

# *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. The number of Members elected was 75, which was consistent with that prescribed by the Constitution.<sup>7</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. State electoral laws ceased to have effect for the Federal Parliament when it passed its own legislation in 1902.<sup>8</sup> This legislation and subsequent amendments were consolidated in 1918 and formed the basis of the Commonwealth's electoral law.<sup>9</sup> Comprehensive changes were made to the legislation following the report of the Joint Select Committee on Electoral Reform in 1983.<sup>10</sup>

The Constitution also determines the composition of the House of Representatives and provides that it shall consist of Members directly chosen by the people of the

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 Constitution, s. 26.

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

9 *Commonwealth Electoral Act 1918*. For comprehensive details of Commonwealth electoral law and electoral statistics see (i) *Commonwealth Electoral Procedures*, Australian Electoral Commission, AGPS, 1985, (ii) *A Summary of Commonwealth Election and Referendum Statistics 1901-1975*, Australian Electoral Office, AGPS, 1976, and (iii) *Conspectus of the Electoral Legislation of the Commonwealth, States of Australia, the Northern Territory and the Australian Capital Territory*, New South Wales Legislative Council Office, 5th edn, April 1980.

10 *Commonwealth Electoral Legislation Amendment Act 1983*.

Commonwealth and that the number of Members shall be, as nearly as practicable, twice the number of Senators. The number of Members in each State was to be proportionate to the populations of the respective States and the manner in which the number was to be 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>11</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>12</sup>
- In 1977 the High Court ruled<sup>13</sup> that the four Territory Senate places created in 1974<sup>14</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>15</sup>

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 2 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

### REVIEW OF THE ELECTORAL SYSTEM

Early in the life of the 33rd Parliament, the Joint Select Committee on Electoral Reform was appointed to inquire into all aspects of the conduct of elections for the Federal Parliament and all related matters.<sup>16</sup> The first report of the committee, presented on 13 September 1983,<sup>17</sup> contained proposals for major alterations to the electoral system. The Government accepted the majority of the committee's recommendations which were subsequently incorporated in legislation.<sup>18</sup> Among the major changes which resulted were:

- an increase in the size of the Parliament;

11 Constitution, s. 24; *Representation Act 1922*; *Commonwealth Electoral Act 1918*.

12 *Representation Act 1948*.

13 *Attorney-General (NSW) ex rel. McKellar v. Commonwealth* (1978) 139 CLR 527.

14 *Senate (Representation of Territories) Act 1973*.

15 *Representation Act 1983*.

16 VP 1983-84/53-4.

17 VP 1983-84/211.

18 *Commonwealth Electoral Legislation Amendment Act 1983*; *Representation Act 1983*.

- the establishment of the Australian Electoral Commission as an independent statutory authority;
- substantial alterations to the arrangements for electoral redistributions;
- the introduction of a system of public funding of candidates, groups or parties in respect of Federal elections;
- requirements for the disclosure of donations made to candidates, parties and groups and the disclosure of electoral expenditure;
- the compulsory enrolment of (and therefore compulsory voting for) Aborigines;
- a 'list' system of voting for Senate elections by which voters may choose to adopt a group voting ticket instead of indicating their own order of preference, and

- the notification of the party affiliation of candidates on ballot papers.

These provisions are described in more detail in the sections which follow.

## 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>19</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>20</sup>
- The Governor-General in Council may cause writs to be issued for general elections of Members of the House of Representatives.<sup>21</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>22</sup>

A general election follows the dissolution of the House by the Governor-General<sup>23</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>24</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 and call a general election for the House and an election for all the Senate.<sup>25</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. At dissolution Senators are 'discharged from attendance' until Parliament is summoned.
- 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-

19 Constitution, s. 5.

20 Constitution, s. 28.

21 Constitution, s. 32.

22 Constitution, s. 5.

23 See Ch. on 'The Parliament'.

24 For a list of federal elections see Appendix 14.

25 For further discussion see Ch. on 'Disagreements between the Houses'.

General<sup>26</sup>, the decision to call a general election can only be made on and with the advice of the Executive Council, that is, the Government.<sup>27</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>28</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>29</sup>, a writ may be issued by the Speaker for the election of a new Member.<sup>30</sup> From Federation to the end of 1988, 121 by-elections had been held.<sup>31</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>32</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>33</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>34</sup> A writ has been issued by the Chairman of Committees as Deputy Speaker during the Speaker's absence within the Commonwealth<sup>35</sup> and the Chairman of Committees as Deputy Speaker has informed the House of the Speaker's intention to issue a writ.<sup>36</sup>

There are no constitutional or statutory requirements that writs be issued for by-elections within any prescribed period.<sup>37</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>38</sup>, and
- a writ has been issued and then withdrawn by the Speaker when a dissolution of the House has intervened.<sup>39</sup>

26 In practice this power is exercised with the advice of the Federal Executive Council; see *Quick and Garrahan*, pp. 404-6. For further discussion see Ch. on 'The Parliament'.

