COMMENTS ON THE ELECTORAL (MISCELLANEOUS) AMENDMENT BILL 2012

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While the Parliamentary Research Library is not resourced to provide comments and explanatory material on every Bill there are nonetheless occasions when there is enough lead time and we have enough specialist knowledge to offer it.

Around Australia there are several aspects of the electoral system which are currently under review. The main areas are how the electoral system can best include all eligible voters at election times (this debate is about direct enrolment, disability access, online voting and postal voting); how elections can be conducted in a fair way (this debate includes regulation of electoral advertising and political comment at election times) and how the election can be regulated so that parties have a fair chance of competing (this debate is currently about public funding of campaigns and legislating for disclosure of contributions and expenditures).

The Electoral (Miscellaneous) Amendment Bill 2012 proposes change in several of these areas. It addresses the inclusiveness of the electoral process with two proposals: one, to allow the Commonwealth’s new direct enrolment and update system to flow on to update South Australia’s roll; and two, to change the arrangements for postal voting, removing parties from the postal vote application process. The Bill addresses election conduct by proposing to remove a requirement that political comment on the internet carry an authorisation statement. It also proposes to regulate How To Vote cards by introducing a registration system and requiring clearer authorisation statements. It leaves for another time the debate about campaign funding and disclosure. Finally it proposes changing several election management procedures and introducing a term limit on the Deputy Commissioner’s appointment.
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Clause 5 of the *Electoral (Miscellaneous) Amendment Bill 2012* Bill would introduce a term limit - of five years - on appointments to the position of Deputy Electoral Commissioner in South Australia. Section 6 of the *Electoral Act 1985* (SA) currently provides for appointment of either the Electoral Commissioner or the Deputy Electoral Commissioner 'for a term expiring on the day on which he or she attains the age of 65 years.' That is unusual in Australia. In some jurisdictions the Deputy Commissioner is a member of the public service but where the position is an appointment both the Electoral Commissioner and the Deputy are appointed for fixed periods, as shown below.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Electoral Commissioner</th>
<th>Deputy Electoral Commissioner</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commonwealth</td>
<td>Up to seven years, with possible reappointment (<em>CEA</em> s.8).</td>
<td>Up to seven years, with possible reappointment (<em>CEA</em> s.21(2)).</td>
<td>Term is three years (<em>CACA</em> s.28).</td>
</tr>
<tr>
<td>NSW</td>
<td>Up to ten years, with possible reappointment for another period of up to ten years (<em>PEEA</em> s.21AB(1a, 1b)).</td>
<td>Deputy Commissioner’s position is not mentioned in the Act.</td>
<td>Commissioner may appoint a person to act as Electoral Commissioner during an election period, in case of illness or absence of the Commissioner (<em>PEEA</em> s.21AD(3)). Term is four years (<em>CA</em> s.24).</td>
</tr>
<tr>
<td>Victoria</td>
<td>Up to ten years, with possible reappointment for subsequent periods of up to ten years (<em>EA</em> s.12 (2a,2b)).</td>
<td>Up to ten years, with possible reappointment for subsequent periods of up to ten years (<em>EA</em> s.13 (2a,2b)).</td>
<td>Term is four years (<em>CA</em> s.38).</td>
</tr>
<tr>
<td>Queensland</td>
<td>Up to seven years (<em>EA</em> s.22(5)). Reappointment provisions unclear.</td>
<td>Up to seven years (<em>EA</em> s.22(5)). Reappointment provisions unclear.</td>
<td>Term is three years (<em>CAA</em> A s.2).</td>
</tr>
<tr>
<td>Western Australia</td>
<td>Up to nine years, with possible reappointment (<em>EA</em> s.5B(1,4)).</td>
<td>Up to nine years, with possible reappointment (<em>EA</em> s.5B(1,4)).</td>
<td>Term is four years (<em>CAA</em> A s.21).</td>
</tr>
<tr>
<td>South Australia (current)</td>
<td>To age of 65 (<em>EA</em> s.7(6)).</td>
<td>To age of 65 (<em>EA</em> s.7(6)).</td>
<td>Term is four years (<em>CA</em> s.28).</td>
</tr>
<tr>
<td>South Australia (proposed)</td>
<td>To age of 65 (<em>EA</em> s.7(6)).</td>
<td>Five years with possible reappointment for one more five-year term (<em>EA</em> new s.7(6a,6b)).</td>
<td>Term is four years (<em>CA</em> s.28).</td>
</tr>
<tr>
<td>Tasmania</td>
<td>Up to seven years, with possible reappointment (<em>EA</em> s.17(1)).</td>
<td>Deputy Commissioner is employed under the <em>State Service Act 2000</em>, with no term limit (<em>EA</em> s.23(1)).</td>
<td>Term is four years (<em>CA</em> s.23(2)).</td>
</tr>
<tr>
<td>ACT</td>
<td>Up to five years, with possible reappointment (<em>EA</em> s.25).</td>
<td>Deputy Commissioner’s position is not mentioned in the Act.</td>
<td>Commissioner may delegate functions to a member of the Commission’s staff (<em>EA</em> s.24(1)). Term is four years (<em>EA</em> s.100).</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>Up to five years, with possible reappointment (<em>EA</em> s.320).</td>
<td>Deputy Commissioner’s position is not mentioned in the Act.</td>
<td>Commissioner may delegate functions to a member of the Commission’s staff (<em>EA</em> s.319). Term is four years (<em>EA</em> s.23(1)).</td>
</tr>
</tbody>
</table>

**SOURCE:**
- *Commonwealth Electoral Act 1918; Commonwealth of Australia Constitution Act*
- *Parliamentary Electorates and Elections Act 1912 (NSW); Constitution Act 1902 (NSW)*
- *Electoral Act 2002 (Vic); Constitution Act 1975 (Vic)*
- *Electoral Act 1992 (Qld); Constitution Acts Amendment Act 1890 (Qld)*
In jurisdictions where there is only one Deputy, the position is a senior one covering policy, operations and management and is regarded as preparation for a Commissioner position. It is unusual for a person to be appointed as an Electoral Commissioner without experience of serving as a Deputy Commissioner somewhere in Australia. The proposed change could be expected to encourage Deputy Commissioners in South Australia to look for employment elsewhere after about four years (because although the new clause provides for a subsequent appointment no guarantee can be assumed).

The proposed term of five years is about average for Commissioners. It is consistent with the maximum terms allowed in the ACT and the Northern Territory, and with recent practice in larger jurisdictions. Although legislation allows for appointments for up to seven years in both the Commonwealth and Western Australia, for example, in practice the most recent appointments have only been for five years. The reasoning behind legislation allowing longer terms – between seven and ten years – seems to be that a longer term would allow a Commissioner or Deputy Commissioner to work on two elections. By contrast the proposed appointment for five years in SA would usually limit a Deputy Commissioner to just one election.

In a 2007 conference paper Norm Kelly reported on interviews he had conducted of Electoral Commissioners. One section of the paper considered how a Commissioner’s independence from political pressure might be affected by the terms of his or her appointment. Kelly reported that ‘the length of Commissioners’ tenure can have significant impacts on their independence and ability to act without fear or favour.’

If a Commissioner lacks long-term security, then his/her actions may be, in a real or perceived sense, related to a desire for re-appointment. The timing of a potential reappointment, irrespective of the length of appointment, can also have an impact, especially if this coincides with an election.

Kelly also reported that Commissioners’ opinions about the ideal length of a term of appointment were varied. One Commissioner said that

if you’re going to shake a show up, then if you haven’t got everything accomplished that you want in five years, you’re not going to get it, and if you go on about it, people are going to say ‘he’s still on about that’. So five years is your effective working life. Secondly if you were a dud, five years of coasting along, they would have a chance of replacing you.

