

# Electoral Regulation Research Network Newsletter October 2016

**ERRN**  
Electoral Regulation  
Research Network



MELBOURNE LAW SCHOOL



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## Director's Message

The Electoral Regulation Research Network was established on 1 March 2012. To coincide with the establishment of the Network, I wrote the following article for *The Conversation*.

With review by the Commonwealth Joint Standing Committee on Electoral Matters of the recent federal election pending and changes in electoral laws such as electronic voting and the regulation of political finance being mooted, this article might provide a useful perspective on the role of the Network in the public debate on Australia's electoral democracy.



### The benefits of deliberation in the political process

Originally published on [The Conversation](#), 2 May 2012

Is there a role for deliberation about electoral rules?

For many, the answer would be “no”. For them, the notion of principled discussion informed by careful reflection is deeply incongruous with the grubby practice of politics.

Politics, so they would say, is centred on the pursuit of political power. Political parties and politicians, in turn, are purely self-interested actors doing “whatever it takes” to grab the reins of power and using that power for their partisan interests.

The modus operandi is one of power plays and bargaining, not deliberation.

If these views were plausible, they should be seen most clearly in the rules of the electoral game – the regulation of elections.

#### The myth and the reality

In electoral democracies like Australia, it is these rules that set the terms of the contest for political power. With so much at stake, we would expect – according to the paradigm of self-interest – for dominant parties to rig these rules in their favour.

It is puzzling then to discover the prevalence in Australia of the rhetoric of “free and fair” elections, even amongst the political class. Even more

puzzling is that Australia's electoral system does, in key respects, provide for “free and fair elections”.

Is it all a sham?

Take two examples for which Australia is internationally renowned: first, the secret ballot – known internationally as the “Australian ballot” as it was pioneered here – which promotes free choice for voters; second, the impartial administration of electoral rules by independent electoral commissions, a necessary condition for fair elections.

#### A principled stand

There is a need then for a more nuanced understanding of the role of political deliberation. Principles, as well as partisanship, find a place in democratic politics, with the laws reflecting both.

And if principles are crucial to politics, so is deliberation, not least for its ability in many situations to filter out hollow rhetoric and more clearly delineate the legitimate, as opposed to illegitimate, self-interest of political actors. Rather than being anathema to the practical realities of party politics, deliberation lies at its heart.

Defending the role of deliberation in politics is not the same, of course, as realising it in practice.

Institutionalised forums for such deliberation are vital, especially in relation to the regulation of elections.

In a parliamentary democracy like Australia, parliaments (and their committees on electoral matters) are central to providing such forums.

## Working together

There is, however, a need to institutionalise forums for deliberating electoral regulation beyond the parliamentary setting. And it is this imperative that prompted the establishment of the [Electoral Regulation Research Network](#) earlier this year.

Its principal purpose is to foster exchange and discussion amongst electoral commissions, academics and other interested groups on research relating to electoral regulation.

This objective is perhaps much easier to state than to achieve. The institutional context of electoral regulation is thick and complex. Different groups have varying functions: the primary task of the electoral commissions is to administer electoral regulation; political parties and politicians seek to advance their ideological agendas through elections; and academics in this field view electoral regulation as an object of study.

With different functions come a range of operative principles. With electoral commissions, the principles of independence and neutrality are key, while the

animating principles of political parties are those of political contestation, a mixture of partisanship and ideological beliefs.

## The virtue of deliberation

When it comes to deliberating electoral regulation and research on this topic, these varying functions and principles can give rise to different benchmarks of relevance: Is a research question significant from the point of view of administering electoral laws? Is there enough scholarly interest in the question? Does it matter in terms of voter interest?

Such diversity does not, however, spell defeat. Deliberation neither presupposes nor does it typically produce a chorus of unanimity. On the contrary, it is sustained and nourished by the expression of diverse viewpoints.

Disagreement is the starting point and invariably the end point of deliberation. The virtue of deliberation is that it holds out the promise of disagreement being grounded on a more principled basis.

Deliberation of research on electoral regulation will need a “meeting ground” where different perspectives are valued and heard. This implies judicious selection of topics of shared concern. Tensions will inevitably arise.

Yet, if the alchemy of deliberation works its effects, these will be productive tensions leading to the broadening of horizons and respectful learning.

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

### COMMONWEALTH



The 2016 federal election was held on Saturday 2 July and was the first double dissolution election to elect the [Parliament of Australia since 1987](#). It was also the first election to take place under a new voting system for the Senate, [including the abolition of group voting tickets and the introduction of optional preferential voting](#). These reforms, as reported on in the April 2016 ERRN newsletter, were the first changes to the Senate voting system since 1984.

### Results

Led by Malcolm Turnbull, who replaced former Prime Minister Tony Abbott in 2015, the Liberal/National Coalition was re-elected with 76 seats, representing a one-seat majority in the 150 seat House of Representatives. The Labor Opposition won 69 seats. The crossbench parties comprise the Greens, Nick Xenophon Team, Katter's Australian Party and independents Andrew Wilkie and Cathy McGowan won a seat each.

Despite being a relatively close election there was only one recount in the [Division of Herbert, which was initially won by Labor by a margin of eight votes](#). The AEC conducted a recount on 19 July; on 31 July the AEC announced that Labor had won the seat by 37 votes. While some reports suggested that the Liberal Party would challenge the recount, the party did not do so within the statutory time frame.

For the Senate, the final result took nearly a month

to finalise even though voting changes to the Senate were thought to curtail the capacity of minor parties to be elected. [The Liberal / National Coalition won 30 seats, Labor 26 seats, Greens nine seats, One Nation four seats, Nick Xenophon Team three seats, former broadcaster Derryn Hinch \(Justice Party\), Jacqui Lambie, Liberal Democrat David Leyonhjelm and Family First's Bob Day all won one seat](#). Subsequent to the election, the Coalition and Labor agreed that the longer six-year Senate terms would be allocated to the first six Senators elected in each state, while the last six serving three-year terms. This ["approach differs to the "recount" method, whereby the Senators who would have been elected in a normal half-Senate election are allocated a six-year term instead"](#).

### Early voting and 'delayed' results

Early voting increased significantly at the 2016 federal election, following increases at the 2010 and 2013 federal elections. Approximately 34 percent of electors voted early at the 2016 federal election, with about 24 percent voting early in person and 10 percent voting via post. [In raw numbers, approximately 2.3 million Australians voted early in person, up from approximately 1.5 million in 2013. In further detail, over 3.7 million Australians \(27 per cent\) voted early \(pre-poll, postal and mobile\) for the 2013 federal election](#). 1.3 million postal vote applications were received for the 2013 federal election. In the 2007 and 2010 federal elections, the rate of early voting was 15 per cent and 18 per cent respectively.

Increased rates of early voting were not entirely unexpected, however. [There was a significant level of media interest in early voting during the pre-poll voting period and the eight-week campaign](#). Some commentators [cautioned that a close election result, coupled with high levels of early voting, could potentially delay election results](#). Due to high levels of early voting, neither major party was able to claim government on Election Day, with some commentators calling on the AEC

to process results more quickly. For its part, [the AEC provided daily updates via its website on the status of the vote count in all seats, including progress updates on the counting of declaration, postal and pre-poll declaration votes \(those cast outside an elector's home Division\)](#). Tom Rogers, Australian Electoral Commission, also issued a statement rebutting claims by the *Daily Telegraph* calling for [faster election results](#). Further, following the 2013 federal election and the loss of 1300 votes in Western Australia, leading to the 2014 Senate election in Western Australia, the AEC also elected to not count votes on the day after Election Day, as is traditionally done. This was in response to the Keelty report's findings regarding the AEC's handling of ballot papers; at the 2016 election the AEC transported all ballot papers to their correct Division before counting.