27 Constitution, s. 32; and see s. 62.

28 See Chs on 'The Parliament', and 'Disagreements between the Houses'.

29 For discussion see Ch. on 'Members'.

30 Constitution, s. 33.

31 For a list of by-elections see *Parliamentary Handbook of the Commonwealth of Australia*, AGPS.

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

33 Constitution, s. 33.

34 S.O. 14; and see Ch. on 'The Speaker, the Chairman of Committees and Officers'.

35 VP 1920-21/575. There is some doubt as to the constitutional validity of this action.

36 VP 1956-57/63; but see Ch. on 'The Speaker, the Chairman of Committees and Officers'.

37 For the last 10 by-elections prior to 1988 the average time between vacancy and polling day has been 44 days.

38 VP 1926-28/649; VP 1964-66/621; H.R. Deb. (18.8.66)157.

39 VP 1929-31/950.

In so far as it concerns the sequence of events following the issuing of a writ, the Act makes no distinction between by-elections and ordinary (general) elections—for indicative timetable details *see* p. 136.<sup>40</sup>

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 outside the House 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>41</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>42</sup> Based on this procedure new elections have been held before the meeting of Parliament<sup>43</sup> and after the meeting of Parliament.<sup>44</sup>

When the Court of Disputed Returns declares an election absolutely void, a writ may be issued by the Speaker for the purposes of a new election<sup>45</sup> (*see* p. 143).

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>46</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;

40 *Commonwealth Electoral Act 1918*, s. 154 (1).

41 Members of State Parliaments previously had to resign 14 days before nomination.

42 Constitution, s. 33; VP 1983-84/6.

43 VP 1964-66/3-5.

44 VP 1917/4.

45 VP 1904/26,44; VP 1907-8/4; VP 1920-21/190.

46 VP 1904/85; and *see* VP 1912/15 and Chs on 'The Parliament' and 'Papers and documents'.

- the writ is forwarded to the Electoral Commissioner;
- notification of the by-election is published in the Gazette<sup>47</sup>;
- the Australian Broadcasting Tribunal is advised, and
- the House is advised.

## SENATE ELECTIONS

Senators are elected on a different basis to Members of the House of Representatives:

- each State votes as one electorate<sup>48</sup>;
- Senators are elected to serve for six years from the beginning of their term of service<sup>49</sup>;
- the term of service of a Senator normally commences on the first day of July following election<sup>50</sup>;
- in the case of an election following dissolution of the Senate, the term of a Senator commences on the first day of July preceding the day of election<sup>51</sup>, and
- there is an election for half the number of Senators at least every three years.

The Senate may only be dissolved under the provisions of section 57 of the Constitution. To re-establish continuity following such a dissolution, Senators elected for each State are divided into two classes by a resolution of the Senate, to serve for three and six years respectively.<sup>52</sup> By convention, in these situations, the Senate has always divided itself on the basis of 'three year Senators' being those with the lowest number of votes at the double dissolution election and 'six year Senators' being those with the largest number of votes. This practice need not be followed. Section 282 of the *Commonwealth Electoral Act 1918* requires, after scrutiny in a Senate election following a section 57 dissolution has been completed, a re-count using the normal 'half-Senate' quota in order to establish an 'order of election' and so guide the Senate in determining the terms of Senators. This provision, inserted in 1983, was not however used after the 1987 double dissolution.<sup>53</sup>

At the first election in 1901, 36 Senators, six from each original State, were elected.<sup>54</sup> The Parliament is empowered to make laws which increase or decrease the number of Senators for each State, excepting that equal representation of the original States must be maintained and no original State shall have less than six Senators.<sup>55</sup> The Parliament has increased the number of Senators on three occasions:

- In 1948 the number of Senators was increased to 10 from each State<sup>56</sup>, 30 Senators retiring every three years.
- In 1974 provision was made for the election of two Senators each for the Northern Territory and the Australian Capital Territory.<sup>57</sup>

47 Gazette S192(9.9.77).

48 Constitution, s. 7.

49 Constitution, s. 13.

50 Constitution, s. 13.

51 Constitution, s. 13.

52 Constitution, s. 13.

53 The Senate has been divided on the following occasions: 1901, 1914, 1951, 1974, 1975, 1983 and 1987, J 1976-77/23-4; S. Deb. (15.9.87) 96-8; S. Deb. (16.9.87) 155-160; S. Deb. (17.9.87) 194-213. The *Representation Act 1948* (Act

No. 16 of 1948) and *Representation Act 1983* made provision for dividing the Senate consequent upon the increase in the size of the Senate after the 1949 and 1984 elections.

54 Constitution, s. 7.

55 Constitution, s. 7; see also Ch. on 'The Parliament' for discussion of nexus provisions.

56 *Representation Act 1948*; effective from the election of 10 December 1949.

57 *Senate (Representation of Territories) Act 1973* (assented to 7 August 1974); effective from the election of 13 December 1975.

