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Submission to the Joint Standing Committee on Electoral Matters - Inquiry into the 2016 election

I am pleased to attach a submission to this inquiry.

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SUBMISSION TO THE JOINT STANDING COMMITTEE ON ELECTORAL MATTERS - INQUIRY INTO THE 2016 FEDERAL ELECTION

Introduction

1. This submission addresses five issues relevant to the Committee's terms of reference:

- the new Senate electoral system;
- qualifications of candidates;
- "truth in advertising";
- regulation of "bunting" and similar material; and
- deceptive "how-to-vote" cards.

2. In formulating the observations and recommendations set out below, I draw on some 40 years of study of elections, including a 30 year career as an officer of the AEC in the course of which I did extensive work on amendments to the *Commonwealth Electoral Act 1918* and also managed the AEC's international programs for the better part of 20 years. I have been involved in the organisation, observation and monitoring of polling not only in Australia (Commonwealth and State), but also in Namibia, Cambodia, South Africa, Indonesia, East Timor, Mozambique and the Autonomous Region of Bougainville, Papua New Guinea.

The new Senate electoral system

3. The implementation of the changes to the Senate electoral system stands out as one of the signal successes of the election. The recommendations made by the Committee in the aftermath of the 2013 election have produced what is arguably the best ever Senate electoral system. It is better than the systems that applied until 1949, because it is proportional, where they were majoritarian; and it is better than the systems which applied from 1949 to 1983 and from 1984 to 2013, because the new system, to a much greater extent than those which preceded it, enables people to vote truthfully rather than forcing them to express spurious preferences, and largely eliminates the discrepancy which previously existed between the ease of voting "above the line" and the difficulty of voting "below the line". This was plainly welcomed at least by the voters of Tasmania, who took the opportunity to use below the line voting to vary the order of election of the candidates of a major party group, something which last happened in 1953.

4. The highest praise is due to the AEC for the way in which it coped with the massive challenge of having to capture the data on all ballot papers, rather than just a comparatively small fraction marked "below the line", as in the past. This required very substantial innovation and initiative to implement new systems and processes in the short period of time available between the passage of the relevant legislation and the commencement of the count.

5. Another element of the challenges faced by the AEC was the increase again in the number of candidates and the scale of ballot papers. In the three largest States there were over 100 candidates, and the number in New South Wales, 151, set a new record. It might have been anticipated that the changes to the Senate voting system would moderate the long-term trend towards increases in the numbers of Senate candidates and the sizes of ballot papers, but the fact that the 2016 election was a double dissolution poll with twice the number of vacancies in the States when compared to a half Senate election was undoubtedly a complicating factor.

6. What is clear is that Senate ballot papers are continuing to include large numbers of candidates who objectively have no hope of getting elected. In New South Wales, for example, out of 40 groups on the ballot paper, only 6 received more than 2% of the first preference votes. Past increases in the monetary deposit for nomination, intended to discourage such candidates, clearly have not worked as planned. Surprisingly little seems to be known about what motivates such candidates to nominate. One might speculate that some have unrealistic expectations of their prospects, others run without expecting to win but in the hope of raising the salience of an issue which concerns them, while others again may be driven by vanity.

7. With the elimination of ticket voting and associated preference harvesting, it is by no means clear that such candidates now have much to gain by forming groups and having access to above the line voting. At present, it is possible, though unusual, for an ungrouped candidate below the line to have a party affiliation shown against his or her name: in New South Wales, for example, candidate Maree Ann Cruze of the Antipaedophile Party was ungrouped. As the width of the ballot paper is essentially driven by the number of groups contesting the election, any mechanism for encouraging parties to run a single candidate among the ungrouped rather than forming a separate group could therefore potentially help to keep the size of the ballot more manageable. (This would be advantageous to the AEC, but even more advantageous to the voters who have to use what are becoming very cumbersome documents.) Consideration could therefore be given to further changes to the Senate ballot paper layout, and to candidates' deposits, to discourage the unnecessary formation of groups.

