

POLLING OFFICIALS THE STRENGTH AND WEAKNESS OF DEMOCRATIC SYSTEMS

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(Australian Electoral Commissioner 2009 - 2014)**

Introduction

In 1863 President Abraham Lincoln in his Gettysburg Address coined one of the most insightful and oft repeated phrases to encapsulate democratic aspirations and systems of representative government:

“.....government of the people, by the people, for the people....”²

With the utmost deference to President Lincoln, this paper suggests that there is a fourth limb that characterises most modern democratic systems. The scale and logistical demands of conducting elections means that they are typically delivered by many thousands of men and women employed for very short periods of time, most no more than a single day every three, four or five years depending upon the constitutional requirements or electoral laws of the country concerned. The inevitable fact that elections can only be delivered **“through”** the individual and collective efforts of large numbers of ordinary men and women drawn from the community represents a fundamental strength of democratic systems. Their involvement provides transparency, credibility and a strong sense of participation in the process that ultimately determines who will be installed as the government of the day to make decisions affecting the lives of the country’s citizens. Yet, as some recent events in Australia (and elsewhere) demonstrate, the involvement of these same men and women from the community represents a challenge for electoral management bodies (EMBs), a potential weakness, with relevance not only to the efficacy of the vast logistical planning associated with the conduct of an election and the perceived integrity of the outcome, but also the design of electoral systems and legislative powers conferred upon EMBs. While much of the research and literature treats these issues independently, this paper also contends that the issues of polling official management, electoral system design and powers conferred on EMBs are very much interrelated.

“Government of the people, by the people, for the people.....through the people”

The scale and logistical demands of modern elections now demands the involvement of thousands of part-time workers. In Australia, the last decade of federal elections has seen the Australian Electoral Commission (AEC) employ in excess of 65 000 polling officials³ on average once every two and half to three years. The numbers employed in other

¹ The views expressed in this paper are those of the author and do not reflect an official view of the Australian Electoral Commission.

² Notwithstanding that many commentators suggest that President Lincoln was paraphrasing what many scholars and theologians had said before him.

³ The term “polling official” is used in this paper to describe those poll workers who are employed for the day of the election only, or for any short term purpose during the conduct of the election, such as the counting of ballots in the ensuing weeks after polling day. The term is not intended to cover full time workers employed continuously by EMBs, although some of the arguments presented in this paper would apply equally to this group of election workers.

jurisdictions are similarly large relative to the local logistical requirements, with the UK, Canada, US and NZ employing respectively 200 000⁴, 230 000⁵, two million⁶ and 18 000⁷ polling officials. The number of poll workers in a vast democracy such as India are even more staggering, with some reports suggesting up to 11 million poll workers employed over the five week election period.⁸

Poll workers are involved in all aspects of an election. Their day typically starts early in the morning, with a short period of time allocated for training before the doors of the polling station are opened to electors. Once polls open, poll workers are involved in a myriad of simple and complex activities associated with the logistics of an election, from issuing of ballots, recording and marking-off voter details on electoral rolls (some paper based, some computer based), (in some cases) examining identification of voters, dealing with voter enquiries from simple to complex, counting ballots, recording, transcribing and communicating results and the general clean up of polling places, often late at night after the votes have been counted. Polling day is never dull - apart from the tasks outlined in electoral legislation, a polling worker can find himself or herself involved in negotiating disputes between opposing candidate workers, managing protestors or removing illegal or offensive electoral material, dealing with emergencies including deaths of voters inside polling stations, or the somewhat comical but nonetheless sensitive (to the elector) issues of lost valuables (such as wedding rings, car keys etc) accidentally dropped into ballot boxes along with the voter's ballot paper.

With such large numbers of polling officials needed to deliver an election once every few years, it is inevitable that only an intermittent work force can be engaged. It would simply be excessively expensive and beyond the means of most country's resources to retain permanently a large full time work force that is only employed at such infrequent intervals, notwithstanding the obvious advantages of doing so, especially from a training and cultural perspective. Not only is citizen involvement a practical necessity to deliver an election, it also provides one of the greatest strengths of western democratic systems - citizen involvement is essential to the conduct of an open, accurate and fair election. Elections therefore are delivered **through** the people.

Rather than a homogenous group, polling official demographics suggest a complex workforce that presents unique challenges for an EMB. In Australia, of the temporary workforce employed in the 2013 Federal election:⁹

⁴ Report on the "Costs of the May 2011 referendum on the UK Parliamentary voting system", December 2012, UK Electoral Commission.

⁵ Report of the Chief Electoral Officer of Canada on the 41st general election of May 2, 2011, Appendix, Table 1.

⁶ The PEW Centre on the States, election.org, Briefing: Helping Americans Vote: Poll Workers, September 2007.

⁷ NZ Electoral Commission. website.

⁸ While it is not the intention of this paper to make comparisons of the number of polling officials between jurisdictions, it is interesting to note the variation in polling worker numbers per electors: Australia (AEC) - one polling official per 211 electors; US - one polling official per 65 electors; Canada - one polling official per 104 electors (or one to 60 if restricted to the number who actually voted); NZ - one polling official per 208 electors; India - one polling official per 75 electors; UK - one polling official per 225 electors. The ratio of poll workers to electors in the 2011 NSW State Election was one polling official per 175 electors.

⁹ AEC submission to JSCCEM 2013, 7 May 2014.

- only slightly more than half, 52.9 per cent of polling staff recruited, indicated that they had previous election experience, with 47.2 per cent employed by the AEC at the last 2010 election;
- 32.8 percent were under the age of 40 years, whilst 13.6 per cent were 65 years of age or older (10.7 per cent in 2010);
- 64.9 per cent of polling officials and other election staff were female and 35.1 per cent were male; and
- of the persons employed as Officers-In-Charge (of a polling station) 51.6 per cent were female and 48.4 per cent were male.

The stereotypical profile of polling officials being largely comprised of retired workers is not borne out by these statistics, with only slightly more than 10 per cent being 65 years or older. Allowing for the large number (39 per cent) who did not disclose their occupation in recruitment surveys, the AEC reported that 34 per cent were not in paid employment, eight per cent were described as “education professionals” and five per cent were local, state or commonwealth employees. The profile that emerges therefore, at least in Australia, is of a predominantly female workforce seeking opportunities to blend responsibilities at home for child care etc with part-time employment bringing in a few extra dollars to supplement the family income. And significantly for the AEC, the consistent picture that emerges is that one in two polling officials at each federal election has not had previous election experience, requiring considerable focus on election training, and added pressure on those with electoral experience who, given their previous (albeit limited) experience, would be employed as Officers In Charge (OICs) or other more demanding roles.

