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CAMPAIGNS AND REGULATION: ONE HUNDRED YEARS ON

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Abstract

This working paper reviews the Commonwealth Electoral Act 1918 by considering five particular characteristics of the Act which have influenced campaigning by the political parties (the Act's racist eligibility requirements; its national and uniform scope; its relatively light regulatory touch; its strongly partisan character; and its failed effort to control campaign finance).

Electoral rules matter. As that pioneering scholar of Australian politics and elections L.F. Crisp observed in 1955, electoral legislation creates “the framework within which the struggle for office and power goes on.” Electoral rules, he further suggested, may influence the outcome of that struggle between the contending parties or groups – and may even contribute in some degree to whether the nation is to have a two-party or a multi-party system (Crisp, 1955, p. 207). The centenary of the Commonwealth Electoral Act 1918 provides an opportunity to test the continuing validity of Crisp's mid-century observation.

The electoral framework created by the Australian Parliament was flawed, incomplete, out-dated and profoundly racist. Perhaps surprisingly however it has, much amended, provided a durable and effective framework for party campaigning – “the struggle for office and power” - and shaped outcomes both of individual elections and at a more systemic level. This is as Crisp predicted. Contemporary observers will also note, with Crisp, that the precise provisions of the Act have also been ‘frequent bones of contention.’ In the shadow of the Armistice that ended the Great War, the 1918 Act was shaped in highly partisan conditions and, introduced only after fierce parliamentary hostilities between the Nationalise Government and the Labor Opposition.

Against this background, this paper will consider in turn five particular characteristics of the Act which have influenced campaigning by the political parties:

- the Act's racist eligibility requirements;
- its national and uniform scope;
- its relatively light regulatory touch;
- its strongly partisan character; and
- its failed effort to control campaign finance.

The Act's racist eligibility requirements

Section 39 of the Commonwealth Electoral Act 1918 is as egregious a policy document as anything produced under the banner of White Australia. The Section deals with eligibility requirements for enrolment and provides that all men and women aged 21 or more shall be entitled to enrol and vote in elections for the Senate and House of Representatives, subject to certain disqualifications.

Those of unsound mind, those attainted of treason and those imprisoned for one year or longer are disqualified under sub-section 4. A further subsection then disqualifies the original and continuing inhabitants of this land. It does so by bundling indigenous

Australians together with a hemispheric sweep of other non-white people, declaring that: ‘no aboriginal native of Australia, Asia, Africa and the Islands of the Pacific (except New Zealand)’ shall be entitled to have his name placed or retained on any roll or to vote at any election.² Thus rather than wholeheartedly celebrating the durability of the Act, we must recognise that the framework it created limited electoral competition to a contest for white votes.

Second, the Act was distinctive in its truly uniform and national scope

Since Federation, a hodgepodge of federal electoral legislation had evolved at the Commonwealth level, alongside the diverse practices of the colonies-turned-states. The Commonwealth Electoral Act 1918 was an act of consolidation, repealing most of the previous federal legislation and re-enacting most of them in a single piece of legislation. In addition, it introduced preferential voting for elections for the House of Representatives.

The author of this Act is Paddy Glynn, the minister for home and territories in the Billy Hughes-led Nationalist government (O’Collins, 1965, 1983). Glynn was a lawyer and graduate of Trinity College Dublin who never lost his Irish brogue. In South Australian politics he had become something of a novelty, a Catholic Free Trader. During the Constitutional Conventions he had contributed the reference in the preamble to God. By 1918, he was – as he reminded the House during the second reading speech - the only surviving member of the Conventions still sitting in parliament.

In his second reading speech on 4 October 1918, Glynn told the House of Representatives that the aim of the new consolidated Act ought to be ‘legislative and administrative uniformity; simplicity, economy, and clearness.’ He quoted himself in the 1902 debate about the first electoral legislation, when he had called for one Electoral Act that covered the Commonwealth and the States, one principle of division of boundaries, one suffrage, one set of administrative officials, one electoral roll, one mode of election and one code of electoral offences (Glynn, 1918).

His 1918 Act achieved most of those goals. The Act cut the states out of any but a supporting role in federal elections. It eliminated the transitional state-based arrangements adopted after the constitution. It co-opted states by adopting some of their practices on what we would call ‘best practice’ basis. And most importantly it ensured that all electoral activities in all of the 75 House of Representatives electorates and their 1050 subdivisions, were conducted by a hierarchy of Commonwealth returning officers and registrars, ultimately responsible to the Chief Electoral Officer for the Commonwealth, and paid for by the Commonwealth.

