

Australian Electoral Law: A Stocktake

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IT IS A CENTURY since the first national elections in Australia were held under uniform federal law.¹ This makes 2003 a good time to reflect and take stock of Australian electoral law. Research and commentary on electoral regulation in Australia has traditionally been left to political scientists, with only sporadic attention from legal practitioners and constitutional theorists. Electoral law, as a scholarly discipline in Australia, is only beginning to emerge from a Cinderella state.²

In this article, we describe the key issues and themes in Australian electoral law, largely in respect to the uniform national (that is, federal) electoral law, but also, where relevant, to the law that applies to state and territory elections.³ We do not seek to be comprehensive. The article generally poses questions rather than suggesting answers. Some of the questions raised here are perennials, but, as the title indicates, ours is a contemporary survey. Rich seams of historical research remain to be unearthed.

Our discussion is confined to parliamentary elections in Australia, as opposed to the broader field, which includes local authority, trade union, the Aboriginal and Torres Strait Islander Commission (ATSIC) and even corpo-

rate elections. Our concern is with electoral law proper and we leave boundary questions about the nature of parliamentary democracy, such as the length and flexibility of parliamentary terms and qualifications for election,⁴ to the broader field of constitutional law.

Australian electoral law has three distinct features. First is its reformist, egalitarian face, which was prominent through the second half of the 19th and early 20th centuries—a prominence shared with New Zealand, but now largely spent. The second, and continuing, feature is compulsory voting—a peculiar, even

¹ Elections in 1901 for the first national Parliament were conducted under the electoral laws of the six States. The first election under uniform national law occurred in 1903 after the passage of the *Commonwealth Franchise Act 1902* (Cth) and the *Commonwealth Electoral Act 1902* (Cth).

² Graeme Orr, "Editorial: Special Edition on Electoral Regulation and Representation" (1998) 2 *Griffith Law Review* 166. For instance, while other common law nations have several textbooks on the subject of electoral law, the lack of an equivalent Australian text means that the field has yet to be systemically analyzed and constructed. This can make it difficult to begin or undertake research on electoral law topics. Compare, for example, the United States (Daniel H Lowenstein and Richard L Hasen, *Election Law: Cases and Materials* [2nd ed, 2001] and Samuel Issacharoff, Pamela Karlan and Richard Pildes, *The Law of Democracy: Legal Regulation of the Political Process* [2nd ed, 2002]), the United Kingdom (Richard Clayton, *Parker's Law and Conduct of Elections* [looseleaf service] and Robert Blackburn, *The Electoral System in Britain* [1995]), and Canada (J Patrick Boyer, *Election Law in Canada* [1987]). But interest in Australian electoral law is growing. For an account of issues arising from the previous federal election, see David Bamford, "Current Issues in Australian Electoral Law" (2002) 1 *Election LJ* 253.

³ In any event, electoral law in Australia is relatively similar between the federal, state and territory jurisdictions, certainly more so than in the United States or the United Kingdom.

⁴ Membership (dis)qualifications are thoroughly examined in Gerard Carney, *Members of Parliament: Law and Ethics* (2000) Chapters 2–4.

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dubious practice to citizens of most Western democracies, but a shared duty embraced by most Australians.⁵ The third important feature of Australian electoral regulation, particularly to international observers, is its relatively unjuridified nature. That is, courts play a limited role in shaping the contours of the law, in terms of detail and administrative application.

In contrast to the United States Supreme Court, for example, the High Court of Australia plays an infrequent (and even then often minor) role in the development of electoral law. A central reason for this is the lack of a Bill of Rights at any level of government in Australia. A related, if secondary cause is a traditional reluctance on the part of many judges to involve themselves in an area felt to be better left to parliamentary debate and independent electoral administration. Judicial deference to the long history of professional, relatively well-funded and centralized electoral authorities in Australia cannot be underestimated in explaining why electoral regulation is a less contested and headline-making field in Australia than elsewhere.

It is important to also note at the outset that electoral law has long been a site of comparative cross-fertilization and analysis. This article brings an Australian focus to such comparative debates, and contributes to the shaping of electoral law as a new sub-discipline in Australia. Some of the issues raised in this article are the subject of more detailed consideration in a forthcoming book *Realising Democracy: Electoral Law in Australia*, which will be the first academic legal work dedicated to Australian electoral law.⁶

CONSTITUTIONAL LIMITATIONS AND THE ROLE OF THE COURTS

The High Court and judicial review of electoral legislation

The Australian Constitution establishes a federal system of government comprising parliamentary government, democratic elections, responsible government, an independent High Court, the rule of law and the separation of powers. However, with roots in the Westminster tradition, including a heavy reliance upon

parliamentary sovereignty rather than judicial review, it is not surprising that Australia achieved nationhood in 1901 without a Bill of Rights. This remains the case today, as Australia is now the only western nation without a Bill of Rights in some form. Indeed, the Constitution still contains very few provisions that could be regarded as rights oriented.⁷ It fails even to include an express right to vote (although in this respect it is admittedly no less deficient than the U.S. Constitution) or to freedom of speech. This, combined with a judicial reluctance to imply new rights into the text of the Constitution (such as from general conceptions of democracy), has meant that Australian courts rarely subject electoral laws to judicial review on rights grounds. As a result, Australian law, and electoral law in particular, is less a product of judicial moulding and innovation than in many other nations.

For a time in the 1990s, it appeared this trend might change. The decision of the High Court in *Australian Capital Television Pty Ltd v Commonwealth (ACTV)*⁸ stands alongside more famous cases such as *Mabo v Queensland (No 2)*⁹ (dealing with the native title rights of Australia's Indigenous peoples) as the high water mark of the activism of the High Court under Chief Justice Mason. *ACTV* struck down federal legislation banning paid broadcast advertising during election campaigns as unconstitutional. The ban was inspired by and based on the United Kingdom model where political advertising during election campaigns was banned and political parties were provided with regulated free television and radio airtime for policy statements. The High Court struck down the legislation by *implying* a constitutional freedom of communication in rela-

⁵ Polls often show support for compulsory voting at between 66–75%. See Lisa Hill, "'A Great Leveller': Compulsory Voting" in Marian Sawer (ed), *Elections: Full, Free and Fair* (2001) 130, 6.

⁶ The book is to be published in 2003 by Federation Press and edited by Graeme Orr, Bryan Mercurio and George Williams. See Federation Press <www.federationpress.com.au/> at 19 February 2003.

⁷ See generally George Williams, *Human Rights under the Australian Constitution* (1999) 96–128.

⁸ (1992) 177 CLR 106.

⁹ (1992) 175 CLR 1.

tion to governmental and political matters. Although not written in the Constitution, this freedom was drawn from the provisions of the Constitution providing for direct elections and was seen as essential to the fabric of representative government.¹⁰ Sections 7 and 24 of the Constitution require, respectively, that the members of the Senate and the House of Representatives of the Federal Parliament be “directly chosen by the people”.

ACTV suggested that the High Court might take a more active role in shaping electoral law in Australia, perhaps even a role similar to that played by the United States Supreme Court. The decision opened up the possibility of a shift in position from relative parliamentary license in the construction of electoral law to routine judicial review. This might have included judicial review of electoral legislation with regard to notions of free and fair elections, as well as rights and freedoms developed by the judiciary.

The case posed a vast array of questions for electoral law. A good example is the system of voting for the Senate. Independent candidates are grouped together on the far right hand edge of the ballot paper, without access to the popular “tick a box” system of voting (that is, the system of being able to select a single box representing a group of candidates, rather than having to number all of the many boxes corresponding to each of the candidates, as is normally required in full preferential voting).¹¹ The question arises: why is such unfavorable treatment of independent candidates constitutional?¹² What level of discrimination between candidates would the Court *not* permit? Further, even if *ACTV* were to be narrowly confined to obvious matters of electoral speech, what limitations on campaign methods (such as currently exist in the form of pre-poll advertising blackouts, physical restrictions around the polling booths and regulation of how-to-vote cards¹³) are legitimate? Will any future bans or caps on campaign donations and expenditures be constitutional?

Thus far, however, the impact of *ACTV* impact has been muted. This reflects a judicious drawing back, by subsequent courts, from what could have been a profound change in the balance of power between judiciary and parlia-

ment. In fact, the implied freedom of political communication has had more impact on the law of defamation than the law of elections.¹⁴ The precedent in *ACTV* has not been successfully applied in any electoral law case. Only time will tell whether *ACTV* will be further utilized by the courts. On present indications, it is likely to be confined to its facts, such that only regulations clearly and significantly impacting on core electoral speech will be subject to serious scrutiny.

