



# October 2020 newsletter

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Electoral Regulation  
Research Network





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## ERRN Director's Message: October 2020



There seems to have been a temporal breach between the time I wrote my last newsletter message in May and this one. Back in May, the country was in a collective lock-down but with strong signs of emerging out of it. Writing in early October, Victoria has experienced a second wave of COVID-19 infections resulting in another lock-down that appears to be coming to an end. Thankfully, the rest of the country has been spared such hardship.

Welcome then to the COVID-19 normal where the only certainty is uncertainty, the only foothold of stability is grasping that much is unstable.

As with all others in the community, ERRN has had to adapt to this context. Its activities have been refocused to contribute to understanding the novel and complex challenges posed by the pandemic to the regulation of elections. Two important working papers have been published in this respect, one on *Electoral Management under COVID-19* by Michael Maley and another on *Remote Voting under COVID-19* by Dr Narelle Miragliotta (see our 'publications' section inside).

With face-to-face seminars no longer possible, ERRN events were organized through different media. As noted in my previous message, video-recordings were made by Professor Anne Twomey, University of Sydney on 'Government Accountability and Virtual Parliament' and by Dr Stephen Mills, University of Sydney, on 'Parliament at a time of virus'. Since that message, there have also been video-recordings by Professor Graeme Orr, University of Queensland on 'Elections in a Time of Contagion' and Professor John Kane, Griffith University on 'COVID-19 and the US Election' (see our 'events' below).

Webinars have also been held on:

- 'Constitutional Government During a Panel' (a panel comprising myself and my Melbourne Law School colleagues, Professor Michael Crommelin AO and Professor Cheryl Saunders AO)
- 'Elections and COVID-19' by Michael Maley;
- 'Elections in the COVID-19 Pandemic: Lessons from the Eden-Monaro by-election' by Australian Electoral Commissioner, Tom Rogers, and Australian Labor Party National Secretary, Paul Erickson; and
- 'Is a virtual Parliament desirable and workable?' by President of the Senate, Senator Scott Ryan and Professor Anne Twomey, Sydney University.

Forthcoming web events include:

- A roundtable of electoral commissioners including Australian Electoral Commissioner, Tom Rogers, and Victorian Electoral Commissioner, Warwick Gately;
- A workshop on 'Interference and Distortion at Australian Elections'; and
- A webinar on 'Remote Democracy?: A Comparative Perspective on Voting in Pandemics and Beyond'.

The last event reminds us how particularly crucial comparative and international perspectives are in this pandemic. I am delighted then to advise that ERRN is a sponsor of the Asia & the Pacific Online Lecture Series on Elections initiated by the International Institute for Democracy and Electoral Assistance (IDEA), an intergovernmental organization that works to support and strengthen democratic institutions and processes around the world, to develop sustainable, effective and legitimate democracies.

When this newsletter published, two of the five fortnightly lectures would have occurred: one on open list proportional representation system and another on the impact of distant and online election campaigning on political freedoms. The other three will respectively address the impact of changes in campaign practices on the funding of election campaigns and political parties; Special Voting Arrangements; and 'Open Data' in elections.

Let me conclude by recording my deep gratitude to those who continue to contribute to ERRN in this pandemic, in particular, the ERRN convenors and editors, Kaori Kano, the ERRN Administrator, speakers and participants and ERRN's funders (the New South Wales Electoral Commission, Victorian Electoral Commission and Melbourne Law School). These are truly challenging times for all of us and our families. With time at a particularly premium, I have been moved at how many continue to volunteer their time to ERRN – thank you!

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

# News

## April-October 2020



### COMMONWEALTH

Electors in Eden-Monaro turned out in early July, in person and via the post, to vote for a replacement for the long-serving Mike Kelly, who [announced](#) his retirement due to ill health in April. Despite coronavirus fears the vast majority of electors voted in person — [43% on polling day; 42% via pre-poll](#). Still, applications for postal votes were [up 127%](#) on the figures from the 2019 general election. Kristy McBain retained the seat for Labor with [50.85%](#) of the final vote. Another by-election, for the Queensland seat of Groom, was triggered after the resignation of John McVeigh for family reasons. The poll has been scheduled for 28th November.

