

Electoral Regulation Research Network Newsletter

April 2017

ERRN
Electoral Regulation
Research Network



MELBOURNE LAW SCHOOL



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Director's Message



'Populism' has clearly become a dirty word after Brexit and the election of Donald Trump as President of the United States. Commenting on the government's withdrawal of China-Australia extradition treaty from ratification, Mark Kenny, *The Age's* national affairs editors [said](#):

The trouble with populism is that it invites more of the same. Sober leadership becomes unfashionable, even dangerous. Principles are sent on vacation. Courage is deported.

If these are the only meanings of 'populism' then there is only occasion for deprecation. But perhaps, we can gain better insight by attending to other meanings of 'populism'. The Cambridge English Dictionary, for instance, [defines](#) 'populism' as:

political ideas and activities that are intended to get the support of ordinary people by giving them what they want.

To be granted, 'ordinary people' can often be a site of myths and fictions. But if one meaning of 'populism' is that found in the Cambridge English Dictionary, we should not be too quick to deride 'populism'. After all, isn't responsiveness to the wishes and concerns of citizens an essential element of democracy?

This brings us to a significant critique of 'populism' – the system of government is not working in the interests of 'ordinary people' because it has been captured by the elite. This charge might or might not be incorrect. But surely it should not be dismissed out of hand. Indeed, isn't the risk of elite capture of the State inherent in any system of representative government? Any such system institutionalizes a distance between those who govern and those who are governed – a system of representative government is clearly not one where there is government by the people. Yet, it is supposed to be government for the people and of the people - elected representatives are, as their title suggests, to represent the interests of the citizenry. Crucial here is of course elections as a mechanism of democratic accountability.

This brings us to a key thrust of the 'populist' critique – that elections are not effective in providing sufficient democratic accountability. This criticism, its validity or otherwise, clearly falls within the purview of the Electoral Regulation Research Network. And in the year to come, various activities of the Network will address this element of the 'populist' critique, including seminars on the regulation of lobbying; the challenges of money politics. The Tasmanian chapter will be organizing a panel on political funding, which will involve the discussion of whether political money is being used by particular interests to unduly influence the governmental process. A related topic will be the subject of a New South Wales ERRN chapter, parliamentary entitlements (to what extent are they justified and to what extent they constitute an abuse of incumbency). And in Victoria, there will be a panel discussion on the implications of Brexit, the Dutch and French elections for Australia. In these modest ways, the Network will hopefully contribute to a better understanding of 'populism' in Australia.

Associate Professor Joo-Cheong Tham, Melbourne Law School

COMMONWEALTH



Politicians' allowances and expenses

In January 2017 Susan Ley, then Health Minister, resigned from her ministerial portfolio following allegations that she used misused her parliamentary travel entitlements. [Ms Ley's resignation followed revelations she purchased an \\$800,000 investment property on the Gold Coast while on a taxpayer funded study trip.](#) Further examination of Ms Ley's travel showed it was one of several taxpayer-funded trips the minister made to the Queensland holiday capital. [Her use of private charter flights on capital city routes, at a cost of more than \\$13,000, also raised questions, with Ms Ley later explaining the private flights were necessary because of last minute diary conflicts.](#) In March 2017, Ley released an independent report conducted by the Department of Finance in response to investigation into her travel expenses; [it found that she breached parliamentary rules once in three and half years. Ley also noted that she has repaid \\$5,232, including a penalty for an incorrect claim, and that "media reporting of the issue was misleading and did not accurately report the full situation".](#)

Independent Parliamentary Expenses Authority Bill 2017

In response to this matter – and following ongoing concern about parliamentary entitlements sparked by former House of Representatives Speaker Bronwyn Bishop's use of a helicopter to attend a function outside Geelong in 2015 – [Prime Minister Turnbull announced in January 2017 that the Liberal government would introduce a new parliamentary entitlements oversight body modelled on the UK's Independent Parliamentary Standards Authority,](#)

[which was created in 2009 following an expenses scandal.](#) In February 2017 the parliamentary debated the Independent Parliamentary Expenses Authority Bill 2017. The Bill would establish the Independent Parliamentary Expenses Authority as an independent statutory authority with responsibilities relating to work expenses of parliamentarians and their staff, ensuring that taxpayers' funds are spent appropriately and in compliance with the rules. [The Bill "does not change the work expenses framework, but rather establishes independent oversight and allows guidance to be provided to parliamentarians and their staff in relation to their work expenses".](#)

The Bill provides that the Authority is constituted by a Chair and members, who meet one of the following criteria:

- the President of the Remuneration Tribunal
- a former judicial officer
- a former member of parliament
- a person with substantial experience or knowledge of, and significant standing, in auditing, and
- may also include a person with substantial experience or knowledge of, and significant standing, in public administration or corporate governance.

All appointments will be made by the Governor-General.

In March 2017 Prime Minister Turnbull announced that until the Authority commences following the passage of the Bill, an interim advisory body will be established by executive order to ["administer travel expenses and allowances, and provide advice and support to parliamentarians on the current parliamentary work expenses system in respect of travel expenses and allowances".](#)

The interim body will be governed by a board which will transition to the Authority when the new body is established.

Federal ICAC

These discussions have also presaged comments about the need for a federal independent anti-corruption body. The Labor Party, and [Opposition Leader Bill Shorten, have called for debate about parliamentary entitlements to “to go beyond the independent parliamentary expenses system proposed by Malcolm Turnbull to also include an open and honest discussion about whether Australia should have a federal Independent Commission Against Corruption \(ICAC\)”](#). ERRN readers may recall that in the 44th Parliament, former Palmer United Party senator Dio Wang [“launched a short-lived inquiry into the establishment of a national integrity commission. The inquiry received written submissions and held two public inquiries in April, but lapsed before a final report could be handed down and received little media attention”](#).

Political donations

In February 2017 Opposition Leader Bill Shorten introduced the [Commonwealth Electoral Amendment \(Donation Reform and Transparency\) Bill 2017](#) into the House.

The Bill amends the *Commonwealth Electoral Act 1918* to: reduce the disclosure threshold to \$1000; ensure that, for the purposes of the disclosure threshold and the disclosure of gifts, related political parties are treated as one entity; prohibit the receipt of a gift of foreign property and all anonymous gifts by registered political parties, candidates and members of a Senate group; provide that public funding of election campaigning is limited to declared expenditure incurred by the eligible political party, candidate or Senate group, or the sum payable calculated on the number of first preference votes received where they have satisfied the four per cent threshold, whichever is the lesser; provide for the recovery of gifts of foreign property, anonymous gifts and undisclosed gifts; introduce new offences and penalties; and increase penalties for existing offences.

Foreign donations

In March 2017 the Commonwealth Joint Standing Committee released an interim report on political donations and disclosure. Traditionally, the JSCEM's terms of reference for election inquiries allow the

committee to inquire into any aspect of the previous election. This inquiry is different because the Terms of Reference provided by the Special Minister of State include a range of specific, additional topics, including: authorisation of voter communication, the donations and disclosure regime, and regulation of third parties.

The committee released its interim report in March following a request for additional time, which was approved by the Special Minister of State in March 2017. While the majority committee made five recommendations, arguably the ‘headline’ recommendation was a [recommendation prohibiting donations from foreign citizens and foreign entities to Australian registered political parties, associated entities and third parties](#). This ban would not apply to dual Australian citizens either in Australia or overseas, or to non-Australian permanent residents in Australia. The committee also recommended the JSCEM further examine the requirement to extend a foreign donations ban to all other political actors. The key issue, the committee said, [“to be considered is how to prevent foreign funds being channelled through organisations engaging in political activities and who are not subject to regulation under the Commonwealth Electoral Act 1918 \(Cwth\)”](#).

