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Director’s Message

2018 will see an exciting suite of activities organized by the Electoral Regulation Research Network. A number of seminars will be devoted to topical issues. The Tasmanian chapter has already organized a seminar on the recent Tasmanian elections and so has the Victorian chapter on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (Cth), a Bill that seeks to regulate ‘foreign’ political donations and third parties. Later in the year, the Western Australian chapter will host an event on the continuing saga of disqualifications due to section 44 of the Commonwealth Constitution and the Tasmanian chapter on electoral reform for the State.

Other events will focus on broader trends. The South Australian chapter will be organizing a seminar on electoral inclusion and exclusion of indigenous communities; the New South Wales, Victorian chapters and Western Australian chapters will host presentations on the ERRN Research Collaboration Initiative projects examining changes in the forms of voting; the New South Wales chapter and Australian Capital Territory chapter will respectively organize seminars on electoral integrity and the use of information technology in elections.

A notable feature of the 2018 ERRN activities are several projects aimed at deepening our understanding of Australian electoral regulation through a comparative perspective. The Victorian chapter will be co-sponsoring a workshop addressing the theme, ‘Informed citizens: Are Institutions addressing the knowledge gap?’, and the South Australian chapter will be hosting an American expert on prisoner disenfranchisement who will compare the Australian and US experiences in this area. In addition, ERRN is coordinating the update of the main global database on political finance laws, International IDEA’s Political Finance Database, in relation to countries in Oceania region; and will be working with the Melbourne School of Government and the Human Rights Legal Centre on a project on ‘Democracy and Migration’.

A new ERRN initiative will also be organized in 2018: a two-day course on ‘Regulation of Elections’. The aim is to provide an introductory course to electoral commission staff on the research and scholarship on the regulation of Australian elections through presentations by leading experts. Topics covered will include: the Australian constitutional framework of elections; the Australian party system; Voting Rights; Compulsory Voting; Forms of Voting; Voter Engagement; Electoral Boundaries; Media in Elections; Political Finance; and Electoral Commissions.

Alongside these events is the ERRN Working Paper Series (edited by Dr Aaron Martin). A number of papers will be published this year from the presentations made at the 2017 ERRN Biennial Workshop with the first one by Australian Electoral Commissioner, Tom Rogers, on ‘The High Court and the AEC’ having been published in January.

The WA ERRN Convenors, Sarah Murray, Justin Harbord, Alan Fenna and Martin Drum, should be thanked here for their sterling efforts in making the 2017 workshop an outstanding success.

Last but not least, there are, of course, the ERRN biannual newsletters. The label ‘newsletter’ possibly undersells the contribution being made here. The first ERRN newsletter, published in December 2012, was 16 pages long whereas the present one is more than 30 pages. There is no doubt that these newsletters provide the most comprehensive catalogue of contemporary developments relating to Australian electoral regulation. Special credit goes to the newsletter team: Nathaniel Reader, the Newsletter Editor; Yee-Fui Ng, the Legal Editor; and Amy Johannes, the Newsletter Designer and ERRN Administrator.

Professor Joo-Cheong Tham, Melbourne Law School
In December 2017 the federal Government tabled the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017* (Cwth) in Parliament. This Bill proposes the most significant changes of federal election funding laws for more than a decade. In summary, the Bill:

a) establishes public registers for key non-party political actors;  
b) enhances the current financial disclosure scheme in the Commonwealth Electoral Act 1918 (the Electoral Act) by requiring non-financial particulars, such as senior staff and discretionary government benefits, to be reported;  
c) prohibits donations from foreign governments and state-owned enterprises being used to finance public debate;  
d) requires wholly political actors to verify that donations over $250 come from:  
   i. an organisation incorporated in Australia, or with its head office or principal place of activity in Australia; or ii. an Australian citizen or Commonwealth elector;  
e) prohibits other regulated political actors from using donations from foreign sources to fund reportable political expenditure;  
f) limits public election funding to demonstrated electoral spending;  
g) modernises the enforcement and compliance regime for political finance regulation; and  
h) enables the Electoral Commissioner to prescribe certain matters by legislative instrument.

As reported in the April 2017 ERRN newsletter, the Bill follows previous investigations by the Commonwealth Joint Standing Committee on Electoral Matters (JSCEM) into political donations, particularly in its second interim report on the inquiry into the conduct of the 2016 federal election: *Foreign Donations*. In that interim report the JSCEM made the following recommendations:

a) donation reform should be aligned with Australia’s sovereign interests;  
b) donation reform should be transparent, clear, consistent and enforceable;  
c) donations from foreign citizens and foreign entities to political parties and their associated entities and third parties should be banned;  
d) an extension of the foreign ban to prevent ‘channelling’ should be considered as part of JSCEM’s broader inquiry into donations and disclosure; and  
e) penalties for non-compliance should be increased

In the explanatory memorandum for the Bill, the Australian Government argues that the Bill is necessary to protect the integrity of Australia’s electoral system:

> “However, Australia’s regulatory approach to political finance has not kept pace with international and domestic developments. Election campaigning has radically changed through the professionalisation of politics and the proliferation of media advertising. New political actors neither endorse candidates nor seek to form government, yet actively seek to influence the outcome of elections. While a positive indicator of the strength of Australian civil society and civic engagement, these new actors lack the public accountabilities of more traditional actors, such as registered political parties or parliamentarians. Internationally, media reports increasingly document foreign attempts to influence elections around the world. This is problematic, because the real and perceived integrity and fairness of elections is critical to peaceful democratic government.”

There has been considerable media and public commentary about the Bill. Actors in the not-for-profit sector have raised concerns about the impact the reforms contained in the Bill will have on charities. Specifically, the Bill has come under fire
The Bill’s Explanatory Memorandum notes that the Bill “intends to illuminate the nature and extent of activities undertaken by persons acting on behalf of foreign actors in Australian political and governmental processes. The scheme established by the Act is intended to provide transparency and oversight of the many and varied ways in which foreign actors seek to exercise influence over Australian political and governmental systems and processes, including the views of the Australia public on such matters.”

The Bill establishes several exemptions from the registration requirements for activities undertaken on behalf of foreign principals. The key exemptions which may apply to companies are those relating to commercial or business pursuits, including:

- employee subsidiary exemption;
- commercial interests exemption;
- humanitarian aid or assistance;
- legal advice or representation;
- reporting news or current affairs;
- acting in accordance with a religion; and
- diplomatic, consular or other privileges or immunities apply in relation to the activity.

According to the federal Government, the scheme does not prohibit the involvement of foreign actors in Australia’s political and governmental processes. Rather, it simply imposes a requirement that, when a person is undertaking activities on behalf of a foreign actor, “this is made transparent to the decision-maker and the Australian public, so that they are able to accurately assess the interests being brought to bear”.

Like the Electoral Donations amendment, there has been considerable public discussion about the Foreign Influence Bill and the combined effect of the Bill and the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (Cwth) on charitable entities. As ERRN readers will know, the Bill follows the controversies around former Attorney-General George Brandis; the Bill “said the majority report did not support the party’s amendment to not include non-partisan issue based advocacy in the definition of political expenditure”.

Dastyari’s resignation followed multiple reports, as covered in the April 2017 and October 2017 ERRN newsletters, about his links with the Chinese Communist Party and high profile Chinese-Australian business Huang Xiangmo, as well as his interventions in policy debates about the South-China Sea. In December, Ross Babbage, former head of strategic analysis at the Office of National Assessments, “described Dastyari as an ‘agent of influence’ and part of China’s aim to build local support for its policy positions around the world”.

Foreign Influence Transparency Scheme Bill 2017 (Cwth)

The Foreign Influence Transparency Scheme Bill 2017 (Cwth) was introduced in Parliament in December 2017 along with the Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017 (Cwth). It establishes the Foreign Influence Transparency Scheme to:

- require registration by certain persons undertaking certain activities on behalf of a foreign principal;
- require registrants to disclose information about the nature of their relationship with the foreign principal and activities undertaken pursuant to that relationship;
- place additional disclosure requirements on registrants during elections and other voting periods;
- establish a register of scheme information and provide for certain information to be made publicly available;
- provide the secretary with powers to obtain information and documents; and
- establish various penalties for non-compliance with the scheme.