## Lowest turnout since 1925

[Turnout at the 2016 federal election was 90.98 percent, decreasing three percent compared to the 2013 federal election. This is the lowest turnout at a federal election since compulsory voting was introduced in 1922.](#) The AEC noted that the low turnout could be related to the length of the campaign period, or the fact the election took place during school holidays. Interesting, informal voting decreased overall at the 2016 federal election, despite widespread changes to the Senate voting system and some commentators expecting an increase in informal voting due to the new voting rules. [Informal voting was 5.05 percent for the House of Representatives.](#)

Approximately 815,000 eligible Australians did not vote. The participation rate amongst 18 to 25 year olds was 85.7 percent.

## Criticism of the AEC

As reported in previous ERRN newsletters, the AEC has undergone significant cultural and administrative change since the 2013 federal election and the 'lost votes' in Western Australia. Despite major logistic changes designed around the Keelty Report, the AEC was criticised again for various aspects of its

election management.

Hundreds of electors were given the wrong ballot papers in several states. In Western Australia, [105 voters were given Victorian Senate ballot papers, meaning their votes were deemed informal. This occurred under the supervision of an early polling mobile ballot team which visited various health and aged care establishments across the region.](#) The AEC confirmed a ["register sheet for votes in the key seat of Cowan was separated from its correct container and some ballot papers were not initialled by the appropriate official"](#). In Victoria, reports suggest many electors were given the wrong ballots in the Division of Higgins, particularly during the first minutes of voting on Election Day. [In NSW, Independent candidate Rob Oakeshott and Greens candidate Carol Vernon, who both ran for the seat of Cowper, lodged an official complaint with the AEC claiming the neighbouring seat ran out of Cowper absentee ballot papers.](#)

With the new Senate voting rules there were also reports of AEC election staff providing inconsistent advice to electors on how to vote for the Senate. Quoted in *The Mercury*, Kevin Bonham said [that "there have been reports some staff are telling people to vote for six parties above the line or 12 candidates below the line in the Senate and not using the magic words 'at least'".](#) Similar reports also emerged in Victoria, NSW and Queensland. However, while many voters used social media to criticise the advice, others said they were impressed by the AEC officials' grasp of the details of the new system. Phil Diak, Director of Media and Communications at the AEC, acknowledged [that "there \[were\] undoubtedly be some instances over the scale of today, where the issuing officers specific conversation with voters, or the interpretation of the latter, varies"](#).

## Calls for electronic voting

Delayed vote counts led to renewed calls for electronic voting at future federal elections. Following the election both Malcolm Turnbull and Bill Shorten backed calls for Australia to investigate electronic voting. But this is not the first push for

electronic voting. In 2014 the Commonwealth JSCEM released its [second interim report on the inquiry into the conduct of the 2013 federal election: An assessment of electronic voting options](#). While the committee accepted that electronic voting, particularly internet voting, could speed up election results, then JSCEM Chair Tony Smith MP said in his foreword to the report that [“Australia is not in a position to introduce any large scale system of electronic voting in the near future without catastrophically compromising our electoral integrity”](#). To this end, some reports suggested that Australia already has remote voting at some state elections, notable NSW’s iVote system. Previous ERRN newsletters have discussed criticisms, and support for, iVote.

Although electronic voting is not used at federal elections, it is worth noting how the AEC utilises technology for electoral roll products. At the 2013 federal election, [the AEC piloted electronic certified lists \(ECLs\) in select locations to introduce efficiencies into the process of finding and marking voters off the electoral roll](#). At the 2016 federal election, the AEC deployed up to 1,500 ECLs that were used in high-volume early (pre-poll) voting centres; at large polling places on Election Day; and by remote mobile voting teams in over 40 electoral divisions throughout Australia. According to the AEC ECLs are used in all electoral Divisions to determine entitlements for declaration votes. In addition, the AEC also scanned millions of Senate ballot papers and recorded voter preferences electronically.

[A further influence on the debate about electronic voting was the 2016 Australian Census of Population and Housing, conducted by the Australian Bureau of Statistics](#). Following a trial at the 2011 Census, where many Australians completed their Census form online via the ‘eCensus’ module, the ABS encouraged as many as two thirds of Australians to complete their census online. [However, ABS computer systems crashed on Census night, with the mass outage affecting potentially thousands of households](#). David Kalisch, Australia’s Chief Statistician, later said that the website was brought down by repeated ‘denial of service’ attacks

from overseas hackers, although these claims have been both supported, and refuted, by the Australian Government, cyber-security experts and commentators. [Nevertheless, many reports have suggested that the Census’ failure has stalled the introduction of electronic voting at federal elections](#).

## **JSCEM inquiry into 2016 federal election**

[On 21 September 2016, the Special Minister of State, Senator the Hon Scott Ryan, asked the Committee to inquire into and report on all aspects of the 2016 federal election and related matters](#). The committee is inviting interested persons and organisations to make submissions addressing the terms of reference by Tuesday, 1 November 2016.

## **Political donations**

In September 2016, it was revealed that Senator Sam Dastyari, former Manager of Opposition Business in the Senate, [received \\$1,600 from Top Education, a firm with links to the Chinese Government, to settle a travel bill](#). During reporting on the incident it was revealed that Dastyari made several statements which were at odds with the [Australian Government’s and Labor’s position on China’s military activities in the South China Sea](#). Subsequently, the Coalition accused Dastyari of a “cash for comment” arrangement to support China over its territorial disputes. Dastyari ultimately resigned on 7 September 2016.

The incident received wide coverage, [with some international publications suggesting it typified Australia’s attitude to foreign investment and Chinese investment specifically](#). It also sparked discussion about the appropriateness of Australia’s political donations laws, and calls for reform to either heavily regulate or ban political donations from foreign business entities and individuals.

Soon after Dastyari’s resignation, it was revealed that [Stuart Robert MP, Member for Fadden, gave a speech in Parliament in 2012 which Fairfax and the ABC alleged was co-authored by a lobbyist from Sunland, a property development firm](#). The

AEC's public disclosure records show that Sunland donated \$12,500 to the Queensland Liberal National Party in 2013. Robert has denied any wrongdoing, despite attacks from Bill Shorten and Labor.

In September it was also reported that [Western Australian Steve Irons MP, Member for Swan, used](#)

[his parliamentary travel entitlements to pay for flight to attend his own wedding in Melbourne.](#) It was also reported that he later paid a flight to Perth for his wife after the wedding using the same funds. Irons insists the payment was identified during a routine audit of his electorate office finances and the monies was paid back using personal funds.



## Local government elections

[The NSW Electoral Commission conducted local government elections on 10 September 2016. Due to NSW Government's council amalgamation process on 81 NSW councils held elections.](#) The remaining councils have had their elections deferred until 2017; this includes many Sydney metropolitan councils, many of whom did not hold elections on 10 September. Of these elections, 20 were mayoral elections. There were also 123 separate elections of councillors due to councils being separated into wards. Five referendums were also held, and five councils also conducted their own elections in an attempt to reduce the cost of the electoral process.

[The City of Sydney election was the first to held using the two votes rule adopted by the Baird Government in 2014. Approximately 23,000 businesses voted in the council election. While the change was thought to be unfavourable to Sydney Mayor Clover Moore, Moore was re-elected for a fourth term with a 10 percent swing in her favour.](#)

Low voter turnout was also a concern in many councils. Camden and Blacktown recorded a slight

decrease in turnout compared to the 2012 council elections.

