HOT TOPICS
LEGAL ISSUES IN PLAIN LANGUAGE

STATE LIBRARY®
NEW SOUTH WALES

# Voting and elections





This is the eighty-fourth issue in the series *Hot Topics: legal issues in plain language*, published by the Legal Information Access Centre (LIAC). *Hot Topics* aims to give an accessible introduction to an area of law that is the subject of change or debate.

AUTHOR NOTE

This issue of *Hot Topics* has been written by Associate Professor Rodney Smith and Dr Anika Gauja, Senior Research Fellow, Department of Government and International Relations, University of Sydney.

**Cover image:** A voter places their absentee vote in the ballot box at a polling booth at St Josephs School in Maroubra, Sydney, during the New South Wales State Election, 24 March 2007. Lee Besford, Sun Herald (Sydney).

EDITOR: Cathy Hammer

DESIGN: Bodoni Studio



HOT TOPICS ISSN 1322-4301, NO. 84

**Photos:** Fairfax Syndication – cover image, pages 4, 6, 15; Age Fotostock – page 8; Flickr – page 11; AAP – page 14.

# Overview

**Elections are common decision-making procedures. Sometimes these decisions have limited consequences, such as the election of a school fundraising committee. Sometimes they have effects felt across the world, such as when a Pope or US President is elected.**

## Hot Tip

**Elections for the House of Representatives and the Senate are usually referred to as 'federal elections'.**

Where elections have limited consequences, the rules applied to them are often minimal and the procedures informal. A school fundraising committee member might be elected on a simple show of hands at a meeting where whoever turns up gets to vote. Where elections have larger consequences, the rules that develop around them tend to become more complicated and procedures much more formal. Only certain types of people are allowed to run for office and to vote. The votes are counted according to specific rules that determine who wins the election.

There are many ways to run an election. Governments in Australia and elsewhere have experimented with these many ways of running elections, with the result that electoral laws are complex. This is particularly true in countries like Australia with federal systems of government; that is, systems that constitutionally divide government between national and state or regional bodies. Over a three or four year cycle, Australians will vote for representatives in legislative bodies at national, state and local levels. Each of these elections will be based on different laws. When Australians move from one state or territory to another, they will find that the electoral laws governing them will differ from those in the state or territory they have left.

It is easy to become confused about Australian laws about voting and elections. This Hot Topics issue explains some of the most important features of Australian electoral laws. It deals in greatest detail with laws at the Commonwealth or national level; however, it also points to some of the differences in election law between the different states and territories and with local government elections.

### QUICK FACTS

- **Who can vote?** ... the right to vote has changed over time, but is now based on adult Australian citizenship – see page 5
- **Federal elections – how often are elections held and how many seats are there?** ... there are 150 House of Representatives seats, elected every 3 years; there are 76 Senators but only half the state Senators usually face election at a time and their term is 6 years – see pages 3-4
- **What are by-elections and casual senate vacancies?** ... if a Member of the House of Representatives or the Senate has to be replaced, these are the different methods used for their replacement – see page 2
- **Is voting compulsory in all elections?** ... voting is compulsory in all state and federal elections and not all states make local government elections compulsory but they are in NSW – see page 7
- **Are you enrolled automatically when you turn 18?** ... new 'automatic enrolment' laws will allow government agencies to share information to automatically enroll eligible people after July 2013 – see page 10
- **What are the requirements for registering a party?** ... for Commonwealth elections, a party must have a written constitution, have 500 members or at least 1 member of parliament and needs to pay $500; states have different requirements – see pages 14-15
- **How votes are counted?** ... preferential voting is used to elect one representative, but where more than one representative is to be elected from each electorate, e.g. in Senate elections, proportional representation is used; the counting is quite complicated, involving a quota system – for details see pages 22-23

# Elections in Australia

**The most important elections in which most Australians will participate are those for representatives in national, state or territory and local legislative bodies. The major kinds of Australian elections are as follows:**

## HOUSE OF REPRESENTATIVES ELECTIONS

Elections for the House of Representatives (the lower house of the Commonwealth Parliament) decide which elected representatives will form the national government. Usually either the Labor Party or the Liberal and National Coalition wins a majority of the 150 House of Representatives seats and forms a government. The 2010 election was unusual in that Labor and the Coalition each won 72 seats. Labor gained the support of enough of the minor party and Independent Members of the House of Representatives to form a minority government.

The Australian Constitution requires that House of Representatives elections be held at least every three years. They may be held sooner if the Governor General 'dissolves' the House of Representatives (usually at the request of the Prime Minister). In such elections, each member of the House is elected from a different geographical region called an 'electorate'.

## Hot Tip: Coalition

**The Coalition is an agreement between the Liberal Party and the National Party that means that they share government ministries and often develop policies together. This arrangement has been in place for most of the period since 1923.**

## SENATE ELECTIONS

Elections for the Senate decide who sits in the upper house in the Commonwealth Parliament. Since bills must pass through both houses of Parliament to become law, elections for the Senate are almost as important as those for the House of Representatives. As with the United States Senate, the senators represent states or territories. Each state has 12 senators and each territory two senators, making 76 senators in total. The Constitution provides for the rotation of senators, so that not all face election at once. Only six of the 12 senators for each state are elected at a normal 'half-Senate' election. They are elected for six-year terms. The four territory senators are elected every three years.

At the next federal election, 40 of the 76 Senate positions will be filled. Half Senate elections do not have to coincide with House of Representatives elections, although they usually do. The last half-Senate election that did not coincide with a House election was held in 1970.

## DOUBLE DISSOLUTION ELECTIONS

The exception to the constitutional provision that half the Senate be elected at one time is a 'double dissolution' election, so-called because the Governor General dissolves both houses of Parliament at once. In this case, all senators and Members of the House of Representatives must retire or recontest their positions. The Constitution provides for double dissolution elections to resolve deadlocks between the House of Representatives and the Senate; that is, lengthy disagreements between the two houses about whether a bill should become law. Only six federal elections since 1901 have been double dissolution elections.

## HOUSE OF REPRESENTATIVES BY-ELECTIONS

When a Member of the House of Representatives resigns, dies or is no longer eligible to sit in Parliament, his or her seat can be filled through a by-election. Only voters in the former Member's electorate vote for a replacement Member. A by-election is often contested by a larger number of candidates than would normally contest the electorate at a federal election. By-elections are generally seen as a test of a government's popularity; however, they rarely have an impact on who governs. Most governments can afford to lose the few by-elections that occur between federal elections without this affecting their majorities in the House of Representatives. This has obviously not been the case during the current period of minority Labor government, when the party numbers in the House of Representatives have been finely balanced. Perhaps because of this fine balance, there have been no by-elections since the last federal election in August 2010, compared with five by-elections between the 2007 and 2010 federal elections.

## CASUAL SENATE VACANCIES

When a senator resigns or dies, he or she is replaced without a by-election. The parliament of the state represented by the former senator appoints another person in his or her place, thus filling the 'casual vacancy'. After controversial Senate appointments in the 1970s, the Constitution was amended in 1977 to ensure that senators chosen to fill casual vacancies were from the same party as those they replaced.

## STATE AND TERRITORY ELECTIONS

Elections for state and territory parliaments are diverse (see below). Lower houses and single house parliaments are elected every three or four years. Half the states and both territories now have a fixed term between elections, with the election date specified by legislation. In the other states, the Premier has some control over when elections are held. In each jurisdiction, all lower house representatives are elected simultaneously. Upper house (Legislative Council) representatives are elected on a rotating basis, except in Victoria and Western Australia. Except in Tasmania and the Australian Capital Territory, lower house members are the sole representatives of their electorates. Except in Tasmania, upper house members share the representation of their electorates with at least one other member. In New South Wales and South Australia, the upper house electorate is the whole state.

## LOCAL GOVERNMENT ELECTIONS

Australia has around 560 local governments, called councils or shires. These use a range of electoral systems, which vary even within a particular state or territory. One of the most distinctive features of some council elections is that as well as voting for council representatives, electors vote directly for a mayor to lead the council. This is different from Commonwealth, state and territory elections, in which the Prime Minister, Premier or Chief Minister is not chosen directly by the people.

**FEDERAL, STATE AND TERRITORY ELECTIONS**

| Jurisdiction | House | Maximum time between elections | Number of members | Number of electorates |
|---|---|---|---|---|
| **Federal** | House of Representatives | 3 years | 150 | 150 |
| | Senate | 40 Senators usually elected every 3 years, most for 6 year terms. | 76 | 8 |
| **New South Wales** | Legislative Assembly | 4 years (fixed term) | 93 | 93 |
| | Legislative Council | Half (21) elected every 4 years for 8-year terms. | 42 | 1 |
| **Victoria** | Legislative Assembly | 4 years (fixed term) | 88 | 88 |
| | Legislative Council | 4 years (fixed term) | 40 | 8 |
| **Tasmania** | Legislative Assembly | 4 years | 25 | 5 |
| | Legislative Council | 2 or 3 elected every year for 6-year terms. | 15 | 15 |
| **South Australia** | House of Assembly | 4 years (fixed term) | 47 | 47 |
| | Legislative Council | Half (11) elected every 4 years for 8-year terms. | 22 | 1 |
| **Western Australia** | Legislative Assembly | 4 years | 59 | 59 |
| | Legislative Council | 4 years (fixed terms) | 36 | 6 |
| **Northern Territory** | Legislative Assembly | 4 years (fixed terms) | 25 | 25 |
| **Australian Capital Territory** | Legislative Assembly | 4 years (fixed term) | 17 | 3 |
| **Queensland** | Legislative Assembly | 3 years | 89 | 89 |

# Who gets to vote?

**To vote in local, state, territory or federal elections in Australia, people must be registered on the relevant electoral roll. The different jurisdictions in Australia's federation – the states, territories and Commonwealth – can each grant the franchise to different types of people and can maintain their own electoral rolls.**

## Hot Tip: Franchise

**The 'franchise' means the right to vote.**

There is a high degree of consensus as to who should have the franchise in Australia. While there has been some recent debate around prisoners' voting rights and lowering the voting age, the states, territories and Commonwealth basically give the same types of people the right to vote. They use Commonwealth electoral rolls administered by the Australian Electoral Commission to determine who is eligible to vote. This was not always the case.

### THE COMMONWEALTH FRANCHISE

In federal elections, the vast majority of Australian citizens who are 18 years and over have the franchise. So do most British subjects who are not Australian citizens but who were on the electoral roll on 25 January 1984. The exceptions are those otherwise eligible who:

- are of unsound mind;
- are serving prison sentences of three years or more;
- have been convicted of treason and not pardoned;
- are not specially registered as 'itinerant voters' and have not have not lived at an address for one month; and
- are living overseas long term and with no intention of returning to Australia.

At the 2010 Federal Election 14,086,667 people were enrolled and 13, 131,667 voted – a turnout of 93%.

