

Electoral Regulation Research Network Newsletter

April 2016

ERRN
Electoral Regulation
Research Network



MELBOURNE LAW SCHOOL



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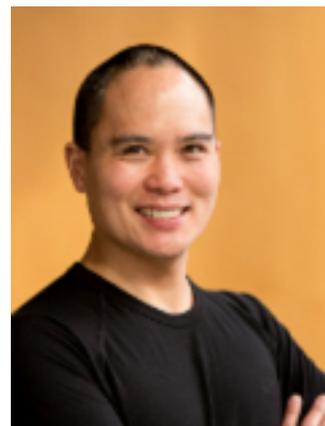
Director's Message

As Director of the Electoral Regulation Research Network, I submit a Performance Plan at the start of each year to the Network's Governance Board. Looking at the 2016 Performance Plan, I am struck by how it highlights ERRN as a truly national network.

This is evident in different ways. Issues of national significance are being tackled by the 2016 activities with seminars planned in most jurisdictions on the federal election. In Victoria, there is a forthcoming seminar on the changes to the Senate voting system and in the ACT, there will be a seminar on plebiscites, a highly topical issue given the proposed plebiscite on same-sex marriage. Published earlier this year is a working paper by the Australian Electoral Commissioner, Tom Rogers, on 'Electoral Integrity and the AEC'.

ERRN is also a national network in the sustained way it deals with state-based issues. In March this year, the South Australian chapter organized a seminar entitled 'Fresh ideas on electoral matters' which presented papers by parliamentary interns proposing ways to reform South Australian electoral laws. Two working papers have resulted from this seminar: one by Sasha Lynch on '[Electoral Fairness in South Australia](#)' and the other by Daniel Messemaker entitled '[Alternative Voting Plus: A Proposal for the South Australian House of Assembly](#)'. These papers were published at the same time as another by Mel Keenan, Principal Legal Officer at the New South Wales Electoral Commission on '[The Regulation of Lobbying in New South Wales](#)'. Two other working papers have also been published dealing with state-based electoral issues: '[Campaigning and Regulation: Time for Change?](#)' by Warwick Gately AM, the Victorian Electoral Commissioner and

['Implications of Change in Electoral Campaign Finance Laws in NSW'](#) by Felicity Wright, Senior Advisor, Regulatory Advice and Analysis of the New South Wales Electoral Commission.



Being a national network, ERRN also deals with federal issues. For instance, expressions of interest are currently being sought for funding under ERRN's Research Collaboration Initiative for research projects in relation to two sets of long-term challenges to Australian electoral regulation: 1) Enhancing electoral participation of groups under-represented in the electoral process; and 2) The implications of changes in the forms of voting on the electoral system (including pre-poll voting, electronic voting and postal voting) (see more detail on page 22). Two other examples of ERRN activities dealing with federal issues warrant mention: the launch of Jenni Newton-Farrelly's book, Fairness and Equality: Drawing Election Districts in Australia, and the forthcoming launch of Yee-Fui Ng's book Ministerial Advisers in Australia: The Modern Legal Context.

As Director, I am often a conduit for communicating the success and efforts of others – especially the efforts of the ERRN Administrator, its state and territory convenors and editors (listed below). The annual Performance Plans which testify to the vibrancy of the Network is a clear example.

Convenors

Australian Capital Territory

- Mr Michael Maley
- Emeritus Professor John Warhurst
- Dr Dominique Dalla-Pozza

New South Wales

- Dr Anika Gauja
- Dr Paul Kildea

Queensland

- Dr Tracey Arklay

South Australia

- Dr Jenni Newton-Farrelly
- Associate Professor Haydon Manning

Tasmania

- Dr Glenn Kefford

Victoria

- Dr Yee-Fui Ng
- Professor Brian Costar
- Dr Paul Thornton-Smith

Western Australia

- Associate Professor Sarah Murray
- Professor Alan Fenna
- Mr Justin Harbord

Editors

- Dr Aaron Martin (Working Paper Series)
- Mr Nathaniel Reader (Newsletter)
- Dr Yee-Fui Ng (Legal Editor)

Administrator:

- Ms Cathryn Lee



Senate voting reform

With a federal election likely in either July or September 2016, there has been considerable discussion about electoral regulation and electoral reform this year.

For the first time since the introduction of proportional representation for the Senate in 1984, changes were made to the Senate's voting system. The [Commonwealth Electoral Amendment Bill \(Cwth\)](#) was passed on 16 March 2016 following a [marathon 28-hour session in the Senate](#). The Bill provides for:

- Changes to the above-the-line voting system for the Senate, introducing a [system of partial optional preferential voting above-the-line](#). The Senate ballot paper now contains advice that electors may now mark between 1 and 6 boxes (or political parties) above-the-line. Voters may still mark a single "1" above-the-line - [leaving this mechanism in tact has been marketed as a "savings provision" by the Coalition and other advocates of Senate voting reform](#).
- Changes to the below-the-line voting system. [The Bill provides for optional preferential voting below-the-line – while voters will be asked to number 12 preferences the vote will remain formal if six preferences are marked, an intended "savings provision" for those voters that misinterpret the instructions to for above-the-line voting](#). This was not originally the case. On the 22 February 2016 the House referred the provisions

of the Commonwealth Electoral Amendment Bill 2016 to the Joint Standing Committee on Electoral Matters for inquiry. JSCEM tabled its [Advisory report](#) on 2 March 2016. During the very short inquiry – report was written in less than 24 hours after the completion of the short public hearing – electoral commentators, notably Antony Green and Professor George Williams, warned the committee that the Bill could trigger a potential High Court change ["due to the anomaly in the government's...Bill that would deem six preferences cast above the line as a valid vote but the same preferences cast below the line as an invalid"](#). The Bill as passed thus provides ["appropriate vote savings provisions to capture voter intent and reduce the risk of increased vote informality, including by improving vote savings provisions for below the line voting"](#).

- The Bill abolishes group and individual voting tickets for the Senate. These changes, according to the Bill's explanatory memorandum, [are designed to increase the transparency around the allocation of preferences in a Senate election](#). This provision does not change other provisions relating to candidates nominating to be grouped on the Senate ballot paper.
- Tightening the rules around party registration, [by requiring that federal registered political parties have a unique registered officer and unique deputy registered officer – i.e., that they cannot be the same person](#).
- Providing for the inclusion of political party logos on both House of Representatives and Senate ballot papers. Evidence from the 2013 federal election (where the Liberal Democrats received nine percent of first preference votes in NSW) [and the 2014 Victorian state election shows that the Liberal Democrats have benefited from being positioned "left" of the Liberal Party on Upper House ballot papers above-the-line, with many voters marking the Liberal Democrats under the impression it was a vote for the Liberals](#).

- Other administrative and technical amendments.

