



# *Elections and the electoral system*

## THE FIRST ELECTION

The Constitution made specific provision for the first general election of the Parliament. The 1st Parliament was to be summoned to meet not later than six months after the establishment of the Commonwealth,<sup>1</sup> which occurred on 1 January 1901. The first general election was held on 29 and 30 March 1901,<sup>2</sup> and the Parliament was summoned and first met on 9 May 1901. Following the enactment of the Constitution on 9 July 1900 and before the election for the 1st Parliament was held,<sup>3</sup> opportunity was given to the State Parliaments under the Constitution to make laws determining the divisions in each State for which Members of the House were to be chosen, and the number of Members to be chosen for each division up to the limits imposed by the Constitution. If a State failed to make a determination, the State was to be considered to be one electorate.<sup>4</sup>

The Constitution made further provision that, until the Parliament otherwise provided:

- the qualification of electors of Members of the House of Representatives be that which was prescribed by State laws;<sup>5</sup> and
- the laws in force in each State relating to elections apply to elections of Members of the House of Representatives;<sup>6</sup>

being those laws applying to the more numerous House of Parliament of the State.

The first general election was conducted on the basis of State laws.<sup>7</sup> The number of Members elected was 75, which was consistent with that prescribed by the Constitution.<sup>8</sup> A conference of statisticians held early in 1900 determined the population of Australia as at the end of 1899 and initial representation was based on these statistics.

## THE COMMONWEALTH ELECTORAL ACT

State electoral laws ceased to have effect for the Federal Parliament when it passed its own legislation in 1902.<sup>9</sup> This legislation and subsequent amendments were consolidated in 1918 and formed the basis of the Commonwealth's electoral law. The *Commonwealth Electoral Act 1918* has been substantially amended over the years. This chapter outlines the provisions applicable at the 2004 general election.<sup>10</sup>

1 Constitution, s. 5.

2 New South Wales, Victoria, Western Australia and Tasmania on 29 March 1901, and Queensland and South Australia on 30 March 1901.

3 *Quick and Garran*, p. 409.

4 Constitution, s. 29; South Australia and Tasmania each voted as one electorate.

5 Constitution, s. 30.

6 Constitution, s. 31.

7 At that time the only States where women were entitled to vote were South Australia and Western Australia.

8 Constitution, s. 26.

9 *Commonwealth Electoral Act 1902*; *Commonwealth Franchise Act 1902*.

10 Comprehensive details of electoral procedures and election statistics are available from the Australian Electoral Commission and on the Commission's internet site ([www.aec.gov.au](http://www.aec.gov.au)). Historical coverage of election results is also contained in the *Parliamentary Handbook* ([www.aph.gov.au/library/handbook](http://www.aph.gov.au/library/handbook)).

## Review of electoral arrangements

A Joint Select Committee on Electoral Reform was established in the 33rd and 34th Parliaments. In each Parliament since then a Joint Standing Committee on Electoral Matters has been appointed. The standing committees have inquired into and reported on the conduct of each general election and related matters. As a result of the committees' reports a number of amendments have been made to the Commonwealth Electoral Act.

## ELECTORS

Members of the House of Representatives are elected on the basis of universal adult franchise for citizens. This principle is based on the interpretation of constitutional provisions.<sup>11</sup> The voting provisions for federal elections (including Senate elections) were established in 1902.<sup>12</sup> Since then elections have been characterised by:

- adult suffrage;<sup>13</sup>
- secret ballot, and
- single vote.<sup>14</sup>

These features, together with the following innovations, make up the principal voting provisions which are currently followed in federal elections:

- **Compulsory registration** of voters since 1911. A roll of electors is kept for each electoral division and every eligible voter is required to enrol.<sup>15</sup>
- **Preferential voting system** since 1918.<sup>16</sup> Up until 1918 the first-past-the-post system was used at federal elections.
- **Compulsory voting** became effective at the 1925 general election.<sup>17</sup> It is the duty of every elector to record his or her vote at each election.<sup>18</sup>
- **Extension of franchise** to Aboriginal people on a restricted basis since the 1949 general election,<sup>19</sup> to all Aboriginal people since the 1963 general election,<sup>20</sup> and to persons 18 years of age and over since the 1974 general election.<sup>21</sup>

In summary, persons entitled to enrol and to vote at federal elections (subject to certain disqualifications) are all persons who have attained 18 years of age and who are Australian citizens. British subjects whose names were on the electoral roll on 25 January 1984 are also entitled to be enrolled and vote. Provisional enrolment may be claimed by 17 year olds but they are not entitled to vote until they turn 18.<sup>22</sup> Persons who have applied for Australian citizenship may also apply for provisional enrolment which takes effect on the granting of citizenship.<sup>23</sup>

11 Constitution, ss. 30, 41.

12 *Commonwealth Electoral Act 1902*.

13 Originally excluding Aboriginal people (other than those already enrolled in a State in 1902).

14 Plural voting is precluded by the Constitution, s. 30.

15 *Commonwealth Electoral Act 1918*, ss. 82, 101.

16 *Commonwealth Electoral Act 1918*, s. 240.

17 *Commonwealth Electoral Act 1924* (Act No. 10 of 1924).

18 *Commonwealth Electoral Act 1918*, s. 245.

19 Those entitled to State enrolment, or members or former members of the Defence Force. *Commonwealth Electoral Act 1949*.

20 Amending legislation passed in 1962 in response to recommendations by the Select Committee on Voting Rights of Aborigines, H of R 1 (1961).

21 *Commonwealth Electoral Act 1918*, s. 93.

22 *Commonwealth Electoral Act 1918*, s. 93, 100.

23 *Commonwealth Electoral Act 1918*, s. 99(A).

A person who is the holder of a temporary visa for the purposes of the Migration Act, or a person who is an unlawful non-citizen under that Act, is not entitled to enrolment. A person who, being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting, or who has been convicted of treason or treachery and has not been pardoned, or who is serving a sentence of three years or longer for an offence against the law of the Commonwealth or of a State or Territory, is not entitled to enrolment or to retain enrolment.<sup>24</sup> The Registrar-General (of births, deaths and marriages) and the Controller-General of Prisons, or their equivalents, in each State and Territory are required to provide to the appropriate electoral authorities details of relevant deaths and convictions, as the case may be.<sup>25</sup>

Electors should normally be enrolled in the subdivision in which they live. Special provisions apply to enrolled persons leaving Australia but intending to return within six years,<sup>26</sup> Australian citizens resident on Norfolk Island,<sup>27</sup> itinerants,<sup>28</sup> prisoners,<sup>29</sup> and Members of Parliament. Senators may be enrolled in any subdivision in the State or Territory which they represent, and Members of the House of Representatives may be enrolled in any subdivision of the division which they represent and are not obliged to live in the electoral division.<sup>30</sup>

## NUMBER OF MEMBERS

The Constitution determines the composition of the House of Representatives and provides that it shall consist of Members directly chosen by the people of the Commonwealth and that the number of Members representing the States shall be, as nearly as practicable, twice the number of Senators representing the States. The number of Members in each State shall be proportionate to the populations of the respective States. The manner in which the number is determined, although set down in the Constitution, was a matter in respect of which the Parliament could legislate, and it has subsequently done so.<sup>31</sup>

Following the 2004 general election representation of the States and Territories was:

New South Wales	50
Victoria	37
Queensland	28
Western Australia	15
South Australia	11
Tasmania	5
Australian Capital Territory	2
Northern Territory	2
	150

<sup>24</sup> *Commonwealth Electoral Act 1918*, s. 93.

<sup>25</sup> *Commonwealth Electoral Act 1918*, ss. 108, 109.

<sup>26</sup> *Commonwealth Electoral Act 1918*, s. 94.

<sup>27</sup> *Commonwealth Electoral Act 1918*, s. 95AA–AC.

<sup>28</sup> *Commonwealth Electoral Act 1918*, s. 96.

<sup>29</sup> *Commonwealth Electoral Act 1918*, s. 96A.

