

## CHAPTER 3: THE LEGAL FRAMEWORK FOR ELECTIONS

This chapter outlines the structure of current electoral laws, and discusses issues that could be considered in thinking about options for reforming current laws, in particular in the areas of harmonising and modernising existing laws.

### THE CURRENT ARRANGEMENTS

#### Structure of current electoral laws

- 3.1 Elections in each jurisdiction in Australia are governed by different laws. Table 3.1 identifies the primary laws that govern federal, state and territory elections in Australia:

**Table 3.1: Primary electoral laws in the Commonwealth, states and territories**

Jurisdiction	Constitution	Primary electoral laws
Commonwealth	<i>Constitution Act 1900</i>	<i>Commonwealth Electoral Act 1918</i> <i>Referendum (Machinery Provisions) Act 1984</i>
New South Wales	<i>Constitution Act 1902</i>	<i>Parliamentary Electorates and Elections Act 1912</i> <i>Constitution Further Amendment (Referendum) Act 1930</i>
Victoria	<i>Constitution Act 1975</i>	<i>Electoral Act 2002</i>
Queensland	<i>Constitution Act 1867</i> <i>Constitution of Queensland Act 2001</i> <i>Parliament of Queensland Act 2001</i>	<i>Electoral Act 1992</i> <i>Referendums Act 1997</i>
Western Australia	<i>Constitution Act 1889</i>	<i>Electoral Act 1907</i> <i>Referendums Act 1983</i>
South Australia	<i>Constitution Act 1934</i>	<i>Electoral Act 1985</i>
Tasmania	<i>Constitution Act 1934</i>	<i>Electoral Act 2004</i> <i>Referendum Procedures Act 2004</i>
ACT	<i>Australian Capital Territory (Self-Government) Act 1988 (Cth)</i>	<i>Electoral Act 1992</i> <i>Referendum (Machinery Provisions) Act 1994</i>
NT	<i>Northern Territory (Self-Government) Act 1978 (Cth)</i>	<i>Electoral Act 2004</i> <i>Referendums Act 1998</i>

- 3.2 The arrangements in each jurisdiction have evolved over time. At the Commonwealth level, the first electoral act (the *Commonwealth Electoral Act 1902*) was a combination of the electoral legislation in the six colonies. After a series of elections the federal electoral laws were consolidated into the *Commonwealth Electoral Act 1918* (the Electoral Act), which continues today. Since 1918, the Electoral Act 'has been subject to continuing debate and regular modification',<sup>37</sup> and it has been substantially rewritten once, in 1984, when the *Referendum*

<sup>37</sup> G Orr, B Mercurio and G Williams, 'The Australian Electoral Tradition', in G Orr, B Mercurio and G Williams (eds.), *op. cit.*, p. 1.

(*Machinery Provisions*) Act 1984 (the RMP Act) was also introduced to govern the conduct of federal referenda. The electoral legislation in each state and territory has also been amended considerably over time.

- 3.3 Generally, the constitution of each jurisdiction prescribes only the broadest features of the electoral process, such as the composition of the Parliament and the timing of elections. There are some exceptions to this: some jurisdictions also entrench various electoral principles in their constitutions or in relevant electoral laws. This makes it harder for parliaments to change these principles. For instance, the New South Wales Constitution entrenches the method of voting for Legislative Council elections.<sup>38</sup> Some constitutions (such as the Australian Constitution) may only be amended through a prescribed process such as a referendum, while others (such as the Victorian and Tasmanian constitutions) may be amended by the relevant state parliament.<sup>39</sup> Arrangements for the territories, which do not have constitutions, are governed by their self-government acts and may be amended by the Commonwealth Parliament. In the ACT, certain electoral principles can only be altered through a referendum or the approval of a two-thirds majority of the members of the Legislative Assembly.<sup>40</sup>
- 3.4 Most of the details of electoral laws are specified in the primary electoral legislation in place in each jurisdiction, with further details set out in subordinate legislation such as regulations. The content of these laws and guidelines is discussed in relevant chapters.
- 3.5 The conduct of elections may also be influenced by other laws, guidelines, and conventions. These include:
- statutes such as the *Commonwealth Broadcasting Services Act 1992* (which provides for pre-election broadcast advertising 'blackouts');
  - statutes governing the broader administrative environment in which elections take place (at the Commonwealth level, these include the *Public Service Act 1999*, the *Financial Management and Accountability Act 1997*, the *Privacy Act 1988*, the *Administrative Appeals Tribunal Act 1975*, and the *Administrative Decisions (Judicial Review) Act 1977*);<sup>41</sup>
  - the common law, both in general areas such as defamation but also in determining the cases associated with electoral law;
  - legislation protecting human rights;<sup>42</sup>
  - caretaker conventions regarding the administration of government during election period;
  - voluntary codes of practice, such as those relating to commercial broadcast advertising; and
  - procedures developed by election administration bodies that instruct electoral employees.

