Australian Electoral Systems
— How Well Do They Serve Political Equality?

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From 2002 to 2004 the Political Science Program in the Australian National University’s Research School of Social Sciences is conducting an audit to assess Australia’s strengths and weaknesses as a democracy.

The Audit has three specific aims:

(1) **Contributing to Methodology**: To make a major methodological contribution to the assessment of democracy—particularly through the study of federalism and through incorporating disagreements about ‘democracy’ into the research design;

(2) **Benchmarking**: To provide benchmarks for monitoring and international comparisons—our data can be used, for example, to track the progress of government reforms as well as to compare Australia with other countries;

(3) **Promoting Debate**: To promote public debate over democratic issues and over how Australia’s democratic arrangements might be improved. The Audit website hosts lively debate on democratic issues and complements the production of reports like this.

**Background**

The Audit approach recognizes that democracy is a complex notion; therefore we are applying a detailed set of Audit questions already field-tested in various overseas countries. These questions were pioneered in the United Kingdom with related studies in Sweden, then further developed under the auspices of the International Institute for Democracy and Electoral Assistance—IDEA—in...
Stockholm which recently arranged testing in eight countries including New Zealand. We have devised additional questions to take account of differing views about democracy and because Australia is the first country with a federal system to undertake an Audit.

**Further Information**
For further information about the Audit, please see the Audit website at: http://democratic.audit.anu.edu.au

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**Introduction—The meaning of political equality:** This audit assesses key aspects of Australia’s electoral systems against the ideal of political equality. Political equality means formal equality (treating people equally as electors), and it requires systems that are representative and inclusive, accessible to all and competitive (so that elections are open to outsiders and newcomers, not just to incumbents).

**Who votes?** There are three perennial questions about who should be allowed to vote: citizenship versus residency as the basis for voting rights; the minimum voting age; and prisoners’ voting rights. To enfranchise permanent residents would give an increasing number of people an electoral say, enhancing political equality and recognising the realities of globalisation. To give the vote, perhaps on a voluntary basis, to 16 and 17 year olds may force politicians to engage more with youth issues. And disqualification for criminal convictions, which varies by jurisdiction, is unsupportable on political equality grounds.

Most Australians favour compulsory voting; most citizens enroll and most vote. However, some people object to voting for principled political reasons and to recognise their rights, there should be greater ballot choice.

**How we vote:** Optional preferential voting (as used in NSW and QLD Assembly elections as well as for the NSW upper house) gives greater choice to electors than the full preferential voting used for most lower houses. It means that voters without a real preference between candidates are not forced to make an insincere or random choice.
The various Australian voting systems are not unduly complicated. However, confusion—and hence disenfranchisement—arises when voters face different voting methods at State and Federal elections. Leaving aside the current lower house arrangements in the ACT and Tasmania, it would be a practical and democratic improvement if optional preferential voting were adopted for all lower house elections and some variant of the Senate voting system adopted for all upper house elections.

Compulsory voting is desirable but at present informal voting is repressed, even when this is a carefully thought out position. A ‘none of the above’ option on the ballot paper would respect dissent and measure levels of dissatisfaction.

Robson Rotation would be the simplest solution to positional advantage (or ‘donkey voting’) which, while less significant than in the past, remains a problem for political equality.

**Who we can vote for:** The Commonwealth Parliament must consider increasing the Senate representation of the mainland Territories, particularly because their voting populations will soon rival that of Tasmania and because the ACT is by far the most under-represented region in Australia.

With increasingly sophisticated demographic information and technology, one-vote, one-value is more achievable than ever. Regional weighting continues at the State level in four remote seats in QLD as well as in WA and, while arguments about what this implies for political equality could go either way, there are practical reasons for rejecting these arrangements.

Having larger multi-member electorates would be a simple way of achieving one-vote, one-value. An option would be the Mixed Member Proportional system now used in New Zealand but it may increase the temptation for parliamentarians to party-swap. Reserving seats for particular ethnic groups or community interests could enhance equality of political representation, although it may be at odds with the usual understanding of one-vote, one-value.

Constitutional barriers to candidacy for the federal parliament—because of dual citizenship or holding an ‘office of profit’—affect many citizens and create uncertainty. Anyone employed by State and Federal government is forced to risk joblessness to exercise their democratic right to become a parliamentary candidate. The Commonwealth Parliament could legislate to automatically place Federal employees on leave whilst they stood as candidates and, if they were elected, to backdate the termination of their position to the day before the poll.

The deposits that candidates are required to pay on nomination are not excessive. They do not guarantee that a candidate will sincerely desire to be elected on a serious platform. However, higher deposits would be more likely to deter smaller parties and poor independents.

Recent evidence of endemic internal ‘rorting’ of preselection ballots raises concerns for political equality and there may be value in having electoral commissions conduct internal party ballots to ensure their integrity.

**Campaigning:** For television debates between leaders, authoritative ground rules should be developed and an independent arbiter appointed to ensure both an informed electorate and equality of political competition.

Research is needed to determine what effect publishing opinion polls during election campaigns has on voter psychology. If that effect is significant, regulating publication (as is common overseas) may be an option but more would be achieved by changing the ethics and culture of opinion polling and the presentation of data.

Push polling should be dealt with by a statutory based, civil right to seek an urgent injunction against any misleading innuendo in any poll questions, coupled with strong civil sanctions against any firm engaging in polling without statistical validity.

While it is difficult to regulate misleading campaign statements, reforms could be considered in two related areas: broadcasters should be required to publish reasons when they refuse to carry an advertisement; and a mechanism could be introduced to mandate public retractions of blatantly incorrect factual claims.

**Money politics and incumbency benefits:** The single greatest issue confronting elections in the developed world is the influence of private money. Once the worry was about politicians bribing voters; now it is about special and wealthy interests buying political influence and favours. Australia has no donation or expenditure limits, and disclosure laws of limited enforceability. Thus the country has a very liberal and major-party friendly model. We should look at what expenditure caps are working in the UK, NZ and Canada and see what lessons we can learn from there.

Incumbent parliamentarians and parliamentary parties have access to significant public resources which they can use in campaigning. These include parliamentary allowances, publicly financed electorate and ministerial staff, and control or
influence over the amount of public service advertising promoting government initiatives. To counter such advantages, free air-time should be widely available as a way of empowering those who draw least on incumbency benefits. Otherwise, the solutions are in the hands of a reinvigorated parliamentary system promoting greater executive accountability and more open scrutiny of members’ expenditure of allowances.
| **Above-the-line** | A voting option in most Australian PR systems. Elector can vote for a party/group box ‘above the line’ of the candidates’ names, rather than giving preferences to individual candidates. |
| **ACT** | Australian Capital Territory |
| **AEC** | Australian Electoral Commission |
| **ALP** | Australian Labor Party |
| **AV** | The alternative vote—better known as majority preferential voting |
| **CWLTH** | Commonwealth of Australia—i.e. the federal system |
| **EU** | European Union |
| **FPP** | First-past-the-post voting |
| **International** | International Institute for Democracy and Electoral Assistance |
| **MMP** | Mixed Member Proportional |
| **NSW** | New South Wales |
| **NT** | Northern Territory |
| **NZ** | New Zealand |
| **ON** | One Nation |
| **OPV** | Optional preferential voting. As opposed to full preferential, where electors must express preferences between all options. Known as ‘partial preferential’ if electors only express a minimum number of preferences. |
| **PR** | Proportional Representation: a family of voting systems where seats are won by achieving a certain percentage or ‘quota’, which depends on the number of members to be chosen. |
| **QLD** | Queensland |
| **SA** | South Australia |
| **STV** | The single transferable vote: used commonly in PR in Australia. |
| **TAS** | Tasmania |
| **UK** | United Kingdom |
| **US** | United States |
| **VIC** | Victoria |
| **WA** | Western Australia |
Introduction—The Meaning of Political Equality

Political equality should be a core value in any democratic society. It is based on the idea that all are born equal, deserve equal respect and opportunity and should have equal voice.

Put this way, the ideal of political equality is a rich but deceptively simple one. It exists in creative tension with another fundamental value, political liberty. Liberty asserts that people are born free and should, as far as possible, be the authors of their lives. Political liberty, then, is the ideal that people should be free to develop, express and advance their beliefs about what makes a good life in a good society.

In a liberal, capitalist society such as Australia, political equality and liberty come together at several key points. For example, people are not equal if one group’s vote is worth less than another’s. And nor are those groups likely to be free, because their political inequality is likely to lead to restrictions on their ability to shape their destinies.

Political Equality encompasses: formal equality, representativeness and inclusiveness, accessibility, and competitiveness.

Equality contrasted with liberty.
But equality and liberty are also often at odds. We often give lip service to equality by enacting rules or creating systems that appear to be formally equal and respectful of freedom. Formal equality, however, sometimes masks substantive inequality. For example, every person and indeed company is formally equal and free in Australia to buy television advertising time to advocate their views at election time. Yet in practice few can afford this. The Hawke government legislated to ban paid television advertising and substituted a regime of free airtime for policy announcements. The High Court, however, struck this down as an infringement on freedom of expression. The Court claimed the political liberty interest in free political speech outweighed competing interests such as more equal access to airtime. Australia has a relatively liberal approach to money in politics; even more so than the United States (which is otherwise usually depicted as more libertarian). The US Supreme Court recently upheld complex and intrusive federal regulation in the Bi-partisan Campaign Finance Act 2003, reasoning that limits on private contributions to campaigns were justified to prevent corruption or its appearance. Such limits may be better understood as ensuring some equality of political competition by limiting the power of private wealth. Australia, in most States at least, has a system of public funding to help defray campaign costs. Does such state aid to political parties equalise competition by reducing reliance on private money?

Outside a concrete example like this, political equality, in the abstract, can seem rather woolly. It is difficult, and probably unhelpful, to try to give it a precise definition. But if we are going to assess the health of Australia’s electoral systems using political equality as the measure, we must begin with some idea of what the measure covers.

Political equality, for our purposes, includes at least four sub-virtues:

- **Formal equality**—This means treating people equally at face value. In particular, it encompasses the principle of non-discrimination except on compelling grounds. For example, about a century ago it was accepted that the franchise should be as wide as possible, except for those who, because of immaturity or mental condition, are not ready to exercise it. But there remain debates about why non-citizen residents cannot vote, disagreements about what age is too young to vote, and unease about why most prisoners are denied the vote.

- **Representativeness and inclusiveness**—Representativeness means ensuring, within reason, that electoral systems and elected offices reflect the will and the make-up of the people. This is not necessarily reduced to ‘majority rules’. In fact, to treat people in a diverse society as equals, an electoral system must be inclusive, in the sense of giving voice to minorities and registering dissent. This includes trying to ensure that voters have an equal chance of electing a representative of their choice.

- **Accessibility**—Aristotle said that man, in society, was zoon politikon, that is, a ‘political animal’. But most people are not political junkies. If we are born equal, it is our interests that must be respected, rather than our enthusiasms. For example, a voting system that is too complex will be unequal if it deters the average person or leads to mountains of spoilt ballots. Accessibility also links into the fourth goal, competitiveness.

- **Competitiveness**—This virtue is easily misconstrued. Electoral politics, at one level, is always a ‘game’. But to ask that it be a competitive game is not to want it to breed endless ego clashes or all-out electoral warfare. Indeed a purely ‘free market’ in electoral competition may lead to a monopolisation of power. As, too, can self-interested electoral legislation, which after all is made by the very politicians who are thrown up by the system in the first place. Political equality requires that mechanisms be in place to minimise the benefits of incumbency and to ensure the system is open to outsiders and newcomers.

Typically we think of political equality in terms of individual rights or interests—whether they be of individual electors, or parties. It is less easy, though no less important, to conceive of equality in terms of group interests. An obvious example relates to visible minorities who have suffered deliberate exclusion from political participation, such as Indigenous Australians. Should there be reserved seats in Parliament, as in New Zealand, to ensure some equity in political representation? But even ‘mainstream’ Australian politics has historically been conceived in ways designed to ensure a level of group equality: notably in a voting system that balanced power between parties that were based on class, namely the traditional ALP versus the Liberal and Country parties.
The purpose of this audit is to assess key aspects of Australia’s electoral systems against the ideal of political equality. Political equality is its focus, but as we have just seen, it is impossible to ignore other values. So, where relevant, we will consider the interaction of equality and liberty, without attempting some mythical balance between the two when they clash.

As we shall also see, if only in passing, there are other important goals that electoral systems are expected to serve. Three are commonly invoked. One is the symbolic and unifying value of **defining a political community** (hence, for example, excluding non-citizen residents/taxpayers from voting). The second is the favouring of **stability**, in particular single-party government over more colourful, but allegedly less stable coalition rule. This is a particular, pragmatic feature of most English-speaking democracies, New Zealand being a recent exception. In contrast, the majority of democracies worldwide have settled for more representative parliaments by employing PR. The third value, receiving increasing attention in recent years, is **deliberation**. That is, the quality and breadth of political knowledge and debate. Sometimes this is reflected in experiments in deliberative decision-making, for example, where conventions of ordinary people are chosen to gather and consider issues only after sessions of information and debate. But deliberation goes deeper than this to include the idea that electoral democracy, in whatever form, should promote discourse capable of promoting understanding, healing divisions and generating consensus within the community.

Elections, and electoral systems, of course, can only do so much. As a form of accountability for government, elections are an ultimate but crude weapon. They merely ask for an occasional and inherently limited choice between representatives. They do not, for instance, ensure that ongoing policy development or the daily business of government are responsive to the needs and opinions of the populace, let alone that these processes treat people equally.

**The Franchise**

Is the expansion of the franchise at an end?
Should all permanent residents have the vote, even if they are not citizens?
Should the voting age be lower than 18?
Should all prisoners have the vote?

Historically, the most fundamental question in political equality was the franchise: that is, who is qualified to vote. The vote is not just the practical currency of political power in a democracy; its possession has great symbolic value, as a talismanic birthright.

For many, the franchise was hard won. Female suffrage in Australia was achieved early by world standards. Although South Australia was proud to be the first Australian colony to enfranchise women, New Zealand had already taken this step in 1893. But although, as had been expected at Federation, the first Australian Parliament enacted a uniform national franchise in 1902 that did not discriminate between men and women, it is a mistake, as Oldfield says, to see votes for women as a ‘gift’. It was a ‘struggle’ that lasted more than two decades.

Indigenous Australians had to wait even longer. In terms of national elections, things went backward rather than forward after 1902, with some Aborigines losing their vote. In 1949 legislation confirmed that those who could vote in
State elections could vote for the Commonwealth and the vote was also given to Aboriginal ex-servicemen. The Commonwealth vote was finally given to all Aborigines in 1962 but it was not until 1983 that voting was made compulsory, as it had long been for ‘non black fellas’.

It is universally accepted today that discrimination on the grounds of gender, race or class is invidious. And, there is also a uniform rule that ‘unsoundness’ of mind disqualifies one from voting. But this uniformity of principle masks debates over the limits to the contemporary franchise. In fact, three perennial questions arise which implicate political equality: citizenship, age and criminal conviction.

Citizenship versus residency as the basis of voting rights?
The most numerically significant limitation is that of citizenship. Note at the outset that Australian law is not particularly jealous about the connection of electors to place. Everywhere bar Tasmania an elector only needs one month’s residency at their current address to enrol. Even this short requirement of connection to a particular place exists primarily to serve administrative and anti-stacking purposes, rather than a desire to mandate community links. Only in Tasmania—an island community—is a substantive residency hurdle imposed, and even there it is only six months.

Similarly, the law is reasonably generous to electors who go abroad for work purposes, provided their shift is not intended to be permanent. Federal law now permits overseas enrolment for up to six years (that is, two electoral cycles) after departure from Australia for personal work reasons. This is less however than allowed by UK law. The Southern Cross Group, representing expatriate Australians, estimates that half a million Australian citizens abroad are disenfranchised either through limitations in the law or ignorance of entitlements. The Group also objects to the requirement of having an intention to return to Australia within six years. It had a small win with a 2003 recommendation to permit applications for overseas elector status to be made within three years of leaving Australia, and no reasons for leaving will need to be given. In line with French and Italian practice, some have argued that an ‘overseas electorate’ should be created to represent this diaspora.

If neither longstanding ties to place nor, in the case of temporary overseas status, a residency requirement are mandated, why is the vote restricted to citizens? Citizenship after all is just a legal category: residency is a real world status. In an age when economics has been the dominant language of public discourse, the rallying cry of the US revolution, “No Taxation Without Representation”, seems apt. Should not all permanent residents be enfranchised? They are equally subject to Australian law, and equally part of Australian communities as are citizens.

Critics of this suggestion argue that the vote should remain allied to citizenship as a symbolic lure, to encourage immigrants to become ‘nationalised’. But if equality is our primary concern, it seems perverse to withhold a fundamental right as an enticement. A deeper argument for the rule would be that the right to vote defines the polity, that is, the nation as a political community. But that merely begs the question why a political community should exclude permanent residents.

