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Normally, my message for the April newsletter would provide a survey of ERRN activities for the year. I would normally in this message write of the various topics proposed to be covered by ERRN seminars: reducing informal voting; the use of technology in elections; the challenge of regulating social media during election campaigns; questions of foreign interference in Australia’s political system; enhancing participation amongst young voters; redressing the disenfranchisement of homeless voters; and the various events on the US Presidential Elections. I would have also referred to the Regulation of Elections course which was scheduled for June.

These are obviously not normal times with the COVID-19 crisis. Like others, ERRN has been affected with face-to-face seminars suspended for the course of the crisis; and the Regulation of Elections course postponed (tentatively) to December.

Much more significantly, elections and their outcomes have been profoundly affected by the crisis. Amongst others, the New South Wales local government elections which were scheduled for September this year have been postponed for 12 months and the holding of the ACT elections, scheduled for 17 October 2020, is presently under review (see table on ‘Covid-19 and the electoral calendar’ at page 7). A number of Australian Parliaments have also been adjourned (see table on ‘The Pandemic and Parliaments at page 7).

The acute difficulties involved were clearly illustrated by the Queensland local elections that proceeded on 28 March despite fears that the event would spread COVID-19. These elections highlight that the dilemmas run on two dimensions: between democracy and public health and also within democracy itself. Holding elections during the crisis maintains their functions in terms of representation and legitimacy while at the same time undermines these very same functions through the limiting impacts on voter turn-out and campaigning as well as through the narrowing of the election agenda and debate (to COVID-19).

What is necessary in this context is an understanding, firstly, of these complex dilemmas and, secondly, how they play out in specific contexts; and thirdly, careful suggestions for the way forward.

ERRN can contribute on all three counts. Whilst face-to-face seminars are no longer possible, video-recordings will be circulated. The first, which has been circulated, is by Professor Anne Twomey, University of Sydney on ‘Government Accountability and Virtual Parliament’; the second by Dr Stephen Mills, University of Sydney, will continue on the theme of accountability through Parliament. There will also be a forthcoming ERRN Working Paper on electoral management during the COVID-19 crisis as well as one on the crisis and remote voting. Also being explored is a workshop on democracy in crises (COVID-19 crisis and the climate crisis).

In these modest ways, ERRN can assist Australian electoral democracy to deftly navigate this crisis.

Professor Joo-Cheong Tham, Melbourne Law School
Electoral News

Commonwealth

Christmas came early for two MPs whose elections had been challenged after the 2019 Federal Election. On December 24th, the Court of Disputed Returns dismissed the cases against Josh Frydenberg and Gladys Liu regarding their party’s controversial use of Chinese-language signs that allegedly misled voters on how to cast their ballots. The Court found that the effect of those signs, if any, would not have been enough to alter the result. Later, the Court also found insufficient evidence for a referral for former Victorian Liberal Party director, Simon Frost, who had organised the signs. See this edition’s Case Notes. Later, in March, the Court also settled the question of Josh Frydenberg citizenship status, finding him eligible to sit in Parliament under s44 of the Constitution. The ruling found that “upon leaving Hungary in 1949 the Strausz family [Frydenberg’s maternal family] lost or renounced any citizenship of Hungary and were stateless.”

The Parliament’s Joint Standing Committee on Electoral Matters was as busy as the Court, with multiple inquiries into donation regulations — two arising from Bills put forward by the Member for Mayo, Rebekha Sharkie. Sharkie’s Bill calling for ‘real-time’ disclosures was reviewed in late 2019, with the Committee’s final advisory report opposing it on grounds that it would place an excessive burden on parties and donors, while failing to capture other important aspects of political money. Its second inquiry, this time more narrowly on reducing the donation disclosure limit to $1000, closed to submissions in March. The Committee has flagged that it plans its own wide-ranging review on donation when it examines the performance of the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018 in November this year. The Committee’s general review of the 2019 election is on-going.

Meanwhile, Australian Electoral Commission spent November running a non-binding plebiscite in the small South Australian town of Kimba on whether a nuclear waste dump might be welcome nearby. 734 votes were cast, with 61.6 percent voting ‘yes’. The vote proceeded after the Federal Court dismissed a case brought by the Barngarla people, the local native title holders, challenging the fact that they had been excluded from the ballot.

Finally, on the 23rd of May, the Federal Government suspended federal parliament for five months, through to 11 August, and delayed the Budget to 6 October. While other legislatures around the world have taken similar measures, research by the Centre for Public Integrity shows the Commonwealth to be ‘an outlier for taking the most drastic action’. MPs have, however, been recalled to pass various Government stimulus measures, and at time of writing, crossbenchers in both houses were discussing the possibility of committees still sitting throughout the pandemic crisis — as per the example set by New Zealand.

