



# May 2021 newsletter

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Electoral Regulation  
Research Network





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## ERRN Director's Message: May 2021



A year ago when I was writing my message for the first ERRN newsletter for 2020, Victoria was in the middle of its first lock-down; the 2020 plan for ERRN activities, devised in pre-pandemic days, was abandoned and I can say with all honesty that I was not certain whether ERRN would be in a position to organize its usual number of activities. As it turned out, the creativity and dedication of the ERRN convenors shone through and ERRN held 10 events online, a number of them securing unprecedented levels of attendance.

The 2020 experience has contributed to ERRN striking a steady beat in 2021. As I write this message, four highly successful (online) events have already been held: the Western Australian chapter has held two events, one on the recent Western Australian State Elections and another (in conjunction with the Australia and New Zealand School of Government) on the struggle for integrity with money in politics; the Queensland chapter has held a seminar on 'Data-Driven Campaigning, Electoral Regulation & Australian Democracy' based on a book by Dr Glenn Kefford (University of Queensland); and a seminar has also been held by the South Australian chapter on 'Towards a Workable Legal Regime for Truth in Political Advertising'.

As the events indicate, ERRN activities deal with a mix of contemporary electoral events and broader developments and challenges for Australia's democracy. Forthcoming events show a similar character. The Western Australian chapter will be having a seminar on early voting in the 2021 Western Australian State Elections whilst the Victorian chapter will organise an event on the 2021 Victorian local government elections. Broader issues being tackled by ERRN seminars include: the female gender cap amongst candidates for federal seats (Queensland chapter); political finance (Tasmanian chapter); reform of the Commonwealth House of Representatives (ACT chapter); voting according to age cohorts (Victorian chapter); and understanding and reducing informal voting (South Australian chapter).

There will also be international perspectives examined. The ACT chapter will hold an event examining primary elections in Australia and the United States. I will be leading a project that will provide a study of digital campaigning and political finance in the Asia and the Pacific region, a project undertaken in collaboration with the International Institute for Democracy and Electoral Assistance (International IDEA), an intergovernmental organisation dedicated to promoting sustainable democracy.

ERRN will also continue to provide key research resources. The Electoral Law Library hosted by AUSTLii continues to provide legal resources on Australian electoral law. The working paper series will continue with a forthcoming paper on regulating truth in political advertisements. Early this year, ERRN released an important report by Dr Yee-Fui Ng (Monash University) on [Regulating Money in Democracy: Australia's Political Finance Laws Across The Federation](#) - the report is the most complete overview of contemporary Australian political finance laws to date. And of course, there is the ERRN newsletters which are one of its kind in providing comprehensive coverage of electoral law developments and cases.

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

## News April-October 2020



### COMMONWEALTH



In December 2020, electors in the Queensland seat of Groom attended the polls to vote for a replacement for the former Turnbull Government Minister John McVeigh, who resigned to care for his ill wife. The Liberal-Nationals retained the seat, with Garth Hamilton [comfortably](#) elected. Also in December, the question of Northern Territory representation in the lower house — flagged last newsletter — was resolved, with the Government [legislating](#) to keep the Territory's two seats. Seat numbers in other states were also under review, by way of redistributions. March saw publication of draft plans for [Western Australia](#) and [Victoria](#). In the case of the former, the Liberal seat of Stirling was set for abolition, with significant changes to Christian Porter's seat of Pearce. In Victoria, there will be some small suburb-swaps that could make for closer contests next election, but the biggest changes were to the surf coast seat of Corangamite, to be renamed Tucker, and shifted to be more centred on Geelong, while a new seat, Hawke, will be created to cover suburbs on the western fringe of Melbourne.

In other news, the Joint Standing Committee on Electoral Matters published its [report](#) on the 2019 Federal Election. It noted that 2019 saw the most complete electoral roll and best turnout in the history of the nation. It also called for significant electoral reforms, including optional preferential voting and robson rotation for lower house elections, expanded voter-ID requirements, and tighter limits on early voting. JSECM has since moved on to inquiries into the administration of elections during [emergencies](#) (such as a global pandemic) (due to report in July) and into the operation of the Commonwealth's foreign donations [ban](#) (to report end of this month).

Finally, the Australian Electoral Commission was busy at time of writing with an [investigation](#) into the many and various social media accounts of Andrew Laming, Liberal MHR for Bowman. In March, the *Guardian* [reported](#) that Laming had set up dozens of Facebook accounts, some masquerading as news pages and community groups, to promote political content. If found to be in breach of authorisation rules, it would be the [first](#) application of stronger penalties established by reforms passed after the 2016 election.

### NEW SOUTH WALES



Early voting for the Upper Hunter By-Election was underway at time of writing. The election, triggered by the [resignation](#) of Nationals MP Michael Johnson, saw a [crowded](#) field of candidates: the Greens, One Nation, the Liberal Democrats, the Shooters, Fishers and Farmers Party, Labor and the Nationals all nominated, alongside three independents. Polling Day is the 22nd of May.

