
The Independence of Electoral Administration*

Colin A. Hughes

As a topic for serious study, electoral administration has been a late starter. Classic political philosophers like Rousseau and John Stuart Mill wrote about electoral systems and the theories of representation they embodied, and so did historians of Greece, Rome, the Papacy, the Holy Roman Empire, the United Kingdom and the United States *et cetera*. But such writers almost always ignored the low-level mechanics of who did exactly what when elections were taking place, the one virtuous exception being Jeremy Bentham.

As an undergraduate fossicking in the second hand bookshops which once stood where the Bank and the Fund now rule the world, I acquired two volumes entitled *How the World Votes*.¹ Their author was a Yale professor, Charles Seymour, with his research assistant shown as co-author. Seymour is still well known today for his account, written a few years earlier, of the development of the English electoral

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¹ C. Seymour and D.P. Frairy, *How the World Votes*. 2 v. Springfield MA, C.A. Nichols Co., 1918.

system after the Great Reform Act.² To start this lecture I want to ask why the ‘How’ in the later title was ignored for so long.³

It will help if we look at the sub-titles of those books for a moment. In 1915 Seymour added ‘The development & operation of the parliamentary franchise 1832–1885,’ and in 1918 ‘The story of democratic developments in elections.’ By 1918 democracy was seen as a good thing, though not necessarily always suitable for export and adoption. Look at what was being said about Iraq in the Covenant of the League of Nations (Art. 22) and the text for the subsequent mandate. What ‘developing democracy’ traditionally meant in the context of elections was extension of the franchise to, eventually, all adults. Since the end of World War II that meaning has expanded, as we will see.

When Seymour reached ‘Elections in the British Colonies,’ those colonies which were about to become Dominions, his praise was fulsome: ‘[T]hese self-governing commonwealths represent in many ways the furthest development of the democratic idea that the world has seen.’⁴ In particular, they had curbed plutocracy and reformed the hereditary upper house. The methods of roll-keeping in Canada and Australia were described briefly, and he noted that ‘Australia has ... gone far in developing the technical details of holding elections.’

Unlike the mother country where untrained officials produced often unsatisfactory rolls, and ‘electoral duties were regarded as of comparative unimportance and shifted on to the backs of already overloaded officials, Australia has a wealth of electoral officials who have nothing else to do but to see that the mechanism of elections runs smoothly.’⁵ The significance of that development has been discussed elsewhere.⁶ In practice the ‘wealth of officials’ meant a full-time junior official who did the routine work and a more senior officer with other, non-electoral duties as well, located in every electoral district (the Commonwealth Constitution called them ‘divisions’, plus very small establishments at state and federal level supervising them. The whole organisation was known as the Electoral Office, and formed part of a large ministerial department for budgetary and personnel administration purposes.

Writing a few years later than Seymour, Lord Bryce, having defined democracy as meaning ‘nothing more nor less than the rule of the whole people expressing their sovereign will by their votes,’ was equally approving of Australia:

² C. Seymour, *Electoral Reform in England and Wales*. New Haven, Yale University Press, 1915; reprinted Hamden CN, Archon Books, 1970.

³ Note the same point has been made about electoral commissions: R.A. Pastor, ‘A Brief History of Electoral Commissions,’ in A. Schedler et al. (eds) *The Self-Restraining State: Power and Accountability in New Democracies*. Boulder CO, Lynne Reiner, 1999, p. 76.

⁴ *How the World Votes*, op. cit., p. 181.

⁵ *How the World Votes*, op. cit., p. 193.

⁶ C.A. Hughes, ‘The bureaucratic model: Australia,’ *Journal of Behavioural and Social Sciences* vol. 37, 1992, pp. 6–23.

It is the newest of all the democracies. It is that which has travelled farthest and fastest along the road which leads to the unlimited rule of the multitude.⁷

That was certainly true. Adult male suffrage, abolition of plural voting and property franchise, suffrage for women were far and fast indeed. Bryce also mentioned several local innovations that extended the franchise, but went on to say that '[t]he counting of votes appears to be everywhere honestly conducted, and one hears no complaints of bribery,' whilst noting limitations had been imposed on campaign expenditure and the likelihood that elections were getting more expensive.⁸

What Bryce did not write about, nor did anyone until Robert Parker⁹ 40 years later, was the Australian tendency to turn adjudication of some important decisions over to independent bodies. It is important for today's topic and again it is a matter written about previously.¹⁰ When developing electoral administration, the Australian colonies had originally followed British foot-steps fairly closely, but as the post-Bentham era of reforms unfolded sometimes the Australians were a few paces ahead, sometimes the British.

The franchise began as a property right, and as such was suitable for adjudication in the ordinary courts of law. But when the numbers of electors grew and their qualifications had been reduced and simplified, it proved easier to turn disputes over to a specialized court that came into existence *ad hoc* when rolls were being compiled to hear *inter partes* disputes about eligibility. The new federal government immediately created Special Courts of Revision (*Commonwealth Electoral Act 1902*, s.38) comprising the electoral official charged with keeping the roll in his division and either a magistrate or a couple justices of the peace. The matter remained with those special courts briefly, then the magistrate or justices of the peace were dropped. That left enrolment disputes to the official responsible for roll maintenance in that division, subject to appeal up the bureaucratic hierarchy.

Disputes about membership of the House of Commons—membership of the House of Lords raised very different questions—could concern either eligibility to be elected or the conduct of the poll. In either case it was considered the responsibility of that chamber which would appoint a select committee to investigate. Eventually responsibility passed to a special court consisting of a superior judge, and the Australian colonies followed.

Another electoral problem took the same course away from the legislative branch. By 1902 when the Commonwealth first legislated, the time was already ripe for what Seymour would soon describe: routine electoral matters were turned over to public servants, a process which was encouraged by the demands made by a continuous roll. New Zealand and New South Wales had already innovated in a closely-related area by

⁷ J. Bryce, *Modern Democracies*. vol. 1. London, Macmillan, 1927, p.viii; vol. 2, p. 181.

⁸ *Ibid.* pp. 200–201.

⁹ R.S. Parker, 'Power in Australia,' *Australian and New Zealand Journal of Sociology* no. 1, 1965, pp. 88–89.

