

**Submission to Australian Government**  
**Second Green Paper on Electoral Reform**

**Introduction**

My main research over the past decade has been not the law of politics, especially parties and elections. My Phd, dozens of academic and newspaper publications, two ARC funded projects and a book delineating electoral law in Australia (in press with Federation Press) are all in this field.

As a member of the Democratic Audit of Australia, I endorse the recommendations in the Audit's submission to this process, which are fashioned at a general and policy level.

I only wish to make here some very specific, machinery suggestions, on electoral litigation in particular, hence this submission is limited to chapters 12 and 13.

I note the Audit endorses the recommendations below in relation to chapter 13. References to paragraphs are to the Green Paper.

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**Chapter 12 – Scrutiny of Ballots**

Counting of Declaration Votes

Paragraphs 12.11 to 12.19 canvass adjusting the rules about declaration votes in the context of speeding the counting of those votes. Unless it were very clear that declaration voters form a radically different voting group to ordinary polling, the issue is miscast. It is not one about the indicative vote count on polling night being potentially misleading. Rather, the issue is the larger one about whether steps to make voting easier will conflict with other values such as the integrity of the process.

Generally, we support endeavours to make it easier for electors to exercise their franchise. However this should not come at the expense of losing the centrality of polling day. This is not just for reasons of ritual: there are substantive differences between an election at which people can vote over a several week period, and an election focused on polling day. Electors who cast their ballot early merely for convenience may disenfranchise themselves if some event occurs late in the campaign which would have affected their vote.

I support therefore the retention of the general requirement that pre-poll and postal voters have a reason for so voting (ie unavailability on polling day). Other measures such as the JSCEM recommendations in para 12.18 and the use of on-the-spot enrolment verification in para 12.19 seem eminently reasonable.

### Electronic Vote Counting

At this stage, widespread electronic voting is not desirable for cost, credibility and sociological reasons.

Paragraphs 12.20 - 12.26 canvass electronic scanning of ballot papers. Any measure which can increase the accuracy and efficiency of the count is supportable, *provided* there is no reduction in the capacity of party scrutineers to play their important watchdog role.

### National Tally Room

There is reason to be agnostic about the continuation of the Tally Room. Either senior politicians will use it as the base for the great theatre of election night (and hence insist on its retention) or they should accede to any case made by the AEC that the tally room is an expensive redundancy. If the media wish to retain a public space as background, they should cover the costs (as suggested in para 12.35). Sponsorship of the tally room would appear crass and hardly fitting to public ideals such as independence which inform organisations like the AEC and indeed ABC.

### Application of Formality Criteria

Paragraphs 12.37 – 12.45 canvass issues of assessing formality. Short of a move to electronic voting, formality issues will always arise. Too much has been made of the *McEwen* Petition. Of course, where a result is knife-edge, parties will retain the right to dispute the return. It is rare, at least in large scale electorates in the larger parliaments, for the result to be so close as to invite a petition. (Indeed it is almost unheard of in the Senate and at referenda).

Disputed returns based on seeking a judicial recount of disputed votes involve the parties risking significant legal costs. (Unlike cases where the parties are alleged to have breached the law, or where the law was uncertain or the Commission has made egregious errors).

The fundamental rule is that the intention of the voter, where clear, is paramount. This is the rule repeated and applied in the *McEwen* case. It would serve no purpose to try to further burden the detail of the Electoral Act by adding additional rules for counting votes (para 12.44).

Much more useful would be for the AEC, in coordination with the State and Territory ECs, to publish a thorough manual that classifies samples of ballots by formality and informality, having first reviewed their internal manuals and relevant Australian court decisions particularly from the past century. The party's chief scrutineers and legal advisers would benefit from such transparency.

It would also have been useful for the Court in the *McEwen* case to reproduce the impugned ballot papers. In the recent, Queensland *Caltabiano* case, Justice Atkinson there did a better job of explaining her decisions on individual ballots.

### Automatic Recounts

Petitioning is a very difficult process (incredibly short timelines, restrictive procedures, limitations on remedies, eg one can show significant errors but not upset the margin).

It has to be accepted that every counting system has some margin of error. Automatic recounts are therefore desirable when the election is so knife-edge that the result falls within the margin of error. At present the Court of Disputed Returns has no power to order a recount.