[The interim report has featured three dissenting minority reports](#). Predictably, Labor, while supporting the overall ban on foreign donations, did not want the ban extended to third parties and associated entities, arguing that doing so might have unintended consequences for Australia's electoral system. In a separate minority report, the Greens also called for a full overhaul of Australia's political finance and disclosure system. In another minority report, Senator David Leyonhjelm argued that [“prohibition of foreign donations is a solution in search of a problem. There is no reason to believe regulation will achieve anything of benefit to Australian democracy, while there are grounds to believe it will have unintended consequences and harm democracy”](#).

The majority committee also recommended stricter penalties in relation to offences in the *Commonwealth Electoral Act 1918*, and stricter penalties for non-compliance.

Other JSCEM work

[Authorisation of electoral material](#)

[In December 2016 the Commonwealth JSCEM also tabled its first interim report for the inquiry into the 2016 federal election on the authorisation of electoral material.](#) The report specifically addressed the application of provisions requiring authorisation of electoral material to all forms of communication to voters in line with 1(a) of the terms of reference.

The committee broadly agreed that current regulations do not cover new forms of communication, such as social media. Accordingly, the committee formed the view [“that the current requirements for authorisation for print and broadcast do not appropriately cover many new forms of communications of electoral materials. In seeking to establish a level playing field for all participants, where the source of electoral advertising is always available to electors, the Committee recognises the need to implement regulations that meet that objective without compromising the purpose of the advertising”.](#)

The committee made six recommendations. Recommendation One called for the *Commonwealth Electoral Act 1918* (Cwth) to be amended to [“specifically and explicitly address the matter of authorisation of electoral materials to ensure that: parties and other participants should be held to account and be responsible for their political statements; those who authorise electoral materials should be identifiable and traceable for enforcement and other purposes; and there is consistency in the application of the rules and requirements to all electoral material”.](#) Recommendation Two called for the *Commonwealth Electoral Act 1918* (Cwth) be amended to include a separate part/division addressing authorisations, and that the requirements should be clear, concise and easy to navigate.

Electronic voting

Following calls for electronic voting at federal elections following the 2016 federal election, and the expansion of iVote beyond NSW at the 2017 Western Australian state election, the Commonwealth JSCEM’s inquiry into the 2016 federal election is also considering evidence about electronic voting models and whether the remote (internet) voting should be used at future federal elections. Given the JSCEM’s two interim inquiries, it is likely that the JSCEM will table its full report on the 2016 federal election in the later part of 2017.

Calls for four-year federal parliamentary terms

Reports suggest a Liberal Member of the House of Representatives has prepared a draft Bill introducing fixed, four-year terms for the House of Representatives. As ERRN readers will know, this is not the first time fixed terms for the federal Parliament have been considered; this issue was included in a referendum in 1988 but defeated with only 32 percent of voters support – the failure of the four questions in the referendum was generally attributed to the poor wording of the questions.

[David Coleman, Members for Banks Division, who sponsored the legislation, argues there are several good reasons for four-year terms, including that governments would “get more done”, economic activity would increase and four-year terms would mean the federal electoral cycle was temporally consistent with that of the states, most of which have fixed four-year terms for Lower House elections.](#)

One Nation

In April 2017 Pauline Hanson’s One Nation party was referred to the Australian Electoral Commission [for investigation in relation to alleged breaches of election disclosure laws for failing to declare a private plane allegedly donated by a Victorian businessman.](#) These allegations were aired on the ABC’s *Four Corners* on 3 April 2017. The AEC has said that all information in the public domain relating to this incident is [“being reviewed in the context of the disclosure provisions of the Commonwealth Electoral Act 1918”.](#) [Activist group Get Up! has also written to the AEC to request this matter be investigated.](#)

Senate elections

Several matters relating to elections to the Senate of former Senator Bob Day, and former Senator Rod Culleton, have been cleared up since the October 2016 ERRN newsletter. These matters are also covered in further detail in the case notes section of this newsletter.

Bob Day

On 4 April 2017 the High Court, sitting as the Court of Disputed Returns, found former Family First Senator Bob Day had indirectly benefited from the government’s lease arrangement on his Adelaide electorate office, in breach of s 44 of the

Constitution. A High Court judge will now determine how a special count will work, but it is expected the South Australian senate seat will go to the second person on Family First's ticket, lawyer Lucy Gichuhi.

As covered in the ERRN case notes section, Bob Day was first elected at the 2013 federal election as a senator for South Australia as a candidate of the Family First Party. He commenced his term on 1 July 2014. He was re-elected at 2016 federal election held on 2 July 2016 and resigned (or purported to resign) from his position on 1 November 2016. It was alleged that Day was disqualified from sitting as a senator by s 44(v) of the Constitution because he had a pecuniary interest in an agreement with the federal government concerning the lease of his electoral office.

Rod Culleton

On 3 February 2017, the High Court of Australia sitting as the Court of Disputed Returns determined that Mr Rodney Culleton was disqualified from being elected at the 2016 Senate election for Western Australia due to the operation of s 44(ii) of the Constitution. The Court ordered that the vacancy created by Mr Culleton's disqualification should be filled by a special count of the votes cast at the 2016 federal election with directions necessary to give effect to that special count to be made by a single Justice. The High Court determined Peter Georgiou, Culleton's brother in law, elected to the Senate, filling the vacancy made by disqualification.

[The AEC's website discusses the procedures for the recount.](#)

Other legal matters related to Culleton, including his bankruptcy, are discussed in the case notes section.



New premier

In January 2017 Mike Baird resigned as Premier of NSW and his resignation from Parliament as the Member for Manly District. Addressing the media, Baird said ["the personal cost of politics had been great, and he struggled not being able to spend time with family members who were experiencing ill health"](#). Since his resignation Baird has accepted a role as Chief Customer Officer in charge of corporate and institutional banking at National Australia Bank.

Following Baird's resignation the NSW Liberal Party room elected Gladys Berejiklian as the 45th Premier of NSW. She has been a member of the NSW Parliament since 2003, representing Willoughby District. Berejiklian is NSW's second female Premier after Kristina Keneally (2009-2011).

By-elections

There have been six NSW state by-elections since the October 2016 ERRN newsletter.

[On 12 November 2016 the NSW Electoral Commission conducted by-elections for Canterbury, Orange and Wollongong Districts, following former Member Noreen Hay's resignation \(Wollongong\) and the resignation of Linda Burney \(Canterbury\) and Andrew Gee \(Orange\) to contest federal seats at the 2016 federal election.](#)

Canterbury District was held by Labor's Sophie Cotsis, and Wollongong by Labor's Paul Scully. Orange was somewhat sensationally won by the Shooters, Fishers and Farmers Party's Phil Donato with a 22 percent swing against the National Party. Donato is the first member of the Shooters, Fishers and Farmers Party to sit in the NSW Legislative Assembly, joining Legislative Council members Robert Borsak and Robert Brown.

On 8 April 2017 the NSW Electoral Commission conducted by-elections for Gosford, Manly and North Shore Districts, following the resignations of Kathy Smith, Mike Baird and Jillian Skinner respectively. Despite significant swings against the party, the Liberals retained North Shore and Manly. Labor retained Gosford.

Independent Commission Against Corruption

NSW ICAC's ongoing investigations against the former NSW Labor government have resulted in two recent criminal prosecutions.

[In December 2016 former Labor minister Eddie Obeid was sentenced to five years in prison with a non parole period of three years for misconduct in public office.](#) As covered in previous ERRN newsletters, in November 2014 the ICAC announced that following advice from the Director of Public Prosecutions, Obeid would be prosecuted for the offence of misconduct in public office for corruptly lobbying his former colleagues to gain lucrative concessions over cafe leases at Circular Quay that were secretly owned by his family. In February 2016 a criminal trial against Obeid commenced in the NSW Supreme Court; however, ten days into the trial the jury was discharged. Obeid was found guilty of misconduct in public office in a subsequent trial.