### *Levels of prescription in current laws*

- 3.6 In general, the primary electoral legislation in each jurisdiction is relatively lengthy and contains a high degree of procedural detail. For example, the Commonwealth Electoral Act prescribes the different background colours for ballot papers in the House of Representatives and the

<sup>38</sup> *Constitution Act 1902* (NSW) section 7A.

<sup>39</sup> Though note that a special two-thirds majority of all parliamentary members is required to amend section 23 of the Tasmanian Constitution, which relates to four year Parliaments: see *Constitution Act 1934* (Tas) section 41A.

<sup>40</sup> *Proportional Representation (Hare-Clark) Entrenchment Act 1994* (ACT).

<sup>41</sup> State and territory jurisdictions have a number of similar statutes governing the broader administrative environment in which elections take place.

<sup>42</sup> This is in place in two jurisdictions: the Victorian *Charter of Human Rights and Responsibilities*; and the ACT *Human Rights Act 2004*.

Senate,<sup>43</sup> and prescribes how to conduct the preliminary scrutiny of declaration votes<sup>44</sup> and the specification of various forms.<sup>45</sup>

- 3.7 At the federal level, the balance of prescription between primary and subordinate legislation has changed significantly in the last few decades. The 1984 amendments consolidated the provisions of a number of other acts into the Electoral Act, and moved a large number of procedural details from subordinate legislation into primary legislation. As a consequence, the Electoral Act became much larger: in 1973 the final section number of the Electoral Act was 219 and the act was 100 pages long (including schedules);<sup>46</sup> in February 2009, the Electoral Act contained 482 sections and had more than 500 pages (including schedules).
- 3.8 The primary electoral legislation in the states and territories is also highly prescriptive on a number of operational and procedural matters.
- 3.9 Some jurisdictions have taken the opportunity to review their electoral legislation with a view to simplifying its drafting and removing unnecessary levels of prescription. For example, Victoria's electoral legislation, revised in 2002, has been characterised as retaining 'all essential electoral principles, while leaving more detailed administrative provisions to regulations'.<sup>47</sup> Similarly, Tasmania's revised electoral legislation has been described as presenting 'electoral principles in a simple and clear way which will assist with the understanding and administration of the Act'.<sup>48</sup>

### *Processes for reviewing current laws*

- 3.10 Across jurisdictions, there are a range of general processes available for reviewing electoral laws as required. For example, governments in all jurisdictions have the ability to conduct inquiries or reviews of current laws and to propose relevant amendments; parliaments may also initiate reviews and amend laws. A number of jurisdictions also have parliamentary committees which play an ongoing role in reporting on the conduct of elections and other pertinent electoral matters.<sup>49</sup> In addition, the courts play an important role in interpreting and applying electoral law, determining whether particular laws comply with relevant constitutional requirements, and resolving particular disputes.
- 3.11 Prior to 1983, amendments to federal electoral laws were proposed by the government of the day and then debated in the Parliament; there was often a high degree of suspicion regarding motives for policy proposals. In 1983, there was an attempt to establish a more collegial and transparent system, with the establishment of the Joint Select Committee on Electoral Reform (JSCER), a bipartisan committee comprising members and Senators from both Houses of the Commonwealth Parliament. JSCER was renamed the Joint Standing Committee on Electoral Matters (JSCEM) in 1987 and continues today, with a mandate to 'inquire into and report on such matters relating to electoral laws and practices and their administration as may be referred to it by either House of the Parliament or a Minister'.<sup>50</sup>

<sup>43</sup> Electoral Act, op. cit., section 209.

<sup>44</sup> *ibid.*, section 266.

<sup>45</sup> *ibid.*, section 392.

<sup>46</sup> 1973 was the last consolidation of the Electoral Act before the 1984 amendments.

<sup>47</sup> Victorian Electoral Commission, 'A New Electoral Act for a new century', *Selections Newsletter*, vol. 9, July 2002, pp. 4-5.

<sup>48</sup> Quoted in Tasmanian Electoral Commission, 'Public comment invited on new Electoral Act for Tasmania', Media Release, 5 August 2004, available at [www.tec.tas.gov.au/pages/Media/PDF/PublicBill.pdf](http://www.tec.tas.gov.au/pages/Media/PDF/PublicBill.pdf).

<sup>49</sup> For example, the New South Wales Parliament Joint Standing Committee on Electoral Matters, the Parliament of Victoria Electoral Matters Committee, and the Queensland Parliament Law, Justice and Safety Committee.