Thought would need to go into whether an automatic recount would be triggered in close Senate races. The difficulty is that the test of ‘closeness’ would logically have to apply to each and every exclusion of a candidate from the count, as the order of exclusion is more likely to have an effect in a Senate count than a House of Representatives count.

## **Chapter 13 - Dispute Resolution**

### Administrative disputes

It is not legally certain that ‘challenges to administrative action undertaken during the election period must wait to be heard by the Court of Disputed Returns’ [para 13.9]. Compare the legal debate between Orr & Williams and the AEC’s O’Neil.<sup>1</sup> Section 355 is meant to be a rule preventing the outcome of an election being challenged except through the very short time frame of the petitioning process. (In that it is an adjunct to s 368 which makes the disputed returns decision unappealable). The petitioning process is anything but a guarantee of electoral purity: it is costly, difficult to plead in time, and requires proof of the likelihood that the result was affected. At a minimum, if O’Neil’s argument is the intention of parliament, that should be made clear in the Act. But that is not our recommendation.

It is not clear why only candidates and the AEC should be able to mount claims for injunctive relief – other than a fear of meddling or vexatious litigants in person. Of course great faith is rightly placed in the AEC, but elections are complex, competitive events. Further, every elector has an interest in them, and in their being conducted according to law. If a prospective candidate’s nomination is wrongly rejected, for instance, it would be unjust if they could not ask a court to correct this. Such an application is not in any sense a challenge to the ‘validity’ of the election. The courts have powers through costs orders and the equitable discretion to refuse late injunctions, to deter undeserving applications. If necessary, it could be made clear in the Act that an injunction that is likely to cause any delay in polling must not be granted except in extreme circumstances.

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<sup>1</sup> Graeme Orr and George Williams, ‘Electoral Challenges: Judicial Review of Parliamentary Election in Australia’ (2001) 23 Sydney Law Review 53-93; cf Angela O’Neil, ‘The Role of Courts in Reviewing Electoral Administration’ in Orr et al eds, *Realising Democracy: Electoral Law in Australia* (Federation Press, 2003).

### Access to the Courts of Disputed Returns; Court Costs; Procedural Requirements

If there is a sense that too many litigants in person are using disputed returns for grandstanding or to air unarguable political theories, a higher security deposit and/or filing fee could be set.

Otherwise, it is undoubtedly true that the barriers to litigating a disputed return are very high. The very short time period, in which facts necessary to overturn an election must be plead, and the rule against amendment outside the time period all can lead to injustice. There is certainly no reason to assume that because successful petitions are rare, that this means every election result is unassailable. The obscurity of the jurisdiction makes it even harder for legal advisers or others to consider petitioning: witness the confusion in the *Caltabiano* case in the court registry at the time of filing, which almost robbed the petitioner of her chance to argue her case.

Recommendations for reform include:

- Extending the time period to lodge a petition, beyond the unduly truncated 40 days.
- Permitting a court to extend the time period where the breaches alleged were such that they were not reasonably knowable within the time period.

### Votes Thrown Away

One aspect of the common law of elections is not mentioned in the Green Paper.

Under British, indeed general Commonwealth law, there is a rule that if a candidate is disqualified, her opponent can publicise this during the campaign and afterwards allege that the disqualified candidates votes were 'thrown away'. All that is required is for the facts of the disqualification to be advertised to the electorate. Of course in reality, whether someone is disqualified can turn on difficult questions of law that are not resolved until a Court (or even Parliament) rules after the election. As noted in para 13.6, disqualification cases are not uncommon in Australia

The High Court of Australia has not ruled this doctrine of votes thrown away, in or out.

In 2007 in the Wentworth campaign, the rule was almost invoked when the Turnbull camp alleged that the Labor candidate Newhouse was disqualified.

The rule evolved out of elections done face to face (eg in meetings, with members of associations who knew each other, and where the disqualification issue could be argued by each side, in front of all).

Despite its recent application in Caribbean and other common law countries, the rule has no place to play in a mass democratic electorate, least of all in one where most electors vote for a party more than a particular candidate.

The Act should be amended to explicitly declare that the doctrine of votes thrown away is not part of the law of federal elections. The net result would be to ensure that in any disqualification case a fresh election has to be held.