

**DEMOCRATIC AUDIT OF AUSTRALIA: SUBMISSION TO THE SECOND
GREEN PAPER ON ELECTORAL REFORM, NOVEMBER 2009.**

Part 1.

Chapter 1.

- 1. While the Audit is supportive of the main architecture of Australia's electoral system—compulsory enrolment and voting, nonpartisan electoral administration, single-member based electoral divisions in the House and multi-member proportional voting in the Senate—it recommends a thorough re-drafting of the Commonwealth Electoral Act 1918 (CEA) so that it follows a more logical structure.**

Chapter 2.

- 1. The Audit supports all the Key Principles identified in this chapter. It is not desirable to disaggregate them, because a democratic electoral system needs them all.**

Chapter 3.

- 1. The electoral systems of the commonwealth, states and territories should progress towards harmonization, but not on a 'lowest common denominator' default position.**

Chapter 4.

1. An inclusive franchise is a necessary condition of a representative democracy and the definition of 'the people' as noted in the constitution should be as broad as possible.
2. If citizenship is to remain a key qualification to be on the roll, then those with a 'British subject notation' should be phased off the roll with cognizance being taken of the High Court's judgment in the *Roach Case 2007*.
3. Alternatively, permanent residents could, after a qualifying period, as in NZ, be permitted enrolment—some states require the enrolment of non-citizens for local government elections.
4. The Audit does not support a lowering of the voting age. It does support a lowering of the provisional enrolment age to 16 years.
5. There should be no restrictions on incarcerated persons' right to enroll and to vote—other than those convicted of treason. The phrase 'unsound mind' is imprecise, outdated and can give offence. It should be replaced—NZ provides an alternative.
6. A uniform franchise should apply across Australia— for example, there is no logical reason why prisoners should be subjected to varying enrolment regimes.

Chapter 5.

1. The Audit supports the current balance between the principles of representation and responsiveness afforded by the House and the Senate
2. Since S 15 of the constitution was amended in 1977 too many people are entering parliament without being elected, but solutions to this problem are beyond the scope of legislation.
3. Optional preferential voting should be adopted for House elections.
4. Optional preferential voting should be permitted below the line for senate elections.

5. A savings provision should be reinstated for the House to lower accidental informal voting if OPV is not adopted.
6. 'Fairness' (at least in the SA sense) would be difficult to achieve Australia-wide because of the state-based nature of redistributions.
7. To have a single trigger redistribution date may fall foul of the High Court's current interpretation of S 24 of the constitution.
8. The voter population of House divisions is reaching very high levels—in excess of 100 000 in some cases. The two possible solutions—increase the Senate by 12 members or again attempt to break the nexus by referendum—have their own challenges.
9. It would be very difficult to craft a law that restricted the right of a Senator to retire before term—desirable though it would be.

Chapter 6.

1. The AEC operates in a non-partisan, neutral and unbiased manner, but it does not act independently.
2. The AEC 'independence' could be achieved by: a) improving the method by which it gains its budget; b) having a JSCEM involvement in the appointment of the commissioner and parliamentary endorsement of that appointment.
3. The Commissioner should be made an officer of the parliament and report to it through JSCEM.
4. The AEC should be split into three bodies: one to maintain the national roll and conduct research and education, one to administer a national FAD scheme, and one to conduct elections. There should be one entry point to all three: *Elections Australia*.
5. There have been numerous recommendations over the years to alter the excessively 'flat' structure of the AEC by reforming the archaic and outdated (by technology) DRO mechanisms. The requirement to have these officers should be removed.

6. The Audit encourages the AEC to be given greater discretion over polling day regulation.
7. The AEC's independence should be guaranteed in the CEA.
8. Maximum co-operation should be encouraged among the nation's electoral bodies.

Part 2.

Chapter 7.

1. As a general principle, the Audit encourages the use of electronic technology—with rigorous security guarantees—for the entire enrolment process.
2. It is unacceptable, given the existence of 'compulsory enrolment' since 1911, that there are at least 1.2 million otherwise eligible persons not on the roll.
3. 'Automatic' re-enrolment should be adopted as should automatic enrolment for those eligible and turning 18.
4. The current proof of identity requirements are excessive and should be simplified.
5. The provisions related to silent enrolment and the enrolment of homeless persons need to be made better known.
6. Automatic enrolment would end the debate about roll closure as would polling day enrolment.
7. There should be uniform enrolment requirements and processes across federal, state and territory jurisdictions administered by a single federal agency.

Chapter 8.