Constitutional conservatives may seek to raise legal arguments drawn from their reading of phrases such as ‘the House of Representatives shall be … directly chosen by the people of the Commonwealth’ in section 24 of the Constitution. Historically, it makes no sense to say that ‘the Commonwealth’ is limited to citizenship; however some may argue that citizenship replaced the concept of being a ‘subject’ of the Crown or Empire. Either way, the real debate lies in how we imagine—and share—our sense of political community and belonging.

Enfranchising permanent residents is not just a matter of equal treatment. It fits Australia’s condition as an immigrant country in a globalising world. The alternative is to retain a system where an increasing number of adults in the community have no electoral say, compounding problems of under-representation and marginalisation for some ethnic communities. It also ensures that, in international rankings of voter turnout, Australia performs poorly (perversely given compulsory voting). International IDEA ranked Australia 20th in a worldwide table of turnout by voting age population in the 1990s.

Enfranchising all permanent residents may seem radical. Yet the principle is not new. Leaving aside some racially discriminatory exceptions, from 1902 the Federal vote was given to ‘all natural born or naturalized subjects of the King’. These voting privileges survived the Nationality Act of 1920 and the Citizenship Act of 1949—indeed they were explicitly extended to ‘natives of British India’ in 1925. However they were largely removed in 1984 in favour of a ‘bright-line’ (that is, a clear rule) citizenship requirement. Of course this history reflected the original status of Australians as subjects of the British Empire. But empire is just one form of globalisation. Better yet, voting rights for permanent residents would enhance political equality and recognise the realities of a globalising world, without the inequality of the historical rules, which favoured only certain Commonwealth cousins.
Instead, we retain a peculiar rule preserving the franchise of those ‘British subjects’ who have remained on the roll since 1984. Since the Empire was long gone even in 1984, this salve discriminates in favour of a select nationality—that is, British subjects. Unless other non-citizen residents are accorded the right to vote, there is no reason to continue that favouritism.

This argument is not anti-British. On the contrary, if we look to UK electoral law we find a generous franchise. Residents who are citizens of most Commonwealth countries are entitled to register for parliamentary elections in the UK. And residents who are citizens of other EU nations can vote for UK-based seats in European parliamentary elections. Of course neither of these categories is as extensive as all resident non-citizens. The UK rules reflect a definition of political community based on a sense of historical obligation (to the Commonwealth as former Empire) and an emerging supranational political entity (the EU).

Moving to a residency franchise in Australia can serve the symbolic value of better defining our political community—of Australia as an immigrant nation in a globalising world—as well as the ideal of political equality for all in the Australian community.

Minimum voting age

Age is the second key axis that defines the franchise. At the Federal level, it was 21 for most of the 20th century, until the Whitlam government lowered it in 1973 to 18. That is where it stands in all Australian jurisdictions. Eighteen has become the age of majority.

Periodically there are calls to lower the voting age. For example, the Greens in 1998 introduced a Federal Bill proposing voluntary enrolment and voting for 16- and 17-year-olds. Reasons cited include rising educational standards and changing patterns of maturity. After all, one can generally be licensed to drive at 17, which is also a common age to finish high school, and women can marry as young as 16. Many young people begin to be economically active, including paying taxes, at 15, and most tellingly, around this time many become politically aware and active. Further, many political parties allow full membership to under-18s. In the case of the Victorian and South Australian branches of the ALP, members can be as young as 14.

A line must be drawn somewhere, and any line will be arbitrary in the sense of excluding many who mature early and including many who mature late. With compulsory voting there may be good reason to avoid drawing the age too low, to avoid including large numbers of uninterested electors. Eighteen is also an age at which nearly all will have completed formal schooling, and hence is a common age to begin establishing an independent life.

Prior to that age, parents will ideally bear their family’s interests in mind when voting: a supposition apparently confirmed by the centrality of slogans and policies directed at ‘the family’ in political debate. But an enlightened young person might object, ‘Why is my voice only exercised by proxy?’ Political equality may well require that 16- and 17-year olds have a vote, if only a voluntary vote. If nothing else, lowering the age will force politicians to engage more with youth issues, and a robust public debate on the issue, if it were to be inclusive of youth, might in itself increase awareness and participation rates.

The issue is of concern internationally. The UK Electoral Commission is conducting a policy review considering whether the UK’s minimum voting and candidacy ages (18 and 21 years respectively) should be lowered. Part of its motivation was alarm that participation rates amongst 18–24-year olds dropped to below 40 per cent at the 2001 Westminster poll—a statistic both sides of the voting age debate are likely to seize on. It must be noted that relatively few nations have voting ages below 18. Of the major democracies, only Brazil, at 16, stands out, although various Länder (that is, states) in Germany and Austria lowered their voting age for local elections to 16 in the 1990s.

Prisoners’ voting rights

The third controversial category is disqualification for criminal conviction. The rules vary by jurisdiction. As the table below shows, they are harshest in Tasmania and most liberal in South Australia.

Whilst not excluding large numbers of voters, especially in comparison to many states in the US where any ‘felony’ conviction is a disqualification for life, unless pardoned, these disqualifications are unsupportable on political equality grounds. Indeed it is ironic that some citizens elect to go to gaol rather than pay the fine for not voting; yet many in gaol are disenfranchised—including some with legitimate grievances over their treatment. Further, although some prisoners are entitled—indeed compelled—to enrol and vote in all jurisdictions bar Tasmania, there is a wide variation in their practical ability to do so. As ‘captive’ electors, there is no reason why enrolment assistance and either postal voting forms or mobile polling booths, or both, should not be provided to enable prisoners to perform their ‘civic duty’.
Society, rhetorically at least, long ago abandoned the idea of ‘civil death’ in favour of deterrence and rehabilitation as the chief justifications for punishment. Depriving prisoners of the vote can only be justified symbolically. Recently the Canadian Supreme Court, by a narrow majority, ruled that symbolic grounds could not justify stripping citizens of their right to vote. But Canada has a Charter of Rights that includes a right to vote—Australia is the only western nation without a Bill of Rights of some description.

When, if ever, should conviction prevent someone from standing or remaining in Parliament? Note that many people ‘under sentence’ are not in prison (the sentence may be suspended, or early release granted.) Generally at a minimum one must be entitled to enrol to vote to be eligible to stand; but in most jurisdictions this now only applies to longer-term prisoners. Under the Constitution, leaving aside treason, only conviction of an offence punishable by more than one year acts as a disqualification from federal candidature (and then only temporarily). But it is unlikely that a presently convicted person would be preselected or elected. The more interesting issue is past conviction. Generally, once rehabilitated, there is no reason to bar a convicted person from public life. Far better to leave it to the voters.

There is an argument that certain offences should act as an ongoing disqualification. For example, following the Shepherdson Inquiry, in Queensland there is a 10-year disqualification if the offence related to ‘an election’, whether parliamentary or local government. (Curiously this would not seem to capture offences against political finance laws.) This is best seen not as a means of protecting voters from themselves, but as a political penalty, to deter electoral offences. More concerning are laws, such as currently proposed in Western Australia, to disqualified candidates simply because of any past conviction (in WA’s case, of any offence punishable by more than 5 years),

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### Compulsory Enrolment and Voting

Is compulsory voting illiberal or does it ensure a healthier democracy?

**Should there be a wider ‘conscientious objection’?**

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The pros and cons of compulsion

In 1915, voting became compulsory in Queensland. At Federal elections, enrolment had already been made compulsory in 1911. As Marian Sawer has argued, this was a natural extension of a bureaucratic urge to create the most accurate and inclusive roll possible. By 1924, voting was also compulsory for Federal elections.

As Table 2 shows, compulsion, although not enforced by heavy fines, has spread to all jurisdictions. Only SA stands out, and only then for not mandating initial enrolment. There are of course a few exemptions: some curious (Norfolk Islanders are not obliged to enrol for Federal elections, but if they do they must vote) and some commonsense (Antarctic, itinerant and overseas electors are generally not obliged to vote).

Compulsion has been derided on various grounds, mostly libertarian, and summed up in the question, ‘Should a fundamental right also be a legal duty?’. This type of thinking led the majority of the Federal Parliament’s Electoral Matters Committee to recommend the repeal of compulsory voting in 1997.

Compulsion is also attacked for its alleged consequences. One is that compulsion makes parties lazy. It was once regularly claimed that compulsion favoured the ALP, based on assumptions that young, migrant and other marginalised constituencies were more likely to vote if compelled, and that these groups tended to favour the ALP. However compulsion is supported by the platforms of all the important parties. If self-interest is a factor in this, it is because no party cares to risk losing lukewarm supporters and because public funding is currently earned on the actual numbers of votes received. Perhaps more seriously, from the equality perspective, it is alleged that compulsion encourages parties to focus only on marginal seats, to the exclusion of safe electorates. Another equality concern is that elections may be decided by the votes of those dragooned to the polls without any knowledge or interest in politics. Professor Joan Rydon twice wrote that:

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<thead>
<tr>
<th>System</th>
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<tr>
<td>CWLTH</td>
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<td>Sentence of 1 year or more</td>
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<td>VIC</td>
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<td>QLD</td>
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<tr>
<td>WA</td>
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<td>NT</td>
<td>As per CWLTH</td>
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*Subject to change to CWLTH standard under the Electoral and Constitutional Amendment Bill 2003

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**Table 1: Prisoner voting disqualification**
In Australia, where the apathetic and ill-informed are forced to the polls by law, it is even more likely that the ‘scum and dregs’ of political life will decide who is to govern the country.

[This quote is perhaps less elitist than it looks: socialist playwright George Bernard Shaw used the phrase ‘dregs and scum’, noting that the ‘scum’ included many who felt socially superior, the ‘dregs’ those at the bottom of the pile. That is, apathetic or ignorant citizens come from all classes.]

Colourful language aside, it is a curious fact that the bulk of Australians routinely report in opinion surveys that they favour compulsion. Now this could simply show how the law generates conformity to itself. But more idealistically it reflects a virtuous feedback loop: Australians grow up to appreciate that voting is an important social obligation. Lisa Hill, the most articulate contemporary advocate of compulsory voting, sees it as an important aspect of inclusive citizenship and reciprocal obligation. If this is true, compulsory voting is justified on grounds of practical social equality as well as its symbolic role in creating an egalitarian political community. In terms of practical political equality, compulsion advances the goal of ensuring elections are inclusive, or as Hill puts it, the realisation of equality of political opportunity. Further, by making enrolment and voting a habit, compulsion makes the electoral system more accessible, in particular to groups that otherwise might tend to be alienated from electoral politics because they are socially or economically marginalised.

It is impossible to know how far turnout would decline if voluntary voting was re-instituted, without actually doing so. Even then, such an experiment would only be meaningful if it took place over several decades. Australia is far from alone in compelling voting, but certainly it is unique amongst the common law countries we instinctively turn to for comparison, such as the US, UK, Canada and NZ. That habits of voting are cultural and situational is borne out by comparative statistics. According to International IDEA, as a measure of voting age population, turnout at Westminster elections averaged 74.9 per cent between the Second World War and 1997. In the same period in NZ, turnout averaged over 86 per cent. So, experience shows that turnout can be high without compulsion. Yet voluntary voting also has no answer to political illegitimacy and under inclusiveness once turnout starts to decline. In the UK, according to Butler and Kavanagh, turnout trended down from 84 per cent to 71.5 per cent between the war and 1997, and then plummeted to just 59.4 per cent in the (admittedly foregone conclusion of the) 2001 election.

Conscientious objection

Whilst compulsory enrolment and voting is a clear site for the collision of equality values and liberty values, there is one area where reform may offer a salve to both ideals. Some electors, who do not have a religious objection to voting, have principled, political reasons for not voting. It seems counterproductive to use the weight of the law on principled objectors: if nothing else it makes political martyrs of them. Lisa Hill therefore has proposed a statutory exemption for conscientious objectors. This might also take the sting out of the apparent absurdity of High Court rulings that genuine objectors (such as a socialist who could not bring himself to vote in elections where candidates were all supporters of capitalism) can be compelled to have a preference even if they sincerely have none. A law that formally compels everyone equally to the polls is not truly equal if it fails to distinguish such principled objectors from those who just could not be bothered to vote.

It is not certain that a conscientious objection process would be more than window-dressing in practice. The mere assertion of a conscientious objection after a fine notice has been issued may be too easy—it might open the floodgates and render enforcement meaningless. Electors could be invited prior to each election to prove a longstanding conscientious objection based on principle or past refusals to vote, and thereby qualify for a ‘non-voter’s roll’. But it is noteworthy that a similar system in the days of ‘closed shops’, where conscientious objectors could apply for an annual ‘certificate of exemption’ from
trade union membership, never applied to more than 200 people (fewer than 1 in 10,000 union members). So any exemption may either be too easy to assert, and hence abused, or too difficult to obtain, and hence nugatory.

For these reasons, and others outlined in the section on ‘Informal voting—registering dissent’ (below), the preferable answer is to retain a broad and enforceable compulsion, but to provide greater ballot choice. This could be done if all jurisdictions, especially the Federal, adopted optional preferential voting (OPV), by making it clear that informal voting is permitted, and even by including a ‘None of the Above’ option to better register electoral dissent.

Table 2: Compulsory enrolment and voting

<table>
<thead>
<tr>
<th>System</th>
<th>Penalty for non-enrolment</th>
<th>Penalty for not voting (lower fine for not contesting matter)</th>
</tr>
</thead>
<tbody>
<tr>
<td>CWLTH</td>
<td>$50</td>
<td>$20–$50</td>
</tr>
<tr>
<td>NSW</td>
<td>$55</td>
<td>$25</td>
</tr>
<tr>
<td>VIC</td>
<td>$100</td>
<td>$50–$100</td>
</tr>
<tr>
<td>QLD</td>
<td>$75</td>
<td>$75</td>
</tr>
<tr>
<td>WA</td>
<td>$50</td>
<td>$20–$50</td>
</tr>
<tr>
<td>SA</td>
<td>Initial enrolment not compulsory —$75 fine for not transferring</td>
<td>$10–$50</td>
</tr>
<tr>
<td>TAS</td>
<td>$50</td>
<td>$50</td>
</tr>
<tr>
<td>ACT</td>
<td>$50</td>
<td>$50</td>
</tr>
<tr>
<td>NT</td>
<td>Enrolment and transfer compulsory by virtue of roll being based on CWLTH</td>
<td>$100</td>
</tr>
</tbody>
</table>

Being qualified to vote does not guarantee the right to vote. For practical reasons there must be a verifiable, public roll of electors. Indeed the accuracy of the roll has been an issue for centuries, and there were once special tribunals to administer the rolls.

Accuracy is the paramount value for the roll, not least as enrolment fraud risks diluting legitimate votes and in a worst case would distort electoral results. Both outcomes make a mockery of political equality. As noted below under ‘Party preselection’, recent revelations of false enrolments by party members have fuelled decade-old concerns about electoral rorting. Even if, as the AEC and Professor Hughes argue, there is no evidence of rorting on a scale capable of affecting electoral results, public perceptions of fairness and equality are almost as important as statistical reassurance.

The centrepiece of the enrolment process is the national roll, kept by the AEC. State rolls have, of late, generally been by-products of this. Such centralisation is vital to keep enrolment simple and thereby serve the accessibility goal of political equality. Ordinary citizens may not appreciate distinctions between State and Federal rolls, and may be disenfranchised if they had to enrol separately. Following the logic of compulsory voting, enrolling with the AEC has, for some time, been a very simple process: a signed form, witnessed by another elector, in a reply-paid envelope.

Responding, ostensibly, to concerns that ‘electoral enrolment was easier than borrowing a video’, the Federal Government in 1999 legislated additional requirements, though due to opposition these were not proclaimed. Compromise recommendations have since emerged from the joint parliamentary committee:

- first time enrollees, and those changing existing details (for example, addresses) must produce identity documentation (for example, driver’s licence). Failing that, written identification references must be presented from two current electors; and
- only persons actually enrolled will be allowed to witness applications.

Enrolment and Proof of Entitlement to Vote

Should electors have to do more to prove their identity? Do such requirements cause disenfranchisement?
On its face these measures are moderate ones to protect the roll’s integrity. But the price of rendering a roll more accurate is the likelihood of depriving some, for whom compliance is made more difficult, of their right to equality of the franchise.

Even stricter measures that are sometimes proposed, such as mandating enrolment in person, photographic identification, or the provision of ‘100 points’ of identification through, for example, bank, lease, Medicare documents etc., will disproportionately disenfranchise some groups over others. These could include the young and elderly, especially if they do not drive, are not economically active and so on. Strict measures are also likely to impact more heavily on the already marginalised, for example, the homeless.

The Government’s compromise position of requiring documentary verification from all new enrollees, but not all currently enrolled, will impact disproportionately on new, that is, mostly young, electors. It is not uncommon for new requirements to be imposed retrospectively. But with something as fundamental as the right to vote, it is an odd form of indirect discrimination against young voters to require them to meet a hurdle that older voters are not necessarily required to meet. The federal Government also wants—contrary to the Parliament’s Electoral Matters Committee—to close the rolls immediately an election is called. Its ostensible fear is that false enrolments are undetectable when the authorities are deluged. Currently there is a seven-day grace period: over 350,000 enrolments are processed in this time, a disproportionate number from younger electors. Early closing would disenfranchise large numbers of citizens.

