

CHAPTER 14: COMPLIANCE AND ENFORCEMENT

This chapter discusses the current arrangements for ensuring compliance with, and enforcement of, electoral laws. It also considers options for changing these arrangements.

THE CURRENT ARRANGEMENTS

Commonwealth arrangements

14.1 The Electoral Act establishes a variety of criminal offences. [Annex 11](#) outlines selected offences, and associated penalties, contained in the Electoral Act. Examples of particular offences include:

- failure to enrol (maximum penalty of \$110);¹¹⁴¹
- failure of an elector to vote (a penalty of \$20 on penalty notice, otherwise a maximum penalty of \$50);¹¹⁴²
- misuse of protected information contained in the electoral roll (maximum penalty of \$110,000);¹¹⁴³
- bribery (a maximum penalty of \$5,000 or 2 years imprisonment or both, and disqualification from sitting as a member of Parliament for 2 years);¹¹⁴⁴
- printing, publication or distribution of unauthorised electoral advertisements or notices (a maximum penalty of \$1,000 for a natural person, or \$5,000 for a body corporate).¹¹⁴⁵

14.2 For most offences in the Electoral Act, the maximum penalty is a fine of \$1,000. There has not been a comprehensive review of the offences in the Electoral Act since 1983.

14.3 The options that the AEC may adopt to deal with an apparent breach of the Electoral Act are currently limited to one or more of the following strategies:

- a request to cease and desist from certain behaviour;¹¹⁴⁶
- seek an injunction in the Federal Court of Australia, to either restrain a breach or anticipated breach of, or compel compliance with, the law relating to elections or referendums;¹¹⁴⁷ or
- prosecute offences.¹¹⁴⁸

In addition, for the offence of failing to vote, the AEC may issue a penalty notice.¹¹⁴⁹

14.4 For most electoral offences, the primary enforcement tool is prosecution. To prosecute an alleged offence, the AEC must identify the responsible person(s) and gather evidence of the breach to refer to the Australian Federal Police (AFP) for consideration.¹¹⁵⁰ The AFP evaluates

¹¹⁴¹ Electoral Act, *op. cit.*, subsection 101(6).

¹¹⁴² *ibid.*, section 245.

¹¹⁴³ *ibid.*, section 91B.

¹¹⁴⁴ *ibid.*, sections 326 and 386.

¹¹⁴⁵ *ibid.*, section 328. In 2006 a new offence was established for publishing unauthorised advertisements on the internet, the penalty is \$1,100: Electoral Act, section 328A.

¹¹⁴⁶ AEC, submission no. 169 to JSCEM, *Inquiry into the 2007 Federal Election*, *op. cit.*, p. 68. This is an administrative action that is not legislated in the Electoral Act, however the AEC may send participants warning letters about potential conduct leading to possible breaches of the Act.

¹¹⁴⁷ Electoral Act, *op. cit.*, section 383.

¹¹⁴⁸ For example, *ibid.*, Part XXI.

¹¹⁴⁹ *ibid.*, section 245.

¹¹⁵⁰ As noted in chapter 8, while parties are the primary participants in Australia's electoral system, parties are not legal entities. The AEC must therefore identify individuals to prosecute.

the matter in accordance with its Case Categorisation and Prioritisation Model before determining whether to accept a referral. This includes considering the impact of the matter on Australian society and the resources available for an investigation. If the AFP accepts a referral and its investigation discloses a possible breach, it will prepare a brief of evidence that is forwarded to the Commonwealth Director of Public Prosecutions (CDPP) for potential prosecution. If a matter is referred to the CDPP, the CDPP then applies the Commonwealth Prosecution Policy to determine whether or not to proceed with a prosecution.¹¹⁵¹ Amongst the issues the CDPP considers in determining whether to prosecute are whether there is sufficient evidence to prosecute the case, and whether prosecution would be in the public interest.