¹⁰ C.A. Hughes, 'Government Action and the Judicial Model,' in A.E. Tay and E. Kamenka (eds), *Law-making in Australia*. Melbourne, Edward Arnold, 1980, pp. 268–70.

turning the drawing of division boundaries to an official, subsequently three officials. However that legislation set criteria to be applied by the official(s) and each chamber retained the right to reject the officials' proposals and require them to try again. There still remains some uncertainty whether the provisions of the Commonwealth Electoral Act (CEA) monopolise the electoral sphere, or whether other legislation dealing with review of administrative decisions can offer an alternative remedy,¹¹ but that lively hare will not be pursued now.

Corrupt acts affecting the electoral process went to the ordinary courts. 'Electoral offenses' they were called generally but in the CEA they were divided into three categories: those committed by electoral officials and called 'breach or neglect of official duty', those committed by political activists and called 'illegal practices' which included bribery and undue influence, and those likely to be committed by ordinary citizens which were also called 'electoral offences.' Offences were prohibited and penalized '[t]o secure the due execution of this Act and the purity of elections' with savage penalties: imprisonment with maximum terms of two years, one year or six months depending on the offence, or fines of £200 or £50 maximum. The only cut-price offence was defacing or removing official notices at £2 maximum, still a tidy sum for those days (CEA 1902, ss.173–91). Breach or neglect of official duty was near the top of the range with a maximum of one year or a £200 fine which is not surprising for an era where public service ethics rested on a penalty-based disciplinary system.

'Independence' from interference by another in a sphere of government activity usually has a close connection to the status and reputation of the person or persons undertaking that activity. By 1902 judges had more than two centuries of independence under their belts; public servants nearly half a century. Both the politically active and the mass public would have had fairly clear and firmly-held beliefs about the integrity and independence of judges and public servants, reinforced as they were by the severe sanctions of loss of a relatively good and certainly secure job and possible criminal prosecution.

It remained possible for a *deus ex machina* to be invoked if and when it was thought necessary, which was rare. A select committee reviewed the first election conducted by federal officials in 1903, and was generally satisfied with arrangements. A royal commission sat in 1913 when some things were thought to have gone wrong at that election. It ended the last vestige of the 'overload' Seymour wrote about by making the senior official in each division's two-person office a full-time electoral official. One might say that Australia's 'characteristic talent' for bureaucracy¹² had triumphed once more because it appeared to work well. In a wider context the point has been made:

Paradoxically ... electoral governance attracts serious attention not when it produces good elections but when it occasionally produces bad

¹¹ A. O'Neil, 'Justiciability: the Role of Courts in Reviewing Electoral Administration,' in G. Orr et al. (eds), *Realising Democracy: Electoral Law in Australia*. Sydney, Federation Press, 2003, pp. 193–204.

¹² A.F. Davies, *Australian Democracy*. Melbourne, Longmans, 1958, p. 3.

ones. It is this paradox that has obscured the empirical relevance and analytical significance of electoral governance.¹³

The Australian system of electoral administration was paralleled in each state for their own elections, save they did not have officials permanently stationed in each of their electoral districts but recruited other officials *ad hoc* when an election came on. It became a familiar and trusted part of the Australian political landscape and as a consequence nobody wrote about it. Regular tinkering with, and occasional substantial changes to, the electoral system meant that Parliament often had an opportunity to say something about the administrative implications of those matters, and in particular Members would avail themselves of the opportunity to mention local grievances like the availability of polling places, but these rarely had a sustained partisan flavour.

Significant for future talk and writing about Australian electoral administration, though not at that time, was the struggle in the 1940s and early 1950s for control of the international trade union movement waged by the American Federation of Labor and the International Congress of Free Trade Unions as part of the Cold War.¹⁴ It led to the Electoral Office being given responsibilities for the conduct of trade union elections as well as parliamentary elections, and the former proved to be much more prone to disputes and consequent litigation in the courts than the latter ever were.

Not until the early 1970s and the coming to office of the Whitlam Government was serious and sustained consideration given to major changes to the electoral system and, associated with it, to the ability of what had become something of an in-bred bureaucratic backwater to cope with major additions to its responsibilities and with the consequences of changes in Australian society and party politics.¹⁵ Thanks to the responsible minister, Fred Daly, a modest increase in the staffing of the divisional offices was achieved and roll-maintenance computerised, but that did little more than recognise the massive growth in enrolments and the number of enrolment transactions every year. The Electoral Office was made a statutory authority, and thus slightly more at arm's length from its ministerial department, and its senior officials were made statutory officers and so removable only by Parliament, but these changes only gave legal form to existing practice. The Hawke Government came to office in 1983 with what was potentially a substantial program for change inherited from the Whitlam period, but chose to work through a Joint Select Committee on Electoral Reform (JSCER) in the first instance.

I will mention only changes which resulted from that process that are germane to this lecture's subject, the independence of electoral administration. For the benefit of anyone present familiar with a paper on that subject published a few years ago,¹⁶ I will

¹³ S. Mozaffar and A. Schedler, 'The comparative study of electoral governance—introduction,' *International Political Science Review* vol. 23, no. 1, 2002 (Special Number on Electoral Governance and Democratization), p. 6.

¹⁴ S. Short, *Laurie Short: a Political Life*. Sydney, Allen & Unwin, 1992, pp. 195–97.

¹⁵ G. Whitlam, *The Whitlam Government 1972–1975*. Melbourne, Penguin, 1985, pp. 653–87; C. Hughes, 'Electoral Affairs,' in H. Emy et al. (eds), *Whitlam Re-Visited: Policy Development, Policies and Outcomes*. Sydney, Pluto Press, 1993, pp. 229–53.