Earlier, in October, the state's Joint Standing Committee on Electoral Matters published its report on the conduct of the 2019 state election. It recommended a shortening of the early voting period and the exemption of travel and accommodation from campaign expenditure caps, amongst many smaller recommendations. It steered away from proposals for a short-form Legislative Council ballot, which would have given electors voting above-the-line a simplified ballot paper; and from the expansion of the iVote online voting system. It also recommended the state's status quo continue for third-party expenditure caps, and went in the opposite direction to the federal JSECM with regards to voter ID, recommending that no ID be required to vote in NSW elections.



JSCEM also joined the chorus of voices calling for additional funding for the New South Wales Electoral Commission (reported on last newsletter). In March it [emerged](#) that funding levels would be headed in the other direction, with the Government planning \$4.45 million in cuts to the electoral commission over the next four years. Cuts were also planned for the Independent Commission against Corruption (\$3.4 million), the Law Enforcement Conduct Commission (\$3.3 million), the NSW Ombudsman (\$3.4 million) and the NSW Audit Office (\$375,000).

Finally, the Electoral Districts Redistribution Panel published its draft electoral boundaries for the state last November. The safe Labor seat of Lakemba in Sydney's inner south-west, currently held by Opposition frontbencher Jihad Dib, was set for the chopping block, while a new seat, Leppington, was proposed for the outer south-west. Several other seats grew [closer](#) in terms of two-party-preferred margins. Public hearings were held in late April.



As noted in our last newsletter, Victoria held elections for 26 local governments in October 2020. Beyond the complexities of running an election in the midst of Melbourne's stage four lockdown, the polls were attended by several controversies that ultimately required the intervention of the constabulary. In the City of Yarra, [police](#) were called the ballot count after scrutineers objected, vigorously, to the enforcement of 1.5 m social distancing, which some felt hampered the transparency of the count. In neighbouring Moreland, fraud squad detectives [arrested](#) a Labor-aligned councillor over allegations of vote tampering. This came after a VEC [investigation](#) discovered 104 Moreland electors appeared to vote twice. The councillor was subsequently released, pending further inquiries by police, and by the [Victorian Civil and Administrative Tribunal](#). See this edition's Case Notes for more.

Meanwhile, the state parliament's electoral matters committee has been carrying out an inquiry into the influence of social media. [Hearings](#), which included evidence from major platforms, like Facebook, focused on disinformation and the possibility of introducing truth in political advertising laws.

This came as the parliament considered a [reform](#) to ban preference harvesting by way of a bill presented by Reason MLC, Fiona Patten. The Bill would prohibit any one person being paid by multiple parties or candidates to coordinate group ticket preferences. The legislative council passed a first reading of the bill in November 2020, despite the objections of the "preference whisperer" himself, Glenn Druery.



Our last newsletter coincided with early voting for the Queensland state elections. The subsequent result was a Labor victory, the Palaszczuk Government gaining four seats. Labor did lose one seat: that of Jackie Trad, former treasurer and deputy premier, who [lost](#) South Brisbane to the Greens. LNP leader Deb Frecklington resigned in the aftermath of the elections, the party replacing her with David Crisafulli. During the campaign, Frecklington had been [referred](#) to election regulators by her own party for allegedly raising campaign funds from property developers.

Indeed, the ban on developer donations was the centre of another battle — this time between mining magnate Clive Palmer and the Queensland Electoral Commission over whether the former should be categorised as a developer, and thus prohibited from making donations. The government has repeatedly claimed he should be, and the QEC has [referred](#) the question to the Supreme Court for a ruling. See our case notes section for details.

Finally, one last thread to Queensland's 2020 Council Elections were resolved in February this year with the conclusion of the Rockhampton Mayoral By-Elections. The original elections almost a year prior had handed the Rockhampton mayoralty

back to the incumbent, Margaret Strelow, but an investigation by the Councillor Conduct Tribunal found her guilty of [misconduct](#), resulting in her resignation that November. Under Queensland's rules, the mayoralty defaulted to the runner-up from the original elections — one Chris "[Pineapple](#)" Hooper, an anti-Adani activist and self-described 'ratbag'. Alas Pineapple's reign never quite materialised: the state government retrospectively [amended](#) council election laws to provide for a by-election. Pineapple contested the subsequent by-election but lost [handsomely](#) to sitting councillor Tony Williams.



In December the Marshall Government quietly withdrew its proposed lobbying laws, going '[back to the drawing board](#)' after several elements of the legislation ran into constitutional and practical problems. The government was also deprived of its parliamentary majority, after an expenses [scandal](#) resulted in Fraser Ellis, MLA for Narungga, resigning from the Liberal Party. Ellis was charged by the state's ICAC with 23 counts of deception and 78 fraudulent claims relating to travel expenses. Fraser was one of several members [investigated](#) by ICAC for misuse of the Parliamentary Country Members Accommodation Allowance the last 12 months. He was also the second MP to quit the Liberals for the crossbench in the last year, joining Sam Duluk, who was [sacked](#) from the party room in February after being charged with assaulting a fellow parliamentarian at the start of last year. Finally, the radical redistribution of seats for the Legislative Assembly, noted last newsletter, were finalised in November. Some of the more consequential changes proposed in the draft report — driven in part by the abolition of the must debated 'fairness provision' of the SA constitution (see our last three years of newsletters!) — were subsequently undone in the final plan. Still, there are some major changes still on the books, especially to some inner-city Adelaide seats, with [complex](#) and multi-directional partisan implications.