<sup>30</sup> *Commonwealth Electoral Act 1918*, s. 99(4).

<sup>31</sup> Constitution, s. 24; *Representation Act 1905* (repealed). The provisions are now in the Electoral Act—see ‘Determination of divisions’ at p. 85.

A list showing the number of Members of the House of Representatives in each Parliament since 1901 is shown at Appendix 11.

### Territorial representation

The Parliament may admit new States to the Commonwealth or establish new States, and may determine the extent of representation of new States in either House.<sup>32</sup> The Parliament may also make laws for the government of any Commonwealth Territory and determine the extent and terms of representation of any such Territory in either House.<sup>33</sup> Thus, the Parliament has determined that the Australian Capital Territory and the Northern Territory shall be represented in both the House of Representatives and the Senate. For a description of former provisions for the representation of the Australian Capital Territory and the Northern Territory and limitations on Members representing the Territories in earlier years *see* pp. 168–9 of the second edition.

In 1988 amendments to the Commonwealth Electoral Act provided for Territories to be represented in proportion to their populations, population quotas being determined in the same manner as for the original States, subject to provisos that:

- the Australian Capital Territory and the Northern Territory each have at least one Member; and
- any other Commonwealth Territory be entitled to separate representation only if its population exceeds one half of a quota; until so entitled the Territories of Cocos (Keeling) Islands and Christmas Island continue to be included in the electoral division of the Northern Territory.<sup>34</sup>

The Territory of Norfolk Island is not represented. However, Norfolk Islanders are entitled to be enrolled in a State or Territory subdivision.<sup>35</sup>

In 2004 the Electoral Act was amended to set aside a determination under section 48 of the Act which had specified one Member for the Northern Territory at the next election, and to provide that the prior determination (specifying two Members) should apply.<sup>36</sup> The amendments also made provision for the Electoral Commissioner to allow for the effect of statistical error in respect of the population count of the territory concerned, before making a determination resulting in a reduction in the representation of the Australian Capital Territory or the Northern Territory.<sup>37</sup>

### The growth of the House

Appendix 11 shows the number of Members of the House of Representatives and the representation of each State and Territory for each Parliament since 1901. Significant variation in membership has occurred as follows:

- In 1949 the membership of the House increased from 75 to 123 following legislation increasing the number of Senators from six to 10 for each original State.<sup>38</sup>

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32 Constitution, s. 121.

33 Constitution, s. 122.

34 *Commonwealth Electoral Act 1918*, s. 48, as amended by *Electoral and Referendum Amendment Act 1989*.

35 *Commonwealth Electoral Act 1918*, s. 95AA.

36 *Commonwealth Electoral Act 1918*, s. 48A, inserted by the *Commonwealth Electoral Amendment (Representation in the House of Representatives) Act 2004*.

37 *Commonwealth Electoral Act 1918*, s. 48.

38 *Representation Act 1948*.

- In 1977 the High Court ruled<sup>39</sup> that the four Territory Senate places created in 1974<sup>40</sup> could not be included for the purpose of calculating the number of Members of the House under the ‘nexus’ provision of the Constitution, and consequently the number of Members, which had reached 127 during 1974–75, was reduced to 124 for the ensuing Parliament.
- In 1984 the membership of the House increased from 125 to 148 following legislation increasing the number of Senators to 12 for each original State.<sup>41</sup>
- Redistributions increased the number of Members to 150 from the 2001 general election.

In both 1949 and 1984 a major reason given for the enlargement of the House was the increase in the number of people to be represented.

**TABLE 3.1** RATIO OF ELECTORS TO MEMBERS

<i>Year of election</i>	<i>Electors</i>	<i>Members</i>	<i>Average number of electors per Member</i>
1901	907 658	75	12 102
1946	4 744 017	75	63 254
1949	4 913 654	123	39 948
1983	9 373 580	125	74 989
1984	9 866 266	148	66 664
2001	12 636 631	150	84 244
2004	13 098 461	150	87 323

## ELECTORAL DIVISIONS

### Determination of divisions

The Constitution provides that:

- the House of Representatives shall be composed of Members directly chosen by the people of the Commonwealth; and
- the number of Members chosen in the several States shall be in proportion to the respective numbers of their people.<sup>42</sup>

These provisions, together, express the concept of equality of representation, the national concept and the democratic character of the House of Representatives.

The Constitution, having provided for the determination of the number of Members and the manner in which they are chosen, also specified that, until the Parliament otherwise provided, the Parliament of each State could make laws to determine the divisions for the

<sup>39</sup> *Attorney-General (NSW) ex rel. McKellar v. Commonwealth* (1978) 139 CLR 527.

<sup>40</sup> *Senate (Representation of Territories) Act 1973*.

<sup>41</sup> *Representation Act 1983*.

<sup>42</sup> Constitution, s. 24; see also Ch. on ‘Members’.

State. The Federal Parliament passed its own legislation in 1902 (*see* p. 81). Electoral divisions are also commonly known as electorates or constituencies.

In order to determine the number of Members for the States and Territories the Electoral Commissioner first ascertains a quota by dividing the population of the Commonwealth (excluding territorial populations) by twice the number of Senators for the States. The number of Members to be chosen for each State or Territory is then determined by dividing the number of people of the State or Territory by the quota. If on such division there is a remainder greater than one half of a quota, an additional Member is chosen.<sup>43</sup> This determination is subject to the constitutional requirement of there being a minimum of five Members for each of the original States<sup>44</sup> and the requirement of the Commonwealth Electoral Act that there be a minimum of one Member for each of the Northern Territory and the Australian Capital Territory.<sup>45</sup>

The Commonwealth Electoral Act provides that each State and the Australian Capital Territory, and the Northern Territory on becoming entitled to more than one Member, shall be distributed into electoral divisions equal in number to the number of Members of the House of Representatives to be chosen for the State or Territory, and one Member of the House of Representatives shall be chosen for each division.<sup>46</sup> These divisions are known as single-member constituencies. Multi-member constituencies, although allowed for in the Constitution, have not been used.<sup>47</sup>

In order to determine these divisions, the Electoral Commissioner ascertains a quota of electors for each State and Territory by dividing the number of electors in the State or Territory by the number of Members to be chosen in that State or Territory.<sup>48</sup> The boundaries of each division are then determined by the State or Territory Redistribution Committee, as outlined below.

Because of Australia's uneven distribution of population, divisions vary greatly in area. In 2004 the largest division in terms of area was Kalgoorlie in Western Australia (2.3 million square kilometres) and the smallest was Wentworth in New South Wales (26 square kilometres).

## Redistribution

The Commonwealth Electoral Act provides for regular redistributions.<sup>49</sup> The Electoral Commissioner must direct a redistribution of a State or Territory:

- when changes in the distribution of population (ascertained during the thirteenth month of the life of each House of Representatives, if still continuing<sup>50</sup>) require a change to the number of Members in a State or Territory;
- when more than one third of the divisions within a State deviate from the average divisional enrolment for the State by more than 10 per cent, and have done so for more

43 *Commonwealth Electoral Act 1918*, s. 48.

44 Constitution, s. 24.

45 *Commonwealth Electoral Act 1918*, s. 48(2B).

46 *Commonwealth Electoral Act 1918*, ss. 56, 57. The means of determining the number of Members is laid down in s. 48; and *see* Ch. on 'Members'.

47 Except at the first election when both South Australia and Tasmania each voted as one division.

48 *Commonwealth Electoral Act 1918*, s. 65.

49 *Commonwealth Electoral Act 1918*, s. 59. The States having been distributed into divisions once are thereafter redistributed. The words 'distributed' and 'redistributed' are commonly used synonymously.

50 *Commonwealth Electoral Act 1918*, s. 46.

than two months, or in the case of the Australian Capital Territory, when one division so deviates; or

- within 30 days of the expiration of a period of seven years since the previous redistribution, except that should the seven years expire during the last year of the life of a House of Representatives the redistribution is to commence within 30 days of the first meeting of the next House of Representatives.

