


SUBMISSION TO  
THE DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL  
QUEENSLAND

INQUIRY INTO ELECTORAL REFORM

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My submission will follow the structure of the Discussion Paper circulated by the Hon Attorney-General. I presume the Department will be familiar with relevant parts of the two EARC reports, R4 and R7, and such material need not be repeated here.

### A1 Political Donations

Alterations to the Act in 2011 were generally misconceived and unhelpful. Disclosure is the one requirement which can be justified on the ground that it *may* work when for most others the odds are that they will not. For obvious reasons the disclosure period must be continuous between one general election and the next so there is no period for which disclosure is not required. The frequency with which donor-recipient relationships are noted in political news stories (e.g. "Election donors gave LNP \$13m", *Australian*, 9 October 2012) mainly print because they take time to research, indicates the subject is believed to be significant. Linking a regime for regulating donations to formal, i.e. after the issue of writs, election campaign periods would certainly be mistaken now, even though some decades ago it might have been plausible. Queensland and Commonwealth elections are so frequent, campaigning techniques so varied, and financial arrangements so variable that any campaign period limits are inadequate.

There might be a case for disclosure and publication being made at regular, say 3 or 6 month intervals, ordinarily, and more frequent, say weekly, during the campaign period. However the recent federal election date controversy, and consequent arguments about the application of various campaign period requirements to the situation, point to potential problems. It would be helpful to the managers of registered political parties to work to a regular timetable and one that allows any disputation, including threat or initiation of litigation, to be kept clear of the final days of a campaign if at all possible.

Recent developments involving the social media include raising campaign donations very widely and delivering campaign messages from a large, and possibly unknowable, set of sources in Australia and abroad. Attention to the financial pages of the quality press will show the extensive networks which already exist along which money may travel before final delivery to a candidate or party. An electoral commission will have enough on its plate without having to investigate suspicions or denunciations, and there might well be a case for creating a separate statutory body with some overlap in personnel to administer campaign finance matters and investigate possible breaches. The NSW precedent warrants consideration.

### A2 Public Funding

The provision of public sector support for campaigning harks back to a era long gone when paying the printing and postage costs of a policy document to be sent to every elector, or allocating free time for several radio (and briefly public sector TV) sessions, matched the prevailing campaign methods. The federal attempt to expropriate private sector electronic media time for such purposes was struck down, and left us with new constitutional doctrine that bedevils inventing a new regulatory regime. Moreover, any

ethical claims public funding might have had were badly damaged by reports of profit-taking by candidates or parties.

If, and I hope the need will not arise, a proposal to retain public funding is put forward, then it should be accompanied by revival of a duty on the part of media proprietors to report receipt of all expenditure that is likely to found claims for public funding. Such a proposal will be resisted by the proprietors on the ground of the volume of work imposed, but more likely because such reporting may well disclose variations in their price rates which can annoy the more regular and substantial customers for their time and space. Nevertheless it is an invaluable check on the accuracy and completeness of returns lodged by candidates and parties, and should be available.

Given the escalation in campaign costs, per district and per elector, in recent years, the current open-ended formula as set out at p.14 of the Discussion Paper appears generous in the extreme. It is, surprisingly infrequently, attacked by members of the public who disapprove of the party system as a whole or some part(s) of it. As a long standing advocate of compulsory voting, which saves candidates and parties from the heavy and costly burden of getting out the vote (witness any election in the United States), I think compulsory voting is beneficial because it encourages electors to pay attention. I also think it would encourage them if the candidates and parties needed to raise their funds as widely as possible, and sought to do that by explaining the beneficial activities of government in general and the policies they will pursue in particular. Helping financially lame dogs to get themselves to the stile e.g. by maintaining fulltime party staff, is one thing, carrying them to the stile and tipping them over it is different.

If the decision is to retain public funding, consideration should be given to the rationale for the 4% vote qualification. A recent phenomenon has been the increase in the number of candidates per district and associated increases in the informal votes. The primary purpose of an election is to choose members to sit in the legislature, not to "educate" the electorate over as wide a range of political or social questions as possible by encouraging candidates who don't have a hope of winning the seat in the legislature. A cut-off figure should be more discouraging, and 10% comes to mind.

