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WORKING PAPER SERIES**

**THE RIGHT ANSWER DEPENDS ON ASKING THE RIGHT QUESTION<sup>1</sup>**

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<sup>1</sup> This working paper is based on a presentation given at the Electoral Regulation Research Network workshop on 'Developing a Legislative Framework for a Complex and Dynamic Electoral Environment' held in at the Melbourne Law School in October 2019.

## **ABSTRACT**

This working paper examines the various challenges that confront Australian democracy and potential reforms to our electoral or political institutions.

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I acknowledge the traditional owners on the land on which we meet and acknowledge elders – past, present and emerging.

Finding the right answer depends on asking the right question.

In terms of electoral regulation, this requires that we take a broad rather than a narrow view of the problem we are grappling with.

I believe that the challenge is to reinforce and rebuild electoral and political institutions which support trust and confidence in our democracy.

This will have to include looking at the roles of civil society organisations, and the media.

Trust and confidence which has been waning for some time, to all our cost.

But this is a particular issue for those of us who are politicians to confront.

What does our policy agenda matter if no-one believes it could ever be delivered?

What's the point, fundamentally, of all our campaigning if it's met with a resigned cynicism, at best, or outright rejection, at worst?

Elections aren't just one-off events, to be considered in isolation.

Elections shape our society.

The fairness or otherwise of elections can't simply be addressed through a technical review of questions of vote-counting and other markers of the accuracy of the results in particular seats or across the nation.

Rather, we need to think about who's participating, and how.

We need to think whether all Australians' concerns are reflected and represented.

We need to think about who's not involved - whether by choice or by having been excluded.

About the range of perspectives on what's at stake, from the existential to complete irrelevance.

The call to action has become urgent.

This is measured in the attitudinal evidence - notwithstanding a recent suggestion that trust in politics has not been increasing, I think it's clear that this is in fact the case. That jury is in.

And also in a range of developments, which challenge the institutional framework that many of us have taken for granted as underpinning a set of agreed democratic norms.

Just last week, the UK Supreme Court overruled Prime Minister Johnson's prorogation of the parliament and Speaker Pelosi has moved towards a process to impeach President Trump.

School strikes have shown us the frustrations of young people, here and around the world, denied a formal voice in their - our - future.

ICAC in New South Wales proceeds, too as do challenges to the court of disputed returns arising from May's election and debate continues over the eligibility of the member for Chisholm.

In this contribution, in this context, I will briefly touch on three matters: the present approach of Labor to cleaning up our political institutions; my experience of electoral reform in the last parliament; and the emerging challenges to fair elections.

As today's topic suggests - this is a complex and a dynamic environment we are considering.

Labor took to the last election a set of policies designed to address the concerns I have set out, with a particular focus on addressing concerns going to the influence of money on our politics.

Of course, we are in the process of reviewing all our policies, which need to be fit for 2022's purposes not those of 2019. In this area this work will be ably led by Senator Farrell, as the Shadow Special Minister of State.

Reviewing our policies, but not our values, nor our objectives.

In his submission to the JSCEM election review, Paul Erickson, ALP national secretary, has again articulated our determination to support reforms to restore faith in politics, through:

- Real-time disclosure of donations, with an appropriate disclosure limit of \$1000;
- Introducing expenditure caps; and
- More generally, working to curtail to influence of vested interests, as well as interference.

This seems to me a useful starting point.

Labor's submission has also directly requested that the JSCEM consider the impact of digital platforms – the social media giants – have on our democracy, and in particular to false information deliberately spread in bad faith, to interfere in democratic purposes.

To think about the impact fake news has had, and what it could have - and what he can do about this.

In the last parliament I served as the deputy chair of JSCEM. It was a busy time – to say the least.

As Malcolm Turnbull might have said, it's never been a more exciting time to be a constitutional lawyer.

- Or anyone with an interest in electoral regulation for that matter.

Section 44 dominated the life of the parliament, and the debate over eligibility continues to this day.

This debate raises important questions of principle, which need to be addressed.