To date, when *ACTV*-inspired cases have been tried, they have tended to be run, unfortunately, by unrepresented litigants. Unsurprisingly, such cases have a negligible success rate. For electoral case law to develop in a sensible and principled way, courts depend on counsel familiar with both constitutional and electoral practice. (A notable exception, where the applicant was represented, is *Mulholland v Australian Electoral Commission*.¹⁵)

From this discussion, it is evident that any hopes—or fears—that *ACTV* would lead to a new world of court-enforced equality of electoral and political competition, have proved unfounded. Australian courts, after a brief flar-

¹⁰ See generally, Williams, above n 7, Chapter 7 “Implications from Representative Government”. The freedom is a shield against legal restrictions, not a sword guaranteeing practical liberty. For example, it does not require the law to ensure that candidates have actual access to the media during campaigns: *McLure v Australian Electoral Commission* (1999) 163 ALR 734.

¹¹ At the 2001 federal election 95.2% of voters chose to vote in this manner. See Australian Electoral Commission, *Election 2001*, 20, located at <www.aec.gov.au/_content/When/past/2001/bts/06vote.pdf> at 19 February 2003.

¹² *McKenzie v Commonwealth* (1985) 59 ALJR 190; *Abbotto v Australian Electoral Commission* (1997) 71 ALJR 675.

¹³ Supporters of candidates hand out cards listing the candidate’s preferred list of preferences. These “how-to-vote” cards are often relied upon by voters in casting their vote. For more on how-to-vote cards, see *How-To-Vote Cards and their Importance* <www.australianpolitics.com/elections/hvt/> at 19 January 2003; Australian Electoral Commission, *Voting*, <www.aec.gov.au/_content/What/voting/index.htm> at 19 January 2003.

¹⁴ For example, *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. See generally Adrienne Stone and George Williams, “Freedom of Speech and Defamation: Developments in the Common Law World” (2000) 26 *Monash University Law Review* 362.

¹⁵ *Mulholland v Australian Electoral Commission* [2002] FCA 1255. See below, text at n 66 and following.

ing of judicial activism, have reverted to the more restrained and orthodox Anglo-Australian approach to the separation of powers. Supporters of judicial activism in this area might argue that electoral law is such a fundamental aspect of democratic and legal legitimacy that it ought not be left to parliaments. Existing parties and parliamentarians have a vested interest in shaping electoral laws in ways that suit themselves. But even assuming parliament cannot be trusted to enact disinterested law, judicial review may not always be the best cure. If the devil of democratic principle is in the detail of electoral regulation and practice, courts may be out of their depth.

Judicial review of electoral process

Separate Courts of Disputed Returns exist in each jurisdiction, including the federal. In reality, they are not free-standing entities, but merely manifestations of each State Supreme Court, and, at federal level, the High Court. These Courts, which grew out of 19th century legal practice, rule on disputed election outcomes.¹⁶ Yet the electoral jurisdiction of the High Court was not finally confirmed until 1999. In *Sue v Hill*, the High Court held that a petition to unseat a successful candidate on the basis of a lack of qualifications was an exercise in judicial power.¹⁷ The decision was pragmatic and necessary. Had the Court held otherwise, the review of electoral petitions by federal courts might have collapsed, due to the strict limitation against federal courts exercising non-judicial power. This would have thrown disputed elections back to parliamentary committees or other non-independent government bodies ruling on the validity of national electoral outcomes.

But *Sue v Hill* raises other constitutional issues.¹⁸ For example, if the disputed returns power is judicial, attempts by states to oust all appeal rights from state Courts of Disputed Returns may be unconstitutional.¹⁹ Yet, in most jurisdictions, such appeals are limited in the interests of finality. A second example is the tension that exists where parliament retains the privilege to rule on the disqualification of members, concurrently with the possibility of judicial review. This happened recently in Federal

Parliament, over allegations that the Hon. Warren Entsch MHR was disqualified for holding an interest in a company that traded with the government. The House of Representatives voted on party lines to uphold his qualifications and not refer the matter to the courts.²⁰ Yet any person, invoking the “common informer” provisions,²¹ can litigate such an issue and the point can also be used as an “irregularity” to found a post-election petition (assuming the member’s disqualification remains at the following election). In either case, the independence of the judiciary could be tested, as the court would need to decide on the relevance of Parliament’s prior ruling (made in all likelihood on party lines) on the member’s qualifications.

In addition to questions of jurisdiction, there are other questions regarding the standard and onus of proof required to unseat a member. Obviously, petitioners have to plead and prove their evidence. But does the onus ever shift to the candidate whose election is impugned? What tests, if any, guide the judicial discretion to order remedies such as a fresh election? In a few instances the law is clear. For example,

¹⁶ For a brief history of this evolution, see Graeme Orr and George Williams, “Electoral Challenges: Judicial Review of Parliamentary Elections in Australia” (2001) 23 *Sydney Law Review* 53. This paper also raised a variety of questions about mechanical procedure on disputed returns petitions that require attention.

¹⁷ *Sue v Hill* (1999) 199 CLR 462. The judicial power question was foreshadowed by Kristen Walker “Disputed Returns and Parliamentary Qualifications: Is the High Court’s Jurisdiction Constitutional?” (1997) 20 *University of New South Wales Law Journal* 257 and Paul Schoff, “The Electoral Jurisdiction of the High Court as the Court of Disputed Returns: Non-Judicial Power and Incompatible Function” (1997) 25 *Federal Law Review* 317.

¹⁸ For more discussion of these issues, see Orr and Williams, above n 16.

¹⁹ Legislative Assembly of Queensland, Legal, Constitutional and Administrative Review Committee, *Issues of Electoral Reform Raised in the Mansfield Decision: Regulating How-to-Vote Cards and Providing for Appeals from the Court of Disputed Returns*, Report No 18 (1999) Chapter 3.

²⁰ Bob Bennett, *Candidates, Members and the Constitution*, Department of the Parliamentary Library Research Paper No 18, 2001–02, 20–21.

²¹ As set out in the *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth). The provisions are so named because anyone can sue a disqualified member and claim a civil fine for each day he or she illegitimately sat in Federal Parliament.

under traditional legislation, a single act of bribery, attributed to a candidate, will unseat that candidate.

But the law is rarely so clear-cut. In fact, the cases have oscillated between two radically different approaches, particularly in the common situation where the legislation requires proof that the election result was “likely to have been affected” by the wrongdoing. Such situations can range from cases where a number of electors were unable to vote through innocent administrative error to cases involving allegations of misleading campaigning.²²

On one approach, overturning an election is a solemn act, not to be undertaken lightly. A judge adopting this approach will put the onus squarely on the petitioner to *prove* the result was *probably* affected. Given the secrecy of the ballot, this may be a difficult onus to discharge in the case of people alleged to have voted who should not (or vice versa).²³

The opposing approach is that once contraventions *capable* of affecting the result are established, the fair elections ideal requires the respondent candidates to *disprove* any reasonable doubt over their election.²⁴ This approach may seem fair if the successful candidate or her supporters were implicated in sharp practices.²⁵ But even in malfeasance cases, a hard-line approach against the respondent on the question of remedies is in tension with the general law rule in *Briginshaw v Briginshaw*.²⁶ *Briginshaw* is a well-known High Court case that provides that the standard of proof in civil proceedings is effectively increased where the allegations are serious or would have grave consequences. In serious cases, petitioners alleging offences ought to adduce strong factual evidence to establish their claims.

Another conundrum for judicial review is the extent to which the “common law of elections” survives. This raises a series of conceptually quite murky questions. What *is* the “common law of elections?” Does it govern elections today, and if so to what extent? Should it be given any legal weight by contemporary judges overseeing an essentially statutory framework?

The term “common law of elections” has been used to refer both to judge-made law and parliamentary committee law, particularly from

the United Kingdom, made prior to the codification of electoral legislation. The most famous case is *Woodward v Sarsons* (1875),²⁷ which addressed administrative problems with the newly enacted secret ballot legislation by invoking the “common law of parliamentary elections.” In *Woodward*, an eminent bench held that an election could be voided on two grounds:

- (a) if there was “no real electing at all”—meaning the constituency did not have a free and fair opportunity of electing the candidate the majority might prefer; or
- (b) if the election was “not really conducted under the subsisting election laws”—meaning the errors were so fundamental that, in a sense, a different method of election was used to that laid down in the legislation.²⁸

The application of these tests is a matter of great conjecture. The more common view, found in Queensland cases²⁹ and High Court *dicta*,³⁰ is that wherever electoral legislation is so detailed and comprehensive that it forms a code, the common law is ousted. At most, a court should confine itself to cases interpreting the legislative provisions (if any) before it, so that cases establishing other principles are irrelevant. This is particularly clear if the legislation states that the type of error involved in the case will not affect an election unless it was “likely the election result was affected.” This

²² *Tanti v Davies* (No 3) [1996] 2 Qd R 602 (handful of ballots not delivered by military on time); *Carroll v Electoral Commission (Qld)* [No 1] [2001] 1 QD R 117 (winning candidate’s supporters made misleading comments about how-to-vote cards on doorstep of polling booth).

²³ For example *Bridge v Bowen* (1916) 21 CLR 582, 619 (lead judgment of Isaacs J). The member survived despite his majority of three being seemingly overshadowed by the improper admission of 13 secret ballots. But contrast the result in *Tanti v Davies* (No 3) [1996] 2 Qd R 602.