- 14.5 Candidates and individuals may also refer alleged breaches of the Electoral Act to the AFP for potential investigation or pursue a private application for a summary or indictable offence.¹¹⁵² Candidates may also seek injunctions.¹¹⁵³
- 14.6 The Electoral Act also provides for the Court of Disputed Returns to declare that any person who was returned as elected was not duly elected, or to declare an election absolutely void, 'on the ground that illegal practices were committed in connexion with the election'.¹¹⁵⁴ 'Illegal practices' is defined in the Electoral Act to mean 'a contravention of this Act or the regulations'.¹¹⁵⁵

State and territory arrangements

- 14.7 In general, electoral legislation in the states and territories contains similar compliance and offence provisions to the Electoral Act. Like the Electoral Act, state and territory electoral legislation relies heavily on criminal offences to deal with most breaches of the law. Annex 11 compares the penalties for selected electoral offences in the Commonwealth, states and territories. It demonstrates that penalties for electoral offences vary across jurisdictions - for example:
- penalties for misuse of electoral roll information vary from \$1,000 (Western Australia)¹¹⁵⁶ to more than \$68,000 for a natural person or more than \$340,000 for a body corporate (Victoria);¹¹⁵⁷ and
 - those jurisdictions which have reviewed their electoral offences relatively recently (Victoria, Tasmania and the NT) have established higher penalties than the other jurisdictions.

CHALLENGES, OPPORTUNITIES AND OPTIONS FOR CHANGE

- 14.8 This Green Paper has considered a number of electoral laws and a wide range of potential reforms. The effectiveness and integrity of electoral laws relies upon compliance by all participants in the electoral process. Consideration might therefore be given to the question of whether the Electoral Act contains an appropriate regime to encourage or enforce compliance with electoral laws.
- 14.9 A number of the key principles outlined in chapter 2 may be relevant to an examination of issues and options for ensuring compliance with the Electoral Act. For example, from the perspective of fostering a civic culture, it might be argued that measures should be adopted to

¹¹⁵¹ The Commonwealth Prosecution Policy is publicly available at www.cdpp.gov.au/Publications/ProsecutionPolicy/.

¹¹⁵² *Crimes Act 1914*, section 13.

¹¹⁵³ Electoral Act, op. cit., section 383.

¹¹⁵⁴ *ibid.*, section 360. Subsection 362(1) also specifies that if a successful candidate has committed or has attempted to commit bribery or undue influence, 'the election of the candidate shall be declared void'.

¹¹⁵⁵ *ibid.*, subsection 352(1).

¹¹⁵⁶ *Electoral Act 1907 (WA)*, section 25D.

¹¹⁵⁷ *Electoral Act 2002 (Vic)*, section 36. Calculated based on penalty unit value as at 1 June 2009.

maximise support for, and voluntary compliance with, the law. To ensure integrity, it could be argued that electoral laws need to be clearly expressed and readily understood, and that the AEC requires appropriate powers to encourage compliance and punish non-compliance. From the perspective of the principle of neutrality, it might be argued that electoral laws should be enforced consistently, fairly and impartially.

14.10 One point to note is that there has been no evidence of widespread subversion of electoral laws in Australia. The most common breaches of the Electoral Act have tended to be inadvertent or unintentional (such as the instances of multiple voting discussed in chapter 11), or transgressions by individuals that were not intended to have a broader impact on the outcome of an election or the actions of others in the political process (such as failure to vote). More serious offences have tended to be isolated events.¹¹⁵⁸

14.11 The following issues and options for change are examined below:

- the effectiveness of the existing enforcement regime;
- options for a broader compliance and enforcement regime; and
- options for harmonisation across jurisdictions.

Effectiveness of the existing enforcement regime

14.12 As noted at paragraph 14.4, the primary enforcement tool available to the AEC for most alleged electoral offences (in particular, those that might be regarded as serious breaches of the Electoral Act) is prosecution. However, for many electoral offences, the maximum penalty available under the Electoral Act is a fine of \$1,000. As a result, most, if not all, AEC requests to prosecute alleged offenders are not progressed, because the AFP and/or the CDPP consider that the relative seriousness of the offence does not warrant allocating resources to investigate and/or prosecute the alleged offence. In light of these issues, the AEC often decides not to pursue a referral to the AFP.

14.13 In addition to the challenges in ensuring that prosecution is pursued, there are a number of practical challenges arising from the current enforcement regime:

- while political parties are the primary participants in the electoral system, the parties have no legal status so cannot be prosecuted for breaches - this issue could potentially be resolved if parties were required to become legal entities, as discussed in chapter 8;
- there are inconsistencies in the structure of penalties in the Electoral Act, with older crimes having a fixed dollar maximum penalty (often \$1,000), while newer penalties are expressed in 'penalty units' which means that they rise when the value of a penalty unit increases;¹¹⁵⁹ and
- ultimately in relation to election offences, prevention is better than punishment after an offence has been committed.