The state election in March 2021 produced a landslide for incumbent Mark McGowan, Labor winning 13 seats, with 69.7% of the two-party-preferred vote. The Liberals were reduced to just two seats, their leader, Zak Kirkup, losing his seat, and the party losing official Opposition status to the Nationals. Labor also won a rare majority in WA's malapportioned upper house. Indeed, the Upper House produced several other notable results. Where the Greens won 6.8 percent primary votes but lost three seats, the Legalise Cannabis WA Party [won](#) two seats, having polled around 2 percent of the primary vote in their respective regions, and the Daylight Savings Party won a seat from an incredible 98 primary votes — thanks to the assistance of aforementioned preference harvester, Glenn Druery. The Daylight Savings Party will represent some of the areas with the weakest support for Daylight Savings, at least according to referendums on the issue held in 1975, 1985, 1992 and 2009. The result has prompted fresh calls for reform to the group voting system in WA, with the premier [reportedly](#) asking the state's Attorney-General to consider broad electoral reform.



Tasmanians had just returned from the polls for a state election at time of writing. Premier Peter Gutwien called the snap poll in March after his government was reduced to minority status with the defection of Sue Hickey from the Liberal Party. The elections coincided with three periodic upper house elections — for Derwent, Mersey and Windermere. The result was X.

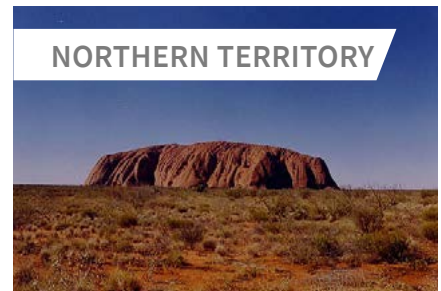
The election fell before the adoption of long-mooted reforms to political donations. As noted in previous newsletters, a major review of the Electoral Act had been underway for much of the last term of government. Some reforms were legislated in 2019, including the removal of Tasmania's election-day reporting blackout, but the second volume of the review report, focused on donations, was not released for some time. In February, it was finally [published](#), the government committing to a major overhaul, including a significant lowering disclosure thresholds on donations, more timely disclosures, and a ban on foreign donations. However, the changes had not been legislated by the time the parliament was dissolved, meaning the 2021 election proceeds on the old, murkier rules.

The elections also showcased some of Tasmania's more idiosyncratic electoral regulations. Under the state's Electoral Act, candidates are prohibited from depicting any image of their opponents without the latter's consent. This rule [tripped up](#) the Labor Party, which ran campaign advertisements featuring the back of a bald head, which was found to be sufficiently evocative of the bald-headed Premier Gutwien to be a breach of the Act. Labor was required to remove the ads from Facebook.



The ACT election was in full swing at time of writing last newsletter. Despite losing two seats, the result was a Labor victory, the Greens winning four seats, and the pair continuing in coalition government for a third term. It was the [first](#) Australian election to see a majority cast their ballot electronically. In February this year, the Legislative Assembly began its inquiry into the conduct of the election, with e-voting a major focus. The counting code was the source of particular controversy, with a [report](#) by cybersecurity expert Dr Vanessa Teague and mathematician Andrew Conway determined a range of small errors occurred in the electronic count, concluding it was essentially 'good luck'

that these errors did not badly affect any final results. The Electoral Commission published its own [report](#) to the Assembly on the conduct of the election in late April. Amongst other things, it recommended some tightening of regulations, including steps to prevent political parties using their federal divisions to circumvent expenditure caps, and expressed concerns about its non-partisan reputation when it came to implementing recently passed truth-in-political-advertising laws.



In March, the NT Electoral Commission published its [report](#) on compliance with the state's new donation disclosure rules. While it found broad compliance from both parties and associated entities, it did note some teething problems, with inadequate disclosures and record-keeping hampering efforts to enforce the new rules. It also raised the discrepancy in how the new regime treat third-party campaigners versus candidates. Where the latter now face spending caps of \$40,000 per election, third-party groups have no limit whatever. The report notes that this leaves the door open for caps to be circumvented. The Gunner Government was yet to respond at time of writing.

## Event reports



### **ERRN/Stretton Institute/Melbourne School of Government Webinar**

#### *'Foreign interference in Australian elections'*

2 December 2020

This webinar brought together Professor Lisa Hill, Associate Professor Tim Legrand and Dr Melissa-Ellen Dowling to discuss the threats posed to democratic legitimacy and functioning by attempted interference in domestic elections by foreign entities. It was then argued that Australia's processes of public engagement are relatively resilient due to hybrid analogue-digital processes, which inadvertently safeguard our electoral system from malign influence. However, research findings also indicate that several modes of participation remain vulnerable at the preference formation and agenda-setting stages of policy development. This poses a risk to: (1) social cohesion, and (2) the integrity of policy outputs. Dowling and Legrand offered a ground-breaking assessment framework for this threat which is transferable to other democratic systems internationally.

