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The Howard Government's Electoral Reforms – a Blight on Democratic Principles

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Abstract

The Howard Coalition government has recently enacted the most significant reforms to the Commonwealth Electoral Act to have occurred for more than 20 years. The reforms include removing the limited prisoner franchise, earlier closure of the electoral roll, and higher disclosure thresholds and increased tax deductibility for political donations. Parliamentary debate on these issues has been limited, while public debate on electoral issues also tends to receive minimal exposure. This paper provides an overview and analysis of the major changes to the Commonwealth Electoral Act 1918 passed by the Australian Parliament in June 2006. It examines the democratic implications of these changes, particularly in relation to the democratic principles of political equality and popular control of government. The paper also compares the Australian Commonwealth reforms with electoral legislation at the Australian sub-national level, and with recent electoral reforms in the United Kingdom, Canada and New Zealand.

When the Howard Liberal/National Coalition government was first elected in March 1996, it moved quickly to place its imprint on election administration. As an example, one of its first acts in government was to abolish the Aboriginal and Torres Strait Islander Election Education and Information Service (ATSIEEIS), an arm of the Australian Electoral Commission (AEC) that had been instrumental in improving the rates of Indigenous enrolment and voting, especially in remote areas. This was the first time that the AEC, an independent statutory authority, had been given explicit instruction as to what it may or may not spend its budget on. However, for nine years the Howard government was thwarted in making substantial changes to electoral legislation due to not having a majority in the Senate. Until this year the government had only been successful in making minor modifications, such as reducing the prisoner franchise, and changing a redistribution formula to ensure the retention of the two Northern Territory House of Representatives seats. Both these changes occurred in 2004 and both required the support of the Labor Party (in fact Labor initiated the amendment that reduced the prisoner franchise).

At the 2004 election, the Coalition was able to win control of the Senate, taking effect from 1 July 2005. Since then, the Coalition has been busy implementing its long-standing electoral policy agenda. The Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2006 contains many measures that the Coalition first raised in 1996, and has consistently pursued since, both through

legislation and through the Joint Standing Committee on Electoral Matters (JSCEM). Following two committee inquiries and 30 hours of parliamentary debate, this legislation was passed, virtually unamended, in late June 2006. In overall terms, the 'reforms' make it more difficult for citizens to vote, while making it easier for donations to be made to political parties in secret. The changes also generally go against the trend occurring in comparable democracies, particularly in the area of political finance accountability. The most notable aspects of the legislation are the disenfranchisement of all prisoners, earlier closure of the electoral roll, more stringent proof-of-identity provisions (both for enrolling and voting), and increases in the donation disclosure threshold and the level of tax-deductible political donations.

Prisoner disenfranchisement

When the Coalition came to power in 1996, prisoners serving terms of less than five years were entitled to vote. This was reduced to terms of three years or less in 2004. At this time, while the Coalition's legislation called for total prisoner disenfranchisement, Labor argued that a three-year qualification was a more suitable restriction as it coincided with a full term of the Australian Parliament (Faulkner, 2004:25138). While the Coalition agreed to this compromise position, it returned to its preferred position in its 2006 legislation, removing the franchise for all prisoners in full-time detention. This is estimated to affect approximately 20,000 prisoners (Costar, 2006:4). This change denies the benefits of preparing prisoners for their transition back into society by restoring their responsibilities as members of the community. There is also a disproportionate impact on young males (the prison population is 93 per cent male) and Indigenous Australians, who are imprisoned at 12 to 15 times the non-Indigenous rate.

In its 2000 report, the JSCEM stated that the prisoner franchise should not be removed 'until there is sufficient and widespread public support for a change' (JSCEM, 2000:90). The government asserted that this move is supported by the Australian electorate; this is not, however, borne out by the submissions received by the Senate Finance and Public Administration Committee's inquiry into the Bill. Of the 39 submissions which addressed the prisoner franchise issue, only three expressed support for the coalition's proposed change (from the Liberal Party, Nationals, and Festival of Light).

