging inquiry into the funding of political parties and election campaigns. That Committee's report, the *Report on the funding of political parties and election campaigns*, was tabled in the Parliament in December 2011 and surveyed various issues relating to election funding and disclosure. The evidence canvassed in that report – and the dissenting reports it contains – demonstrate the varied perspectives on this element of the electoral landscape.¹

¹ Joint Standing Committee on Electoral Matters (JSCEM) (43rd Parliament), *Report on the funding of political parties and election campaigns*, December 2011, pp. xxvii-xxxiii.

- 6.5 There have been few regulatory developments at the Commonwealth level concerning funding and disclosure since that report was tabled.
- 6.6 During the conduct of this inquiry, the following releases of funding disclosure returns by the AEC have occurred:
- 2012–13 annual disclosure returns – 3 February 2014;
 - 2013 federal election – 24 February 2014;
 - Griffith by-election – 28 July 2014;
 - 2014 WA Senate election – 22 September 2014; and
 - 2013–14 annual disclosure returns – 2 February 2015.²
- 6.7 Funding and disclosure is an issue of public and parliamentary focus, and will continue to be so during the life of this Parliament.
- 6.8 A summary of the history of the funding and disclosure system and its elements follows.

Development of the Commonwealth system

- 6.9 Disclosure of donation amounts from all donors has had a varied history federally in Australia.
- 6.10 The requirement to disclose election campaign donations was introduced in 1983, with the introduction of annual political party returns in 1992 with an initial disclosure threshold for donations of \$1 500 or more.³
- 6.11 The *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* made a number of changes to the financial disclosure scheme subsequent to the 2004 Federal Election.
- 6.12 The main change in that Act, after 14 years of no change, was an increase in the minimum financial disclosure thresholds for donations from \$200 (candidates), \$1 000 (groups) and \$1 500 (parties) to ‘more than \$10 000’, indexed annually to the Consumer Price Index (CPI). Currently the disclosure threshold is donations of more than \$12 800 (current until 30 June 2015).⁴
- 6.13 Additionally, Australia has had a long tradition of public funding of successfully elected candidates and Senate groups. Public funding was

2 Information on past releases can be found on the Australian Electoral Commission (AEC) website at <aec.gov.au/Parties_and_Representatives/financial_disclosure/index.htm>.

3 AEC website, *Funding and Disclosure Report Election 1996*, accessed 3 March 2015, <aec.gov.au/About_AEC/Publications/Reports_On_Federal_Electoral_Events/1996/part4.htm>.

4 AEC website, *Disclosure threshold*, accessed 3 March 2015, <aec.gov.au/Parties_and_Representatives/public_funding/threshold.htm>.

officially introduced in 1983 and has grown since then.⁵ From a humble beginning of 60 cents per vote in the House of Representatives and 30 cents per Senate vote, the rate stood at 248.8 cents per vote for the 2013 election.

Public funding

- 6.14 The formalised public funding system that is in place puts the funding of successful candidates and parties squarely in the public domain, thus ensuring accountability and transparency.
- 6.15 Part XX of the *Commonwealth Electoral Act 1918* (the Electoral Act) provides for government funding of eligible candidates and Senate groups that attract a certain number of formal first preference votes in an election.
- 6.16 If an individual candidate or Senate group receives at least four per cent of the formal first preference votes in their relative Division or Senate election, they are eligible for public funding after the election.
- 6.17 The amount of election funding received by an eligible candidate or group is calculated by multiplying the total formal first preference votes cast by the current election funding rate (at the time of the election). The rate of election funding is indexed every six months to increases in the CPI.
- 6.18 An initial payment is required by the Electoral Act as soon as possible after the 20th day following election day, comprising at least 95 per cent of the entitlement. This is followed up by any remaining balance payable as soon as possible afterwards.
- 6.19 A total of \$58 076 456 was paid in electoral funding for the 2013 election.⁶
- 6.20 This funding has been a stable element of electoral law in Australia and is well supported across most political parties. It was introduced in order to provide an equal access to funding for those that contest elections and receive adequate support from the voting public.
- 6.21 In evidence to the Committee some minor parties such as the Future Party, the Pirate Party and the #Sustainable Population Party submitted that they consider the four per cent threshold for electoral funding to be a barrier to entry into the political sphere for emerging or smaller parties or an inequity advantaging the major parties.⁷ Most other parties and political

5 B Holmes, Parliamentary Library, *Electoral and political financing: the Commonwealth regime and its reforms*, 30 March 2012, p. 7.

6 A full breakdown of payments made is available in the AEC substantive submission: AEC, *Submission 20.3*, p. 114.

7 Future Party, *Submission 169*; Pirate Party, *Submission 177*; #Sustainable Population Party, *Submission 182*.

commentator inquiry participants, however, either do not raise public funding as an issue or appear to be in support of the current threshold.⁸

Private funding

- 6.22 The majority of commentary regarding electoral funding relates to the private funding of candidates, parties, or 'associated entities' (as defined in the Electoral Act). Private funding (that is, donations and funds provided to political parties or candidates by non-government third parties) has close ties to the disclosure requirements under the Electoral Act. Some submissions erroneously labelled private donations to political parties as 'public funding'.
- 6.23 The traditional elements of private funding, and the mechanisms that individuals and other entities use to fund candidates or parties, are continually evolving.
- 6.24 The challenges in defining the ways that parties receive funding in the evolving financial landscape are diverse. The rise of crowd funding, for instance, is a current challenge for regulators in relation to following funding trends. Crowd funding is typically the raising of funds for a project or venture through numerous donations of differing sizes from interested people, often via the internet.
- 6.25 For example, the Australian Sex Party used crowd funding to finance its advertising response to the 2014 Federal Budget.⁹ Crowd funding has also become a popular way of raising campaign funds in the United States.¹⁰ In the Committee's view, as methods of fundraising evolve, so should the regulatory system in order to ensure adequate accountability and certainty for donors and recipients. The AEC is best placed to monitor this issue.