1. The ability for an individual Member or Senator to register a political party is inconsistent with the requirement that parties should have at least 500 members. The provision has been abused and should be abolished.
2. The national agency charged with administering the FAD scheme (see above) should also administer party registration.

Chapter 9.

1. The AEC needs to make a decision on what are its responsibilities in the area of electoral education.
2. The Canberra AEC education centre does good work but it can accommodate only 24% of Year 6 students in any one year.
3. DROs should not be used as school visiting educators.
4. If a decision is made to (re)establish state-based education centres then they should be cooperative ventures with the state and territory Commissions.
5. The last twenty- year experiment with civics education has been a failure and the 'subject' should be removed from the curriculum. Most teachers are not trained to teach it and some are reluctant to do so because of fears of being accused of 'partisanship' by parents. Of greater success are 'school excursions' to designated Education Centres such as the one which operated in Melbourne before its closure in 2009.

Chapter 10.

1. Parliamentary entitlements and allowances should not be used for campaigning from the date of the issue of the writ.
2. All HTVs should be registered.

3. 'Truth in political advertising' while desirable was found to be impossible to achieve by the JSCER in 1984.
4. Party data bases such as Electrack and Feedback should be subject to the Privacy Act.
5. Political parties should not be permitted to harvest PVAs.
6. There should be uniform campaign regulations.

Chapter 11.

1. Electors should be required to give a written reason for pre-poll voting—by ticking a box.
2. An ACT-type of electronic voting should be trialed.
3. The Audit does not support internet voting—otherwise than by very specific groups such as military personnel serving overseas.
4. There is no evidence of organized multiple voting—as the AEC has shown, most of it is accidental—and no new measures should be adopted to solve a problem which does not exist.
5. The 2006 changes to provisional voting should be reversed.
6. No ID should be required to cast a vote.
7. Polling places should be provided at places where homeless electors congregate and in indigenous communities.
8. Prisoners should vote by post so as not to give rise to 'security' issues said to accompany mobile polling booths.
9. Voting should remain compulsory.
10. Federal, state and territory elections should not be permitted to occur on the same day.
11. All jurisdictions should move to fixed-date elections.

Chapter 12.

[The Audit does not wish to recommend on this chapter]

Chapter 13.

[The Audit endorses the remarks of Professor Graeme Orr, who is an Audit member, in his comments in response to the Green Paper under the heading: *Dispute Resolution (Chapter 13)*.

Chapter 14.

- 1. The penalties for offences against the CEA should be reviewed.**

ELECTORAL REFORM GREEN PAPER: STRENGTHENING AUSTRALIA'S GREEN PAPER

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Background: I have been researching and commenting on electoral and political party law for just over a decade, and am currently finalising a book on the topic for Federation Press. Other qualifications include a PhD in electoral bribery regulation and membership of the editorial board of the *Election Law Journal* (US). Unfortunately, I will be overseas in November-December and cannot accept the JSCEM invitation to its Roundtable on this paper; but I am happy to answer any queries, particularly on the mechanics of electoral law.

I will confine my comments to machinery aspects of the oversight of federal election law. Whilst I have personal belief that we need, for example, greater proportionality, I cannot see a groundswell of support for that in the political parties and my legal expertise probably makes my opinion on such policy matters no more relevant than any other informed layperson.

Specific recommendations are in bold italics.

Electoral Management Bodies (chapter 6)

Political Finance issues should be dealt with by a separate Political Finance Commission.

I first raised this possibility in a paper given in 2006.¹ In the US, UK and NZ (currently) the oversight and enforcement of political finance law is vested in a separate body to the body or bodies that run elections. There are numerous reasons for this:

- (a) Quite different 'skills sets' and attitudes are required. Political finance law is primarily an auditing task. It also, ultimately, requires policing: not of just parties, but third parties. It is akin to the core work of regulators such as ASIC. In contrast, elections and roll-keeping are massive logistical events requiring a highly co-operative approach between the management bodies and the candidates and parties.
- (b) In the worst case, a regulator whose primary focus is co-ordinating and co-operating with the very entities it is meant to be scrutinising and policing, may become 'captured' by them. This is a particular danger in electoral matters where the parties indirectly control the law, budgets etc. I am not saying this has occurred in Australia. However in relation to FAD, the AEC has tended, in the past, not to see its role as a 'regulator' but merely as an administrator of disclosure law. It has not been a primary focus but this will have to

¹ Published as 'Political Disclosure Regulation in Australia: Lackadaisical Law' (2007) 6 *Election Law Journal* 89

change if political finance law is reformed in a more regulated and involved way – eg expenditure or donation limits - as appears likely from the debate surrounding the first Green Paper.