Watch the full webinar [here](#).

### **ERRN WA/John Curtin Institute of Public Policy Webinar**

#### *'The WA State Election'*

12 March 2021

Western Australia went to the polls on 13 March. This panel, held on election-eve, discussed several big questions thrown up by the campaign. What impact did the 'concession' of the Liberal Opposition Leader have? How significant is the Legislative Council? What might 'total control' mean and should we be worried about it?

A full recording will be available on the ERRN website.

### **ERRN/MSoG/Stretton Institute Webinar**

#### *'Towards a workable legal regime for truth in political advertising'*

18 March 2021

This Stretton Institute webinar, co-hosted with the Electoral Regulation Research Network and the Melbourne School of Government, addressed a serious impediment to the democratic ideal of 'full, free and fair elections' in Australia and comparable settings, namely the use of dishonest advertising and disinformation at election time.

The problem of disinformation and non-transparent campaigning practices that subvert democratic – and especially electoral – processes is a growing one; it has been significantly compounded by the proliferation of social media and other online forms of political communication. South Australia has shown itself to be a leader in the fight to address the problem of truth in political advertising by being the first state in Australia to have this kind of law. Based on s.113 of the S.A. Electoral Act 1985 –with our own refinements – we are working towards a legal regime suitable for adoption in other jurisdictions in Australia and elsewhere.

This webinar first explores the character and effect of disinformation campaigns at election time, after which we canvas attempts to regulate them in a range of established democracies. We then reflect on potential legal remedies that are not only likely to be effective but publicly acceptable and capable of withstanding constitutional challenge.

Watch the full webinar [here](#).

### **ERRN WA/ANZOG Webinar**

#### *'The struggle to regulate integrity: money and politics'*

21 April 2021

No one stands for office or enters the public sector promising to undermine integrity, engage in corruption or turn a blind eye to wrongdoing – and yet, somehow, scandals at the intersection of money, power and politics are everywhere.

For the many integrity bodies charged with promoting pro-integrity behaviour and/or regulating its opposite, the usual difficulties of speaking truth to power as a regulator are compounded when the highest levels of politics or the bureaucracy are your duty holders.

What can we all learn from the struggle to regulate 'hot potato' issues like political donations? How do those in charge of enforcing painfully crafted rules negotiate the traps and pitfalls of their role?

This webinar was presented in partnership with The Australia and New Zealand School of Government (ANZSOG) and the National Regulators Community of Practice.

A full recording will be available on the ERRN website.



## Forthcoming events:

### NSW Electoral Commission Webinar

#### *'Election Funding and Disclosure Webinar'*

Tuesday 11 May

Speaker: TBC

Time: 6:00-7:30pm (AEST)

Register [here](#).

This webinar is part of a series being run by NSWEC in the lead up to local government elections in September. This session will focus on campaign finance and disclosure requirements for the upcoming poll. While the sessions are pitched at prospective candidates, it may be of interest to ERRN members following and researching campaign finance.

### ERRN QLD Event

#### *'Date-driven campaigning, electoral regulation & Australian democracy'*

Tuesday 18 May

Speaker: Dr Glenn Kefford (UQ)

6:00-8:00pm (AEST)

Register [here](#).

If we are to believe many prominent commentators, data-driven campaigning and microtargeting are said to not only be changing election campaigns, but democracy itself. Christopher Wylie, the Cambridge Analytica whistleblower, told the Guardian, "We exploited Facebook to harvest millions of people's profiles. And built models to exploit what we knew about them and target their inner

demons". While there have been numerous enquiries and investigations into data-driven campaigning across the globe, our understanding of the way political parties collect and use data and what voters think of these practices is extremely limited. In this presentation, Glenn Kefford draws on his original research from his recent book on data-driven campaigning to provide answers to both questions and demonstrate that there is a significant disconnect between current campaign practices and Australian voter attitudes towards these practices.

Glenn's book presentation will be accompanied by the comments of: Prof. Juliet Pietsch, Griffith University Prof. Graeme Orr, University of Queensland Tegan Cohen, PhD Candidate at Queensland University of Technology

**Chair:** Dr. Ferran Martinez i Coma, ERRN Queensland chapter organizer, Griffith University

### ACT ERRN Webinar

#### *'Primary elections in the USA and Australia'*

Thursday 20 May

Speaker: Emeritus Prof. John Hart, Prof.

Anika Gauja, Dr Jill Sheppard

4:00-5:00pm (AEST)

Register [here](#).

Primary elections, in which voters are given the opportunity to determine who will be a party's candidate at a general election, are a long-standing feature of the electoral

process in the USA. The opportunity they provide to involve party supporters more deeply in shaping election outcomes has sometimes been viewed favourably in countries where public disengagement from politics has been seen as a problem.