New South Wales

A ban on cash donations to political parties over $100 came into effect in New South Wales on the 1st of January — changes that were passed by the State Government late last year after an ICAC investigation revealed huge cash donations being made by developers — see our last issue on that investigation.

Earlier, in late 2019, several reports were tabled in parliament regarding the 2019 state election. The NSW Parliamentary Budget Office handed down a post-election report, finding that it costed more policies with greater accuracy than in 2015, however with slightly less confidentiality — in 2019, there were some cases of bureaucrats informing Ministers about Opposition policies. The PBO requested a number of policy changes to enhance their capacities, including a request to have a permanent staff and building — something the NSW Parliament’s Public Accounts Committee did not support in its response to the report.

The NSW Electoral Commission also tabled its report on its administration of the state election. On top of reporting on the performance of various new laws and regulations, it recommended a number of electoral reforms, including the digital scanning of upper house ballots, an option for voters to take a short-form,
The Victorian Government pressed ahead with its local government electoral reforms, passing legislation in early March mandating single-member wards for all councils — a major shift. The laws also notably change the way ward boundaries and magnitudes are determined, shifting the process into the hands of the Local Government Minister. Council elections are due in Victoria in 2020 — how many will run on new single-ward boundaries is not yet known.

Also in March, it was reported that both the Liberal and National parties would be taking the Victorian Electoral Commission to court over the application of the state’s new donations regime. The new rules have created immense complications for the coalition partners transferring resources to one another, causing the Nationals to be $800,000 out of pocket after recent campaigns. The case is in its early stages and will be followed up in our Case Notes in the next edition.

Meanwhile, the state parliament announced a motion for the Electoral Matters Committee to investigate the impact of social media on electioneering. The committee last inquired into the impact of social media on state elections in 2014, issuing a number of discussion papers but no final report. The new inquiry will presumably start up upon the completion of the committee’s review of the 2018 state election, due in June.

Finally, this March saw Victoria’s Special Minister of State (and Minister for Aboriginal Affairs), Gavin Jennings, retire.

Liberal-National MP and former Minister Jane Stuckey resigned from the Queensland parliament on the 1st of February, triggering a by-election for Currumbin on the 28th of March. On 20 February, Jo-Ann Miller of the Labor Party also resigned, her seat of Bundamba going to a by-election on the same day. At writing the ABC was projecting that Currumbin would be retained by the LNP (Laura Gerber); Labor (with its candidate Lance McCallum) held Bundamba — but final counts had not been completed.

That same weekend, Queenslanders attended the polls for local government elections too, despite COVID-19 fears. The State Government had at one stage announced that the 2020 elections would adopt compulsory preferential voting, but the government backed down on the reform in October. For the Brisbane City Council the vote produced an unchanged chamber, with all seats looking like sticking with incumbents at time of writing. This, however, did not seem to satisfy the Lord Mayor-elect, Adrian Schrinner, who joined calls for an inquiry into the conduct of the election by the ECQ over technical problems that plagued the count on election night. The next day, Premier Annastacia Palaszczuk asked Attorney General Yvette D’ath to investigate the ECQ.

The council election campaign saw the debut of the Independent Council Election Observer, established by the state’s Local Government Association to improve the truth and accuracy of campaigning. Candidates and members of the public submitted requests for the Observer to review campaign claims, with reports determining whether they are false or misleading.

Finally, the state’s Supreme Court will rule on whether non-profit organisations with involvement in electioneering are, like political parties, banned from accepting developer donations. See this edition’s Case Notes for more.

The battle over South Australia’s ‘fairness provision’ — see previous newsletters— continued, with the Marshall Government trying and failing to reinstate it via legislation in October. In December, the SA Electoral Districts Boundaries Commission heard arguments about what the 2017 removal of the fairness provision should mean for this year’s redistribution, the first draft of which is due by August. The last state redistribution, in 2016, had relied heavily on the fairness provision for a large-scale change in boundaries that shifted nearly 400,000 voters, and was subject to challenge in the state’s Supreme Court.

Also late last year, the SA division of the National Party narrowly avoided deregistration. Lacking MPs at the state or federal level since 2010, the SA Nationals needed to show evidence of 200 members to retain official party status. After two extensions, the Party finally delivered 200 names on 29 November.

As our previous edition foreshadowed, West Australians went to the polls in October 2019 to vote in local government elections. Turnout was dismal — the WA Electoral Commission reported just over 28% participation by eligible voters. This was lower than the last local government election, but unfortunately on par with the prior two. The Electoral Commission is also managing a number of Extraordinary Local Government Elections through early 2020 (none of which had been cancelled at time of writing).

