
The Long, Long Road: Western Australian Electoral Reform*

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Abstract Electoral Acts are central to the manner in which elections are conducted, and determine whether the outcomes of these elections are free and fair. Australia has experienced a considerable degree of electoral reform in recent years; this article assesses how Western Australia's Electoral Act 1907 (WA) fares in key areas. The article considers four crucial areas in which WA lags behind best practice in Australia: malapportionment, ticket voting, political financing and postal voting. The article outlines where concerns lie in these areas, and what potential solutions are available to legislators.

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INTRODUCTION

On 13 March 2021, Western Australians went to the polls to elect a new Parliament. While the Legislative Assembly result became the subject of much discussion on account of the extraordinarily one-sided result (with Labor winning 53 of the 59 seats, to the Liberal Party's two and the Nationals' four), two separate but equally extraordinary stories were playing out in the Legislative Council. First, the Daylight Saving Party candidate in the Mining and Pastoral Region, Wilson Tucker, won a seat in the Council with just 98 primary votes, in an election where 1,467,159 votes were cast for that House, and where unsuccessful upper house candidates in metropolitan Perth received as many as 27,077 votes.² The result was all the more remarkable given that the Mining and Pastoral Region has consistently voted against daylight saving at four referenda, the most recent being in 2009 when 65.89% of voters in that region rejected its adoption.³ Second, the Labor Party won a record 22 seats in the 36 Member Legislative Council—its first ever majority, buttressed by its astonishing 60% primary vote. The election result shone a spotlight on problems in the *Electoral Act 1907 (WA)* (the Electoral Act), especially in two key areas, malapportionment and group ticket voting, and the opportunity that now presents itself for reform.

This article reviews the Electoral Act and considers whether Western Australia (WA) is falling behind other Australian jurisdictions in key areas of electoral reform. In 2018, a parliamentary committee report on the 2017 WA election noted that:

The outdated Electoral Act [in WA] ... is a hodgepodge of contradictory provisions that often make no sense ... our electoral process is becoming stuck in the past ... legislative reform must be urgently undertaken and the Western Australian Electoral Commission appropriately resourced in the future.⁴

² This was the Greens candidate for North Metropolitan Region. Western Australian Electoral Commission 2021 State General Election: First Preference Analysis Reports. Perth: WAEC, 2021. Accessed at: <https://www.elections.wa.gov.au/elections/state/sgelection#/sg2021/LCDetailResults>

³ Western Australian Electoral Commission. *2009 Western Australian Referendum on Daylight Saving*. Perth: WAEC, 2010.

⁴ Community Development and Justice Standing Committee (CDJSC), *2017 WA State Election: Maintaining Confidence in Our Electoral Process*. Perth: Legislative Assembly, Parliament of Western Australia, 2018. Accessed at:

This comment is reflective of a broader pattern of WA elections falling behind national electoral best practice in crucial aspects. While a wholesale review of the Electoral Act would be ideal, this article will examine four specific areas of electoral practice which impact heavily on the integrity of WA's electoral system and which provide a basis for analysing whether WA's electoral system meets contemporary electoral standards. These four areas are:

1. Malapportionment, in both the Legislative Assembly and Legislative Council;
2. Ticket voting in the Legislative Council;
3. Regulation of political donations and campaign expenditure; and
4. Postal voting practices.⁵

MALAPPORTIONMENT

One critical component of any electoral law is the way electoral districts and regions are defined, as this in turn influences the number and indeed the nature of Members elected to each House. The current arrangements under WA's Electoral Act are characterised by significant malapportionment between districts in the Legislative Assembly and, especially, between regions in the Legislative Council.

Malapportionment—that is, systemic deviation in the number of electors between electoral districts—has a long history in Australia, as Jackman found in his survey of electoral bias from 1949 to 1993.⁶ There has been significant research into malapportionment and its impact on the outcome of elections in recent decades.⁷

[https://www.parliament.wa.gov.au/Parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/AF9E28D58010F9FD482582330018A9DC/\\$file/20180201+-+RPT+-+Full+Report+-+FINALISED+-+Online+version.pdf](https://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/AF9E28D58010F9FD482582330018A9DC/$file/20180201+-+RPT+-+Full+Report+-+FINALISED+-+Online+version.pdf)

⁵ There are a range of other issues which are potential areas for reform, such as truth in electoral campaigning, and the regulation and duration of early voting, but it was not possible to canvass all of these in this article. Our focus is on areas where WA is behind—and often well behind—best practice elsewhere in Australia.

⁶ S. Jackman, 'Measuring Electoral Bias: Australia, 1949-93'. *British Journal of Political Science* 24(3) 1994, pp. 319-357.

⁷ A. Siaroff, 'Spurious Majorities, Electoral Systems and Electoral System Change'. *Commonwealth & Comparative Politics* 41(2), 2003, pp. 143-160; N. Kelly, 'Research Note. Western Australian Electoral Reform: Labor Finally Succeeds'. *Australian Journal of Political Science* 41(3) 2006, pp. 419-426; A. Davies and M. Tonts, 'Changing Electoral Structures and Regional Representation in Western Australia: From Country-mindedness to One Vote One

Malapportionment undermines the notion of a legitimate government. Our Parliaments have the right to make decisions which bind us as a community because they purport to represent the collective decision of the public. This collective decision is seen as legitimate because all voters have the same right to elect the Members who sit in the Parliament that represents them. Without fair elections based on equal voting rights, the notion of legitimacy is compromised. Malapportionment raises the possibility of the 'spurious majority', where parliamentary majorities are formed despite a party (or coalition of parties) losing the popular vote to another party (or coalition). Spurious majorities occur more often where there are malapportioned electorates.

