

Electoral Regulation Research Network Newsletter



**Melbourne
Law School**

Contents

Director's Message	3
Electoral regulation news	5
Forthcoming events	14
ERRN Event Reports	16
Recent Publications	18
ERRN Working Papers Series	18
Case Notes	19
<i>Independent Commission against Corruption v Cunneen (High Court)</i>	
<i>Duncan v Independent Commission against Corruption (High Court)</i>	
<i>Jones v Pearson & the NSW Electoral Commissioner</i>	
<i>Alison Byrne (NSW Electoral Commission) v Robert Smith (the Fishing Party)</i>	
<i>Rigoni v Victorian Electoral Commission</i>	
<i>Donohue v Victorian Electoral Commission</i>	
<i>McCloy v New South Wales and ICAC (High Court)</i>	
<i>Australian Citizenship Amendment (Allegiance to Australia) Bill 2015</i>	
<i>Potential Queensland Human Rights Legislation</i>	

ERRN
Electoral Regulation
Research Network





Director's Message

One of the key objectives of ERRN is to 'facilitate research collaboration amongst academics, electoral commissions and other interested groups on the topic of electoral regulation'. In its first two years, the Network has primarily advanced this aim through regular events such as seminars and workshops; the hope here is that by bringing people together, research collaborations will organically emerge.

In 2013, the Network established its Research Collaboration Initiative to more directly facilitate research collaboration between electoral commissions and academics. The focus of the Initiative is on *research collaboration* – a joint effort in electoral commissions and academics where the commissions and academics work together to identify research priorities, design and undertake research projects.

Through this collaboration, the Network contributes to two key aims. The first is informing and improving the overall quality of policy-making in the area of electoral regulation. The second is providing a forum to discuss *long-term challenges* associated with Australia's electoral regulation. With its strong connections to Australia's electoral commissions and academia both in Australia and overseas, the ERRN is well placed to do this.

In order to foster such 'thick' research collaboration between academics and electoral commission officials, two projects were funded through the Initiative: the *Enhancing Local Government Democracy* project and *The Challenge of Informed Voting* project.

The members of the [Enhancing Local Government Democracy](#) project are:

- **Associate Professor Ken Coghill**, Department of Management, Monash University;
- **Dr Paul Thornton-Smith**, Senior Information and Research Officer, Victorian Electoral Commission;
- **Dr Yee-Fui Ng**, Lecturer, School of Law, RMIT University; and
- **Dr Valarie Sands**, University of Melbourne and Monash University, (Research Assistant).

The members of [The Challenge of Informed Voting](#) project are:

- **Professor Rodney Smith**, Department of Government and International Relations, University of Sydney (project leader);
- **Dr Anika Gauja**, Senior Lecturer, Department of Government and International Relations, University of Sydney;
- **Mr Mel Keenan**, Principal Legal Officer, New South Wales Electoral Commission;
- **Dr Paul Kildea**, Lecturer, University of New South Wales.

There are, of course, challenges in successfully bringing about research collaboration between electoral commissions and academics. Foremost is the challenge of 'fit': a fit of research priorities between electoral commissions and academics; and a fit of researchers who come from different

institutional contexts. Added to this, are the usual challenges associated with any research collaboration (time commitments, team cohesion and effective leadership).

The final reports for both projects are now available on the ERRN website. These excellent reports show that the challenges of fostering 'thick' research collaboration are not insurmountable. Both projects also show how collaboration between academics and electoral commissions produces research and policy advice which is highly relevant to contemporary issues in Australia. In the case of *Challenges of Informed Voting*, the report deals with the timely concern of voter information, and how electors interpret and decipher information before they cast their vote. In *Enhancing Local Government*, the authors discuss how to improve the City of Melbourne's local government electoral system – their recommendations are valuable to anyone interested in Australia's third tier of government.

For these reasons, the ERRN Governance Board has decided to continue with the Research Collaboration Initiative as a scheme providing funding for two research projects on a biennial basis (with the next round of projects to be funded in 2016). This outcome should enhance both research capacity and quality in the area of electoral regulation. I thank both the project teams for their energies and efforts.

For those interested, I invite you to contact me if you would like to discuss possible research projects.

Associate Professor Joo-Cheong Tham

Director

Electoral Regulation Research Network

Electoral regulation news

Commonwealth

It has once again been an interesting six months for followers of Australian electoral regulation. While not directly related to elections, Malcolm Turnbull's elevation to the Prime Ministership in September has reopened discussion about the future of Australia's Upper House voting systems, as well as other matters in electoral reform.

Senate voting reform is receiving fresh attention. As reported in the April 2015 ERRN newsletter, in April 2015 the Commonwealth Joint Standing Committee on Electoral Matters tabled its [final report in Parliament on the 2013 federal election](#). Readers will remember that the report was preceded by the JSCEM's [interim report on Senate voting practices, which was tabled in May 2014](#), and another [interim report on electronic voting](#). While the interim report contains the bulk of the JSCEM's recommendations for sweeping reform to the Senate voting system – primarily, [the recommendation that the Senate electoral system be changed to remove Group Voting Tickets and introduce optional preferential voting above and below the line](#) – public debate in Senate reform was reinvigorated by the April 2015 final report. Specifically, with Turnbull's elevation the Coalition government seems to be testing the waters for reform; on [22 September Mal Brough, Special Minister of State, revealed that he hoped to have changes to the Senate voting system in line with the JSCEM's recommendations passed before the 2016 federal election](#). Although Prime Minister Turnbull quickly hosed down these comments, [noting that electoral reform was not on his agenda](#), Brough's statements have led the Senate crossbenchers, led by Liberal Democrat Senator David Leyonjlem, to threaten the government with 'war' over the proposed changes. In retaliation, at the September Canning by-election the Liberal Democrats did not preference Liberal candidate Andrew Hastie; [they nevertheless received 489 first preference votes](#).

The latest salvo in this debate comes from independent Senator Nick Xenophon. In October Xenophon wrote to Mal Brough [proposing several revisions to the Senate voting system](#). As reported in the *Australian*, Xenophon's proposed changes focus on OPV above the line and would [abolish group voting tickets and, instead of voters marking "1" in the box "above the line" on the Senate ballot paper for a party or group and having preferences predetermined, they would be required to number a minimum of three squares above the line](#)'. Electors voting below the line will have to number 12 boxes, instead of the existing rule to sequentially number every box.

With the Coalition heavily dependent on the Senate crossbench to pass legislation when Labor and Greens deny support, it remains to be seen whether these changes will proceed to the floor of Parliament. As noted by Antony Green, the crossbenchers have much to lose under this system, although Xenophon stands to gain if the changes are passed. [With some commentators declaring that the current Senate voting system is nothing more than a 'game of chance' at present, these discussions will have continuing implications not just for the Senate but also for the nature of electoral representation at Australian elections](#).

