

Democratic Audit of Australia

Submission to the Joint Standing Committee on Electoral Matters

Inquiry into the Conduct of the 2007 Federal Election

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1. Introduction

Australia is one of the two oldest continuous, modern, representative democracies in the world. It enjoys a reputation as an electoral innovator with a voting system that is free of the serious corruptions and malpractices which bedevil many other 'democratic' nations and enjoys widespread public confidence. This fact was recognized in the *Economist Intelligence Unit's* 2007 Democracy Index, which ranked Australia eighth of the 27 'full democracies',¹ The United States, by contrast, was ranked seventeenth. This rank, while welcome, does not mean there is no room for improvement and, given our strong democratic history, we should strive to be world's best practice in the areas of electoral law, systems and practice.

2. The Electoral Roll

The Australian Electoral Commission (AEC) estimates the electoral roll to be approximately 93 per cent complete. At the 2007 federal election turnout was about 95 per cent, and 96 per cent of those votes were admitted as formal for the House of Representatives. In other words, 85 per cent of eligible Australians cast a valid vote, a low figure for an electoral system in which enrolment and voting are compulsory. Put another way, just in excess of two million of those eligible to cast a valid vote in 2007 did not do so.²

An inclusive, accurate data set of those eligible to be enrolled is a necessary condition of modern representative democracy. The Australian National Audit Office

¹ http://www.economist.com/media/pdf/DEMOCRACY_INDEX_2007_v3.pdf.

² This does not factor in the special problems posed by the 900 000 'Youth Diaspora'—an issue addressed later in this submission.

has described Australia's electoral roll as being of 'high integrity'³, yet the roll is not keeping pace with population growth.

While the AEC is mandated to remove from the roll those who are not eligible – and by mining data bases such as Centrelink and Australia Post it does so very efficiently – automatic deletion is not mirrored by automatic enrolment. Put bluntly, 'the AEC is getting much better at taking people off the roll, but not at putting them on'.⁴

At present, when the AEC discovers an enrollee has moved address, it deletes the person from the roll and sends a letter and an enrolment form to their new address. Only 30 per cent of these forms are returned completed. (The AEC's Annual Report 2006-07 reported a total of 1.6 million address changes for that year; this does not include those who changed address but did not return an enrolment form). The same data sources that the AEC uses to delete voters from the roll could be used to automatically enrol voters, who would then be advised of the enrolment and invited to correct any inaccuracies.

Recommendations

- That the Commonwealth Electoral Act (CEA) be amended to require the AEC to automatically reinstate those deleted from the roll because of change of address.
- That the CEA be amended to permit the AEC to automatically enroll eligible 18 year olds who can be identified by State Education Department and other data bases.
- That an electronic version of the roll be used at each polling place so that would-be voters can determine immediately where they are enrolled. (The adoption of these first three recommendations would resolve the problems associated with 'provisional votes', of which only 14 per cent were admitted to the House count in 2007.)
- That the current (post-2006) proof of identity requirements to enroll be removed.
- That the current *enroll to vote* form be significantly simplified—removal of the ID requirements will facilitate this.
- That enrolment online be permitted. This is particularly important for young citizens.

³ Australian National Audit Office, *The Integrity of the Electoral Roll*, Canberra, 2002, p 11.

⁴ Peter Brent. 'Time to introduce automatic enrolment in Australia', Democratic Audit of Australia, *Discussion Paper 3/08*, February 2008, p 3.

- That an automatic enrolment system, which utilizes modern data base management practices and information technology be developed to create an inclusive, highly accurate and fraud-proof roll.

3. Roll Closure

The current roll is required to 'close' to allow sufficient time to print the Certified List of Voters used at polling places on election day and for pre-polls. A move to a fully electronic roll, rather than the current paper-based one, would remove the need for roll closure and permit enrolment as late as election day, as already occurs in countries such as Canada and New Zealand and some states of the United States.

Recommendations

- That, as a minimum and interim measure, the 'period of grace' which (before 2006) permitted new enrolments and updates for seven days after the issue of the writ be reinstated.
- That the issue of the date of roll closure be canvassed in the government's proposed Green Paper reform process

4. The Franchise

Our recommendations concerning the definition of the franchise come under five headings:

Uniformity for parliamentary elections

A uniform franchise for state, territory and federal electoral enrolment is desirable on at least two pragmatic grounds. One is ease of joint roll maintenance. The other is to promote public understanding of their voting entitlements. Given the importance of an inclusive franchise, uniformity must be on the basis of the 'highest common denominator' rather than compromise down.