Advocates for malapportionment point out that equal representation for every voter in geographically large and sparsely-settled jurisdictions like WA means that rural communities would have a lesser voice in Parliament, and regional constituents would be unable to access local MPs effectively. They also argue that rural and regional voters are among the most economically and social disadvantaged people in the community.⁸ Yet there are many other marginalised or disadvantaged groups within a community who can also claim to lack a political voice, lack access to MPs, or have an insufficient say in decision-making. Improved telecommunications and provision of greater financial resources to MPs representing large electorates can help compensate for difficulties in providing electors with representation and access functions, without the need for malapportioned electorates. Over time, the equal representation argument has increasingly prevailed in Australia.

Malapportionment in WA's Legislative Assembly

After more than a century of debate and struggle, historic electoral reform legislation in 2005 achieved 'one vote one value' across almost all lower house electorates in WA.⁹ Section 16 of the Electoral Act divides the state into 59 single member electorates (or

Value'. *Space and Polity* 11(3) 2007, pp. 209-225; G. Orr and R. Levy, 'Electoral Malapportionment: Partisanship, Rhetoric and Reform in the Shadow of the Agrarian Strongman'. *Griffith Law Review* 18(3) 2009, pp. 638-665; N. Kelly, *Directions in Australian Electoral Reform: Professionalism and Partisanship in Electoral Management*. Canberra: ANU Press, 2012.

⁸ M. Davies, 'Country Voters Need a Strong Political Voice'. *The West Australian*, 28 March 2019. Accessed at: <https://www.miadavies.com.au/country-voters-need-a-strong-political-voice/>

⁹ Kelly, 'Research Note'.

districts), with most required to be within 10 percent of the Average District Enrolment (ADE), which at the time of the 2021 State Election was 29,097 (the total number of electors divided by the number of districts). However, special provision was made for districts of 100,000 square kilometres or more, via what is termed the Large District Allowance (LDA). The bigger the size of the electorate, the larger the LDA. In effect, this has meant that four electorates in the far-flung Mining and Pastoral Region contain far fewer voters than other electorates. Two electorates in the Agricultural Region receive similar treatment. WA followed Queensland in adopting this LDA model, providing a partial concession to rural and regional interests while at the same time providing the major parties (Labor, Liberal and National) with reasonable prospects of winning at least some of these less populated seats.

Tables 1 and 2 show the largest and smallest electorates by enrolled voters, as of 11 February 2021 (the final roll used for the WA election on 13 March 2021). All of the six districts with the largest number of voters (Table 1) are in the Perth metropolitan region.

Table 1. Largest WA Electoral Districts by enrolled voters (February 2021)

District	Enrolled voters	Variation from ADE
Butler	32,712	12.4%
Baldivis	32,554	11.9%
West Swan	32,246	10.8%
Armadale	32,207	10.7%
Jandakot	32,119	10.4%
Perth	32,100	10.3%

Source: Western Australian Electoral Commission, District Enrolment Statistics. Perth: WAEC, 11 February 2021. Retrieved from: <https://www.elections.wa.gov.au/enrol/enrolment-statistics/state-enrolment-reports>.

By contrast, certain regional areas, especially in the Mining and Pastoral region, have experienced little to no population growth, resulting in their number of enrolled voters remaining low. Seven regional districts are more than 10 percent below the ADE (see Table 2). At the extreme, electors in the least populous electorate (North West Central) have almost three times the voting weight of those in the most populous electorate (Butler).

Table 2. Smallest WA Electoral Districts by enrolled voters (February 2021)

District	Enrolled voters	Variation from ADE
North West Central	10,993	-62.2%
Kimberley	15,734	-45.9%
Kalgoorlie	19,651	-32.5%
Pilbara	23,272	-20.0%
Roe	24,711	-15.1%
Central Wheatbelt	25,884	-11.0%
Moore	26,014	-10.6%

Source: See Table 1.

Despite these issues, there have been no attempts since 2005 to change the provision of the LDA in the Legislative Assembly. This may be because this chamber has always embodied single member representation on a regional basis, and because the Labor, Liberal and National parties have all won LDA seats at various times.

Malapportionment in WA's Legislative Council

Despite the shift toward electoral equality in the Legislative Assembly in 2005, the situation in the Legislative Council did not improve—in fact, it went backwards.¹⁰ The system created in 1987 of having six regions (three in the metropolitan area and three in the regions), each electing multiple Members via proportional representation, was preserved, but the malapportionment (with rural regions having more representatives per voter than metropolitan regions) was not only retained but intensified. The 1987 changes saw the metropolitan area have three regions, one with seven Members and two with five each. The country area had a similar split.¹¹ As a consequence, the quota

¹⁰ Kelly, 'Research Note'.