## Political donations and public funding

In September it was reported that the ["NSW Liberal Party will forgo almost \\$600,000 in public funding after political donations equal to that amount were deemed to have been unlawful following an investigation by the NSW Electoral Commission into its fundraising before the 2011 election"](#). The commission also ["revealed disgraced former Liberal MP for Charlestown, Andrew Cornwell, has been forced to repay \\$10,000 cash he received from property developer Jeff McCloy during the campaign"](#).

As reported in the April 2016 ERRN newsletter, earlier this year the NSW Electoral Commission withheld \$4.4 million in public funding from the NSW Liberal Party pending the party disclosing who donated the funds to party via the Free Enterprise Foundation, based in Canberra. This matter was resolved in late September, [with the Liberal Party revealing the source of the donations. In return it will not receive nearly \\$600,000 of the \\$4.3 million. In a statement on 19 September from NSW Electoral Commission Chairman Keith Mason, Mason advised that the party had submitted an amended declaration, with "officers of the party \[have\] taken steps to ensure that the party made full and proper disclosure of political donations for the relevant period". Nevertheless, as reported in the Guardian, Mason also indicated that the –](#)

["commission did not seek "double recovery", a process where it could recover twice the funds. Mason said this decision was based](#)

[on a number of factors, “including difficulties of proof in some instances, likely additional Limitation Act hurdles and the belief that the public interest has been best served by the action taken, its resolution and the importance of being able to provide prompt educative guidance to the public and all political parties”.](#)

## Allegations of vote rigging

In the lead up to the 2016 federal election allegations emerged that NSW Labor Party officials may [have misused electoral roll information provided by the NSW Electoral Commission in relation to a community pre-selection process](#). In September 2014, residents Ballina District [“were encouraged to vote online in what was billed as an “historic pre-selection”, so they could “have their voice heard on who Labor’s candidate will be for the 2015 NSW state election”.](#) However, in May 2016 the NSW Electoral Commission charged former NSW Labor Party Secretary Jamie Clements with disclosing protected information to a factional ally, Derrick Belan. In August 2016 Clements pleaded not guilty to accessing the electoral roll improperly – it has been reported that the information sought related to a relationship dispute involving Mr Belan.

## China trip referred to NSW Electoral Commission

In September it was reported that Nick Lalich MP, Member for Cabramatta, was referred NSW Labor leader Luke Foley to the NSW Electoral Commission over allegations a property developer funded Mr Lalich for a study tour to China. As reported in the Daily Telegraph, [Mr Foley asked the NSW Electoral Commission for “clarification” as to whether the 2013 gift was a donation, which could be illegal under electoral laws](#). Mr Lalich declared the trip in his MPs register of interests statement in 2013, noting the trip was at the invitation of Mr Henry Ngai to distribute hearing aids to underprivileged people in Henan province. However, Mr Ngai is also a property developer with interests in NSW and abroad.

## Discussion around iVote

There is a continuing discussion about iVote, NSW’s remote voting system, and whether the system might be used in other jurisdictions. Since leaving the NSW Electoral Commission earlier this year former Chief Information Officer [Ian Brightwell has advocated for other Australian States to take up remote voting so that the system is developed across several sites and benefits from economies of scale](#). Appearing before the Victorian Parliament’s Electoral Matters Committee in August 2016 as part of that committee’s inquiry into electronic voting, [Brightwell argued that remote voting should not replace attendance voting, but merely supplement it in light of the growing challenges facing postal voting due to postal service changes and societal pressures leading to increased convenience or early voting](#). As reported in previous ERRN newsletters, however, there remains strong criticism of iVote; Dr Vanessa Teague, from the University of Melbourne, and other computer scientists also appeared at the Victorian Parliamentary inquiry. They outlined the case against remote voting based on security, verification and potential software issues.

Further coverage about the electronic voting inquiry is outlined below in the Victorian news section.

## NSW parliamentary inquiry – ICAC

[On 1 June 2016 the Premier referred that Committee on the Independent Commission Against Corruption \(‘ICAC’\) review and report on the ICAC Inspector’s Report to the Premier: The Inspector’s Review of the ICAC dated 12 May 2016](#); with particular regard to:

1. the extent, nature and exercise of the ICAC’s current powers and procedures including the rationale for and conduct of investigations and public hearings, and possible options for reform;
2. the current structure and governance of the ICAC, best practice models adopted by other integrity institutions, and possible options for reform;

3. the current oversight arrangements for the ICAC, including the role, powers and resourcing of the ICAC Inspector, and possible options for reform;
4. whether the outcome of legal action taken in response to the ICAC's corrupt conduct findings is adequately reflected on the public record; and possible options for reform;
5. any other related matters.

In September, amongst other testimony, ["the committee was told the NSW Parliament should consider replacing the head of the state corruption watchdog with three commissioners to stop any one "personality" determining the direction of the agency, according to the Sydney silk who headed a review of its powers. Bruce McClintock, SC, who reviewed the Independent Commission Against Corruption's powers in 2005 and again last year with former High Court chief justice Murray Gleeson, told a parliamentary inquiry a governance shake-up was "potentially reasonable and very worth thinking about"](#).

## NSW JSCEM

[The NSW JSCEM continues its inquiry into the 2015 NSW state election and matters related thereto.](#) Submissions closed in September 2015 and the

committee held public hearings in August 2016. The inquiry has received 22 submissions and the committee has received answers to eight Questions on Notice as of August 2016.

## NSW state by-elections

[The NSW Electoral Commission will conduct three by-elections on 12 November 2016 in the Districts of Canterbury, Orange and Wollongong.](#) Noreen Hay resigned in Wollongong District, with Linda Burney triggering the by-election with her resignation in Canterbury to contest – and win – the Barton Division at the 2016 federal election. Andrew Gee also resigned to contest – and win – Calare Division at the 2016 federal election.

The NSW Electoral Commission has advised that iVote will be available in all three by-elections.

## New NSW Electoral Commissioner

Following Colin Barry's resignation in 2015 [John Schmidt was appointed NSW Electoral Commissioner in June 2016 for a seven-year term.](#) Mr Schmidt is a former chief executive of the Australian Transaction Reports and Analysis Centre (AUSTRAC), the federal agency responsible for fighting money laundering and terrorism financing.



## Local government elections

[Victoria is holding local government elections on 22 October 2016 for 78 of 79 councils.](#) The City of Greater Geelong will not have a general election in October 2016. The next general election for Greater Geelong City Council will be October 2017. The council was dismissed by the Victorian Government in April 2016 after an independent commission of inquiry found a culture of bullying by council staff had continued under Mayor Darryn Lyons, who was elected in November 2013.

There are a record number of candidates contesting the elections. [2135 "candidates in total had](#)

[nominated for the council elections, up from the 2004 people who put their hands up in 2012 and the 1975 people who contested in 2008”.](#)

Candidates will be seeking election for one of 637 councillor vacancies across 78 councils. Wyndham Council has the highest number of nominees – 95 – including 41 candidates in Harrison Ward, Victoria’s highest. Casey Council has 84 candidates for just 11 councillor positions. Brimbank Council is also holding its first election since the appointment of administrators in 2009.

[Reports have also surfaced about allegations of “dummy” candidates in the Wyndham elections. In light of these allegations and in light of the record number of candidates in Wyndham, Bernie Finn MLC has called for the election to be cancelled and administrators appointed.](#)

## **Electoral Matters Committee – electronic voting inquiry**

[The Victorian Parliament’s Electoral Matters Committee commenced its inquiry into electronic voting in May 2016](#), following the tabling of its final report for the inquiry into the 2014 Victorian state election – this was covered in the April 2016 ERRN newsletter.