From many in the sector with fears it could have a ‘chilling effect’ on advocacy and impose an onerous level of red-tape on charities - the Benevolent Society told the Commonwealth JSCEM that the Bill is “too vague to be meaningful and enforceable”. At present, legislative changes in September 2017 mean that charities are now legally defined as a “third party” – the equivalent of an election campaigning organisation – if they engage in “public expression of views on an issue that is, or is likely to be, before electors in an election”. Further, a survey conducted by Pro Bono Australia asked how respondents how concerned they were about the “disclosure and regulatory obligations of the draft bill, 79 per cent said they were concerned, with the majority of those (53 per cent) either “very concerned” or “extremely concerned”. These points were raised during the Commonwealth JSCEM’s inquiry into the Bill, where several inquiry participants, including ERRN Director Professor Joo-Cheong Tham (along with the Law Council of Australia and Professor Anne Twomey, amongst others), critiqued the term ‘political purpose’ and noted the definition may capture non-political activities. Beyond this, there was some support for the Bill’s provisions establishing a registration scheme for political campaigners, actors and organisations.

The Bill was referred to the Commonwealth JSCEM in December 2017, with the committee issuing an advisory report on 9 April 2018. The Committee received 102 submissions from the charity sector. In its report, the Committee acknowledges the concerns raised and proposes 15 recommended amendments. For most charities, the two key recommendations are that the Commonwealth Government:

a) reconsiders introducing the term “political purpose” into the Commonwealth Electoral Act 1918 (Electoral Act), due to potential confusion with the Charities Act 2013 in which the term has a divergent meaning; and

b) amends the definition of “political expenditure” to define the type of expenditure which constitutes expenditure undertaken to influence voters to take specific action as voters, so as not to capture non-political issue advocacy.

Following the report’s publication, Labor called on the government to make charities exempt from the Bill. Charities have also claimed there is still a lack of clarity around the legislation, and called for the Bill to be withdrawn and redrafted. Echoing these concerns, the Greens issued a minority report dissenting from the JSCEM’s full report, to highlight the party’s differences with the JSCEM regarding “the critical issue of the role of non-government organisations and charities in engaging in issue based advocacy”. Greens Senator Lee Rhiannon “said the majority report did not support the party’s amendment to not include non-partisan issue based advocacy in the definition of political expenditure”.

Resignation of Senator Sam Dastyari

On 12 December 2017, former Senator Sam Dastyari announced he would be resigning from the Senate prior to the 2018 parliamentary year; he formally submitted his resignation to the President of the Senate on 25 January 2018, a decision which drew some criticism as it allowed him to continue earning his Senator’s salary for over a month before his official resignation.

ERRN readers will know, the Bill follows a comprehensive review of Australia’s counter-intelligence law led by former Attorney-General George Brandis; the Bill is thus designed to stop interference in Australia’s democratic institutions, and also follows the controversies around former Labor Senator Sam Dastyari’s aired in 2017 and early 2018. As noted by Williams, a journalist reporting for the not-for-profit
sector, “the government’s suite of foreign interference laws – which were introduced with the aim of cracking down on foreign influence in Australia – have come under attack from civil society organisations across the political spectrum”. Critics note that if passed, the scheme would make it difficult to see Australia stifle civil society and join the ranks of countries such as Russia and Egypt which prohibit foreign donations to charitable organisations.

The Bill was referred to the the Parliamentary Joint Committee on Intelligence and Security for review by Prime Minister Malcom Turnbull on 7 December 2017. Submissions were open until midday 22 January 2018. While the Committee has indicated that it will report on the Scheme by February 2018, the committee has yet to table its report.

Ministerial staffing, code of conduct and resignation of Barnaby Joyce

On 22 February 2018 Barnaby Joyce resigned as Deputy Prime Minister following ongoing fallout from his relationship with a staffer, Vicki Campion.

Subsequent to the scandal, on 15 February 2018 Prime Minister Malcolm Turnbull announced changes to the ministerial code of conduct. The code - Australian Government: Statement of Ministerial Standards - at 2.24 now specifically prohibits Ministers from having sexual relations with their staff. In authorising these changes, Prime Minister Turnbull noted that “Ministers should also recognise that they must lead by example – values should be lived. So as you will see I have today added to these standards a very clear and unequivocal provision: Ministers, regardless of whether they are married or single, must not engage in sexual relations with their staff. Doing so will constitute a breach of the code. While this new standard is very specific, Ministers should be acutely aware of the context in which I am making this change and the need for them always to behave in their personal relations with others, and especially their staff, the staff of other Ministers or members of the Australian Public Service, with integrity and respect”.

The changes have met with some criticism. Barnaby Joyce said the new code goes too far and should not meddle in people’s personal lives. Others, including key lawyers in workplace relations law, suggest that imposing a code from the ‘top down’ is inappropriate and that any attempt to regulate workplace behaviour, even in Parliament, should be consultative.

Cambridge Analytica

In March, The New York Times, working with The Observer of London and The Guardian, obtained a cache of documents from “Cambridge Analytica, the data firm principally owned by the right-wing donor Robert Mercer and responsible for the Trump 2016 campaign’s voter strategy. The documents “proved that the firm, where the former Trump aide Stephen K. Bannon was a board member, used data improperly obtained from Facebook to build voter profiles. The news put Cambridge under investigation and thrust Facebook into a crisis of public trust”.

Since the revelations there have been reports that Australian political parties may have attempted to utilise Cambridge Analytica’s services. While Labor and the Liberal Party have denied this, it is known that the company registered an Australian office in Maroubra in 2015, and that in 2017, senior representatives from Cambridge Analytica came to Australia to address a data-driven advertising conference and met with Dan Tehan, who was then the minister responsible for cybersecurity. Some politicians, such as Senator Kristina Keneally, have said that Cambridge Analytica should not be involved in Australian politics.

Commonwealth JSCEM - other inquiries

It has been a busy six months for the Commonwealth JSCEM as it continues work on three separate, ongoing inquiries.

In terms of recent completed inquiries, alongside the Advisory report on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (Cwth), in February 2018 the committee released its final report on the inquiry into decisions made by the Court of Disputed Returns. The terms of reference, received in December 2017, required the committee to consider the implications of recent decisions by the Court of Disputed Returns concerning section 44 of the Constitution on questions referred by the Parliament under section 376 of the Commonwealth Electoral Act 1918, with particular reference to:

(a) the decisions in connection with the disqualification of former Senators Bob Day and Rodney Culleton;

(b) a regime for disclosing information relating to aspects other than section 44(i), for which the Parliament has already provided;

(c) the form such a process might take and how it could be implemented; and

(d) any related matters.

The committee only received one submission from Professor George Williams AO, University of NSW. The report noted that the Senate’s requested reporting date provided insufficient time “to gather evidence and only resulted in one submission... the committee does not intend to present a rushed report on such a significant constitutional issue. Rather, the Committee intends to focus on its other related Section 44 inquiry, which has a later reporting date”. Accordingly, evidence from the report will be included in the committee’s inquiry into Section 44 of the Australian Constitution, which is currently taking evidence.

In terms of ongoing inquiries, the committee continues to investigate the 2016 federal election and matters related thereto. The committee has issued three interim reports; the first interim report: Authorisation, second interim report: Foreign donations, and third interim report: AEC Modernisation. The inquiry continues.

On 28 November 2017, the Prime Minister referred matters relating to Section 44 of the Constitution for inquiry and report. To date the committee has received 70 submissions and is currently conducting public hearings.

On 18 October 2017, the Committee resolved to inquire into and report upon the Australian Electoral Commission’s Annual Report 2016-17.

Federal electoral redistribution

As reported in the October 2017 ERRN newsletter, the AEC Commenced electoral redistributions for Victoria, the Australian Capital Territory, South Australia, Tasmania and Queensland in September 2017. The October 2017 ERRN newsletter reported on Tasmania’s and Queensland’s boundary reviews.

Victoria is undergoing a “redistribution because the number of members of the House of Representatives it is entitled to has increased from 37 to 38 as a result of a determination made by the Electoral Commissioner on Thursday 31 August 2017”. Reports have suggested that the new seat, which is likely to be located in Melbourne’s north west, will favour Labor at the next federal election. Further, the ACT is undergoing a redistribution because the number of members of the House of Representatives it is entitled to “has increased from two to three as a result of a determination made by the Electoral Commissioner on Thursday 31 August 2017”. Overall, as reported by the Australian Financial Review, the “latest redistribution of federal electorates in Victoria and the ACT...
has likely handed Labor four new seats at the next election, effectively wiping out the Coalition’s majority in Parliament.”