14.14 The AEC has never exercised its power to seek an injunction in the Federal Court. The main areas in which the use of this power has been contemplated have been in the publication of alleged misleading and deceptive material such as how-to-vote cards. However, these issues

¹¹⁵⁸ For example, the prosecution of Mr G Clark regarding unauthorised election pamphlets in the seat of Lindsay at the 2007 election, www.smh.com.au/national/jackie-kellys-husband-fined-1100-for-election-leaflets-20090519-bdhx.html.

¹¹⁵⁹ For example, distributing a pamphlet without containing the name and address of the person authorising it has a maximum fine of \$1,000 (Electoral Act, section 328), while publishing the same document on the internet opens up the perpetrator to a fine of 10 penalty units, currently totalling \$1100 (Electoral Act section 328A). 1 penalty unit is currently \$110 (*Crimes Act 1914*, section 4AA).

usually arise on polling day, and are by then too late to be prevented, particularly given the need to gather sufficient admissible evidence to support an application for an injunction.¹¹⁶⁰

- 14.15 It is common for complainants to approach the AEC and request it to refer a matter to the AFP for investigation or seek an injunction. Where the AEC examines the available evidence and decides that it will not pursue a particular complaint, it advises the complainant that if they disagree with the AEC's conclusions, it is their right to refer a matter to the AFP. Prosecutions brought about as a result of references to the AFP from candidates or individuals are rare; similarly, applications for injunctions from parties other than the AEC are also rare.
- 14.16 In light of these challenges in enforcing the Electoral Act, consideration might be given to options for revising and modernising the current compliance and enforcement provisions.

Options for a broader compliance and enforcement regime

- 14.17 As noted above, the current emphasis in the Electoral Act on criminal offences may not provide the most effective range of enforcement options to encourage compliance with electoral laws. A key challenge is to ensure that there is the right mixture of tools to enable the AEC to respond adequately and promptly to the circumstances of each case.
- 14.18 Compliance and enforcement regimes that have been adopted in other areas (for example, the *Trade Practices Act 1975*), and for electoral regulation in other countries (such as Canada), consist of a regime based on a hierarchy of graduated responses to non-compliance, ranging from education and advice through to civil and criminal sanctions. These regimes establish a range of enforcement mechanisms so that administrators can choose the most appropriate mechanism to encourage compliance, prevent breaches, or punish breaches of the law.
- 14.19 The availability of a wider range of enforcement options may encourage compliance without the need to escalate enforcement action to the more serious levels of punishment. Broadly speaking, the range of enforcement options that might be considered can be classified into two categories:
- measures to prevent breaches of the Electoral Act; and
 - measures to address breaches of the Electoral Act.

Prevention

- 14.20 Measures to encourage compliance with electoral laws might include:
- education campaigns to increase awareness of electoral laws and encourage compliance (electoral education is discussed in chapter 9);
 - measures canvassed in other chapters of this paper, such as options to make it easier to enrol to vote (chapter 7) and options to increase the accessibility of polling services (chapter 11), which may have an effect on the extent to which eligible electors voluntarily comply with their obligations to enrol and vote; and
 - as an alternative to imposing additional regulations, voluntary codes of conduct could be developed to encourage certain conduct or behaviour by particular participants in the electoral process. For example, the option of developing codes of conduct for the campaigning activities of political parties and candidates was discussed in chapter 10.
- 14.21 An additional option that could potentially improve compliance with particular electoral laws could be to make compliance a precondition for the receipt of particular government benefits. For example, recipients of welfare payments might be required to be on the electoral roll before their benefit was paid. While this option would be likely to increase compliance with

¹¹⁶⁰ Further discussion of these evidentiary requirements is contained in AEC, submission no. 169 to JSCEM, *Inquiry into the 2007 Federal Election*, op. cit., pp. 69-70.

electoral laws, it may be criticised for being heavy-handed and would be likely to present some administrative challenges and costs.

Addressing breaches

14.22 The following options, discussed below, could be considered for inclusion in a broad suite of options available to the AEC to deal with alleged electoral offences:

- warning letters for minor or technical breaches;
- compliance agreements;
- civil penalties and other sanctions;
- criminal offences;
- infringement notices; and
- public reporting of breaches.

