

SUBMISSION TO THE JOINT STANDING COMMITTEE ON ELECTORAL MATTERS - INQUIRY ON THE FUTURE CONDUCT OF ELECTIONS OPERATING DURING TIMES OF EMERGENCY SITUATIONS

Introduction

1. In formulating the observations and recommendations set out below, I draw on some 40 years of study of elections, including a 30 year career as an officer of the AEC in the course of which I did extensive work on amendments to the *Commonwealth Electoral Act 1918* and also managed the AEC's international programs for the better part of 20 years. I have been involved in the organisation, observation and monitoring of elections not only in Australia (Commonwealth and State), but also in Namibia, Cambodia, South Africa, Indonesia, East Timor, Mozambique and (most recently) the Autonomous Region of Bougainville, Papua New Guinea. I am also one of the ACT Co-coordinators of the Electoral Regulation Research Network (ERRN), and a member of the Editorial Board of the *Election Law Journal*.

2. At the invitation of the ERRN's Director, Professor Joo-Cheong Tham of the Melbourne Law School, I prepared earlier this year a detailed Working Paper entitled *Electoral Management under Covid-19*¹. I attached a copy to my submission of 17 September 2020 (now published as submission no. 169) to the Committee's 2019 Federal Election inquiry, and am also attaching a copy to this submission for the Committee's convenience. My key observations and recommendations, which I would invite the Committee to consider, were set out in the Executive Summary at pp. i-iii, and in Part 7 at pp. 42-4. Reflecting on them some five months later, and noting the way in which elections have since been conducted successfully for the House of Representatives division of Eden-Monaro, the Legislative Assemblies of the ACT and the Northern Territory, and two Tasmanian Legislative Council divisions, I see no need at this point to change or revise them; and the recommendations are therefore reiterated at the end of this submission. I would however offer some additional observations on the topics of pre-poll voting, use of electronic certified lists, and legal frameworks.

Pre-poll voting

3. I addressed this topic in my 17 September 2020 submission, as follows.

"I have been particularly prompted to write by recent discussion, including at public hearings of the Committee, of the suggestion that the period allowed for pre-poll voting at federal elections should be cut back. The argument for such a change would appear to have several strands. First, some have expressed concern

¹ Michael Maley, *Electoral Management under Covid-19*, Electoral Regulation Research Network/Democratic Audit of Australia Joint Working Paper Series, Working Paper No. 71 (May 2020), at https://law.unimelb.edu.au/data/assets/pdf_file/0003/3393066/WP71_Maley.pdf.

at the difficulty parties and candidates may face in seeking to deploy supporters at pre-poll voting centres, especially to hand out how-to-vote cards, over a prolonged period. Second, it has been argued that having in effect a polling period rather than a polling day diminishes the deliberative character of the electoral process. Third, it has been noted that a rising number of pre-poll votes imposes a particular burden on the AEC in organising massive pre-poll counting operations on election night with the aim of delivering election results as quickly as possible.

Without necessarily disputing those arguments, I would wish to highlight some contrary points which should be borne in mind.

- First, while the Committee recommended in its report on the 2016 election that pre-poll voting should be limited to the fortnight before polling day, in 2019 86% of pre-poll votes were cast in that period anyway, so such a change by itself would be unlikely to reduce significantly the number of pre-poll votes cast.
- Second, there would be no guarantee that measures to limit pre-poll voting would lead people instead to vote at polling places on election day. Those unable to vote pre-poll might well instead choose to vote by post, given that:
 - the criteria for entitlement to a postal vote are the same as those for a pre-poll vote;
 - the process for applying for a postal vote is especially simple and efficient; and
 - political parties are permitted to distribute postal vote applications, and continue to do so on a significant scale.

Such an increase in postal voting would be undesirable on multiple grounds.