South Australia is undergoing a redistribution because the number of members of the House of Representatives it is entitled to “has decreased from 11 to 10 as a result of a determination made by the Electoral Commissioner on Thursday 31 August 2017. The AEC has proposed abolishing the seat of Port Adelaide, held by Labor MP Mark Butler”.

The AEC’s website provides further information about the redistribution process and current status.

**Australian Electoral Commission – procurement audit**

The final report for the Australian Auditor General’s (ANAO’s) audit of the ‘Australian Electoral Commission’s Procurement of Services for the Conduct of the 2016 Federal Election’ was released in January 2018. The objective of “this audit was to assess whether the AEC appropriately established and managed the contracts for the transportation of ballot papers and the Senate scanning system for the 2016 federal election. To form a conclusion against the audit objective, the ANAO adopted the following high-level audit criteria:

- Did the procurement processes demonstrably achieve value for money?
- Were key risks to the security and integrity of ballot papers, and of ballot paper data, addressed?
- Did the AEC obtain adequate assurance of the service deliverables and of the effectiveness of risk treatments?"

The Audit found that although the “AEC could rule out any large-scale vote tampering, it did not conduct a statistically valid audit to demonstrate the data integrity of the election and could not account for all the ballot papers”. The report follows substantive legislative changes affecting the AEC’s operations in May 2016 introducing above-the-line preference voting, and the system’s wholesale introduction before the July 2016 federal election. In the report, the AEC noted the Senate voting changes ‘were the most significant reforms to Australia’s electoral system in 30 years’. The AEC also committed to further strengthening its procurement processes.

**Dual citizenship**

Section 44 of the Australian Constitution continues to claim political careers and spark resignations. As reported in the ERRN Case Notes, the High Court, sitting as the Court of Disputed Returns upon references from the Senate and the House of Representatives, unanimously held that Scott Ludlam, Larissa Waters, Senator Malcolm Roberts, the Hon Barnaby Joyce MP and Senator the Hon Fiona Nash was ‘a subject or a citizen … of a foreign power’ at the time of their nominations for the 2016 federal election, and were therefore incapable of being chosen or of sitting as a senator or a member of the House of Representatives by reason of s 44(i) of the Constitution.

As documented in the ERRN Case Notes, the High Court is also expected to rule on Senator Katy Gallagher’s eligibility to sit as a Senator. It is expected that Gallagher will also be disqualified as the government told the court that Gallagher “ignored the possibility her bid to renounce UK citizenship could take 74 days or longer by posting her application close to a deadline for candidates to nominate for election”.

News reports suggest that the total cost of the by-elections caused by the s44 scandal could exceed $20 million.

Further, the High Court, sitting as the Court of Disputed Returns, has decided a matter referred to it by the Senate over the eligibility of two South Australian senate nominees, Skye Kakoschke-Moore and Timothy Storer who were third and fourth in the Nick Xenophon Team order of senate candidates for the 2016 federal election. On 24 January 2018 the Court held that the vacancy left by “Kakoschke-Moore should be filled by a special count of the votes cast on 2 July 2016; that Kakoschke-Moore’s renunciation of her British citizenship in December 2017 does not render her capable of now being chosen to fill the vacancy; and that Storer should not be excluded from the special count”.

**Batman Division by-election**

A by-election for the Australian House of Representatives seat of Batman was held on 17 March 2018. The by-election was called as a result of the resignation on 1 February 2018 of David Feeney, the incumbent Labour MP. Labor’s Ged Kearney won the by-election.

**Bennelong Division by-election**

A by-election for the Australian House of Representatives seat of Bennelong was held on 16 December 2017. The by-election was called as a result of the resignation of John Alexander, the incumbent Liberal Party MP, on 11 November 2017, when he was unable to produce proof that his father was not a British subject. Alexander won the by-election.

**NEW SOUTH WALES**

**Salim Mehajer electoral fraud conviction**

In April 2018 former Auburn Deputy Mayor Salim Mehajer was found guilty of electoral fraud. Local Court magistrate Beverley Schurr “found the property developer and former Auburn deputy mayor engaged in a joint criminal enterprise with his sister Fatima to rig the September 2012 local government election, which catapulted him into public office”. Fatima Mehajer, who also ran for election to Auburn Council at the 2012 poll, was due to stand trial with her brother in June 2017. She pleaded “guilty on the first day of the trial to 77 counts of giving false or misleading information to the Australian Electoral Commission. Her sentencing was delayed until after the conclusion of her brother’s trial on more than 100 counts of electoral fraud”.

**NSW JSCEM - inquiry into preference counting in local government elections**

In November 2017 the NSW JSCEM tabled its final report for the inquiry into preference counting at NSW local government elections. The terms of reference required the committee to examine the current system of ‘random selection’ in the counting of preferences in local government elections, whether this system delivers fair results in all cases for candidates, whether there are any alternative methods of ballot counting which would produce more accurate preference flows, and any other related matter.

The committee received 23 submissions and made 10 recommendations, including one that the NSW Government introduce the weighted inclusive Gregory method to conduct future local government elections. The report as made a number of recommendations to increase the transparency of the electoral system and improve the scrutineering process; and recommendations to remove inconsistencies between the local and state electoral systems.
Proposed political donations reforms

As reported in the October 2017 ERRN newsletter, Victoria is set to introduce a suite of political donations laws in 2018, although the timing of the amendments remains unclear given legislation has not been introduced in Parliament. In September 2017 Premier Daniel Andrews announced the proposed changes including:

- “capping donations at $4,000 over a four-year parliamentary term, completely eliminating large donations to political parties, associated entities, and third party campaigners;
- reducing the disclosure limit from $13,500 to $1,000 per financial year;
- a system of real-time disclosure of donations to be administered by the Victorian Electoral Commission; and
- banning foreign donations”.

As noted by the ERRN’s Legal Editor, Dr Yee-Fui Ng, RMIT University, “the caps on donations will level the playing field and reduce the risk of corruption in the state’s political system. It will prevent rich donors from exerting greater influence over politicians than those who lack the means to do so. Parties will no longer be able to rely on these wealthy donors to fund their election campaigns”.

Local Government Electoral Bill 2018 (Vic)

In February 2018 the Local Government Bill 2018 (Vic) was introduced in the Victorian Parliament. The Bill is the first step in the Andrews Government Ministerial Statement of local government reform, and follows the publication of discussion paper in 2015 - which received 384 submissions - a Directions Paper in 2016 and the final consultation process which involved circulating the Bill to stakeholders in December 2017.

The Bill aims to achieve 10 key changes to Victoria’s local government system, including changes to electoral processes involving “consistency for council representative structure...will be improved by establishing a consistent formula for determining councillor numbers and having councils unsubdivided or comprise uniform councillor numbers per ward, and increasing participation, formal voting and fairness in council elections by adopting a consistent voting method for all elections (attendance, postal or electronic)”.

The Bill is currently before the House.

Victorian Ombudsman - report to Parliament on Legislative Council referral

In March 2018 the Victorian Ombudsman released its report on a matter referred to it by the Victorian Legislative Council. The referral involved allegations that ALP Members of the Victorian Parliament misused members’ staff budget entitlements, against the provisions of the Parliament of Victoria’s Members Guide. The background of the “referral involved allegations, widely reported in the media and reported in the April 2017 ERRN newsletter, that parliamentary funds had been misused to partially fund the Australian Labor Party’s Community Action Network campaign for the 2014 Victorian state election. Electorate Officers were allegedly involved in training and recruiting direct volunteer campaigners for door to door canvassing, telephoning voters and other campaign activities”. These allegations were also referred to Victoria Police in 2015 but no action was taken in relation to the referral.

The report of Victorian Ombudsman, Deborah Glass, into the election funding found that former Victorian Labor Treasurer John Lenders was the architect of an ‘artifice’ to redirect at least $388,000 of taxpayer funds directed to elect Labor. Ms Glass welcomed the ALP’s offer to repay the funds but said the “misuse of public funds” identified by her report risks worsening the already dismal public trust in politicians”.

Electoral Matters Committee

The Electoral Matters Committee continues its inquiry into civics and electoral participation at Victorian state elections. The committee was asked to specifically examine and report to Parliament by August 2018 on;

- electoral and civics education, the Victorian Electoral Commission’s (VEC’s) community engagement programs and other best practice approaches used by the VEC, other Australian electoral commissions, the United Kingdom and New Zealand, to ensure that Victorian citizens are adequately informed and able to participate effectively in elections;
- strategies to reduce informal voting at Victorian state elections which are not related to the voting system;
- how the VEC employs and trains casual staff for Victorian state elections, this should involve discussion about methods to attract people to join the VEC’s casual staffing roster for Victorian elections, the Committee should also examine the roles and responsibilities of the VEC’s casual election staff in light of changing technological and societal demands; and

- strategies to increase electoral participation amongst community groups that traditionally experience barriers to electoral participation, such as Victorians aged 18 to 24, Victorians from multicultural backgrounds, as well as Victorians who have recently become Australian citizens and are not familiar with Australia’s electoral system.

