EDITORIAL
Special Edition on Electoral Regulation and Representation

*Graeme Orr**

The Cinderella Status of Electoral Law as a Field of Study in Australia

From the vantage point of legal scholars,the study of electoral regulation in Australia is a Cinderella field. Given that electoral laws are the foundations of democratic process, and hence, in contemporary understanding, of the very law making process, this is an odd oversight — perhaps even an occlusion of the legal imagination.

Within the undergraduate law curriculum, it has been relegated to the margins of constitutional law. It is summarily taught, if at all, in a hurried, overview fashion in one of the early, notoriously paper-shuffling weeks of the typical constitutional law offering compulsory to the LLB (the same might be said of its treatment in the foundational government unit in many political science degrees).

Within the broader profession and society, it has been the preserve of a select group of folk: those who staff electoral commissions; the executive apparatchiks of the major political parties; and a handful of legal practitioners. The latter tend to have links to those parties, and are called upon occasionally to advise and litigate 'their' parties' interests in the heat of a campaign or in the wake of a declaration of poll, interests which become acute, not just for the candidates and parties concerned, but for the whole polity, when, as is increasingly the case especially at state level in Australia, elections are close and minority or bare majority governments commonplace.[1]

This is not to imply that the subject of the electoral system has been neglected within the academy. It is an area that has long underpinned, nourished and fascinated political scientists who have produced a great body of work about the sociology, pragmatic politics and mathematical quirks of elections. A list of eminent and active electoral scientists and psephologists from within the English-speaking common law world would be easy to

* Law Faculty, Griffith University, Brisbane, Australia.

1 From where I sit in Queensland, the past two state elections have produced knife-edge governments, and on both occasions the Court of Disputed Returns held the fate of the government in its quasi-judicial hands. In 1995, the Labor government lost power after the court ordered a re-election in a super-marginal seat: *Tanti v Davies (No 3)* [1996] 2 Qd R 602. In 1998, the minority Labor government held off such a challenge, but not without some moralising from the judicial bench about the propriety of canvassing tactics involving 'unofficial' how-to-vote cards seeking second preferences: *Carroll v Electoral Commission of Queensland* (unreported, Queensland Court of Disputed Returns, 21 September 1998).

begin but difficult to end: David Butler, Anthony King, Dennis Kavanagh, Iain MacLean, Colin Hughes, Joan Rydon and Malcolm Mackerras, to name but a few. Similarly, Australian civics and introduction to politics classes have been well served by a series of primers by political scientists such as Bennett, Jaensch and Stevens, books pitched at the general reader, which cover electoral politics, electoral dynamics and the electoral system in broad sweep.[2]

Why then be concerned that those steeped in the analysis of legal regulation have tended to ignore the field? We might well be suspicious of letting those trained chiefly within a legal framework from feasting their dry mouths and dead hands on the tasty morsels of electoral study. Iain MacLean, having tersely outlined the key laws and statistics relevant to the 1974 British elections in his elegant generalist work *Elections*, noted wryly *'[t]his brief account ... has omitted almost everything of interest.* It is the aim of the book to try to fill in the gaps'.[3]

Yet if we accept three simple premises, then we must wonder why there is not a well-developed legal scholarship surrounding elections in Australia. The first premise is that whilst constitutional matters are seen as foundational to legal study (despite their lack of direct relevance to most who practice or are subjected to the law), constitutional law itself would have no meaning in a representative democracy without a highly developed and constantly evolving set of laws and principles governing elections and referendums. That is, constitutional law, which in a parliamentary state tends to focus on the powers of legislatures, is itself constituted, in a very real and practical sense, by electoral law. Electoral law is thus fundamental to constitutional law — to all public law — and not simply a curious adjunct.

The second premise is that democratic political theory itself largely finds voice and root in electoral regulation. This is not to say that democratic principles are necessarily reflected in any ideal form in any particular electoral and voting system, nor that democratic ideals could ever be exhausted in any voting system or systems.[4] But it is to claim that public or state power in a mass democratic state — usually seen as the paradigm form of power — ultimately rests and owes its legitimacy not just to motherhood notions of the sovereignty of the people, but to the detailed mechanisms and regulations by which elections are conducted and managed.

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2 S Bennett (1996) *Winning and Losing: Australian National Elections*, Melbourne University Press; D Jaensch (1995) *Election! How and Why Australia Votes*, Allen & Unwin; and B Stevens (1984) *Elections: How? Why? When?*, Rigby.