There has been widespread commentary – to say the least – about the Senate’s new voting laws. Amongst the micro-parties, there is a view that their chances of being elected to the Senate have been drastically reduced by the passage of the Bill. Senator David Leyonhjelm has said that [the Bill will make it almost impossible for a smaller political party to win a seat in the Senate, based on similar reforms to the NSW Legislative Council in the 1990s](#). Either way, at the time of writing, Senator Leyonhjelm’s claims seem exaggerated. It is unlikely that the micro-parties will be wiped out: [as noted by Tim Colebatch and the Parliamentary Library, had these new rules applied at the 2013 federal election the cross-benchers would have won between three and six seats](#). A double dissolution election also halves the quota for the Senate election to 7.7, further advantaging smaller parties.

Senator Nick Xenophon – who attempted to enter the chamber during the 28-hour Senate sitting whilst wearing pyjamas – ultimately sided with the Greens and the Coalition to support the Bill. As reported in the October 2015 newsletter, [in 2013 Xenophon introduced a Bill to Parliament amending the Senate’s voting system](#).

Greens Senators were mostly unanimous in their support for Senate voting reforms – readers will remember that former Greens leader Bob Brown advocated for similar Senate reforms during his time in Parliament. However, some Senators have expressed concern that a double dissolution election could result in fewer Greens elected to the Senate. As reported by Fairfax Media, “the proposed changes would likely benefit the Greens in normal half-Senate elections but in [a double dissolution there is only a slim chance the party](#) would return two senators in all the states they currently have two”. In South Australia and Western Australia in particular, the Greens would likely lose two senators from its current representation of Sarah Hanson-Young, Robert Simms, Scott Ludlam and Rachel Siewert.

Reports also suggest a split within the Labor Party

about the Senate voting reform debate. Gary Gray MP, a former national secretary of the ALP and the former shadow minister of state (with oversight for electoral reform), announced his resignation from Parliament in February 2016. [He called the ALP’s position on Senate voting reform “nonsense” and “dumb”](#).

Further, in March 2016 Family First Senator Bob Day [launched a High Court challenge to the new Senate voting laws. He is arguing that the law contravenes the principles of representative government](#). Chief Justice French has ordered the parties to return to court on 15 April 2016 from for a further preliminary hearing in Canberra, and to file submissions including worked examples of how the voting systems worked. The court will determine “if the matter is fit for referral to the full court” for hearing on either 2 or 3 May. Speaking to The Guardian, Professor George Williams said the challenge had low prospects of success because [“the High Court has indicated that parliament has significant leeway to design the electoral system”](#).

Further coverage of this case is included in the Case Notes section.

Commonwealth JSCEM

As reported, in March 2016 the Commonwealth JSCEM tabled its [Advisory report on the Commonwealth Electoral Amendment Bill 2016](#).

The JSCEM is also conducting three other inquiries:

- [Inquiry into campaigning at polling places](#). The inquiry was referred to the JSCEM on 21 May 2015 and is currently accepting submissions. The inquiry’s terms of reference focus on the distribution of how-to-vote cards, campaigning by organisations other than political parties at polling places and allegations in relation to the conduct of, and material disseminated by, campaigners at state and federal elections in the vicinity of polling places intended or likely to mislead or intimidate electors.
- [Inquiry into electoral education](#). The inquiry was referred to the JSCEM on 17 June 2015 and is

currently accepting submissions.

- [Inquiry into political donations](#). The inquiry was referred to the JSCEM on 15 October 2015.

Alleged voter fraud in Indi

Readers will recall coverage in the October 2015 newsletter regarding allegations about electoral fraud in the federal Division of Indi in the lead up to the 2013 federal election. Maggie McGowan, the Member for Indi Cathy McGowan's niece, and Sophie Petrea Fuchsen, [had each been charged with providing false or misleading information to the AEC as a result of an Australian Federal Police investigation begun after The Australian reported allegations of vote fraud involving a number of McGowan's supporters](#).

In March, [the fraud charges were dropped by the AFP, which accepted that McGowan and Fuchsen's change of address from Melbourne to the regional seat of Indi was not aimed at misleading electors](#).

December 2015 North Sydney by-election

A by-election was held in December 2015 for the Division of North Sydney, following the resignation of Joe Hockey from Parliament. Hockey was appointed as Australia's ambassador to the United States of America in December. [The seat was retained by the Liberals Trent Zimmerman, who won the seat despite the Liberal Party not obtaining a majority of the primary vote for only the second time in North Sydney since Federation](#).

Electoral redistributions

[The Australian Electoral Commission is currently conducting electoral redistributions from New South Wales \(NSW\), Western Australia, the Australian Capital Territory and the Northern Territory](#). New divisions have been formalised for NSW, Western Australia and the Australian Capital Territory and will take effect once the writs are issued for the next federal election.



NSW Electoral Commission denying public funding to NSW Division of Liberal Party

In March 2016 the NSW Electoral Commission decided that the Liberal Party of Australia, NSW Division, [is not eligible for payment of its current claims for approximately \\$4.4 million in public funding because it failed to disclose the identity](#)

[of all major political donors in its 2011 declaration, corresponding to the 2011 NSW state election](#).

On 23 March the NSW Electoral Commission released a statement, advising that:

[“...the Liberal Party will not receive further funding from the Election Campaigns Fund or the Administration Fund, administered by the Commission. The Party will remain ineligible until it discloses all reportable political donations in relation to its 2011 declaration. These donations include some made by donors identified during the Independent Commission Against Corruption \(ICAC\)'s public hearings relating to Operation Spicer”](#).

The Commission's findings relate to allegations that senior figures in the Liberal Party used the Free Enterprise Foundation to channel or “wash” donations from anonymous donors to the NSW Division of the Liberal Party – some of these donors

may have been banned from donating, given the restriction in NSW on political donations from several sources, including property developers. The commissions, led by Justice Keith Mason, a former president of the NSW Court of Appeal, [used its “investigative powers supplemented by evidence gathered at ICAC in 2014”](#). As previously reported in ERRN newsletters, ICAC has been prevented from releasing its own reports by a series of High Court challenges.

Following the publication of the report, lawyers representing Cabinet Secretary Senator Arthur Sinodinos, who is referred to in the report due to his role at the time as the as Honorary Treasurer of the NSW Division of the Liberal Party, [wrote to the Commission requesting that his name be retracted from the published report. The Commission refused, advising Sinodinos that it stood by the statement of facts in its original report.](#)

As noted by Professor Graeme Orr, the Commission’s stance is aggressive but indicates that NSW law is working to prevent illegal donations: [“The law – to its credit – now requires a significant level of disclosure and even probity in the financial affairs of parties”](#). Kerry Schott, who headed the panel of experts tasked with investigating reform of NSW’s political finance system, also said the [“system is working pretty much as expected”](#).

ICAC is likely to release its findings on the Free Enterprise Foundation in the next two months, which will likely draw further attention to the NSW’s political finance system.