International comparisons

- 6.26 International systems of political financing are varied and generally do not compare easily with the Australian system due to the federated nature of parliaments and political party structures. However, some analogies can be drawn.
- 6.27 The US system of political funding is complex and for this reason the Federal Election Commission (FEC) was established in 1975, with the
-

8 Electoral Reform Australia, *Submission 87*, p. [3].

9 R Powell, 'Australian Sex Party crowdfunds its 2014 budget response video', *Sydney Morning Herald*, 28 May 2014, accessed 10 December 2014, <smh.com.au/federal-politics/political-news/australian-sex-party-crowdfunds-its-2014-budget-response-video-20140529-zrqqy.html>.

10 G Silveira, 'How politicians are learning to harness the crowd', *Crowd Expert.com*, accessed 26 September 2014, <crowdexpert.com/articles/crowdfunding-in-politics/>.

power to regulate the financing of US federal elections.¹¹ Much like the AEC, the FEC is responsible for receiving, monitoring and regulating compliance with reporting requirements.

- 6.28 Like Australia the US has a system of disclosure requirements for candidates, parties and entities (known as Political Action Committees (PACs)). However, unlike Australia, some PACs (known as Super PACs) take independent action and expend funds directly on political campaigns, advocating defeat of certain candidates or other advertising – action which is not subject to any regulation.¹²
- 6.29 The electoral system in Canada is somewhat similar to Australia, but its political financing and disclosure system is more restrictive in some ways. Canada has election spending caps for party election expenditure, donation limit caps of \$1 200 on donations to parties, and also prohibits donations from corporations and unions.¹³
- 6.30 In addition, expense limits for election expenditure are also imposed on parties dependent on how many electoral districts are contested, with stringent reporting requirements somewhat similar to those in Australia.¹⁴

Australian developments

- 6.31 The political and judicial imperatives in relation to electoral funding have been varied (and have varied between federal and state levels). As noted above, there has been little regulatory change at the Commonwealth level. In 2008 the Government released a green paper on donations reform, followed by a second green paper in 2009 considering broader electoral issues. In 2008, 2009 and 2010 the Government introduced legislation seeking to make a range of changes to donations regulation; none of these bills were enacted.¹⁵
- 6.32 The High Court's dismissal in 2013 of the New South Wales (NSW) state government's attempts to ban political donations from unions and

11 FEC website, *About the FEC*, accessed 3 March 2015, <fec.gov/about.shtml>.

12 Opensecrets website, *What is a PAC?*, accessed 3 March 2015, <opensecrets.org/pacs/pacfaq.php>.

13 Elections Canada website, *Political Financing*, accessed 3 March 2015, <elections.ca/content.aspx?section=res&dir=ces&document=part6&lang=e>.

14 Elections Canada website, *Political Financing*, accessed 3 March 2015, <elections.ca/content.aspx?section=res&dir=ces&document=part6&lang=e>.

15 The Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008, the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009, and the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010.

- corporations in 2012 is one clear indicator of the tensions that can exist in the private funding space.¹⁶
- 6.33 In its decision the Court unanimously upheld that the amendments to the *NSW Election Funding, Expenditure and Disclosures Act 1981* were ‘invalid because they impermissibly burden the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution.’¹⁷
- 6.34 The High Court’s decision did not touch on other changes introduced in NSW that restrict donation amounts to certain capped levels for state elections, as well as prohibiting donations from property developers or tobacco, liquor or gambling industry donors.¹⁸ However, this is still a ‘live’ issue with a current challenge to property developer restrictions before the High Court.¹⁹
- 6.35 NSW also has caps on election expenditure and provides public funding for party administration costs.
- 6.36 The Committee also notes the NSW Government’s in-principle acceptance of the majority of recommendations from an expert panel established to analyse reforms to political donations in that state.²⁰
- 6.37 The level and sources of private funding are contested. In its evidence the Labor Party argued for:
- reform of the funding and disclosure regime to increase public funding for elections and to remove the distorting influence of vested interests and big money politics.²¹
- 6.38 The Australian Greens called for:
- a ban on corporate donations, a cap on individual donations and public funding for political parties which includes party administration and broadcasting time in federal elections.²²

16 *Unions NSW v New South Wales* [2013] HCA 58 (18 December 2013).

17 High Court Judgement Summary, *Unions NSW v New South Wales*, accessed 30 October 2014, <court.gov.au/assets/publications/judgment-summaries/2013/hca58-2013-12-18.pdf>.

18 Division 4A of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) prohibits donations from these entities.

19 Sydney Morning Herald, *Former Newcastle mayor Jeff McCloy's High Court challenge to political donations laws could delay ICAC report*, 19 January 2015, accessed 4 March 2015, <smh.com.au/nsw/former-newcastle-mayor-jeff-mccloys-high-court-challenge-to-political-donations-laws-could-delay-icac-report-20150119-12t9tt.html>.