3 I MacLean (1980) *Elections*, 2nd edn, Longman, p 2 (emphasis added).

4 For democratic ideals to have any richness or pervasive effect, they must infuse a variety of social and legal entities — such as our public institutions, our workplaces and our corporations — and not just be limited to occasional expression in mass elections and referenda. Electoral law itself should thus not be held in thrall only by parliamentary affairs, but begin in a coherent way to address the electoral laws of local government, trade unions, corporations and co-operatives and specialist representative bodies (such as the Aboriginal and Torres Strait Islander Commission).

The third premise is that law is to politics as yin is to yang: complimentary but different. A century on from Oliver Wendell Holmes and all that, contextual approaches to scholarship are so familiar that those writing about laws governing elections and political behaviour and processes should be able to do so from an inter-disciplinary perspective, rather than the imperial fortress of pure legal doctrine and normative assertion, or the deep trenches of purely social science descriptiveness.

A conspicuous absence in the realm of academic scholarship about electoral matters, particularly in Australia, is any sustained or comprehensive analysis of electoral law and its history, policies, purposes, theoretical bases and even black-letter instantiations. This is not to decry the work that exists. Political scientists, for instance, have left Australians with an important and ongoing debate over issues such as compulsory voting and proportional voting systems. Constitutional scholars have taken up issues as they arise, particularly as they fall from the High Court, sitting either as the Court of Disputed Returns or the ultimate constitutional arbiter, considering challenges to the qualification of members or the absence of one-vote, one-value in electoral distributions.[5]

But we do not have any tradition within the legal academy of treating electoral regulation and representation as a sustained focus of attention. We have neither the body of legal thought and analysis, nor the breadth and depth of courses, on offer, for instance, in the United States, which can spawn and sustain critical collections such as Lowenstein's *Election Law: Cases and Materials*.[6] We have no Lani Guinier to provoke thought about those who the electoral laws are marginalising or excluding.[7] Even though parliamentary elections in Australia's bicameral federal system are as common as football seasons — albeit less colourful — unlike the United Kingdom, there is no basic legal reference such as *Parker's Law and Conduct of Elections* for Australia,[8] let alone a sustained and scholarly treatment like Blackburn's *The Electoral System in Britain*.[9] Other common law countries

5 Recent cases include: *McGinty v Western Australia* (1996) 186 CLR 140 (one-vote one-value challenge); *Langer v Commonwealth* (1996) 186 CLR 302; *Muldowney v South Australia* (1996) 186 CLR 352 (restrictions on electoral speech); and *Free v Kelly (No 2)* (1996) 185 CLR 296 (constitutional disqualification and consequences).

6 DH Lowenstein (1995) *Election Law: Cases and Materials*, Carolina Academic Press. There are, of course, cultural, geo-political and jurisprudential reasons for the fascination that elections have to the American legal mind.

7 See, eg, L Guinier (1994) *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy*, Free Press.

8 R Clayton (1996) *Parker's Law and Conduct of Elections*, Charles Knight. In another age, of course, even more substantial attention was paid to systematising the expression and development of electoral law in the UK. The classic work reached a 20th edition: see C Willoughby Williams (1928) *Rogers on Elections, Vol II: Parliamentary Elections and Petitions*, 20th edn, Stevens and Sons (companion works, *Vol I: Registration* and *Volume III. Municipal and Other Elections and Petitions* reached 18th and 19th editions respectively in the same year).

9 R Blackburn (1995) *The Electoral System in Britain*, St Martin's Press. However,

are similarly better served than Australia,[10] and there is even an literature on the international law of elections.[11]

This special number of the *Griffith Law Review* is not, however, a complaint about the legacy of electoral law scholarship past, but an invitation to present and future scholars to work within a neglected area. Australia, like many Western countries, experienced a golden period of interest in and passionate debate about electoral rights and voting systems from the 1850s until the 1920s. That period encompassed many groundbreaking reforms, from the secret ballot to the full, and even compulsory, adult franchise under preferential voting. It gave rise to what one writer has called a 'cherished myth ... of Australia as a paragon of democratic virtues'.[12]

In recent times, that debate has been somewhat moribund, as it has in many Western countries; indeed, it has tended to be abandoned to the professional politicians, who both make the electoral laws and benefit from them. That, in effect, is the equivalent of letting corporations decide the tax laws.