The JSCEM's final report was more wide ranging than the May 2014 interim report on Senate voting, and has sparked discussions about several matters. One of the more contentious matters has been the [JSCEM's recommendation to discontinue the AEC's direct enrolment / smart enrolment program](#). Under this system the AEC currently uses information it, or partner government agen-

cies, holds to update and enrol electors on the electoral roll. According to the government majority on JSCEM, the current automatic enrolment system features an [‘unacceptable vulnerability’ in that it essentially adds people to the roll without first checking that their details are correct; the Majority recommendation, not supported by the Australian Greens, requests the AEC first correspond with electors to confirm whether the proposed enrolment is correct, allowing the person to advise the AEC if the details are correct](#). Peter Brent, writing for the *Australian*, believes these changes may [‘shrink’ the electoral roll at the 2016 federal election](#).

Since the last ERRN newsletter the Commonwealth JSCEM also received two new references; the Committee is currently investigating [electoral education in Australia, and holding a broad inquiry into campaigning at polling places for federal elections](#). As part of the campaigning inquiry, the Committee is particularly interested in the ‘distribution of how-to-vote cards; campaigning by organisations other than political parties at polling places; 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’. The inquiry into electoral education is considering how electoral education in Australia can be improved, how schools provide electoral education, and how electoral commissions offer electoral education as part of their work. [Submissions for both inquiries closed in July and the Committee held public hearings in NSW, Canberra and Victoria in July and August](#).

As a result of the death of sitting MP Don Randall, the Western Australian seat of Canning required a by-election. The by-election was held on 19 September, just four days after Tony Abbot’s removal as Prime Minister, [and won by Liberal candidate Andrew Hastie](#). Tony Abbot’s removal, and the subsequent Cabinet reshuffle, also looks set to result in another by-election. Having been replaced as Treasurer by Scott Morrison, [Joe Hockey issued a statement announcing his intention to resign from Parliament](#). The date for the by-election for his seat of North Sydney is yet to be determined.

Meanwhile, alongside these electoral and voting reform discussions, there has been considerable commentary about political donations and calls for uniform, national reform of Australia’s political finance system. In July an [ABC Four Corners investigation demonstrated how the Calabrian Mafia had ingratiated itself with various senior figures in federal government; the report specifically revealed how in 2005 ‘Mafia money may have played a role in helping to lobby the then-immigration minister Amanda Vanstone to grant a visa to senior Calabrian Mafia figure’, Frank Madafferri, whose connections allegedly paid tens of thousands of dollars into the Millennium Forum, a now-defunct fundraising body connected to the Liberal Party](#). Following on from these reports, Opposition Leader [Bill Shorten called for a broad-ranging inquiry into Australia’s political donations regime](#), with the the Australian Greens, Senator Nick Xenophon, Andrew Wilkie MP and several other independents continuing their support for reform.

Calls for national, uniform reform have been accompanied by reports about well-known political figures allegedly breaching campaign disclosure rules, leading to strengthened calls for political finance reform. In July, during his appearance at the Trade Union Royal Commission, [Opposition Leader Bill Shorten admitted that he failed to disclose a \\$40,000 donation from Unibit during his 2007 election campaign. The funds were used to pay for one of Shorten’s campaigner managers under the guise of a ‘researcher’](#). Immediately following these claims, then Defence Minister Kevin Andrews was revealed to have [received a \\$20,000 donation from Clubs NSW via a donation to the Menzies 200 Club in 2013/2014; during that time Andrews led the government’s repeal of La-](#)

[bor's gambling laws](#). Having helped initiate media interest in Andrews' alleged failure to disclose, in September independent [Senator Nick Xenophon was himself accused of breaching the AEC's disclosure requirement for donations over \\$12,000 following claims he used staff from an independent supermarket chain in his last election campaign](#). The employees from several Foodland stores helped to hand out voting cards.

There have also been calls for an overhaul of the Commonwealth parliamentary entitlements system, following former Speaker Bronwyn Bishop's well-publicised use of a helicopter to travel from Melbourne to Geelong for a Liberal Party fundraiser, and subsequent resignation as Speaker. Freedom of Information requests have revealed that ['several MPs have refused to personally sign off on their expenses over a number of years'](#). To this end, the Australian Greens have proposed [legislation requiring politicians to regularly publish their taxpayer-funded entitlements; the legislation has not been introduced in Parliament](#).

The *Australian Citizenship Amendment (Allegiance to Australia) Bill* was introduced in federal Parliament. The *Bill* provides for dual citizens to lose their citizenship in two new ways; by engaging in conduct deemed to amount to a renunciation of citizenship through engaging in certain acts related to terrorism (conduct-based cessation), or by being convicted of a prescribed offence (conviction-based cessation). The Case Notes section of this newsletter provides further commentary.

[The AEC is currently conducted electoral redistributions for Western Australia, NSW, the Australian Capital Territory and the Northern Territory](#). For Western Australia, the AEC has proposed increasing Western Australia's representation from 14 to 15 seats, with a proposal to name the new seat Burt after the prominent Western Australian family's contribution to the state's legal system. For the Australian Capital Territory, in September the Redistribution Committee published its report proposing new federal electoral boundaries for the ACT's two electoral divisions of Canberra and Fraser. It also proposed re-naming the northern Division of Fraser to Fenner in honour of the distinguished scientist Professor Frank Fenner. For NSW, the Redistribution Committee is currently preparing its report. The Northern Territory redistribution has just commenced.

Victoria

The 2014 Victorian state election has raised interest in several matters relating to electoral regulation, voting systems reform and electoral reform.

Most recently, [the Andrews government has been accused of using, or 'pooling', electorate officers to campaign for Labor at the 2014 Victorian state election, rather than work for their MP](#). In Victoria current parliamentary guidelines state that electorate officers must not be used for party or political purposes. However, it is also possible for electorate officers to be used at the direction of the MP. As a result of these allegations, the [Parliament's Audit Committee is currently considering whether the 'pooling' contravenes parliamentary rules](#). The Victoria Police's Fraud Squad is also investigating the matter. At the time of writing, [the Australian has reported that an internal parliamentary report has found that pooling activity contravenes parliamentary rules](#).

The state election was followed by three by-elections for the Victorian Legislative Assembly; the first being the March 2015 by-election for Gippsland South District, as reported in the April 2015 newsletter. In August Former Premier Denis Napthine, and former Transport Minister Terry Mulder,

resigned from Parliament, triggering by-elections in their [south-western Victorian seats of South-West Coast District and Polwarth District respectively](#). Both by-elections are scheduled for 31 October. Notably, [both by-elections have a four-week early voting period; the only other Victorian election to feature an early voting period of this length was the 2012 Melbourne District by-election](#).