20 NSW Government Premier and Cabinet website, *Panel of Experts – Political Donations*, accessed 16 March 2015, <dpc.nsw.gov.au/announcements/panel_of_experts_-_political_donations>.

21 Australian Labor Party, *Submission 187*, p. [5].

22 Australian Greens, *Submission 175*, p. [1].

6.39 The tax deductibility of business donations was also raised in evidence to the inquiry. In its submission Family Voice Australia noted that tax deductibility for businesses for donations to political parties was removed in February 2010 and called for that to be reversed:

All contributions and gifts [from businesses] to political parties and to independent candidates and independent members for amounts up to \$1 500 in each income year should be tax deductible... Tax deductibility for such donations by businesses should be restored.²³

Disclosure

6.40 The current disclosure regime across the jurisdictions in Australia is diverse. Federal disclosure requirements differ from those at state level, which can add complexity and confusion for political parties and donors administering and lodging disclosure returns²⁴ and, more broadly, for interested parties attempting to comprehend the various requirements.

6.41 Simple separations, such as the definition of a gift, donation, or what an associated entity entails, can lead to confusion and errors in the way parties, corporations or donors may undertake their disclosure requirements.

6.42 Without exception, the existence of a donation disclosure scheme is supported by political parties. Nonetheless, there are areas of contention and suggestions for reform. Two issues in particular attract differing views – the threshold for donation disclosure and the timing of disclosures.

Threshold for donation disclosure

6.43 The setting of disclosure thresholds necessitates the striking of a balance between safeguarding the political process from undue influence and transparency regarding the source of political donations on the one hand, and, on the other, facilitating participation in the political process by not applying overly onerous disclosure requirements that may discourage financial donations to parties and candidates.

6.44 The Australian Greens submitted:

The current system, which has a very high disclosure threshold currently set at \$12 400, permits substantial areas of funding to

23 Family Voice Australia, *Submission 21*, p. 4.

24 Liberal Party of Australia, *Submission 188*, pp.12-13.

avoid proper scrutiny through the disclosure requirements of the Electoral Act.²⁵

- 6.45 As per their submission to the *Report on the funding of political parties and election campaigns* during the last Parliament, the Australian Labor Party continues to support a \$1 000 disclosure threshold. The Labor Party also supports the recommendation from that report of the Joint Standing Committee on Electoral Matters that CPI indexation of threshold limits should be removed.
- 6.46 In the same *Report on the funding of political parties and election campaigns*, the Coalition noted in its dissenting report that:
- The Coalition does not believe that the Labor, Greens and Independent members of the Committee have successfully argued their case for changes to the current donations system.
- ...
- The Coalition strongly disagrees with a number of the recommendations of this Committee, noting that they pose a significant threat to participatory democracy, where individuals have the right to have their say in a free and open system, free from intimidation.²⁶
- 6.47 The Liberal Party submitted that it is 'is strongly committed to appropriate disclosure of significant donations to political parties'.²⁷
- 6.48 The Committee recognises that views on the threshold vary. However, there is a need for the funding and disclosure regime to keep pace with innovation in fundraising methodology and, in the interests of transparency, ensure that these are fully captured by disclosure regulations.

Timing of disclosure

- 6.49 The timing of the disclosure of donations is also a matter of contention. A number of considerations need to be balanced in this context:
- the principle of openness and transparency in the political system;
 - the right of individual donors to freely participate in the political system without fear of reprisal or undue pressure; and

25 Australian Greens, *Submission 175*, p. [1]. See also GetUp!, *Submission 205*, p. 15.

26 Joint Standing Committee on Electoral Matters (JSCEM) (43rd Parliament), *Report on the funding of political parties and election campaigns*, December 2011, p. 229.

27 Liberal Party, *Submission 188*, p. 12.

- reasonable reporting requirements and the administrative burden placed on political parties and donors – particularly for small parties that can be heavily reliant on volunteers.
- 6.50 Under the current system, ‘registered political parties and their state or territory branches and associated entities must lodge an annual return with the AEC.’²⁸
- 6.51 Election returns in respect of individual elections are required from candidates, unendorsed Senate groups, Senate groups endorsed by more than one registered political party, and those donors making donations to candidates in excess of the disclosure threshold. These returns are due 15 weeks after polling day.²⁹
- 6.52 In the past, some groups have argued for a contemporaneous reporting scheme such as those that exist in some overseas jurisdictions.³⁰ In evidence to this inquiry the Australian Greens, while not specifying a time limit, called for ‘a system for prompt, comprehensive public disclosure for political donations and funding on a public website.’³¹
- 6.53 Labor Party members of the Committee continue to support the recommendations regarding disclosure contained in the Joint Standing Committee on Electoral Matters *Report on the funding of political parties and election campaigns* during the last Parliament. Recommendations 6 and 7 sought to establish a 6-monthly disclosure timeframe and that donations in excess of \$100 000 be reported publicly in a timely manner.
- 6.54 Alternatively, a criticism of a system of contemporaneous disclosure would be that it could potentially conflict with the right for donors to participate in the political system without fear of reprisal or undue pressure, especially if there was awareness of differing levels of donation among donors and recipients. This could also have the potential to place an unreasonable administrative burden on political parties given the sheer volume of donations received during a busy and active campaign period.
- 6.55 The Committee notes that there is nothing to prevent a political party from establishing its own public donation disclosure website, and some parties have chosen to do this.³²

28 AEC, website, *Financial Disclosure overview*, accessed 20 January 2014, <aec.gov.au/Parties_and_Representatives/financial_disclosure/Overview.htm>.

