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## THE RULES OF THE GAME

Marian Sawer and Michael Maley

In 2019 the federal election campaign was awash with money as never before, prompting many to wonder whether billionaires could now buy elections in Australia and what exactly were the rules of the game. The money bought an onslaught of negative advertising and resulted in a substantial number of complaints to the Australian Electoral Commission (AEC). It prompts questions about how far Australia is now lagging behind best practice in the regulation of campaign finance and other aspects of electioneering in the digital age. As we shall see in this chapter, there are a number of ways in which Australia departs from the principles of the ‘level playing field’ for electoral competition, as laid down in international guidelines.

The *Commonwealth Electoral Act 1918* (the *Electoral Act*) has been the vehicle for some of Australia’s most distinctive electoral reforms, including compulsory voting, preferential voting, single transferable vote proportional representation for Senate elections, independent electoral administration and a process for the redistribution of electoral boundaries that is widely recognised as one of the world’s best. From its original length of 62 pages, the Act has grown over the century to its current length of 639 pages. Its growth reflects the increasing complexity of electoral processes but also a lack of trust that political parties will comply with the rules unless they are laid down in great legislative detail. In some areas, however, regulation has retreated—for example, the original limits on campaign expenditure were finally withdrawn in 1980.

Our aim here is not to describe the whole of the regulatory framework for the election, but rather to focus on parts that have been the subject of controversy and a focus for reform efforts. We will not include elements that are important but relatively uncontroversial, such as the redistribution process, which is covered in Chapter 9 of this volume. We deal with enrolment, political party registration, candidate nomination (and disendorsement), campaign funding and advertising, and early voting. We conclude with some reflections on current trends in federal electoral reform.

## Enrolment

In April 2019, the AEC announced it had achieved ‘the best electoral roll in history’, with 96.8 per cent of eligible voters (more than 16 million) now enrolled.<sup>1</sup> Youth enrolment had also reached its highest level, with an estimated 88.8 per cent of eligible 18–24-year-olds enrolled (AEC 2019a).

That achievement was driven by major changes in the preceding 10 years. Prior to 2009, there was an antiquated system whereby names could be added to the electoral roll only after receipt of a hardcopy electoral enrolment form completed by the claimant. Then, in September 2009, an online ‘SmartForm’ was introduced, which could be downloaded from the AEC website, although it still had to be signed and lodged manually. Next, in July 2010, a process was introduced whereby a person already on the roll could update their details online, without having to lodge a hardcopy form. At last, in 2012, the *Electoral Act* was amended to permit the AEC to update electors’ details on the roll and to add new electors to the roll without receiving an enrolment form from the elector at all. This represented a fundamental shift from the system that had applied for about a century and that had placed the onus on voters to get on the roll and update their details when they moved address. In 2019, approximately two-thirds of all electoral enrolment was done by the AEC (see Chapter 12, this volume).

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1 It should be noted that an enrolment of 96 per cent of eligible voters was already claimed in 1903—the highest enrolment of a national population anywhere for democratic purposes—but it was admitted at the subsequent conference of Commonwealth electoral officers that there had been some overenrolment in two States (Sawer 2003: 53).

While the Liberal and National parties opposed the 2012 reforms in the parliament, the relevant provisions of the *Electoral Act* have been left untouched since the return of the Coalition to power in 2013, and it seems unlikely that attempts will be made to wind them back. Indeed, the Joint Standing Committee on Electoral Matters (JSCEM) has recommended, among other things, that the *Electoral Act* be amended ‘to allow for online enrolment in all enrolment circumstances, provided that an appropriate digital identity verification process is in place’ (JSCEM 2018b: 41).

Apart from improvements through the provision of online and automatic enrolment, there was a surge in youth enrolment before the 2017 same-sex marriage postal survey. While there was speculation that having a more complete roll would result in lower turnout (the percentage of people on the roll who actually vote), in fact the 2019 (House) turnout of 91.9 per cent was greater than the 91 per cent achieved in 2016.

## Political party registration

There was widespread concern over the success at the 2013 Senate election of ‘micro-parties’ with little community support, such as the Australian Motoring Enthusiasts Party, which won a Senate seat in Victoria despite gaining only 0.5 per cent of the first-preference votes. The majority of the votes that elected these micro-party candidates came from supporters of other parties and were collected through a ‘preference harvesting’ strategy first attempted at the 1999 NSW Legislative Council election.

