



June 2022 newsletter

Electoral Regulation
Research Network





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ERRN Director's Message: June 2022



The year 2022 promises to be another exciting year for ERRN. It will see expansion of the Australian [Electoral Law Library](#) including through a specialised RSS feed and email list which users can subscribe to. The newsletter and Working Paper series — both of which contribute significantly to the corpus of Australian electoral knowledge — will continue to be regularly published.

And I am thrilled to say that plans are on foot to hold an ERRN Biennial Workshop in Canberra in December this year. This flagship event, which was postponed due to the pandemic, promises to be an excellent occasion that brings together specialists in area of Australian electoral regulation (including electoral commission officials and academics). Many thanks here to Professor Jill Sheppard and other ACT ERRN convenors (Peter Brent; Michael Maley and Damon Muller) for agreeing to organise the Biennial Workshop; and also to Dr Paul Kildea for organising the teaching workshop that will accompany the main event.

These activities will be accompanied by a rich suite of seminars. There are several on coming elections. The Queensland chapter kicked off the year with a [seminar](#) on the logistical challenges of the coming federal election, a seminar that was followed by the New South Wales chapter's federal [election preview](#) by Antony Green. In addition, there will be seminars on the New South Wales and Western Australian elections.

Challenging topics for electoral regulation will be tackled through ERRN seminars with planned events on electoral disinformation; stolen elections claims; and the role of social media in elections. Enduring topics such as voter participation, informal voting, lowering the voting age and electoral redistributions will also be the subject of ERRN seminars.

It remains for me to thank the ERRN community: the ERRN convenors, editors, Governance Board, Administrator as well as those who unhesitatingly support ERRN. Needless to say, the success of ERRN is very due to their efforts.

News

November '21 - June '22



Australia's first full federal election under Covid-19 is over, bar the counting of remaining declaration votes, most of them postal and the results in all House of Representatives are known, if not all declared. The Australian Electoral Commission would be happy so far, for the election administrator's [prayer](#), 'let this election not be close' was answered, with the incumbent prime minister Scott Morrison conceding, despite a slower than usual count, on election night. The Labor seat haul of 77 seats out of 151 might at first glance seem modest, but with a record 16-strong crossbench, and opposition tally of just 58 — the Coalition's smallest proportion of lower house seats since the creation of the Liberal Party during the second world war — the outcome is one-sided. In these Trump-fuelled, Covid-inflicted, conspiracy-inclined times, this is no small mercy.

For the first time at a federal election, a majority of votes were cast before election day, but it was a close run thing. The proportion, likely to be between 50.5 and 51 per cent, on the surface appears to represent a slight escalation of recent increases — from approximately 31 per cent in 2016 and 41 per cent in 2019. (It is never possible to precisely state the number of early votes, because some declaration votes are impossible to categorise). But beneath the headline lay a surge in postals (after a small decline in 2019) and more modest, in line with trends, lift in pre-polls.

The tension between the stipulations of the *Commonwealth Electoral Act 1918* and reality of voters' demands for convenience grows. As Australian Electoral Commissioner Tom Rogers [reminded everyone](#) during the campaign, the law still "requires people to vote on the day unless there's a reason for them not to".

(This terminology contrasted starkly with that at the most recent ACT election, in 2020, which Elections ACT explicitly framed as a five week [election period](#), "encouraging everyone to vote early and vote safely".)

And yet the AEC also urged people to avail themselves of the pre-poll opportunities during the two-week window (down from three-week for the two previous elections). The legislation meanwhile remains quite restrictive, stating that to qualify a person must meet at least one of the criteria laid out in the lengthy [Schedule 2](#) of the Act. In practice all that was needed was to answer "yes" to a question from the electoral official along the lines of "are you eligible to vote early?"

(Until 2010, all pre-poll votes were declaration votes, which meant the elector had to sign a form stating they met the conditions, which were more restricted back then.)

If the AEC's embrace of early in-person voting sat uncomfortably with the letter of the law, this wasn't the case with postal voting, an activity the Commissioner rather discouraged. That despite this a (on current estimates) approximately 14 per cent of turnout arrived in the mail (the previous record, in 2016, was 8.6) reflects an understandable desire on the part of many Australians to avoid large gatherings during Covid. As with a variety of behaviour changes during the pandemic, it remains to be seen how much will revert to the status quo ante.

A small part of that postal vote increase resulted from decreased mobile polling due to Covid, mostly felt in remote communities, hospitals, nursing homes and prisons. And while three years ago the AEC took votes in person in [85 cities](#) around the world, this was [slashed](#) in 2022 to just 19. Although the AEC reportedly "contracted a point-to-point courier to send postal vote packs directly to overseas voters," there have been multiple accounts of ballots [not arriving](#) for electors.

