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Newsletter Team
Nathaniel Reader
Newsletter Editor
Ben Saunders & Yee-Fui Ng
Legal Editors
Jean Goh
ERRN Administrator

Contact Us
email us: law-errn@unimelb.edu.au

Democratic Audit of Australia

ERRN
Electoral Regulation Research Network

www.law.unimelb.edu.au/errn
If the working papers published by the Network are any guide, research on the regulation of elections is truly thriving.

24 working papers have been published over the space of two years examining a diverse range of topics concerning the regulation of elections. Earlier papers include those by Professor Dean Jaensch (Flinders University) and Jane Peace (NT Electoral Commission) canvassing some of the issues pertinent to the establishment of a research network such as ERRN. Papers by Michael Maley (Australian National University) and Antony Green (Australian Broadcasting Corporation) deal with the design of voting systems with Maley's paper providing an analysis of the optional preferential voting system for the Australian Senate and Green's paper identifying reform options for the voting system applying to the South Australian Legislative Council. In a similar vein, Professor Andrew Geddis (University of Otago) explains the review of New Zealand's Mixed Member Proportional (MMP) system. The important topic of electoral boundaries and methods for determining them are also subject to examination in a paper by Dr Paul Thornton-Smith (Victorian Electoral Commission) and three separate analyses by Jenni Newton-Farelly (South Australian Parliament Research Library).

The working paper series have also examined key institutions involved in the regulation of elections. My paper on electoral management bodies analysed how principles of deliberative democracy should apply to Australian electoral commissions. Three other papers deal with the regulation of political parties: one by Professor Graeme Orr (University of Queensland) on the common law conception of the political party and two on the professionalization of the parties (one by Dr Stephen Mills (Sydney University) and another by Dr Jennifer Rayner (Australian National University)). Other papers deal with a related topic, the funding of election campaigns: a paper by Professor George Williams (University of New South Wales) discusses the High Court challenges to New South Wales and Queensland political finance laws; Andrew Ellis' paper (International IDEA) situates Australian political finance law in an international context; and Bradley Edgman (Australian Electoral Commission) distils the main approaches to compliance and enforcement of such laws. In the most recent paper to be published Alison Byrne (NSW Electoral Commission) argues that strict liability offences should be introduced into NSW political finance laws.

There have also been analyses of mechanisms of democratic accountability other than elections: the paper by Yee-Fui Ng (Monash University) assesses the adequacy of the laws governing the accountability of ministerial advisers; former Victorian Supreme Court judge Tim Smith critiques the legislative framework of the Victorian Independent Broad-based Anti-Corruption Commission (IBAC); a paper by Professor George Williams (University of New South Wales) discusses the politics of the proposed constitutional referenda on local government and gay marriage; and the paper by Eyal Halamish (OurSay) evaluates the effectiveness of recent voter engagement strategies.

Finally, the working paper series has provided analyses of important normative issues. A recent paper by former Australian Electoral Commissioner, Emeritus Professor Colin Hughes, discusses the right to vote in the context of the Bill of Rights Debate; a paper by Dr Ron Levy (Australian National University) connects the regulation of elections to the principles of deliberative democracy while the paper by Professor Katharine Gelber (University of Queensland) surveys the latest High Court decisions on the implied freedom of political communication.

The quality and breadth of the working papers do not, of course, spontaneously emerge. Special thanks here to the contributors and to the editor of the working paper series, Dr Aaron Martin. I invite you to make full use of the rich resources provided by the Network's working paper series.

Associate Professor Joo-Cheong Tham
Director, Electoral Regulation Research Network
News

Commonwealth

The 2013 federal election continues to present several, ongoing matters of relevance to Australian electoral regulation and administration.

On 6 December 2013 the Australian Electoral Commission released a report by Mr Mick Keelty AO inquiring into the circumstances surrounding the 1,370 missing Western Australian Senate votes from the 2013 federal election. The report found 'significant failures in some of the processes and procedures for the handling, movement and storage of WA Senate ballot papers'. Major recommendations centred on better staff training, a ban on the recycling of ballot materials at polling centres and strengthened management processes relating to the transport and security of ballot papers. A full list of the recommendations can be found here; the AEC has considered and accepted all of Mr Keelty's recommendations.