But more commonly Commissioners argued for a longer term. Four views are given below.

I think you need to plan over two election cycles, so eight to ten years is about a good time in my view. Otherwise you just get short-term bites at the planning and no look above the horizon.

Tenure’s good for being absolutely seen and perceived as free and fair and impartial and having confidence that you can do your job properly without any perception of interference. If you’re in a job around eight years, people are getting sick of you, you’re getting sick of them, and it’s good for the organization and for the Commissioner to do something else.

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The Australian Electoral Commission tends to appoint people as their last job, as Commissioner, and they tend to serve five years, and my sense is that one of the things that misses out there is the longer term vision for electoral administration.

If you’ve gone through two elections, you’ve probably established more independence in the role, and perhaps a fairer decision can be made.

There was also support for appointments to the age of 65. One Commissioner said that with the right person, the ideal is to the age of 65. I’d probably have preferred ten years. I think ten gives it a greater longevity, and there’s more security for people coming into the job. There have been in some other jurisdictions questions over the Commissioner being swapped every time a government swaps. I don’t know how true that is, but it does raise the question in some cases.

Commissioners generally though that they the ideal length for an appointment would cover two elections. With a five year appointment, combined with a three- or four-year electoral cycle, a Commissioner would usually only run one election, and therefore had less of an ability to oversee administrative reforms designed to make running future elections more efficient. The timing of appointments, and whether the end of the term was close to an election, was also an issue of concern for some Commissioners. One Commissioner said that if a possible re-appointment coincided with the conduct of an election, this may have an impact, either real or perceived, on the actions of the Commissioner during the election period.

I should point out that Clause 5 affects the term of appointments to the Deputy Commissioner position, and Kelly did not report on deputy appointments. But the legislation around Australia implies that other Australian jurisdictions have decided that if one of the leadership positions is to have shorter tenure, it would be the Commissioner’s position. That implies some reliance on a Deputy for the first election, and less at a second. Proposed clause 5 would reverse that situation, allowing administrative competence to build up over a longer term in the Commissioner’s position, while Deputies would change. When the time came to replace the Commissioner the pool of applicants for Commissioner may be a little smaller, because if there is no experienced Deputy the Commissioner would need to be a person who has been a Deputy (or Commissioner) elsewhere. (When appointed our current Commissioner did not have this experience.)

In summary, it is unusual to limit the term of a Deputy Electoral Commissioner without a similar term limit on the Electoral Commissioner’s appointment, and the proposed term seems short, given our four year electoral cycle.

**Clauses 4 and 6 to 13** would bring the Commonwealth’s new direct enrolment process into operation for South Australia. They would adopt the Commonwealth electoral roll as the electoral roll for South Australian state elections, and provide that a person who is newly listed on the Commonwealth roll would also be enrolled for SA state elections.

It has been suggested that the change to direct enrolment would benefit the ALP and the Greens because a relatively high proportion of people in their late teens and twenties are missing from the roll. But it is worth remembering that the population of 18 to 25 year olds is relatively small compared to the population aged 26 and over, so even if a larger proportion of young people are missing from the roll, there may nonetheless be more older people missing from the roll. In addition, recent research by Rob Hoffman in Victoria indicates that the inaccessibility of inner-city apartment blocks and gated communities currently creates a
real problem for checking enrolments, and both of these housing types are favoured by more-affluent individuals\(^2\). It is not clear that any party would benefit most from the change.

**Clause 4** would add to the defined terms in s.4 of the *Electoral Act* (SA), to include references to the *Commonwealth Electoral Act* and the electoral roll kept under that Act.

**Clause 6** would add new s.21(2) to the Act, to ensure that an elector whose address is suppressed on the Commonwealth roll would also have an address-suppressed record on the state roll.

The next clauses would change the way that the roll is updated. **Clause 7(1)** would remove the current state requirement (in s.23(a)) that in order to be enrolled a person must make a claim. That would enable a new enrolment to be received via the Commonwealth’s new direct enrolment process. **Clause 7(2)** would provide for the roll to remain capable of reflecting different state and Commonwealth enrolment entitlements and processes, by requiring that electoral registrars adjust enrolments where they are affected by a change to the *Commonwealth Electoral Act 1918*.

**Clause 8** would amend s.29(1) and s.29(2) of the current Act to extend to a new group of people the entitlement to be on the roll. That group would be people who have been enrolled by the Commonwealth. The characteristics which entitle a person to be enrolled by the Commonwealth would entitle the person also to be enrolled under *Electoral Act 1985* (SA)\(^3\) so this amendment is the one which adopts the Commonwealth roll. Entitlements are currently different in one area – provisional enrolments – so section 29(2) of our Act would be changed to lower the age at which a person may be provisionally enrolled from 17 to 16, matching the Commonwealth provision.\(^4\)

**Clause 9** would repeal Division 2 of the *Electoral Act 1985* (SA), which requires that in order to be enrolled a person must make a claim. This change is necessary in order to enable a new enrolment to be made without a claim, through the Commonwealth’s new direct enrolment process. (Claims may still be made, albeit under a new section 32.)

**Clause 10** would make several minor changes.

It would amend the way that s.31A refers to s.29, to reflect the new numbering proposed in clause 8, and would amend a reference in s.31A(3)(b) to reflect the fact that claims would now be made under Division 3 rather than Division 2.

It would remove the requirement that an itinerant person’s claim for enrolment must be witnessed - ‘attested by the Commissioner’. (The witnessing requirement for *other* claims is removed by Clauses 9 and 11.)

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\(^3\) South Australia’s provisions are slightly broader: we have no exclusion of a person convicted of treachery or treason (and not pardoned) (*Commonwealth Electoral Act 1918* s.93(8)(b)).

\(^4\) *Commonwealth Electoral Act 1918* (s.100).
Clause 11 would retain the existing obligation on individuals to enrol and to keep their enrolment up to date when they change address, but would add a new rider that a new or changed entry on the Commonwealth roll (through the direct enrolment and update program which is introduced by clause 13) would be taken as a claim.

Second, an impediment to adopting the Commonwealth roll – our state requirement that a claim must be witnessed – would be removed. Existing s.30 which governs how a person may make a claim for enrolment would be moved (deleted by clause 9 and reintroduced by clause 11 as new s.32(1a)) but it reappears without the witnessing requirement.

Clause 12 would apply where an enrolled elector changes address within the same subdivision. For these sorts of updates a new claim for enrolment is not required but the elector must notify the Commission of the new address. Clause 12 would add the new rider for these changes as well, so that a changed entry on the Commonwealth roll within the same subdivision would be taken as a notification.

Clause 13 would introduce new s.32B which specifies how the roll would be updated - either when an electoral registrar responds to a claim or notification, or when the Commonwealth roll is changed. Proposed s.32B(2) provides that direct enrolment and updates through the Commonwealth roll would not be effective in respect of a state election, once the rolls close for the state election. Proposed s.32B(3) specifies that the electoral registrar must notify a claimant if a claim is rejected.

Clause 14 would remove the current requirement that the Electoral Commissioner should transfer candidates’ deposits to the relevant returning officers.

Clause 15 would add a new provision, s.68(1), to recognise an existing process. Once the rolls close for a state election, each of the federal electoral registrars currently sends the state Electoral Commissioner a certified list of the electors in their federal division, separated into the various state electoral districts which are included within the boundaries of their federal division. The electoral registrars certify that these lists are correct.