On what basis should citizens be barred from seeking elected office? And how can we provide certainty to all participants about these eligibility issues?

Similarly, issues of donations were prominent in the last parliament and doubtless will be in this one.

The changing political landscape generated much debate within the committee, the parliament and the community.

Over the prospect of lowering the voting age (and on the terms of any such reduction), the evolving roles of third-party actors and civil society actors in electoral politics, the influence of social media as part of a rapidly changing media landscape and, of course, questions of foreign influence on our politics.

In the work of the committee, I see some reasons to be hopeful.

We did manage to reach significant agreements, on a multi-partisan basis.

And the last election was the first where public funding was linked to actual expenditure - ending profiteering off contesting elections.

All of this is worth acknowledging - it shows that our parliament isn't broken, and that we can make it serve wider interests.

That's why I stressed at the start of this contribution the need to get the question right.

To make further progress, we have to start by setting out what it is we are trying to

achieve.

It's also why I speak about the Joint Standing Committee on Electoral Matters now.

Its work is vitally important.

Unlike the other committees of our parliament it has a charter that goes to the very heart of the functioning of our politics - to explore this, with a view to finding common ground on the rules of engagement.

In my very strong opinion, this is a necessary, though not sufficient, basis for politics with greater appeal.

A politics concerned with debate over policy issues, not questions of integrity and influence.

I'm pleased that Labor has put forward such a strong team led by Carol Brown as deputy chair, with Milton Dick - who made an enormous contribution to the work of the committee in the last parliament - Kate Thwaites and Marielle Smith.

The last election revealed some new challenges for electoral regulation, as well as those I've just referred to.

There's plenty to be done.

This means we can't afford to be distracted.

In the Coalition party room it seems there's a renewed interest in reshaping the senate and the house to end one-vote, one-value, amongst other things. And reducing the complex debates around third-party regulation to 'getting GetUp!'.  
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They are welcome to that conversation.

It can stay in that room while we grapple with lifting up the state of Australian democracy. Recognising that while law-making isn't everything here, we can better shape our electoral laws to serve our democratic purposes

For starters, the extraordinary role of Clive Palmer in May's election demands a response.

A billionaire spending \$60 million is a powerful reminder that the problem isn't just about party fundraising (and disclosure) - it's about dealing with an understanding that our politics can be purchased.

The other side of this coin is the sense of alienation felt by too many Australians. Let's think about those not enrolled to vote, those who didn't vote and those whose ballots reflected frustration not inspiration.

And those who weren't able to vote - whether by awaiting a delayed grant of citizenship, or impatient for their 18th birthday to arrive.

We have learnt more about the power of social media, and the inadequacies of our present regulatory environment.

This also goes, again, to the disturbing phenomenon of fake news, which technology will surely accelerate.

Hence a renewed interest in seeking to provide for 'truth in political advertising'.

This is an important debate to have, but it cannot be regarded as a panacea.

For a range of reasons of principle, and practicality.

Further to this, I want to also touch on a wider trend.

Our accountability framework simply isn't what it should be.

The very notion of a truly independent public service, providing frank and fearless advice to government is under siege.

Our freedom of information laws have become something close to a joke.

In this age of big data, it's getting harder and harder to obtain information about government decision-making.

On a closely related note, the other declining institution we need to think about is the news media.

Threats to press freedom and the public's right to know are critical, but only part of the problem.

Our democracy rests on shared understandings - being able to share in a national conversation.

I'm worried that the fragmentation of our traditional media, the pressures on journalists and the practice of journalism, as well as the encroachment of the social media giants has eroded our capacity to carry on this conversation.

Curated news consumption narrows our understanding of the world, and diminishes our capacity to engage in meaningful debate.

Without restoring a genuine national conversation, I fear any other reforms to our electoral or political institutions may prove worthless.

In these remarks I've touched on a few specific reform challenges, and a few proposals, to be considered.

But let us not lose sight of the main game here: restoring confidence in the possibilities of Australian politics, developing and committing to an institutional framework that we can all have faith in.

Our response has to be as broad as this objective.

Thank you.