²⁴ *Scarcella v Morgan* [1962] VR 201, 203.

²⁵ This is implied in the *Commonwealth Electoral Act 1918* (Cth), s 362(3). Yet *Scarcella v Morgan* [1962] VR 201 applied this approach to a mere returning officer error.

²⁶ (1938) 60 CLR 336.

²⁷ (1875) LR 10 CP 733

²⁸ *Ibid* 743–744.

²⁹ For example, *Forde v Lonergan* [1958] Qd R 324

³⁰ See *Sue v Hill* (1999) 199 CLR 462, 548–554 per McHugh J.

rule provides a greater challenge to a petitioner than the test in *Woodward*.

Yet in *Featherston v Tully*, a full bench of the South Australia Supreme Court recently held that *Woodward v Sarsons* applied in that State.³¹ The case involved a challenge to an independent conservative member, who allegedly misled electors during the campaign, by stating that he would not support a minority Labor government if a hung parliament resulted from the election. After the election he did support a minority Labor government. It was claimed that he had infringed the State's "truth in political advertising" law. The independent member was elected with a relatively large majority. If the sole test had been "was the result likely to have been affected?" the petition would clearly have been untenable. But in adopting the common law test, the Court took a second, more nebulous path, by asking whether the candidate's pledges about which governing party he might support were so misleading, and whether they had permeated the electorate so deeply, that the whole election had been corrupted.³²

The Court's reasoning is unfortunate because it opens the way, at least in South Australia, for every election result to be petitioned on the basis of misleading statements, possibly taken out of the context, made during an election campaign. Electoral petitioning by political parties has admittedly become less common in recent years, as the major parties have come to recognize the potential for voter backlash against being forced back to the polls. But *Featherston* is an example of a petition driven in part by a desire for revenge, that is, to embarrass the successful candidate. It is not clear whether judges are in a position to decide, in retrospect, whether the campaign debate was so corrupted by misstatements that a new election is necessary. Applying the empirical requirement that the election was "likely to have been affected" is a little more rational in this situation. It introduces the test of whether sufficient electors were so swayed, or at least so confused, by the misleading statements that on the balance of probabilities, the result was affected. Such a test is less intuitive or subjective and can potentially be assisted by survey evidence.

However, the common law test may yet have

value where electoral legislation is silent, or in unanticipated circumstances. Most Australian legislation ultimately leaves the question of remedies to the judge's discretion: that is, remedies are to be granted on whatever grounds the judge thinks "just and sufficient," given the "real justice," or "substantial merits and good conscience," of the case.³³ It is not surprising that many judges look to precedent, including the common law, to guide such a broad remedial discretion.

As for unanticipated events, it is a trite observation that no electoral legislation can predict all eventualities. Consider this extreme but not fanciful example. Imagine a natural disaster causes polling to be spread over a week instead of a day, but the process to elongate polling is not authorized by law. This is just the sort of situation where a court may need to exercise the discretion to order a fresh election. But this would not be because the result can be shown to have been affected—there may be no way to discover how the people voted on the extra polling days—but because a deeper principle is involved. Namely, the principle that balloting is a snapshot of the electorate's mind and hence ought to occur on the single day set in the writ. This is a fundamental principle implied in Australian electoral legislation. A court in such a situation could, under ground (b) of *Woodward*, order a fresh election.³⁴

A final controversy regarding judicial review of elections concerns the role of administrative law in overseeing the electoral process. Australian electoral legislation makes a handful of electoral authority activities explicitly reviewable, for example the registration of electors and parties. But what of the myriad other decisions made by electoral officers, especially during campaigning and counting? Under the general judicial review legislation, most administrative decisions made pursuant to a

³¹ *Featherston v Tully* [2002] SASC 243.

³² The petition itself was resolved in *Featherston v Tully* (No 2) [2002] SASC 338.

³³ *Commonwealth Electoral Act 1998 (Cth)*, ss 360 and 364.

³⁴ Though at the federal level in Australia, at least, s 365 of the *Commonwealth Electoral Act 1918 (Cth)* provides that a mere delay in polling is not grounds for petitioning unless it has affected the result of the election.

statutory power are potentially subject to (i) the provision of written reasons, and (ii) natural justice review. Electoral administration, of course, is done pursuant to statutory power. The question then arises: to what degree is electoral administration subject to ordinary administrative law review?

On one view, electoral administration is not essentially different to other vital bureaucratic work. Subjecting it to administrative review may help lead to more consistent and fairer practice. Indeed, waiting until after the election result is declared may lead to greater difficulties. Yet, on the other hand, parties and even cranks can misuse administrative review in ways that waste administrative resources, stymie efficient electoral administration and encourage “defensive” practices by electoral authorities.

Most Australian electoral legislation contains the rule that the “validity of any election or return” may be disputed only by petitioning the result.³⁵ This rule puts a barrier in front of general judicial review of electoral process. Some judges have held that this prevents injunctive relief during the campaign or ballot count, if the matter being litigated could affect the outcome of the election, or if the applicant is seeking an injunction that might delay the election.³⁶ But what is the proper definition of “validity of any election” in this context? If “election” is interpreted narrowly as “election result,” rather than “any process within an election,” judicial review would be more widely available.

This may be good policy. Post-election petitions tend to be too late, too costly, and in any event can only feasibly occur in close races. But the arguments against opening electoral processes to general judicial review are that electoral purity is an unrealistic goal and that courts should be reticent to interfere if the electoral authority has acted reasonably. Further, in the Anglo-Australian tradition, some judges may be reluctant to adjudicate electoral matters, under time and media pressure, during the heat of a campaign.

In summary, in many electoral law disputes there will be uncertainty about the level and onus of proof, the applicability of the common law, and the availability of judicial review. On

an uncertain legal basis like this, political careers—indeed whole governments in an era of hung parliaments—can stand or fall.³⁷ The situation is aggravated because Courts of Disputed Returns work under very hurried time frames, and judges have broad discretion as to what evidence to admit. The net result is that the rule of law may be less entrenched in disputed elections than Australians care to believe.

ELECTORAL EQUALITY AND VOTING RIGHTS

The franchise, one-vote one-value and boundary apportionment

Outside local government elections, the remnants of plural voting and property qualifications came long ago to be seen as too undemocratic for Australian democracy. Universal adult suffrage was achieved for most Australians several generations ago—though Indigenous Australians were less fortunate.³⁸ While the federal franchise was extended to women by the *Commonwealth Franchise Act 1902* (Cth), s 4 of that Act denied voting rights to the

³⁵ For example *Commonwealth Electoral Act 1918* (Cth) s 353(1). Yet s 383 of the *Commonwealth Electoral Act 1918* (Cth) also entitles any candidate (but not any elector) to seek an injunction to restrain contraventions of the Act itself.

³⁶ For example *Schorel-Hlavaka v Governor General* [2001] FCA 1577 (challenge to validity of issue of writs); *McDonald v Keats* [1981] 2 NSWLR 268 (rejecting attempt to use equity to remedy possible error in the counting process). Compare *Courtice v Australian Electoral Commission* (1990) 21 FCR 554 (ordinary judicial review legislation used to review the Australian Electoral Commission’s acceptance of allegedly late nomination).

³⁷ For example *Tanti v Davies* (No 3) [1996] 2 Qd R 602 led to a change of government.

³⁸ On the federal franchise generally, see Adrian Brooks, “A Paragon of Democratic Virtues? The Development of the Commonwealth Franchise” (1993) 12 *University of Tasmania Law Review* 208; Jennifer Norberry and George Williams, *Voters and the Franchise: the Federal Story*, Department of the Parliamentary Library Research Paper No 17, 2001–02. On female suffrage, see Audrey Oldfield, *Woman Suffrage in Australia: A Gift or a Struggle?* (1992) or Kirsten Lees, *Votes for Women: The Australian Story* (1995). On Indigenous voting rights see Will Sanders, “Delivering Democracy to Indigenous Australia” in Marian Sawer (ed), *Elections: Full, Free and Fair* (2001) Chapter 10.

“aboriginal native[s] of Australia.” It was not until 1962 that the *Commonwealth Electoral Act 1918* (Cth) was amended to extend adult suffrage to Aboriginal people. Even then, full equality at Commonwealth elections did not eventuate until 1983, when enrolment for and voting in Commonwealth elections were made compulsory for Aboriginal, as it already was for other Australians.

Enrolment and voting itself for the non-Indigenous community became compulsory as early as 1915 (enrolment) and 1924 (voting). Il-liberal, but popular, this move elevated the status of the franchise from a privilege to a duty. Section 245(1) of the *Commonwealth Electoral Act* currently states: “It shall be the duty of every elector to vote at each election.” The section goes on to establish a penalty of A\$20 (~US\$12) (or A\$50, ~US\$30) if the matter is dealt with by a court) for electors who fail to vote and who cannot provide a valid and sufficient reason. This compulsion colors electoral authority activity in a positive way. It encourages the electoral commissions to treat every vote as sacred and to expend considerable efforts in ensuring adequate access to the ballot.