Northern Territory representation in the Federal Parliament was another key issue over the last six months. A [report](#) from the Parliamentary Library published in July projected the NT would lose a House of Representatives seat in the next redistribution, due to the Territory's population falling below quota. Territory representatives from both sides of the political divide spoke out against the change, and Senators Farrell and McCarthy introduced an [amendment](#) to the *Electoral Act* proposing a floor of two House seats for the Territory. The Joint Standing Committee on Electoral Matters convened an inquiry into the Bill. Notable [submissions](#) came from the AEC, confirming the Parliamentary Library's

arithmetic, and the NT's Chief Minister, who noted significant under-enrollment issues that may be warping figures. In October, the Deputy Prime Minister Michael McCormack [indicated](#) the Government would support the retention of a second Territory seat.

JSCEM juggled this consideration of Territory seats with two other inquiries: [one](#) into all aspects of the 2019 federal election — public hearings were held in September and submissions closed on the 20th of that month; another into [amendments](#) to the *Electoral Act*, including clarification on how federal, state and territory disclosure regimes should interact, in light of *Spence v Queensland* (see Case Notes from [October 2019 Newsletter](#)) The latter was cause for some controversy, with minor party MPs [claiming](#) the amendment, which has bipartisan support, would effectively help the major parties circumvent tough new donation laws introduced at the state level over the last few years.

The AEC was also in the spotlight, with the Australian National Audit Office publishing its [review](#) of the Electoral Commission's administration of political finance disclosures in mid September. The audit found the Commission was only partially effective in that role, with limited use of its own data to cross-reference disclosures and hunt down non-compliant entities, almost no scrutiny of third-party disclosures, and a relatively soft approach to breaches of the rules. The AEC has rejected the overall finding, but accepted many of the specific recommendations to tighten their regulation of political finance.



### NEW SOUTH WALES

The NSW Audit Office is in the middle of an [investigation](#) into funding arrangements of the state's integrity and oversight bodies, including the Independent Commission Against Corruption and the NSW Electoral Commission. The audit came in response to revelations of critical shortfalls in funding for the NSWEC, covered in [our May 2020 Newsletter](#). The audit remains underway as of writing.

Meanwhile, the state is in the midst of a lower house redistribution. Election analysts [predict](#) fairly significant change to seats in suburban Sydney, as well as the creation of a new seat. Public submissions closed in July; by [November](#), the Redistribution Panel will hand down its draft determinations, with new boundaries to be in place for the 2023 state election.

Finally, the date of Saturday 4th of September 2021 has been fixed for [local government elections](#). Local elections had been due in September of this year, but they were held over to 2021 due to coronavirus fears (see previous newsletter). The postponement will shorten the term of councillors elected next year, with the subsequent election still [scheduled](#) for 2024.



It was branch-staking-galore in Victoria the last six months, with major revelations about membership impropriety in Victorian [Labor](#) and the Victorian [Liberal](#) Party, each implicating state and federal MPs, published by Nine-Fairfax. Some Labor-related allegations have been referred to a [joint-probe](#) by the state Ombudsman and IBAC, and the state branch of the ALP is now subject to a federal [intervention](#). On the Liberal Party side, key organisational-wing [figures](#) resigned following the revelations, and Assistant Treasurer, Michael Sukkar, along with Kevin Andrews, invited the federal Department of Finance to [investigate](#) any possible misuse of taxpayer-funded staff.

In September, the Victorian Parliament's Electoral Matters Committee released its [report](#) on the 2018 state election. If found enrollments (96.6% of potential electors) were strong that year, thanks in part to the 2017 Marriage Law Postal Survey; that turnout (90.2%), by contrast, was at its lowest since 1945; and that informal voting for the Lower House (5.8%) and Upper House (4%) was higher than the VEC's targets. The Committee called for new initiatives to engage young and linguistically diverse electors; greater transparency around security of pre-poll ballots; and stronger efforts to find accessible early voting centres. To the [disappointment](#) of some Committee members, the report stopped short of recommending the abolition of group voting tickets, suggesting instead that a dedicated inquiry consider the voting system for the Upper House. It will, however, take up the issue of social media influence on elections as its next subject of [inquiry](#). Submissions for that inquiry closed at the end of September, with public hearings to follow later this year.