Perhaps the biggest surprise in this space was Electoral Commissioner Rogers urging people to apply for postal votes directly with the AEC [rather than through the political parties](#). While this might seem common sense, it is the site of decades-long battle. Electoral experts all but unanimously recommend abolishing the practice of party-initiated postal votes, but the major parties are robustly bipartisan on this score, jealously guarding these data-harvesting exercises. At previous elections, some have sent out their postal vote applications in AEC-coloured purple and even had "returning officer" on the return envelope. For the AEC to push back publicly (as opposed to in a parliamentary inquiry), is unusual, perhaps unprecedented.

How should we view the uptake in postal voting? The 19th century inventors of the Australian ballot, which for the first time anywhere saw the state enforcing voting secrecy (within decades it had become standard procedure around the democratic world), would be turning in their graves at the in effect optional nature of the private ballot for such a large proportion of electors. But times do change — in advanced, wealthy democracies at least. (In low-income nations, where the potential for widespread coercion and bribery remains real, secrecy remains sacrosanct.) Switzerland has for a long time sent a

postal vote to everyone on the roll, and the NSW Electoral Commission did just this for by-elections in March this year. (See that state's section, below.) What this all means for the future is not clear, and the context of declining postal services is a complicating factor.

Purse strings were substantially loosened for this election, with the cost, excluding party funding, put at around \$400 million, up from around \$300 million in 2019. Temporary staff numbers increased from approximately 90 thousand in 2019 to 105 thousand. What did all those extra employees do? Lots of spraying and wiping for one thing — of benches, boxes, tables, everything. And of pencils, whose number exploded from around 100 thousand three years ago to about 4.5 million.

Polling booth queues were longer than usual, both pre-poll and on election day, and counting was slower.

Most of these changes didn't require legislative changes. Of the ten electoral acts passed by federal parliament since September last year, only two dealt with Covid. The [first](#), in December, implemented [recommendations](#) of the *Joint Standing Committee on Electoral Matters*' Report of the 'Inquiry on the future conduct of elections operating during times of emergency situations.' It bestowed extra powers to the Commissioner in any situation declared an emergency under a Commonwealth emergency law, including to override state and territory restrictions that would limit canvassing at polling places and to insert extra flexibility to postal vote rules. (No emergency was declared, and the powers were not used.)

The other, which passed in [February](#), was a one-off specifically for this pandemic. It expanded the availability of telephone voting from vision-impaired Australians and those working in Antarctica to anyone under Covid lockdown from the Tuesday evening before election day. Intended as a backup only, to be used sparingly, it developed in that final week into a potential headache when it became apparent that most electors (unsurprisingly, in hindsight) were not sufficiently aware of their obligations to apply for a postal vote if they tested positive from Saturday to Tuesday evening. A quick regulation on the day before election day allowed anyone under lockdown to vote by phone. And with apparently no anecdotal accounts of people trying and unable to vote by phone, it quickly dropped from the radar. Some 75 thousand votes were cast in this way.

Not wholly unrelated to the pandemic, the online electoral rumour mill has been doing extra trade. A popular one in the lead-up to this election, and after, claims the AEC used voting machines supplied by Dominion, the company that many Trump supporters claim rigged the last American presidential elections. If the conspiracy theory was bizarre regarding the United States, it was positively batty in the Australian context, as we [don't use](#) any voting machines in our federal elections.

The AEC took the front foot against misinformation and disinformation about the electoral process, releasing videos such [this](#), and advertisements urging people to check the source of information they hear about. The Commission was active on social media and also in the mainstream media discussing that activity. Social media service Tiktok, after consultation with the AEC, launched an [election guide](#) and [proactive](#) approach and "established a new fact-check process in line with its community guidelines, which prohibit harmful misinformation and content that is inauthentic, or designed to mislead users."

An ERRN [webinar](#) in March anticipated the tight labour market seeing some loss of critical knowledge; and indeed in the final week of the campaign there was reporting of staff shortages in more remote polling stations, which after an outcry apparently were rectified.

Apart from the pandemic, the count was slowed even more by the sharp decline in major party support (around 69 per cent in total, down from 75 in 2019), a continuation of recent trends plus a lot more. We saw more than the usual rethrowing of two-candidate preferred indicative counts in the lower house, and several three-candidate-preferred ones.

A [rule](#) whereby the Commission conducts full preference counts before declaring in all electorates where it is theoretically possible, even if infinitesimally likely, that they have the wrong two-candidate-preferred count, got a thorough workout. (All electorates get a thorough preference count, but the rest are done after the declaration.) Due to the collapse in major party primary votes (from an already post-second world war record low of 74.8 per cent in 2019 to a touch over 68 per cent this year) it was triggered in roughly half the 151 electorates. Blogger Ben Raue [calculates](#) the number (75 on current counting) is more than double the 2019 figure of 33 and compares with just 4 in 2004.