In effect, uniformity meant nationalisation. In Australia, the Commonwealth created for itself, and readily shouldered, a positive obligation to create and manage the electoral machinery for the nation. As Glynn put it in his second reading speech,

² The disqualification of indigenous Australians, which reflected in full the original provisions of the Franchise Act 1902, was gradually unwound in 1949 and 1962 but complete equality of Australian indigenous voters – that is, their compulsory enrolment onto a colour-blind electoral roll – was not achieved for 65 years, with the Hawke government amendments of 1983 (Norberry & Williams, 2002).

Australia had established and operated on “the principle that the expense, as well as the provision, of electoral machinery is a legitimate obligation of the State.”

This national scope safeguarded the electoral system from parochial meddling by state governments or municipal officials in any aspect of enrolment, voting or vote counting. It likewise prevented party officials from becoming involved in administering the election, keeping them focussed on winning the vote not rorting it. The contrast with the radically decentralised, fragmented and party-infused American system is stark (Hughes and Costar, 2006).

It also had profound, though delayed, implications for Australia’s nascent political parties and for the way they campaigned. The element of compulsion in enrolment – and, after 1924, in voting – delivered knock-on financial savings to the parties, especially saving them the expense and effort of ‘getting out the vote.’ More generally, the Act helped orient to the parties to the national arena. Australian parties at the time, and for decades after, were strongly federal structures with powerful state branches and weak centres. Just three years earlier – that is, fifteen years after federation - the Australian Labor Party had created the first national governing structure in an Australian party. It created a Federal Executive made up of representatives of its state branches and appointed its first national party official, federal secretary Archibald Stewart. The reality is that this federal apparatus would remain a poor relative of its wealthier and much more powerful state branches until the 1960s. It was a similar story on the conservative side of politics after the creation of the Liberal Party in the 1940s: its Federal Secretariat and federal director were better resourced than their ALP counterparts but state branches, especially in NSW and Victoria, basically held the purse strings and power.

So it was not until the late 1960s, leading up to Labor’s ‘It’s Time’ campaign in 1972 and the Liberals’ ‘Turn on the Lights’ in 1975, that the parties learned to execute a truly national centralised campaign (Mills, 2014). In this respect, the 1918 Act was more than 50 years ahead of the party organisations. Yet the national electoral act constituted an early step towards the centralisation and professionalisation of Australian party organisation and campaign management.

Third, the Act has a relatively light regulatory touch on candidates and parties

The type of election campaign envisaged by the Act reflected the prevailing communications and marketing technologies. Candidates are thought to run campaigns of public meetings, newspaper ads and leaflets; they send telegrams and hire committee rooms. But the Act does not prescribe any such practices and leaves it up to candidates to determine the details. Nor does the Act seek to regulate what candidates might say, to whom they say it, or when and where they say it.

The Act is much more prescriptive in relation to election administrators and voters than it is in relation to candidates. For example, it meticulously prescribes the elaborate procedures for updating the electoral roll and ensuring its accuracy (Sections 43-51) and sets out in pedantic detail the process for applying for, witnessing, verifying, casting and counting postal votes (Sections 85-97). It requires each voting compartment of every polling booth to be furnished with a pencil for the use of the voters (Section 101). It Those eligible for enrolment who fail to enrol

within 21 days is guilty of an offence, punishable by a fine of ten shillings, rising to £2 for repeat offenders (Section 42(2)). Voters for House elections “shall” place a number 1, 2, 3 and so on beside the names of “all” the candidates, in order of their preference and ballots not so marked are to be declared informal and not included in the count (Sections 124 (a) and 133 (c)). Rabblers engaging in “disorderly conduct” at a public meeting or rally may be fined £5 or one months imprisonment (S177).

It is a kind of tight-loose system, where the election administrators and the voters are tightly managed, but those seeking election are largely allowed to improvise as their strategy suits them. This is surely the right approach. Let the contending parties contend, let the campaigners campaign, and let the voters decide the outcome (Orr, 2010, p. Chapter 7). It follows that the Act is technology-neutral. In fact in some respects it was already out of date in 1918. Candidates were banned (Section 57) from supplying voters with “horse or carriage hire whilst going to or returning from the poll” – penalty £200 or one year’s imprisonment. By 1918 many campaigns were able to hire motorcars for this precise purpose.³

This laissez faire, technology-neutral approach allowed the Act to accommodate the continuing waves of change in media and marketing communications, as public meetings and telegrams gave way to new media for campaign messaging and news coverage: newspapers, radio, television, and digital. The Act’s lack of prescriptive detail doubtless helps explain its durability.