In addition, in March 2016, former Labor minister [Ian MacDonald was also found guilty of misconduct in public office for issuing a mining license to a company run by former head of the Construction, Forestry, Mining and Energy Union, John Maitland.](#) Maitland escaped jail time in the first prosecution relating to ICAC, but was given a suspended sentence and \$3,000 fine for providing misleading evidence to ICAC during its public hearings in May 2013.

Alleged electoral fraud in Wollongong

[A former staffer to former Wollongong MP Noreen Hay is contesting charges of electoral fraud in Wollongong Local Court in March 2017. As reported in the Illawarra Mercury, Susan Maree Greenhalgh "allegedly knowingly using forged electoral enrolment application forms in the lead-up to the seat's November 2014 pre-selection vote. She faces five charges relating to allegedly fraudulent forms which placed five voters at addresses in Wollongong, Coniston and Port Kembla".](#)

Alleged electoral enrolment fraud – Salim Mehajer

[Salim Mehajer allegedly lodged false enrolment documents with the Australian Electoral Commission in order to secure his election to Auburn Council in 2012. Mehajer and his sister, Fatima Mehajer, are](#)

[charged with tending more than 70 false enrolment records with the AEC. The trial continues.](#)

Political donations and NSW Liberal Party

The NSW Liberal Party is currently in dispute with the NSW Electoral Commission over the source of payments made by candidates to their re-election campaigns at the 2015 NSW state election.

NSW legislation provides that candidates may fund their own campaign, but the payments must be processed through an official campaign account operated by a separate official agent if more than \$1000 is expended. During the campaign two Liberal candidates, Ronney Ouiek and Glenn Brookes – [Brookes publicly admitted that he spent more than \\$100,000 of his own funds on his campaign. He was subsequently reported to the NSW Electoral Commission by NSW Labor. As reported in the Sydney Morning Herald, the Liberal Party denies wrongdoing is considering legal action.](#)

NSW Joint Standing Committee on Electoral Matters

[In November 2017 the NSW JSCEM tabled its report on the administration of the NSW state election and matters related thereto.](#) The report contains 34 recommendations across a broad range of electoral administration issues.

In relation to electronic voting, ERRN readers will know that NSW's iVote system recorded over 280,000 votes at the 2015 NSW state election, making iVote the world's largest remote voting application. [During the inquiry the JSCEM received a range of evidence about iVote's operation, including evidence about the system's security and verification procedures, and concerns about a security breach demonstrated when a team of computer scientists 'hacked' into iVote's verification system during early voting period, exposing iVote's vulnerability to a man-in-the-middle attack.](#) Moreover, the committee recommended the NSW Electoral Commission not expand iVote beyond its current role for the 2019 NSW state election. [The committee also recommended "the NSW Government establishes an independent panel of experts to conduct a full inquiry into the iVote internet and telephone voting system to consider security, auditing and scrutineering issues well before the 2019 State Election".](#) The panel will

[“contain members with expertise in at least the following areas of information technology: online voting; privacy; security; and cybercrime. Finally, the committee also recommended that iVote “only be used for the 2019 NSW state election if the security concerns highlighted by the Committee in this report have been addressed”.](#)

The committee also discussed voter identification during the inquiry. Despite being told that voter identification [“was a solution looking for a problem”](#) and that the scheme would increase the NSW Electoral Commission’s administrative workload, [the committee recommended that the “NSW Government introduces legislation to require that voters provide proof of identity at the time of casting their vote. The Committee also recommends that the Government considers appropriate safeguards to ensure voters are not disenfranchised by new photo identification requirements. This could include the option to provide a statutory declaration to attest for one’s identity or a system of vouching for another’s identity”.](#) While legislation has yet to be introduced in Parliament, [the committee’s recommendation has attracted criticism in some media reports, with Opposition Leader Luke Foley calling the laws “undemocratic and wrong”.](#)

The report also recommended the [“NSW Government reviews the current role of a Returning Officer in NSW State Elections to determine whether there is a more effective and efficient way to carry](#)

[out the functions associated with this position”.](#) The NSW Electoral Commission told the committee that some role of the Returning Officer was varied and required [“the establishment of centralised processes for approving electoral material, recruitment, application and distribution of postal votes, counting results and distributing ballot papers”.](#)

Further, continuing concern about the size of the Upper House ballot papers across Australia saw the committee recommend that the [“NSW Government increases the number of required nominators for independent Legislative Council candidates from 15 to 100”.](#) The committee also recommended several changes to party registration laws, including tightening auditing laws by compelling the NSW Electoral Commission to conduct a random audit of [“25% of party members of the members submitted for registration to confirm their bona fides and that they are genuine current members of their party”.](#)

Finally, the committee also recommended increases in the [“allocation of monies from the Administration Fund”.](#) The Administration Fund reimburses eligible political parties and independent members of parliament for administrative and operating expenditure incurred in a calendar year. The committee also recommended the creation of an online portal for registered political parties to report donations, and that all reportable donations be registered on the portal not more than 48 hours after receipt.



Parliamentary entitlements

The Victorian Parliament is currently reviewing parliamentary entitlements following issues relating to two members of the Legislative Assembly.

[In February 2017 Telmo Languiller, former Speaker of the Legislative Assembly, resigned his speakership following claims documented in *The Age* newspaper that he had claimed a second-residence allowance of \\$37,678 for residing in Queenscliff, more than 80 kilometres away from his seat of Tarneit in Melbourne’s western suburbs.](#) Since February Languiller has repaid the funds to Parliament, acknowledging that using the allowance did not meet community standards.

[Also in February 2017, Don Nardella, former Deputy Speaker of the Legislative Assembly, resigned his deputy speakership following reports that he too claimed the second residence allowance for residing in Ocean Grove, more than 80 kilometres from his seat of Melton, in Melbourne’s outer west. Nardella claimed more than \\$100,000 as part of the allowance scheme but while resigning the backbench, has](#)

[denied any wrongdoing and is refusing to pay back funds to the Parliament.](#) A subsequent independent audit by PriceWaterhouseCoopers found that Nardella's arrangements – he rented a second residence allegedly from a family member because his accommodation in Melbourne was not spacious enough – were not prudent or “[at arms length](#)”. Premier Daniel Andrews has also come under pressure to force Nardella to repay the funds, but Andrews has noted that he has no power to compel Nardella to repay the money or resign from Parliament. [Most recently, The Age has reported that Nardella's second residence was actually a caravan park in Ocean Grove, and that the park does not allow permanent residents.](#)

The Age has reported that Gavin Jennings, Special Minister of State, has been asked by Premier Daniel Andrews to tighten up the parliamentary entitlements scheme.

Alleged electoral fraud

[The Victorian Liberal Opposition has reported Languiller and Nardella to the Victorian Electoral Commission for an alleged violation of electoral enrolment laws.](#) The Opposition alleges that both men were falsely enrolled at the 2014 Victorian state election. The VEC and AEC are currently investigating.

Victorian Electoral Matters Committee – inquiry into electronic voting

[As reported in ERRN October 2016 newsletter, the Victorian Parliament's Electoral Matters Committee is due to table its final report for its inquiry into electronic voting in Parliament in May 2017.](#) The inquiry received 34 submissions and conducted three days of public hearings.

Steve Herbert – resignation

[Member for Northern Victoria Region, Steve Herbert, resigned from Parliament in March 2017.](#) His resignation will not trigger a by-election because the relevant political party fills casual vacancies in the Legislative Council.

Ombudsman and power to investigate use of parliamentary resources by Labor Party

[In March 2017 the High Court found that the Victorian Ombudsman had the power to investigate whether the Labor Party misused parliamentary resources during the 2014 Victorian state election campaign.](#) As reported in previous ERRN newsletters, the matter was first referred to the Ombudsman by the Legislative Council in 2015, following a Department of Parliamentary Services report which found that Labor had used electorate office funds to pay at least 26 staff for two days of campaigning during the 2014 Victorian state election period. [In 2016 the Victorian Supreme Court found that the Ombudsman had the authority to investigate the claims, but Labor appealed resulting in the High Court decision.](#)

The Labor government has announced it will appeal the latest decision.