While the 2016 reforms to the Senate voting system (which abolished the group voting ticket system) put a stop to preference harvesting, the number of registered political parties did not drop between 2016 and 2019. New parties registered since the 2016 election include Love Australia or Leave (with a registered logo of a map of Australia stamped ‘Full’) and the Involuntary Medication Objectors (Vaccination/Fluoride) Party. The application fee for party registration has remained at \$500, and the number of members required in support of an application has remained at 500. The provision made in the *Electoral Act* for an existing federal parliamentarian to be able to apply to register a party without meeting a requirement for a minimum number of party members has, however, looked increasingly anomalous.

When party registration was introduced in 1984, there was an assumption that any MPs or senators making an application for party registration would previously have been elected in their own right. The rate at which senators have recently been leaving the parties through which they were elected was not envisaged. Senator Fraser Anning provides a striking example: he was elected on the ticket of Pauline Hanson's One Nation (PHON) following the disqualification of Senator Malcolm Roberts in 2017 but decided to enter the Senate as an Independent. He then joined Katter's Australian Party (KAP) for a few months in 2018 but was expelled after making a widely criticised speech in the Senate in which he referred to the 'final solution to the immigration problem'. Because he was a senator, he was able to register Fraser Anning's Conservative National Party without any membership requirement and ran unsuccessfully for it in 2019. The JSCEM recommended in its report on the 2016 election that this anomaly be done away with, but it was still in existence in 2019.

## Candidates and nominations

Typically, it is only at election time that details of electoral regulation are of much interest to the media and the public. However, the departure from the parliament of seven MPs and eight senators in 2017–18 as a result of breaches of Section 44 of the constitution, whether because they were found to be dual citizens or for other reasons, figured prominently in the news.

The various rulings of the High Court on the interpretation of Section 44 have served to clarify the law to some extent, but there are points that remain unclear. In particular, the mechanism applied in the case of a disqualified senator, under which the ballots are recounted as though the departed senator had never been on the ballot, means it is possible for another senator whose qualification is undisputed to fail to be elected in the recount (Bonham 2017). It is unclear at this point whether the High Court would declare such 'unelection' to be legally possible or whether it would instead treat such a senator's position as being beyond dispute.

While more senators than MPs lost their seats, the political impact of Section 44 was felt primarily in the House of Representatives, as previous High Court rulings meant the House vacancies had to be filled through by-elections—with seven ultimately held in an eight-month period—rather than a recount process. Of particular significance was the 'Super Saturday'

of voting on 28 July 2018. This saw the government poll poorly in the Queensland seat of Longman, which was a catalyst for the removal of Malcolm Turnbull as prime minister, and a further by-election following his resignation from parliament, at which his seat of Wentworth was lost to an Independent (see Chapter 2, this volume).

The travails arising from Section 44 generated much debate and an inquiry and report by the JSCEM (2018a). One outcome was an amendment to the *Electoral Act*, requiring candidates to provide ‘qualification checklists’ to the AEC, covering in much more detail than previously anything that could impact on their qualification under Section 44. The checklists must be published, but the AEC has no power to reject a nomination on the strength of shortcomings in the checklist or associated documents, as long as all ‘mandatory questions’ in the checklist have been answered. On 24 April 2019, the AEC (2019b) did, however, announce in relation to a WA Senate candidate, Rodney Culleton, that given his previous disqualification by the High Court, it was referring his nomination form to the Australian Federal Police to examine whether a false statement had been made concerning his status as an undischarged bankrupt.

The mechanisms by which a challenge to a candidate’s qualification may be put before the High Court have also been clarified in a 2018 case (*Alley v Gillespie*). The only processes for obtaining a High Court ruling now are a petition to the Court of Disputed Returns following an election or a referral from the relevant House of the parliament. In the final week of sittings of the 45th Parliament, each House adopted a bipartisan resolution setting out procedures to be followed before making such a referral. The effect of those would be to limit the court’s involvement to cases referred on the basis of fresh information not disclosed in the relevant qualification checklist.

In the aftermath of the election, there was speculation on social media about whether the disqualification of a *defeated* candidate could be the basis for challenging an election in the Court of Disputed Returns. That scenario has been examined in detail by Graeme Orr (2015) and is highly unlikely.

Finally, it is noteworthy that 1,056 candidates stood for the House of Representatives in 2019—an increase from the 994 who stood in 2016. They were not deterred by the increase shortly before the election in the deposit required of candidates, raising it from \$1,000 to \$2,000 and bringing it into line with that payable by Senate candidates.