And yet, in the USA, primary elections are increasingly being identified as a major factor underpinning a dysfunctional polarisation of, or even "sectarianism" in, political discourse. This is reflected in the invention of a new verb - "to be primaried" - which describes the potential fate of incumbent representatives who face challenges from activists if their political stances have not adhered sufficiently to a typically more extreme (left or right) world view.

What then, can be learned from recent US experience? Would primary elections, if adopted elsewhere, eventually lead to similar consequences? Or are the pathologies seen in the US unique to that country, such that primary elections held elsewhere could be expected to be beneficial to democratic participation?

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





## Publications



Ferran Martínez I Coma and Inacio Lago, “Sacrificial lambs” or candidate mimicking? Gender-based nomination strategies in elections’, *Party Politics*, [Published online 17 March 2021: <https://journals.sagepub.com/doi/full/10.1177/1354068821998235>].

Paul Kildea, ‘The Constitutional Role of Electoral Management Bodies: The Case of the Australian Electoral Commission’ (2020) 48 *Federal Law Review* 469-482.

Paul Kildea, AJ Brown and Jacob Deem, ‘When Should the People Decide?: Public Support for Direct Democracy in Australia’ (2020) *Parliamentary Affairs* [Published online 10 August 2020: <http://dx.doi.org/10.1093/pa/gsaa019>].

Yee-Fui Ng, 2021. Report for Electoral Regulation Research Network, ‘Regulating Money in Democracy: Australia’s Political Finance Laws across the Federation’ <https://law.unimelb.edu.au/centres/errn/research/research-projects/regulating-money-in-democracy>.

Yee-Fui Ng & Chris Draffen, 2020. ‘Foreign Influence Registration Schemes in Australia and the United States: The Scope, Risks and Limitations of Transparency’ *University of New South Wales Law Journal* 43(4): 1101-36.

Yee-Fui Ng, 2020. ‘Regulating the Influencers: The Evolution of Lobbying Regulation in Australia’ *Adelaide Law Review* 41(2): 507-543.

Yee-Fui Ng & Stephen Gray, 2021. ‘Wars, Pandemics and Emergencies: What can History Tell us about Executive Power and Surveillance in Times of Crisis?’ *University of New South Wales Law Journal* 44(1): 227-66.

Marian Sawer, 2021. ‘The concept of the level playing field: assessing fairness in electoral competition’, *Australian Journal of Public Administration* 80(1): 29-45.

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

## Working Papers:

The Electoral Regulation Research Network was established in 2012 with the aim of fostering exchange and discussion amongst academics, electoral commissions and other interested groups on research relating to electoral regulation. To this end, the Network 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. We welcome papers written on all aspects relating to electoral regulation from

academics, electoral commission officials, parliamentarians, party officials and others interested in this field.

### Working Paper 74

[Foreign Interference and Australian Electoral Security in the Digital Era](#)

Dr. Melissa-Ellen Dowling

May 2021

### Working Paper 73

[How Does Digital Campaigning Affect the Problems of Political Finance?](#)

Prof Joo-Cheong Tham

December 2020



## Case Notes

### ***Electoral Commissioner of Australian Electoral Commission v Anning***

The Australian Electoral Commissioner (“AEC”) commenced proceedings against Mr William Fraser Anning contending that Mr Anning as agent for Fraser Anning’s Conservative National Party failed to make disclosures to the AEC required under Part XX of the *Commonwealth Electoral Act 1918* (Cth) (the “Act”) in contravention of s 314AB(1) of the Act.

In November 2020 the AEC informed the Court that the respondent was residing overseas, and as a result the respondent could not be located and the solicitors were unable to effect service of the originating application and affidavit.

In light of this, the AEC applied to discontinue the proceedings with leave of the Court, with a right of reinstatement of the proceeding within 6 years of the alleged contravention on 21 October 2019. The Court made an order on 16 February 2021 to discontinue the proceedings.

The solicitors of the AEC wrote to the court asking:

“Could you please confirm whether the AEC will be permitted to file fresh proceedings in relation to the same alleged contravention of Mr William Fraser Anning (so long as those proceedings are competently instituted) within 6 years of the alleged contravention. Relevantly, could you please confirm that the discontinuance of this proceeding will not preclude our client from bringing a fresh proceeding in relation to the same alleged conduct of Mr Anning.

If, due to the discontinuance of this proceeding, our client will be precluded from bringing a fresh proceeding in relation to the same alleged conduct, we will file an affidavit as you suggested and request that this be [sic] proceeding be discontinued with a right of reinstatement within 6 years of the alleged contravention.

The Federal Court of Australia (“FCA”) refused to give its advice to the AEC regarding instituting proceedings against Mr Anning. The FCA found that it was not a matter for the FCA to provide an advice or advisory opinions to any party about any matter relating to the proceeding instituted in the Court or in relation to the future or prospective proceeding that might be instituted.

