

**Submission**

**No 8**

# Administration of the 2011 NSW election and related matters

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**The Conduct of the 2011 New South Wales Election**

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## Timing Problems with the Issue of the Writs

Since the introduction of fixed-term parliaments in 1995, New South Wales has conducted elections with fixed dates for the dissolution of the Legislative Assembly and the day of polling, but with a variable date for the issue of writs.

The date for the expiration of the Legislative Assembly is set in Section 24 of the NSW Constitution Act.

### **24 Duration of Assembly**

- (1) A Legislative Assembly shall, unless sooner dissolved under section 24B, expire on the Friday before the first Saturday in March in the fourth calendar year after the calendar year in which the return of the writs for choosing that Assembly occurred.
- (2) In this section, a reference to a writ does not include a reference to a writ issued because of the failure of an election, including a failure of an election because of its being declared void in accordance with law.

The date for polling is then defined in Section 24A

### **24A Date of general election for Legislative Assembly**

The writs for a general election of Members of the Legislative Assembly must name as the day for the taking of the poll at that general election:

- (a) if the previous Legislative Assembly expired-the fourth Saturday in March next following the expiry, or
- (b) if the previous Legislative Assembly was dissolved-a day that is not later than the fortieth day from the date of the issue of the writs.

Sections 24 and 24A are entrenched provisions and can only be changed by referendum.

The date for the issue of the writs for the election is specified in Section 68 of the Parliamentary Electorates and Elections Act. It allows for up to four days after a dissolution or expiration before writs have to be issued.

### **68 Within what time writs for general elections to be issued and made returnable**

All writs for Assembly general election shall be issued within four clear days after the publication in the Gazette of the proclamation dissolving the Assembly, or after the Assembly has been allowed to expire by effluxion of time, and every such writ shall be made returnable on a day not later than the sixtieth clear day after the date of the issue thereof or on such later day as the Governor may by proclamation in the Gazette direct.

This variable date for the writ creates problems. While the Electoral Commission can publicise the date of the election in advance, it cannot publicise the date for the close of the rolls or close of nominations, as these dates cannot be set until the writ is issued.

New South Wales has Australia's shortest election campaign between dissolution and polling day. This period can be made even shorter if the government chooses to defer the issue of the writs until the last possible moment.

New South Wales also has the largest and most complex upper house ballot paper in the country, another matter that makes the short time frame for NSW elections difficult to administer.

Given the fixed dates that start and end the election period, it makes administrative sense to change the Parliamentary Electorates and Elections Act so that the date for the issue of the writs and the close of nominations are also fixed and determined in advance.

## **Recommendation 1**

### **Section 68 of the Parliamentary Electorates and Elections Act be amended to**

- (1) Fix the date for the issue of writs for a normal quadrennial election to be on the same day as the expiration of the Legislative Assembly**
- (2) That the provisions should also fix the date for the close of nominations.**
- (3) That a similar fixity in date be adopted for elections where an early dissolution occurs or where Section 24B(4) is invoked to vary the date for a quadrennial election.**

## **Registration of Electoral Material**

New South Wales, Victoria and Queensland are the only Australian jurisdictions where election material must be registered. Much of this regulation concerns the content and distribution of how to vote material and recommendations of preferences.

However, while Victoria and Queensland go to considerable effort to make registered material available to the public and to other candidates and parties, the New South Wales regulations makes it nearly impossible to examine registered election material.

The difference in access allowed in the legislation is starkly defined in the relevant Acts.

The registration of how-to-vote material in Queensland is governed by Section 183 of the Electoral Act. Subsection (4) and (5) define access to how-to-vote material.