### A3 Election Campaign Expenditure

Setting maxima is likely to lead to attempts to circumvent their application and may be arbitrary in their application to changes in campaign methods. What has to be paid to TV proprietors is different from what use of the social media costs. Distinctions between registered and unregistered political parties are arbitrary. \$84,000 may seem unrestrictive, whereas a figure per elector in *that* district would be supply a different perspective. What could be the penalty if a maximum is exceeded by expenditure made outside the state e.g. posting every elector an expensive DVD? A fine or overturning the result?

In the dramatic Queensland general election of 1957 a car dealer stood as an Independent against the three major party candidates in a marginal district, Buranda, and polled 5.2%

despite expenditure at a level that caused all to marvel. The subsequent half-century has failed to shake my conviction that money doesn't matter that much apart from encouraging the spender's troops. More immediately, fine tuning figures to the campaign techniques is difficult and preventing breaches of a restrictive regime outside its jurisdiction almost impossible. It would be better to return to pre-2011.

## B1 Truth In Political Advertising

The Commonwealth's experience 30 years ago recorded in the Joint Select Committee on Electoral Reform Reports of 1983 and 1984 remains convincing. Creating a new principality of Truth in Political Advertising from the border lands of False Pretences, Misleading or Deceptive Advertisements, and Breach of Promise will have its attractions, but the retreat of the first to web bases overseas and the disappearance of the second discourage a new experiment. The apparent success of the second can be attributed to its reliance on the natural sciences for evidence in a prosecution, whereas any controls proposed for the new area would have to turn to the social sciences which are much less reliable or helpful. Despite the enthusiasm of US courts for the Brandeis Brief, when asked to review electoral boundaries they have relied on seemingly hard numbers and refused to enter that part of "the political thicket" which would have to deal with the concept of partisan advantage.

It might be helpful to start by asking who would enforce any new provision. It would be highly undesirable to give any enforcement power to an electoral commission because initiating an investigation, or responding to a complaint, will poison relations with the candidate or party complained against at a time when amiable albeit distant relations should prevail for the principal objective of getting a free and fair election conducted. It might be possible to have an office created, resembling the Californian official who checks arguments on initiative cases for example, but that would leave the possibility of redress in the courts open when an expeditious as well as authoritative decision is highly desirable. Two bites at the cherry should be avoided as much as possible. It might be possible to designate a judicial officer, like the judge available for injunctions on short notice, but they are likely to take a cautious and thorough approach with both evidence and argument when speed is essential. Further, widespread concern about politically motivated complaints to the Crime and Misconduct Commission anticipates what would probably occur if such a wild card were added to the campaign deck.

My inclination would be to duck-shove the problem over to the media, and encourage some or all of the mass media to designate "fact-checkers" who could report and respond the following day and ensure wide dissemination of that "outcome". It might be helpful to provide some degree of statutory protection so that the medium isn't hit by writs and its insurance premium shoots up. Alternatively, the media could club together and designate a single fact-checker who could call on the resources of the group for expert advice or independent inquiry. The *Washington Post*, for example, puts responses on line daily and in print at weekends. It is a subjective impression, but it seems that media which appear outrageously biased in reporting and editorializing for most of the political cycle do lift their game in the direction of objectivity during election campaigns. On the

other hand, systematic bias in the media will probably reinforce misrepresentation from whatever quarter, but that problem lies beyond the current inquiry.

A final point is that public dissatisfaction with politicians' "untruthfulness" tends more to the breach of promise analogy than the false pretences analogy, encouraged in this by the parties themselves. The output of statements is spread out over time and, long before the run-up to polling day, it comes from a wide range of candidates, party officials and even wealthy self-identified supporters. If there were a reversion to a single document, like the Australian party leaders' policy speech, or the UK's party program, and this was made subsequently enforceable in a court of law, the public might be satisfied. It would shake-up constitutional principles e.g. a judge directing the Treasury to make funds available and the Public Works Department to start spending. There would be a question of locus so probably any State Attorney General should be empowered to challenge. But it would still be easier than the judge determining the damages if promised legislation were not passed. In short, the idea is a can of worms which should be avoided. The Commonwealth Treasurer's very recent proposal for a post-mortem examination of budgetary planks by a neutral party raises similar problems.