NSW council amalgamations

In December 2015, following a near three-year review process, [the NSW government announced its council amalgamation plan, which involves reducing NSW’s 154 councils by more than a quarter and cutting metropolitan Sydney’s 43 councils to just 25, lifting the minimum population base in some areas from just 14,000 people to comprise about 150,000 people in each new local government area.](#) Premier Mike Baird has [claimed that the mergers will deliver economies of sale and create](#)

[greater administrative and bureaucratic efficiencies.](#) On 6 January 2016 the Minister for Local Government referred 35 merger proposals to the Chief Executive of the Office of Local Government for examination and report under the *Local Government Act 1993*. In addition to the Minister’s 35 original council merger proposals, a number of councils have submitted their own proposals. As a consequence, the [“Minister has put forward a number of additional proposals for adjacent areas for examination and reporting, in the event that the council-initiated proposals proceed. The additional proposals will undergo the same process of examination and reporting, which includes Delegates conducting public inquiries, calling for written submissions, and preparing reports with due regard to the factors in section 263\(3\) of the Act”](#).

The proposed council amalgamations have been met with strong criticism, with several councils, especially those which were divided up under the first merger proposals published in late 2015, submitting new plans. This follows the decision by Warringah Council to launch legal action against the forced merger – the council found a loophole in the *Local Government Act 1993* (NSW) allowing them to submit a rival plan for a Northern Beaches Council. As noted in Government News, Warringah’s [“new proposal would mean it was no longer be split between a part merger with Pittwater and another with Mosman and Manly Councils as it is under an alternative merger plan”](#). Several regional councils have also taken a similar course of action.

Further afield, two former Queensland state ministers – who both presided over, and one who reversed, Queensland’s 2008 local government amalgamation process – have prepared a [report for the NSW government, which highlights the risks of merging councils without taking proper account of residents’ views.](#) In contrast, in Victoria, Stephen Mayne, and Jeff Kennett, who while Premier of Victoria dissolved 210 Victorian councils and created 78 new councils, [have said that the NSW amalgamations are long overdue.](#)

As noted by several commentators, evidence is

weak that local government mergers tend to result in cost savings. Writing for The Conversation, Professor Brian Dollery examines the logic of the “bigger is better” doctrine underpinning the NSW government’s mergers. Using empirical data from the 2004 round of NSW council mergers under the then Carr government, Dollery and his colleagues found no [“statistically significant differences in the performance of the two groups of councils against these criteria”](#). According to Dollery, [“this falsifies past claims by the Carr Labor government that its forced amalgamations would substantially improve NSW local government financial performance. It also undermines the Baird Coalition government’s claims for its proposed mergers”](#).

2016 NSW local government elections

The next round of NSW local government elections are currently scheduled for September 2016.



Parliament of Victoria’s Electoral Matters Committee

[The Parliament of Victoria’s Electoral Matters Committee is finalising its inquiry into the conduct of the 2014 Victorian state election.](#) The inquiry, which received 57 written submissions and held three separate days of public hearings, has addressed several key issues in Victorian electoral administration, including potential reforms to the Legislative Council’s voting system, the increasing popularity of early voting in person at Victorian state

Information about the elections can be found on the [NSW Electoral Commission’s website](#).

There has been some commentary that there could be two election dates – one for merged councils, and another for unmerged councils. Premier Mike Baird has [previously said](#) that due to the proposed mergers the council elections would likely need to be moved from September this year to March 2017, although the government would still aim for the earlier date. In March, however, Local Government Minister Paul Toole said that councils not proposed for a merger should plan for local government elections in September.

Resignation of Colin Barry

Colin Barry retired from his role as NSW Electoral Commissioner in December 2015. He was first appointed in July 2004. Linda Franklin is the Acting NSW Electoral Commissioner.

elections and the conduct of political campaigning at the 2014 Victorian state election. The committee will table its final report for the inquiry in Parliament on 3 May 2016.

Political campaign “pooling”

The October 2015 ERRN newsletter reported on allegations of improper use of parliamentary electorate officers by the Labor Party during the 2014 Victorian state election campaign. In September 2015, [three state Labor MPs anonymously accused Premier Daniel Andrews’ office of directing upper house MPs to pool electorate officer entitlements](#) and use the staff to campaign at the election.

In March 2016, [the ALP faced criticism after it questioned the authority of Deborah Glass, the Victorian Ombudsman, to preside over the allegations.](#) Subsequently Ms Glass filed an application with the Supreme Court [seeking a determination as to whether she has jurisdiction to investigate a recent referral from the Legislative Council.](#) A vote by the Legislative Council on 25 November [2015 “referred to the Ombudsman for](#)

[investigation allegations that ALP Members of the Victorian Parliament misused Members' staff budget entitlements against the provisions of the](#)

[Members Guide, and any other breach in relation to these allegations".](#)



Referendum on fixed four-year terms

On 19 March 2016 a state referendum was held in Queensland, coinciding with quadrennial local government elections, [to determine whether the Queensland Parliament should have four-year fixed terms. The enabling Bill was passed by the Legislative Assembly in February 2016.](#)

The referendum officially passed on 3 April 2016, with the result declared by Walter van der Merwe, the Queensland Electoral Commissioner, on 5 April 2016. The success of the 'Yes' case on this occasion is the first referendum approved in Queensland since 13 April 1910 when electors voted to support religious instruction in schools. The only other successful referendum was in 1899 where Queenslanders approved joining the Federation of Australia. As noted by Mr van der Merwe: ["A change from three to four year terms was previously rejected by Queenslanders at the 1991 referendum, and this is only the third successful referendum in Queensland's history."](#)

At the time of writing a total of [2,465,765 votes \(80 percent of enrolled electors\) have been counted to date, with 51 percent of electors in favour of the Bill and 46 percent opposed.](#)

During the election period [there were reports that the "No" campaign felt that the "Yes" campaign received preferential coverage in the official campaign material published by the Electoral Commission of Queensland.](#) Statements were distributed to all Queensland households and were prepared by members of Parliament supporting the "No" and "Yes" campaigns: the Commission was advised not to alter the format of the pamphlets.

The new, four-year terms will not apply until after the next Queensland state election, which is expected on or before 2018.