### STATES AND TERRITORIES

New South Wales, the Australian Capital Territory, Tasmania and the Northern Territory grant the franchise to the same people within their borders as the Commonwealth does for federal elections. Victoria, South Australia, Western Australia and Queensland differ from the Commonwealth by granting the franchise in state elections to a wider group of British subjects.

image unavailable

Cunningham divisional returning officer Ann Cass at the voting booths ahead of the Federal election on 30 September 2004. Cunningham is an electoral division on the coast of NSW from the southern outskirts of Sydney, including parts of the City of Wollongong.

Robert Peet.

## LOCAL GOVERNMENT COUNCILS

The franchise for residents in a local government council area is usually the same as for the state in which the council exists. In states like New South Wales, Victoria and Tasmania, the local government franchise also includes people who do not live in the council area but who own or rent property or have a business in the area. This franchise is based on paying rates to the council.

## HISTORY OF THE FRANCHISE

These variations and the current restrictions on the franchise in Australia are quite small in comparison with the past. The story of the franchise in Australia over the last 160 years has mostly been one of expansion. Property, gender and race-based restrictions on the right to vote have all been progressively eliminated and age restrictions slightly relaxed.

### *Colonial period*

The first parliamentary elections in the Australian colonies had a very restricted franchise. The elected members of the New South Wales Legislative Council established by the *Australian Constitutions Act (No. 1) 1842* (which was an Act of the British parliament) were voted in by men who owned freehold property worth £200 or more, or who paid annual household rent of at least £20.

The South Australian House of Assembly (the colony's lower house) was established in 1856 with a franchise of all male British subjects, 21 years and over, regardless of property. New South Wales, Victoria, and Queensland quickly followed suit for their lower houses, while Western Australia and Tasmania did so late in the nineteenth century.

The South Australian colony again acted first on female suffrage, granting women the vote on the same terms as men in 1894. By 1908, all the other colonies and states had followed suit.

### *Australian Constitution*

The right of any particular person to vote is not guaranteed in the Australian Constitution. While the Constitution provides that the parliament must be 'directly chosen by the people', it does not explicitly say who 'the people' are, nor provide details as to how they might make their choice. These are matters that are left to parliament to determine.

As a transitional document, section 41 of the Constitution did guarantee the right to vote in the first elections for the Commonwealth Parliament of those already enfranchised in the former Australian colonies. This provision meant that women from South Australia and Western Australia were eligible to vote in the first Commonwealth Parliament elections, as were male Aboriginal voters in New South Wales, Victoria and Tasmania, and all Aboriginal voters in South Australia.

### *Race, citizenship and the vote*

The Constitution also gave the Commonwealth Parliament power to make laws about who should be able to vote in future federal elections. While the new parliament's *Franchise Act 1902* excluded Aboriginal people and non-British people from the franchise. The White Australia Policy extended to the right to vote at Commonwealth level.

The government grudgingly allowed individual Aboriginal people and non-British people who were eligible to vote in 1901 under section 41 to remain on the Commonwealth electoral roll. The government took the restrictive view that no new voters could be added to the roll under the provisions of section 41. This position altered little for the next 50 years.

In 1949, the Commonwealth Parliament passed an act to affirm the right of Aboriginal people enfranchised in states to vote in federal elections. In 1962, the Commonwealth Parliament legislated a full Aboriginal franchise in federal elections. Western Australia enfranchised Aboriginal people in the same year, and Queensland followed in 1965.

The *Nationality and Citizenship Act 1948* opened up the possibility of a right to vote based on Australian citizenship. With the relaxation of the White Australia Policy, increasing numbers of immigrants from outside the British Empire were able to vote by acquiring Australian citizenship.

As part of a wide-ranging review of Commonwealth electoral procedures in 1983, the *Commonwealth Electoral Act 1918* was amended to make Australian citizenship the primary basis for the franchise from 26 January 1984. The legacy of past discrimination will not disappear until the last of the British subjects, currently enrolled, die or take up Australian citizenship. Nonetheless, the 1983 amendments provide for a future franchise based solely on adult Australian citizenship.

In recognition of an increasingly interconnected world and that fact that many Australian citizens choose to move and work overseas at some period of their lives, many have suggested that expatriates be given the same voting rights as resident Australians. Currently, an Australian living overseas can only maintain his or her franchise if he or she expresses an intention to return to Australia within six years of leaving. The argument behind extending this franchise indefinitely is that Australian citizens should have the right to vote in Australian elections as citizenship is a more important tie to a country than residency. A number of countries have adopted this arrangement. The United States allows its citizens to vote indefinitely once they have moved abroad and United Kingdom citizens maintain their franchise for parliamentary and local elections for up to 15 years.

### *Residency and the vote*

The inverse proposition is that residency is a more important consideration than citizenship in determining whether someone should have the right to vote. After all, those who pay taxes should have the right to representation. Currently, those who reside in Australia permanently (with the exception of some British subjects – see above) do not

have the right to vote – no matter how long they have lived in the country, whether they own property, pay taxes or have families. A more liberal franchise has existed in New Zealand since 1975, including all permanent residents provided that they had at least one year's continuous residence.

## *Age and the vote*

'Adult' mostly meant people aged 21 and over for the first 130 years of voting in Australia. Military service was the exception. In World War I, some states granted members of the armed services the vote. In World War II, the Commonwealth and some states did the same.

Military service may have had some impact on lowering the voting age from 21 to 18 years in the early 1970s. At the time, Australian men under 21 were being conscripted for military service in Vietnam. In 1966, the Commonwealth had lowered the voting age to 18 for members of the services in Vietnam and Malaysia. The stronger impulse for the general age lowering, however, was the recognition that by 18 people were mature enough to vote. The change was uncontroversial when first made by the Western Australian Parliament in 1970. All other states and the Commonwealth followed by 1973. Since 1983, 17-year-olds have been able to enrol; however, they cannot vote until they turn 18.

Nonetheless, the voting age remains a live issue. Youth groups and the Australian Greens support lowering the age to 16 or 17, to bring it into line with other government-regulated activities (such as work) and as a measure to increase youth participation and engagement in politics. Others remain sceptical. In 2013, a study conducted by Professor Ian McAllister of the Australian National University found that even if the voting age was lowered, participation would not necessarily increase as voting intention was lowest amongst those in the youngest age group (18-23).

## *Upper houses, property and the vote*

The Australian Constitution ensured that the right to vote for the Senate was granted to the same people as could vote for the House of Representatives. Some state upper houses were either appointed or kept a restricted franchise well into the last half of the twentieth century. The South Australian Legislative Council was elected on a property-based franchise until 1973. The New South Wales Legislative Council was appointed until 1978. Since the 1970s, all the houses of Australian parliaments have been elected on the basis of a full adult franchise.

## *Prisoners and the vote*

In 2007, the High Court in the case of *Roach v Electoral Commissioner*[1] struck down federal government legislation that prohibited all prisoners from voting regardless of the crime that they had committed or the length of their imprisonment. The Court held that although it was legitimate to exclude long-term prisoners on the basis that they had broken their contract with society, the disenfranchisement of short-term prisoners was arbitrary and not a proportionate measure of criminal culpability.

The issue of prisoner voting remains politically contentious and many changes have been made to both state and federal laws. Issues of rehabilitation and civil rights need to be balanced against responsibilities to society. After the decision in *Roach*, the minimum sentence at which prisoners may be disenfranchised at the federal level is three years. Some states have a different threshold, for example, prisoners are excluded from voting in Victorian elections if they are serving sentences of more than five years, whereas there is no prisoner disenfranchisement in the Australian Capital Territory or South Australia.

## *Questions for Discussion*

1. Should the franchise be extended to Australians younger than 18? Say to those 16 years and older?
2. This is an era of increased cooperation between Australia and its regional neighbours like New Zealand. Should the franchise be extended to New Zealand citizens (or other citizens from the Asia-Pacific region) who live in Australia?
3. Some political theorists argue that democracy means that all people affected by political decisions should have a say in those decisions. Should all people living in Australia for any reasonable length of time, regardless of their citizenship, be given the right to vote?

image unavailable

**Secretary of the Australian Aborigines League, Doug Nicholls, casts his vote in the 1949 election at a polling booth in Dennis. Commonwealth legislation had just affirmed the right of Indigenous people from most states and territories to vote in federal elections.**
The Age Archive.

1. *Roach v Electoral Commissioner* [2007] HCA 43; available at www.austlii.edu.au/au/cases/cth/HCA/2007/43.html

# Compulsory enrolment and voting

**In Australia, the franchise might better be described as a duty to vote, rather than a right. Under the *Commonwealth Electoral Act* and the related state laws, voting is compulsory in Commonwealth, state and territory elections. Voting is also compulsory in local government elections, except in South Australia, Western Australia and Tasmania.**

In practice, compulsory voting means eligible voters must attend a polling place, have their name crossed off the list of voters, accept ballot papers and lodge them in a ballot box. They do not actually have to fill out the ballot papers. If ballot papers are not filled out correctly, they are set aside as 'informal' (see page 23).

In purely practical terms, compulsory enrolment and voting work in Australia. The Australian Electoral Commission spends a considerable amount of time and money ensuring eligible people are enrolled and that they are able to cast a vote on polling day or beforehand. The Australian Electoral Commission staffs a large number of polling places in each electorate during polling day. Voters who cannot attend a polling booth on polling day can still vote by casting a postal vote or a pre-poll vote in the period after nominations to contest the election close. The Australian Electoral Commission provides mobile polling services for hospitals, prisons and remote parts of Australia before polling day to allow eligible voters in these places to vote.

## Hot Tip: Voter turnout

**Voter turnout means the percentage of eligible voters who actually vote on election day.**

Voter turnout would undoubtedly be lower in Australia without compulsory voting. When voting in federal elections was voluntary at the start of the twentieth century, the turnout averaged around 63 per cent. Since voting has been made compulsory, the average turnout has been 95 per cent.

### WHAT IF ELIGIBLE VOTERS DON'T VOTE?

After every election, officials send a penalty notice to those eligible voters who do not seem to have voted. If those voters do not respond by giving a 'valid and sufficient reason' for not voting, they are fined. For federal elections, the amount of this fine is $20. If they do not pay the fine and do not provide a valid and sufficient reason for not voting, the matter is taken to court. If the court imposes a fine and the eligible voter still declines to pay, the court may take further action, including imposing a jail sentence in some jurisdictions.

What is a 'valid and sufficient' reason? Officials determine this on the merits of each case, in accordance with the law as previously interpreted by the courts and using guidelines drawn up the Australian Electoral Commission. These guidelines are kept confidential to prevent people from falsely using excuses they know will be valid. In 1994, the Commonwealth Administrative Appeals Tribunal ruled that the public could not have access to these guidelines under the *Freedom of Information Act 1989*.[2] (The *Freedom of Information Act* was replaced by the *Government Information (Public Access) Act 2009* ('GIPA') on 1 July 2010.) Australian Electoral Commission publications suggest that a fine would be 'unlikely' in the cases of 'the elderly and frail, women in late pregnancy, or the intellectually disabled'. According to the provisions of the *Commonwealth Electoral Act*, a voter's belief that it is part of her or his religious duty to abstain from voting is also considered a valid and sufficient reason for not voting.