Many of the submissions opposing the change cited Article 25 of the International Covenant on Civil and Political Rights, which states that all citizens shall have the right and opportunity to vote at elections. This argument is consistent with what has occurred in Canada and the United Kingdom in recent years. In Canada no prisoners have been disenfranchised since the Supreme Court ruled in 2002 that disenfranchisement was in breach of the country's Charter of Rights and Freedoms. While the United Kingdom disenfranchises all prisoners, in 2004 and 2005 the European Court of Human Rights found this to be in contravention of the European Convention on Human Rights (Sawer, 2006:8-9).

At the Australian sub-national level, four jurisdictions (Victoria, Queensland, Australian Capital Territory, and the Northern Territory) adopt the Commonwealth standard. These jurisdictions therefore will have a corresponding disenfranchisement of all prisoners for their elections, unless they pass new legislation to restore prisoners' voting rights. At the time of writing, the Queensland Beattie government

had announced it would agree to the federal change (Osborne, 2006:NP). New South Wales (section 21, *Parliamentary Electorates and Elections Act 1912*) and Western Australia (section 18, *Electoral Act 1907*) continue to enfranchise prisoners serving sentences of less than one year; Tasmania enfranchises prisoners serving sentences of less than five years (section 31(2) *Electoral Act 2004*); while South Australia enfranchises all prisoners, irrespective of their length of sentence (Orr, 2004:10; also see section 29 (4)-(5) of South Australia's *Electoral Act 1985*). This confusing mix of voting entitlements can only add to the difficulty in encouraging prisoners (where eligible) to engage in the democratic process as part of their rehabilitation into broader society.

The arbitrary nature of imposing an additional penalty (that is, of denying the right to vote) on top of a custodial sentence, is also questioned. Senator Andrew Murray has pointed out that an offence, such as traffic fine defaulting, may be punished by imprisonment in one jurisdiction while in another jurisdiction, the same offence only warrants a loss of licence (JSCM, 2005:405). This inconsistency, both between jurisdictions, and offences, can be expected when electoral governance imposes on judicial decisions. As Senator Murray points out, the arbitrary removal of citizens' rights should be a decision of the courts, not the legislative process. However, it is exactly the intent of the Howard government's reforms to remove courts' discretion. While Labor does not support the total disenfranchisement of prisoners, it does support discretionary prisoner enfranchisement, through the imposition of a threshold length of imprisonment that coincides with the length of the parliamentary term.

Early Closure of the Electoral Roll

Australia does not have fixed-date elections at the Federal level. The Prime Minister is able to call an election, within a specified time frame, without any notice or warning. The writs for the election are then issued shortly afterwards. This uncertainty makes the closing date of the electoral roll a critical issue. Because of the uncertainty of the election date, since the 1980s seven days have been allowed following the issuing of the writs before the electoral rolls are closed. During this time, citizens have been able to newly enrol, or update their existing enrolment if they have moved address or changed their name. However, as a result of the 2006 legislation, the electoral rolls will now close for new enrolments at 8pm on the day that writs are issued, and three business days after the issuing of the writs for enrolment changes. There are exceptions for 17-year-olds who will turn 18 before the election day, and for people who are to be granted citizenship before election day. People in these categories will have three business days from the issuing of the writs to enrol. The government's reasoning for this change is that it will enhance the integrity of the roll by preventing people from making fraudulent enrolments following the calling of an election. The government argues that by closing the roll earlier, the AEC will have additional time to verify new and updated enrolments.