- (4) Before polling day, the commission must make a how-to-vote card that it has not rejected available for public inspection for free at**
  - (a) the commission's Brisbane office; and**
  - (b) if the how-to-vote card was printed for a candidate, the office of the returning officer for the electoral district being contested by the candidate.**
- (5) On polling day, if the how-to-vote card relates to only 1 electoral district, the commission or returning officer for the district must, to the extent that it is reasonably practicable to do so, make the card available for public inspection for free at each polling place in the district.**

The registration of electoral material in Victoria is governed by Sections 77-82A of that state's Electoral Act. Access is specified in Section 82

**82. Commission to make how-to-vote cards available**

As soon as practicable after registering a how-to-vote card under section 79 or 80, the Commission must-

- (a) make available a copy of that card for inspection at the office of the Commission; and
- (b) publish a copy of that card on an Internet website maintained by the Commission.

Access to registered material in New South Wales is governed by clause 12A of Section 151F of the Parliamentary Electorates and Elections Act. As the extract below shows, this provision seems designed to ensure that registered material is not accessible. It specifies only limited access and at a place that is not convenient for anyone attending a polling place.

(12A) A copy of:

- (a) electoral material registered under this section for a district, and
  - (b) the relevant certificate of registration,
- must be available for inspection at the office of the returning officer for the district during the hours of polling on polling day, and on all days to which the polling is adjourned, at the request of any person enrolled for the district or of any scrutineer.

The NSW provision prevents any access to registered material before polling day. While copies of material must be in polling places to allow polling supervisors to adjudicate on disputes over registered material, access to this material is denied to party workers.

The regulation of how-to-vote material works best if all involved have access to the registered material. The current NSW provisions do not allow such access.

The New South Wales provisions governing how-to-vote material are contained in Sections 151F, 151G and 151GA of the Parliamentary Electorates and Elections Act. The provisions are considerably more complex than those in the Victorian and Queensland Acts. The NSW provisions go into greater detail about what recommendation of preference can and cannot be made, and also define who can make recommendations in both the Assembly and Council.

Rather than the current heavy handed regulation, the Act should be modified to simplify what can and cannot be registered and distributed. It should also allow greater access to the registered material, removing the secrecy that surrounds current registration.

Allowing material to be registered and accessed stands greater chance of allowing voters to understand preference arrangements than does the current provisions.

## **Recommendation 2**

**That Sections 151F to 151GA of the Parliamentary Electorates and Elections Act governing registration of election material be modified to**

- (1) Simplify the provisions governing what can be registered and distributed.**
- (2) Specify that material can be easily accessed before the election and that voters can have access to material on polling day**

### **New Counting Procedures for the Legislative Assembly**

As an election analyst, I would like to congratulate the Electoral Commission on how the new counting procedures for the Legislative Assembly operated for the 2011 election.

At the 2011 election, as at previous elections, the Commission conducted indicative preference counts in polling places on election night between two nominated candidates.

The change made in 2011 was to check-count these totals after polling day, and in certain circumstances, to re-do the indicative counts. The additional accuracy produced by the check counts ensured that reported preference totals in close contests could be relied upon in the days after the election. Unlike at previous elections, there were no dramatic changes between the reported totals by polling place and the final totals after the distribution of preferences.

There has been some criticism of the Electoral Commission for conducted counts between the "wrong" candidates. Most of this criticism concerned choices of candidates in electorates where the winning candidate achieved more than 50% of the first preference vote, so the choice of candidates for the indicative preference count was irrelevant to the result

I feel this criticism is unwarranted. In choosing pairings of candidates, the Electoral Commissioner has to make a judgment on how candidates will poll. The Commissioner does not have perfect judgment on this matter.

The 2011 election was also unusual in the marked decline in support for the Australian Labor Party. This meant that many more Labor candidates were excluded than at past elections. In the normal turn of the political cycle, it is unlikely that Labor candidates would be excluded in as many contests in the future.

The first priority of the Electoral Commission must always be to determine the winning candidate in every contest, and conduct the count with attention to provisions of the relevant Acts so as to ensure the count can withstand any court challenge.

Preference counts that are for information purposes only must have lower priority to the actual count to determine the elected member.