Victorian Electoral Commission v Municipal Electoral Tribunal (2017) VCAT 294

[In the October 2016 Melbourne City Council election,](#) Wandin stood for election as a councillor as the lead candidate of the “An Indigenous Voice on Council” group. Wandin was the sixth of nine candidates elected. There was considerable public interest in her election, as the first Indigenous person to be elected to the Melbourne City Council. However, on 22 October 2016, Richard Foster (a former councillor and unsuccessful candidate) lodged a complaint with the Victorian Electoral Commission (VEC) that Ms Wandin had never resided at her enrolled address within the City of Melbourne, which was Mr Foster's own residential address. On 8 November, Wandin resigned before being sworn in as a councillor, and two days later the VEC received a letter from Wandin confirming that she was not validly enrolled on the Council voters roll. Subsequently, Wandin and Foster were charged with unlawful nomination and false declaration. This VCAT proceedings are discussed further in the case notes section.

Enforcement of compulsory voting – 2016 local government elections

[The 2016 Victorian local government elections saw a record number of compulsory voting infringements.](#) The VEC has said that 1.144 million electors, or around a quarter of eligible electors, failed to vote. [As reported in the Herald Sun, Port Phillip, which has attendance voting, was the worst performing municipality with more than half \(51.28 per cent\) not](#)

[exercising their democratic right. Yarra saw 48.81 per cent failing to vote, Melbourne 44.31 per cent, Stonnington 36.64 per cent and Moreland 36.4 per cent. The best performing municipalities were regional councils; Warrnambool \(84.48 per cent voted\), Moyne \(83.31 per cent\), Gannawarra \(83.09 per cent\).](#)

City of Greater Geelong Council – 2017 elections

Following the Council's dismissal in 2016, in March 2017 the Labor government said that Geelong would likely hold elections in October 2017. In contrast to the former direct election system for mayor, [a Citizen's Jury recommended the mayor be elected by councillors and serve a two-year term, with 11 councillors elected across four wards.](#)



Crime and Misconduct Commission – Operation Belcarra inquiry

Following the Queensland local government elections on 19 March 2016, the Queensland Crime and Corruption Commission (CCC) received a number of allegations about the conduct of candidates for several councils. [These allegations identified a number of possible breaches of the Local Government Electoral Act 2011 \(Qld\). These allegations also identified practices that give rise to potential corruption risks, or may otherwise undermine transparency, integrity and public confidence not only in the 2016 elections, but in local government more generally. The CCC established Operation Belcarra to investigate the allegations.](#)

The CCC will specifically investigate whether; [“candidates in the Gold Coast, Moreton Bay and/or](#)

[Ipswich 2016 local government elections advertised or fundraised for the election as an undeclared group of candidates, which is an offence contrary to section 183 of the Local Government Electoral Act 2011 \(Qld\); provided an electoral funding and financial disclosure return that was false or misleading in a material particular, an offence contrary to the Act; and whether candidates operated a dedicated bank account during the candidates' disclosure period to receive and/or pay funds related to the candidates' election campaign”.](#)

The first public hearing for Belcarra is scheduled on 18 April 2017.

Queensland state electoral boundaries review

In 2016 the passage of the *Electoral (Improving Representation) and Other Legislation Amendment Act 2016 (Qld)* increased the number of state electoral districts from 89 to 93. This means the Queensland Redistribution Commission will create and name an additional four electorates during this review.

[In April 2017 the Commission advised that it received over 1,500 objections to the proposed new boundaries. The Electoral Commission of Queensland is now reviewing submissions.](#)

SOUTH AUSTRALIA



Electoral Districts Boundaries Commission

[The decision of the Full Court of the Supreme Court of South Australia in the appeal against the order of the Electoral Districts Boundaries Commission was handed down on 10 March 2017.](#) This case was covered in the October 2016 ERRN newsletter. The challenge was originally brought by the South Australian Labor Party.

The Court unanimously upheld the approach taken by the Commission. The [“appeal concerned the interpretation of s 77 of the Constitution Act 1934 \(SA\). The question was whether the](#)

[Commission was entitled to use the “tolerance” in section 77 to assist in achieving the aims of section 83 of the Act. The Full Court confirmed that the tolerance was available to be used for that purpose and that doing so did not undermine the “one vote one value” principle”.](#)

As reported in the October 2016 ERRN newsletter, during the redistribution process the Commission found that, [“having regard to election results over the last 40 years, there was an innate imbalance against the Liberal Party caused by voting patterns in South Australia upon which had been imposed successive redistributions as a result of which the Liberal Party could win a significant majority of State-wide votes but not win a majority of seats”.](#) The Commission referred to an argument by the Labor Party that the imbalance [“was a function of poor placement of resources at the last election but said that there was no evidence that this occurred. Accordingly, the final boundaries proposed by the Commission in 2016 notionally gave four more seats to the Liberal Party, strengthening the party’s chance to winning 25 seats in the 47 seat Legislative Assembly based on figures from the 2014 South Australian election”.](#)

The next South Australian state election is scheduled for March 2018.

WESTERN AUSTRALIA



2017 Western Australian state election

[The 2017 Western Australian state election was held on Saturday 11 March 2017. The incumbent Liberal-WA National government, led by Premier Colin Barnett, was defeated by the Labor opposition, led by Opposition Leader Mark McGowan.](#)

Labor won 41 of the 59 seats in the Legislative

Assembly – a 12 seat majority – both the largest government seat tally and largest government majority in Western Australian parliamentary history, and is therefore the largest seat tally achieved by WA Labor. Additionally, Labor exceeded all published opinion polling, winning 55.5 percent of the two-party preferred vote from a state record of 12.8 percent two-party swing. Labor also won 14 of the 36 seats in the Legislative Council.

[On 4 April, the Western Australian Electoral Commission conducted a recount of 2013 election results to fill two casual vacancies for the remainder of the 2013–17 term caused by the resignation and subsequent election to the Legislative Assembly of Amber-Jade Sanderson \(Labor\) in East Metropolitan and Peter Katsambanis \(Liberal\) in North Metropolitan.](#) The vacancies were filled by Bill Leadbetter (Labor) and Elise Irwin (Liberal), who will first sit in the Legislative Council on 11 May 2017.

There was a [“substantial decrease in informal voting at the 2017 Western Australian state election compared to the 2013 state election, from](#)

[six percent to 4.5 percent in 2017](#)". As a result of high informality rates at the 2013 state election, the Western Australian Electoral Commission implemented several initiatives, including an elector education focus (particularly in Districts with higher than average rates of informality), ["while others concentrated on improving ballot paper design, voting instructions and signage, or enhancing the available support at polling locations"](#).

Remote voting was also used for the first time in 2017 at a Western Australian state election. As

noted in the October 2016 ERRN newsletter, in 2016 the Western Australian Parliament ["amended legislation to specifically allow for technology assisted voting for people who are blind or sight impaired, have literacy difficulties or are impacted by some form of incapacity that makes voting difficult or impossible to do in secret. The Western Australian Electoral Commission adopted NSW's iVote system, making it the second Australian jurisdiction to use remote voting"](#). At the 2017 Western Australian state election, 2,288 electors used iVote.



Recount in Braddon

[A recount for House of Assembly Division of Braddon was held in April 2017. The recount was triggered by the resignation of the Hon Bryan Green.](#) Candidates who were not elected at the 2014 House of Assembly election were eligible to stand. Labor's Shane Broad was elected.

Legislative Council elections

[Elections for the Legislative Council Divisions of Launceston, Murchison and Rumney will be held in May 2017.](#)



ACT Electoral Commission report on October 2016 election

In March 2017 the ACT Electoral Commission released its report on the 2016 ACT Legislative Election, the results of which were reported in

the October 2016 ERRN newsletter. The election was the first held following the expansion of the Legislative Assembly in 2016 to 25 Members from 17 Members, from five electorates each returning five Members.