Following the Keelty report, on 18 February 2014 the High Court, sitting as the Court of Disputed Returns, declared void the 2013 Senate election in Western Australia. Justice Hayne ruled that the court could not determine who was duly elected because of the 1,370 missing votes. The Western Australian Governor, His Excellency Malcolm McCusker AC CVO QC, subsequently announced on 28 February that the Western Australian Senate election would be held on 5 April. Further discussion of the High Court's decision is featured in the Case Notes section of this newsletter.

On 21 February Ed Killesteyn, Australian Electoral Commissioner, resigned. The Electoral Officer for Western Australian, Peter Kramer, also resigned. Special Minister of State Michael Ronaldson announced that Tom Rogers, Deputy Electoral Commissioner, would act as the Electoral Commissioner, while Kathy Mitchell would act as the Chief Electoral Officer for Western Australia. Both resignations followed criticism of the AEC by the Member for Fairfax, Clive Palmer, and the Coalition government.

There were a record number of candidates for the Western Australian half-Senate election on 5 April, with 77 candidates nominating compared to 66 for the first election in 2013. George Williams notes that the election is an unprecedented event in Australia's electoral history. According to the AEC more than 28,000 new electors will be voting in April compared to the original September election. At the time of writing and with 69 percent of the vote counted, the Liberal Party had won three seats. The ALP, the Greens and the Palmer United Party all won one seat.

In other federal election-related events, the first by-election of the 44th Parliament of Australia took place in the Division of Griffith on 8 February 2014 following former Prime Minister Kevin Rudd's official resignation on 13 November 2013. The seat was won by Australian Labor Party candidate Terri Butler; breaking the usual pattern for federal by-elections, the election saw a small swing of 1.25 percent towards Liberal National Party candidate Bill Glasson.

As has become customary, the Commonwealth Parliament's Joint Standing Committee on Electoral Matters also commenced its inquiry into the conduct of the 2013 federal election in February 2014. To date the inquiry has received over 100 written submissions and conducted five days of public hearings, with a further 15 days of hearings scheduled for the rest of 2014. The Committee has thus far considered the circumstances surrounding the lost Western Australian Senate votes, including evidence from Mick Keelty AO and Acting Electoral Commissioner Tom Rogers. While the circumstances surrounding the original Western Australian Senate vote is attracting a great deal of evidence, the Committee is also considering potential investigations into voter ID, Senate voting reform and the feasibility of and options for electronic voting.

These three particular issues have received significant coverage since the ERRN's December 2013 newsletter. Regarding voter ID, Rodney Smith has prepared a report for the New South Wales Electoral Commission on the incidence of multiple voting at NSW state elections, and also voter ID. On 14 November 2013 independent Senator Nick Xenophon's bill to introduce optional preferential (OPV) 'above the line' voting was referred to the Senate's Standing Committee on Finance and Public Administration, with the Committee due to report to Parliament at any time: Antony Green has discussed the bill. In addition, there has been some discussion about electronic voting as a measure to reduce the high levels of informal voting recorded in some federal Divisions at the 2013 federal election. Communications Minister
Malcolm Turnbull has called for further analysis, as has the member for Fairfax, Clive Palmer.

The NSW Independent Commission Against Corruption (ICAC) is currently investigating allegations that persons with an interest in Australian Water Holdings Pty Ltd (AWH) obtained a financial benefit through adversely affecting the official functions of Sydney Water Corporation (SWC). The former Assistant Treasurer and former senior Howard government advisor, Arthur Sinodinos, stood down from the portfolio following political pressure over his role in the ICAC investigations. The ICAC is also examining whether, between December 2010 and November 2011, some members of parliament solicited, received and failed to disclose political donations from companies, including prohibited donors, contrary to the Election Funding, Expenditure and Disclosures Act 1981.

New South Wales

Followers of New South Wales’ politics and Australia’s political finance provisions keenly awaited the outcome of Unions NSW v NSW [2013] HCA 58. On 18 December 2014 the High Court unanimously held in a 6:0 judgment that New South Wales’ election funding laws are invalid because they breach the implied freedom of political communication in the Commonwealth Constitution. The laws, which were introduced by the O’Farrell government and passed by the Parliament of New South Wales in 2012, prohibit political donations by anyone other than an individual on the electoral roll, and aggregate expenditure by affiliates of a political party (with the expenditure of that political party for expenditure cap purposes). ERRN Director Joo-Cheong Tham has highlighted some of the problems with the laws, while George Williams has discussed the ruling. Further discussion about the case is featured in the Case Notes section of this newsletter. Since the decision the NSW government has said that it is continuing to examine options to improve trust and transparency in the state’s electoral funding system. Reports suggest the NSW Liberal Party has also promised political donors access to Premier Barry O’Farrell at specially organised dinners.