In the end, the sanctity of the roll is guaranteed best by administrative innovation and resourcing, and not so much by rules and system design. Habitation reviews and, more recently, electronic data matching have been the chief tools of roll accuracy. A 2002 report of the Australian National Audit Office found the Federal roll to be well within target, at over 96 per cent accurate, 95 per cent complete and 99 per cent valid.

The Voting System

Why is majority preferential voting used rather than the simpler first-past-the-post (FPP)?

Is optional preferential voting (OPV) preferable to full preferential?

Are there alternatives to our current mix of majority preferential and preferential proportional representation (PR)?

Should we have a uniform voting system for State and Federal elections?

Is informal voting the political act that dare not speak its name? Should ballot papers have a ‘None of the Above’ option?

Across the world there is endless dispute about the relative merits of PR (and between different types of PR) and other voting systems. This is not the place to rehash the detail of those debates. Rather, let us look at the political equality virtues of the different systems in an Australian context.
Preferential voting clearly preferable to first-past-the-post

Majority preferential voting predominates in the lower houses of government in Australia. It involves listing a set of candidates, and having electors choose between those options by ranking them. The preferential vote is sometimes known as the ‘alternative vote’ (AV). It replaced the simpler system of first-past-the-post voting (FPP) many years ago in Australia, but not, for instance, in elections to Westminster Parliament. It clearly scores better than FPP in terms of equality virtues such as competitiveness, and generally does so in terms of representativeness and inclusiveness. FPP gives little encouragement to minor parties or their supporters, since, literally, all that counts are the crosses besides the candidate who gets the highest number of votes.

FPP’s primary virtue is the guarantee of strong government and its extreme simplicity: everyone who has ever seen a horse race understands the idea of ‘first past the post’! One Nation supporters called for its reintroduction in the late 1990s, upset at decisions by almost all other parties to recommend preferences against the ON party. But FPP almost guarantees the distortion of electoral results: it is the most unrepresentative voting system in regular use. Besides failing the representativeness aspect of political equality, it also fails the inclusiveness and fair electoral competition angles of equality. Supporters of any but the most popular candidate have no say in the race, and such votes are in effect wasted.

What compulsory preferential voting does do, however, is generate insincere voting. Compelling voters to completely rank all candidates (aka ‘full’ or ‘exhaustive’ preferential voting) forces many to make distinctions between candidates they have no preference between or even knowledge about. This is a particular danger when coupled with compulsory enrolment and voting. As a result, and given the difficulties of convincing Australian parliaments to move to PR (proportional representation) the real debate today is why few lower houses permit optional preferential voting (OPV).

Optional versus compulsory preferential voting

OPV was pioneered in Queensland as early as 1892; it is now used in both NSW and Queensland Assembly elections. NSW also allows OPV in above-the-line voting for its upper house or Legislative Council. That is, voters can simply choose one party slate, or rank several slates in order of preference. Elsewhere, full preferences (aka ‘exhaustive’ preferential voting) are compulsory.

### Table 3: Preferential Voting Systems for each Australian Parliament

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Lower House</th>
<th>Upper House</th>
<th>No.</th>
<th>Voting system</th>
<th>Jurisdiction</th>
<th>Lower House</th>
<th>Upper House</th>
<th>No.</th>
<th>Voting system</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commonwealth</td>
<td>House of Representatives</td>
<td>Full preferential</td>
<td>48</td>
<td>Full preferential</td>
<td>Senate</td>
<td>Legislative Council</td>
<td>Full preferential</td>
<td>42</td>
<td>Full preferential</td>
</tr>
<tr>
<td>New South Wales</td>
<td>Legislative Assembly</td>
<td>Optional preferential</td>
<td>93</td>
<td>Optional preferential</td>
<td>Legislative Council</td>
<td>None - abolished 1922</td>
<td>None - abolished 1922</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Victoria</td>
<td>Legislative Assembly</td>
<td>Full preferential</td>
<td>88</td>
<td>Full preferential</td>
<td>Legislative Council</td>
<td>34</td>
<td>None - abolished 1922</td>
<td>34</td>
<td>Full preferential</td>
</tr>
<tr>
<td>Queensland</td>
<td>Legislative Assembly</td>
<td>Optional preferential</td>
<td>89</td>
<td>Optional preferential</td>
<td>Legislative Council</td>
<td>None - abolished 1922</td>
<td>None - abolished 1922</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Western Australia</td>
<td>Legislative Assembly</td>
<td>Full preferential</td>
<td>86</td>
<td>Full preferential</td>
<td>Legislative Council</td>
<td>22</td>
<td>None - abolished 1922</td>
<td>22</td>
<td>Full preferential</td>
</tr>
<tr>
<td>South Australia</td>
<td>Legislative Assembly</td>
<td>Full preferential</td>
<td>47</td>
<td>Full preferential</td>
<td>Legislative Council</td>
<td>15</td>
<td>None - abolished 1922</td>
<td>15</td>
<td>Full preferential</td>
</tr>
<tr>
<td>Tasmania</td>
<td>Legislative Assembly</td>
<td>Partial preferential</td>
<td>25</td>
<td>Partial preferential (Hare-Clar, min. 5 preferences)</td>
<td>Legislative Council</td>
<td>7</td>
<td>None - abolished 1922</td>
<td>7</td>
<td>Partial preferential (Hare-Clar, min. 5 preferences)</td>
</tr>
<tr>
<td>Australian Capital</td>
<td>Legislative Assembly</td>
<td>Full preferential</td>
<td>17</td>
<td>Full preferential</td>
<td>Legislative Assembly</td>
<td>25</td>
<td>None - abolished 1922</td>
<td>25</td>
<td>Full preferential</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>Legislative Assembly</td>
<td>Full preferential</td>
<td>17</td>
<td>Full preferential</td>
<td>Legislative Assembly</td>
<td>25</td>
<td>None - abolished 1922</td>
<td>25</td>
<td>Full preferential</td>
</tr>
</tbody>
</table>
OPV allows the elector to list as many or as few preferences as they wish. In the context of dissatisfaction with the major parties, it has the equality virtue of inclusiveness because it does not artificially force electors to choose between what some see as the Tweedledum of the Liberal Party and the Tweedledee of the ALP.

Opponents of OPV usually cite two objections. One is that it can in effect be reduced to FPP if nearly all electors just plump for their first preference. A dominant majority party can encourage this with a ‘Just Vote 1’ strategy, as, for example, illustrated by the ALP campaigns in QLD in 1998 and 2001. Still, with sufficient voter education, electors can be reminded that the choice is entirely theirs. And if they make that choice, at least it is a free choice: FPP denies such freedom. The second objection is that OPV hurts major parties when they are reliant on blocs of preferences: for example, the reliance of the ALP on Green preferences, and the mutual reliance of the Liberal and National parties in “three-cornered” contests. But all OPV really does is encourage the party seeking the preferences to better sell itself to the voters concerned. Further, whilst OPV can weaken the hand of minor parties in the horse-trading over preferences, it also gives them extra leverage in bargaining over policies, and hence an indirect form of political representation and inclusiveness is achieved. The Greens, for instance, can threaten the ALP that it will not recommend that Green supporters give the ALP their preferences without having to recommend their supporters preference the conservative parties.

All in all, OPV gives greater choice to electors than full (or exhaustive) preferential voting. It does so without making voting more complex; indeed it saves some votes that might otherwise be wasted either through accidental misnumbering or by electors who cannot decide how to rank all the options. Its adoption at the Commonwealth level would minimise confusion, thereby making voting more accessible in the large States of NSW and QLD where currently there are different rules between State and Federal lower house elections.

Further, the greater choice offered by OPV better serves political equality as it is less likely to distort representativeness. This is because it does not demand an insincere or random choice of electors who have no real preference between all the candidates on offer.

Preferential PR versus preferential voting in single-member electorates

In multi-member electorates preferential voting can also be combined with proportional representation. This form of proportional representation is known as the single transferable vote (STV). In a single-member constituency, the preferential vote looks for a majority winner: that is, 50 per cent + 1 of the final preference count. Given that there are not major differences in the support for parties across Australia (at least treating the National Party as the rural analogue of the Liberal Party), the system tends to produce relatively stable, majority government. By creating larger electorates to choose much larger numbers of elected members, the ‘quota’, that is the percentage of the final count required for election, is reduced. In this way, something much more representative than ‘majority rules’ is achieved.

In Australia, STV was first introduced in Tasmania in the 19th century and today Tasmania and the ACT still have the most candidate-centred form of STV—known as the Hare-Clark system (see Figure 1 for an ACT ballot paper). The best known form of STV, however, is that used in the Senate since 1949. In a half Senate election, when six Senators are to be chosen from each State, the quota is approximately 14 per cent; in a full Senate election, when 12 Senators are to be chosen, the quota is almost halved to approximately 7.5 per cent. At different times over the last three decades, outside the parties of government, the Senate has welcomed representatives of the Democratic Labor Party, the Australian Democrats, two different Greens’ parties, the Nuclear Disarmament Party, Pauline Hanson’s One Nation and Independents. Yet in the same period, no minor party was able to win a seat in the House of Representatives until the Greens broke through in a by-election in 2002.

As a consequence, few governments have had a majority in the Senate in that time. The historical position should not be overstated—the DLP’s position in the period from the 1950s to the early 1970s was largely to support the Liberal–Country parties government. But in the last 30 years, only one government, that of the Fraser Liberal–National Coalition, has enjoyed a majority, and that was for a short period prior to the rise of the Democrats. This irks advocates of strong government, from both the ALP and the Liberal party. Some advocate raising the quota for Senate election. But as Malcolm Mackerras has pointed out, in arguing that the Senate system is really only semi-proportional, the quotas for election are neither high nor low.
The real complaint is that electors have drifted to minor parties: partly in response to the parties of government de-emphasising traditional ideologies, and partly because many electors value the checks and balances the Senate provides. This realisation is behind the present Prime Minister’s proposal to bypass the electoral issue and simply reduce the Senate’s legislative powers per se.

Is it possible for a voting system to be too representative and inclusive? The political equality ideal suggests not. But equality does not necessarily mandate tiny quotas either. The experience in the second largest PR system, the NSW upper house, is salutary. By treating the State as a single electorate with 21 members to be chosen each election, the quota is only approximately 4.5 per cent. At the 1998 election, 266 candidates nominated. Whilst that might seem like a triumph for democratic participation, the ballot paper was so large it derisively became known as the ‘tablecloth’ ballot. Besides its physical unmanageability, electors could only manage it due to the above-the-line option that allows electors to plump for a party rather than numbering candidates. Three parties won seats with 1 per cent or less of the first preference vote; one, the Outdoor Recreation Party, won with just 0.2 per cent of the primary vote. In short, the size of the State and the low quota encouraged a colourful kaleidoscope of candidates, but the result owed more to horse-trading between parties and the randomness of rules about excluding candidates during the count than to a mythical will of the people. Single interest parties won seats almost at random: an inclusive but hardly representative result. The same potential flaws exist in PR systems generally, they are just less apparent when the quota is higher.

The simple idea underlying preferential voting is turned into a complex mathematical conundrum when it is applied to PR. Very few Australian electors could explain the method of counting and transfer values used in the Senate, for instance. This does not in itself mean PR is inaccessible. But to minimise informal voting and ease the complexity of choice, most PR systems in Australia (except, for example, in Tasmania or the ACT) provide an above-the-line option, allowing electors to effectively “tick-a-box” for a party vote. This suits the parties, especially where it is combined with a rule that allows them to guarantee control of their preferences. It also increases the risk of sham parties arising to milk preferences.

Further, the order of elimination of the least popular candidates from the count creates the potential for a lottery effect in battles for the final seat, even in the
Senate. Again, few electors seem aware of this. But this does not necessarily damn the system on equality grounds of inaccessibility. As long as minor parties that are neither extreme nor frivolous hold the balance of power in the Senate, many electors seem not to care about the complexities of the system.

Only two Australian jurisdictions have met the challenge of more than a century of agitation for PR and introduced it for their lower house of government. They are Tasmania and the ACT. The Tasmanian system could be regarded as only semi-semi-proportional, since it now elects only 5 members per division. This means that a quota of over 16 per cent is needed for election. Tasmania is interesting however in that there is no above-the-line party vote option. Due to its smaller size and electoral history, its voting culture is more candidate-centred. Indeed, in both Tasmania and the ACT, a significant percentage of Senate electors eschew the above-the-line option.

A uniform voting system?

Readers of the last several pages who are not politically educated may have felt their head spin. One virtue of political equality is accessibility: if systems are too complex they will turn off some voters and confuse others enough to potentially distort the outcome. (This famously occurred with the confusing ‘butterfly ballot’ in Palm Beach county, Florida. Most experts believe this confusion lost Al Gore the 2000 presidential election to George W. Bush.)

Individual Australian voting systems are not unduly complicated. Every consumer can understand the idea of ranking preferences. Boiled down, our voting systems employ that idea. Granted, more civics and electoral education could be undertaken to explain to voters broader constitutional issues as well as mechanical ones, for example, the consequences of using the above-the-line option of Senate voting.

However, confusion—and hence disenfranchisement—arises when voters face different voting methods at State and Federal elections. In particular, voters from QLD and NSW move between OPV and compulsory preferential voting at lower house elections. Most Australians also confront different rules between upper house elections. Leaving aside the small jurisdictions of Tasmania and ACT (with PR at their lower house elections) it would be a practical and democratic improvement if OPV were adopted for all lower house elections, and some agreed variant of the Senate voting system adopted for all upper house elections.

Talk of a uniform voting system suggests another perennial topic: simultaneous elections. The US has fixed polling days for local, state and national polls. This debate, however, rests on broader constitutional values than political equality. In any event, simultaneous elections raise a fear of less representative parliaments. They could lead to State and Federal outcomes becoming more similar, whereas at present it is commonplace for voters to react to a Federal government of one persuasion by favouring rival parties at State level, and vice versa.

Informal voting—registering dissent

Compulsory voting, as we have seen, has certain virtues and seems destined to remain a feature of Australian elections. But one of the practical concerns with compulsory voting is that it forces the apathetic or the undecided to vote for someone. In the case of the apathetic, this may distort electoral outcomes unless by some statistical quirk their votes happen to mirror the rest of the nation. In the case of undecided electors, or worse, those who have reason to be hostile to either politics generally or the would-be politicians on offer, the perception that the law requires them to vote formally is an offence to their liberty of political conscience. Should a right to vote informally be clearly enshrined in law?

Of course there are arguments against informal voting, similar to some of the arguments in favour of compulsory voting. One is the desire to legitimate the results of elections and hence the stability of government. The other is that in a culture that sometimes has a knee-jerk negativity towards politics, cynicism and apathy might come to shelter behind a right to vote informally. But the purpose of compulsory voting is to encourage engagement, not to force the formation of opinions. For a time it was even an offence to advocate informal voting at federal elections. (Under this law, Albert Langer was infamously gaol for advocating a type of vote that was formal, but enabled a voter to withhold preferences.) Such a position is not just illiberal: it fails to treat the aspirations of dissentients as equal to those of the partisan.

In most Australian jurisdictions—except South Australia—it is not clear whether informal voting is lawful, or unlawful but untraceable. The only point of this legal obscurity is to hide a legislative unwillingness to bite the bullet. Thus electors face ballot papers that provide instructions in bold print, such as ‘You must number all squares’ when, at most, this is an exhortation. A simple option would be to adopt the SA rule, where the law and the ballot paper makes it clear that no-one
is obliged to mark their ballot paper. However, even in South Australia, it is an
offence to ‘publicly advocate’ informal voting—a schizophrenic state of affairs,
and possibly an unconstitutional offence.

The AEC has conducted informal ballot surveys to better understand what
aspects of ballot design or voting rules cause involuntary wasting of votes. This is
laudable: anything that keeps the electoral system accessible enhances political
equality. But we must distinguish between deliberate and accidental informalities.
Even under the SA system, there is no way of knowing if an informal voter was
apathetic, hostile or merely forgot to mark her ballot. More interesting would be
a survey to find out what percentage of the population realises it has a freedom
to vote informally.

None of this is to say that the system should encourage informal voting on the
same level that it encourages valid voting. But, at present, in every jurisdiction
(albeit to a lesser extent in SA) informal voting is repressed and ignored, even
when it is a carefully thought-out position. This not only treats dissent as
undeserving of equal respect, it also suppresses it and can create a false sense
of complacency, especially amongst the major parties. Nations we once ridiculed
for their lack of democracy do better than Australia on this score. In Russia, for
instance, presidential ballots contain a ‘None of the Above’ option. In
some eastern European nations this option ensures repeated balloting if
unpopular candidates are presented. A ‘None of the Above’ option need
not have this costly consequence however; it could simply be used to
gauge the different levels of dissatisfaction in each seat and across the nation/State as a whole.

The Ballot
Should computerised voting replace the paper ballot?
What alternatives are there to voting in person—especially postal voting?
Ballot order—Robson Rotation.
Party and candidate identification.