Further, to the extent that the Act did make specific rules covering campaign activity, they have in many cases been superseded by developments in party campaign activity. The original campaign timetable of 37 days between the issue of writs and polling day (Sections 62-63) has been overrun by the so-called ‘permanent campaign’ stretching over a much longer pre-campaign period. The original requirement that elections be held on a Saturday (Section 64) – designed for the convenience of working men – has also been undermined by the introduction of pre-polling. *Weekday* voting is now a convenience for working people, and parties compete to locate and persuade voters at pre-poll voting centres (Smith et al., 2018).

Yet in one particular respect, an original element of the Act has survived to empower dynamic change in campaign practices. Compulsory enrolment created an excellent electoral roll, to which voters provided their surname, ‘Christian’ name, residential address, occupation and sex (Section 31). This single national roll was continuously updated and available for public inspection. The legislators of 1918 could not have imagined how helpful this data would prove for the later development of targeted mobilisation campaigns. Access to the electoral roll has allowed parties to aggregate vast databases of personal details of individual voters, powering direct mail campaigns in the 1980s and the fieldwork campaigning of the current decade (Mills, 2014).

³ This anachronism also remained in the Act until the 1980s.

Fourth, the Act was the product of partisan calculation

Crisp's contention that electoral regulations are 'frequent bones of contention' serves to remind us that the 1918 Act was the product not of statesmen but of flesh-and-blood politicians. To be sure, both the Nationalist Government and the Labor Opposition were conscious of their responsibility to protect and promote democratic practice in Australia. But it is clear they wanted to do so on terms that were as favourable as possible to their own partisan electoral interests. The charged political atmosphere – in the wake of the conscription referendums, the Labor split and the emergence of Labor 'rat' Billy Hughes as Prime Minister of the Nationalist government – ensured that this legislation was framed and debate through a partisan lens. This was especially the case in relation to the Act's banner achievement, the introduction of preferential voting.

Under preferential voting, versions of which had operated in some state elections, voters were required to express a preference for all candidates by placing a number, from '1' onwards, against each candidate's name.⁴ Where no candidate recorded a majority on primary votes alone, these preferential votes were allocated until one candidate did emerge with a majority of aggregate (first preference plus contingent) votes. This system permitted a candidate with the largest number of primary votes to be defeated on preferences. By contrast, previous federal elections had operated with First Past the Post (FPP) voting, whereby voters placed an 'x' against the name of one candidate; whichever candidate had the highest tally of votes was declared the winner. This system permitted a candidate to win with a minority of votes. Given the single member structure of electorates of the Australian House of Representatives, the two voting systems thus expressed contrasting concepts of majoritarian representation.

Such philosophical considerations were not entirely absent from the parliamentary debate. Glynn asserted that the purpose of the legislation was to elect a parliament, under the single-seat system, which reflects public opinion as perfectly as possible. Under preferential voting, "the candidate is returned by an absolute majority of operative votes, and he then represents the majority of the division."

The switch from FPP to preferential voting was in reality however driven by more pragmatic and partisan calculation (Crisp, 1949, pp. 65-70; Sawyer, 1956, p. 168; Souter, 1988, pp. 164-166). In 1918 the Nationalists were concerned about the emergence of new anti-Labor parties, particularly a farmers' movement (forerunner of the Country Party). Under FPP, such groupings threatened to splinter the conservative vote and place safe Nationalist seats in jeopardy. Preferential voting would avert this threat, by allowing a farmers' party voter to cast a second preference for the Nationalists without damage to the overall anti-Labor cause. In May 1918, during the by-election campaign for Flinders in Victoria, the farmers group had railroaded the Nationalists into promising to introduce preferential voting.

With comparable self-interest, Labor saw merit in FPP. Indeed, with great drama, right in the middle of the second reading debate in October 1918, Labor won a by-election in Swan, a very safe Nationalist seat, which had been brought about by the death of Sir John Forrest. The Nationalist candidate was opposed by a Country Party

⁴ In elections contested by more than two candidates

candidate and an independent – prime conditions for a split in the anti-Labor vote. Labor's candidate, a young Gallipoli veteran Ed Corboy, won the seat with 34.4% of the vote. Four days later, the death of Chester Manifold, the member for another reliable Nationalist seat, Corangamite, opened up the opportunity for another Labor FPP triumph before the end of the year. Labor leader Frank Tudor disparaged preferential voting with betting parlance - as 'a win and a place' method of voting (Tudor, 1918).