And that's without mentioning the Senate, where since the 2016 Turnbull government's changes, introducing optional preferential voting, counting has also become more arduous. At time of writing the button has been pressed on several of the eight sub-national jurisdictions, but it's clear the Greens, for a second election in a row, won a seat in each state, taking them to a record twelve. The big disrupter was a former rugby union player David Pocock winning the second Australian Capital Territory spot, squeezing out Liberal Zed Seselja. Until this year the ACT, like the Northern Territory, had always returned one senator from each major party.

It seems a lifetime ago, but there was electoral life before the election campaign. Elsewhere on the commonwealth front since November's newsletter, the party registration saga continued its twists and turns. For those joining late: last August parliament [passed](#) the *Electoral Legislation Amendment (Party Registration Integrity) Act 2021*, whose purpose was to cull party numbers, particularly above-the-line on Senate ballot papers. Its too prongs were an increase in required membership numbers from 500 to 1,500 and, more contentiously, a rather heavy-handed attempt to combat possible name confusion. The latter went to the courts. As a result the Democratic Labour Party (to name probably the highest profile victim) is no more, and while the Liberal Democrats initially suffered the same fate, after some clever legal manoeuvring got to fight (unsuccessfully) one more election under that name. (See also Case Notes, below.)

The New Liberals were at first given the thumbs up, a decision reversed on an internal review. (Surprisingly perhaps, the AEC [described](#) being "fortified" in its decision by research findings presented by polling and lobbying outfit CJT, which has a long relationship with the Liberal Party.) Their name of the ballot paper was TNL.

Late last year Senator Samantha McMahon, the only federal MP from the Coalition's Northern Territory contingent, the Country Liberal Party, lost preselection, and in January this year joined the crossbench. The relevance to this discussion is that parties already in parliament don't need to clear the 1,500 member hurdle, and the CLP suddenly became a non-parliamentary party. The AEC gave it two months notice to provide 1500 members, but it was [saved](#) by the general election, which produced a new CLP Senator.

The party name legislation impacted other, lesser-known entities. Blogger Kevin Bonham kept a [continually updated page](#) dedicated to the news.

Voter ID, which had a starring role in the November newsletter, was doomed by the Senate even under the previous government. With the change of government it is gone (or it will be once parliament sits). And that blast from the previous decade, Section 44 of the Constitution, made a return during the campaign regarding several candidates with little chance of winning. More importantly, it currently hangs over the head of the elected Independent Dai Le in the NSW electorate of Fowler, who was born in the then South Vietnam in 1968.

Of other electoral legislation to pass federal parliament since the November newsletter, three dealt with financial disclosure:

Most controversial was the *Electoral Legislation Amendment (Political Campaigners) Act 2021* which expanded the definition of political campaigners and lowered disclosure thresholds for those so defined. It was widely seen as an attempt to bring many charities into the system, thereby restricting their activity in the political arena.

The *Electoral Legislation Amendment (Annual Disclosure Equality) Act 2021* and *Electoral Legislation Amendment (Foreign Influences and Offences) Act 2022* tightened the ban on foreign donations introduced in 2019. And the *Electoral Legislation Amendment (Authorisations) Act 2022* required political parties to use their current registered name in authorisations of election advertising and paraphernalia and allowed them to use a condensed name in those authorisations.

In June, to little fanfare, a Commission press release [announced](#) Australia's "first successful prosecution of a person for breaching electoral laws that prohibit misleading or deceiving Australians about the act of casting a vote." The offending, during the 2020 Eden-Monaro by-election campaign, involved false, deranged, outrageous accusations about the Labor candidate emailed to millions of addresses. The same individual had been similarly active in the electorate of Wentworth during the 2018 by-election and the 2019 general election, both times targeting Independent Kerryn Phelps.

"This result is also a credit to the Electoral Integrity Assurance Taskforce, to which the AEC referred this matter in 2020," Mr Rogers said. The Taskforce has been in place since the 2018 federal by-elections.

In April, news.com.au [reported](#) that the offender, Cheng Fan, had "pleaded guilty to charges of releasing misleading and deceptive matter in an election period, using a carriage service to menace, harass or offend and multiple counts of dealing in identification information and using it to commit fraud." In June, according to the [ABC](#), the 34-year-old was "handed a 20-month jail sentence to be served in the community."

Finally, in early February, as every year, we had the AEC's annual political finance dump, for the financial year ending the previous June. With more holes than Swiss cheese, and mere slaps on wrists for non-compliers, it generated fewer stories than usual. Next year we will finally get the data for the current financial year, ending end of June, which of course includes the 2022 election campaign.



On 12 February, four by-elections were held for the NSW Legislative Assembly. Due to Covid-19, the state went Swiss, sending every person on the electoral roll a postal ballot with no application required; the voter could either use the ballot or throw it away and vote in person. A touch under half of turnout (48.9 per cent including a few dozen iVotes) did vote postal, more than five times the proportion across from 9.2 per cent across those electorates at the 2019 general election. Just a quarter voted in person on the Saturday, compared with 66 per cent in 2019, and another quarter voted pre-poll.