¹¹ In WA, the 1987 reforms established that the whole Council is elected every four years, unlike the situation in the Senate and some other state upper houses, where Members have staggered terms and only half the house is normally up for election at any one time.

of votes required to win a seat was either 12.5 percent (seven-Member regions) or 16.7 percent (five-Member regions). In 2005, the number of Legislative Council Members (MLCs) was increased from 34 to 36, again with equal Members in the metropolitan and country areas, but now with each of the six regions having six MLCs. This means the quota for gaining a seat is now 14.3 percent in each region, thus in theory making it easier for minor parties to win a seat in four of the six regions (but slightly more difficult in two regions). This may have been a factor behind the Greens' insistence on this model in the negotiations leading up to the 2005 changes, although in fact they have not been more successful in securing MLCs in subsequent elections.¹²

More importantly for our purposes here, the 2005 changes meant that malapportionment has increased overall, as the regional population has continued to move into the metropolitan area while its share of MLCs has remained the same. As a result, rural and regional voters—and the parties representing them—continued to have more political influence in the WA upper house than their population would warrant, due to deliberate malapportionment.¹³ The WA Legislative Council has by far the most extreme malapportionment of any state or territory house in Australia.

Section 16 of the Electoral Act divides the state into the six electoral regions electing six Members each. As noted above, the Act stipulates that there will be three metropolitan regions (North, South and East), and three non-metropolitan: Mining and Pastoral; Agricultural; and South West. The boundary between the metropolitan and non-metropolitan regions is fixed in legislation. Moreover, the Electoral Act specifies that the number of electors in the three metropolitan regions should be roughly equal, but there is no such stipulation for the non-metropolitan regions.

Hence there are two levels of inequality built-in to the legislation. The first is between the metropolitan and non-metropolitan regions, with the average number of electors in the former being around three times those in the latter (see Table 3). The second is between the three non-metropolitan regions, with the South West Region being increasingly disadvantaged compared to Agricultural and, in particular, Mining and Pastoral. Furthermore, there is no in-built mechanism in the legislation to prevent the

¹² The history behind the 2005 changes has been told deftly by both Kelly and Phillips. See Kelly, 'Research Note'; H.C.J. Phillips, *Electoral Law in the State of Western Australia: An Overview*. Perth: Western Australian Electoral Commission, 2012.

¹³ Davies and Tonts, 'Changing Electoral Structures'.

situation deteriorating further, as population continues to shift towards the South West and metropolitan regions.

Table 3. Weighting between enrolled voters within Regions in the Legislative Council of WA

Election	Metropolitan (average)	Non- Metropolitan	South West	Agricultural	Mining and Pastoral
1989	1.00	2.8	2.74	2.5	3.27
1993	1.00	2.78	2.59	2.58	3.38
1996	1.00	2.82	2.52	2.71	3.56
2001	1.00	2.85	2.4	2.85	3.87
2005	1.00	2.86	2.36	2.89	4.02
2008	1.00	2.92	1.85	3.91	4.35
2013	1.00	2.97	1.84	3.88	4.76
2017	1.00	3.01	1.76	3.88	5.82
2019 (November Distribution)	1.00	3.06	1.76	4.04	6.04
2021 (State Election)	1.00	3.13	1.78	4.19	6.22

Source: See Table 1.

Note: Legislative change after the 2005 election increased the Legislative Council from 34 to 36 Members, and changed the number of MLCs per region.

Table 3 demonstrates the substantial discrepancy between the metropolitan and non-metropolitan regions in the Legislative Council over repeated electoral cycles. The ‘one vote one value’ reforms relating to the Legislative Assembly passed by the Gallop Government in 2005, which relied on support from the WA Greens, did not resolve malapportionment in the Legislative Council; instead, while the discrepancy between the metropolitan regions and South West has slightly decreased, their difference with Mining and Pastoral and Agricultural regions has increased. There is now more than six times the number of voters per MLC in the Perth Metropolitan Region as a whole, compared to the Mining and Pastoral Region. Table 3 shows this is getting worse with each electoral cycle.

Table 4. Number of enrolled voters per Legislative Council Region (State Election 2021)

Region	Enrolment	Percentage of total enrolled voters	No. of MLCs	Percentage of total MLCs
South Metropolitan	449,182	26.2%	6	16.7%
East Metropolitan	423,759	24.7%	6	16.7%
North Metropolitan	427,779	24.9%	6	16.7%
South West	242,983	14.2%	6	16.7%
Agricultural	103,378	6.0%	6	16.7%
Mining and Pastoral	69,651	4.1%	6	16.7%
Total	1,716,732	100%	36	100.0%

Source: See Table 1.

Table 4 lists the number of electors and Members in each Legislative Council region. It shows that metropolitan electors represent around three-quarters of all enrolled electors (75.8 percent to be precise) but choose only half the MLCs. Just one-tenth (10.1%) of enrolled electors—namely those from the Mining and Pastoral, and Agricultural, Regions—choose one-third of MLCs. In fact, the imbalance is actually worse than the enrolment figures suggest, as the voter turnout in the Mining and Pastoral Region is traditionally much lower than in the other regions. At the 2017 election, only 73.78 percent of enrolled electors in that Region actually voted, well

below the state average of 87 percent. By 2021 turnout had dropped to 72 percent.¹⁴ Hence the malapportionment in favour of Mining and Pastoral electors compared to the rest of the state is even greater when actual turnout is considered.

WA is now wildly out of kilter with the upper houses in other Australian states and territories, all of whom have removed malapportionment in their electoral systems. Only the Australian Senate retains a comparable level of malapportionment, as all 'original' states elect 12 Senators regardless of their population. However, this was a situation imposed by the states as a pre-condition of federation set by the six self-governing colonies. Changing it requires a constitutional referendum and is highly unlikely to be contemplated, let alone approved. It therefore has a different rationale to the situation in WA, where the Legislative Council regions have no administrative basis.