The Victorian Parliament's Electoral Matters Committee was also reappointed in the 58th Parliament, following its appointment in the 56th and 57th Parliaments. As is [customary the Committee received a reference to inquire into the 2014 Victorian state election, with a reporting date of 1 December. The Committee held public hearings in August and September and has received over 60 written submissions](#). There is also currently a Victorian Greens motion before the Legislative Council which, if moved, would require the Committee to inquire into Victoria's system of political donations and disclosure. The Committee completed a similar inquiry in the 56th Parliament. On 7 October the Committee also received terms of reference to inquire into electronic voting.

In local government matters, [the ERRN collaborative project *Enhancing Local Government Democracy: City of Melbourne*, led by Associate Professor Ken Coghill, Monash University, tabled its final report in September](#). The report's major focus was improving the City of Melbourne's electoral system. The report's first major finding was to limit the franchise for candidature and for voting for Lord Mayor, Deputy Lord Mayor and Councillors of to residents on the electoral roll and non-citizen residents, thereby repealing the current property franchise. The second finding was, if the City chooses not to repeal the property franchise, to extend the franchise to users of facilities and services provided by or under the authority of the MCC, including non-resident property owners and permanent employees. It is estimated that allowing only residents to vote would cut the municipalities' electoral roll by 60 percent – amounting to 41,000 non-resident owners, 20,000 company representatives and 4,000 business occupiers registered in 2012. [Since publication, Lord Mayor Robert Doyle has opposed the major recommendations, as has Rob Spence, Chief Executive of the Municipal Association of Victoria. Others, including City of Melbourne Councillor Stephen Mayne, have suggested that a residents-only roll could result in more 'left leaning' council administrations](#).

Also in local government matters, the VEC has commenced planning for Victoria's 2016 local government elections, releasing its draft services plan in September. As part of this the VEC is planning to run 80, not 79, local government elections, [due to the former Liberal government's poll to remove Sunbury from Hume City Council – the separation was timed so that Sunbury would have its own council election in 2016](#). In April the Andrews Government appointed a team of transition auditors, led by Frank Vincent QC, to examine 'Sunbury out of Hume'; [in September the audit team found that the separation of Sunbury from Hume is so problematic at the present time that it should not proceed, for a variety of financial and administrative reasons. Local Government Minister Natalie Hutchens is currently considering the transition auditors' report before announcing her final decision on the split](#).

The VEC also tabled its [report to Parliament on the 2014 Victorian state election](#). In July, the Parliamentary Library Research Service also published its [report on the state election](#).

New South Wales

While the results and immediate implications of the 2015 NSW state election were discussed in ERRN's April newsletter, there is continuing interest in the NSW Electoral Commission's iVote remote voting system.

iVote recorded 283,000 votes at the 2015 NSW state election. However, there is ongoing concern about the security of the system, as a result of two issues. [Readers will recall that the NSW Electoral Commission was forced to shut down iVote for six hours during the early voting period, following complaints from computer scientists working for the University of Melbourne that the system was vulnerable to the FREAK hack, based on the external Javascript code used by the NSW Electoral Commission to query users about their iVote experience.](#) The hack was quickly repaired. In addition, readers will also recall that nearly [20,000 iVote electors voted with incorrect ballot papers, because two parties were left out above the line for two days of voting.](#) While the April newsletter reported that the Animal Justice Party would challenge the election result on this basis, Animal Justice Party candidate Mark Pearson ultimately won the last available Legislative Council seat.

Since the election the NSW Electoral Commission has widely promoted iVote, which is now the world's largest remote voting platform. According to media reports, the NSW Electoral Commission is looking to increase iVote usage in favour of postal voting, which faces increasing logistical constraints as a voting medium due to Australia Post's recent commitment to implement a three-day mail service. [Speaking at a recent 'Technology in Government Summit' in Canberra in August, the NSW Electoral Commission's Chief Information Officer, Ian Brightwell, said that the NSW Electoral Commission expects iVote's share of total votes to increase to 15 percent within the next two election cycles.](#)

[The NSW Joint Standing Committee on Electoral Matters is conducting an inquiry into the 2015 NSW state election. At the time of writing the Committee had received 22 written submissions and was planning public hearings.](#) In addition to this inquiry, [the Committee also has a reference to inquire into the Final Report of the Expert Panel – Political Donations.](#) Terms of reference require the Committee to examine the recommendations made in the Final Report of the Expert Panel - Political Donations relating to the *Election Funding, Expenditure and Disclosures Act 1981* (NSW); and the government's response to the recommendations made in the Final Report of the Expert Panel – Political Donations.

[In July concerns about enrolment fraud resulted in Labor MP for Wollongong Noreen Hay standing aside as NSW Opposition Whip.](#) The Australian Federal Police (AFP) are investigating claims of alleged branch stacking and electoral fraud, including allegations that some people falsified their details to help Ms Hay win a pre-selection ballot ahead of the 2015 NSW state election. The AFP's investigation continues.

There have also been calls for local government reform in NSW following recent coverage of events in Auburn and Hurstville Councils. [In Auburn, a group of councillors — including high-profile deputy mayor Salim Mehajer — are accused of a failure to address the appearance of conflicts of interest in council planning decisions. Mr Mehajer is apparently part of the 'super six' group of councillors of 10 Auburn councillors, who allegedly vote in favour of each other's business interests.](#) Following recent controversies around Mr Mehajer, [Premier Mike Baird has stated that there is a need to look at how local governments are elected and how they make decisions.](#) To this

end, in September NSW Local Government Minister Paul Toole introduced the [Local Government Amendment \(Councillor Misconduct and Poor Performance\) Bill 2015](#). The *Bill* modifies the legislative scheme for dealing with councillor misconduct and poor performance and council maladministration. Debate continues in the Legislative Assembly. In the Legislative Council, in August Peter Primrose MLC introduced the [Local Government Amendment \(Pecuniary Interests\) Bill 2015](#). The *Bill* will remove provisions authorising councillors to be present and take part in meetings on matters in which they have a pecuniary interest. Debate is presently adjourned in the Legislative Council.

On 28 September the [Independent Commission Against Corruption \(ICAC\) Amendment Bill 2015 \(NSW\) was passed by the NSW Parliament](#). The *Bill* generally broadens ICAC's powers. While the limits that were identified in *ICAC v Cunneen*, will largely continue, as anticipated ICAC 'will be able to investigate and make finding of corruption in respect of the some actions of private citizens (rather than just government officials). These powers apply take in 'serious' matters, including collusive tendering, fraud in relation to applications for licences or permits facilitating the exploitation of mineral resources, and dishonestly obtaining public funds for private advantage.

While he awaits the outcome of his High Court challenge to NSW's electoral funding provisions, [the NSW Supreme Court has agreed to expedite a challenge to ICAC's powers by Jeff McCloy, property developer and former Newcastle lord mayor. McCloy, who is seeking to have Commissioner Megan Latham removed from the inquiry on the grounds of bias, has been investigated by ICAC for alleged breaches of the electoral funding laws](#). McCloy is also trying to stop the release of ICAC's report on the alleged breaches, [Operation Spicer, which has led 10 Liberal members of the NSW Parliament to resign or move to the cross benches. The case will be heard in mid-November](#).

