



October 2019 newsletter

Electoral Regulation
Research Network





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Director's Message



There is a diversity of electoral systems worldwide. Each electoral system has its distinctive peculiarities – Australia is no different. It is among a dozen or so countries that have an effective compulsory voting system; its preferential system is very much unique.

Such diversity is not necessarily a problem from the perspective of democratic government. As High Court Justice Dawson recognized in *McGinty v Western Australia*, '(t)here are hundreds of electoral systems in existence today by which a form of representative government might be achieved'. The UN Human Rights Committee has similarly observed in relation to Article 25 of the International Covenant of Civil and Political Rights which requires 'genuine periodic elections . . . guaranteeing the free expression of the will of the electors' that it 'does not impose any particular electoral system'.

Such diversity makes the task of comparison inherently difficult. Indeed, some might conclude that there is very little utility in comparative studies of electoral regulation.

Two events in ERRN's suite of activities have provided a counter-point to such a perspective. The first was the August workshop organized by the Melbourne School of Government in New Delhi, India on 'The Future of Electoral Democracy in India and Australia', the proceedings of which have been published jointly by ERRN and the School of Government (see page ??0. The differences between Australia and India are obvious and significant not least in terms of scale; ethnic, cultural and religious heterogeneity; and level of economic development. Yet having participated in

the workshop, I was struck firstly how, despite all these differences, there is a common moral vocabulary when it came to understanding and evaluating elections, much of which loosely comes under the rubric of free and fair elections. The challenges commonly experienced by these two countries were also apparent with three specifically noteworthy: political participation and representation by marginalised communities; 'fake news' and digital campaigning; and money in politics.

The other event is the upcoming ERRN Biennial Workshop which is being superbly organised by Professor Lisa Hill and Dr Jonathon Louth. Separately by design, the workshop will examine the topics arising from the Delhi workshop with a focus on Australia. Its central theme will be the inclusion of marginalised communities with dedicated sessions on voting and homelessness; supporting those with intellectual disabilities; dealing with the challenges of remote communities; and importantly, enhancing participation by Indigenous communities. Alongside there is a separate session on "Big Money, Social Media and Elections: Disinformation, Interference and Distortion". In all these sessions, speakers will be drawing upon international experience whilst being firmly grounded in the Australian context.

This message is obviously not the place to provide a systematic approach on comparing the regulation of elections of different countries. Two precepts are, however, worth emphasising. First, seek to understand. A basic task is to gain a sound understanding of the countries being compared. Here ERRN can play an important role especially in providing resources on the electoral systems of

countries where the level of knowledge is low. A critical example here is Australia's largest neighbour, Indonesia, with ERRN having held a number of events on Indonesian elections.

Second, embrace the unfamiliar. The usual comparator countries are Canada, United Kingdom and the United States. This focus on the Anglo-Saxon sphere (which curiously often omits New Zealand) is manifestly narrow. And it is not clearly a focus that will necessarily be productive of the most insight; it is moot whether a comparison between Australia and the United States as opposed to one between Australia and India will generate more advances in knowledge. Cultural familiarity can sometimes hinder the pursuit of knowledge. An important task for ERRN will be to extend comparative research beyond the comfort zone of the Anglo-Saxon countries.

**Professor Joo-Cheong Tham,
Melbourne Law School**

Electoral News



This year's federal election on the 18th of May produced an upset victory for the Coalition. Where all the major polls, including a Nine-Galaxy [exit poll](#) conducted on the day, had predicted a Labor win, the final result saw them suffer a net loss of one seat, while the Coalition won a majority with 77 seats. Twelve seats changed hands overall: Labor gained Corangamite (Vic), Dunkley (Vic) and Gilmore (NSW); the Coalition, Bass (Tas), Braddon (Tas), Chiscolm (Vic; from Liberal-turned-independent Julia Banks), Lindsay (NSW), Herbert (QLD), Longman (QLD) and Wentworth (NSW). Indi (Vic) remained independent, and Warringah (NSW) also opted for an independent, unseating former Prime Minister, Tony Abbott.

During the campaign, an unusually large number of candidates were disendorsed or resigned as candidates, ten after the close of nominations. Many of these campaign casualties came after controversial [social media posts](#) were un-earthed, but a number of candidates also managed to encounter citizenship problems, despite all the recent attention on Section 44 of the Constitution. After the election, Treasurer Josh Frydenberg, had his eligibility [challenged](#) on citizenship grounds — that case is on-going. The election result also led to at least two parties formally [de-registering](#): Cory Bernardi's Australian Conservatives and Rise Up Australia.