Over the years, the courts have ruled out various reasons for not voting. These have related to political or moral objections rather than physical or intellectual incapacity. In the first important High Court case, *Judd v McKeon*[3] in 1926, the majority of judges found that belonging to a political organisation that prohibits members from voting, or objecting to the views of all the candidates, were invalid reasons for not voting. Later cases affirmed that not having a preference among candidates, or not knowing enough to choose between them, were invalid reasons.

2. *John Paul Murphy and Australian Electoral Commission* [1994] AATA 149; available at www.austlii.edu.au/au/cases/cth/AATA/1994/149.html
3. *Judd v McKeon* [1926] HCA 33; (1926) 38 CLR 380; available at www.austlii.edu.au/au/cases/cth/HCA/1926/33.html

In September 2012, Anders Holmdahl challenged his conviction for failing to vote in the 2010 federal election in the South Australian Supreme Court.[4] The Supreme Court dismissed his argument: that voting was a right rather than a responsibility and; that Australian citizens should be able to choose whether or not to vote. In April 2013, the Full Bench of the High Court heard Holmdahl's case, but refused special leave to appeal. Justice Hayne commented that Holmdahl's challenge to the constitutionality of compulsory voting would enjoy no prospect of success.[5]

## COMPULSORY VOTING: UNIQUE TO AUSTRALIA?

Despite what many Australians think, the answer is 'no'. Compulsory voting is found in more than 20 other countries at national, regional (state) and/or local levels, including:

- Argentina
- Belgium
- Brazil
- Costa Rica
- Cyprus
- Dominican Republic
- Ecuador
- Egypt
- Greece
- Lichtenstein
- Luxembourg
- Peru
- Singapore
- Switzerland
- Turkey
- Uruguay

These countries are quite varied. They include relatively new democracies as well as long-standing ones. They include countries that generally respect individual liberties as well as countries with a poorer record on this score. In some of these countries (for example, Belgium) compulsory voting is mandated by the Constitution. In others (for example, Singapore) it is prescribed by ordinary legislation, as it is in Australia.

Compulsory voting is enforced by a variety of measures. In Brazil and Ecuador, like Australia, fines are given to individuals who have not voted without reason. In Belgium, individuals are removed from the electoral roll if they have not voted in four elections within 15 years and citizens in Peru must carry around a stamped voting card to access some public services.

image unavailable

Egypt's presidential election, May 2012. In Egypt, like Australia, voting is compulsory.
Toño Labra, Age Fotostock.

Some countries, such as Austria, the Netherlands and Venezuela, have used compulsory voting in the past but have since switched to voluntary voting. In other countries compulsory voting has been raised as a remedy for perceived problems in voting. On average, only 62 per cent of eligible voters have actually voted in UK General Elections since 2001. Some British commentators have called for an examination of compulsory voting to increase both citizen participation and party responsiveness to the electors.

## HOW WE GOT COMPULSORY ENROLMENT AND VOTING

The Commonwealth first introduced compulsory enrolment in Australia in 1911. Compulsory voting came soon after, first in Queensland. The motives for its introduction there in 1914 had to do with party politics rather than high principle. Digby Denham's Liberal Government believed that it would lose office at the 1915 election because its disenchanted supporters would stay away from the polls, while Labor's supporters would turn out in large numbers. Compulsion was introduced to try to force more Liberal voters to the polls. The plan succeeded in raising voter turnout, from 75 per cent in 1912 to 88 per cent in 1915. It failed, however, to save Denham's Liberals, who lost to Labor.

In 1924, the Commonwealth Parliament legislated for compulsory voting at federal elections. The bill to make the change was sponsored by E. Mann in the House of Representatives and H. Payne in the Senate, one of the few private members' bills (that is, bills not put forward by the government of the day) ever to pass through the Commonwealth Parliament. Although some parliamentarians spoke against the measure, it attracted very little debate and was passed quickly in both houses without a division.

The remaining states gradually introduced compulsory voting for at least their lower houses of parliament over the next two decades. The last state to fall into this pattern was South Australia, in 1942. Some elements of voluntary voting, however, remained until the 1980s. Aboriginal people were not compelled to enrol or vote in federal elections until 1984. Voting for the South Australian Legislative Council remained voluntary until 1985.

State and Commonwealth governments generally have not considered a return to voluntary voting. However, in January 2013 the Queensland State Government released a discussion paper on electoral reform that considers the option of removing compulsory voting for Queensland elections. Although Labor Prime Minister Julia Gillard publicly opposed the suggestion, a number of prominent Liberal parliamentarians (including Eric Abetz and Julie Bishop) supported voluntary voting. Their commitment to voluntarism rests on principles like individual freedom (see ***Compulsory voting – for and against***, on page 9). It may also have to do with the questionable assumption that voluntary voting would advantage the Coalition over the Labor Party.

4. *Holmdahl v Australian Electoral Commission* [2012] SASC 76; available at: www.austlii.edu.au/au/cases/sa/SASC/2012/76.html
5. High Court transcript available at www.austlii.edu.au/au/other/HCATranscript/2013/72.html

## COMPULSORY VOTING – FOR AND AGAINST

The main arguments for and against compulsory voting in Australia can be organised into six opposed pairs:

| 1. Citizenship, duties and rights | |
|---|---|
| ***For:*** | Voting is a necessary part of the duties of citizenship, just like jury duty or paying taxes. |
| ***Against:*** | Citizens have the right to choose whether they want to vote. Compulsion is part of a slippery slope to totalitarianism. |

| 2. Legitimate representation | |
|---|---|
| ***For:*** | Compulsory registration and voting increase the legitimacy of elected representatives. Candidates winning seats in parliament really do win a majority of the people's votes. In countries like the United States, where the turnout can be low, candidates can win with much less than a majority of the eligible vote. |
| ***Against:*** | Compulsory registration and voting reduce the legitimacy of elected representatives. Majorities in Australian elections include the votes of many uninterested and ill-informed people who vote just because they have to. |

| 3. Political education | |
|---|---|
| ***For:*** | Compulsory voting increases the political education of the people. They will tend to pay more attention to politics if they know they have to vote. |
| ***Against:*** | Australians seem to be no more politically educated (and are perhaps less so) than citizens of comparable countries (for example, New Zealand, the United States, and the United Kingdom) that use voluntary voting. |

| 4. Choice | |
|---|---|
| ***For:*** | Compulsory voting forces people to vote for someone even if they do not like any of the candidates on offer. |
| ***Against:*** | Compulsory voting does not force such a choice. People can always lodge a blank or spoiled ballot paper. |

| 5. Bias | |
|---|---|
| ***For:*** | Compulsory voting means that candidates have to address the needs of all the voters. If voting were voluntary, the experience of countries like the United States is that poorer and less educated people would tend not to vote. This would skew the political system (further) toward the well off and well educated. |
| ***Against:*** | Voluntary voting does not necessarily produce bias to the wealthy or well educated. In the United States, candidates like Jesse Jackson have shown that the poor and relatively uneducated can be mobilised in large numbers behind candidates who support their concerns. |

| 6. Responsiveness | |
|---|---|
| ***For:*** | Compulsory voting keeps the Australian political system responsive to the people. New parties and candidates (like Katter's Australian Party) who lack wealthy backing can contest elections without spending large sums of money just to get the voters to polling booths. |
| ***Against:*** | Compulsory voting has made the Australian political system unresponsive. If voting were made voluntary, it would shake up the political system. Parties and candidates would have to do more to convince people of the merits of their policies in order to get voters to the polls. |

### *Questions for Discussion*

Is the low turnout in some voluntary local government elections a cause for concern?

Would it be of concern if Australia reverted to voluntary voting and experienced similarly low turnouts in federal and state elections?

Do you think the political parties' positions on compulsory voting have more to do with principle or trying to win government?

## CURRENT ENROLMENT PROCEDURES

To enrol, a person must complete an Electoral Enrolment form and provide proof of identity (for example, a driver's licence or a passport) or have their identity verified and declared by someone who is already on the roll. Making sure that everyone who is eligible to vote is on the roll is a costly and time-consuming exercise. It is estimated that around 1.5 million people (or 9.5 per cent of eligible voters) are not enrolled.

The Australian Electoral Commission (AEC) attempts to ensure that people are correctly enrolled by undertaking advertising campaigns and cross-referencing address information from state electoral commissions and government agencies.

### *New 'automatic' enrolment laws*

Until 'automatic enrolment' laws were passed in late 2012 (which come into effect in July 2013), the AEC could only use the information available to it to send an enrolment form to a person who was not enrolled. It was then up to that person to complete, sign and return the form to the AEC. Automatic enrolment enables the AEC to directly enrol eligible voters or update their details based on information obtained from third parties, including the tax office, motor registries and utilities companies.

Those in favour of direct enrolment see it as a way of facilitating participation in politics, particularly amongst the young. However, critics of the scheme argue that more time and stricter measures are necessary to verify identity and protect the integrity of the roll. They also point to potential partisan effects, as young people are more likely to vote for the Labor Party and the Greens rather than the Coalition.

Over the past two decades, some commentators have claimed that Australian enrolment procedures are too lax and allow for fraudulent voting. The Coalition has been generally sympathetic to these claims and the Howard Government attempted several times to restrict enrolment. Its first reform, introduced via 1999 legislation, meant that Australians had to provide specific forms of identification (a passport or driver's licence) or a written witness statement before they could enrol and whenever they changed their enrolment details. These requirements still exist today.

The Howard Government's second reform to electoral enrolment was less successful. In 1998, it attempted to amend federal electoral law so that, instead of having seven days to get on the electoral roll after the election writs were issued, no one could be added to the roll after the day of the writs. The Coalition's Bill was defeated in the Senate; however, it re-introduced the amendments in 2006, and the Bill passed. At the 2010 election, the Human Rights Law Resource Centre and GetUp! took a case to the High Court on behalf of about 100,000 Australians whose enrolments were not allowed under the new laws. The High Court declared the amendments unconstitutional, effectively reinstating the seven-day enrolment period. GetUp! argued that the amendments meant many young people would have been disenfranchised, while Coalition parliamentarians argued that the large number of applications in the seven-day period left too little time to check for fraudulent enrolments.

### ENROLLING ONLINE?

Federal electoral enrolments cannot currently be accepted online. However, in 2010 the activist organisation GetUp! successfully ran a case in the Federal Court against the Australian Electoral Commission. In *Getup Ltd v Electoral Commissioner*, the court declared that an application for enrolment generated with an electronic signature was valid for the purposes of the *Commonwealth Electoral Act* – potentially clearing the way for online enrolments in the future.