The Case Notes section of this newsletter reports on several cases relating to the NSW ICAC – *Independent Commission against Corruption v Cunneen (High Court)*, *Duncan v Independent Commission against Corruption (High Court)* and two challenges to the 2015 NSW state election heard in the NSW Supreme Court.

Queensland

A potential legislative stalemate in the Queensland Parliament has been avoided with [Queensland Police dropping their investigation into two charges of domestic violence against independent MP Billy Gordon. One of the women involved in the claim has subsequently been charged for attempting to blackmail Mr Gordon](#).

[Premier Anastasia Palaszczuk has announced that the Queensland Crime and Misconduct Commission will conduct an inquiry into Queensland's political donations regime, and the way tenders and contracts are awarded](#). Terms of reference are yet to be announced. The announcement comes at a time of renewed debate about Queensland's political finance system and 'cash for access' in the lead up to the 2014 Queensland state election. [Both major parties engaged in similar behaviour, as reported by the Brisbane Times, 'donation disclosure returns posted by the LNP show Queensland businesses and industry figures were happy to pay between \\$3300 and \\$22,000 for membership packages, which grants access to events featuring various MPs throughout the year'](#). The Labor government also benefited, with events at its recent State Conference raising \$300,000. Debate about the inquiry's terms of reference also continues in Parliament: while the

crossbench and the LNP Opposition have called for a broad-ranging inquiry, Premier Palaszczuk seems to favour a more focused inquiry, looking specifically at the LNP's fundraising activities; this follows her agreement to hold the inquiry, in return for independent MP Peter Wellington's support.

The Queensland Parliament has completed, and is inquiring into, two matters relating to electoral reform. In late 2014 the Legal Affairs and Community Safety Committee was tasked with reviewing the [Electoral and Other Legislation Amendment Bill 2015](#). The key objectives of the *Bill* were to give effect to the Labor government's election commitment to amend the *Electoral Act 1992*, winding back the former LNP's Government legislative changes. [The major changes involved reinstating the \\$1,000 gift threshold amount, backdated to 21 November 2013, removing voter proof of identity requirements, and facilitating real time disclosure of political donations, alongside other disclosure and administrative arrangements. The Committee 'was unable to reach a majority decision on whether the Bill be passed and, therefore, in accordance with section 91C \(7\) of the Parliament of Queensland Act 2001, the question on the motion failed'. Despite varying opinions on whether the Bill should be passed, the Committee reached consensus on the Bill's providing for the CCC chair to access a judicial pension.](#)

More recently, the Finance and Administrative Committee has been asked to inquire into whether the Queensland Parliament should have fixed four-year terms. On 17 September 2015 Ian Walker MP, Shadow Attorney-General and Shadow Minister for Justice, Industrial Relations and Arts, introduced the [Constitution \(Fixed Term Parliament\) Amendment Bill 2015](#) and the [Constitution \(Fixed Term Parliament\) Referendum Bill 2015](#). These *Bills* have been referred to the committee for detailed consideration. The Parliament resolved that the Committee consider these *Bills* as part of its general inquiry into four year terms and report by 9 November 2015. In support of the inquiry, the Committee has released an issues paper and will be holding public forums in Brisbane and regional areas in September and October.

The Palaszczuk government has committed to holding a parliamentary inquiry into whether Queensland should adopt human rights legislation. The Case Notes section discusses this further. At the time of writing the government has not moved a motion to refer the inquiry to a parliamentary committee.

South Australia

As reported in April's newsletter, a [Select Committee of the Parliament of South Australia is inquiring into the 2014 South Australian state election](#). The Committee has received several submissions and conducted public hearings.

Premier Jay Weatherill has also unveiled a revised code of conduct for South Australian MPs and lobbyists, following on from the expenses controversies surrounding the former federal Speaker Bronwyn Bishop and South Australian Tourism Minister Leon Bignell. [Mr Bignell has been heavily scrutinised for spending \\$180,000 on ministerial travel in 2013-2014, including the purchase of a \\$248 meal whilst in Glasgow for the Commonwealth Games](#). Following the coverage of Mr Bignell, Attorney-General John Rau introduced the [Parliamentary Remuneration \(Determination of Remuneration\) Amendment into Parliament](#). The *Bill* makes broad changes to how South Australian MPs are compensated, including removing an annual travel allowance in exchange for an increase to their base salary which will be determined in coming months by the independent

Remuneration Tribunal. Mr Weatherill is also planning to increase the South Australian Governor's salary.

The Parliament is also considering Legislative Council voting reform. The *Advertiser* has reported that Attorney-General John Rau is planning to reintroduce his amendments to the Legislative Council voting system, [to introduce a system in line with the Sainte Lague voting system](#). Sainte Lague is a proportional representation voting system which has no quota and which aims to elect candidates based in approximate proportion to the number of votes won by their party. Also in the Legislative Council, in September the Greens Mark Parnell MLC has introduced the [Electoral \(Legislative Council\) Optional Preferential Voting Bill 2015](#), which in contrast to the Attorney-General's *Bill* proposes a system of optional preferential voting above the line for the Legislative Council. This *Bill* lapsed in the 52nd Parliament.

The South Australian Electoral Commissioner, Kaye Mousely, retired in May. Her replacement will be determined by the Statutory Officers Committee, whose choice will then be recommended to the Governor by a resolution of both houses of Parliament. Mr David Gully was appointed Acting Electoral Commissioner.

South Australian ERRN convenor Jenni Newton-Farrelly, electoral specialist at the Parliament of South Australia, also published a book on Australia's electoral redistribution process. [Fairness and Equality – Drawing Election Districts in Australia examines whether the process of drawing election maps in Australia ensures fair political representation and competition. The ERRN will launch Jenni's book in late 2015.](#)

Western Australia

[In October the Western Australian Corruption and Crime Commission \(CCC\) found that Perth Lord Mayor Lisa Scaffidi engaged in serious misconduct by failing to disclose a \\$US36,000 \(\\$50,956\) trip Ms Scaffidi took to the Beijing Olympics in 2008, courtesy of BHP Billiton.](#) While the CCC did not suggest that Ms Scaffidi had acted corruptly, the CCC did find that [Ms Scaffidi 'failed in her duties by not disclosing the gift in her annual return, along with tickets to the 2009 Leeuwin Concert from BHPB and accommodation for the 2008 Broome Cup which she accepted from property management company Hawaiian Investments'](#). After accepting hospitality and accommodation in Broome, Ms Scaffidi voted to approve a business feasibility grant to a consortium which included Hawaiian. Ms Scaffidi is currently seeking to win a third term as major in local government elections on 17 October.