- With postal vote ballot papers typically despatched by the AEC shortly after the close of nominations, many people would still be able to vote well before polling day, which would to some extent defeat the aim of seeking to reinforce the deliberative character of the election.
- Counting of postal votes would potentially continue until 13 days after polling day, which would prolong uncertainty of the result in close seats to a greater extent than would have been the case had the votes in question been cast pre-poll.
- Postal voting is in general a less robust process than pre-poll voting, since postal votes are recorded in an uncontrolled environment, making it more likely that the secrecy of the ballot will be compromised, for example by family pressures....

- Third, and most importantly, in the Covid-19 era an increase (rather than decrease) in opportunities for pre-poll voting has come to be seen as an important policy option for reducing the sort of crowding and queueing on a single polling day which represents the antithesis of social distancing.”

4. The inferiority of postal voting from the perspective of ballot secrecy is explored in more detail in the following two papers, copies of which are attached to this submission:

- Jørgen Elklit and Michael Maley, “Why Ballot Secrecy Still Matters”, *Journal of Democracy*, vol. 30, no. 3, July 2019, pp. 61-75); and
- Michael Maley, *The Secret Ballot in Australia: What does it mean and how secret is it really?*, Panel on “Electoral Integrity and the Quest for Secret Voting”, International Political Science Association World Congress, Brisbane, 21-25 July 2018.

Electronic certified lists

5. For more than ten years now, the AEC has had the option of deploying electronic rather than paper-based lists of voters at polling places; at the 2019 election, over 4500 such devices were used. In a pandemic, the benefits of electronic certified lists are multiplied. They expedite voter flow by speeding up the process of finding the voter’s name and recording that he or she has voted, thereby lessening the length of time which voters may spend in queues. They reduce the paper handling involved in printing, distributing, retrieving (and later scanning) large hardcopy lists. Most importantly, however, they can greatly facilitate contact tracing in the event that a person who voted is later found to have been infectious, as they can record the time at which a person voted, enabling the data to be sorted and searched to identify who else voted at around the same time.

6. I understand that electronic certified lists were used successfully across the board at the Eden-Monaro by-election. The technology is now well consolidated, and the AEC should be funded to deploy it at all polling sites at future federal elections.

Legal frameworks

7. While the Covid-19 pandemic has had massive negative effects on Australian society, it needs to be recognised that its impact on the conduct of elections could have been much worse: infection levels were never allowed to rise to the disastrous ones seen in Europe and the Americas, and the elections held since May did not have to be implemented against a background of uncontrolled community spread.

8. It is worth emphasising that Australia essentially went from normal life at the end of February 2020 to a situation some three weeks later in which returning overseas

travellers were being required to self-quarantine, and restrictions on public activities were rapidly being put in place. The Committee needs to consider whether an electoral process could have continued to be implemented effectively had such public health steps been required after the Parliament had been dissolved, writs for an election had been issued, and the government had gone into caretaker mode.

9. As a general rule, last minute changes to electoral laws and processes are most undesirable, since they can undermine the societal consensus on “the rules of the game” which help to buttress the legitimacy of election outcomes. In emergency situations, however, a failure to modify processes to reflect critical public health requirements could well have an even more dire effect.

10. The *Commonwealth Electoral Act 1918* makes provision for some responses to emergencies - for example by the adjournment of polling - but it has not been designed to cope with emergencies of a nationwide character requiring (comparatively) radical solutions. Such flexibility as exists is largely accidental in character. To give but one example, the Act would permit the AEC to do away with in-person voting if a pandemic were raging, simply by abolishing all polling places. The AEC could not, however, take the logical next step of sending postal ballot papers to all enrolled voters, since at the moment only registered general postal voters are entitled to receive their ballot papers automatically, without making a discrete application.

11. If it be accepted that the Act needs to be reconfigured so as to enable effective responses to be made to worst case scenarios of the type mentioned in paragraph 8, several options could be considered.