Paper versus electronic balloting
The paper ballot has been a staple of elections in Australia for more than 150
years. It replaced a more colourful, if corruptible system of public, that is, oral,
polling. Paper, pencil stub, and cardboard voting compartments and ballot boxes
remain the predominant method of voting in Australia today. At 6pm, as the
polling booth closes, votes are hand-tallied, electorate by electorate, by a legion
of casual employees.

The only variations to this are the various forms of ‘declaration’ and ‘sectional’
voting, so named because the elector has to make a declaration under a
particular section of the electoral law to be entitled to vote in an alternative
manner. The most popular of these alternatives are:

• the absentee ballot, which caters for those still within their home State, but
  not their home electorate;

• postal voting, which is pitched to those suffering illness or the tyranny of
distance (for example, remote locations, or being overseas without access
to an overseas mission offering voting facilities);

• pre-poll voting, a more recent alternative to postal voting, for those who
  are likely to be away from home on polling day and are happy to make their
decision early.

Supporters of Australia’s adherence to paper ballots argue it is a failsafe
system. People are often fearful of new technology. There are certainly
reasons to be concerned about computer security, whether it be
compromised by accident (for example, a virus or worm) or malice (a student
was convicted of hacking into the AEC’s system in 1992/93).
Those excited by new technology consider the paper ballot to be cumbersome and antiquated, and point to a variety of electronic alternatives. These are promoted on several grounds: efficiency, such as accuracy and speed of counting; long-term cost savings; and greater accessibility, particularly for voters disabled by visual impairment or illiteracy. The most viable, current alternative would be computerised, possibly touch-screen or voice-activated, voting stations, at official polling locations. Touch screens were offered at a successful recent trial conducted by Elections ACT at the 2001 ACT Legislative Assembly election, and the NT authorities are investigating options.

Is the paper ballot lacking on the political equality scale? The answer is yes, but not damningly so. Its most obvious flaw is that it discriminates against the vision-impaired or illiterate, who lose the right to a secret ballot when they need assistance in completing their ballot. Variable size fonts and audio interaction with ‘smart’ computer technology is an easy cure for this. A second, more widespread concern is with accidentally informal ballots, and errors in counting. Machines, per se, do not circumvent errors, as the Florida 2000 experience shows. However, touch-screen voting, available in dozens of different languages, with a formality check before an elector presses ‘submit’, would doubtless save many thousands of wasted ballots.

A third, looming issue is whether computerised voting outside the traditional confines of the community hall cum polling booth—for example, through computers at shopping centres, or even Internet voting—will become necessary to keep voting relevant to consumerist, information technology-obsessed generations of the future. Political junkies love the ritual of polling day and the sense of community it creates. But if voting does not keep pace with technology, voting may come to seem old-fashioned, and the numbers of younger people who fail to vote may increase further.

Postal balloting

Concern with keeping voting relevant aside, compulsory voting insures Australia against the corrosive problems of low turnout that are experienced in many other parts of the world. To alleviate this, states in the US, and recently, trials in UK local government polls, have offered postal ballot only elections. The intention is to increase the convenience, and hence accessibility of voting. The principle is not new in Australia. Industrial ballots have for some decades been conducted almost exclusively by post. Democrat leadership ballots and Greens Senate pre selection ballots are conducted by post, as was the 1997 Constitutional Convention ballot. But it is difficult to see why public elections in Australia would benefit from being entirely by post. The need to avoid intimidation in union elections is not present with secret balloting at public polling places. In fact, the concern with security is reversed: more postal voting in public elections would increase the possibility of ballot tampering. It would also reduce the secrecy of voting for electors (particularly women) in subordinate relationships.

Ballot order

Marketing agencies have a term, ‘positional advantage’. In elections we call it ‘donkey voting’. The underlying principles are similar. If you present people with a list to choose amongst, the names nearer the top are chosen more often. In Australia, the temptation to make a crude donkey vote (meaning to thoughtlessly number the ballot from top to bottom, or vice versa) was exacerbated by the compulsion to vote without an obvious informal option.

Donkey voting was a great concern to political equality for many decades in Australia because candidates were alphabetically listed. Accurate estimates were impossible to make, but conventional wisdom valued the donkey vote at 1–2 per cent. It may have saved Jim Killen MHR and hence the Menzies government in the knife-edge 1961 election. Work by Colin Hughes and others suggested that parties were favouring candidates with names higher up in the alphabet, possibly to take advantage of donkey voting.

A decline in the donkey vote accelerated with the advent of ballot labels—electors typically have some reason to prefer one party to another, even if they are ignorant of the candidates. Alphabetic advantage was also erased with a move to random ordering of candidates and groups. That crude donkey voting is worth less than once feared is borne out by glancing at recent electoral figures. For instance, at the 1998 Federal election in NSW, micro-party or Independent candidates headed 12 House of Representative ballots. Seventy-five per cent of these received less than 2 per cent of the vote, and 25 per cent received less than 1 per cent.

But positional advantage remains a problem for political equality. Why should the candidate or group that happens to be drawn near the top of the ballot achieve a statistical benefit? Those ‘protest’ voters who decide on the day on the basis of party name may be most susceptible to positional advantage.
There are two solutions. One is circular ballot papers. A shift to these would cause confusion, at least initially. But even a circular ballot must have instructions printed somewhere, and the orientation of the instructions is likely to be read as ‘this way is up’. The simpler solution, used now in Tasmania and the ACT, is known as ‘Robson Rotation’ (after a Tasmanian parliamentarian). This involves printing different batches of ballots, with different orders of candidates. It is the fairest system invented as far as candidate equality is concerned. But it presumes an electorate that does not rely on how-to-vote cards. Assuming there are still significant numbers of electors who wish to follow the party line, the nearest compromise would be to have Robson Rotation by polling station, allowing parties to print or display suitably re-ordered how-to-vote cards at each.

Party and candidate identification
The standard measure used in Australia to assist voters is the party label: that is, if a party is registered, its name appears alongside the candidates it endorses. In some countries, pictures are used. In India, for example, regulations dating to 1968 provide for the reservation of symbols to registered parties (and indeed to non-aligned candidates). There are obvious benefits to this where illiteracy is an issue, or where the national language is not everybody’s native tongue. But its appeal is not so limited. The UK only recently adopted a system of registering parties, and now provides for party emblems or logos to be printed on the ballot. This would seem to allow the established parties there to ‘cash in’ on their long established emblems (for example, Labour’s rose, or the Tories’ torch). Curiously, in Australia, only the NT has lacked a system of party registration and hence ballot labelling*, yet it is the most ‘modern’ in the sense that candidates’ photos feature on the ballot (see Figure 2 for an example from an NT municipal election). This approach makes sense in smaller electorates where candidate recognition is desirable, and given the large Indigenous population and issues of English literacy in the NT. It may not suit all jurisdictions however: a candidate who is facially disfigured should not be subject to ballot box discrimination, and who is to police the currency of the photos? Campaign material routinely features photos showing candidates’ younger years, and not always to save money through recycling!

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* Up till 2004 when party registration was to be introduced.
For national elections, the constitutional requirements are that:

- **In deciding the number of seats per State, population is the determinant, not the number of electors.** In theory, this favours States with, say, high birth rates. But given that it is people, and not merely electors, who politicians have to represent, this is no blight on political equality.

- **Each original State of the federation is guaranteed five seats.** In practice this means Tasmania has always been relatively overrepresented. This is an obvious, but small, contradiction of political equality.

- **Each original State is guaranteed an equal number of Senators.** Like the previous requirement this can only be understood in terms of the original Federal compact. In particular, the Senate was to protect and articulate the different interests of each State. It quickly became a party house rather than a State house, but since 1980, when neither government nor opposition has controlled it, it has acquired a stronger role as a house of review. Is there any rationale for the huge inequality between the power of a Senate vote in NSW versus Tasmania? The parties of government think not; rather, they become upset when minor party and Independent Senators from the smaller States have a say in the balance of power. At least the PR system ensures that a party, merely by reason of being more popular in the smaller States, does not achieve grossly disproportionate representation in the Senate.

- **The guarantee of equality in the Senate is unlikely to change.** However the Constitution leaves open the representation of the Territories. The mainland Territories have each, by Federal Parliament, been allotted two Senators. In every election (and almost in every foreseeable election) these split equally between the major parties—that is, they cancel each other out. But from the viewpoint of an elector in the ACT or NT, whose voting populations will soon rival that of Tasmania, Federal Parliament must soon consider increasing the Senate representation of the Territories.

- **Finally, and of most relevance to the mainland Territories, the Constitution provides that House of Representative seats cannot cross State/Territory borders.** Further, in allocating seats based on population and quotas, rounding occurs. For example, if the population is 649,000 and the quota is 100,000, the entitlement is rounded down to six seats. This rounding up or down has most affected the smallest jurisdictions—in effect...
the mainland Territories (as Tasmania is guaranteed five seats). In recent times, with the ACT hovering near an entitlement to 2.5 quotas and the NT to 1.5, this has led to instability and obvious disparities even though the population has been growing in both. The ACT was entitled to a third seat, then lost it; the NT won, but stands to lose, its second seat. It is difficult to see how this statistical anomaly could be overcome, short of erring on the side of overrepresentation (the rule with Tasmania), or making a seat that would straddle both Territories (unpalatable to notions of geographic community—but consistent with the way offshore Territories are treated). The federal parliament’s Electoral Matters Committee recommends a margin for error—in effect assuming that Territory populations are at the highest end of the range of statistical estimates. It recommends preserving the NT’s second seat: rather conveniently this is a government seat. Yet it leaves the ACT (traditionally ALP territory) by far the most under-represented region in Australia, and with electorates almost twice the size of those in the NT.

One-vote, one-value and PR

Pure one-vote, one-value is not mandated in Australia: indeed it is only achieved in those houses where under PR the jurisdiction votes as one. Unlike in the US, the High Court has several times refused to imply a principle of one-vote, one-value into the constitutional fabric. Indeed the very idea that each electorate should be the same size was a long time in coming. It is not entrenched in the practices of nations like the UK either. In Australia something of a consensus emerged during the Whitlam era that a 10 per cent tolerance above or below the average quota was acceptable. However that still permitted a one-fifth disparity in the relative value of a vote, and with increasingly sophisticated demographic information and technology, one-vote, one-value is more achievable than ever. The aim now, for the AEC, is to achieve one-vote, one-value as nearly as practicable (within the constitutional constraint that each State/Territory will have a different quota), allowing a 3.5 per cent tolerance.

Is pure one-vote, one-value mandated from a political equality perspective? Clearly it is, if we truly respect the idea that electors are equal, as electors. Of course it is not enough on its own—many electors will spend their whole lives in a safe seat in which it would not matter if they voted or not (another reason PR advocates oppose the constituency system). But it is a core starting point. However opponents of pure one-vote, one-value argue it promotes statistical equality over other values, such as regionalism and equality of access to representation.

They cite the Commonwealth electorate of Kalgoorlie, the largest in the world, which covers almost all of WA.

The States that clung longest to regional vote weighting have been the largest States, QLD and WA. QLD’s zonal malapportionment, instituted by the ALP and perfected by the National–Country party, was abolished in 1992, with a curious exception. Electorates of over 100,000km² have notional voters attributed to them. This affects just five remote seats: a token measure. In WA the Gallop government has unsuccessfully tried to introduce one-vote, one-value for the lower house.

In the final analysis, the best argument against regional weighting is not so much the different conceptions of equality (of electors versus representation of far-flung communities) but a practical one. How do we define and keep track of areas deserving special treatment? Over time, and sometimes quite rapidly, the nature of land use and economic status can change. For example, the formerly rural hinterland around many cities is now thriving, whereas the outer suburban sprawl of such cities is facing deprivation.

The simplest route to one-vote, one-value would be to abolish seats, and treat each jurisdiction as one electorate. This would occur if Australia were to have an elected head of state, for example. Proponents of PR cite the use of larger, multi-member electorates as one advantage of PR. The other advantage is that each vote is more likely to count towards the election of at least one representative.

In the lower houses in which governments are formed, only Tasmania and the ACT have moved in this direction. The reluctance is twofold. First, tradition weds us to the ideal of members serving particular electorates. This may seem quaint when the average Commonwealth electorate covers over 130,000 people, when voters focus on party over candidate, and when almost no-one defines themselves as an elector in a particular seat (as opposed to a ‘Queenslander’ or an ‘Australian’). But constituency representation ensures some personal affiliation with a member representing a geographic community, and hence in practice assists accessibility, an aspect of political equality. Second, the idea of strong government is valued, especially by the major parties, whereas PR in lower houses is seen as a recipe for unstable coalitions.

NZ moved in the 1990s, through two popular referendums, to a mixed form of election, where constituencies were retained, but voters given a second vote for a party list form of PR. Known as MMP (Mixed Member Proportional), the system drew inspiration from Germany, and motivation from a reaction against...
strong government. Variations have since been adopted in the UK regional assemblies for Scotland and Wales. Electors under MMP seem to have the best of both worlds: a choice for both local member and national party, as well as a parliament that reflects the strength of the party vote. Such systems appear on paper to advance political equality and should be investigated in Australia. There is a concern that MMP, or any other system using a ‘top up’ method, creates two classes of parliamentarians: those directly elected by a constituency, and those elected by the party vote. But that distinction already exists, say between Members of the House of Representatives and Senators.

Some words of caution. First, strong upper houses like the Australian Senate operate to moderate the overweening power of a strong government and executive. Neither NZ nor the UK has such a house of review. Second, a sudden shift to PR would have unpredictable effects on parties, and most likely lead to splits and new forces emerging. To those who feel the major parties have had an undeserved hegemony, this would be a good thing. It would challenge the political acumen of an electorate used to a regime consisting of two centrist parties of government, and several minor parties, usually representing more left- or right-wing values, vying to share the balance of power in the upper house. Of more concern to political equality is the increased temptation for party-swapping, which occurs when PR results in hung parliaments and coalition building. We have seen this in the Senate of late; NZ has felt moved to legislate about it; and QLD has introduced a Bill on the subject. When a system encourages electors to vote for a party, they feel rightly duped when a member dumps the party without a strong reason, trashing the ideal of equality of representation in the process.

So far we have focussed on the equal valuing of votes. A second concern, apparent after some elections, is that a party can form government with fewer than 50 per cent of the two-party preferred vote. This has happened numerous times, especially in Federal elections, and the ALP has disproportionately suffered it. It is a natural feature of a constituency-based system, however, which we have noted leads to parties emphasising electors in marginal seats, to the exclusion of safe seats. Short of a move to PR, the alternative is to mandate that redistributions of seats take the two-party preferred vote into account. The SA system now does this. The problem with this is that the only reliable evidence of the two-party preferred vote is the previous election, but that is no guarantee of two-party voting at the next election.

Reserved and Indigenous seats

An alternative to one-vote, one-value is to reserve seats for particular ethnic groups or sectors of the community. (In a sense the guarantee of Federal seats to the original States was a loose form of this.) In some countries, different sectors of the community are guaranteed representation in upper houses through appointment or limited election. Thus the Irish Seanad has elected representatives from vocational interests, namely, Culture and Education, Agriculture, Labour, Industry and Commerce, and Public Administration, as well as the university convocations. This approach contradicts the strict electoral equality of one-vote, one-value. That ideal, it must be remembered, is based on a liberal, individualist notion of political equality. In a more corporate or class-oriented society, ensuring a balance of community interests is not just a way to ensure balanced government but to configure political equality.

In NZ, most notably, the Maori population is accorded some degree of political respect by the reservation of seats in the National Parliament. There is a Maori roll, and Maoris can opt, at each census, to be on the Maori roll or the general roll. The purpose is to ensure a ‘seat at the table’ of government, that is, representation of a unique voice, in recognition not only of historical dispossession but also that Indigenous populations are not simply another ethnic group. A QLD parliamentary committee recently enquired into the possibility of a similar system for QLD but found against it.

Undoubtedly any such proposal in Australia would be met with cries of ‘special treatment’ and one-vote, one-value would be used as a trump card, invoking political equality. The reality is that outside of the NT, where Indigenous candidates, and to a lesser extent members, are not uncommon, Indigenous parliamentarians have been few and far between. There are at least two reasons. First, the Indigenous population was decimated and swamped by immigration. Second, even more so than other minorities Indigenous people find it hard to win preselection and majority-rules elections when the model of the parliamentarian is a 35–60-year-old white male.

So extreme has been the dispossession and silencing of Indigenous voices in Australia that a special case, from political equality, can be made for reserved seats. However there are two inherent problems. One is that outside the NT, the Indigenous population is small in percentage terms. In pure population terms, there would only be three Indigenous seats reserved in the House of Representatives. Three sounds better than none, if they ensured a career path for role models and
if their voices were paid heed. But the number would be even more tokenistic than in NZ. The second issue is that the Indigenous population includes many peoples. It has no single geographical or political voice. At least seven Indigenous parties have existed at various periods since the 1960s: the most successful and widespread of these, the Australian Indigenous Peoples’ Party, stood 25 House of Representatives candidates in 1996, but it is not registered today. There is every likelihood that Indigenous-only seats would become ‘owned’ by the major parties, particularly the ALP. In political equality terms, revivifying and empowering the elected Councils of the Aboriginal and Torres Strait Islander Commission may be a better way of ensuring ‘a voice at the table’.