<sup>50</sup> JSCEM, Commonwealth Parliament, 'Committee establishment, role and history', 2007, available at [www.aph.gov.au/house/committee/em/role.htm](http://www.aph.gov.au/house/committee/em/role.htm).

- 3.12 JSCEM has conducted inquiries on a range of electoral matters since its establishment, including holding public hearings, receiving and publishing submissions from a range of interested stakeholders, and producing public reports for the government to respond to. Since 1983, JSCEM (and its predecessor, JSCER) has conducted 33 inquiries, including ten inquiries into the conduct of federal elections. In contrast, it has been noted that 'from Federation until 1983, federal parliament held only two wide-ranging electoral inquiries – in 1904 and 1926-27'.<sup>51</sup> In addition to inquiring into the conduct of each federal election, JSCEM inquiries have examined matters including:<sup>52</sup>
- women, elections and the parliament;
  - the integrity of the electoral roll;
  - provisions for electoral redistributions;
  - representation of the territories in the Parliament;
  - civics and electoral education;<sup>53</sup>
  - the role of the AEC in conducting industrial elections; and
  - funding and disclosure of political donations.
- 3.13 JSCEM has become an embedded part of the work of the Commonwealth Parliament, and an important part of the Australian electoral reform process. JSCEM inquiries allow all interested parties, including the AEC, to suggest options for reform of our electoral processes.
- 3.14 Over the last quarter of a century, while most changes to federal electoral laws have received bipartisan support and been based on expert advice, some amendments have been labelled as being of a partisan character.<sup>54</sup> The checks and balances within the federal system generally guard against inappropriately partisan amendments being made.

## CHALLENGES, OPPORTUNITIES AND OPTIONS FOR CHANGE

### *Harmonisation issues*

- 3.15 As noted in chapter 1, there may be a number of opportunities for harmonisation of electoral arrangements across jurisdictions. Harmonisation can offer a range of benefits, including that it can:<sup>55</sup>
- create efficiencies, by reducing duplication across different levels of government;
  - ensure greater certainty, if consistent rules apply across all jurisdictions;

<sup>51</sup> P Brent, 'Has parliament's electoral matters committee run its course?', *Australian Policy Online*, 2008, available at [apo.org.au/commentary/has-parliaments-electoral-matters-committee-run-its-course](http://apo.org.au/commentary/has-parliaments-electoral-matters-committee-run-its-course).

<sup>52</sup> For further information, see [www.aph.gov.au/House/committee/em/reports.htm](http://www.aph.gov.au/House/committee/em/reports.htm).

<sup>53</sup> JSCEM, *Civics and Electoral Education*, 2007. On 30 October 2008, the Australian Government issued an interim response to this report, indicating that the report's recommendations had been referred to the Electoral Reform Taskforce established to facilitate this Green Paper, that the Taskforce's deliberations would assist in the formulation of the Government's final response to the JSCEM report, and that the Government's final response was expected to be tabled after the completion of the Green Paper process.

<sup>54</sup> For instance, the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006*, which changed electoral law relating to enrolment deadlines, proof of identity for enrolment and provisional voters, disclosure thresholds, and candidate nomination fees, was opposed by the Australian Labor Party, the Australian Greens, Family First and the Democrats: see Hansard, Senate Debates, 21 June 2006, pp. 20-21.

<sup>55</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, *Harmonisation of legal systems within Australia and between Australia and New Zealand*, 2006, pp. 5-6.

- reduce compliance costs for those who must comply with multiple regulatory regimes across jurisdictions; and
  - improve the effectiveness and integrity of laws by removing regulatory inconsistencies.
- 3.16 Harmonisation between federal, state and territory electoral arrangements may be particularly desirable where there are clearly identifiable differences between jurisdictions which affect an elector's ability to participate in the electoral process or cause significant elector confusion. It may be argued that differences between voting systems used for federal elections and those used in state and territory elections can have such effects. For example, at the 2007 federal election, over 75,000 voters in New South Wales marked their House of Representatives ballot paper with a '1' only: this would have been deemed formal and counted in a state election in New South Wales, but was deemed informal and not counted in the federal election. Options for harmonisation of voting systems are discussed in more detail in chapter 5; other options for harmonisation of electoral arrangements which are discussed in relevant chapters of this paper include:
- harmonisation in electoral administration activities (discussed in chapter 6);
  - harmonisation of enrolment requirements and processes (discussed in chapter 7);
  - harmonisation of party registration arrangements (discussed in chapter 8);
  - harmonisation of campaign regulations (discussed in chapter 10); and
  - harmonisation of polling arrangements (discussed in chapter 11).
- 3.17 Harmonisation can be effected through a range of mechanisms, including cooperative schemes negotiated between jurisdictions, the enactment of complementary legislation by different levels of government, or the referral of state powers to the Commonwealth.<sup>56</sup>
- 3.18 The federal system presents some challenges to achieving harmonisation. Agreement must be secured between all nine jurisdictions before a consistent approach can be implemented, and where legislation is required to give effect to a harmonised approach, there is a risk that it may be varied by one or more of the nine parliaments. The political environment is constantly changing, which can present challenges to maintaining a harmonised approach in a particular area.
- 3.19 It might also be argued that harmonisation should not be pursued merely for its own sake. One advantage of a federal system is that there are opportunities for innovation and experimentation, because various jurisdictions are able to act independently of the others. There have been examples of electoral innovations introduced in one Australian jurisdiction which have later been adopted by other jurisdictions and become best practice: these include innovations such as granting women the right to vote, cardboard voting equipment, and ordinary voting at pre-poll voting centres.
- 3.20 Given these challenges and issues, consideration could be given to the areas of Australia's electoral system which would benefit most from a harmonised approach and should therefore be prioritised as areas for attention.