Such provisions also apply to the Northern Territory by virtue of section 55A of the Commonwealth Electoral Act, and it is treated as a State for the purposes of redistribution.<sup>51</sup>

To conduct a redistribution the Electoral Commission appoints a Redistribution Committee for the State or Territory, comprising:

- the Electoral Commissioner;
- the Australian Electoral Officer for the State or Territory (in the case of the ACT the senior Divisional Returning Officer);
- the Surveyor-General for the State or Territory or the Deputy Surveyor-General (or equivalent); and
- the Auditor-General for the State or Territory or the Deputy Auditor-General.

In circumstances where the appropriate State officials are not available, the places of the Surveyor-General and Auditor-General may be filled by senior employees of the Australian Public Service from the State or Territory nominated by the Governor-General.<sup>52</sup>

A quota of electors, ascertained by dividing the number of electors in the State or Territory by the number of Members,<sup>53</sup> is the basis for the proposed redistribution. A proposed division may not depart from this quota by more than 10 per cent.

In making the proposed redistribution, the Redistribution Committee is required, as far as practicable, to endeavour to ensure that, three years and six months after the redistribution (or earlier time determined by the Electoral Commission),<sup>54</sup> the number of electors enrolled in each proposed electoral division in the State or Territory will be not less than 96.5% or more than 103.5% of the average divisional enrolment in the State or Territory. Subject to this requirement the Redistribution Committee shall give due consideration, in relation to each proposed electoral division, to:

- community of interests within the proposed electoral division, including economic, social and regional interests;
- means of communication and travel within the proposed electoral division;
- the physical features and area of the proposed electoral division; and
- the boundaries of existing divisions in the State or Territory.<sup>55</sup>

Redistribution Committees are required to consider any suggestions and comments lodged with them pursuant to public advertisement in the Gazette and the press. A period is allowed for lodgement of suggestions. At the end of the lodgement period, the Redistribution Committee must make copies of all suggestions available for perusal at the

51 The first redistribution of the Northern Territory to provide for two Members occurred in 2000.

52 *Commonwealth Electoral Act 1918*, s. 60.

53 *Commonwealth Electoral Act 1918*, s. 65.

54 *Commonwealth Electoral Act 1918*, s. 63A.

55 *Commonwealth Electoral Act 1918*, s. 66.

relevant office of the Electoral Commission, and invite written comments on the suggestions. A further period is allowed for submission of comments.<sup>56</sup>

Once the initial proposals are determined by the Redistribution Committee, maps showing the names and boundaries of each proposed division must be exhibited at every Electoral Commission office in the State or Territory. Copies of any suggestions or comments made to the committee, detailed descriptions of the proposed boundaries and the committee's reasons for its proposals must be made available for perusal at Electoral Commission offices.<sup>57</sup> A member of a Redistribution Committee may submit a statement of dissent to any proposal<sup>58</sup> and copies of any such statement must also be made available.

Maps of proposed divisions and the availability of other documents must be advertised publicly and written objections may be lodged.<sup>59</sup> Objections to proposed redistributions are considered by an 'augmented Electoral Commission', that is, the members of the Redistribution Committee concerned and the Chairperson and the non-judicial member of the Electoral Commission.<sup>60</sup> The augmented Electoral Commission must hold an inquiry into an objection unless it is of the opinion that the objection is frivolous or vexatious or is substantively the same as a submission previously made.<sup>61</sup> Objections are determined by a majority vote of the augmented Electoral Commission. If the findings of the augmented Electoral Commission, in its own opinion, are significantly different from the original Redistribution Committee proposals, further objections can be made and a second round of hearings occur. The resultant determinations are final and conclusive. They are not subject to appeal of any kind and cannot be challenged in any court.<sup>62</sup>

### *Parliamentary procedure*

Following determination relevant documents are forwarded to the Minister responsible, who must have them presented to each House within five sitting days of receipt.<sup>63</sup> Under these procedures Parliament has no further role and has no opportunity to alter the determination in any way.

Prior to 1983 amendments to the Electoral Act, redistributions were subject to the approval, by resolution, of each House of the Parliament.<sup>64</sup>

### *Limited redistribution*

If writs are issued for a general election and the number of Members to be elected in a State or the Australian Capital Territory does not correspond to the existing number of electoral divisions, a so-called 'mini-redistribution' is conducted by the Electoral Commissioner and the Australian Electoral Officer for the State or Territory (the senior Divisional Returning Officer for the Australian Capital Territory).<sup>65</sup> To decrease or increase the number of divisions, pairs of contiguous divisions with the least number of electors are combined or pairs of contiguous divisions with the greatest number of electors are divided

<sup>56</sup> *Commonwealth Electoral Act 1918*, s. 64.

<sup>57</sup> *Commonwealth Electoral Act 1918*, s. 68.

<sup>58</sup> *Commonwealth Electoral Act 1918*, s. 67.

<sup>59</sup> *Commonwealth Electoral Act 1918*, s. 69.

<sup>60</sup> *Commonwealth Electoral Act 1918*, s. 70.

<sup>61</sup> *Commonwealth Electoral Act 1918*, s. 72.

<sup>62</sup> *Commonwealth Electoral Act 1918*, s. 77.

<sup>63</sup> *Commonwealth Electoral Act 1918*, s. 75.

<sup>64</sup> The earlier provisions are described in previous editions (4th edn, p. 88).

<sup>65</sup> *Commonwealth Electoral Act 1918*, s. 76. The Northern Territory is treated as a State under these provisions, now that it has two Members.



into three, as the case may be. New electorates so created carry the names of the electorates from which they were formed, arranged alphabetically and hyphenated.

### *Improper influence*

It is an offence punishable by fine or imprisonment to seek to influence improperly members of a Redistribution Committee, members of an augmented Electoral Commission or a Redistribution Commissioner in the performance of their duties.<sup>66</sup>

In 1978 a Minister's appointment was terminated following a finding by a Royal Commissioner that the Minister's action in seeking to influence Distribution Commissioners in relation to names of electoral divisions had constituted impropriety.<sup>67</sup>

## GENERAL ELECTIONS

The following constitutional provisions relate to a general election, that is, an election for all Members of the House of Representatives:

- The Governor-General may dissolve the House of Representatives.<sup>68</sup>
- Every House of Representatives shall continue for three years from the first meeting of the House, and no longer, but may be sooner dissolved by the Governor-General.<sup>69</sup>
- The Governor-General in Council may cause writs to be issued for general elections of Members of the House of Representatives.<sup>70</sup>
- After any general election the Parliament shall be summoned to meet not later than 30 days after the day appointed for the return of the writs.<sup>71</sup>

A general election follows the dissolution of the House by the Governor-General,<sup>72</sup> or the expiration of the House by effluxion of time three years from its first meeting. The period between the first meeting and dissolution, called a Parliament, has varied between seven months (11th Parliament) and a period just short of the three year maximum term (18th and 27th Parliaments). The 3rd Parliament has been the only one to have expired by effluxion of time.<sup>73</sup> Notwithstanding the generality of the above:

- The Governor-General may dissolve both Houses simultaneously upon certain conditions having been met under section 57 of the Constitution, resulting in a general election for the House and an election for all the Senate.<sup>74</sup>
- Apart from section 57, the constitutional provisions relating to dissolution only concern the House of Representatives. The election of Senators does not necessarily take place at the same time as a general election for the House of Representatives.
- The distinction between the 'Governor-General' dissolving the House and the 'Governor-General in Council' issuing writs for a general election should be noted. While the decision to dissolve the House may be made by the Governor-General,<sup>75</sup> the

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<sup>66</sup> *Commonwealth Electoral Act 1918*, s. 78.

<sup>67</sup> 'Matters in relation to electoral redistribution, Queensland 1977', *Report of the Royal Commission of Inquiry*, PP 263 (1978). The case is described in more detail in previous editions (4th edn, p. 89).

<sup>68</sup> Constitution, s. 5.

<sup>69</sup> Constitution, s. 28.

<sup>70</sup> Constitution, s. 32.