In December the NSW Electoral Commission conducted a bumper set of local council elections. Of 128 local councils, 4 were in administration and two others conducted their own elections. There were nine [referendums](#) across eight councils, and 33 [mayoral](#) elections, one of which was uncontested.

Once again the troubled iVote system, whereby people vote on the internet, generated unpleasant headlines. Originally available only to vision-impaired, the criteria have since expanded, and on this occasion it was extended to people outside their council area on election day. Not for the first time, the system fell over, and many were unable to vote. Electoral Commissioner John Schmidt himself brought an application to the Supreme Court, which [declared](#) that because the number of unsuccessful votes could have changed the results in three councils, those three elections are void. At time of writing the re-election dates have not been announced.

It is somewhat complicated by the fact that at least some of those unsuccessful attempts to iVote were from people who were outside their district on the day and were it not for iVote would not have voted at all. As with the AEC's extension of telephone voting (above) it shows that if an election management body is going to offer an extra service for vote delivery, they'd better make sure it delivers.

Since then the Commissioner has announced iVote will not be used at the next general election, in 2023. The system has never been short of critics, who now enjoy some vindication.



Truth in political advertising laws might soon be in place in Victoria. Perhaps.

Such laws were introduced in South Australia back in 1997, and in the ACT last year (so are yet to be operational during an election campaign).

Last year Victoria's Electoral Matters Committee's [Report](#) of its 'Inquiry into the impact of social media on Victorian elections and Victoria's electoral administration' recommended, inter alia, that "the Government introduce legislation making it illegal to publish statements in electoral advertising which purport to be facts but which are inaccurate."

The committee did "not have a strong view on whether the [Victorian Electoral Commission] or a different body should be responsible for managing complaints about inaccurate information in electoral advertising," but the Commission, like most in this country, robustly immune to the lure of mission creep, routinely opposes such expansion of responsibility.

Then in April the *Age* [reported](#) tripartite support, from the government, opposition and the Greens.

One tier down, former Moreland councillor Milad El-Halabi appeared in court [charged](#) with rigging ballots at a council election, along with two alleged co-conspirators. The matter is due to return to court.



State MP Michael Crandon has drawn attention to the fact that his electorate of Coomera, on the northern Gold Coast, has an electoral roll a whopping 32 per cent [bigger](#) than the state average. After the last redistribution, in 2017, Coomera's enrolment of 30,722 was 7.4 per cent lower than the average and was projected to exceed it by 9.5 per cent in 2023. But rapid, older population growth in the northern Gold Coast electorate sees it exploding in the [latest QEC data](#). When more than a third of the 93 electoral divisions are either 10 per cent below or 10 per cent above the average, an election is triggered. The May 2022 data has six above and one below, a long way from the required 32. For the time being, Mr Crandon has to make do with an additional \$2,500 per year in funding; he requested \$18,000.



More than a year after an election last year that produced easily the most one-sided election result in the history of federal, state and territory elections, things have been quiet on the electoral front out west. Unless we note the two-party-preferred swing to federal Labor in this year's federal election, at (on current counting) 11.3 per cent, the biggest by any state or territory this side of 1975 (when Tasmania shifted to the Liberal Party by 11.4).



South Australians went to the polls on 19 March and delivered the Labor Party a big win after just one term in opposition, with 54.6 per cent of the two-party-preferred vote and 25 of 47 House of Assembly seats to the Liberals' 16 and a crossbench of six.

Despite the Omicron wave, South Australia was noticeably slow in announcing Covid measures for the vote. Unlike the later federal exercise, there were no facilities for telephone voting, but parliament eventually legislated for postal vote packs to be made available for people who find themselves in isolation in the dying days of the campaign. These were picked up at rapid antigen test stations, by car.

Postal vote applications (not all of which become actual postal votes) roughly doubled as a proportion of turnout compared with 2018, and prepolls increased by two-thirds. In contrast with the federal election, this still left a big majority of electors, around 70 per cent, doing their voting in person on the day.

Labor governments have been the norm in South Australia this century, but so have Liberal vote majorities; while this is the fifth formation of an ALP government at the last six elections, it's only the second two-party-preferred win. This is partly a function of the unlamented "fairness clause" created in 1991 to ensure the vote winner formed government, but ended up doing the opposite, most spectacularly in 2014. It was put out of its misery in 2017.

South Australia's compulsory preferential voting always records a low informal vote rate, partly because how-to-vote posters are displayed in polling booths, but mostly because of its [savings provision](#) which distributes preferences of incomplete ballot papers as per candidates' and parties' tickets. This year it was 3.2 per cent, compared with 5.2 per cent at the May federal contest.