Warning letters

14.23 This option would provide the opportunity for less serious or technical breaches to be corrected without the need for escalation to more serious enforcement options. While the AEC has adopted this as an administrative practice for a range of alleged breaches, the option is not specified as an enforcement option in the Electoral Act, which may give the impression that the only action that is currently available to the AEC to deal with non-compliance is to commence a criminal prosecution.

Compliance agreements

14.24 A number of regulatory frameworks in Australia now enable a regulator to establish compliance agreements with individuals or organisations that have, or are likely to, infringe legislation.¹¹⁶¹ Canada has applied this approach to enforcing electoral laws: the Commissioner of Canada Elections may enter into, and publish details of, compliance agreements with a person who has committed, or is likely to commit, an electoral offence.¹¹⁶² A compliance agreement is a voluntary agreement between the Commissioner and the other party to the agreement, in which they agree terms and conditions that the Commissioner considers to be necessary to ensure compliance with Canada's electoral laws. If a person is not willing to sign an agreement or fails to comply with an agreement, then further civil or criminal actions may be pursued against the person.¹¹⁶³

Civil penalties and other sanctions

14.25 If the above measures are not effective or not considered appropriate, civil penalties could be an alternative. Civil penalty provisions have been described as a hybrid between the criminal and the civil law, because the unlike typical civil damages, civil penalties can be punitive and will be payable whether or not any 'harm' was actually caused.¹¹⁶⁴ Such provisions are founded on the notion of preventing public harm by having a significant deterrence value. While a civil penalty provision may be similar to a criminal offence and the purpose of imposing a civil sanction may include an element of punishment of the offender, the procedure by which an offender is sanctioned is based on civil court processes. Some advantages of civil penalties over criminal offences are that they do not lead to a conviction being recorded on an offender's

¹¹⁶¹ For example, the *Corporations Act 2001*, the *Trade Practices Act 1975*, and the *Environment Protection and Biodiversity Act 1999*.

¹¹⁶² *Canada Elections Act* (2000, c. 9), section 517.

¹¹⁶³ Canadian compliance agreements are published on the Elections Canada website at www.elections.ca/content.asp?section=loi&dir=agr&document=index&lang=e&textonly=false.

¹¹⁶⁴ Australian Law Reform Commission, Report 95: *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, p. 87.

criminal record, and that they do not require the involvement of the AFP and CDPP to prosecute, as enforcement action can be pursued in the courts by the applicable regulator.

14.26 In addition to pecuniary penalties, other forms of sanction might also be considered as options to deter undesirable conduct. Section 386 of the Electoral Act currently disqualifies a person who is convicted of bribery or interfering with political liberty from sitting or being chosen to sit as a member of either House of Parliament. This disqualification could be expanded to cover other offences in the Electoral Act, to impose longer periods of disqualification, or be broadened to include disqualification from employment under the *Members of Parliament (Staff) Act 1984* (that is, people who work for members of the Commonwealth Parliament) or from holding certain offices in a registered party.

14.27 Other options that might be considered could include:

- reducing public election funding to candidates or political parties who had been found to have breached a particular electoral law - for example, where the actions of a registered political party breach the Electoral Act, but no responsible individual can be identified, then a court could order that the party's public funding should be withheld or repaid;
- enabling a court to order that a person or political party which has committed a breach undertake community service (for example, in the area of civic education); or
- if the Court of Disputed Returns declares that an election is void on the ground that illegal practices were committed (as outlined at paragraph 14.6), empowering the Court to also order that the person who committed the illegal practice should pay the costs of any by-election or recount that may be required as a result of the Court's decision.

Criminal offences

14.28 Criminal offences could be retained in the Electoral Act to deal with the most serious offences. From this perspective (and in the context of determining the level of any civil pecuniary penalties), the level of the penalties set out in the Electoral Act might be reviewed. Many of the penalties in the Electoral Act were set in 1983: as a consequence, it might be argued that they are no longer a significant deterrent.¹¹⁶⁵ For example, a penalty of \$1,000 in 1983 was worth only \$382 in real terms in 2008.¹¹⁶⁶ The level of penalty considered appropriate for a particular offence, and the type of conduct involved, may be relevant in determining what type of penalty (civil or criminal) is suitable for each offence.

14.29 As noted at 14.7 and [Annex 11](#), Tasmania, Victoria and the NT have recently reviewed and updated their electoral laws and have established substantially higher penalties for electoral offences than apply in the Commonwealth context. NSW has also recently updated and increased penalties for offences under the *Election Funding and Disclosures Act 1981* (NSW). In addition, the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009, currently before the Senate, is proposing to increase the penalties for the funding and disclosure offences in Part XX of the Electoral Act. If this Bill is passed by the Parliament, the other offences in the Electoral Act might be criticised for being inconsistent with the new penalties, or for being out of date.