In the introduction to the report Phil Green, the ACT Electoral Commission, provided some key facts about the election. He wrote that:

- [The election resulted in a majority of female members, with 13 female MLAs elected, a first in Australian parliamentary history;](#)
- [Over a third of electors cast their vote electronically at the 2016 ACT election; and](#)

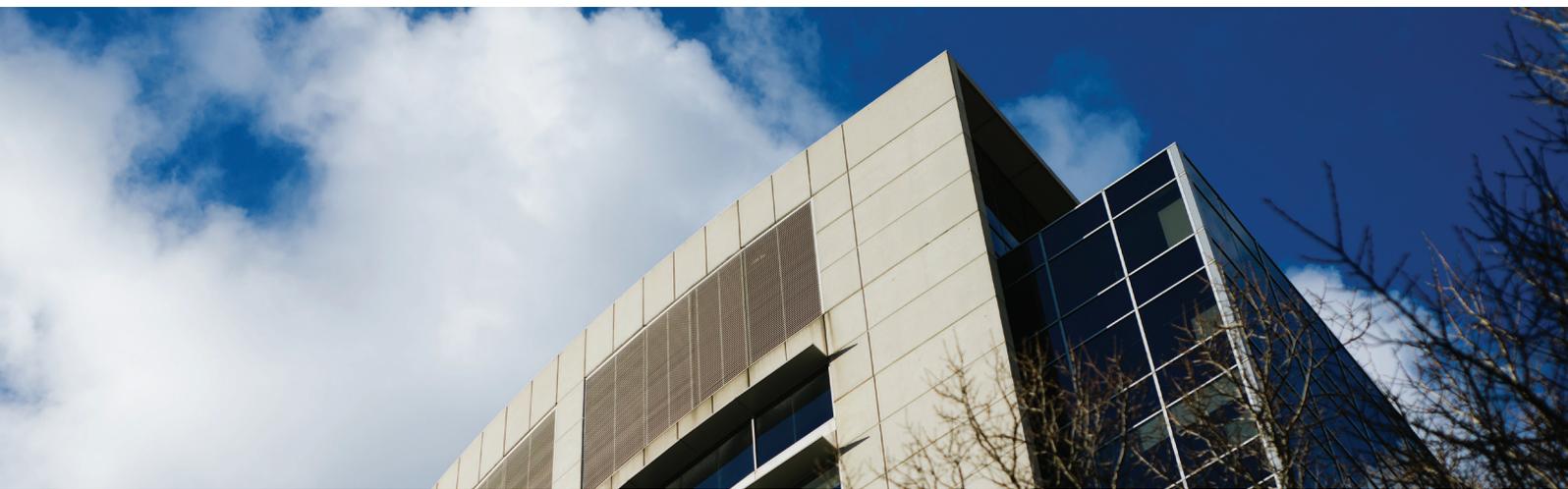
[Voter turnout was the highest of the past four ACT elections, with nearly 99.8 percent of eligible electors casting a vote, including high rates of turnout in the 18-24 age cohort.](#)

[The Commission made 10 recommendations to the Legislative Assembly.](#) These included:

- The Commission noted it would investigate an electronic voting option for overseas electors, based on a large number of postal votes that were unable to be admitted to the count
- Amending legislation to allow any elector to vote early as a right rather than provide a declaration; and
- The Commission also recommended the Legislative Assembly consider whether it should amend legislation to increase the expenditure cap applied to ungrouped candidates and

third-party candidates to avoid the risk of impermissibly burdening the freedom of political communication implied by the Commonwealth Constitution.

[The 2016 ACT election also resulted in the first ever legal challenge to an ACT election. In December Mohammed Hussain lodged an application with the Court of Disputed Returns challenging the election result in Yerrabi on the basis of the rejection of his nomination by the Commissioner. At the time of writing this report, the case was still before the court, but Mr Hussain has attempted to withdraw his application on the grounds of ill health.](#)



Research Collaboration Initiative

In July 2016 the ERRN Governance Board awarded grants to two projects.

Professor Rodney Smith of the University of Sydney is leading a team on a project entitled '[Implications of Changes to Voting in Australia](#)' with involvement from the New South Wales Electoral Commission and the Western Australian Electoral Commission.

Dr Narelle Miragliotta of Monash University will lead a team on a project entitled '[The Desirability and Feasibility of Extending Convenience Voting in Australia](#)' with involvement from the Victorian Electoral Commission.

Collaboration with McDougall Trust

[Since 2016 the ERRN has collaborated with the McDougall Trust, a UK-based independent charity promoting public understanding of electoral democracy.](#) The Trust will fund video recording of ERRN events that provide comparative perspectives on electoral democracy. Two of these videos are already available online: Political Corruption Elections and Beyond Perspectives from Indonesia and Australia, and A Comparative Analysis of the Deliberative Quality of Televised Election Debates in Europe.

Forthcoming Events

“Understanding Australian and Indonesian voting systems: Lessons for the future”

17 May 2017

Jointly hosted by ERRN and Centre for Indonesian Law, Islam and Society

Indonesia and Australia are two very different democracies. One is new, the other much older. One is based on European models of governance, the other on British traditions. Both, however, are huge countries with widely dispersed populations. This seminar explores how the voting systems of these two countries work. What are their differences and similarities? What are their strengths and weaknesses? And how can the challenges of democratization in both countries be better met by learning from each other? How might each system be reformed? Two leading experts on electoral systems address these questions by explaining the Australian and Indonesian voting systems, conducting a dialogue on the future of electoral democracy in their countries.

Speakers:

Warwick Gately AM, Victorian Electoral Commissioner

Warwick Gately's early career was with the Royal Australian Navy. Joining the Western Australian Electoral Commission in 2003, he conducted three State general elections as well as local council elections and referendums on retail trading hours and daylight saving. He oversaw the redrawing of the State's electoral boundaries under "one vote, one value" legislation. In April 2013, he was appointed as the Electoral Commissioner for Victoria with responsibility for the administration of the State's register of electors and the conduct of Parliamentary and local council elections as well as referendums and various statutory polls in Victoria. He holds a Bachelor's Degree in Political Science and Government, a Master's Degree in Defence studies and is a graduate of the Institute of Company Directors.

Professor Denny Indrayana, Former Deputy Minister of Justice of Indonesia Professor

Denny Indrayana is an internationally recognised anticorruption campaigner who has played a leading role in law reform efforts in Indonesia. He served as Deputy Minister of Law and Human Rights from 2011-2014 under President Susilo Bambang Yudhoyono. Before that, Denny was Special Advisor for Legal Affairs, Human Rights and Anticorruption to President Yudhoyono, Chair of the Centre for the Study of Anti-Corruption at Gadjah Mada University, and Director of the Indonesian Court Monitoring NGO. He is a Professor of Constitutional Law at Gadjah Mada University and a Visiting Professor in the University of Melbourne Law School.

ERRN Biennial Workshop

November 2017, Perth, University of Western Australia

WA Convenors: Sarah Murray, Martin Drum, Alan Fenna and Justin Harbord

The WA ERRN convenors have commenced planning for the 2017 ERRN Biennial Workshop to be held at the University of Western Australia Club in Perth in November 2017.

The proposed theme for the workshop is "The times they are a changin'...", taking account of the ever-changing landscape including electoral reform, voter participation and behaviour, technology and judicial review.

Issues arising from police activity during election time

Thursday 6 April

ANU College of Law and ERRN event

Presenters: Prof James Stellios & Mr David Savage AM

In a number of recent cases, police forces have taken well-publicised actions which became part of the narrative of election campaigns in Australia. At the State election of 2015, Queensland police arrested a political activist who wore a T-shirt bearing the slogan “I’m with Stupid” to a campaign event of the then ruling party, but offered no evidence when the case went to court. During the 2016 federal election campaign, the Australian Federal Police conducted a raid on the office of the then Deputy Leader of the Opposition in the Senate, capturing the headlines for a time, and giving rise to several separate inquiries by the Senate Privileges Committee which are still on foot. In elections around the world, interventions of this type have also been seen, ranging from systematic attempts to disrupt opposition activities, to the “October Surprise” visited on Mrs Clinton’s presidential campaign by the Director of the FBI.

