



**ELECTORAL REGULATION RESEARCH NETWORK/DEMOCRATIC
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ISSUES FOR ELECTORAL REGULATORS

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Electoral regulators have two prime functions.

First, the public function: to administer the Electoral Act, and the electoral processes.

In my long experience, I remain convinced that this function is carried out superbly well.

Second, the advice function, advising parliament and government about the Act and the processes, and recommending reforms.

The final decision on such advice is solely the responsibility of the parliament and the government.

My theme concerns the second function. I suggest that regulators could consider strengthening their advice.

The grounds for this rest on the following:

Electoral Commissions are independent; They contain expertise on electoral systems, processes and principles; They are perfectly suited to assess the quality of electoral systems in relation to democracy; Their advice to governments and parliaments can be the spark for further reforms on the basis of democratic principles.

It follows that Commissions should be granted further funding to support the research which will be essential for such advice to be developed.

To clarify this, some case studies.

1. “Compulsory voting”

Under the Commonwealth Act:

It shall be the duty of every elector to vote at each election.

... guilty of an offence if the elector fails to vote ...

... there, in private, mark his or her vote on the ballot paper.

The keys to the essential problem for regulators are the definition of “vote”, and the requirement to mark the ballot paper. It is reasonable to assume that the “duty” to vote essentially entails the marking of a ballot paper.

But this establishes a requirement which cannot be enforced. A secret ballot guarantees that. In other words, there is no way that an election regulator can enforce a compulsory vote.

Under the South Australian Act:

An elector who leaves the ballot paper unmarked but who otherwise observes the formalities of voting is not in breach of the duty.

This is a key difference, and allows the “formalities” to be policed. But it recognises that the act of marking the ballot paper cannot be.

Any law which uses a term such as “compulsory voting”, which cannot be enforced, is a nonsense law. So regulators have to regulate a clause which cannot be regulated! In terms of democracy, the law is clearly an ass.

2. Compulsory preferences

This requirement in the Acts should be abolished. It requires electors to give preferences to candidates who they may strongly oppose. As such, it does not accord with democratic principles, which hold that elections should offer the people the widest possible choices.

Governments and parliaments should be strongly advised that this law is not democratic.

3. Above the line voting

This was introduced as a possible method to minimise informal voting. It has certainly done so, but in the process it has offended democratic principles. Its main offence is that it does not allow electors to preferentially support individual candidates. As such, it is a restriction of choice.

Governments and parliaments should be advised that a modified form of optional preferential voting – the necessity for a formal ballot to show preferences at least to the number of vacant seats (with the right of the elector to continue with further preferences) - would more reflect democratic principles.

Further, there is insufficient education of the voters about the “tickets” which are used to allocate preferences. The posters showing these are not sufficient in terms of the obligation to inform and educate in a democracy.

4. South Australian “Ticket Vote”

This is a serious offence against every principle of democracy in relation to elections.

It allows an informal vote to be transformed into a formal vote, without any consultation with the voter, solely for the benefit of the party concerned.

This is simply unacceptable in a democracy.

The corollary is a foolish law. Under a “ticket” vote, marking just one preference on a ballot paper for a candidate or party which has registered a ticket, is translated into a formal vote. But the Act (S 126) states that a person shall “not publicly advocate that a voter should mark the ballot paper otherwise than” with full preferences. But if a ticket vote is legal in that preferences are added, then this stricture again offends democracy.

5. Truth in political advertising

It is a basic premise of democracy that the electors should have an equivalent “consumer protection” as the public does in its transactions in the commercial and business world.

South Australia does have a “truth” clause in the Act. But this was found to be insufficient to deal with a case of misleading advertising in the 2010 election. This clause needs to be strengthened, and the regulators should make this clear to the government and parliament.

In 1984, a “truth” clause in the amended Australian Electoral Bill was deleted by the parliament. The government and parliament should be advised to restore this.

These (and other case studies which could have been included) raise two issues for election regulators.

First, regulators are required to enforce a law which is either nonsense (compulsory voting), or which offends democratic principles. That should not be required of any regulator.

Second, the regulators have the responsibility to advise parliaments and governments that such laws, as passed by the parliaments, offend democratic principles.