¹⁶ C.A. Hughes, 'The Independence of the Electoral Commissions: the Legislative Framework and the Bureaucratic Reality,' in G. Orr et al. (eds), *op. cit.*, pp. 205–15.

try to avoid repeating what was said then. Both the major parties, Labor and Liberal, recommended creation of an independent electoral commission, and the JSCER saw 'great merit in the existence of an Australian Electoral Commission (the AEC) with a statutory basis and which is seen to operate independent of political influence' and recommended accordingly.¹⁷ The JSCER proposed that the AEC carry on all the current functions of the Electoral Office, and in particular a statutory basis should be given to what had already started on a limited and intermittent basis, 'research, information and education programs.'¹⁸

But the JSCER also proposed involving the AEC in what would have to be relatively novel responsibilities. In 1902 a relatively recent British precedent had been copied and limits set for campaign expenditure (CEA 1902, ss.160–72), but the provisions had been largely ignored in practice. Eventually they were repealed by the Fraser Government when the possibility that they might be applied arose. The JSCER considered two 'closely related' issues, the first being introduction of partial public funding of election expenditure, and the second the re-imposition of an obligation to disclose expenditure, now coupled with imposition of a new and additional obligation to disclose the source(s) of donations.

Whilst a great many of the JSCER's recommendations were supported by both major parties, the area of these two issues was charged with partisan feeling, attributable presumably to the widely-held belief that the Liberal Party benefited more substantially from the current, un-regulated situation than did the Labor Party. With the support of minor party members in the Senate the Hawke Government was able to legislate along the lines laid down by the JSCER. In the more than 20 years since then there has been, I think, widespread acceptance that there should be public funding and that there should be some degree of disclosure, but considerable partisan feeling hangs over the details of both.

Another new field of activity would be the registration of political parties, introduced to support several changes being made. One change was the addition of the party identification of candidates on ballot-papers; a second was collective lodging of nomination papers of a party's candidates, and a third the payment of public funding and the lodging of disclosure returns. Those changes largely reflected the changing nature of campaigning and electoral contests with increased emphasis on party leaders rather than individual candidates, the centralized control over campaign messages allowed by IT developments, and the steeply rising cost of campaigning. The new function appeared to fit comfortably into existing routine: for the most part it required routine clerical work within fairly clear statutory provisions. Ready access to an administrative tribunal and then the courts if an imaginative new party tested the *status quo* took away any politically sensitive disputes. However a case that happened to arise under similar legislation in a state jurisdiction recently showed the potential for trouble that can lurk in apparently quiet corners. It involved money and therefore imported the criminal law of fraud into the dispute and that in turn led to a well known political identity being locked up for a time. On the other hand, when a party opposing the passage of a constitutional amendment referendum differed from the

¹⁷ Joint Select Committee on Electoral Reform, *First Report*. Canberra, AGPS, 1983, pp. 38–40.

¹⁸ *Ibid.* p. 40.

AEC on the meaning of a statutory restriction on advertising, the matter was speedily and finally resolved by the former applying to the High Court. It all depends.

Finally the JSCER proposed enhancing the AEC's independence, compared to the Electoral Office's, by abandoning the power of each chamber to fail to pass or to reject a redistribution scheme for a particular state and require the redistribution commissioners to try again (CEA 1902, ss.21–22). Lest this be thought a minor matter, for the last instances are now 30 years in the past, there were 17 instances of rejection and 14 instances of a scheme lapsing before the parliamentary veto power was removed. There had been speculation whether the possibility of rejection might inhibit the independence of the redistribution commissioners.¹⁹ The majority of the JSCER, wisely, chose to rely instead on appearances and 'believed that, to reinforce to the maximum possible extent the independence of the commission and to ensure as much as possible the removal of its conclusions from the political sphere, the conclusion of the Electoral Commission with respect to redistributions should be final'²⁰ and that was what the legislation provided. In a dissenting report, Senator John Carrick, the senior Liberal member of the JSCER, suggested that at the final stage of the redistribution the proposals should be placed before Parliament, which might make comments or recommendations. The redistribution commissioners should consider these and then make their decisions, which would be final.

That has been a short history of how we, that is Australia, got to where we are today and it is time to start looking around and asking questions. This is undoubtedly a popular topic:

From Afghanistan to Burundi to Liberia to Palestine, today's headlines are full of situations in which electoral processes go forward in the face of tremendous challenges for conflict management. The reason is clear: in today's world, no government can claim to rule legitimately without some degree of deference to the will of the people ...²¹

To begin at the beginning, the first critical decision has to be the choice of an electoral system, how to convert votes into seats. For some time Australia has used bicameralism to have two-bob each way, and whilst there are proposals abroad for tinkering with each system, their only impact on electoral administration is the increased burden complexity of the voting process places on an administrative authority that is expected to explain the variations to the electorate.

Next is the question of how electoral systems affect party systems, which at present is the extent to which proportional representation increases the number of minor and mini parties on offer.

Finally, and back to our subject, there will be fundamental considerations of electoral administration:

¹⁹ C.A. Hughes and D. Aitkin, 'The federal redistribution of 1968: a case study in Australian political conflict,' *Journal of Commonwealth Political Studies* vol. 8, no. 1, 1970, pp. 21–22.

²⁰ JSCER, op. cit., p. 88.

²¹ J. Large and T.D. Sisk, *Democracy, Conflict and Human Security: Pursuing Peace in the 21st Century*. Stockholm, International IDEA, 2006, p. 85.

Research has shown that the structure, balance, composition and professionalism of the electoral management body (e.g. an electoral commission) is a key component in successful electorate processes that generate legitimate, accepted outcomes.²²

But it is a great truth that has been recognised only recently:

The organisation of elections was traditionally a specialist backwater of the administrations of established democracies, often located within the government or local government service. Individual committed officials worked in their electoral service for many years often in isolation and with their role unrecognized.²³

Does the international scene have anything to do with us? Australia hasn't had a civil war like Afghanistan and the others. Elections in such countries have generated a literature of their own²⁴ and organizations have sprung into existence to assist, some based on a single national benefactor and others truly international in their composition and funding. Australian electoral administration is good enough to export to the less fortunate, and the AEC and its officials have been vigorously engaged in that activity since 1983 as its Annual Reports document and a comment by the Prime Minister about Iraq puts beyond question. Do we really need to worry about the maintenance of what is a long-accepted administrative structure or the avoidance of politico-administrative ills we have never experienced? My answer is that it would be useful to have a look at some recent events, first in fellow members of the Commonwealth of Nations with which we are rarely compared, then in a country with which we like to think we have a number of similarities, and finally in one about which we don't think we have much in common.