The demographic profiles of polling officials in comparable jurisdictions of Canada, New Zealand and the UK show similarities to the Australian position, especially in regard to the predominant employment of female workers and lack of previous elections experience:

In Canada:¹⁰

- slightly more than half, 53 per cent, of ‘election officers’ reported that they had elections experience in the previous election;
- the largest cohort of elections officers, 44 per cent, were between the ages of 45 and 64, although significantly more than in Australia, 35 per cent were 65 years or older; and
- similar to the Australian position, 66 per cent were female and 34 per cent male.

In New Zealand:¹¹

- generally, less than 50 per cent of polling workers had previous electoral experience, with the percentage falling from 46.86 per cent in the 2008 general election to 40.25 per cent in the 2011 general election;
- the average age of polling workers was 46, with an age range of 16 to 80 years of age; and

¹⁰ Survey of Election Officers Following the 41st Federal General Election, December 2011, http://www.elections.ca/res/rec/eval/pes2011/soeo/src_e.pdf.

¹¹ New Zealand Electoral Commission website.

- female workers consistently represent 75 per cent of the polling official work force.

In the UK:¹²

- 70 per cent of managers are male and 78 per cent of team members are female;
- approximately 84 per cent of ES employees are full-time and 16 per cent are part time; and
- poll workers were predominately white (96 per cent) and female (71 per cent) and most likely aged 45 to 64 years.

Recent Events in Australia

Three events in recent history of Australian Federal elections are relevant examples of the issues discussed below in this paper.

Case Study 1: Supplementary Certified Lists in the 2010 Election

While this first case study does not involve acts or omissions by polling officials, it is included here to illustrate the issues discussed below in relation to the powers of EMBs.

By law all Australian citizens 18 years of age or older must enrol and have their name recorded on the electoral roll. Both enrolment as a voter and voting are compulsory. A 'certified list' contains the names of voters eligible to vote in Australian elections and is issued at the time of an election and used in polling stations to mark-off voters who have voted.¹³ Despite the right to vote being automatic for all Australians, a person whose name does not appear on a certified list at the time of the election may not be able to vote.¹⁴

The electoral roll is maintained on an ongoing basis between elections,¹⁵ but once an election is called (upon issue of a writ by the Governor-General) the Electoral Act provides a limited time for voters to either enrol or to update their electoral address and/or name details and thereby have their names included on the certified list of voters. The "close of rolls" period" as it is commonly known is currently seven days from the date of the issue of the writ.¹⁶

In 2006 the *Commonwealth Electoral Act 1918* was amended to limit the close of rolls period (for new voters) to one day only, being the close of business on the day of the writ

¹² It should be noted that UK polling officials are invariably full time employees of local councils that are responsible for managing the election.

¹³ The preparation and use of certified lists is provided for in Section 208 of the Commonwealth Electoral Act,.

¹⁴ If their name is not subsequently found on the electoral roll.

¹⁵ This feature of the Australian electoral system is called "Continuous Roll Management". In some other jurisdictions electoral rolls are only created at the time of an election.

¹⁶ A writ is a legal instrument issued by the Governor-General of Australia commanding the Australian Electoral Commissioner to conduct an election according to a timetable specified in the writ.

issue. From 1984 until 2006 the close or rolls period had been seven days, as it is today.¹⁷ Opponents of this amendment argued that it served to potentially disenfranchise many voters who could not meet, or were otherwise incapable of meeting, the restricted timetable imposed for enrolment. Ultimately these concerns led to action in the High Court of Australia by a group called GetUp¹⁸ to have the laws struck down as unconstitutional. That action was taken in the middle of the 2010 election period (several weeks after the issue of the writ), after the electoral roll had closed and certified lists prepared and distributed to some 8 000 polling stations across Australia.

The High Court ruled in favour of GetUp and the Electoral Act returned immediately to its position prior to the 2006 amendment; that is, a seven day roll close period. The High Court ordered the AEC to admit as voters for the 2010 election any person who had submitted their enrolment application, or updated their name and/or address details between the day of issue of the writ and a further seven days after that day. Some 100 000 voters were affected, with the AEC required to process a further 100 000 applications or changes to enrolment details in less than 2 weeks ahead of the commencement of voting.

Supplementary certified lists were required to enable these voters to vote without further inconvenience¹⁹. The only legally effective manner available to the AEC in which to undertake what was a seemingly simple administrative task to produce such supplementary lists was to seek a proclamation from the Governor-General under the s 285 of the Electoral Act. Section 285 is drafted in the following terms:

Correction of errors

(1) Any delay, error, or omission in the printing, preparation, issue, transmission, or return of any roll writ, ballot papers, certified list of voters or approved list of voters may be remedied, removed, rectified, and supplied by proclamation specifying the matter dealt with, and providing for the course to be followed, and such course shall be valid and sufficient.

Case Study 2: Prematurely Opened Ballot Boxes²⁰

Another significant event occurred during the 2010 Federal Election when ballot boxes used in a pre-poll voting centre were opened prematurely; that is, before the polls closed at 6pm on the Saturday of the election.

¹⁷ For decades prior to 1984, it had been the general practice of governments to announce a proposed election date well before the issuing of the writ, giving rise to a de facto roll close period. In 1983, PM Fraser didn't do that, and it was his snapping shut of the rolls then which led to the 1984 amendment which formalised the previous general practice.

¹⁸ According to the organisation's website, "GetUp is a progressive, independent organisation. Our community believes democracy can only be strengthened by having every day Australians participate in politics. We believe Australians should be heard all the time, not just at elections once every three years."

¹⁹ Where a person's name cannot be found on an electoral roll the person is able to cast a provisional vote which would be admitted to the count if the person is subsequently found to be on an electoral roll. The Electoral Act, as it stood at that time, required the person to attend an AEC office within 7 days and provide identity before the vote could be admitted. Experience suggested that few electors subsequently made the effort to attend an AEC office and accordingly their ballot was effectively disenfranchised.