- In 1983 the number of Senators was increased to 12 from each State, 36 Senators retiring every three years.<sup>58</sup>

The term of Territorial Senators expires on the day before the polling day of the general election following a dissolution of the House of Representatives and elections are conducted concurrently with general elections for the House of Representatives.<sup>59</sup>

The Australian Capital Territory and the Northern Territory will become entitled to further Senate places when entitled to six or more House of Representatives places, on the basis of one Senator for each two Members. Any other Territory will become entitled to Senate representation when represented by two or more Members, on the same two to one ratio.<sup>60</sup>

The election to fill places vacated by Senators whose terms of service are to expire shall be held within one year before the places are to become vacant.<sup>61</sup> Subject to this requirement, the decision as to when Senate elections are to be held rests with the six State Governors who issue the writs for the election.<sup>62</sup> The elections must be held on a Saturday. By convention the Governor-General (acting with the advice of the Executive Council) invites State Governors to issue the writs. This facilitates joint Senate elections for all States although a Governor is not obliged so to act. The Senate may proceed to business notwithstanding the failure of any State to provide for its representation in the Senate.<sup>63</sup>

No time is fixed for the issue of the writs except in the case of the Senate having been dissolved under section 57 of the Constitution when the six State Governors must issue the writs within 10 days from the proclamation of the dissolution.<sup>64</sup>

Because Senators are normally elected for a fixed six year term and Members of the House for a maximum term of three years, the elections for the two Houses do not necessarily occur at the same time. The majority of elections since Federation have been timed however so that both Senate and House of Representatives elections have been held concurrently. A proposal has twice been put to the people of Australia at referendum to alter the Constitution to require simultaneous elections<sup>65</sup> and on both occasions<sup>66</sup> the proposal was rejected. On a third occasion the proposal<sup>67</sup> passed both Houses of Parliament but was not submitted to electors at referendum. A 1988 proposal providing for four year terms for both Houses would also have had the effect of ensuring simultaneous elections. This proposal was also defeated at referendum.<sup>68</sup> Double dissolutions, of course, ensure that elections are held concurrently.

The House of Representatives proceeds to a by-election when a vacancy occurs. A Senate casual vacancy is filled by a person chosen by the Houses of Parliament of the State which the former Senator represented and, as far as practicable, must be a person of the same political party as the Senator chosen by the people. The person chosen fills the vacancy until the end of the former Senator's term. If the State Parliament is not sitting, the Governor in Council may appoint a person to hold the place up until the expiration of 14 days from the beginning of the next

58 *Representation Act 1983*.

59 *Commonwealth Electoral Act 1918*, s. 42.

60 *Commonwealth Electoral Act 1918*, s. 40.

61 Constitution, s. 13.

62 Constitution, s. 12. The Governor-General issues writs for the election of Territory Senators.

63 Constitution, s. 11.

64 Constitution, s. 12.

65 Constitution Alteration (Simultaneous Elections) Bill 1974; Constitution Alteration (Simultaneous Elections) Bill 1977.

66 For further discussion see Ch. on 'The Parliament'.

67 Constitution Alteration (Simultaneous Elections) Bill 1983.

68 Constitution Alteration (Parliamentary Terms) Bill 1988.

session of the State Parliament or the expiration of the former Senator's term, whichever first happens.<sup>69</sup>

If the place of a Senator for the Northern Territory becomes vacant before the expiration of the Senator's term of service, the Legislative Assembly of the Territory chooses a person to hold the place until the expiration of the term. If the Assembly is not in session when the vacancy is notified the Administrator of the Territory may appoint a person to hold the place up until 14 days after the beginning of the next session of the Assembly or the expiration of the term, whichever occurs first. The filling of a casual Senate vacancy for the Australian Capital Territory follows the same procedure except that the Senate and the House of Representatives, at a joint sitting, choose a person, unless the Parliament is not in session, in which case the Governor-General may appoint a person to hold the place.<sup>70</sup>

## 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>71</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 how the people are to be represented by way of dividing the States into electoral Divisions. 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>72</sup> This determination is subject to the constitutional requirement of there being a minimum of five Members for each of the original States<sup>73</sup> and the requirement of the Commonwealth Electoral Act that there be a minimum of one Member for both the Northern Territory and the Australian Capital Territory.<sup>74</sup>

The Constitution states that, until the Parliament otherwise provides, any State may make laws which determine the Divisions within that State for which Members of the House of Representatives may be chosen, and the number of Members to be chosen for each Division, with the qualification that a Division cannot be formed

69 Constitution, s. 15.

70 *Commonwealth Electoral Act 1918*, s.44. The first joint sitting for this purpose was held on 5 May 1981, J 1980-81/227. The second was held on 16 February 1988, J 1987-89/477-8. For rules adopted for the sitting see Rules for joint sittings. For further information on the system of election of Senators and the filling of vacancies in the Senate see *Odgers*, pp. 113 ff.

71 Constitution, s. 24; see also Ch. on 'Members'.

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

73 Constitution, s. 24.

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



out of parts of different States.<sup>75</sup> The provisions in force for determining Divisions for the first election of the House of Representatives (*see* p. 122) were superseded by legislation of the Commonwealth Parliament in 1902<sup>76</sup> and the first distribution was conducted in 1903.