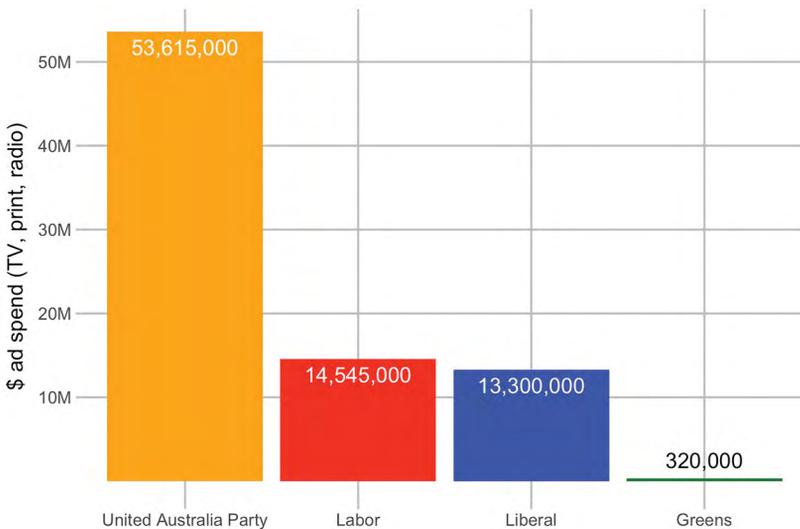
## Disendorsements

The 2019 election was also notable for the number of cases in which a candidate whose endorsement by a party had been announced was subsequently 'disendorsed'. According to a running tally compiled by Kevin Bonham (2019), 33 intending candidates were disendorsed, resigned or withdrew from the election after it was announced, with 10 of those cases arising only after the close of nominations. A substantial number of the cases that arose before the close of nominations were the result of difficulties the candidates faced in confirming that they were not disqualified under Section 44. The cases arising after the close, on the other hand, flowed mainly from the discovery of sexist, anti-Muslim or homophobic statements they had made on social media. Bonham has argued plausibly that the onerous nature of Section 44 checking may have left party organisations with less time and fewer resources to check candidates' social media history thoroughly enough. High-profile casualties included (before the close of nominations) a former ALP MP for Fremantle and Commonwealth minister Melissa Parke; and (after the close) the Queensland leader of PHON and former State MP and minister, Steve Dickson.

The full implications of the disendorsement of a candidate after the close of nominations are not, however, clear. The *Electoral Act* makes no provision for such a step; a statement of disendorsement at that stage is essentially a political rather than a legal act. A candidate so 'disendorsed' remains on the ballot paper and is still shown as the candidate of the disendorsing party. In addition, votes for the candidate are still treated as votes for the party in the vote totals published by the AEC. A question the disendorsing parties generally left up in the air was how their disendorsed candidates would be treated post election should they win. As it happened, only one of the disendorsed candidates—the erstwhile Liberal candidate in Lyons—was running in a seat that the disendorsing party had any real chance of winning, and she did not in fact win.

## Campaigning and electoral funding

The election was marked by an unusual level of controversy surrounding campaign activities and spending, electoral advertising and its authorisation and the level of regulation of such activities. Public funding for parties and candidates who received more than 4 per cent of the vote was introduced at the federal level in 1984 but failed in the objective of reducing party reliance on private funding. Under legislation enacted in 2018, the amount of public funding is currently \$2.801 per vote or the amount of electoral expenditure, whichever is lower. The role of private money in Australian elections was highlighted by the ubiquitous campaign presence of billionaire Clive Palmer, founder and leader of the United Australia Party (UAP). With expenditure that dwarfed that of the major parties, he was able to flood the print media, airwaves, social media and billboards with his advertising. As Nielsen data show, between 1 September 2018 and 18 May 2019, Palmer spent \$53.6 million on television, radio and newspaper advertising alone, while the Liberal Party spent \$14.5 million and Labor \$13.3 million (Figure 3.1).



**Figure 3.1 Political party advertising spending, 1 September 2018 – 18 May 2019**

Source: Nielsen Ad Intel Portfolio, TV, print and radio ad spend, 1 September 2018 – 18 May 2019. Courtesy Nielsen.

In the final two weeks of the campaign, this was mostly negative advertising directed against Labor, using slogans such as 'Labor will hit us with an extra trillion dollars of taxes & costs. Tell Shifty he's dreaming.' Although Palmer's party polled only 3.4 per cent of the vote in the House of Representatives, with many candidates losing their deposits, he claimed success in defeating the ALP through the effect of his advertising and preference flows.

As noted above, since 1980, Australia has had no limits on campaign expenditure at the federal level, unlike most countries in the Organisation for Economic Co-operation and Development (OECD). Neither does it have limits on political donations at the federal level. Declared donations of more than \$40 million were made for the 2016 federal election, quite apart from donations below the (high) disclosure threshold (Wood and Griffiths 2018: 10, 34). A dampener was put on campaign finance reform by the 1992 High Court decision in the case of *Australian Capital Television Pty Ltd v Commonwealth* that the Hawke Government's attempt to ban paid political advertising in the electronic media contravened an implied freedom of political communication.