*Getup Ltd v Electoral Commissioner* [2010] FCA 869; available at www.austlii.edu.au/au/cases/cth/FCA/2010/869.html

# Current voting procedures

**To vote, most Australians (84% in 2010) attend a polling place in their electorate on the day of the election.**

An official checks their eligibility to vote by asking three questions:

1. What is your full name?
2. Where do you live?
3. Have you voted before in this election?

If the answers match the information on the electoral roll, the official rules a line through the person's name and gives the voter their ballot papers to fill in. If there is a discrepancy (details are missing or the person's name has already been ruled through), the person can apply for and cast a provisional vote, which may be included in the election count.

Voters who cannot attend a polling place on the day of the election can cast a vote by:

- 'absent voting' in another electorate on polling day (their ballot papers are later added to the tally in their home electorate);
- pre-poll or early voting, where voters attend a polling place before polling day; and
- postal voting, where voters complete ballots before polling day and post them to the electoral officials.

Most voters fill in their ballot papers using pencils and paper ballots. To protect the secrecy of the ballot for people who are blind or have a sight impairment, the Australian Electoral Commission has established a number of polling places throughout Australia that allow for secret voting using a telephone system. Some state and territory elections provide similar services. In 2011, New South Wales introduced voting via the internet or telephone for voters who were absent from the state on polling day, lived far away from a polling place, were blind or vision impaired, or had another disability that prevented them from voting.

Recent increases in postal voting across Australia and the introduction of internet and telephone voting in New South Wales elections have raised concerns about possible interference in the secrecy of voting and manipulation of the voter's choice. Federal parliamentarians are entitled to use their taxpayer-funded entitlements to print and distribute postal vote applications featuring their party name and logo to up to half the voters in their electorates. For senators, this means half the voters in their states or territories. The applications are returned to the Australian Electoral Commission via the parties themselves. This process could easily give the mistaken impression that the political parties are officially involved in administering elections. The parties can also use their knowledge of the timing of lodging voters' applications to target direct advertising material at those voters. More generally, since postal, telephone and internet votes are unsupervised by electoral officials, there is no guarantee that they are completed without interference by family members or other people.

## *Questions for Discussion*

1. What are the advantages and disadvantages of tightening Australian laws and practices for dealing with enrolment fraud?
2. What are the pros and cons of allowing Australians to vote by post, over the telephone or via the internet?

image unavailable

**Scanning machine being used at the Scanning Centre in Nelson Street, Wallsend NSW, to scan in some of the local government elections held in New South Wales on 8th September, 2012. The centre was operated by the Australian Election Company.**
OZinOH's photostream.

# Who can become an election candidate?

**Candidates in federal elections must be 18 years old, Australian citizens and eligible voters. There is no requirement that candidates live in the electorate that they wish to contest.**

The Constitution, under section 44, disqualifies the following people from nominating as candidates:

- citizens and subjects of a foreign power;
- anyone convicted of an offence punishable by a sentence of 12 months or more;
- undischarged bankrupts;
- anyone holding an office of profit under the Crown; and
- anyone with a pecuniary interest in an agreement with the Commonwealth Public Service (except members of incorporated companies with 25 people or more).

These constitutional restrictions have seen several candidates who have won elections challenged in the courts. Several candidates have been disqualified for holding dual citizenship, including One Nation Senator-elect Heather Hill. In 1999 the High Court declared her election to the Senate in the previous year invalid on the ground that her Australian-British dual citizenship constituted an allegiance to a foreign power. All candidates for the federal parliament must therefore take 'reasonable steps' to renounce their foreign citizenship. The rule does not, however, apply to state and territory elections.

Disqualification on the basis of holding public office also represents a significant barrier for many potential parliamentarians. Although the aim of the rule is to prevent elected representatives being compromised by their duty to the executive government, it extends to a wide range of occupations with very little potential for conflict. For example, in 1996, Liberal Party candidate Jackie Kelly won the seat of Lindsay while an officer serving in the RAAF (an office of profit). She was found ineligible but, having resigned from the RAAF, successfully recontested the seat in a by-election. The Commonwealth and some states have legislated to ensure that public servants who resign their positions to contest elections are reinstated if they are unsuccessful but this problem has not been eliminated entirely.

## HOW DO CANDIDATES NOMINATE?

People wishing to nominate in federal elections have to do so between the issuing of writs for an election and the close of nominations (between 10 and 27 days after writs are issued). Nomination forms are available from the Australian Electoral Commission and can either by submitted individually by candidates or in bulk by political parties. Candidates must be nominated by 50 electors or be endorsed by a political party, in addition to paying a deposit of $500 to contest a House of Representatives seat and $1000 to contest a Senate seat. Deposits are returned to candidates who get more than four per cent of the first preference vote.

Nomination and deposit requirements limit access to election contests in order to discourage frivolous candidates, and to reduce the length and complexity of ballot papers so as to minimise the possibility of confusion and mistakes. In 2010, there were 349 nominated Senate candidates and 849 candidates nominated for the House of Representatives – an average of six candidates in each seat.

The states and territories have similar laws governing who can nominate in their elections and when and how they nominate. Grounds for exclusion from candidacy vary but generally relate to residency, criminal sentences and offices of profit. The number of people who need to support a nomination also varies, from six (for example, in the Northern Territory) to 15 (New South Wales). Deposits vary from $200 (Northern Territory) to $700 (Victorian Legislative Council). The percentage of votes needed to recoup deposits also varies. While it is typically four per cent of the first preference vote; 20 per cent of the quota is required in the Tasmanian and ACT Legislative Assembly elections.

## HOW PARTIES CHOOSE CANDIDATES

Although an increasing number of election candidates are independents, with no ties to political parties, most successful candidates are members of political parties. The stability of Australian voting patterns means that the Labor, Liberal and National parties each win certain lower house electorates, so-called 'safe seats', at nearly every election.

## Hot Tip: Preselection

**Preselection is the process by which a party selects official candidates to run for it at particular elections.**

These parties are also guaranteed of winning a number of Senate places.

In safe seats, the greatest contest in an election is over who will become the winning party's candidate. The rules for these preselection contests vary from party to party and among its state and territory branches. Apart from the issues of who may nominate for a preselection contest and which members are eligible to vote, the main point of difference is the composition of the body that selects the candidate (the selectorate). Some examples are given in the following table:

| Selectorate | Example |
|---|---|
| 1. Ballot of eligible local party members | NSW Branch of the ALP for House of Representatives candidates. |
| 2. Delegates from local branches vote | NSW Division of the National Party for House of Representatives candidates. |
| 3. Local members and a central panel drawn from other parts of the party vote | Victorian Branch of the Liberal Party for House of Representatives candidates. |
| 4. Local delegates and a central panel drawn from other parts of the party vote | SA Branch of the ALP for House of Representatives candidates. |
| 5. Members of a state convention or conference vote | Queensland Branch of the ALP for Senate candidates. |

The most common types of major party preselection panels in House of Representatives elections are types 3 and 4 in the table. Local party members or their delegates have some say in who their party's candidate will be. This say is balanced by votes from a central panel drawn from other branches, members of the party executive, parliamentarians and, in the case of the ALP, delegates of trade unions formally affiliated with the party. The most common Senate preselection panels are type 5, in which delegates meeting at a state-wide conference vote to decide who their Senate candidates will be.

Critics of preselections based solely on branch members' votes argue that this process encourages 'branch stacking'. Branch stacking occurs when large numbers of members with no real interest in a party are signed up just to support a particular preselection candidate, sometimes in return for expected favours if that candidate wins a seat. Critics of preselections in which a central panel has a large say, argue that this process can preselect candidates who have no real connections with, or feel for, the seat they are contesting.

In each of these types of preselection, decisions about who will contest (and therefore win) safe seats are often taken by no more than a few hundred people, often meeting in private.

In recent years, a number of political parties have experimented with preselection contests in which members of the local community who are not party members may also vote. Commonly called 'community preselections', these contests have been trialled in a handful of seats by the Victorian ALP, the NSW National Party and by the NSW Branch of the Labor Party. The NSW National's community preselection for the NSW State Parliament seat of Tamworth in 2010 attracted 4293 voters (or 10 per cent of the electorate).

## PRESELECTION AND THE LAW

Some commentators argue that Australian electoral law should focus more on how people come to be preselected as candidates for their parties. Until recently, the law treated Australian political parties essentially as private bodies – voluntary organisations whose internal arrangements were not the business of courts. This treatment, and the legal arguments for it, rested on the High Court's 1934 judgment in *Cameron v Hogan*.[4] The political parties were happy to determine their own affairs away from the courts. Unsuccessful candidates for preselection were expected to accept internal party decisions, even when they appeared unfair or against the party's rules.

Since the Queensland Supreme Court's 1993 judgment in *Baldwin v Everingham*,[5] the courts have begun to develop a new position on the reach of the law into political parties. This new position rests on the fact that political parties are now registered for public funding under the *Commonwealth Electoral Act* (see page 15). They are required to lodge their constitutions as part of their registrations. The courts, while continuing to acknowledge *Hogan v Cameron*, have argued that this statutory recognition brings with it a public interest in the enforcement of internal party rules.

Baldwin won his case, which was that he was wrongly excluded from a Liberal preselection; however, he did not recontest the preselection. In 1999, South Australian MP Ralph Clarke won two cases against the ALP that forced the ALP to rerun the preselection for Clarke's electorate (see page 14). As a result of these cases, the parties now recognise that their preselection practices are open to legal scrutiny and challenge. In September 2012, the NSW Branch of the Liberal Party was forced to postpone its Annual General Meeting following a writ issued by the NSW Supreme Court in a legal battle over preselection reform within the party.

4. *Cameron v Hogan* [1934] HCA 24; (1934) 51 CLR 358; available at www.austlii.edu.au/au/cases/cth/HCA/1934/24.html
5. *Baldwin v Everingham* [1993] 1 Qd R 10, Supreme Court of Queensland; available in the State Library of NSW.

## THE CLARKE v ALP CASES

Ralph Clarke, Member for Ross Smith in the South Australian House of Assembly and a former Deputy Parliamentary Leader of the Labor Party in South Australia, lost a 1999 preselection for his seat for the South Australian state election. He took the ALP to the South Australian Supreme Court on two occasions later in the year, alleging that 2000 new members had joined the ALP in South Australia in January 1999. Without fulfilling a six month membership requirement, these new members participated in electing delegates to the Convention at which Clarke lost his preselection.

When Clarke and another member raised the matter within the ALP, it was not properly investigated or resolved. Instead, the ALP state executive proposed to change party rules retrospectively to allow the invalid memberships to stand. The Court found in Clarke's favour, against the retrospective rule change and finding that the new members should not have participated in electing convention delegates.

In the second case, the Court found against another plan by the party executive to hold a new preselection convention involving only delegates appointed in 1997. This would have excluded legitimate members who joined after 1997. In a recontested preselection held as a result of the court cases, Clarke lost to another candidate. The legal costs awarded against the ALP in the cases were estimated at around $250,000.