Local government elections

[The 2016 Queensland local government elections were held on 19 March 2016. Of the 74 elections, 40 shires elected a new mayor and one election was decided, in late March 2016, by drawing a ping pong ball from a bucket, due to a "dead heat" between two candidates.](#)

Following complaints about alleged missing enrolments, people voting in the wrong ward following boundary changes and the slow update of counting results in some regional areas, [the Palaszczuk government has ordered a review into the conduct of the election, and the Electoral Commission of Queensland's performance. As reported in the Courier Mail, Premier Annastacia Palaszczuk said the Electoral Commission of Queensland's handling of elections was discussed in Cabinet and a review would be undertaken. Opposition Leader Lawrence Springborg said a review needed to assess whether the Electoral Commission of Queensland was properly resourced.](#)

The Electoral Commission of Queensland also [trialled ballot paper scanning technology at the 2016 local government elections. The technology](#)

[was developed by the Commission in partnership with two private companies in the lead up to the election.](#) However, during counting reports suggested that the technology had resulted in some delayed election results. Dermot Tiernan, Assistant Commissioner, told the ABC that the delays were caused by the ballot paper scanners being set to the wrong sensitivity: [“What happened on Saturday night is that we started scanning postal votes, and postal votes are always folded up and creased, and we probably set the scanners’ sensitivity a bit too specific, so it was reading some of the creases as mark...Once we realised what was going on,](#)

[we switched to pre-poll votes and the scanning technology worked quite well”.](#)

Political donations

As reported in the ERRN’s October 2015 newsletter, [the Palaszczuk Labor government committed to establishing an inquiry into political donations in Queensland.](#) The inquiry is yet to be established. [This comes as the Electoral Commission of Queensland has confirmed that it will not pursue the Queensland LNP over anonymous political donations of nearly \\$100,000.](#)



The [Parliament of South Australia’s Select Committee on Electoral Matters is continuing its inquiry into the 2014 South Australian state election.](#)

The committee has published several submissions and transcripts of public hearings on its website.

Kaye Mousley retired as South Australian Electoral Commissioner in August 2015. She was first appointed in 2005. The Parliament of South Australia’s Statutory Officers Committee commenced the recruitment process in November 2015 but has not yet made an appointment. David Gully is Acting South Australian Electoral Commissioner.



[Western Australian held led government elections in October 2015, just after the publication of the ERRN October 2015 newsletter.](#)

As reported by the Western Australian Electoral Commission, there were a record number of candidates (1021 candidates) at the 2015 elections, [over 200 more than at the 2013 ordinary elections.](#) [As with the 2016 Queensland local government elections, there were some close results: in Albany’s Yakamia Ward there was a tie and hence after a re-count, the winner was determined by drawing a name from a ballot box.](#)



Following former Resources' Minister Paul Harris' resignation from Parliament, [Nic Street was elected in a countback to fill the vacancy in the Division of Franklin on 1 March 2016.](#)

Elections will also be held for the Legislative Council Divisions of Aspley and Elwick on 7 May 2017.

Julian Type retired as Tasmanian Electoral Commissioner in late 2015. Andrew Hawkey was appointed Tasmanian Electoral Commissioner in February 2016.



The next Northern Territory election is due to be held in August 2016.

In February the Northern Territory Legislative Assembly passed the [Electoral Legislation Amendment Bill 2016 \(NT\)](#). The Act makes a number of major amendments to the Northern Territory's electoral practice, including:

- Introducing optional preferential voting. One of the reasons cited by Chief Minister Adam Giles for introducing optional preferential voting is to reduce informal voting at Northern Territory elections. [As noted by Ken Parish, Charles Sturt University, informal voting is not really a problem in Territory elections, "despite low levels of literacy in Aboriginal communities. The overall informal vote at the last NT election in 2012 was 3.2 percent, compared with 5.9 percent nationally at the 2013 federal election"](#).
- Including a provision in the Territory's electoral legislation providing for compulsory electoral enrolment. Unlike other states and territories, the Australian Electoral Commission maintains the Territory's electoral roll. Traditionally the Territory has much lower rates of electoral enrolment than other Australian jurisdictions: the current estimate [is that 78.5 percent of eligible Territorians are on the electoral roll compared to the national average of 92.8 percent. In support of this provision, the Northern Territory Electoral Commission has noted that "a participative democracy depends on an accurate roll of eligible electors. An express provision in the Act stating that enrolment is compulsory will support the message to Territorians of the importance of being correctly enrolled"](#).
- Greater provision for early voting at Territory elections. At present the Electoral Act 2011 (NT) provides that an elector meet certain eligibility criteria in order to apply for a postal vote. These criteria have also been applied historically for electors who have sought an early voting, despite no specific eligibility criteria outlined in the Act. [April 2015 amendments to the Local Government \(Electoral\) Regulations 2015 removed the eligibility criteria for both postal and](#)

[early voting at council elections, with the aim of increasing voter participation. This provided voters with the choice of 'convenience voting' either at an early voting centre or by post, as opposed to on the traditional Saturday polling day. This provision is ostensibly, then, designed to facilitate early voting at Territory elections.](#)

- Measures to facilitate the return of postal votes, including allowing electors to electronically scan and email their postal application, as well as allowing an extra week for postal ballots to be received after Election Day. [Given Australia Post's recent move to a three-day regular mail service,](#)

[the Northern Territory Electoral Commission is anticipating greater difficulties providing postal voting services due to jurisdiction's size and the location of remote communities.](#)

- [Establishing a 100-metre campaigning exclusion zone around polling places.](#) While the Bill originally called for a 500-metre exclusion zone, this was dropped following concerns that the provision would be challenged in that it might be interpreted as a restriction on the implied freedom on political communication in the Australian Constitution.

Forthcoming ERRN events

[“Above the line: Changes to the way we vote for the Senate”](#)

Thursday 14 April 2016, 1:00 - 2:00 PM

**Parliamentary Library
Parliament House
East Melbourne VIC 3002**

The Commonwealth Electoral Amendment Act 2016 is making the biggest changes to the way Australians vote in Federal elections since 1984. Group voting tickets – a key feature of Senate elections for more than 30 years – are being abolished, and there will be optional preferential voting both above and below the line on Senate ballot papers. These changes can be expected to have profound effects on voting patterns, the vote counting process and election results. There has been an unusual line-up of parties for and against the changes. As always in electoral matters, political self-interest and democratic principle are intertwined. In this seminar, Dr Nick Economou of Monash University’s School of Political and Social Inquiry will explain the changes to the Senate system. Dr Economou will also outline possible implications for Victoria, whose Upper House has a similar voting system to the Senate.

Dr Nick Economou (Monash University)

Nick Economou, a PhD graduate from the University of Melbourne, is a Senior Lecturer in the School of Political and Social Inquiry at Monash University. Nick has been teaching Australian politics and governance at Monash since 1992, and, prior to this, taught at the then Swinburne Institute and the former Gippsland Institute of Advanced Education (now Monash Gippsland). Nick is a habitual commentator on Australian politics on behalf of a number of media outlets that have included the ABC, the BBC and various newspapers. Nick has a great interest in national and state politics, including the electoral contest and sometimes he even gets it right. His scholarly publications have included books such as *The Kennett Revolution* (co-edited with Brian Costar) and *Australian Politics for Dummies* (co-authored with Zareh Ghazarian). There have also been numerous academic journal articles on subjects ranging from Australian state and federal and even local government elections and the role and behaviour of Australia’s political parties through to analyses of environmental policy-making.