Existing s 68(2) would be rewritten, again to recognise an existing process, namely that the Commissioner must then construct from these various lists a single list for each state electoral district, and provide it to each state electoral district’s returning officer.

Clauses 16 and 17 relate to Postal Voting, and propose an important change to the Act, so it is dealt with at some length here. The clauses would prohibit the parties from sending out postal vote applications, and would in return give the parties and independent candidates access to information about people who lodge an application for a postal vote.

The background to these changes is well-known to Members. Currently the parties conduct mass mail-outs early in the election period, sending postal vote applications with accompanying party campaign material. If an elector chooses to apply for a postal vote through this process the party potentially gains in two ways: it gains access to personal information on each elector who applies, and it can time a subsequent mailout of How to vote cards to arrive at the elector’s mailbox at about the same time as the Commission’s postal vote pack.

There is a range of personal information on a postal vote application, and it would be up-to-date. The form asks for name and address (both the elector’s residential address and the address to send the voting papers), date of birth, contact phone number and the reason (one of seven) which entitles the elector to claim a postal vote. It is possible that disclosure of
that information could compromise a person’s security – if a person asks their ballot papers to be sent to an address in another state for example. There are no legislated privacy or security guidelines that apply to party staffers who currently access the information to update the parties’ databases when electors use the reply-paid envelope provided by a party, whereas AEC and ECSA staff are covered by codes of conduct and privacy guidelines.\(^5\)

The parties’ activities in relation to postal voting applications have been widely-criticised as misleading, on a number of grounds. Some electors complain to the relevant electoral Commissions that it was not clear that the address to which they were asked to return their applications was a party address, and if it was clear some of them would not have given permission for the party to access their personal information. Allowing postal vote applications to be sent back to the parties before processing by the electoral authority adds a delay to the process and adds pressure to the Commissions’ efforts to provide ballot papers to electors in time. Then there are allegations that the practice interferes with the election itself because voters ‘known to be hostile to a political party have had their applications for postal votes delayed - and in some cases destroyed - by campaign workers.’\(^6\) Finally there have been allegations that when letters from the parties’ postal voting mailouts are returned to the parties as undeliverable they indicate addresses where electors are not correctly enrolled, and that allows the possibility of fraudulent voting.\(^7\)

None of Australia’s electoral Commissions have accepted that high levels of postal voting have led to multiple voting, whether fraudulent or unintentional. After the 2006 SA state election the State Electoral Office investigated 679 instances of apparent multiple voting and 660 of these cases were identified as errors by issuing officers marking the wrong elector off the roll. When ‘the remaining 19 apparent instances were investigated: 16 electors were elderly, three electors were hospitalised. No action was pursued.’\(^8\)

On the other hand, all Australian electoral Commissioners are concerned by electors’ complaints that the current system is misleading or at least not transparent. The VEC reported receiving 10 formal written complaints after the 2006 Victorian state election. The complaints included confusion about where applications had been sent and who was administering the process. Complainants also expressed concern that material sent to them from political parties was misleading in that it appeared to have been sent by the VEC.\(^9\)

SA Electoral Commissioner Kay Mousley made a similar observation in her evidence to the Legislative Council Select Committee on Matters Related to the General Election of 20 March 2010.

There was a degree of elector confusion throughout the campaign. Electors were not aware that a number of these applications were being returned to the

\(^5\) The AEC website warns electors that ‘personal information you give on the application is used for electoral purposes and may be viewed by authorised staff and scrutineers.’

\(^6\) P van Onselen ‘Political parties’ postal vote abuse in firing line’ The Australian 29 July 2011, p.3.

\(^7\) In 2006 for example, it was alleged in the SA Parliament that 3,000 votes in the state seat of Port Adelaide had been obtained by one party ‘…by letter dropping postal vote applications, then checking which ones were not retrieved from the mailbox, and mailing those off to obtain a postal vote on behalf of someone who had not received it.’ South Australian Parliamentary Debates, House of Assembly Estimates 23 October 2006, p.183.


different parties for reconciling and compiling certain levels of detail and information prior to handing them to my office.\textsuperscript{10}

In 2007 Commissioner Mousley recommended that the \textit{Electoral Act 1985} (SA) be changed to provide ‘restrictions or removal of the capacity of political affiliations to distribute postal applications’.\textsuperscript{11}

In 2011 the federal Joint Standing Committee on Electoral Matters asked the AEC to consider a proposal for federal elections that completed postal vote applications must be sent directly to the Australian Electoral Commission, and in return the Commission would supply the parties with data on postal vote applicants. The AEC’s interest in the proposal was based on the fact that it would eliminate the delay which arises from applications first being returned to the parties before being sent on for processing at the Commission. The Australian Electoral Commissioner noted that the current process clearly imposed a delay.

That is our concern, because our role is to try to get the postal vote certificate to the elector as quickly as possible so that they can meet the deadlines for lodging the postal vote. If there is any delay, then that inhibits or compromises the elector’s capacity to post the ballot.\textsuperscript{12}

We need to get the postal vote pack out to the individual very quickly. We believe the way to do that is to have the postal vote application remitted directly back to us, where we can process the postal vote application and send out the certificates, but still look for a way to provide you with information about who was responding and so forth.\textsuperscript{13}

Meanwhile, the parties have adopted various positions on their ability to send out postal voting applications, and even at federal and state level parties’ positions differ. Both the Liberal and the National Party submissions to the 2010 federal JSCEM inquiry expressed support for the continuation of parties’ involvement in postal voting, but Labor members of the Committee proposed quite the opposite - ‘banning political parties from reproducing and distributing PVAs and making the AEC the sole entity responsible for these functions.’\textsuperscript{14} Meanwhile state Labor members on South Australia’s LC Select Committee on the 2010 State Election supported the continuation of parties’ involvement in sending out postal voting applications. The Greens have been consistent in recommending that postal vote applications only be distributed by the electoral Commissions.

\textsuperscript{10} Legislative Council Select Committee on Matters Related to the General Election of 20 March 2010, \textit{Transcript of hearings} 5 July 2010, p.4.


The JSCEM Inquiry and the Legislative Council Select Committee both recommended change. The JSEC recommended that ‘completed postal vote application forms must be returned directly to the Australian Electoral Commission for processing’ and in return that the AEC would provide name, address and birth date information on postal vote applicants. And the LC Select Committee recommended that the Electoral Commission SA ‘assess the viability and cost of the Commission being the sole distributor of postal vote applications with the Commission distributing the relevant set of voting tickets with the ballot papers sent to postal voters.’

South Australia would be the first Australian jurisdiction to change to this kind of arrangement. But the proposal would be feasible and would not raise any privacy issues. Neither would it increase the amount of information on electors that would be granted to the parties, as the Commonwealth Electoral Act already allows postal vote applicants’ details to be made publicly available by data transfer.

Clauses 16 and 17 would, more specifically, change the current postal vote application process in two ways. **Clause 17** is straightforward and would prevent anyone who is not authorised by the Commissioner from distributing postal vote applications, even in electronic form. If the Commissioner does not authorise political parties, this would mean that the parties’ mailouts could only contain party material. (The federal proposal was that parties could still distribute postal vote applications but completed applications would need to be returned directly to the Commission.)

**Clause 16** is less straightforward. It seems to be drafted with an assumption that all postal voters would be on the register of general postal voters. It proposes that the Commissioner give parties information on the register about anyone who has applied for a postal vote under s.74(1)(b). The problem is that the register only covers electors who apply under s.74(1)(a), not (1)(b).