### ***Electoral Commission of Queensland v Palmer Leisure Australia Pty Ltd***

On 2 December 2020 the Electoral Commission of Queensland filed an originating application seeking a declaration that the respondent, Palmer Leisure Australia Pty Ltd (“Palmer Leisure”) was, during the relevant period, a property developer within the meaning of section 273(2) of the *Electoral Act 1992* (Qld).

During that relevant period, Palmer Leisure made six gifts to Clive Palmer’s United Australia Party. If Palmer Leisure Australia was a property developer, it would be deemed to be a prohibited donor within the meaning of the Act.

On 25 May 2015, Palmer Leisure submitted to the Gold Coast City Council a development application in respect of some land. The proposed development had a commercial connotation. Since then, Palmer Leisure has on two occasions in 2018 submitted notices of change to that development application, but the application itself has not been approved, and there is no evidence of any other relevant planning application made by or on behalf of the corporation.

In those circumstances, the Electoral Commission maintained that Palmer Leisure was a corporation engaged in a business that regularly involved the making of relevant planning applications connected with residential or commercial development of land, and that the ultimate purpose of these applications was the sale or lease of the land for profit.

Palmer Leisure, whilst maintaining the proposition that it would succeed in defeating the application on the basis that the word “regularly” should not be tortured into having a meaning that is far from obvious, denied that this form of proceedings was suitable for dealing with the issues raised. It pointed out that the basis on which the Electoral Commission resisted an apparently obvious interpretation places particular emphasis upon the concept of a corporation being “engaged in a business”. As a result, the question as to whether Palmer Leisure is a “property developer” is one that involved a mixture of fact and law. That form of proceedings was not suited to that type of enquiry. Palmer Leisure therefore sought

from the Court, pursuant to r 14 of the Uniform Civil Procedure Rules, an order that the proceeding continue as if started by claim, and subsequent orders as to the filing of a statement of claim and defence.

The Court made the following orders:

- Pursuant to r 14 of the Uniform Civil Procedure Rules, the proceeding continue as if started by claim;
- The Electoral Commission of Queensland is to file a statement of claim within 14 days; and
- Palmer Leisure Australia Pty Ltd is to file a defence to the statement of claim and counterclaim (if any) within 28 days after the day the statement of claim is served.

### ***Australian Electoral Commission v James***

In 7 December 2020, the AEC filed an originating application alleging that the respondent, as a candidate for the House of Representatives in the 2019 Federal election, failed to make disclosures to the AEC required under Part XX of the *Commonwealth Electoral Act 1918* (Cth) (“Electoral Act”) in contravention of ss 304 and 309 of the Electoral Act. The Commissioner sought civil penalties against the respondent in respect of the contraventions.

The respondent, Christopher Ronald James, nominated himself as a candidate for the House of Representatives in the 2019 Federal election by an AEC Nomination Form dated 23 April 2019. In that form, he disclosed his residential address, e-mail address and mobile number. The Federal election occurred on 18 May 2019.

From 6 June 2019, the AEC sent letters to the respondent at the residential address stated in his AEC Nomination Form regarding his nomination for the House of Representatives and his requirement to comply with various obligations under the Electoral Act, to which he never responded. Further letters were sent on 20 June 2019, 22 August 2019 and 17 September 2019.

On 14 January 2020, the AEC had a conversation with the respondent by telephone using the mobile phone number stated in his AEC Nomination Form. Following that conversation, the AEC sent the respondent an email, using the email address stated in his AEC Nomination Form, attaching the letters previously sent to the respondent. The respondent replied to that email notifying the AEC that he had not been able to access the attachments to the AEC’s email. From that date, the AEC sent

further emails to the respondent at that email address and made further attempts to contact him by telephone and post. Despite the AEC making multiple communications with him by letter, mobile phone and email, the respondent has not provided the disclosures required by the Electoral Act or responded to the AEC’s requests.

On 14 August 2020, the AEC sent a letter to the respondent at his residential address stating that, if he continued to not comply with his obligations under the Electoral Act, the AEC may seek the imposition of a civil penalty.

In an affidavit, Mr Woodward, a process server, deposed that he delivered the letter of 14 August 2020 to the respondent’s address and spoke to a woman named Yvonne at the address. Mr Woodward asked whether the respondent lived at the address, to which Yvonne replied that he was not in. Mr Woodward asked whether Yvonne lived at the address and whether she was authorised to accept documents on behalf of the respondent, to which Yvonne replied “I can pass it onto him”. Having received no reply to the letter dated 14 August 2020, the AEC issued proceedings and engaged Mr Woodward to effect personal service of the originating application on the respondent. Mr Woodward was not able to effect personal service despite multiple attempts and confirmation from a neighbour that the respondent resided at that address.

On 20 January 2021, Mr Woodward called the respondent’s mobile phone number and spoke to him. The respondent confirmed that he resided at the South Oakleigh address but said he was “not interested in accepting service” of the originating application and “will not make himself available”. The respondent also said that “the matter was being handled by his legal team due to the fraud and corruption of the electoral commission”.