While the District of Miranda by-election (held on 19 October 2013 and brought about by the resignation of Liberal MP Graham Annesley) occurred in between two ERRN newsletters in October 2013, it is worth discussing briefly here. Australian Labor Party candidate Barry Collier won the seat; the swing to Labor of 26 percent in the traditionally Liberal seat was the highest ever swing recorded at a NSW by-election. Peter Brent has discussed the implications of the 2013 Miranda by-election for NSW politics.

Following calls from John Robertson, New South Wales’ Opposition Leader for direct election of the NSW parliamentary leader, there have been calls from within the union and Labor movement to fix the party’s ‘broken’ pre selection process and allow rank and file members to have a greater say in pre-selection processes.

Reports suggest the NSW JSCEM is considering reforms to voting for the City of Sydney which would force businesses registered in the city to vote in council elections. It is suggested that the committee’s draft report wants the government to adopt the model of voting currently used in the City of Melbourne, whereby landlords, business owners, corporations and other eligible non-resident voters must vote in council elections.

Victoria

It has been a tumultuous few months for the Parliament of Victoria. Following sustained pressure on the Office of the Speaker due to tight numbers in the Legislative Assembly (see ERRN December 2013 newsletter), Speaker Ken Smith resigned on 4 February and was subsequently replaced by the member for the District of Evelyn, Christine Fyffe. Since then the Liberal Party has expelled Mr Shaw as a member (Shaw resigned from the party just before this took effect), and the Legislative Assembly remains finely balanced; Mr Shaw continues to hold the balance of power and has recently sided with the Australian Labor Party to defeat legislation to set up a Parliamentary Budget Office, which would have independently costed election policies. Mr Shaw has also failed to commit to supporting financial bills in the lead up to the state budget.

The independent Local Government Electoral Review continues. At an ERRN seminar on 27 February 2014 the Chair of the Panel, Petro Georgiou, announced that the Panel has submitted its Stage One report to the Minister for Local Government, Jeanette Powell, for consideration and a future government response. The Stage One report addresses the
The Parliament of Victoria’s Electoral Matters Committee also tabled its final report to Parliament on 27 March 2014 for its inquiry into the future of Victoria’s electoral administration. The report contains several findings and recommendations on a diverse range of topics related to electoral administration, including early voting, the system of election used for Victoria’s Legislative Assembly, the Victorian state tally room and how to promote and modernise the Parliament.

Queensland

A by-election for the Queensland state District of Redcliffe was held on 22 February 2014, brought about by the resignation of former, embattled MP Scott Driscoll. The resignation was noteworthy in of itself as it came following a unique recommendation from the Queensland Parliament’s ethics committee that Driscoll resign following his failure to declare 14 separate commercial interests to the Parliament. Australian Labor Party candidate Yvette D’Ath won the election with a swing of nearly 17 percent against the Liberal National Party. Significantly, over 35 percent of voters voted early either by post or in person, reemphasising the continuing popularity of flexible voting methods across Australia.

The Newman government’s proposed reforms to Queensland’s Electoral Act have continued to generate commentary and political debate. As reported in the ERRN’s December 2013 newsletter, the Electoral Reform Amendment Bill 2013 would remove donation and expenditure caps and increase the disclosure threshold from $1,000 to $12,400, with disclosure occurring on a monthly basis. Public electoral funding would no longer be a reimbursement of expenditure, and the qualifying threshold would be raised to ten percent of the vote. In addition, the bill provides for the introduction of proof of address at attendance voting centres, and that all how-to-vote cards be registered with the Electoral Commission of Queensland and be published online. Writing in response to the amendments, Jennifer Rayner has suggested the proposals would spark an ‘arms race’ in political expenditure; Graeme Orr has called the changes retrograde and a ‘backwards step for the key goals of political integrity and equality’. Others have suggested the proposals could curtail the ability of minor parties to run for parliament.