The committee received 25 submissions and is currently finalising its report.

The Victorian Government also tabled its response to the committee’s final report into electronic voting on 2 November 2017. While the government supported the committee’s recommendation to introduce a system of remote voting for Victorian state elections, the government supported “referring remote electronic voting to COAG to consider the development of a national approach”.

Northcote by-election

A by-election for the seat of Northcote in the Victorian Legislative Assembly was held on 18 November 2017. The by-election was triggered by the death of Australian Labor Party MP Fiona Richardson on 23 August 2017. The seat was won by the Greens candidate Lidia Thorpe, who became the first female Aboriginal MP in the Victorian Parliament as a result of the victory.
members of the Legislative Assembly of Queensland. Labor’s Premier Annastacia Palaszczuk won a second term in government, and were challenged by the Liberal National Opposition, led by Opposition Leader Tim Nicholls and minor parties One Nation, Katter’s Australian Party and the Greens.

The election was the first following substantial electoral reforms in Queensland covered in previous ERRN newsletters, including the abolition of optional preferential voting and the introduction of four-year fixed parliamentary terms (although this does not come into effect until 2020). The number of seats in the Legislative Assembly increased from 89 to 93; Labor won a net seven seats while the Liberal National Opposition lost a net three seats. Overall, Labor won 48 seats, Katter’s Australian Party three seats, the Liberal National Party 39 seats, Pauline Hanson’s One Nation one seat, the Greens one seat, and other candidates one seat.

Turnout was 87.5 percent, a fall of 2.4 points compared to the 2015 Queensland state election. There was also an increase in the informal rate to 4.3 percent, compared to 2.1 at the 2015 Queensland state election; this can be attributed to the voting system change to compulsory preferential voting from optional preferential voting. As noted by Beaumont, the informal rate was below Queensland’s informal rate (4.7 percent) at the 2016 federal election.

Resignation of Queensland Electoral Commissioner

In February Walter van der Merwe, Queensland Electoral Commissioner, resigned from his role. Mr van der Merwe resigned two days after being issued a show cause notice from Queensland Attorney-General Vettee D’Ath, who said she became aware of claims about his behaviour which could have been in breach of the Electoral Act.

Mr Dermot Tiernan is the Acting Queensland Electoral Commissioner.

Operation Belcarra - Local Government Electoral (Implementing Belcarra) and Other Legislation Amendment Bill 2017

As reported in previous ERRN newsletters, in March 2016 the Queensland CCC received numerous complaints about the conduct of candidates in the 2016 local government elections for the Gold Coast City Council, Moreton Bay Regional Council, Ipswich City Council and Logan City Council. In response to these allegations, in September 2016 the CCC initiated “Operation Belcarra to determine whether candidates committed offences under the Local Government Electoral Act 2011 (QLD) that could constitute corrupt conduct and to examine practices that may give rise to actual or perceived corruption or otherwise undermine public confidence in the integrity of local government, with a view to identifying strategies or reforms to help prevent or decrease corruption risks and increase public confidence”. Tabled in 2017, the Belcarra Report made 31 recommendations “to improve equity, transparency, integrity and accountability in Queensland local government elections and decision-making”, including that political donations from property developers be banned for Queensland local government elections. The Local Government Electoral (Implementing Belcarra) and Other Legislation Amendment Bill 2017 (QLD) was reintroduced in March 2018 having lapsed in October due to the Queensland state election. According to the explanatory notes the policy objective of the Bill is to implement certain recommendations of the CCC’s report Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government (the Belcarra Report) to:

- reinforce integrity and minimise corruption risk that political donations from property developers has potential to cause at both a state and local government level;
- improve transparency and accountability in state and local government; and
- strengthen the legislative requirements that regulate how a councillor must deal with a real or perceived conflict of interest or a material personal interest.

The headline provision of the Bill amends state and local government electoral legislation to prohibit political donations by property developers to candidates, groups of candidates, third parties, political parties, councillors and Members of State Parliament. The Bill makes unlawful:

- the making and acceptance of political donations made by or on behalf of prohibited donors and
- for prohibited donors (or others on their behalf) to solicit other persons to make political donations.

The Bill adopts the New South Wales scheme provisions in this area. The Bill has generated considerable discussion. In a submission to Parliament of Queensland the CCC noted that the Bill goes further than its recommendations in the Operation Belcarra report by including state elections in addition to local government elections.

Further, on 23 April the Economics and Governance Committee, a portfolio committee of the Parliament of Queensland, tabled its report on the Bill. A previous version of the Bill was introduced into the 55th Parliament on 12 October 2017, and referred to the former Legal Affairs and Community Safety Committee (LACSC). The former LACSC had not completed its inquiry into the 2017 version of the Bill when the Parliament was dissolved on 29 October 2017. During its examination of the Bill, the committee received 43 submissions and conducted a number of hearings and briefings. The committee made three recommendations, including that the Bill be passed.

Queensland Ministerial Guidelines

In March 2018 Premier Annastacia Palaszczuk amended Queensland’s Ministerial Handbook to ban the use of messaging apps such as WhatsApp, Facebook Messenger, Facetime and Wickr. The amendment follows reports covered in the October 2017 newsletter about Minister Mark Bailey’s use of a private email account to conduct some government business.

Operation Belcarra - CCC charges

A third Queensland mayor has been charged by the CCC in relation to the proceedings of Operation Belcarra - as reported in the October 2017 ERRN newsletter, former Ipswich Mayor Paul Pisasale and sacked Fraser Coast Regional Council Mayor Chris Loft were also charged with various offences following Operation Belcarra. In March 2018 Logan Mayor Mark Smith was charged and would face two counts of perjury, one of official corruption and one of failing to correct his register of interests. Smith has not stood down from his position and has indicated he will strongly contest all charges.
South Australian state election

The 2018 South Australian state election was held on 17 March 2018. All 47 seats in the House of Assembly or lower house, whose members were elected at the 2014 election, and 11 of 22 seats in the Legislative Council or upper house, last filled at the 2010 election, were contested. The Opposition Liberal Party led by Steven Marshall defeated Jay Weatherill’s Labor Party. Nick Xenophon’s new SA Best party unsuccessfully sought to obtain the balance of power. The Liberal Party won 25 seats, Labor 19 seats and Independents three seats.

Voter turnout was 91.00 percent, a slight decrease of 0.94 percent compared to the 2014 South Australian state election. Informal voting was 4.10 percent, an increase of 1 percent compared to the 2014 South Australian state election.

Former Senator Nick Xenophon announced he would be leaving the Senate in October 2017 to contest the seat of Hartley at the 2018 South Australian state election, under the banner of SA Best, the state-based party of the Nick Xenophon Team. The party failed to have any lower house candidates elected, however it succeeded in securing two upper house seats.

Big data and the 2018 South Australian state election

Big data is making its way into Australian politics, with the South Australian Liberal Party becoming the first Australian political party to use i360, a well-known software voter program from the US. According to some news reports, i360 “was used by the Liberal Party in its recent successful campaign in the state of South Australia and is under consideration by the party’s other state branches and also nationally”. The Liberal’s director in South Australia, Sascha Meldrum, told local media the Party had “embraced modern technology in campaigning”, i360 aggregates data from different sources, and its algorithm then “identifies voters who are yet to make up their minds. In a marginal electorate of 25,000 voters, i360 was reportedly able to identify 1,000 voters who have yet to make a decision and understand their ‘hot button’ issues. Once identified, the party is then able to focus on them to win their vote”.

Cottesloe by-election

A by-election for the electoral district of Cottesloe in Western Australia was held on 17 March 2018. The by-election was triggered by the resignation of the Liberal Party member, Colin Barnett, on 5 February 2018. Liberal candidate David Honey won the election.

Tasmanian state election

The 2018 Tasmanian state election was held on 3 March 2018 to elect all 25 members of the Tasmanian House of Assembly. The four-year incumbent Liberal government, led by Premier Will Hodgman, won a second consecutive term. It defeated the Labor Party, led by Opposition Leader Rebecca White, and the Greens, led by Cassy O’Connor. The Jacqui Lambie Network also competed in a state election for the first time but did not win any seats.