Nigeria has an electoral commission that is supposed to be independent. It also has an anti-corruption watchdog commission, like some of our states. With elections pending, the Economic and Financial Crimes Commission recently wrote to political parties, of which Nigeria has a good number, listing 130 candidates who are about to be charged with corruption, including one of the most serious candidates for the federal presidency. The Nigerian electoral commission has since said they will not be allowed to stand.²⁵ At the beginning of the year the army of Bangladesh called on the country's president to declare an emergency to prevent the impending general election being held. Bangladesh is a polity where excessive bitter rivalry between two major parties and their veteran respective leaders permeates political life. Each party distrusts the other being in office during an election, and so a practice developed that a caretaker government would be installed whilst the election was on. One had just been appointed when it was tipped out by the army. When the new, temporary one was installed it appointed a new electoral commission. However, the author of the article relied on here speculates that the army will not allow an election to be held for

²² Ibid. p. 99.

²³ *Ten Years of Supporting Democracy Worldwide*. Stockholm, International IDEA, 2005, p. 106.

²⁴ E.g. K. Kumar (ed.), *Postconflict Elections: Democratization and International Assistance*. Boulder CO, Lynne Rienner, 1998.

²⁵ 'A blacklist to bolster democracy', *The Economist* 17–23 February 2007, p. 49.

at least a year, in part to allow correction of a national roll thought to contain 12.2 million ‘dubious names’, an estimate attributed to the National Democratic Institute which says the roll will take ‘several months’ to correct, and the issue of ‘fraud-proof identity cards’ would take a year.²⁶

In the United States the Federal Electoral Commission was established only after the Watergate scandal.²⁷ It is concerned only with regulating campaign finance in presidential elections, and is an example of a bipartisan commission, rather than a non-partisan commission. Consequently its members may have active party links, as do a great many elected or appointed electoral officials. Everything else involving federal elections is the responsibility of the 50 states and 4600 local authorities, though there are federal constitutional provisions and federal legislation covering some aspects. The federal legislation may be very specific; e.g. requiring access to polling places for the disabled (1984), ensuring that the military and other citizens overseas can still vote (1986), and that voter registration is possible at motor vehicle registries (1993); or it can be very broad in its effect—battling discriminatory voting practices (1965) and requiring state wide rolls and provisional ballots and making money available to improve electoral administration (2002). Brian Costar and I,²⁸ and a great many Americans too,²⁹ have been very critical of the conduct of recent American elections on more grounds than can be dealt with now.

Finally there is the recent experience of Mexico, where democracy suffered from the long dominance of one major party. Their Federal Election Committee (FEC) was established in 1946 and has been characterised as ‘highly controversial ... run directly by the interior secretary as a dependence of the executive branch ... notorious for directing elections towards outcomes dictated by the president.’³⁰ In 1989 a Federal Electoral Tribunal was created in which decisions of the FEC might be challenged, and in 1990 the Federal Electoral Institute was added. Gradually its powers and its jurisdiction were extended and its reputation for integrity enhanced. In 1996 it was transferred from the executive branch to come under the authority of the Supreme Court, and given control over the selection of its chief executive officer. By 2006 it had engendered sufficient confidence in its independence and integrity to weather an extremely close presidential election followed by a short period of peaceful mass protest against the outcome it had declared.

The conclusion to be drawn from these cases, and there could have been many more, is that there is nothing magical about an electoral commission. It can be set up with

²⁶ ‘Everybody but the politicians is happy’, *The Economist*, 10–16 February 2007, pp. 27–28.

²⁷ *Congressional Campaign Finances: History, Facts, and Controversies*. Washington, Congressional Quarterly, 1992, pp. 44–50.

²⁸ C.A. Hughes and B. Costar, *Limiting Democracy: the Erosion of Electoral Rights in Australia*. Sydney, University of New South Wales Press, 2006, pp. 7–10.

²⁹ For example S. Overton, *Stealing Democracy: the New Politics of Voter Suppression*. New York, W.W. Norton, 2006; House Judiciary Democratic Staff, *Preserving Democracy: What Went Wrong in Ohio*. Washington, US House of Representatives, 2005; The Commission on Federal Election Reform, *Building Confidence in U.S. Elections*. Washington, Center for Democracy and Election Management, American University, 2005.

³⁰ T.A. Eisenstadt, ‘Off the Streets and into the Courtrooms: Resolving Post-electoral Conflicts in Mexico’, in A. Schedler et al. (eds), *op. cit.*, p. 88.

inadequate responsibilities and powers, and be recognised as inconsequential. The principles on which its members are selected are important, as are the circumstances in which they can be removed, individually or collectively. A commission can be caught up in political conflict and become the pawn of more powerful forces. Or it can establish itself as a respected independent force able to resolve political conflict. The rest of this lecture will address a series of questions about how this is most likely to be achieved.

The first question is whether a statutory foundation is sufficient, or should the electoral commission be entrenched in the constitution. There are three pretty obvious truths to start with. Thirty years have passed since the Australian electorate got up enough speed to carry a constitutional referendum, and we have only to consider the level of affirmative voting in 1988 on parliamentary terms and fair elections. Next, amendments may not get things quite right first time. The 1977 amendment on Senate vacancies failed to catch the first case that arose after it had been adopted. Finally, the fact that the Commonwealth Constitution says something should exist is no guarantee it will exist. What could be said to a Martian visitor to Canberra who asked to be taken to the Inter-State Commission? Perhaps tell him it was intended to regulate river transport and he will understand. Given the likelihood that a federal government will not control the Senate, legislation ought to be sufficient. If I caught the magic flounder and it offered me one amendment in return for its freedom, I would rather try to guarantee a right to vote.