Each Australian jurisdiction has a register of electors whose ongoing entitlement to lodge a postal vote has been recognised, and their entitlement stems from an inability to attend in person on polling day. Jurisdictions vary in their requirements but in South Australia a person may be registered if it could be dangerous for them to attend (the elector’s address has been suppressed) or unreasonably difficult (due to a physical disability or because they are caring for someone who is seriously ill or infirm or disabled or because the nearest polling location would be at least twenty kilometres from their home) or may be prevented by the elector’s religious beliefs. Federally there are several more categories of entitlement.

There were almost 12,000 electors on the register at the time of the 2010 state election. They are issued a postal vote automatically – without having to apply each time an election is called. In fact there is no separate book or file which contains the names of these electors.
electors. Instead each general postal voter’s record on the electoral roll is flagged. Whenever a copy of the register is required a subset of the full electoral roll can be specially produced, showing only those electors who have been flagged as registered and whose details have not been suppressed, and only the data for these electors which is prescribed by the Act: the elector’s name and residential address. Because roughly half of all registered declaration voters gain their entitlement from having a suppressed address, in this publicly-releasable form the register would currently contain about 6,000 records.

The second, and much larger, group of people who lodge a postal vote also gain their entitlement by virtue of difficulty in attending a polling location but their entitlement is only recognised in respect of one election. At the state election of 2010 over 100,000 electors applied to lodge postal votes and almost 76,000 of them did then lodge a postal vote.

While registered declaration voters are issued voting papers under current s.74(1)(a) of the Electoral Act 1985 (SA), those electors who apply on a one-off basis are issued voting papers under current s.74(1)(b). And whereas registered declaration voters’ electoral roll entries are flagged and they thereby become part of the register, these postal voters’ entitlement to a postal vote does not continue after the election, so their entries on the electoral roll are not flagged and they therefore do not appear on the register.

When the register is understood in this way, the drafting of Clauses 16(1) and 16(2) seem awkward. Clause 16(1) proposes that section 74(4)(c) of the Act - which currently allows the register to show the electors’ address except where it has been suppressed - be amended to allow that the information on the register should also include the postal addresses (but not the names or residential addresses) of those electors who, in applying for a one-off postal vote, have specified that they would like their voting packs to be posted to an address that is different from their residential address.

An alternative viewpoint is that the register could be understood as having two components: the permanent register maintained under s.74(4) and including those electors with an ongoing entitlement to lodge a postal vote (the 74(1)(a) electors), as well as a list of those electors who are granted a postal vote for a particular election (the 74(1)(b) electors). On that understanding it would be legitimate to mention in s.74(4)(c), address details of electors granted postal votes under s.74(1)(b).

This stretches the understanding of what the register is for, and stretches the definition of who can be put on the register under s.74(3). An elector may be granted a one-off postal vote because he or she lives more than eight kilometres from a polling location, but to be entitled to receive ballot papers on an ongoing basis the elector needs to live 20 kilometres away. So an elector who lives nine kilometres from a polling location would not be entitled to be on the register if s.74(3) is an exhaustive list of those who can be registered.

But these different understandings of what the register is or can be, are really unnecessary distractions from the purpose of the Bill. Clause 16 is not intended to require the Commission to amend 100,000 records on the electoral roll for no reason. It is designed to allow the Commission to give the parties the name and address (including a postal address) of people who are issued with a postal vote at a given election, so that the party can send voting material to these people. In return for withdrawing from the postal vote arena it is

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22 *Electoral Act 1985* (SA) s.74(4).


24 Grounds for applying for a postal vote on a one-off basis are similar to, but not quite the same as, grounds for applying to be a general postal voter. For example, an elector needs to live 20kms from a polling location in order to be placed on the register to receive ballot papers automatically by post, but any elector who lives further than 8 kms from a polling location may apply at each election for a postal vote.
intended to grant parties (and candidates) some details of applicants for postal votes under section 74(1)(b) to ensure that parties and candidates can continue to provide campaign material to those electors who have applied to the Commissioner to submit a postal vote.

That could be achieved by amending the proposed section 74(6a) to read:

74(6a) The Electoral Commissioner must, on request, provide (in a form determined by the Electoral Commissioner) -

a. the registered officer of a registered political party with a copy of the information contained in the register in relation to the name, residential address and postal address of electors in any district who have applied for the issue of declaration voting papers under subsection (1)(b); or

b. a person who is a nominated candidate in an election with a copy of the information contained in the register in relation to the name, residential address and postal address of electors who have applied for the issue of declaration voting papers under subsection (1)(b) for-

(i) in the case of a person who is a candidate in an election for the House of Assembly district – that district; or

(ii) in the case of a person who is a candidate in a Legislative Council election – the Legislative Council district.

The change proposed by Clause 16(1) would then not be necessary.

It may also be helpful for the Bill to specify how often the data should be transferred.

It is possible that changing the process to require that the Commission send data on roughly 100,000 electors to the parties, including information from which it may be inferred that individual electors will be interstate on election day, could open a door to impersonation on an unparalleled scale. On the other hand,

Clause 18 amends one of the provisions which define an informal vote. Currently a ballot paper (for either the House of Assembly or the Legislative Council ballot) is rejected as informal if the voter has marked it in such a way that it can identify the voter – for example if the voter signs it. Clause 18 removes those grounds for rejection.

After the state election of 2010, Electoral Commission SA staff examined each of the 33,762 informal House of Assembly ballot papers lodged across the state, and found that about 0.1 per cent of them would have been formal except that they contained marks that identified the voter. On that basis the provision could be expected to return roughly 300-400 ballot papers to the count rather than having them rejected as informal. It is not clear how many Legislative Council votes might be similarly returned to the count by this change.

Clauses 19 and 20 would bring the Act up to date by deleting any reference to telegrams.

Clause 21 would tighten authorisation provisions for electoral advertisements and bring them into line with the current requirements for How to vote cards. Currently the author’s name and address must be shown at the end of an advertisement in a newspaper, and the printer’s details must also be shown if the advertisement is a handbill or is printed in something other than a newspaper. This new provision would require advertisements published by a registered political party or an endorsed candidate to also show the party’s name (in full or its registered initials).

The provision would not extend to advertisements published by a third party (such as Get-Up, an industry group or a union); in that case the author (and printer) needs to be identified but the organisation still would not need to be named. It may be helpful for the Bill to extend
this authorisation requirement to third party organisations as well as to parties and individual unendorsed candidates.

Clause 22 relates to How to vote cards. At each election, concerns are expressed that some distributed material is misleading. Those concerns sometimes relate to How to vote cards and sometimes to other campaign material. Clause 22 would tighten the requirements for How to vote cards, by extending existing s.112A to introduce a new requirement that all How to vote cards distributed at any time during the election period must be lodged with the Electoral Commissioner. It also provides for regulations to specify the format of How to vote cards, so that non-compliant cards could be refused lodgement. Finally, there would be a new offence of distributing a How to vote card which differs substantially from a card lodged with the Commissioner. These provisions are important and will be dealt with at some length in the following sections.

False How to vote cards are uncommon and may even be issued mistakenly. An example is a Liberal How to vote card distributed in the ACT at the 1998 federal election, indicating that the Australian Democrat candidate for the ACT Senate position was in fact an ALP candidate. In South Australia it is already illegal to distribute election material which ‘incorporates a statement purporting to be a statement of fact that is inaccurate or misleading to a material extent’ (s.113), and there is a specific prohibition on distributing a How to vote card which incorrectly identifies a candidate with a party (s.112B).