- The Act could be amended to permit the making of regulations inconsistent with existing provisions of the Act. Section 392J of Queensland’s *Electoral Act 1992*, inserted shortly before state by-elections held in March 2020, had that effect. Such a regulation-making power could be made contingent on an emergency (appropriately defined) having been formally declared. Such regulations made after the dissolution of the Parliament would not, however, be susceptible to parliamentary scrutiny prior to the election, and there would be a risk that the matters they prescribed could give rise to partisan controversy, which would be undesirable. While unilateral regulation-making by the government might be seen as inconsistent with the spirit of the caretaker conventions, a serious disagreement between the government and opposition over whether or how processes should be modified could have the effect of stalling necessary action while the clock continued ticking.
- Alternatively, the AEC could be empowered to modify processes and procedures, including in ways inconsistent with the Act. Such a power is, for example, conferred on the Chief Electoral Officer of Canada by section 17 of the *Canada Elections Act*. Political players outside the government might well see such an arrangement as less problematical than empowering the government to change electoral processes during an election. One disadvantage of proceeding in this way

is that it would deprive the rules governing the election of the legitimacy which is derived from their being the outcome of the democratic process.

- A third option, which seems to me on balance to be most desirable, would be to empower the AEC in the way just described, but provide, through the Committee's forthcoming report, a clear statement of principles - ideally adopted with across-the-board support - which should guide the AEC in the exercise of such emergency powers. Such a statement might, for example, flag whether priority should be given to expanding pre-poll or postal voting, if a choice had to be made between the two. It could also flag elements of the electoral process which should be seen as non-negotiable, for example, the need for counting to be conducted transparently, using processes which recognised the legitimate rights of scrutineers.

12. In relation to legal frameworks, it should be noted that most of the main public health restrictions responding to the Covid-19 pandemic were implemented through State and Territory laws, regulations and determinations. To the extent that they conflicted with Commonwealth electoral law, they would be at risk of being held to be invalid through the operation of section 109 of the Constitution. It would be most undesirable to go into a federal electoral process with such potential inconsistencies unresolved.

13. Finally, as noted in my ERRN Working Paper, out-of-country voting by Australians will be subject to the public health regulations applicable in a voter's locality, which might well make it difficult or impossible for a voter to attend an Australian diplomatic mission to vote. This would be a particular problem in countries (such as, for example East Timor) where there is only a very limited local postal service.

Reiteration of recommendations

14. I would reiterate the following recommendations, which are explored in greater detail in my ERRN Working Paper.

- Prescribed timetables for elections should in general be extended, to provide the AEC with an enhanced capacity to respond to any disruptions which may occur.
- The AEC should be empowered to implement different voting modalities in different parts of the country, depending on the local public health situation.
- The AEC should ensure that it has contingency plans in place to cover the possibility that key staff could fall ill at a critical time, possibly requiring everyone working in a particular office or team to be quarantined. If a vaccine becomes available, such plans could include the provision of subsidised vaccinations to all staff.

- Provision should be made for enrolment on polling day, to ensure that people whose opportunities to enrol may have been disrupted by the pandemic can still vote.
- If a candidate at a general election for the House of Representatives dies, giving rise to a need for a later supplementary election in the affected electoral division, the relevant laws should make it possible for the Senate polling in the division to be postponed until the date of the supplementary election.
- Rules governing campaigning near polling places should be reviewed and amended to enforce social distancing. Such amendments could encompass changed mechanisms for the provision of how-to-vote cards (where that is already permitted).
- Options which can be considered for making polling safer include encouraging pre-poll and postal voting; improved processes for attendance voting; the automatic despatch of postal ballots to all voters; and even internet voting (should no other voting modality be feasible).
- At the federal level, the electronically assisted voting method for which provision is made in Part XVB of the Commonwealth Electoral Act 1918, recently extended to Antarctic voters, should also be made available to persons in quarantine or self-isolation.
- Electronic certified lists of voters should replace paper lists, not just because they speed up the polling process, but also because they can be configured to facilitate contact tracing by recording the time at which each person votes.