This is not to say that groups at the margin are not disadvantaged in the franchise. The most obvious exception is prisoner disqualification. Although less restrictive than in the United States (where felons can suffer disenfranchisement for life), the temporary federal disenfranchisement of prisoners serving sentences in excess of 5 years and those serving just 1 year in several state elections robs thousands of otherwise voiceless citizens of their political birthright.³⁹ Full prisoner enfranchisement is so politically charged that is unlikely to occur in Australia. Unlike Canada, with its Charter of Rights and Freedoms, there is no constitutional guarantee on which to support prisoner voting.⁴⁰ It remains to be argued whether sections 7 and 24 of the Constitution, which require Federal Parliament to be “directly chosen by the people,” could be interpreted by a rights-oriented High Court to deny Parliament the power to disenfranchise competent adult citizens. Until then, it remains ironic that some libertarian minded Australians prefer to go to jail, for a symbolic period, rather

than be compelled to vote, whereas a significant number of prisoners want to vote, but are unable to, despite the electoral commissions employing mobile polling booths in prison for those inmates who are entitled to vote.

A second issue, concerning practical access to the ballot, is the ability of homeless people to enroll. Australian law and practice has been fairly liberal, in line with the idea that every vote is precious—the flipside of the compulsion to vote. Generally, at the federal level, one only has to be “living” in a federal division to be able to enroll, although there is a 1-month qualification period and the traditional electoral form stipulates a residential address.⁴¹ However to accommodate homeless and peripatetic citizens, those without a fixed address can enroll in the special category of “itinerant electors.”⁴²

With the franchise essentially uniform, reform debates shifted in the 1970s to focus on to the weight of votes, and issues of apportionment, gerrymandering and redistributions (better known as redistricting in the United States). Such debates have been particularly acute in the two geographically largest states, Queensland and Western Australia, both of which had significant rural weighting in the form of a system dividing those States into different zones, with markedly different enrolment quotas. Queensland, after the purgative of a major Royal Commission, which heralded root and branch reform to many aspects of government, conducted a thorough inquiry into its electoral system in 1990.⁴³ The Labor adminis-

³⁹ Graeme Orr, “Ballotless and Behind Bars: The Denial of the Franchise to Prisoners” (1998) 26 *Federal Law Review* 55.

⁴⁰ Contrast *Sauvé v Canada* (Chief Electoral Officer) 2002 SCC 68, in which the Supreme Court of Canada stuck down s 51(e) of the *Canada Elections Act 1985* that denied the right to vote to “[e]very person who is imprisoned in a correctional institution serving a sentence of two years or more.”

⁴¹ The issue generated litigation in the United Kingdom, where residency requirements were more stringent: Kirsty Milne, “Voters on the Doorstep,” *New Statesman & Society*, 19 April 1996, 20.

⁴² *Commonwealth Electoral Act 1918* (Cth) s 96.

⁴³ Bron Stevens, “Reform of the State Electoral System” in Bron Stevens and John Wanna (eds), *The Goss Government: Promise and Performance of Labor in Queensland* (1993) Chapter 10.

tration had a long-standing policy favoring “one-vote, one-value,” that is, strict parity of enrolments to ensure that votes in different constituencies were of equal value. However it bowed before the inquiry’s recommendation of a curious, hybrid system, largely based on “one-vote, one-value,” but with a dispensation for electorates greater than 100,000 km² in area. In these, “phantom” voters are to be counted.⁴⁴ In effect, a few vast electorates in the Queensland Parliament are allowed a lower quota of electors. In Western Australia, a similarly large and even more sparsely populated state, the Legislative Assembly adopted a close variant of that system in 2001. However the Western Australian reforms are currently crippled by arguments about the entrenchment of the zonal system.⁴⁵

Proponents of strict “one-vote, one-value” have twice unsuccessfully asked the High Court to entrench that principle through constitutional implication.⁴⁶ Without a solid constitutional guarantee on which to hang such a case, the Court has been unwilling to follow the lead of the United States Supreme Court in such seminal cases as *Baker v Carr*⁴⁷ and *Reynolds v Sims*.⁴⁸ But these failures, and the exceptional Queensland and Western Australian systems aside, a political and legal consensus has emerged around a principle that, at the very *maximum*, no seat should be above or below a tolerance of 10% from the average enrolment.⁴⁹

This consensus has allowed focus to shift to issues of redistribution practice, such as the timing of redistributions, mechanisms to project changing enrolment patterns, and the balancing of criteria such as community of interest and geographical contiguity with the now computer-managed task of drawing physical boundaries. The increasing sophistication of technology and data management, in turn, makes the goal of minimum deviation from pure “one-vote, one-value” more achievable than ever.

South Australia, most notably, has experimented with a particularly prescriptive and controversial redistribution system. Its *Constitution Act* contains an electoral “fairness” provision, which effectively requires the South

Australian Boundary Commission to predict not just demographic changes, but *future* voting intention. The law aims to “ensure, as far as practicable, that . . . if candidates of a particular group attract more than 50 per cent of the popular vote” they will win more than 50% of the seats.⁵⁰ In a system still based on single-member constituencies, this introduces a sharp-edge of proportionality around the magical figure of 50% of the two-party preferred vote. Those who blanch at the sight of a party or administration gaining political control with less than 50% of the vote see this as a noble aim. But the problem for those administering the system is how far to base their predictions and notional seat allocations on past voting behavior, current opinion polls or future expectations. In the end, perhaps the only way to ensure a perfectly proportional outcome, in a system that remains based on constituencies, would be to draw the boundaries after the event.

Representation and voting systems

Generally, the parliamentary model of representation that applies at the national level in Australia is replicated in those states that have bicameral parliaments. That is, there is a lower house, of single-member constituencies, from which the government is formed. This lower house is typically elected on compulsory preferential voting (although preferences are optional in New South Wales and Queensland). In addition, most states have an upper house of review, consisting of multi-member, geographically broader constituencies. At the level of the Federal Senate, based on the United

⁴⁴ *Electoral Act* 1992 (Qld) s 45.

⁴⁵ *Marquet v Attorney-General of Western Australia* [2002] 193 ALR 269.

⁴⁶ *A-G (Commonwealth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1; *McGinty v Western Australia* (1996) 134 ALR 289.

⁴⁷ 369 US 186 (1962).

⁴⁸ 377 US 533 (1964).

⁴⁹ Dean Jaensch, *Election: How and Why Australia Votes* (1995) 73–76.

⁵⁰ *Constitution Act* 1934 (SA) s 83(1).

States model, the six States each return 12 Senators and the two internal territories each return two Senators.⁵¹

Members of upper houses are invariably elected on some form of the single transferable vote (STV).⁵² STV ensures a moderate level of proportional representation (PR), and hence the possibility, if not likelihood, of minor party control of these houses of review. Tasmania and the Australian Capital Territory are notable exceptions in also employing PR in their lower houses.⁵³

Debates erupt periodically about possible reform of this model. Three recurring themes are notable. The first concerns the proportionality of STV systems and any effect on stable or strong government.⁵⁴ Federal governments routinely complain about the difficulty of achieving a Senate majority. Although in an ordinary, triennial election of half the Senate, the quota for a Senate seat is over 14%, this tends to be achieved on preferences by one minor party candidate in each state. However, as Malcolm Mackerras argues, the Senate voting system is really only “semi-proportional” since minor parties must poll a significant primary vote to achieve the 14% quota for a normal half-Senate election, and usually only one seat per state is “up for grabs.” Increasing the number of Senators to be returned would decrease the quota, and in the long-run favor minor parties. Not surprisingly, since decreasing the number of Senators would increase the quota, some members of the parties of government (essentially the Liberal and Labor parties) advocate that option.

In short, there is no consensus as to what level of proportionality is desirable. But in any event, as long as minor party, independent and protest voting runs at current levels of 15–20%, significant reform favoring the parties of government is unlikely to be popular, and tinkering at the edges of the quotas is unlikely to affect the number of hung Senates. The position, however, is more acute in the New South Wales upper house, where the quota is as low as 4.5%. When quotas are this small, even micro parties can win seats, as the STV can become a lottery, depending on the order in which candidates happen to be excluded from the count and the preference deals they have done.

The second fundamental issue about parliamentary design concerns Indigenous representation. Outside Western Australia and the Northern Territory, Indigenous Australians have not been elected to lower houses, and only a handful have been elected to any upper house. At a little over 2% of the national population, the Indigenous population is so diluted that it would not be feasible, except perhaps in the relatively lightly populated Northern Territory, to experiment with the United States solution of drawing “majority-minority” constituencies (so called because race conscious apportionment is used to ensure at least a few geographically based seats are dominated by minorities).