Meanwhile, local government elections scheduled for late October went ahead, despite [unprecedented challenges](#), including the extension of the Stage Four lockdown measures to cover the most of the campaigning period, rendering many common forms of electioneering impossible. Some [critics](#) suggested this handed something of an unfair advantage

to well-resourced candidates, as costly direct mail would become one of the only avenues for communicating directly with electors, outside social media. Some [carve-outs](#) for campaigning were put in place in early September, to allow for leafleting and delivery of campaign posters, and by the end of the month city-wide restrictions had been taken down a step — however face-to-face voter outreach was still all but impossible. All elections were held by postal ballot only — a change for some metropolitan councils. Votes must be returned by the 28th of October; a summary of results will appear in our next newsletter.

Finally, also in September, the Victorian divisions of the Liberal and National parties took the VEC to [court](#) over rulings on public financing of elections. The parties had an agreement splitting public funding between them in several regions — one the VEC decided it could not, by law, recognise when doling out public funds after the 2018 state election. The case is in its early stages.



State elections were scheduled to go ahead late October. In August, Queensland's electoral commission released a [statement of intent](#) setting out how it intends to plan for running the poll under the threat of COVID-19, including wider provision of pre-poll and postal voting options. Early voting is set to open on the 19th of October; polling day is Saturday the 31st of October. Labor has little wiggle-room this election — a net loss of two seats would see them [lose](#) their majority in the Parliament — however reliable state-wide polls have not been published since July. Full results will follow in our April newsletter.

Earlier, in June, a parliamentary inquiry into the ECQ's handling of local government elections in March (see previous newsletter) published its [report](#). It found the Commission bungled the count process on election night, in part because it had not set up adequate systems after [abandoning](#) a new data management system in 2018. However the report made no recommendations, noting that the issues had been identified and fixed.



July saw the Marshall Government introduce [sweeping](#) electoral changes, including a switch to optional preferential voting for the state's Legislative Assembly, bans on corflutes on public roads and a big expansion of pre-polling. The measures came in response to [recommendations](#) from the state's electoral commission following the 2018 State Election. The [Bill](#) is currently before the Parliament.

The reforms came on top of a redistribution of the state's electoral boundaries, rendered controversial due to last year's tussle over the 'fairness provision' in the state's Constitution (see the last two newsletters). The removal of the provision last year has meant this redistribution is likely to weaken the position of the governing Liberal Party ahead of the 2022 election. In August, the Electoral Boundaries Commission [published](#) its draft report. Feedback was due by mid-September, with final boundaries to be gazetted in November.

## WESTERN AUSTRALIA



In June, the McGowan Government introduced [legislation](#) to ban foreign donations to political parties. As of writing, the Bill had passed the Lower House and was before an Upper House [committee](#), due to report back in November, meaning the ban may not have a large impact on the next WA election, due in March 2021.

Meanwhile, elections for the City of Perth were held up before the campaign officially began, with a [stoush](#) over candidate eligibility delaying the ballot draw in early September. The Electoral Commission deemed two nominees ineligible over technicalities of leases they held inside the council area — something that had been a major focus of a [special inquiry](#) into the City of Perth, which found sham leases had been used to ensure the eligibility of some former councillors, amongst other things. The Perth election has thrown up other regulatory complications, including the matter of Lord Mayoral candidate and Seven West Media commentator Basil Zempilas using his media positions to [campaign](#).

## TASMANIA



August saw Tasmania hold elections for two of the state's upper house seats. The elections saw major party candidates take over from independents, with Labor's Bastian Seidel triumphant in [Huon](#) and the Liberal Party's Jo Palmer elected with a lead of just 250 votes in [Rosevears](#). This brings the proportion of Upper House seats held by parties, rather than independents, up to a [majority](#) for the first time ever — a significant change for Tasmanian politics.

