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The Secretary
Joint Standing Committee on Electoral Matters
Parliament House
Canberra ACT 2600

Dear Secretary

Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto

Thank you for the opportunity to make a submission. This submission is based upon two recent publications by us: 'Australian Electoral Law: Free and Fair?' (2004) 32 *Federal Law Review* 365 and 'The Australian Diaspora and the Right to Vote' (2004) 32 *University of Western Australia Law Review* 1.

The history of the Australian electoral system is largely a story of experimentation and change. Australia pioneered numerous voting methods and led the world in achieving 'free and fair' elections. The law has had an important role to play in this. A flexible system of law has accommodated, rather than hindered, innovation and has also ensured public confidence in the process. This has enabled Australia to be a leader in electoral governance.

It is not surprising that many would proclaim the virtues of the system of Australian electoral law. However, the modern era has seen less vitality in the Australian electoral system. While other nations are moving forward with initiatives such as major electoral reviews, computerisation, experimentation with new registration methods, tough campaign finance laws and clear laws regulating political advertising, Australia seems to be resting on its laurels. This is not to suggest that a revolution is needed. Indeed, the electoral system retains its core strength. However, Australia has a long tradition of innovation in electoral law and a revitalisation of the system may be in order once again.

Many areas could be studied for potential improvement. We address four: voting technology, political advertising, political funding and overseas voting.

Voting technology

The electoral process of registering voters, generating ballots, and casting and counting votes are increasingly becoming automated in many nations, with electronic machines replacing humans in many areas of the electoral process. The use of computers to make voting more accessible and vote counting faster and more reliable is a natural extension of the burgeoning technology. Moreover, a perfected computerised system is a more secure, cost effective,

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efficient, convenient, environmentally friendly way to vote. Even the AEC, while not at the forefront of activity in the area, sponsored a study on the issue in 2001 and again in 2002.

Another reason many nations are introducing computerised voting, and perhaps the central reason why Australia should further investigate such possibilities, is for its ability to grant the secret ballot to voters unable to vote without assistance under traditional voting methods. This group of voters (special needs voters) comprises a substantial, yet indeterminate number of all voters, and includes disabled voters with impaired vision or limited arm movements as well as illiterate voters and those voters from non-English speaking backgrounds who may not feel comfortable reading or writing in English. These voters are at present given the option of either voting with assistance at the polling station (s 234 of the *Commonwealth Electoral Act 1918* (Cth)) or registering as a General Postal Voter ('GPV') and having election materials and a paper ballot sent to their home through the post (ss 184A, 186 of the *CEA*). Neither option is acceptable.

Voting with assistance at the polling station means that voters are denied the rights and protections associated with the secret ballot. In addition, voters can feel that being forced to tell someone else their vote is degrading and violates the spirit of the secret ballot. Voting as a GPV is also unworkable for many as the election materials and ballot paper are only available and posted in print form. Blind, limited arm movement and illiterate voters are reminded again of their dependency by being forced to rely on others, in effect, to vote for them. In addition, having disabled and illiterate voters voting by post segregates them from the rest of the voting public on polling day and excludes them from receiving polling day literature (such as how-to-vote cards) or from considering late-breaking political developments. To many Australians, the act of voting at the ballot box is an ingrained part of the election process. Special needs voters should not be excluded from this.

While we do not assert that the ballots of special needs voters are being recorded against their wishes, the very fact that the system relies on and trusts a polling volunteer or friend of the voter to accurately and honestly mark the ballots and record the votes of assisted voters can spark fear, or at least doubt, in the minds of some. These concerns were raised by a number of submissions to the JSCEM in 2001, including one (no. 108) from Barry Wakelin MP, Federal Member for Grey. In response, the AEC responded (in submission no. 174) with a one-sentence reply 'absolutely refut[ing] the implication ... that polling staff who assist voters are encouraging voters to vote in a particular way'. This may well be correct, but it does not remove the need to examine how the law could be changed to enable new technologies to enable more electors to vote in secret. Both the JSCEM Report on the 2001 federal election and the JSCEM Report on the 1998 federal election examined this issue. They demonstrate how not everyone in the community is fully satisfied that the assisted voting process is free from encouragement, coercion or corruption.