A more direct approach to ensuring some Indigenous representation might follow the New Zealand model, where five Maori members, chosen by voters on the Maori Electoral Roll, are elected to the New Zealand Parliament.⁵⁵ Under s 51(xxvi) of the Constitution, the Australian Parliament has the power to make laws with respect to “the people of any race for whom it is deemed necessary to make special laws.” This power might be used to create Indigenous quotas (unless this is seen by the High Court as inconsistent with the direction in ss 7 and 24 of the Constitution that Parliament be “directly chosen by the people”). But in practice, the idea of Indigenous seats is not on the agenda of the major parties, and since there might be only 3 or 4 in a House of Representatives of 150, their creation would be largely symbolic.

A third issue concerns compulsory preferen-

⁵¹ Although only after a protracted battle in the High Court on whether representatives of the territories could properly sit in the Senate, the “States’ House.” See *Western Australia v Commonwealth (First Territory Senators Case)* (1975) 134 CLR 201; *Queensland v Commonwealth (Second Territory Senators Case)* (1977) 139 CLR 585.

⁵² Victoria was an exception, but this is poised to change with *The Constitution (Parliamentary Reform) Bill 2003 (Vic)*.

⁵³ Using variations of the Hare-Clark system.

⁵⁴ For more, see Marian Sawer and Sarah Miskin (eds), *Representation and Institutional Change: 50 Years of Proportional Representation in the Senate*, Papers on Parliament No 34 (1999).

⁵⁵ See *Electoral Act 1993 (NZ)*. Similarly, under art 330 of its Constitution, India has since 1950 had reserved parliamentary seats for members of the Scheduled Castes and Scheduled Tribes.

tial voting. Compulsory enrolment and voting are fairly popular and remain bi-partisan policy. Compulsory preferential voting, however, raises more criticism. Preferential voting is better known as “instant run-off voting” in the United States. Compulsory preferential voting is a system where, to record a valid vote, the elector must express an order of preferences between *all* the candidates on offer. Its proponents consider it to be the logical extension of compulsory voting and the prioritizing of political legitimacy. It guarantees that electoral winners receive at least 50% + 1 of the two candidate preferred vote. But its detractors object to the way in which it forces electors to choose between the major parties if they wish to have their vote counted.⁵⁶ They further argue that it exacerbates the trend to centralize politics around a fictional center. Besides demanding insincere choices, it tends to reduce elections to a measure of least unpopularity, rather than greatest popularity.

Minor parties are ambivalent about compulsory preferential voting. Compulsory preferences increase minor party leverage, since all their votes remain in the count and hence influence the result. But it deprives them of the option of recommending that their supporters punish the major parties by not preferencing either of them. On the grounds of maximizing voter choice alone, however, optional preferential voting seems a desirable reform, and for that reason has been adopted in two states, Queensland and New South Wales.

Realizing voting rights and voting technologies

The procedures to implement the franchise have always posed a challenge. The law has to balance a desire for easy and varied methods of enrolling and casting votes, with the integrity of the roll and the voting system. In addition, the law concerning informality, that is, what counts as a valid vote, must prioritize the intention of the voter, without opening the scrutiny of votes to impossibly subjective decisions. Moreover, the traditional role of scrutineers, that is, those people nominated by candidates to watch the count to assist in ensuring a fair and accountable result, may need to be reconceived to adapt to changes in voting practices and the technology of the count.

Perhaps the most exciting challenge in the electoral field is the potential of electronic counting machines, computerized voting terminals and even internet voting to outflank traditional voting methods. Australia has been slow to innovate in this area. In fact, Australia never embraced mechanical technology such as voting machines, in part because of the complexity of preferential voting for mechanical devices, and in part because paper ballots and pencils have proven cheap and failsafe. Experiments with electronic technology are now commonplace internationally, with a veritable industry leading the way in the United States, where dispersed regulatory control has led to a bold, if sometimes unreliable, patchwork of innovation. The idea of electronic voting has been around in Australia for many years, and the Australian Capital Territory recently conducted a limited trial in electronic voting.⁵⁷ But computerized voting in Australia remains some way off.

The question of new technology is not just one of framing regulations and systems of accountability to maximize the benefits of any cost-savings and improvements in accuracy and speed. Rather, at root it is a question of how computerization can address and, ideally, enhance public trust and interest in elections. Computerized voting, given the Australian tradition, would be a transition to a brave new era. Voting from a home computer would be a radically different experience to queuing at a communal ballot box. Younger generations may well come to expect such easy access to the electoral system. And instant vote tallies would certainly be a radically different political event to the traditional theatre of election night in Australia, which centers on a single, national tally room. Yet since outstanding postal votes are a necessary feature of a geo-

⁵⁶ One prominent detractor who has sought, unsuccessfully, to have compulsory preferential voting declared unconstitutional, is Mr. Albert Langer. See *Langer v Commonwealth* (1996) 186 CLR 302; Chris Field, *Tweedledum and Tweedledee 1,2,3,3—The Albert Langer Story*, Department of the Parliamentary Library Current Issues Brief No 14, 1995–1996.

⁵⁷ See *Electoral Amendment Act (No 2) 2000* (ACT) (enabling legislation). For more detail see the Australian Capital Territory Electoral Commission <www.elections.act.gov.au/elecvote.html> at 19 February 2003.

graphically dispersed electorate such as Australia's, and will remain definitive in really tight seats, the ultimate result may not be expedited at all. Senate results, however, would be known much quicker, whereas at present they are something of an afterthought, taking several weeks to be finalized given the complexity of the count under STV.

PARTIES, CANDIDATES AND CAMPAIGNING

*Party pre-selections and the role of the electoral authorities*⁵⁸

Recently, allegations of "rotting" in party pre-selections have gained widespread attention. ("Rotting" is an idiomatic term used to cover any self-serving malfeasance, whether illegal or not.) Pre-selections are party ballots, or other internal mechanisms, to determine a party's official endorsement of candidates for public elections. Primaries are unknown in Australia—though they have a few proponents amongst those who think they could re-vivify public interest and involvement, and break the stranglehold that party apparatchiks tend to have on candidate choice, especially for the lower houses of the various parliaments. Proof of rotting in pre-selections has led to calls for public law to involve itself in the traditionally private realm of party endorsements.

For a long time, public law in Australia was of marginal importance to party affairs. Indeed even today, the degree to which anti-discrimination law applies to pre-selections appears limited.⁵⁹ But since *Baldwin v Everingham*,⁶⁰ it has become increasingly common for Australian courts to oversee party rules (particularly in pre-selection battles). The decision was justified on the policy argument that since parties are now routinely registered to receive public funding, they are quasi-public entities. However, the Court in *Baldwin* was only required to force the party in question to abide by its published rules; it did not seek to modify those rules.

United States-style primaries, however, are unlikely to be seriously countenanced in Australia, for two reasons. First, Australian parties are much more rigid and disciplined organiza-

tions. They are better placed to guard their independence, both by uniting legislatively and because the public accepts the idea that individuals are only entitled to vote in a party pre-selection if they are fully paid up members of that party, and thereby committed to the party's constitution and internal discipline. Second, Australia lacks the history of blatant political discrimination, such as the "white primaries," that inspired a system of open primaries in the United States.

Despite this, concerns with the rotting of party pre-selections have led to legislation in Queensland to involve electoral commissions in auditing, and potentially conducting, internal party ballots.⁶¹ It is not a huge leap from this innovation to mandating that commissions conduct all pre-selection ballots, or even set the rules that govern those ballots. Indeed such a model already exists in the regulation of trade union elections.⁶²

For the electoral authorities, involvement in party pre-selections raises pointed questions about their proper role and resource levels. The more electoral authorities become entangled with internal party administration, the more potential exists for a blurring of public perceptions about their role. In the worst case, they could become embroiled in public, possibly litigious, disputation between factions and candidates vying for pre-selection.

Registration and names

Curiously, until 1977, parties were not even mentioned in Australian electoral legislation. That is, traditionally parties have been below the radar of electoral law because only candidates were formally elected. This legal invisibility has been eroded. As noted above, courts

⁵⁸ Graeme Orr, "The Law Comes to the Party: the Continuing Juridification of Political Parties in Australia" (2000) 3 *Constitutional Law and Policy Review* 41, 44–47.

⁵⁹ *Scott v Gray* [1999] HREOCA 15.

⁶⁰ *Baldwin v Everingham* [1993] 1 Qd R 10.

⁶¹ *Electoral and Other Acts Amendment Act 2002 (Qld)* introducing new Part 8A "Commission Oversight of Pre-Selections" to the *Electoral Act 1992 (Qld)*.

⁶² Graeme Orr, "Overseeing the Gatekeepers: Should the Pre-selection of Political Candidates be Regulated?" (2001) 12 *Public Law Review* 89.

now routinely review party affairs, at least for consistency with their rules. Federally, and in an increasing number of states, parties receive a direct public subsidy through funding based on votes received. There is also an indirect, albeit limited, federal subsidy through the tax deductibility of small, individual donations. Further, registered parties can control the use of their name on the ballot, and even control the flow of their preferences where “tick a box” voting is allowed (such as in Senate elections). In return, registered parties are required to disclose the amount and source of donations above A\$1500 (~US\$900).

