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No. 110 2000–01

Electoral and Referendum Amendment Bill
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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 110 2000–01

Electoral and Referendum Amendment Bill (No. 1) 2001

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27 March 2001

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Electoral and Referendum Amendment Bill (No. 1) 2001

Date Introduced: 7 March 2001

House: House of Representatives

Portfolio: Finance and Administration

Commencement: On a day fixed by Proclamation

Purpose

The Bill makes a number of mostly technical amendments to electoral law, including:

- allowing greater power to exclude certain names from the electoral rolls
- authorising the review of the registration of political parties, and
- allowing restricted access to electronic lists of postal voters after the close of polls.

Background

Since 1983 the conduct of each general election has been examined by a Joint Standing Committee with the aim of recommending improvements in the electoral process. Following the 1998 general election a review was conducted by the Joint Standing Committee on Electoral Matters, which released its report, entitled *The 1998 Federal Election* (the Report), in June 2000. The Report contained minority reports from the ALP and Australian Democrat members of the Committee, although both were in agreement with the majority of the recommendations of the Committee. The ALP minority report deals with specific recommendations of the majority while that of the Australian Democrats principally deals with more general principles.

The Government's response to the Report was tabled on 1 March 2001, shortly before the introduction of this Bill, and specifically or in principle supported 49 of the 57 recommendations of the majority report, with the unsupported recommendations relating to technical matters, such as a proposed requirement for pre-poll voters to indicate their reason for such a vote and marking of postal votes. In addition to the matters contained in

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the Report, the Government's response indicated that it also wished to pursue reforms which:

- would deny the right to vote for all prisoners (currently prisoners serving a sentence of 5 years or more are denied the right to vote), and
- review penalties for breaches of electoral law and increase penalties for multiple voting.¹

The Report deals with a number of largely technical issues in addition to those which are more contentious and subject to some disagreement. This Bill deals with largely non-contentious matters and of the recommendations of the Report to be implemented, none were opposed in the minority ALP report. Some of the more contentious recommendations were that:

- The electoral rolls for new voters be closed for new electors on the day of the issue of the writs for the election and 3 days later for enrolled voters wishing to change their address. Currently section 155 of the *Commonwealth Electoral Act 1918* (the Principal Act) provides a period of 7 days. The Report notes that a similar recommendation was contained in the similar report on the 1996 election and when introduced in legislation was rejected by the Senate. The recommendation was based on the inability of the Australian Electoral Commission (AEC) to verify the number of enrolment forms received under the current rules (351 913 enrolment forms for new voters, changes of address and other reasons were received by the AEC between the issue of writs and the close of rolls prior to the 1998 election).² The recommendation is opposed in the ALP minority report on the basis that it will disenfranchise voters, particularly those enrolling for the first time.³ The Australian Democrats have reserved their position on this recommendation.⁴
- The threshold above which donations must be disclosed by recipients and donors be increased from \$1 500 to \$3 000. Currently, political parties must disclose the name of a donor where a contribution is \$1 500 or more (so that multiple contributions below this amount need not be declared), while donors must make a declaration where the sum of their contributions equals or exceeds this amount. The Report recommends that the level of donations in both cases be increased to \$3 000, while noting that previous amendments to increase these amounts to \$5 000 for political party disclosure and \$10 000 for individual disclosure were defeated in the Senate.⁵ The recommendations are largely based on a reduced administrative burden on the parties involved. (In relation to the individual disclosure amount the Report states: 'This proposal would have the advantage of minimising the duplication and easing the burden on small donors, while ensuring the disclosure of all donations above \$1 500 through party disclosure returns.' This appears to contradict the recommendation elsewhere in the Report that the disclosure level for political parties be raised from \$1 500 to \$3 000.⁶) The recommendation is opposed in the ALP minority report, principally on the basis that their implementation would 'diminish the transparency of the [current] disclosure

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laws.’⁷ The Australian Democrats minority report is in favour of a stricter disclosure regime, particular where another entity is interposed between the donor and the political party which ultimately receives the donation.⁸

As the measures contained in the Bill relate to a wide range of issues, the specific background to the major measures in the Bill will be briefly discussed below.

Main Provisions

Commencement by Proclamation

Clause 2 provides that this Bill is to commence on Proclamation, with no further date set within which the Bill must commence in any event. This appears to be a departure from the general approach referred to in *Drafting Instruction No. 2 of 1989*, issued by the Office of the Parliamentary Counsel. Drafters are required by the Instruction to comply with a general rule that a restriction be placed on the time within which an Act should be proclaimed. The rationale is that ‘Parliament, as the elected holder of Federal legislative power (rather than the Executive) should be responsible for determining when the laws it makes are to come into force’.⁹ According to the Drafting Instructions, exceptions ‘should only be used in unusual circumstances, where the commencement depends on an event whose timing is uncertain’ such as the enactment of complementary State legislation.¹⁰ The Explanatory Memorandum states that ‘[t]he AEC would be working to implement the Act, and have it proclaimed, as soon as possible. However, should a federal election be called before the AEC is in a position to implement the Act, the amendments would not be effective for the purpose of that election’.¹¹

Removal of Names from the Electoral Roll

Recommendations 8 and 10 of the Report deal with the removal of ‘offensive’ names from the electoral rolls. The Report notes that if a name is accepted by other government agencies, including State and Territory agencies, the name must be registered and a candidate may stand under that name. While extreme names may currently be excluded (the example given in the Report is: Mr Prime Minister Piss the Family Court-Legal Aid which was excluded), the Committee was of the view that the AEC, through its officers, should have a greater power to refuse to enrol a person under an offensive name and that the criteria for determining whether a name is invalid ‘should be developed by the AEC in consultation with the Office of the Parliamentary Counsel’.¹² Recommendation 10 is that a decision to refuse to register a name be appealable to the Administrative Appeals Tribunal.