*Clarke v Australian Labor Party (South Australian Branch)* [1999] SASC 365; available at www.austlii.edu.au/au/cases/sa/SASC/1999/365.html; *Clarke v ALP* [1999] SASC 415; available at www.austlii.edu.au/au/cases/sa/SASC/1999/415.html; the legal costs decision is available at www.austlii.edu.au/au/cases/sa/SASC/1999/433.html

image unavailable

Rob Katter (left) and his father Federal MP Bob Katter after handing out 'how to vote' cards for Katter's Australian Party in the Queensland State election at Mount Isa Central High School on Saturday, 24 March 2012. Rob Katter was successful, winning the seat of Mount Isa.

Patrick Caruana, AAP Image.

Some commentators and politicians argue that the law should go further than simply enforcing current party rules. They argue that the law should prescribe particular types of democratic preselection. This is the case in democracies such as New Zealand and Germany, which prescribe that registered political parties and preselections must be internally democratic, as well as the United States where political parties are mandated by law to conduct open primaries in order to select candidates for public office.

Political parties' preselection contests in Australia are exempt from anti-discrimination legislation such as the *Sex Discrimination Act 1984*. This allows political parties to implement affirmative action measures to increase the number of women selected as candidates in winnable seats. Initiatives such as the ALP's 40:40:20 rule (in which at least 40 per cent of all party positions, including public office positions, should be held by women) have increased the presence of women in the Parliament. However, they have not been supported by all Australian parties.

### *Questions for discussion*

1. What are the advantages and disadvantages of making the requirements for nominating as an election candidate more stringent?
2. Should parties have been left to run their own preselections, including dealing with any disputes over party rules, or is legal action in the courts a legitimate means of ensuring fairness in preselections?
3. Should the law force parties to adopt particular approaches to preselections, such as adopting community preselections or ballots in which all party members vote?
4. Is the application of affirmative action measures to party preselection an appropriate way to increase the presence of women and minorities in public office?

## PARTY REGISTRATION

In 1984, the Commonwealth introduced the registration of political parties for electoral purposes. One benefit of registration for political parties was that their names could be printed alongside their candidates' names on ballot papers. Rather than voters having to work out which candidates belonged to which party, ballot papers now contain this information for registered parties. This is particularly useful for smaller parties that may not have enough members or volunteers to give out 'How to Vote' cards at every polling place, informing voters about their candidates.

Other benefits of registration include the right for parties to receive public election funding. Although individual candidates of unregistered parties can also receive this funding, registration allows funding to be centrally administered by parties. Registered parties can also coordinate nomination processes and are eligible to receive copies of electoral rolls and other electorate information.

To be eligible to register under the *Commonwealth Electoral Act*, parties must:

- have a written constitution;
- have as an objective endorsing candidates to contest federal elections;
- and either have at least 500 members, or have at least one member of parliament at Commonwealth, state or territory level; and
- pay an application fee of $500.

Members must be unique to each political party (that is, not also relied on by other political parties for their registration), but need not be eligible voters. This enables non-citizens and those under 18 to join political parties.

Applications are made to the Australian Electoral Commission, which verifies the claims made in applications and advertises proposed registrations so that people can lodge objections. Certain party names, including lengthy and obscene names or names which may cause confusion with existing registered parties, are not allowed. For example, in 2011 prominent Queensland parliamentarian Bob Katter applied to register Bob Katter's Australia Party. The initial application was rejected by the Australian Electoral Commission on the basis that the shortened version of the name that was to appear on the ballot paper 'The Australia Party' could be too easily confused with other parties. Katter subsequently amended the party name and 'Katter's Australian Party' was registered in September 2011.

Once registered, a party is added to the Register of Political Parties. Registered parties must lodge annual financial statements. The Australian Electoral Commission audits their compliance with the conditions of registration. Parties can be de-registered if they cease to exist, no longer comply with the requirements for registration, or were registered fraudulently or by misrepresentation.

The relevant electoral acts in most states and territories also provide for party registration and de-registration. Pauline Hanson's One Nation Party was de-registered in Queensland after the Queensland Supreme Court found in 1999 that it had been registered under the *Queensland Electoral Act 1992* by fraud or misrepresentation. One Nation's constitutional structure meant that the party itself did not have the required 500 members.

The required number of party members for registration under state and territory laws varies from 100 (Australian Capital Territory) to 750 (New South Wales). After the 1999 New South Wales state election, the *Parliamentary Electorates and Elections Act 1912* (NSW) was amended to make party registration more difficult. In 1999, there were 90 parties registered; 10 won seats in the Legislative Council.

The requirement that political parties have 500 members for federal registration was challenged in the High Court by the Democratic Labor Party (DLP) in *Mulholland v AEC*.[6]

image unavailable

**Federal Election 2010, the Channel 9 set at the Tally Room in Canberra on the evening of 21 August 2010.**
Andrew Sheargold, Canberra Times.

6. *Mulholland v Australian Electoral Commission* [2004] HCA 41; available at www.austlii.edu.au/au/cases/cth/HCA/2004/41.html

The Court rejected the argument that an unregistered party's inability to place a party name on the ballot paper was an undue restriction on political communication and upheld the '500 rule'.

## ELECTION FUNDING AND CANDIDATE FINANCES

The New South Wales Parliament first introduced public funding of candidates' election campaigns, tied to public disclosure of candidate's donations and expenditure, for the 1981 state election. Commonwealth public funding laws followed in 1984. Queensland, West Australia and the ACT also now have systems of public funding for election candidates. The measure has been debated in some other states but not introduced.

The introduction of public funding of candidates usually has been supported by the ALP and opposed by the Coalition parties. The rationale for the introduction of public funding for federal elections was to assist parties in financial difficulty, to lessen corruption, to avoid excessive reliance upon 'special interests', to equalise opportunities between the parties and to stimulate political education and research. Arguments against public funding usually rest on responsibility, public cost and fairness. Candidates should be responsible for raising their own support. Taxpayers should not have to support the activities of political parties. The scheme is seen to be unfair in that most of the public funding goes to Labor or the Coalition, further entrenching their duopoly in the electoral system.

The Commonwealth legislation provides for candidates to be paid an amount for every first preference vote they win, as long as they win more than four per cent of the first preference vote in their electorate. At the 2010 federal election, the amount was $2.31 per vote. Total candidate funding in 2010 was just over $53 million. Candidates who are endorsed by registered political parties do not receive funding directly – it is paid to the registered parties. The relevant states and territories have similar funding formulae and procedures.

Australia, like a number of other western democracies, has laws that require parties, candidates and others to reveal publicly their election-related financial relationships. The main argument for such financial disclosure is transparency. Disclosure reduces the capacity for secret policy deals between parties or candidates and their financial backers. The main argument against disclosure is privacy. People should be able to donate money to whomever they want without facing possible intimidation or other repercussions of that donation becoming public knowledge.

Candidates and parties must disclose donations they receive to the Australian Electoral Commission, which makes information about these donations public and posts all disclosure returns on its website. Parties and candidates are required to disclose the overall value of donations, the total number of sources of donations and the names of donors who give more than $12,100 to a candidate or party (as at April 2013). Other individuals or groups who spend $12,100 on electoral purposes (such as advertising in support of a party or candidate or donating money) are also required to disclose this.

Political finance in NSW is highly regulated in comparison to the federal disclosure regime. Measures introduced by the Keneally Labor Government in 2008 and 2010 placed caps on political donations and expenditure in return for increases in public funding. In 2012 the O'Farrell Liberal Government went further, banning all donations to political parties and candidates from anyone or anything other than a person registered on the electoral roll. These laws now make it unlawful for corporations to donate to political parties and for unions to pay affiliation fees to parties. The laws are currently being challenged by Unions NSW in the High Court.

Electoral officers monitor the returns of candidates, parties and others and investigate possible breaches of the law. Proper monitoring of electoral finances is notoriously tricky and controversial. The *Commonwealth Electoral Act* has been amended a number of times since 1984 to deal with perceived loopholes in disclosure law. In recent years, 'associated entities' and third parties have become particularly hot issues. Labor and the Coalition have accused each other of hiding money by receiving benefits from organisations that have not made public their finances and sources of donations.

### *Questions for discussion*

1. Should the election expenditure of parties and candidates be subsidised by public funding?
2. Should there be limits to the amounts that candidates and parties are allowed to spend on election campaigns?
3. What are some of the key difficulties in making electoral finances as publicly transparent as possible? Is it worth trying to achieve this goal?

# Drawing electoral boundaries

**All elections involve boundaries that define which voters get to elect which candidates to represent them in legislative bodies. These boundaries define what in Australia are called 'electoral divisions' or 'electorates'.**

For Senate elections, the electorates are defined by the state and territory boundaries. Elections for upper houses in New South Wales and South Australia and for the single house of the ACT Legislative Assembly use their state or territory boundaries to define a single electorate. For all other elections in Australia, including elections for the House of Representatives, boundaries have to be specifically drawn to group voters into different electorates. The 2010 Federal Election required boundaries to be drawn for 150 House of Representatives electorates.

The laws concerning drawing electoral boundaries are important and controversial because those boundaries can effect who wins elections.

## Hot Tip: Distribution and redistribution

**The process of drawing electoral boundaries for the first time is called a 'distribution'. After electoral boundaries have been drawn once, they can be adjusted in what is called a 'redistribution'.**

### WHO DRAWS THE LINES?

In Australia, committees of public officials draw and redraw electoral boundaries. These committees are established by law to be independent of the government of the day, the parliament, political parties and other groups who might have an interest in drawing up electorates to suit their political purposes. At the Commonwealth level, the Australian Electoral Commission oversees the process of electorate drawing and appoints redistribution committees for each state and territory. Each committee consists of the Electoral Commissioner, the senior electoral officer in the state or territory, the state or territory Surveyor-General and the state or territory Auditor-General. Similar committees draw up the boundaries for state and territory elections.

At various points, the process of drawing electoral boundaries involves publicity and public consultation. For House of Representatives electorates, the redistribution committees invite suggestions from the public before they begin to redraw boundaries and consider objections after they have released a draft set of proposed boundaries. Political parties make submissions to the committees to try to persuade them to draw boundaries in ways that will favour their candidates. The final decision on electoral boundaries, however, stays with the committee.

Having an independent body to draw electoral boundaries may seem an obvious way to avoid or reduce the manipulation of boundaries by governments and political parties. It is not a universal practice, however, even among western democracies. In the United States, for example, the state legislatures (the equivalents of Australian state parliaments) draw the electoral boundaries for state and national elections. This means that American redistribution processes involve party politics much more than they do in Australia. The Democratic and Republican parties have both used their majorities in state legislatures to draw up boundaries that favour their own candidates over opponents.