Party registration was first introduced as a measure to support the administration of the public funding and disclosure regime.⁶³ Yet it has grown to be a much more contentious and potentially intrusive legal regime. Concerns with the proliferation of micro and even front parties have arisen, particularly in the largest state, New South Wales. Meanwhile, a court held that the hard-right One Nation Party had been fraudulently registered in Queensland, because its grass-roots membership was kept separate from the registered party (to enable the party’s elite to maintain control).⁶⁴ The legislative response to such scandals has been a tightening of registration eligibility and ongoing scrutiny of the register in several jurisdictions. Such scrutiny places extra demands on electoral authorities, and carries with it the potential for mistakes and litigation (such as in the *Save our Suburbs Case*).⁶⁵ It also raises deeper policy questions about associational and political freedoms, and fair electoral competition, as illustrated in *Mulholland v Australian Electoral Commission*.⁶⁶

Mr. John Mulholland represented the Democratic Labour Party (DLP). The DLP was a formerly significant, Catholic breakaway group from the Australian Labor Party, which achieved electoral success in the Senate in the 1950s through the 1970s. Its activities are now limited, and the party faces de-registration under tightened federal laws that require a minimum, unique membership of 500 for parties that lack a parliamentarian.

The trial judge in *Mulholland* accepted that the inability to be registered and hence a party label on the ballot *was* a burden on the DLP’s

ability to communicate political information at the crucial moment of voting. But he held this was not a significant restriction, and deferred to Parliament’s view that 500 members was a minimum for a party to demonstrate reasonable community support. He did not explain how mandating an arbitrary, reasonable measure of support was consistent with electoral freedom, other than by referring to the integrity of the ballot.

The DLP advanced arguments based on the ACTV principle,⁶⁷ as well as administrative law grounds, but lost at trial. It can of course remain as a private association, capable of endorsing candidates and buying electoral advertising. But if de-registered, the DLP’s candidates will be denied benefits such as ballot labelling and lose control of Senate preferences, two key benefits that make minor party electoral activity meaningful. Given its unique history, the DLP is clearly a genuine party. If excessive candidate numbers threaten the ballot’s integrity, a logical reform would be rationing access to nomination, such as increasing the number of signatures required to establish a person’s candidature. The case also raises issues about public access to the membership lists supplied for registration purposes. DLP members are sensitive to such exposure; but a process of public registration implies complete transparency.

Less contentious, but no less interesting, is the way registration permits parties, in effect, to reserve an electoral name. Image, after all, is of vital importance in electoral politics. Electoral authorities must rule on the eligibility of new registrants, a process that can lead to clashes between rival organizations seeking to use prized terminology. A clear, recent example is *Woollard v Australian Electoral Commission*. There, the Administrative Appeals Tribunal,

⁶³ Joint Standing Committee on Electoral Matters, *Who Pays the Piper, Calls the Tune: Minimising the Risks of Funding Political Campaigns* (1989).

⁶⁴ *Sharples v O’Shea* [1999] QSC 190.

⁶⁵ *Save Our Suburbs (SOS) NSW v Electoral Commissioner of NSW* [2002] NSWSC 785.

⁶⁶ *Mulholland v Australian Electoral Commission* [2002] FCA 1255.

⁶⁷ See text above n 8.

consisting of a full bench of Federal Court judges, ruled that the Western Australian “liberals 4 forests” was registrable, despite protests from the older, larger and more conservative Liberal Party of Australia (Western Australian Division).⁶⁸

Even more curious has been the spate of unusual candidate names and the legislative responses to them. Some names have been playful, reflecting celebrity identities, such as Ms. Tamara Tonite, a television drag queen. Some have been politicized, reflecting long-held commitments to a single issue, for example, Mr. Nigel Freemarijuana. Some have been pointed, and possibly offensive, plays on the names of well known politicians: for example Ms. Pauline Pantsdown (a play on Ms. Pauline Hanson, former leader of the right-wing One Nation Party) and Mr. John Piss the Family Court and Legal Aid Party (a disgruntled gentleman, opposed to various aspects of the no-fault divorce system, who stood as a candidate in Prime Minister John Howard’s electorate).

The common law rule is that a name is merely a matter of convention. Under that approach, one is entitled to be enrolled, and hence nominate, under any name, subject to proof of self-identification with, and some community acknowledgment of, the name in question. However, new federal laws require electoral authorities to weed out not only “offensive,” but also “frivolous” names, and even those “contrary to the public interest.”⁶⁹ These tests are rather nebulous. Moreover, since a person’s name is central to his personal identity, administration of these laws can put electoral officials in an invidious position.⁷⁰ The logic of the tightened law is presumably to deny grandstanding, but the law does so at the expense of taking the color out of fringe candidacies.

Electoral finance and disclosure laws

Campaign finance and disclosure laws are perhaps *the* central issue facing electoral law internationally. They raise fundamental and contentious issues about both the cost and fairness or corruptibility of electoral politics on the one hand, and free elections and expressive freedoms on the other.⁷¹

Most Australian states share a model of lim-

ited regulation based on the federal system.⁷² The federal system involves a public subsidy paid according to the number of primary votes received at each election, subject to a minimum threshold of 4%. The amount for federal elections stood at just under A\$1.87 (~US\$1.12) per vote, for the first half of 2003. The amount automatically increases through regular indexation. There are no caps on donations, although parties, candidates and donors are meant to disclose donations above certain thresholds, the typical figure being A\$1500 (~US\$900). Uniformity of disclosure laws across all federal and state jurisdictions would be highly desirable. In addition, disclosure laws need to be extended to all local government elections, as “carpet bagging” and the purchase of influence still occur at this level.

The regulation of campaign finance is topical in Australia for a variety of reasons. The Federal Parliament’s Joint Standing Committee on Electoral Matters has an ongoing inquiry into funding and disclosure. Submissions to that Committee reveal numerous regulatory problems. Most notably, the Australian Electoral Commission has expressed concern about the workability of the current regime of unlimited, but disclosable donations, given its numerous loopholes, and called for a comprehensive review.⁷³ Realistically, the more restrictive the donation laws and the more revealing the disclosure laws, the greater the incentive to self-interested political actors to find

⁶⁸ *Woollard v Australian Electoral Commission* [2001] AATA 166.

⁶⁹ *Commonwealth Electoral Act 1918 (Cth)*, ss 93A(2) and (3).
⁷⁰ *Freemarijuana v Australian Electoral Officer for Qld* [2001] AATA 917; see on this Bamford, above n 2, at 255.

⁷¹ Joo-Cheong Tham, “Legal Regulation of Political Donations in Australia: Time for Change” in Glenn Patmore (ed) *The Big Makeover: A New Australian Constitution* (2001) 72.

⁷² Which owes its roots to the 1981 New South Wales reform. The federal regime, beginning in 1991, followed a Joint Standing Committee on Electoral Matters report, above n 63.

⁷³ Australian Electoral Commission, “Submission to the Joint Standing Committee on Electoral Matters Inquiry into Electoral Funding and Disclosure”, Submission No 15, 3 August 2001, para 1.4, <www.aph.gov.au/house/committee/em/f&d/index.htm> at 19 February 2003.

loopholes. Yet the integrity of the electoral commissions will be compromised if they are required to administer unworkable laws. A key practical issue for Australia, then, is the proper resourcing and structuring of electoral authorities to administer and police campaign finance laws.

In the United States, as is well known, “money politics” is *the* central issue of electoral regulation. The Federal Election Commission was specially set up in the United States to administer the *Federal Election Campaign Act*, which governs the financing of federal elections.⁷⁴ Australian jurisdictions should consider disentangling the process of running periodic elections from the more specialized and ongoing task of implementing campaign finance law.

Yet ultimately, laws that provide merely for disclosure, such as in Australia, are only useful accountability mechanisms if disclosure is timely, accessible and utilized. Disclosed information needs to be publicized in an up-to-date fashion (ideally through regular internet release) in a form that permits easy computerized searching and analysis.⁷⁵ Most of all, media and watchdog groups need to be aroused to make use of the information. At present, those conditions do not exist in Australia to the same extent as the United States.