Meanwhile, the Western Australian Electoral Boundaries Commission gazetted its final boundaries for the state’s Legislative Assembly electorate.
in November. In a report for the state’s parliamentary library, the ABC’s Antony Green found the redistribution to be incremental compared to the major changes adopted in the previous review: nearly all electorates retained the vast majority of their enrolments, with just eight changing more than 20%. There was also one name change: the seat of Girrawheen is now Landsdale. The boundaries will apply for the next state election, due in March, 2021.

Long-mooted reforms to Tasmania’s donations laws looked to have fallen off the Tasmanian Government’s agenda over the summer holidays, particularly after a largely unexpected change in Premier. Will Hodgman resigned on the 20th of January, his replacement in Franklin determined via countback. This saw the Liberal Party’s Nic Street returned to parliament having failed to win re-election to his Franklin seat in the 2018 general election. The Government had been considering major changes to donations, disclosures and more — and had been urged on in its efforts by a major report from the University of Tasmania in August, but all reform plans appear to stalled as of writing.

Another area of reform-mulling was the composition of the parliament. In February, a Joint Committee issued its final report on the size of the parliament, recommending a return to 35 seats for the lower house. It also proposed that a new inquiry be held to look at models for dedicated Aboriginal seats in the Tasmania parliament.

Legislative Council elections for seats of Huon in the south and Rosevears in the north were due on 2 May. That date was initially pushed back to 30 May time for the electoral commission — and indeed the electorate — to switch to a mostly postal format, in light of the COVID-19 pandemic. But that plan too was soon scrapped, with the Government announcing on 5 April that it would opt to defer the Legislative Council elections, at least until the next sitting of the chamber, presently scheduled for 25 August (see our table on changes to the 2020 electoral calendar below).

Debate around mooted electoral reforms for the ACT (see previous newsletter) continued. The Government has two reforms currently before the Assembly: the 2018 amendment bill covered in the April 2019 newsletter, changing the regulation of donations, and the Electoral Legislation Amendment Bill 2019, tabled in September 2019 and subject of a committee Scrutiny Report that October. The latter proposes several technical reforms, as well as a change allowing voters to enroll up until polling day. The Greens, meanwhile, presented plans for truth-in-political-advertising laws and a reduction in the minimum voting age. Territorians are scheduled to go to the polls for a Legislative Assembly election in October 2020.

At the end of January, the Territory MLA for Johnston, Ken Vowels, resigned. Vowels had been a minister in the Gunner Labor Government, but had been sacked and expelled from the party caucus in late 2018. His resignation triggered a by-election on the 29th of February. The election could have seen the Country Liberal Party deprived of official Opposition status, had the Territory Alliance candidate, Steven Klose, prevailed. As it turned, this did not eventuate: the seat remained in Labor hands, with former footballer Joel Bowden elected. A full election of the Legislative Assembly is due in August 2020 — however, like other elections around the country, the status of the Territory elections are in doubt in light of the COVID-19 crisis.
Covid-19 and the electoral calendar

The format and timing of many 2020 elections has been thrown into doubt by the Covid-19 pandemic. Here is where things stood at time of writing:

<table>
<thead>
<tr>
<th>Election</th>
<th>Original Date</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Currumbin (QLD)</td>
<td>28-Mar</td>
<td>Went ahead</td>
</tr>
<tr>
<td>Bundamba (QLD)</td>
<td>28-Mar</td>
<td>Went ahead</td>
</tr>
<tr>
<td>QLD Local Govt</td>
<td>28-Mar</td>
<td>Went ahead</td>
</tr>
<tr>
<td>Huon &amp; Rosevears (Tas)</td>
<td>2-May</td>
<td>Deferred until sometime before next Leg. Co sitting (currently scheduled 25 Aug)</td>
</tr>
<tr>
<td>Adelaide City council supplementary election</td>
<td>11 May</td>
<td>(postal election) going ahead</td>
</tr>
<tr>
<td>NT Election</td>
<td>22-Aug</td>
<td>Unchanged at time of writing</td>
</tr>
<tr>
<td>NSW Local Govt</td>
<td>Sep-20</td>
<td>Delayed 12 months</td>
</tr>
<tr>
<td>ACT Election</td>
<td>17-Oct</td>
<td>Under review</td>
</tr>
<tr>
<td>Vic Local Govt</td>
<td>5-23 Oct</td>
<td>Unchanged at time of writing</td>
</tr>
<tr>
<td>QLD Election</td>
<td>31-Oct</td>
<td>Full postal election under consideration</td>
</tr>
</tbody>
</table>