<sup>71</sup> Constitution, s. 5.

<sup>72</sup> See Ch. on 'The Parliament and the role of the House'.

<sup>73</sup> For a list of federal elections see Appendix 12.

<sup>74</sup> For further discussion see Ch. on 'Disagreements between the Houses'.

<sup>75</sup> However, in practice this power is exercised with the advice of the Federal Executive Council; see *Quick and Garran*, pp. 404–6. For further discussion see Ch. on 'The Parliament and the role of the House'.

decision to call a general election can only be made on and with the advice of the Executive Council, that is, the Government.<sup>76</sup>

While the majority of Parliaments have extended for more than two years and six months some Parliaments have been dissolved well short of the maximum three year term. Reasons for the early dissolution of the House have included:

- defeat of the Government on the floor of the House (1929, 1931);
- an insufficient working majority in the House (e.g. 1963);
- double dissolution situations (1914, 1951, 1974, 1975, 1983, 1987);
- synchronisation of House elections with Senate elections (e.g. 1955, 1977, 1984); and
- perceived political or electoral advantage.

Occasionally reasons for dissolving the House have been published.<sup>77</sup>

## BY-ELECTIONS

Whenever a vacancy occurs in the House because of the death, resignation, absence without leave, expulsion or disqualification or ineligibility of a Member,<sup>78</sup> a writ may be issued by the Speaker for the election of a new Member.<sup>79</sup> Since Federation there have been, on average, three or four by-elections per Parliament.<sup>80</sup> A by-election may be held on a date to be determined by the Speaker or, in his or her absence from Australia, by the Governor-General in Council. The polling must take place on a Saturday.<sup>81</sup>

If there is no Speaker or if the Speaker is absent from the Commonwealth, the Governor-General in Council may issue the writ.<sup>82</sup> A by-election writ may be issued by the Acting Speaker performing the duties of the Speaker during the Speaker's absence within the Commonwealth.<sup>83</sup> A writ has been issued by the Deputy Speaker during the Speaker's absence within the Commonwealth<sup>84</sup> and the Deputy Speaker has informed the House of the Speaker's intention to issue a writ.<sup>85</sup>

There are no constitutional or statutory requirements that writs be issued for by-elections within any prescribed period.<sup>86</sup> The following cases have occurred:

- with a general election pending, the Speaker has declined to issue a writ in order to avoid the need for two elections within a short period of time;<sup>87</sup> and
- writs have been issued and then withdrawn by the Speaker when dissolution of the House has intervened.<sup>88</sup>

In so far as it concerns the sequence of events following the issuing of a writ, the Electoral Act makes no distinction between by-elections and ordinary (general) elections—for indicative timetable details *see* p. 94.

<sup>76</sup> Constitution, s. 32; *and see* s. 62.

<sup>77</sup> *See* Chs on 'The Parliament and the role of the House', and 'Disagreements between the Houses'.

<sup>78</sup> For discussion *see* Ch. on 'Members'.

<sup>79</sup> Constitution, s. 33.

<sup>80</sup> For a list of by-elections *see* *Parliamentary Handbook*.

<sup>81</sup> *Commonwealth Electoral Act 1918*, s. 158.

<sup>82</sup> Constitution, s. 33.

<sup>83</sup> S.O. 18; *and see* Ch. on 'The Speaker, Deputy Speakers and officers'.

<sup>84</sup> VP 1920–21/575 (Chairman of Committees as Deputy Speaker). There is some doubt as to the constitutional validity of this action.

<sup>85</sup> VP 1956–57/63 (Chairman of Committees as Deputy Speaker); *but see* Ch. on 'The Speaker, Deputy Speakers and officers'.

<sup>86</sup> For the last 10 by-elections prior to 2004 the average time between vacancy and polling day has been 52 days.

<sup>87</sup> VP 1926–28/649; VP 1964–66/621; H.R. Deb. (18.8.66)157; VP 1990–92/1941.

<sup>88</sup> VP 1929–31/950; VP 1932–34/899.

Notwithstanding that Speakers have decided not to issue writs pending general elections, a suggestion that the Speaker should withhold issue for other purposes has been rejected. In January 1946 the Speaker issued the following statement:

The guiding principle in fixing the date of a by-election has always been to hold the election as early as possible so that the electors are not left without representation any longer than is necessary. With that principle before me I submitted the dates I proposed to the Chief Electoral Officer; he suggested a minor alteration regarding the return of the writ, which I accepted, and the writ was accordingly issued early today. Representations were later made to me that sufficient time was not allowed for a particular State Member to resign. In reply to that I would point out that Mr Wilson's appointment to an office under the Crown had been announced early in December and was published later in December in the Gazette. Individuals and parties thus had ample notice of the pending vacancy in the House. I would also point out that in the last by-election (Fremantle) an exactly similar number of days was allowed between the issue of the writ and nominations. It has been represented to me that the writ should be withdrawn and a new writ issued. If I were to do this I would be considering the wishes of one particular individual, which should not enter into the matter and which would raise a justifiable protest from other candidates and parties. Moreover, the Chief Electoral Officer advises that the dates have already been notified to the commanders of service units outside Australia, and confusion and inconvenience would be likely if the writ were withdrawn and another issued.<sup>89</sup>

A writ has been issued by the Governor-General between a general election and the meeting of a new Parliament consequent upon the death of an elected Member and when a Member has resigned to the Governor-General before the House has met and chosen a Speaker.<sup>90</sup> Based on this procedure new elections have been held before the meeting of Parliament and after the meeting of Parliament.<sup>91</sup>

When the Court of Disputed Returns declares an election absolutely void (*see* p. 102), a writ may be issued by the Speaker for the purposes of a new election.<sup>92</sup>

The Clerk of the House was subpoenaed by the Supreme Court of Victoria to appear on 20 June 1904 and produce the original writ issued by the Speaker on 15 March 1904 for an election for the division of Melbourne.<sup>93</sup>

In issuing a writ for a by-election Speakers normally follow the procedure set out below:

- the vacancy and cause of vacancy is notified to the House at the earliest opportunity;
- convenient dates are selected and the Electoral Commission is consulted as to their suitability for electoral arrangements;
- proposed dates are forwarded to party leaders for comment;
- dates determined by the Speaker are notified by a press release;
- a writ addressed to the Electoral Commissioner is prepared, signed by the Speaker and embossed with the House of Representatives seal;
- the House is advised;
- the writ is delivered to the Electoral Commissioner;
- the Australian Broadcasting Authority is advised; and
- notification of the by-election is published in the Gazette.<sup>94</sup>

<sup>89</sup> Statement issued outside the House. Members of State Parliaments previously had to resign 14 days before nomination.

<sup>90</sup> Constitution, s. 33; VP 1983–84/6.

<sup>91</sup> VP 1964–66/3–5 (before), VP 1917/4 (after).

<sup>92</sup> E.g. VP 1904/26, 44; VP 1907–8/4; VP 1920–21/190; VP 1996–98/428–30, 489.

<sup>93</sup> VP 1904/85; *and see* VP 1912/15 and Chs on 'The Parliament and the role of the House' and 'Documents'.

<sup>94</sup> E.g. Gazette S338 (17.9.96).

## SENATE ELECTIONS

Senators are elected on a different basis to Members of the House of Representatives. Key features of Senate elections are:

- Each State or Territory votes as one electorate. Twelve Senators are chosen for each State and two Senators for each of the Australian Capital Territory and the Northern Territory.
- Senators are elected by a system of proportional representation which ensures that the proportion of seats won by each party in each State is virtually the same as the proportion of the votes gained by that party in that State.
- There is an election for half the number of State Senators every third year. It is not necessary for half-Senate elections and elections for the House of Representatives to occur at the same time, although elections for the two Houses are generally held concurrently.
- Elections for Territory Senators are held concurrently with general elections for the House of Representatives.
- State Senators serve for six years from the beginning of their term of service (except following a dissolution of the Senate when half of them serve for three years).<sup>95</sup> Territory Senators serve until the day before the poll of the next general election.
- A Senate casual vacancy is filled by a person chosen by the Parliament of the State concerned or, in relation to the Australian Capital Territory or Northern Territory, by the respective Legislative Assembly. The person chosen fills the vacancy until the end of the former Senator's term. A person of the same political party as the Senator previously filling the vacant position must be chosen, if there is one available.<sup>96</sup> Before the Australian Capital Territory achieved self-government the Senate and the House of Representatives, at a joint sitting, chose the person to fill a casual Senate vacancy in the Territory.<sup>97</sup>

For further information on Senate elections *see Odgers*.