“Truth in political advertising” and broadcasting laws

Relatedly, there is relatively little regulation of campaign advertising in Australia. The most commonly invoked rule prohibits the misleading of voters in the “manner” of voting. But this was read down in *Evans v Chricton-Browne* to cover only statements likely to mislead electors as to *how* to cast their votes. It does not, therefore, cover falsehoods that mislead electors in the process of *deciding* whom to vote for.⁷⁶

South Australia is an exception. It prohibits misleading campaigning generally, though even its prohibition is limited to *factual* statements in *advertisements*.⁷⁷ The desirability of such “truth in political advertising” laws is a perennial topic.⁷⁸ Proponents ask why campaigners ought not be held to similar standards as business, which is governed by fair trading laws against misleading or deceptive conduct

in trade or commerce. Opponents of “truth in political advertising” laws (namely the major parties) fear a chilling effect on political speech and question their enforceability. For instance, campaigning is largely focused on promises. When can a statement of future intention be false, and how can reliable evidence of subjective intentions be gathered?⁷⁹

Typically, the rule in *Chricton-Browne* is applied in disputes about “second preference cards.” These are how-to-vote cards⁸⁰ in which major parties encourage electors who otherwise are supporting minor parties or independents to direct their second preferences to them. Such cards are sometimes designed to disguise their source. Electoral matter of course must be “tagged” with an authorization and printer’s name, but this may not necessarily identify its partisan source. Second preference cards are deemed unlawful when they would be likely to mislead an ordinary, possibly gullible, elector on the doorstep of the polling booth.⁸¹

A borderline case illustrating the problem occurred in Queensland in 1998, and led to reform which micro-manages how-to-vote cards in an attempt to reduce confusion.⁸² More radical reformers wish to ban how-to-vote cards altogether, both to save wasted paper and to make electoral competition fairer on smaller

⁷⁴ See Federal Election Commission website <www.fec.gov> at 19 February 2003.

⁷⁵ Computerized searching is, at least, now available. See the Annual Political Disclosure Returns posted by the Australian Electoral Commission <<http://search.aec.gov.au/annualreturns/>> at 19 February 2003.

⁷⁶ *Evans v Chricton-Browne* (1981) 147 CLR 169.

⁷⁷ *Electoral Act 1985* (SA) s 113.

⁷⁸ See generally George Williams and Natalie Gray, “A New Chapter in the Regulation of Truth in Political Advertising in Australia” (1997) 8 *Public Law Review* 110.

⁷⁹ See *Featherston v Tully* (No 2) [2002] SASC 338, discussed above, n 32.

⁸⁰ On how-to-vote cards, see above, n 13.

⁸¹ Australian Electoral Commission, “Misleading and Deceptive Electoral Advertising: ‘Unofficial’ How-to-Vote Cards”, Electoral Background No 3 <[www.aec.gov.au/\[unsc\]content/how/backgrounders/03/index.htm](http://www.aec.gov.au/[unsc]content/how/backgrounders/03/index.htm)> at 19 February 2003. The “gullible voter” test comes from a polling day injunction proceeding, *Goss v Swan* [1994] 1 Qd R 40.

⁸² Legislative Assembly of Queensland, Legal, Constitutional and Administrative Review Committee report, above n 19.

parties who cannot mobilize the supporter base of the major parties needed to distribute them. However, an outright ban on how-to-vote cards could invoke a constitutional challenge on freedom of communication grounds based upon the decision in *ACTV*.⁸³

Broadcasting law is another aspect of the regulation governing campaigning that has received scant attention (aside from the overruling of the electronic advertising ban in *ACTV*). Laws requiring the source of electoral and political matter to be “tagged,” are fairly derisory, although complaints about untagged material continue to be made to the Australian Broadcasting Authority. In fact, most government advertising now routinely contains tagging, even when the advertisements merely give information about public service programs. This is a formalistic attempt to deflect criticism of the large sums of taxpayer money spent promoting government programs, particularly in election years. But such perfunctory tagging does nothing to address the benefit to the incumbent government that large scale, “spin doctored” advertising can deliver. In fact, blanket but perfunctory tagging of government advertising simply renders tagging meaningless as an identifier of genuinely political material. (Tagging remains useful, however, as a means of tracing formal responsibility for the occasional material whose electoral content is unlawful).

The newest broadcast medium, the internet, is yet to feature prominently in Australian electoral campaigning, although much general political activity occurs via the internet.⁸⁴ The present, albeit limited system of regulation of electoral and political material, is yet to be reviewed to ensure its equal application to the internet.⁸⁵

Perhaps the most interesting question concerning electoral broadcasting in Australia is the manner in which private broadcasters self-regulate. Commercial Television Australia (formerly known as “FACTS,” the Federation of Commercial Television Stations) administers a private code governing advertising. Pursuant to this, it can and does pull electoral commercials from the air.⁸⁶ While this tends to be ignored as “soft law,” the exercise of such private power fills the void left by the relative absence of “hard law” regulating the content of

misleading advertising. At a minimum, such private codes and their application needs to be studied, so that the reasoning used in dealing with complaints about electoral advertising is scrutinized and publicly available.

Electoral fraud, offences and the vexed ambit of electoral bribery

There has been significant recent debate about alleged enrolment and voting fraud in Australia.⁸⁷ As earlier mentioned, Australian electoral systems are relatively open, in order to minimize hurdles facing electors, who, it must be remembered, are compelled to vote. For example, electors traditionally have been able to enrol by post, without producing identification, and can in all cases vote without producing identification. New enrolments can be made for a week after the writs are issued. Electors are not assigned to precincts—that is, the roll for each seat is not based on a sub-division. This allows electors in a mobile community to vote easily anywhere in their constituency, or indeed throughout their state or territory by means of an “absentee” ballot on polling day. But it also means local polling officials do not build up familiarity with regular voters. Further, non face-to-face voting is facilitated

⁸³ See text above n 8. While not amounting to an outright ban, the *Electoral Act* 1992 (ACT) was amended in 1995 to ban canvassing for votes within a 100 meter radius of polling booths during Australian Capital Territory elections. This does much to limit the effectiveness of how-to-vote cards, as they cannot be distributed to voters as they enter the ballot box. See George Williams, ‘Freedom of Political Discussion and Australian Electoral Laws’ (1998) 5 *Canberra Law Review* 151, 166–172.

⁸⁴ See Rachael Gibson and Stephen J Ward, “Virtual Campaigning: Australian Parties and the Impact of the Internet” (2002) 37 *Australian Journal of Political Science* 99.

⁸⁵ Joint Standing Committee on Electoral Matters, “The 1998 Federal Election” (2000) 35.

⁸⁶ For an example from the 2001 federal election, see Bamford, above n 2, at 257.

⁸⁷ Indeed a vocal group of activists, the HS Chapman Society, is devoted to its pursuit. See, for example, Amy McGrath, *The Fraudling of Votes* (2nd ed, 2001). A former federal electoral Commissioner has long argued the problem is overstated: Colin A Hughes, “The Illusive Phenomenon of Fraudulent Voting Practices: A Review Article” (1998) 44 *Australian Journal of Politics and History* 471; Colin A Hughes, “Administrative Reform in a Politically Sensitive Environment” (1989) 59 *Canberra Bulletin of Public Administration* 41.

through a range of pre-poll and postal ballots. Finally, the ballot is absolutely secret so that, once cast, votes are untraceable.

The incidence of fraudulent enrolment, multiple voting, "cemetery voting" (i.e., people voting in the names of dead electors whose names are yet to be cleansed from the roll) and impersonation is a matter for conjecture. Convictions for multiple voting are almost nonexistent. But this may be because it is almost impossible to find evidence to contradict an elector whose name was marked off at different polling booths, but who denies voting twice. (The possibilities of administrative error or anonymous personation cast too much doubt on prosecution in such cases.)

In truth, there is a dearth of credible evidence of serious attempts to influence electoral outcomes through such crude fraud. Any such attempt would have to be on a fairly large scale to be effective. But concern about the potential for such fraud was raised in the wake of recent revelations about malfeasance in candidate pre-selection in the Queensland Labor Party. Political activists and even senior politicians admitted to a history of false enrolments to "stack" internal party ballots. (The party's rules made voting rights contingent on official enrolment.) Political activists and politicians had thus admitted contaminating the official electoral roll—albeit in relatively small numbers and with the motivation of rorting party pre-selections rather than public elections. A spate of inquiries ensued.⁸⁸

Debate about fraud has subsided somewhat, having been channelled into detailed questions about enrolment procedures and roll management. The National Audit Office produced a favorable report into the integrity of the national roll in 2002, making mere machinery recommendations to achieve best practice out of existing processes.⁸⁹ While the response of the Federal Parliament's Joint Standing Committee on Electoral Matters was to declare some of the Audit Office's optimism to be unfounded, it nevertheless adopted the recommendations.⁹⁰

A more heated battle is being fought over federal moves to tighten requirements for new enrollees. Similar debates are common overseas, for example in the United States and the United Kingdom. In Australia, as elsewhere, these

tend to be fought along party lines, with conservative parties keen to tighten enrolment and voting procedures, and social democratic parties keen to minimize disincentives to vote.

Aside from fraud, there are a host of other electoral offences in Australia, some of which are peculiar to particular jurisdictions. The one of most contemporary interest, and which sheds most light on electoral law values, is the vexed concept of electoral bribery. While old-fashioned, individualized vote-buying is all but dead in today's mass, relatively wealthy electorate, the question of improper and corrupt arrangements to attract electoral support is very much alive. A plethora of scandals in Australia, ranging from a secret policy deal with a lobby group on the eve of a crucial by-election, to allegations of cash-for-preference-recommendations, have led to a series of embarrassing inquiries and investigations.⁹¹ The notion of "bribery" is notoriously fuzzy. It is impossible to draft a rule in advance that will capture all corrupting activities, without chilling some ordinary political activity. The onus however lies on politicians to draft clear exemptions to preserve accepted political customs from allegations of electoral bribery.