South Australia

The South Australian State election was held on 15 March with the Labor government forming a minority government with the support of Independent Geoff Brock. While the Australian Labor Party recorded swings against it in many seats the party retained 23 seats, and the Liberal Party 22 seats. The election result has also resulted in calls for reform of South Australia’s electoral system, focusing in particular on the electoral ‘fairness clause’ in South Australia’s Constitution.

As reported in the ERRN’s December 2013 newsletter, in the lead up to the election the Parliament of South Australia was considering changes to the Legislative Council ballot structure, but the Electoral Commission of South Australia had said that they would be unable to implement changes to the count in time for the March 2014 state election. As a result the various private members’ bills aimed at changing the Upper House ballot structure to some form of optional preferential vote were did not proceed. The Attorney-General proposed alternative solutions. The Electoral (Legislative Council Voting Reform) Amendment Bill would have amended the Electoral Act 1985 to change the Legislative Council ballot structure to a Sainte-Lague count which would not utilise preferences at all. At the same time, the Electoral (Legislative Council Voting) Amendment Bill proposed changes to administrative arrangements (raising nomination fees and requiring a larger number of electors’ signatures for any nomination, and ensuring that independents are placed to the far right of the Legislative Council ballot paper). Only the administrative changes were passed by both houses, and the new procedures were in place in time for nominations for the March 2014 state election. The amendments increase the number of electors’ signatures required by a single candidate (not party-endorsed) in support of their nomination application, from two to 20 for a House of Assembly District and from two to 250 for the Legislative Council. Amendments to the Electoral Regulations 2009 (SA) have also increased the nomination fee for any candidate, from $450 to $3,000.

The Electoral (Legislative Council Voting) Amendment Act reduces the number of descriptive words which could be printed against a Legislative Council candidate’s name on the ballot paper, from five words to three. It also ensures that
candidates endorsed by parties are shown to the left of the Legislative Council ballot paper, then those endorsed by groups, and finally candidates not endorsed by parties or groups are shown at the far right of the Legislative Council ballot paper. While candidate numbers have been increasing at each election, these changes reduced the number of candidates contesting the 47 House of Assembly Districts from 253 in 2010 to 204, and the number of candidates contesting the single Legislative Council District from 74 in 2010 to 63 in 2014.

Western Australia

The ERRN’s WA Chapter was formed in late 2013. The convenors are Justin Harbord, Western Australian Electoral Commission, Professor Alan Fenna, Curtin University and Associate Professor Sarah Murray, University of Western Australia.

Tasmania

The Tasmanian state election was also held on 15 March and resulted in the first change of state government in Tasmania in 16 years, with the Liberal Party and new Premier Will Hodgman defeating the Giddings Labor government. The Liberal Party won 15 seats, the Australian Labor Party seven and the Tasmanian Greens, despite hopes of becoming the Tasmanian opposition, three seats; despite a prominent campaign the Palmer United Party did not win a seat. Under Tasmania’s Hare-Clark system, in which five members are elected per seat, the Liberals increased their number from two to three in the state’s north, the same electorates which swung heavily against the Australian Labor Party at the 2013 federal election.

Northern Territory

A by-election for the District of Blain was triggered by the resignation of Terry Mills, the former Northern Territory Chief Minister. The by-election is scheduled for 12 April 2014.

Timetable of Upcoming Australian Elections

<table>
<thead>
<tr>
<th>Event</th>
<th>Date</th>
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<tbody>
<tr>
<td>Blain by-election, Northern Territory</td>
<td>April 2014</td>
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<tr>
<td>Victorian state election</td>
<td>November 2014</td>
</tr>
<tr>
<td>South Australian local government elections</td>
<td>7 November 2014</td>
</tr>
<tr>
<td>New South Wales state election</td>
<td>March 2015</td>
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<tr>
<td>Queensland state election</td>
<td>no later than June 2015</td>
</tr>
<tr>
<td>Australian federal election</td>
<td>mid-2016</td>
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Forthcoming Events (2014)

11 April 2014: ERRN (ACT) & ANU College of Law Workshop: ‘A New Senate Voting System?’
Speakers: Emeritus Professor John Warhurst, Dr Ryan Goss, Mr Phillip Green, Mr Antony Green, Mr Michael Maley and Mr Andrew Moyes

Speakers: Dr Dirk Tomsa, Dr Vannessa Hearman, Professor Thomas Reuter and Dr Dave McRae