## **Legislative Council Count**

The results of the Legislative Council count were generally well reported by the Electoral Commission, but widely mis-reported by the media and misunderstood by the public.

For the first time since the new Legislative Council ticket voting system was introduced in 2003, preferences made a difference to the result. Independent Pauline Hanson was passed by two candidates on the final exclusion and distribution of preferences, the first time the order of election for candidates had been altered by preferences under the new system.

Misunderstanding was made worse by the enormous 'below-the-line' vote recorded by Pauline Hanson. Under the NSW Electoral Commission's counting procedures, 'below-the-line' votes are not recorded in the tallies until ballot papers are data entered. With one in five of Ms Hanson's ballot papers being 'below the line' votes, this meant that Ms Hanson's vote increased through the count in a manner which looked unusual compared to the pattern of counting for Senate elections.

At Senate elections, the Australian Electoral Commission tallies above and likely formal below the line votes as a batch total per candidate for each polling place. Once data entry of below the line votes begins some of these below-the-line votes prove to be informal, but it means there is an awareness of the real level of vote for a candidate or party at the start of the count

Under the NSW counting procedures, the initial counts are of ticket or 'above the line' votes only, with below the line votes added later. With so many of her votes cast below the line, Ms Hanson's vote rose through the count, where under Senate provisions her vote would probably have stayed the same or declined slightly.

The subsequent court challenge to the result by Ms Hanson created confusion as to whether there was something wrong with the count. I do not believe this to be the case.

What did happen was the race for the final two Legislative Council places was very close. With preferences not under control of candidates and parties at Legislative Council elections, it therefore became more difficult to predict who would win the final vacancy.

The 2011 Legislative Council election was unusual in being so close that preferences always had the potential to change the result. The method in which the Council results were reported understated the final level of support for Pauline Hanson. Even had a different counting method been used, the final result was so close that it was only with the distribution of preferences that the final elected members could be determined.

## **Should a New Legislative Council Ballot Paper be Introduced?**

Of all formal Legislative Council ballot papers admitted to the count at the 2011 election, only 2.25% were below the line votes. 97.75% were above the line votes, with 15.59% being above the line votes with preferences, and 82.16% being single '1' only votes above the line.

Despite the huge size of the Legislative Council ballot paper and its 311 candidates, only the tiniest proportion of voters bothered to make use of the option to choose candidates.

Because of the NSW option to direct preferences above the line, many more ballot papers have to be data entered to conduct the count. Less than 5% of Senate ballot papers are data entered at federal elections, but the number that must be entered in NSW is closer to 20%.

Given the size of the ballot and the requirement to data enter many more above the line votes, perhaps it is time to offer an option to voters. Voters can be given the option to use the current ballot paper if they wish to choose between candidates. Or they can be offered a smaller ballot paper that only lists the parties/groups.

The second ballot paper would be the equivalent of an 'above the line' ballot paper, though perhaps the layout could be vertical for ease of understanding. Given so few voters bother to vote below the line, many people would be happy not to have to manipulate the current giant ballot paper.

An advantage of a smaller party-only ballot paper would be that optical character recognition technology could be used to scan the ballot papers, greatly improving the speed of data entry. Scanning the existing ballot would be nearly impossible given its size.

The ACT already uses scanning technology to scan ballot papers for its Legislative Assembly elections.

Adopting a second ballot paper would require a change to how unaffiliated groups are listed on the ballot paper. At the 2011 election, two groups of Independents contested the election, one headed by John Hatton and a second by Pauline Hanson. Under existing legislation, neither could be identified above the line. Were such an approach repeated with a party/group only ballot paper, both groups would have had no identification on the ballot.

### **Recommendation 3**

**An alternative version of the Legislative Council ballot paper be introduced that permits party/group only voting, and would permit the ballot paper to be scanned.**

### **Recommendation 4**

**If an alternative ballot paper is introduced, the methods of identifying parties and groups on the ballot paper be re-examined.**