Following concern raised by a Liberal Party MP after the 2001 election, the AEC conducted an audit of the South Australian roll. Two cases were identified (in a roll of over one million) where people had moved address following the calling of the election, only to move back to their old address after the election. However, these cases were not found to be for fraudulent reasons (Sawer, 2006:5). In 2002, the Australian National Audit Office found that the electoral roll is reliable and of high integrity (Costar and Browne, 2006:NP). In the lead-up to the 2004 election, during

the seven-day period following the issuing of the writs, the AEC processed 78,816 new enrolments and 345,159 updated enrolments (AEC, 2004a:NP). A further 150,000 people applied for new or amended enrolments between the close of the roll and the election day (Campbell, 2006:5), and therefore were unable to be placed on the roll in time to vote (or voted using an incorrect address).

The AEC has adopted an interesting position on the issue of fraudulent enrolment. In a submission to the JSCEM in 2000, it noted that neither it nor the JSCEM had uncovered any organised or widespread attempt to defraud the roll in this way in the previous 15 years. The AEC went on to state that the proposed early closure of the rolls would not improve the accuracy of the rolls for an election, and in fact the rolls would be less accurate, as there would be less time for electors to correct their enrolments or to apply for new enrolments. The AEC also stated that the change would have a negative impact on the franchise, that it would delay election results due to an anticipated rise in declaration voting, have a particularly negative impact on young people seeking to vote for the first time, and cause public confusion due to different systems operating at the State and Territory levels (AEC, 2000:64).

The AEC's submission to the JSCEM following the 2004 election did not refute the above position (AEC, 2005). However, at a more recent committee inquiry hearing in March 2006, the AEC Commissioner stated that the earlier closure of the roll would not create any difficulties, and will actually 'make our life easier' (Campbell, 2006:8). The Commission will rely on a public awareness campaign to alert people to the earlier cut-off date. The AEC's focus has changed from accuracy at election time, to one of ongoing accuracy between elections. An interesting complication for this change could be the timing of the issuing of the writs, as House of Representatives' writs are issued by the Governor-General while the writs for Senate elections are issued by the respective state governors. Traditionally all writs are issued on the same day, but rebellious Labor-governed states may want their governors to delay issuing Senate writs (though governors would be unlikely to accede to this), as the move is regarded as favouring the Coalition electorally. An indicator of this can be seen in youth support levels, with Australian Election Study figures from 2004 showing 43 per cent of young people (under 25 years) supported the Liberal and National parties, while 49 per cent supported the left-wing parties (Labor-32, Greens-17) (Bean, 2005:22).

This legislative change means there will be a minimum of 33 days between the close of the roll and the election day. By comparison, under the Electoral Administration Bill 2005 the United Kingdom will close its roll 11 days before an election, Canada allows enrolment up to and including the election day, and New Zealand until the day before an election. Of course, there is a greater imperative to encourage citizens to vote in jurisdictions with voluntary voting (unlike Australia's compulsory voting system), however the principle of maximising voter enrolment and turnout remains the same.

As with prisoner enfranchisement, there is a confusing mix of electoral laws regarding close of rolls at the Australian sub-national level. The timing of the close of the roll is not a significant issue for the four jurisdictions with fixed-date elections, as ample notice is already given as to when the roll will be closed. However, these jurisdictions have a mixture of roll closing dates, with New South Wales – the day writs are issued;

Victoria – three days after writs are issued; South Australia – seven to ten days after writs are issued; and the Australian Capital Territory – 29 days before election day (Sawer, 2006:7).

As noted above, the closing of the roll is a more serious issue when the government of the day can suddenly call an election with little or no warning. In the jurisdictions without fixed-date elections, there is a similar mix of closing dates: Tasmania closes its roll on the day writs are issued, however, Tasmania's *Electoral Act 2004* (section 63) requires that writs are not to be issued until at least five days (and up to ten days) following the dissolution of parliament, ensuring reasonable notice before the roll is closed. The Northern Territory closes its roll only two days after writs are issued. This is an understandably short period considering that the Territory's *Electoral Act 2004* (section 28) requires that polling day must be 18 days after the issuing of the writ, and also taking into account the need for extensive mobile polling in the widespread population areas of the Territory. The remaining jurisdictions without fixed-date elections provide reasonable notice of an election before closing their rolls – Queensland (five to seven days after the issuing of writs) and Western Australia (eight days after the issuing of writs) (Sawer, 2006:7). The lack of uniformity between Australian jurisdictions unnecessarily adds confusion and cost to the election process. It is understandable that the differing requirements between Commonwealth and sub-national elections lead to potential electors inadvertently being omitted from the roll. It also adds to the cost for electoral authorities to advertise the roll closure deadlines at a time when electors are already being bombarded with political advertising during an election campaign.