Indonesia voted on 9 April 2014, with a total of 19,699 legislative seats to be contested across the archipelago, from the national to local levels. This will be one of the most significant elections in Indonesian history. At the national level, the DPR (national legislature) is now arguably the single most powerful political entity in the country, and provincial and district legislatures are major centres of power in the regions. After the decade of Yudhoyono’s administration, Indonesia faces an uncertain future. The parties who win the largest number of seats in this election will play a key role in deciding whether to consolidate the gains of Reformasi or follow a new path altogether. This election also signals generational change in Indonesian politics. More Indonesians will vote for the first time than ever before, and more of them will be middle class. This began to influence policy some years ago, but in this election their preferences will dominate the outcome. The results of this election will also determine which parties can nominate candidates for the July presidential and vice-presidential elections. The popular vote on 9 April will therefore give strong indications as to who is likely to be sworn in as Indonesia’s 8th president in October.

Speaker: Professor Victoria Farrar-Myers

Campaign finance regulations in the United States reflect an ongoing tension among competing fundamental interests in the American political system. In particular, balancing freedom of speech, on one hand, with preventing corruption or the appearance of corruption, on the other hand, leads to controversial decisions with unintended consequences. The causes, implications, and issues that arise from this system will be explored, including considering what could be learned about the American political system by contrasting it with the Australian campaign finance system and regulatory regime and the challenges facing it.

29 April 2014: Melbourne Law School. Centre for Employment and Labour Relations Law, the Centre for Comparative Constitutional Studies & ERRN (VIC) Seminar: Unions NSW v New South Wales and its Implications for Campaign Finance Regulation
Speakers: ERRN Director, Joo-Cheong Tham and Professor Adrienne Stone

The speakers will discuss the case and the implications of the ruling for the regulation of Australian political finance.

1 May 2014: Unions NSW v New South Wales (ERRN (NSW) held in conjunction with the Australian Association of Constitutional Law).
Speakers: Joo-Cheong Tham, Adrienne Stone and Anika Gauja

Speaker: Antony Green, ABC Election Analyst

2 July 2014: Centre for Indonesian Law, Islam and Society & ERRN (VIC) Seminar: Indonesian Presidential Elections
**July 2014:** One-day workshop on Citizens, Parties and Electoral Contexts, University of Montreal.

The Electoral Integrity Project is holding a one-day workshop on Citizens, Parties and Electoral Contexts held on Friday 18th July 2014 at the University of Montreal. More than thirty papers will be presented and there are also breakout discussion groups.

**17 and 18 July 2014:** Australia-New Zealand Workshop on Campaign Management and Political Marketing, Graduate School of Government, the University of Sydney.

The workshop will bring together academics and practitioners for an in-depth discussion of current and emerging trends in campaign management and political marketing, and generate new networks and opportunities for further trans-Tasman and international research. The workshop will have a particular emphasis on the nexus between research and practice, and is open to academics, party representatives, political consultants, research students and civil society campaigners.

**29 September – 1 October 2014:** The Australian Political Science Association annual conference, hosted by the University of Sydney.

The annual conference of the Australian Political Studies Association will meet at the University of Sydney, 29 September – 1 October 2014. The main conference theme is ‘Elections, Democracy and Autocracy’.
ERRN Event Reports

Audio recordings of ERRN events can be found on individual event pages.

Victoria

Chair: Ken Coghill, Associate Professor, Monash University

In August 2013, the Minister for Local Government appointed the Local Government Electoral Review Panel, chaired by Petro Georgiou AO, to review the local government electoral system in Victoria. The review provides the opportunity to re-examine the impact of many decades of incremental reform and recommend further improvements to the conduct of local government elections in Victoria. Mr Georgiou discussed the panel’s broad observations about Victoria’s local government electoral system, the themes addressed by the panel’s Stage One report which is currently being considered by the Victorian Government, and the panel’s general thoughts about the Stage Two report.

Western Australia

6 March 2013: ERRN Seminar – ‘Elections and Money: Legislative Regulation of Political Donations – The High Court Decision’.
Chair: Justin Harbord (Western Australian Electoral Commission)

In this seminar, Grant Donaldson, SC, Solicitor-General for Western Australia and Dr Martin Drum, Senior Lecturer in Politics, University of Notre Dame, discussed legislative regulation of political donations in Australia, reflecting on the High Court’s decision in the Unions NSW case.