The result for half the 22-strong Legislative Council was an increase in one for Labor, a decrease for the Liberals and One Nation gaining a seat at the expense of Advance SA.



In Tasmania in February, government minister Sarah Courtney resigned from the ministry and parliament. Under the Hare-Clark electoral system (which Tasmania's lower house shares with the ACT's single chamber, but no other in the country) this triggers rather than a by-election, a "countback". The previous election's result is re-examined, eliminating the retiring member and distributing their preferences, and the next cab off the rank is the replacement. Courtney's was another Liberal, Lara Alexander. In April none other than the Premier followed suit, in the same seat (Bass), and Simon Wood, from the same party, took his place.



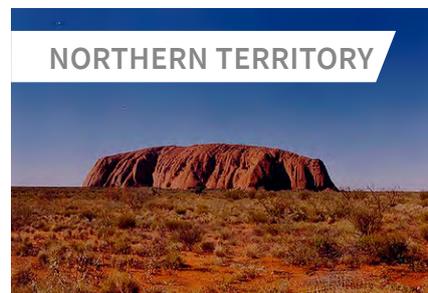
In December two Greens MPs introduced legislation to decrease the voting age from 18 to 16. Under their plan the fine for a 16 or 17 year-old not voting would be \$10, while that for 18 year-olds and older would remain at \$20. A parliamentary inquiry was formed, which in February recommended against it.

(Oddly, the inquiry's [home page](#) included a link to an opt-in online survey to supposedly measure public support, waste of time and resources for everyone involved, given the notoriously unreliable and unscientific nature of such exercises. The results were included in the report — for what they were worth, which was very little indeed.)

The territory's [Electoral Commission](#) was against it, largely because of issues with con-formity with other Australian jurisdictions, alignment with the Commonwealth electoral roll and enforcement of compulsion, the [Liberal Party](#) dismissed it as "a poorly masked attempt by the Greens to increase their vote" and [Labor](#) sat on the fence.

The [report](#) came down in the negative, the chief stumbling block it identified being the issue of compulsion and its enforcement and the financial impact on that younger cohort. The lower fine could not "guarantee young people will not be exposed to criminal proceedings and more serious penalties," and exempting them from penalties altogether would have "the potential to create perceptions of inconsistency and inequality which may undermine respect for the electoral process" and could "erode community support for compulsory voting".

The Greens' original plan had been for voting to be voluntary (rather like, in the federal arena, Indigenous Australians between 1962 and 1984) but had dropped this element to assuage Labor concerns.



The Northern Territory Electoral Commission's annual report again reported by far the lowest enrolment rate of any Australian jurisdiction, 85.7 per cent of eligible Territorians compared with the national figure of 96.2 per cent. As the electoral roll is predominately compiled by the AEC, the numbers largely coincide with the Territory's component of the national roll. This was an issue with some profile in the May federal election, particularly in the electorate of Lingiari, where the popular Labor member had retired and the contest was competitive. The unenrolled are dramatically overrepresented by Indigenous Australians, and they largely vote for the ALP.

Some of the blame is being laid at the feet of the AEC's direct enrolment program, which uses government agency data to change and add to the roll, but this seems misguided. The Territory and national participation rates [in 2011](#), just before direct enrolment began, were 78.4 and 90.9 per cent respectively, so both have improved by similar amounts in the decade since. The culprit can more likely be found earlier, in the move away from habitation reviews (in person visits by the AEC) in 1999; they were replaced by the practice of using government data to take people off the roll when they moved home, but not put them on at another address, or to make additions. (Direct enrolment merely corrected this imbalance.)

In terms of numbers, turnout is an even bigger problem: 74.9 per cent (of the incomplete roll) at the last Territory election in 2020, and 73.0 for the jurisdiction's almost-completed 2022 federal election count, compared with 89.7 per cent nationally.

The new Labor prime minister, Anthony Albanese, sheeted these statistics to the at his [predecessor](#) (specifically regarding Lingiari, with 67 per cent turnout), describing it "straight out of the right-wing [United States] Republican playbook". But note the almost-as-awful turnout, above, for the 2020 election run by the Territory's electoral body, under a Labor government.

Dialling down the bombast, one can reasonably suggest that the Coalition government, under three prime ministers, didn't see much point in prioritising this issue, and that electoral considerations were not totally absent.

The extent of any improvement in participation and turnout in the Territory at the next federal election will be worth watching.

Event reports



ERRN Webinar

'Changes to the American electoral system: politics as usual?'

30 November 2021

After the high drama of the 2020 US presidential election and its aftermath, there has been a plethora of legislation aiming to change important aspects of the American electoral system. In several States there has been legislation whose avowed purpose is to ensure electoral integrity, while in the US Congress the Democrats have sponsored legislation aiming to maximise participation.