8. I would recommend two such mechanisms be considered by the Committee.

- First, the ballot paper could be slightly reconfigured so that instead of having a single column for all ungrouped candidates, there would be two columns of

ungrouped candidates, the first listing those against whom a party affiliation was to be shown, and the second listing those who were to have no affiliation (or the word "Independent") shown. These columns could bear labels such as "Ungrouped Party Candidates" and "Ungrouped Non-Party Candidates". An attraction of this arrangement for the candidates in question is that it could actually make it easier for their supporters to find them on the ballot paper: rather than having to search through all the above the line groups, they could simply be directed to look for the penultimate column below the line.

- Secondly, the deposit structure could be changed, so that candidates would all have to pay a basic deposit at about the current level, but candidates who wished to be grouped would be required to pay a substantial additional deposit (for example, a sum equivalent to the total of the basic deposits of all of the candidates of the group, a formula which would also tend to discourage groups from running an unnecessarily large number of a candidates).

9. An example can be given of how these two provisions would work together. A candidate endorsed by a political party could run on his or her own and be listed below the line with other such ungrouped candidates, and would have to pay only the current deposit of \$2000. If the party wished to have a group, that would cost \$8000 in deposits for a two-candidate group, \$12000 for a three candidate group, and so on.

Qualifications of candidates

10. During the life of the previous Parliament, certain community activists sought to raise the question of whether the then Prime Minister, Mr Abbott, had failed to renounce the UK citizenship he had acquired at birth and therefore could have been subject to disqualification from being a candidate or an MP under section 44 of the Constitution. As it happened, Mr Abbott was under no obligation to make public any relevant correspondence, and to the best of my knowledge did not do so; and there the matter rested.

11. It is not my wish to address the specific situation of Mr Abbott. The circumstances of the case, however, highlight a lacuna in the mechanisms available for ensuring compliance with section 44. The other disqualifications it prescribes - being attainted of treason; being convicted and under sentence for certain offences; being bankrupt; holding an office of profit under the Crown; and holding a pecuniary interest in an agreement with the Commonwealth - are all matters where the facts relevant to an individual will in general be in the public domain. The question of whether a person continues to hold foreign citizenship or is under an acknowledgement of allegiance to a foreign power will, in contrast, typically not be a matter of public record. If a candidate subject to this disqualification has not otherwise publicised the fact and is prepared to make a false declaration in his or her

nomination, there is no obvious mechanism by which the candidate's disqualification can be operationalised.

12. The most common warning sign that a candidate may be so disqualified will be his or her having been born in another country. It is notable that a person seeking to enrol to vote who does not indicate that he or she became an Australian citizen by birth is required to provide a citizenship certificate number as evidence of his or her statutory entitlement to vote. This being the case, it would seem reasonable to require a candidate who was born outside Australia to provide evidence of his or her constitutional right to nominate.

13. I would therefore recommend that the Committee consider adopting a scheme along the following lines.

- Candidates would be required to indicate their place of birth on the nomination form, and to confirm whether that place was in Australia.
- Where a candidate indicated a place of birth outside Australia, he or she would be required to lodge with the nomination form a complete statement of the facts on which he or she wished to rely to establish the absence of any relevant disqualification under section 44(i) of the Constitution, along with copies of any supporting documents providing evidence relevant to the issue. These could include documents demonstrating that the candidate had taken "reasonable steps to renounce foreign nationality", but could also be documents establishing that the candidate had not, in fact, acquired foreign nationality by birth (for example, because his or her parents were on a diplomatic posting in the relevant foreign country at the time).
- This statement and associated documents would be deemed part of the nomination form, and would be made public.
- The AEC would not be required to consider whether the statement and any document(s) sufficed to establish that the candidate was not subject to a constitutional disqualification, but would simply be required to ensure that where a candidate showed a place of birth outside Australia, a statement of some type had been provided.
- Any person who wished to challenge the right of the candidate to be elected or to sit in Parliament would, in taking the matter to court, be entitled to rely on the statement and document(s) lodged by the candidate as constituting *prima facie* a complete statement of the candidate's case as to why he or she was not disqualified.