29 *The Commonwealth Electoral Act (The Act)*, Part XX, Division 4.

30 JSCEM (43rd Parliament), *Report on the funding of political parties and election campaigns*, December 2011, p. 65.

31 Australian Greens, *Submission 175*, p. [2].

32 Australian Greens, website, *Donation disclosures*, accessed 20 January 2014, <greens.org.au/disclosure>.

- 6.56 The Committee recognises that the timing for donation disclosures will be an ongoing source of political debate, but notes that all parties submitting to this inquiry on this matter reaffirmed their commitment to a transparent disclosure scheme.

Committee comment

- 6.57 The Committee is conscious of the varied attitudes towards funding and disclosure and is pragmatic about the approach that should be taken to an aspect of electoral law that is influenced by so many different stakeholders.
- 6.58 Calls for spending caps, bans on certain donors and reform of the federal system needs to be informed by what is happening at the state and international levels. In addition, the constitutionality of some suggested reforms such as restrictions on donations from classes of donor is still an uncertain element in Australia and should be carefully considered before any action is taken.
- 6.59 In addition, it seems a sensible proposition that private citizens should have the right to make small, private and tax-deductible donations to a political party of their choosing, without the need for onerous disclosure requirements. Similarly, political parties should not have to undertake multitudinous administrative procedures to maintain disclosure records for every small donation received.
- 6.60 The Committee believes better progress could be made by monitoring the developments in funding methodologies (such as crowd funding), as well as monitoring the conduct of party compliance with disclosure requirements and whether that could, potentially, be linked to eligibility for public funding.
- 6.61 As methods of community engagement rapidly evolve, so will methods of political and election fundraising. It is important for the AEC, as the agency responsible for maintaining the regulatory framework, to be innovative in its thinking so that the adequacy of that framework is assured.
- 6.62 The Committee also acknowledges that during the course of this inquiry the NSW Independent Commission Against Corruption (ICAC) has been inquiring into alleged corrupt conduct. Given the Committee's focus on the events of the 2013 federal election and related issues, and also given that ICAC is yet to conclude certain investigations, the Committee does not consider these matters in this report.
- 6.63 While the Committee received little evidence on disclosures in relation to the 2013 election, as with all issues, the Committee reserves the right to analyse the continuing evolution of political funding and disclosure

regimes during the life of the 44th Parliament. Accordingly, the Committee will continue to monitor this issue as developments come to light.

Appointment of agents

- 6.64 One technical issue reported to the Committee by the AEC concerned unendorsed candidates and Senate groups appointing an agent to fulfil disclosure return obligations. The AEC noted that, as the deadline for the appointment of the agent is the same as for lodging a nomination, a number of candidates missed this deadline, as they may have not been fully aware of the mechanism or the timelines.³³
- 6.65 The AEC proposed that the Electoral Act be amended to extend the deadline for agent nomination in order to allow it to better liaise with new candidates and advise them of this requirement.³⁴
- 6.66 The Committee agrees. There is no reason why the deadline for appointment of an agent should be the same as that for lodging a nomination if this is a contributor to non-compliance for some candidates.

Recommendation 21

The Committee recommends that section 290 of the *Commonwealth Electoral Act 1918* be amended to allow for the deadline for the nomination of candidate agents to be one week after the close of candidate nominations.

Electorate redistribution

- 6.67 All states and territories are divided into House of Representatives electoral Divisions (electorates) based on population. This ensures that representation is based on an equal number of electors in each electorate. This also means that redistributions are required when the population changes; redistributions are also required under certain other circumstances. Redistributions occur when:
- the number of members in the House of Representatives to which a State or Territory is entitled has changed;
 - the number of electors in more than one third of the divisions in a State or one of the divisions in the ACT or Northern Territory deviates from the average divisional enrolment by over 10% for a period of more than two months

33 AEC, *Submission 20.3*, p. 115.

34 AEC, *Submission 20.3*, p. 115.

- a period of seven years has elapsed since the previous redistribution.³⁵
- 6.68 Redistributions are undertaken by committees comprising the Electoral Commissioner, the relevant state's Australian Electoral Officer (AEO), surveyor-general (or equivalent) and the relevant auditor-general.³⁶ The process for redistribution is detailed in the Electoral Act.³⁷
- 6.69 On 13 November 2014, redistributions were announced in Western Australia (WA), NSW and the Australian Capital Territory, with the determination that NSW will reduce by one division to 47 and WA will increase by one to 16.³⁸
- 6.70 The Parliament has no power to reject or amend a proposed redistribution – an important measure to ensure that there can be no political influence or gerrymandering. The Electoral Act contains penalties for persons attempting to improperly influence a member of a redistributions committee.
- 6.71 Redistribution committees take into account the current and proposed enrolment based on population statistics and also give consideration to:
- community interests within the proposed division, including economic, social and regional interests;
 - means of communication and travel within the proposed division;
 - physical features and area of the proposed division; and
 - existing boundaries of divisions in the State or Territory.³⁹
- 6.72 The timetable for making a determination on redistributions is clearly established by the Electoral Act. Firstly:
- Twelve months after the first meeting of the newly elected House of Representatives, the Electoral Commissioner ascertains the population of the Commonwealth (excluding the territories) using the latest official statistics published by the Australian Statistician. The Commissioner then makes a determination of the number of parliamentary representatives to which each state is entitled. A

35 AEC website, accessed 22 October 2014, <aec.gov.au/Electorates/Redistributions/Overview.htm>.

36 The Act, s60(2).

37 The Act, sections 55-78.

38 AEC Media Release, *Determination of membership entitlement to the House of Representatives*, 13 November 2014, accessed 5 December 2014, <aec.gov.au/media/media-releases/2014/11-13.htm>.