Photos from the ERRN (VIC) Seminar presented by Petro Georgiou AO on the 27 February 2014.
Recent Publications

The Parliament of Victoria’s Electoral Matters Committee tabled its final report on 27 March 2014 for its inquiry into the future of Victoria’s electoral administration.

In February 2014 the Victorian Electoral Commission tabled its report on the 2013 Lyndhurst District by-election, held on 27 April 2013.

In the *Australian Journal of Political Science*, William Cross and Anika Gauja develop a typology for understanding the diversity of preselection mechanisms in Australia’s major parties based on degrees of influence between the central and local components of the party organisation. In the same journal, Malcolm Anderson and ERRN Director Joo-Cheong Tham examine the evidence for a cost explosion over the course of three NSW elections (1999–2007).

Rodney Smith has prepared a publication for the New South Wales Electoral Commission on multiple voting, and voter ID at New South Wales state elections.

The Commonwealth Joint Standing Committee on Electoral Matters has started to publish submissions on its website for its inquiry into the conduct of the 2013 federal election. At the time of writing there were over 100 submissions available.

In *Parliamentary Affairs*, Nathaniel Reader (Swinburne University / ERRN Newsletter Editor) has written about the Parliament of Victoria’s Electoral Matters Committee and the contribution of Australia’s three parliamentary electoral matters committees to Australian electoral reform.
ERRN WORKING PAPER SERIES

In support of the Electoral Regulation Research Network's aim of fostering exchange and discussion amongst academics, electoral commissions and other interested groups on research regulating to electoral regulation, the ERRN together with the Democratic Audit of Australia regularly publishes a series of Working Papers. These Working Papers are intended to help foster discussion about all aspects of electoral regulation.

Working Paper 23

The Right to Vote and the Bill of Rights Debate
Emeritus Professor Colin Hughes, University of Queensland

Abstract: When the National Human Rights Consultation Committee, usually known as the Brennan Committee after its chairman, Father Frank Brennan, was appointed to look at the possibility of protecting and promoting human rights, it revived what had been a pervasive theme in earlier efforts to discourage development of a Bill of Rights at federal or state level: if you want to protect any rights which might be deemed appropriate or advisable to protect, elected members of Parliament are to be preferred to non-elected judges. Eventually the wider question was returned to the back-burner where it normally resides. This paper will deal not with the broader issue of whether there should be some additional protection of rights in Australia, but only with what seems to be a 3-dollar bill some players frequently try to slip into the pot of any debate about bills of rights.

Working Paper 24

The Application of Strict Liability to NSW Funding and Disclosure Offences
Alison Byrne, Principal Legal Officer, New South Wales Electoral Commission

Abstract: Political funding and disclosure are fundamental to the democratic process. Breaches of funding and disclosure laws strike at the heart of the political system. The integrity of the system is dependent upon legislation that promotes compliance, and empowers the regulator to enforce the law and prosecute non-compliance. This paper discusses issues facing the Election Funding Authority of NSW in its enforcement of funding and disclosure laws. The standard of criminal liability required to be proved under the Election Funding, Expenditure and Disclosures Act 1981 (NSW) is such that breaches are almost impossible to prove. This paper proposes amendment to the legislation to reduce the standard of liability attaching to (most) funding and disclosure offences to strict liability.

Working Paper 25

Victoria's Local Government Electoral Review: Report from the Chair, Petro Georgiou AO

In this paper Mr Georgiou discusses the panel's broad observations about Victoria's local government electoral system, the themes addressed by the panel's Stage One report which is currently being considered by the Victorian Government, and the panel's general thoughts about the Stage Two report.
ERRN Case Notes

Unions New South Wales v State of New South Wales (2013) ALJR 227 (High Court, 18 December 2013)

In this case the High Court unanimously held that sections 96D and 95G(6) of the Election Funding, Expenditure and Disclosures Act 1981 (NSW) were invalid for breaching the implied freedom of political communication.

The court delivered two separate judgments: a joint judgment by French CJ, Hayne, Crennan, Kiefel and Bell JJ, and an individual judgment by Keane J.

Section 96D provided that it was unlawful for anyone other than electors on the electoral roll the ability to make political donations, which effectively prohibited persons and entities such as corporations, unions and non-citizens from making political donations. Section 95G(6) aggregated the 'electoral communication expenditures' of political parties and affiliated organisations to introduce a cap on the political spending of each political party.