There were also a [number](#) of electoral regulation controversies during the campaign. In the Victoria, Chinese-language signs in the colour-scheme of the AEC, advising electors that a formal vote required a '1' next to the Liberal candidate, are [now subject of a legal challenge](#) — see this edition's Case Notes. The AEC also investigated a large number of campaign ads, including 109 social media ads, finding 28 to be in breach of the *Electoral Act*. [Some platforms](#) were more co-operative with those investigations than others: Facebook, previously resistant, was applauded by the AEC for its compliance through the 2019 campaign, while emails revealed Google dragged the chain in responding to requests for information. This and more is expected to be covered by the Joint Standing Committee on Electoral Matters in its [inquiry into the 2019 Federal Election](#), begun in July, with submissions still open at time of writing. The Committee is due to report at the end of July 2020.



Hearings for a high-profile ICAC investigation into donations to NSW Labor took place through September. Investigators alleged that an illegal [\\$100,000 donation](#) was made to Labor in 2015 by Huang Xiangmo, a property developer and billionaire with [links](#) to the Chinese Communist Party. They alleged

donation was attributed to multiple ['straw donors'](#) at a Labor fundraising dinner. The hearings, still on-going, have already claimed NSW general secretary, [Kaila Murnain](#), who was suspended from her role following her testimony to the Commission, claiming she was instructed by a party lawyer to cover up the donation.

The NSW Liberals also seemed to [fall foul](#) of the state's developer donations ban, with a (significantly smaller) donation from property developer Ming Shang at a 2015 fundraiser for the then-parliamentary secretary for planning, John Sidoti, being 'forfeited' by the party last month.

Earlier, in August, the ICAC began a public inquiry into the regulation of lobbying, access and influence in New South Wales. Over forty submissions to the inquiry, including from friends of the ERRN, are [now available online](#). A key discussion paper circulated by the Commission, by our very own Joo-Cheong Tham and Yee-Fui Ng, can be found in this edition's Publications section.

Meanwhile, following some concern about potential [coding flaws](#) in the state's online voting system, the NSW Electoral Commission [published the full iVote source code](#) for public inspection in July.



In June the Victorian Parliament's Electoral Matters Committee commenced its inquiry into the 2018 State Election, with [submissions](#) closing in August. At writing, hearings were yet to be scheduled. A final report is due by June 2020.

Also in June, the Andrews Government [announced](#) it would bring local council election finance rules in line with its stricter state laws, introduced in 2018 (and recently causing [consternation](#) for the state Coalition). The new rules for council elections ban foreign donations, cap domestic donations to candidates at \$1000, and require any gifts or donations over \$250 be declared to the Chief Municipal Inspector within 21 days, to be published on the Local Government Inspectorate website. Candidates running for City of Melbourne would have a higher cap – up to \$4000 – and a higher disclosure limit – \$500.

The donation reforms were part of a broader local government electoral reform. In July, Victoria's Local Government Minister announced [those reforms](#) may include the total abolition of multi-member wards in Victorian councils, in favour of single-member wards, with some rural councils permitted to keep their un-subdivided arrangements. Other changes include a 'simplified' enrolment process and voter-initiated inquiries into council conduct.

The move to single-member wards would seem to undo some of the changes being recommended by the VEC in its own review of council elections. Of the 12 councils reviewed so far, the Commission has recommend four move to multi-member wards for the next set of council elections in 2020. The status of those recommendations, in light of the Government's mooted reform agenda, [is unclear](#).



Our last edition noted an up-coming court challenge to the State Government's ban on developer donations. Shortly after publication in April, the High Court [upheld](#) the ban – see this edition's Case Notes for details. In July, it emerged that the LNP would allow developers to obtain '[diamond membership](#)' of the party, allowing access to party forums and special events – apparently an arrangement specifically designed to cope with the donations ban.

Also in April, the Local Government Change Commission began a boundary review of the massive Brisbane City Council. In August, the Commission [published](#) its proposed changes to the 26-seat Council, including significant changes to two wards (Gabba and Central). Some pundits [estimated](#) the changes could be enough to imperil the LNP's large majority on the Council. Public submissions to the Commission closed in September, and boundary changes are scheduled to be finalised ahead of the next elections for the Council, due in March 2020.



The Marshall State Government is in the middle of a [complicated](#) reform of the state's lobbying laws. They aim to prevent party officials doubling as lobbyists by excluding them from eligibility for the Lobbyist Register. The Government is also exploring putting in-house lobbyists on the register. The [Bill](#) is currently before the South Australian upper house.