Subsequent cases have, however, confirmed that the High Court will not necessarily strike down reasonable (proportionate) regulation of political finance. In 2015 in *McCloy v New South Wales*, the court upheld a cap on political donations and a ban on political donations by property developers, finding that the restrictions on freedom of political communication were defensible in the light of the benefits of ensuring the integrity of the political system and 'equality of opportunity to participate in the exercise of political sovereignty'.

The constitutionality of regulating political donations was reaffirmed in April 2019 by the High Court in the case of *Spence v Queensland*. The Commonwealth Parliament had passed amendments to the *Electoral Act* to enable Commonwealth law to override the tighter regulation of political donations at the State or Territory level. This provision (Section 302CA) was overturned by the High Court and Queensland's ban on developer donations was upheld, despite an attempt by the plaintiff, former Queensland Liberal National Party president Gary Spence, to argue it burdened the freedom of political communication.

The lack of any restrictions on the amount of political expenditure or political donations at the federal level, despite the High Court's recent rulings, has given rise to perceptions among voters that government is

run primarily for the benefit of ‘a few big interests’. In 2019, as in 2016, 56 per cent of respondents to the Australian Election Study believed this (Cameron and McAllister 2019: 16). Indicative of how far Australia has fallen behind in regulating the role of private money in elections, the Perceptions of Electoral Integrity survey now places Australia 26th out of 33 OECD countries on the campaign finance dimension (Cameron and Wynter 2018: 172). Highly regulated industries are the largest donors, and spikes in donations occur when policy changes are proposed affecting industries such as gambling or mining (Wood and Griffiths 2018: 42–43). The 2018 Democracy 2025 survey, conducted well before Palmer’s cash splash, found that, of possible reforms to rebuild trust, by far the strongest support was for limits on political donations and campaign expenditure (Stoker et al. 2018: 44).

Another change enacted at the end of 2018 (apart from the reintroduction of campaign expenditure as the basis for public funding) was the banning of ‘foreign’ donations of more than \$100 made for the purpose of funding electoral expenditure. The registration of foreign lobbyists was also required. Otherwise, there was a continuing lack of transparency about the sources of many donations, due to the high threshold for disclosure and other loopholes, such as allowing the splitting of donations between different divisions of a party. Forty per cent of the money received by political parties at the 2016 election had no identifiable source (Wood and Griffiths 2018: 31). Timeliness also continued to be a problem, with disclosures only published in the February following the financial year in which they were made (that is, up to 18 months after the donation was made) rather than the ‘real-time’ disclosure being adopted in other jurisdictions such as Queensland.

## **The use of public resources for campaigning**

The laissez-faire approach adopted at the federal level to the use of private money in elections also extends to the use of government and parliamentary resources for campaigning purposes. This is contrary to international standards that specify that party regulation should prevent incumbent parties or candidates from using state resources to obtain an unfair advantage (OSCE 2011). In Australia, incumbent governments regularly benefit from the use of government advertising for partisan purposes and spikes

in such advertising occur in the run-up to elections. While guidelines in place since 2008 require campaigns to be objective and not directed at promoting party-political interests, this has done little to stop the use of emotive language and images to foster a positive impression of the incumbent government. In 2019, the government engaged in saturation advertising of its infrastructure programs and tax reforms in the period before the issue of the writs. For example: 'The Australian Government is building a better tax system, so hard-working Australians can keep more of their money' (Australian Government Campaign: [bettertax.gov.au/campaign.html](http://bettertax.gov.au/campaign.html)). There are also important benefits from the pork-barrelling associated with discretionary grants programs. It was estimated that, in the marginal Victorian seat of Corangamite, 41 promises were made on behalf of the Liberal candidate, adding up to \$26,500 per voter (Wright and Irvine 2019; see also Chapter 11, this volume).

One use of parliamentary resources for political campaigning that was extraordinary even by relatively loose Australian standards was the setting up of a parliamentary inquiry into the opposition's tax reform policy. This was the House of Representatives Economics Committee inquiry into the implications of removing refundable tax credits, begun in September 2018. The chair set up a website in the committee's name, [stoptheretirementtax.com](http://stoptheretirementtax.com), and used Twitter to direct people 'worried about Labor's retirement tax' to register on the website to attend hearings and make statements. Initially, those wishing to register were required to sign a petition opposing the Labor policy. The well-attended townhall-style meetings held around Australia at public expense proved highly successful in reframing Labor's proposed reform as a 'retirement' or 'retiree' tax. The committee's chair, Tim Wilson, justified his use of parliamentary resources by saying that the 'parliamentary purpose' was to 'campaign against a piece of policy' (Evershed and Knaus 2019).