39 AEC website, accessed 23 October 2014, <aec.gov.au/Electorates/Redistributions.htm>.

similar exercise is used to calculate the entitlements of the territories.⁴⁰

- 6.73 Public comment must then be sought on the proposed redistribution both during the committee's consideration process and once the proposal is published. Objections are then invited and a final determination must be made as soon as practicable after the closing date for written objections.
- 6.74 This public consultation is an important and influential process. In the case of the 30 July 2010 proposed redistribution in Victoria, the redistribution committee had proposed, amongst other things, the abolition of the Division of Murray. On the basis of public submissions made, solutions were found to a 'substantial number of objections' and the Division of Murray was reinstated.⁴¹
- 6.75 This demonstrates a robust process, and certainly this Committee has received no criticism of the process. Indeed, it was put to the Committee that Australia's low level of enrolment inequality can be attributed to 'Australia probably ha[ving] the best division redistribution rules to strive for division population equality.'⁴²
- 6.76 The Committee received one submission identifying possible changes to the redistribution system:
- Under the current legislation, redistributions are required to be automatically triggered every 7 years, even if they are unnecessary due to stable population patterns. In order to provide more certainly for communities of interest, the Committee may wish to examine whether the automatic triggering of a redistribution instead take place every 10 years.⁴³
- 6.77 The Committee does not propose to recommend any changes to the redistribution process at this point, but may revisit redistribution issues at a later stage.

40 AEC website, accessed 22 October 2014, <aec.gov.au/Electorates/Redistributions/Overview.htm>.

41 AEC, *2010 Redistribution of Victoria into Electoral Divisions*, p. 3, accessed 23 October 2014, <aec.gov.au/Electorates/Redistributions/2010/vic/files/vic-redistribution-report-24122010.pdf>.

42 M. Baalman, *Submission 181*, p. 13.

43 Liberal Party of Australia, *Submission 188*, p. 11.

Political party engagement

- 6.78 The AEC has always upheld a proud history of apolitical, unbiased service to the Australian public and Parliament and, notwithstanding the events of the most recent election, has a good service reputation in Australia and the region.
- 6.79 In the context of interactions between the AEC and political parties, however, matters raised by some political parties in submissions to this inquiry indicated that there is a level of confusion over some of the basic processes relating to party requirements for registration and the election.⁴⁴
- 6.80 The Committee notes that, currently, there is a lack of active engagement between the AEC and political parties on a regular, periodic, or formalised national and state basis outside of legislated requirements. Given the confusion that appears to exist over some processes, this is a gap of some concern.
- 6.81 Political parties, candidates and their representatives or agents are key stakeholders for the AEC. A lack of engagement can lead to a divergence of awareness across parties and candidates regarding changes to legislation and/or process. In the Committee's view, both political parties and the AEC would be well served by a greater level of appropriate engagement with each other.
- 6.82 The Committee acknowledges that the AEC does conduct candidate and scrutineer briefings at election time, as well as publishing handbooks for both of these stakeholder groups. However, these resources are more effective as a 'pull' mechanism given that the intended audiences only engage with them should they wish to.
- 6.83 In contrast, a 'push' mechanism involving the AEC engaging with political party and/or independent candidates, or their representatives or agents, would provide a formal mechanism for engagement and interaction. This would be similar to many other public service stakeholder forums that occur regularly in government business.
- 6.84 Formalised stakeholder engagement forums held at regular intervals (annually, or at appropriate points in each electoral cycle) could facilitate useful information exchange on relevant legislative, policy and procedural matters without compromising the independence and integrity of the AEC.
- 6.85 Such interactions could also assist the AEC in ensuring that the information resources it produces meet the needs of parties, as well as

44 Future Party, *Submission 169*; C Palmer MP, *Submission 92*.

potentially increasing the quality of other stakeholder engagements – for example in relation to funding and disclosure compliance, scrutineer awareness, and candidate knowledge at election time.

- 6.86 The Committee is cognisant that such engagement may not be desirable for all political parties or candidates, but formalising the opportunity would aid in better shared awareness of issues that all stakeholders may have with electoral issues.

Recommendation 22

The Committee recommends that the Australian Electoral Commission hold regular by-invitation forums, at appropriate points in each electoral cycle, with the federal directors and registered officers of political parties in order to achieve improved engagement on relevant legislative, policy and procedural matters.