²⁰ The full circumstances of this incident are outlined in a report commissioned by the Australian Electoral Commissioner at http://www.aec.gov.au/about_aec/Publications/Reports_On_Federal_Electoral_Events/2010/e2010-gray-report.pdf.

The Electoral Act provides for pre-poll voting. For some days before the election day voters may attend at special polling places and lodge their votes. This convenient facility has become quite popular. At the 2013 election some 27 per cent of voters lodged their votes before polling day, up from 18% at the 2010 election.²¹

Subdivision C of Division 3 of Part XVA of the Electoral Act sets out the requirements that must be complied with in relation to each ballot box used for pre-poll ordinary voting (pre-poll ordinary ballot boxes). In summary, the Electoral Act provides that while a pre-poll ordinary ballot box that is not full may be used on a subsequent day of polling, the ballot box is only made ready to receive additional votes by the opening of the flap through which ballots can be inserted. There is no provision under the Electoral Act which would authorise the opening of a pre-poll ordinary ballot box at a pre-poll voting office (PPVO) before the close of the poll. The wording of the relevant clause (section 200DP(2)) and in particular the words ‘on no account’ is a strong indication that the Parliament considered compliance with this requirement to be crucial and one that must be observed.

The Officer-in-Charge²² (OIC) of a particular polling station, after the close of polling each day and after all public access was locked at the polling place, opened the small ballot boxes containing ordinary ballot papers in the presence of at least one of the pre-poll voting officers. Once the seals were broken and the details recorded and witnessed in the OIC return, the contents of the two smaller ballot boxes containing the House of Representative and Senate ballot papers were amalgamated into two larger plastic ballot boxes, one for the House of Representatives ballot papers and the other for the Senate ballot papers. These larger ballot boxes were located in a secure room within the PPVO. After the “amalgamation of papers” had taken place, seals were replaced on all the ballot boxes containing ordinary ballot papers and recorded on the OIC return.

The OIC indicated that he had initiated the practice of opening the ballot boxes to permit the transfer of ballot papers from the small ballot boxes used by the public and which were full after each day, to the larger ballot boxes stored in a secure room located at the back of the PPVO. The small ballot boxes, once emptied, were then used the following day.

The incident was discovered when a duly appointed scrutineer (an appointed representative of a candidate) noticed that the House of Representatives ballot papers contained in the large plastic ballot box, which was semi-transparent, were all stacked and flat unlike other ballot boxes where the contents were very disordered and jumbled. The ballots were admitted to the count at the time but a subsequent investigation ensued.

The investigation into the circumstances of the premature opening the ballot boxes found no evidence of malevolent intent on the part of the OIC or any evidence of vote tampering. Training of polling officials, particularly the complexity of the material prepared for distribution to polling officials ahead of the election, was criticised. These findings notwithstanding, external legal advice obtained by the AEC suggested that it was “prudent” to exclude the votes from the count. Fortunately, the exclusion of the votes did not change the outcome of the election. Regrettably, some 4000 voters were disenfranchised because their vote was not included in the count.

²¹ These figures include both postal ballots, which must be cast on or before election day, and personal attendance ballots at a pre-poll polling station.

²² The Officer-In-Charge was a casual worker employed only for purposes of the election.

Case Study 3: Lost West Australian Senate Ballot Papers

Perhaps the most serious example of electoral error that has come to light occurred during the 2013 Federal Election when it was discovered that 1370 West Australian (WA) Senate ballot papers could not be located.²³

In summary, on 7 September 2013, a half-Senate election was held in WA (as in other States) to fill six Senate seats for that State to become vacant on 1 July 2014. Three Liberals and one Labor candidate were elected to the first four Senate positions. The fifth and sixth positions were initially '*announced*' as being won by the Palmer United Party (PUP) and the Australian Labor Party (ALP). The election was close however - the critical margin at the point of exclusion of candidates with insufficient votes to yield a "quota" that determined the last two Senate positions was 14 votes, out of some 1.3 million votes in total. Accordingly, a recount was requested by a number of candidates and granted in accordance with the Electoral Act in an attempt to give the electorate confidence in the outcome.

During the recount, it was discovered that 1370 ballots (from two electorates) were missing, probably going astray sometime between the conclusion of the first count and the recount. The AEC did however hold counting record sheets which provided information about the preferences expressed by the voters whose ballots were missing. Without these ballots, the result was different after the recount, with the Australian Sports Party and the Greens Party candidates declared as winning the fifth and sixth spots, with the margin at the critical point of exclusion that determined the final two Senate positions being only 12. Had the 1370 ballots been available to be included in the recount, the original result (PUP and ALP filling the 5th and 6th Senate positions) would have been confirmed, albeit with a margin of only one vote at the critical point of exclusion (out of 1.3 million) determining the final two Senate positions.

The three person Electoral Commission concluded that the result of the election could not be known with sufficient confidence that the will of the West Australian electorate had properly been reflected and that there was a real chance that the declared result would have been different if the missing ballots had been able to be included in the count. The Commission petitioned the High Court, sitting as the Court of Disputed Returns, to declare the half-Senate election in WA was void and that a new election should be held. This was the only recourse available to the Commission. On 25 February 2014 the High Court ruled that the result as declared was to be voided and a new WA Senate election ordered.²⁴ The re-run of the WA Senate election was held on 5 April 2014 at a cost of some \$20 million.

Significantly neither the AEC nor the Court of Disputed Returns had the power to blend the results of the original count and the recount (that excluded the 1370 missing ballots), an option called for by many public commentators and candidates. That action would have resolved quickly the uncertainty of the election result and avoided significant cost, although the option of petitioning the High Court would have still been open for any person, candidate or political party aggrieved by the result. The Court of Disputed Returns concluded that it (nor the Commissioner or the Commission) was precluded by the

²³ The full circumstances of this incident are outlined at http://www.aec.gov.au/about_aec/Publications/Reports_On_Federal_Electoral_Events/2013/files/inquiry-into-the-2013-wa-senate-election.pdf.

²⁴ See High Court judgement <http://www.austlii.edu.au/au/cases/cth/HCA/2014/5.html>.

Electoral Act from mixing the recount results and the count records from the original count.²⁵

An independent investigation by a former Commissioner of the Australian Federal Police (appointed by the Electoral Commissioner) into the circumstances that led to the loss of the ballots concluded “that the ballots are most likely to have been mistakenly destroyed with recycling material”. The investigation was also highly critical of the systems and controls put in place by the WA AEC office for the control, storage and movement of ballot papers.