### GERRYMANDERS

The sort of manipulation of electorate boundaries that goes on in American state legislatures is known as 'gerrymandering' (see Hot Tip). The aim is usually to draw boundaries that maximise the number of parliamentary seats won by a party on its available vote. Deliberate gerrymanders for this purpose have been much rarer in Australian politics than in the United States.

## Hot Tip: Gerrymander

**The word 'gerrymander' originated in 1811 in Massachusetts, USA, when Governor Elbridge Gerry drew a wiggling electoral boundary designed to favour his party. Discussing the strange shape of the electorate, someone suggested it looked like a salamander. A newspaper editor replied 'I call it a Gerrymander!' and introduced the expression in his newspaper. Gerry's electoral manipulation duly worked to his party's advantage and 'gerrymander' gradually gained wider usage.**

### *How do gerrymanders work?*

Consider the following simple example, involving 12 voters, six of whom support Party A and six Party B. In a fair electoral system containing four electorates, we would expect the boundaries to be drawn so that Party A would win two electorates and Party B to win two electorates, as in the following diagram.

| Electorates | Voters | | | Winners |
|---|---|---|---|---|
| 1 | A | B | B | B |
| 2 | A | B | B | B |
| 3 | A | A | B | A |
| 4 | A | A | B | A |

We could draw the boundaries differently so that with the same number of votes, Party A now wins three electorates to Party B's one.

Voters

| | | |
|---|---|---|
| A | B | B |
| A | B | B |
| A | A | B |
| A | A | B |

Equally, we could redraw the boundaries to give Party B three wins to Party A's one.

Voters

| | | |
|---|---|---|
| A | B | B |
| A | B | B |
| A | A | B |
| A | A | B |

While gerrymanders are generally used to benefit parties, they have also been used in the United States to improve the chances of members of minority ethnic groups such as African or Latino Americans being elected. Before the courts began to restrict them, these efforts led to the drawing of strange looking electoral boundaries that joined up geographically separate ethnic communities.

Australian electoral boundaries have not been designed with this purpose in mind. Under the *Commonwealth Electoral Act*, redistribution committees must 'give due consideration' to an electorate's 'community of interests ... including economic, social and regional interests'. This 'community interest' consideration has not been applied to improving minority ethnic representation. The other considerations stipulated by the Act are the proposed electorate's 'means of communication and travel', 'physical features and area' and existing electorate boundaries. These considerations tend to produce compact electorates in Australia, which follow natural or artificial boundaries such as rivers and major roads.

Although deliberate gerrymanders are not a feature of Australian elections, parties sometimes win more than 50 per cent of lower house seats with less than 50 per cent of the lower house votes. At the 1998 Federal Election, for example, the Labor Party won almost 51 per cent of the House of Representatives vote to the Coalition parties' 49 per cent. The Coalition nevertheless won more seats than Labor and therefore formed government. At the 1990 Federal Election, the pattern was reversed. The Coalition won just over 50 per cent of the vote but Labor won more seats and therefore government.

Similar outcomes have occurred at state and territory level. South Australia is the only jurisdiction whose laws require that electoral boundaries must be drawn up to ensure that a party winning 50 per cent or more of the lower house vote at a general election wins a majority of seats and is therefore able to form government.

## MALAPPORTIONMENT AND 'ONE VOTE ONE VALUE'

In both of the hypothetical examples of gerrymanders in the previous section, the electorates contained equal numbers of voters. All that was done to change the election result was to change the boundaries of equally-sized electorates. A set of electoral boundaries that are drawn so that electorates contain unequal numbers of voters should not be described as a gerrymander, but as a malapportionment. When people complain about gerrymanders in Australia, they are usually really complaining about malapportionment.

The consequences of malapportionment can be just as significant as those of gerrymandering. The following example illustrates this point. It uses the same pattern of voting as in the examples given above, but this time across two electorates containing three voters and one electorate containing six voters.

Voters

| | | |
|---|---|---|
| A | B | B |
| A | B | B |
| A | A | B |
| A | A | B |

The winning candidate in the larger electorate has to win twice as many votes as the winning candidates in the two smaller electorates. Another common way of expressing this is that each vote in the smaller electorates has been 'weighted' to count for as much as two votes in the larger electorate. By assigning different weights to votes, malapportionment violates the principle of voter equality generally expressed as 'one vote one value'. The consequence in the case above is that Party A, with the same number of votes as Party B, wins two electorates to Party B's one.

## MALAPPORTIONMENT AND AUSTRALIAN LAW

Deliberate malapportionment has been common in Australian electoral legislation. It has been used to favour small states and country areas and the parties that tend to draw their electoral support from these regions.

The Australian Constitution does not protect against malapportionment. In 1974 and again in 1988, voters rejected referendum proposals that would have written a requirement for equal electorates into the text of the Constitution.

In its decisions in the *McKinlay*[7] and *McGinty*[8] cases, the High Court held that the Australian Constitution does not require electorates to be drawn up on the basis of 'one vote one value'. In 1975, Brian McKinlay argued unsuccessfully that section 24 of the Constitution, which states that Members of the House of Representatives shall be 'directly chosen by the people', was violated by large inequalities in enrolment figures across different Victorian House of Representatives electorates. In 1996, Jim McGinty tried to have Western Australia's state electoral system declared unconstitutional on similar grounds. McGinty hoped that the Court would view 'one vote one value' as a right implied by the Australian and Western Australian constitutions, following its decisions in 'implied rights' cases earlier in the 1990s. The Court rejected this argument.

The Constitution, rather than preventing malapportionment, produces it in several cases. Section 7 leads to malapportionment in Senate elections by requiring that each state have the same number of senators. This means that, (in round numbers) 360,000 Tasmanian voters elect the same number of senators as 4,600,000 voters in New South Wales. In 2010, candidates for the Senate from Tasmania needed just 48,820 votes to be elected, compared with the 593,218 votes needed by Senate candidates in New South Wales.

Similarly, section 24 of the Constitution guarantees all the original states at least five Members of the House of Representatives, regardless of whether their population size would otherwise justify this number. For this reason, the average number of eligible voters in Tasmanian House of Representatives electorates in 2010 was around 72,000 voters, compared with an average of almost 95,000 across the rest of the country.

As well as this constitutionally protected malapportionment in favour of small states, for many decades from Federation, Commonwealth law allowed significant disparities in the numbers of voters in different electorates. The number of voters could vary up to 20 per cent either way from the average enrolment. This meant that some electorates could have two-thirds as many voters as other electorates. The Parliament also had to agree to redistributions being carried out and gaps of over ten years between redistributions were common. Population shifts during these periods, particularly from rural areas to the cities, reinforced the trend for some electorates to contain significantly more voters than others.

The main beneficiary of this inequality was the then Country Party (now National Party), since it drew its support almost exclusively from the less populous rural electorates. In the 1970s and 1980s, Labor federal governments initiated changes to the *Commonwealth Electoral Act* to ensure that House of Representatives electorates became more equal. As a result, the permissible variation in voter numbers for any electorate has been reduced from 20 per cent to 10 per cent more or less than the average enrolment. Redistribution committees are now also required to examine demographic trends and draw boundaries so that variations between electorates will tend to reduce over time.

Rather than Parliament determining when redistributions will take place, the Act now requires that redistributions be held for House of Representatives electorates in a state or territory at least every seven years. They must be performed more frequently if population changes within or between states and territories are large enough. More frequent redistributions and the reduction in allowed variations between electorates have reduced malapportionment at Commonwealth level.

## ZONAL SYSTEMS

Historically, malapportionment in lower house electoral systems has been much stronger at state than at Commonwealth level. Governments in all states except Tasmania have, at some time or other, passed legislation that divided state electorates into electoral zones. Queensland had various zonal systems from 1949 to 1991, New South Wales from 1928 to 1979, Victoria from 1903 to 1952 and again from 1965 to 1983, South Australia from 1936 to 1976 and Western Australia from 1922 to 2008.

These zonal systems separated country electorates from urban electorates. A number of systems also created different zones for different types of urban and country areas. In all cases, seats in the country zones have averaged fewer voters than those from urban zones. In Western Australia, the last state to end its zonal system, the electorates in the 'Country Area' averaged about half the number of voters in 'Metropolitan Area' electorates.

Governments that have used electoral zones have justified them in two ways. First, they have argued that parliamentarians cannot adequately service large country electorates. Second, they have argued that the economic importance of industries like farming and mining should be reflected in more seats for country areas. Not surprisingly, zonal systems were always introduced by parties that had significant support in country areas. Non-Labor parties introduced them in all states except Queensland. Moves to abolish zonal systems (rather than adjust or weaken them) have all been initiated by Labor governments, using the 'one vote one value' argument.

7. *Attorney-General (Cth) Ex rel. McKinlay v the Commonwealth; South Australia v the Commonwealth; Lawlor v the Commonwealth* [1975] HCA 53; available at www.austlii.edu.au/au/cases/cth/HCA/1975/53.html
8. *McGinty v Western Australia* [1996] HCA 48; available at www.austlii.edu.au/au/cases/cth/HCA/1996/48.html

# How votes are counted

**In House of Representatives and other lower house elections (except in Tasmania and the ACT), each electorate elects one representative.**

The three main ways used in Australia to determine the winning candidate in this situation have been:
> first-past-the-post voting;
> full preferential voting; and
> optional voting.

## FIRST-PAST-THE-POST VOTING

In a first-past-the-post system, voters simply indicate (usually with a cross) the candidate that they prefer over all others. The Australian colonies copied this system from British practice in the nineteenth century. It was also used in Australian federal elections until 1918 and in Queensland elections as late as 1960. It is still used in the United Kingdom, among other countries. The winning candidate is the person who gets most votes, regardless of whether or not that candidate wins a majority of votes. Consider the following result, taken from the seat of Melbourne at the 2010 Federal Election.

| Candidate | Votes (%) |
|---|---|
| Georgina Pearson (Family First) | 1.6 |
| Adam Bandt (Green) | 36.2 |
| Joel Murray (Australian Sex Party) | 1.8 |
| David Collyer (Australian Democrat) | 0.7 |
| Penelope Green (Socialist Party of Australia) | 0.7 |
| Cath Bowtell (Labor) | 38.1 |
| Simon Olsen (Liberal) | 21.0 |

Under a first-past-the-post system, the winner would have been Labor's Cath Bowtell. Although she only gained 38.1 per cent of the total vote, much less than a majority, she won more votes than any other candidate.

Many commentators would argue that such an outcome would not be terribly democratic. A party could win electorates with 35 or even 40 per cent of the vote and could go on to win government with much less than a majority of votes across the country. This happens regularly in the United Kingdom where first-past-the-post counting is used. In 2001, for example, the British Labour Party won government and almost two-thirds of the parliamentary seats after winning just under 41 per cent of the nationwide vote.