It is more common for How to vote cards to be challenged as misleading, rather than untruthful, and that was the case when second preference How to vote cards were distributed at the South Australian state election of 2010. After that election the LC Select Committee reported on How to vote cards which were distributed by ALP workers in four districts. The cards were authorised by the ALP but printed in light blue (the colours used by Family First) and they stated: ‘Put Your Family First’. These cards recommended a first preference for the Family First candidate but a second preference for the ALP candidate, contrary to the official Family First order of preferences in those districts (which would have sent second preferences to the Liberal candidate). The cards did carry the required (ALP) authorisation statement, and each also said in font large enough that a voter could be expected to have read it: ‘Preference someone who shares your values, preference Labor.’

The Electoral Commissioner received complaints from both the Liberal Party and Family First, that these cards were misleading because - at least at first glance – their colours and format looked like those published as official Family First How To Vote cards. But ECSA received legal advice that these cards did not breach the Act. Following the election two questions were raised – whether all second preference How to vote cards should be prohibited, and whether cards which imitate other parties’ cards should be prohibited.

Second preference cards have been used at Australian elections for at least twenty years. The Australian Electoral Commission has described these cards as:


27 The Electoral Reform Society submitted that a second preference card was issued even earlier - in 1985 - by Stan Evans when he stood as an Independent; he allegedly distributed a card printed in official Democrat colours which allocated second preferences to himself. SA, Legislative Council Select Committee on Matters Related to the General Election of 2010, 2011, Interim Report, South Australian Parliamentary Paper No.228 of 2010-2011, fn.72.
those in which a party (usually a major party) recommends a first preference vote for a candidate of another party (usually a minor party) while recommending its own candidate as the second preference (or at least a preference higher than other major parties). These how to vote cards are actually authorised by the originating political party (usually a major party) although they sometimes appear, due to their heading, colour and general layout, similar to the official how to vote card of the party endorsing the candidate recommended as the first preference. A party which puts out a second preference how to vote card may also put out its own official how to vote card recommending a first preference vote for its own endorsed candidate.28

In a tight Assembly contest the preferences which flow when minor party candidates are excluded during the count, may make a real difference to the outcome, so second preference How to vote cards are sometimes used to win these preferences. But this kind of How to vote card have been criticised because voters are accustomed to reading a How to vote card as a party document, recommending a first preference for the party’s endorsed candidate and preferences in an order which the party has decided. And if two cards have a similar appearance it is possible for electors to be misled into allocating their preferences in a direction which they had not intended. There have been several court challenges to second preference cards on the grounds that they have mislead a voter in choosing which candidate to vote for, but none of the challenges has been successful.

The first of these challenges was made in 1993 when a card distributed in the federal division of Macquarie appeared to be likely to deceive an elector and therefore contrary to s.329(1) of the Commonwealth Electoral Act (see Webster v Deahm29). It was alleged that the ALP distributed How to vote cards printed in the colours and format of Australian Democrat How to vote cards, calling on Democrat voters to give their second preferences to the ALP candidate (whereas the official Democrat card did not direct preferences). The Court considered Evans v Crichton Brown30 from 1981, in which electoral advertisements (but not How to vote cards) were challenged as contrary to s.161 of the Commonwealth Electoral Act 1902. That section prohibits the ‘printing, publishing, or distributing any electoral advertisement, notice, handbill, pamphlet, or card containing any untrue statement intended or likely to mislead or improperly interfere with any elector in or in relation to the casting of his vote.’ In Evans v Crichton-Browne the court distinguished between two actions: the voter forming a judgement about which candidate to support, and the voter putting that decision into effect when voting. The Court found that the challenged advertisements related to the voter forming an opinion about which candidate to support, and the voter putting that decision into effect when voting. The Court found that the challenged advertisements related to the voter forming an opinion about who to support - not to the action of casting a vote - and that the Act only made it illegal to mislead someone in relation to the casting of his or her vote. Following that line of reasoning, in Webster v Deahm the court ruled that the challenged second preference How to vote cards ‘when read as a whole’ were not misleading, ‘clearly could only influence the formation of a judgement as to the candidate who should receive the elector’s second vote’ and therefore did not mislead anyone in relation to the casting of a vote.31

At the subsequent federal election of 1996 the AEC received complaints about several other second preference How to vote cards but investigations by the Australian Federal Police and the Director for Public Prosecutions could not provide the AEC with sufficient grounds for legal action. Nonetheless the AEC remains wary of second preference How to vote cards

and its current advice to candidates focuses on the cards’ appearance, and this notice appears in AEC information.

On the basis of relevant decisions handed down by the courts over the years, second preference how to vote cards would probably be held by a court to be in contravention of subsection 329(1) if they were very similar in appearance to the official how to vote card for another political party or independent candidate. This might mislead a voter into thinking it is the official how to vote card and thereby mislead the voter in casting a vote.32

The second challenge was made at the 1998 federal election, when both major parties issued second preference cards. The AEC received complaints about ALP cards in Parramatta and Richmond, and about Liberal Party cards in four divisions in Western Australia. The AEC received legal advice that the cards issued in Western Australia might be in breach of the Act and so ‘sought and obtained the voluntary cessation of distribution of these second preference How to vote cards by about 4pm on polling day.’33

A challenge to second preference cards How to vote cards used in a state election was made in at the Queensland state election of 1998. It was alleged that cards authorised by the ALP state secretary and distributed at polling booths by ALP supporters, were misleading because they were printed as if they were official How to vote cards for Pauline Hanson’s One Nation Party. Whereas the official PHON cards left voters to decide where to send second or subsequent preferences or indeed whether to list them at all, the ALP-issued cards directed second preferences to the ALP. But whereas the official PHON How to vote cards were printed in purple, the ALP-issued cards were printed in a lurid orange and clearly showed that they were authorised by Mike Kaiser for the ALP. A Court of Disputed Returns refused to see these cards as misleading.

In New South Wales it has been illegal since 1987 to distribute second preference How to vote cards on election day, though it would be legal to distribute them before election day as long as they were duly authorised. Other jurisdictions have taken a different path and have tried to make it clear to voters just who is intended to benefit from these cards. Proposed section 112A (clause 22 of the Bill) would not prohibit a party or an organisation from issuing How to vote cards; instead it would go some way to ensuring that any How to vote card should make it sufficiently clear just who is intended to benefit from the preference arrangement shown on the card.

There is no real reason why second preference How to vote cards should be seen as inherently undemocratic or inherently misleading. Indeed, an argument can be made that a voter’s reliance on a party’s How To Vote card increases the party’s influence in the electoral process, and according to that reasoning, second (or subsequent) preference How to vote cards might be understood as empowering the voter by demonstrating that he or she can support a party or a candidate without agreeing to allocate preferences in a way that may suit the party but not the elector. What has made second preference How to vote cards seem odious is that they have often been printed to look as if they are official How to vote cards published by the first-preferred candidate, or his or her party.

There is a practical reason why parties should be allowed to publish How to vote cards recommending a vote for a candidate whom the party has not preselected. It is conceivable that a minor party would not want - or be able - to stand candidates in each Assembly

district, but would want nonetheless to recommend an order of preference to its supporters. That kind of How to vote card would need to recommend a first preference vote for a candidate preselected by another party. Prohibiting that kind of card might be seen as unduly restricting the party’s ability to communicate with its supporters and could potentially raise the issue of unconstitutionally limiting political communication (although in fact NSW legislation does currently prohibit the distribution of that kind of card on election day).