Meanwhile, the state Opposition is urging a change to the *Electoral Act* to ban party-political 'robo-calls', after the Liberal Party accidentally made hundreds of automated survey calls to South Australian electors between 6:15am and 7:15am, not once, but [two days in a row](#). The Liberal Party apologised for

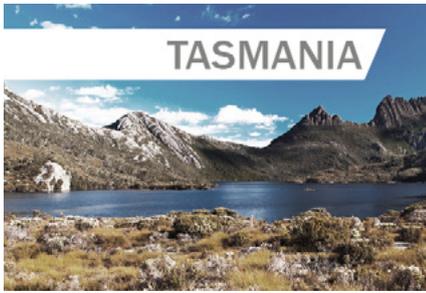
rousing electors from their slumber, and promised to investigate how the error occurred, but appeared to stop short of supporting a ban on the practice.

South Australia also achieved a national-first since our last newsletter: in September, former deputy mayor of the City of Marion, Luke Hutchison, [pleaded guilty](#) to two counts of publishing election material without a name or address affixed. This was, according to counsel for the South Australian Electoral Commission, the first time a prosecution has been brought over anonymous leafletting anywhere in Australia.



This month WA holds [local government elections](#). Council elections run every two years in the West, with half of each council up at a given election. Voting is non-compulsory and a first-past-the-post system is used in most contests. 86 councils will run postal-ballot-only elections; just four will be in-person (Broome; Halls Creek; Derby West Kimberly; Menzies). 209 individual elections will be managed by the WA Electoral Commission: 12 Mayors; 1 President and 196 Councillors – though it is anticipated some vacancies will be filled unopposed.

Meanwhile, in July, the state Electoral Commission [published](#) its proposed redistribution of state Assembly boundaries. Eleven electorates exceeded the permitted variance in enrolled electors, with another five within less than 1.5% of the limit. In response, the Commission proposed some changes to all but 10 of the state's Assembly districts. Public submissions on the boundaries closed at the end of August, with final boundaries to be set in November, well ahead of the next state election, due in March 2021.



Elections were held for three Legislative Council divisions in May. [Montgomery](#) returned Leonie Hiscutt, a Liberal; [Nelson](#), an independent, Meg Webb; [Pembroke](#), Labor's Jo Siejka. In late August, Labor's Scott Bacon resigned his Assembly seat, a subsequent count-back electing Labor-turned-independent candidate [Madeline Ogilvie](#) to replace him.

The state's [Electoral Act Review](#), covered in the last newsletter, was due to issue a final report mid-2019. An interim report, published in June 2018, had raised the prospects of considerable reform to donations, media blackouts and other electoral regulations, and consultations formally ended in April, however no final recommendations have appeared as of writing.

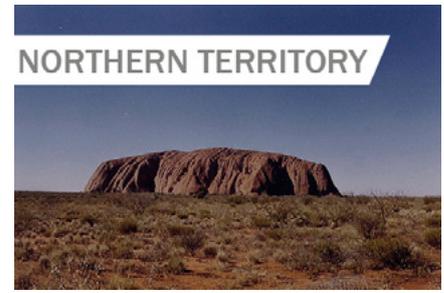
The state Electoral Commission also held an '[elector poll](#)' gauging attitudes on building height restrictions in the City of Hobart in July. While the vote was non-binding, and turnout was relatively low — 42%, against 61% turnout for the last council elections — 77% voted in favour of retaining existing limits. The ballot was triggered under provisions (sections 59 and 60) of Tasmania's [Local Government Act 1993](#) that allow for petition-initiated public meetings and polls



The Territory Government's 2019-20 [Budget](#) announced funds for Elections ACT to refresh its electoral roll management software, and to introduce electronic, online voting for Territorians overseas on election day.