The electronic voting inquiry is the first, dedicated State-level inquiry into electronic voting by a parliamentary committee in Australia. [The committee has received 34 submissions and conducted two days of public hearings in August 2016.](#)

While the committee has received some evidence about kiosk-based electronic voting, as currently used in Victoria, [most inquiry participants have discussed remote internet voting and its potential use in Victoria. The committee heard from the VEC that it had changed its position on electronic voting. In contrast to previous parliaments, when the commission saw the technology as “too risky”, changes in lifestyle, the continued increase in early voting, challenges for postal voting and other factors make the move to remote voting inevitable, but not to replace traditional attendance voting on Election](#)

[Day](#). The committee received similar evidence from David Kerlake, the Western Australian Electoral Commissioner, and the NSW Electoral Commission.

[Several inquiry participants, including Drs Vanessa Teague, Rajeev Gore and other computer scientists](#), contrastingly urged the committee to take a cautious approach to remote voting and not adopt internet voting until the technology was definitively shown to produce a secure, verified vote.

The committee will table its final report in May 2017.

## **Ombudsman to investigate alleged Labor ‘rorts’**

[In August the Supreme Court ruled that the Victorian Ombudsman, Deborah Glass, had jurisdiction to conduct an investigation into Labor’s finances at the 2014 Victorian state election following a 2015 referral from the Victorian Legislative Council.](#) In 2015 the Herald Sun reported that Labor staff, MPs and officials allegedly utilised a [“scheme that saw a team of ALP staff being paid two days a week as electorate officers for MPs, when they were actually working as 2014 election campaign staff. In some cases, the electorate officers never met the MPs for who they were working, and instead ran phone banks, doorknocked and organised volunteers”.](#) These rules may contravene parliamentary guidelines regarding the use of electorate service funds.

As of September 2016 the Victorian Government will appeal the Supreme Court’s ruling.

## **Legislative Council procedural issues**

While not specifically related to electoral regulation, it is worth noting that the Legislative Council is experiencing a political ‘tit-for-tat’ which blocks the swearing in of Nationals MLC Luke O’Sullivan, who replaced Damien Drum after his resignation to contest – and win – Murray Division in the 2016 federal election. [The situation began after the government’s leader of the Upper House, Gavin Jennings, was suspended from the chamber for six-months over his refusal to produce confidential](#)

[government documents](#). In retaliation Labor used its numbers in the lower house to block a special

joint sitting of Parliament needed to swear in Mr O'Sullivan.



With the next Queensland state election due in 2018 the Palaszczuk Government has been forced to 'bat away' rumours that it will call an early election in order to stave off One Nation's growing electoral appeal and instability in the Queensland Parliament. However, as reported in the Courier Mail, [Labor sources have denied the move, citing "a lack of will, money or need to go this early in the cycle, with the government only just approaching its 18-month anniversary"](#).

## **Fallout from Electoral (Improving Representation) and Other Legislation Amendment Bill**

As reported in the April 2016 ERN newsletter, fallout continues from the passage of the Palaszczuk Government's electoral reform legislation. To refresh, the Bill increased the size of the Legislative Assembly from 89 to 93 Districts. A last minute amendment to the Bill by the Palaszczuk Government, which has been called an "act of bastardry" by the LNP and widely criticised by commentators, [saw the Bill repeal optional preferential voting and introduce compulsory preferential voting for Queensland state elections for the first time in a generation](#).

## **Toowoomba South by-election**

[The Toowoomba South by-election was held on 16 July 2016](#), following the 29 April resignation of

LNP MP John McVeigh. McVeigh resigned after he was preselected as the LNP candidate for Groom Division at the 2016 federal election. The LNP's David Janetzki held the seat.

The by-election was the first Queensland election to use compulsory preferential voting following 2016 electoral reforms. [3.24 percent of votes were informal, an increase of one percent compared to the District result at the 2015 Queensland state election](#).

## **2016-2017 electoral redistribution**

[An electoral redistribution commenced in Queensland in 2016](#). The Queensland Redistribution Commission is responsible for managing the redistribution of Queensland's electoral districts, ensuring that the number of electors in each district remains within the acceptable range (quota) and that every person's vote carries the same value (one vote, one value). Due to the 2016 electoral reforms, the 2016-17 boundary review will be responsible for increasing the number of electoral districts from 89 to 93. The Commission is comprised of Judge Hugh Botting, retired District Court Judge and the Chairperson for the redistribution; Ms Liza Carroll, Director-General, Department of Housing and Public Works; and Mr Walter van der Merwe, the Electoral Commissioner of Queensland.

## **CCC probe**

In September 2016 it was reported that Queensland's Crime and Corruption Commission will continue investigations into alleged corruption during the 2016 Gold Coast City Council elections. The Queensland Electoral Commission has recently [referred the allegations to the Crime and Corruption Commission](#).

After the March 2016 council elections ["it was reported that federal Liberal MP Stuart Robert donated \\$30,000 dollars from his national LNP](#)

[campaign fund, the Fadden Forum, to council candidates who stood as independents”.](#)

## Palmer United deregistered

Also in September, [the Palmer United Party applied for deregistration in Queensland. The Electoral](#)

[Commission of Queensland received an application from \(the Palmer United Party’s\) registered officer to cancel the registration of that party, under the provisions of the Electoral Act 1992 s78\(1\).” Queensland electoral commissioner Walter van der Merwe said in the notice.](#)



## Electoral redistribution – draft report

The South Australian Electoral Commission released its draft report in August 2016 for the review of South Australia’s electoral boundaries.

South Australia’s Constitution requires the Electoral Districts Boundaries Commission to review parliamentary election districts, after each (four-yearly) state general election. A state election was held in 2014 and the Commission began a review in November of 2015. The Commission called for demographic projections and also commissioned Professor Clem Macintyre (Adelaide University) to review its methodology; early in 2016 hearings were conducted with the major parties giving evidence and held country hearings.

The Commission aims for equality of electors at the time of the subsequent election and traditional

criteria, but it has an additional fairness criterion which is intended to prevent overconcentration of one party’s votes to the party’s detriment at the subsequent election. Implementation of that requirement has been difficult. At the 2014 state election Labor won 23 seats, Liberals won 22 and two were won by Independents; when they gave their support to Labor, the Labor Party retained government. Nonetheless the two Independents’ seats were both notionally Liberal rather than Labor, so the statewide two party preferred vote showed that 53 percent of the state’s voters preferred Liberal candidates.

The report makes major changes – almost one in every three electors would be moved out of their districts, two Labor districts have been drawn as notionally Liberal and one of the Independents’ districts has been drawn as notionally Labor rather than notionally Liberal. This Commission has also made more use of the allowable tolerance from equality, and as a result has been able to retain the three Iron Triangle districts. The Labor Party has argued that only one of its districts should have been drawn notionally Liberal; the Liberal Party has argued that the new districts would still allow Labor to win a majority of seats without winning a majority of the statewide two party-preferred vote. But that argument rests on assuming a hypothetical uniform swing, and recent elections have not shown uniform swings at all. On the other hand, if the Commission does not assume a uniform swing, it is hard to see how it can assess its districts as likely to be fair.



## WESTERN AUSTRALIA

### Leadership challenge

In mid-September Premier Colin Barnett saw off a challenge to his premiership after a spill motion put to a Liberal party room meeting failed. The motion was brought by Murray Cowper, a backbencher who cited “bullying and intimidation” and the party’s lack of direction for the challenge. The motion was defeated 31 votes to 15.