In this seminar, the appropriate way in which police should approach their tasks during election campaigns so as to maintain political neutrality while respecting the rights of electoral participants and ensuring the rule of law will be addressed from a range of different perspectives.

Dr James Stellios is a Professor at the ANU College of Law. His primary research interest is constitutional law, and he has published widely in that field. He is the Director of the Centre for International and Public Law.

David Savage AM, is a Visiting Fellow at the ANU. He was an AFP Federal Agent from 1982-2001, serving in a number of roles including as a UN Peacekeeper in Mozambique, Timor Leste, and Bougainville. He was involved in supervising Police in Mozambique and Timor during elections and the Popular Consultation. He was also present in Afghanistan for the 2009 elections. He has also worked as a Human Rights adviser with the UN, International Crisis Group and other international organisations throughout South and South East Asia.

ERRN Seminar: “Between Law and Convention: Ministerial Advisers in the Australian System of Responsible Government”

27 March 2017

Presenter: Dr Yee-Fui Ng, RMIT University

Ministerial advisers have been increasingly thrust into the limelight through scandals that appear on the front page of the newspapers. Political advisers have also come to prominence through television series such as *The Thick of It* (UK), *The West Wing* (US) and *The Hollowmen* (Australia). The rise in significance of political advisers has occurred in Westminster countries such as the United Kingdom, New Zealand and Canada. This has led to increasing scrutiny of their role and influence in traditional Westminster advisory systems.

This seminar will trace the rise in the power and significance of Australian ministerial advisers. It will show the fundamental shift of the locus of power from the neutral public service to highly political and partisan

ministerial advisers. The talk will address the issue of whether there are any constitutional conventions that regulate the appearances of ministerial advisers before parliamentary committees. This talk draws on material from interviews with prominent Australian Ministers and Members of Parliament from all political persuasions. Interviewees include former senior Ministers such as Peter Costello, Lindsay Tanner, Kim Carr, Peter Reith, Philip Ruddock, and David Kemp. Several former State Premiers were also interviewed, including John Brumby, Steve Bracks, John Cain, and Geoff Gallop.

Dr Yee-Fui Ng is a Lecturer in Law at RMIT University. She has written widely on issues in law and politics. Her book, *Ministerial Advisers in Australia: The Modern Legal Context*, was published by Federation Press as a finalist for the Holt Prize. Dr Ng has practised as a solicitor in top-tier law firms in Melbourne, London, and Canberra. She has worked as a Policy Adviser at the Department of the Prime Minister and Cabinet, a Senior Legal Adviser at the Victorian Department of Premier and Cabinet, as well as a Manager at the Victorian Department of Justice.

“The Law of Deliberative Democracy – book release”

10 November 2016

Presenter: Dr Ron Levy, ANU College of Law

Laws have colonised most of the corners of political practice, and now substantially determine the process and even the product of democracy. Yet analysis of these laws of politics has been hobbled by a limited set of theories about politics. Largely absent is the perspective of deliberative democracy – a rising theme in political studies that seeks a more rational, cooperative, informed, and truly democratic politics. Legal and political scholarship often view each other in reductive terms. This book breaks through such caricatures to provide the first full-length examination of whether and how the law of politics can match deliberative democratic ideals.

Essential reading for those interested in either law or politics, the book presents a challenging critique of laws governing electoral politics in the English-speaking world. Judges often act as spoilers, vetoing or naively reshaping schemes meant to enhance deliberation. This pattern testifies to deliberation’s weak penetration into legal consciousness. It is also a fault of deliberative democracy scholarship itself, which says little about how deliberation connects with the actual practice of law. Superficially, the law of politics and deliberative democracy appear starkly incompatible. Yet, after laying out this critique, *The Law of Deliberative Democracy* considers prospects for reform. The book contends that the conflict between law and public deliberation is not inevitable: it results from judicial and legislative choices. An extended, original analysis demonstrates how lawyers and deliberativists can engage with each other to bridge their two solitudes.

The GetUp! Effect: Movement Mobilisation and Australian Electoral Politics

10 November 2016

Co-sponsored by the University of Tasmania and the Institute for the Study of Social Change

Panel: Mr Paul Oosting, National Director of GetUp!, Dr Glenn Kefford, University of Tasmania and Dr Hannah Murphy-Gregory, University of Tasmania

GetUp! is widely regarded as one of Australia’s most influential social movements. During the recent federal election, the capacity of GetUp! to mobilise their volunteers and supporters meant they were able

to make 40,000 telephone calls and hand out over a million how-to-vote cards. The GetUp! effect was particularly pronounced in the three Northern Tasmanian seats of Bass, Braddon, and Lyons. In each of these seats, the three sitting members from the Liberal Party – dubbed the ‘three amigos’ – were defeated and GetUp! was said to have played a critical role. With the election now behind us, what role GetUp! – and other third party campaigners – have played and will continue to play in Australian politics is a question worthy of further analysis. Come along and hear our panel discuss these important issue