The Challenges of Polling Officials

These events illustrate the challenges facing EMBs in adequately preparing casual workers for the task of conducting an election, the design of electoral laws governing the conduct of the election and its component elements, and the appropriateness and extent of powers that ought to be conferred on EMBs to deal with electoral mistakes and omissions, especially those where there does not appear to be any attempt at electoral fraud. While each of these issues can be examined and discussed independently, it is also worth examining the interrelationships that exist between them.

The Management of Polling Officials

Polling officials have been invariably described as the “backbone of democracy”, or the “foot soldiers for democracy”. They are more than just workers - they provide a valuable overt demonstration of democracy in action by providing the basis for inclusiveness, transparency and credibility of the electoral outcome. They are an important part of the “theatre of democracy” where eligible citizens emerge from their homes and workplaces to cast a ballot assisted by their fellow citizens in that process.

Much of the literature, and indeed the criticisms of the AEC (and other EMBs) in relation to the errors described in the preceding paragraphs, relate to the need for EMBs to improve arrangements for recruitment and training of polling officials. Similar conclusions have been made in other jurisdictions where errors made by polling officials have, possibly or actually, impacted on electoral results.²⁶ This is incontrovertible and an obvious task for EMBs - the need for training of workers involved in elections will continue as long as elections are held and a casual work force employed. Some of the recent initiatives by the AEC and other EMBs to improve the skills and knowledge of polling officials include:

In Australia, a policy of “soft contact” was introduced by the AEC after the 2010 election. Rather than contacting polling officials once every three years, and

²⁵ Section 365 of the Electoral Act operated to prevent admitting the records of the recount and the original count that bear on the 1,370 missing ballot papers. The Court found that the records of the original count and the recount that bear on those missing ballot papers are not admissible for the purpose of the Court determining that it should declare any candidate duly elected who was not returned as elected. Section 365 of the Electoral Act places limits on the evidence the Court may admit to determine whether the result of an election was affected by certain illegal practices. If any elector was prevented from voting in an election on account of an error of, or omission by, an officer, the section prohibits the Court from admitting, for the purpose of determining whether the error or omission affected the result of the election, any evidence of the way in which the elector intended to vote in that election. Accordingly, the mix and match approach using the original count records with the actual physical examination of the remaining ballot papers was rejected by the Court. A useful discussion of the technical basis of the High Court’s reasoning can be found at A Twomey, ‘The case of the missing votes’, *Constitutional Critique*, 19 February 2014, (Constitutional Reform Unit Blog, University of Sydney, <http://blogs.usyd.edu.au/cru/>).

²⁶ See for example COMPLIANCE REVIEW: FINAL REPORT AND RECOMMENDATIONS: A Review of Compliance with Election Day Registration and Voting Process Rules By Harry Neufeld: http://www.elections.ca/res/cons/comp/crfr/pdf/crfr_e.pdf and The PEW Centre on the States, *election.org* Briefing Helping Americans Vote: Poll Workers, September 2007.

then only after the election had been called when time is extremely limited, polling officials from the previous election are contacted three or four times a year to update them on electoral matters, changes to legislation etc.²⁷ Online training systems are also being developed, and a DVD distributed to polling officials that provided a visual experience of working in a polling place as well as important attitudinal messages about integrity, accuracy and responsiveness.

In the US, made more complicated by the absence of a national EMB, with each State responsible for conducting federal elections within their borders, initiatives include allowing teens to serve before they reach voting age, recruiting election officials from colleges, universities, and nonprofit organisations to recruit young poll workers and encouraging corporations, federal government agencies, and private organisations, to allow their employees to be released from work to volunteer for Election Day service without having to take a personal or vacation day. Many of these initiatives have been underwritten by Federal funds provided under the Help America Vote Act.

In the UK, the UK Electoral Commission has developed a performance standards framework for Returning Officers, which aims to support them in delivering a consistent high-quality service for voters and those standing for election standards. Importantly, regular monitoring and publication of results of assessments is part of the framework, ultimately assisting not only the effective administration of elections but also building community confidence in the conduct of elections.

In Canada, as a consequence of a review of compliance with election day registration and voting process rules, Elections Canada has committed itself to, inter alia, improving quality control at polling sites; simplifying procedures; clarifying written instructions; improving recruitment practices; modernising training; and measuring levels of compliance on an ongoing basis.²⁸ In a survey of election officers conducted after the 41st Federal General Election, and without detracting from the overall high election officer satisfaction ratings, the report concluded that “a few officers also seem to have been adversely affected by what could be described as an information overload, where the sheer volume of paperwork and confusing or useless documentation to read became an issue. Finally, the perceived lack of competence of a few staff members was also listed as a particular concern. Consequently, improving training and communication should be considered key factors in overcoming these types of challenges in future elections.”²⁹

All of these initiatives emanate from the same fundamental concern about what actually transpires during the conduct of an election at all of the various critical points of handling a ballot. The general community, the electorate, sees the process as relatively simple - a

²⁷ The Electoral Act sets out a minimum of 33 days between issue of the writ and the day of the election. Although longer election periods are able to be put in place, the 1980s the election period has rarely exceeded the minimum time frame specified in the Electoral Act.

²⁸ COMPLIANCE REVIEW: FINAL REPORT AND RECOMMENDATIONS: A Review of Compliance with Election Day Registration and Voting Process Rules By Harry Neufeld: http://www.elections.ca/res/cons/comp/crfr/pdf/crfr_e.pdf.

²⁹ op cit, 12.

person casts a ballot, the ballot gets counted and a winner is declared. What could be more simple? There is little tolerance for mistakes, with not unreasonable expectations about the integrity of the process. But mistakes do and will continue to happen as long as people are involved. Similar errors have occurred in the past, including the loss of ballots, although, because the electoral outcome was unaffected, went unnoticed. The initiatives outlined above are just some being pursued to reduce the risk of error which can have dramatic impacts on the electoral process, the credibility of the election and the confidence that the community has in the electoral process, its outcome and the legitimacy of the government. To that extent the initiatives are laudable, vital and urgent, especially in the light of continuing problems with the electoral process across all jurisdictions.

However, in the short to medium term, this paper proposes that more must be done to enhance the skills of the part-time workforce employed during the election period.