[“Politics and Ideology – The Heydon Royal Commission: CELRL/ERRN Seminar”](#)

Wednesday 4 May 2016, 1:00 - 2:00 PM

**Room 609
Melbourne Law School
185 Pelham Street**

The trade union movement in Australia has faced increased regulation in recent years, after revelations of corruption and financial mismanagement within several major unions. The Coalition Government responded by establishing a Royal Commission into Trade Union Governance and Corruption. After two years of hearings, the Royal Commission’s Final Report was released on 30 December 2015. As well as

referring almost 100 individuals and organisations to police and other investigative authorities, the Royal Commission made 79 recommendations aimed at lifting standards of probity and accountability within trade unions; and substantially increasing the penalties for breaches of these legal requirements. In addition, it is proposed that a specialist agency be established to oversee and enforce the new regulatory regime: the Registered Organisations Commission; and that the Australian Building and Construction Commission be re-established with full investigatory powers.

In this seminar, Anthony Forsyth will consider whether the Royal Commission and the Government's regulatory response are (as unions argue) simply an ideological attack on Australian unions, intended to pave the way for the Government's broader agenda of weakening employee representation and eroding minimum wages and conditions. Alternatively, are the new laws a necessary response to events which have caused considerable damage to the union 'brand', and (in the view even of some union supporters) set back the cause of unionism many years? This will involve an evaluation of the necessity of the Royal Commission's recommendations and the Government's proposals, and the arguments supporting union participation in regulatory measures to improve their standing in the Australian community.

Joo-Cheong Tham will provide commentary on Anthony's presentation from an electoral law perspective.

Anthony Forsyth (RMIT University)

Anthony Forsyth is a Professor of Law in the Graduate School of Business and Law, RMIT University; and a Consultant with the Corrs Chambers Westgarth Employment Workplace & Safety Group. His recent publications include an edited collection with Professor Breen Creighton: *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012). In October 2015, he was appointed by the Victorian Government as Chair of an independent Inquiry into the Labour Hire Industry and Insecure Work.

[“Fresh ideas on electoral matters – ERRN South Australia event”](#)

9 March 2016

**Parliament House
South Australia**

Presenters: Isabelle McIver, Daniel Messemaker and Sasha Lynch

Each year some of SA's brightest university students are paired with MPs through the Parliamentary Internship Scheme, and some have worked on electoral projects. This event gave the floor to three of them whose projects looked at the current SA electoral system – particularly the difficult fairness criterion – and proposed changes.

The students were all, coincidentally, students of Prof Clem MacIntyre, who agreed to chair the seminar. The students each presented a summary of their projects and findings, and took questions from the floor. Discussion started with their projects and findings and led onto a more-general discussion ranging across measurement problems, alternative electoral structures and constitutional requirements. The 26 attendees included three of the MPs who are the most-involved in state electoral reform. The students' projects were very interesting, they presented well and answered questions in a thoughtful way, and the general discussion was really interesting.

[“Party Hopping in Israel: An Assessment of the Impact of Anti-Defection Laws”](#)

3 March 2016

**Melbourne Law School
185 Pelham Street**

Since 1991, Israel has been among the small number of parliamentary democracies that have passed anti-defection laws that aim to discourage parliamentarians from quitting their party's parliamentary group. In this talk, I assess the impact of the Israeli legislation on political parties and the electoral process. My central finding is that legislative attempts to keep Israeli parties united have by and large failed: the overall rate of defections has increased since the law came into effect and political parties have become increasingly less rather than more cohesive and united. Moreover, since defections have been concentrated in the immediate pre-electoral period they have led to more volatility and fragmentation in the electoral competition. I propose that electoral reform may be a more effective, although indirect, way of keeping defections at bay.

Csaba Nikolenyi

Csaba received his PhD from the University of British Columbia in 2000 and was hired by Concordia University the same year. His research focuses on the comparative study of political parties, electoral systems and legislatures in post-communist democracies as well as on the political systems of Israel

and India. He was former English Co-Editor of the Canadian Journal of Political Science (2006-11). He served as Code Administrator in the Faculty of Arts and Science between 2009 and 2011 and as Chair of the Department of Political Science between 2011 and 2014. Currently, he is the Director of the Azrieli Institute of Israel Studies. Dr. Nikolenyi has published extensively in comparative politics journals and has authored two books: *Minority Government in India* (Routledge 2010) and *Institutional Design and Party Government in Post-Communist Democracies* (Oxford University Press, 2014). He was Visiting Professor at the Hebrew University of Jerusalem (2007-8) and at the Centre for European Studies at the Australian National University (2012).

[“Fairness and equality: Drawing election Districts in Australia”](#)

18 February 2016

**Melbourne Law School
185 Pelham Street**

The Liberal Party strongly criticised a recent Federal electoral redistribution in New South Wales, which notionally put at risk at least three Coalition seats. A columnist in Adelaide’s Sunday Mail has declared the Electoral Commission’s work a disgrace, because the boundaries it established have failed to reflect the popular will in three of the past four State elections. Electoral boundaries matter politically.

In her recently published book, *Fairness & Equality: Drawing Election Districts in Australia*, Jenni Newton-Farrelly points out that redistributions are inevitably political, and that any set of boundaries will have political effects. She acknowledges that Australian redistribution authorities are impartial and transparent in carrying out their task, but is critical of their refusal to consider the political ramifications of their maps. Dr Newton-Farrelly discusses the experiences of South Australia and New Jersey, and argues that redistribution authorities should take party-political effects into account in devising boundaries that are equal, fair and responsive to changes in voters’ opinions.

In this seminar, the ABC’s election analyst Antony Green, who has analysed dozens of electoral redistributions, formally launched the book and discussed the issues raised in it. Victoria’s Electoral Commissioner Warwick Gately spoke from the perspective of the redistribution authorities, and Jenni Newton-Farrelly replied.

Presenters

Jenni Newton-Farrelly is the Electoral Specialist at South Australia’s Parliamentary Research Library. She has advised that Parliament’s Members on elections since 1985 and in that role has helped to develop methodology for the Electoral Districts Boundaries Commission to comply with South Australia’s fairness requirement. Her PhD from Swinburne’s Institute for Social Research was on redistribution methodology.

Antony Green has worked for the ABC as its Election Analyst for more than two decades. He designed the ABC election night computer system and has covered more than 60 federal, state and territory elections, as well as elections in the United Kingdom, Canada and New Zealand. He produces regular publications on electoral matters for Australian parliamentary libraries, and in 2015 was appointed an Adjunct Professor in the Department of Government and International Relations at the University of Sydney.

Warwick Gately's early career was with the Royal Australian Navy. Joining the Western Australian Electoral Commission in 2003, he conducted three State general elections as well as referendums on retail trading hours and daylight saving. He oversaw the redrawing of the State's electoral boundaries under "one vote, one value" legislation and conducted local council elections. In April 2013, he was appointed as the Electoral Commissioner for Victoria with responsibility for the administration of the State's register of electors (the roll) and the conduct of Parliamentary and local council elections as well as referendums and various statutory polls in Victoria.