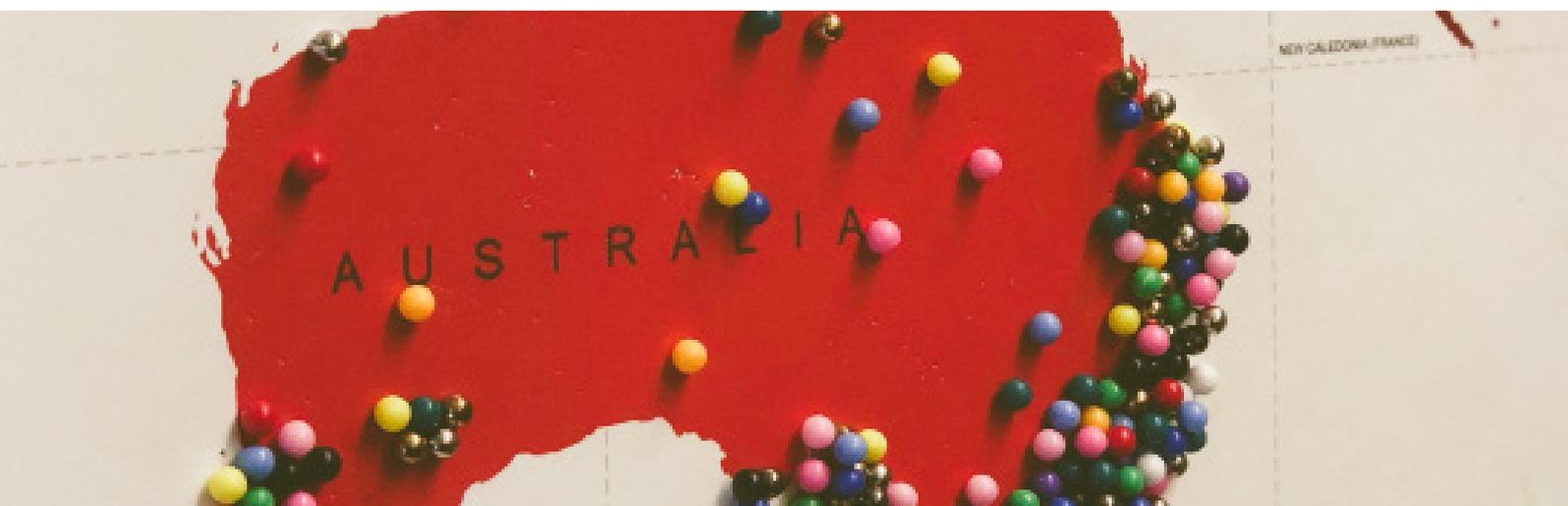
Other electoral reforms mooted in the April Newsletter — including significant reforms to political donations — remain before the Legislative Assembly, with a Government response to [criticisms](#) by the Assembly's Scrutiny Committee [outstanding](#) as of writing.

The ACT Electoral Commission completed its [redistribution](#) of Legislative Assembly Boundaries in July. The Commission's draft boundaries, drawn up by its redistricting committee, were accepted by the Augmented Electoral Commission without change, after consideration and ultimate dismissal of seven objections, some from local resident associations. The [largest changes](#) were the shifting of two suburbs from inner-city Kurrajong, out to Murrumbidgee; a change likely to marginally favour the Liberals. The new boundaries will be in force for the 2020 Territory elections.



As in many other jurisdictions, it is redistribution season in the Northern Territory. The NT Electoral Commission completed its redistribution of boundaries for the Legislative Assembly last month, its [final report](#) adopting some level of change to 20 seats, with substantial alterations to Katherine, Araluen and Braitling. The Commission also adopted two district name-changes: Stuart (named for Scottish explorer John McDouall Stuart) will become Gwoja (for [Gwoya Tjungarrayi](#)); Nhulunbuy (from the township of the same name) will become Mulka. The new boundaries and names will be in place for next year's Territory elections.

Later in September, the Gunn Labor Government [passed](#) major reform to the Territory's campaign finance regime. Included are caps on campaign expenditure — \$40,000 per candidate, and \$1 million for parties standing candidates in all 25 assembly seats; timely disclosure of donations (but with a higher donation threshold); and a broader registration of third-party campaigning entities with the electoral commission — see the [inquiry](#) by the Economic Policy Scrutiny committee of the NT legislature for more of the details. The laws come in response to Justice John Mansfield's recent [inquiry](#) into political donations in the



Event reports



ERRN (ACT) Seminar: Campaign Finance Regulation: A Troublesome Area?

2 May

Presenters: Phil Green PSM and Benjamin Smith

[Recorded and available here.](#)

Recently Australian governments have grappled with reform of political donations and campaign finance. This seminar brought together speakers who examined campaign finance regulation from two distinct perspectives. Benjamin Smith examined the constitutional questions which arose in the High Court's decision in *Unions NSW v New South Wales* [2019] HCA 1 (29 January 2019), while Phil Green drew on his practical experience administering the campaign finance regulation scheme that operates in the Australian Capital Territory under the amendments made by the *Electoral Act 1992 (ACT)*. Together they sought to identify some of the reasons this area of electoral regulation can be so 'troublesome'.

ERRN (Vic) Seminar: The Problem of Political Participation

6 June

Presenters: Dr. Paul Thornton-Smith and Associate Professor Andrea Carson

[Recorded and available here.](#)

Despite compulsory voting, voter turnout rates in Federal and State elections have been declining. In the recent Victorian State election, the voter turnout rate fell from 93% of enrolled electors to just over 90% - the lowest percentage for 73 years. Polls and election results reveal growing voter alienation from established

parties and processes. In this seminar, Paul Thornton-Smith of the Victorian Electoral Commission explained what's been happening in Victoria, while Andrea Carson, Associate Professor, Politics, Media and Philosophy at La Trobe University's School of Humanities and Social Sciences, looked at the broader picture, with particular reference to the role of the media.