It is inevitable that the number of poll workers required to deliver elections is likely to increase, short of any major change to the manner in which ballots are cast. This increase is driven simply by the increase in the number of electors needing to be serviced. In the last decade for example, the number of enrolled electors in Australia has increased by nearly two million.³⁰ Commensurately, polling officials employed for election day have grown from 61 756 in the 2004 election to 65 962 and 66 874 in the 2007 and 2010 elections respectively. Casual employee expenses are also rising, from \$37 million in 2004 to \$42 million and \$51 million respectively for the 2007 and 2010 elections.

AEC figures show that, at least for the last three elections, one in two poll workers have not worked in a previous election (although 89 per cent of OICs reported that they had previous election experience). There is constant turnover from election to election hindering the ability of the AEC to build a cadre of experienced poll workers not only with a good understanding of electoral practice but also an appreciation of the importance and need for care and integrity. Even those workers with previous elections experience need training, not only to refresh their understanding of systems and procedures, but to also learn about and understand systems, procedural and legislative changes that may have occurred since the last time they were engaged. Significantly, only a small number of polling officials are recruited at the “eleventh hour”, with typically less than 1000 positions appointed on the day of the election.

At this point it is also worth noting the unique position of the AEC in relation to the recruitment and training of polling officials, compared to jurisdictions in each of the Australian States and Territories and in the UK and the US (with the exception of Canada). Unlike these other jurisdictions, the date of the Australian Federal election is unknown. While the broad election timing may be reasonably predictable, the actual date of the election, and therefore the day on which polling officials need to commit their time, and the AEC commence final recruitment and training, is unknown. Moreover, recent elections (at least those called from the early 1980s) have provided only the minimal time for preparation allowed under the Electoral Act; that is, 33 days from writ issue to election date. Accordingly, the recruitment and training of tens of thousands of polling officials must occur well within this 33 day period, noting that pre-poll polling places can be open up to three weeks before actual polling day. Recruitment becomes a scramble, and the ability to put in place effective mechanisms for instilling and testing the knowledge and values of the polling officials is limited. The opportunity for long term planning of recruitment and

³⁰ Enrolment at the 2004 election was 13 021 230. As at March 2014 enrolment stands at 14 855 337.

training is highly compromised. It is incontrovertible that having a fixed election date enhances significantly the ability of the relevant EMB to put in place recruitment and training practices well ahead of the actual election.

It is also worth noting that the 1983 reforms to the Electoral Act, which amongst other initiatives included the creation of the AEC as an independent statutory authority, amended s157 to extend the minimum prescribed time to elapse after candidate nominations closed before the fixed polling date. The amendment extended the then seven day period to 22 days (later amended to 23 days). While there is little discussion of the rationale for that amendment in the Parliamentary debates or the Explanatory memorandum to the Bill, it can be presumed that Parliament was acknowledging the growing logistical challenge of conducting elections. In 1983 the number of enrolled electors was just over nine million. Enrolment as at 31 March 2014 stands at 14.8 million, nearly two-thirds more than at the time of the 1983 amendment.

The initiatives being implemented by EMBs to recruit and train workers better point to a broader trend however, inevitably, to “regularise” the polling official workforce. Indeed, this must occur sooner rather than later in an effort to mitigate the risk of errors in the the future and sustain the the electorate’s confidence in the electoral process.

Irrespective of the jurisdiction, given the importance of the integrity of the electoral process and the potential consequences of errors, Parliament needs to support greater investment in the regularisation of the polling official work force. One such initiative would be to create an “electoral official reserve”, along similar lines to the army reserve. An electoral official reserve work force would provide ready and direct access to a high quality, semi-volunteer, electoral workforce for the EMB in the face of an uncertain election timing.

Such a reserve would provide a cost-effective way to mitigate risk of electoral damage from polling official error. In general terms the army reserve is a modest cost against the defence budget, but adds considerably more, relative to that investment, to the responsive capacity of an army. The same logic could apply to an electoral official reserve. For example, in the Australian context, a electoral reserve of (say) some 8000 individuals (approximately one for each polling place), out of some 70 000 generally employed, could be retained on a semi permanent basis with a commitment to attend or undertake regular training and performance assessment and to be available on the day of the election irrespective of when it is called. During the three years between elections they could, for a small retainer, be required to undergo regular training and be assessed on both skill and appropriate electoral attitudes.

Online technology can be leveraged to enhance this regularisation and to keep costs at reasonable levels. Training can be conducted online and in real time, assessment can be conducted online and those who do not complete, or satisfactorily pass assessments excluded from further employment, with time available to recruit replacements. While the AEC has made investments in these systems, more needs to be done.

However, the question must be asked whether such initiatives are enough for the long term management of elections and will in future be sufficient to mitigate the risk of electoral error by persons involved in the process, be they casual workers or full time electoral staff.

A strategic challenge/risk has been creeping up on EMBs in Australia (and other jurisdictions) for quite some time, and which the events in WA crystallised. The problem is

not just one of training for polling officials and election casuals and staff, but also one of what can be assumed to be part of the general knowledge they will bring with them when they work on election tasks. The more mature workers in the past brought with them the skills and understanding of paper handling (batching and bundling, check counting, process flow and so on), and would only really have to learn some of the distinctive electoral elements of the process – for example, the particular forms to be used. Now, however, nearly all of those organisations have shifted away from paper, and this makes the training task for electoral staff even more difficult. Then you can add to the mix that AEC operations outside election periods have also become less paper-based.

Similar concerns are being raised in other jurisdictions. In the UK for example, an Electoral Services Skills and Workforce Survey³¹ found, inter alia, a lack of experienced/qualified electoral services officers nationally, a lack of electoral services knowledge, very few people with experience of electoral administration and a shortage of trained election officers nationally were key concerns for electoral administration in the UK.

Then add to the mix the proposition that the bigger a paper-based operation is, the harder and riskier it can be to manage. In total some 23 million ballot papers (House of Representatives and the Senate) were used in the 2013 election. Over one million absent and interstate ballot papers “float” through the mail system to reach their destination for counting in the relevant division.³² There is an inevitable risk of accidental loss, or otherwise. And it is almost certain that the gathering of WA ballots together for the recount represented the single greatest assembly of ballot papers in one place for processing in the history of federal elections in Australia. Some 1.3 million ballot papers had to be retrieved, despatched and centrally managed.³³ An operation on this scale is and always will be incredibly difficult. It is simply inconceivable that a paper ballot system could be used in a country of the scale of India for example.