## B2 How-to-vote Cards

As such cards may subsequently be vital evidence in the Court of Disputed Returns (without saying why), there should be a requirement that a specimen of any card distributed be delivered to the central election authority, and it be a minor offence not to have done so. Whether it should be possible to reject the content or design of a card is a bigger question, the easier solution being to have delegated legislation lay out a standard form which must be complied with closely. If that were done, fixing the penalty for non-compliance could be tricky. A small fine for words that won the election would be unpopular, a small deviation from a statutory form but it overturned the result would be equally bad.

Probably the best solution is to require lodging samples of every card "early". The lack of a fixed term and election date makes specifying "early" tricky, but the objective has to be to give other candidates sufficient opportunity to seek an injunction even in the case that pre-poll voting is already under way. It might in such a case be advisable to legislate to preserve the outcome, or empower the Court of Disputed Returns to do some slick calculations with pre-poll-cast ballots (kept separate of course) to see if the overall outcome could have been changed.

If the function of the how-to-vote card is to say who the party's candidate(s) is/are, and how preferences should be allocated, the format could be cleared well in advance and names entered later. There remains the possibility of a Hanson situation, when a candidate is disendorsed after the submission and approval of the card and it has been issued for pre-poll voting. Perhaps an escape clause covering this to prevent invalidating the election would be advisable.

### B3 Proof Of Identity

It is unfortunate that the Premier has already indicated that some action by the Government will be forthcoming, not least because of the number of cases now before the US Supreme Court that go to the question whether such a requirement comes from a genuine concern about personation at the polls, or is an egregious example of voting-pruning.

Some inferior courts have already struck down requirements in the 34 Republican States which have recently legislated in the area on the ground, inter alia, that no convincing evidence had been produced to them that such abuses were in fact taking place. Before any equivalent legislation be introduced in Queensland, the Government and the Parliament should see convincing evidence that there is a real problem which requires a solution. How many prosecutions have been launched in Queensland for state and federal elections in the past decade? What inquiries into allegations of personation have been held, what was the outcome of any such inquiries, and were any findings accepted and acted on by the government of the day? A particularly significant point, do the current advocates of action rely on the spectre of the (NSW) Castlereagh by-election for which there is a substantial literature laying it to rest?

If there were a national identity card or internal passport issued universally and after proper investigation, no harm would be done apart from the slight inconvenience of finding it on polling day. But there is not, and the substitutes usually suggested like drivers' licences or proof of age cards are notoriously prone to faking. The selection of acceptable alternatives is always open to advantage-seeking e.g. the US state that rejected university student IDs bearing photographs. There was a time in Australia when the elderly, notoriously short on drivers' licences or work IDs, discouraged introduction of such a requirement by preferring substantially the major party naturally inclined to restriction over the alternative party. However the voters who cast their first vote after turning 21 for Menzies in 1963 and have stuck to that choice ever after have now turned 70 and are a wasting asset despite increasing longevity. Hence, I'm afraid, the current enthusiasm for the pruning shears.

### B4 Enrolment On Polling Day

In countries where enrolment and turn-out are relatively low, any chance to catch a voter can be defended. Given the efforts that in Australia go into maintaining both at a high level, I see no need to effect enrolment and then allow voting on the same day. Particular electoral districts have higher population mobility rates and so invariably low enrolments. When an election is called, they then have a surge of enrolments which would appear suspicious if it occurred on polling day, or could be made to look so. Give the aspirants enrolment forms, accept them back if possible, but don't let them proceed to the issuing officers and get ballot-papers.

## B5 Electronic voting

On the one hand, the near universal turnout of adults on polling day (though an increasing proportion will have voted previously) is a welcome manifest of democracy in action. Less fortunate countries, or at least their less fortunate citizens, envy us for it. Given the current extensive provisions for pre-poll voting, the burden or inconvenience to any one elector is minimal. What we have ensures a paper trail which is not only helpful should there be a meaningful suspicion of illegality to be tested, but encourages those who think about it to believe the system is honest and fair.