Prisoners

The High Court decision in *Roach v Electoral Commissioner (2007)* was welcome on two grounds: for the first time it recognised an (implied) constitutional entrenchment

of a universal adult franchise – albeit subject to ‘proportionate’ exclusions through legislation; more particularly, it protected the right to vote of ‘short term’ prisoners.

As a consequence of the ruling, the parliament’s 2006 complete ban on convicted prisoners voting at federal elections was overturned. Prisoner enfranchisement defaulted to the prior law (ie disenfranchisement during a sentence of three years or more).

Prisoner enfranchisement has been treated as a political football. Prisoners who are citizens of full capacity to vote should be enfranchised (indeed this is the trend in comparable countries, eg Canada and New Zealand). This fits the logic of compulsory voting and of the sentencing purpose of rehabilitation. Arguments against prisoner voting are essentially symbolic (harking to discredited notions of ‘civil death’ or abstract ideas of the ‘social contract’).

Recommendations

- That prisoner disenfranchisement be abolished.
- To help overcome concerns that not all prison authorities facilitate prisoner polling, the attention of state corrections ministers and officials be drawn to S 327(1) of the CEA.⁵

Expatriate Voting

This topic has been on the agenda of the JSCEM for many years. Over time, the entitlement to be enrolled as an ‘eligible overseas elector’ has been liberalised, both in terms of definitions and administrative hurdles. However, the liberalisation has not been back-dated. This has created several classes of expatriates, depending on date of departure, and led to a situation where relatively few citizens abroad are able to exercise the franchise.⁶

We do not wish to offer a detailed position on this matter. In general, however:

⁵ S 327 (1) ‘a person shall not hinder or interfere with the free exercise or performance, by any other person, of any political right or duty that is relevant to an election under this Act Penalty: \$1,000 or imprisonment for six months or both’

⁶ See Graeme Orr, ‘Citizenship, Interests, Community and Expression: Expatriate Voting Rights in Australian Elections’ in Kim Rubenstein (ed), *Law and Policy Papers (Cosmopolitan Citizenship: Legal Issues for the EU and Australia* (working title), Federation Press, in press, 2008).

- We support the efforts of the Southern Cross Group to achieve an equality of treatment between existing expatriates, regardless of whether they left Australia under more restrictive or more liberal definitions and administrative processes.⁷
- We do not support a completely open system: one that would allow citizens abroad to enrol or remain on the roll indefinitely without showing any ongoing connection. (Among other things, given that permanent residents of Australia, who typically have intimate community connections, have no right to vote, it would be strange to have a purely open ended expatriate franchise). A requirement to formally renew one's desire to remain enrolled and re-declare an intention to return sometime in the future, or the act of exercising the vote once in a three year cycle, is a reasonable expectation to remain on the roll.

Exclusion of those of 'unsound mind'

This disqualification is neither defined in the legislation nor by common law decision. Electoral commissions are left to rely on medical or other evidence, adduced ad hoc, typically by relatives or carers.

On its face, some exclusion may be justified, either because compulsory voting may be a burden to some with intellectual/mental disabilities, or out of concern that the votes of those with serious intellectual/mental dependency may be exercised by their relatives/carers without regard to the vote holders' wishes.

But besides being unduly vague, the term 'unsound mind' may have offensive connotations. It also leaves some vulnerable citizens at the mercy of permanent disenfranchisement at the hands of their relatives/carers. This may be a particular issue in relation to younger people. It also tends to assume a static model of mental health impairment, whereas many people experience periods of greater and lesser (or nil) impairment.

We support the principle of universal and compulsory enrolment, which has long underpinned Australia's franchise. This should apply to all citizens, and not exclude a class defined over-broadly and over-vaguely defined according to what may not be a permanently severe impairment.

Compulsory enrolment is also a feature of New Zealand's system. In New Zealand, the rule is clear: only persons detained under the *Mental Health (Compulsory*

⁷ Southern Cross Group, *Primary Submission to JSCEM Inquiry Into Civics and Electoral Education*, 19 June 2006.

Assessment and Treatment) Act 1992 (NZ) are denied enrolment – although they can enrol immediately upon their release (*Electoral Act (NZ)* section 80(1)(c)).