The Pandemic and Parliaments

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>C'th</td>
<td>House adjourned 23 March until a date set by the Speaker; Senate adjourned 23 March until at least August 11 — however both recalled for a one-day sitting on 8 April to pass special COVID-19 legislation. Budget sittings delayed until August.</td>
</tr>
<tr>
<td>NSW</td>
<td>Adjourned 24 March until 15 September. Set to be recalled to pass COVID-19 legislation.</td>
</tr>
<tr>
<td>QLD</td>
<td>Adjourned 18 March; due back 22 April — however discretion given to Speaker to set a different date up until 17 September</td>
</tr>
<tr>
<td>SA</td>
<td>Adjourned 8 April. Council due to sit 28 April; Assembly due back 12 May</td>
</tr>
<tr>
<td>TAS</td>
<td>Adjourned 26 March until 18 August (Assembly) and 25 August (Council)</td>
</tr>
<tr>
<td>VIC</td>
<td>Adjourned 19 March, initially until May, but recalled early for one day ‘emergency’ sitting on 23 April</td>
</tr>
<tr>
<td>WA</td>
<td>Adjourned 2nd April for five weeks, but recalled on 15 and 16 April to pass special legislation</td>
</tr>
<tr>
<td>ACT</td>
<td>Adjourned 2 April after having skipped two days it was scheduled to sit. Due back 7 May, but discretion rests with Speaker</td>
</tr>
<tr>
<td>NT</td>
<td>Adjourned 24 March; scheduled to sit on 24 April to consider COVID-19 laws</td>
</tr>
</tbody>
</table>
Launch of Australian Electoral Law Library
14 November 2019
The Australian Electoral Law Library was launched at the biennial Electoral Regulation Research Network (ERRN) workshop in Adelaide. The Library is a free online database of primary and secondary materials on election law.

The Library includes digital copies of hundreds of court and tribunal decisions on electoral matters across Commonwealth, State and Territory jurisdictions. It also covers legislation and academic scholarship. The Library’s coverage extends from the mid-19th century to the present day.

The Australian Electoral Law Library is hosted by AustLII, Australia’s most popular free access legal resource. It is the result of collaboration between AustLII, the ERRN and the Gilbert + Tobin Centre of Public Law. The design and contents of the Library were overseen by project manager and ERRN (NSW) Co-Convenor, Dr Paul Kildea. The Library’s development and ongoing maintenance is funded by the New South Wales Electoral Commission and the Victorian Electoral Commission.

As electoral regulation gains in profile, the launch of the Library is an exciting development that will assist the work of electoral commissions, support academic research and make electoral law more accessible to the general public.


The 6th Biennial Electoral Regulation Research Network Workshop: Voting Inclusion, Electoral Integrity and the Challenges of the Twenty First Century:
14-15 November 2019
The Electoral Regulation Research Network Biennial was this year hosted by the Adelaide node of the Network, at the University of Adelaide, by Professor Lisa Hill, and Dr Jonathon Louth (Uni SA).

The biennial brought together over 75 leading academics and practitioners in electoral law and politics. Participants included Federal and State Electoral Commissioners from every Australian state and territory; the Electoral Commissioner of New Zealand; and Chief Electoral Officers from the states of Maharashtra and Rajasthan, India, many of whom took part in a Roundtable Sharing Session. Papers were also given by Anthony Green (ABC) and key academics in the field of Electoral Studies such as Scientia Professor George Williams AO FASSA (UNSW), Professor Lisa Hill and Professor Marian Sawer AO FASSA (ANU). The conference reported on electoral research being conducted here at the University of Adelaide, Uni SA and Flinders University as well as University of Queensland, University of Western Australia, University of New South Wales, Australian National University, Monash University, and the University of Toronto.

The theme of this year’s Biennial was Voting Inclusion, Electoral Integrity and the Challenges of the Twenty First Century. The opening session focused on the issues of Trust in Australian Democracy, with Federal Electoral Commissioner Tom Rogers reporting on the 2019 Federal Election. Over the two days, the workshop heard papers on issues of inclusion for indigenous populations, people with disabilities, people experiencing homelessness and other minority groups. The unique challenges of the digitally and economically complex twenty-first century were at the heart of the questions and discussions throughout the two days.

A particular highlight of the was the launch of the Australian Electoral Law Library with special thanks due to Paul Kildea and Philip Chung (University of NSW) for the launching of a virtual tour of the online interface (https://www.austlii.edu.au/). The notes from the presentation by Professor Graeme Orr are available here.