This scheme would have several advantages. First, it would ensure that the right of a person to be a candidate or elected representative would not be left under a cloud

because of ongoing unsubstantiated allegations of a disqualification due to foreign allegiance. Secondly, it would serve to concentrate the minds of candidates who might otherwise be inclined to take a cavalier attitude to the issue, and perhaps prevent some disqualified people from nominating in the first place. It would place a negligible additional administrative burden on the AEC.

Truth in advertising

14. The issue of legislating to require truth in electoral advertising has been an ongoing one ever since the High Court's ruling in the leading case of *Evans v. Crichton-Browne* [1981] HCA 14. A provision of this type was inserted in the *Commonwealth Electoral Act 1918* by the *Commonwealth Electoral Legislation Amendment Act 1983*, but following a further inquiry by the Joint Select Committee on Electoral Reform, was deleted immediately before the 1984 election by the *Electoral and Referendum Amendment Act 1984*. The inquiry in question and associated report dealt with the fundamental issues in considerable depth, and I would very much doubt that circumstances have so changed in the intervening period as to have brought the basic findings from that time into question.

15. One point of history is worth noting: the idea of regulating truth in advertising was not new even in the 1980s. L F Fitzhardinge, in the second volume of his biography of William Morris Hughes, noted that the latter had, in the run up to the second conscription referendum in 1917, promulgated:

“a new regulation making it an offence to publish false statements intended to mislead the voters, a regulation which clearly left a wide discretion to the censors”.¹

That regulation in fact formed the basis for the 1983 amendment.

Regulation of bunting and similar material

16. In this section of my submission, and the next section, I am raising again issues that I put to the Committee in a submission to its lapsed inquiry in the last Parliament on Campaigning and Polling Places.

17. It is worth stating at the outset the role played by polling places in the overall electoral process. While these are often seen simply as sites for the issuing, marking and casting of ballots, they constitute, arguably much more importantly, a state-

¹ L F Fitzhardinge, *The Little Digger 1914-1952: A Political Biography of William Morris Hughes, Volume II*, Angus & Robertson Publishers, 1979, p. 284. The provision in question was contained in the *War Precautions (Military Service Referendum) Regulations 1917*.

guaranteed place at which voters are supposed to be able to cast a secret ballot in a neutral political environment, free of fear, intimidation, or pressure.

18. In general, and with very few exceptions, this ideal has been met to a high standard at modern Australian federal elections. International visitors witnessing polling in Australia have in my experience almost without exception been struck by the calm, peaceful and friendly atmosphere on polling day, by the absence of overt presence of police or military officers at polling places, and by the typically polite way in which representatives of different political parties or candidates deal with each other. These characteristics of polling day are underpinned by strong cultural foundations: a widely shared societal understanding that the election process is to be respected and supported, and that everybody - including parties, candidates, scrutineers, canvassers and voters - has a role to play in ensuring its success.

19. That having been said, there have in recent years been a number of episodes at polling places at State elections which have not been consistent with this overall picture. Events at the 2014 Redcliffe State by-election in Queensland have been addressed in detail in a Report prepared by the Electoral Commission Queensland.² More recently, it was noted in the press in February 2015 that the mayor of Ryde in Sydney was knocked unconscious outside a polling booth after an alleged altercation with a candidate at a local government by-election.

20. In some countries, canvassing for votes is forbidden either in the immediate vicinity of polling places, or anywhere on election day, or, sometimes, not only on election day but on the days immediately preceding it. Such bans are typically intended to prevent physical violence from breaking out between supporters of different parties and/or to give the voters the opportunity to enjoy a time of quiet reflection before voting.