Recommendations

- That a similarly narrow disqualification to that of NZ be enacted in Australia, with reference to equivalent ‘certification’ under the relevant mental health legislation.
- That the Electoral Commissions retain the discretion to accept as a ‘reasonable excuse’ for failure to vote, a letter from an elector or their relative/carer (with or without some evidence from a medical professional) stating that the elector was impaired by mental illness or intellectual disability on polling day. In doing so, we would simply be treating such issues as on a par with any other medical or emotional condition. The Commissions could also be empowered to keep a register of those electors for whom there is medical evidence of indefinite/permanent intellectual impairment, to whom no ‘show cause’ notice need be sent.
- That the Commissions should be funded to undertake a programme of educating those concerned about these enhanced rights and expectations, through disability support groups, for example.

Permanent Residents and Citizenship

Currently only Australian citizens and a small number of British subjects who were on the roll (and ‘re-enrolled’) prior to Australia Day 1984 are entitled to be enrolled and to vote. Some countries, for example, New Zealand, do permit permanent residents (‘resident aliens’) to vote under various conditions.⁸

Since 2005 the hurdles for permanent residents seeking Australian citizenship have been raised: the period of required residency has been doubled from two years to four; and a ‘Citizenship Test’ imposed. Of course, the higher the hurdles for citizenship, the fewer people will be on the roll and be able to vote.

Recommendations

- That, while citizenship remains a necessary condition for such a fundamental civil right as voting, the path to citizenship should be clear and non-discriminatory, with barriers restricted to the truly necessary and no more.

⁸ See David C Earnest, ‘Voting Rights for Resident Aliens: A Comparison of 25 Democracies’, *Northeast Political Science Association Conference*, 7 November 2003.

- That serious consideration be given to permitting permanent residents (under certain conditions) to enroll, as is the case in New Zealand and is currently being adopted in Ireland.

5. Informal voting

While it is true that the percentage of informal House votes declined in 2007 (3.95 per cent) compared to 2004 (5.18 per cent), this was still the fifth highest on record. Informal voting levels have never really recovered from the spike experienced in 1984 which was a by-product of the introduction of 'above the line' voting for the Senate. The later adoption of optional preferential voting in NSW and Queensland exacerbated the problem. AEC research suggests that approximately 50 per cent of all informal ballots are unintentional.

Recommendations

- That consideration be given to adopting OPV for the House of Representatives and for the 'below the line' Senate ballot.
- As an alternative to OPV, that a version of the 'savings' provision that was in the CEA from 1983 to 1998 be reinstated.⁹

6. Funding and disclosure

The regulation of 'political money' is one of the most complex, controversial and seemingly intractable problems currently on the Australian political agenda. The issues have been extensively canvassed in successive JSCER/JSCEM inquiries and reports and elsewhere since 1983 and we do not intend to take up the Committee's time with a lengthy recapitulation.¹⁰ We wish, however, to make a number of recommendations which we could elaborate on at Hearings.

Impoverishing the political parties would harm representative democracy; parties need income to maintain their administrations and discharge their important functions both during and between elections. Because of the fungibility of money, all funding and disclosure (FAD) regimes will have loopholes and it would be counter-productive to attempt to close all of them. Australia's FAD scheme should be based on firm

⁹ *Electoral Newsfile*, No. 72, August 1998, p 3.

¹⁰ See for a discussion of the problems: Sally Young and Joo-Cheong Tham, *Political finance in Australia: a skewed and secret system*, Democratic Audit of Australia, Report No.7, Canberra, 2006.

principles and not be over-burdened with administrative or regulatory detail. (We concede that achieving the latter will be a challenge).

Recommendations

- That, to facilitate the implementation of reforms listed below, the CEA be amended so that the House of Representatives has a fixed election date – say the first Saturday in December in the third year of an electoral cycle. This will allow the declaration of an ‘election period’ unrelated to the issue of the writ. (This does not require constitutional amendment, but would need to anticipate s 57 dissolutions – which are relatively rare – and the Governor General’s reserve powers – though the latter has been exercised only once since 1901). Liaison with those states that already have fixed-date elections will be necessary.
- That, if the fixed-date recommendation is not accepted, the ‘election period’ could be nominated as the 26 weeks prior to the cessation of the House of Representative’s term (s 28 of the constitution).
- That the Commonwealth adopt modern practice, which has been to extend parliaments to four-year terms – as all Australian jurisdictions, apart from the Commonwealth and Queensland, have done in the past few decades. The benefits of longer terms are many, including improved policy-making and business confidence, and the reduced cost of elections.¹¹ Although this change would require constitutional amendments, and raises issues regarding the length of Senate terms, we recommend that the introduction of four-year terms should be set as a goal.
- That, in order to achieve maximum transparency of the original source of political donations, the CEA be amended to provide for an internet-based, graduated¹², in-time accounting system of disclosure similar to that used successfully by the New York City Campaign Finance Board for many years, and that the obligations to disclose extend to parties, candidates and third-party campaign entities.