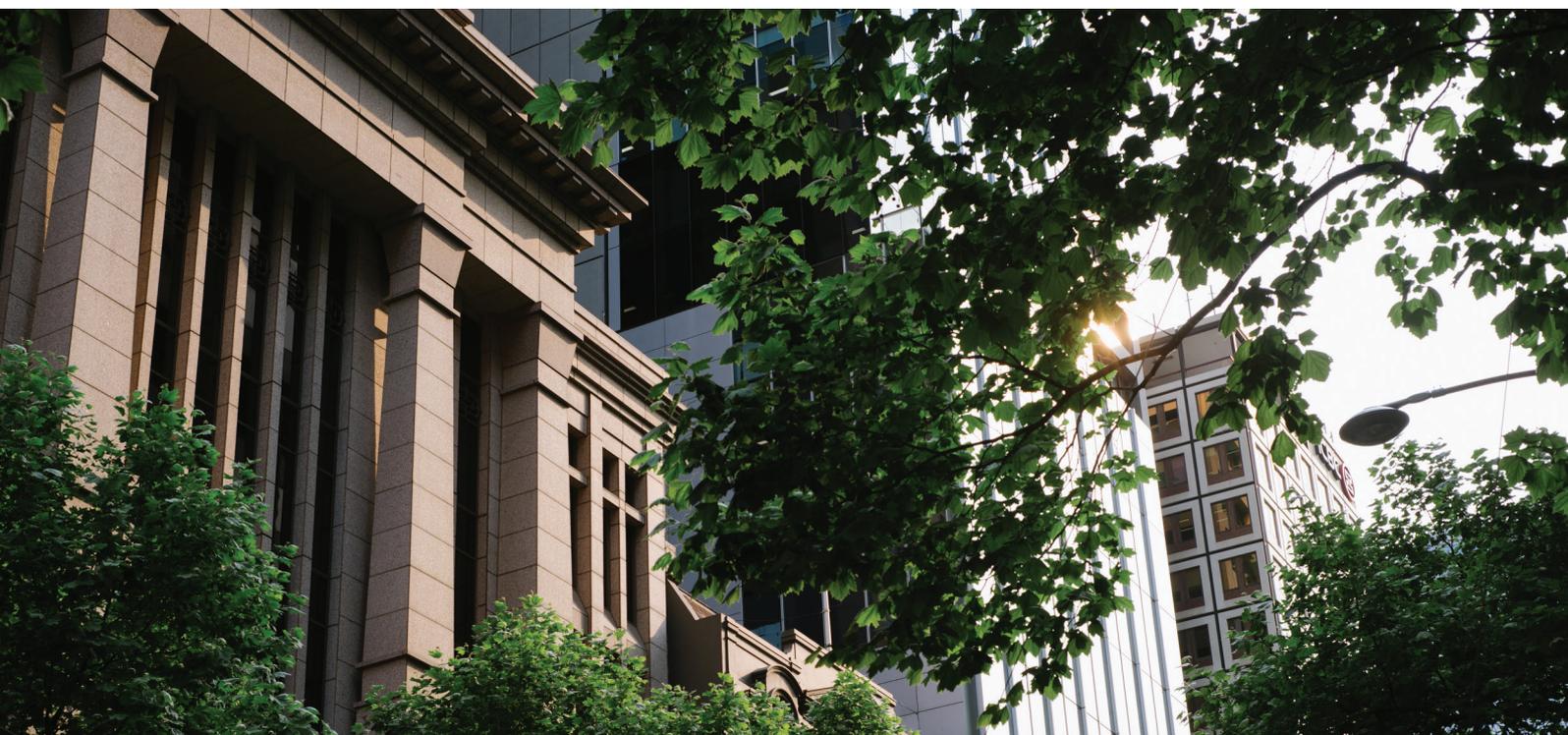
Working Papers

Working Paper 44

[“The Law of Deliberative Democracy: Deliberating in a crisis”](#)

Dr Ron Levy, Senior Lecturer in Law, Australian National University

Can law improve democracy? Can it, in particular, make democracy more deliberative: more informed, reflective, flexible and equally inclusive of diverse people, views and ideas? Can law help reshape democracy to make it less impulsive, less partisan or less trivial, and better able to reach sound, far-sighted decisions?



Recent Publications

Yee-Fui Ng, Ken Coghill, Paul Thornton-Smith and Marta Poblet

[“Democratic Representation and the Property Franchise in Australian Local Government”](#)

Australian Journal of Public Administration

Australia remains one of the last liberal democracies to retain a property franchise at the local government level. This particular feature is both the result of historical particularities and contemporary political arrangements. This article analyses the property franchise in the City of Melbourne, the capital of the Australian State of Victoria, based on democratic theory and an empirical study. It illustrates the tensions between the democratic principles of representation and political equality in defining structures for representation at the local government level. The authors suggest that a more nuanced interpretation of representation can be adopted at a local level based on territorial residency rather than legal citizenship. Despite this, based on analysis of both electoral and non-electoral mechanisms, the property franchises are found to be anachronistic and indefensible from a democratic perspective and unrelated to the status of capital city. The article concludes that, at a local level, deliberative democracy holds the promise to better represent various interests, including property interests.

Yee-Fui Ng

[Ministerial Advisers in Australia: The Modern Legal Context.](#)

From their origins in the shadows of Australian public administration, ministerial advisers have been increasingly thrust into the limelight through scandals that appear on the front page of the newspapers. This book traces the rise in the power and significance of Australian ministerial advisers. It shows the fundamental shift of the locus of power from the neutral public service to highly political and partisan ministerial advisers.

The book demonstrates that the introduction of ministerial advisers into the structure of the

Executive has led to the erosion of the Australian system of responsible government. This is caused by a failure in the political, legal and managerial accountability frameworks surrounding ministerial advisers.

Ministerial Advisers in Australia is the first comprehensive study of the legal and political regulation of Australian ministerial advisers. This book features material from original interviews with Australian Ministers and Members of Parliament, as well as several former State Premiers.

Ron Levy, Graeme Orr

[The Law of Deliberative Democracy](#)

Laws have colonised most of the corners of political practice, and now substantially determine the process and even the product of democracy. Yet analysis of these *laws of politics* has been hobbled by a limited set of theories about politics. Largely absent is the perspective of *deliberative democracy* – a rising theme in political studies that seeks a more rational, cooperative, informed, and truly democratic politics. Legal and political scholarship often view each other in reductive terms. This book breaks through such caricatures to provide the first full-length examination of whether and how the law of politics can match deliberative democratic ideals.

Anika Gauja and Marian Sawyer

[Party rules? Dilemmas of political party regulation in Australia.](#)

Trust in political parties has never been lower, but we have more and more of them, to the point where voters need magnifying sheets to read ballot papers. What is the relationship between party regulation and the nature of our democracy? How is it that parties have been able to gather so many public resources yet with so little scrutiny of their affairs? This is the first book on party regulation in Australia. It covers a wide range of issues, from party donations to candidate selection, from expectations of parties in a representative democracy to the reluctance to regulate and the role of the courts where legislators fear to tread.

Case Notes

Re Day [2017] HCA 2

Robert ('Bob') Day was first elected at the 2013 Australian Federal Election as a senator for South Australia as a candidate of the Family First Party. He commenced his term on 1 July 2014. He was re-elected at the Federal Election held on 2 July 2016 and resigned (or purported to resign) from his position on 1 November 2016.

It was alleged that Day was disqualified from sitting as a senator by s 44(v) of the *Constitution* because he had a pecuniary interest in an agreement with the federal government concerning the lease of his electoral office. Section 44(v) of the *Constitution* provides:

Any person who has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

Justice Gordon, sitting as the Court of Disputed Returns, referred to the Full Court the following questions transmitted by the Senate on s 377 of the *Commonwealth Electoral Act 1918* (Cth):

- whether Day was disqualified from sitting as a senator;
- if he was disqualified, on what date he became incapable;
- whether there is a vacancy in the representation of South Australia in the Senate for the place for which Day was returned; and
- if there is a vacancy, how it should be filled.

The issue was whether Day had a direct or indirect pecuniary interest, of a kind prohibited by s44(v) of the *Constitution*, in a lease agreement between the owner of his electorate office premises in South Australia, as lessor, and the Commonwealth, as lessee.

The High Court held by majority that there was no requirement that a 'pecuniary interest' be a legally enforceable interest, and held unanimously that the

financial benefit which Day stood to obtain from the Commonwealth performing its obligations to pay rent pursuant to the lease constituted an 'indirect pecuniary interest' within the meaning of s 44(v) of the *Constitution*. By virtue of the direction that the rent be paid into a bank account owned by him, Day was to receive rent directly from the Commonwealth. Therefore he had an expectation of a pecuniary benefit from the lease. A majority of the Court held he was incapable of being chosen or of sitting as a senator from 26 February 2016, when the direction was made.

The Court unanimously held that the resulting vacancy should be filled by a special count of the ballot papers. It is expected the South Australian senate seat will go to the second person on Family First's ticket, lawyer Lucy Gichuhi.

Re Culleton [2017] HCA 3

After Barker J in the Federal Court ordered that the estate of Senator Culleton be sequestered under the *Bankruptcy Act 1966* (Cth), the President of the Senate, Senator Parry wrote to Senator Culleton stating that he was satisfied that the order confirmed Culleton's status as an "undischarged bankrupt" within the meaning of s 44(iii) of the *Constitution*.

Section 44(iii) of the *Constitution* provides that a person who "is an undischarged bankrupt or insolvent ... shall be incapable of being chosen or of sitting as a senator". Section 45 provides that if a Senator becomes subject to such disability, "his place shall thereupon become vacant". Section 21 provides that whenever a vacancy happens in the Senate, the President must notify that vacancy to the Governor of the State in the representation of which the vacancy has happened. Section 15 sets out a mechanism for the filling of a vacancy in the Senate by the Governor of the State or the Houses of Parliament of the State.

The Usher of the Black Rod, the Department of Finance and Information Services Division at Parliament House all contacted Culleton about finalising his affairs as a Senator.

Culleton sought orders from the High Court restraining Senator Parry and his servants and agents from taking steps to oust him from the

Senate or deny him his privileges or allowances as a Senator pending determination of whether his seat has become vacant either by the Senate or by the Court of Disputed Returns.