ERRN (Vic) Seminar: The Third Coming of American Plutocracy

11 June

Presenters: Associate Professor Tim Kuhner

[Recorded and available here.](#)

Tim Kuhner presented a chapter from his new edited volume, "Democracy by the People: Reforming Campaign Finance in America" (co-edited with Eugene Mazo and published in 2018 by Cambridge University Press). "The Third Coming of American Plutocracy," will expose the similarities between the different eras in which American democracy has been hijacked by wealth. And it will culminate in an analysis of how President Trump has added to the pre-existing problem of government by and for the wealthy. In conclusion, the speaker invited reflections on Australia's vulnerabilities the sort of 'legalized corruption' that has become well established in the United States.

ERRN (WA) Workshop: Elections, Engagement and Democracy

16 July

This was a full-day workshop organised by our WA convenors to discuss issues relating to elections, engagement and democracy. The program presenters

represented a cross-section of views from practice, academia, politics and the media. Topics covered included compulsory voting in Australia and overseas, declining elector engagement and options to address it, use and outcomes of Australian voting methods in America, lowering the voting age, truth in political advertising, parliamentary scrutiny of electoral innovation, trends and implications of convenience voting and the changing role of the media. The workshop was very well attended, with representatives including fellow ERRN convenors, academics and representatives from a number of electoral commissions across the country.

ERRN (Vic) Seminar: Securing meaningful indigenous voice in elections

29 August

Presenters: Dr Sana Nakata, Mr. Eddie Cubillo and Mr Warwick Gately

[Recorded and available here.](#)

In 2016, 649,173 Aboriginal and Torres Strait Islanders were counted in the national census. This is estimated to be 3.3% of the Australian population. Representative democracies have long-struggled with how to make minorities matter in electoral processes that are premised upon majoritarian, aggregative forms of political decision-making. But for Aboriginal and Torres Strait Islanders this minority status has more complex and substantive character due to geography, age demographics and our foundational role in the making of this nation. In all, Aboriginal and Torres Strait Islanders are less likely to be enrolled to vote and less likely to turn out. It turns out that making 3% count in a representative democracy

is exceptionally difficult indeed. The panel explored the kinds of problems and problematisations this should raise for understandings of Indigenous Australian political engagement.

ERRN (Vic) Research Workshop: Developing a legislative framework for a complex and dynamic electoral environment

1 October

This workshop brought together researchers and electoral regulation practitioners to discuss work by Professor Graeme Orr and Michael Maley outlining broad principles for electoral regulation reform, with a focus on the role of legislation.

Launch of the Australian Electoral Law Library

On 3 September the ERRN, together with AustLII and the Gilbert + Tobin Centre of Public Law at the University of New South Wales, launched the Australian Electoral Law Library — a free online database of primary and secondary materials on election law, from digital

copies of hundreds of court and tribunal decisions on electoral matters across Commonwealth, State and Territory jurisdictions, to legislation and academic scholarship extending right back into the 19th century, updated daily.

The Library's development and ongoing maintenance is funded by the New South Wales Electoral Commission and the Victorian Electoral Commission. The design and contents of the Library were overseen by its project manager, Dr Paul Kildea of UNSW Law, and developed following consultation with academics and practitioners in the field.

The launch of the Library will be marked at the ERRN Biennial Workshop in Adelaide on 14 November 2019. The Australian Electoral Law Library is now available at <http://www.austlii.edu.au/au/special/electoral/>.

Questions and feedback on the Library are welcome and may be directed to Dr Paul Kildea (p.kildea@unsw.edu.au) or Associate Professor Philip Chung, Executive Director of AustLII (philip@austrlii.edu.au).

Forthcoming events:

ERRN Biennial Workshop

14-15 November
Adelaide

This is the network's flagship invite-only event, organised this year by the ERRN's SA convenors, Professor Lisa Hill and Dr Jonathon Louth.

ERRN (Vic) Seminar: Homelessness and political participation

Presentation by Anna Kopec
4 December
Location TBA.



Publications



A special edition of the *International Political Science Review* was published in June 2019, entitled '[Building Better Elections: Electoral Management and Electoral Integrity](#)', guest edited by Dr. Toby James, Assistant Professor Holly Ann Garnett, Professor Carolien van Ham, and Leontine Loeber, all co-convenors of the [Electoral Management Network](#).