At the March 2006 Senate committee inquiry, the AEC Commissioner stated that at least 150,000 Australians enrolled or updated their enrolments in the period between the seven-day cut-off for the close of roll, and the election day (Campbell, 2006:5). This meant that these people either missed out on having their democratic voice at the election, or for those people who had moved outside their old electorate, fraudulently voted by using their old address. It can be seen that, rather than changing the system to capture this significant group of people, this government reform can only be expected to increase the number of otherwise eligible citizens who will be unable to vote at future elections, or who will fraudulently vote due to an out-of-date enrolment. It can also be expected to disproportionately impact on people living in remote areas, or who travel for extended periods as part of their work, who will find it particularly difficult to meet the new deadline.

New proof-of-identity requirements

The government has also introduced new proof-of-identity requirements, both for enrolling and provisional voting. In both cases, citizens will be required to provide their driver's licence or other documentation to be prescribed in regulations. For enrolments where the person does not have any documentation, the application will need to be witnessed by two electors who know the person.

These provisions will make it more difficult for citizens, particularly those in rural and remote areas, to enroll and vote. Combined with the early roll closure, it can be expected that many will not bother to go to the trouble of complying, and will therefore choose not to vote, or will vote using an old address (if already enrolled). These changes also reflect the Howard government's emphasis in shifting the

traditional 'responsibility' to vote into a 'right' to vote. This shift means that rather than having electoral legislation that facilitates ease of voting, citizens are now increasingly challenged to justify their entitlement to vote. This has occurred in the absence of any evidence of systemic or regular cases of fraudulent voting or enrolment. Unlike the situation for citizens in countries with a voluntary voting system, where there is a greater emphasis on encouraging enrolment and turnout, disinterested Australians may see these more stringent identification requirements as an opportunity to opt out of the compulsory system.

Increased donation disclosure threshold

The biggest threats to the democratic principles of political equality and popular control of government are in the area of political finance reforms. As Ewing and Ghaleigh (2006:9) point out, the concerns of ensuring that political parties are adequately funded and that individuals' rights to privacy in making donations, need to be balanced by the democratic state's interest in having a political system free of corruption and with voters being able to make informed decisions. This informed decision includes knowing the causes and interests that a candidate may be likely to represent in parliament. With these reasons in mind, there is a strong argument for establishing and maintaining an effective disclosure regime. It is in this aspect of politics that Australia appears to be increasingly out of step with the modern practices that are occurring in comparator countries. The government's Bill increases the current disclosure threshold of \$1,500 to donations of more than \$10,000 in a year. The \$10,000 threshold will steadily increase over time as it is to be indexed annually to the Consumer Price Index. The government argues that it is not in the public interest for donations below this amount to be disclosed. Individual, but related entities (such as members of a family, or directors of a company) are treated separately, as are state divisions of the same party. For example, a husband and wife could separately donate \$10,000 to each of the seven state and federal divisions of a party, a total of \$140,000, without any of this being disclosed. Although this ability to donate separately was already in the Act, the increased threshold makes this option more attractive to major donors. Countries such as Canada have been able to place stringent caps on total party donations, so the above example of separate donations appears to be a deliberate legislative loophole that advantages the major Australian parties.