Across Western Australia, local government ordinary elections will be held on 17 October 2015. [The Western Australian Electoral Commission is conducting 82 postal elections and six voting in person elections on behalf of 88 local governments across Western Australia.](#)

The Western Australian Electoral Commissioner, David Kerslake, recently called for direct enrolment to address the decline in electoral enrolment as a proportion of the eligible voting population. Referring to Australian democracy as 'under siege', [the Western Australian Electoral Commission's Annual Report notes a widening divergence between the Western Australian and federal electoral rolls, 'with the number of West Australians enrolled to vote at federal elections, but not state ones, grew from 25,7000 in June 2013 to 114,796 in March 2015'](#). As reported by the ABC, the



Commission fears the number could grow to more than 200,000 by the time of the next state election in March 2017. Electoral Affairs Minister Peter Collier has previously supported direct enrolment.

Tasmania

[Elections for the Tasmania Legislative Council Divisions of Derwent, Mersey and Windermere were held in May 2015. In Derwent Labor candidate Craig Farrell was returned. In Mersey, independent Mike Gaffney was returned. In Windermere, independent Ivan Dean was returned.](#)

[The Tasmanian Parliament's Legislative Council Sessional Committee on Government Administration, B, is conducting an inquiry into the Tasmanian Electoral Commission, with particular reference to the administration of the *Electoral Act 2004 \(Tas\)*, resources available to the Tasmanian Electoral Commission and other deficiencies with the *Electoral Act 2004 \(Tas\)*. The Committee has held public hearings and received 33 submissions. \[The Tasmanian Electoral Commission's submission is noteworthy, addressing the Commission's concerns around its funding arrangements as a result of Tasmania moving to a quadrennial local government electoral cycle. It also discusses campaign finance, electronic voting and Tasmania's Hare Clark electoral system, as well as administrative issues relating to the handling of lost or damaged ballot papers.\]\(#\)](#)

Northern Territory

[Previous ERRN newsletters have covered allegations of enrolment fraud in the federal Division of Indi in the lead up to the 2013 federal election.](#) These allegations have a link to the Northern Territory. [The independent Member for Indi, Cathy McGowan's, niece Maggie McGowan and another campaign worker, Sophia Fuschen, are due to appear in the Melbourne Magistrates' Court on a charge giving false or misleading information to the Australian Electoral Commission.](#) Maggie McGowan is a solicitor in the Northern Territory. As reported by the ABC, it is believed the charges relate to Maggie McGowan enrolling falsely in Indi when she was in fact living in the Northern Territory. The offence carries a maximum of 1 year's imprisonment.

There have been renewed calls for reform of the Northern Territory's political finance system following a report documenting inadequate reporting. [In May the Northern Territory Electoral Commission, in conjunction with auditors BDO, conducted an audit of political disclosure returns for the 2012-2013 and 2013-2014 financial years. It found that late lodgements and inadequate reporting meant there was a possibility that the returns did not reflect the financial affairs of the parties. As reported by the ABC, the report also noted that 78 per cent of 2013-14 donor returns were lodged after the required deadline and that no political party recorded gifts-in-kind.](#)

Australian Capital Territory

With the 2016 ACT elections approaching, there has been discussion about the ACT's political donations regime, centred on the proposal to build a light rail line. In March the [ACT Government shortlisted two international consortia to build the Capital Metro light rail project](#) from Gungahlin to the city. [One of the consortia, the Plenary Group, has been shown in returns to the Australian Electoral Commission and ACT Elections to have made six donations totalling \\$12,440 to the ACT Labor Party over the past four years. The ACT Labor Party has denied undue influence as a result of the donations.](#)

[These discussions follow major changes to the ACT's campaign finance laws, which came into effect in April.](#) The changes include the removal of the \$10,000 cap on donations for ACT elections, the removal of the restriction on receiving donations for ACT election purposes from organisations and persons not enrolled in the ACT, an increase in election funding for parties and non-party candidates from \$2 per vote to \$8 per vote at the 2016 ACT Assembly election. The changes also decreased the electoral expensiture cap from \$60,000 to \$40,000 per candidate and third party campaigner for the 2016 election.

Forthcoming events

'Electronic voting in practice at two State elections'

Thursday 22 October 2015
Melbourne Law School, University of Melbourne

Speakers: **Mark Radcliffe**, iVote Manager, NSW Electoral Commission
Simon Hancock, IT Manager, Victorian Electoral Commission



With digital transactions increasingly prevalent in many aspects of our lives, it's not surprising that there is a call for electronic voting. It's common for people to say, 'If I can transfer money online, why can't I vote that way?' Electronic voting raises important issues. In this seminar, speakers from the New South Wales and Victorian Electoral Commissions will explain their States' different approaches to electronic voting in two recent State elections.

'Independent Electoral Administration in Australia – Contemporary challenges and opportunities'

Friday 30 October 2015
ANU College of Law, Canberra ACT
Registrations: coast.law@anu.edu.au
Speaker: **Tom Rogers**, Electoral Commissioner

Events of recent years have highlighted the increasing difficulties faced by Australian electoral administrators in conducting what are the largest logistical exercises faced by a country in peacetime. The voiding by the Court of Disputed Returns of the 2013 Senate election in Western Australia led to lengthy processes of external review of, and introspection within, the Australian Electoral Commission (AEC), culminating in its recent publication of a Corporate Plan for 2015-19 which has been greatly influenced by lessons learnt from those events.

At the same time, the environment in which federal elections are conducted is arguably becoming more difficult, with polling taking place over a longer period due to the ever-increasing use of early voting, and with large paper-based operations of the type which are at the heart of elections becoming rarer and rarer in government administration.

At this event, Mr Tom Rogers, Electoral Commissioner, will reflect on a number of these issues. The Electoral Commissioner is the full-time Chief Executive of the AEC, and as an independent statutory officer has extensive responsibilities and powers under the Commonwealth Electoral Act 1918 and associated legislation.

Mr Rogers was appointed to the position in December 2014, having acted in it for the preceding 12 months, and having served since January 2012 as Deputy Electoral Commissioner. He was the AEC's State Manager and Australian Electoral Officer for NSW from 2007 to 2009, and has also held appointments as Director of Programs and later Executive Director of the Australian Institute of Police Management. Prior to these civilian appointments, Mr Rogers had a distinguished career in the Australian Army.



Clive Palmer, Palmer United Party



Silvio Berlusconi, Forza Italia

'Plutocrat parties: A comparative study of Clive Palmer and Silvio Berlusconi's parties'

Friday 23 October 2015

Sandy Bay Campus, University of Tasmania

Speakers: **Dr Glen Kefford**, Lecturer in Politics and International Relations, University of Tasmania
Dr Duncan McDonnell, Senior Lecturer in the School of Government and International Relations, Griffith University

Plutocrat parties - personal parties created by wealthy individuals - are on the rise in both old and new democracies. Examples include Silvio Berlusconi's Forza Italia in Italy, Andrej Babis's ANO in the Czech Republic, Frank Stronach's Team Stronach in Austria, Thaksin Shinawatra's Thai Rak Thai party in Thailand and Clive Palmer's Palmer United Party in Australia. To date however, there have been no comparative studies of such parties based on original research. In this seminar we seek to establish what distinguishes these parties both from other types of parties and from one another. We focus on two cases: the archetypal 'plutocrat party', Forza Italia, and one of the most recent instances, the Palmer United Party. Based on interviews with internal party figures and analysis of party documents, the paper examines how these parties are organised, the role of the leader and how this affects the party. Finally, the paper discusses which factors may determine the success/failure of plutocrat parties and we consider what their emergence means for party theory.