Item 2 of Schedule 1 of the Bill will insert a **new section 93A** into the *Commonwealth Electoral Act 1918* (the Principal Act) authorising a Divisional Returning Officer (DRO) or the AEC to remove a name from the register if it is considered that the name is:

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- fictitious, frivolous, offensive or obscene
- not the name by which the person is usually known
- not written in an alphabet known for the English language, or
- the inclusion of the name would not be in the public interest.

Similarly, **item 16** will insert a **new section 98A** into the Principal Act to allow new or transferred enrolments to be excluded on the same grounds.

Items 17 and 18 amend section 120 of the Principal Act to provide for such a decision of a DRO to be reviewable by an Australian Electoral Officer (AEO), while **item 19** provides that such a decision of an AEO will be reviewable by the Administrative Appeals Tribunal.

Item 81 contains transitional provisions for people who may have their names removed from the rolls under the proposed amendments and allows their enrolment to be changed to a previously enrolled (and acceptable) name or to be notified to provide a name by which the person is generally known in the community. If these conditions cannot be satisfied, the name may be removed from the rolls.

The proposed amendments appear to go further than the Report's recommendations, particularly in including an ability to exclude a name on the basis of 'public interest'. It is notable that the criteria for the exclusion of names are not to be contained in guidelines or regulations which would be subject to Parliamentary scrutiny.

Review of Registered Parties

Item 21 proposes to insert a **new section 138A** into the Principal Act to enable the AEC to review the eligibility of a registered party to remain registered. The AEC currently has power to deregister a party under section 136 and 137 of the Principal Act on a number of grounds, including that: it has been registered for 4 years or more and has not endorsed a candidate during that period; it was registered due to having a Member of Parliament and has ceased to have such a Member and also has fewer than 500 registered members; or the AEC is satisfied that the party was registered by fraud or misrepresentation.

The Report notes that the AEC is reviewing the registration of parties on a number of grounds, including where parties lost sitting members of Parliament at the 1998 Federal Election.¹³ Recommendation 54 of the Report proposes to give the AEC legislative backing for such reviews and to require the production of documents to support continuing registration.

Proposed section 138A will give the AEC specific power to review whether a party is still an eligible party and whether it may be deregistered under sections 136 or 137 of the Principal Act. The AEC will also be given power to request information from a registered

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party for these purposes and a failure to supply such information may lead to deregistration.

Electronic Access to Lists of Postal Voters

Section 189 of the Principal Act requires a DRO to compile a list of postal voters which is to be available for public inspection from the third day after the poll closes until the election can no longer be questioned. Recommendation 12 of the Report proposes that electronic access to such a list be given to candidates and 'party political organisations'.¹⁴

Proposed section 189A will allow candidates and registered political parties to request an electronic list of postal voters during the same period. Such a copy is to be supplied as soon as practicable. **Proposed section 189B** restricts the use to which such information may be used and specifically excludes its use for commercial purposes. The end use restrictions reflect those currently applying to other electronically available electoral information for candidates and political parties.

Court Proceedings

Recommendation 56 of the Report is that the jurisdiction for the hearing of an injunction regarding a breach of the Principal Act be transferred from State Supreme Courts to the Federal Court (currently section 383 of the Principal Act requires such matters to be heard in a State Supreme Court). The reason for the proposed change given by the Committee is that the AEC has submitted that State Court jurisdiction existed before, and has not been changed since, the creation of the Federal Court and it is more appropriate that the Federal Court determine such matters.¹⁵

The change will be effected by **items 57 to 73**, which will amend section 383 of the Principal Act to replace references to State Courts with the Federal Court. **Items 50 to 55** will amend section 354 to give effect to the recommendation that if the High Court sitting as the Court of Disputed Returns refers a petition to a lower court, then that court also be only the Federal Court of Australia.

Amendments to the *Referendum (Machinery Provisions) Act 1984*

Amendments to this Act reflect those to the Principal Act where they relate to the conduct of a referendum, including:

Item 11 of Schedule 2 which allows electronic access to lists of postal vote applicants, and

Items 18 to 33, which deal with the jurisdiction of the Federal Court.

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Endnotes

- 1 Government Response to the Joint Standing Committee, tabled 1 March 2001, p. 28.
- 2 Joint Standing Committee on Electoral Matters, *The 1998 Federal Election*, p. 15.
- 3 *ibid.*, p. 155.
- 4 *ibid.*, p. 163.
- 5 *ibid.*, pp. 127–129.
- 6 *ibid.*, recommendations 44 and 45.
- 7 *ibid.*, pp. 158&9.
- 8 *ibid.*, pp. 173–176.
- 9 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, No. 19, 1999, p. 5.
- 10 Office of the Parliamentary Counsel, *Drafting Direction 1989, No. 2*, ‘Commencement of Legislation by Proclamation’, p. 92.
- 11 *Explanatory Memorandum*, ‘Electoral and Referendum Amendment Bill (No.1) 2001’, p. 4.
- 12 Joint Standing Committee on Electoral Matters, *The 1998 Federal Election*, pp. 22 & 23.
- 13 *ibid.*, p. 139.
- 14 *ibid.*, p. 27.
- 15 *ibid.*, p. 147.

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