Although IT experience has spread across Australian society to an ever widening extent, it has attracted considerable attention for its vulnerability. If one reads that banks' and defence departments' computers are vulnerable, will not those who view competitive politics as one more conspiracy against the public good believe that election outcomes are at equal risk. If false prophets say they have been violated, much as the underlying attacks on cardboard boxes, pencils, &c survive, will it be possible to satisfy all the anxious?

The US Government Accountability Office's report, *Federal Efforts to Improve Security and Reliability of Electronic Voting Are Under Way. But Key Activities Need to Be Completed*, GAO-05-956, is an admirable introduction to the basic problems, but readers should remember that a first-past-the-post voting system is less demanding than either compulsory or optional preferential voting. The advice of the ACT's Electoral Commissioner would be most helpful, and up to date, for Australian problems and limited experience.

## B6 Postal Voting

Social changes, eg changing working hours and days, make maximizing opportunities to cast a vote highly desirable. The possibilities set out in the Issues Paper appear sensible, and it may be more will be drawn to attention before any legislation is finalised.

## B7 Compulsory Voting

Much of the argument on compulsory voting stems from a failure to distinguish between "liberal" and "democratic" despite the voluminous and well-regarded literature on the subject. Consequences rarely get a look-in. Thus free spirits often complain about compulsion for the use of seat-belts, but would expect the state to provide hospitalisation and pensions. However they don't object to a requirement that all vehicles drive on the left-hand side of the road. The system of compulsory voting in place only requires electors to obtain and return a ballot-paper. It ought to be remembered that compulsory voting was introduced to Queensland and Australia by governments of the right which feared the competitive advantage given their regular opponent by its association with a relatively new mass-movement. Before abandoning the century-old experiment, it should be asked what might be the effect on Australian political life of the mushroom mass-movements generated by the social media, a question already in the press. American

experience may well be relevant. Following unseemly events at the Democratic presidential nominating convention in Chicago (1968) opinion turned against what was predominantly the existing system characterized as cigar-smoking, Derby-wearing professionals in hotel rooms, and in favour of what had been regarded as west-of-the-Mississippi direct democracy experiments, party primaries, which became much more widespread. There are the first green shoots of the idea about now in Australia.

Most general elections see the final decision, who wins a majority of seats, settled by a relatively small number of districts. Not always, witness recent outcomes in Queensland and New South Wales state elections, but usually. And those marginal, swinging districts are determined by relatively few electors. Maximising the number of those people by compulsory voting may be the strongest argument for its retention. There used to be a school that argued broad franchises and compulsion swept up the ignorant and apathetic who tended to make bad decisions, resorting for proof to the supposed experience of Weimar Germany. Recent American experience suggests that the social media can and will promote turn-out which in a rigid two-party system could be expected to advantage one party over the other. But it also shows that they promote turn-out at the primaries which affects outcomes between competing factions, including those which have appeared quite recently. A cook-book for such activities, recently available in Brisbane at \$5, is Dick Morris and Eileen McGann, *2010 Take Back America: A Battle Plan* (2010). It would be premature to predict this could happen here, but the widespread tendency to say Australian politics are changing in largely unknown directions suggests it would be unwise to pull out so critical a part of the machine as compulsory voting and see what happens next. The turnout and informal vote figures at the next federal election should be of assistance in making a decision whether or not to try.

### B8 Voting System

There is some overlap with the previous issue from allegations about optional preferential voting being undemocratic. Some years ago, reviewing the experience of New South Wales and Queensland to date, I could find only one instance when it could be said with any certainty that a different outcome had resulted from optional. It is generally agreed that the informal vote rate has declined somewhat in those states since the change. It appears to be the case that the number of candidates per district continues to rise, which would strengthen the case on this point.

On the previous issue I have said that compulsory voting does not violate an elector's conscience by making them say something they do not believe, that they have a preferred candidate for election. They can lodge a blank ballot-paper without fear. But if they do not wish to consider a particular candidate as suitable for election, or to chose between several candidates, their refusal to make the requisite marks will invalidate the decision which they are prepared to make. This enters a field, getting into electors' heads, where legislators should tread carefully.