'ERRN Biennial Electoral Regulation Workshop'

5-6 November 2015

Gilbert + Tobin Law Centre, University of NSW

*Event is invite only

The ERRN announces that the fourth biennial workshop will be held in Sydney this year by our NSW Convenors, Dr Anika Gauja and Dr Paul Kildea. The workshop will bring together electoral commission officials and law and political science academics to explore a range of important issues in electoral regulation. A number of papers written by participants will be circulated prior to, and be presented during the workshop.

'The Challenges of Convenience Voting'

4 November 2015

University of Sydney

*Event is invite only

The workshop will address the challenges of rising early voting at Australian and international elections, focusing on empirical, normative and campaign-related research.

ERRN Event Reports

'Citizens Coerced: Citizens United and the Growing Incidence of Political Intimidation in the US Workplace'

Tuesday 6 October 2015

Melbourne Law School

Speaker: **Professor Paul Secunda**, Marquette Law School



Professor Paul Secunda
Marquette Law School

In 2010, the United States Supreme Court handed down its controversial campaign finance decision in *Citizens United*. Although the case opened up the supply of money that candidates and their political parties had access to from employers and others during election campaigns, it also has had a less-noticed impact on how employers engage their employees in the workplace on political issues. There have been a number of well-publicised instances where politicians were asking their corporate supporters to push their employees into supporting the employer's chosen candidate in a myriad of ways.

In his presentation Professor Secunda argued for the adoption of a federal Workplace Freedom Act, modelled on existing state laws that prevent employers from using captive audience meetings during union election campaigns. Such laws would return political autonomy to

American workers by prohibiting employers from using their unequal power in the workplace to

coerce employees to take part in politicking or voting conduct in which they do not wish to engage.

'Who Votes Early in Victoria'

Thursday 20 August 2015
Melbourne Law School

Speaker: **Nathaniel Reader**, PhD Candidate, Swinburne University of Technology



Nathaniel Reader
Swinburne University of
Technology

Early voting is one of the fastest growing trends in Australian electoral participation. Victoria has seen some of the most dramatic increases; nearly 30 percent of Victorians voted early in person at the 2014 Victorian state election. In this presentation Mr Reader discussed his research into the demographic correlates of early voting in person at recent Victorian state elections. The presentation also addressed Maria Rigoni's unsuccessful Victorian Supreme Court petition to overturn the 2014 Victorian state election.

Twilight Seminar: 'Engaging Voters in Australia – Capturing Hearts and Minds'

Thursday 20 August 2015
The Constitutional Centre of Western Australia, West Perth

Speakers: **Professor David Denmark**, University of Western Australia,

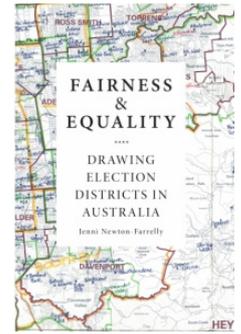
Dr Harry Phillips, Parliamentary Fellow (Education), Honorary Professor Edith Cowan University, Adjunct Professor Curtin University

Chair: **Chris Avent**, Deputy Electoral Commissioner (WA Electoral Commission)

In this seminar Professor Denmark and Dr Phillips discussed their respective work on civics education and electoral engagement. Professor Denmark is the author of *Generations and Democratic Attitudes in Advanced Democracies: Australia in Comparative Perspective*. Dr Phillips is the author of *The Civics Quest! Past, Present and Future*.

Recent Publications

ERRN South Australian convenor Jenni Newton-Farrelly recently published a book on Australia's electoral redistribution process. [Fairness and Equality – Drawing Election Districts in Australia](#) examines whether the process of drawing election maps in Australia ensures fair political representation and competition. The ERRN will launch Jenni's book in late 2015.



The final report for the ERRN's research collaboration initiative, '[Enhancing Local Government Democracy: City of Melbourne Project](#)', was published in September and is available on the ERRN website.

The final report for the ERRN's research collaboration initiative, '[The Challenge of Informed Voting](#)', was published in September is available on the [ERRN](#) website.

Since April's newsletter ERRN has also published two new working papers; Lisa Hill's '[For Compulsory Voting](#)', which offers a general defence of Australia's compulsory voting laws, and Nathaniel Reader's '[Who votes early in Victoria](#)', which examines the demographic correlates of early voting at the 2006, 2010 and 2014 Victorian elections.

ERRN Working Papers Series

Working Paper 31

['Who votes early in Victoria'](#)

Nathaniel Reader, PhD Candidate, Swinburne University of Technology

This article investigates the demographic correlates of early voting in person at the 2006, 2010 and 2014 Victorian state elections. Between 2006 and 2014 the rate of early voting in person increased 300 percent at Victorian state elections. These elections followed the first reforms to Victoria's electoral legislation in 100 years, including amendments to the provisions for early voting in person. Using data from the 2006 and 2011 Australian Census of Population, in conjunction with voting data from the Victorian Electoral Commission, the article demonstrates a positive association between the level of early voting in person in a Legislative Assembly District and the number of people who changed address in the five years preceding the relevant Census. The article also demonstrates a negative association between early voting in person in a Legislative Assembly District and two demographic characteristics; the number of people born overseas, and a weaker association with the number of people who report having no religion.

Case Notes

Independent Commission against Corruption v Cunneen (High Court)

Cunneen, the NSW Deputy Senior Crown Prosecutor, allegedly advised her son's girlfriend, who had had a car accident, to pretend she was having chest pains so that the police would not give her a breath test.

The Independent Commission against Corruption (ICAC) launched an investigation of this incident. Cunneen challenged its power to do so.

A majority of the High Court (French CJ, Hayne, Kiefel and Nettle JJ) ruled that the ICAC had no power to conduct an inquiry into allegations that were made against Cunneen because the alleged conduct was not 'corrupt conduct' as defined in s 8(2) of the *Independent Commission Against Corruption Act 1988* (NSW) ("the ICAC Act").

Section 8(2) of the ICAC Act provides that 'corrupt conduct' is 'any conduct of any person ... that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official' and which could involve certain kinds of misconduct listed in the sub-section, including perverting the course of justice.