### WA Parliament – agency review of Western Australian Electoral Commission

[In September the WA Parliament’s Community Development and Justice Standing Committee conducted an agency review of the Western Australian Electoral Commission in preparation for the March 2017 WA state election.](#) During the review David Kerlake, WA Electoral Commissioner, told the committee that WA would follow NSW’s lead of introducing pens rather than pencils for electors to mark the ballot paper. [Mr Kerlake also told the committee that the commission’s budget, “in real terms, would be smaller than in 2013, given there would be an extra 200,000 voters”.](#)

### Non-voter follow up in WA following 2016 federal election

Approximately 12 percent of WA’s eligible electors did not vote at the 2016 federal election. In August and September the AEC’s state manager, Marie Neilson, [“said while the turnout was pretty low for the recent federal election not everyone sent a letter would be fined”.](#)

Bruce Bell, a former associate of One Nation senator Rodney Culleton has lodged a High Court challenge seeking Culleton’s dismissal from Parliament and a fresh Senate election to be held in Western Australia. The petition lodged with the High Court claims the Senator is ineligible to nominate as a candidate because at the time of nomination, he was convicted and awaiting sentence for a crime carrying a penalty of more than 12 months in jail. The conviction, over a larceny charge in New South Wales, took place in Culleton’s absence and was annulled earlier this month to be re-heard at a later date.

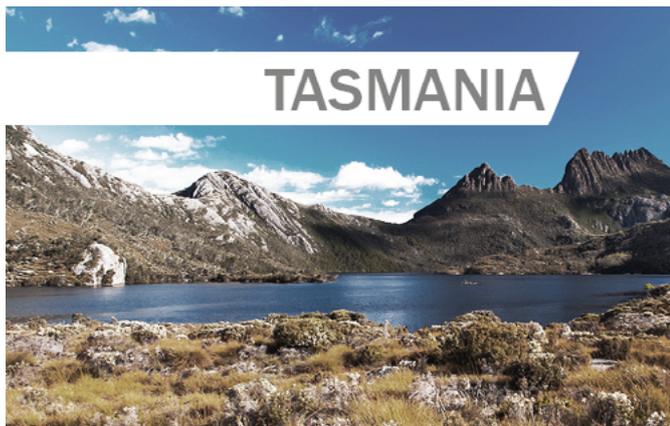
The case is covered further in this newsletter’s case notes.

### Remote voting in WA

Western Australia looks set to embrace remote voting at the 2017 WA state election following the passage of enabling legislation through the WA Parliament in mid-2016.

In his submission to the Victorian Parliament’s Electoral Matters Committee inquiry into electronic voting, [David Kerlake, WA Electoral Commissioner, explained that the “legislation is restricted application than in NSW, with eligibility for Internet voting confined at this stage to electors who are illiterate, sight impaired or otherwise incapacitated”.](#) The Western Australian legislation mirrors NSW in enabling the Electoral Commissioner a degree of flexibility in establishing approved procedures. [However, there are some mandatory aspects to the system; it must be secret, allow users to verify that their vote has been stored as cast and ensure that votes are securely transmitted and stored. The system must also be independently audited. In addition, the Electoral Commissioner can also make a determination not to proceed with remote voting at a particular election.](#)

Remote voting will also operate alongside telephone voting. Electors will be able to record their votes via an IVR/telephony facility using special telephone keypads in their own homes. With this system in operation, the WAEC intends to discontinue the Vote Assist system used in designated voting centres at the last State election.



## 35 seat restoration for House of Assembly

In September [the Tasmanian Chamber of Commerce and Industry reignited interest in increasing the size of the Legislative Assembly from 25 to 35 members](#). The House of Assembly was reduced to 25 members in 1998. Since then discussion about increasing its size has ebbed and flowed, with all three political parties supporting expansion prior to the 2010 Tasmania state election. [More recently, the Liberal Government has backed away from the proposal.](#)



[August 2014, the Assembly increased the size of the Assembly to 25 members, elected from five electorates of five seats each.](#) The Hare-Clark system remains in place.

As reported by Antony Green for the ABC a ["record 141 candidates will contest the 2016 ACT election, higher than the 117 candidates at the first ACT election in 1989 under the Modified D'Hondt electoral system"](#). The large number of candidates is probably related to the increase in the Assembly.

## 2016 ACT Legislative Assembly election

[The next election for the ACT Legislative Assembly will be held on 15 October 2016. At the 2012 ACT Legislative Assembly election there were 17 seats in the Assembly based on three multi-member electorates Brindabella \(five seats\), Ginninderra \(five seats\) and Molonglo \(seven seats\), using the Hare-Clark proportional representation system. On 5](#)

## Election signage

The ABC has reported that Canberra's roads are "clogged" with election signage, drawing the ire of some residents. Phil Green, the ACT Electoral Commissioner, said there is nothing in ACT legislation limiting the number of corflutes placed by a candidate. Typically local government by-laws regulate the placement of political advertising signage.

## NORTHERN TERRITORY



### 2016 Northern Territory election

The 2016 Northern Territory general election was held on 27 August 2016 to elect 25 members of the Northern Territory Legislative Assembly.

[The one-term incumbent Country Liberal Party \(CLP\) minority government, led by Chief Minister Adam Giles, was defeated by the Labor Party Opposition, led by Michael Gunner. The CLP suffered the worst defeat of a sitting government Territory electoral history, and the first ever one-term defeat.](#) From 11 seats at dissolution, the CLP won only two seats—those of second-term MPs Gary Higgins (the only member of the Giles cabinet to

be re-elected) and Lia Finocchiaro. Labor won 18 seats. Independents won five seats. Although the independent MPs outnumbered the CLP MPs, the CLP was ultimately recognised as the official opposition.

The election was the first following the introduction in March 2016, as reported in the April 2016 ERRN newsletter, of electoral legislation introducing optional preferential voting and introducing a 100-metre exclusion zone on canvassing at polling places. The introduction of optional preferential voting had a significant effect on informal voting, which is always higher in the NT compared to other states. Informal voting was 2.0 percent in 2016, down from 3.2 percent in 2012. In the six electorates with majority indigenous populations the rate of informal voting fell from 4.6 percent to 1.9 percent.

### Early voting

In line with all other Australian jurisdictions early voting increased substantially at the 2016 NT election. [Nearly 30,000 electors cast an early vote, an increase of 127 percent on the 2012 NT election, representing 26 percent of total votes cast at the 2016 NT election.](#)

## Research Collaboration Initiative

### New grants

In July 2016 the ERRN Governance Board awarded grants to two projects.

Professor Rodney Smith of the University of Sydney will lead a team on a project entitled 'Implications of Changes to Voting in Australia' with involvement from the New South Wales Electoral Commission and the Western Australian Electoral Commission

while Dr Narelle Miragliotta of Monash University will lead a team on a project entitled 'The Desirability and Feasibility of Extending Convenience Voting in Australia' with involvement from the Victorian Electoral Commission.

Further for information about the projects please visit <http://law.unimelb.edu.au/centres/errn/research/research-projects>.

## Collaboration with the McDougall Trust

The ERRN has a new collaboration with the McDougall Trust, a UK-based independent charity promoting public understanding of electoral democracy. The Trust will fund video recording of ERRN events that provide comparative perspectives on electoral democracy.

Two of these videos are already available online: [Political Corruption Elections and Beyond Perspectives from Indonesia and Australia](#), and [A Comparative Analysis of the Deliberative Quality of Televised Election Debates in Europe](#).