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>77</sup> These Divisions are known as single-member constituencies. Multi-member constituencies, although allowed for in the Constitution, have not been used.<sup>78</sup>

In order to determine these Divisions, the Electoral Commissioner ascertains a quota of electors for each State and the Australian Capital 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>79</sup> The boundaries of each Division are then determined by the State or Territory Redistribution Committee, as outlined below. As at 11 July 1987 the Division of Fraser in the Australian Capital Territory had the largest number of electors (84 109) and Franklin in Tasmania had the least (59 813). Because of Australia's uneven distribution of population, Divisions vary greatly in area. In 1984 the largest Division in terms of area was Kalgoorlie in Western Australia (2 308 320 square kilometres) and the smallest was Phillip in New South Wales (17 square kilometres).

### Redistribution

The Commonwealth Electoral Act provides for regular redistributions.<sup>80</sup> The Electoral Commissioner must direct a redistribution of a State or the Australian Capital Territory—

- when changes in the distribution of population (ascertained during the tenth month of the life of each House of Representatives, if still continuing<sup>81</sup>) require a change to the number of Members in a State;
- 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 than two months, 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.

These provisions will also apply to the Northern Territory once it becomes entitled to more than one Member, when it will be treated as a State for the purposes of

<sup>75</sup> Constitution, s. 29.

<sup>76</sup> *Commonwealth Electoral Act 1902*.

<sup>77</sup> *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'.

<sup>78</sup> Except at the first election when both South Australia and Tasmania voted as one Division.

<sup>79</sup> *Commonwealth Electoral Act 1918*, s. 65.

<sup>80</sup> *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.

<sup>81</sup> *Commonwealth Electoral Act 1918*, s. 46.

redistribution.<sup>82</sup> To conduct a redistribution the Electoral Commissioner appoints a Redistribution Committee for the State or Territory, comprising—

- the Electoral Commissioner;
- the Australian Electoral Officer for the State (in the case of the A.C.T. the Senior Divisional Returning Officer for the Territory);
- the Surveyor-General for the State or the Deputy Surveyor-General (in the case of the A.C.T. the Commonwealth Surveyor-General), and
- the Auditor-General for the State or the Deputy Auditor-General (in the case of the A.C.T. a senior officer of the Australian Public Service nominated by the Governor-General).

The places of the Surveyor-General and Auditor-General may be filled by senior officers of the Australian Public Service from the State nominated by the Governor-General.<sup>83</sup>

Redistribution Committees are required to consider any suggestions and comments lodged with them pursuant to public advertisement in the Gazette and the press.<sup>84</sup> A period of 14 days is allowed for any such submission.

A quota of electors, ascertained by dividing the number of electors in the State or Territory by the number of Members<sup>85</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, the number of electors enrolled in each proposed electoral Division in the State or Territory will be not less than 98% or more than 102% of the average divisional enrolment in the State or Territory and, subject to the above requirement, 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>86</sup>

Once the initial proposals are determined by the 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>87</sup> A member of a Redistribution Committee may submit a statement of dissent to any proposal<sup>88</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 within 28 days.<sup>89</sup> Objections to proposed redistributions are considered by an "augmented Electoral Commission", that is, the Electoral Commission plus the members of the Redistribution Committee concerned.<sup>90</sup> Public hearings are held unless the objection is considered frivolous or

<sup>82</sup> *Commonwealth Electoral Act 1918*, s. 55A.

<sup>83</sup> *Commonwealth Electoral Act 1918*, ss. 60, 61.

<sup>84</sup> *Commonwealth Electoral Act 1918*, s. 64.

<sup>85</sup> *Commonwealth Electoral Act 1918*, s. 65.

<sup>86</sup> *Commonwealth Electoral Act 1918*, s. 66.

<sup>87</sup> *Commonwealth Electoral Act 1918*, s. 68.

<sup>88</sup> *Commonwealth Electoral Act 1918*, s. 67.

<sup>89</sup> *Commonwealth Electoral Act 1918*, s. 69.

<sup>90</sup> *Commonwealth Electoral Act 1918*, s. 70.

vexatious or is substantively the same as a submission previously made.<sup>91</sup> Objections are determined (within 60 days) 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>92</sup>

### *Parliamentary procedure*

Following determination relevant documents are forwarded to the Minister responsible, who must have them tabled in each House within five sitting days of receipt.<sup>93</sup> Under the procedures established, Parliament has no further role and has no opportunity to alter the determination in any way.

Prior to the 1983 amendments to the Electoral Act, redistributions were subject to the approval, by resolution, of each House of the Parliament. If either House disapproved of, or negatived, a motion for a proposed distribution, the Minister could direct that a fresh redistribution be proposed, as was the case in 1912, 1936 and 1968.<sup>94</sup> In 1975 the House approved redistributions which the Senate rejected<sup>95</sup> and the unprecedented step was taken of introducing the redistribution proposals in the form of bills<sup>96</sup> which were in turn also defeated at the second reading stage by the Senate on two occasions,<sup>97</sup> being cited in the 1975 double dissolution proclamation. There have been instances of the Parliament taking no final action in respect of redistribution proposals (e.g. 1905 and 1931)<sup>98</sup>, and of a motion to approve a proposed redistribution being debated but lapsing at dissolution (1962).<sup>99</sup> The Parliament also on occasions adopted proposed boundaries but altered the names of proposed Divisions.

### *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.<sup>100</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 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>101</sup>

91 *Commonwealth Electoral Act 1918*, s. 72.