Miskin and Baker (2006:3) identify the impact in monetary terms that the increased disclosure threshold will have. In the 2004-05 financial year (an election year), \$33.1m in donations to the major parties was disclosed under the existing \$1,500 threshold. That figure would drop to \$25.2m under the new regime. That is, an additional \$8.1m would be removed from public accountability. Of course, this is assuming that donating patterns remain the same. However, it can be expected that political parties will adapt their fundraising and donation strategies, and donors who previously donated up to the old cap will be encouraged to donate up to the new threshold. The increased threshold is also a cause for concern given the lack of regulation in other areas of political finance such as foreign and corporate donations; the timing of disclosure; and the absence of caps on donations or campaign expenditure. These are all areas where Australia falls far behind the practices of countries such as the United Kingdom and Canada.

The United Kingdom's £5,000 disclosure threshold is comparable to Australia's new limit; while Canada, which has far more stringent caps on donations, is also stricter on disclosure, with a \$200 threshold (Ewing and Ghaleigh, 2006:6; Geddis, 2006:6). However, when comparing political funding structures, there are many aspects to consider. For example, the United Kingdom and Canada prohibit foreign donations, while Australia has no restrictions in this area. In fact, the largest single donation during the 2004 election campaign was \$1m to the Liberal Party, received from a British peer, Lord Michael Ashcroft. Similarly, Australia has no restriction on corporate donations, even in cases where companies have significant government contracts. By comparison, Canada prohibits donations from corporations that receive more than half their revenue from government, and otherwise limits corporate donations to \$1,000 for an individual campaign. In April 2006 the Canadian government introduced Bill C-2, which bans all donations to parties or candidates by corporations, trade unions and associations, replacing the previous limit of \$1,000 (Parliament of Canada, 2006:NP). In addition, corporations are not allowed to donate to national party organisations or for leadership contests (Geddis, 2006:5). Although the United Kingdom does not have limits on corporate donations, campaign expenditure caps were introduced in 2000 to limit the potential for corporate influence in elections. The requirement for shareholder approval for company donations was introduced at the same time (Sawer, 2004:NP).

For a disclosure regime to be effective, it is important that information is made public in a timely manner. Once again, Australia falls well short of best practice, with financial returns for the October 2004 election not being released until February 2006. These disclosures therefore become more of a historical document rather than information that electors can consider in determining their vote. The United Kingdom leads the way in this area, with a requirement for quarterly disclosure reports and weekly reports during election campaigns. Canada also requires quarterly reports but does not have any special requirements during election campaigns (Young and Tham, 2006:140). It is acknowledged though that a disclosure regime that requires reporting during an election campaign could easily be subverted by donors agreeing to support parties, but not making actual donations until after the election.

Australia's reporting regime also has serious issues of non-compliance and inaccurate reporting, a problem raised by the JSCEM (2000; 2005), Miskin and Baker (2006), and Young and Tham (2006). For example, the inflated cost of tickets to a party dinner with Ministers in attendance may be classified as 'other receipts' rather than donations. The original source and size of donations can also be hidden through the use of third parties, such as public relations companies that organise fundraising events for political parties. While New Zealand has similar failings in its disclosure regime, it, like Canada, places a cap on election spending (Geddis, 2006:7) with the intention that the ability to generate private donations does not unduly influence an election result. Another area of concern is in the use of loans to political parties, which can give the lender a stronger, ongoing influence over a party than a donation of the same amount would. Although Australia has not had any major scandals like Britain's recent 'loans-for-lordships' affair (e.g. Woodward, Hencke and Branigan, 2006:NP), the ability for the use of loans to have a corrupting influence on Australian politics remains. The AEC has raised this issue numerous times with the JSCEM, including the lack of source disclosure for overseas loans (AEC, 2004b:27-8). The Australian government does not appear to be concerned to address any of these issues.

Combined, it can be seen that the increase in the donation disclosure threshold is symptomatic of Australia's poor record on political finance. Overall it provides a fertile environment for undue influence and corruption to prosper.