¹¹ JSCEM 2004 election report, p.166.

¹² Under the NY scheme the requirement for disclosure becomes more frequent closer to the election date. See <http://www.nyccfb.info>.

- That, given the adoption of the NY Model, we recommend that all campaign donations to parties, candidates and third parties of \$50 and above be required to be disclosed.
- That, to slow the 'arms race' of fund raising by the major political parties, restrictions be placed on TV advertisements by political parties, candidates and third parties during the identified 'election period'. This can be done in ways which will not fall foul of the 'implied right of political communication' identified by the High Court in the 1992 *Australian Capital Television Case*.
- That donations to political parties and associated entities from corporations and trade unions not be permitted and that attempts at 'smurfing' (ie the splitting of large donations among directors, employees, members etc) attract appropriate penalties.
- That non-citizens usually resident abroad not be permitted to make political donations – though we note that this is little more than symbolic because it can easily be circumvented by the use of local agents.
- To encourage grass roots donating, we recommend very limited tax deductibility.
- That donations from individuals to registered political parties be limited to \$1 000 per annum and \$1 000 per annum to individual candidates.
- That the current loophole in the CEA whereby the federal, state and territory divisions of registered political parties are treated as separate legal entities be closed.
- That there should be the highest degree of uniformity of FAD regimes across federal, state and territory jurisdictions by way of mirror legislation. To achieve this, and to cover local government elections, we recommend that the matter be referred to COAG.
- That, while recognizing that it has not achieved the 1983 stated goal of restraining excessive campaign expenditure, a level of public funding of parties and candidates be retained. To abolish it would disproportionately impact on minor parties and Independents.

- That public funding should be retained as an automatic entitlement for parties and candidates achieving at least 4% of the primary vote.
- If a change to the administration of the public funding system—based on the production of receipts—is deemed necessary to prevent ‘profiteering’, allowable receipts should include administrative (ie office rental and wages) as well as direct campaign costs.
- Where a candidate/party’s funding entitlement is greater than its expenditure, the difference could be initially withheld to made available should the candidate/party contest the following federal election.
- That the banning of all private donations *not* be replaced by complete public funding of election campaigns. The first may be unconstitutional and the second raises the question as to how much the taxpayer should contribute to political parties, which then transfer most of the public funds received to private corporations such as advertising agencies and media organizations.
- That a Campaign Funding Authority be created to regulate the FAD regime – see below.

7. Electoral administration

Review of the *Commonwealth Electoral Act 1918*

All other Australian jurisdictions have refreshed their electoral legislation in the past couple of decades. While the CEA is regularly amended and updated, there is a need for it to be overhauled to incorporate modern electoral practices. Also the Act could be drafted in more logical sequence. A review of the Act could also be a vehicle towards greater uniformity (where desirable) and efficiency in electoral administration among Australian jurisdictions.

A review process could be tasked to an organisation such as the Electoral Council of Australia and , and would include issuing a discussion paper as part of a public consultation process. The review should be treated as a separate process to the progress of other electoral reform agendas that the government or JSCEM may propose.

Recommendation

- That a comprehensive review of the *Commonwealth Electoral Act 1918* be initiated.

Electoral Commissioner Appointments

Length of tenure – Currently Commissioners are appointed for five years, although appointments of up to seven years are allowed.¹³ This means that the experience gained by a Commissioner being responsible for one general election is then often lost by the time the next election comes around. Other Australian jurisdictions appoint commissioners for periods up to 10 years (NSW, Victoria) or in the case of South Australia, to the age of 65.

Mandatory longer-term appointments, ideally for seven to ten years, for the Commonwealth Commissioner, would also provide a greater degree of independence for the Commissioner.

Recommendation

- That the CEA be amended to ensure Commissioner appointments are for a minimum seven year term.

Selection process – The current practice of appointing commissioners in the absence of consultation with other parties and Independents, is outdated and currently remains only in the Commonwealth, NSW and Victorian jurisdictions.¹⁴ Two jurisdictions (South Australia and Queensland) engage parliamentary committees in the selection process, while the remaining jurisdictions require the government to consult with parliamentary parties, Independents and/or presiding officers prior to making an appointment.

A formal consultative process prior to appointment would also do away with perceptions of partisanship that has been levelled at Commonwealth commissioners on occasion in recent times.

Recommendation

¹³ The first Commissioner, Professor Colin A Hughes, was appointed for seven years (however, he resigned after five years). All subsequent appointments have been for five years.