Candidate qualifications
Besides being entitled to vote (or, in a few States, actually being on the roll) there are few positive qualifications for candidacy. For example, there are no tests of intelligence, literacy or loyalty. There are plenty of negative qualifications, that is, disqualifications. But aside from the constitutional tangle affecting Federal candidacies, these are generally uncontroversial. For example, it is commonplace to disqualify those serving sentences, those who are bankrupt, or those who hold a seat in another Australian legislature. (Curiously, the latter is not the case in some US states. Besides being a practical recognition of the separation of powers, because these are different legislatures, and the fact that parliamentary office in Australia is a more than full-time occupation, the rule is justified to avoid the unequal monopolising of power by a charismatic person being able to ‘hog’ several seats at once.)

One positive qualification that is sometimes mandated is a minimum period of residency. But as Table 4 below on candidate requirements reveals, that is only a feature of elections in two of the smaller States, WA and Tasmania. A three-year minimum residency requirement for Commonwealth candidates was repealed in 1983. Such requirements are aimed at ensuring candidates have demonstrated at least a minimum commitment to the jurisdiction in whose Parliament they wish to serve. But if one follows their logic, they may not be parochial enough! Why not require minimum residency in the actual constituency involved? In any event any residency requirement can easily be criticised. It denies voters the right to vote for whomever they wish to represent them, even a ‘ring-in’. (Of course any qualification does that, but using age as a proxy for maturity, or absence of current criminal conviction as a proxy for a minimum current respect for the law are far less arbitrary, especially in a mobile population.)

Ballot Access
Is it too hard—or too easy—to become a candidate?
Is it too hard—or too easy—to register a party?
Can we trust party preselection processes or do they need to be regulated?

Residency

Dual citizenship

Ballot Access

Is it too hard—or too easy—to become a candidate?
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Residency requirements also breach political equality, at least to the extent that a timeline drawn anywhere creates arbitrary distinctions between those falling close to one side rather than another.

The real bugbear with unduly restrictive candidacy qualification rules is the inflexible barriers to Federal candidacies in section 44 of the Australian Constitution. These prevent anyone being chosen for or sitting in Federal Parliament whilst:

- being a ‘subject or a citizen … of a foreign power’; or
- holding an ‘office of profit under the Crown’ or an ‘indirect pecuniary interest in any agreement with … the Commonwealth’.

As the High Court has interpreted this, nomination is an essential part of the process of ‘being chosen’, so these disqualifications apply at the time of nomination.

With regards to foreign powers, it will be remembered that to enrol to vote and hence to be eligible to stand, an elector must be an Australian citizen anyway. So that token of formal allegiance to Australia is already written into law. But recalling the earlier discussion of Australia’s ongoing status as an immigrant nation in a globalising world, it is hard to see why holders of dual citizenship should be ineligible to serve the Australian Parliament, especially when citizenship by birth is not a question of choice. Questions of allegiance may become acute at times of international conflict, but in such environments voters are likely to form their own views on a candidate’s loyalties. In relation to other questions of conflicts of interest, the perception of conflict will arise because of a parliamentarian’s substantive interests—for example, their business or family ties to another country—not her formal citizenship.
Australian nationalists may argue that the symbolic status of being a subject or citizen of another country is a powerful one, and that no-one can serve two masters—the Australian people and a foreign state. The High Court has interpreted an escape route of sorts. You can stand if you have done all you possibly can to renounce your former citizenship. (The Court has also ruled, in the interests of political equality, that ‘foreign power’ implies no favouritism to the old ‘mother country’. In disqualifying Senator Heather Hill after the 1998 election, the Court held that the UK was clearly now a ‘foreign power’.)

The ‘office of profit’ disqualification is of equal concern in the numbers of citizens that it affects, and of even greater concern in the uncertainty it creates. As interpreted by the courts, it prevents anyone permanently employed by a government, State or Federal, from standing for Federal Parliament, even if granted leave without pay. In the first half of the nineteenth century the Chartists campaigned for payment of MPs in the interests of political equality and to ensure that working-class men could afford to be parliamentarians. Why should a whole class of employees be forced to risk joblessness to exercise its democratic rights? This affects not just public servants (whose higher echelons, at least, might justly be depoliticised). As demonstrated by the case of Phil Cleary, who was elected to the House of Representatives but then unseated by the High Court, even State schoolteachers on unpaid leave are disqualified. Yet it is generally accepted (though not judicially affirmed) that even senior employees of local government, itself a creature of State law, are not prohibited from standing, although they are clearly closer to the politics and processes of government than teachers.

What can be done? Few agree with the harsh effects of section 44. Yet altering it, especially to overcome the disadvantage to dual citizens, requires a constitutional referendum (of which only 8 out of 42 have ever passed). With more flexible, unentrenched constitutions, elections to State Parliaments are much more logical. For example, the typical equivalent of the ‘office of profit’ provision at State level merely requires that public servants must take leave to campaign. Besides being a sensible administrative requirement, this permits them to return to their position if unsuccessful. At least to free up its own public servants, the Federal Parliament could legislate to automatically place employees of Federal agencies on leave whilst they stood as candidates, and backdate a termination of their position to the day before the poll in cases where they were returned as elected. Fingers crossed, only a very literalistic High Court would object to that reform.

Nomination hurdles—candidate deposits and nomination formalities

As a demonstration of their bona fides, candidates must pay a deposit on nomination. This is patently not a fee for service, since candidates who are elected or who attract a certain percentage of the first preference vote—typically 4 per cent—receive a refund. In practice, parties pay for most deposits.

At best, money is a poor and indirect proxy for sincerity. That deposits do not guarantee that a candidate will sincerely desire to be elected on a serious platform is illustrated by the modern phenomenon of joke candidacies. The most famous of these have involved the Monster Raving Loony Party in the UK, and its perennial candidate, now deceased leader, Screaming Lord Sutch. Australia has a tradition of joke candidacies, dating at least to the inaugural ACT Legislative Assembly election, when ambivalence about self-government encouraged the Sun-Ripened Warm Tomato Party, the Deadly Serious Party, and the Party Party. Higher deposits may minimise the numbers of such candidacies, but at the cost of eliminating colour and Dadaist dissent from elections. Further, even very high deposits will not necessarily deter a more corrosive menace, candidates who stand not merely for an ego boost, but as a form of self-promotion (for example, a stripper used the notoriety of her high-profile candidacy at a 2001 by-election to promote her business website, which contained more nude pictures than policy statements).

Deposits set at more than merely token rates have obvious effects on political equality. Deposits that are unduly high will be more likely to deter small parties than major parties, and poor Independents than wealthy ones. As Table 4 shows, deposits in Australia, which range from $200 (Tasmanian elections) to $700 (Senate elections), could not be considered excessive. Compare the UK, where £500 (more than $1200) is required for House of Commons elections, three and a half times the amount for the equivalent, the Australian House of Representatives.

Interestingly, deposits in Australia have not kept pace with inflation. That is, over time, it has become relatively cheaper to stand as a candidate. For example, in the first national electoral law of 1902, the nomination fee was £25 (worth nearly $2300 in current dollars). On its face, this is not a bad thing in terms of political equality. Fields of ten or more candidates in lower house seats are becoming commonplace, especially in high-profile seats. To the degree that this may reflect real disenchantment with the major parties and a diversity of candidacies, it is not
unwelcome. But equality is not well served if ballot papers become so long and unwieldy, or so full of obscure candidates, that the average elector has to become a political junkie to make a meaningful expression of preferences between them. In this regard, the equality goal of accessibility is potentially self-contradictory, or at least must balance easy access to the ballot and voter simplicity.

A second means of restricting ballot access is to require nominations to be accompanied by the signatures of a minimum number of electors. This is done in the name of requiring at least a token of community support. As Table 4 shows, the numbers required vary from none (WA) to 50 (Federally). By contrast, the figure is 10 for UK elections. Nor, except at Federal level when they were increased from 6 to 50, have these numbers kept pace with population growth.

It might be felt that more signatures should be required to ensure that candidacies were serious. If so, this would formally have to be done of all candidacies, and not just Independents and those endorsed by unregistered parties. But even then, requiring hundreds of nominators might prove a perfunctory hurdle. In the United States, firms exist that will collect signatures for a fee. In effect, the requirement of a large number of nominators can be overcome by money. This would hardly be in the interests of political equality. Even if no such firms evolved in Australia, the currency of signatures on petitions has declined over the years. (For example, an Independent candidate, mounting a challenge to the 1998 Senate election in Victoria, approached pedestrians to sign his court petition. Many obliged in the belief they were just supporting his right to take legal action, not the action itself.)

**Party registration, including ballot labelling**

People tend to vote for parties rather than candidates. Party machines tend to control everything from candidate selection to voting in Parliament, and it is to party officials that the electoral commissions look in search of a partnership for the observance of electoral rules.

Curiously, for most of the last century, the law ignored the existence of parties. But as Table 5 shows, in most Australian jurisdictions there is now a system of party registration.

Party registration attracts many carrots. These include:

- ballot labelling, and through that a form of exclusive right in the party’s name and abbreviation (this is discussed further above, under ‘The Ballot’);

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**Table 4: Candidature requirements**

<table>
<thead>
<tr>
<th>System</th>
<th>Minimum residency requirement</th>
<th>Deposit (amount and refundability)</th>
<th>Signatures needed</th>
</tr>
</thead>
<tbody>
<tr>
<td>CWLTH</td>
<td>No</td>
<td>$350 House of Reps. $700 Senate</td>
<td>50 or registered party officer</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4% of vote</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>$500 Senate</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>party officer</td>
<td></td>
</tr>
<tr>
<td>NSW</td>
<td>No</td>
<td>$250 Leg. Assembly $500 Leg. Council (to max of $5000 for a group)</td>
<td>15 or registered party officer</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4% of vote</td>
<td></td>
</tr>
<tr>
<td>VIC</td>
<td>No</td>
<td>$350 Leg. Assembly $700 Leg. Council</td>
<td>6 or registered party officer</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4% of vote</td>
<td></td>
</tr>
<tr>
<td>QLD</td>
<td>No</td>
<td>$250</td>
<td>6 or registered party officer</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4% of vote</td>
<td></td>
</tr>
<tr>
<td>WA</td>
<td>1 year in State immediately prior to candidacy</td>
<td>$250 either House 10% of vote in Leg. Assembly 5% of vote if group in Leg. Council</td>
<td>None</td>
</tr>
<tr>
<td>SA</td>
<td>No</td>
<td>$450</td>
<td>2 or registered party officer</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4% of vote</td>
<td></td>
</tr>
<tr>
<td>TAS</td>
<td>2 years in State immediately prior to candidacy, or five years in total</td>
<td>$200 either House 1/5 of quota Leg. Assembly (approx. 3.3% of vote) 1/10 of votes in Leg. Council</td>
<td>2</td>
</tr>
<tr>
<td>ACT</td>
<td>No</td>
<td>$240</td>
<td>20 or registered party officer</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1/5 of quota</td>
<td></td>
</tr>
<tr>
<td>NT</td>
<td>6 months in Australia and three months in NT immediately prior to candidacy</td>
<td>$200 20% of winner’s first preferences</td>
<td>6</td>
</tr>
</tbody>
</table>
access to public funding;

- control of preferences, particularly where PR is accompanied by above-the-line voting; and

- income tax deductibility (albeit restricted to Federally registered parties, and to individual, non-corporate donations of $100 p.a.).

The quid pro quo for registration is comparatively slight. In most jurisdictions it attracts an obligation to disclose certain financial details, especially relating to donations. Indeed registration was justified, federally, as an administrative necessity to support funding and disclosure regimes. But registration may become the hook on which a lot of other regulatory burdens will be hung; indeed the courts have already used it and public funding as a rationale for judicial intervention in party affairs.

In the larger jurisdictions, registered parties proliferated during the 1990s (although to a lesser extent in Queensland). As discussed above in relation to the NSW ‘tablecloth’ ballot-paper, this could be seen as a sign of democratic diversity, of fragmentation, or both. But revelations about the creation of ‘micro-parties’ to manipulate the NSW system raises political equality concerns. Inattentive electors were at risk of being duped by parties with attractive, sloganist names whose real purpose was to attract first-preference votes and to channel them as preferences to other parties, or even to make a profit on public funding. Examples include the finding of the NSW Independent Commission against Corruption that the Outdoor Recreation Party MLC misused parliamentary entitlements in membership drives for eleven other ‘micro parties’, and the registration of sloganising, ‘shell’ parties like the No-GST Party. (The fact that Queensland has not seen the same proliferation of small parties is attributable to its not having an upper house elected on the basis of PR.)

But the most serious abuse of registration law may have occurred in Queensland, when the then very popular One Nation, in a rush to be registered in time for the 1998 Queensland election, allegedly misled the Electoral Commission of Queensland about the size of the party membership (in contrast with its supporters’ movement). Its paying members were found by a civil court to be members of an incorporated ‘supporters’ group—the party itself was a mixture of a company and a tightly controlled association, both in the hands of a small executive. The party was subsequently deregistered and its founder, Pauline Hanson, almost bankrupted in repaying public funding received on the basis of that registration. Hanson, however, was acquitted of fraud charges, the criminal appeal court ruling that at contract law, applicants did acquire formal, if nugatory, membership in the party. In short, the party’s structure, in law and intention, was confused and convoluted. The case reminds us that there was no requirement of internal democracy in political parties in Australia before the Queensland reform of 2002. It also highlights a legal dichotomy. On one hand, loosely worded or policed registration laws can lead to a weakening of the integrity of the electoral process. On the other hand, if the law becomes too complex or interferes too much with parties, those without good (read ‘expensive’) legal advice can become entangled in a legal thicket.

These scandals have led to ongoing tightening of registration rules and stricter enforcement, particularly in NSW, where the register is now reviewed and culled annually. The risk with such a ‘crackdown’ of course is that genuine small parties may be excluded. Another concern is that mistakes may be made in administering the laws, as occurred in NSW with the Save Our Suburbs party, where the Commission’s method for screening party members was considered invalid by the courts. Of course mistakes will occur: the equality concern is that the more complex the legal processes, the more difficult it may be for small parties to conform. In particular, parties, especially those representing unpopular viewpoints, need reassurance that membership information will be treated confidentially. Whilst this might sound like a liberty concern, it is also one about equality in the form of accessibility to the electoral process. But the logic of public registration is that such information is always subject to publication under legal process.

Overseas, the genuineness of a party for registration (and hence ballot and ballot label access) is sometimes tested by requiring parties to field a minimum number of candidates. Canadian Federal law, for example, mandated a minimum of 50 candidates. This was recently overturned as an infringement of Charter rights to equality of political participation and opportunity, in a case brought on behalf of the Communist Party of Canada. (The Canadian position was complicated by the fact that deregistration meant not merely that the party reverted to a simple unincorporated status, but that it went, in effect, into liquidation.) Minimum candidacy requirements may deter bogus parties; however they amount to a sizeable financial hurdle for poorer parties, who lose most of their deposits. Parties in Australia will be deregistered only if they fail to field any candidates. Usually this applies to every election, but at Commonwealth and SA level the requirement is just one candidate in every two elections.
The UK bypassed party registration altogether until recently. Candidates could simply nominate the ballot label they wished to run under. The problem with this is the confusion caused, sometimes mischievously, by deceptively similar names on ballots. Compared to the restrictive Canadian model or the (former) laissez-faire UK model, the Australian system is a fair balance—with an emphasis on the need to maintain and hone the balance between order and accessibility.

<table>
<thead>
<tr>
<th>System</th>
<th>Registration Requirements</th>
<th>Ballot Labels</th>
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<tbody>
<tr>
<td>CWLTH</td>
<td>500 members or Federal parliamentarian or Independent</td>
<td>$500 fee</td>
</tr>
<tr>
<td>NSW</td>
<td>750 members or Independent</td>
<td>$2000 fee</td>
</tr>
<tr>
<td>VIC</td>
<td>500 members or Independent</td>
<td>$500 fee</td>
</tr>
<tr>
<td>QLD</td>
<td>500 members or QLD parliamentarian or Independent</td>
<td>No fee</td>
</tr>
<tr>
<td>WA</td>
<td>500 members or Independent</td>
<td>No fee</td>
</tr>
<tr>
<td>SA</td>
<td>150 members or parliamentarian (any Australian parliament) or Independent</td>
<td>No fee</td>
</tr>
<tr>
<td>TAS</td>
<td>100 members or Independent</td>
<td>No fee</td>
</tr>
<tr>
<td>ACT</td>
<td>100 members or parliamentarian (ACT, CWLTH or State) or Independent</td>
<td>No fee</td>
</tr>
<tr>
<td>NT</td>
<td>No party registration or Independent</td>
<td>No fee</td>
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The advantages to parliamentarians:

- Rorting

One feature that does, however, stretch the boundaries of even formal equality, is the typical Australian rule that allows a parliamentarian to register her own party regardless of whether it has any membership. This rule evolved as a sop to existing Independents. It gives them privileged ballot access over other Independents. For example, in the Senate, new Independents are lumped at the far end of the ballot, without an above-the-line voting option and hence without the power to control their preference flows. It is difficult to justify this differential treatment. Of course many reforms are political compromises, but this rule helps entrench existing representatives—including those who resign from a party having been elected on a particular party ticket such as Senator Meg Lees—over new parties and Independents.