## METHOD OF VOTING

With every system of election there are two quite separate and distinct processes, the 'voting' process and the 'scrutiny' process, that is, the counting. The first is performed by the voters in the marking of their ballot papers while the second is carried out by the officials responsible for the conduct of the election. The procedure for the scrutiny of votes in House of Representatives elections is provided for in the electoral law.<sup>98</sup>

Until 1918 the 'first-past-the-post' voting process was used. This is one of the simplest forms of voting as it requires the voter to indicate a vote for only one candidate and the candidate with the greatest number of votes (that is, a relative majority) is elected.

<sup>95</sup> Constitution, s. 13. The term of service normally starts on 1 July following the election. After a dissolution of the Senate it starts on 1 July preceding the election.

<sup>96</sup> Constitution, s. 15; *Commonwealth Electoral Act 1918*, s. 44.

<sup>97</sup> Joint sittings for this purpose were held on 5 May 1981 (J 1980–81/227) and 16 February 1988 (J 1987–89/477–8)—for rules adopted for this sitting *see* Rules for joint sittings. The mechanism of filling a casual Senate vacancy by means of a joint sitting of the Commonwealth Parliament is retained in the case of a vacancy in a Territory other than the ACT or NT (should any gain Senate representation), *Commonwealth Electoral Act 1918*, s. 44(2A).

<sup>98</sup> *Commonwealth Electoral Act 1918*, s. 274.

The voting process now in use is a preferential one, usually referred to as 'preferential voting' (also known as the 'alternative vote' or 'contingent vote' system).

The preferential voting system used is an absolute majority system where for election a candidate must obtain more than 50 per cent of the votes in the count. The voter is required to mark his or her vote on the ballot paper by placing the number one (1) against the name of the candidate of first choice, and to give contingent votes for all the remaining candidates in order of preference by the consecutive numbers 2, 3, 4 and so on; all squares on the ballot paper must be numbered, although one square may be left unnumbered, in which case the blank square will be deemed to be the voter's last preference, provided a first preference has been indicated.<sup>99</sup>

The first step in obtaining the result of the election is to count the first preferences marked for each candidate. If a candidate has an absolute majority (that is, fifty percent plus one) on the first preferences or at any later stage of the count, that candidate is declared elected. The next step is to exclude the candidate with the fewest votes and sort those ballot papers to the next preference marked by the voter. This process of exclusion is repeated (to achieve the two party preferred figure) until there are only two candidates left in the count, even though one of those candidates may have been declared elected at an earlier stage.<sup>100</sup>

### *Senate voting*

The method of counting described above was also used for Senate elections from 1919 to 1946. A system of proportional representation has been used since 1949. This system is a relative majority system which means that for election a candidate must obtain a certain percentage of the votes in the count, usually referred to as the 'quota'. This system is only appropriate to multi-member constituencies, such as those for the Senate, where each State votes as one electorate.

For Senate elections the ballot paper may be marked preferentially or, alternatively, the voter may indicate his or her wish to vote for candidates in the order set out on a registered party list by marking the appropriate box. The special feature of proportional representation is contained in the method of counting the votes which ensures that the proportion of seats won by each party is virtually the same as the proportion of the votes gained by that party.<sup>101</sup> There is thus greater opportunity for the election of minority parties and independents than in the House.

The result of proportional representation has been that since 1949 the numbers of the Senate have been fairly evenly divided between government and opposition supporters with the balance of power often being held by minority parties or independents, whose political influence has increased as a consequence. Governments have frequently been confronted with the ability of the Opposition and minority party or independent Senators to combine to defeat or modify government measures in the Senate.

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<sup>99</sup> *Commonwealth Electoral Act 1918*, ss. 240, 268.

<sup>100</sup> *Commonwealth Electoral Act 1918*, s. 274.

<sup>101</sup> *Commonwealth Electoral Act 1918*, s. 239. For a more detailed account of this system see *Odgers*, 11th edn, pp. 98–101; and Electoral Commission publications.

## THE ELECTION PROCESS

The following table illustrates the constitutional and statutory requirements for the conduct of an election and the particular time limitations imposed between dissolution and the meeting of the new Parliament.<sup>102</sup>

**TABLE 3.2 TIMETABLE FOR A GENERAL ELECTION**

<i>Stage</i>	<i>Limitation(a)</i>	<i>Constitutional or statutory provision</i>
Dissolution	—	Constitution, ss. 5, 28
Issue of writs (at 6 p.m.)	Within 10 days of dissolution	Constitution, s. 32; Commonwealth Electoral Act, ss. 151, 152
Close of electoral rolls (at 8 p.m.)	7 days after date of writ	Commonwealth Electoral Act, ss. 102(4), 155
Nominations close (at 12 noon)	Not less than 10 days nor more than 27 days after date of writ	Commonwealth Electoral Act, ss. 156, 175
Date of polling (a Saturday)	Not less than 23 days nor more than 31 days from date of nomination(b)	Commonwealth Electoral Act, ss. 157, 158
Return of writs	Not more than 100 days after issue	Commonwealth Electoral Act, s. 159
Meeting of new Parliament	Not later than 30 days after the day appointed for the return of writs	Constitution, s. 5

(a) Advice from the Attorney-General's Department, dated 15 March 1904, states that the dates fixed are reckoned exclusive of the day from which the time is reckoned; *and see Acts Interpretation Act 1901*, s. 36(1).

(b) A general election (or by-election) must therefore take place not less than 33 nor more than 58 days after the issue of writ(s).

### Issue of writs

The authority for holding an election is in the form of a writ issued by the Governor-General,<sup>103</sup> or in the case of a by-election by the Speaker (*see* p. 90), directed to the Electoral Commissioner commanding the Commissioner to conduct an election in accordance with the prescribed procedures.<sup>104</sup>

The writs for general elections of the House of Representatives are issued by the Governor-General (acting with the advice of the Executive Council) and specify the date by which nominations must be lodged with the Divisional Returning Officer concerned, the date for the close of the electoral rolls, the date on which the poll is to be taken and the date for the return of the writ. The writ is deemed to have been issued at 6 p.m. on the day of issue.<sup>105</sup> Eight writs are issued for a general election, one for each of the six States and the two Territories. The issue of writs is notified in the Gazette.<sup>106</sup>

102 Appendix 12 shows significant dates in relation to each general election since 1940.

103 Constitution, s. 32.

104 *Commonwealth Electoral Act 1918*, s. 154.

105 *Commonwealth Electoral Act 1918*, s. 152. Form B of Schedule 1 to the Act prescribes the form in which writs are issued.

106 E.g. Gazette S434 (31.8.98).

In the case of dissolution or expiry of the House of Representatives the writs must be issued within 10 days,<sup>107</sup> so that there cannot be undue delay before an election is held to elect a new House of Representatives.