Apart from this somewhat exceptional use of a parliamentary committee, all incumbent parliamentarians also benefit from resources such as electorate staff and parliamentary allowances. Many also benefit from 'personal employees'—staff employed under the *Members of Parliament (Staff) Act 1984 (MOP(S) Act)*. These 'personal employees' are normally employed by ministers, office holders, shadow ministers and former leaders, except in the case of crossbenchers. They are in addition to the four electorate staff to which each MP or senator is entitled. In February 2019, the government had 452 personal employees compared with 95 for the ALP Opposition and 17 for the Greens. In addition, three personal employees

were provided for each of the crossbenchers in the Senate and the House of Representatives (increased to four after the 2019 election)—an indication of their significance in the balance of power. The Department of Finance website advises that employees under the *MOP(S) Act* are employed to assist with parliamentary duties, not for party-political purposes, and ‘accordingly’ may ‘undertake activities in support of their employing senator or MP’s re-election but not in support of the election or re-election of others’. These parliamentary resources are unequally distributed both between incumbent parties and, more especially, between candidates of such parties and candidates of other parties and Independents who do not have access to parliamentary resources.

Supposedly, such staff and allowances are provided for parliamentary and electorate purposes, with any other effects, such as promoting the re-election of the parliamentarian, only incidental. However, the use of allowances for electoral campaigning purposes has been normalised and has long been recognised as unfairly advantaging incumbents. In 2010, an independent review of parliamentary entitlements, appointed by the Rudd Government, recommended that access to printing and communications entitlements be removed from the date of the announcement of a federal election, along with travelling allowance for parliamentary staff working at party campaign headquarters. The review committee noted the latter created the ‘not unreasonable perception that staff were engaged in party political business at public expense’ (Belcher et al. 2010: 74–76).

No progress was made in implementing these particular recommendations. Indeed, the *Parliamentary Business Resources Act 2017* (*PBR Act*) and associated determinations made it clear that travel to assist parliamentarians in their re-election, including travel to work at party campaign headquarters, could be considered official business. Moreover, such travel-related resources for the hundreds of *MOP(S) Act* staff and electorate staff could be accessed until the day before polling day, unlike the previous convention that such travel be paid for by political parties in the period after their election campaign launches. Under the *PBR Act*, it was made clear that electioneering activities could be regarded as official business and hence undertaken at Commonwealth expense (IPEA 2019). The 2018 *Guidance on Caretaker Conventions* provided by the Department of the Prime Minister and Cabinet did, however, continue to refer to the ‘long-standing convention that Ministers do not claim travelling allowance from the day of the Prime Minister’s campaign launch to the day after polling day’ (PM&C 2018: 7.2.5).

Under the *PBR Act*, the parliamentary allowances of federal parliamentarians (now called office expenses) could be spent on not just printed or other forms of communication, but also advertising on social media. However, an attempt in February 2019 by the government to remove a restriction on the use of office expenses for radio and television content was disallowed by the Senate in April. Australia remains out of step with comparable democracies such as Canada, New Zealand and the United Kingdom in allowing both the use of parliamentary allowances for electioneering and access to the services of the Parliamentary Library after parliament is dissolved. As already noted, this is contrary to the principle that incumbent parties or candidates should be prevented from using state resources to obtain unfair electoral advantage (Sawer and Gauja 2016: 11).

## **Authorisation of advertisements and deceptive advertising**

A new requirement in the *Electoral Act* (since 2017) is for authorisation of advertising on social media. It is not yet clear how effective this will be, not least because, for all their expanded scope, the new provisions only cover certain forms of social media communication and do not apply to unpaid viral messages shared by people who are not 'disclosure entities' as defined in the Act. In addition, the 48-hour ban on advertising in broadcast media before election day does not apply to social media. There was a huge amount of negative advertising on social media on the Thursday and Friday before the 2019 election, including the ubiquitous 'death tax' advertising, with video clips of ALP frontbenchers saying the words 'death tax' when trying to deny the rumour of such a tax.

Although the AEC has entered into a cooperative arrangement with Facebook, there were almost 500 complaints about election advertising during the campaign, including 87 cases of advertising found by the AEC to have failed to meet the authorisation requirement (Knaus and Karp 2019).