¹⁴ Victoria's Public Accounts and Estimates Committee has recommended that the Electoral Commissioner should be appointed by a resolution of both houses of parliament, following a recommendation from the appropriate parliamentary committee (as is currently the process in South Australia).

- That Commissioner appointments be determined following a formal consultation process involving the government and opposition and a representative of independent and minor party MPs and Senators

District Returning Offices

The organisational structure of the AEC is outdated, inefficient and costly. There is no longer any justification for having an AEC District Returning Office (DRO) in every electoral division. The Commission itself is well aware of this, and for decades has been attempting to geographically rationalise its divisional offices. It has had some success – currently, around 120 offices around the country service 150 electorates and the state, territory and federal head offices.

The continuation of the current DRO structure is related to automatic enrolment issues. Every year, several million paper enrolment forms are data-entered by divisional office staff. Once these forms become largely a thing of the past (as would be the case under automatic enrolment), one of the few remaining justifications for maintaining divisional offices disappears

Recommendation:

- That the AEC be encouraged to further regionalise/amalgamate/co-locate its divisional offices.
- That DROs , as they currently exist—one per Division, permanent and staffed, be phased out by the middle of the next election cycle, ie by mid-2012 to be replaced by a system that would operate for six weeks before each federal electoral event.

The Australian Electoral Commission

When it comes to conducting elections, one advantage Australia has over most other countries (and especially the USA) is that they are managed by a national body – the AEC – rather than a concerted effort of state/local government bodies. This is a benefit that should not be surrendered.

But should there be more than one national body? The AEC's several tasks require different skills. The much smaller jurisdiction of New Zealand, for example, has three national bodies. One of them maintains the electoral roll, one of them conducts

elections, and a third deals with party/campaign finance matters, regulation of advertising, logos and electoral education

Recommendation:

- That serious consideration be given to restructuring the AEC into three authorities:
 - A **National Enrolment Authority** which would maintain the roll.
 - A **National Election Commission** which would conduct elections, redistributions and engage in electoral research and education.
 - A **National Campaign Authority** which would administer and regulate the funding and disclosure regime.

8. Party Registration

Registered parties currently receive benefits not available to other electoral competitors – such as ballot paper identification and centralised nomination procedures. In addition, parties receive substantial public funding.¹⁵ Despite these benefits, there are minimal requirements placed on how parties are to be structured or organised. Although a party is required to provide a copy of its constitution when applying for registration, there is no requirement for the constitution to be based on democratic principles or for the constitution to be publicly available.

Requiring parties to operate on democratic principles would bring them into line with the parliamentary system to which they wish to become a part of, and by making party rules and processes more readily available, adds to the transparency and accountability of party operations. This may also have the effect of encouraging more citizens to become members of a party, and to participate actively in party processes.

Recommendations

- That registered political parties' constitutions be based on democratic principles similar to that contained in section 73A of Queensland's *Electoral Act 1992*.
- That registered political parties' constitutions be available on the AEC's web page.

New Parties Currently MPs and Senators who have been elected representing one party can register another party under s126(1) of the CEA, without having to meet

¹⁵ In excess of \$48m from the 2007 federal election.

normal membership requirements. This practice raises the ethical question of whether such MPs or Senators should continue sitting in parliament.

However, irrespective of this, the practice also subverts the intention that registered parties should be representative of a group of people sharing common political beliefs and goals – the representative nature of parties is measured by either meeting the 500-member requirement, or having pre-existing parliamentary members.

Recommendation

- That section 126 of the *Commonwealth Electoral Act 1918* be amended to prevent an MP or Senator elected as a representative of a registered political party from being able to register another political party based on his/her parliamentary position.

9. Size of Divisions

The average number of enrolled electors per House of Representatives division has increased 36 per cent from 66,684 at the 1984 election, to 90,977 at the 2007 election.¹⁶ Given the demands placed on MPs, this raises the question of whether the current size of the parliament should be increased, on the basis that constituents' needs could be better addressed.

In addition, the anomaly in representation of the Territories continues to exist, with the Northern Territory two divisions having an average of 59,023 enrolments, compared to the Australian Capital Territory's 119,393 enrolments.

Recommendations

- That the numerical size and rate of growth of House of Representatives divisions be closely monitored, with the aim of identifying an optimal range of divisional enrolments for effective representation.
- That JSCEM consider the current serious malapportionment whereby Northern Territory electors have twice the voting power of ACT electors.

¹⁶ At the 1983 election, the average division size was 74,977. This prompted the increase from 125 to 148 MPs.