## PREFERENTIAL VOTING

Preferential voting was introduced in House of Representatives elections in 1918. It has also been used for a long time in state lower house elections in Victoria, South Australia and Western Australia, elections for the Northern Territory Assembly and many local council elections across Australia. Preferential systems of voting deal with the problem of winning candidates not necessarily winning a majority of votes by making voters indicate a series of preferences among the candidates. Voters write '1' in a box on the ballot paper next to the candidate they want to see elected, then '2' against the candidate they would prefer after their first choice, and so on. In the case of Parkes, voters would have to indicate six preferences by numbering the boxes on the ballot paper 1, 2, 3, 4, 5 and 6.

Where no candidate wins more than 50 per cent of the first preference votes, the least popular candidate (the one with the fewest first preferences votes) is eliminated. The second preferences of voters who voted for that candidate are then distributed among the remaining candidates. If there is still no candidate with a majority of votes, the remaining candidate with the fewest votes is eliminated and the preferences of his or her voters distributed. This process is repeated until one candidate gets more than 50 per cent of the votes.

In Melbourne in 2010, no candidate won a majority of first preference votes. The Democrat candidate, with fewest votes, was eliminated and his preferences distributed (see table, page 21). No candidate had a majority of votes after this process. The Socialist candidate was then eliminated, followed by the Family First candidate and the Sex Party candidate. Labor's Cath Bowtell still had more votes than the other two remaining candidates after the fifth count but was still well short of a majority. After the Liberal candidate's preferences were distributed, the Greens candidate Adam Bandt won the seat of Melbourne with 56 per cent of the final vote.

As the Melbourne example shows, preferential voting always produces a candidate with a majority of votes. It also shows that it may take quite a few preference distributions to achieve this result. In Melbourne, some voters may have helped to elect the candidate who was their fourth, fifth or even sixth preference. The Melbourne result in 2010 was unusual, since in most cases, the candidate with the largest first preference vote goes on to win the seat. It was particularly unusual in that minor parties almost never win lower house seats in Australian elections. The fact that a Green was elected as a result of Liberal preferences in Melbourne also shows that parties sometimes advise their voters to give preferences to candidates with whom they share little ideologically so as to inflict damage on another rival party, in this case Labor.

Preferential voting gives voters the opportunity to register support for a minor party or Independent candidate that they like, but know has no chance of winning, while using their second and later preferences to help determine who does win the electorate. For most commentators, this feature

| Candidate | Votes after first count | Votes after second count | Votes after third count | Votes after fourth count | Votes after fifth count | Votes after sixth count |
|---|---|---|---|---|---|---|
| Georgina Pearson (Family First) | 1,389 | 1,445 | 1,522 Excluded | | | |
| Adam Bandt (Green) | 32,308 | 32,481 | 32,676 | 33,371 | 34,664 | 50,059 Elected |
| Joel Murray (Australian Sex Party) | 1,633 | 1,739 | 1,916 | 2,120 Excluded | | |
| David Collyer (Australian Democrat) | 602 Excluded | | | | | |
| Penelope Green (Socialist Party of Australia) | 613 | 671 Excluded | | | | |
| Cath Bowtell (Labor) | 34,022 | 34,134 | 34,287 | 34,547 | 34,982 | 39,268 |
| Simon Olsen (Liberal) | 18,760 | 18,857 | 18,926 | 19,289 | 19,681 Excluded | |

of preferential voting provides distinct advantages over first-past-the-post voting. Critics of preferential voting argue that they should not be forced to indicate preferences, even if they are low preferences, for candidates whose views they find offensive.

## OPTIONAL PREFERENTIAL VOTING

Optional preferential voting in electorates each choosing one representative provides a middle path between first-past-the-post and preferential voting. It has been used in New South Wales since the 1981 state election and in Queensland since the 1992 state election. In both cases, Labor governments introduced optional preferential voting.

Optional preferential voting requires only that voters register a first preference on their ballot papers for their votes to be counted.

Voters who wish to register one or more additional preferences among the remaining candidates are able to do so in the normal way, using consecutive numbers. Unlike full preferential voting, these voters do not have to indicate preferences among all the candidates. They can, for example, just indicate their first preference with a '1' and leave the rest of the ballot blank.

If no candidate gains more than 50 per cent of the first preference votes, then the least popular candidate is eliminated, as in full preferential vote counting. Any second preferences of voters who voted for that candidate are then distributed among the remaining candidates. The ballot papers of voters who have indicated only a first preference for the least popular candidate are set aside as 'exhausted'. These exhausted ballots not longer count as part of the total number of votes among which a winning candidate has to gain a majority. The process is repeated until one candidate gets more than 50 per cent of the remaining votes.

In the 2011 NSW State Election Labor candidate Cherie Burton won the seat of Kogarah after the distribution of preferences from Christian Democrat and Greens voters. Over half of the Christian Democrat and Greens voters (3615) did not express a preference for Burton or Hindi. While Burton won 51.9 per cent of the 40,872 votes that remained in the count after the distribution of preferences, she was elected with a little under 48 per cent of the 44,487 valid votes cast in the South Coast electorate. See the vote count in the table below.

## ELECTORATE OF KOGARAH, 2011 NSW STATE ELECTION

| Candidate | Votes after first count | Votes after second count | Votes after third count |
|---|---|---|---|
| Joseph Abdel Massih (Christian Democrats) | 2,507 Eliminated | | |
| Miray Hindi (Liberal) | 18,360 | 19,155 | 19,665 |
| Cherie Burton (Labor) | 19,668 | 19,922 | 21,207 Elected |
| Simone Francis (Greens) | 3,952 | 4,062 Eliminated | |
| **Total Votes in Count** | **44,487** | **43,139** | **40,872** |
| **Total Exhausted Votes** | | **1,348** | **3,615** |

As this example illustrates, optional preferential voting always produces a winning candidate with a majority among voters who have expressed a preference between the winner and his or her main rival. It does not, however, always produce a winning candidate supported by a majority of all voters who have cast a valid vote.

## PROPORTIONAL REPRESENTATION SYSTEMS

The voting systems discussed above are generally used to elect one representative. Where more than one representative is to be elected from each electorate, proportional representation systems tend to be used. Proportional representation has been used for Senate elections since 1949. It is also used in upper house elections in New South Wales, South Australia and Western Australia, lower house elections in Tasmania, Legislative Assembly elections in the Australian Capital Territory and some local council elections.

## VOTING IN PROPORTIONAL REPRESENTATION BALLOTS

The most common forms of voting and counting votes used in these elections are variations on the 'Hare-Clark' system. The system is named after the nineteenth century London barrister Thomas Hare and the Tasmanian Attorney-General Andrew Inglis Clark, who altered Hare's system and campaigned successfully for its introduction in colonial Tasmania. The Hare-Clark system is a 'quota-preferential' system. This means that successful candidates must win a quota of all the valid votes cast and that preferences from other candidates can be included in a winning candidate's quota.

Three main methods of voting are used in Australia's Hare-Clark systems. This requires voters to indicate their preferences for all of the candidates on the ballot paper. This can be a complicated task, especially when a large number of candidates stand. In the 2010 Senate election, for example, 84 candidates nominated for the six places in contract to NSW.

The complication of having to fill in a large number of preferences in Senate elections has been dealt with by allowing voters simply to indicate with a '1' which party or group they want to vote for in proportional representation elections. This method of voting was introduced in 1984, to reduce mistakes on ballot papers. It is often called 'above the line' voting, because the registered parties' names appear on the ballot paper above a thick line separating them from the names of the individual candidates, which appear 'below the line'. Prior to polling day, parties register the way that they want the preferences of voters who vote for them above the line to be distributed. Voters can vote above the line, or else fill out preferences in all the boxes 'below the line'. Voting above the line is extremely popular in Senate elections, with around 95 per cent of voters using this method and only five per cent preferring the older 'below the line' method. Variations of these 'above' and 'below' the line options are used in state upper house elections in New South Wales, Victoria, South Australia and Western Australia.

## QUOTAS

Hare-Clark quotas are calculated by dividing the number of valid votes by one more than the number of places to be filled, and then adding one vote to the result. The size of the quota is therefore determined by the number of places to be filled and the number of valid votes. In the 2010 Senate election, the quota that candidates in New South Wales had to reach to be elected was as follows:

$$\frac{\text{4,610,795 valid votes}}{\text{6 Senate places + 1}} + 1 = \text{a quota of 593,218 votes}$$

In the 2011 New South Wales Legislative Council elections, the quota to be reached by successful candidates was as follows:

$$\frac{\text{3,948,985 valid votes}}{\text{21 Legislative Council places + 1}} + 1 = \text{a quota of 179,501 votes}$$

Most of the difference in these New South Wales quotas is explained by the difference in the number of places to be filled in each election (six for the Senate, 21 for the Legislative Council). In percentage terms, the quota for a Half Senate election is approximately 14.3 per cent of the overall vote, while for the New South Wales Legislative Council it is approximately 4.5 per cent.

## HARE-CLARK VOTE COUNTING

Vote-counting for Hare-Clark systems is complicated. It has three main stages. The first stage is to determine which candidates have a quota or more of first preference votes. The first candidate in the Senate groups put forward by the Labor and Coalition parties always get more than a full quota in each state at Senate elections. In 2010, for example, the first candidate in the Coalition group, Concetta Fierravanti-Wells, won 1,610,385 first preference votes, or 2.71 quotas. Most of these votes were cast for the Coalition above the line. John Faulkner, the first candidate in the Labor group for New South Wales, won 1,515,446 votes, or 2.55 quotas. Fierravanti-Wells and Faulkner were declared elected.

The second stage in the count is to distribute the surplus votes won by candidates like Fierravanti-Wells and Faulkner; that is, any votes over a quota that they do not need to get them elected. These surplus votes are transferred according to second preferences using a 'transfer value' to allocate them to other candidates. The transfer value is the total number of votes won by a candidate, minus the quota, divided by the original total. For Fierravanti-Wells, this transfer value was:

$$\frac{1{,}610{,}385 - 593{,}218}{1{,}610{,}385} = 0.632$$

All the second preferences of voters who gave their first preference to Faulkner were then multiplied by 0.608 to determine how many votes should go to which other candidates. As a result, the second candidate on the Labor group, Matthew Thistlethwaite, was elected. The same process was carried out with Coalition votes, resulting in the election of the second Coalition candidate, Bill Heffernan.

Thistlethwaite and Heffernan both now had surplus votes. In cases like these, the surplus votes are again distributed using newly-calculated transfer values. In 2010, this process added to the votes of the third Labor and Coalition candidates but did not give them enough votes for a quota. Two Senate places for New South Wales thus remained unfilled at this point in the count.

The third stage of the Senate count is to eliminate the most unpopular of the remaining candidates in turn and distribute their preferences to other candidates, as in House of Representatives counts. Many of the remaining candidates often only have a small number of votes, meaning that a large number have to be excluded before another candidate is elected. In 2010, after 259 counts, the third Coalition candidate, Fiona Nash, was elected on preferences. After 271 counts, the Greens Lee Rhiannon was elected to the final seat.