Turnout was 92.89 percent, down 2.1 percent compared to the 2014 Tasmanian state election. Informal voting 4.86 percent, a decrease of 0.94 percent compared to the 2014 Tasmanian state election.

Casual vacancy

A casual vacancy to the fill the seat left vacant by the passing of former MLA Steve Doszpot was held on 11 December 2017. Candice Burch was elected.

Inquiry into Electoral Act and 2016 ACT election

On 15 December 2016, the Legislative Assembly for the ACT passed the following resolution:

“That:

1) a select committee be established to review the operation of the 2016 ACT election and the Electoral Act and other relevant legislation and policies in regards to election-related matters, and make recommendations on:

a) lowering the voting age;
b) improving donation rules and donation reporting timeframes;
c) increasing voter participation in elections and encouraging political activity; and
d) any other relevant matter.

The committee tabled its report in November 2017 and made 23 recommendations, including maintaining the voting age at 18, banning political donations from property developers, including civics education in the Year 11 and 12 curricula, as well as allowing pre-poll voting without excuse.

Collaboration with McDougall Trust

Since 2016 the ERN has collaborated with the McDougall Trust, a UK-based independent charity promoting public understanding of electoral democracy. The Trust will fund video recording of ERN 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.
ERRN (SA) seminar: Implications and Effects of Prisoner Disenfranchisement (co-hosting with PLPPRU, University of Adelaide)

July 2018

Presenters: Dr Victoria Shineman (University of Pittsburgh), Professor Lisa Hill, Professor Alex Reilly (Law, University of Adelaide)

ERRN (WA) Seminar: Convenience Voting

July 2018

Presenters: Narelle Miragliotta and Martin Drum

ERRN (VIC) Seminar with Victoria Shineman

2 August 2018

Presenter: Dr Victoria Shineman (University of Pittsburgh)

ERRN (OLD) Seminar: Informed citizens: Are Institutions addressing the knowledge gap?

September 2018

Presenters: Dr Jackie Laughland-Booy, Dr Zareh Ghazarian, Tracey Arklay and other experts on voting awareness and democratic participation

Forthcoming Events

Image credit: Election 2010 - Duffy Primary School, Basil Dewhurst, Attribution-NonCommercial-ShareAlike 2.0 Generic (CC BY-NC-SA 2.0), Flickr
Event Reports

ERRN (VIC) Seminar: The state of convenience voting in Victoria

19 April 2018

Presenters: Dr Matthew Laing and Dr Narelle Miragliotta

The explosion in the number of electors casting their votes early at Victorian elections since the 2000s (and in Australia more generally) has raised important questions about the practical and normative implications of convenience forms of voting. In this presentation, we share our findings from our broad ranging study into convenience voting in Victoria are, conducted in conjunction with Paul Thornton-Smith from the Victorian Electoral Commission. Specifically, we explore how convenience voting is perceived and experienced from the perspective of the main stakeholders: parties, electoral officials and voters. Our findings reveal that while convenience voting generates different opportunities and challenges for stakeholders, there is broad, even if somewhat skeptical support, for its continuing use and even its further expansion.

Dr Matthew Laing is a political scientist specializing in issues of leadership and policy. He is a lecturer in political leadership with a particular background in United States politics, political leadership, and policymaking in democratic systems. His work and publications have focused on leadership in political parties and in policy processes, as well as leadership capacity building in a range of contexts, particularly policymaking. A key interest for Dr Laing is the health of western democracies – particularly the disengagement of people in the political process, the quality and diversity of people seeking political office, and the rise of populism. His views on these topics have been published/broadcast in the Australian media.

Dr Narelle Miragliotta is a senior lecturer in the Department of Politics and International Relations at Monash University. Her current research interest and publications have focused on political parties, elections, and electoral systems.

ERRN (TAS) Seminar: Tasmania votes 2018: Key issues and likely outcomes with Antony Green

28 February 2018

Presenters: Antony Green and Professor Richard Eccleston

Ahead of the Tasmanian election on 3 March 2018, ABC’s election analyst Antony Green spoke on the issues, personalities and electorates that will determine who leads the state.

ERRN (VIC) Seminar: The Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (Cth): Dealing with foreign interference or stifling charities?

13 February 2018

Presenter: Professor Joo-Cheong Tham, ERRN Director

The seminar explained the complex detail of the Bill and provide a principles-based evaluation. It concluded that while certain aspects of the Bill are welcome, much of it is over-broad and unjustified – especially the restrictions relating to non-allowable...
donors other than foreign governments. The seminar was based on Joo-Cheong’s submission to the Commonwealth JSCEM’s inquiry into the Bill.

Joo-Cheong Tham is a Professor at Melbourne Law School. He is one of Australia’s leading experts on political funding with his publications including Money and Politics: The Democracy We Can’t Afford (2010, UNSW Press) and key reports for the New South Wales Electoral Commission on the regulation of political finance and lobbying. He also specializes in the regulation of precarious work and has undertaken considerable research into counterterrorism laws. JooCheong regularly speaks at public forums and has presented lectures at the Commonwealth, South Australian and Victorian Parliaments. He has also given evidence to parliamentary inquiries into labour migration, terrorism laws and political finance laws.

The seminar was based on Joo-Cheong’s submission to the Commonwealth JSCEM’s inquiry into the Bill.

Joo-Cheong Tham is a Professor at Melbourne Law School. He is one of Australia’s leading experts on political funding with his publications including Money and Politics: The Democracy We Can’t Afford (2010, UNSW Press) and key reports for the New South Wales Electoral Commission on the regulation of political finance and lobbying. He also specializes in the regulation of precarious work and has undertaken considerable research into counterterrorism laws. JooCheong regularly speaks at public forums and has presented lectures at the Commonwealth, South Australian and Victorian Parliaments. He has also given evidence to parliamentary inquiries into labour migration, terrorism laws and political finance laws.

Professor Joo-Cheong Tham and Dr Eszter Bodnár

ERRN (VIC) Seminar: The role of the European Court of Human Rights in the protection of the right to free elections

27 November 2017

Presenter: Dr Eszter Bodnár

The aim of this presentation was to give an overview of the practice of the European Court of Human Rights and evaluate the level of protection it provides to the right to free and fair elections. It examined which factors explain the Court’s reserved approach towards election-related cases and proposed an argument to justify a more activist approach by the Court.

Dr Eszter Bodnár is a Kathleen Fitzpatrick Visiting Fellow with the ARC Laureate Project in Comparative Constitutional Law. Her research interest is in comparative constitutional law, international human rights, and European constitutional law. She has been an assistant professor at the Faculty of Law of University Eötvös Loránd (ELTE) in Budapest, Hungary since 2013. She is also a faculty member in the Master of Electoral Policy and Administration program of Scuola Sant’Anna, Pisa. In the last years, she has been teaching and researching in Germany, France, the United States, the Czech Republic, Portugal, Italy, and Canada. She graduated as a lawyer and worked at the Department of Constitutional Law in the Hungarian Ministry of Justice, and in the Hungarian National Election Office. She obtained her PhD degree in constitutional law at ELTE in 2013 with her thesis on the fundamental right attributes and restrictions of the right to vote that was published in Hungarian (HVGOrac, 2014). Currently she is working on a comparative constitutional law project on open justice, seeking the answer on how the courts should answer the challenges of the 21st century in a constitutional way.

The 5th Biennial Electoral Regulation Research Network workshop

The University Club of Western Australia

9–10 November 2017

‘The Times They are a Changin’

The Workshop covered a range of issues in electoral regulation and brought together electoral commission officials and law and political science academics. This year there were sessions on:

- Changes to Voting in Australia
- Funding of Political Parties
- Key Electoral Issues/Reforms
- Psephology and the Australian Electoral Scene
- Judicial Review of Elections
- Electoral Agency Challenges
- Overseas Involvement in Domestic Politics

The workshop was being convened by the Western Australian ERRN convenors; Sarah Murray (sarah.murray@uwa.edu.au); Justin Harbord (justin.harbord@waec.wa.gov.au); Alan Fenna; (a.fenna@exchange.curtin.edu.au); Martin Drum (martin.drum@nd.edu.au).

The ERRN website also contains a transcript of a speech presented by Professor Graeme Orr at the 2017 ERRN Biennial Workshop held at the University of Western Australia Club in Perth in November 2017, entitled ‘In Memoriam Professor Colin A Hughes: A Queensland perspective’.