An informal reception to welcome all participants was attended by the Vice Chancellor of the University of Adelaide, Professor Peter Rathjen. The concluding session included a report of the pilot study “Voting and Homelessness in South Australia” which is being conducted at the University of Adelaide by Professor Lisa Hill, Veronica Coram and Jonathan Louth (at Uni SA) in partnership with the South Australian Office of the Australian Electoral Commission.
Thank you to all presenters at the 2019 ERRN Biennial. Some of the presentation slides are available here (in order of the program):

- Trust and Attitude to Australian Democracy by Jill Shepherd
- The 2019 Federal Election by Tom Rogers
- South Australian Experiments by Mick Sherry
- The Challenges of Remoteness by Iain Loganathan
- Exploring Perspectives About Voting and People With Intellectual Disabilities by Christine Bigby
- Electoral Interference and Disinformation by Jeff Pope
- The Level Playing Field and The Challenges of The 21st Century by Marian Sawer
- Voting and Homelessness in South Australia by Veronica Coram, Jonathon Louth, Lisa Hill, Susan Geraghty and Martyn Hagan
- Homelessness and Citizenship: Political Consequences of Public Policies by Anna Kopec

ERRN (Vic) Seminar: Beyond the Right to Vote: Homelessness and Voting
2 December 2019

Individuals experiencing homelessness have the same rights to political participation that are protected and constitutionally enshrined to all. Anna Kopec’s previous research however, found that the policies and services individuals experiencing homelessness access dictate not only whether or not they vote, but also how they participate beyond voting and the nature of their relationship with the state. This seminar introduced her preliminary results from fieldwork in Melbourne, which show a disconnect between social policy approaches to homelessness and attempts to include the population into the electoral process. She has also found that other forms of political participation have positive effects on inclusion of the vulnerable population into the political system.

She was joined by Nigel who has experience of homelessness who acted as a discussant and spoke to the ways in which policies shape the lives and participation of those experiencing homelessness.

Watch a recording of the seminar here.

Government Accountability and Virtual Parliament
Friday 3 April 2020

In this talk, Professor Twomey addresses how parliamentary committees can keep the Government accountable during this pandemic period, their ability to sit remotely and what is happening to review government action, especially in relation to delegated legislation. See the video here.

Parliament in a Time of Virus
9 April 2020

The emergency response to the COVID-19 pandemic in Australia in March and April 2020 saw an unprecedented expansion of the authority of executive government at the expense of parliament. In this talk, Dr Stephen Mills argues each of the parliament’s five principal functions (representation, executive legitimisation, authorisation, deliberation and accountability) have been substantially curtailed by the elongated adjournment, and looks at proposals to give it a role during the shutdown. See the video here.

Elections in a Time of Contagion
21 April 2020

Like all else, politics is upturned by the current pandemic. How will electoral politics and particularly the conduct of elections be affected? This talk canvasses what flexibility there is to delay elections and options to adapt their conduct. And how will such options affect ‘free and fair elections’ – their integrity, democratic value and ritual experience? In this talk by Prof Graeme Orr, the focus is on Australia, but emerging international experience is also considered. See the video here.

Forthcoming events:

Many up-coming Network events have been postponed, cancelled, or shifted online due to the COVID-19 pandemic. See the ERRN events page to keep up to date.
Publications


Stephen Mills, ”Where no counsel is, the people fall”: why parliaments should keep functioning during the coronavirus crisis’, The Conversation, 27 March 2020.


Alan Page and Yee-Fui Ng, ‘Subnational Constitutionalism in Comparative Perspective: The Case of Scotland’ Public Law (2020) 98-115.


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

For inclusion in next October’s newsletter, send your publications through to our newsletter editor, James Murphy: 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 64

Developing A Legislative Framework For A Complex And Dynamic Electoral Environment - Discussion Paper

Mr Michael Maley (formerly Australian Electoral Commission)
Professor Graeme Orr (University of Queensland)
Working Paper 65
Observations From A Comparative Perspective
Leena Rikkila Tamang (International IDEA)

Working Paper 66
The Right Answer Depends On Asking The Right Question
Mr Andrew Giles MP

Working Paper 67
Report On Proceedings From The Workshop On The Informed Voter: Improving The Political Literacy of Young Australians
Dr Tracey Arklay (Griffith University)

Working Paper 68
Engaging Youth - Strategies For Creating Interested And Informed Voters
Dr Tracey Arklay and Dr Caitlin Mollica (Griffith University)

Working Paper 69
The Role Of New Media In Increasing Youth Political Engagement
Dr Peter Chen (University of Sydney)