Reforming malapportionment in WA faces its own set of legislative and constitutional difficulties. A clause in the Electoral Act (s 16M) stipulates that absolute majorities of Members (requiring a majority of those eligible to vote) in each house of Parliament are required to repeal or alter crucial clauses relating to electoral districts and regions. In particular, an absolute majority is required to change the number of regions, while an absolute majority and a referendum of WA electors is required to reduce the total number of MLCs.¹⁵

Alternative models of representation

One means of establishing more equal enrolment in the Legislative Assembly of WA would be to abolish the Large District Allowance (LDA). The clause establishing the LDA is one of the few that is specifically exempted from the requirement for an absolute majority of Members. Abolishing the LDA would ensure that the number of voters in each electorate would need to be within 10% of the Average District Enrolment (ADE). In real terms, this would mean the abolition of at least one of the electorates in the

¹⁴ Western Australian Electoral Commission 'Mining and Pastoral Region Profile'. Accessed at: <https://www.elections.wa.gov.au/elections/state/sgelection#/sg2021/region/5/results>

¹⁵ Such a change may activate s 73(2)(d) in the *Constitution Act 1889* (WA) and require any amending Bill to comply with the absolute majority and referendum requirements in ss 73(2)(f) and (g) of the *Constitution Act 1889* (WA). These procedures would likely be rendered binding by s 6 of the *Australia Acts 1986* (Cth & UK) when the amending Bill would seemingly relate to the 'constitution' of the WA Parliament.

Mining and Pastoral Region and adding substantial numbers of voters to the others. It may also result in the abolition of further electorates within the Agricultural Region in future. However, there are practical implications for local representation in the abolition of the LDA, given that the electorates in question are already very large. As noted above, there has been no appetite from either side of politics to amend the LDA since its inception in 2008.

A much more pressing reform issue is the situation in the Legislative Council. There are a number of potential models, which would ensure more complete voting equality across the State. These include:

1. One State-wide electorate, consisting of 36 Members;
2. Three Regions in the Perth Metropolitan Area consisting of 9 Members each and three Non-Metropolitan Regions consisting of 3 Members each;
3. Five Regions in the Perth Metropolitan Area consisting of 5 Members each, one Region in the South West consisting of 5 Members, and 3 Members each in the Agricultural Region and Mining and Pastoral Region;
4. Three Regions in the Perth Metropolitan Area consisting of 9 Members each and one Non-Metropolitan Region consisting of 9 Members.

Option 1 would be similar to the situation in NSW and SA, although in those states voters only elect half the MLCs at each election (thereby giving each MLC an 8-year term), whereas in WA all MLCs face election every four years. Options 2, 3 and 4 would be variations on the current system but with regional malapportionment removed as much as possible, and would be similar to the system prevailing in Victoria (which has eight regions each returning five MLCs).

TICKET VOTING AND PREFERENCE HARVESTING

Another issue in which WA electoral procedures have fallen behind other states and federal practice concerns the ongoing use of 'ticket voting' at Legislative Council elections, and the requirement that voters either use this option (by voting 'above the line' for a party) or indicate a full ranking of every candidate standing, with no exceptions (i.e., a 'below the line' vote), to produce a valid vote. This provision effectively pushes voters towards the ticket vote option, which the vast majority (over 97 percent in 2021) avail themselves of rather than numbering a full slate of preferences. While convenient, the use of ticket voting undermines voters' ability to control the distribution of their preferences, forcing voters to accept their chosen party's full preference ordering. The lack of any 'savings provisions' in the Electoral Act

also means that a single error by an elector in numbering ‘below the line’ leads to the vote being declared informal, further discouraging electors from preferencing candidates of their choice.

Ticket voting was a response to the interaction of compulsory preferential voting with increasingly high levels of candidature. It was first introduced at the federal level for Senate elections in 1984 to make the act of voting simpler, but also to allow political parties more control over the flow of preferences. It effectively makes Australia’s single transferable vote electoral systems (used for the federal Senate and most state upper houses) resemble the party list forms of proportional representation (‘PR’) found in Europe. It has largely succeeded in making voting easier, with the previously high rates of informal voting for Senate elections falling as the onerous task of numbering every candidate was replaced with a single party vote. But ticket voting also had other unintended consequences, which have been addressed at the federal level and by some other states but not yet by WA.

WA adopted ticket voting when PR came to the Legislative Council in 1987. Under ticket voting, parties and aligned candidates may lodge prior to the election a preference schedule or ‘group voting ticket’, which sets out how their preferences are allocated when they receive an ‘above-the-line’ vote (in contrast to an elector ranking every candidate standing if they vote ‘below-the-line’). In WA, this constitutes a written statement of preferences lodged with the Western Australian Electoral Commission (‘WAEC’) by a political party contesting a Council election. The statement indicates how preferences will be distributed during the count if a party, group or candidate is eliminated, or if they have a surplus to transfer. This effectively moves decisions on preference allocation from voters to party secretariats.