At the federal level, the main requirement is that campaign advertisements be authorised and there is no requirement for 'truth in advertising'. The only prohibition of misleading advertising in the *Electoral Act* is restricted to the process of casting a vote. The prevalence of misleading and deceptive advertising during the campaign—particularly the torrent

of claims on social media that the ALP intended to introduce a ‘death tax’—led to renewed calls for broader regulation (Knaus and Evershed 2019; Murphy et al. 2019; Steketee 2019). When Essential Research undertook focus groups in June, it found that ‘at least three members in each group thought the death tax was a real thing’ (Lewis 2019). Two weeks before the election, there were also reports of unauthorised ‘news’ circulating in chat rooms on the Chinese-language platform WeChat to the effect that under an ALP government there would be an enormous increase in the number of refugees entering Australia, at the expense of taxpayers (see Chapter 14, this volume).

It needs to be emphasised that election campaigning based on the dissemination of deliberate falsehoods represents a fundamental challenge to the democratic process. Responding effectively to that challenge is, however, by no means straightforward (Maley 2019). Truth in advertising provisions have an interesting history in Australia. Prior to the second conscription referendum in 1917, the Hughes Government prohibited under the *War Precautions Act* the publication of ‘any false statement of fact of a kind likely to affect the judgment of electors in relation to their votes’. In early 1984, the Hawke Government enacted a provision based on the 1917 regulation, which, however, was quickly repealed after the Joint Select Committee on Electoral Reform (1984) highlighted the difficulties involved in enforcing it. These included not only the danger of suppressing public debate, as in 1917, but also difficulty in classifying statements about the future as either true or false and the risk of turning campaigns into a lawyers’ picnic. Until now, Australia’s main experience with such provisions has arisen from the rules applying in South Australia (Renwick and Palese 2019: 22–30) and the Northern Territory.

An example of advertising that fell within the currently prohibited category was the Liberal Party signage at polling places in the Victorian electorates of Chisholm and Kooyong. The Chinese-language signs mimicked an AEC notice, using the same shade of purple, and told voters the ‘correct’ way to vote was to ‘vote 1 Liberal Party’ (see Plate 3.1). Faced with complaints on election day, the AEC noted that the authorisation requirements of the *Electoral Act* had not been breached (there was authorisation in tiny letters at the bottom of the signs) and that it did not have a monopoly on the use of particular colours. The publication of electoral matter in languages other than English, particularly on polling day, constitutes a significant challenge for electoral regulators. On 31 July 2019, the matter was taken to the Court of Disputed Returns. The results

in Kooyong and Chisholm were challenged on the ground that the posters were in breach of the *Electoral Act* prohibition of misleading and deceptive conduct, with the mimicry of an AEC notice indicating an intention so to deceive. The court ultimately held the display of the posters to have been in breach of the law. However, to force a fresh election in such situations it must also be shown that the election outcomes were likely to have been affected (Orr 2019), and the court was not satisfied of that. A longer-term solution may be to amend Subsection 339(2) of the *Electoral Act* to prohibit use of material that could reasonably be taken to be an official AEC notice.

It is clear that the rise of social media has fundamentally changed the environment in which elections are conducted when compared with 1917 or even 1984, to the point where it would be virtually impossible for the truth of published statements to be comprehensively policed or even monitored. Short of closing internet access during election campaigns, it is hard to see progress being made on this issue.



**Plate 3.1 Chisholm polling place sign mimicking an AEC notice**

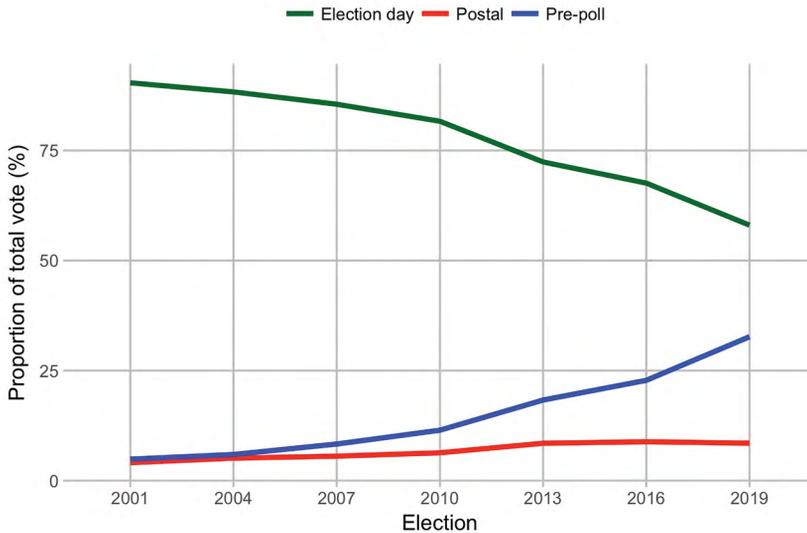
Photo: Courtesy of the Victorian Trades Hall Council.