It should be remembered that there are well known points at which the Constitution pinches electoral administration, for example introducing a fixed term would assist administration but runs up against the Governor-General's power to dissolve in s.28. There is current an interesting point following the statutory change passed in 2006 to close the rolls on the day that the writ for an election issues. It brings into play s.12 which allocates the power to issue writs for Senate elections in the state governors, and their power to do this has traditionally been regulated by state legislation.³¹ Current provisions either give the local Governor-in-Council discretion, or for Victoria adopt the 1983 amendments to the CEA—as that state did generally with its electoral legislation—and specify the close of rolls being seven days after the date of the writ (s.4(1)). The federal government apparently relies on s.109 to claim that such a provision is inconsistent with a Commonwealth law and to that extent invalid, and it may well be that Commonwealth law determines what can be put on the writ. But whether the Commonwealth can compel a state governor to issue a Senate writ may be a different matter, and one can only say 'watch this space'.

The second question is how specific, or broad, should electoral legislation be; in other words how much discretion should an electoral commission have when conducting an election. Over the years the CEA has grown in length, and the regulations made under it have shrunk, and that is a good thing. There will always be matters where a wide discretion is required. If you are going to enforce compulsory voting, as the Act requires, then something like s.245(4) is necessary:

³¹ *Senators' Elections Act 1903* [NSW], *Senate Elections Act 1960* [Qld], *Election of Senators Act 1903* [SA], *Senate Elections Act 1935* [Tas], *Senate Elections Act 1958* [Vic], *Election of Senators Act 1903* [WA].

The DRO is not required to send a penalty notice if he or she is satisfied that the elector: (d) had a valid and sufficient reason for failing to vote.

Parliamentarians should not have to spend their time considering what should, or should not, be included in a list of reasons that would qualify as valid and sufficient. Possibly some of them have not seen enough of the world to even imagine some of the reasons that are put forward.

On the other hand, discretion demands careful consideration. Take s.268(3):

A ballot-paper shall not be informal for any reason other than the reasons specified in this section, but shall be given effect to according to the voter's intention so far as that intention is clear.

A rhyming couplet was easily remembered: 'When in doubt/throw it out,' but it hardly complies with the intention of the legislation to preserve the voter's right to have their vote counted if that is possible. On a related point, casual observers of the political scene are at risk of mistaking where responsibility lies and whither criticism should be directed. To take a current issue, the ability of candidates who qualify for public funding to show a profit on the operation, the one news story might refer to 'federal electoral law' or 'the rules' or 'the AEC rules' which allow this. It is unlikely to say there once was a statutory provision preventing such an abuse, but it was deleted by agreement of the major parties once they found it an inconvenient distraction from the main game of spending as much as they could as quickly as they could.

The third question is whether there should be some protective machinery involving the legislature to act as a counter-balance to the executive's natural and pervasive influence. Some countries bring their courts into play for this purpose, but because of the view that Australian (and US) courts have taken of dangers to the separation of powers doctrine we can more usefully concentrate on the legislature. The news that the JSCER was going to morph into a permanent feature of the electoral landscape was good news, and some years of living with the Joint Standing Committee on Electoral Matters (the JSCEM) did not undermine my belief in parliamentary committees.

However, it is possible that the relative stability of governments since 1983, a period of almost a quarter century in which two governments each lasted more than a decade and won five and up to the present four general elections respectively, induced a feeling among new members of the committee and others that elections weren't working properly 'to throw the rascals out' and something was wrong somewhere. Two other phenomena of the period, a propensity to strengthen a few components of the government machine at the expense of the rest, and an intensification of partisanship in public life and attack campaigning on the American model in electoral competition, contributed to this feeling. But having said that, it is certainly the case that the evidence engendered by the JSCEM's inquiries and its subsequent reports constitute a unique body of material on electoral administration in detail.

The fourth question is whether the leadership of an electoral commission can be protected from partisan influence, and if so how. The South Australian branch of the Labor Party had suggested to the JSCER that the first chief executive officer should be chosen 'on the recommendations of an independent select committee' and thereafter by the AEC itself, but the JSCER preferred the more usual Governor-General-in-Council appointment. This followed interviews conducted by a committee of relevant permanent heads. Although the defeat of the Whitlam government in 1975 effectively brought an end to administrative reform in the Electoral Office, it coincided with the retirement of the long-serving Frank Ley and led to the appointment for the first time in living memory of an outsider, coming from the Prime Minister's Department, to the most senior office. Since then no insider has been appointed.

What is probably more important as a guarantee of independence is that no incumbent has been re-appointed when their first statutory term ended. If a convention has developed, and one must always be reluctant to say that, it is a useful one. This is not a matter of removing self-interest as a consideration when unpleasant decisions have to be made, but of preventing any appearance that self-interest might have operated. Curiously the point at which the discretion of the Governor-General-in-Council is partly fettered concerns the chairman, one of the two-part time commissioners, who has to be selected from a panel of three 'eligible Judges' supplied by the Chief Judge (CEA 1918, s.6(4)), a formula which, I suspect, was designed to maintain a proper arm's length between the judiciary and a politically sensitive appointment. For the other part-time member, another convention again appears to have started that the appointee will always be by the Commonwealth Statistician; again it is a wise step.

It will always be possible for a government so inclined, and provided it controls both houses of the Parliament, to nibble away a bit of independence by so legislating rather than picking the right person. Thus the Act previously said:

The office of a Divisional Returning Officer shall, unless the Commission otherwise directs, be located with the Division. (CEA 1918, s.38)

The location of divisional offices was the subject of tension between the AEC and some Members and within the Commission between Central Office and divisional staff, primarily because the section's clear implication of each division having its own, small office and existing staff's satisfaction with that arrangement ran counter to the cost and other benefits of consolidating several offices into one in metropolitan and large provincial city areas.³² Eventually, by the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2005 the provision became:

The office of a Divisional Returning Officer must be located within the Division, unless the Minister has given written authority for the office not to be so located.

³² JSCEM, *'Is this where I pay the electricity bill?' Inquiry into the Report on the Efficiency Scrutiny into Regionalisation within the Australian Electoral Commission*. Canberra, AGPS, 1988.

And, it was added, such a written authority was not a legislative instrument, the significance of which I need hardly explain to this audience. This may be a one-off bit of business pressed by a few back-benchers, or even former back-benchers, or it may be a tentative toe in the water with a view to bringing back the Minister in other places. In the United States, for example, the location of and allocation of resources to polling places have been highly controversial matters at recent elections.