## Forthcoming Events

### “The Law of Deliberative Democracy – book release”

10 November 2016  
185 Pelham Street, Room 920  
1.00pm – 2.00pm

Presenter: Dr Ron Levy, ANU College of Law

Laws have colonised most of the corners of political practice, and now substantially determine the process and even the product of democracy. Yet analysis of these laws of politics has been hobbled by a limited set of theories about politics. Largely absent is the perspective of deliberative democracy – a rising theme in political studies that seeks a more rational, cooperative, informed, and truly democratic politics. Legal and political scholarship often view each other in reductive terms. This book breaks through such caricatures to provide the first full-length examination of whether and how the law of politics can match deliberative democratic ideals.

Essential reading for those interested in either law or politics, the book presents a challenging critique of laws governing electoral politics in the English-speaking world. Judges often act as spoilers, vetoing or naively reshaping schemes meant to enhance deliberation. This pattern testifies to deliberation's weak penetration into legal consciousness. It is also a fault of deliberative democracy scholarship itself, which says little about how deliberation connects with the actual practice of law. Superficially, the law of politics and deliberative democracy appear starkly incompatible. Yet, after laying out this critique, *The Law of Deliberative Democracy* considers prospects for reform. The book contends that the conflict between law and public deliberation is not inevitable: it results from judicial and legislative choices. An extended, original analysis demonstrates how lawyers and deliberativists can engage with each other to bridge their two solitudes.

### The GetUp! Effect: Movement Mobilisation and Australian Electoral Politics

10 November 2016  
Stanley Burbury Theatre, University Centre, Sandy Bay Campus  
6.00pm – 7.00pm

Co-sponsored by the University of Tasmania and the Institute for the Study of Social Change

Panel: Mr Paul Oosting, National Director of GetUp!, Dr Glenn Kefford, University of Tasmania and Dr Hannah Murphy-Gregory, University of Tasmania

GetUp! is widely regarded as one of Australia's most influential social movements. During the recent federal election, the capacity of GetUp! to mobilise their volunteers and supporters meant they were able to make 40,000 telephone calls and hand out over a million how-to-vote cards. The GetUp! effect was particularly pronounced in the three Northern Tasmanian seats of Bass, Braddon, and Lyons. In each of these seats, the three sitting members from the Liberal Party – dubbed the 'three amigos' – were defeated and GetUp! was said to have played a critical role. With the election now behind us, what role GetUp! – and other third party campaigners – have played and will continue to play in Australian politics is a question worthy of further analysis. Come along and hear our panel discuss these important issues.

## **2017 ERRN biennial workshop**

"The Times They are a-Changin..."

November 2017

University of Western Australia Club, Perth

The Western Australian Chapter of ERRN is pleased to announce that it will be hosting the 5th Biennial Workshop on 9-10 November 2017 at the University of Western Australia Club. Further details will follow. Let us know if you have any topics you would like featured that follow our theme of issues arising in a changing electoral landscape.

Note in your calendars the opportunity to come to picturesque Perth in November 2017 to attend the workshop, 'experience extraordinary' Western Australia and maybe even attend the weekend's Rugby League World Cup double-header.

### **‘Political Donations – A Fresh Pathway’**

2 August 2016

Melbourne Law School, 185 Pelham Street

Presenter: Neil A. Freestone, author of Political Donations and Safeguards Code

The author of a new work on political donations discussed his proposal for a new pathway towards enabling greater participation in our democracy. The pathway provides for an expanded role for the Australian Electoral Commission, funded (at least in part) by the re-direction of public funding away from political parties and candidates and towards the administration of a fairer and more transparent electoral system. The proposal would see the end of large political donations and the end of donations from any person or entity that is not an ‘eligible voter’. The new pathway would deliver real-time transparency along with a range of caps. It also draws associated entities and third parties into the proposal, while acknowledging basic political rights. The author’s work includes a draft piece of legislation that is intended as a starting point where the model can – with constructive input from interested persons – become a reality.

### **‘Monitoring and Analysis of Myanmar’s 2015 Election Processes and Result’**

21 July 2016

Melbourne Law School, 185 Pelham Street

\*Audio and video available at <http://law.unimelb.edu.au/centres/errn/about/past-events/myanmars-2015-election>

Presenter: Dr Anthony Ware

Chair: Dr Yee-Fui Ng

Myanmar held landmark general elections on 8 November 2015. This was the first general election Daw Aung San Suu Kyi’s National League for Democracy (NLD) party contested after it won the 1990 election but was denied power. Despite being held under a constitution many argue is deeply flawed, this landmark election saw the NLD win 77.1 percent of seats up for election (255 of 330 in lower house, 135 of 168 in the upper house). Thus despite the Myanmar constitution granting 25 percent of seats to military appointees, this result is sufficient to give the NLD an outright majority in both houses of parliament (58 percent in lower house, 60 percent in upper house).

Nonetheless, Suu Kyi is barred from being President, and the power of the government is severely limited by the constitutional power of the military. This seminar discussed the elections, analysing the Election Day processes, concerns and issues raised, and the constitutional limitations imposed on the elections. It also offered insights into the Myanmar peace process and Muslim-Buddhist communal tensions, and the implications of the election on these processes.

## **‘A comparative analysis of the deliberative quality of televised election debates in Europe’**

12 July 2016

Presenter: Stephen Elstub, Newcastle University

Televised debates have become a pre-eminent means of campaign communication in numerous countries and are becoming increasingly widespread in Europe. However, concerns have been raised repeatedly about the quality of these election debates. As a result of increased media logic, expressing controversial one-liners and waging uncivil attacks on one's opponents is a successful strategy to gain media coverage. As a result, the quality of political debates in the media is argued to be in decline leading to a drop in political trust (Shea & Fiorina 2013). Yet empirical evidence on the quality of televised election debates is scarce and often focuses on single case studies. This study fills this void by investigating the quality of election debates in three European countries (UK, the Netherlands, and Belgium) using the Discursive Quality Index. This index meticulously follows the criteria of the ideal-speech situation developed in deliberative democracy theory (e.g. amount of respect, justification) and has repeatedly proven to be a reliable measurement instrument (Habermas 1981; Steenbergen, et al 2003). Preliminary analyses suggests variation in the quality of election debates as a result of the different media, electoral and political systems.

## **Twilight lecture series: ‘The federal election away from the politics – the legal issues’**

29 June 2016

Constitutional Centre of Western Australia, in conjunction with ERRN and the Australian Association of Constitutional Law

Chair: Dr Martin Drum, Associate Professor, University of Notre Dame

Presenters: Grant Donaldson SC (Solicitor General for Western Australia) and Dr Sarah Murray (Associate Professor, UWA Faculty of Law)

This twilight seminar explored some of the legal issues presented by the forthcoming Federal election including relevant statutory changes and the High Court matters of *Day* (<http://www.austlii.edu.au/au/cases/cth/HCA/2016/20.html>) and *Murphy* ([http://www.hcourt.gov.au/cases/case\\_m247-2015](http://www.hcourt.gov.au/cases/case_m247-2015))

## **‘Above the line: Changes to the way we vote for the Senate’**

14 April 2016

Parliamentary Library, Parliament of Victoria

Audio and video available from <http://law.unimelb.edu.au/centres/ernn/about/past-events/above-the-line>

Presenter: Dr Nick Economou, Monash University

Chair: Paul Thorton-Smith, Victorian Electoral Commission

The Commonwealth Electoral Amendment Act 2016 is making the biggest changes to the way Australians vote in Federal elections since 1984. Group voting tickets – a key feature of Senate elections for more

than 30 years – are being abolished, and there will be optional preferential voting both above and below the line on Senate ballot papers.

These changes can be expected to have profound effects on voting patterns, the vote counting process and election results. There has been an unusual line-up of parties for and against the changes. As always in electoral matters, political self-interest and democratic principle are intertwined.