Legislative changes between the 2010 and 2013 election

- 6.87 A number of changes have been made to the Electoral Act and the *Referendum (Machinery Provisions) Act 1984* (the Referendum Act) since the 2010 federal election. Many of these changes were of significance to the conduct of the 2013 federal election, comprising improvements to electoral procedure, electoral administration and machinery provisions. The most notable changes included:
- the introduction of direct enrolment and direct update of enrolment in 2012; and
 - changes to declaration vote scrutiny and postal voting.⁴⁵
- 6.88 Direct enrolment and update together with postal voting are discussed in Chapters 4 and 5.
- 6.89 While recommendations from the previous Electoral Matters Committee's report on the conduct of the 2010 election⁴⁶ formed the basis for a majority of the legislative changes following the 2010 election, some changes stemmed from other parliamentary committee recommendations and High Court rulings.
- 6.90 These changes were made via seven pieces of legislation introduced during the 43rd Parliament; these are outlined below. Changes made prior

45 AEC, *Submission 20.3*, pp. 34-35.

46 JSCEM (43rd Parliament), June 2011, *The 2010 Federal Election: Report on the conduct of the election and related matters*, Canberra.

to the 2010 election but not implemented until subsequently are also identified.

Legislative changes prior to 2010

- 6.91 A number of administrative measures were enacted during the 42nd Parliament that were not implemented in time for the 2010 election but were in place prior to the 2013 federal election.
- 6.92 The most significant of these changes included:
- the reduction of the provisional enrolment age from 17 to 16 years;
 - the enhancement of enrolment identification requirements for new or change of name applicants;
 - the enhancement of electronic voter support provisions for postal vote applicants;
 - the introduction of specific enrolment provisions for the homeless;
 - clarification of electoral roll access provisions including further access provisions being granted to parliamentarians;
 - specific and expanded authorisation requirements for how-to-vote cards designed to facilitate better understanding for voters and reduce the potential for voters to be misled; and
 - enhanced provisions to reduce the instance of misleading advertising.⁴⁷

Legislative changes in the 43rd Parliament

- 6.93 The *Electoral and Referendum Amendment (Provisional Voting) Act 2011* legislated, in most instances, for the removal of the requirement for proof of identity for people casting a provisional vote.
- 6.94 However, caveats were put in place as part of the scrutiny process to determine the identity of the voter and to ensure the validity of the ballot. These caveats relate particularly to the scrutiny of provisional vote envelopes, and include checking the voter's signature against records; contacting the voter to request proof of identity if the signature check is unable to be conducted; and excluding the vote from scrutiny if the identity of the voter is unable to be verified.
- 6.95 The *Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Act 2011* followed two High Court decisions relating to the rules for the closure of the Roll and voting for incarcerated persons. The Electoral Act and Referendum Act were amended to:

47 AEC, *Commonwealth electoral legislation - changes since the 2010 federal election*, accessed 3 December 2014, <aec.gov.au/Elections/australian_electoral_system/legislation-changes.htm>.

- restore the close of Rolls period to 7 days after the date of the writ for a federal election; [and]
 - reinstate the previous disqualification, for prisoners serving a sentence of imprisonment of 3 years or longer, from voting at a federal election.⁴⁸
- 6.96 As part of this package of reform, the Electoral Act was also amended to allow prisoners serving a sentence of three years or longer to remain on, or be added to, the electoral roll even though they would be disqualified from voting.
- 6.97 The *Electoral and Referendum (Maintaining Address) Act 2012* allowed for the Electoral Commissioner to update an elector's enrolled address, inform the elector of the update, and enable objections to the process. This Act also made consequential amendments among other provisions.
- 6.98 The *Electoral and Referendum (Maintaining Address) Act 2012* did not allow for the direct enrolment of new electors; this was facilitated separately by the *Electoral and Referendum (Protecting Elector Participation) Act 2012*. This Act provided the Electoral Commissioner with the authority to directly enrol new electors on specific grounds, and with full disclosure of intention. The provisions of the *Electoral and Referendum (Protecting Elector Participation) Act 2012*:
- allow the Electoral Commissioner to directly enrol a person if satisfied that the person is entitled to enrolment, has lived at an address for at least one month and the person is not enrolled;
 - require the Electoral Commissioner to inform the person that the Electoral Commissioner is proposing to enrol the person at a particular address;
 - require the Electoral Commissioner to inform the person that the Electoral Commissioner has enrolled the person at a particular address;
 - allow the Electoral Commissioner to admit certain declaration votes to the scrutiny; [and]
 - allow the Electoral Commissioner to enrol certain persons who have cast declaration votes and who had been removed from the roll.⁴⁹
- 6.99 The *Electoral and Referendum Amendment (Improving Electoral Procedure) Act 2013* enacted the following changes partly with the aim of reducing the size of the Senate ballot paper:
-

48 AEC, *Commonwealth electoral legislation - changes since the 2010 federal election*, accessed 3 December 2014, <aec.gov.au/Elections/australian_electoral_system/legislation-changes.htm>.

49 AEC, *Commonwealth electoral legislation - changes since the 2010 federal election*, accessed 3 December 2014, <aec.gov.au/Elections/australian_electoral_system/legislation-changes.htm>.