Gageler J dismissed the summons filed by Culleton. He was not satisfied that the orders sought by Senator Culleton were necessary. If the Full Court were to determine that, by reason of s 44(ii) of the *Constitution*, Culleton was disqualified from election at the time he was returned as a Senator on 2 August 2016, the subsequent events would be irrelevant. If the Full Court were to determine that, by reason of s 44(ii) of the *Constitution*, Culleton was not disqualified from election when so returned as a Senator, nothing done by Senator Parry would affect the efficacy of that determination.

Re Culleton (No 2) [2017] HCA 4

The High Court, sitting as the Court of Disputed Returns, has decided on the validity of the election of Senator Culleton. The High Court unanimously held that Culleton was not eligible to stand for the Senate at the time of his election, because he had been convicted of the offence of larceny and was subject to be sentenced for an offence that carried a year or more imprisonment.

In March 2016, before his nomination and election, Culleton was convicted of larceny in a NSW court in his absence, and was liable to be sentenced to up to two years' imprisonment. In August 2016, after his election, Culleton was brought before the court, which annulled the earlier conviction and heard the matter afresh, found him guilty on his own plea, and then dismissed the charge without convicting him of the offence.

Section 44(ii) of the *Constitution* provides that:

any person who has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer ... shall be incapable of being chosen or of sitting as a senator.

Kiefel, Bell, Gageler and Keane JJ found that Culleton was a person who had been convicted and was subject to be sentenced for an offence punishable by imprisonment for one year or longer at the date of the 2016 election, both as a matter of fact and as a matter of law. They held that the

annulment of the conviction in August 2016 only operated prospectively: that is, it did not void the March conviction from the beginning.

Nettle J agreed with other judges' conclusions, but for partly different reasons. Nettle J held that s 44(ii) is best construed as directed to a conviction in fact, regardless of whether it is subsequently annulled as it accorded historically with the circumstance that at the time of federation.

Rod Culleton's brother-in-law, Peter Georgiou, filled his vacant Senate seat.

Victorian Electoral Commission v Municipal Electoral Tribunal (2017) VCAT 294

This is the Victorian equivalent of the federal Culleton case, involving similar issues of the election and exclusion of an unqualified candidate, and how to fill the resulting vacancy. Proceedings arising from the election of Brooke Wandin have been underway since November 2016.

In the October 2016 Melbourne City Council election, Wandin stood for election as a councillor as the lead candidate of the "An Indigenous Voice on Council" group. Wandin was the sixth of nine candidates elected. There was considerable public interest in her election, as the first Indigenous person to be elected to the Melbourne City Council.

However, on 22 October 2016, Richard Foster (a former councillor and unsuccessful candidate) lodged a complaint with the Victorian Electoral Commission (VEC) that Ms Wandin had never resided at her enrolled address within the City of Melbourne, which was Mr Foster's own residential address. On 8 November, Wandin resigned before being sworn in as a councillor, and two days later the VEC received a letter from Wandin confirming that she was not validly enrolled on the Council voters roll. Subsequently, Wandin and Foster were charged with unlawful nomination and false declaration.

There remained the issue of how to fill the vacancy created by Wandin's departure. Under Schedule 3A of the *Local Government Act 1989* (the Act), a vacating councillor's position is filled through a countback of the votes that elected that councillor, distributed to unsuccessful candidates at the previous council election. Under clause 8 of

Schedule 2 of the Act, if a candidate retires during the election, the candidate's name is treated as if it has been removed from the ballot paper, and votes for that candidate are transferred to the voters' next preferences for continuing candidates. Wandin's position did not exactly fit either situation.

On 11 November 2016, the Electoral Commissioner, Mr Warwick Gately, applied to the Municipal Electoral Tribunal (MET) for an inquiry into the election under section 45 of the Act. The Electoral Commissioner's position was that Wandin should be treated as if she had retired from the election, and the votes should be recounted with Wandin's name removed. However, at a hearing on 5 December, the MET rejected the Electoral Commissioner's submission because Wandin did not retire before the declaration of the election, and ordered that the vacancy be filled through a countback.

On 8 December, the VEC applied to the Victorian Civil and Administrative Tribunal (VCAT) for a review of the MET's decision. The matter was heard on 21 February 2017 by the President of VCAT, Justice Greg Garde. On 27 February, Justice Garde set aside the MET's decision and order, declared that Wandin was not duly elected, ordered the VEC to conduct a recount of all the ballot papers as if Wandin had retired and to provide the results of that recount to all candidates, and invited candidates to make further applications to VCAT following the recount. Justice Garde was guided by two decisions of the High Court of Australia (*Re Wood* (1988) and *Re Culleton (No 2)* (2017)), and considered that the countback procedures did not apply because Wandin was never a councillor and so there was no extraordinary vacancy, and that the election should be concluded as much as possible in accordance with voters' preferences.

The VEC conducted the recount on 1 March, and provided the results to the candidates. The outcome

of the recount was significant. If a countback had taken place, only one position would have been filled, and the winner would most likely have been Wandin's running mate, Nicolas Frances Gilley. In contrast, the recount was for all councillors, and the result was quite different from the original count. Not only was Wandin replaced by Frances Gilley, but also the sitting councillor Michael Caiafa (who had nothing to do with the Wandin case) was defeated and replaced by Susan Riley. Commentators noted that this outcome would alter the political balance in the Council.

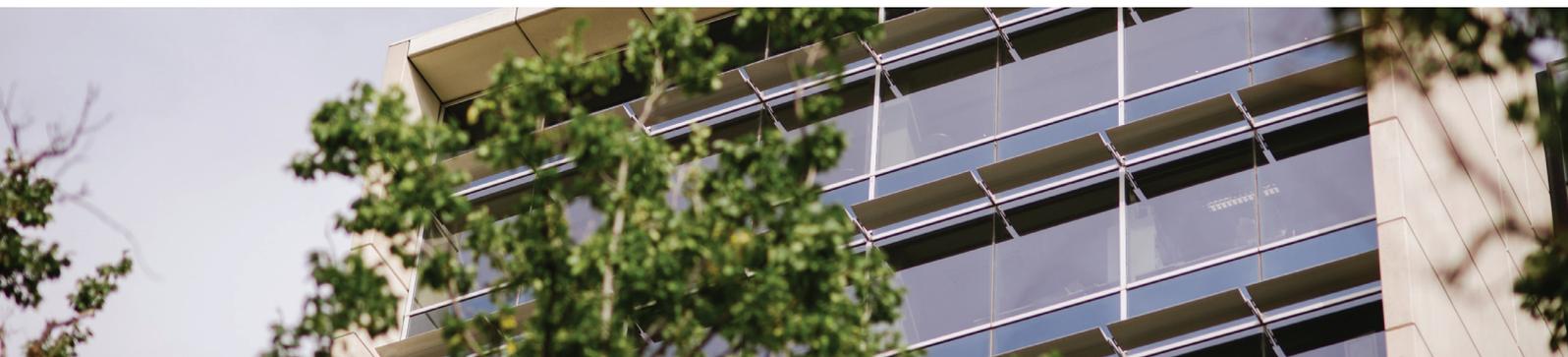
On 14 March 2017, VCAT declared that:

- Michael Caiafa, a person who was declared elected as a councillor, was not duly elected.
- Nicholas Frances Gilley, Wandin's running mate, a person who was declared not to be elected at the election, was duly elected.
- Susan Riley, a person who was declared not to be elected at the election, was duly elected.

This decision implemented the results of the recount. In the reasons for his decision, Justice Garde acknowledged that no previous instance of such a nature in the case of a multi-member electorate was cited to the Tribunal, and sympathised with the position of Caiafa, but emphasised:

The Tribunal must ensure that effect is given as far as possible to the votes of the electors as cast in the ballot. This duty is at the heart of the democratic system of local government. It is the factor that deserves the greatest weight in the exercise of the Tribunal's discretion.

Parties have 28 days to seek leave to appeal to the Court of Appeal. Newspaper reports suggest that Caiafa is considering an appeal.



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