Fifth and finally, are some electoral administration functions more dangerous to exercise, i.e. likely to lead to an attack on independence, than others? Or, coming at it from a different angle, has the expansion of responsibilities since 1983 put the AEC more frequently into the political firing line than the old Electoral Office ever was? One has only to mention removal of the parliamentary veto of redistributions, entanglement in parties' internal affairs, enforcing disclosure, contributing to electoral education, and various international contacts—the likelihood that effective controls in Australia will only drive the offending operation overseas, the possibility of web and blogging defamation, money and messages sent from outside the jurisdiction, the swarm of front and fellow-travelling organizations that may surround a contemporary political party, even terrorism and the measures taken to fight it, to appreciate how far the political environment that surrounds electoral administration has changed and the extent to which the newer responsibilities have thrust the AEC into it. Understanding its past may help to protect its future.



Question — You mentioned the joint select committees and the first joint committee in 1904, and the royal commission a decade later and how committees re-started in the 1980s. What is their history between those dates? Were there periods where there was a lot of parliamentary committee analysis of the previous election? Did they stop in the long period of Menzies' government, for example?

Colin Hughes — I'm disadvantaged in answering that question at the moment because, for a quite different purpose, I've been reading a lot of old *Hansards*, basically pre-1948, and I have been surprised at how many references you pick up by looking at 'home affairs' and then the sub-reference 'Electoral'. There was a lot going on, sniping about little things, and indeed in a paper that I hope may one day soon appear on the Democratic Audit site, you will get my gleanings from that exercise. People were using occasions, even grievance debates, to raise electoral matters. Therefore that experience clouds my judgment.

I would have said the premise that the Joint Standing Committee on Electoral Matters has taken electoral matters off to an appropriate forum is right, but I don't know enough about how questions have changed over the years. How far, for example, the independent question is like the Tasmanian Tiger, to be treasured if you think you've seen one; and how far what we're really looking at is the control of Question Time by ministerial officers and the like. There is little concern about the minutiae of electoral matters in ministerial office, most of the ministers having safe seats, which is why

they are ministers. It's a good question. I'm not sure if I went away for a week with a full set of *Hansard* I'd really be able to come up with a watertight answer, but I think certainly the Joint Standing Committee has had a beneficial effect in educating a great many people on the subject and I think a fair few Members too. I think the fairly outrageous critical things are no longer said by Members of Parliament but said by people outside Parliament, but whether they have been put up to doing that by Members of Parliament is a different question again.

Question — I want to ask you a question which really extends a comment you made, but in doing that can I just have a few moments to explain the background that I come from? You were saying in going through your list of questions at the end that one of them was about the possibility for the legislature to act as a counter-balance to executive power. My question is: given that there has not been much controversy about electoral administration in Australia, in the light of something like the Uhrig Report in the Commonwealth on statutory authorities generally, where the report is obviously designed to drag them back into the area of ministerial influence, to curtail autonomy, is there a feeling within the electoral administration that it is now necessary to get the legislature set up to act as a counterbalance? I was at a conference of the International Institute of Administrative Sciences in Mexico about nine months ago, and you mentioned Mexico and the case of the Mexican Electoral Institute. The interest was very much in what you might call integrity agencies: in audit offices, ombudsmen, anticorruption commissions, bodies like that, as well as electoral bodies. And their establishment as a special category of statutory bodies (where governments like to have them, so they can curtail their funding so that they are more like window-dressing than effective instruments). Electoral bodies were mentioned, and in the discussions that took place it seemed to me that in South Africa, in Mexico itself, in the United Kingdom and in Victoria now in Australia, there is a movement towards a special category of officers of parliament. I don't mean clerks of houses, but I mean people heading statutory bodies with a degree of independence from the executive government who are in danger of losing that independence so need special parliamentary protections. It seems to me that New Zealand a few years ago took a great initiative in formalising this notion of officers of parliament, but strikingly and compared with the others I've mentioned, didn't mention the electoral administration—the others did.

My question really is, is there much sense within the Australian electoral administration of the need to push for stronger parliamentary protection?

Colin Hughes — I wouldn't presume to answer the last part of the question because I haven't been part of the AEC for a very long time.

I think the general point that you make about lack of interest in shifts between the executive and quite possibly both other branches of government is like the old frog-boiling metaphor—the frog is only gradually becoming unhappy about this. To personalise the response, I had the misfortune not to have lived under responsible government until I was 20 years old, and this has left me with a permanent prejudice against the executive branch; and to that extent, on seeing a legislative committee set up to deal with electoral administration in 1984, I threw my hat in the air and cried hurrah.

You mentioned South Africa and England and I think it can be said that both were very conscious of the Australian commission model when they moved along those lines. There is a lot of serious talk around the world about this sort of problem, but it's very difficult to seize a constitutional tradition and a constitutional regime. For example, in Latin American countries they reversed this drastically. In the United States, of course, there was a long tradition of the independent regulatory agencies. This meant that when they turned to electoral administration, to set up a federal body, they had an opportunity to do something worthwhile, instead of which they created a Federal Electoral Commission that has one function, and said it should be composed half of Republicans and half of Democrats. They ended up in the court to determine whether it would be proper, considering separation of power violations, and that it had to come out of the executive. Obviously consultation would be possible, but there was no way that you could have the executive and the Senate and maybe the courts getting together to produce a body that was, if not independent, at least coming from all three branches of government.

The Mexicans started up with a body that wasn't worth powder and trot, and by a series of acts of will turned it into a very respectable institution, which appears to have stood on the edge of the civil war and faced down the mob and Mexico is back and running normally. So there are wins.

Question — I think you mentioned in the introduction your role in the Bjelke-Petersen gerrymander. I actually grew up under the Playford gerrymander and shortly after I moved to Canberra, a great time ago now, that was actually reformed by Dunstan and Steele Hall. Gradually, over the years, there has been a lot of reform in most of the state electoral systems, but we still have a situation in some state upper houses, I think in Western Australia, where there's a slightly undesirable situation. Would you comment on the state situation and particularly on upper houses?