The majority held that the expression 'adversely affect' in s 8(2) refers to conduct that adversely affects or could adversely affect the probity of the exercise of an official function by a public official. The alleged conduct was not conduct that could adversely affect the probity of the exercise of an official function by a public official, as it was not undertaken as part of Cunneen's official functions as a Crown Prosecutor. The alleged conduct was therefore not corrupt conduct within the meaning of s 8(2) of the ICAC Act and ICAC had no power to conduct the inquiry.

Duncan v Independent Commission against Corruption (High Court)

In *ICAC v Cunneen* [2015] HCA 14 discussed above, the High Court held that 'corrupt conduct' within the ICAC's investigative jurisdiction under the ICAC Act does not encompass conduct which does not adversely affect the probity, even if it adversely affects the efficacy, of the exercise of the functions of a public official.

Shortly after *Cunneen* was handed down, the NSW Parliament amended the ICAC Act to limit its impact by inserting a new pt 13 to sch 4, which explicitly expanded the definition of conduct prior to 15 April 2015 by deeming it to include 'conduct that adversely affects, or could adversely affect, the efficacy (but not probity) of the exercise of official functions'. This section purports to validate ICAC's decisions regarding corrupt conduct following the High Court's decision in *Cunneen*.

Previously in July 2013, ICAC published a report containing findings that Duncan had engaged in 'corrupt conduct' within the meaning of s 8(2) of the ICAC Act. It was agreed that Duncan's conduct which was the subject of the ICAC's findings did not affect the probity of the exercise of the functions of a public official.

Mr Duncan commenced Supreme Court proceedings, seeking a declaration that the finding of

corrupt conduct on his part was a nullity because, in making it, ICAC had exceeded its jurisdiction. On 29 July 2014 Justice McDougall dismissed Mr Duncan's application. Mr Duncan applied to the Court of Appeal for leave to appeal from Justice McDougall's decision.

Following the High Court's judgment in *Cunneen*, Mr Duncan sought final orders in his favour in the leave proceedings. Duncan contended that, following *Cunneen*, ICAC's original finding against him was invalid, and that pt 13 of sch 4 (specifically cll 34 and 35) is itself invalid.

The High Court unanimously rejected the challenge to the validity of the newly inserted pt 13 in sch 4 of the ICAC Act.

The High Court held that cll 34 and 35 of Pt 13 deem those acts done by the respondent before 15 April 2015 to be valid to the extent that they would have been valid if the definition of corrupt conduct in s 8(2) of the ICAC Act encompassed conduct that adversely affected the efficacy, but not the probity, of the exercise of official functions. A majority of the Court (French CJ, Kiefel, Bell and Keane JJ) held that cll 34 and 35 of Pt 13 operate to alter the substantive law as to what constitutes corrupt conduct.

Gageler J accepted that the ICAC's actions remain invalid, and held that cl 35 'does no more' than provide that ICAC's authority extends to include the authority to have done the historical acts which, but for the amendments, would have been in excess of power. Nettle and Gordon JJ would have preferred to not characterise pt 13 as effecting a change in the law, but rather as creating a 'new or different legal regime' within which the concept of corrupt conduct is 'taken to be expanded' to cover conduct that went to the efficacy but not probity of official functions.

The whole Court held that cll 34 and 35 of Pt 13 retrospectively confer jurisdiction upon the ICAC. In doing so, the provisions attach new legal consequences and a new legal status to things done which otherwise would not have had such legal consequences or status.

Jones v Pearson & the NSW Electoral Commissioner

On 28 March 2015 the NSWEC conducted the quadrennial NSW State General Elections. While it was clear on that night that the Coalition had been returned to Government, the 93 Legislative Assembly seats were not formally declared until 8 April 2015; and the 21 seats of that half of the Legislative Council in contention on 16 April 2015.

According to s 157(4) of the *Parliamentary Electorates and Elections Act 1912* (NSW) (PE&E Act), the return of the writs to the Governor meant that any challenge to the result in the Court of Disputed Returns had to be made by the beginning of June 2015. On Friday 29 May 2015, Mr Peter Jones, leader of the 'No Land Tax Campaign' (NLTC), lodged a petition in the Court of Disputed Returns.

The challenge to the election result was based on claims that there was interference with NLTC employees by the Liberal Party, Macquarie Radio Network and the Australian Labor Party; and a defamatory smear campaign by Macquarie Radio Network. On the basis of these allegedly illegal acts, Mr Jones petitioned the Court to make orders that:

- he be declared elected and public funding be paid to NLTC for its election campaign expenditure; or
- the Legislative Council result be declared void, a new election held and election campaign expenditure be reimbursed; or
- the party receive public funding for election campaign expenditure; and
- costs be paid by the Crown.

As he had been the 21st candidate elected to the Legislative Council, the petition named Mr Mark Pearson (representing the Animal Justice Party) as First Respondent, and the Electoral Commissioner as Second Respondent.

Under s 164 of the PE&E Act, the Court of Disputed Returns may void an election for 'illegal practices'; however, what constitutes such an illegal practice is not set out in the Act. As Mr Jones did not make any claims of misconduct on the part of the NSWEC, nor allege any breaches of the PE&E Act, on 23 June 2015 the Electoral Commissioner filed a motion to have the matter dismissed.

Two days later Mr Jones filed a motion for discontinuance, but the matter could not proceed immediately as he had failed both to publish his petition in the Government Gazette and in a newspaper notice and to publish his notice of discontinuance as required by the Supreme Court Rules. Therefore the matter was listed for directions or hearing on 27 July 2015, when Mr Jones' legal representative acknowledged that the petitioner had 'misfired' and still had not complied with the publication requirements.

In the judgment on 14 September 2015, the judge:

- granted leave for Mr Jones to discontinue; and
- ordered that Mr Jones pay the costs of all of the parties.

The question of costs is yet to be decided.

Of significance to the NSWEC, his Honour stated that none of the matters alleged in the petition could, if proved, have constituted 'illegal practice' within the meaning of s 164 of the PE&E Act, and that this should have been obvious to Mr Jones. His Honour also observed that there was a 'strong likelihood' that the Commissioner's strike-out motion would have been successful.

Alison Byrne (NSW Electoral Commission) v Robert Smith (the Fishing Party)

On 13 July 2015 the prosecution of Robert Smith, the Chairman of the Fishing Party, was heard in the Downing Centre Local Court, Sydney. Mr Smith was charged with the offence of failure to lodge a declaration for the disclosure period ending 30 June 2013, in contravention of s 96H(1) of the *Election Funding, Expenditure and Disclosures Act 1981* (EFED Act).

The primary issues in dispute were:

- whether the defendant was in fact the party agent, and therefore responsible for

lodgement of the declaration on behalf of the Fishing Party; and

- the date that the Fishing Party's declaration was due to be lodged.

In relation to the first issue, Mr Smith argued that he was ineligible to be the party agent for the Fishing Party, and therefore could not be responsible for the lodgement of the declaration, because:

- there was no signed acceptance of the appointment of the defendant as party agent;
- Mr Smith was ineligible to be a party agent because he also holds the office of Secretary of the Fishing Party; and
- Mr Smith had not completed the training prescribed by the regulations for appointment as such an agent.