Session 1: Psephology and the Australian Electoral Scene

- The Senate, preferences and minor party representation
  William Bowe, Election Analyst and Editor of The Poll Bludger
- Fixing the Upper House – why and how?
  Antony Green, Australian Broadcasting Corporation
- Voting below the line in the Senate
  Kevin Bonhong, Psephologis
- Stephen Smith (chair)

Session 2: Judicial Review of Elections: Australian and Comparative Perspectives

- The High Court and the AEC – Day, and Culleton and beyond.
  Tom Rogers/Paul Pirani, Australian Electoral Commission
- Candidate (Dis)qualification: a way through the thicket?
  Graeme Orr, University of Queensland
- Judicial Review of Elections in Asia
  Po Jen Yap, University of Hong Kong
- Sarah Murray (chair)

Session 3: Changes to Voting and Campaigning in Australia

- How do political parties respond to changing forms of voting?
  Maria Tafalla, ANU
- Stakeholder perceptions of the challenges and possibilities of convenience voting
  Narelle Miragliotta, Monash University
- Electronic voting in NSW and WA: the implications
  Rodney Smith, University of Sydney
- Campaigning, Elections and Social Media
  Peter Chen, Sydney University
- Martin Drum (chair)

Session 4: Colin Hughes: In Memoriam Professor Graeme Orr

Session 5: The Funding of Political Parties

- Of aliens, money and politics: Should foreign political donations be banned?
  Joo-Cheong Tham, Melbourne Law School
- The Commonwealth Parliament’s recent enquiry into political donations: submissions and outcomes
  Martin Drum, University of Notre Dame Australia
- Political Donations - an Insider’s Perspective from the Outside
  Stephen Smith, University of Western...
ERRN (VIC) and Victorian Parliamentary Library Seminar: Deliberative Democracy in Local Government

1 November 2017

Presenters: Iain Walker, John Hennessy and Simon Breheny

Faced with a trend of declining public engagement, local government bodies in Australia and around the world have been turning to deliberative democracy as a way of enhancing citizen participation and the legitimacy of government. Typically, a group of citizen’s are randomly selected to be briefed and make recommendations on an important matter of public policy. Recent examples in Victoria include the People’s Panel in the City of Melbourne, which considered the Council’s 10-year financial plan, and the Citizens’ Jury in the City of Greater Geelong, which recommended a change to the electoral structure.

Are such forms of deliberative democracy likely to supplement or subvert representative local government? Three speakers will provide different perspectives on this issue.

Iain Walker is the Executive Director of the new Democracy Foundation in Australia, which aims to pursue a fundamental change in democracy to ensure that citizens trust government decision making. Iain holds a Masters in Public Policy from the University of Sydney and a Bachelor of Business from UTS.

John Hennessy is a Sector Development Manager with the Municipal Association of Victoria (MAV), which supports councils to embrace deliberative democracy as a key part of the MAV Future of Local Government program.

Simon Breheny is the Director of Policy of the Institute of Public Affairs and chairman of the International Young Democrat Union and a regular media commentator on policy and politics in Australia. Simon holds a Bachelor of Arts/Bachelor of Laws from the University of Melbourne.

ERRN (SA) Seminar: Elections, Referenda and Surveys: Exploring the Challenges of the Same-Sex Marriage Postal Vote

31 October 2017

Presenters: Prof John Williams, Prof Lisa Hill, Dr Jonathon Louth, Prof David Bamford, Dr Mikhail Balaev

Prof John Williams (University of Adelaide) presented on constitutional consideration. Prof Lisa Hill (University of Adelaide) and Dr Jonathon Louth (Flinders University) presented on democratic legitimacy and electoral behaviour; Prof David Bamford (Flinders University) presented on electoral law; and Dr Mikhail Balaev (Flinders University) presented on survey/quantitative methodology.

Event recordings

Audio and Video recordings of recent ERRN events are now available on the website:

- ERRN (VIC) Seminar: The state of convenience voting in Victoria. Presented by Dr Matthew Laing and Dr Narelle Miragliotta on 19 April 2018. [Listen now]
- ERRN (VIC) Seminar: The Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (Cth). Presented by Professor Joo- Cheong Tham on 13 February 2018. [Watch now]
- ERRN (TAS) and Institute for the Study of Social Change Seminar: Tasmania votes 2018: Key issues and likely outcomes with Antony Green. Presented by Antony Green and Professor Richard Eccleston on 28 February 2018. [Watch now]
- ERRN (VIC) Seminar: The role of the European Court of Human Rights in the protection of the right to free elections. Presented by Iain Walker, John Hennessy, Simon Breheny and David Morris, MP (Chair) on 1 November 2017. [Listen now]
Working Papers

The Electoral Regulation Research Network was established in 2012 with the aim of fostering exchange and discussion amongst academics, electoral commissions and other interested groups on research relating to electoral regulation. To this end, the Network together with the Democratic Audit of Australia will be publishing a series of working papers – often called ‘discussion papers’ – to help foster discussion about all aspects of electoral regulation. These working papers will be posted on the Network’s website and circulated to members of the Network. They will also be posted on the Democratic Audit of Australia’s website. We welcome papers written on all aspects relating to electoral regulation from academics, electoral commission officials, parliamentarians, party officials and others interested in this field.

Recent Publications

‘Double Disillusion: Analysing the 2016 Australian Federal Election’

ANU Press, April 2018

Anika Gauja, Peter Chen, Jennifer Curtin and Juliet Pietsch

This book provides a comprehensive analysis of the 2016 Australian federal election. Won by the Liberal–National Coalition by the slimmest of margins, the result created a climate of political uncertainty that threatened the government’s lower house majority. While the campaign might have lacked the theatre of previous elections, it provides significant insights into the contemporary political and policy challenges facing Australian democracy and society today.

In this, the 16th edited collection of Australian election studies, 41 contributors from a range of disciplines bring an unprecedented depth of expertise to the 2016 contest. The book covers the context, key battles and issues in the campaign, and reports and analyses the results in detail. It provides an evaluation of the role of political actors such as the parties, independents, the media, interest groups and GetUp!, and examines election debate in the online space. Experts from a range of policy fields provide an analysis of election issues ranging from the economy and industrial relations to social policy, the environment, and gender and sexuality. Each of the chapters is written on the basis of in-depth and original research, providing new insights into this important political event.

“The Barnaby Joyce affair highlights Australia’s weak regulation of ministerial staffers”

The Conversation

Yee-Fui Ng

Australian ministerial staff are now very important players in our democracy, but ministers and advisers are weakly regulated within our system. The law has lagged behind, but now is the time for reform, argues Yee-Fui.

The Rise of Political Advisors in the Westminster System

London: Routledge, 2018

Yee-Fui Ng

Political advisors have risen in significance in Westminster countries, and have been increasingly thrust into the limelight by headline scandals and through their characterisation in various television series. This increased prominence has led to greater scrutiny of their role and influence. This book demonstrates that the introduction of political advisors into the structure of the executive has led to the erosion of the Westminster doctrine of ministerial responsibility.

Working Paper 46

‘The High Court and the AEC’

Tom Rogers (Electoral Commissioner, Australian Electoral Commission)

January 2018

This paper focuses on the interaction between the AEC and the High Court and its effects on electoral administration.
Less Money, Fewer Donations: The Impact of New South Wales Political Finance Laws on Private Funding of Political Parties

Australian Journal of Public Administration, April 2018

Malcolm Anderson  Joo-Cheong Tham  Zim Nwokora  Anika Gauja  Stephen Mills  Narelle Miragliotta

The role of money in politics has been a concern internationally with strong calls for stricter regulation of such funds. In Australia, this has resulted in a shift from laissez-faire to increased regulation. Yet, there has been little research into the impact of this shift. To address this gap, this article examines the impact of four New South Wales political finance laws enacted from 2008 to 2012, which reflect the emergent regulatory approach. Focusing on the total number and value of political donations made to New South Wales political parties, it assesses the effects of the four Acts individually, as well as their overall impact, to test the assumption of legal effectiveness. It finds strong support for two key expectations resulting from the assumption: first, the raft of legislation will reduce the total number and value of political donations to the parties and second, that the 2010 legislation, which imposed caps on political donations and election spending, and substantially increased public funding, would be the most significant of the four Acts in terms of impact due to its scope and depth.