Working Paper 70
A Victorian’s Response To The Discussion Paper: “Developing A Legislative Framework For A Complex And Dynamic Electoral Environment” By Maley and Orr
Liz Williams (Victorian Electoral Commission)
Case Notes

**Garbett v Liu [2019] FCAFC 241**

A High Court challenge was 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, Ms Naomi Leslie Hall, to launch a legal bid to have the results in both electorates ruled invalid. Ms Hall was replaced as petitioner by Ms Vanessa Claire Garbett, a voter in Chisholm and the two petitions were transferred to the Federal Court, sitting as the Court of Disputed Returns under s 354(1) of the Commonwealth Electoral Act 1918 (Cth) (‘the Act’).

The challenges relate to Chinese-language Liberal Party posters or ‘corflutes’ that appeared at voting booths on election day, which the applicant claimed were designed to deceive voters in the casting of their vote. The corflutes, 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. Chisholm and Kooyong have a substantial Chinese speaking community, both Mandarin and Cantonese. Some of the corflutes were placed next to AEC banners.

The claim was that the corflutes imitated official Australian Electoral Commission material and were likely to mislead or deceive an elector in relation to the casting of a vote under section 329(1) of the Act, such that the result of the election was likely to be affected, and that this was therefore an illegal practice in breach of section 352 of the Act. The posters were officially authorised by the Liberal Party’s acting Victorian state director, Mr Simon Frost, in small text at the bottom of the corflute. In the course of the proceedings, Mr Frost accepted unequivocally that he “intended to convey the impression that this was an AEC corflute.”

The broad issues for the Court were:
- Were the corflutes likely to mislead or deceive an elector in relation to the casting of a vote?
- Was anyone, and if so whom, responsible for the printing, publishing or distribution of the corflute?
- Was the result of the election likely to be affected?
- Was it just to order the relief sought, if otherwise available?

The Court held that at least 16 polling places in Chisholm and at least 12 polling places in Kooyong the corflutes, either in simplified or traditional Chinese script, were displayed immediately adjacent or proximate to AEC signage. In this context, the Court found that the corflutes are plainly misleading or deceptive in two respects. First, as was the intention of Mr Frost, at least when placed adjacent to AEC signage, it purported to be a sign of the AEC. Mr Frost accepted unequivocally that he intended to convey the impression that this was an AEC corflute.

The Court absolved Ms Liu of the offence otherwise available?

The Court further held that there may be a small group of electors who had a lack of interest or naivety, or lack of intelligence, or who had some other characteristic and whose choice of party was, by reason of such, either influenced or changed by reading the corflutes. In that sense, the corflutes were likely to mislead or deceive an elector.

The Court found that Mr Frost breached s 329(1) of the Act, as he caused or authorised the printing, publishing and distribution of the corflutes, which were likely to mislead or deceive an elector in relation to the casting of a vote. He had full knowledge of the essence of the misrepresentation that the corflute appeared to be a sign of the AEC. Mr Frost was to make submissions as to why the Court should not direct the Chief Executive and Principal Registrar of the Federal Court of Australia to inform the Chief Executive and Principal Registrar of the High Court of the finding of the committal of an illegal practice under s 329(1) of the Commonwealth Electoral Act 1918 (Cth) by Mr Frost in respect of the characterisation of the corflutes.

The Court absolved Ms Liu of the offence despite her knowledge about the corflutes, as Mr Frost and his office were responsible for the signage, while it was unclear if Mr Frydenberg knew of the English translation of the Chinese corflute.

At any rate, the Court held that there was no real chance that the result of either of the two elections was affected. The Court was of the opinion that only a very small group of people would have felt that they should follow the direction on the corflutes,
that is, those who were gullible or naive or unintelligent, and this would not amount to the 500 or 5000 votes likely to change the election results for the respective electorates.

**Barnsgerla Determination Aboriginal Corporation v District Council of Kimba**

The District Council of Kimba resolved to conduct a non-binding ballot in order to ascertain the support within its community for the construction and maintenance of a radioactive waste management facility within its local government area.

**Barnsgerla Determination Aboriginal Corporation RNTBC (BDAC)**

BDAC is a corporation entrusted with the responsibility for administering the declared native title rights and interests of its members. The declared native title rights and interests of the members of BDAC apply to about 10% of that area. BDAC claimed that the passage of the resolutions and the facilitation of the ballot infringed s 9(1) and (1A) of the *Racial Discrimination Act 1975* (Cth). The ballot was conducted on the basis of the franchise in the *Local Government (Elections) Act*, which none of the members of BDAC qualified for.