["McCloy's case: The High Court on Political Donations, Freedom and Equality"](#)

Tuesday 16 February 2016

**Supreme Court Library
Brisbane**

This event was co-sponsored by the Electoral Regulation Research Network and the [Australian Association of Constitutional Law](#).

In *McCloy v NSW* [2015] the High Court upheld, by a strong majority, state laws capping political donations and prohibiting property developer donations. The case has significant implications for the regulation of electoral politics. It also has intriguing potential for constitutional implications, with the Court softening its approach to the implied freedom of political communication by nuancing the "proportionality" test and by invoking political equality as a nascent balancing concept.

Presenters

Tony Keyes, Senior Deputy Crown Solicitor. Tony appeared for the State of Queensland (intervening) in *McCloy's* case.

Professor Graeme Orr, University of Queensland. Graeme is the author of *The Law of Politics* (2010), *Ritual and Rhythm in Electoral Systems* (2015) and, with Ron Levy, *The Law of Deliberative Democracy* (2016).

["Political funds of trade unions: How should they be regulated?"](#)

27 November 2015

**Melbourne Law School
185 Pelham Street**

In Australia, the Royal Commission into Trade Union Governance and Corruption chaired by former High Court Justice Dyson Heydon has thrown the spotlight on the political funds of trade unions, in particular so-called 'slush' funds. In the United Kingdom, the Conservative Government has been criticized for introducing a Bill that would replace the 'opt-out' system in relation to trade union political levies with an 'opt-in' system. Developments in both countries pose the question: how should political funds of trade unions be regulated? In this seminar, Professor Keith Ewing spoke to this question, comparing the Australian and

UK situations. Associate Professor Joo-Cheong Tham followed with a brief comment from an Australian perspective.

Presenters

Keith Ewing is Professor of Public Law at King's College London. Before this position he worked at the Universities of Edinburgh (1978–83) and Cambridge (1983–89) and has also held visiting positions at various institutions overseas, including the universities of Queensland and Sydney. He is the President of the Institute of Employment Rights (a trade union funded think tank), and Vice President of the International Centre of Trade Union Rights.

Joo-Cheong Tham is an Associate Professor at the Melbourne Law School. He specializes in the regulation of money in politics and is the author of *Money and Politics: The Democracy We Can't Afford*; his research also focuses on the regulation of temporary migrant work.

Nicholas Reece is a Principal Fellow at the Melbourne School of Government at the University of Melbourne. Nick has considerable experience in both politics and policy making, having worked as a senior adviser to an Australian Prime Minister and two Victorian Premiers. He also served as Secretary of the ALP Victoria. Early in his career he worked as a solicitor acting for trade unions.

ERRN 2015 Biennial Workshop

5-6 November 2015

**UNSW Law School
University of New South Wales**

On 5-6 November the UNSW Law School hosted the fourth biennial Electoral Regulation Research Network (ERRN) workshop. The event was a joint initiative of the Gilbert + Tobin Centre of Public Law, the Department of Government and International Relations at the University of Sydney, and the ERRN.

The workshop brought together leading academics and practitioners in electoral law and politics. Australian Electoral Commissioner, Tom Rogers, opened the workshop with a paper on electoral integrity, in which he noted the challenges of operating in a highly complex electoral environment, and discussed the measures the AEC has adopted to enhance confidence in its management of elections. Over the next two days, speakers addressed a variety of contemporary issues in electoral regulation, including political finance, early

One of the most enjoyable parts of the workshop was the opportunity to engage with deeply informed people who approach elections from such diverse perspectives. Workshop discussions and conversations over tea and coffee ranged widely from political philosophy to the fine details of election delivery – from talk of ‘the will of the people’ to the challenge of enforcing poster bans at polling places. This not only reflected the richness of this field of practice, but also the open and generous spirit with which delegates approached the workshop.

Report by Paul Kildea and Anika Gauja – ERRN NSW Convenors.



Max Grömping, Electoral Integrity Project, University of Sydney and Tom Rogers, Australian Electoral Commissioner

voting, voter ID, Senate reform and electronic voting. A particular highlight was the launch of Graeme Orr's new book, *Ritual and Rhythm in Electoral Systems* (Ashgate, 2015). Michael Maley launched the book with a warm and generous speech that acknowledged Graeme's influential contribution to electoral law scholarship over the past 20 years.



The ERRN has published seven working papers since the October 2015 newsletter. 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.

1. Sasha Lynch

Student, University of Adelaide
March 2016

[“Electoral Fairness in South Australia”](#)

This working paper examines South Australia’s electoral system in regards to electoral fairness. It argues that the outcomes of recent elections in South Australia can often not be deemed to be “fair” and suggests some ways the electoral system could be improved.

2. Daniel Messemaker

BA (Hons) Student, Department of Politics and International Studies, University of Adelaide
March 2016

[“Alternative Voting Plus: A Proposal for the South Australian House of Assembly”](#)

This working paper outlines the case for the South Australian House of Assembly adopting an Alternative voting plus (AV+) voting system and argues that AV+ would represent a genuine attempt at producing a majority government whilst increasing proportionally.

3. Mel Keenan

Principal Legal Officer, NSW Electoral Commission
March 2016

[“The Regulation of Lobbying in NSW”](#)

This working paper considers the current regime of

regulating political lobbyists in NSW. In considering the NSW statutory regulatory regime this paper addresses the specific background to that regime; the role and content of the Register of Third-Party Lobbyists; and the compliance responsibilities and powers of sanction of the NSW Electoral Commission, which is the statutory regulator. It outlines some of the tools the NSWEC has at its disposal and shows that NSW is making positive steps toward fulfilling ICAC’s aims of a regulatory regime that improves transparency and addresses risks of corruption in a practical way.

4. Tom Rogers

Australia Electoral Commissioner, Australian Electoral Commission
February 2016

[“Electoral Integrity and the AEC”](#)

Since the loss of ballot papers in 2013, the AEC has refreshed its commitment to electoral integrity in all its forms. The AEC’s experiences over recent years have reinforced how broad the concept of electoral integrity is – and how it is a critical, fundamental precept of Australian democracy. Integrity must be at the heart of all electoral processes and must be more than just the prevention of enrolment and voter fraud. In its pursuit of delivering trusted, consistently reliable, high quality and high integrity electoral events and services, the AEC has undertaken a wide range of reforms, including the development and application of an ‘every vote matters’ principle, a focus on the sanctity of the ballot paper, the further development of a set of key AEC values, and the establishment of the Electoral Integrity Unit and an Electoral Integrity Framework and other initiatives.

5. Andrew Geddis

Professor, Faculty of Law, University of Otago
February 2016

[“Electoral Rights, Parliament and the Courts: The Case of Prisoner Voting in New Zealand”](#)

Thinking about electoral rights, two deeply intertwined questions arise. First of all, what rights must the members of a society enjoy in order for it to be considered a proper or genuinely democratic nation? Second, who gets to decide if a right is necessary, how it ought to apply and what limits on it are permissible? In this paper, I wish to illustrate these deep issues by way of a particular example: that of New Zealand and its experience with the vexed issue of prisoner voting.