Perhaps the key is to regulate the formats for second preference How to vote Cards, to make sure they are not misleading. While the Queensland Supreme Court refused to see the challenged second preference cards as misleading, it did suggest that any perceived potential for misleading voters could be addressed by amending Queensland’s Electoral Act to require clearer authorisation details, shown in fonts ‘sufficiently large to be easily read and…not overwhelmed by other printing on the card.’ That recommendation was supported by the Queensland parliament’s Legal, Constitutional and Administrative Review Committee and in 2002 the Electoral Act 1992 (Qld) was amended to tighten the authorisation details on How to vote cards (to include the name of the party on whose behalf the card is authorised, as well as ‘the authorising person’s name and street address) and also to require a larger font for these details. Authorisation statements must appear ‘at each end’ of the card and must be printed in specified font sizes (at least 10 point font for a card up to A6 size, at least 14 point for a card up to A3, and at least 20 point if the card is larger than A3 size).

South Australia’s Electoral Regulations 2009 also now require that How to vote cards to be distributed during the campaign (i.e. other than those submitted under s.66 of the Act) must print the party or candidate’s name in font of at least 9 points, or 10 points if using Times New Roman. In his second reading speech on the current Bill the Attorney-General said that South Australia’s regulations would increase the size of the font required for these authorisation details. But Regulation 15 only applies to s.112A(1)(b) of the Electoral Act 1985 (SA) and therefore only to the party or candidate’s names, not to the name and address of the authorising officer (which is governed by s.(1)(a)), nor to the name and address of a third-party organisation (which is not required to be shown at all).

It may be helpful to extend the font requirements to apply to these authorisation details as well.

34 Cards to be distributed on election day must be registered and these kinds of cards are denied registration. But they can be distributed prior to election day as long as they are properly authorised. Parliamentary Electorates and Elections Act 1912 (NSW) s.151G (B)(c)(ii). This provision was enacted in 1987, well before Australian Capital Television case (Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106). In that case the High Court overturned the complete ban on political broadcasting during election campaigns on the basis that it infringed a freedom of political communication implied from the Constitution, as there were other less drastic means by which the objectives of the law could be achieved. The NSW legislation has not been challenged.


37 Electoral Act 1992 (Qld) s.182.

38 South Australian Parliamentary Debates, House of Assembly 15 November 2012, p.3834, Hon JR Rau.
In an effort to ‘make it clear who would benefit from the intended preference flow suggested on the how to vote card’ the Commonwealth also recently legislated to increase the information provided on How to vote card authorisation statements: the party officer’s street address and the party name are now required; the printer’s name and address are no longer required. The Commonwealth Electoral Act 1918 also now specifies font sizes (s.328B). At the same time the Commonwealth parliament adopted other amendments to prohibit the publication of any kind of material that is ‘designed to mislead or deceive an elector in relation to the casting of a vote.’

Despite clearer authorisation statements, the recently-issued Queensland Green Paper on Electoral Reform suggests that second preference How to vote cards could still be illegal if they look like the official cards of the first-preferred party:

Section 185(1) has been afforded a very narrow interpretation by the courts. In 1981 the High Court...held that section 185(1) applies only to misleading or incorrect material that is intended or likely to affect a voter when he/she seeks to record and give effect to the judgment which he/she has formed. Notwithstanding the narrow interpretation of section 185(1), it is likely that a misleading how to vote card (for example, a how to vote card that is authorised by one party but disguised to look like it has been authorised by a different party) would be found to offend the section.

Clause 22 also includes provisions that would require How to vote cards to be registered. Registration is also required in Victoria and New South Wales, for material to be handed out on election day. Registration transfers the responsibility to adjudicate on a challenge, from the courts to the Commission, and it also makes a prompt decision more feasible. NSW does not allow appeals though Victoria does, to the Victorian Civil and Administrative Tribunal. South Australia’s Bill does not propose an appeal provision.

The registration requirement in New South Wales is long-standing, having been introduced in NSW in 1987. It is illegal in that state to distribute material on polling day if it has not been registered with the Commissioner, and the Commissioner must refuse to register a party’s material if it ‘directs or suggests that a candidate not endorsed by it should be given the first preference vote.’ So NSW does not allow the registration of second preference How to vote cards (other than joint cards); nor does it allow cards issued by organisations other than registered parties. But the state has an optional preferential count so many voters refuse to mark more than one preference, and second preference cards distributed in that state affect the decisions of fewer votes than in South Australia.

The NSW provision was introduced as part of a major reform of the electoral system which included the introduction of the NSW campaign finance and disclosure scheme. There was no debate on the provision prohibiting second preference How to vote cards, though it was apparently a (Wran) government amendment to the original Bill, and in debate there was mention that it would preclude the Liberal Party from issuing How to vote cards recommending that their supporters give a first preference vote to a National Party

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42 Electoral Act 2002 (Vic), s. 82A.
43 Parliamentary Electorates and Elections Act 1912 (NSW) s.151G(8)(c)(ii).
candidate, and would also preclude the Australian Conservation Foundation from issuing a How to vote card favouring Australian Democrat candidates.  

The proposed extension of s.112A in South Australia’s legislation would introduce a scheme for lodging How to vote cards. This is in line with registration provisions interstate, and also with a recommendation of the Interim Report of the (SA) Legislative Council Select Committee on Matters Related to the General Election of 2010:

3. That the Electoral Act be amended so that only how to vote cards or second preference how to vote cards which have been lodged with the Electoral Commission at least seven days before election day are allowed to be distributed in the vicinity of a polling place on polling day.

In fact the Bill proposes to go further: it would require lodgement of How to vote cards that would be distributed at any time during the election period.

In 2002 Victoria also introduced a requirement that How to vote cards be registered if they are intended for distribution on election day. The SA provision would go further than Victoria and NSW, and require registration of all How to vote cards to be distributed at any time during the election period.

Grounds for the SA Electoral Commissioner to refuse to register a card would be specified in regulations made under new s.112A(2). It is already illegal in South Australia to distribute a How to vote card which is not authorised correctly (s.112A) or which identifies a candidate as standing for a party if the candidate has not been preselected by that party (s.112B) or which encourages a person to mark the ballot paper in a way that would produce an informal vote (s.126(2)). It is also illegal in South Australia to distribute election material which ‘incorporates a statement purporting to be a statement of fact that is inaccurate or misleading to a material extent’ (s.113).

In NSW the Commission must refuse to register a How to vote card if the authorisation statement is not clearly legible (that statement requires the name and address of the authorising officer, the party name and the name and address of the printer); or if the material could cause an informal vote or if it contains obscene or offensive words. Also, as noted earlier, the Commissioner in New South Wales must refuse to register a party’s How to vote card if it advocates a first preference vote for a candidate not endorsed by that party (s.151G(7A)(c)(ii)) unless both of the parties consent (thereby allowing, for example, a Liberal How to vote card to advocate a first preference for a National Party candidate). It is not possible for a third party organisation (such as GetUp! or a peak industry body) to have a card registered, because a third party organisation cannot endorse a candidate.

Similarly the Victorian Electoral Commission must refuse to register a card

s. 79(3) …if the Commission is satisfied that the card—
(a) is likely to mislead or deceive an elector in casting the vote of the elector; or
(b) is likely to induce an elector to mark the vote of the elector otherwise than in accordance with the directions on the ballot-paper; or
(c) contains offensive or obscene material.

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46 Parliamentary Electorates and Elections Act 1912 (NSW) s.151GA.  
47 Electoral Amendment (Electoral Participation) Act 2010 (Vic) s.79(3).
Other criteria to be considered by South Australia's Commissioner in accepting How to vote cards for registration are not specified, but there is provision for them to be included in Regulations (proposed s.112A(2)(b)). In Victoria they are in the Act:

79(2) In determining whether to register a how to vote card, the Commission must have regard to the following matters—

(a) that the how to vote card clearly identifies the person, political party, organisation or group on whose behalf the card is to be distributed;

(b) that the size of any logo, emblem or insignia belonging to the person, political party, organisation or group on whose behalf the card is to be distributed appearing on the how to vote card is not less than the relevant prescribed size;

(c) in the case of a how to vote card to be used for an Assembly election, that the how to vote card indicates the order of voting preference for all candidates listed on the card or contains a statement that a number must be placed against the name of each candidate;

(d) that the how to vote card contains the material required by section 83;

(e) that the how to vote card contains the prescribed endorsement.

