

Polling place offences

Introduction

- 3.1 During the examination of the events in the division of Lindsay, questions were raised about the powers of the Australian Electoral Commission (AEC) to deal with polling booth offences.
- 3.2 During hearings the committee canvassed the possibility of the AEC being given powers to issue on-the-spot fines for certain polling booth offences. This chapter outlines the current arrangements covering polling place offences, and discusses the adequacy of the AEC's existing powers to deal with these offences. In the light of this information, the committee examines the need and merits of introducing an infringement notice scheme.

Polling place offences – types and current penalties

- 3.3 The AEC provides guidance on polling place offences in its reference publication, *Electoral backgrounder No. 20* (EB No. 20).¹ Electoral backgrounders are published by the AEC to provide a basic introduction to electoral law, policy and procedures. All persons performing political functions at polling places should be aware of the information covered in EB No. 20 which is reproduced in full at **Appendix J**.
- 3.4 The range of polling place offences discussed in EB No. 20 include:

1 Australian Electoral Commission, *Electoral Backgrounder No. 20*, October 2007, www.aec.gov.au/About_AEC/Publications/Backgrounders/index.htm.

- Compulsory voting
- Influencing the votes of hospital patients or residents of nursing homes
- Bribery
- Interference with political liberty
- Printing and publication of electoral handbills, pamphlets or posters
- Misleading or deceptive publications
- Depiction of certain electoral matter
- General offences in relation to ballot papers
- Canvassing near polling booths
- Displaying badges or emblems of candidates in polling booths
- Leaving how-to-vote cards in polling booths
- Making false statements to voters about enrolment
- Unlawfully marking ballot papers
- Disobeying lawful directions of the person in charge of the premises
- Officers and scrutineers to observe secrecy
- Scrutineers influencing or communicating with voters in polling booths

3.5 If a person is in breach of the provision in the Act then any or all of the following actions may be taken:

- **Removal from the premises** – Section 348 provides that where a person commits misconduct in a polling booth, counting centre or a early voting centre, the person in charge of the premises may direct that person to leave the premises or have the person removed from the premises.
- **Injunctions** – Section 383 of the Act provides that the Federal Court may grant an injunction to (amongst other things) prohibit a person from engaging in conduct that constitutes a contravention of the law in relation to elections.
- The AEC and candidates in the election may make an application for an injunction to the Federal Court. If the AEC is informed or becomes aware that a person may have committed an offence, the AEC determines whether it is appropriate in the circumstances to apply for an injunction. The Federal Court is able to order injunctions at short notice on election day.

- If an injunction is granted against a person, failure to comply with the injunction order may constitute contempt of court, for which the Federal Court can order arrest and detention.
- **Prosecutions** - When the AEC becomes aware of a person engaging in activity that may constitute a breach of an offence provision, the AEC may refer the matter to the Australian Federal Police (AFP) for investigation. The AFP may then refer the matter to the Commonwealth Director of Public Prosecutions for consideration, in accordance with the *Commonwealth Prosecution Policy*, as to whether a prosecution is initiated.²

3.6 During the hearing, the type of polling place offence which was the focus of attention was ‘canvassing near polling booths’. Section 340 of the CEA provides that the following acts are, on polling day, and on all days to which the polling is adjourned, prohibited at an entrance of or within a polling booth, or in an public or private place within 6 metres of an entrance of a polling booth:

- Canvassing for votes
- Soliciting the vote of any elector
- Inducing any elector not to vote for any particular candidate
- Inducing any elector not to vote at the election
- Exhibiting any notice or sign (other than an official notice) relating to the election.

3.7 A person found guilty of these offences may be fined up to \$500.

3.8 EB No. 20 states that ‘if a person is engaging in any of the activities listed above and is using a loudspeaker, broadcasting equipment or other sound amplifier-type equipment, then if the activity is audible within a polling booth or within six metres from the entrance to the polling booth, the person is guilty of an offence.’³ A person found guilty of this offence may be fined up to \$550. It should be noted that the AEC, in its submission to the inquiry, stated:

The effectiveness of the existing offence provisions in the Electoral Act is difficult to assess. One of the reasons for this is that the AEC does not have any systems in place to capture or record all alleged breaches of the requirements of the Electoral Act. This is

2 Australian Electoral Commission, *Electoral backgrounder No. 20*, p. 5.

3 Australian Electoral Commission, *Electoral backgrounder No. 20*, p. 3.

particularly the case on polling day when the AEC staff (which includes both Public Service Act employees and temporary staff engaged under section 35 of the Electoral Act) are primarily engaged in the conduct of the election at polling places and then undertaking the count. These AEC staff complete incident reports forms which are forwarded to the Divisional offices of the AEC after the completion of the count. However, the AEC does not have any systemic approach to capturing all of the reported incidents.⁴

- 3.9 The AEC advised that it does have a document entitled A Protocol for Escalating/Issues/Complaints 'which is based on the AEC's experience that **most complaints involving the conduct at polling places are handled promptly and effectively by the Officers in Charge of the Polling Place and then the Divisional Returning Officers (DRO)**'.⁵ The AEC explained what occurs after the level of the DRO:

If a complaint is not resolved at this level, it is then referred to the Australian Electoral Officer for the particular State or Territory. If the complaint cannot be resolved at this level, it is then referred to the AEC's Chief Legal Officer and the Deputy Electoral Commissioner for action. The AEC has previously published information about the numbers of complaints that were escalated under this Protocol in the lead up to an election.⁶

The case for an infringement notice scheme

- 3.10 No evidence has been provided to the committee that there is an increasing trend in polling booth offences or that the current powers available to the AEC need to be enhanced. The committee raised this matter unilaterally and has sought information from witnesses as to the merits of modifying the current arrangements.
- 3.11 The AEC has not identified any problems with the current arrangements. The AEC, however, notes that there are administrative issues relating to training and delegation that would need to be carefully thought out if new arrangements were introduced.