‘Between Law and Convention: Ministerial Advisers in the Australian System of Responsible Government’


Yee-Fui Ng

‘Ministerial Advisers and the Australian Constitution’


Yee-Fui Ng

‘The Challenges of Money Politics in the Asia-Pacific’

Australian Journal of Asian Law, Volume 18, No. 2, 2017

- Introduction to the Australian Journal of Asian Law Theme on ‘Money Politics in the Asia-Pacific: Challenges and Solutions’ - Joo-Cheong Tham
- Political Corruption in Philippine Elections: Money Politics through the Pork Barrel System - Neri Javier Colmenares
- Financing Politics in Malaysia: Reforming the System - Edmund Terence Gomez, Joseph Tong
- Drivers of Electoral and Institutional Money Politics in Papua New Guinea - Lesley Clark, Grant W Walton
- Money Politics in a More Democratic Indonesia: An Overview - Denny Indrayana
Dual Citizenship Cases: Re Canavan, Re Ludlam, Re Waters, Re Roberts [No 2], Re Joyce, Re Nash [2017] HCA 45

The High Court, sitting as the Court of Disputed Returns upon references from the Senate and the House of Representatives, unanimously held that Scott Ludlam, Larissa Waters, Senator Malcolm Roberts, the Hon Barnaby Joyce MP and Senator the Hon Fiona Nash was a subject or a citizen ... of a foreign power at the time of their nominations for the 2016 federal election, and were therefore incapable of being chosen or of sitting as a senator or a member of the House of Representatives by reason of s 44(i) of the Constitution.

Section 44(i) of the Constitution states that:

Any person who is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

The central legal issue raised by each of the references is the construction of the phrase ‘is a subject or a citizen ... of a foreign power’ in s 44(i) of the Constitution.

The Court took a literalistic approach, and held that section 44(i) should be interpreted based on its ordinary textual meaning, subject only to the implicit qualification in s 44(i) that the foreign law conferring foreign citizenship must be consistent with the constitutional imperative underlying that provision, namely that an Australian citizen not be prevented from participation in representative government where it can be demonstrated that he or she took all steps reasonably required by foreign law to renounce his or her citizenship of a foreign power. This is because this construction adheres closely to the ordinary and natural meaning of the language of s 44(i), and accords with the views of a majority of the decision in Sykes v Cleary (1992) 176 CLR 77.

Ludlam
Ludlam was born in New Zealand in 1970, at which time he became a New Zealand citizen by birth. He and his family moved to Australia in 1978. The Court received a report from a New Zealand barrister, which stated that New Zealand law made him a citizen at birth, and that he may only lose his citizenship by renouncing it or by ministerial order, and the naturalisation ceremony did not constitute renouncement. Consequently, Ludlam still held NZ citizenship at the time of his nomination and was thus incapable of being chosen.

Waters
Waters was born in Canada in 1977 to two Australian parents. She became an Australian citizen by descent and a Canadian citizen by reason of the place of her birth. Waters’ parents, together with Waters, moved to Australia when she was 11 months old. The Court received a report by a practising Canadian lawyer which indicated that Canadian law at the time of Waters’s birth was that a person born in Canada is a natural-born Canadian citizen, and that that status could only be affected by renunciation. Consequently, at the time of her nomination, Water was ineligible to be chosen.

Canavan
Matt Canavan was born in Australia, and his only link to Italy was through his maternal grandparents, who were naturalised as Australian citizens in the 1950s, at which point, under Italian law, they ceased to be Italian citizens. After Canavan’s mother told him on 18 July 2017 he may have been registered as an Italian citizen in 2006, after she had applied for Italian citizenship, he contacted the Italian consulate and was told that he had been registered as an ‘Italian citizen abroad’ in 2006. He then took steps to renounce his Italian citizenship, which took effect on 8 August 2017.

A report by two Italian lawyers submitted to the Court stated that Canavan’s status as an Italian citizen would depend not on his mother’s application but his maternal grandmother’s, because at the time of his mother’s birth, his grandmother had not yet renounced her Italian citizenship, and, following a 1983 Italian Constitutional Court decision, Canavan became an Italian citizen ‘retroactively’ through the maternal line, which was not broken by his mother’s marriage to an Australian. Nonetheless, the report also stated that registration as a citizen is a ‘separate and more rigorous process’, and that Canavan’s mother’s application for registration was made in her own interest: the registration of Canavan and his siblings occurred at the consulate’s initiative. Registration is distinct from a declaration of Italian citizenship, and further administrative steps must be taken to activate the ‘potential’ right of citizenship, which Canavan had not sought.
Nick Xenophon was born in South Australia on 29 January 1959. At the time of his birth, he became an Australian citizen, and a citizen of the United Kingdom and Colonies by descent. He acquired that latter status because his father was born in Cyprus when it was a British colony, and his father thereby became a British subject and later a citizen of the United Kingdom and Colonies. He passed that status to Senator Xenophon when he was born, and Senator Xenophon subsequently became a British Overseas Citizen by force of section 26 of the British Nationality Act 1981 (UK).

The Court held that British Overseas Citizen (BOC) status is a residuary form of nationality, differing from full citizenship in two significant ways. First, BOC status does not include the right of abode in the UK, a central characteristic of a ‘national’ under international law, which means Xenophon cannot enter the UK without satisfying the requirements of immigration control. Second, it does not require a pledge of loyalty to the United Kingdom or its monarch. The Court thus held that Xenophon was neither a subject nor citizen of the UK nor entitled to the rights and privileges of a subject or citizen of the UK, and was thus validly elected. However, this was moot as Xenophon had resigned from federal Parliament to run for a seat in the South Australian parliament, but did not succeed in being elected.

Outcome

The Court thus held that Ludlam, Waters, Roberts, Joyce and Nash were disqualified by reason of s 44(i). Neither Canavan nor Xenophon was found to be a citizen of a foreign power, or entitled to the rights or privileges of a citizen of a foreign power, within the meaning of s 44(i), and therefore neither was disqualified.

In the matters of Nash, Roberts, Waters and Ludlam, the Court ordered that the Senate vacancies created by their eligibility would be resolved by a special count of the ballot papers. The candidate by the special count to be entitled to be elected in place of Nash was to be Hollie Hughes. The Attorney-General sought an order that Hughes be declared duly elected for that place.

However, the High Court unanimously held that Hughes was ineligible to be declared elected, because she took a part-time position in the Administrative Appeals Tribunals (an office of profit under the Crown) during the 15 months that ineligible dual citizen Fiona Nash purported to take her seat in the Senate.

Section 44(iv) of the Constitution states that:

Any person who holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

There was no doubt that an appointment to the AAT constituted an ‘office of profit under the Crown’. The major issue was whether holding that disqualifying office during the discrete period between 1 July and 27 October 2017 was enough to render Hughes ‘incapable of being chosen’ as a senator in the election at which Nash had been returned.

The Court held that the position held by Hughes rendered her ‘incapable of being chosen’ under s 44(iv). The Court ruled that it is the Electoral Act 1918 (Cth) which establishes the structure by which the choice by the people is to be made and the processes established by the Act do not end with polling. They are brought to an end only with the declaration of the result of the election and of the names of the candidates elected and they are not completed when an unqualified candidate is returned.

The Court dismissed the summons by the Attorney-General to Hughes. This prompted a further recount by the AEC, and a further summons from the Attorney-General to the next in line, Jim Molan, who was declared duly elected.

Alley v Gillespie S190/2017

Since 30 August 2016 the defendant, David Gillespie, has sat as a Member of the House of Representatives. On 7 July 2017 the plaintiff, Peter Alley, commenced proceedings in the High Court under the Common Informers (Parliamentary Disqualifications) Act 1975 (Cth) (‘the Common Informers Act’), claiming that the defendant was liable to pay
penalties under s 3(1) of that Act because he was declared by the Constitution to be incapable of sitting as a Member of the House of Representatives. The basis of the claim is that the defendant is disqualified under s 44(iv) of the Constitution due to having an indirect pecuniary interest in an agreement with the public service of the Commonwealth.

The alleged pecuniary interest stemmed from Gillespie being a majority shareholder of a company whose premises was leased in return for rent indirectly to Australia Post. Gillespie contended that Australia Post is a corporate entity that is not a part of the public service of the Commonwealth. He also challenged the High Court’s power to impose the penalties under the Common Informers Act, on the basis that the Court only has such power in respect of a Member of the House of Representatives once a determination has been made that the Member in question is not qualified to sit. Gillespie contended that such a determination can be made only by the House of Representatives, under section 47 of the Constitution, or by the Court of Disputed Returns, upon a reference to it by the House of Representatives under section 376 of the Commonwealth Electoral Act 1918 (Cth). The House had not referred to the Court of Disputed Returns any question as to Gillespie’s qualification to be a Member of the House of Representatives, nor has the House made a determination itself.