Combine these two, and you start to have what looks like a really intractable problem. Assembling a reserve, or providing better training, or both, will assist, and must be pursued in the short to medium term, but the basic problem is one of increasing logistical requirements within a compressed and immutable time frame. Election workloads are becoming greater at each election, but the political imperative of short election periods (at the Federal level) seem to be driving immutably short timeframes in which to complete critical tasks. Given the unresolved (and probably unresolvable) problems with wide-scale internet voting,³⁴ Parliament, together with the AEC and other EMBs (hopefully in a spirit of genuine collaboration) may have to confront the equally confronting logistical challenge of electronic voting in a large number of polling places across Australia to ameliorate the

³¹ “Electoral Services Skills and Workforce Survey”, Skills for Justice, February 2011.

³² An absent vote is a vote cast by an elector out of their home division but still within their home state or territory on election day. An interstate vote can be cast on election day at interstate voting centres by electors who are not in their home state or territory.

³³ Prior to 1983, Senate counting was done in divisional offices. From 1984 onwards, only non-ticket votes were processed centrally and the greatest numbers there, in New South Wales, would have been of the order of half a million.

³⁴ See Electoral Council of Australia and New Zealand “Internet voting in Australian election systems” at <http://www.eca.gov.au/media/18-09-13.htm>.

challenges of managing millions of paper ballots.³⁵ The widespread deployment of electronic voting facilities in polling places deserves more analysis, research and collaboration by EMBs and State and Federal Governments to achieve a nationally uniform approach.

Prescriptive Electoral Laws

In designing electoral systems a balance needs to be struck between the need to specify to the nth degree the process for electoral officials to follow and the capacity of individuals, especially those recruited for one day's work every few years to carry out those tasks. In this regard the legislators take some responsibility for ensuring that electoral processes can be effectively administered.

Perhaps because electoral legislation bears so directly on the fortunes of legislators, there has been, at least in the federal sphere in Australia, a highly prescriptive approach. Procedures are laid down in excruciating detail.

One example is s 213 of the Electoral Act, dealing with the order in which names are to appear on ballot papers. It is an obvious political advantage for a candidate's name to appear at the top of the list. A significant number of voters simply vote in order down the paper (known colloquially in Australia as the "donkey vote"). So it might be thought there should be a provision that simply said, "The order of names on a ballot paper shall be determined by lot".

However s 213 takes up two pages of the Electoral Act prescribing an elaborate procedure. Lists of names of candidates are to be prepared, Candidate A, Candidate B, Candidate C etc and a number of balls equal to the number of candidates, "being balls of equal size and weight and each of which is marked with a different number" are placed "in a spherical container large enough to allow all the balls in it to move about freely when it is rotated".

Then the person in charge is to "rotate the container and permit any other person present who wishes to do so to rotate the container".

Then a "person who is blindfolded and has been blindfolded since before the rotation of the container" takes the balls out of the container "one by one" and passes it to another person "who shall call out the number on the ball".

All of this is merely to establish an order of names so that, for example, ball three is called out first so Candidate A comes third on a new list. When this new list is compiled the whole process (rotating container, blindfolded selection etc,) is repeated to determine the actual sequence. While clearly aimed at ensuring chance is the only factor determining the position of a candidate's on a ballot paper, any failure at any point in the process could be a cause for action.

³⁵ For example, there are in the order of 7500 static polling places established for an Australian federal election containing approximately 200 000 voting screens. If the same level of elector service was to be provided to ensure no delays for an elector in casting a ballot, some 200 000 electronic voting machines would need to be deployed. Each of these would need to be programmed ahead of time within a constrained period, and while wireless technologies offer the scope for remote management, often the vagaries of technology and inconsistent connection adds further to the challenge.

As another example, Schedule 3 of the Electoral Act sets out the rules for the conduct of counting for declaration votes.³⁶ Schedule 3 contains 25 sections. It is perhaps one of the most prescriptive provisions of the Electoral Act (save for those describing the manner in which Senate preferences should be distributed). Separate declaration vote issuing officers are appointed in polling stations reflecting the complexity of the law. In contrast, the Tasmanian Electoral Act 2004, a principles based Act, has one section dealing with declaration votes, specifying the fundamental criteria for admitting declaration votes rather than a process for their handling.³⁷ Procedures are approved by the Commission rather than specified in the legislation.

The challenge of making electoral laws administratively simple is becoming increasingly recognised across jurisdictions. Harry Neufeld, former Chief Electoral Officer for British Columbia, in reviewing compliance with election day registration and voting process rules in the May 2011 Canadian general election, wrote:

The review has established that there are multiple causes of error: complexity; supervision; recruitment; training; updating the list of electors; and historical, cultural and jurisdictional factors all play contributing roles in the errors made by election officers on Election Day. The reality of election work must be considered in order to properly understand this problem; more than 200,000 election officers need to be recruited and trained, most often for a single day's work that happens only once every few years.

Stakeholders involved in the review process identified many potential solutions that could help improve compliance for the 2015 election. However, there was a widespread consensus among participants that fully addressing the compliance problem requires a fundamental redesign of the voting process. Redesign, through simplification and rationalization, is necessary in order to reduce the risk of errors so that the administrative burden that is now placed on election officers is manageable. Such redesign will involve extensive amendment to the framework of electoral legislation. (underlining added)³⁸

There are clearly some difficult issues of balance here. On the one hand, prescriptive laws provide a high degree of certainty about what Parliament expects of EMBs. Those expectations need to be applied consistently in every polling station, every counting centre and so on to ensue that results are not influenced by variations in interpretation of electoral provisions. The lack of discretion also affords the EMB a degree of protection

³⁶ There are several types of declaration votes: postal votes, absent votes, un-enrolled votes and votes by electorate where the name on the roll is already marked as having voted. A declaration vote is held in an envelope, unlike an "ordinary vote" deposited directly into a ballot box. The envelope contains details to enable the conformation that the vote should be admitted to the count.

³⁷ According to section 138 of the ELECTORAL ACT 2004:

(1) The returning officer, in conducting a preliminary scrutiny in accordance with procedures approved under [section 137](#), is to admit a declaration vote envelope for further scrutiny at an election if he or she is satisfied that –

(a) the envelope was provided and returned in accordance with [section 118](#); and
(b) the appropriate declaration on the envelope is signed and witnessed; and
(c) the voter is entitled to vote at that election.