Meanwhile there has been precious-little movement on long-mooted electoral reforms in Tasmania, despite claims a major review of the Electoral Act, calling for donations reform, was actually [completed](#) in December 2019. Nine months later, in September, when asked in state parliament if the government was sitting on the Review report, Premier Gutwein said electoral reform was not receiving any consideration during the COVID-19 pandemic. This has not stopped other parties calling for reform, with Labor putting forward a [private member's Bill](#) proposing real(ish)-time disclosure of by all donors giving \$1000 or more (cumulatively or in one donation) as well as caps on candidate and party spending for the Legislative Assembly (\$1 million for parties; \$100,000 for individual candidates).

## ACT

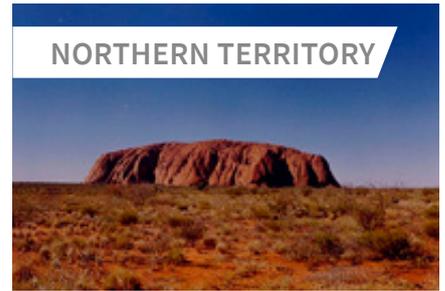


The ACT's Legislative Assembly elections were in full swing at time of writing. Early voting commenced on the 28th of September, and was scheduled to run for three weeks. The long voting period was one of several [provisions](#) made to accommodate pandemic concerns, with the Electoral Commission predicting 50-80% of voters would attend the polls before polling day on the 17th of October. It is also likely to be one of the first Australian elections in which [most](#) electors vote electronically, rather than with pencil and paper. A change of government under the ACT's Hare-Clark system would require that the Liberals win two '[hinge](#)' seats, or one, with the other won by a sympathetic cross-bencher.

In the days before the dissolution of the Legislative Assembly, the ACT Government finally introduced long-mooted electoral reforms. Included in the [Bill](#) was the creation of a new offence of misleading electoral advertising; bans donations from property developers or their associates; and a seven-day deadline on disclosing donations over \$1000. A Greens amendment to also ban donations from gambling companies and add donation caps was defeated.

The truth-in-political-advertising provisions are particularly significant. They empower the Electoral Commissioner to prevent the dissemination of misleading statements — or even compel a retraction — and impose fines for non-compliance. However, the powers will only cover content that requires a formal authorisation, leaving a fair gap for scare campaigns of the '[Death Taxes](#)' or 'Mediscare' variety. What is more, the rules will not take effect until [after](#) this month's election, with the next Territory government to work out with the Electoral Commission how to implement the laws.

## NORTHERN TERRITORY



Territorians voted in Legislative Assembly elections in August. The Gunner Labor Government was returned with 14 out of 25 seats. The Territory Alliance, the fledgling new party founded by former Chief Minister and MLA for Blain, Terry Mills, had a particularly bad election, gaining no seats at all, and losing Mills' seat to Labor. A good chunk of the vote came via postal ballots. During the count, Labor lodged a formal [complaint](#) with the NT Electoral Commission that some postal ballots seemed to have been posted after the close of polling booths on election day. As the count stretched on, Michael Gunner suggested changes to postal voting would need to be considered by the next government.

It was also the first Territory election run on new donation disclosure rules. While not quite 'real-time', donations data for the 2019-2020 financial year was [released](#) ahead of polling day. It showed Labor received over three times as many donor dollars as their main rivals, the Country Liberal Party, and 2.8 times the Territory Alliance total. Total donations were well down on [previous form](#), prior to donations reform.

## Event reports



### **ERRN Webinar**

#### ***'COVID-19 and the US election'***

30 April 2020

In this webinar, Prof John Kane of Griffith University speculated on the likely or possible impact of the pandemic crisis on the upcoming November elections by looking at both the advantages Trump possesses and the challenges he faces. While prediction is unsafe — indeed, who could have foreseen the President himself contracting the virus — Prof Kane argued it is possible to clarify both what is at stake and how things were playing out early in the campaign.