Beneath these electoral considerations lay another, more subterranean, level of party politics. One of the reasons for Labor's parliamentary success since its foundation had been its organisational discipline, including its practice of preselecting and endorsing its candidates. Pre-selection allowed Labor to concentrate its vote and to staunch leakage to splitters or spoilers on the right or left – useful assets under FPP and critical in the aftermath of the Hughes conscription split. The conservatives disparaged this as the 'caucus' method and regarded it as a pernicious party limit on the breadth of choice available to voters.⁵ Those among the Hughes splitters who had joined the Nationalist government and who still regarded themselves as 'Labor' men also regarded it as a threat to their continued incumbency.

Glynn saw preferential voting as an opportunity for a radical remedy to these defects in the Opposition party – while also fulfilling the government's promise to the farmers. He imagined that preferential voting would allow all potential candidates to run for office, with or without party pre-selection; the voters could decide by expressing their preferences among the full list of available candidates:

The Party choice is made under this system, not through the Caucus, but at the same time as the choice at the poll, and the electors there may express their preferences between men of their own party. ... What we propose to do is to afford an opportunity to have both choices of parties and electors made at the election.

In Glynn's argument, preferential voting was an all-purpose all-party cure-all:

(It) provides a remedy for a party split, gives the result of a second poll of the same voters, and scope for the expression of wider electoral opinion than any Caucus can give, since it enables all the electors to hear before giving party support to the candidates.

One Nationalist backbencher, Arthur Rodgers (Wannon, Vic), even claimed that the Act would 'never prove effective unless it prevents political parties from making a selection within their own organisations.' Glynn recognised that the Commonwealth had no power over internal party operations and could not 'prevent' pre-selections but he hoped to make them redundant:

Mr Blakely (ALP) - Does the honorable gentleman really think that the Government proposal is going to do away with the pre-selection?

⁵ The establishment Melbourne newspaper *The Argus*, as an editorial policy, did not refer to the Labor Party but used the term, 'Caucus Party'.

Mr Glynn - Not necessarily, but I think it the duty of the legislature to afford opportunities adequate for the purpose. What men do outside will depend upon their own wisdom or folly, and we cannot cure that.

Mr Fenton (ALP) - Both political parties will still indulge in pre-selection.

Mr Glynn - Even if they do, that will not to any extent neutralise the efficacy of this method of attaining the same end. What I say is that the method proposed by the Government will permit of the selections by the party taking place under the very same conditions as the selections by the electors.

In addition to Labor's overall reticence about preferential voting, it is this apparent attempt to interfere with its internal affairs that perhaps best explains the heat of the Opposition's response to the bill. Tudor went so far as to accuse the Government of using the bill not to reform the Electoral Act but "for the express purpose of trying to wipe out the Labor party." He shouted this by interjection during Glynn's speech, and he repeated it in his own speech a few days later, over the interjections from the Government side: "My opinion is that it has been designed by the Minister and the Cabinet with the express purpose of trying to injure the party on this side of the House" (Anon., 1918a; Tudor, 1918). In the Senate, Labor leader Albert 'Jupp' Gardiner delivered the longest speech in the history of the Australian Parliament, a marathon 12 hour 40 minute tirade against the bill - which did not defeat the bill but did lead to the outlawing of the filibuster (Souter, 1998, p.167).

Labor saw a further conspiracy in the Act's reintroduction of postal voting. This was somewhat ironic given postal voting had effectively ensured access to the ballot by itinerant bush workers. But Labor now believed it was open to abuse and had abolished postal voting under Fisher Government amendments in 1910, now being repealed. One Labor MP, Arthur Blakely recalled for the House an incident in the 1911 referendums when he had been "shearing on a station above Brewarrina" and the station manager who was also handling the postal ballots tried to influence his vote. Another, Dr William Maloney, complained of "bribery and corruption of the vilest kind" in relation to postal voting in his famous 1903 election defeat - famous because it had gone to the High Court which declared the election void. According to one press report, Labor had also argued that 'servants, gardeners and others employed in the large houses of Toorak and Darling Point were open to pressure that would be impossible if they had to go to a polling booth' (Anon., 1918b).