A writ for the taking of a referendum<sup>108</sup> is also issued by the Governor-General (in Council) and is addressed to the Electoral Commissioner. The writ specifies the date for the close of rolls, for holding the referendum and for the return of the writ.<sup>109</sup>

### Nomination of candidates

To contest an election to the House of Representatives a person must be nominated by at least 50 electors in the division he or she is to contest or the registered officer of the party endorsing him or her as a candidate. Continuing independent Members need only nomination by one elector.<sup>110</sup> Nominations are made to the Divisional Returning Officer at any time between the issue of the writ and the close of nominations. Candidates of registered political parties<sup>111</sup> may also be nominated in bulk for divisions of a State by the registered officer of the party. Bulk nominations must be made to the Australian Electoral Officer for the State no later than 48 hours prior to the close of nominations. The date for the close of nominations cannot be less than 10 days nor more than 27 days after the issue of the writ. The time for nominations closes at 12 noon on the appointed day.<sup>112</sup> For a nomination to be valid, it must have the candidate's consent and be accompanied by a declaration by the candidate that he or she is qualified under the Constitution and the laws of the Commonwealth to be elected as a Member of the House of Representatives. The declaration must also state that he or she will not be a candidate for any other election held on the same day, and give details of his or her Australian citizenship.<sup>113</sup>

A person who at the hour of nomination is a Member of a State Parliament or Territory Assembly may not be nominated.<sup>114</sup> Likewise a Member of the Senate or the House is required to resign to contest an election for the House of which he or she is not a Member.<sup>115</sup> There are constitutional prohibitions (outlined in the Chapter on 'Members') concerning persons who hold any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth. If unsuccessful, an Australian Public Service or Parliamentary Service employee who has resigned to contest an election must be reappointed to the service.<sup>116</sup> Officers of the Electoral Commission are not eligible for nomination.<sup>117</sup>

A deposit of \$350 is required to be lodged with the nomination. The deposit is returned if, at the election, the candidate polls at least four per cent of the total first preference votes polled in the division.<sup>118</sup> A candidate may withdraw his or her nomination up to the close of

107 Constitution, s. 32.

108 See Ch. on 'The Parliament'.

109 *Referendum (Machinery Provisions) Act 1984*, ss. 7–8.

110 *Commonwealth Electoral Act 1918*, s. 166. Form D of Schedule 1 to the Act contains a sample nomination form.

111 To be able to be registered, a party must have at least one member in Parliament or, if it has no parliamentary member, at least 500 party members. *Commonwealth Electoral Act 1918*, s.123.

112 *Commonwealth Electoral Act 1918*, s. 175.

113 *Commonwealth Electoral Act 1918*, s. 170. Qualification and disqualification requirements are outlined in the Ch. on 'Members'.

114 *Commonwealth Electoral Act 1918*, s. 164.

115 Constitution, s. 43 (the resignation needs to be made before nomination).

116 *Public Service Act 1999*, s. 32. *Parliamentary Service Act 1999*, s. 32.

117 *Commonwealth Electoral Act 1918*, s. 36.

118 *Commonwealth Electoral Act 1918*, ss. 170, 173.

nominations but cannot do so after nominations have closed.<sup>119</sup> If one candidate only is nominated then he or she shall be declared duly elected without an election being necessary.<sup>120</sup>

Should a candidate die during the nomination period the hour of nomination is extended by 24 hours to allow time for the nomination of an alternative candidate.<sup>121</sup> If any candidate dies between the close of nominations and polling day, the election is deemed to have failed and a new writ for a supplementary election<sup>122</sup> is issued forthwith. These provisions are based on the principle that no political party should be disadvantaged at an election because of the death of its candidate. In the division of Hume for the 1972 general election an independent candidate died after the close of nominations and a new writ was issued setting a new date for nominations. The dates of the original writ for polling and the return of the writ were retained.<sup>123</sup> During the 1993 general election in the division of Dickson an independent candidate died shortly before the poll. A new writ was issued for a supplementary election, setting later dates for nominations, polling and the return of the writ.<sup>124</sup> Similarly, a supplementary election was held in 1998 for the division of Newcastle because of the death of a candidate prior to polling day.

In order to help ensure fair elections, the Commonwealth Electoral Act prohibits bribery, undue influence and a number of other practices, and provides for penalties for these offences.<sup>125</sup>

On 16 February 1976 a case against a former Minister (Hon. R. V. Garland) and a former Senator (Mr G. H. Branson) was brought by the Attorney-General under the then section 209 of the Commonwealth Electoral Act alleging a breach of the bribery provisions of the Act.<sup>126</sup> As a result of the proposed action Mr Garland had resigned his commission as a Minister on 6 February 1976.<sup>127</sup> The magistrate dismissed the charge, ruling that although a *prima facie* case had been established, a jury, properly directed, would not convict the defendants.<sup>128</sup>

Nominations are declared (publicly announced) at the office of the respective Divisional Returning Officer at 12 noon on the day following the day of the close of nominations,<sup>129</sup> and the order of candidates' names on the ballot paper then determined by a method of double randomisation.<sup>130</sup>

## Polling day

Each voter is required to mark the ballot paper preferentially (*see* p. 93) and secrecy of voting is assisted by the provision of private voting cubicles. Since the introduction of

119 *Commonwealth Electoral Act 1918*, s. 177.

120 *Commonwealth Electoral Act 1918*, s. 179(2). The last occasion of an uncontested election was in respect of the Northern Territory at the 1963 general election. In the 1955 general election 11 divisions were uncontested.

121 *Commonwealth Electoral Act 1918*, s. 156.

122 *Commonwealth Electoral Act 1918*, ss. 180, 181.

123 *Gazette* S112 (13.11.72).

124 *Gazette* S78 (9.3.93).

125 *Commonwealth Electoral Act 1918*, Part XXI.

126 *Commonwealth Electoral Act 1918*, s. 326.

127 *Gazette* S28 (9.2.76).

128 Case unreported; but see 'Australia: Alleged breach of Electoral Act', *The Parliamentarian*, LVII, 4, 1976, p. 253.

129 *Commonwealth Electoral Act 1918*, ss. 175, 176.

130 *Commonwealth Electoral Act 1918*, s. 213. Form F of Schedule 1 to the Act contains a sample ballot paper. (Until 1983 candidates were listed on the ballot paper in alphabetical order.)



compulsory voting in 1925, some 95 per cent of enrolled voters have cast a vote at general elections.<sup>131</sup>

### *Scrutineers*

Scrutineers may be appointed by candidates to represent them at polling places during the election,<sup>132</sup> and at pre-poll voting offices,<sup>133</sup> in order to observe the proceedings of the poll and satisfy the candidate that the poll is conducted strictly in accordance with the law.

### *Counting*

Each candidate may also appoint scrutineers at each place where votes are being counted.<sup>134</sup> Counting commences in the presence of the scrutineers as soon as possible after the poll closes.<sup>135</sup> An initial count of first preference votes and a two candidate preferred count is carried out. The purpose of the two candidate preferred count is to provide on election night an indication of the candidate most likely to be elected. After polling day a fresh count is made and preferences are distributed (*see* p. 93). Informal (i.e. invalid) ballot papers are not included in the count.<sup>136</sup> In recent years the number of informal votes cast at general elections has varied between 2.1 and 6.3 per cent of the total votes cast.<sup>137</sup> In 2004 this figure was 5.18 per cent.

### *Recount*

At any time before the declaration of the result of an election, the officer conducting the election may, at the written request of a candidate, or of his or her own volition, recount some or all of the ballot papers.<sup>138</sup> A recount is generally undertaken only where the final result is close and there are specific grounds for supposing that a recount could change the result of the first count. If a recount confirms a deadlock, the officer must advise the Electoral Commissioner that the election cannot be decided.<sup>139</sup> In such circumstances the Electoral Commission must file a petition disputing the election with the Court of Disputed Returns, which must within three months declare either a candidate elected or the election void.<sup>140</sup>

### *Declaration of the poll*

The result of the election is declared as soon as practical after it has been ascertained that a candidate has been elected—in some divisions this may be a week or more after the election. In a House of Representatives election the declaration of the poll is made at the office of the respective Divisional Returning Officer.<sup>141</sup> Because the time for counting will vary from division to division, declarations of the various polls do not necessarily occur on the same day. The poll may be declared, notwithstanding that all ballot papers have not

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131 The pre-1925 figure was about 60%.

132 *Commonwealth Electoral Act 1918*, s. 217.

133 *Commonwealth Electoral Act 1918*, s. 200DA.

134 *Commonwealth Electoral Act 1918*, s. 264.

135 *Commonwealth Electoral Act 1918*, s. 265.