In this seminar, Dr Nick Economou of Monash University's School of Political and Social Inquiry explained the changes to the Senate system. Dr Economou also outlined possible implications for Victoria, whose Upper House has a similar voting system to the Senate.

## Working Papers

The Electoral Regulation Research Network was established in 2012 with the aim of fostering exchange and discussion amongst academics, electoral commissions and other interested groups on research relating to electoral regulation.

To this end, the Network together with the Democratic Audit of Australia will be publishing a series of working papers – often called 'discussion papers' – to help foster discussion about all aspects of electoral regulation. These working papers will be posted on the Network's website and circulated to members of the Network. They will also be posted on the Democratic Audit of Australia's website.

We welcome papers written on all aspects relating to electoral regulation from academics, electoral commission officials, parliamentarians, party officials and others interested in this field.

### **No. 39: Prohibiting Corporate Felon Political Spending: Is It Possible? (April 2016)**

Sheldon Oski, Student, Melbourne Law School

This working paper examines the different legal impediments faced in introducing laws in Australia that would prohibit a corporation that has pled guilty to, or been convicted of, a felony from making any expenditure, directly or indirectly, in any political campaign for federal office.

### **No. 40: An Instance of Cartel Behaviour? The Politics of Senate Electoral Reform 2016 (April 2016)**

Dr Nick Economou, Monash University

This working paper outlines the history, politics and mechanics of the recent changes to Senate voting.

### **No. 41: A Framework Convention Against Political Corruption (April 2016)**

James D. Cooper, Student, University of Melbourne

The interaction between money and political parties – especially during election campaigns – raises serious issues for democracies around the world due to the occurrence of political corruption. This working paper advocates for the development of a Framework Convention Against Political Corruption (FCAPC), which should be negotiated and implemented by the United Nations.

### **No. 42: Funding of Political Parties and Election Campaigns in the Maldives (May 2016)**

Aminath Sweiza Naeem, Student, University of Melbourne

This working paper examines the Maldives's electoral system in regards to the funding of political parties and election campaigns. It argues that there needs to be a more effective regulatory framework for campaign financing, including extending coverage

to expenditure by political parties during elections and ensuring campaign financing restrictions for political parties, candidates and third parties to minimize loopholes with the regulatory framework.

**No. 43: Political Donations and Safeguards Code** (August 2016)

Neil A. Freestone, Solicitor

This working paper looks at how we might change the current system of political donations (and expenditure) and the form such changes might take.

## Recent Publications

Professor Graeme Orr and Ron Levy have released *The Law of Deliberative Democracy*. It considers prospects for reform. The book contends that the conflict between law and public deliberation is not inevitable: it results from judicial and legislative choices. An extended, original analysis demonstrates how lawyers and deliberativists can engage with each other to bridge their two solitudes.

ERRN Legal Editor Yee-Fui Ng has written about Operation Spicer and Sam Dastyari's resignation and what it means for the influence of money in Australia politics for *The Conversation*.

Yee-Fui also published "Dispelling myths about conventions: ministerial advisers and parliamentary committees" in the *Australian Journal of Political Science*, March 2016. She writes:

"There is a tension between a key principle underpinning liberal democratic governments and the associated political practice. Responsible government demands that the Executive is responsible to the Legislature. Governments, however, are generally inclined to evade or limit their accountability to Parliament wherever possible. In addition, ministerial advisers have thus far been excluded from the accountability framework of responsible government. This has led to an accountability deficit in terms of ministerial advisers appearing before parliamentary committees. Indeed, Ministers in the Australian Commonwealth and State of Victoria have claimed that there is a constitutional convention that ministerial advisers do not appear before parliamentary committees. This article challenges this claim and argues that there are no strong grounds based on precedent, reason, and the beliefs of political participants to conclude that there is a constitutional convention preventing ministerial advisers from appearing before parliamentary committees".

In May 2015 the Parliament of Victoria's EMC released its final report for the inquiry into the 2014 Victorian state election.

Professor Graeme Orr and Tracey Arklay published "Rethinking voter identification: its rationale and impact" in the *Australian Journal of Political Science*, May 2016.

## Case Notes

### ***Murphy v Electoral Commissioner*** **[2016] HCA 36**

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

Murphy relied on *Roach v Electoral Commissioner* [2007] HCA 43 and *Rowe v Electoral Commissioner* [2010] HCA 46 to argue that:

a law that has the practical operation of effecting a legislative disqualification from what otherwise is the popular choice mandated by the Constitution is invalid unless the disqualification is for a substantial reason; and

such a law will be for a substantial reason only if it is reasonably appropriate and adapted to serve an end which is consistent or compatible with the constitutionally mandated system of representative government.

The High Court unanimously rejected the challenge to the *Electoral Act* in six separate judgments. French CJ and Bell J held that the suspension period has existed for a long time and for legitimate reasons and was not a 'burden' upon the realisation of the constitutional mandate of popular choice. The impugned provisions do not become invalid just because it is possible to identify alternative measures that may extend opportunities for enrolment.

Kiefel J endorsed the use of proportionality testing in determining the limits of legislative power where legislation burdens the franchise. Applying this approach, her Honour held that the purpose of impugned provisions was the facilitation of the efficient conduct of an election. The closure of the rolls increases the accuracy and certainty in the lists when polling takes place; thus the provisions bore a rational connection to its purpose. Kiefel J also found it relevant that most of the people who will be unable

to enrol are already in breach of their obligation to do so and that persons who have transferred to, but are not yet enrolled in, another division retain the ability to vote in their former division.

Gageler J emphasised that closure of the rolls has always been a step in the conduct of an election under our national electoral law. He rejected the use of proportionality testing: the appropriate question was simply whether there was a substantial reason for the burden. He held that the reason for the impugned provisions was to promote the orderly conduct of national elections and that this was a substantial reason.

Keane J held that the *Constitution* confers on the Parliament a broad power to create the electoral system that effects the constitutional requirement of 'choice by the people'. He noted that the concept of 'choice by the people' covers the broader aspects of the electoral system which are necessary to facilitate that choice and against which the desirability of maximising voting opportunities must be balanced. He held that it is within the discretion of Parliament to permit some leakage from the compulsory franchise on the part of those who are 'less than astute to discharge their civic duty to enrol'.

Nettle J accepted that restrictions on the period in which persons may enrol to vote must be justified by a 'substantial reason'. This requires that the restriction be reasonably appropriate and adapted to a legitimate end. He held that the *Electoral Act* is directed to the achievement of a degree of order and certainty within the constraints of finite resources and that the impugned provisions were reasonably appropriate and adapted to that end. Although there were alternative means of managing the electoral roll, it was not clear that these were capable of achieving the same level of order and certainty. The relatively broad discretion conferred by the *Constitution* left it open to Parliament to prefer the system established by the *Electoral Act*.

Gordon J held that the impugned provisions did

not impose a relevant restriction on, or exclusion from, the franchise, as they do not exclude part of universal adult suffrage, restrict the franchise, or produce a distortion of the popular choice. She held that, even if the impugned provisions did impose a restriction, the creation of an orderly process for Members of Parliament to be 'directly chosen by the people' was a substantial reason justifying that restriction.

### ***Day v Australian Electoral Officer for the State of South Australia [2016]*** **HCA 20**

Senator Robert Day lodged a High Court challenge to provisions the *Electoral Amendment Act 2016* that amended the method of electing Australian Senators. The changes allow optional preferential voting by numbering sequentially at least six squares above the line or number at least 12 candidates below the line. The effect is to give voters greater control over their voting preferences, but will also allow many votes to exhaust, rather than elect a candidate.