## Campaigning at polling places

The presence outside polling places of third-party campaigners, especially from the union movement and from organisations such as GetUp!, has long been a matter of concern to some Coalition figures. During the 44th Parliament (2013–16), the JSCEM commenced an inquiry into campaigning at polling places, but it lapsed on the dissolution of the parliament and was not resumed. After the 2019 election, it was reported (Norington 2019) that the re-elected Coalition Government was considering ‘introducing rules to restrict spruikers outside polling booths to volunteers who are attached to registered parties and independent candidates’. Any such restriction would inevitably be challenged in the High Court as imposing an impermissible burden on the implied constitutional freedom of political communication.

## Early voting, counting and results

In 2019, the incidence of early voting rose to unprecedented levels. The *Electoral Act* specifies seven modalities for voting before the day fixed for polling. Five of those (voting in the Antarctic, telephone voting by blind or vision-impaired electors and mobile polling in special hospitals, prisons and remote areas) are used by a relatively small and stable number of people. The remaining two—pre-poll and postal voting—reached record levels in 2019 (see Figure 3.2). The greatest boom came in the pre-poll numbers: 4,766,853 such votes were cast—31.6 per cent of votes cast in the election. Just over half of those pre-poll votes were cast in the five days immediately before polling day. Postal voting, however, also increased: 1,291,364 postal votes were received by the AEC, representing 8.6 per cent of those who voted.



**Figure 3.2 Proportion of House of Representatives votes by voting method**

Source: Constructed by Ben Raue from AEC data.

This growth represented a continuation, but also an accentuation, of a trend developing over a long period. It had its roots in two significant changes to the *Electoral Act* in 1984. The first made it possible for an elector attending an AEC office to make an ‘oral application for a postal vote’ that could then be recorded on the spot. As this process became more popular, it was renamed ‘pre-poll voting’. The second change relieved those seeking a postal vote of the obligation to state the specific ground on which they were applying. For all practical purposes, this meant that, from then on, anyone who wished to cast a postal vote rather than an ordinary vote for reasons of personal convenience could do so, not least because a number of the prescribed qualifications were purely within the knowledge of the voter, such as the voter’s travel plans for election day, and could not be objectively tested. These changes were viewed at the time as ones of minor, primarily administrative, significance; where they would ultimately lead was certainly not foreseen.

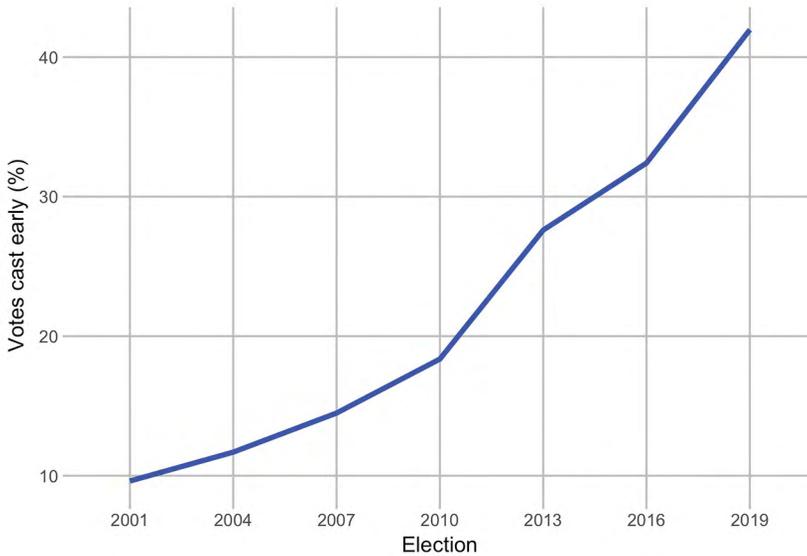
By 2007, however, the rising popularity of early voting could not be denied. In the aftermath of that year's election, the AEC (2008: 41) argued to the JSCEM that:

With close to 2 million votes being cast before polling day in 2007 (either at early voting centres, or through the post), it is now misleading to conceive of an election as taking place on a single polling day: there is, in fact, a polling period.