Other publication by members and friends of the ERRN on electoral regulation include:

Nicholas Barry, Narelle Miragliotta and Zim Nwokora, '[The dynamics of constitutional conventions in Westminster democracies](#)', *Parliamentary Affairs*, vol. 72, no. 3 (July 2019): 664-683.

Peter Brent, '[Not what the voter ordered?](#)', *Inside Story*, 7 August 2019.

Timothy Gravelle and Andrea Carson, 'Explaining the Australian Marriage Equality Vote: An Aggregate-Level Analysis,' *Politics*, vol. 39, no. 2 (May 2019): 186-201.

Michael Maley, '[Home truths about political advertising](#)', *Inside Story*, 30 July 2019.

Yee-Fui Ng and Maria O'Sullivan, '[Deliberation and automation - when is a decision a "decision"?](#)', *Australian Journal of Administrative Law*, vol. 26, no. 1 (2019): 21-34.

Yee-Fui Ng and Joo-Cheong Tham, '[Enhancing the democratic role of direct lobbying in New South Wales: a discussion paper prepared for the New South Wales Independent Commission Against Corruption](#)', in NSW ICAC, *The Regulation of Lobbying, Access and Influence in NSW: A Chance to Have Your Say*, April 2019.

Graeme Orr, '[Is My Foreign Yours? The Concept of Foreignness in the Regulation of Political Finance](#)', *Representation*, vol. 55, no. 2 (2019): 179-195

William Partlett and Zim Nwokora, '[The foundations of democratic dualism: why constitutional politics and ordinary politics are different](#)', *Constellations*, vol. 26, no. 2 (2019): pp. 177-193.

For inclusion in next April's newsletter, send your publications through to our newsletter editor, James Murphy: james.murphy@unimelb.edu.au

Working papers

Democratic Audit of Australia 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.

Working Paper #54

[Measurement Tools for Comparative Political Finance: Excessive Reductionism or Valuable Simplicity?](#)

William C.R. Horncastle (University of Birmingham)

In September, the University of Melbourne, the Australia India Institute and the Trivedi Centre For Political Data held a workshop in New Delhi on the future of Electoral Democracy in India and Australia. This workshop was [opened](#) by Harinder Sidhu, Australian High Commissioner to India

and Ambassador to Bhutan, and ran with support from the Australian Department of Foreign Affairs and Trade. It resulted in a series of working papers, co-published by [Election Watch](#) (University of Melbourne):

[“Trust is hard-earned but easily lost”: The challenges of technology in elections](#)

Warwick Gately AM (Victorian Electoral Commissioner)

[Much remains to be done to make the world’s largest democracy also the greatest](#)

Dr S.Y. Quraishi (Former Chief Election Commissioner of India; Executive Board Member, Trivedi Centre for Political Data, Ashoka University)

[Transparency and accountability in political funding](#)

Shelly Mahajan (Program Associate, Association for Democratic Reforms) and Maj. Gen. Anil Verma (Retd.; Head, Association for Democratic Reforms)

[The current challenges to electoral democracy go beyond good election administration](#)

Leena Rikkila Tamang (Regional Director, International Institute for Democracy and Electoral Assistance (IDEA))

[Making India’s democracy bigger and better](#)

Tanya Spisbah (Director, Australia India Institute, Delhi)

[Democracy before dollars: the problems with money in Australian politics and how to fix them](#)

Professor Joo-Cheong Tham (Melbourne Law School, University of Melbourne)

[Compulsory voting in Australia makes governments more representative of the people, but it won’t work everywhere](#)

Professor Lisa Hill (University of Adelaide)

[Electoral democracy in Australia: crisis, resilience and renewal](#)

Dr. Tom Gerald Dal (Assistant Director, Melbourne School of Government)





Case Notes

Spence v State of Queensland

This matter concerns the validity and operation of Commonwealth and Queensland laws that regulate the making of gifts to political parties. The High Court held the Queensland laws to be valid and a provision of the Commonwealth law to be invalid.

The plaintiff, Mr Gary Douglas Spence, is a former president of the Liberal National Party of Queensland. In May 2018, the Queensland Parliament passed amendments to the *Electoral Act 1992* (Qld) and the *Local Government Electoral Act 2011* (Qld) which prohibited property developers from making gifts to political parties that endorse and promote candidates for election to the Legislative Assembly and to local government councils in Queensland.