Day argued that the Senate reforms contravened sections 7 and 9 of the *Constitution*, regarding the method of election of senators, because it constituted more than one method of voting, did not meet the requirements that Senators be 'directly' chosen by the people, contravened the principle of proportionate representation, prevented a 'free and informed' vote; or contravened a constitutional principle of representative government and the freedom of political communication.

Section 7 of the *Constitution* provides for the Senate to be 'directly chosen by the people', while section 9 provides that the Commonwealth Parliament 'may make laws prescribing the method of choosing Senators, but so that the method shall be uniform for all the States'.

The High Court unanimously dismissed the challenge. French CJ, Kiefel, Bell, Gageler, Keane,

Nettle and Gordon JJ held that the new voting requirements did not prescribe more than one method of choosing Senators. They found that constitutional method requirements are relevant to national uniformity of ballot paper approaches, and are not a formal constraint on Parliament's power to legislate on Senate election methods unconnected to national uniformity purposes.

The Court found that above the line voting is still just as much a direct vote for individual candidates as below the line voting. The requirement of direct choice excluded indirect choice by an electoral college or some other intermediary. That was not the case here.

The Court also rejected the existence of a principle of 'directly proportional representation', and held that, while many voters may be encouraged to vote above the line, that did not constitute any disenfranchisement in the legal effect of the voting process. Further, the Court held that the ballot paper did not preclude a free and informed vote, as the ballot paper was not misleading and did not fail to inform the voter of the range of voting options.

### ***Horn v Electoral Commission [2016]*** **HCA Trans 149**

Dieter Horn sought mandamus to compel the Commissioner to provide persons voting at the 2016 federal election with 'lawfully constructed polling booths that shall have separate voting compartments, constructed so as to screen the voters from observation while they are marking their ballot papers; i.e. lawfully constructed voting compartments that can be closed by a door or curtain'.

Horn contended that the current form of voting compartment, which does not have a door or curtain, does not comply with section 206 of the *Commonwealth Electoral Act 1918* (Cth) which provides that polling booths shall have separate voting compartments, constructed so as to screen

the voters from observation while they are marking their ballot papers.

Horn had tried for many years to compel the Commissioner, through a number of court cases, to provide polling booths that have a separate voting compartment constructed with a door or curtain.

French CJ dismissed the application as an abuse of the Court's process, as the plaintiff was re-litigating the same case that he lost in 2007 without any relevant changes in the factual circumstances. He held that, based on a purposive and a literal reading of the legislation, there is no reason why the fact that a voter is in a booth marking a ballot paper as required by law should in itself be the subject of privacy; rather it is the manner in which the vote is exercised that is subject to privacy.

### **Gately v Kennedy (Victorian Magistrates' Court)**

Jason Kennedy was a Palmer United Party (PUP) candidate for South-Eastern Metropolitan Region at the 2014 State election. The day after nominations closed, the PUP contacted the Victorian Electoral Commission (VEC) to state that it had become aware that Kennedy was ineligible to be a candidate (he had been found guilty of an offence punishable by 5 years or more imprisonment, which disqualified him under s 44(3) of the *Constitution Act 1975* (Vic)). PUP requested that his name removed from the ballot paper. However, the VEC had no legal power to do so. PUP applied for an injunction, but failed.

The nomination signed by a candidate includes a declaration by the candidate that the candidate is qualified to be elected, plus a warning that making a false declaration is an indictable offence.

In September 2015, Mr Kennedy was charged with providing false information, contrary to section 148(1) of the *Electoral Act 2002* (Vic). Contravention of this section is an indictable offence, with a penalty of up to 5 years' imprisonment or 600 penalty units.

On 14 June 2016 at the Melbourne Magistrates' Court, Kennedy was convicted of providing false or

misleading information, and was fined \$15,000 with \$5,000 costs.

### **Mowen v Australian Electoral Commission [2016] QCA 152**

Bevan Mowen was convicted in the Magistrates Court in Rockhampton for failing to vote at a federal election in contravention of s 245(15) of the Commonwealth Electoral Act 1918 (Cth). He was convicted and fined \$170 and ordered to pay \$93.40 for court costs and \$150 for witness expenses. Mowen sought leave to appeal against the judgment of the District Court.

Mowen argued that section 93 of the *Electoral Act*, which provides that a person who is 18 years of age and an Australian citizen shall be entitled to enrolment to vote, is inconsistent with s 34 of the Constitution and therefore the *Electoral Act* is invalid in its entirety.

The judges dismissed the appeal. They found that as section 34 of the *Constitution* expressly says 'until the Parliament otherwise provides', it empowers the Commonwealth Parliament to make laws with regard to the qualification to be a Member of Parliament and Parliament can therefore validly change the age at which a person is eligible to be a Member of Parliament.

### **Culleton (High Court)**

Bruce Bell, a former associate of One Nation senator Rodney Culleton has lodged a High Court challenge seeking Culleton's dismissal from Parliament and a fresh Senate election to be held in Western Australia.

The petition lodged with the High Court claims the Senator is ineligible to nominate as a candidate because at the time of nomination, he was convicted and awaiting sentence for a crime carrying a penalty of more than 12 months in jail.

Section 44 of the *Constitution* states that anyone convicted or awaiting a sentence for any offence punishable by jail for one year or longer is ineligible to sit in Parliament.

The conviction, over a larceny charge in New South Wales, took place in Culleton's absence and was annulled earlier this month to be re-heard at a later date.

Bell's petition has yet to be heard by the High Court, sitting as the Court of Disputed Returns.

## **Operation Spicer Investigations (NSW ICAC)**

The New South Wales Independent Commission Against Corruption (ICAC) has handed down its report on illegal political donations from property developers during the 2011 state election, dubbed Operation Spicer.

In Operation Spicer, ICAC investigated allegations that the NSW Liberals used associated entities to disguise donations from donors banned in the state, such as property developers, in exchange for favouring the interests of the donors. The money was channelled back to state campaign coffers.

ICAC confirmed the NSW Liberals used two entities, the Free Enterprise Foundation and Eightbyfive, to 'launder' banned political donations from developers and channel the money back to the NSW election campaign.

ICAC was hampered by a High Court challenge to its jurisdiction in *ICAC v Cunneen* (discussed in a previous newsletter), which meant it was unable to make findings of corrupt conduct for breaches of electoral laws.

Nevertheless, ICAC found former Labor MP Joseph Tripodi engaged in serious corrupt conduct. He misused his position as a Member of Parliament to improperly provide an advantage to property developer Buildev, which wanted to create a fifth coal terminal at the port of Newcastle. Tripodi helped Buildev with this, and leaked confidential government information in the hope he could secure future personal benefit from the company.

ICAC recommended the Director of Public Prosecutions (DPP) charge former energy minister Chris Hartcher for an offence of larceny. ICAC found Hartcher had stolen A\$4,000 of donations to the NSW Liberal Party for his own personal use. He had also orchestrated a scheme where banned donations were 'laundered' through an entity called Eightbyfive.

ICAC also recommended the DPP prosecute Samantha Brookes, Andrew Cornwell, Tim Gunasinghe, Tim Koelma and Bill Saddington for giving false or misleading evidence to the commission.

ICAC also found nine state Members of Parliament acted with the intention of evading election funding laws: Hartcher, Cornwell, Mike Gallacher, Chris Spence, Tim Owen, Garry Edwards, Bart Bassett, Craig Baumann and Darren Webber. It also made similar findings about property developer and former Newcastle lord mayor Jeff McCloy, and former Australian Water Holdings CEO Nick Di Girolamo.

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