### ***Modernising electoral laws***

- 3.21 The following issues may be relevant to a consideration of how to best modernise Australia's electoral laws.

<sup>56</sup> Note that there may be some limitations to the extent to which a referral of particular state electoral powers to the Commonwealth would be valid under the Australian Constitution and/or the constitutions of some states.

### *Updating existing laws*

- 3.22 A number of provisions of the existing federal Electoral Act have become outdated and do not necessarily reflect what happens in reality: for example, the enrolment provisions in Part VIII of the Electoral Act largely reflect the original arrangements under which amendments were made to hard copy electoral rolls, whereas in reality, the process for updating the rolls has been computerised for some time.

### *Levels of prescription*

- 3.23 It might be argued that the highly prescriptive nature of the current federal electoral laws makes them susceptible to becoming quickly outdated, and requires regular amendments to be made to update particular provisions from time to time. Less prescriptive laws could ensure greater flexibility for processes to be updated to reflect a changing electoral environment, without the need for Parliament to consider amendments to legislation.<sup>57</sup> It could be contended that primary legislation should be prescriptive enough to ensure that electoral administrators uphold the key principles of the Australian electoral system, while more detailed administrative arrangements could be contained in subordinate legislation that would be easier to amend if change becomes necessary.
- 3.24 On the other hand, it could be argued that one advantage of highly prescriptive electoral laws is that they encourage political consensus by requiring the Parliament to agree to more of the details of electoral processes. They may also leave fewer matters open to the interpretation of the courts. In addition, highly prescriptive laws may heighten public trust in the electoral system, and may also serve as a mechanism for deflecting criticism from the electoral administration, which can point to a legislative basis for particular decisions or processes.

### *Complexity*

- 3.25 The wording of a number of sections of the federal Electoral Act is relatively complex, which may render it incomprehensible to a lay audience. Options for addressing this issue could include redrafting the Electoral Act to modernise and clarify its language using plain language drafting techniques, or preparing and disseminating appropriate explanatory material. Issues and options regarding education about electoral systems are discussed in further detail in chapter 9.

### *Consolidation of current provisions*

- 3.26 An additional option for reforming federal electoral laws could include consolidating the Electoral Act and the RMP Act into one act. The RMP Act duplicates many provisions of the Electoral Act, which has led to a risk of inconsistencies developing between the two acts if one is amended separately from the other.<sup>58</sup>

<sup>57</sup> For example, JSCEM recently recommended that the Electoral Act be amended 'to provide a flexible regime for the authorisation by the Australian Electoral Commission of approved forms, which will: allow for a number of versions of an approved form; enable forms to be tailored to the needs of specific target groups; and facilitate online transactions' (JSCEM, *Report on the Conduct of the 2007 Federal Election and Matters Related Thereto*, 2009, pp. 273-275).

<sup>58</sup> This risk was acknowledged by JSCEM, *ibid.*, p. 283, which recommended that 'any recommendations in this report that propose amending the *Commonwealth Electoral Act 1918* should, where also appropriate, be incorporated into the *Referendum (Machinery Provisions) Act 1984*, to ensure consistency between the provisions applying to elections and referenda'.

## DISCUSSION POINTS

- 3.27 This chapter has discussed a number of issues that may be relevant in considering options for strengthening and modernising Australia's electoral systems.
- 3.28 The following questions may assist in contemplating specific options for reform:
- Given the inherent challenges of achieving and maintaining harmonisation in a federal system, which areas of harmonisation should be given priority attention?
  - How prescriptive should our electoral laws be?
  - How flexible should our electoral laws be to adapt to the changing electoral environment?
  - What is the best way to ensure that our electoral laws are easily understood by participants in the electoral process?