(2) Notwithstanding subsection (1)(b), if a declaration is not witnessed, the returning officer may admit the declaration vote envelope if he or she is satisfied that the declaration vote was otherwise issued in accordance with [section 118](#).

(3) The returning officer is to keep a record, in an approved manner, of whether each declaration vote envelope is admitted to further scrutiny or not.

³⁸ COMPLIANCE REVIEW: FINAL REPORT AND RECOMMENDATIONS: A Review of Compliance with Election Day Registration and Voting Process Rules By Harry Neufeld: http://www.elections.ca/res/cons/comp/crfr/pdf/crfr_e.pdf.

from claims that it may be acting in a partisan manner, especially if it has simply put in place procedures consistent with the legislation (as it should). On the other hand, it is naive to expect that ‘perfection’ can be achieved through regulation. Prescriptive laws make the task of training difficult, especially in circumstances where polling officials only undertake the task once every few years, add risk that the processes are not followed “to the letter”, thereby providing a basis for action against the result of an election, and are often at odds with how modern technological systems, that are continually evolving and developing, can assist the electoral process.³⁹

Powers of Electoral Management Bodies

To what extent should independent EMBs be given powers to correct errors? Again there is an issue of balance with no particularly persuasive argument to prefer that the powers be primarily conferred upon either Parliament, the judiciary or the EMB.

The example cited above requiring a special proclamation by the Governor-General to issue supplementary certified lists would seem, at first blush, to be an example of a power that could comfortably rest with the Electoral Commission. It was a simple administrative exercise, reflecting the wishes of the High Court. It made the work of polling officials easier and, for those electors included on the electoral roll as a consequence of the High Court’s decision, made the casting of their ballot much easier - because their name would not have been on the previously issued certified list, they would have been required to complete a declaration vote.⁴⁰

The case of the missing WA Senate ballots is less clear. Was democracy served by conducting a fresh election? Had the AEC (or the Court), acting as an independent body, been able to blend the results of the recounted ballot papers and the counting records of the missing ballots, that could have served the democratic process, at that time, better than a fresh election conducted at a later time. As the count sheets reflected the wishes of the electors, including the outcome of their preferences, the result could have been declared much more quickly and without the uncertainty hanging over the make-up of the Senate for several months, and with considerably less cost. Moreover, to re-contest the Senate election in one State only, months after the Government had been installed and was making decisions which were the subject of debate, political commentary and scrutiny, could be argued as not reflecting the will of the electorate at the time the election was first held in September 2013.

An argument against this approach however is that it could lead to a perception that the Electoral Commission is entering the political arena, given the importance to the political aspirations of all political parties of the make-up of the Senate and consequential ability to implement a legislative agenda. In addition, as an important component of a recount is the

³⁹ For example, registration as an elector in Australia for many decades required the process to be completed on a paper form as specified by the Electoral Act. The legislation was written well before the emergence of the internet. It was only in 2010, a decade after online transaction processing had become commonplace both in the private sector and in many aspects of government services, that the Electoral Act was amended to allow online applications. This was finally put in place just ahead of the 2013 election with a dramatic shift in applications being made online and arguably an enhancement of the franchise by making the process much easier and convenient without any loss of integrity.

⁴⁰ That is not to say that the issue did not have political significance. While one side of politics was keen for the the supplementary lists to be issued, the other side was less committed. Ultimately the view of the author is that the franchise was enhanced because of the actions of the Electoral Commission.

opportunity for scrutineers to examine afresh the ballot papers, no such opportunity was available in respect of the missing ballots.

An alternative is to confer greater powers on the judiciary, especially in such serious circumstances. The inability of the High Court to include evidence about voting intentions has existed since 1922 and was inserted into the Electoral Act at the time to align Australian law with the then English law. But prior to 1922 the Electoral Act was constructed in such a way that an election could be declared invalid if official error *may* have affected the result. The High Court in 1920 concluded that in order to prove that official error *had* affected the result, "[t]he error of refusing a vote to a qualified elector, if it is to have any weight at all, must be accompanied with proof as to how the elector intended to vote."⁴¹ Of course, the action of ordering a fresh election would still have been open to the High Court, but importantly, other options, such as blending the two counts, would also have been open to the Court to consider.

Another consideration in Australia is that the conferring of powers on the AEC could not exclude the power of the High Court to make orders against an "officer of the Commonwealth" under s 75(v) of the Australian Constitution. So there would always be the potential for delay and uncertainty.

The notion that lost ballots is a matter that can be effectively managed legislatively rather than through litigation is not without precedent. In New Zealand, the *Electoral Act 1993* contains a provision that expressly provides for papers lost between the official count and recounts. Section 184 provides as follows:

s 184 Ballot papers and certificate to be compared on recount

(1) At any recount made as aforesaid the Returning Officer shall produce to the District Court Judge all the used ballot papers, together with the Justice's certificate stating the total number of ballot papers used at the election

(2) If, on comparing the number of ballot papers stated in the certificate with the ballot papers used at the election, the District Court Judge finds that any of the ballot papers have been lost, stolen, or in any way interfered with during the interval between the official count and the recount, the official count made by the Returning Officer shall be deemed to be correct, and the result of the poll declared accordingly. Where in any such case there is an equality of votes between constituency candidates and the addition of a vote would entitle one of those constituency candidates to be declared elected, the

The NZ legislation would seem to be directed to obtaining certainty in election results in a quick and pragmatic way.⁴²

Notwithstanding the limitations imposed on the AEC and the judiciary by some parts of the Electoral Act to correct errors in these cases described above, other provisions are not so limited and stand in marked contrast to the detailed process requirements contained in other sections. For example, s 215 of the Electoral Act provides that each ballot paper,

⁴¹ [1920] HCA 35; (1920) 27 CLR 449 at 458.