The AEC further put it to the committee that, in the face of the trend, there were basically three options open to the parliament: do nothing, attempt to wind back early voting or embrace the trend and be prepared to modify and resource the process to enhance its efficiency. The JSCEM (2009: 190–91) supported the third option, leading directly to another major change: pre-poll votes cast within a voter's own electoral division—which until then had had to be recorded and counted as declaration votes—could instead be cast as ordinary votes, making the pre-poll voting experience for such voters essentially identical to that of voting on polling day.

The point reached in 2019—with just over 40 per cent of votes recorded before polling day (see Figure 3.3)—has certainly generated concerns. One is the effect on the deliberative quality of election campaigning when large numbers of votes are cast before parties have released all their policies or even had their campaign launches (Mills and Drum 2019). Another is the concern about a level playing field, that a three-week period for pre-poll voting disadvantages Independent candidates and minor parties who may not have the resources to hand out how-to-vote cards at pre-polling centres for such a prolonged period.

In its report on the 2016 election, the JSCEM (2018b: 88) recommended that the *Electoral Act* be amended to restrict pre-poll voting to no more than two weeks before election day. Although there was no response in time for the 2019 election, the committee will certainly revisit the issue. But limiting the period for pre-poll voting is unlikely to make much difference to its growing popularity; in 2019, 86 per cent of pre-poll votes were cast in the fortnight before polling day anyway. In addition, the option voters now have of applying for a postal vote via the AEC website has made postal voting so easily accessible that restrictions on pre-poll voting could well have the effect of increasing postal voting, rather than encouraging a return to ordinary voting.



**Figure 3.3 Rise in proportion of House of Representatives votes cast before election day**

Source: Constructed by Ben Raue from AEC data.

The rise of early voting has created various difficulties for the AEC. With fewer people voting on polling day, it has come under pressure, including from the Australian National Audit Office (Brent 2014), to cut back on resourcing of polling booths; but if that were done too vigorously, it could lead to queueing and delays on polling day, which could tip the balance further in favour of more convenient early voting. At the same time, the AEC remains under pressure to deliver a result on the Saturday night of an election if possible; that now requires each electoral division to organise a discrete count of tens of thousands of pre-poll ordinary votes, staffed by a cohort of casuals separate from those who have worked at the polling booths during the day.

The 2019 count was also the subject of a High Court case (*Palmer & Ors v Australian Electoral Commission & Ors*) seeking to restrain the AEC from publishing the results of 'two-candidate-preferred' counts on election night until after 9.30 pm Australian Eastern Standard Time. This was the moment when the polls would close in the Territories of Christmas Island and Cocos (Keeling) Islands, three and a half hours after they closed on the eastern seaboard. Palmer argued that electors might be influenced by hearing these counts before voting but the court was unanimous in its view

that the application should be dismissed. This is in line with the ongoing reluctance of the court to interfere with the very considerable latitude given by the constitution to parliament to devise electoral processes.

## Trends in the rules of the game

The experience of the 2019 election highlights a number of regulatory issues arising from the rapidly changing electoral environment. Australia has now shifted from having a polling day to having a polling period. This change may turn out to be irreversible; it will be difficult to place restrictions on convenience voting when it has proved so popular. In addition, it is notable that, while the rise in early voting may encourage parties to release more policies in the early part of the campaign period, parties still tend to have their formal campaign ‘launches’ ridiculously close to polling day.

Another issue relates to timing. As noted earlier, the inquiry by the JSCEM into campaigning at polling places lapsed on the dissolution of the 44th Parliament, while the committee’s report on the 2016 election took so long to produce that action to implement its recommendations proved impossible prior to the 2019 election. The comparative shortness of the federal parliamentary term is clearly a constraint, but the relatively leisurely approach to the conduct of inquiries and production of final reports taken by the committee in recent times does not bode well for its future as a vehicle of reform.

On the other hand, it is notable that some matters long the subject of partisan contestation seem to be slowly fading from the scene. For example, the issue of proof of identity for enrolment has essentially been resolved by technological change. In addition, a number of players with a US Republican Party–inspired reform agenda focused on the supposed dangers of electoral fraud have now left the political arena.

One major continuing issue is the failure to introduce political finance reform at the federal level and the way this undermines the efforts of States and Territories to reduce the influence of private money in elections. While the Greens and many nongovernmental organisations have long been campaigning for reform, and the ALP is now committed to caps on expenditure as well as much greater transparency around donations, there is little confidence that progress will be made under the federal Coalition, which has consistently opposed reforms in this area.

Finally, it is clear that the growth of social media, and the ways in which it rapidly evolves, gives rise to great difficulties both for the structuring and for the administration of appropriate schemes of regulation. At present, there seem to be no obvious solutions to these difficulties.

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