The debate reveals a strong pattern of partisan division on matters of electoral law. This is not yet 'cartel' behaviour as later presented by Katz and Mair in their influential theory of party structure and behaviour (Katz and Mair, 2009, 1994). Where Katz and Mair would expect to see major parties engage in duopolistic collusion to improve their own positions and prevent the emergence of small parties, the major Australian parties were engaged in a fierce 'winner take all' contest over electoral legislation. Yet the 1918 Act formed a battlefield within this wider inter-party conflict. The parties had adopted positions on voting measures determined largely according to how they understood each method would serve its own electoral position - including in relation to the relative impact of emerging smaller parties. These emerging parties too employed the same logic to determine their policy on

voting methods, supporting preferential voting because it might help them win the occasional seat from the larger parties (Souter, 1998, pps. 164-5).

Fifth, the Act failed in its effort to control campaign finance.

At face value, the 1918 Act made a credible attempt to channel and dam the flow of campaign finance. In today's language, it imposed spending caps, spending limits to eligible expenses, and disclosure. But Part 16 of the 1918 Act, titled 'Limitation of Electoral Expenses,' was fatally flawed and did no such thing.

In brief: campaign spending by each candidate for the House of Representatives was capped at £100 and for each Senate candidate at £250 (Section 145). Eligible expenses were limited, essentially, to printing and stationery and the hiring of halls and advertising the public meeting (Section 146). No one could be employed "as canvasser or committeeman" by the candidate (Section 149). Candidates had to report their expenses publicly, in the form of a statutory declaration, within eight weeks of the election (Section 151).

The Act also sought to control what we would call third party campaigning – that is, spending on behalf of a candidate or party by "every trades union registered or unregistered, organization, association, league, or body of persons" (Section 152). In addition, and new in 1918, newspaper proprietors were to disclose how much advertising they had printed, its cost and who had authorized it (Section 153). These disclosures, then, served to regulate third party spending and could also be used to check against candidate disclosures.

The fatal flaw in this approach is its focus on spending by candidates. The Act understood elections to revolve around individuals, presenting their electoral vision to their fellow citizens and seeking their vote. This was a comfortable fiction, in the Burkean mould of responsible representation. (Glynn in fact twice cites Burke in his speech, lauding him as 'the seer of statesmanship'.) But this was not how elections were conducted in 1918. The missing ingredient is the political parties, of which the candidates were the chosen representatives and on whose leadership, strategic coordination and funding their campaigns depended. Party spending was not covered by the Act.

In 1946 the spending caps were lifted to £250 and £500 for House and Senate candidates respectively; in 1966 they were pedantically translated into decimal currency. But these caps were already unrealistically low, and as campaigns adopted new technologies of communication and adopted new techniques of marketing, their spending steadily increased. With the advent of television advertising as the principal form of election communication, from the early 1970s onwards, spending skyrocketed into the millions. The implications for election campaigning became clear: electoral contestants basically ignored the caps, the limits and the disclosure.

One federal MP, Labor's Dick Klugman, recalled in 1980,

I must admit I have never completed that [disclosure] When I became a member of the parliament [in 1969] and received the form for the first time I

made some inquiries. I was told not to complete it; that there was no penalty attached if I did not do so (Klugman, 1980).

There was indeed a penalty for non-lodgement, including six months imprisonment. But this was a paper tiger.

The matter reached high farce with the Tasmanian state elections of 1979, when most of the defeated candidates threatened to sue the successful ones for having breached their campaign spending limits. With the 1980 election looming, the Fraser Government realised a similar action at the federal level could jeopardise the entire parliament. The Government amended the Act to withdraw the entire section, lethargically appointed a retired public servant to conduct a review, and kicked the problem down the road. With the election of the Hawke Government in 1983, the Act was, at last, overhauled and campaign spending put on a realistic footing with the introduction of public funding and a new regime of disclosure of donations.

Sadly, succeeding years have seen that system progressively undermined: public funding has ballooned; parties' reliance on donations from unions and corporations has increased; campaign spending has ratcheted up arms-race style; and disclosure is a virtually useless procedure. A substantial reform initiative undertaken by then Special Minister of State John Faulkner in 2008 – now ten years ago – foundered in partisan acrimony (Australian Government. Special Minister for State, 2008, 2009).

The Commonwealth Electoral Act remains a stable and functional framework for electoral practice and Australian electoral administration is in safe hands. Its laissez-faire approach has allowed parties the flexibility to conduct robust and largely unregulated campaign debates across all media. Despite the partisanship that attended its introduction, preferential voting (followed in 1924 by compulsory voting) have proven highly durable, distinctive and effective responses to the challenges of majoritarian representation and electoral participation. The Act's failed attempt to regulate campaign finances however was and remains a glaring hole in the framework, requiring further major amendment.

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