**Party preselection**

Unlike in the US, the selection and endorsement of candidates in Australia is considered entirely a matter for each party. This befits a system where parties are strong and coherent entities, traditionally beneath the radar of the law.

The view of parties as purely voluntary associations has waned over the last 15 years. This has coincided with a decline in faith in the major parties as measured by things such as primary vote share and membership levels. But the major parties retain a stranglehold over lower house seats. Recently, evidence of endemic internal ‘rorting’ of preselection ballots, especially within certain ALP factions, has been revealed. Such rorting reminds us of an old truth—that the most interesting politics typically occurs within parties, not in parliament or public.

Besides the concerns raised about the quality of parliamentary representation and faith in the party system, do these revelations raise concerns for political equality? Arguably they do, in two ways. First, if only ‘toe-cutting’ insiders can gain party preselection, then access to winning candidatures, at least between party members, is rendered unequal. Second, electors in safe seats, whose members in effect are chosen for them by the predominant party in their area, are liable to receive poorer representation.

At present, in almost all Australian jurisdictions, party rules are entirely a matter for the party concerned. This reflects a liberty notion of freedom of association. Infidelity to party rules can usually only be challenged by a party member: in a case from South Australia, potential Liberal party members, refused membership, were not permitted to mount a legal challenge. So the only time preselections
Debates—Elections as a Battle of Ideas and Image

How is campaigning carried out in the mass electorate and media?
Can—and should—broadcast advertising be regulated?
Should campaign debates be institutionalised?

The public presentation of opposing ideas, policies and visions ought to be the *raison d’être* of the campaign. Without idealising elections past, it is important to reflect on how changes in technology and society have impacted on campaigning and what, if anything, an electoral system can do to accommodate such technological changes.

The hustings, literally used to mean an official and physical site at which nominations were declared and candidates then addressed a crowd of electors. Being “on the hustings” now is just a metaphor, which has lost any sense of the public occasion or interaction. Aside from stage-managed rallies launching each party’s campaign, we no longer have large electoral meetings. And whilst political demonstrations remain fairly common, their role is very limited. They no longer represent forums for the exchange of information, but are reduced by organisers and media alike to a single question—maximising the “headline” figure of the number of demonstrators. Not because a bigger mob necessarily means a more legitimate cause, but because democratic politics in a mass age is governed by the laws of large numbers and the power of the media.
Of course many individual candidates retain the tradition of door-knocking, a practice reflecting two important values. One is the expressive message of the act itself: the candidate is saying ‘I’m not aloof; I respect you as another person’. The other is the chance to gain a direct feeling of electors’ concerns and leanings, either in general or in response to the issues the candidate wishes to highlight.

So door-knocking represents a dialogue, but it is one-to-one, it is not a public debate. And of course technologies have brought new marketing practices—usually scientifically co-ordinated from central campaign offices and focussed on marginal electorates—where, however individualised it becomes, genuine discourse is largely feigned: leafleting, direct mail and telemarketing, and even push polling.

At the other end of the scale, the modern campaign, in terms of monetary resources and the public experience, is a media exercise. And whilst newspaper, radio and the Internet are part of the mix, the central advertising focus is television. This includes both paid television advertising, and public relations exercises and media management techniques designed to maximise the chance that the intended message or image (‘spin’ to the cynical) is conveyed in the nightly news.

Broadcast advertising

A common lament is that, by its very nature, television tends to reduce politics to the ten-second grab. In 1991, the Hawke government legislated to ban all paid electoral advertising at all elections. This was rationalised by a desire to reduce pressure on the cost of campaigning, and thereby minimise the risk of corruption through reliance on private donations. But the ban was more than subliminally based on a Whiggish distaste for unregulated television as a medium for political debate. Instead of open slather broadcast advertising, the legislation sought to substitute a British system of free airtime for ‘talking head’ presentations, designed for sober presentations of practice reflecting two important values. One is the expressive message of the act itself: the candidate is saying ‘I’m not aloof; I respect you as another person’. The other is the chance to gain a direct feeling of electors’ concerns and leanings, either in general or in response to the issues the candidate wishes to highlight.

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Whilst the conservative parties vehemently opposed this legislation, it was generally welcomed and supported by the minor parties and Independents—subject to the free airtime being allocated in a way that encouraged diversity and was not unfairly monopolised by the existing duopoly of Labor versus the Liberal/National coalition. Their support is easy to explain on grounds of political equality. Broadcast advertising is expensive, and whilst in an unregulated system every citizen, group or party is theoretically equally able to purchase it to project their message, in reality only well-funded parties, lobby groups or corporations can do so. And in the case of parties, only the established parties of power can attract sufficient donations to do so. In short, rather than being a way of allowing free electoral speech to bloom, freedom of advertising may be a way of entrenching an existing cartel.

However the High Court in 1992 struck down the ban. Its predominant legal reason was an implied freedom of political communication it ‘read into’ the Commonwealth and State Constitutions. The political theory behind this was clearly based on liberty interests (similar to US ideals of ‘free speech’) and formal equality.

Whether we are dubious or agnostic about the value of television as a medium for political debate, its place and power are undeniable. All the regulation and systematic reform imaginable will not change the fact that, for most, television is the predominant source of perspectives on the world. Further, parties will engage in attack advertising (unmitigated, unflattering portrayals of their rivals) until they are convinced that it turns off more voters than it wins over or reassures. We could not just borrow the British model of excluding television as an advertising medium without somehow borrowing its more sober electoral campaign culture.

There is another reason why prohibitions on television advertising—or attempts to regulate its style—may be flawed. Electoral politics needs to keep itself relevant, particularly to younger people who have the highest rates of non-enrolment. Whether we like it or not, television is a powerful medium because it is the ‘sexiest’. Eliminate television advertising or reduce it to a ‘talking head’ format and electoral debate will hopefully be more worthy, perhaps it will be ‘fairer’ in the sense of a competition between rival platforms, but will it be more engaging?

Political equality, remember, requires accessibility, if not engagement. Nowhere is accessibility more important than Australia, where the involvement of 100 per cent of citizens is an ideal embedded in law. The death of ideology in Australian politics may have been overstated in the 1980s and 1990s, but the major parties continue to be distinguishable only by nuance on many issues. When ideology resurfaces—as it did during the One Nation period—almost everyone becomes engaged and political discourse erupts. But at other times, disengagement tends to be the norm, and it is difficult to see how downplaying the role of television in political debate would help.
**Campaign debates and the obsession with leadership**

Along with the emphasis of the image over the word has come an obsession with leadership. In formal terms, the Australian system remains Westminster-based, in that the prime minister or premier is in theory just ‘first amongst equals’, a parliamentarian relying on the support of a majority of fellow parliamentarians to maintain executive power. But in political reality, the party machines and electoral politics in a mass society and media have come to treat the party leader as the Overlord. This has been dubbed the ‘Presidentialisation’ of electoral politics, although since the other side of the same coin is the *Führer Prinzip* we might equally call it the ‘Leadership Principle’. Electoral campaigns—indeed political debate outside campaigns—are centred on the figure of the leader. To make this point is not to endorse or lament it, but merely to recognise its present inescapability.

In Australian elections, it has become customary for the leaders of the governing party and the major opposition party (and occasionally the treasurer and the shadow treasurer) to engage in at least one made-for-television debate during the campaign. Unfortunately, unlike at US Presidential elections, nothing about these debates is guaranteed. Their number, timing and format are all subject to inter-party haggling. The only outside involvement is that of the network/s concerned—and even they are not entirely independent of the process, as above all they are concerned with ratings. In Realpolitik, the party or leader who is ahead in the opinion polls holds the aces in this haggling; the other side has little bargaining power. As a result, many campaigns are diverted in an unedifying and media-centred sideshow about the haggling.

For the sake of both an informed electorate and equality of political competition, it would be far preferable if authoritative ground rules were developed with an independent arbiter to rule on them. This need not involve an elaborate purpose-built commission as in the US. For example, since the leaders are invariably members of parliament, the rules could be set by the parliament concerned, and Federal Parliament could legislate to give the Australian Broadcasting Authority or Tribunal authority to quickly resolve disputes over the rules.

**Television debates**

Opinion polling, of electors’ voting intentions and views on issues is ubiquitous. It takes two forms: that commissioned and published by the media, and that conducted privately to inform party strategy. The latter is sometimes derided; or rather, populist politicians are sometimes derided for excessively relying on it and ‘leading from the rear’. But whilst this sort of polling, especially in marginal seats, can have a profound effect on campaign strategy, and indeed policy, it is not of direct concern to the electoral system. Reliance on it can just as well be defended as democratic (forcing representatives to represent public, or at least majority, concerns) as it can be lamented for discouraging bold policy formation. In any event, it is private and hence almost impossible to monitor or regulate.

But in many electoral systems, regulations limit the publication of opinion polling. A Foundation for Information survey in 1997 found that of 78 nations with well-established polling industries, 30 had some form of embargo prior to or on election day. Nine of these only covered the day set for polling: for example, NZ prohibits publication from 7 am to 7 pm on election day. But another nine had embargoes which stretched more than a week: indeed Italy had extended its embargo to 28 days.

Australia has never adopted any regulation of published polling, and indeed never seriously debated it. But the issue has existed as long as such polls have existed. The chief concern is whether opinion polling distorts the formation of voters’ choices. The classical assumption is that voters do—or rather should—take a rational approach to deciding who to vote for, weighing up policies against a mix of their self-interest, the common interest and their ideological assumptions. Opinion polling may interfere with voter psychology.

How might this happen? Voters surely are not like the punter who thinks ‘I’ll back the favourite because I’m sick of backing a loser’, or conversely ‘I won’t back the favourite because I want juicier odds’. In the first place, only partisan electors get
any psychological pleasure from the thrill of having supported the winner—but by definition they are loyal to their party so their vote is not affected by polling. In the second place, the ‘odds’—that is, tangible benefit a punter gets from backing a winner—have no analogue with secret balloting, in a mass electorate, where government benefits do not get paid according to how an individual voted.

But electors are not rational machines. They probably share some of the psychology of consumers who react to fashions. Thus there is concern about both the ‘bandwagon effect’ and its counterpart, the ‘reverse bandwagon effect’. The bandwagon occurs if one leader, party or candidate develops self-perpetuating momentum in the polls, something that may particularly occur if the media report polling in such a way to create a picture of an inevitable winner and loser. The reverse bandwagon is where one side opens up a significant lead and the tide of opinion reins itself in, whether out of sympathy to the other side or a desire to clip the wings of the likely winner.

The first thing that needs to be said is that much more needs to be done to measure these hypotheses in actual Australian elections. No question of whether or not to regulate should be conducted in an empirical vacuum.

But assuming opinion polls are not merely trivial background detail but have some impact on voter psychology, the ultimate question is what degree and type of impact would be unacceptable. In asking this, a number of factors must be weighed. Compulsory voting in Australia may dampen the bandwagon effect. Since all electors have to vote, those with a moderately strong leaning to one side or another will tend to vote even if the side they are leaning towards is predicted to lose, whereas they might not turn up if voting were voluntary. Also, the bandwagon effect will be a greater concern in countries where mass rallies are crucial to campaigning and voter perception.

In countries with more dour electoral cultures, the reverse bandwagon may be no less prominent than the bandwagon effect. If Australians still feel sympathy for the ‘underdog’ or, more rationally, a concern to vote tactically to rein in governmental hubris, then the two effects may tend to balance themselves out. A noticeable feature of campaigning, particularly since the mid 1990s, has been a belief of party strategists that the ‘underdog’ tag has value. So we routinely see parties and leaders, who on all objective measures are riding high, stressing the closeness of the election. This is a response to the attribution of unexpected electoral defeats of administrations led by premiers like Goss in Queensland and Kennett in Victoria to public perceptions of arrogance and a so-called ‘protest vote’. The importance of avoiding hubris in campaigning is also linked to an abiding English modesty in Australian culture and hence to a belief that triumphalism in campaigning can cost an election, as some believe happened to UK Labour under Neil Kinnock in 1992.

In short, the effect of published opinion polling on Australian electoral opinion needs empirical research, and research that recognises the complex interactions involved. Assuming such research showed effects on a level that could swing close elections, would it be practical, desirable or legal to ban its publication?

Federal Parliament has the primary power to ban the broadcast of opinion poll results, including over the Internet at any elections, and its publication in relation to its own elections. (State Parliaments would have to ban its press publication at State or local elections.) Although we would be influenced by a recent decision invalidating a 72-hour blackout on the publication of opinion polls prior to Canadian elections, foreign decisions are far from binding on us. Unlike Canada, Australia has no Charter of Rights. The more likely legal question is how long a ban the High Court would allow, given the 1992 discovery of an implied freedom of political communication in the fabric of Australian constitutionalism. Since several members of the High Court strongly hinted in the 1992 case that the ‘electronic blackout’ of all television and radio advertising for three days prior to elections is OK, it is likely the Court would uphold an opinion poll ban for some days prior to polling day. Given the mischief that misleading ‘exit’ polls can create (witness the 2000 Florida Presidential election fiasco), it would be worthwhile to at least ban the publication of exit poll data until after the close of all polls; although such exit polling is not common in Australia.

However the law would not abide a long ban on publishing opinion poll results, for example, one that extended prior to the campaign period. Such a ban would clearly impede accountability and representative government, by limiting the electorate’s ability to judge for itself the responsiveness of administrations during their term of office. So any bandwagon and reverse bandwagon effects would continue throughout the electoral cycle. And even during a campaign period ban, some results would leak. Political parties could leak their polling when it suited them, perhaps in distorted form. And polling could be leaked to sympathetic websites overseas (as happened when MORI in the UK posted Canadian research during the Canadian ban). Of course such information or misinformation might only spread slowly and amongst political aficionados.
But just to say that is to acknowledge that any ban could create two classes of voters at election time: those with knowledge of the latest opinion polling data, and a mass without it. Further, no ban could stop the media speculating on who was the frontrunner—speculation that would be based on ‘sniffing the wind’, or worse, editorial favouritism, whereas good opinion polling is at least scientific in its method.

In this area, the liberty interest in freedom of information seems to coincide with the equality interest. In short, whilst a ban might be a good idea in theory, it presumes a radical change in media culture. Contemporary Australian media culture tends to overlay opinion polling as part of a style of reporting that paints elections as a game, a battle about leadership rather than one about ideas or competing local candidacies. Further, pollsters need to take particular care in the wording of questions, which often can slant responses. Changing the ethics and culture of opinion polling and the presentation of its data, rather than regulating the publication of polls, is the more important step.

Push polling

A less difficult question for electoral systems in relation to opinion polling is ‘push polling’. These are sham polls, particularly conducted by telemarketers on behalf of parties or candidates in marginal electorates. In them, leading and even misleading questions are asked, not to gauge genuine electoral opinions, but to influence them. George Williams, in a study on push polling in 1996, cites the following example:

… it was alleged by the Northern Territory [ALP] Opposition that a poll was taken two days before the 1995 Territory election in which voters were asked whether they would change their vote if they knew certain ‘facts’. These ‘facts’ included that the Opposition would, if elected, ‘introduce two sets of laws— one for blacks and another for whites.

There are no laws specifically targeting push polling. The nearest are defamation laws: both the civil law of defamation and the traditional electoral offence of publishing a false and defamatory statement about the personal character or conduct of a candidate. But defamation law is inadequate since courts will almost never grant an injunction to stop defamation, and damages after the election come too late. The offence provision is also problematic. Besides having been rarely enforced, it is too narrow (for example, it does not cover misleading statements about policies) and may be too easy to get around. If the innuendo is subtle, a court applying the criminal standard of proof will be wary of finding criminal intent.

A more useful rule would be a statutory-based, civil right to seek an urgent injunction against any misleading innuendo in any poll questions, coupled with strong civil sanctions against any firm engaging in polling without statistical validity. In the United States, where push polling probably originated, the regulatory response in jurisdictions such as Michigan has been to mandate that push pollers identify, upfront, that they have been paid by a particular candidate or party to conduct the ‘research’. Further, any firm that solicits for votes by telephone must be registered in Michigan. Otherwise, curtailing future outbreaks of push polling is probably best achieved by putting the onus on the industry that facilitated it. Whilst some of the initial concern about push polling has died down, allegations that it is still used were raised as recently as the 2002 Victorian State election (by the Greens against the ALP). It is noteworthy that the AEC recommended to the Federal Parliament’s Electoral Matters Committee that push polling not be specifically regulated by Federal legislation.

Push polling, however, is just one manifestation of a more perennial issue: whether misleading electoral speech can be regulated at all.

The need for new laws

Misleading Electoral Conduct
Can misleading campaign statements be regulated without chilling free speech?
Is the SA model of ‘truth in political advertising’ worth replicating?