Ticket voting has, over time, created some unexpected pathologies in Australian elections. In particular, it has provided multiple opportunities for parties to ‘game’ the system through the direction of preferences. One way in which such gaming can occur is via a form of preference-swapping between ‘micro’ parties (parties with a minimal public profile that receive negligible vote shares, rendering them irrelevant in most circumstances). At the 2013 Senate election, some of these micro-parties were able to win seats by making promiscuous preference-trading deals with others and reaping the (essentially random) rewards that accrued to whichever was able to assemble the necessary quota for victory. Such ‘preference whispering’ saw several micro-party

candidates elected and holding crucial balance-of-power positions in the Senate, with one gaining a seat on just 0.23% of the primary vote.¹⁶

In 2014 the federal Joint Standing Committee on Electoral Matters conducted an inquiry into the ticket voting system, finding that:

The 'gaming' and systematic harvesting of preferences involving complex deals that are not readily communicated to, or easily understood by the electorate has led to a situation where preference deals are as valuable as primary votes.¹⁷

In response, in 2016 the system was changed to allow voters in Senate elections an optional preferential vote 'above the line' between parties, or the alternative of needing to number at least 12 preferences below the line to enact a valid vote. These reforms have been widely seen as successful, making voting more consequential, and largely eliminating the proliferation of micro-parties. In WA, however, a single ticket vote above the line or a full ranking of all candidates below it remain the only ways to enact a valid vote for the Legislative Council. This means that nearly all WA voters rely on parties to allocate their preferences, rather than doing it themselves.

The continuation of this model in WA has amplified the possibility that preference deals will be gamed and result in micro-parties not just winning representation with negligible public support, but potentially holding the balance of power. It is only thanks to good fortune that there were no glaring examples of this at the 2017 State Election, when several micro-parties such as Flux the System, Fluoride Free WA and the Daylight Savings Party all engaged in apparent preference harvesting. Examination of 2017 electoral returns for the Legislative Council show the influence of ticket voting and preference deals on several outcomes. For instance, the Liberal Democrats won a South Metropolitan seat on less than four percent of the primary vote (in a situation where the quota for election is 14.3 percent) by receiving preference transfers from all

¹⁶ I. McAllister and T. Makkai, 'Electoral Systems in Context: Australia', in Erik S. Herron, Robert J. Pekkanen and Matthew S. Shugart (eds), *The Oxford Handbook of Electoral Systems*. Oxford: Oxford University Press, 2018.

¹⁷ Joint Standing Committee on Electoral Matters Interim report on the inquiry into the conduct of the 2013 Federal Election Senate voting practices. Canberra: Commonwealth Parliament, 2014. Accessed at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/2013_General_Election/Interim_Report

of the parties mentioned above, along with others such as One Nation and the Australian Christians.

At the March 2021 State Election, Labor's historically high vote at the expense of all other parties reduced the representation of minor and micro parties in the Council. Still, group ticket preferences saw two Legalise Cannabis WA candidates elected, one in South West and one in East Metropolitan, despite receiving just 1.98 percent of the overall state-wide vote. By contrast, the Greens received 6.38% of the state-wide vote and had just one candidate elected. As discussed above, the most extraordinary result was the election of Wilson Tucker from the Daylight Saving Party. His party polled just 0.24 percent of the primary vote across the state, and an even smaller share (0.20 percent) in the Mining and Pastoral Region, where Mr Tucker was elected.

It is important to emphasise that this is not an argument against minor parties gaining election. Proportional representation in WA, as in other jurisdictions, has been successful in giving minor parties who attract real support but are unlikely to gain a lower house seat a viable route to representation. In the eight elections held since the WA system of multi-Member regions was adopted in 1989, this has allowed 37 independents and non-major party representatives (i.e., excluding Labor, Liberal and National Party MLCs) to gain election in the Legislative Council, breaking the almost exclusive monopoly held by the three oldest parties in the chamber. The WA Greens, for instance, which elected their first Member to the Council in 1993, managed to elect between two and five Members of the Council at every election until 2017.¹⁸ There is a difference between minor party representatives, who often command significant but dispersed voter support, and micro-parties with no real support base.

Action needs to be taken to put preferences back into the hands of voters, so that they can more easily choose where their vote ends up. An obvious route is to follow the Senate and states such as New South Wales and South Australia and allow voters to indicate their preferences between parties 'above the line', on an optional basis. This would make voting more consequential by eliciting more information about voters' true preferences between parties, and undercut any preference harvesting strategies such as those adopted by micro-parties at the 2017 State Election. However, a 2019

¹⁸ N. Miragliotta, S. Murray and J. Harbord, 'Western Australia', in Peter J. Chen, Nicholas Barry, John R. Butcher, David Clune, Ian Cook, Adele Garnier, Yvonne Haigh, Sara C. Motta and Marija Taflaga (eds), *Australian Politics and Policy*. Sydney: Sydney University Press, 2019.

Private Members Bill to do exactly this, introduced by the Greens, failed to progress in the Legislative Council, leading to the 2021 result outlined above.¹⁹ The need for reform along the same lines as the Senate, New South Wales and South Australia is now clear.

POLITICAL FINANCING

Transparency and timeliness are crucial to the success of any political financing regime. While political parties, candidates and ‘third party’ campaigners (e.g. companies, industry associations, trade unions, etc.) all require funds to communicate their electoral messages, voters need to be able to make informed decisions at the ballot box, including those in relation to how the political communications they receive have been funded.