92 *Commonwealth Electoral Act 1918*, s. 77.

93 *Commonwealth Electoral Act 1918*, s. 75.

94 1912 proposals in the case of New South Wales, J 1912/153-4; 1935 proposals in the case of Western Australia, VP 1934-37/607-8; 1968 proposals in the case of Queensland, J 1968-69/241-3.

95 J 1974-75/696-7,704-6.

96 VP 1974-75/727-8.

97 J 1974-75/794-6; VP 1974-75/931-6; J 1974-75/939-41.

98 VP 1929-31/487,491.

99 VP 1962-63/315-16; VP 1962-63/340-1.

100 *Commonwealth Electoral Act 1918*, s.76.

101 *Commonwealth Electoral Act 1918*, s.78.

On 24 April 1978 a Royal Commission was appointed to inquire into and report upon whether any breach of a law of the Commonwealth or any impropriety occurred in the course of the 1977 redistribution of the State of Queensland, including the change of the name of a proposed Division from 'Gold Coast' to 'McPherson'.<sup>102</sup>

The Royal Commissioner found that no breach of a law of the Commonwealth had occurred by reason of anything said or action by or on behalf of the Hon. E. L. Robinson (the Member for McPherson), any action taken by the Distribution Commissioners or any of them as a result of any action taken or anything said by or on behalf of Mr Robinson or any communications by the Commissioners to Mr Robinson. The Royal Commissioner found however that Senator the Rt Hon. R. G. Withers (Minister for Administrative Services, with responsibility for electoral matters) had used his position to further a political purpose by an approach (not open to members of the public) to the Distribution Commissioners. The Royal Commissioner reported that, in his view, whilst Senator Withers did not seek to influence, or influence, the Commissioners in any way about how they should perform their duties of distribution of the electoral Divisions in Queensland, he had sought to influence them, and he had in fact influenced them, through an intermediary, as to something which they had proposed to say in their report, that is to say, the names which they had tentatively attached to two electoral Divisions. The Commissioner concluded that what Senator Withers had done, having regard to the purpose with which he had done it, in his judgment constituted impropriety.<sup>103</sup>

The Government accepted the Royal Commissioner's report<sup>104</sup> which 'had inevitable consequences in respect of the finding of impropriety'.<sup>105</sup> The appointment of Senator Withers as Minister for Administrative Services was determined and his appointment as Vice-President of the Executive Council terminated on 7 August 1978.<sup>106</sup>

## ELECTORS

Members of the House of Representatives are elected on the basis of universal adult franchise. This principle is based on the interpretation of constitutional provisions.<sup>107</sup> The voting provisions for federal elections (including Senate elections) were established in 1902.<sup>108</sup> Since then elections have been characterised by:

- adult suffrage (except Aborigines);
- secret ballot, and
- single vote.<sup>109</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 State and Territory and every eligible voter is required to enrol.<sup>110</sup>

102 Gazette S72(27.4.78); Terms of reference extended, see Gazette S81(11.5.78); Gazette S92(31.5.78).

103 H.R. Deb. (15.8.78)18.

104 'Matters in relation to electoral redistribution, Queensland 1977', *Report of the Royal Commission of Inquiry*, PP 263(1978).

105 H.R. Deb. (15.8.78)19.

106 Gazette S149(8.8.78); and see Ch. on 'House, Government and Opposition'.

107 Constitution, ss. 30,41.

108 *Commonwealth Electoral Act 1902*.

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

110 *Commonwealth Electoral Act 1918*, ss. 81, 101.

- **Compulsory voting** became effective at the 1925 general election.<sup>111</sup>  
It is the duty of every elector to record his or her vote at each election.<sup>112</sup>
- **Preferential voting system** since 1918<sup>113</sup>  
Up until 1918 the first-past-the-post system was used at federal elections (see below).
- **Extension of franchise** to all Aborigines since the 1963 general election<sup>114</sup>, and all persons 18 years of age and over since the 1974 general election.<sup>115</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 enrolled or entitled to vote until they turn 18.<sup>116</sup>

A person who is the holder of a temporary entry permit for the purposes of the Migration Act, or a person who is a prohibited non-citizen under that Act, is not entitled to enrolment. No 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 has been convicted and is under sentence for an offence punishable under the law by imprisonment for five years or longer, is entitled to enrolment or to retain enrolment.<sup>117</sup> A person who has served his or her sentence may once again secure enrolment if otherwise qualified.

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 deaths and convictions, as the case may be, with respect to all persons not under 18 years of age.<sup>118</sup>

## Method of voting

There are several different systems of election and the system used usually depends upon a number of factors, for example, whether the electorates are to have single-member or multi-member representation; whether the result is to be determined by an absolute majority of the voters or by a relative majority only; the number of voters in the election and the number of candidates to be elected.

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>119</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.

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

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

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

114 Amending legislation passed in 1962 in response to recommendations of Report from Select Committee on Voting Rights of Aborigines, H of R 1(1961).

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

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

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

118 *Commonwealth Electoral Act 1918*, ss. 108, 109.