Colin Hughes — I think there are two problems with state upper houses (well three if you count not having one like Queensland). You can say it's going to be about proportional representation and then have so few members elected per district that in fact what you're doing is ensuring a reasonably fair go between the two major parties and leaving everybody else, you hope, on the outer. That system can turn around and bite you as happened with the Victorians who ended up resuscitating the DLP, that we all thought had passed from the scene. So there's the problem of getting PR right. The other problem is the ratio of seats to electors.

Some sort of deal was done in Western Australia—I don't know anything about the circumstances—that at least the lower house would be more or less one vote, one value, and the upper house would still have a heavy rural weightage. You have one elected from single member constituencies and preferential voting, and one elected from multimember constituencies with proportional representation; you have one that is malapportioned, and one that isn't malapportioned. If you think malapportionment is a bad thing, then there's a problem. I don't really know enough about sentiments in

Western Australia to know whether this is a problem bubbling away beneath the surface that will soon break through.

If you look at the history of drastic electoral changes anywhere, either you have to have a disaster, or a long shot of averting a disaster by doing something now to cause people to change the rules. One of the difficulties of electoral reform is that you have to go to a body of people and say: 'The means by which you got here is flawed and ought to be changed,' and this is pushing up a fairly steep hill, but there are occasions when it happens. The Senate going over to proportional representation in 1948–49 was undoubtedly the Labor Party seeing dark clouds gathering on the horizon and buying a bit more time in the Senate to make Menzies' life miserable for a year or two. Things would never have happened in Queensland if a body set up ostensibly in the first instance to address problems in the police force had not said that one of the problems in the police force is because the electoral system is so crook and therefore an independent body was given an opportunity of doing something about it.

Talking about Queensland, and the abolition of the gerrymander, when the zonal system was abolished, the Electoral and Administrative Review Committee (EARC), of which I was a member, retained a novel form of weightage for a small number of seats, and there was some grizzling from the purists in the Labor Party about this. Since then there have been a number of elections, and at one election I noticed that somebody in the Country Party said that there shouldn't be big districts. I think a dispute that had been going on since the nineteenth century was resolved by a good principle and a bit of compromise, saying that there are times when you have to modify principle to accommodate local situations.

To let you into the proceedings of EARC, the five of us sat there with a referdex and worked out how long it would take, if you were the member for Gregory, to visit all towns over 500 population in your constituency—drove through at the speed limit and just shouted 'Hi I'm your member' as you passed through. If you drove all night you could do it in two days. That didn't really seem representation.

So a formula was suggested to us which seemed admirable; we adopted it and it has now been adopted in Western Australia, and I think that's how you do get changes from time to time. It may well be that there are other machinery things; for example going back to how to choose the members of a body that is very sensitive, like the Australian Electoral Commission. Should a word be had with the Leader of the Opposition before the names go forward to the Governor-General-in-Council? There are good ideas that will be decided against not on principle, but because Bloggs tried it ten years ago and it turned into an utter dog's breakfast of squabbling and abuse. So until the generation that remembers that has passed from the scene, you won't be able to get that fine principle up on its legs again. That's how the system works unfortunately.

Question — You've suggested that the convention that has emerged that Australian Electoral Commissioners only serve one term is a good thing. I was wondering if there aren't some advantages in such offices being filled through some kind of bipartisan process as you've just eluded to, and that they be filled for life as the Chief Electoral Officer in Canada is, and have that kind of accumulating authority and standing and so on which life appointments give. I think positions such as Clerk of the Senate are another example where appointment for life may be a good idea.

Colin Hughes — I think it would be hard to sell. I think in fact a single term has some advantages that aren't tied necessarily to the question of independence. I was appointed for a seven year term and five years and a couple of months into it, the Commonwealth announced that whatever the statutory provision was, hereafter their statutory appointments would be for only five year terms. It got me to thinking about the matter and it did seem to me, not in terms of independence but in terms of doing the job, that after about five years if you haven't got something done and you've tried to raise it again, people will say 'Oh he's not going on about that again is he?' Five years was really about the time to either keep the thing on the rails if it was satisfactorily on the rails or shake it up and clear out and see whether it worked under anybody else. The danger with the life appointment is that people start watching you too closely for little foibles: 'Did you notice that he did something this morning that he doesn't ordinarily do, the old boy's losing it.'

I can remember seeing one of the last two life professors at Oxford (Gilbert Murray was one, but I never saw him). R.W. Lee, who used to lecture in Roman-Dutch law, used to come down to the Inns of Court once a week to lecture to half a dozen Ceylonese students as they were in those days. Seeing this 90-year-old figure tottering along the back of the law courts made me think probably retirement age is a good for professors, judges and a lot of other people. I don't think a life term necessarily is the best way of getting at things. I think if I had a choice, I'd certainly go for seeing if there is some conceivable way of involving the Opposition in saying: 'Is this person acceptable to you?' and seeing if the flood of vile abuse that they produced contained any germ of truth that it might be worth your while to know about.

Question — When we think about the history of Australian politics, we see that some elections are decided in a land-slide and some are decided by the tally of a handful of marginal seats, and we may have a government coming into office that has indeed been elected by perhaps the sum of three or four marginal seats, maybe less than 500 votes in an extreme example. I'm interested in the increasingly apathetic state of Australian society about political affairs. I am interested in the impact of the large number of informal votes, which can be sometimes between 5 and 6 per cent of the total number of votes cast. I'm wondering what your thoughts are on how we can minimize the impact of glitches in marginal seats or in times of tight elections where the true word of the people may not come into force due to opportunities for marginal electorates to be targeted.

Colin Hughes — There are a number of problems in the questions you raise. One of the consequences of having single member seats is that you get odd mixes because the population isn't spread evenly over the districts. You don't have 17 bank managers, 23 doctors, 45 wharfies allocated to each constituency. This also varies quite considerably by area. I noticed in the papers in the last day or so somebody speculating about the forthcoming federal election, and making the point that there is a lot more potential for trouble for the government in Queensland and in Western Australia than in the three other mainland states. That has always been the case and it's to do with the geography of Sydney, Melbourne and Adelaide as against the geography of Perth and Brisbane. Perth and Brisbane are all mixed up with lumps of wharfies here right next to lumps of bank managers there, whereas in Adelaide, slightly less than used to be the case, and Melbourne and Sydney, there are lines that you can draw on the map and there may be a marginal seat at Parramatta that's been sitting on the fault line, and that's why marginals matter.