WA electoral funding laws have long fallen short of best practice. In June 2020, in line with the governing Labor Party’s election platform, the Electoral Amendment Bill 2020 (WA) (‘Bill’) was introduced into the WA Legislative Assembly. The Bill introduced a range of reforms including to disclosure thresholds, foreign donations, contemporaneity of disclosure and fundraising caps. While some of these measures received a lukewarm reception by the WA Standing Committee on Legislation, the Bill signalled a recognition of the need for political financing reform in WA. Unfortunately, the Bill was introduced to the Parliament relatively late in the Government’s term, in a period when Covid-19 related matters were taking precedence, and lapsed when Parliament was prorogued for the 2021 election, without being fully debated. Nevertheless, the matters raised in the Bill are worthy of discussion, as they are likely to be raised again in the next term of government. During the 2021 election campaign, WA Premier Mark McGowan promised to introduce new legislation to provide greater transparency around political donations.²⁰

¹⁹ Electoral Amendment (Ticket Voting and Associated Reforms) Bill 2019.

²⁰ P. Taylor, ‘Mark McGowan Wants Transparency in Donations from Developers’. The Australian, 25 February 2021, Accessed at: <https://www.theaustralian.com.au/nation/politics/mark-mcgowan-wants-transparency-in-donations-from-developers/news-story/c2055f69f5e7c83d7ca62cf1e338a064>

Disclosure thresholds

Currently WA only requires donations exceeding \$2500 to be disclosed (Electoral Act, s 175; *Electoral (Political Finance) Regulations 1996* (WA) r 3).²¹ The Bill would have reduced this amount to \$1000, which would bring WA in line with most other states and territories.²² However, the Standing Committee on Legislation put a number of questions to the Minister for Electoral Affairs in relation to this threshold, including whether it should be increased to align with ‘the tax deductible threshold for political donations’.²³

There are a range of other weaknesses with the WA disclosure regime as it currently stands. First, a party registered at state and federal level, can meet their state disclosure requirements by satisfying the federal disclosure levels.²⁴ As the ‘disclosure threshold’ under the *Commonwealth Electoral Act 1918* (Cth) sits at \$14,300 (ss 287, 321A),²⁵ the state limits can be readily bypassed. Second, the anti-avoidance provision (s 175N(4)), which aggregates two or more gifts by the same individual, does not apply if a gift is below one-third of the disclosure amount. As the Standing Committee on Legislation highlighted, ‘[a] series of donations under \$833 by the same person’ can, through this legislative gap, be made anonymously. Third, the donation regime relies on accurate party disclosure and compliance without reporting by donors or adequate mechanisms for enforcement or regulator monitoring.²⁶

²¹ Government Gazette No. 93 of 2017, 12 May 2017.

²² Western Australian Standing Committee on Legislation, Report 47- Electoral Amendment Bill 2020. Accessed at: [https://www.parliament.wa.gov.au/parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/2FF98027EF21DCFC4825861E0014334E/\\$file/ls.eab.201112.rpf.047.xx.pdf](https://www.parliament.wa.gov.au/parliament/commit.nsf/(Report+Lookup+by+Com+ID)/2FF98027EF21DCFC4825861E0014334E/$file/ls.eab.201112.rpf.047.xx.pdf); Chivers, C., Wood, D. and Griffiths, K., (2018). Time for the Federal Government to Catch up on Political Donations Reform. Grattan Institute, 14 August, Accessed at: <https://grattan.edu.au/news/time-for-the-federal-government-to-catch-up-on-political-donations-reform/>

²³ Western Australian Standing Committee on Legislation, Report 47, p. 19.

²⁴ Electoral Act, s 175N(5); Community Development and Justice Standing Committee, 2017 WA State Election; Hamish Hastie, ‘Who’s Paying for Our Politics? Your Complete Guide to WA’s Political Donations’. WA Today, 12 February 2020. Accessed at: <https://www.watoday.com.au/politics/western-australia/who-s-paying-for-our-politics-your-complete-guide-to-wa-s-political-donations-20200211-p53zv0.html>

²⁵ Australian Electoral Commission, Disclosure Threshold. Accessed at https://www.aec.gov.au/Parties_and_Representatives/public_funding/threshold.htm

²⁶ WA Standing Committee on Legislation, Report 47, [2.17]-[2.18]]

Foreign donations

On the back of Committee recommendations from a Senate Select Committee Report, the Commonwealth Parliament legislated, pursuant to the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth), to ban foreign political donations because of their potential for foreign influence on public policy decision-making.²⁷ Other jurisdictions such as NSW, Victoria and Queensland employ similar measures. While the WA Bill sought to curtail such donations, the WA Standing Committee on Legislation identified that it may not go far enough, since the Bill's definition of 'foreign donor' is narrower than that used federally or in NSW. It would not, for instance, rule out donations from a foreign individual with residency rights in Australia or who owned an Australian business. Given that WA is the state most economically exposed to the influence of the mining industry and Chinese business investment—both major sources of political donations in Australia—this creates another weak point in the Electoral Act's disclosure regime.

Timing of disclosure

WA's current disclosure regime lacks contemporaneity, potentially undermining the object of disclosure. For instance, a donation made in the first half of one year (e.g., January-June 2020) does not become public until 2021. If it is made in the second half of a year (e.g., July-December 2020) it does not become public until 2022, because the reporting cycle is annual and based on the financial year.