21. While three Australian jurisdictions, Tasmania, the Australian Capital Territory and the Northern Territory, place strict limits on canvassing on election day, the other jurisdictions permit such activities on a scale which stands out when compared with international practice.³ This would appear to be driven by two main factors:

- the belief on the part of parties and candidates that compulsory voting brings to the polling places significant numbers of people who may not be much engaged with politics, and whose voting choices may be influenced by last-minute messages; and

² Electoral Commission Queensland, *2014 INQUIRY INTO THE REDCLIFFE BY-ELECTION*, (the "Redcliffe Report") at www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2014/5414T4895.pdf.

³ On these, the Redcliffe Report provides useful cross-jurisdictional comparisons, though the information it contains relating to the Northern Territory has been superseded by subsequent changes to Territory law.

- the importance of the distribution of how-to-vote cards in buttressing electoral alliances between different candidates and/or parties, which has been further enhanced by the elimination of ticket voting for the Senate.

These factors are deeply embedded features of Australian federal elections, and it might be unrealistic in the short-term to expect them to be ignored when formulating an appropriate scheme for regulating campaigning at polling places.

22. In addition, any regulatory mechanism needs to take heed of the constitutional doctrine of freedom of political communication elaborated in various decisions of the High Court. In the context of the specific element of the Terms of Reference of the Committee's lapsed inquiry relating to "campaigning by organisations other than political parties at polling places", it should be noted that the High Court, in the *Unions NSW* case, made it clear that it did not see the freedom in question as one which was only protected when exercised by political parties, candidates or electors. It could also be observed that many of the political parties registered for federal elections in Australia have proven to be evanescent, and this could cause one to question whether such parties should be given a privileged position, in relation to election campaigning, over bodies which might not be seeking the election of their own candidates but which, on other measures, might be rather more enduring and substantial than some parties.

23. Recent years have seen a proliferation of the display of posters and other electoral materials at polling places, and in some marginal seats this seems to have acquired some of the characteristics of an arms race. The Redcliffe Report noted in particular that:

"An emerging trend at elections is the use of continuous plastic wrapping signage referred to as 'booth wrap' or 'bunting'. The plastic wrap is typically displayed along fences and features a recurring image and/or message every metre or so in a continuous repeated banner. Submissions on this subject were from two different groups, members of the public who believed the wrap was unsightly; and political supporters complaining that rival groups used the wrapping in long banner lengths thereby completely monopolising available space."

The Report also noted that:

"It is now common practice at elections in Queensland for supporters to erect signage and bunting on Friday afternoons and evenings and then guard the material throughout the night by the use of volunteers and professional security guards. Submissions to this inquiry made mention of incidents overnight between supporters competing for space to display electoral material. The Commission believes that consideration should be given to introducing legislation restricting the display of election material at and around polling booths prior to polling day."

24. For several reasons, this trend is a most undesirable one. Not only does it give rise to the possibility of conflict between party workers, but it also compromises what should be a politically neutral atmosphere at polling places: I have had it put to me by international visitors that it made the polling venues look as if they had been captured by a political party (something which in fact has been known to happen in countries such as India).

25. Up to 1984, the use of such bunting was forbidden, as the *Commonwealth Electoral Act 1918* specified limits on the size of electoral posters. Specifically, section 164B (now section 334) had provided (from 1966 to 1984) as follows.

"164B. (1) A person shall not post up or exhibit, or permit or cause to be posted up or exhibited, on any building, vehicle, vessel, hoarding or place (whether it is or is not a public place and whether on land or water or in the air)-

- (a) an electoral poster the area of which is more than one thousand two hundred square inches; or
- (b) any electoral poster in combination with any other such poster if the aggregate area of those posters exceeds one thousand two hundred square inches.

Penalty: Two hundred dollars.

(2) A person shall not write, draw or depict any electoral matter directly on any roadway, footpath, building, vehicle, vessel, hoarding or place (whether it is or is not a public place and whether on land or water or in the air).

Penalty: Two hundred dollars.