119 *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 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 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>120</sup>

In summary, a result is obtained in the following way:

If the number of first preference votes recorded in favour of a candidate is greater than one-half of the total number of formal votes in the election (i.e. an absolute majority of the formal votes), that candidate is elected. If no candidate has received an absolute majority of the votes, the candidate who has received the fewest first preference votes is excluded from the count and each ballot paper counted to him or her is transferred to the candidate next in order of the voter's preference. This process of excluding candidates one by one is continued until a candidate receives more than half the number of votes in the count, when he or she is elected.<sup>121</sup>

This method of counting was also used for Senate elections from 1919 to 1949 when a system of proportional representation was introduced. 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 on a registered party or group 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 or group is virtually the same as the proportion of the votes gained by that party or group.<sup>122</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 in 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 and 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.

<sup>120</sup> *Commonwealth Electoral Act 1918*, ss. 240, 268.

<sup>121</sup> *Commonwealth Electoral Procedures*, p. 35. For an example of this method of counting see p. 67 of the publication.

<sup>122</sup> *Commonwealth Electoral Act 1918*, s. 239. For a more detailed account of this system see *Commonwealth Electoral Procedures*, pp. 33-4 and Odgers, pp. 94-101.

**THE TIMETABLE FOR ELECTIONS**

The following table, based on the 1987 general election, 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>123</sup>

**TABLE 3 GENERAL ELECTIONS FOR 35TH PARLIAMENT—SCHEMA**

<i>Stage</i>	<i>Limitation(a)</i>	<i>Actual date</i>	<i>Constitutional or statutory provision</i>
Dissolution	—	5.6.87	Constitution, ss. 5, 28
Issue of writs (at 6 p.m.)	Within 10 days of dissolution—before 16 June	5.6.87	Constitution, s. 32; Commonwealth Electoral Act, ss. 151, 152
Close of electoral rolls	7 days after date of writ	12.6.87	Commonwealth Electoral Act, s. 155
Nominations close (at 12 noon)	Not less than 11 days nor more than 28 days after date of writ—between 16 June and 3 July	18.6.87	Commonwealth Electoral Act, s. 156
Date of polling (a Saturday)	Not less than 22 days nor more than 30 days from date of nomination(b)—either 11 or 18 July	11.7.87	Commonwealth Electoral Act, ss. 157, 158
Return of writs	Not more than 100 days after issue—on or before 13 September	Various dates	Commonwealth Electoral Act, s. 159
Meeting of new Parliament	Not later than 30 days after the day appointed for the return of writs—not later than 13 October	14.9.87	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 or a referendum is in the form of a writ issued by the Governor-General<sup>124</sup>, or in the case of a by-election by the Speaker (see p. 125), directed to the Electoral Commissioner commanding the Commissioner to conduct an election in accordance with the prescribed procedures<sup>125</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>126</sup> Eight writs are issued for a general election, one for each of the six States and the two Territories.

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

124 Constitution, s. 32.

125 *Commonwealth Electoral Act 1918*, s. 154 and the Schedule.

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

In the case of dissolution or expiry of the House of Representatives the writs shall be issued within 10 days<sup>127</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>128</sup> is also issued by the Governor-General (in Council) and is addressed jointly to the Electoral Commissioner and the Australian Electoral Officers for the several States. The writ specifies the date for holding the referendum and for the return of writs.

### **Nomination of candidates**

No person may contest an election to the House of Representatives unless nominated by at least six electors in the Division he or she is to contest or the registered officer of the party endorsing him or her as candidate.<sup>129</sup> Nominations are made to the Divisional Returning Officer at any time between the issue of the writ and the close of nominations. The date for the close of nominations cannot be less than 11 days or more than 28 days after the issue of the writ. The time for nominations closes at 12 noon on the appointed day.<sup>130</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.<sup>131</sup>

A person who at the hour of nomination is a Member of a State Parliament or Territory Assembly may not be nominated.<sup>132</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>133</sup> A Commonwealth or State public servant is not eligible to be nominated unless he or she has resigned from the public service before nomination.<sup>134</sup> If unsuccessful, a Commonwealth public servant who is not a departmental secretary must be reappointed to the service.<sup>135</sup> Officers of the Electoral Commission are not eligible for nomination.<sup>136</sup>

A deposit of \$250 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>137</sup> A candidate may withdraw his or her nomination up to the close of nominations but cannot do so after nominations have closed.<sup>138</sup> If one candidate only is nominated then he or she shall be declared duly elected without an election being necessary.<sup>139</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>140</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>141</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

127 Constitution, s. 32.

128 See Ch. on 'The Parliament'.

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

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

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

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

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

134 Constitution, s. 44.

135 *Public Service Act 1922*, s. 47C, as amended by the *Public Service Legislation (Streamlining) Act 1986*.

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

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

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

139 *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.

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

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



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>142</sup>

In order to help ensure fair elections, the Commonwealth Electoral Act prescribes that bribery, undue influence and a number of other illegal practices are prohibited, and provides for penalties for these offences.<sup>143</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>144</sup> As a result of the proposed action Mr Garland had resigned his commission as a Minister on 6 February 1976.<sup>145</sup> The charge was heard by a magistrate in the Court of Petty Sessions of the Australian Capital Territory and the decision given on 8 March 1976.<sup>146</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. Both defendants were discharged.