Rule 10.24 of Federal Court Rules 2011 provides as follows:

If it is not practicable to serve a document on a person in a way required by these Rules, a party may apply to the Court without notice for an order:

- substituting another method of service; or
- specifying that, instead of being served, certain steps be taken to bring the document to the attention of the person; or

- specifying that the document is taken to have been served on the happening of a specified event or at the end of a specified time.

The judge was satisfied that the respondent was refusing to accept service of the originating application and, as a result, it was not practicable to serve the respondent personally. The judge was satisfied on the evidence that the respondent resided at the address, used the email address; and used the mobile phone number provided to the AEC. He was satisfied that service by mailing and hand delivering the originating application to that address, and by notifying the respondent of service by text message to the above mobile phone number and email address, would in all probability be effective to bring knowledge of the proceeding to the respondent.

The judge made the Order under rule 10.24 of the Federal Court Rules 2011 that personal service of the originating application addressed to the respondent be dispensed with and service of the originating application and supporting affidavit on the respondent be effected by:

- posting the documents by ordinary mail addressed to the respondent;
- by sending a text message addressed to the respondent on his mobile number and an email message stating that the message has been sent in accordance with orders made by the Federal Court of Australia and that an originating application addressed to him has been sent by mail and has been left at the address and that the proceeding has been listed for a case management hearing at 9.15am on Friday 12 March 2021; and
- by placing the documents in an envelope addressed to the respondent and handing the envelope to a person apparently over the age of 16 years apparently residing at the address or, in the event that no such person is in attendance, by placing the envelope in the letter box at the address.
- Personal service of the originating application on the respondent will be deemed to be effected 7 days after the documents have been posted.



### ***Electoral Commissioner of Australian Electoral Commission v Wharton***

The AEC brought proceedings in respect of an alleged breach of ss 304 and 309 of the *Commonwealth Electoral Act 1918* (Cth) by the respondent, Wayne Morris Wharton. The proceeding was filed in October 2020. Since then, on numerous occasions, a process server engaged by the solicitors for the Commissioner endeavoured to affect service on the respondent at an address which, on the evidence, is one which can comfortably be concluded as the respondent's residential address. Endeavours had also been made to contact him via a mobile telephone number. That mobile telephone number is one which has, in the past, been a channel of communication between the Commissioner and the respondent. It had not been possible to affect personal service on the respondent.

The judge held that he was satisfied that it is not practical, in terms of r 10.24 of the Federal Court Rules 2011 (Cth), to affect personal service of the originating application and supporting documents on the respondent in a way required by the rules and it was apt to make provision of substituted service, in terms of the orders sought by the Commissioner in the interlocutory application.

### ***McConell v ACT***

The plaintiff is a resident of the Jervis Bay Territory. He is on the Commonwealth electoral roll. He wanted to vote in the 2020 ACT general election. He has sought declarations that he is qualified to vote in that election and entitled to be enrolled on the ACT electoral roll.

The judge found that the plaintiff was not qualified to vote in that election and not entitled to be enrolled on the ACT electoral roll. As a consequence, his claim for declarations were dismissed.

Following self-government, the first and second elections for the ACT Legislative Assembly were carried out in accordance with the *Australian Capital Territory (Electoral) Act 1988* (Cth). That Act expressly excluded persons living in the JBT from the electoral roll used for the purposes of ACT elections: s 9(2)(a). It also made clear that, for the purposes of that Act, the Division under the *Commonwealth Electoral Act 1918* (Cth) that included the JBT was to be taken as not including that territory: s 6.

The entitlement to vote is determined by s 128 of the *Electoral Act 1992* (ACT). The effect of s 128(1) and (2) is that a person who is 18 years old on the day of the poll and "enrolled for an electorate" is entitled to vote at an election for the electorate. That means that the entitlement to vote is dependent upon enrolment, which in turn is dependent upon the entitlement to be enrolled under s 72. Because the plaintiff was not entitled to be enrolled for any ACT electorate he was not, under s 128, entitled to vote in relation to any such electorate.

### ***Innes v Electoral Commission of Queensland (No 1)***

On 21 August 2020, the Court of Disputed Returns heard Mr Innes' application, disputing the election of Mr Jamieson as Mayor of the Sunshine Coast Regional Council on 28 March 2020. Just days after the hearing, on 24 August 2020, Mr Innes decided to apply to re-open the matter. He so advised the respondents and the intervenor. He filed his application to re-open on 31 August 2020, together with supporting material.

The judge dismissed the application. He held that the interests of justice are not served by the Court re-opening the hearing for Mr Innes' purposes. He found that the ECQ behaved fairly in its approach to this matter, and that Mr Innes' complaints were unfounded.

### ***Matthew Harris, State Director of the National Party of Australia – Victoria and Sam McQuestin, State Director of the Liberal Party of Australia (Victorian Division) v Victorian Electoral Commission***

On 14 October 2020, Justice Richards gave her judgment in a case relating to the distribution of public funding for the 2018 Victorian State election.