The Court applied the two-step test in the case of Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 of considering whether:

- the law effectively burdened political the freedom of political communication in its terms, operation or effect; and
- the law is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the prescribed system of representative government.

Section 96D

The joint judgment of French CJ, Hayne, Crennan, Kiefel and Bell JJ held that section 96D burdened the freedom of political communication by restricting the source of funds available to political parties and candidates to meet the costs of political communication. Although the scheme provided public funding to offset the loss of political funding, this would not completely offset the loss and the party or candidate would have to fund the gap.

The joint judgment adopted the methodology in Monis v The Queen (2013) 87 ALJR 340 to determine the second limb of Lange, that is, the purpose and scope of the statutory provision has to be identified and compared with the purpose of the legislation. The restrictions in the provision must be seen to be connected to or advance the statutory purpose in order to be legitimate. If there is a legitimate purpose, then a proportionality analysis will be necessary to determine whether the provisions are reasonably appropriate to achieve their purpose.

The burden on political communication imposed by section 96D was not justified as the provisions did not have any connection with the statutory purpose of reducing corruption. This was because the prohibition on political donations from certain persons and entities was unconnected to and did not advance the statutory purpose of reducing the risk of undue, corrupt or hidden influences over the government. Thus, the High Court held that the purpose of section 96D's wide, but incomplete, prohibition as ‘inexplicable’. This meant that it was not necessary to undertake the proportionality test contemplated by the second limb of Lange.

Their Honours noted that there are many in the community who are not electors but are ‘governed and affected by the decisions of government’ that have a legitimate interest in governmental actions and policies. These groups may wish to directly or indirectly support a party or candidate who they consider best represents their interests.

The majority found that the burden on the freedom was not justified; thus section 96D was invalid.

Keane J held that section 96D burdened political communication as it limited the funds available to political campaigns, and these campaigns were an essential aspect of political communication. Noting that the second limb of the proportionality test in Lange was beset with difficulties, Keane J advanced an alternative test where a State law was impugned: whether the law can reasonably be said to be compatible with the free flow of political communication within the federation. The provision proscribed donations from certain sources but not others, which distorted the flow of political communication. Keane J stated that as no one had advanced this alternative test, the second limb of Lange had to be applied. Section 96D failed the second limb of Lange as the prohibition in section 96D was broad and not calibrated to give effect to the rationale of anti-corruption in the legislation. Thus, Keane J noted that whichever test was adopted, the result would be that section 96D was invalid.
Section 95G(6)

The joint majority found that section 85G(6) imposed a burden on the freedom of political communication by restricting the amount that a political party could spend on political campaigning in a relevant period.

Their Honours also found the provision did not have a connection with the anti-corruption purposes identified in the statute. This meant that section 95G(6) lacked a legitimate purpose that conformed with the Act. Again it was not necessary to undertake a proportionality test and the provision was invalid.

Keane J held that sections 95G(6) and 95G(7) burdened political communication as it had the practical effect of reducing the total flow of political communication that would emanate from a party. The provisions distorted the free flow of political communication by treating certain sources of communication differently, where third party campaigners were not subject to the provisions and may promulgate the same political messages, while political communication of party affiliates are disadvantaged. Keane J found that this distortion was not appropriate and adapted to enhance or protect the free flow of political communication and the provisions were thus invalid.

**Queensland Police Union of Employees v Queensland** (High Court)

As outlined in the last newsletter, three unions, the Queensland Police Union of Employees, Queensland Nurses’ Union of Employees and the Queensland Teachers Union of Employees, have brought proceedings in the High Court challenging section 553F(2) of the *Industrial Relations Act 1999* (Qld).

Section 553F(2) provides that an organisation may only spend more than $10,000 for a political purpose in a financial year if the spending is authorised by a self-funded ballot by members. The applicants are seeking a declaration that section 553F(2) is invalid on the ground that it infringes the implied freedom of political communication.

The case is still ongoing.

**Australian Electoral Commission v Johnston** [2014] HCA 5 (High Court, 18 February 2014)

At the Commonwealth federal election on 7 September 2013, a half Senate election was held for 6 senators for Western Australia. Three Liberals and one Labor candidate were elected.