The issue was whether the passing of resolutions for, and the facilitation of the conduct of, a non-binding ballot by a local government authority on a franchise constituted by the persons entitled to vote in elections for the authority, and which excludes native title holders, is unlawful by reason of s 9(1) and (1A) of the *Racial Discrimination Act 1975* (Cth).

The Federal Court dismissed the application. White J held that the Council’s adoption of the franchise for the ballot based on the *Local Government (Elections) Act* meant that the exclusion arose not by reason of the Aboriginality of BDAC’s members, but by reason of their place of residence and the fact that they were not ratepayers. White J held that it was reasonable for the Council to decide that the ballot should be conducted on the local government franchise. It was the franchise which the Parliament of South Australia had determined was appropriate for the participation of members of the Kimba community in the democratic election of councillors and for the conduct of polls. It was a franchise with which the members of the community are familiar, and had the advantages of being objectively determined and transparent. An enlargement of the franchise for the purpose of the ballot would have required a number of subjective judgments about the extent of the enlargement and raised issues concerning the proper identification of those within the expanded franchise. Further, the grant of individual votes to each of BDAC’s members would have involved a distortion of the franchise because each native title holder would have an individual vote whereas it was only the designated members of other groups who may vote.

**Fidge v Municipal Electoral Tribunal**

This case concerned the constitutionality of the countback provisions of *Victoria’s Local Government Act 1989* (the Act).

The Act provides that if there is a vacancy in an unsubdivided council or a multi-councillor ward of a council, that vacancy is to be filled not though a by-election, but through a countback of votes cast at the previous general election for the council. The votes cast for the vacating councillor (both the first-preference votes for the councillor and any preference votes that flowed to the councillor during the count) are distributed to the remaining eligible candidates in the general election according to the preferences on the ballot papers.

In the October 2016 Wangaratta Rural City Council election, four councillors were elected for the City Ward. Dr Julian Fidge received the third highest number of first-preference votes, but after preferences were distributed, he came fifth, and so was not elected. Dr Ruth Amery (City Ward) died a year after the election. The vacancy was filled through a countback of Cr Amery’s votes, and Ms Ashlee Fitzpatrick was elected.

Dr Fidge challenged the countback procedure first in the Municipal Electoral Tribunal (MET) and then in the Victorian Civil and Administrative Tribunal (VCAT). He was aggrieved that not all the votes cast in the election were counted in the countback, and believed that he should have been elected because he obtained more first-preference votes and more votes after preferences than Ms Fitzpatrick. He accepted that the countback was conducted in accordance with the provisions of the Act, but argued that those provisions were contrary to the *Charter of Human Rights and Responsibilities Act 2006* (the Charter) and were unconstitutional. Section 18 of the Charter provides that “Every eligible person has the right, and is to have the opportunity, without discrimination – to vote and be elected at periodic State and municipal elections that guarantee the free expression of the will of the electors”.

**Schonfelder v McIntyre and others**

This case was very similar to the Fidge case. In a July 2019 countback for the Winchelsea Ward of Surf Coast Shire, Mr James McIntyre was elected to replace Cr Carol McGregor, who had retired. Mr Adrian Schonfelder, who had come third in first-preference votes and after preferences in the 2016 general election, applied to the MET to overturn the result of the countback and order a new countback on a different basis. Mr Schonfelder argued that the existing countback provisions were unjust and undemocratic, because they arbitrarily did not count the votes for candidates who had not been elected or excluded in the election count, and thereby discriminated against Mr Schonfelder and disenfranchised those who had voted for him.

At the first directions hearing on 1 August 2019, Mr Schonfelder indicated he would withdraw his application for an inquiry if Dr Fidge were to be unsuccessful in the Supreme Court. Following the outcome of the Fidge case, Mr Schonfelder withdrew his application.
Fry v Municipal Electoral Tribunal

This case concerns the issues of what constitutes misleading electoral material within the meaning of the Act, and whether, if there was a breach of the Act, it would render an election invalid.

Shortly after the October 2016 Whittlesea City Council election, Mr John Fry, a candidate for the South East Ward, applied to the MET for an inquiry into the election, disputing the election of Mr Norman Kelly. 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.

Mr Fry contended that Mr Kelly was elected because he had misled and deceived the voters through advertising that falsely claimed that he was endorsed by Bill Shorten, the then Federal leader of the Australian Labor Party. This, Mr Fry argued, was a breach of section 55A of the Act, under which a person must not print, publish or distribute any matter or thing that is likely to mislead or deceive an elector in relation to the casting of the vote of the elector. Mr Fry sought that Mr Kelly be deemed “not duly elected” and that Mr Fry be declared “duly elected” instead.