The proposed Bill represented an improvement in disclosure standards by introducing more frequent quarterly reporting. In the current Act, separate rules are in place for election returns, requiring candidates and parties to report donations within 15 weeks after election day. The Bill shortened this to 12 weeks. However, in terms of transparency around election time, this is still inadequate. The public would lack

²⁷ Select Committee into the Political Influence of Donations, *Political Influence of Donations*. Canberra: Commonwealth Parliament, 2018. Accessed at:

https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024147/toc_pdf/PoliticalInfluenceofDonations.pdf;fileType=application%2Fpdf; Joint Standing Committee on Electoral Matters (JSCEM) (2017). *Second interim report on the inquiry into the conduct of the 2016 Federal Election: Foreign Donations*. Canberra: Commonwealth Parliament, 2017. Accessed at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/2016Election/Report_1

complete information about political donations at the time of their casting a vote. Likewise, there is still no ‘real time’ disclosure for donations received outside the election period, although this is less significant given that voters are not at that time preparing to pass judgement on parties or candidates. Best practice disclosure would be for all donations to be disclosed within a matter of days after the donation has been accepted, especially during the election period.

The WA Standing Committee on Legislation recommended that ‘an online “real-time reporting system”’, such as that employed in Queensland, be considered by the WA Minister for Electoral Affairs.²⁸ However, a majority of the Committee opposed the shift towards quarterly over annual reporting because of the administrative load it would introduce, recommending the deletion of this amending clause. This administrative load could be easily managed though, were WA to increase public funding of political parties beyond its current levels, which are the lowest in the country for those jurisdictions that are bicameral.²⁹

Capping electoral expenditure

Expenditure caps are vital to ensure ‘that those with the deepest pockets should not be able to spend their way to influence an election’.³⁰ The Bill proposed to establish expenditure caps for candidates, political parties and third party organisations, while not putting a ceiling on party donations per se. There are strong reasons why this is a necessary reform. A fair electoral process should have a relatively even ‘playing field’ in that a number of different electoral competitors should be able to access and influence public opinion. Furthermore, wealth should not be an obstacle to pursuing election to Parliament, which may be the case if different candidates or parties are effectively unable to compete due to the unlimited resources of one entity. Excessive expenditure by a single entity has the potential to ‘drown out’ alternative voices.

For these reasons a number of Australian jurisdictions have imposed expenditure caps, including NSW, South Australia and Queensland. The High Court in *Union New South*

²⁸ WA Standing Committee on Legislation, Report 47, [4.79].

²⁹ As of December 2020, WA funds its political parties at \$1.96699 per vote, for those which meet the four percent threshold within an electorate. This is much lower than other states and territories, or the Commonwealth. The next lowest figure is the Commonwealth, which funds parties at \$2.73 per vote.

³⁰ Stephen Dawson MLC, Western Australia, Parliamentary Debates. Legislative Council, 13 August 2020, p. 4945.

Wales (No 1) v State of New South Wales (2013) and *Unions NSW v State of New South Wales (No 2)* (2019) found that capping campaign expenditure is a legitimate practice; however, the extent of any caps must be justified and not impair competition, given they limit freedom of political communication. It is perhaps this finding that has led to rather generous provisions in the WA Bill for spending by political parties, candidates and third party organisations. For instance, the Bill's proposed expenditure limits per seat exceed those in NSW, South Australia and Queensland and are CPI indexed.³¹ While it may be argued that distances in WA require higher political campaigning costs, it is unlikely to justify, for example, the \$2 million cap for third parties, which is double that which applies in a jurisdiction such as Queensland. While the Government asserted that 'the electoral system in Western Australia is unique so it was not possible to ensure consistency with other jurisdictions in Australia',³² even an elevated figure of \$1.5 million would accommodate campaigning costs for third parties, while providing for a more level playing field. Relevantly, a majority of the Standing Committee on Legislation disavowed the expenditure cap limits set out in the Bill as 'unsafe' when the 'case for the establishment of expenditure caps had not been made'.³³ This left open the unacceptable possibility that the existing situation of no spending limits at all would be retained.

POSTAL VOTING

A fourth aspect of WA's electoral arrangements in need of reform concerns postal voting. As Kelly notes, there are instances when the major political parties have ignored best electoral practice and acted in their own interests; the administration of postal voting application (PVA) forms provides such an example.³⁴ Under the current legislation, candidates and political parties can and do send PVAs to many thousands of voters. Those who respond usually send their applications to the candidate or party concerned, who are required to forward them on to the WAEC. This practice occurs in some other Australian jurisdictions, although the practice has been reformed in Victoria and South Australia. It is not established practice in comparable international

³¹ WA Standing Committee on Legislation, Report 47.

³² WA Standing Committee on Legislation, Report 47, Appendix 1.

³³ WA Standing Committee on Legislation, Report 47, p.56.

³⁴ Kelly, *Directions in Australian Electoral Reform*.

electoral processes; in no other instances have political parties been so directly involved in the promotion and administration of postal voting. Wall *et al*'s research on electoral management design highlights a number of key criteria for independent electoral administration, which include maintaining electoral management processes that are free from interference by executive government, and ensuring that the electoral management body takes full responsibility for the implementation of all election processes.³⁵ The sending and receipt of PVAs falls short of such standards.