At the Australian sub-national level, disclosure legislation has traditionally mirrored or complemented Commonwealth legislation, with most states currently adopting the Commonwealth's \$1,500 disclosure threshold (Young and Tham, 2006:14-6). However, the Labor Party has expressed staunch opposition to the Howard government's raising of the threshold to \$10,000, labelling it as a 'greedy grab for cash' by the Howard government (Griffin, 2006:143). It will therefore be interesting to see whether the state and territory Labor governments retain the Commonwealth threshold as the norm. For example, Victoria's *Electoral Act 2002* (section 222) requires political parties to provide the Victorian Electoral Commission with a copy of their Commonwealth annual return (which will now use the \$10,000 threshold). Western Australia, the Australian Capital Territory and Northern Territory also have this provision in their electoral legislation (Young and Tham, 2006:14). Therefore the Labor governments in these states and territories would need to amend their electoral legislation if they wish to return the disclosure threshold to \$1,500. To do so would confirm the Labor Party's commitment to accountability in political donations, although it would also create confusion and complexity in complying with the legislation. However, for Labor not to take action at the state and territory level would allow it to benefit from the secret political donations for which it has been so critical of the Howard government.

Tax-deductible political donations

The legislation increases the threshold for the tax-deductibility of donations to political parties and independents from \$100 to \$1,500, and extends deductibility from individuals to corporations. There are legitimate arguments to use a tax subsidy to encourage participation in a society's democratic processes; however this only holds true for small donations, as a person's involvement in politics should never be tied to a person's ability to pay. The government's only argument for this increase is to increase political participation, so it must be questioned what type of participation the Coalition is looking for. Instead of active participation in matters such as policy development, debate, and community engagement, it appears the government is seeking passive financial support only. In addition, by extending deductibility to corporations, the government is encouraging business to be more heavily involved in political debate. This will have the effect of further diluting the voice of individuals. The increase also skews political influence to the wealthier in society who have a greater capacity to contribute financially, and thanks to the incremental tax scales, will receive proportionately higher (taxpayer-funded) subsidies than people on lower incomes. For example, a person earning \$100,000 per year who makes a \$1,500 donation will receive a \$600 tax rebate, while someone on \$20,000 making the same donation only receives a \$190 rebate (based on 2006-07 tax scales). In its financial impact statement, the government estimates that this increased tax relief will cost \$22.5m over the next four years. As a comparison, the ATSIIEIS which the government abolished in 1996 only cost \$2m per year. To date, the government has not provided a cost benefit analysis to support its case in providing this tax relief.

Young and Tham (2006) suggest that it would be more equitable to adopt a tax subsidy system as used in Canada. In the Canadian system, the level of subsidy

reduces in percentage terms as the size of donation increases, with there being three tiers of subsidies for donations up to the maximum allowable of \$C1,000 (2006:142). This system appears cumbersome for such amounts and unlikely to cause significant changes in donating behaviour. An additional aspect of inequity that has been raised by Senator Andrew Murray and others is the differential tax treatment given to political donations compared to donations to other comparable community organisations that do public good in a civil society (JSCEM, 2005:386), and that tax deductibility should be applied to not-for-profit organisations on a basis of principle, rather than special interest (Murray, 2006:9).

Conclusion

It can be seen that these changes will have significant impacts on the franchise and the political finance environment. Rather than extending the franchise and attempting to maximise the turnout of eligible citizens at elections, as has been the experience in most modern democracies, Australia is moving towards a selective franchise where governments decide who is fit to exercise this civic duty. Instead of voting being a 'responsibility', as it traditionally has been, especially under the compulsory regime, it is becoming more of a 'right' that can only be exercised by those selected by the government. Similarly, the ability to participate on an equal basis is being undermined, with wealth playing an increasingly significant role in the style and content of Australian political discourse. The democratic principle of popular control of government is also threatened when the financial supporters of political parties remain unknown to the citizenry.

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