### Polling day

In an election for the House of Representatives the position of names of the candidates on the ballot paper is determined by lot whereby numbered balls representing candidates are drawn at random.<sup>147</sup> Until 1983 candidates were listed in alphabetical order according to their surnames. Each voter is required to mark the ballot paper preferentially (*see* p. 135) and secrecy of voting is assisted by the provision of private voting cubicles. Since the introduction of compulsory voting in 1925, an average of some 95 per cent of enrolled voters have cast a vote at general elections.<sup>148</sup>

### Scrutineers

One scrutineer may be appointed by each candidate at each polling booth, in order to observe the proceedings of the poll and satisfy the candidate that the poll is conducted strictly in accordance with the law.<sup>149</sup>

### Counting

Each candidate may also appoint scrutineers at each place where votes are being counted.<sup>150</sup> Counting commences in the presence of the scrutineers as soon as possible after the poll closes and when all electors present in the polling booth have voted.<sup>151</sup> Informal ballot papers are not included in the count.<sup>152</sup> If any preferences are to be distributed, a fresh count is made (*see* p. 135). The average number of informal votes cast at general elections has been put at 2.7 per cent of the total votes cast.<sup>153</sup>

142 Gazette 112(13.11.72).

143 *Commonwealth Electoral Act 1918*, Part XXI; *see also* Appendix 13.

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

145 Gazette S28(9.2.76).

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

147 *Commonwealth Electoral Act 1918*, s. 213. Form F of the Schedule to the Act contains a sample ballot paper.

148 *Commonwealth Election and Referendum Statistics*, p. 36 (figures for elections to 1980 inclusive).

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

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

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

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

153 *Commonwealth Election and Referendum Statistics*, p. 38 (figures for elections to 1980 inclusive).

### **Recount**

At any time before the declaration of the result of an election, the officer conducting the election may, if he or she thinks fit, at the written request of a candidate, or of his or her own volition, recount the ballot papers.<sup>154</sup> A recount is generally undertaken only where the closeness of the final result makes it desirable to do so. If a recount confirms a deadlock, the officer must advise the Electoral Commission that the election cannot be decided.<sup>155</sup> In such circumstances the Electoral Commissioner 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>156</sup>

### **Declaration of the poll**

The result of the election is declared as soon as possible after the scrutiny of the ballot papers has been completed (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>157</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.

### **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. As soon as convenient after the result has been ascertained and the poll has been declared, the Divisional Returning Officer forwards a statement setting out the result of the election and the name of the successful candidate to the Electoral Commissioner. This statement may be despatched notwithstanding that all ballot papers have not been received or inquiries completed providing there could not possibly be any effect on the result.<sup>158</sup> After receiving such statements from all Divisional Returning Officers in the case of a general election or from a Divisional Returning Officer in the case of a by-election, the Electoral Commissioner certifies on a writ for the election the name of the successful candidate for each Division, and forwards the writ to the Governor-General or Speaker, as the case may be. 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>159</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>160</sup> Over the 10 Parliaments prior to the 1980 general election, an average period of 21 days elapsed between the date fixed for return of the writs and the first meeting of the House. Following the 1980 and 1983 general elections the House met 22 days and 14 days, respectively, **before** the date fixed for return of

<sup>154</sup> *Commonwealth Electoral Act 1918*, s. 279.

<sup>155</sup> *Commonwealth Electoral Act 1918*, s. 274 (9C).

<sup>156</sup> *Commonwealth Electoral Act 1918*, s. 357 (1A); s. 367A.

<sup>157</sup> *Commonwealth Electoral Act 1918*, s. 284.

<sup>158</sup> *Commonwealth Electoral Act 1918*, s. 284.

<sup>159</sup> *Commonwealth Electoral Act 1918*, s. 286. Gazette 26(30.4.10)973.

<sup>160</sup> S.O. 2(d); and see Ch. on 'The parliamentary calendar'.

the writs. Following the 1984 general election the House met 27 days after the date for the return of the writs and in 1987 the House met the day after the date fixed for the return of the writs.

## **PUBLIC FUNDING FOR ELECTIONS AND ELECTORAL EXPENSES**

### **Public funding for election purposes**

In 1983 amendments to the Commonwealth Electoral Act provided for public funding 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.
- Subject to the provision that public funding for candidates, groups or parties cannot exceed their electoral expenditure, for each valid first preference vote received specified amounts are payable which are adjusted half yearly in accordance with movements in the Consumer Price Index. For the half year July to December 1987, the period covering the 1987 general election, the following amounts were applicable:
  - 76c for a House of Representatives election or by-election;
  - 57c for a Senate election not held on the same day as the House election, and
  - 38c for a Senate election held on the same day as a House election.
- 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.
- Claims must be lodged with the Electoral Commission within 20 weeks of the polling day and be accompanied by statements of electoral expenditure. Funding for candidates endorsed by a party is claimed by, and paid to, the relevant State branch of the party.<sup>161</sup>

### **Disclosure of income and expenditure**

#### *Returns by candidates and political parties*

All candidates, parties and groups are required to disclose publicly donations received for electoral purposes, and electoral expenditure incurred or authorised by them.<sup>162</sup>

Principal provisions include:

- Returns must be submitted to the Electoral Commission, within 20 weeks, in the case of parties and groups, and 15 weeks, in the case of individual candidates, covering the period extending from the day after the poll for the preceding election to the day of the poll of the current election. The returns of individual candidates who have not been candidates at a federal election within the previous four (House) or seven (Senate) years are to cover the period commencing on the day of nomination or announcement of candidature for the current election.