The reference in subsection (d) above, to s.83 of the Victorian Act, requires the authorisation statement to show the name and address of the authorising officer and the printer; the party’s name (or the non-party organisation) must also be shown in compliance with subsection (a). Naming the party in the authorisation statement was also important to the Commonwealth and to Queensland, but neither of those jurisdictions require a non-party organisation to identify itself in the authorisation details. Only Victoria requires that so far.

The states have different requirements for when cards need to be lodged. In Victoria, lodgement may occur from nomination day until six working days before election day.48 The South Australian Bill’s proposed 112A(1)(c)(ii)) would provide for lodgement until two working days from election day.49 In Victoria all cards registered up to six days prior to election day are printed by the Commission for use in posters at the polling booths, whereas SA has a much earlier cut-off for How To Vote cards submitted under s.66 for use at the booths – just 4 days after close of nominations. That allows the Commission to print the collected How to vote cards as books for use in pre-polling centres which begin operation much earlier in the campaign period; and these sets of How to vote cards are also reproduced as posters and sent out to polling booths for election day. New s.112A would allow How to vote cards to be changed (s.112A(5)) or new cards to be lodged (s112A (1)(c)(ii)) until just two days before the election, so these late-lodgements would not be able to be incorporated in official printed material sent by the Commission to the polling booths.

The Victorian registration provisions came into effect for the first time at the state election of 2006 and the Commissioner’s 2007 report did indicate that the registration process imposed an additional workload at a time when the Commission and the parties were understandably stretched:

Feedback obtained after the election from candidates and political parties included some feedback on the requirement to register How-To-Vote (How to vote) cards. Parties generally found the process of registering How to vote cards to be complicated, labour-intensive and pressured. One party felt that the process of registering How to vote cards was unnecessary, whereas another party strongly preferred the practice to continue.

48 There was no committee-stage debate on these clauses of Victoria’s Electoral Bill 2002.
49 Electoral Amendment (Electoral Participation) Act 2010 (Vic) ss.77,78.
...From the VEC’s point of view, the registration of How-To-Vote cards is very labour intensive. A number of parties and candidates register more than one card covering different preference combinations.50

Receipt of the How to vote cards electronically has made the process less onerous and more efficient, and these comments were not repeated in the Commissioner’s 2010 report.51

A registration scheme is not something that all other jurisdictions favour. The recent Queensland Green Paper seems to argue in favour of retaining the courts, rather than the Commissions, as arbiters of the legality of party material:

Given the subjective nature of the issue, there is an argument that a provision along the lines of section 79(2)(sic) of the Electoral Act 2002 (Vic) may compromise the neutrality and impartiality of the ECQ.52

But the VEC has not apparently had any difficulty with its new obligation. As noted earlier, when How to vote cards have been challenged in Australian courts for being misleading, the courts have interpreted the relevant provisions narrowly and have not considered whether material might cause a voter to vote for a different candidate, only whether it might mislead a voter in relation to casting his or her vote, so VEC advice to candidates and parties has made it clear that the Commission would follow the courts and interpret the provision narrowly.53

If How to vote cards must be lodged with South Australia’s Electoral Commission, it might be argued that it is in the public interest to require the Commissioner to publish them on the Commission website. In SA that would not impose an extra obligation on the Commission because ECSA currently does publish all How to vote cards lodged under s.66, on the ECSA website.54 And in Victoria the Act now requires the VEC to publish each registered card on a website maintained by the Commission.55 A different approach is taken in NSW where the legislation holds all material registered by the Commissioner confidential until polling day, at which point the material relevant to each district becomes available at the district returning officer’s office, for viewing by an elector enrolled for the district or by a scrutineer.56 That confidentiality was agreed in order to protect the Commissioner from challenge if he needed to refuse to register a card late in the election period: there is no appeal from his decision.57

If material will need to be registered for use at any time during the campaign, a need could arise for a registered How to vote card to be changed. It might be considered misleading for

52 The provision being discussed is actually s.79(3). Queensland Department of Justice and Attorney-General, 2013, Green Paper on Electoral Reform, The Department, Brisbane, p.27.
54 The Commission also compiles a book containing all of the cards lodged as voting tickets under s.63, for its own use during the count, and produces booklets of the HTV cards lodged under s.66 for use by returning officers at each polling booth (for absent voters) and prints sheets of the HTV cards for each district so that they can displayed in each voting compartment at polling booths.
55 Electoral Act 2002 (Vic) s.82(b).
57 The Liberal (opposition) spokesman noted that the ‘Electoral Commissioner had intimated that the material would be confidential and that he would not propose to permit other people to look at it….In Committee the Opposition will move an amendment to guarantee confidentiality.’ NSW Parliamentary Debates, Legislative Assembly 28 May 1987, p.13086, Mr JD Booth.
a candidate to distribute a How to vote card if that card was different from one which the
candidate had lodged with the Commissioner. That seems to have been the LC Select
Committee’s view, when it recommended that

the Electoral Act be amended to require that the registered voting ticket, the
booth how to vote card and how to vote card for a particular House of Assembly
candidate or party distributed at a polling place should display the same
preference order.58

The difficulty with implementing the Select Committee’s recommendation is that the current
provision (at s.66) for How to vote cards to be lodged with the Commission is permissive,
rather than a requirement, and is simply designed to help voters by making it possible for the
Commission to receive a full set of How to vote cards and distribute them online, at pre-poll
centres and at polling booths. The time required for printing and distribution means that the
cards are required early in the campaign. Although the VEC and Elections NSW deadlines
are later they do not make it possible for How to vote material to be available at pre-poll
centres, just at polling booths on election day.

In South Australia parties and candidates can currently change their How to vote cards at
any point in the election period if a preference arrangement which seemed reasonable at the
beginning of a campaign became inappropriate over the course of the campaign. Voting
tickets are different: they are submitted under s.63 and they become part of the official
material supporting the count. There is no provision for voting tickets to be changed during
the course of the campaign (and the Bill does not propose to make provision).

But the Bill introduces a requirement that How to vote cards be lodged with the
Commissioner, and it would be illegal to distribute cards that have not been lodged. To
recognise the possible need for flexibility, the new provisions extending s.112A also allow a
candidate to produce another How to vote card during the campaign. New s.112A(1)(c)
would enable a candidate to distribute a new How to vote card at any time during the
campaign without lodging it with the Commissioner, if it is the same as the How to vote card
he or she lodged early in the campaign under s.66, except only that the order of preferences
is changed, or the font is changed or the material the cards are printed on is changed. This
How to vote card would not replace the original one lodged with the Commission and
uploaded to the Commission’s website, printed in books for pre-poll centres and printed in
posters for voting compartments at polling booths. But it would be legal to distribute the new
cards.

Note that under proposed s.112A(5) two cards that are identical except that they are printed
in different colours would not be considered substantially the same, so changing the colour
of one’s How To Vote card would require the Commissioner’s approval. That would be
made possible by a second proposed provision - new s.112A(c)(ii) - which would allow a
candidate to produce a new How to vote card that is quite different from his or her original
card, and still lodge it with the Commissioner up to two days before polling day. That might
help a candidate who is dis-endorsed by his or her party to remain in the contest as an
Independent, or help a candidate who found that the card he or she had originally submitted
was printed in a colour that was similar to another candidate’s card.