On 29 September 2017 Bell J referred the following questions to the Full Court under section 18 of the Judiciary Act 1903 (Cth):

- Can and should the High Court decide whether the defendant was a person declared by the Constitution to be incapable of sitting as a Member of the House of Representatives for the purposes of section 3 of the Common Informers Act?
- If the answer to question 1 is yes, is it the policy of the law that the High Court should not issue subpoenas in this proceeding directed to a forensic purpose of assisting the plaintiff in his attempt to demonstrate that the defendant was a person declared by the Constitution to be incapable of sitting as a Member of the House of Representatives for the purposes of s 3 of the Common Informers Act?

The Court unanimously answered Question 1 ‘no’, and consequently it was not necessary to answer Question 2.

The joint judges (Kiefel CJ, Bell, Keane and Edelman JJ) held that whether the defendant is incapable of sitting as an MP is a question to be determined by the House of Representatives, unless it resolves to refer the matter to the Court of Disputed Returns. This answer to Question 1 is determined by sections 46 and 47, and their relation to s 44 of the Constitution.

Section 46 provides that:

Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting [in Parliament] shall, for every day on which he so sits, be liable to pay the sum of one hundred pounds to any person who sues for it in any court of competent jurisdiction

The judges held that Parliament has ‘otherwise provided’ by the enactment of the Common Informers Act, which mirrors the liability requirements of section 46.

Section 47 provides that:

Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises.

The judges noted that Parliament has otherwise provided for this through section 376 of the Electoral Act 1918 (Cth), which enables, but does not require, the House to refer questions of qualification for election to the Court of Disputed Returns.

Re Kakoschke-Moore

Skye Kakoschke-Moore and Timothy Storer who were third and fourth in the Nick Xenophon Team (NXT) order of senate candidates for the 2016 federal election. Kakoschke-Moore was returned as a senator for the State of South Australia after the election. Upon subsequently becoming aware that she held United Kingdom citizenship by descent, Kakoschke-Moore submitted her resignation as a senator. On 30 November 2017 she renounced her United Kingdom citizenship, with that renunciation taking effect on 6 December 2017.

On 24 January 2018, Nettle J declared that Kakoschke-Moore was incapable of being chosen or sitting by reason of s 44(iv). The issue arose of how to determine the candidate to be elected in her place. Timothy Storer had been nominated as the fourth of the four NXT candidates at the election, but was not returned as a senator. Storer remained a member of the NXT until 3 November 2017, when he was purportedly expelled as a member. He then formally resigned as a member on 6 November 2017.

In a unanimous judgment, the High Court held that because Kakoschke-Moore was incapable of being chosen at the election...
there was a possibility of her having British citizenship, Gallagher applied to renounce her British citizenship by submitting the prescribed form and accompanying documents to the UK Home Office. Her renunciation was not registered by the UK Home Office until 16 August 2016. The Court was asked whether she was under the disability of s 44(i) of the Constitution by remaining a British citizen at the time of her nomination and her subsequent election.

Gallagher submitted that by no later than 6 May 2016, she had taken every step that, as a matter of British law, was sufficient for her renunciation to be effective. As this date was prior to writs being issued or nominations closing, it was argued that the ‘constitutional imperative’ from Re Canavan (that an Australian citizen not be irremediably prevented by foreign law from participation in representative government) was engaged. Alternatively, it was argued that if British law required Senator Gallagher to take the further steps of providing the additional document requested by the British Secretary, these were not steps that were reasonably required by British law.

The Attorney-General submitted that under the Court’s reasoning in Re Canavan, ‘the exception is not engaged by foreign laws that make renunciation difficult, but only by foreign laws that make it impossible, or not reasonably possible, to renounce foreign citizenship’.

The High Court has yet to hand down its judgment in the matter.

Cases arising from 2016 Victorian local government elections

Two cases discussed in the October 2107 newsletter were concluded in November-December 2017. In both cases, the Municipal Electoral Tribunal (MET) first overturned a council election result following an application from an unsuccessful candidate, and the Victorian Electoral Commission (VEC) then applied for review of the MET’s decision. The Supreme Court in one case, and the Victorian Civil and Administrative Tribunal (VCAT) in the other, have overturned the MET’s decisions, restoring the original result of the election. The outcome has clarified the qualifications of candidates and grounds on which election results can be challenged.


Rose Iser, a candidate for Myrnong Ward, applied to the MET for the election to be declared void on the basis that Benjamin Smits, another unsuccessful candidate, was ineligible to nominate, because he was not qualified to be enrolled at his enrolled address. The MET refined the nature of Iser’s submission, and found that Smits was not eligible to nominate as a candidate because he was not enrolled in the Myrnong Ward.

The Electoral Commissioner was not satisfied that the MET had correctly interpreted and applied the relevant sections of the Local Government Act 1989 (the Act), and applied to VCAT to review the MET decision. VCAT upheld the MET decision.

Considering the significant consequences for the conduct of local government elections, the VEC applied to the Supreme Court for permission to appeal VCAT’s decision. The appeal was heard by Justice Garde, who delivered his judgment on 21 December 2017.

Justice Garde found that there were three main issues in the case:

- Was Smits entitled to be enrolled on the register of electors at his enrolled address in Mirams Street, Ascot Vale?

Smits had been enrolled at Mirams Street since 2014, but lived on Mt Alexander Road (without updating his enrolment) before returning to Mirams Street on 30 July 2016, less than a month before entitlement date on 26 August. Iser argued that the timing of his return made him ineligible to be enrolled at Mirams Road (and therefore to nominate as a candidate), because the Electoral Act 2002 provides that a person must live at an address for a month before being eligible to enrol for that address. However, Justice Garde found that Mr Smits was enrolled for Mirams Road throughout the period 2014-2016, and so was entitled to nominate as a candidate.

- Are the entries on the register of electors conclusive?

Justice Garde observed that in State election cases, the Court of Disputed Returns must not inquire into the correctness of any electoral roll or the register of electors, and concluded that the roll for the 2016 Myrnong Ward election (which included Smits) was conclusive.

- Can a candidate nominate for election for a ward other than the one in which the candidate resides?
Justice Garde found that that the Local Government Act clearly provided that a candidate was entitled to stand for any ward in the municipal district, not just the ward in which the candidate lived.

Therefore, Justice Garde overturned the MET decision, finding that Smits was legitimately enrolled at the Mirams Street address for the 2016 Moonee Valley City Council election, and was entitled to stand as a candidate for any ward in that election.

**Manningham City Council Koonung Ward election. Victorian Electoral Commission v Municipal Electoral Tribunal Z485/2017**

Stella Yee, a candidate for Koonung Ward in the Manningham City Council elections, applied to the MET for the election to be declared void on the basis that the Council had not properly informed non-citizen owner occupiers of their eligibility to apply to be enrolled in the election. The MET found that the VEC’s statutory notice of entitlement (which appeared in the Manningham Leader and in The Age) had failed to properly inform, or may have actively misled, non-citizen resident ratepayers as to their eligibility to be enrolled to vote, that such voters were effectively prevented from voting, and that on the balance of probabilities the outcome of the election was affected in that the election could not be said to have resulted in a free and fair election of the candidates preferred by the majority of voters. Consequently, the MET declared the election void and ordered a further election for Koonung Ward.

Believing that the notice complied with the Act and did not actively mislead any person, the VEC applied to VCAT for review of the MET’s decision. On 27 November 2017 the Deputy President of VCAT set aside the MET’s decision.

The Deputy President first dealt with the scope of the decision. Yee contended that VCAT should declare the election void for the other two wards in the City of Manningham, arguing that, as a candidate in the City of Manningham, she was eligible to make such an application. However, the Deputy President disallowed this change, pointing out that the election under review was solely that for Koonung Ward.

The Deputy President then analysed each element of the VEC’s notice, concluding that the notice complied in every respect with the Act and provided residents and ratepayers with the information they needed concerning enrolment. The Deputy President observed that the amount of information required to be covered in the notice was potentially vast, and that it could never have been intended that the notice was meant to give a detailed and comprehensive description of the full enrolment application process to every category of voter. What the notice did was to inform every category of voter how they could apply to enrol, and as such the notice fulfilled the requirements of the Act. There was no evidence from the enrolment period of any individual being misinformed by the council about enrolment.

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