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<sup>161</sup> *Commonwealth Electoral Act 1918*, ss. 293-302.

<sup>162</sup> *Commonwealth Electoral Act 1918*, ss. 303-314.

- 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 of or greater than a specified value (\$1000 in the case of a political party or 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.
- It is unlawful for a candidate to receive an anonymous gift, or a gift from an unincorporated association or trust fund of which the names and addresses of members of the executive committee or trustees are unknown, of \$200 or more or for a party or group to receive such a gift of \$1000 or more.
- Returns must also be made to the Commission, within the time limits specified above, setting out details of all expenditure incurred in relation to the election in respect of advertising, electoral material, consultant's or advertising agent's fees, the conducting of opinion polls or other research.

#### *Returns by third parties*

Persons who have incurred or authorised electoral expenditure exceeding \$200 not authorised by a candidate, political party or group must furnish returns to the Electoral Commission within 15 weeks of the day of polling.

#### *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 or material, 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>163</sup>

#### *Failure to make returns*

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 \$10 000 to knowingly provide a return containing false or misleading information.<sup>164</sup> Failure to provide required returns does not invalidate the election of a candidate.<sup>165</sup>

#### *Public availability of returns and claims*

After 24 weeks from the date of the poll, returns and claims for payment may be inspected at the main office of the Electoral Commission in Canberra by members of the public and copies may be obtained on payment of a fee to cover the cost of copying.<sup>166</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

163 *Commonwealth Electoral Act 1918*, ss. 310-312.

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

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

166 *Commonwealth Electoral Act 1918*, s. 320.

arose.<sup>167</sup> On 10 October 1902, legislation was assented to 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>168</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>169</sup> On 22 November 1907 legislation was enacted extending the jurisdiction of the Court of Disputed Returns to 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, such questions to be referred to the court by resolution of the House in which the question arose.<sup>170</sup>

Under the original procedure three petitions were presented to the House of Representatives disputing the election of certain Members.<sup>171</sup> All three petitions were referred to the existing Committee of Elections and Qualifications for inquiry and report.<sup>172</sup> In all three cases the committee's report, adopted by the House, did not support a change in the election result.<sup>173</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>174</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 Electoral 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>175</sup> The petition must be filed with a deposit of \$100 in the Principal Registry of the High Court in the capital city of the State in which the election was held within 40 days of the return of the writ.

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 Supreme Court of the State or Territory in which the election was held, 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>176</sup> When the court finds that any person has committed an illegal act, this fact is reported to the responsible Minister.<sup>177</sup>

The Principal Registrar or District 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.<sup>178</sup> The Clerk presents the petition and order of the court to the House at the earliest opportunity either separately or together. The decision of the court is final and no appeals are permitted.<sup>179</sup> A Member continues to hold his or her seat pending the outcome of the hearing.

167 Constitution, s. 47.

168 *Commonwealth Electoral Act* 1902, ss. 192-206.

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

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

171 VP 1901-02/59,83,419. See Appendix 13.

172 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; and see *Odgers*, pp. 120-1.

173 VP 1901-02/61,87,441.

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

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

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

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

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

179 *Commonwealth Electoral Act* 1918, s. 368; VP 1929-31/91-2.

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. 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>180</sup>

Since the establishment of the court of Disputed Returns there have been 29 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>181</sup> The court ruled the election absolutely void in four cases and the Speaker issued a writ for a new election to be held.<sup>182</sup>

In 1920 a Member (Mr McGrath) was elected at a second election after the first election was 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>183</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>184</sup> The Speaker sends to the court a statement of the question together with any papers possessed by the House relating to the question.<sup>185</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 Principal Registrar or District 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>186</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 although this has happened in the Senate.<sup>187</sup>

On 30 March 1977 a Member gave a notice of motion:

... that the question whether the place of the Honourable Member for Macarthur [Mr Baume] has become vacant pursuant to the provisions of Section 45(ii) of the Constitution of the Commonwealth of Australia be referred for determination to the Court of Disputed Returns pursuant to section 203 of the Commonwealth Electoral Act.<sup>188</sup>

The motion was debated on 5 May 1977 and the Attorney-General tabled a joint opinion from the Attorney-General and the Solicitor-General, and two other legal opinions, on the matter. The question was negatived, on division.<sup>189</sup>

*And see Chapter on 'Members'.*

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

181 *See* Appendix 13.

182 VP 1904/25-6,43-4; VP 1907-8/3-4; VP 1920-21/189-90.

183 VP 1920-21/468.

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

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

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

187 J 1974-75/628-9; and *see* Ch. on 'Members'.

188 NP 11(31.3.77)580-3.

189 H.R. Deb. (5.5.77)1598-1610; VP 1977/108-12.