The WAEC has itself expressed its concern at the involvement of political parties in the postal voting process, as has the Australian Electoral Commission at numerous Commonwealth inquiries.³⁶ These concerns have both administrative and integrity aspects. The two-step delivery process involved in an elector using a reply-paid envelope to a political party or candidate, who is then obliged to forward it to the Commission, generates the potential for delay in forwarding the ballot material to the elector by the WAEC. Parties may wait before sending postal vote applications in bulk to the WAEC, which can exacerbate the situation.³⁷ It is possible for electors to miss out on voting if their ballots are not received by a certain date—for example, if they are preparing to travel interstate or overseas.

The potential for inadvertent or deliberate mistakes increases with 'double handling' of postal vote applications. Indeed, one of the biggest sources of complaint to the WAEC comes from voters who had applied for postal votes but had not received them, sometimes several weeks later. Searches on the Commission's voter databases then fail to find evidence that the application has been lodged.³⁸

While there is no evidence that political parties deliberately withhold postal vote applications, there is clearly *potential* for this to occur. Even such potential interference in the voting process should not be acceptable. As Wall *et al* note, the

³⁵ Wall, A., Ellis A., Ayoub A., Dundas C., Rukambe J. and Staino S. (2006). *Electoral Management Design: The International IDEA Handbook*. Stockholm: International IDEA.

³⁶ Western Australian Electoral Commission, State General Election: Election Report, Perth: WAEC, 2017.

³⁷ Community Development and Justice Standing Committee, *2017 WA State Election: Maintaining confidence in our electoral process – Government Response*. Perth: Legislative Assembly, Parliament of Western Australia, Perth, 2018. Accessed at:

[https://www.parliament.wa.gov.au/Parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/AF9E28D58010F9FD482582330018A9DC/\\$file/government+response.PDF](https://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/AF9E28D58010F9FD482582330018A9DC/$file/government+response.PDF)

³⁸ Community Development and Justice Standing Committee, *2017 WA State Election*.

perception of political interference in itself is enough to undermine the legitimacy of election results.³⁹ There is also a transparency issue. The Commission has noted that it ‘continues to be concerned about the level of confusion when electors receive unsolicited postal vote application forms through the mail. It may not be clear that an accompanying reply-paid envelope is in fact addressed to a political party rather than the Commission’.⁴⁰

There should be no place for candidates or political parties organising applications for any particular vote type; this should be left to the WAEC, as the independent statutory body. Unfortunately, this activity is likely to increase with the shift towards convenience voting, in addition to lingering concerns about in-person voting due to Covid-19. Indeed, at the 2021 WA election, 755,075 electors (55 percent of the electorate) voted early, including 169,301 who returned postal vote ballots (15 percent of the electorate) (WAEC 2021c, authors’ calculations).⁴¹

South Australia and Victoria have legislated in recent years to address this issue, at least to some extent. Both these states allow application forms to be distributed by parties to electors so long as they specifically state that the forms must be returned directly to the electoral commission. Political parties are notified of any returned applications. There is also a stipulation that there cannot be any political party material included in the material distributed to the elector. These reforms should be considered as a minimum reform in any review of the WA Electoral Act. While some areas of electoral reform require complex or contentious solutions, in this case the solution to concerns around the integrity of the postal voting process is simple: the Electoral Commission should be the only entity which handles PVAs, and voters should return these directly to the Commission.

There has been no movement in the WA Parliament towards reform of postal voting in recent years, despite a Legislative Assembly committee in 2017 recommending an urgent review of the Electoral Act and that particular consideration be given to ‘the ability of political parties to distribute postal vote applications’.⁴²

³⁹ Wall *et al.*, *Electoral Management Design*.

⁴⁰ Western Australian Electoral Commission, *State General Election: Election Report*, p.19.

⁴¹ Western Australian Electoral Commission, *Return of Writ*, Perth: WAEC 2021. Accessed at: <https://www.elections.wa.gov.au/about-us/media/whats-new/1934>

⁴² Community Development and Justice Standing Committee, *2017 WA State Election*, p. xii.

CONCLUSION

Implementing electoral reforms is never easy; however, WA's laggard electoral status makes it a priority. Malapportionment continues to get worse with each election, with outcomes in the Legislative Council in particular being unrepresentative of the collective views of the WA public. Ticket voting in the Legislative Council needs urgent reform to ensure that voters can easily select their own preferences. While there were promising moves towards the reform of political finance in 2020, these eventually came to naught. In any case, much more is required in this area to ensure transparency and integrity around campaigning and decision-making in government. The postal voting mechanisms, while much criticised, remain unchanged and give the opportunity for political interference in the accessing of voting forms. The advent of Covid-19 has made reform in this area more pressing.

Earlier in this article we quoted from the bipartisan report of a parliamentary committee on the 2017 election highlighting the need for wholesale revision of the Electoral Act. The WA Government's formal response to the Committee concluded with these words: 'The Government is committed to reviewing the Electoral Act, and is keen to have it completed as soon as possible'.⁴³ No such review has taken place, although legislation to reform political finance provisions was eventually introduced (see above). Given the myriad deficiencies of WA's electoral system outlined here, such a review of the Electoral Act, followed by legislative action to reform its manifest deficiencies, is a matter of urgency. In particular, the Legislative Council issues of malapportionment and group ticket voting stand out, given the results of the 2021 election. Whatever the precise route chosen, the general direction and destination required are clear, commencing with the four areas of reform highlighted in this article.

⁴³ Community Development and Justice Standing Committee, *2017 WA State Election*, p.3.