In November 2018, the Commonwealth Parliament passed legislation inserting Div 3A into Pt XX of the *Commonwealth Electoral Act 1918* (Cth). This new Division restricts the making and receipt of gifts from ‘foreign donors’ to ‘political entities’, which include political parties registered under Pt XI. The new division also included s 302CA, which sought to regulate the relationship between State, Territory and Commonwealth electoral laws. Section 302CA of the Commonwealth *Electoral Act* conferred authority on a person to make, and on a political entity to receive and retain, a gift that is not prohibited by Div 3A, provided only that ‘the gift, or part of the gift, is required to be, or may be’ used for the purposes of incurring ‘electoral expenditure’ or creating or communicating ‘electoral matter’. The terms ‘electoral expenditure’ and ‘electoral matter’ were each defined by reference to certain conduct directed at influencing voting at

a federal election. The section provided that the authority it conferred would be displaced in particular circumstances, including where a State or Territory electoral law required the gift or part of it to be kept or identified separately in order to be used only for the purpose of a State, Territory or local government election.

Spence commenced proceedings against the State of Queensland, in the High Court’s original jurisdiction, seeking declarations that the Queensland amendments were invalid. Spence argued that the amendments to the *Electoral Act* infringed the implied freedom of political communication. He also contended that the amendments to both the *Electoral Act* and the *Local Government Electoral Act* were purported exercises of a legislative power vested by the *Constitution* exclusively in the Commonwealth Parliament and also that they infringed the doctrine of inter-governmental immunities. Spence argued in the alternative that the amendments were inoperative because they were inconsistent with s 302CA or Pt XX of the Commonwealth *Electoral Act*.

The State of Queensland in turn challenged the validity of s 302CA of the Commonwealth on several grounds. Spence and the State of Queensland agreed on a special case stating nine questions, covering these and other issues, for the Court’s opinion. The Attorney-General of the Commonwealth intervened to support the validity of s 302CA. The Attorneys-General for each of the other States and for the Australian Capital Territory intervened in support of the State of Queensland.

By majority, the High Court held that s 302CA of the Commonwealth *Electoral Act* was invalid for going beyond the limits of the Commonwealth’s legislative power, conferred by s 51(xxxvi) in its application to sections 10 and 31 of the *Constitution*, over federal elections. Sections 10 and 31 of the *Constitution* state that laws in force in each State are to apply, as much as possible, to elections in the State of members of the House of Representatives and senators of the Senate in the Federal Parliament. Section 302CA exceeded Commonwealth legislative power by protecting from the operation of a State electoral law the giving, receipt and retention of a gift that merely ‘may’, and therefore might never, be used for the purpose of influencing voting at a federal election. Accordingly, other aspects of the State of Queensland’s challenge to the section’s validity did not arise for consideration, and the Queensland amendments could not be inoperative by reason of inconsistency with s 302CA.

Although a minority would have held that the amendments were to some extent inoperative by reason of inconsistency with s 302CA, the Court unanimously held that the Queensland amendments were otherwise valid. The amendments to the *Electoral Act*, which reflected legislation upheld in *McCloy v New South Wales* (2015) 257 CLR 178, did not infringe the implied freedom of political communication. The amendments to both the *Electoral Act* and the *Local Government Electoral Act* did not intrude into an area of exclusive Commonwealth legislative power, did not infringe the doctrine of inter-governmental immunities and were not inconsistent with the framework of Pt XX of the Commonwealth *Electoral Act*.

Palmer v Australian Electoral Commission [2019] HCA 24

The High Court dismissed a challenge to a practice of the Australian Electoral Commission (“the Commission”). The Court unanimously held that the Commission could publish information about an indicative two-candidate preferred count (“the Indicative TCP Count”) for a Division of the House of Representatives as soon as polls closed in that Division.

Since 1992, s 274(2A)-(2C) of the *Commonwealth Electoral Act 1918* (Cth) (“the Electoral Act”) has required the scrutiny of votes in an election for each Division to include the Indicative TCP Count. It is a count of preference votes (other than first preference votes) on the ballot papers that, in the opinion of the Australian Electoral Officer, will best provide an indication of the candidate most likely to be elected for the Division. The Commission’s established practice is that, from the close of polls in a Division, or shortly thereafter, the Commission’s website, “The Tally Room”, displays the identity of the candidates in respect of whom the Indicative TCP Count will be undertaken and, in most cases, a “matched polling place projection” based on progressive results of the Indicative TCP Count.

The plaintiffs were endorsed and nominated by the United Australia Party as candidates in a Division of the House of Representatives or for the Senate in the federal election held on 18 May 2019. Prior to that election, the plaintiffs filed an application for a constitutional or other writ in the original jurisdiction of the Court seeking to challenge the practice of the Commission, in making public, while polls remained open in some parts of Australia, one or both of the identity of the candidates selected by the Commission for the purpose of the Indicative TCP Count in a Division and the progressive results of any of those indicative counts (collectively, “the TCP Information”).