Watch the full webinar [here](#).

### **Melbourne Law School COVID-19 and Law Expert Panel series**

#### ***'Constitutional Government During a Pandemic'***

9 June 2020

For this webinar, Professor Adrienne Stone and a panel of legal experts discussed how Australia's constitutional arrangements have responded to the challenges of Covid-19, and the new ways forward. This online event was the first webinar in Melbourne Law School's twice-weekly series on Law and Covid-19. The discussion was moderated by Professor Adrienne Stone, featuring: Professor Michael Crommelin, Professor Joo-Cheong Tham, Professor Emeritus Cheryl Saunders.

Watch the full webinar [here](#).

### **ERRN Webinar**

#### ***'Elections in the COVID-19 Pandemic: Lessons from the Eden-Monaro By-Election'***

26 August 2020

In this recorded seminar, we heard from AEC Commissioner Tom Rogers and ALP National Secretary Paul Erickson about the challenges of election management and campaigning under pandemic conditions. Both reflect on the experience of the Eden-Monaro By-Election and draw out lessons for future elections. This event was co-hosted by the Electoral Regulation Research Network and the Gilbert + Tobin Centre of Public Law at the University of New South Wales.

Watch the full webinar [here](#).

### **ERRN Webinar**

#### ***'Is a Virtual Parliament Desirable and Workable?'***

30 September 2020

Parliaments are central to Australia's democracy – they are key to democratic representation, law-making and accountability. But how are they to properly function in the COVID-19 pandemic where there are severe public health restrictions and substantial increases in executive power? Is a virtual Parliament the answer to this difficulty? What are its strengths and limitations? Is a virtual Parliament workable? Senate President Scott Ryan took up these questions drawing upon his experience organising a virtual sitting of the Senate whilst Professor Anne Twomey provided commentary. This event is co-hosted by the Electoral Regulation Research Network, Gilbert + Tobin Centre of Public Law, and Melbourne School of Government.

### **ERRN/International IDEA Online Lecture**

#### ***'Open List Proportional Representation System: The Good, the Bad & the Ugly'***

30 September 2020

The open-list proportional representation (OLPR) system, as opposed to the closed-list version, allows voters to pick their favourite candidate from the party list while retaining proportionality of the election results. In the Asia & the Pacific region, this system is used in Fiji, Indonesia and Sri Lanka, to name a few. In lecture #1 of the International IDEA lecture series on Asia & the Pacific, elections expert Alan Wall took us through the upsides, downsides and unintended consequences of this system.

Visit the International IDEA YouTube channel for a recording,

### **ERRN/International IDEA Online Lecture**

#### ***'How does distant & online election campaigning affect political freedoms?'***

14 October 2020

The need for physical distancing during this COVID-19 pandemic has raised the need for innovative campaign methods to be developed by election contestants because conventional methods such as rallies, public meetings, etc. are prohibited in some jurisdictions. Distant and online campaigning may be seen as restrictive to both contestants and voters alike due to physical and technological barriers that appear. In this second lecture in the International IDEA lecture series on Asia & the Pacific, Associate Professor Tom Daly spoke about COVID restrictions the political freedoms.

Visit the International IDEA YouTube channel for a recording,

## Forthcoming events:

### ERRN/International IDEA Online Lecture

*'Special Voting Arrangements (SVAs): Between the Convenience of Voting & Integrity of Elections'*

Wednesday 28th October

Speaker: Therese Pearce-Laanela

Time TBC. Keep up to date with these [International IDEA events here](#).

Thursday 29th October 5pm (WST)

### ERRN Webinar

*'Remote Democracy?: A Comparative Perspective on Voting in Pandemics and Beyond'*

Speakers: Prof Ben Reilly (UWA) and Dr Lachlan Umbers (UWA)

Chair: Assoc/Prof Martin Drum (University of Notre Dame Australia)

### ERRN/International IDEA Online Lecture

*'How does innovative unconventional campaign practices affect the funding of election campaigns & political parties?'*

Wednesday 11th November

Speaker: Joo-Cheong Tham

Time TBC.