The second point about marginals is there are very few divisions that are habitual offenders. This year's marginal seat is unlikely to be next year's. About the only seat that's worth treating as a habitual offender is Eden-Monaro, and that's presumably why Mr Nairn's been made minister, and he ought to be more sensitised than most to these problems. It is very hard to manage things to capitalise on marginal seats because you can't pick the horse to nobble.

Where it can matter is when you look at aggregates and that's why it's more likely to matter for the Senate. Manipulating informal voting for the Senate is worth having a couple of bob on because a vote wasted in Bradfield is as effective as a vote wasted in Parramatta or whichever marginal seat, or Fowler, which is a safe Labor seat. Therefore if you manipulate the system of voting for the Senate, there could be a bit of pay dirt at the end of it. It doesn't mean you'll wipe out the opposition, but that sixth seat might just fall across the line. Doing it for the House of Representatives would be buying a lottery ticket and hoping your number comes up. This is why in 1983 above-the-line voting was introduced by a Labor government, because they were taking a shellacking in Senate informal voting. You had only to look at the informal vote for the Senate by division, to see that there were very few Liberal votes being lost in Bradfield and a terrible lot of Labor votes being lost in Fowler. Therefore whilst most of the arguments going on at the moment are valid reasons being put forward for changing the ticket voting system, there are some people with an axe to grind about the ticket voting system who might be thinking of the long term benefit that would be received by pushing the Senate informal vote back to where it was 20 years ago, which is throwing out one in ten, or likely to be more nowadays.

As for people being fed up with the political system and therefore not paying attention to politics, or worse, not turning up to vote if voting was no longer compulsory, I think this is a very considerable problem. It's a world-wide problem. I used to think that teaching civics in the schools and bodies like the Electoral Commission doing worthwhile things would help. That faith has been sadly damaged by reading what other similar countries have tried to do and how intractable the problem really is for a whole variety of socio-economic, educational, media-competition reasons. I think

therefore that keeping compulsory voting is by far the safest course that we have open to us. If we abolished it, the people who started voting 30 years ago and are pretty well habituated would continue voting, and the people who are say under 25 would take the first opportunity they got and stay away, or most of them would. That debate about compulsion I think needs to be watched, and whether that might be opened up again in the near future.

Question — I'm actually from Eden Monaro standing as an Independent, and I have approached Professor Sawyer about electoral probity, and things such as the raising of print allowances. The Special Minister appears to stumble over his feet where he shouldn't in terms of administrative errors in polling community organisations, and also tacking a little bit of polling information for the electorate on the end of the print budget. I'm quite concerned about the diluting of the democratic processes through using raised print allowances and raising the ceiling on disclosures, and the fact that our year 11 and 12 students don't get that electoral education anymore, so there's disenfranchisement of the potential youth voters. I wonder if you have any comments how we can shore up the Electoral Act to make sure that we are protecting democratic rights for all Australians.

Colin Hughes — The Electoral Act is a bit like a Tax Act, you can suppose at any given moment that a lot of experienced, shrewd people are out there tapping anything that they can find. Marshall Mannheim, the great Finnish leader, said that the Russians are window rattlers. They constantly walk around and they rattle every window they see and if it's open they go in. The Electoral Act is a bit like that, there are people rattling the windows all the time.

I think the incumbency advantage, to put a general label on some of the things that you were on about, is causing a lot of concern at the present time. For the narrower subject matter that I was concerned with, the first question I suppose is whether this should be a responsibility of the Electoral Commission or Commissioner or whether a separate statutory officer, for example on government advertising, ought to be set up to say that you can't do that, and then either issue an injunction or go to the Court for an injunction to get a breach.

That was the experience of course with the referendum held in 1988. The Labor government, which was producing the favourable case, had an interest in the constitutional changes that they wished to achieve and they were putting out (I think the Attorney General, Lionel Bowen was the name that appeared as authorising them) words that went something like: 'The founding fathers said you, the people, should be able to change the Constitution and this is what we want to do.' The Liberals understandably took exception to the second half of that and objected to its association with the first half. We at the Electoral Commission looked at the Act and held it up to the light and wet our fingers and touched it, and we didn't think that it was in breach of the prohibition in the Referendum Act against spending government money on promoting one side or the other. It was stating a historical fact: the founding fathers had intended that the people should be able to change the

Constitution from time to time. Peter Reith, who was the Shadow Minister responsible for electoral matters, took a different view. He said to us that we ought to stop it. We said we don't think so, but if you want to stop it, you are perfectly entitled to go to the Court. He went to the Court and returned with a piece of paper signed by one High Court judge saying he was right, and the matter was disposed off in a short period of time.

Now there may be problems that can't be resolved as satisfactorily as that. What you need when you're really at the coal face, if the story has to be killed instantly before it gets out, is somebody who is dedicated to raising such questions, authorised to go to the Court and get something out of the Court. To give you an example: when I was practicing as a lawyer, I ended up suing a newspaper in the magistrates court because that was the only place that I could get a judgement in the time to deny that my candidate, as the newspaper had alleged, had said that there were only three ladies in the constituency, and named them. By getting the maximum 25 quid out of the magistrate's court, we could at least say, 'You see they are liars.'

It's a very tight timeframe when you're in the last four weeks or so of an election. You have to have access to the courts. It may be an isolated independent who wants justice against the major parties, and who is dedicated to going to the court.

The AEC has a number of statutory provisions which I haven't talked about entitling it to raise defects in the conduct of a poll. They are the best placed people to know whether there has been a defect in the conduct of the poll because they will hear about it immediately, and they ought to be obliged to take it before the court and say maybe someone shouldn't have been elected. But there are other matters that aren't a matter of turfing someone out and either having another election, which is what the court ordinarily orders now, or declaring someone else elected. In the last couple of days of furious campaigning, it may be a question of getting the record straightened, and saying no, this is what the truth of the matter is, here is a learned judge who has just said that. Judges have been independent since fairly soon after the Restoration and people tend to believe what judges say. Not perhaps as much as they would have a few years ago.