136 *Commonwealth Electoral Act 1918*, s. 268.

137 Figures for elections from 1980 to 2004 inclusive.

138 *Commonwealth Electoral Act 1918*, s. 279.

139 *Commonwealth Electoral Act 1918*, s. 274(9C).

140 *Commonwealth Electoral Act 1918*, ss. 357(1A), 367A.

141 *Commonwealth Electoral Act 1918*, s. 284.

been received or inquiries completed, if the Returning Officer is satisfied that the votes recorded on the ballot papers concerned could not possibly affect the result.<sup>142</sup>

### Return of writs

A writ is both the authority for an election to be held and the authority by which the successful candidate is declared elected. When all polls in a State or Territory have been declared at a general election or when the poll has been declared for a division subject to a by-election, the Electoral Commissioner certifies the name of the successful candidate for each division, and forwards the writ to the Governor-General or Speaker, as the case may be.<sup>143</sup> Writs are returnable on or before the date fixed for their return. The date on which a writ is returned is the date on which the endorsed writ comes into the actual physical possession of the person authorised to act upon it (i.e. the Governor-General or the Speaker).<sup>144</sup> All writs for a general election are returnable by the same day and all writs are forwarded together by the Governor-General's Official Secretary to the Clerk of the House. The issuing authority may extend the time for holding an election or for returning the writs.<sup>145</sup> An error in a writ may be remedied by proclamation.<sup>146</sup>

### Meeting of a new Parliament

On the meeting of a new Parliament, returns to the eight writs for the general election must be laid upon the Table by the Clerk and the Members are then sworn.<sup>147</sup> After a general election the House must meet not later than 30 days after the day fixed for the return of the writs.<sup>148</sup> However, the House may meet as soon as the writs are returned and in recent Parliaments it has not been unusual for the House to meet before the date fixed for the return of writs.<sup>149</sup>

## PUBLIC FUNDING AND FINANCIAL DISCLOSURE

### Public funding for elections

Since 1983 public funding has been made available for election purposes. Responsibility for the operation of the system of public funding is vested in the Electoral Commission.

Principal features of the provisions include:

- To be eligible for public funding political parties must be registered with the Commission.
- For each valid first preference vote received a specified amount is payable, which is adjusted half yearly in accordance with increases in the Consumer Price Index. For the half year July to December 2004 the amount was 194.397 cents.

142 *Commonwealth Electoral Act 1918*, s. 284.

143 *Commonwealth Electoral Act 1918*, s. 284.

144 Letter from Electoral Commissioner to Clerk of House 17.3.94 (citing advice from the Attorney-General's Department).

145 *Commonwealth Electoral Act 1918*, s. 286. Gazette 26 (30.4.10) 973.

146 *Commonwealth Electoral Act 1918*, s. 285. VP 1998–2001/3 (Governor-General's proclamation rectifying errors in certificates on writs presented). Other kinds of error in the election process may also be remedied under this provision—in the 2004 general election the times for the return of postal votes in Queensland were extended by proclamation after it had been found that a number of electors had not received postal voting materials.

147 S.O. 4; and *see* Ch. on 'The parliamentary calendar'.

148 Constitution, s. 5.

149 *See* Appendix 12.

- No payment is made in respect of candidates or groups who do not receive at least four per cent of the eligible votes polled (that is, valid first preference votes).
- Funding for candidates endorsed by a party may be shared between the relevant State branch and the Federal secretariat of the party.<sup>150</sup>

## Financial disclosure

### *Annual returns by political parties and associated entities*

Each registered political party and each State or Territory branch of a registered political party must submit a return within 16 weeks after the end of each financial year showing the total amounts received and paid during the year and the total of debts outstanding at the end of the year. Details of receipts and debts are required if the total amount received from a person or organisation during the year, or owed to a person or organisation at the end of the year, is \$1500 or more.<sup>151</sup> Entities closely associated with parties also must disclose receipts, payments and debts in the same manner as parties and additionally must disclose the source of deposits of capital.

### *Returns by candidates*

After each election, candidates and groups are required to disclose publicly donations received for electoral purposes and electoral expenditure incurred or authorised by them.<sup>152</sup> Principal provisions include:

- Returns must be submitted to the Electoral Commission, within 15 weeks of polling day.
- Disclosure of donations covers the period from 31 days after the poll for the preceding election to 30 days after the poll for the current election. Returns of individual candidates who have not been candidates at a federal election within the previous four (House) or seven (Senate) years must cover the period commencing on the day of nomination or announcement of candidature for the current election, or in the case of Senators appointed under the casual vacancy provisions, the day of appointment.<sup>153</sup>
- Returns must set out the total amount or value of all gifts received, the number of persons who made gifts, the number of gifts, and for gifts from a single source of or greater than a specified total value (\$1000 in the case of a group and \$200 in the case of a candidate) details of each gift, including the date of the gift, its value and the name and address of the donor. Details of each gift are not required if the gift has been made and has been or will be used for purposes unrelated to an election.<sup>154</sup>
- Returns must also be made setting out details of expenditure incurred in relation to the election in respect of advertising, electoral material, direct mailing, the conducting of opinion polls or other research.<sup>155</sup>
- If no donations have been received or no expenditure has been incurred returns must nevertheless be lodged with a statement to this effect.<sup>156</sup>

150 *Commonwealth Electoral Act 1918*, ss. 294–302, 321.

151 *Commonwealth Electoral Act 1918*, ss. 314AA–AG.

152 *Commonwealth Electoral Act 1918*, ss. 303–314AG.

153 *Commonwealth Electoral Act 1918*, s. 287.

154 *Commonwealth Electoral Act 1918*, s. 304.

155 *Commonwealth Electoral Act 1918*, ss. 308–9.

156 *Commonwealth Electoral Act 1918*, s. 313.

### *Returns by third parties and donors*

Persons who have incurred or authorised electoral expenditure exceeding \$200 not authorised by a candidate, political party or group must furnish returns of expenditure.<sup>157</sup> Persons who have incurred expenditure of \$1000 or more must make returns listing gifts received by them with a value of \$1000 or more which were used to incur that expenditure.<sup>158</sup> Persons who have made gifts to candidates in relation to elections of \$200 or more, or to any person or body specified by the Electoral Commission of \$1000 or more, must furnish returns detailing such gifts.<sup>159</sup> Such returns must be submitted within 15 weeks after polling day, covering the period extending from 31 days after the poll of the preceding election until 30 days after the poll of the current election.

Persons making gifts totalling \$1500 or more during a financial year to a registered political party must submit a return, within 20 weeks of the end of the year, showing details of all gifts made to that party. Gifts to any person or body made with the intention of benefiting a political party are also covered.<sup>160</sup>

### *Returns by media*

Broadcasters and publishers who, during the election period, broadcast or publish advertising relating to the election must furnish a return to the Electoral Commission giving particulars of such advertising, identifying the person authorising it and showing the charges involved, although publishers whose total charges do not exceed \$1000 are exempt from this requirement. Returns must be made within eight weeks of the day of polling.<sup>161</sup>

### *Annual returns by government departments*

Government departments must include in their annual reports details of amounts of \$1500 or more paid to advertising agencies, or to market research, polling, direct mail, and media advertising organisations.<sup>162</sup>

### *Failure to make returns or keep records*

It is an offence punishable by a fine of up to \$5000 to fail to make a return if required to do so or by a fine of up to \$1000 to make an incomplete return and by a fine of up to \$10000 to knowingly provide a return containing false or misleading information.<sup>163</sup> Failure to provide required returns does not invalidate the election of a candidate.<sup>164</sup> A penalty of \$1000 applies for failure to retain (for three years after polling day) records relating to matters which are or could be required to be set out in a return.<sup>165</sup>

### *Unlawful gifts and loans*

It is unlawful to receive gifts of more than a specified value (\$1000 or more for a political party or group, \$200 or more for a candidate) where either the names or addresses of the donors are unknown at the time the gift is received. Loans of \$1500 or more may not be received other than from a financial institution unless details of the source and

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157 *Commonwealth Electoral Act 1918*, s. 309(4).