The fact that some disabled voters are denied their right to vote in secret during our compulsory elections, even though technology exists to allow those voters to vote in secret, may be inconsistent with s 24 of the *Disability Discrimination Act 1992* (Cth), which provides that it is unlawful for a person who provides services, or makes facilities available, to discriminate against another person on the ground of the other person's disability by refusing to provide the other person with those services. It might be argued that the Commonwealth, in providing the service (ie, facilitates voting), in which exists a guarantee of the secret ballot, and by correspondingly denying special needs voters the full service to which other voters are getting (ie, the secret ballot), is in breach of the Act. It is arguable that making facilities available would not 'impose unjustifiable hardship'.

Apart from the issue of ballot access for voters with disabilities, Australia should also follow the lead of the US, UK and several European and South American countries and initiate more studies and trials regarding the possibility of implementing computerised voting to the wider public in general elections. The reason for this recommendation is simple: Australia should stay at the forefront of electoral governance. While the paper voting system has worked, it may not be the best system currently available (whether 'best' is judged by accuracy, cost, administrative ease, etc).

Computerised voting, as with any new system of voting, will also have to be anchored in a carefully drafted legal framework governing the voting process. For that reason, before implementing any new technology into the electoral system on the widespread voting public, electoral laws must be scrutinised and amended in order that the technology complements, rather than contradicts, electoral values. The law must also accommodate the possibility of technological failure. For instance, the US has recently enacted legislation providing that all electronic voting must enable voters to see their vote and have the ability to change it before it is registered, and that print-outs, or audit trails, of the vote be generated in certain circumstances.

Political advertising

Communication through the media is often the most effective way a candidate can present their policies and program to the public. The content and manner of delivery of political advertising during an election campaign calls for reform after every election. The calls for reform are not just from the losing candidate and the media, but also from the JSCEM, which has often included in its reports references to the debate over the scope and method in which political advertising is regulated. The reason for the calls of reform is not difficult to see, as the Australian political advertising regime has been described by noted political scientist Dean Jaensch as 'full of dissembling, half-truths, fudging, questionable statistics and plain, straight lies.'

As more voters are increasingly loosening their ties to particular parties, political advertising becomes the most important means of attempting to sway undecided voters to support a particular party or candidate. In that regard, the regulation of political advertising becomes a major part in the overall system of electoral governance. It impacts on several well-known principles of democracy, including the principle that the electorate possess at least a general knowledge about the voting process, and for what they are casting their vote for. It could be argued that deceptive and deceitful advertising is not upholding the well-held principle of free and fair elections that voters have adequate knowledge of the system and the candidates, since voters can easily be deceived by untruthful advertising and may alter their vote accordingly.

Parliament has largely left political communication unregulated, although s 329(a) of the *Commonwealth Electoral Act 1918* does make false and misleading statements 'in relation to the casting of [an elector's] vote' an offence. In interpreting the section, the High Court in *Evans v Crichton-Brown* (1981) 147 CLR 169 held the section to refer 'to the act of recording or expressing the political judgment which the elector has made rather than to the formation of that judgment'. As a result of the ruling, Parliament enacted s 329(2), which made it an offence to print, authorise or distribute an electoral advertisement containing an untrue or misleading statement. However, due to its alleged unenforceability, the provision was repealed shortly after its passage in 1983. Therefore, only statements relating to how to cast a vote, as opposed to statements intended to induce voters to vote for a particular candidate, are caught under the Act.

This reflects the difficulty in the law ever capturing the elusive concept of 'truth' in political advertising.

By allowing deceptive and misleading advertisements to air, Australia is potentially violating the internationally known standard for 'free and fair' elections. Moreover, it can be argued that the party running the deceptive or misleading advertisement denies the other parties a fair and equal piece of the electoral process. While this argument can be countered by asserting that all parties engage in such deceptive and misleading comment, such a response is unsatisfactory.

Political funding

The current legislative regime on electoral funding and disclosure suffers from a number of problems, including as to its enforceability, scope and capacity to deal with systematic problems in the political and electoral process (such as the potential for corruption and undue influence). These problems are not atypical to Australia, and indeed similar issues have arisen over a long period in jurisdictions such as the United States.