(2A) It is hereby declared that the application of the last two preceding sub-sections extends in relation to an election or referendum although the writ for that election or referendum has not been issued.

- (3) Nothing in this section shall prohibit-
 - (a) the posting up, exhibiting, writing, drawing or depicting of a sign on or at the office or committee room of a candidate or political party indicating only that the office or room is the office or committee room of the candidate or party, and specifying the name of the candidate, or the names of the candidates, or the name of the party, concerned; or
 - (b) the projection, by means of a cinematograph or other similar apparatus, of electoral matter on to a screen in a public theatre, hall or premises used for public entertainment.
- (4) In this section-

“electoral matter” means any matter intended or calculated to affect the result of an election or referendum under any law of the Commonwealth;

“electoral poster” means any material whatsoever on which any electoral matter is written, drawn or depicted.”.

26. The repeal of subsection 164B(1) in 1984 flowed from a recommendation made to the Joint Select Committee on Electoral Reform from the then Australian Electoral Office, and I can say from having been personally involved with the preparation of the Office’s submissions to that Committee’s inquiry that the primary motivation for the recommendation was to relieve electoral officials of the burden of dealing with complaints from political players concerning the sizes of their rivals’ posters. While that may well have been seen as a legitimate concern at the time, it would seem likely that the prospect of physical altercations at polling booths of the type discussed in the Redcliffe Report would these days be a matter of much greater concern.

27. There would appear to be no reason to believe that in the long run any particular party would enjoy a sustained advantage over its rivals from the continuing opportunity to make use of bunting; and it follows that its elimination from the electoral process would not be expected to have a partisan effect.

28. Taking all of these points into account, I would recommend that the *Commonwealth Electoral Act 1918* be amended so as to forbid the use of “bunting” (as described in the Redcliffe Report) at polling places, if necessary by re-enacting a limitation on the sizes of electoral posters. This should be supplemented by appropriate penalties, and by an explicit power given to polling officials to remove or destroy any bunting displayed in breach of the law.

Deceptive how-to-vote cards

29. How-to-vote cards become a problem when they mislead voters. There have over the years been well-documented cases in which how-to-vote cards have been distributed which appeared to have been designed to give the impression that they had been officially issued by a candidate or party, but in fact have been issued by other players with the aim of “siphoning” preferences away from the preference flow officially recommended by that candidate or party. I note that the AEC’s witnesses spoke about this issue at the Committee’s public hearing in the course of the lapsed inquiry on 16 July 2015.

30. At best, the distribution of such how-to-vote cards is a sharp practice. Section 329B of the *Commonwealth Electoral Act 1918* has sought to deal with this somewhat indirectly, by imposing more specific authorisation requirements for how-to-vote cards. I note that the AEC in its submission to the lapsed inquiry flagged some issues with that provision.

31. The provision could, however, be strengthened further, and I recommend that it be so strengthened, by inserting a requirement, supported by an appropriate penalty for non-compliance, that any how-to-vote card which suggests a first preference for a candidate/party but which is not in fact a how-to-vote card authorised by or on behalf of that candidate/party must have printed at the top in bold type and in a large point size (say, 16 point) words along the following lines: "THIS IS NOT THE OFFICIAL HOW-TO-VOTE CARD OF CANDIDATE [insert name] OF THE [insert party name]".

32. In making this recommendation, I am conscious that the issue of font sizes for authorisations required on how-to-vote cards is one which has been considered by the Committee previously; with the ultimate outcome being the repeal of some prescriptive provisions which had previously been enacted. The mechanism recommended above would not, however, apply either to the text specifying authorisation, or to how-to-vote cards officially issued by or on behalf of a candidate or party.

33. It might, of course, be argued that a candidate or group minded to issue a deceptive how-to-vote card would simply ignore such a requirement. That is of course true, but the requirement would nevertheless simplify any subsequent prosecution, since that could be pursued not on the basis that the how-to-vote card was deceptive, but simply that it was one which was required to bear the words set out in paragraph 31, but had not borne them.