While these two proposed provisions would ensure flexibility, they do mean that on election
day the How to vote cards for a candidate distributed outside a polling booth may be
different from his or her original How to vote card shown in the voting compartment inside
the booth. And if the new How to vote card shows a new order of preferences, that order
would also differ from the order in which the candidate’s ticket votes would be allocated
during the official count – that order is locked in 72 hours after close of nominations. While

58 SA, Legislative Council Select Committee on Matters Related to the General Election of 2010,
this may seem messy, in fact it does not change the current arrangements and it affects relatively few ticket votes: in 2010 on average fewer than 100 ticket votes per district needed to be distributed to a second or subsequent preference. In practical terms, the Select Committee’s aim of consistency in a candidate’s How to vote cards and voting ticket could only be achieved at the price of locking candidates in to arrangements which may be inappropriate when it really counts – on election day. And legislation locking a candidate in to such arrangements could be challenged, presumably on freedom of political communication grounds. The price of allowing candidates the flexibility to adopt new How to vote cards during the campaign, is that the new cards cannot replace the old cards completely.

But experience in Victoria shows it is not likely that many registered cards would be changed. In that state a new How to vote card may be lodged in order to ‘correct an error in the registered how to vote card’ at any time up to noon on the fifth day before voting (i.e. the Monday before election day), and it is only after that point that candidates’ choices are locked in. In Victoria ‘error’ is not defined, and I understand that a candidate could argue that changed circumstances had made his existing order of preferences erroneous. But registration has been required for the last two Victorian state elections and there have not been any applications for change yet.\(^{59}\) Meanwhile the New South Wales legislation allows How to vote cards to be lodged up to eight days prior to election day, and provides for flexibility in two ways. First, an application can be made for a variation to a How to vote card that has already been approved, as long as that application is also made up to eight days prior to election day (after that point no major changes can be made). Second, the Act allows material actually distributed to contain ‘some differences from the draft or sample in respect of which the certificate of registration was issued, so long as the material is substantially the same as the draft or sample.’\(^{60}\)

Finally, although the legislation addresses second preference cards it does not cover third party How to vote cards. A range of organisations might be affected by proposals made during any election campaign and South Australia’s legislation does not prohibit an individual or an organisation from authorising a How to vote card. When the NSW parliament changed that state’s \textit{Parliamentary Electorates and Elections Act} in 1987 to prohibit the distribution of How to vote cards which advocated a first preference vote for any candidate other than one preselected by the party authorising the card, it seems that the move was not in fact aimed at prohibiting second preference cards. Instead it was apparently aimed at preventing third party organisations, such as Right To Life and the Conservation Council, from issuing How to vote cards in a district where the organisation had not endorsed a candidate in the district.

The NSW change certainly also had the effect of preventing the distribution of Liberal and National How to vote cards which recommended a first preference vote for the other party, in those districts where the two parties had deferred to each other in their attempt to avoid three corner contests. But that situation was changed in 2006 when the Act was amended to allow joint voting cards as long the parties jointly apply for the card to be registered.\(^{61}\)

Elsewhere in Australia third party How to vote cards are permitted and are treated no differently from those authorised by political parties. However most jurisdictions – South Australia included - do not require non-party organisations to provide the same level of identification in their How to vote card authorisation details. While How to vote cards issued by parties must clearly identify the party, only Victoria currently requires that when How to vote card submitted for registration must clearly identify the ‘organisation or group on whose behalf the card is to be distributed’.\(^{62}\)

\(^{59}\) Pers. comm. Acting Deputy Commissioner, VEC, 6 January 2013.
\(^{60}\) \textit{Parliamentary Electorates and Elections Act 1912 (NSW)} s.151G(11).
\(^{61}\) \textit{Parliamentary Electorates and Elections Act 1912 (NSW)} s.151GA.
\(^{62}\) \textit{Electoral Act 2002 (Vic)} s.79(2)(a).
A new s.112A(1)(b)(iii) could require that if the How to vote card is authorised by an organisation other than a political party then the authorisation details must include the organisation's name.

Proposed new s.112A(6) would make it clear that electronic distribution of a How to vote card is covered by the Act in the same way as distribution of hard copy.

**Clauses 23 and 24** amend the way that online political advertisements and online political commentary are regulated. Current s.112B prohibits electoral advertising material which identifies a candidate in party terms unless the party has actually endorsed the candidate or has agreed to the reference. **Clause 23** would clarify that this prohibition extends to material distributed online as well as in hard copy. That would bring s.112B into line with other sections which deal with electoral advertisement materials, so that they all include online distribution as well as hard copy.

**Clause 24** moves from electoral advertisements (including How to vote cards) to election comment about candidates or parties. It would move the other way and remove an existing (since 2009) provision in s.116 that online political commentary on candidates or parties be authorised in the same way as political commentary published in hard copy (and political advertising published online or in hard copy).

Existing s.116 requirement was amended to require authorisation of political commentary on online sites, by the *Electoral (Miscellaneous) Amendment Act 2009*. The amendments were proposed by then Attorney-General Hon Michael Atkinson and by Hon Paul Holloway in the Council, and were adopted during the committee stages in both houses; Mr Atkinson said that the intention was ‘to catch web pages and, therefore, it would cover blog sites, Wikipedia and internet newspapers such as Adelaidenow, but we do not want it to go into Twittering because that is too much like individual communication over a mobile phone.’

As it stands, s.116(1) requires authorisation for online comment; it requires that the material contain ‘a statement of the name and address (not being a post office box number) of a person who takes responsibility for the publication of the material’. But a defining characteristic of social media is interactivity, so some political comment posted on a blog site would have been generated by contributors. That makes s.116(1) effectively a requirement for a blogger to monitor his or her site and make judgements about comments posted by readers. While it is obvious that the courts could make fine judgements about the appropriateness of political comment, and it is reasonable to expect that electoral Commissioners will have a similar ability, it is less obvious that bloggers will have it.

The Electoral Commissioner commented in her report on the 2010 state election that there is a need to address the fact that publishing via the internet including by way of blogging is a form of communication that avoids the broadcasting and advertising regulations, and any new attempts to regulate party-issued information would need to confront the new media. In addition, there would

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64 A recent research report for the AEC on strategies and pitfalls of electoral management bodies using social media to increase young people’s electoral engagement, notes that the interactive nature of social media means that they are ‘usually open to anyone to comment, (so) social media can disseminate criticism, as well as other disruptive information such as spoofs, parodies, “send-ups” and satire.’ J Macnamara, P Sakinofsky and J Beattie, 2012, *Electoral Engagement: Maintaining and enhancing Democratic Participation Through Social Media*, AEC, Canberra, p.8. Available at [http://www.aec.gov.au/about_aec/Publications/Strategy_Research_Analysis/files/social-media.pdf](http://www.aec.gov.au/about_aec/Publications/Strategy_Research_Analysis/files/social-media.pdf)
always be a need for any new regulation to ensure that implied rights of free political communication are not infringed to the extent of invalidity.65 In addition, regulating the enormous volume of internet comment about candidates and political parties may simply be infeasible, and returning s.116 to its previous form may be an acknowledgement of these difficulties. It would also bring South Australia back into line with other Australian jurisdictions which require authorisation statements for online political advertisements but not for online political comment.66

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66 Commonwealth Electoral Act 1918, s.328A; Parliamentary Electorates and Elections Act 1912 (NSW) s.151; Electoral Act 1992 (Qld) s.181; Electoral Act 2002 (Vic) ss.85,86; Electoral Act 1907 (WA) s.187B.