- (c) Such reform will pit parties and the Commission in a potentially more adversarial role. It is vital that whoever manages this activity be properly funded. Funding transparency will be easier to monitor in a distinct Commission.
- (d) Such reform will have to have some uniformity nationwide. This, and the more involved nature of policing limits, compared to mere disclosure of donations, will necessitate a higher level of funding, expertise and strength than has currently been permitted in the AEC's FAD division. There will also be more need for regulatory guidance, eg the Political Finance Commission should be able to issue administrative rulings to fill in gaps in definitions. There may also be more need for prosecutions or other sanctions (which have almost been non-existent under the disclosure regime).

None of this is to say that the two Commissions will not be able to share some resources such as offices, and co-ordinate at a high level. A Political Finance Commission would report to the JSCEM and Parliament. Nb, I am not recommending we adopt the internal structure of the US Federal Election Commission: bi-partisan structures are foreign to our heritage of bureaucratic independence and impartiality.

Dispute Resolution (Chapter 13)

Courts of Disputed Returns

There was some consternation after the McEwen electoral petition,² about the time taken to resolve it and the concept of a judge ruling on disputed ballots.

Concern about delay is understandable. But overstated. We are fortunate to have such independent Commissions and Courts, and a general absence of electoral litigiousness (in part because of a high level of trust in those institutions). In comparison, the US system is very lacking. The recent Minnesotan Senate challenge, for example, took some eight months and multiple court actions, in which time the Senate was one member short. In our system, the winner declared by the AEC takes their seat until unseated, so neither Parliament nor constituents are under-represented. Expedition for its own sake is not the ultimate goal. The ultimate goal is certainty and faith in the election outcome.

As to the make-up of the body, in the early 20th century Queensland, for example, had an Election Tribunal in which a judge presided, but over a jury of several parliamentarians. That way, people with political nous decided the facts, guided by a judge on points of law and who also controlled the hearing. Such a system would seem too subject to partisan considerations today. An alternative might be to have a panel of serving or retired senior electoral officials.

² Culminating in *Mitchell v Bailey* (No 2) [2008] FCA 692.

For reasons given in an earlier JSCEM submission,³ I don't support such approaches or indeed any change to the (judicial only) composition of Courts of Disputed Returns.

Further, at federal level however we are limited by the separation of powers which the High Court has strongly implied from Chapter III of the *Constitution*. The AEC is a party to each petition. Not always in the sense of being personally implicated in the litigation (eg in a disqualification claim, the AEC may just play the role of amicus or friend of Court, and guide it on technical matters such as fresh elections or count-back procedure). But sometimes it is, because its conduct of the election is challenged. This includes challenges to informality or the admission of declaration votes. Such challenges should not be seen as a slight on the AEC, but a recognition that in ultra-marginal results, we value a final arbitration by a fresh and independent body.

Disputed Returns procedure is far from perfect. Professor George Williams and I examined them in 'Electoral Challenges: Judicial Review of Parliamentary Elections in Australia' (2001) 23 *Sydney Law Review* 54. Petitioning is far too restrictive currently. It cannot simply be implied, as the Green Paper states, that few petitions succeed therefore the system is perfect. Some reform recommendations are:

- (a) A specific power to permit the Court to allow amendments of substance to the petition, subject to the petitioner establishing that the new material was unavailable within the 40 day petitioning period.*
- (b) A specific power to permit the Court to extend the time to petition in cases where it is necessary in the interests of justice and equity, where the alleged errors were not detectable within the normal 40 day time limit (eg due to AEC systems of inaccessibility of material with the AEC, or due to malfeasance by the respondent or her party or agents).*
- (c) Increased filing fees and/or security deposits, to deter frivolous petitions.⁴*
- (d) The decision in Mitchell v Bailey (No 1)⁵ should be undone, with an explicit provision in the Act requiring the AEC and subsequently the Court to provide access to all reserved ballots, to all parties to a petition. Copies of such ballots should be available to all parties to the petition at a fair cost.*
- (e) The AEC commission a review of all Disputed Returns cases (including state level cases) involving ballot formality issues, and its own internal manual on the issue, and compile an updated, user-friendly and public guide to formality.*
- (f) The Act should require the federal Court of Disputed Returns to publish (either in print or permanent electronic format) copies of ballot papers on which they rule.*

³ See section 2 of my submission to the 2007 Federal Election Inquiry.