The prosecutor submitted that, as Mr Smith was 'deemed' party agent by the default provision in s 41(2) of the EFED Act, the provisions relating to the 'appointment' of a party agent were irrelevant.

In relation to the second issue, Mr Smith argued that the time limit for lodgement only applies to 'disclosure'. Mr Smith submitted that his letter of 27 March 2013 sent to the NSWEC indicating that the Fishing Party *expected* to be making a nil disclosure for the disclosure period ending 30 June 2013 satisfied the disclosure requirement. In response, the prosecutor argued that amendments to the EFED Act which commenced in November 2012 required a declaration to be lodged with the Election Funding Authority even if it would not contain any such disclosures.

Based upon the prosecution's evidence, the defendant made a 'no case submission' and Grogin LCM then indicated that he was satisfied that Mr Smith had a prima facie case to answer. Holding that the EFED Act clearly specifies that disclosures are to be made in a declaration lodged in the approved form and manner, his Honour rejected Mr Smith's contention that his letter had amounted to 'disclosure'. His Honour therefore found that Mr Smith had been required to lodge a declaration by 23 September 2013, and had failed to do so.

His Honour found that Mr Smith was deemed to be the party agent after the resignation of the previous party agent, by operation of the s 41(2) of the EFED Act. As the defendant was not 'appointed' as party agent, the provisions of the EFED Act relied on by him did not apply.

The particular importance of the decision was that Mr Smith's request for a bond under s 10 of the *Crimes (Sentencing Procedure) Act 1999* was rejected. His Honour held that Mr Smith showed a lack of contrition in rigorously contesting the offence; and emphasised the importance of the transparency of political parties in relation to the declaration of political donations, regardless of the size or financial means of the political party. Mr Smith had acted 'with an air of ignorance' in failing to make a declaration, despite the 'obvious requirement' to do so, as clearly communicated by the NSWEC.

Overall, his Honour emphasised that ignorance of the law is no excuse in failing to comply with the requirements of the EFED Act. While he took into account Mr Smith's age and limited financial means - and expressed doubt that he would ever re-offend - his Honour also considered that general and specific deterrence were important considerations; in those circumstances, a s 10 bond

would not be appropriate. Mr Smith was convicted of the offence and sentenced to pay a fine of \$2,750.00, together with the prosecutor's professional costs in the sum of \$5,000.

Mr Smith has lodged an appeal against his conviction and the matter was listed for mention at the Downing Centre District Court on 23 September 2015.

Rigoni v Victorian Electoral Commission

Ms Maria Rigoni, a Palmer United Party candidate for Northern Metropolitan Region, failed to win a seat in the Victorian Parliament's Victorian Legislative Council at last November's election.

Rigoni brought proceedings in the Victorian Supreme Court arguing that the Victorian Electoral Commission (VEC) did not comply with the *Electoral Act 2002* (Vic) because it did not require early voters to make a declaration that they were unable to vote on election day.

Under section 99 of the *Electoral Act 2002* (Vic), a voter may apply to vote early to an election manager or an election official at an early voting centre, while section 65(2)(a)(i) allows the VEC to designate appropriate voting centres as early voting centres.

Rigoni was seeking to overturn the whole State election.

The judge held that the Court of Disputed Returns does not have power to declare a general election void and that Rigoni did not have standing to dispute the result of a general election. She was only entitled to challenge the election for the Legislative Council Northern Metropolitan Region (where she stood as a candidate) and the election of members for the Legislative Assembly district of Ivanhoe and the Legislative Council Eastern Metropolitan Region (where she was enrolled to vote).

Garde J found that in some instances, early voting was not conducted in accordance with ss 98(b) and 99(1) of the Act. Nevertheless, in these instances, the votes of the electors who voted early are valid. Section 112(1) sets out various deficiencies that lead to the informality and invalidity of a ballot-paper. The failure by an elector to give a declaration under s 98(b) is not listed amongst them. Accordingly, any failure of the VEC to comply with ss 98(b) and 99(1) of the Act did not affect the result of any election.

Donohue v Victorian Electoral Commission

Mr Gerard Donohue, an Independent candidate for the Gippsland South by-election, was seeking to overturn the Victorian election results on the basis of the lack of a declaration for early votes, as well as the alleged illegality of the election writs.

Garde J struck out the request made by the petitioner for production of the election writs on the basis that it was an abuse of process and was not proven or substantiated by any or any acceptable evidence.

Regarding early voting, the judge adopted his decision in *Rigoni* discussed above. As a result, the Court of Disputed Returns must not declare the election to be void.



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.

Legislation

Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

The *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* provides for dual citizens to lose their citizenship in two new ways:

- by engaging in conduct deemed to amount to a renunciation of citizenship through engaging in certain acts related to terrorism (conduct-based cessation), or
- by being convicted of a prescribed offence (conviction-based cessation).

Conduct-based cessation: There are two methods a dual citizen can lose their citizenship by their conduct. First, they can commit any of the offences listed in section 33AA. These offences are deemed to be inconsistent with allegiance to Australia. Secondly, dual citizens would lose their Australian citizenship if they fight for or are in the service of a declared terrorist organisation outside Australian territory.

Conviction-based cessation: Section 35A provides for citizenship loss where a dual citizen is convicted of prescribed offences deemed to demonstrate a lack of allegiance to Australia.

The loss of citizenship is said to operate 'automatically', upon the relevant conduct or conviction. It is uncertain who is to make this determination.

The *Bill* expressly provides that the rules of natural justice do not apply in relation to the exercise of ministerial powers and makes no provision for merits review. Judicial review is available for decisions that might be made as a result of the cessation or renunciation of citizenship. In a judicial review action, the court would consider whether or not the power given by the *Citizenship Act 2007* (Cth) has been exercised according to law.

In September 2015, the Parliamentary Joint Committee on Intelligence and Security (PJCIS) reported on their inquiry into the *Bill*. The Committee made certain recommendations to limit the operation of the *Bill*. For instance, for the conviction-based cessation, the Committee recommended that instead of an automatic loss of citizenship, a conviction with a sentence of at least six years' imprisonment triggers a ministerial discretion to revoke citizenship. On the other hand, the Committee also recommended a broadening of the *Bill*, proposing that the conviction-based cessation should apply retrospectively for convictions before the commencement of the Act, provided the person is sentenced to at least 10 years' imprisonment.

Potential Queensland Human Rights Legislation

The Premier of Queensland, Annastacia Palaszczuk, is considering whether to introduce human rights legislation in Queensland. This was what Labor agreed to do to obtain the support of Independent MP, Peter Wellington, so it could form government. In September 2015, the Deputy Premier announced that there will be a parliamentary inquiry into whether Queensland should enact human rights legislation. Currently there is human rights legislation in Victoria and the Australian Capital Territory.

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