The cost of campaigning continues to be largely driven by the cost of advertising, particularly electronic broadcasting. Laws aimed at achieving transparency, equality and the minimisation of (the appearance) of corruption through donation disclosure, limits and state funding are having mixed success around the world and in some instances seem to be in constant disrepute. In this regard, Australia is no different to other nations, as the challenge of 'money politics' is universal. However, much could be done to tighten up the reins of electoral funding. Australia's laissez-faire approach to campaign finance and advertising laws is troubling for a number of reasons, not the least of which is that it inherently favours major parties. For instance, the fact that Australia allows unlimited donations and no expenditure caps effectively means that the parties can blitz the electorate with advertising similar to what we are used to with corporate ads, such as Coles v Woolworths or Coke v Pepsi. This unfettered advertising frenzy crowds out minor party voices, which cannot attract as much money in donations and therefore cannot afford to spend large amounts on advertising. Moreover, such a system encourages major corporations to hedge their bets and donate to both major political parties, knowing that one of them will form government. The system can thereby marginalise alternative voices.

In this submission we do not make detailed proposals for reform of this regime. Instead, we put forward the following issues that might be considered as part of such a process. First, where a political party receives public money one consequence might be that parties should be required to be accountable to their members and the public and to have transparent processes for resolving matters such as pre-selections and disputes. The privilege of receiving public funding should lead to political parties adopting democratic and transparent internal mechanisms.

Second, and complimenting the above section on political advertising, the receipt of public money by a political party might lead to restrictions on how that money is spent and how political parties generally engage in political advertising. The earlier report of this Committee, *Who Pays the Piper Calls the Tune* (Report No 4 June 1989), identified problems with the rising cost of electronic advertising and the potential for corruption and negative other flow on effects. The public funding mechanism might provide that any party in receipt of public funding cannot engage in electronic advertising. Although the *Political Broadcasts and Political Disclosures Act 1991* (Cth) was struck down by the High Court in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, the Court did not indicate that other schemes regulating electronic advertising will also be unconstitutional. So long as a scheme limiting such advertising did not unfairly benefit the established parties and did not exclude the

contributions of third parties to the political process (such as other political interest groups), such new legislation may well be upheld by the High Court. In this regard, the State assistance to election contestants model used in New Zealand (*Broadcasting Act 1989* (NZ)) might be a useful guide.

Third, the current regime in being based on disclosure could be broadened to not only require disclosure but also to place limits on individual contributions to political parties. In addition, the campaign expenditure disclosure scheme is not sufficient and should be broadened as in other nations to require disclosure of the transactions themselves, not simply of the total expenditure amount. The current disclosure laws on both individuals and parties have not proved sufficient to restricting the scope for undue influence and the potential for corruption. Donation or spending limits are by no means perfect, but they have proved to be a potentially effective regulatory mechanism in other countries such as New Zealand and the United Kingdom.

Campaign finance reform is a major issue in the United States and United Kingdom and, while it is also a major issue in Australia, the nation has not followed their path and sought to improve the electoral funding regime. Reform in Australian is long overdue.

Overseas Voters

The Department of Foreign Affairs has stated that over 800,000 Australians are abroad at any given time. But only 63,000 votes were issued overseas in the 2001 Federal Election. We believe more Australians resident overseas should be voting in the Australian elections. To achieve this, Parliament should consider relaxing the restrictions currently placed on overseas voters. While this could be accomplished in a number of different ways, it might best be achieved through either extending the timeframe for voting rights (similar to the United Kingdom) or by adopting a measure similar to that of New Zealand, whereby an elector would not be disenfranchised so long as that person returned to Australia within a time period. Therefore, as long as an Australian residing overseas would return to Australia (even for a short visit) within a set timeframe, that person would retain their Australian voting rights. However, if an Australian residing overseas did not return to Australia at least once within the set timeframe, then that person would be ineligible to vote. The Committee might again investigate whether a special electorate for overseas voters is needed (as well as constitutional).

We do not suggest that such a change would be easy or cheap to implement. Increasing the number of overseas voters would require at the very least that the Australian Electoral Commission be given sufficient resources to manage the process. Maintaining an accurate and up-to-date electoral roll will be challenging as would the integration of overseas voting with Australia's system of compulsory voting. Nevertheless, recognising and giving effect to the citizenship rights of all Australians is an important and worthy goal.

Yours sincerely

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