Under the trade practices and fair trading laws throughout Australia, business conduct that is likely to mislead or deceive consumers is subject to various sanctions such as fines, damages and corrections. Yet there is currently no such law governing campaign conduct, except in South Australia. There the law attempts to prohibit advertisements containing misstatements of fact that are misleading to a material extent. In Australia generally the issue is a perennial one reflected in concerns arising after every election.
For a brief period covering the 1984 national election, a similar federal law existed making it an offence to publish an untrue and misleading statement in an electoral advertisement. In the absence of such laws, outside SA, only conduct that misleads an elector in how they cast their vote is prohibited: and a High Court ruling has limited that chiefly to misleading how-to-vote cards or misrepresentations of the ballot paper. That is, misleading and even patently false material that distorts electors’ decisions about who to support are, with a few exceptions, not regulated. (The exceptions include the fear of defamation law—which now in Australia does not apply to reasonable and bona fide mistakes of fact—and the power of the self-regulating media to require advertisements to be withdrawn if they are misleading.) In 1996, both federal and Queensland Parliamentary committees recommended the adoption of a South Australian style law: but in both cases the governments of the day rejected the recommendation. The AEC also has consistently opposed such laws as ‘unwise and unworkable’.

Most likely, misleading even malicious statements are inevitable part of election campaigning. If they happen too late in a campaign to correct, if they are corrected but the mud has stuck, or if they happen to vulnerable candidates or parties without the media access necessary to fight back, then political equality is compromised. Electoral competition is rendered unfairly unequal, and if electors’ choices are distorted, the representativeness of the outcome may be compromised.

Political liberty itself is compromised when this happens. Free speech is not a licence to lie or mislead, even accidentally. Fair trading laws have had a significant impact on the ethics and practice of commercial marketing, and similar laws governing at least elections if not political speech generally might create a more considered approach to campaigning in Australia. For example, claims about asylum seekers throwing children overboard may have not been given ministerial backing during the 2001 federal election if such laws were in place.

What would be the cost of such laws? The SA laws have not led to the evaporation of robust debate at that State’s elections—although they only apply to electoral advertisements. So even in SA, for example, there is no legal redress if a powerful politician makes a misstatement, however crude and influential, at a press conference or policy launch. But even leaving aside the free speech concern that some important allegations will be ‘chilled’, there is an indirect concern for political equality. Those parties or candidates with greater wealth and access to legal representation will be empowered to threaten less well-off candidates and parties into retracting or watering down their campaign claims. The difficulty for any regulation of political statements is how to sift misleading statements about fact, from misleading statements about the consequences of a policy, about future intentions or even more nebulous campaigning based on image. The core of campaigning, after all, is about promises and perceptions.

The problem is illustrated by a 2002 SA court case. Independent MP, Peter Lewis, was required to defend his election in a hearing concerning statements he made during the campaign that he would not support a minority ALP administration. (In a hung parliament, after the election, he did support the ALP, then the largest party and clearly most likely to offer stable government.) The case ran over 14 days! Even if a court could decide whether he had lied about a matter of fact, or rather overstated his unwillingness to deal with the ALP, is this not the sort of case where we would want the member to reserve the right to reverse his position without fear of formal consequences? Presumably if the electorate feels duped it can exact its wrath at any breach of trust involved at the next election.

In short, there is much to be said for adopting a position of caveatelector. It may however be worth considering two related reforms. One is whether the media’s self-regulatory role in pulling misleading electoral ads should itself be subject to regulation: at a minimum, broadcasters should publish reasons when they refuse to carry a political ad. The second is whether a mechanism to mandate public retractions of blatantly incorrect factual claims could be introduced. In SA, the Electoral Commissioner can request that an ad be retracted if the misstatement of fact is ‘misleading to a material extent’. Caveatelector

(Let the elector beware!)
Elections in a Big Country
The problem of polling hours across different time zones in Federal elections.

A final topic relevant to the campaign—and which replays concerns about the impact of published opinion polls on voter psychology—is the effect that east–west time zones might have on late voting in WA and to a lesser extent Central Australia (that is, the NT and SA). At Federal elections, WA polls open and close two or three hours later than in the Eastern States, depending on Summer Time. As a result, early actual results in the most populous States are broadcast, and in some years the fate of the Federal government virtually decided, before polls close in Western Australia.

Clearly, this puts those who by choice or circumstance vote late in the West in an unequal position to the great majority of the electorate. And this unequalness arises at the heart of voting—the secrecy of the ballot itself. Not because any individual’s ballot is knowable, but because it is an integral part of modern secret balloting that no one knows the real trend of voting until all votes are in (unlike the traditional poll, in which electors made a public declaration of their vote).

Is this unequalness an inescapable consequence of geography? There are only two solutions. The first would be to delay the release of any results in the East until polling had closed in the West. But it would be tremendously inefficient for polling officials to twiddle their thumbs for the first two or three hours after polling closed in the East. Short of locking scrutineers into polling stations until polling had closed in the West, delaying the release would not guarantee that word of results in the East would not filter into areas where polling was continuing. A second, more feasible option would be to synchronise polling, which currently occurs everywhere from 8am to 6pm. This would make election night a later affair, at a time when some are promoting electronic voting as a way of expediting the result. But it would cure the inequality. Late closing is a feature in the UK, for example, where parliamentary and European polling runs from 7 am to 10 pm—even allowing that in the UK voting occurs on a weekday rather than Saturdays, that summer elections present much longer days, and that first-past-the-post voting for Westminster seats generates quicker definitive counts than under Australia’s preferential system. Later closing formerly applied in Australia for federal elections. Polls were open from 8 am to 8 pm until 1983, when a parliamentary committee found that few people voted in the last two hours of the day and that, with the inclusion of religious reasons in the list of grounds for postal voting, practising Jews would not be disadvantaged by an earlier close.

Whether staggering polling hours is desirable depends on a number of factors. First is whether it would create confusion amongst voters in a mobile population, compared to the uniform closing times that currently prevail. Even a small rate of confusion might lead to practical disenfranchisement (for example, voters in the West turning up after 6 pm). The more fundamental factor is whether the current inequality—where late voters in the West know the trends in the East—matters much in practice. With compulsory voting, parties do not have to worry about voters in the West not turning out if the fate of the government is clear. At worst, some late voters in the West might be influenced by a ‘bandwagon’ effect. But as we saw in relation to opinion polling, that can cut both ways. Second, we have a constituency system such that electors in different time zones are not voting in the same contest. In a tight election, late voters in the West might feel empowered to know that their vote may matter to the fate of the government. Conversely, in a landslide, they might feel deflated to know that their vote will not make a difference to the fate of the government. But their vote still counts equally to every other vote, and like everyone else, they vote ignorant of the actual trend in their particular seat or Senate race. So the time-zone issue is much less a concern than say in the US, where pundits still muse over the effect of Eastern State results on Presidential turnout in places like California.
Money Politics
The single greatest issue confronting elections in the developed world is the influence of private money on electoral politics and, more broadly, on legislative and executive behaviour. One is tempted to say ‘Wasn’t it ever thus?’ Certainly in the US, where the question is a source of endless controversy and regulation, contemporary concerns date back a century to Teddy Roosevelt’s attempts to restrict the power of the purse strings of corporations and labour unions.

Actually concerns about the unfairness and potentially corrupting impact of wealth on electoral contests go back much further. However in the 19th century and before, the primary concern was with politicians bribing voters: in the 20th and 21st centuries, the concern is reversed. It is with special and wealthy interests buying political influence and favours.

Money politics
The most pressing question facing electoral equality today.
Are disclosure laws doomed to fail? What purpose do they serve? Can donations be capped? Does public funding enhance equality? Should electoral expenditure be limited?

The contemporary Australian model of regulating political finance arose in the early 1980s. Its details, as they now vary between Commonwealth, State and Territory elections, are given in Table 6. The essence of the model is as follows:

- Disclosure of donations (and annual returns of total receipts and expenditures);
- Public funding; and
- No expenditure limits (the only exception is the Tasmanian upper house).

We will now deal with each aspect of the Australian ‘model’, from the viewpoint of political equality, before looking at the model’s strengths and failings as a whole.

Donations and disclosure
Candidates, parties and others, such as significant donors, are required to undertake public disclosure of donations received or made. Disclosure is designed to inform the electorate, and provide a mild incentive to modesty.

Whilst not all States/Territories have an independent disclosure regime, the Commonwealth system is in large measure a coverall. This is because parties in Australia, including their State branches, register federally to secure public funding for federal elections. Once registered, no distinction is made between monies received or spent on federal or State (or for that matter local government) electoral purposes. Nevertheless, the federal regime will not catch donations to candidates (as opposed to parties) that run only at State elections, so for completeness’ sake, disclosure requirements should ideally exist in all jurisdictions. But even here we find a catch-22 of federalism. If the rules differ between jurisdictions, confusion and cost will follow, which will impact harder on small or poorer parties. But if the requirements are uniform, there will be a considerable amount of unnecessary duplication.

Does disclosure contribute to political equality? It may, but probably no more than being whipped with a feather amounts to punishment. One motivation for disclosure laws is to inform the electorate and, then for the media to pursue links between donations and cronyism or corruption. A second motivation is to encourage modesty in political gifts. The information issue is important to a broad notion of representation—sources of donations may reveal to voters as much about a party or a candidate’s true leanings as their stated policies. Similarly, deterring cronyism, corruption, and their perception, is vital to the basic ideal of representation—parliamentarians should represent the many and not just the powerful or wealthy few.
Table 6: Election Finance Law

<table>
<thead>
<tr>
<th>System</th>
<th>Public Funding</th>
<th>Disclosure</th>
<th>Expenditure Limits</th>
</tr>
</thead>
<tbody>
<tr>
<td>CWLTH</td>
<td>Post-election, as of right. 4% threshold</td>
<td>Post-election by candidates and donors. Annual returns by parties and associated entities</td>
<td>None</td>
</tr>
<tr>
<td>NSW</td>
<td>Post-election, as of right. 4% threshold.</td>
<td>Post-election by parties, candidates.</td>
<td>None</td>
</tr>
<tr>
<td>VIC</td>
<td>Post-election, capped by actual expenditure. 4% threshold (unless elected)</td>
<td>Parties merely file copy of Federal return.</td>
<td>None</td>
</tr>
<tr>
<td>QLD</td>
<td>Post-election, capped by actual expenditure. 4% threshold</td>
<td>Post-election by candidates. Annual returns by parties and associated entities</td>
<td>None</td>
</tr>
<tr>
<td>WA</td>
<td>None</td>
<td>Post-election by candidates. Annual returns by parties and associated entities</td>
<td>None</td>
</tr>
<tr>
<td>SA</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>TAS</td>
<td>None</td>
<td>None</td>
<td>Legislative Council only: candidates limited to approx. $9000. Party or even third party expenditure prohibited</td>
</tr>
<tr>
<td>ACT</td>
<td>Post-election, as of right. 4% threshold</td>
<td>Post-election by candidates, donors. Annual returns by parties, associated entities and donors</td>
<td>None</td>
</tr>
<tr>
<td>NT</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
</tbody>
</table>

As for modesty in donations, the ideal is an electorate where many are active, including by small donations, rather than an oligarchy where a few very well resourced people or organisations scream out their interests with large gifts. It is noteworthy that federal income tax deductibility is limited in Australia to $100 p.a., and is explicitly not available to corporations. That is, the tax laws offer an incentive to small donors.

But as Joo-Cheong Tham argues, disclosure laws in Australia may be ‘ineffectual by design’. One flaw is that disclosure obligations arise after the election in question. A second is that the information is not widely publicised. Remedies include an Australian Democrat proposal that donations over a certain limit be instantly disclosable, and that the electoral commissions, especially the AEC, publicise the information more widely, especially through the Internet. But without a more tuned in (or perhaps less cynical) public and media, it is not clear that a stream of more timely information will achieve much.

A third flaw may be in the project itself. As Tham argues, over time disclosure may discourage modesty, by ‘normalising’ large-scale political donations, especially by corporations. Donation details are officially released in an annual publication, a little media comment is made, and the business of politics carries on. Of course this tendency to normalisation is not the whole picture. Disclosure may create a kind of level playing field—that is, formal equality—but only between the major parties. For example, many financial institutions seem to hedge their bets by donating similar amounts to both the ALP and the Liberal Party. Conversely, the libertarian fear that disclosure laws will chill some donors is also true, particularly where parties outside the mainstream are concerned. So the laws impact unequally. Also, over time the laws have grown increasingly complex, and now resemble the legal thicket of taxation law. This is a product of a cat-and-mouse game: legally represented major parties and wealthy donors keep finding ways to circumvent the law. We have seen a wave of such mechanisms in the past ten years, some more, some less legal: for example, trust funds, forgiven loans, and channelling funds through foundations and intermediaries. Such undermining of the rules does more than merely distort the picture that disclosure provides. It forms a kind of political inequality, as less well-off parties and candidates are more likely to conform to the law, or be caught.

Tham’s solution is to advocate caps on donations. Currently that only exists in two small forms: (a) restrictions on accepting anonymous donations of any significant amount; and (b) a ban in Victoria on donations above $50 000 from...
Caps on donations. Caps are attractive from an equality standpoint. After all, large donors are rarely in the business of charity: at a minimum they donate to be seen to be supporting the political establishment, either out of a sense of public-mindedness or to gain an ear equal to that of other donors. Large donations will always, therefore, help entrench the existing parties of power, to the exclusion of potential competitors.

The problem with caps on donations, as the US has found in trying to distinguish between ‘hard’ money (legal, regulated donations) and ‘soft’ money (money raised outside the regulations) is that money is fluid by nature. This is what Issacharoff and Karlan call the ‘hydraulics’ of campaign finance reform. And since donations occur in private, it is possible that caps—a form of prohibition—may drive donations even further underground.

One area where a cap might be introduced is to render it illegal to accept money from an international source, except an Australian elector overseas. As long as Australian citizenship and (usually) residency is a requirement to vote and stand for office, it is hard to see why Australian parties should rely on overseas donations. Further, since this is the kind of rule that will appeal to nationalism-minded folk, it is likely to be respected by the parties as long as they believe it is being applied equally. Canada, for instance, prohibits donations from sources other than citizens, permanent residents, or corporations/unions carrying on business in Canada. However, sometimes political parties represent international aims and are affiliated with international movements—e.g. socialism or the environment, and it would seem to be unduly discriminatory to prevent such movements helping each other with resources. In 2001, the Australian Greens for instance received and declared as a donation a sum of over $19,000 (40 per cent of their donations that year) a one-off contribution from the Stockholm based Global Greens Forum, although the party says this related to a major forum hosted in Australia rather than money available for campaigning.

Public funding

In most Australian elections, funding is ‘earned’, with a certain dollar value attached to each first preference vote received, above a minimum threshold of 4 per cent. This system was ostensibly designed to support parties, with a view to weaning them from private donations, but also to encourage healthier parties better able to devote resources to policy development. For federal elections, the current rate (for 2003–04) is 190.57 cents per vote (or approximately $3.81 per elector, given each elector has a vote for both the Senate and the House of Representatives).

The problem with public funding is that, in the absence of enforceable limits on donations, or limits on expenditure, it can amount to pouring public money into a bottomless pit. According to its detractors, it can create dependence—parties become addicted to the guaranteed flow of money, and become less reliant on their grassroots.

In theory, public funding, like free airtime, ought to advance political equality. But there are three problems with the position as it exists in most Australian systems. One is that the money is paid post-election. A new party, unless it has bankers willing to take a gamble, is in a catch-22 situation. They may not have the resources to make an electoral splash until after they have made the splash. Second, the 4 per cent threshold is arbitrary. In theory there should be no threshold, since every vote (and hence every voter’s preference) should be equal. Certainly there is a need to avoid encouraging crank or opportunistic candidatures, but 4 per cent represents a significant vote for a minor party. The Greens, for example, until recently received relatively little funding compared to the Australian Democrats, although they were both genuine parties with not dissimilar platforms.

A third criticism is that funding is generally as-of-right. The original Commonwealth rule required reimbursement—that is, proof of expenditure. This proved administratively difficult and costly. But should any candidate or party be capable of making a profit on an election? As in Queensland and the ACT, it seems sensible to cap funding to total campaign expenditure, although this would penalise parties that do not spend money on television advertising but do rely on public funding to sustain party secretariats between elections.