INSTITUTIONALIZING GOOD ADMINISTRATION AND LAW REFORM

Commission independence and accountability

Ultimately, the most important institutional measure in Australia for achieving free, efficient and reliable elections is ensuring electoral authority independence. Elections in Australia are characterized by centralized, professional

⁸⁸ For example Joint Standing Committee on Electoral Matters, *User Friendly, Not Abuser Friendly: Report of the Inquiry into the Integrity of the Electoral Roll* (2001); Criminal Justice Commission Queensland, *The Shepherdson Inquiry: An Investigation into Electoral Fraud* (2001).

⁸⁹ Australian National Audit Office, *Integrity of the Electoral Roll*, Audit Report No 42 (2001-02).

⁹⁰ Joint Standing Committee on Electoral Matters, *The Integrity of the Electoral Roll: Review of ANAO Report No 42 2001-02* (2002).

⁹¹ Colin A Hughes, "Electoral Bribery" (1998) 7 *Griffith Law Review* 209.

and, by and large, completely independent electoral commissions.⁹² However, this is not to say there are no threats to their independence. Practical independence of electoral agencies can only be achieved through long-term guarantees of adequate resourcing and full budgetary freedom. Not all states or territories, for instance, commit ample resources to electoral administration.

In addition, the perception of independence in this field is almost as important as actual independence. Australian electoral commissions are staffed with expert public servants. By law they cannot be candidates, but more importantly, by strongly held convention they must renounce any formal party membership. As a rule, as career public servants they have traditionally been exceptionally apolitical. However, the appointment of the *head* of each electoral commission is solely within the executive government's fiat. This can lead to unfortunate consequences where bi-partisanship over appointments deteriorates, as occurred recently at the federal level. However, the obvious alternative model, viz making appointments subject to an open process of parliamentary scrutiny (in line with the United States model of Senate review of significant federal appointments) may simply result in a greater politicization of appointments.

The inverse of independence is accountability. In practical governance terms, electoral commission accountability in Australia usually rests with the relevant minister, who is then responsible to the parliament. However, electoral commission accountability cannot end there. The electoral agencies must in some respects be directly accountable to parliament and to the electorate at large. To this end, the Federal Parliament's Joint Standing Committee on Electoral Matters conducts a public "post-mortem" after each federal election, which includes public scrutiny and questioning of the Australian Electoral Commission. Further, practical accountability is not just a matter of formal channels of reporting. It requires that the electoral commissions be open and engaged with the media, and involved in two-way public information and education activities with the general community.

Parliamentary review

Electoral law, by its nature, is a matter of intense partisan interest. It is important therefore, that legislatures develop structures to assist with the development of appropriate policy in the reform process. As a study by John Uhr suggests, the history of the Joint Standing Committee on Electoral Matters has been rewarding in this regard.⁹³ It has tended to institutionalize parliamentary review of federal electoral law and practice and ensured both public and expert input into a rolling process of law reform. For instance, in the ongoing inquiry into the 2001 federal election, to date over 150 public submissions have been received. The weightiest of these, not surprisingly, have come from the experts in the Australian Electoral Commission.

Since the 1980s, the most significant achievement of the Joint Standing Committee on Electoral Matters has been to regularize the fine-tuning of electoral regulation through a public, consultative process. However, its reports are recommendations only, and divisions along partisan lines inevitably determine the fate of any contentious legislation.⁹⁴ It is unclear, therefore, whether the Joint Standing Committee is the ideal body to generate *major* reform. Citizen-initiated referenda do not exist in Australia (except in the tiny offshore territory of Norfolk Island).⁹⁵ In any event, unlike the United States, citizen interest in politics is less a process of a vibrant civic society driven by thousands of private associations. As a result, any push for significant electoral reform in Australia must inevitably come from a reform-

⁹² Colin A Hughes, "The Bureaucratic Model: Australia" (1992) 37 *Journal of Behavioural and Social Sciences* 106.

⁹³ John Uhr, *Rules for Representation: Parliament and the Design of the Australian Electoral System*, Australian Parliamentary Library Research Paper 29 (1999–2000).

⁹⁴ On the inter-relationship of innovative reform and partisanship, see James Jupp and Marian Sawyer, "Political Parties, Partisanship and Electoral Governance" in Marian Sawyer (ed) *Elections: Full, Free and Fair* 216.

⁹⁵ See George Williams and Geraldine Chin, "The Failure of Citizens' Initiated Referenda Proposals in Australia: New Directions for Popular Participation?" (2000) 35 *Australian Journal of Political Science* 27.

ing government's agenda; but this in turn excludes the likelihood of reform that does not suit the interests of the dominant party.

Internationalizing electoral law

A final, and ongoing issue for Australian electoral law is the fertilization of electoral systems and regulation across national boundaries. Comparative law was a major fillip to democratic innovations in Australia in the 19th century, from the secret ballot to alternative voting systems. The contemporary notion of "internationalization," however, has several different strands.

One strand remains, of course, the ongoing interest in comparative law. Comparative legal scholarship is admittedly difficult, since true comparisons must allow for differences in political development and culture. Generally, researchers and reformers in Australia have looked to a small set of other nations, notably the United Kingdom, and to a lesser extent the United States, Canada and New Zealand. This reflects several realities. One is shared language and history, including a strongly shared tendency in all these systems to prioritize majoritarian rule (at least, that is, until recent developments in New Zealand and the newly devolved sub-legislature in Wales). Yet, this small set of electoral "cousins" also suggests an unwillingness on the part of Australians to look further afield. The way forward in comparative electoral law may well be through international focus groups working on and sharing ideas, models and information in particular areas of regulation, for example campaign finance.⁹⁶

Another strand is international law itself, and the potential for internationalization at the level of fundamental principle. This affects Australia, like the United States, less than many nations, since it is not part of any international electoral or legal system as such, in contrast, say, to the nations of the European Union. However, there is an emerging body of work building on notions of universal democratic, including electoral, values.⁹⁷ Whether such work is truly universal, or confined in its relevance to certain western traditions, is debatable. But judges in Australia's highest courts, most no-

tably Justice Michael Kirby of the High Court,⁹⁸ have increasingly recognized that the development of the Australian common law, including statutory and constitutional interpretation, ought be in accordance with fundamental norms reflected in international human rights principles. Electoral law is a manifestation of such fundamental civil and political rights. But in practice, such international norms may have limited effect on Australian law, as they tend to be stated at a high level of generalization, and Australian electoral practice tends to easily meet them.

The final, and most practical aspect of internationalization, is the capacity of Australian electoral agencies to provide assistance and aid to other electoral systems. Much, both truth and myth, has been written about Australia as a "cradle" of democratic innovation in the second half of the 19th and early 20th centuries. In the aftermath of the Cold War, democratic governance has been recognized as a keystone to social and economic development. The issue for the Australian Electoral Commission in the 21st century is the potential for Australia to provide export or aid-oriented services in electoral design and administration.⁹⁹ To call this an "industry" is only partly true. The more important realization is that its emergence proves that free and fair elections, the most basic of civil and political rights, are not purely national affairs but matters of international concern. But as with comparative electoral law, there remains the realization that electoral norms and practices suited to Australian conditions are not necessarily adaptable to different political cultures and levels of development.

⁹⁶ Such as the "Money, Politics, International" forums convened by Professor Keith Ewing of Kings College London, drawing together representatives of major developed and western legal systems.

⁹⁷ Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (2000).

⁹⁸ See, for example, Michael Kirby, "The Australian Use of International Human Rights Norms" (1993) 16 *University of New South Wales LJ* 363.

⁹⁹ Michael Maley, "Exporting Expertise in Democratic Electoral Administration" in Marian Sawyer (ed), *Elections: Full, Free and Fair* (2001) 175.

CONCLUSION

This article has addressed a number of key issues confronting contemporary electoral law in Australia. It demonstrates that Australian electoral law is facing many of the same questions and problems that concern other nations, such as how best to regulate campaign financing, regulating ballot access, and what role the law ought to play in shaping the "internal" affairs of political parties.

However, the Australian approach to such issues is often quite different to other nations. It is characterized by a lower degree of judicial intervention than is commonly experienced in nations such as the United States. Without a Bill of Rights or even the entrenchment of basic democratic principles such as the right to vote, the Australian High Court has played only a

minor role in the development of this field of law. It has instead been largely the domain of political scientists, parliamentarians and the electoral officials who administer the law.

For these and other reasons of history and culture, Australian electoral law is distinctive in ways that go far beyond the practice of compulsory voting. It is a rich field that offers important comparative insights and deserves more sustained legal scholarship than has been afforded to date. In that regard, this conspectus of an article, we trust, has been a small, but useful step.

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