The VEC distributes public funding to registered political parties, based on the number of votes they obtain. Since the 2010 State election, the Liberal and National parties have fielded joint tickets in three Upper House regions. The VEC has paid two-thirds of the public funding for these elections to the Liberal Party and one-third to The Nationals. The *Electoral Legislation Amendment Act 2018* (Vic) made substantial changes to public funding provisions. After the 2018 State election, the VEC provided nearly all the Coalition's

public funding for the three regions (some \$750,000) to the Liberal Party, which received nearly all the first-preference votes for the Coalition in these regions. The VEC informed the parties that the Liberal Party would not be able to transfer one-third of the funding to The Nationals, as this would constitute a political donation, and donations were capped at \$4,000.

The Liberal and National parties applied to the Supreme Court to overturn the VEC's decision. The case was heard on 14 September 2020. The central question considered at the hearing was whether a transfer of some \$250,000 from the Liberals to The Nationals would be a gift within the terms of the *Electoral Act 2002* (Vic) (and thus caught by the \$4,000 donation cap) or would be "consideration" for the two parties forming a composite group.

Justice Richards concluded that a payment by the Liberal Party to The Nationals would be a payment made for adequate consideration in money's worth and would not constitute a 'political donation' within Part 12 of the Electoral Act. The consideration was the fact that under the 2018 Coalition agreement, The Nationals agreed to joint tickets with the lead candidate in each region being a Liberal, forgoing first preference votes for their own candidates. The one-third payment to the Nationals had been a settled part of the Coalition arrangements since 2010. Although the Coalition agreement was not an enforceable contract and the consideration given by The Nationals did not have an exact monetary value, Justice Richards was satisfied that the consideration was adequate consideration for the proposed payment. Justice Richards rejected the VEC's concern that such a finding would weaken the effectiveness of Part 12 of the Electoral Act.

The outcome was that the Liberal Party was able to transfer one-third of its public funding for the three regions to The Nationals.

The case has clarified an important aspect of Victoria's public funding and donations scheme.

### ***Matters arising from the 2020 local government elections***

The provisions for legal challenges to local government elections changed in 2020. Before 2020, persons wishing to challenge an election could apply to the Municipal Electoral Tribunal, which sat in the Magistrates' Court of Victoria and decisions could be reviewed by the Victorian Civil and Administrative Tribunal (VCAT). Under the *Local Government Act 2020* (Vic), VCAT now has original jurisdiction to hear these applications directly. Within 14 days of the declaration of the result of an election, a candidate for that election, 10 persons entitled to vote at that election, or the VEC, may apply to VCAT for a review of the declaration of the result of an election. VCAT has wide powers in conducting a review, including the power to declare an election void, to declare that any person declared elected was not duly elected, and to dismiss or uphold an application in whole or in part.

There were nine applications to VCAT after the October 2020 local government elections, relating to elections for five councils. Seven applications were made by candidates, one by 14 persons entitled to vote at an election, and one by the VEC.

Applications related to two fields: the VEC's conduct of the election (for example, an alleged lack of an opportunity for a candidate to request a recount in the election for Colac Otway Shire Council); and the behaviour of other participants in the election (for example, electoral material distributed by a community group in the election for Bayside City Council's Dendy Ward).

Five applications have been withdrawn, leaving four applications still live, as detailed below.

#### ***Moreland City Council, North-West Ward***

This application arose out of suspected interference with the election. On 3 November 2020, the VEC announced that it had discovered what appeared to be intentional postal vote tampering. Reconciliation procedures by election staff uncovered a high incidence of multiple returns in North-West Ward. Subsequent checking identified several hundred suspicious returned postal voting declarations which did not appear to have been completed by the voter.

The Electoral Commissioner, Warwick Gately, stated that he would lodge an application with VCAT into the election as soon as the result was declared.

On 5 November 2021, the VEC applied to VCAT for the election to be declared void. The 17 candidates for the ward are listed as the respondents to the application. There have been several directions hearings, and the VEC has submitted evidence.

The VCAT application has been proceeding in parallel with a separate criminal investigation by Victoria Police and the Local Government Inspectorate.

The alleged interference in the election is a critical integrity issue. It is potentially the most serious election offence since the VEC began conducting local government elections in 1995

#### ***Loddon Shire Council applications***

There have been three applications regarding the Loddon Shire Council election, one by Mr Kenneth Pattinson (an unsuccessful candidate for Boort Ward), one by Mr Reginald Holt (an unsuccessful candidate for Wedderburn Ward), and the third by 14 voters for Wedderburn Ward. These applications cover similar matters, and are being heard together by consent of the parties. The applications relate to the conduct of councillors, including the then-mayor, during the election period, and to statements in election campaign material published by or on behalf of the successful candidates. The elections themselves have not been directly impugned, and the VEC has primarily participated as a 'friend of the tribunal'.

#### ***Defamation case, Banyule City Council***

In a separate matter, former Banyule councillor Jenny Mulholland and her son David Mulholland Junior sued former mayor and State MP Craig Langdon for defamation in relation to statements in an election leaflet, 'The Banyule Eye'. The plaintiffs alleged that Mr Langdon was responsible for creating and distributing the leaflet. Proceedings in the County Court have in part related to difficulties in obtaining evidentiary materials from Mr Langdon.

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