The plaintiffs submitted that publishing the TCP Information after polls closed in the relevant Division but before the polls closed in all parts of the nation is not authorised by the *Electoral Act*. In particular, they submitted that by publishing that information, the Commission would not be impartial or avoid the appearance of favouring one or more of the candidates. They also submitted that by publishing that information while the polls remained open in any part of the nation, the Commission “would impermissibly distort

the voting system in a manner that would compromise the representative nature of a future Parliament”, contrary to sections 7 and 24 of the *Constitution*.

The High Court unanimously held that the plaintiffs’ contentions about the Indicative TCP Count process, which underpinned both their statutory and constitutional challenges, lacked a factual foundation. The selection of candidates for the Indicative TCP Count was not shown to be inaccurate or misleading, and publication of the TCP Information did not constitute the Commission giving any imprimatur to any particular candidate or outcome. Accordingly, s 7(3) of the *Electoral Act*, which provides that “[t]he Commission may do all things necessary or convenient to be done for or in connection with the performance of its functions”, empowers the Commission to publish the TCP Information as soon as the polls close in the relevant Division.

Setka v Carroll [2019] VSC 571

Mr Setka applied for an injunction to restrain the Australian Labor Party (ALP) National Executive from proceeding with a motion to expel him as a member of the ALP; and declarations accordingly.

Justice Riordan dismissed the application on the basis that the Court did not have jurisdiction to interfere with internal decisions of voluntary unincorporated associations unless it is protecting or enforcing a contractual or other right recognised in law or equity. Mr Setka did not establish any such underlying right.

Further, it was common ground that the National Executive could exercise the powers of expulsion under the Rules of the Victorian Branch of the ALP. Justice Riordan held that if (contrary to his conclusion) he did in fact have jurisdiction to enforce the ALP’s National Constitution, he would have found that the National Executive would be required to substantially comply with the limitations set out in rule 20 of those Rules, where the power to expel is confined to proven specified offences under the Victorian Rules.

Yates v Frydenberg

A High Court challenge has been lodged against the outcome of the 2019 federal election in Chisholm, won by Gladys Liu, and Kooyong, held by Treasurer Josh Frydenberg.

Independent candidate Oliver Yates, who challenged Mr Frydenberg in the seat of Kooyong, teamed up with a voter from Ms Liu’s seat of Chisholm to launch a legal bid to have the results in both electorates ruled invalid.

The challenges relate to Chinese-language Liberal Party posters that appeared at voting booths on election day, which the applicant claimed were designed to deceive voters in the casting of their vote. The posters, which featured the AEC’s distinctive purple and white colouring and were written in Chinese, instructed voters at polling stations that the ‘correct way to vote’ was to place a ‘1’ next to the name of the Liberal candidate on the ballot paper.

The claim was that the posters imitated official Australian Electoral Commission material and were therefore an illegal practice in breach of section 352 of the *Commonwealth Electoral Act 1918* (Cth). The posters were officially authorised by the Liberal Party’s Victorian state director in small text at the bottom of the poster.

The case is still ongoing.

De Santis v Staley and Victorian Electoral Commission

A Court of Disputed Returns case arising from the 2018 Victorian State election has concluded since the previous newsletter.

On 22 January 2019, Ms Sarah De Santis, the ALP candidate for Ripon district, filed a petition with the Court seeking an order that the VEC conduct a recount of all used ballot papers for the election for Ripon District, and a declaration that Ms Louise Staley (the Liberal candidate and member for Ripon District) was not elected and that Ms De Santis was elected. The petition submitted that the counting activities conducted by the VEC after the first count and distribution of preferences did not constitute a recount in accordance with section 120 of the *Electoral Act 2002* (Vic).

After a directions hearing on 7 February 2019, the petition was listed for hearing on 6 May. Up to four days were allowed for the hearing.

Shortly before the hearing, the petitioner sought leave to discontinue her petition, and, with the consent of the parties to the proceedings, the petition was dismissed on 7 May 2019.

Contact Us



Electoral Regulation Research Network

Melbourne Law School

The University of Melbourne, VIC 3010

E law-errn@unimelb.edu.au

W www.law.unimelb.edu.au/errn

ERRN Convenors & Editors:

ACT

Dr Peter Brent, Swinburne University

Dr Dominique Dalla-Pozza, ANU College of Law

Michael Maley, Electoral Process Specialist

Dr Damon Muller, Parliamentary Library

NSW:

Rachel McCallum, NSW Electoral Commission

Dr Paul Kildea, University of New South Wales

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VIC:

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Legal Editor

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