Proportional representation elections produce parliamentary houses that more accurately reflect the diversity of opinion in the electorate than houses based on first-past-the-post or single member preferential or optional preferential systems. The greater proportionality of Hare-Clark systems can be seen by comparing votes and seats won for the House of Representatives and the Senate in 2010 (see table, below). The Greens won just one of the 150 House of Representatives seats with 11.8 per cent of the vote, while Labor won 48 per cent of the seats with just 38 per cent of the vote. The Senate result better reflects the distribution of first preference votes. The over-representation of major parties is reduced and the Greens won as many Senate seats as their votes suggested they should. The same pattern occurs in state parliaments in which one house uses single member preferential voting and the other a version of proportional representation.

**FIRST PREFERENCE VOTES AND SEATS WON IN THE 2010 FEDERAL ELECTION**

| | House of Representatives | | Senate | |
|---|---|---|---|---|
| Party | Votes (%) | Seats (%) | Votes (%) | Seats (%) |
| Lib-Nat Coalition | 43.6 | 48.7 | 38.3 | 45.0 |
| Labor | 38.0 | 48.0 | 35.1 | 37.5 |
| Greens | 11.8 | 0.7 | 13.1 | 15.0 |
| Others | 6.6 | 2.7 | 13.5 | 2.5 |

### *Questions for discussion*

1. Why has single member preferential voting generally been chosen over proportional representation voting for lower house elections in Australia?
2. Which of the voting methods outlined above do you think is best? Why?

## FORMAL AND INFORMAL VOTES

Ballot papers have to be marked according to the laws governing voting before they are accepted as 'formal' or valid votes. Ballot papers that are not marked according to the rules are deemed 'informal' and are not included in the count to see who is elected.

While some citizens deliberately cast informal votes, not marking the ballot paper, or marking it incorrectly, most informal voting is caused by misunderstandings about the rules. Confusion among voters is undoubtedly heightened by the fact that they often have to vote according to different methods at Commonwealth, state or territory and local elections.

Australia's electoral laws allow various degrees of latitude for ballot papers that are not filled in entirely correctly but where a voter's intention is clear. While the *Commonwealth Electoral Act* specifies, for example, that House of Representatives votes must include a full list of preferences, it allows votes to be counted if a final preference is missing. Similarly, Senate ballot papers on which more than nine candidates appear are counted as formal if at least 90 per cent of the squares on the ballot paper are numbered.

Laws regarding informal voting are sometimes controversial, particularly when differences between state and Commonwealth laws cause confusion among voters. In 1990, for example, the New South Wales Coalition Government of Nick Greiner legislated to make ticks and crosses on ballot papers informal. A single tick or cross on a ballot paper had previously been counted as a formal vote indicating one preference under New South Wales's optional preferential voting system. The move to make ticks and crosses informal produced a higher than usual informal vote at the 1991 state election. This high level of informal voting was widely seen as disadvantaging the Labor Party. Labor amended the state legislation to re-allow tick and cross votes after it won office in 1995.

## LEGAL DISPUTES OVER ELECTIONS

As has already been mentioned, the courts can become involved in elections at various stages, including the registration of parties, candidate preselections, voter enrolments and disputes between candidates during campaigns.

Legal challenges to the outcomes of Australian elections are heard by the Court of Disputed Returns, which is the High Court, the Federal Court or the relevant state or territory Supreme Court. Petitions to the Court of Disputed Returns have to be filed by a candidate or voter in the election within 40 days of the return of the writs officially announcing the election results. The Court is required to deal with the petitions speedily.

Most elections produce petitions to the Court of Disputed Returns on a range of matters that might have affected the result. These include the eligibility of successful candidates and irregularities in the handling and counting of votes. While most petitions are not upheld, those that are upheld may result in by-elections or casual vacancies (see page 2).

# Further information

The **Legal information Access Centre (LIAC)** in the State Library offers a free service to help you find information about the law, including cases and legislation. See the back cover for details.


Visit LIAC's ***Find Legal Answers*** website:
**www.legalanswers.sl.nsw.gov.au**

You will find the ***Legal Studies Research*** guide under the 'HSC Legal Studies' tab.

Use our ***HSC Legal Studies News Watch*** blog to find the latest information:
**http://blog.sl.nsw.gov.au/hsc_legal_studies/**

## Australian Electoral Commission

**www.aec.gov.au**

Information and forms covering a range of aspects of Australian elections, including enrolment. The AEC also provides up to date information on many aspects of federal elections, as well as electoral maps and recent federal election and by-election results. Links to relevant legislation, including the *Commonwealth Electoral Act 1918* as well as to each of the state and territory electoral commissions.

General telephone inquiries: 13 23 26

## New South Wales Electoral Commission

**www.elections.nsw.gov.au**

Website has a wide range of information including an enrolment verification tool and information about electoral offences, NSW electoral history, electoral boundaries etc.

Telephone 1300 135 736

## Electoral Council of Australia

**www.eca.gov.au**

Website of the consultative council of Australian electoral commissioners and chief electoral officers. Contains good up-to-date comparative material on state and territory elections. Lists the main electoral legislation for each state and territory. Information updates available via email.

## Parliament of Australia

**www.aph.gov.au**

Comprehensive information on the Australian Parliament includes information on each current senator and member of the House of Representatives.

## ABC Elections

**www.abc.net.au/elections**

A comprehensive site with regularly updated information and analysis provided by Australia's best-known election commentator, Antony Green.

### Directions in Australian Electoral Reform

Norm Kelly (ANU E Press, 2012). A good discussion of recent and proposed reforms to Australian electoral administration. Available as a free download from http://epress.anu.edu.au/titles/directions-in-australian-electoral-reform

### Julia 2010: The Caretaker Election

Edited by Marian Simms and John Wanna (ANU E Press, 2012). A comprehensive account of the 2010 Federal Election by political scientists and practitioners. Available as a free download from http://epress.anu.edu.au/titles/julia-2010-the-caretaker-election

### From Carr to Keneally

Edited by David Clune and Rodney Smith (Allen and Unwin, 2012). Includes extensive discussion of NSW election rules and the 2011 NSW election. Available in the State Library of NSW.

### The Australian Electoral System

David Farrell and Ian McAllister (UNSW Press, 2005). An overview of the development of Australian elections. Available in the State Library of NSW.

### The Australian Voter: 50 Years of Change

Ian McAllister (UNSW Press, 2011). Discussion of Australian attitudes toward voting and the forces that make them vote the ways they do. Available in the State Library of NSW.

STATE LIBRARY®
NEW SOUTH WALES

HOT TOPICS
LEGAL ISSUES IN PLAIN LANGUAGE

ABN 19 665 924 697

# Order form

| | | |
|---|---|---|
| ☐ | 2013 annual subscription (issues 84-87) | $82.50 |
| ☐ | 2012 issues 80-83 | $82.50 |
| ☐ | Second subscription for the same year | $55.00 |
| ☐ | Single issue (please specify) | $22.00 |
| ☐ | All available issues | $330.00 |

*All prices include GST* Total $

Please specify Topic title/s below:

.....

.....

Organisation: .....

Name or department: .....

Address: .....

.....

Tel: ..... Fax: .....

Email: .....

## PAYMENT OPTIONS

Please debit my:

☐ Amex ☐ VISA ☐ MasterCard ☐ BankCard

Card no: .....

Expiry date: .....

Name on card: .....

Signature: .....

☐ Enclosed is my cheque/money order made out to the **Library Council of NSW**

Send to: Legal Information Access Centre
State Library of NSW, Macquarie Street
Sydney NSW 2000 Australia

## CURRENT ISSUES

**84 Voting and elections**
Over a 3-4 year cycle, Australians vote for representatives in legislative bodies at national, state and local levels – each election will be based on different laws. This issue explains the key features of our electoral laws, main differences between laws, who can vote, who can be an election candidate and how votes are counted.

**83 Consumer law**
This issue looks at the new national consumer legislation, the Australian Consumer law (ACL), which provides new laws relating to product safety, unfair contract terms, national consumer guarantees, door-to-door sales, lay-by agreements and information standards for services as well as products. The issue looks at the complexity of creating this national legislation and what the changes mean.

**82 Families**
This issue looks at the different concepts attached to the idea of 'family'. Some families are vulnerable and require more support, while some undergo changes such as separation, divorce and repartnering. it looks at money and property after separation, child support, adoption and courts dealing with family issues.

**81 Child care and protection**
Responsibility for decisions about a child's health, schooling and cultural upbringing in Australia generally lies with parents; but when families cannot provide adequate care and protection for their children, the State may intervene in various ways. This issue discusses Australia's obligations to implement and report under the UN Convention on the Rights of the Child, as well as parental responsibility, children in out-of home care and initiatives to improve protection for children.

**80 International humanitarian law**
IHL is the branch of international law that deals with armed conflict. It seeks to place limitation on the damaging effects of armed conflict especially on the vulnerable and to impose restrictions on the means and methods of warfare that are permissible.

**79 Australian legal system**
An overview of the elements of our system and how it developed, covering how law is made, what the law deals with and the roles of the legislature, judiciary and executive. Information on the Australian legal system is rarely to be found in a single publication and in a reader-friendly accessible format.

## OTHER ISSUES

78 You and your lawyer, 77 Refugees, 76 Employment and the law, 75 Discrimination, 74 Animal law, 73 Young people and crime, 72 Consumer credit, 71 Courts, 70 Cyberlaw, 69 International law, 68 Indigenous peoples, 67 Prisoners, 66 Domestic violence, 64 Health and the law, 63 Climate change, 58 Terrorism, 57 Shelter, 56 Sexual assault, 55 Sentencing, 54 Bill of rights, 53 Same-sex families, 52 Copyright, 51 Personal injury.

All other issues have now been withdrawn.

## ENQUIRIES

**Editor, Hot Topics, LIAC Sydney**
**Tel: 61 2 9273 1645**
**Fax: 61 2 9273 1250**
**Email: liac@sl.nsw.gov.au**
**www.legalanswers.sl.nsw.gov.au**

# www.legalanswers.sl.nsw.gov.au

The State Library of NSW is a statutory authority of, and principally funded by, the NSW State Government

## Hot Topics is published by the Legal Information Access Centre (LIAC)

The Legal Information Access Centre (LIAC) is a free library-based information service for all members of the community in NSW. The service is based in the State Library of New South Wales. LIAC also manages the Find Legal Answers service available through the statewide public library network (nearly 400 locations) and online.

LIAC is an iniative of the State Library of NSW and the Law and Justice Foundation of NSW, jointly funded by the Library and the Public Purpose Fund.

Contact LIAC for help in finding answers to your legal questions.


### Legal Information Access Centre

State Library of NSW
Macquarie Street Sydney NSW 2000
Phone: (02) 9273 1558
Fax: (02) 9273 1250
www.legalanswers.sl.nsw.gov.au

### Law librarians to assist

Monday to Friday 10 am to 5 pm
Sunday 1.30 pm to 5 pm