In Australia we are accustomed to elections and electoral boundary reviews being conducted by apolitical independent commissions. It can be hard to [appreciate](#) how every aspect of the American electoral system is partisan and hotly contested. In this seminar, Professor Tim Lynch discussed how elections are and always have been politicised, and how the United States is an ideological project where elections necessarily frame and advance ideologies. Dr. John Hart critically discussed President Biden's address at the National Constitutional Center in July on Protecting the Right to Vote and tie together recent developments in electoral law in Florida, Georgia and Arizona and the Democratic Party's attempt to pass HR.1 (The For the People Act) in the U.S. Congress.

Watch the recording [here](#).

ERRN Webinar

'Hidden Money: Shining light on political finance for the next federal election'

2 December 2021

The gaps in Commonwealth disclosure of political donations mean that the source of millions of dollars of party finance is hidden from public view. Transparency is key to unpicking the complex webs of undue influence and creating a fair and equal democracy. The Centre for Public Integrity presented on their research into hidden money in politics and what reforms are needed to fix it.

This webinar was joint initiative of the *Electoral Regulation Research Network (ERRN)*, [Centre for Public Integrity](#) and [Stretton Institute](#).

Watch the recording [here](#).

ERRN Webinar

'Australia 2022 election: Logistical challenges'

15 March 2022

With the federal election looming, ERRN QLD chapter organised an online panel discussion on the management and logistics of the election. At least two elements regarding the forthcoming election can be considered: logistical challenges such as voters' and staff safety, given Covid-19 and a predicted surge in early in postal voting. Fostering exchange between academics and electoral commissions, in this ERRN event, Professors Anika Gauja and Rodney Smith joined First Assistant Commissioner, Service Delivery Division, Dr Kath Gleeson from the Australian Electoral Commission. The event was chaired by Dr Ferran Martinez i Coma ERRN QLD chapter convener and Senior Lecturer at Griffith University.

Watch the recording [here](#).

G+T Centre/ERRN public lecture

'Australia Votes 2022: Election Preview with Antony Green'

4 April 2022

The federal election is just around the corner and Australians are weighing up their vote. In this public lecture, ABC election analyst Antony Green discussed a range of key issues and talked about the races to watch in the House and Senate. The event was jointly hosted by the Gilbert + Tobin Centre of Public Law and the Electoral Regulation Research Network.

Listen to Antony [here](#).



Online WA ERRN Chapter event

'You be the judge! Do citizen juries work in the Australian context?'

8 June 2022

Citizen juries provide an opportunity to get a representative group of citizens involved in participatory decision-making at the grassroots level. Emeritus Professor Janette Hartz-Karp discussed the phenomenon of citizen juries and the concept's development in the Australian context. Emeritus Professor Geoff Gallop AC spoke to his engagement with the concept through the New Democracy Foundation and the Hon Jay Weatherill AO reflected on his experience in overseeing a major citizen jury initiative in South Australia.

Chair: Associate Professor Ron Levy

A video will shortly appear [here](#).

Upcoming events:

ERRN Victorian Chapter

'Political Parties and the Courts'

20 July 2022, 5-6pm

Speakers: Professor Anika Gauja (University of Sydney, Political Science) and Professor Graeme Orr (University of Queensland, Law).

Venue: Melbourne Law School and Zoom

Details [here](#).



Publications



Paul Kildea, [‘The Law and History of State and Territory Referendums’](#), 2022. 44(1) *Sydney Law Review* 31-76, vol 44 no. 1.

Paul Kildea, [‘Time to modernise: The future of constitutional review and referendums in Australia’](#), *AUSPUBLAW*, 11 February 2022.

Paul Kildea and Sarah Murray, 2021. [‘Democratic Constitutions, Electoral Commissions and Legitimacy – The Example of Australia’](#), *Asian Journal of Comparative Law* 177-192, 2021 no. 16.

Halfdan Lyngue and Ferran Martinez i Coma, 2022. [‘The effect of economic downturns on voter turnout in Africa’](#) *Electoral Studies*.

Narelle Miragliotta and Sarah Murray, [‘iVote, the 2021 NSW Government Elections and the Future of Internet Voting’](#), *AUSPUBLAW*, 1 June 2022.

Damon Muller, Parliamentary Library, [Election funding and disclosure in Australian jurisdictions: a quick guide](#), updated February 2022.

Graeme Orr, 2022, [‘Stronger laws on “foreign” election influence were rushed through this week – limiting speech but ignoring our billionaire problem’](#), *The Conversation*, 18 February 2022.

Graeme Orr, 2022, [‘What’s in a Name? Political Party Names and Ruddick v Commonwealth’](#), *Australian Public Law*.



Case Notes

Ruddick v Commonwealth [2022] HCATrans 23

The High Court by majority of 4:3 upheld items 7, 9, 11 and 14 of Sch 1 to the *Electoral Legislation Amendment (Party Registration Integrity) Act 2021* (Cth) (“the 2021 Amendments”) which amended the *Commonwealth Electoral Act 1918* (Cth) and held that it did not infringe the constitutional implied freedom of communication on government or political matters.