Mr Kelly argued that this case was analogous to the 1981 Evans v Crichton-Browne case, in which the High Court ruled that the “misleading” provision applied to “misleading or incorrect statements which are intended or likely to affect an elector when he seeks to record or give effect to the judgement which he has formed as to the candidate for whom he intends to vote, rather than with statements which might affect the formation of that judgement”. Mr Kelly contended that the pamphlet in question sought to persuade voters to vote for him, and so did not fall within the scope of section 55A of the Act. Mr Kelly further argued that even if VCAT found that section 55A had been breached, this did not mean that the election was invalid according to the common law of elections, and there was no basis on which VCAT could conclude that the election was void.

The Victorian Electoral Commission’s (VEC’s) role in the case is limited. The VEC does not authorise election material in postal elections such as that for the Whittlesea City Council. “The VEC intends to assist the Tribunal in a manner that is as neutral as possible while ensuring that all relevant facts (insofar as they are known to the VEC), legal principles and issues are before the Tribunal”.

The case is ongoing.

Awadby v Electoral Commission of Queensland

The issue in this case is whether a law of the State of Queensland that requires the agent of a registered political party under the Electoral Act 1992 (Qld) (“Queensland Act”) to give a return to a State agency that must include particulars of gifts from any person or organisation that exceed $1,000 is inconsistent with a law of the Commonwealth that requires the agent of a registered political party under the Commonwealth Electoral Act 1918 (Cth) (“Commonwealth Act”) to furnish a return to a Commonwealth agency that must include particulars of sums received from any person or organisation that exceed $13,500.

This case involved an appeal from the decision of a trial judge, Jackson J, who held that sections 290 and 291 of the Electoral Act 1992 (Qld) are not inconsistent with sections 314AB and 314AC of the Electoral Act 1918 (Cth) within the meaning of section 109 of the Constitution, which provides that in the case of an inconsistency between a Commonwealth and State law, the Commonwealth law will prevail.

The Court of Appeal dismissed the appeal, holding that the Commonwealth and State laws were not directly or indirectly inconsistent. The Commonwealth and the State laws did not regulate the same conduct. The subject matter of Pt XX of the Commonwealth Act was the prevention or reduction of corruption in federal elections by imposing obligations upon political parties to disclose financial transactions to a Commonwealth officer. The subject matter of Pt 11 of the Queensland Act was the prevention or reduction of corruption in State elections by imposing obligations to disclose financial transactions. The state law was not concerned with federal elections and did not trespass upon the obligations under the Commonwealth law.

Australian Institute for Progress Ltd v The Electoral Commission of Queensland

Changes to the Electoral Act 1992 (Qld) (“the Act”) in 2018 made it illegal for property developers to donate to political parties or candidates.

As a result, the Electoral Commission of Queensland (ECQ) recently advised that any organisation involved in political advocacy in Queensland would be unable to have property developers pay to go to their functions, or donate money.

A Brisbane think tank, the Australian Institute for Progress (AIP), is challenging 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.

AIP is seeking declarations from the court that:

- the definition of ‘electoral expenditure’ under the Act does not include expenditure by third parties in relation to political communications;
- A gift to a third party including in relation to political communications does not constitute a ‘political donation’ under the Act; and
- A gift made to or for the benefit of a third party by a prohibited donor under s 273 of the Act for that third party to carry out its activities, including political communication, does not engage the operation of section 275 and 276 of the Act, banning donations from property developers.

The case is ongoing.

Kwok v Maresch

The plaintiff, an official of the New South Wales Electoral Commission (“the Commission”), and on its behalf, appealed from the dismissal of a summary prosecution brought against the defendant, Mr Peter Maresch, by the Local Court at Parramatta. The Commission prosecuted the defendant for failing to vote in a contested election in the West Ward of the Council of the City of Ryde held on 9 September 2017, contrary to the provisions of s 312 Local Government Act 1993 (NSW).

The matter was heard by Magistrate Shields on 26 November 2018, who held that the defendant had a sufficient reason for having failed to vote and dismissed the matter.

On appeal, the Commission contended that the magistrate erred in law by finding that the defendant’s lack of knowledge of the election could constitute a sufficient reason for failing to vote.

Campbell J dismissed the appeal. His Honour was not of the view that ignorance that the occasion has arisen to discharge the obligation to vote is necessarily outside the statutory description of “sufficient reasons”. His Honour was also not persuaded that the Commission demonstrated that its sole ground of appeal involved a question of law alone (as required for the appeal), as the decision appealed from was quintessentially one of fact.
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