- [removing] the prescription relating to how postal votes are processed and allow for technological developments over time;
- [increasing] the sum to be deposited by or on behalf of a person nominated as a Senator from \$1000 to \$2000;
- [increasing] the sum to be deposited by or on behalf of a person nominated as a Member of the House of Representatives from \$500 to \$1000;
- [increasing] the number of nominators required by a candidate for the Senate or the House of Representatives who has not been nominated by a registered political party from 50 to 100 electors; [and]
- [requiring] unendorsed candidates for the Senate who have made a request to be grouped to each be nominated by 100 unique electors.⁵⁰

6.100 Despite these changes, the number of nominations received for the 2013 election increased significantly on previous years, meaning that these legislative changes failed to reach the desired outcomes of reducing the size of Senate ballot paper. The AEC acknowledged this in its submission:

Legislative reforms introduced in 2013 that were, in part, designed to address the increasing size of Senate ballot papers (such as increasing nomination deposits and the numbers of nominators required for unendorsed candidates) appear to have been ineffective.⁵¹

- 6.101 The Committee's first interim report on Senate voting practices noted the issue of the cost of nominating a political party and deposits for nominating candidates.⁵²
- 6.102 In its interim report the Committee recommended further measures that should be put in place to address this issue, including the introduction of optional preferential voting, the abolition of individual and group voting tickets, and enhanced party registration requirements.⁵³
- 6.103 These measures, if adopted, should go some way towards addressing any concerns that arise out of increasing candidate numbers. Also, given that deposit amounts doubled prior to the 2013 election, the Committee feels

50 AEC, *Commonwealth electoral legislation - changes since the 2010 federal election*, accessed 3 December 2014, <aec.gov.au/Elections/australian_electoral_system/legislation-changes.htm>.

51 AEC, *Submission 20.3*, p. 29, for statistics see pp. 104-105.

52 JSCEM, May 2014, *Interim report on the inquiry into the conduct of the 2013 federal election senate voting practices*, Canberra, p. 61.

53 JSCEM, May 2014, *Interim report on the inquiry into the conduct of the 2013 federal election senate voting practices*, Canberra.

there is no need to make further recommendations on this issue at this stage.

6.104 Further administrative changes were enacted by the *Electoral and Referendum Amendment (Improving Electoral Administration) Act 2013* in response to events that occurred during the 2010 election. These changes:

- set out the procedures to be followed when a ballot-box is opened prematurely, that is, before the close of the poll, other than in accordance with the relevant provisions of the Electoral Act and Referendum Act;
- [introduced] into the Electoral Act and the Referendum Act a specific offence for an officer that unlawfully interferes with a ballot box;
- [removed] the requirement under the Electoral Act and Referendum Act for an applicant for a pre-poll ordinary vote to complete and sign a certificate;
- [provided] that pre-poll voting cannot commence earlier than 4 days after the date fixed for declaration of nominations for any type of election or by-election;
- commencing on 1 January 2014, [brought] forward the deadline for applications for postal votes by one day from the Thursday before polling day to the Wednesday before polling day;
- [provided] for further fixed periods of time to be provided to the augmented Electoral Commission (as defined in section 70 of the Electoral Act) to complete its inquiries into objections against proposed redistribution of electoral boundaries;
- [amended] the Taxation Administration Act to allow the Commissioner of Taxation and other taxation officers to provide some forms of taxpayer information to the Australian Electoral Commission for the purposes of administering the Electoral Act and Referendum Act; [and]
- [omitted] provisions from the Electoral Act requiring a minimum font size for the authorisation details on How-to-Vote Cards.⁵⁴

6.105 Changes to the Referendum Act were introduced via the *Referendum (Machinery Provisions) Amendment Act 2013* as a direct outcome from the House of Representatives Standing Committee on Legal and Constitutional Affairs report into the machinery of referendums which was tabled in December 2009.⁵⁵

54 AEC, *Commonwealth electoral legislation - changes since the 2010 federal election*, accessed 3 December 2014, <aec.gov.au/Elections/australian_electoral_system/legislation-changes.htm>.

55 Standing Committee on Legal and Constitutional Affairs, December 2009, *A Time for Change: Yes/No? Inquiry into the machinery of referendums*, Canberra.

- 6.106 These changes saw the implementation of a requirement that, in relation to referendums, Yes/No pamphlets be distributed to every household on the electoral roll as opposed to every elector, along with the temporary suspension of the operation of subsection 11(4) relating to limits applied to the capacity of Commonwealth spending for referendums.⁵⁶

Review of the Act/s

- 6.107 As the conduct of this inquiry progressed and submissions and evidence were received on the full range of issues, concerns and events surrounding the 2013 federal election and associated events, it became clear to the Committee that the legislative framework within which the AEC has to operate is flawed.
- 6.108 The legislative history behind the Electoral Act and the Referendum Act is extensive and rich. Successive reforms to electoral process are reflected in both Acts and facilitate the comprehensive electoral process that underpins democracy in Australia today.
- 6.109 However, the extensive list of technical and other amendments that the AEC identifies as necessary suggest that some of the foundational linkages between the roles, entities, activities and powers in the Electoral Act may have been undermined by decades of amendment.⁵⁷ It could be said that there is an unacceptable level of fragmentation within the legislation.
- 6.110 In its submission the AEC outlined some of the issues in this space together with the history of (largely piecemeal) reform efforts since 2001:

As part of the inquiry into the 2001 election, the AEC recommended to the JSCEM that a major review of the Electoral Act was overdue and necessary to rectify the complexities and inconsistencies built up over the previous 20 years. JSCEM had some concerns with the AEC's proposal (see page 210 of the Report). In May 2004, the AEC engaged the law firm Minter Ellison to scope a review of the Electoral Act. Minter Ellison undertook some work during 2004-05, which considered possible amendments to the Electoral Act to make the language more straightforward and accessible. The work undertaken by Minter Ellison did not eventuate into any comprehensive legislative proposal, although elements of the work were reflected in

56 AEC, *Commonwealth electoral legislation - changes since the 2010 federal election*, accessed 3 December 2014, <aec.gov.au/Elections/australian_electoral_system/legislation-changes.htm>.