The Commonwealth Electoral Act permitted registered parties to have their name, abbreviation and logo printed on the ballot paper next to the name of a candidate endorsed by the party. Items 7 and 9 of the 2021 Amendments imposed a requirement that the name, abbreviation or logo of a party applying for registration must not, subject to limited exceptions, contain a word that is in the name or abbreviation of a prior registered party without that party’s consent. By items 11 and 14, an existing party could not remain registered under its name if an earlier registered party objected to the existing party’s name or logo and that name or logo contained a word that was in the name or abbreviation of the earlier registered party.

This case involved the application of the 2021 Amendments to the Liberal Democratic Party. If applied to the Liberal Democratic Party, it would be precluded from using ‘Liberal’ on the ballot paper in a federal election.

The plaintiff, Mr Ruddick, was the lead Senate candidate endorsed by the Liberal Democratic Party for New South Wales. In the 2013 federal election, the Liberal Democratic Party appeared first on the New South Wales Senate ballot paper, and substantially to the left of the “Liberal & Nationals”. In that election, the Liberal

Democratic Party received approximately three times the vote share it received in its next best election and exceeded its expected vote share by 5.5 percentage points, or almost 241,000 votes. Mr Ruddick admitted, in his pleading, that some voters unintentionally voted for the Liberal Democratic Party instead of the Liberal Party because they were confused as to the party affiliation of Liberal Democratic Party candidates. An issue was whether it could be inferred that a significant part of the increase in that vote was due to the confusion caused by the similar party names.

The Court, by majority, held that items 11 and 14 did not infringe the implied freedom or preclude the direct choice by the people of senators and members of the House of Representatives.

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 and responsible government.

The majority of the Court (Gordon, Edelman, Gleeson, Steward JJ) held that there was no burden on informed electoral choice or the ability to communicate on government or political matters. The constraint implied by the requirement of “choice” is that the people must have the ability to make an informed choice. Proof that a law burdens the implied freedom requires that the existing freedom is curtailed or restricted in some way. The

purpose of the 2021 Amendments was to reduce voter confusion, and their likely effect was to improve the clarity, and hence the quality, of electoral choice and communication on government or political matters.

NSWEC v Kempsey Shire Council (No 2) [2022] NSWSC 282

The case concerned the legal consequences of the failure on the afternoon of 4 December 2021 of the “iVote” system of technology assisted voting administered by the NSW Electoral Commissioner on three of the many council elections conducted on that day. The Electoral Commissioner applied for orders declaring the three elections void in whole or in part.

The Court held that even though the number of voters denied the franchise by the failure of the iVote system was small, the system of proportional representation utilised in local government elections is such that the votes that were denied to those voters had the real potential to affect the election of at least one Councillor in each of the three elections. Accordingly, because the system of election for the three Councils was proportional representation, the Court found it necessary to declare all of the Councillors’ elections void. The Court noted that had it only declared one Councillor’s position void then the result would be a by-election using the optional preferential system of voting which would undermine the manifest purpose of the proportional voting scheme of the *Local Government Act 1993* (NSW).

Camenzuli v Hawke [2022] NSWSC 168

The plaintiff (Matthew Louis Camenzuli, a member of the Liberal State Executive) sought urgent declaratory relief about the proper construction of the constitution of the NSW Division of the Liberal Party of Australia (Liberal Party). The plaintiff sought a declaration that, if an Annual General Meeting (AGM) of the State Council of the Liberal Party of Australia (New South Wales Division) does not occur by 30 November in an odd year or such other date as the State Executive may determine within three months of 30 November in that odd year, no member of the State Executive ceases to hold office as such by reason only of that circumstance.

The judge held that the preponderance of authority supported the proposition that disputes as to the operation of the constitutions of political parties are justiciable. In doing so, the judge distinguished the case of *Cameron v Hogan* (1934) 51 CLR 358, where it was held that the then extant rules of the Australian Labor Party did not operate to create contractual rights and duties between members and/or the executive of the Australian Labor Party nor did they confer on members a proprietary interest in the assets of the Party; and hence that the Party's rules were not enforceable by Court action.

The judge decided to grant the declaration in favour of the plaintiff, meaning that the elected members of the State Council validly held office.

Asmar v Albanese [2022] VSCA 19

This case concerned a challenge by certain Victorian Australian Labor Party (ALP) branch members and affiliated unions against the National Executive of the ALP's decision to override the preselections of the State branch for 21 safe ALP seats and one newly created seat, and instead conduct the preselection at the national level.

The Victorian Court of Appeal dismissed the appeal by the Victorian branch seeking to have the National Executive's resolution on the preselections declared invalid.