158 *Commonwealth Electoral Act 1918*, s. 305.

159 *Commonwealth Electoral Act 1918*, s. 305A.

160 *Commonwealth Electoral Act 1918*, s. 305B.

161 *Commonwealth Electoral Act 1918*, ss. 310–311.

162 *Commonwealth Electoral Act 1918*, s. 311A.

163 *Commonwealth Electoral Act 1918*, s. 315.

164 *Commonwealth Electoral Act 1918*, s. 319.

165 *Commonwealth Electoral Act 1918*, ss. 315, 317.

conditions of the loan are recorded. The amount or value of a gift or loan received in breach of these provisions is payable to the Commonwealth.<sup>166</sup>

### *Public availability of returns*

After 24 weeks from the date of the poll, returns may be inspected by members of the public at the main office of the Electoral Commission in Canberra and copies may be obtained on payment of a fee to cover the cost of copying. Annual returns may be inspected and copied from the first working day in February in the calendar year after the return is due.<sup>167</sup>

## DISPUTED ELECTIONS AND RETURNS

At the commencement of the Commonwealth, any question concerning the qualification of a Member or Senator, a vacancy in either House, or any disputed election to either House was to be determined by the House in which the question arose.<sup>168</sup> Under this original procedure three petitions were presented to the House of Representatives disputing the election of certain Members.<sup>169</sup> All three petitions were referred to the Committee of Elections and Qualifications for inquiry and report.<sup>170</sup> In all three cases the committee's report, adopted by the House, did not support a change in the election result.<sup>171</sup>

In 1902 legislation was enacted which provided for the validity of any election or return to be disputed by petition addressed to the High Court sitting as the Court of Disputed Returns.<sup>172</sup> This legislation did not apply to the election of a Member to fill a vacancy in the House of Representatives during the 1st Parliament.<sup>173</sup> In 1907 legislation was enacted providing that the relevant House could refer to the Court of Disputed Returns any question respecting the qualifications of a Member of the House of Representatives or a Senator to sit in Parliament or respecting a vacancy in either House of Parliament.<sup>174</sup>

The provisions of the 1902 legislation relating to the Court of Disputed Returns have not changed substantially over the years. Under the present legislation the validity of any election or return may only be disputed by a petition addressed to the Court of Disputed Returns.<sup>175</sup>

Such a petition must contain a form of words called a prayer, set out the facts relied on to invalidate the election or return, be signed by either a candidate or person qualified to vote at the election and be attested by two witnesses. The petition must be filed within 40 days of the return of the writ, with a deposit of \$500, in the Principal Registry of the High Court in the capital city of the State in which the election was held. The Electoral

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166 *Commonwealth Electoral Act 1918*, ss. 306, 306A.

167 *Commonwealth Electoral Act 1918*, s. 320. Annual returns are also available on the Australian Electoral Commission internet site ([www.aec.gov.au](http://www.aec.gov.au)).

168 Constitution, s. 47.

169 VP 1901–02/59, 83, 419. See Appendix 13.

170 Until 1987, the Senate at the commencement of each Parliament appointed a Committee of Disputed Returns and Qualifications but it did not function from 1907.

171 VP 1901–02/61, 87, 441.

172 *Commonwealth Electoral Act 1902*, ss.192–206.

173 *Commonwealth Electoral Act 1902*, s. 4.

174 *Disputed Elections and Qualifications Act 1907*, s. 6 (later repealed and its provisions incorporated in the *Commonwealth Electoral Act 1918*).

175 *Commonwealth Electoral Act 1918*, s. 353.

Commissioner may also file a petition disputing an election, on behalf of the Commission, and is obliged to do so if the election cannot be decided because of a deadlock.<sup>176</sup>

The petition is heard by the High Court sitting as the Court of Disputed Returns or is referred by the High Court for hearing by the Federal Court of Australia, which has all the powers and functions of the Court of Disputed Returns. In either court these powers may be exercised by a single justice or judge.<sup>177</sup> When the court finds that any person has committed an illegal act, this fact is reported to the responsible Minister.<sup>178</sup>

The Chief Executive and Principal Registrar of the High Court sends a copy of the petition to the Clerk of the House of Representatives immediately it has been filed, and after the hearing sends the Clerk a copy of the order of the court. A copy of the order is also sent to the issuer of the writ (that is, the Governor-General or the Speaker).<sup>179</sup> The Clerk presents the petition and order of the court to the House at the earliest opportunity either separately or together.<sup>180</sup> The decision of the court is final and no appeals are permitted.<sup>181</sup> A person whose election has been challenged continues to serve pending the outcome of the hearing.

Any person returned who is declared by the court not to have been duly elected ceases to be a Member of the House of Representatives—in fact the decision means that the person has not been a Member. Any person not returned who is declared to have been duly elected following consideration of an election petition may take his or her seat in the House of Representatives. If any election of any Member is declared absolutely void, then a new election is held.<sup>182</sup>

Since the establishment of the Court of Disputed Returns there have been 44 cases of the court being petitioned in connection with a seat in the House of Representatives, including 13 of similar intent lodged after the 1980 general election.<sup>183</sup> The court has ruled the election absolutely void in six cases and the Speaker (or Acting Speaker) has issued writs for new elections to be held.<sup>184</sup> Following the 1993 general election petitions were lodged alleging irregularities in the conduct of a general election, against the Electoral Commission, and challenging the election of all Members elected, rather than challenging the election of specified Members. The cases were dismissed.<sup>185</sup>

In 1920 a Member (Mr McGrath) was elected at a second election after the first election had been declared void. The House agreed to a motion that compensation be paid to him because he had been compelled to contest two elections as a result of official errors and had thus been involved in much unnecessary but unavoidable expenditure.<sup>186</sup>

The House of Representatives may, by resolution, refer any question concerning the qualifications of a Member or a vacancy in the House to the Court of Disputed Returns.<sup>187</sup> The Speaker sends to the court a statement of the question together with any documents

176 *Commonwealth Electoral Act 1918*, s. 357(1A). Such cases must be decided within three months, s. 367A.

177 *Commonwealth Electoral Act 1918*, s. 354.

178 *Commonwealth Electoral Act 1918*, s. 363.

179 *Commonwealth Electoral Act 1918*, s. 369; VP 1929–31/91–2.

180 E.g. VP 1996–98/72, 428–30; VP 2002–04/17, 328; VP 2004–/130.

181 *Commonwealth Electoral Act 1918*, s. 368.

182 *Commonwealth Electoral Act 1918*, s. 374.

183 See Appendix 13—(figures to end 2004).

184 VP 1904/25–6, 43–4; VP 1907–8/3–4; VP 1920–21/189–90; VP 1990–92/1907, 1921–3 (by-election not held due to general elections in March 1993); VP 1996–98/428–30, 489.

185 VP 1993–95/176–7, 1106.

186 VP 1920–21/468.

187 *Commonwealth Electoral Act 1918*, s. 376.

possessed by the House relating to the question.<sup>188</sup> The court has the power to declare any person not qualified or not capable of being chosen or of sitting as a Member of the House of Representatives, and to declare a vacancy in the House of Representatives. The Chief Executive and Principal Registrar of the High Court sends a copy of the order or declaration of the Court of Disputed Returns to the Clerk of the House, as soon as practicable after the question has been determined.<sup>189</sup>

There has been no instance of the House of Representatives referring a question concerning the qualifications of a Member or a vacancy in the House to the Court of Disputed Returns<sup>190</sup> although this has happened in the Senate.<sup>191</sup>

For further coverage of Members' qualifications and disqualifications and challenges to membership of the House *see* Chapter on 'Members'.

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188 *Commonwealth Electoral Act 1918*, s. 377.

189 *Commonwealth Electoral Act 1918*, s. 380.

190 Unsuccessful motions to refer matters are noted under 'Challenges to membership' in Ch. on 'Members'.

191 *See Odgers*, 6th edn, pp. 172–4; 11th edn, p. 131.