4 Australian Electoral Commission, *Submission 3A*, p. 3.

5 Australian Electoral Commission, *Submission 3A*, p. 3.

6 Australian Electoral Commission, *Submission 3A*, p. 3.

- 3.12 The AEC advised that for a federal election, there are almost 7 700 polling stations around Australia. Almost 60 000 temporary staff are employed, 'and many of them are engaged with only a short period of training prior to being polling place officials.'⁷
- 3.13 If an infringement notice scheme was introduced, the examination focused on what level the AEC official would need to be to issue the fine. Mr Luke Foley noted that 'we would have no objection to an on-the-spot fine, but I would contend that the DRO would be the appropriate person.'⁸
- 3.14 There is a permanent DRO in each division who is responsible for electoral administration – including maintenance of the electoral roll and preparations for the conduct of the next electoral event – in that division. The AEC stated:
- Clearly, if an infringement notice scheme were to be introduced in relation to polling place offences, we would have to restrict it somehow to either the divisional returning officer or the officer in charge of the polling place. They have lots of other duties to do. We would not want it to be exercised by any officer who was exercising powers and duties on behalf of the Electoral Commission at a polling place.⁹
- 3.15 One of the key points in relation to the debate about the possible introduction of on-the-spot fines for polling booth offences is whether there is the need. The AEC has not identified significant problems with the current arrangements. The AEC in its submission to the inquiry commented that while it would have no objections to giving senior AEC officers the power to issue penalty notices, the 'AEC would not support this power being given to all AEC staff (including polling place officials). The AEC set out the following reasons for this position:
- On polling day DROs and other AEC staff are primarily focussed on the conduct the conduct of the poll and to add this additional task would be an have the potential to divert them from that primary task and to become embroiled in party political disputes;
 - On polling day the AEC staff include over 60 000 polling place officials who have received limited training. To confer such a significant power on those AEC staff could result in a lack of consistent decision-making

7 Mr Paul Pirani, Chief Legal Officer, Australian Electoral Commission, *Transcript T2*, p. 4.

8 Mr Luke Foley, Assistant General Secretary, Australian Labor Party, NSW Branch, *Transcript T1*, p. 27.

9 Mr Paul Pirani, Chief Legal Officer, Australian Electoral Commission, *Transcript T2*, p. 4.

and would undermine the existing Escalation Protocol which has proven to be successful in handling polling place disputes.

- While some polling place offences merely involve clear questions of fact (e.g. whether or not an “electoral advertisement” contains the necessary authorisation details as required by section 328 of the Electoral Act) some other offences involve more complex issues and the application of case law (e.g. matter that is likely to mislead or deceive an elector in relation to the casting of a vote in breach of section 329). To have such judgements made by DROs or temporary AEC staff would be of concern and would have the potential to create administrative difficulties (including additional costs for training and the creation of systems to record and recover any fines imposed); and
- The main task faced by the AEC is to ensure a breach of the Electoral Act is resolved quickly and effectively. If a person fails to take the appropriate action to remedy any action that is in breach of the Act, then the issuing of an on-the-spot fine or penalty notice does not ensure that the unlawful action ceases and resort would need to be had to the injunction power contained in section 383 of the Electoral Act. Decisions on section 383 matters are made by the Chief Legal Officer and the Deputy Electoral Commissioner as they involve the expenditure of significant amounts of public moneys on legal representation.¹⁰

Conclusions

- 3.16 The matter of the Australian Electoral Commission being given the power to issue on-the-spot fines for polling place offences was raised as a side issue to the larger debate about the adequacy of penalties in the Electoral Act and the abuses under section 328. The AEC advised that **most complaints involving the conduct at polling places are handled promptly and effectively by the Officers in Charge of the Polling Place and then the Divisional Returning Officers**. In addition, the AEC has set out a range of persuasive administrative reasons for not providing all AEC officers with the power to issue on-the-spot fines and penalty notices.
- 3.17 The committee has not been provided with any persuasive reasons for changing the current AEC practices for dealing with polling place offences. However, the committee does support the need for the AEC at the next federal election to record all polling booth offences that are reported, the actions that were taken and provide an appraisal of the
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¹⁰ Australian Electoral Commission, *Submission 3A*, pp. 3-4.

adequacy of their powers under the Electoral Act to deal with polling place offences. The AEC should provide this report as part of its submission to the committee's inquiry into the next federal election which is likely to be in 2010.

Recommendation 3

- 3.18 **The committee recommends that the Australian Electoral Commission should, at the next federal election, record all polling booth offences that are reported, the actions that were taken and provide an appraisal of the adequacy of the powers under the *Commonwealth Electoral Act 1918* to deal with polling place offences.**

Daryl Melham
Chair
15 March 2010