### ERRN/International IDEA Online Lecture

*'Open Data in Elections: Why is it needed and what can be done to make more progress?'*

Wednesday 25th October

Speaker: Peter Wolf

Time TBC.

### ERRN Webinar

*'Elections under COVID-19 in Australia: an update on recent experiences and lessons for the future'*

Thursday 26th November

Speakers: Tom Rogers (AEC) and Warwick Gately (VEC)

This webinar will explore the responses to the Covid-19 challenge adopted at recent electoral processes in Australia, and seek to identify the longer term implications of work practices which Australian election administrators have been forced by the pandemic to adopt. Time TBC.

### ERRN & Stretton Institute for Public Policy Webinar

*'Interference and Distortion at Australian Elections'*

December (date TBA)

This event will feature two papers from researchers at the University of Adelaide: one by Prof Lisa Hill on 'Truth in Election Advertising'; another by Tim Legrand and Melissa Dowling on 'Disinformation During Election Campaigns'.

Keep up with details via the [ERRN events page](#).



## Publications



Matteo Bonotti and Paul Strangio (eds), *A Century of Compulsory Voting in Australia: Genesis, Impact and Future*, Palgrave Macmillan, 2020.

Christopher Cooper, 'Impartiality and public sector employees' online political activity: evidence from three Australian elections', *Acta Politica*, September 2020.

Anika Gauja, Marian Sawer and Marian Simms (eds), *Morrison's Miracle: The 2019 Australian Federal Election*, ANU Press, 2020.

Hideo Ishima, 'How electoral reform alters legislative speech: Evidence from the parliament of Victoria, Australia 1992-2017', *Electoral Studies*, vol. 67, October 2020.

Toby James, 'New development: running elections during a pandemic', *Public Money and Management*, June 2020.

Paul Kildea, 'The constitutional role of electoral management bodies: the case of the Australian Electoral Commission', *Federal Law Review*, September 2020.

Anthoula Malkopoulou and Lisa Hill, 'The politics of voter presence', *International Political Science Review*, June 2020.

Yee-Fui Ng, 'Political Advisers in the Executive Branch' in Rudy B Andeweg, Robert Elgie, Ludger Helms, Juliet Kaarbo, and Ferdinand Müller-Rommel (eds), *The Oxford Handbook of Political Executives* (Oxford University Press, 2020) 501-524.

Yee-Fui Ng, Maria O'Sullivan, Moira Paterson and Normann Witzleb, 'Revitalising Public Law in a Technological Era: Rights, Transparency and Administrative Justice' (2020) 43(3) *UNSW Law Journal* 43(3) 1041-77.

Graeme Orr and Andrew Geddis, 'Islands in the storm? Responses to foreign electoral interference in Australia and New Zealand', *Election Law Journal*, September 2020.

For inclusion in November's newsletter, send your publications through to our newsletter editor, James Murphy: [james.murphy@unimelb.edu.au](mailto:james.murphy@unimelb.edu.au)

## 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 71

[Election Management under COVID-19](#)

Michael Maley (Electoral process specialist, formerly Australian Electoral Commission)

May 2020

### Working Paper 72

[Remote Voting under COVID-19](#)

Dr. Narelle Miragliotta (Department of Politics and International Relations, Monash University)

September 2020



## Case Notes

### ***The Australian Institute for Progress Ltd v The Electoral Commission of Queensland***

The Australian Institute for Progress (“AIP”) is a think tank based in Queensland. The AIP’s funding sources include some property developers who are ‘prohibited donors’ for the purposes of the *Electoral Act 1992* (Qld).

Changes to the *Electoral Act 1992* (Qld) in 2018 made it unlawful for a ‘prohibited donor’ to make a ‘political donation’ as defined in the Act. It is also unlawful for a person to accept a ‘political donation’ that was made (wholly or in part) by or on behalf of a ‘prohibited donor’. The legislation aims to minimise the corruption and undue influence that political donations from property developers have the potential to cause at both a State and local government level.