There are of course alternative models of state support for parties. One involves grants to support administration and policy development. To an extent this exists in Australia, but only for parties represented in a parliament. Grants can also be tied to particular electoral expenditure—for example, they could come in the form of postage allowances to encourage direct mailing of electors. The NSW model, the oldest in Australia, contains an element of this in a Political Education Fund. Another model is more generous tax deductibility. But since income tax is at progressive rates, this is regressive in socio-economic terms, and would
<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Acts</th>
<th>Max. amount for individual or corporate donation</th>
<th>Min. amount for disclosure by party or donor</th>
<th>Expenditure limits</th>
<th>Additional information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia (Federal)</td>
<td>Commonwealth Electoral Act</td>
<td>No maximum amount</td>
<td>$1500 threshold from each separate donor</td>
<td>No limit</td>
<td>Donors must declare aggregate donations to a single party where they total $1500 or more including ‘gifts-in-kind’</td>
</tr>
<tr>
<td>New Zealand</td>
<td>Electoral Act</td>
<td>No maximum amount, No foreign donations</td>
<td>$1000 for ‘electorate donations’.</td>
<td>$1m for parties and $20 000 per seat</td>
<td>Amendments to the law in Feb 2002 replaced the requirement to disclose ‘electorate’ and ‘national’ donations with a requirement to disclose ‘party’ donations—one or more donations to a registered party in a calendar year totalling more than $10 000</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Political Parties, Elections and Referendums Act</td>
<td>No maximum amount; No foreign donations</td>
<td>£5000 for parties; £1000 for local branches and individuals. Individual donors must declare donations of £200 or more</td>
<td>£20m per national party. Under £10 000 for typical constituency campaign</td>
<td>Donations of £200 or less, including non-cash donations (e.g. special paid leave, hospitality, free room hire), must be declared by donors where the aggregate of the donations is greater than £200</td>
</tr>
<tr>
<td>Canada (Federal)</td>
<td>Canada Elections Act</td>
<td>Maximum amount of $5000 for individuals. $1000 for corporations and trade unions. No foreign donations</td>
<td>$200: parties and candidates (and third parties that spend over $500) must disclose identity of all contributions over $200 from a single source</td>
<td>Preselection: 20% of election expenses in that district during the last general election. Candidates: sliding scale. $41 450 for 25 000 electors + $0.52 per additional elector. Parties: $0.70 per elector in constituencies contested. Third parties: $150 000 including no more than $3000 in a particular constituency race</td>
<td>Reporting requirements for expenses and revenues apply to registered electoral district associations and to leadership contestants and nomination contestants of registered parties</td>
</tr>
</tbody>
</table>

*All money amounts are in the currency of the nominated country*
be politically unequal to the extent that it would favour those parties supported by the wealthy. A third is a ‘voucher’ system of the type recently proposed by Ackerman in the US (‘patriot vouchers’). In this model, electors can independently choose to bestow an equal amount of public money on a candidate or party of choice. But aside from creating an extra outlet for participation, the voucher system reduces to an administratively inefficient variation on the automatic funding model in Australia.

**Electoral expenditure**

Unlike donations, expenditure on campaigning is incurred publicly, not privately. For this reason, it ought to be easier to regulate and control, not least as candidates and parties have an incentive to police each other. As Table 7 shows, Australia is increasingly isolated in not limiting campaign expenditure. Indeed, compared to the UK, and especially Canada, both of which very recently thoroughly overhauled their laws, we have a very laissez-faire system of political finance.

From a liberty standpoint, expenditures, even more than donations, are a form of political expression. It is impossible to imagine a mass, representative democracy without either. But like donations, unbridled expenditure creates equality concerns. Advertising, for example, may not directly ‘buy’ votes, but it would hardly be engaged in if it had no effect. Further, excess expenditure by a couple of hegemonic major parties can drown out competition, by saturating the airwaves and even turning electors off. Of course this can backfire if done badly. But, as US experience shows, it tends to create a closed cycle, in which incumbents attract donations by their ability to wield power, and use the money to buy ‘brand recognition’ and become hard to shift from power. Of course this is not an invariable rule—periods of ‘anti-politics’, as seen in the One Nation-dominated election of 1998, generate a backlash against sitting members. But, other things being equal, especially in an age of limited ideology, electoral politics favours the well-heeled party that can afford the most savvy campaign techniques. The formal equality of electoral competition is not real equality of opportunity if new voices find it hard to get their message across.

The 19th century approach of capping candidate expenditures fell into disregard in Australia over the 20th century. The limits were not indexed. The Commonwealth electoral authorities, from early on, took a less than vigilant approach to them (for example, in 1910 the Chief Electoral Officer revealed a policy of not prosecuting candidates for failing to make returns of expenditure if they had not won the seat). And most of all, the rising dominance of parties meant that rules limited to candidates and not parties were outflanked. In terms of mass advertising, at least, parties spend to promote ideas, visions, policies and the leader, rather than individual candidatures.

Only in the Tasmanian upper house did expenditure limits survive. They are uniquely tough and well enforced. But this is as much a product of a parsimonious and party-free upper house culture as it is of the rules themselves. Tasmanian upper house polls are held separately from party-dominated lower house elections.

Even the major parties agree that the cost of election campaigning needs to be constrained (not least as branches periodically face insolvency after elections). Capping expenditures is the obvious way. The High Court forbids achieving this through a blanket ban on broadcast advertising. However nothing would stop reasonable limits on expenditure being imposed on candidates, parties and lobby groups. Certainly, following US experience (and even some Australian experience in the use of formal legal entities to mask the source of donations), we might expect some front organisations to arise to make expenditure on behalf of the major parties. But, compared to the US, Australian campaign culture is relatively modest. People accept that legitimate lobby groups will play a small part, but they are wary of faceless organisations appearing out of the blue to tell them whom to vote for.

A greater hurdle for expenditure restrictions is the detail of what to count as a political or campaign expenditure. For instance, what of volunteer activity? In the name of political equality, it is entirely reasonable to treat, say, volunteer doorknockers as political expenditure, but count hired hands as part of any expenditure cap. Difficulties arise, however, where the services are expensive gifts, say professional services like opinion polling or legal representation, although these could be given a market value and audited as such.

As outlined in Table 7, spending limits have recently resurfaced in UK electoral law. One of the major innovations of the 2000 UK reforms was the extension of expenditure limits to parties at national elections. This generates a cap of under £20 000 000 per national party (assuming it endorses candidates in every constituency) and under £10 000 for a typical constituency.
campaign. Similarly, in 1995 NZ adopted a cap on total election expenses by individual parties (NZ$1000 000 + NZ$20 000 per seat contested) to supplement traditional caps on candidatures (NZ$20 000). And in Canada we find the strictest expenditure regime of all comparable countries.

The Australian funding and finance ‘model’ overall
The mix of no limits on donations and expenditure, disclosure laws of limited enforceability, and partial public funding leaves Australia with a very liberal and major party-friendly model. It pays most heed to liberty interests, which hold that politics is like a market, and indeed that wealth generated in the market can legitimately buy a louder voice in electoral politics. There is only one sense in which this is understandable from an equality perspective. And that is that without a market in political speech, those with direct access to the media (especially via editorial influence) or public platforms would be hard to challenge.

But in all other respects the equality principle is given short shrift in Australia’s essentially laissez-faire system of money in politics. In this, Australia is far from alone. Curiously, though, the US puts much more effort into regulating campaign finance. But, perhaps most of all we should turn attention to the British model—or rather the return to expenditure caps in the UK, NZ and Canada—and see what lessons we can learn there.

Incumbency Benefits
What are incumbency benefits?
Are public resources, unequally open to existing parliamentarians or parties but not challengers, used for electoral advantage?
Should private broadcasters be required to make free airtime available to counterbalance incumbency benefits?

It is not just private wealth or explicit public funding of parties that can affect election campaigns. Incumbents—meaning both existing parliamentarians and parliamentary parties, particularly those in government—have access to significant public resources. These include parliamentary allowances, publicly financed electorate and ministerial staff, and control or influence over the amount of public service advertising promoting government initiatives. Sally Young has described the way in which modern electioneering has become a ‘permanent’ campaign, based as much at electorate level through direct marketing as through general advertising. The cost of this, she says, is increasingly being outsourced to the taxpayer through parliamentary allowances and government advertising.

Table 8 illustrates these benefits. Following it is a discussion focussing on government advertising and, to a lesser extent, parliamentary allowances:

A graded political inequality is built into such ‘spoils of office’:

1. Governing parties and their members benefit more than the major Opposition party.
2. The major Opposition party and members benefit more than minor party and Independent parliamentarians.
3. All parliamentarians and parliamentary parties benefit in a way that challengers, and indeed other political actors, do not.

Of course public resources ought be used only for public service purposes, that is, for genuine and necessary communication between governors and the governed. Auditors-general and parliamentary committees concerned with budgetary proprieties have a vital role in policing this. And there are some protocols designed to limit the electoral influence of
such resources. For example, by convention, government advertising ceases during an election campaign (except for essential or uncontroversial public service information).

But it is increasingly recognised that there is no strict dividing line between the ‘electoral’ and the ‘political’. Voters’ impressions and political agendas are formed throughout the life of a parliament, so promotional material has an effect whenever it is aired. Modern marketing is slick and subtle: in a marketplace driven by images, little is delivered simply as ‘information’. Public service advertising campaigns will inherently contain elements of promotion, which, if sold effectively, create some favourable perceptions of the minister or government concerned. But in the worst cases, advertising campaigns may be deliberately ‘spin-doctored’ or aligned with controversial, partisan policy.

Recent controversial examples, to quote only from the federal arena, include:

- The ‘New Tax System’ promotion. The size and tenor of this campaign caused concern. Estimates of its cost have varied, but start at $151million. It consisted not merely in public education, including information packages to households, but involved an attempt to ‘sell’ the Goods and Services Tax (a term noticeably absent from the headline of the campaign) through a Joe Cocker song ‘Unchain my Heart’. The Tax Commissioner defended the campaign in part by noting that the public needed to be won over, since tax revenues depend to a large extent on self-assessment and business collection.

- The public information packages and advertisements accompanying the ‘war’ on drugs (directed at families) and terror. Most saw the former as a charged moral issue and the latter as a practical policing and national security issue. Glossy brochures, fridge magnets and signed letters from the Prime Minister himself were seen as odd methods to educate the public on complex issues. But the medium was the message: the subtext of the packages was ‘The Government cares and is focussed on protecting you’. The Government’s defence was that both packages were merely consciousness-raising exercises, as part of wider strategies.

Table 8: Key Incumbency Benefits

<table>
<thead>
<tr>
<th>Benefit</th>
<th>Who Benefits and How</th>
</tr>
</thead>
<tbody>
<tr>
<td>Government advertising—e.g. the federal government has become the largest advertiser in Australia in dollar terms</td>
<td>As discussed below, advertising campaigns increasingly are used to ‘sell’ controversial policies and not merely to educate with public service information.</td>
</tr>
<tr>
<td>Parliamentary, ministerial and electorate staffers</td>
<td>Parliamentarians, and parties with a minimum number of parliamentarians, have staffing entitlements. E.g. federal MPs have 3 electorate staff. Within limits differing between jurisdictions, these staff can work on PR activities and activities that provide practical electoral benefits. These employees are typically not imbued with a public service ethos, but often are party activists.</td>
</tr>
<tr>
<td>Parliamentary allowances. Parliamentary allowances.</td>
<td>Incumbent parliamentarians use these for self-promotion as much as genuine interaction with constituents: eg to engender community goodwill, target particular sub-constituencies or simply keep themselves ‘top of mind’ with their electorates.</td>
</tr>
<tr>
<td>Privacy Act exemptions</td>
<td></td>
</tr>
</tbody>
</table>

Members of Parliament and registered parties are exempt from privacy restrictions for electioneering or political activities. In practice, this benefits incumbents, especially the major political parties, who have the resources and skills to ‘profile’ individual electors and target them through direct political marketing.
campaign is controversial or not. We could regulate to ensure the tag is more obvious (for example, to be read at a certain speed, or be more prominent) or even as to its content (for example, to remind viewers that the government is actually composed of certain political parties—though that may just reinforce the partisan benefit). But it is doubtful that any form of tagging has much effect, except to very discerning ‘consumers’ of the advertising material.

Of course, self-promotion can backfire. Australians like to see themselves as having ‘bullshit-detectors’. But even if today’s Australian electorate were more cynical about political discourse than others, this would not necessarily be a good thing. Nor would it answer the concern that segments of the population may be swayed by exposure to material promoting incumbents. In a compulsory voting system, there are likely to be people, whether conscientious swinging voters or disinterested citizens, who will be swayed by such material, even if only incrementally. To believe otherwise is to deny the evidence that advertising works, and that marketing is a subtle science as well as a haphazard art.

Unfortunately, few of the matters raised by incumbency benefits here can be easily solved by formal regulation. For example, what process would ensure that the content of government advertising is purged of unnecessary puff? Is it unethical for parliamentarians to use their electorate allowance as largesse, for example, by donating prizes to schools in their district and sponsoring community events. Few begrudge the social benefit of this, but what of the goodwill ‘bought’ over rival candidates? Ethical conduct easily gives way to self-interest in tight voting system, there are likely to be people, whether conscientious swinging voters or disinterested citizens, who will be swayed by such material, even if only incrementally. To believe otherwise is to deny the evidence that advertising works, and that marketing is a subtle science as well as a haphazard art.

One response is to recommend that free airtime be widely available—that is, not just on public broadcasters at election time, but on private broadcasters, and at both election time and during the life of a parliament. Party political broadcasts (or PPBs) are such a feature of British political life, and provide a direct platform for opposition parties in particular. Airtime could be demanded of private broadcasters through federal licensing requirements, time ratiﬁed on the basis of previous electoral performance (just as public funding is), and a pool of state money allocated to ensure all parties can produce professional content. Of course there is no way of guaranteeing that such airtime will be wisely used, or even that it will be widely watched. However it is a way of empowering those who draw least on incumbency beneﬁts, and partially redressing the inequality of attention from which they suffer. Along the way it might also generate more deliberative and informed debate.

Otherwise, the answers to these dilemmas lie outside electoral rules as such, and in the hands of a reinvigorated parliamentary system: greater executive accountability and more open scrutiny of members’ expenditure on allowances. Whilst it is true that, say, at federal level, salaries and most allowances are set by an independent Remuneration Tribunal, its determinations are subject to disallowance. Federal members’ printing allowances are set by regulation, and only minor and Opposition party action prevented the current $125 000 p.a. allowance being further increased recently at government instigation. In any event, the problem transcends the question of the independence of the body that sets the allowances, because the benefits these allowances confer on incumbents over challengers never enter the equation, so their unequalising political effects are not considered.

In serious cases of misuse, there should be public censuring commensurate with the abuse of power: for example, the Auditor-General could be required (and funded) to publish advertisements naming the particular government, minister or member to highlight improper uses of taxpayer resources. Of course this would risk embroiling Auditors-General and their offices in political controversy. In extreme cases, what is needed is more vigorous policing of rules dealing with the misuse of benefits, for example, the recent Independent Commission Against Corruption (ICAC) report in NSW into the misuse of resources by Malcolm Jones MLC. Amongst other improprieties, Jones was found to have used publicly salaried staffs for dubious electoral activities—registering ‘dummy’ micro-parties. The report led to the ultimate political sanction, his removal from parliament. Mr Jones was a minor party figure: does anyone believe that abuse of public resources for electoral purposes does not occur in the major parties as well?

As with the ‘bandwagon’ effect in opinion polling, there are of course some forces counteracting the benefits of incumbency. For example, incumbents tend to be judged on their record, or in some cases, blamed for matters outside their control. In Michael Warby’s phrase, incumbency is a ‘wasting asset’. The 14 federal elections since 1966 have shown that Australians may well have a deeply entrenched pattern of negative voting; in only two of those elections has the government of the day not lost support. Even in those two, 1993 and 2001, the shifts were not great and were explicable by peculiar factors. (In 1993, a change of Prime Minister had occurred and the Opposition largely lost the election by exposing itself with an overly detailed platform; in 2001, the election focussed on national security issues.)
Further, there may be other confounding factors explaining incumbency. The party in federal government has only changed on five occasions in the nearly 60 years since the Second World War: this probably reflects a deep desire for stability more than that it is the product of tangible incumbency benefits.

But even sweeping those countervailing and confounding factors aside, it remains the case that the benefits identified above exist, and exist in a way that may distort electoral equality. They may only work at the margin, but that is where elections are won and lost.

Further Reading

On contemporary issues in Australian electoral systems and law generally:

- Democratic Audit of Australia (website): http://democratic.audit.anu.edu.au

On the right to vote—limitations and evolution of the franchise:


• Southern Cross Group, ‘Voting for Overseas Australians’. Available at: http://www.southern-cross-group.org/overseasvoting/overseasvoting.html


On participation internationally:


On the various voting systems:


On compulsory voting:


On enrolment practice, voter identification and the integrity of the rolls:


On ballot order and ‘donkey voting’ in Australia:


On seats reserved for Indigenous people and Indigenous participation generally:


On computerised voting:

• Electoral Commission (UK), *e-democracy*. Available at: http://www.electoralcommission.org.uk/toolkit/theme-listing.cfm/45


On regulating opinion polls:


On ‘push polling’ and truth in political advertising laws:


On political advertising and the law in Australia:


On campaign finance regulation in Australia:


On campaign finance internationally:


On parliamentary entitlements creating incumbency benefits, and modern marketing techniques:


On comparable overseas election systems generally:

- Elections Canada. Available at: http://www.elections.ca

- Elections New Zealand. Available at: http://www.elections.org.nz

- International IDEA (Institute for Democracy and Electoral Assistance). Available at: http://www.idea.int

- United Kingdom Electoral Commission. Available at: http://www.electoralcommission.org.uk
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