⁴ The problem of litigants in person is identified in S Gageler, 'The Practice of Disputed Returns for Commonwealth Elections' in G Orr et al (eds) *Realising Democracy, Electoral Law in Australia* (The Federation Press, 2003) 186.

⁵ [2008] FCA 426. See section 1 of my submission to the 2007 Federal Election Inquiry.

Votes Thrown Away

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

Under British,⁶ indeed general Commonwealth law,⁷ there is a rule that if a candidate is disqualified, her opponent can publicise this during the campaign and afterwards allege that votes for the disqualified candidate were 'thrown away'. All that is required is for the facts of the disqualification to be advertised to the electorate. I was recently involved in a case that went to the Jamaican Court of Appeal where the rule was reaffirmed.

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 definitively whether the doctrine of votes thrown away is part of Australian law, but appears to accept that it might be, not least in two candidate races.⁸

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

The rule evolved out of elections run face to face: especially in meetings, with voters who knew each other, and where the disqualification issue could be argued by each side, in front of all.⁹

It should have absolutely no place in modern, mass elections, especially where electors vote for parties more than candidates. The effect of the rule is to disenfranchise the majority opinion of the electorate and most likely award the seat to the less popular major party.

The Act should be amended to declare that the rule about votes thrown away is not part of federal electoral law.

Injunctions

There is some legal confusion about the availability of injunctions to correct breaches of electoral law or errors in electoral administration.

In section 355 of the Act there is a rule that 'the validity of any election or return may be disputed by petition ... and not otherwise'. Some judges have read this as precluding the use of general administrative law/judicial review procedures to seek electoral injunctions *before* a result is declared. That position has been defended in the writings of an AEC official.¹⁰ It seems to boil down to the idea: 'trust the AEC'. That is understandable given the AEC's high reputation. But it seems to ignore different values, such as the openness of the electoral process, or 'a stitch in time saves nine'.

⁶ *Drinkwater v Deakin* (1874) LR9CP 626; *In re Parliamentary Election for Bristol South East* [1964] 2 QB 257.

⁷ *Dabdoub v Vaq*, Jamaican Supreme Court Civil Appeal 45&47/2008, March 13, 2009; *Peiris v Perera* (1969) 72 New Law Reports of Ceylon 232.

⁸ *Free v Kelly (No 2)* (1996) 185 CLR 296 at 304.

⁹ *Gosling v Valey* (1847) 7 QB 406.

¹⁰ A O'Neil, 'Justiciability: the Role of Courts in Reviewing Electoral Administration' in G Orr, et al (eds), *Realising Democracy: Electoral Law in Australia* (Federation Press, 2003) 193.

Other judges however have not taken that line, and have heard pre-election complaints about electoral administration:

- *Courtice v AEC*¹¹
- *Cusack v Australian Electoral Commissioner*¹²
- *Assaf v AEC*¹³

Professor Williams and I argue that the rule about petitioning is only meant to ensure that there is no way of *overturning* an election except by petition, with its narrow time limits and special procedures.

Seeking an injunction prior to an election is not challenging its 'validity'. It is invariably just an argument about correcting an alleged defect in the process of an election. The fear seems to be of eccentric, possibly vexatious, litigants in person, trying to halt an electoral process. In truth, Courts have plenty of equitable responsibilities in such cases: for example to reject claims that have been dilatory, to reject injunctions even if the law was breached where that would be very inconvenient. Further, unreasonable litigants can be strongly reminded of their likely liability in costs.

At present, the AEC or duly nominated candidates can explicitly seek recourse in the Federal Court under s 383 of the Act, to enforce or clarify the requirements of the Act. But that provision is too narrow:

1. It denies parties recourse against the AEC outside the formal campaign period, in relation to electoral (but not necessarily other matters such as political finance).
2. It denies electors or civic associations with a proper interest ('standing') to enforce the electoral rules. In particular, it would lead to the bizarre result that someone whose nomination is wrongly rejected would have no recourse.¹⁴

Either section 355 should be clarified so that it only applies to preclude attempts to challenge an electoral return.

Or, preferably, section 383 should be extended. At a minimum to include someone whose candidature was rejected (to challenge that rejection) and the registered officer of any federally registered party. Ideally it should be extended more generally 'any elector with sufficient interest'. Courts are well used to resolving issues of standing: for instance an elector would have no busy-body interest in most matters of campaigning or administration outside their electorate.

End of Submission

¹¹ (1990) 21 FCR 554

¹² Federal Court of Australia, Unreported, Spender J, 6/11/1984.

¹³ [2004] FCAFC 265

¹⁴ *Courtice v AEC* avoided this result by simply ignoring the broad reading of s 355.