6. Felicity Wright

Senior Advisor, Regulatory Advice and Analysis,
NSW Electoral Commission
February 2016

["Implications of Change in Electoral Campaign Finance Laws in NSW"](#)

In the last seven years the Election Funding, Expenditure and Disclosures Act 1981 (NSW) has been subject to no fewer than eight substantial amendments. Not only have successive Parliaments implemented these changes, but individual Premiers have made such changes keynotes of their tenure. These successive changes have resulted in a funding and disclosure scheme which has become overly complex and impractical, as it attempts to be

a 'one size fits all' system for all participants. This paper discusses areas the Electoral Commission believes are of vital importance in establishing a more transparent and effective scheme.

7. Warwick Gately AM

Victorian Electoral Commissioner, Victorian Electoral Commission

["Campaigning and Regulation: Time for Change?"](#)

The 2014 Victorian State election witnessed a shift in the manner of campaigning where organisations other than political parties were active in putting their views to electors, particularly during early voting. The mobilisation of organisations such as firefighters and ambulance officers and their conduct and behaviour around voting centres was the subject of formal complaints, received media attention and has been raised during the Victorian Electoral Matters Committee inquiry into the State election. Further the Joint Standing Committee on Electoral Matters (JSCEM) commissioned its own inquiry specifically into campaigning conduct at polling places. What was the VEC's conclusion from the election including around the need for further campaigning regulation?

ERRN Research Collaboration Initiative

ERRN Research Collaboration Initiative is now seeking expressions of interest for projects to be funded in 2016 – 2017.

One of the objectives of the Electoral Regulation Research Network (ERRN) is to 'facilitate research collaboration amongst academics, electoral commissions and other interested groups on the topic of electoral regulation'. The Network's Research Collaboration Initiative advances this objective by facilitating research collaboration between electoral commissions and academics through the provision of grants for research projects that deal with long-term challenges for the regulation of elections in Australia.

ERRN is seeking expressions of interest for projects to be funded in 2016-2017 through its Research Collaboration Initiative. Two topics have been identified as priority areas of research for this round of funding:

- a) Enhancing electoral participation of groups under-represented in the electoral process; and;
- b) The implications of changes in the forms of voting on the electoral system (including pre-poll voting, electronic voting and postal voting).

Up to two projects lasting two years will be funded in this round. Each project will be funded to the amount of \$30,000. Proposed projects should include the involvement of one or more electoral commissions, preferably with electoral commission staff as part of the project team. Funded projects are to produce a report that will be made publicly available on the ERRN website.

In 2014, the first round of grants made through the Research Collaboration Initiative funded two projects: 1) The Challenge of Informed Voting; 2) Enhancing Local Government Democracy: the City of Melbourne. Reports of these projects are available at: <http://law.unimelb.edu.au/centres/errn/research/research-projects>

Questions regarding this EOI should be directed to Associate Professor Joo-Cheong Tham, Director of the Electoral Regulation Research Network (Email: j.tham@unimelb.edu.au).

How to apply

Completed expressions of interest should include all the information listed below, and should be submitted to Cathryn Lee, the ERRN Administrator, by Monday, 16 May 2016 by email (law-errn@unimelb.edu.au). These expressions of interest will be assessed by the ERRN Governance Board with applicants being notified in July 2016 of the outcomes.

Expressions of interest should contain the following information

1. Details of project leader: Please provide the name and contact details of the project leader.
2. Members of the project team (no more than one A4 page): Please list the members of the project team, their institutional affiliations and their expertise as is relevant to the research proposal.
3. Research proposal (no more than one A4 page):
4. Please explain:
5. How the research proposal fits within one of the priority areas;
6. The key questions of the proposal;
7. Its methodology;
8. Timeline;
9. Key outputs.
10. Role of project team (no more than half an A4 page): Please indicate the contributions to be made by each project team member and how the team proposed to work collaboratively and cohesively (including the process for planning the project and writing up its findings, the project's meeting schedule and how the project team seeks to ensure the integration of academic and electoral commission expertise).
11. Budget (no more than half an A4 page): Please indicate the key items of expenditure to be funded by the \$30,000 grant.

Recent publications

ERRN South Australian Convenor Jenni Newton-Farrelly published her book on Australian electoral redistricting, [*Fairness and Equality: Drawing Election Districts in Australia*](#).

The ERRN Victorian Convenor Yee-Fui Ng is also launching [*Ministerial Advisers in Australia: The Modern Legal Context*](#).

[In *The Conversation*, Yee-Fui has also written about the independent review of the parliamentary entitlement system, which was completed in February 2016. The Coalition seems likely to adopt the review's recommendations.](#)

Writing for Australian Public Law, Professor Graeme Orr, in "[Never too Late to Regulate: Political Finance and the Electoral Commission and Liberal Party of NSW](#)", discusses the NSW Electoral Commission's decision to withhold approximately \$4.4 million in public funding the NSW Liberal Party due to the party's alleged failure to disclose the identity of all major political donors in its 2011 declaration, corresponding to the 2011 NSW state election.

In March 2016 the Commonwealth Joint Standing Committee on Electoral Matters has published its ["Advisory Report on the Commonwealth Electoral Amendment Bill 2016"](#).

McCloy v New South Wales and ICAC (High Court)

On 28 July 2014, Newcastle Lord Mayor Jeff McCloy, and two companies he is associated with (McCloy Administration Pty Limited and North Lakes Pty Limited) lodged a writ in the High Court challenging the ban on property developers and other prohibited donors making political donations under section 96GA of the Election Funding, Expenditure and Disclosures Act 1981 (NSW).

McCloy launched these proceedings after admitting to the Independent Commission Against Corruption to making illegal donations by giving envelopes stuffed with \$10,000 in cash each to former Liberal MPs Tim Owen and Andrew Cornwell before the last election, as well as a smaller sum to MP Garry Edwards.

McCloy submitted that Divisions 2A and 4A of Part 6 and s 96E in Div 4 of Part 6 of the Election Funding, Expenditure and Disclosures Act 1981 (NSW) contravened the implied freedom of political communication. Division 2A imposes a cap on the amount of political donations that can be made per person per financial year to parties, while Division 4A prohibits donations from property developers. Division 4 of Part 6 prohibits certain donors, such as property developers, from making political donations and makes accepting such a donation unlawful. Section 96E prohibits the making or acceptance of 'indirect campaign contributions'.

The High Court applied the two-step test in the case of *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 of considering whether:

- the law effectively burdened political the freedom of political communication in its terms, operation or effect (first limb); and
- the law is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the prescribed system of representative government

(second limb).

The High Court accepted that the first limb was made out as the impugned provisions indirectly burden political communication by restricting the funds available to political parties and candidates.