In February 2020, the AIP wrote to the Electoral Commission of Queensland (ECQ) advised that it intended to participate in the State election later that year by advocating for a particular political party and conducting political research. It sought clarification as to whether it was legal to accept donations from ‘prohibited donors’ if it conducted such activities. In response to this, the ECQ advised that it considered the AIP to be a ‘third party’ within the meaning of the *Electoral Act 1992* (Qld) and confirmed that was not lawful for prohibited donors to make gifts to other entities which incur electoral expenditure. The ECQ requested further information from the AIP so it could consider appropriate action.

The AIP challenged that ruling by the ECQ. AIP executive director Graham Young claimed that the ruling threatened the advocacy of charities and not for profits, many of whom received donations from philanthropic property developers.

The AIP sought declarations from the Supreme Court, including that ‘a gift to or for the benefit of a Third Party for that Third Party to pursue its activities, including in relation to political communications or concerning an election for the Legislative Assembly’, is not within the meaning of the expression “political donation” in the Act.

The Court refused to grant a declaration, as the relief sought did not accord with the principles governing the circumstances in which the Court will grant declaratory relief. This was because the question was essentially hypothetical and the declaration sought was highly dependent on fact-specific circumstances not before the court, such as the purpose of the particular donor and the particular gift.

The Court did, however, decide an issue of statutory interpretation in dispute between the AIP and the ECQ. The Court found that the word ‘campaign’ in the definition of ‘electoral expenditure’ may describe the campaign of a third party or a group of third parties whose organised activities are aimed at achieving the election of a political party or a candidate or the defeat of a political party or candidate at an election.

The Court held that whether or not a gift falls within the definition of ‘political donation’ in s 274(1)(b) depends on the circumstances in which the gift was made. It depends on the purpose of the particular donor and the particular gift: was it ‘to enable’ the entity to incur expenditure ‘for the purposes of a campaign for an election’ for the Legislative Assembly?

The issue of whether the making of a gift engages the prohibition in s 275 was said to be fact-specific. The matter being fact-specific, the declarations sought by the AIP lacked utility, and it would be inappropriate to grant them, or even declarations which referred to the AIP rather than any ‘Third Party’.

### ***Johnston v The Greens NSW Incorporated***

In May 2018 The Greens NSW, in seeking to field candidates in a forthcoming election for the Legislative Council, held a preselection process. The third person on the ticket adopted as a result of that process was Mr Jeremy Buckingham. On 20 December 2018 he resigned his membership of The Greens NSW. As a result, it was necessary to adopt a process which would produce an alternative candidate. The question was whether he should simply be replaced by the person in position number four, or whether there should be a recount of the pre-selection ballot. The party adopted the former position.

The applicant, Daryl Lindsay Johnston, considered that to be the wrong approach under the party’s Constitution. He and another member of the party commenced proceedings in the Equity Division on 1 March 2019. The trial judge, Robb J, made an order dismissing the plaintiffs’ summons.

On 31 May 2020 Mr Johnston filed a summons seeking leave to appeal from the judgments and orders in the Equity Division. Following this, there had been settlement negotiations which had resulted in The Greens NSW making an offer to settle the matter on the basis that the applicant discontinue the application for leave to appeal and agree to pay an amount in full settlement of the costs of the proceedings.

The applicant's position was that he accepted the offer, but there was an issue as to whether the offer bound all the active parties in the Court.

The Court held that it would not hear the appeal, with the likelihood that further costs would be incurred by the parties, until any issues regarding the agreement to settle have been resolved. Accordingly, the Court vacated the date for hearing the application for leave to appeal.

### ***Petersen v Nolan***

Dr Petersen claimed damages against Ms Nolan for misfeasance in public office and/or negligence. Dr Petersen and Ms Nolan were both candidates at the 2012 Queensland State election with Dr Petersen contesting the seat of Ipswich as an independent candidate and Ms Nolan, as the sitting member, contesting the same seat as the endorsed Labor candidate. Dr Petersen alleged that Ms Nolan caused Ipswich City Council to seize Dr Petersen's election signs and have her fined and by doing so intentionally aimed to cause harm to Dr Petersen. Dr Petersen made a series of allegations in the statement of claim against Ms Nolan as to the conduct she alleged Ms Nolan engaged in that was alleged to be dishonest and misleading in relation to Dr Petersen's election signs.