57 AEC, *Submission 20.3*, pp. 162-164; *Submission 20.6*, pp. 25-27.

subsequent technical and minor amendments proposed by the AEC.

Other than the Referendum Act, the re-drafting proposed by Minter Ellison to the Electoral Act did not affect any other Commonwealth legislation. Since that time the AEC has actively sought to address inconsistencies and errors in the electoral legislation, and update provisions for matters such as changes in technology, by a series of technical and minor amendments to the Electoral Act and the Referendum Act. Since Minter Ellison's work, there has been no further analysis of a wholesale review of these Acts.

In September 2009, the then-Government issued the Electoral Reform Green Paper: Strengthening Australia's Democracy (the Green Paper). The Green Paper noted some issues with the Electoral Act but did not specifically address redrafting the Electoral Act and no comprehensive legislative proposal arose from the Paper.

Finally, in December 2009, the House of Representatives Standing Committee on Legal and Constitutional Affairs recommended that the Australian Government consolidate and harmonise the machinery of referendums provisions with the Electoral Act. At page 68 of the Committee's report attention was drawn to the pitfalls of having separate legislation for the conduct of elections and the conduct of referendums. The amalgamation of the referendum provisions with the provisions in the Electoral Act would necessarily result in substantial amendments to the Electoral Act. In October 2012, the Government responded to the Report and supported recommendation 17. Drafting instructions to implement this recommendation remain in draft form.⁵⁸

- 6.111 Additionally, as the Committee has conducted its inquiry it has become aware of inconsistencies or outdated elements within the Electoral Act, such as:
- the requirement for a person lodging a private objection to another person's enrolment to pay a fee of \$2 (section 115). This requirement would far outweigh the administrative cost of accepting payment;
 - that strict security requirements for handling of ballot-boxes for pre-poll ordinary votes are prescribed in Subdivision C of Division 3 of Part XVA of the Electoral Act, yet there are no such requirements for pre-poll declaration ballot-boxes under Division 4;

58 AEC, *Submission 20.6*, pp. 23-25.

- that a party (the Australian Democrats) that has not been represented federally since 2007 are explicitly catered for in principal agent appointments under Part XX of the Electoral Act; and
 - section 387 provides that electoral matters should be sent free by post, under regulations in force under the *Postal Services Act 1975*. Such regulations have not existed since 1989.
- 6.112 The Committee's own conclusions and recommendations involving legislative change across very diverse matters, both in this report and in its interim reports, themselves indicate some of the broader problems and complexities with the Electoral Act. The potential need for legislative separation of the statutory Australian Electoral Officer role from the senior AEC state manager role, together with the need for clarity and consistency in relation to recount provisions and provisions pertaining to the role of scrutineers, are of note in this context.
- 6.113 It is also necessary to acknowledge the difficulties that legislative inconsistency and fragmentation present for the AEC in discharging its remit.
- 6.114 In view of all of these factors, the Committee believes that a wholesale review of the internal consistency and operational adequacy of the Electoral Act is needed. The Electoral Act needs to be internally consistent; it needs to be cohesive; and it needs to facilitate best practice delivery of elections. This review should take into account past recommendations and reviews outlined by the AEC.
- 6.115 The Committee supports the recommendation of the then House of Representatives Standing Committee on Legal and Constitutional Affairs in its 2009 report on the machinery of referendums regarding consolidation and harmonisation of the referendum machinery provisions in the Referendum Act with the Electoral Act.⁵⁹
- 6.116 The Committee notes that the Government of the day accepted this recommendation, and also notes the AEC's advice that associated drafting instructions have been taken forward to a limited extent. The AEC should consider progressing this work, along with a broad-ranging review of the consistency and adequacy of the Electoral Act in consultation with the

59 Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No? – Inquiry into the Machinery of Referendums*, 2009, pp. 68-69.

Committee. The Committee recognises that such an undertaking would be a long-term project.

Recommendation 23

The Committee recommends that the Australian Electoral Commission consider undertaking, in consultation with the Joint Standing Committee on Electoral Matters, a wholesale review of the internal consistency and operational adequacy of the *Commonwealth Electoral Act 1918* in order to ensure that this Act is a cohesive, effective and contemporary piece of legislation that facilitates best practice election delivery.

Such a review would also need to proceed in tandem with progressing the consolidation and harmonisation of the *Referendum (Machinery Provisions) Act 1984* with the *Commonwealth Electoral Act 1918* so as to create one consolidated Act responsible for federal elections and referenda.

- 6.117 As a final point, the Committee feels that it is important to acknowledge that the recommendations and actions advanced in this report, along with the reform process already underway at the AEC, involve an additional cost. The further work recommended in this report will require additional resourcing, particularly the complex longer-term projects.
- 6.118 Accordingly, the Committee recommends that the Australian Government allocate and prioritise resources to ensure that the implementation of measures recommended by the Committee is adequately funded and supported.

Recommendation 24

The Committee recommends that adequate resourcing be allocated and prioritised to fund and support the implementation of the recommendations contained in this report.

Hon Tony Smith MP

Chair

13 April 2015