¹¹⁶⁵ In 2009, JSCEM recommended that the penalties for printing or publishing an unauthorised electoral advertisement under section 328 of the Electoral Act 'be revised to ensure that they provide a greater deterrent': see JSCEM, *Report on the Conduct of the 2007 Federal Election and Matters Related Thereto*, op. cit., p. 292. This recommendation was criticised in a dissenting report from Coalition members of the Committee for not addressing the 'issue of penalties in a serious and balanced fashion', which argued that increased penalties should be considered across a much broader range of offences: see pp. 331-332.

¹¹⁶⁶ JSCEM, *Advisory Report on the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008*, 2008, pp. 66-67.

Infringement notices

- 14.30 One element of either a civil or criminal penalty regime could be to utilise infringement notices for a broader range of alleged offences than at present. As outlined at paragraph 14.3, the AEC may currently issue an infringement notice to a person for failure to vote; if the person does not wish to have their alleged offence dealt with by a court, he or she may pay a penalty of \$20 to the Divisional Returning Officer who issued the notice. Infringement notices can avoid the need for references of breaches of the law to be made to the AFP, and may be a more efficient way of dealing with some electoral offences. They are likely to be particularly appropriate for relatively minor offences, where a high volume of contraventions are expected and where a penalty must be imposed immediately to be effective.

Public reporting of breaches

- 14.31 The Electoral Act currently contains only a very limited power for the AEC to report issues of non-compliance to the Parliament: the existing power applies only to reporting of breaches of the funding and disclosure requirements of the Electoral Act.¹¹⁶⁷ This power could potentially be broadened to apply to all areas of non-compliance and acts or omissions constituting an electoral offence. Under such an arrangement the AEC could publish public announcements with details of non-compliance, and any undertakings or agreements as to how the actions would be remedied. This could provide a transparent and accountable process for the handling of complaints, while the prospect of negative publicity could also be a deterrent to both political parties and individuals. Given the potential consequences for those who would be publicly named under such a system, it might be argued that mechanisms to ensure natural justice and procedural fairness would need to be incorporated into this option.

Undertaking enforcement

- 14.32 At present, the investigation of all potential offences other than failure to vote must be referred to the AFP. The establishment of a broader range of administrative and civil enforcement options could provide the AEC with more appropriate powers to enforce compliance, without the need to refer the bulk of matters to the AFP.
- 14.33 If the AEC were given greater enforcement powers and a greater discretion to choose between different enforcement options, one issue that might require consideration would be the likely scrutiny of AEC decisions to pursue a particular enforcement option. There could be a risk that the AEC would be subject to criticism from, in particular, persons who saw themselves as having been dealt with in an unduly harsh manner. An option to avoid compromising the trust in, and independence of, the AEC might be to confer decision-making authority for enforcing electoral laws on a separate statutory officer, as applies in Canada.¹¹⁶⁸

Options for harmonisation

- 14.34 Some of the options for reform that have been canvassed above may be more effective if they were to be introduced in a harmonised manner across jurisdictions. For example, sanctions that disqualify persons convicted of particular offences from sitting as, or being chosen as, a member of Parliament would be most effective if they prevented a transgressor from sitting or being chosen as a member of Parliament in any jurisdiction.
- 14.35 As noted at Annex 11, there is presently a large degree of variation in the level of penalties which applies to electoral offences in different jurisdictions. To maximise consistency, there could be a national review of electoral offences, with a view to achieving greater consistency in the levels of penalties applied across jurisdictions.

¹¹⁶⁷ Electoral Act, op. cit., section 17.

¹¹⁶⁸ In Canada, such a function is performed by the 'Commissioner of Canada Elections', an independent officer appointed by the Chief Electoral Officer under section 509 of the *Canada Elections Act*.

DISCUSSION POINTS

14.36 Comments are invited on this chapter, in particular on the following questions:

- Is the existing compliance and enforcement regime in the Electoral Act effective?
 - If not, what changes should be made?
- Should the AEC have a greater role in enforcing compliance with the Electoral Act?
- Are there particular areas of the compliance and enforcement arrangements that you think would benefit from greater harmonisation?