Dr Petersen also pleaded that Ms Nolan owed her a duty of care in her capacity as the member for Ipswich and a Minister of the Government not to harm Dr Petersen.

The primary judge held that, Ms Nolan's alleged actions did not disclose an exercise of some power or authority which Ms Nolan had by virtue of the offices she held. The primary judge found that that the pleading did not disclose any basis to support that a Member of Parliament or a Minister owed a duty of care of the type pleaded to Dr Petersen.

The Court of Appeal affirmed the decision of the primary judge. The Court held that the tort of misfeasance in public office involves an act done in the exercise by the public officer of some power or authority that exists by virtue of the office the public officer holds. On the basis of the existing law, there is not that connection between Ms Nolan's then public office as a Member of Parliament and a Minister and her communication with the Council. Any complaint by Ms Nolan to the Council was not an exercise of her authority or power by virtue of being the sitting member or a Minister.

The Court also found that the mere fact that Ms Nolan was a MP and a Minister who was seeking re-election in the same seat in which Dr Petersen was a candidate did not give rise to a duty of care not to harm Dr Petersen in the course of the election campaign.

### ***Fry v Victorian Electoral Commission***

A hearing in the Victorian Civil and Administrative Tribunal (VCAT) finalised a matter that began when Mr John Fry, a candidate in the 2016 Whittlesea City Council election, applied to the Municipal Electoral Tribunal (MET) for an inquiry into the election, disputing the election of Mr Norman Kelly because Mr Kelly had allegedly misled and deceived the voters, breaching section 55A of the *Local Government Act 1989* (Vic). The MET dismissed the application on 9 February 2017. On 6 May 2019, Mr Fry applied to VCAT for a review of the MET's decision. VCAT granted an extension of time for Mr Fry to lodge his application.

On 20 March 2020 the Governor assented to the Local Government (Whittlesea City Council) Act 2020, which dismissed Whittlesea City Council, installed administrators and deferred the Council's next general election to October 2024. After corresponding with Mr Fry, who confirmed his case should continue, the Victorian Electoral Commission (VEC) then applied to VCAT for Mr Fry's application to be summarily dismissed under section 75(1) of the Victorian Civil and Administrative Tribunal Act 1998 because the application had become misconceived and lacked in substance. The VEC also sought cost orders for costs incurred since its correspondence about the passage of the Act dismissing the Council.

On 18 August 2020 VCAT Deputy President Lambrick made orders for the application to be dismissed and made no award for costs. Deputy President Lambrick concluded that the application had become misconceived as a result of the dismissal of the Council; VCAT could not declare Mr Fry elected to an office that no longer existed, nor could it create an extraordinary vacancy in an elected council that no longer existed.

### ***Matthew Harris, State Director of the National Party of Australia – Victoria v Victorian Electoral Commission***

The Liberal and National parties have applied to the Supreme Court to overturn the VEC's decision on the distribution of public funding.

The VEC distributes public funding to registered political parties, based on the number of votes they obtain. Since the 2010 State election, the Liberal and National parties have fielded joint tickets in three Upper House regions. The VEC has paid two-thirds of the public funding for these elections to the Liberal Party and one-third to The Nationals. The *Electoral Legislation Amendment Act 2018* (Vic) made substantial changes to public funding provisions. After the 2018 State election, the VEC provided all the public funding for the three regions to the Liberal Party, which received nearly all the first-preference votes for the Coalition in these regions. The VEC informed the parties that the Liberal Party would not be able to transfer one-third of the funding to The Nationals, as this would constitute a political donation, and donations were capped at \$4,000.

The case was heard on 14 September 2020. The central question considered at the hearing was whether a transfer from the Liberals to the Nationals would be a gift (and thus caught by the \$4,000 donation cap) or would be "consideration" for the two parties forming a composite group.

Justice Richards reserved her decision.

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