Yet today, with electoral politics being played in the shadow of interest group pluralism, corporatism and the mass media and information technology age, live questions about electoral regulation and representation are more alive than ever. The media, the courts and tribunals and the parliamentary committees bristle with them. Such questions concern the selling of democracy and the regulation of electoral funding and expenditure; the fairness and invasiveness of electoral advertising (including governmental advertising masquerading as public service information); electoral choice and the tension between representativeness and stable government (optional preferential voting, proportional representation and the size of the quota); citizen's referenda as a form of direct democracy; and the mechanics and corruptibility of pre-selection, party registration, balloting and canvassing procedures. Independents, rival 'third parties' and even maverick candidates proliferate, challenging and enlivening the two-party hegemony that paradoxically arose out of the dichotomous left–right conception of traditional politics, where shades of left and shades of right ended up converging in a competition for uncommitted voters of the centre.[13] In times of such

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even in Britain, monographs on electoral law tend to fall out of print after one edition: eg H Rawlings (1988) *Law and the Electoral Process*, Sweet and Maxwell.

10 Eg J Patrick Boyer (1987) *Election Law in Canada: The Law and Procedure of Federal, Provincial and Territorial Elections*, 2 vols, Butterworths; S Sothis Rachagan (1993) *Law and the Electoral Process in Malaysia*, University of Malaya Press; and VS Deshpande and K Jain (1995) *Elections Law and Practice*, 5th edn, Bahri Brothers.

11 GS Goodwin-Gill (1994) *Free and Fair Elections: International Law and Practice*, Inter-Parliamentary Union.

12 A Brooks, 'A Paragon of Democratic Virtues? The Development of the Commonwealth Franchise' (1993) 12 *U Tas LR* 208. For Brooks, the accent is on the mythical part of this belief.

13 Dubbed 'Tweedledum and Tweedledee' politics. Lewis Carroll, a leading thinker behind the movement for proportional voting systems, would probably

flux and relative openness, there is more room for debate about the nature and aims of our electoral laws.[14]

It is, therefore, no time to lapse into smug 'end-of history' liberalism as people have tended to do, thinking that liberal democracies, by virtue of having an (almost)[15] universal franchise and free elections, therefore necessarily have completely fair elections. It is a time, instead, for us to subject the methods of electoral regulation to closer critique.

The Contributions in this Number

With the election of a modernising, somewhat liberally flavoured Labour government after nearly two decades of Conservative rule, the United Kingdom is engaged in a host of debates, legislative and extra-parliamentary, about its democratic institutions and processes: from restructuring of the House of Lords and devolution to regional Parliaments, to reform of its voting laws and electoral system. Perhaps no area is in more need of modernisation than the funding of political parties. As **Professor Keith Ewing** writes here, 'Britain has one of the most primitive regimes for regulating the funding of political parties in the developed world'. Professor Ewing has written extensively on such issues in the past,[16] and offers here a spirited account of the problem and the pros and cons of alternative models dealing with donation and expenditure limits, state aid and enforcement.

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not mind his fictional twins being used to represent this development, even if it is not one confined to the non-proportional voting systems favoured in the English-speaking world.

14 This has led, on the one hand, to calls to increase the Senate quota to deter minor party control of the Upper House in Australia, and on the other, to calls to introduce the Hare-Clark system (à la Tasmania and the ACT) to other lower houses in Australia. On a more mechanical note, it has led to calls for reforms to broadcasting laws and even the design of the Senate ballot paper, to give Independents a better chance. In the latter respect, the offering of simple, 'above-the-line' voting for candidates grouped by party or affiliation, but not to independent candidates (a differentiation which not only deters voters from voting independent, but denies independents the chance to automatically direct preferences, perhaps the true lobbying power of such a candidacy) is an anomaly ripe for consideration. Given that the vested interests in the Senate are unlikely to amend it, it may be time that the full High Court reconsidered the discrimination against independent Senate candidates in the structure of the ballot paper, which it approved in *McKenzie v The Commonwealth* (1984) 57 ALR 747.

15 The fact that prisoners around the world are denied the vote remains a major blot, especially in Australia which otherwise compels the vote, and even gaols people for refusing to pay a fine for voting without a valid reason: see G Orr, *Ballotless and Behind Bars: The Denial of the Franchise to Prisoners* (1998) 26 *FLR* 55.

16 Including two books: K Ewing (1987) *The Funding of Political Parties in Britain*, Cambridge University Press, and KD Ewing (1992) *Money, Politics and Law: A Study of Electoral Campaign Finance Reform in Canada*, Oxford University Press

Regulation of electoral funding in Australia is more developed, but each legal measure raises inevitably dilemmas of interpretation, and, almost as inevitably, attempts to circumvent or avoid its scope. **Teresa Somes** provides a detailed commentary on current debates regarding the inadequacies and possible reform of such laws at a federal level, especially in light of recent controversies concerning the use of interest-friendly loans, trust funds and the question of 'associated entities'.