However, the Court unanimously held that the burden imposed by the donation caps in Div 2A is permissible. The joint judgment of French CJ, Kiefel, Bell and Keane JJ utilised a proportionality analysis based on a balancing of the following factors:

- *suitable*: having a rational connection to the purpose of the provision;
- *necessary*: there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;
- *adequate in its balance*: a criterion requiring value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.

Based on these factors, the joint judgment found that the provisions are a legitimate means of pursuing the legitimate objective of removing the risk and perception of corruption and undue influence in New South Wales politics. The joint judgment ruled that the provisions in fact enhance the system of representative government that the implied freedom of political communication protects, and are adequate in their balance. Further, there are no obvious and compelling alternative and reasonably practicable means for achieving that purpose.

Gageler J reached the same conclusions as the joint majority, but eschewed a standard proportionality analysis and instead held that the restrictions on political communication imposed by the provisions are no greater than are reasonably necessary to be imposed in pursuit of a compelling statutory objective. Nettle J also found that the donation caps in Div 2A were appropriate and adapted to the

legitimate aim of reducing the risk of patronage and undue influence.

Gordon J likewise agreed with the answers proposed by the joint judgment, but applied a straightforward two-step Lange analysis. Dealing with each provision separately, Gordon J concluded that each burdened the implied freedom but that each served a legitimate object and were reasonably appropriate and adapted to serving that end.

All judges also held that section 96E was valid, on the basis that as an anti-avoidance provision, its validity depends on that of Div 2A. As Div 2A is valid, section 96E is likewise valid.

By a majority of 6:1 the High Court held, taking note of the history of corruption in New South Wales, that the prohibition on donations by property developers in Div 4A was also valid. The joint judgment of French CJ, Kiefel, Bell and Keane JJ, as well as Gordon J held that property developers are sufficiently distinct to warrant specific regulation in light of the nature of their business activities and the nature of the public powers that they might seek to influence in their self-interest. Gageler J found that Div 4A could be justified based on the nature of the business, the profits of which depended on public officials' exercising statutory discretions in their favour, which gives corporate property developers a particular incentive to exploit the avenues of influence that are available to them.

Nettle J dissented on this point, finding that the prohibition on donations by property developers

arbitrarily discriminated against property developers in a manner that deprives them as a section of the electorate of an ability enjoyed by other sections of the electorate of making political donations and so participating in the political system.

Murphy v Electoral Commissioner

Tony Murphy, supported by the activist group GetUp, has launched a High Court challenge to section 155 of the Commonwealth Electoral Act 1918 (Cth) and other suspension provisions in the Act, which close the electoral rolls seven days from the issue of an election writ.

The provisions are said to be invalid because they serve no legitimate end and are not proportionate or reasonably appropriate and adapted to serve a legitimate end. This case is reminiscent of *Rowe v Electoral Commissioner* (2010) 243 CLR 1. The argument is that the provisions are so restrictive that they have a substantial disenfranchising or disqualifying effect and distorts the integrity of the system by not recording people whose addresses have changed.

The case is currently in directions before Nettle J, and is set to be heard in May, pending the federal election. If successful, the case could result in voters being able to enrol up to and including polling day – a practice that is now in place in NSW and Victorian elections. In Queensland elections, voters can enrol up to the day before polling day.

Legislation

Senate Voting Reforms: Commonwealth Electoral Amendment Act 2016

The Senate voting reforms have recently passed both Houses of Parliament and will commence on 1 July 2016. The Commonwealth Electoral Amendment Bill 2016 (Cth) amended the Commonwealth Electoral Act 1918 (Cth) to amongst other things, amend the Senate voting system.

The Bill responds to key elements of the first interim report and the final report of the Joint Standing Committee on Electoral Matters (JSCEM) inquiry into the 2013 Federal Election, which were tabled on 9 May 2014, and 15 April 2015, respectively. The JSCEM identified that the current Senate voting system, as provided for in the Electoral Act, lacks transparency, is overly complex, and needs simplification. The current ballot paper encourages above the line voting, with voter preferences distributed through a complex and opaque system of individual and group voting tickets. The JSCEM concluded that most voters are unlikely to understand, where their preferences flow when they vote above the line.

Above the Line

The amendments reduce the complexity of the Senate voting system by providing for partial optional preferential voting above the line, including the introduction of advice on the Senate ballot paper that voters number, in order of preference, at least six squares. Voter's preferences will be 'exhausted' after last number is filled in.

Below the Line

Below-the-line voters rank individual candidates in the order they prefer. The Bill also provides vote savings provisions to capture voter intent and reduce the risk of increased vote informality, including by improving vote savings provisions for below the line voting. The changes mean that voters have to number at least 12 squares below the line. The ballot will nevertheless be formal provided it shows

six consecutive preferences. Voter's preferences will be 'exhausted' after last number is filled in.

Voting Tickets Abolished

The Bill also abolishes group and individual voting tickets, but does not change other provisions relating to candidates nominating to be grouped on the Senate ballot paper. By removing the use of group and individual voting tickets, the Bill allows voters to assign their own preferences and seeks to prevent preference deals between candidates and parties.

Day v Australian Electoral Officer for the State of South Australia

Senator Robert Day has lodged a High Court challenge to Part 1, and three items in Part 3 of Schedule 1 of the Commonwealth Electoral Amendment Act 2016.

Day is arguing that the Senate reforms contravenes section 9 of the Constitution, regarding the method of election of senators. The case is under directions before French CJ.

Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

The Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 was passed by both Houses of Parliament in December 2015. It provides for dual citizens to lose their citizenship in three new ways:

the person, aged 14 years or older, renounces their Australian citizenship if the person acts inconsistently with their allegiance to Australia by engaging in specified terrorist-related conduct, where the conduct was engaged in outside Australia or the person left Australia before being charged and brought to trial for the conduct;

the person, aged 14 years or older, ceases to be an Australian citizen if the person fights for, or is in the service of, a declared terrorist organisation. The Minister may, by legislative instrument, declare a declared terrorist organisation. This legislative

instrument is subject to oversight; or

the Minister may determine in writing that a person ceases to be an Australia citizen because the person has been convicted of a specified terrorist-related offence with at least 6 years of imprisonment (or to periods of imprisonment that total at least 6 years).

The renunciation of citizenship for the first two categories is said to operate 'automatically', upon the relevant conduct. It is uncertain who is to make this determination.

The Minister must give written notice to the person (or make reasonable attempts to do so) regarding the loss of citizenship as soon as practicable, except where the Minister is satisfied that giving the notice could prejudice the security, defence or

international relations of Australia or Australian law enforcement operations. The notice must include a basic description of that conduct and the person's rights of review. In a judicial review action, the Court would consider whether or not the power given by the Citizenship Act has been exercised according to law.

A person will have the right to seek judicial review of the basis on which a notice was given. Decisions leading to removal from Australia following cessation of citizenship would all be conducted in line with the relevant provisions in the Migration Act, so removal itself would be conducted based on a decision reached in accordance with law. These decisions would most likely be subject to review by a tribunal or court.

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