⁴² Of course, as is the case in Australia, depending upon the number of votes involved, the next step might well be a petition seeking to void the election.

upon issue to an elector, *must* be initialled by an issuing officer - there is no discretion. With some 70 000 polling officials, issuing in excess of 23 million ballot papers (both House of Representatives and Senate), it is inevitable that some ballots will not be initialled as required by the Electoral Act. Yet, s 268 of the Electoral Act provides that the Divisional Returning Officer can “correct” the error where he/she is “...satisfied that this ballot paper is an authentic ballot paper on which a voter has marked a vote”. The same provision allows photocopies of ballot papers to be issued to voters and counted to cover shortages that occur from time to time.⁴³

The absence of an initial of a polling official on a ballot paper, or the use of a photocopied ballot paper, were used as arguments in the 2013 election in the seat of Fairfax to allege that bogus ballots could have been entered into the count. The argument put forward was that without an ability to verify the polling officials’s signature against some pre-recorded data base, the opportunity existed for fraudulent ballots to be entered into the count.

According to AEC policy a recount of ballots is conducted automatically where the margin of votes between the first and second candidate is less than 100. In the first count, the differential was seven. During the recount, candidate scrutineers objected against the authenticity of over 43 000 ballots, nearly half the total 89 000 ballots cast for the electorate, most on the basis of an absence of a signature or the use of a photocopy.⁴⁴

The Electoral Act provides for a two stage process for dealing with objections. The first stage is a decision by the Divisional Returning Officer (DRO). If a scrutineer is dissatisfied with the decision of the DRO a further avenue of appeal is open to the Australian Electoral Officer (AEO) of the State concerned.⁴⁵ Prior to the 2013 election, the largest number of disputed ballots forwarded to an AEO for decision was 643 (in the Victorian seat of McEwen in the 2007 Federal election). It is testimony to the sense of dedication and responsibility of the two AEC officers involved that they were able to cope with the huge logistical, physical and mental challenge of transparently dealing with some 43 000 objections (no other person can make a decision on the formality of a ballot), and complete the process within sufficient time to enable the writs to be returned on time and Parliament to commence.⁴⁶ There would be very few in the community that fully comprehend the efforts of the officers concerned. It is noted that after the recount was concluded, and all 43 000 objected ballots decided, most of which were admitted to the count under the provisions of s 268 of the Electoral Act, including all of those ballots where nothing more than the absence of a polling official’s signature or a photocopy was in

⁴³ Considerable effort is made by the AEC to accurately estimate the number of ballots required in each polling station, The Australian National Audit Office, in its audit of the AEC’s preparations for the 2007 election said that “One clear strength of the AEC’s approach to election staffing is that it has in place sound methods and systems for estimating the likely number of electors who will cast votes at ordinary polling booths. Nevertheless, shortages can occur and the Electoral Act provides a basis for providing the elector with a ballot immediately rather than requesting that they return at a later time or disenfranchising the elector entirely.

⁴⁴ There are no provisions contained in the Electoral Act that specify the grounds on which an objection can be made against a ballot.

⁴⁵ The Australian Electoral Officer, whilst an officer of the AEC, is a statutory position appointed by the Governor-General.

⁴⁶ While 43 000 objections may seem unduly large, this does not reflect the full extent of the task presented to the counting officers, the DRO and the AEO. Scrutineers are able to object to a ballot at each point where preferences are distributed from one candidate to another. With eight candidates standing for election, many thousands of ballots were objected against and decided many many times over, generally on the same grounds and decided *by the DRO on the same grounds). The Electoral Act required that the basis of the DRO’s decision is recorded on the back of the ballot. By the end of the count there was little room on the back of the ballot for the latest decision to be recorded.

dispute, the differential between Mr Clive Palmer, the successful candidate, and the second placed candidate, Mr Ted O'Brien, was 53.

Even greater discretion is given to a DRO (or an AEO on appeal) to interpret marks on a ballot paper, both in terms of whether the ballot paper is informal (and therefore not admitted to the count) or in relation to the order of preferences expressed on the ballot paper. Under the preferential system in Australian federal elections, returning officers are often required to make judgements as to whether a '1' is '7' for example, or a 'tick' is really a tick and not some extraneous mark on the ballot paper that might render it informal.

The powers to admit ballot papers or to interpret the legitimacy/formality of marks on a ballot paper that are conferred on DROs and AEOs are just as critical to determining which candidate is ultimately successful as the processes defined for admitting declaration votes or the position of a candidate on the ballot paper. What must ultimately drive the powers provided to the EMBs to deal with complex processes must be the reality of ensuring perfection by including detailed process descriptions in the enabling legislation. For example, the notion that any EMB could collect the initials of some 65 000 polling officials and put in place a process to compare the initials of these polling officials with those appearing on issued ballots before the ballot is entered into the count is unrealistic. Why some critical aspects of electoral process are open to legal correction by officers of the AEC, the Commission or the Commissioner while others are not suggests the need for a more comprehensive review of the Electoral Act and the powers conferred on officers of the AEC and, where appropriate, the reinforcement of those powers. At the same time, given the events in the seat of Fairfax, the question must be asked whether the ability to object against nearly half of all ballots cast by electors served the democratic process, or rather weakened its credibility because of the use, albeit legal, of these provisions in a manner unlikely to have ever been intended by the legislators.

More broadly, as newer democracies emerge and focus on the legislative basis of their desired electoral system, and the involvement of the general community becomes the norm as an expression of the independence of the process rather than the exception, just as much attention needs to be given to what might go wrong, and how errors can be corrected and by whom, as the preferred design of the system itself.

Conclusion

This paper proposes that the challenge of avoiding and dealing effectively with critical errors in the electoral process is a complex mix of the administrative task of recruiting, training and managing polling officials, the legislative provisions polling officials are required to administer and the powers available to EMBs to deal with inevitable errors. The most serious error in Australian electoral history, the loss of ballots which ultimately led to an unprecedented High Court ruling that the WA Senate election was void and to require a re-election, is a salutary lesson. I hope that attention to the matters contained in this paper by the AEC and Parliament will mitigate the risk of another such dramatic event and serve as a lesson for other jurisdictions.

Epilogue

Shortly after the discovery of the missing Senate ballots in WA, I had personally concluded that resignation as Electoral Commissioner was inevitable, and appropriate. The need for CEO accountability is of paramount importance in organisational life. That was early

November 2013. There were three immediate imperatives however. First, it was important to find out what happened. Second, to put in place corrective measures as quickly as possible in anticipation of a fresh election. And third, perhaps most importantly, to seek redress through the High Court (as the only avenue available) given that the officially declared result possibly did not reflect the wishes of the WA electorate at that time (at least in so far as the final two Senate positions were concerned). Once those tasks had been completed, or I was personally satisfied that processes were in place for their completion, I tendered my resignation. That was early February 2014.