An ancient electoral dilemma, intimately related to questions of funding and expenditure, is electoral bribery. Whilst outright vote-buying and the rollicking spectre of keg-and-whiskey treating may be things of the past,[17] as long as politics and electoral politics is about doing deals and swinging numbers, allegations of bribery, whether metaphorical or actual, will abound. Such allegations will be all the more poignant since modern electioneering involves a mass 'buying' of votes, whether through highly publicised acts of election-eve pump-priming, or behind-the-scenes deals with influential lobby groups for electoral support or with rival political parties for preference swaps. In contemporary Australia, a number of noteworthy cases and inquiries have dealt with such allegations on a case-by-case basis, and not entirely satisfactorily, given the dearth of analysis and scholarly writing on this topic. Former Australian Electoral Commissioner, **Professor Colin Hughes** surveys these cases, and offers insights and suggestions for a reform agenda. Being a political scientist by trade, Professor Hughes is suitably wary of the heavy hand of legal regulation in criminalising or inappropriately regulating what to many is a common and even necessary (if unlovely) aspect of the art of politics.

Australians either love, or hate, preferential balloting, whether it be in the guise of the alternative vote or the single transferable vote. Not many Australians (except perhaps the many immigrants from these countries) would realise that the system has been adopted and adapted in two nations overseas: the Republic of Ireland and Malta. **Associate Professor Malcolm Mackerras and Dr William Maley**, political science colleagues, describe and contrast the preferential voting systems of these three countries, including the effect such laws can have on key issues such as representation and choice, and the vexed question of optional preferential voting, including the *cause célèbre Langer case*, which saw the gaoling of a political activist in Australia.[18]

17 Although allegations of treating, in the form of free public spectacles and refreshments, including concerts at campaign launches, survive even in this day of electronic media and mass consumerism: a Moore Electoral Petition (*Stevenage v Filing*) was filed in the High Court as the Court of Disputed Returns following the 1996 federal election, but not proceeded with. In a peculiar twist on the theme of monetary bribes, the One Nation Party was subject to Australian Federal Police investigation for asking its Senate candidates to contribute up to $10,000 prior to endorsement: 'One Nation faces bribery investigation', *The Australian*, 1 October 1998, p 7.

18 *Langer v Commonwealth* (1996) 186 CLR 302; *Langer v Australian Electoral Commission (No 1)* (1996) 136 ALR 141; *Langer v Australian Electoral Commission (No 2)* (unreported, Federal Court of Australia, 7 March 1996).

Referendum laws are often overlooked in any study of electoral regulation, yet as many citizens of the United States and Switzerland know, citizen's initiated referendums (CIR) offer the potential for direct, issues-based democracy and even legislation by plebiscite. Such processes have not been the subject of much scholarly attention in Australia, and yet as **Helen Gregorczuk** and **George Williams and Geraldine Chin** show, there is a long history of public and even parliamentary support for CIR, a history extending well into the present. Helen Gregorczuk examines arguments from political theory both for and against CIR, and in optimistically concluding the case for the positive potential of CIR, reminds us that it has appeal not simply to reactionary agendas, but also to moderate and left-of-centre forces. George Williams and Geraldine Chin, trace the evolution and possibilities of the proposals for CIR in the Australian Capital Territory — a push all the more remarkable because it has the backing of the Liberal party government in that territory. Williams is one of Australia's leading, and most prolific, constitutional scholars, and the article also examines the sovereignty hurdle which CIR confronts.

Finally, as students of Australian politics know, the closest the Australian legal, electoral and political systems have come to seizure or meltdown was in the 1975 constitutional crisis. The blocking of supply and dismissal of the Whitlam government would not have occurred but for two state parliaments breaking with convention and not appointing (Labor) party nominees to casual Senate vacancies. The Constitution was subsequently amended by referendum to enshrine the convention in law. As **Tom Round** observes, in doing so, the Constitution for the first time explicitly recognised the existence of the party system, and in that regard beat the *Commonwealth Electoral Act* 1918 (Cth) which only formally acknowledged parties in 1983. The Constitution in a sense now provides a form of 'ownership' of Senate seats by parties; Round provides here a detailed textual analysis of, and explanation of the political context surrounding, questions about the interpretation of the casual vacancy provisions raised by the regime of party registration.

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