It was initially announced that Zhenya Wang (Palmer United Party) and Louise Pratt (ALP) had won the fifth and sixth places. The election for these positions was, however, very close. A re-count was directed, but 1,370 ballot papers were lost. On the re-count, the result was different from the earlier count, with the fifth and sixth places won by Wayne Dropulich (Australian Sports Party) and Scott Ludlam (Greens).

The Australian Electoral Commission considered that there was a real risk that the result of the election was affected by the loss of the ballot papers and petitioned the High Court sitting as the Court of Disputed Returns, seeking a declaration that section 553F(2) was invalid on the ground that it infringes the implied freedom of political communication.

The case is still ongoing.
extended to anything that denied the effective expression of a voter’s choice. Those voters whose ballot papers were lost had been “prevented from voting” within the meaning of section 365. Admitting evidence of the records of the ballot papers prior to the re-count would be evidence of the way those voters intended to vote at the election. Accordingly, that evidence could not be admitted under section 365.

Hayne J held it was probable that due to the loss of the ballot papers, the result of the election was likely to be affected as required by section 362(3): “the recount yielded different tallies of votes and different decisions about rejection or acceptance of ballot papers from those reached in the original and fresh scrutinies, in numbers which cannot be dismissed as irrelevant or trivial”.

Hayne J held that ‘[w]ithout evidence of the voting intentions recorded in the lost ballot papers, the conclusion that the result which was declared was likely affected by the loss of the ballot papers is inevitable’.

It was not possible to determine who was duly elected because ballot papers had been lost. The only proper course was to declare the election void. His Honour noted that the Commonwealth Electoral Act does not permit a reconstruction of the result of the votes based on a combination of the results from the original scrutiny of votes and the results from the re-count (as submitted by Mr Wang and Mr Mead).

One of the main sources of the differences between the original scrutinies and re-count was the assessment of the formality of ballot papers. His Honour noted that ‘Scrutiny of the ballot papers is much more than a mechanical task. Judgments must be made about particular ballot papers’. Amendments to the Commonwealth Electoral Act to reduce informality would assist in preventing issues of the sort canvassed in this case in the future.

Butler v Mulholland (No 2) [2013] VSC 662 (Victorian Supreme Court, 2 December 2013)

This case is the latest salvo in the wrangle for control of the Victorian branch of the Democratic Labour Party (DLP) by two warring factions, described in the judgment as the Butler faction and the Mulholland faction.

In earlier proceedings (noted in the December 2012 ERRN newsletter) the Victorian Court of Appeal held that an earlier election at which Mr Mulholland was defeated in the election for the position of secretary of the Victorian Branch of the DLP was void.

In the present proceedings, the plaintiffs sought a declaration as to the proper constitution of the State Executive and sought injunctions restraining Mr Mulholland from purporting to act on behalf of the DLP. The key question for resolution was to determine who were the validly appointed members of the Victorian State Executive of the DLP.

One question for determination was whether the dispute was justiciable by the court. Although the court are reluctant to interfere in the internal affairs of voluntary associations (see also Mylne v RSL (Qld Branch) Maroochydore Sub Branch Inc [2013] QSC 179, noted in the December 2013 ERRN newsletter), Robson J noted that various cases have recognised the importance of political parties in public affairs and so the proper administration of political parties extends beyond the interests of the party members and into the broader public welfare.

The secretary of a political party has important responsibilities under the Victorian Electoral Act 2002, including being responsible for carrying out the administration and the correspondence of the party and signing applications for registration of the party. The identity of the secretary and his authority to act on behalf of the political party are important issues for the proper working of the Electoral Act. Further, the Secretary can only act with the authority given under the DLP’s Constitution and in accordance with the instructions of the State Executive, and so the membership of the State Executive was also an important issue, which it was in the public interest to resolve.

For these reasons, Robson J held that the determination of who is the Secretary of the DLP and who constitutes the State Executive were justiciable issues.

Robson J made a declaration as to the constitution of the DLP State Executive, which included 2 persons from the Butler faction, 3 from the Mulholland faction and one casual vacancy. While this declaration resolved the present proceedings, it was unlikely to resolve the ongoing and protracted dispute between the factions. For the DLP to continue in Victoria under its current Constitution, Robson J noted, ‘it will be necessary for one of more of the current office-bearers in one faction to meet with the office-bearers in the other faction’.
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Postal Address
Electoral Regulation Research Network
Melbourne Law School
The University of Melbourne
VIC 3010 Australia

www.law.unimelb.edu.au/errn