The Court determined that the plaintiff's claim that the National Executive's intervention by the Administration Resolution was an unlawful interference with the trusts upon which the Victorian Branch's property is held was justiciable. However the plaintiffs' other grounds for challenging the resolutions were not justiciable, because they were internal disputes within a political party, which is an unincorporated association.

However, the Court found that the plaintiffs failed to establish their claim that the National Executive unlawfully interfered with the administration of the Branch trusts by passing and implementing the resolution. The Court held that the Victorian Branch of the ALP is not a separate legal entity, but as the word 'Branch', which is part of its name, indicates, it is part of the ALP. Thus the powers contained in the National Constitution and exercisable by the National Executive apply to all Branches and members of the ALP. The Court found that none of the plaintiffs' grounds of challenge would succeed in establishing that the National Executive resolutions were invalid.

Kairouz v Bracks (No 2) [2021] VSC 671

Marlene Kairouz is a member of the Australian Labor Party (the 'ALP'), the member for Kororoit in the Victorian Parliament and a former Minister in the current Victorian Government. She challenged the validity of the National Executive's intervention in the Victorian Branch, amendments made to the Branch Rules and the disciplinary charges alleging involvement in, or knowledge of, branch stacking brought against her by the Administrators of the Branch.

The Court held that Kairouz's claim that the National Executive's intervention by the Administration Resolution was an unlawful interference with the trusts upon which the Victorian Branch property is held is justiciable. However, the Court held that Kairouz had not proved or established her claim that the National Executive had interfered with the administration of the Branch trusts by passing and implementing the Administration Resolution.

The Court found that Kairouz's other grounds for challenging the National Executive's Resolutions and the disciplinary charges were not justiciable and, even if they were justiciable, none of her grounds of challenge would have succeeded in establishing that the Resolutions were invalid. The Court thus dismissed the challenge.

Pattison v Victorian Electoral Commission (Review and Regulation) [2021] VCAT 1073

The Applicant challenged the result of the 2020 Victorian local government election for Loddon Shire Council, where he stood unsuccessfully as a candidate, alleging councillor misconduct and irregularities preliminary to voting.

The Tribunal dismissed the application, finding that there was no basis to declare the applicant elected and declare the election void.

Moreland City Council, North-West Ward

The Moreland City Council matter, which was reported in the previous newsletter and concerned suspected vote tampering in the 2020 local government elections, has not progressed any further through the Victorian Civil and Administrative Tribunal (VCAT). The VEC had applied to the VCAT for the election to be declared void. However, the criminal investigation conducted in parallel with the VCAT matter has resulted in charges being laid against three people, including Cr El-Halabi, who has since resigned his position as councillor.

The Electoral Commissioner v Parry & Wilson [2021] NTCAT 33

An application was made under section 143(1) of the *Local Government Act 2014* (NT) (LGA) disputing the election of a council member to the West Daly Regional Council, Tyemirri Ward. There was only one councillor position for that ward. The first and second respondents were the only two candidates.

The election was held on 28 August 2021. The results were declared on 13 September 2021. The first respondent received 31 votes and the second respondent received 24 votes.

The basis for the application was that the first respondent was ineligible to nominate as a candidate due to his employment with the West Daly Regional Council. At the time of nominating as a candidate the first respondent was a staff member of the Council. Section 47 of the LGA provides that a person is disqualified from office as a member of council if the person is a staff member of the council.

The Tribunal held that that in order to be eligible for election, a candidate must be eligible at the time of nomination. As the first respondent was a council staff member at the time of nomination, he was not eligible to be elected.

Accordingly, the Tribunal declared the first respondent, Joe Parry, not to have been duly elected as a member of the West Daly Regional Council at the Local Government Election held on 28 August 2021, and declared the second respondent, John Wilson, to have been duly elected for that seat.

Cocking v The Electoral Commissioner & Paterson & Bedford (No 2) [2021] NTCAT 41

The Applicant challenged the result of a recent local government election for the office of Lord Mayor of Alice Springs. The Second Respondent won by a margin of only two votes.

The Applicant's primary complaint was that the Electoral Commission did not order a full recount of all votes. The Tribunal accepted the evidence of the Commission that counting primary votes was relatively straight forward such that two counts of the primary votes was sufficient to achieve an accurate result. Accordingly, the Tribunal dismissed the challenge and found that the conduct of the vote counting was methodical and thorough.

Rajwin v Northern Territory Electoral Commissioner [2021] NTCAT 42

Raj Rajwin was an unsuccessful candidate in the 2021 Local Government election for the Palmerston City Council. On 4 October 2021, he filed an application to cancel the election results and recount the Palmerston Council Election Votes on the basis of the closeness of the vote and a possible conspiracy of him being placed last in the 'how to vote' cards and his perception of the unfairness of the preferential voting system.

The Tribunal dismissed the application as being lacking in substance and misconceived.

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