

**THEMATIC:
THE LAW OF ELECTIONS AND POLITICS**



Illustration by Tilley Wood

EDITORIAL

DAMIAN MORRIS*

Free, fair and competitive elections which reflect the voice of the people are an aspiration for any democratic society such as Australia.¹ Elections allow the people of many nations around the world to select their legislators,² leaders³ and occasionally judges⁴ at all levels of government. Maintaining the integrity of these electoral processes is vital.⁵ Thus, the laws regulating elections and the key political actors who participate assume a central importance in the integrity of elections and ensuring that electoral outcomes reflect the will of the people.⁶

Australia has long been an innovator in the field of electoral regulation, introducing the first significant widespread use of the secret ballot,⁷ the development and introduction of preferential voting,⁸ and female

* Editor, Issue 39(1), 2016.

- 1 Richard H Pildes, 'Elections' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 529, 529–30; Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (Federation Press, 2010) v–ix.
- 2 See, eg, *Australian Constitution* ss 7, 24; *United States Constitution* art I § 4; *Representation of the People Act 1983* (UK) c 2.
- 3 This most commonly occurs in presidential systems following the model of the United States: see, eg, *United States Constitution* art II § 1; *La Constitution du 4 octobre 1958* [French Constitution of 4 October 1958] art 6; *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany] art 54.
- 4 Direct judicial elections occur in some United States jurisdictions: see, eg, *Texas Constitution* art 5 § 2(c). However, 'retention elections' after an initial executive appointment are more common: see, eg, *Florida Constitution* art V § 10. In the United States, both modes of election have given rise to a unique jurisprudence on judicial campaigning: see, eg, *Caperton v A T Massey Coal Co*, 556 US 868 (2009); *Williams-Yulee v Florida Bar*, 141 L Ed 2d 570 (2015).
- 5 Pildes, above n 1, 529–30; Orr, above n 1, 11–12.
- 6 Stuart N Soroka and Christopher Wlezien, *Degress of Democracy: Politics, Public Opinion, and Policy* (Cambridge University Press, 2010) 1–2. See especially the discussion of the different forms of 'representation' and thus electoral expression: at 4–14.
- 7 The first jurisdictions to enact the secret ballot were Tasmania and Victoria in 1856: *Electoral Act 1856* (Tas) s 63; *Electoral Act 1856* (Vic) s 36; see generally Terry Newman, 'Tasmania and the Secret Ballot' (2003) 49 *Australian Journal of Politics and History* 93. New South Wales followed suit in 1858: *Electoral Act 1858* (NSW) s 43.
- 8 The requirement for preferential voting in House of Representatives elections was introduced in the *Commonwealth Electoral Act 1918* (Cth) s 124, later renumbered to s 240 by *Commonwealth Electoral Legislation Amendment Act 1984* (Cth) s 5(4). Preferential voting was introduced in the Senate by *Commonwealth Electoral Act 1948* (Cth) s 3, amending *Commonwealth Electoral Act 1918* (Cth) s 135. See David M Farrell and Ian McAllister, '1902 and the Origins of the Preferential Voting System in Australia' (2005) 51 *Australian Journal of Politics and History* 155.

suffrage.⁹ These examples of the growth of our electoral system as a whole should not merely be regarded as procedural changes. As Andrew Geddis notes in his Foreword to the thematic component of this Issue, the choices made by a nation in making these changes represent ‘fundamental value judgments’ about how it should be governed.¹⁰ Each of the reforms noted above and many others embody such value judgments about the form of government to be adopted in each Australian jurisdiction. For the most part, the values expressed by Australia’s electoral systems do well in achieving the goals of a representative liberal democracy.

Unfortunately, the values expressed in fact by these systems are often not the values which the public believe ought to be expressed. The recent scrutiny of the federal electoral system arising out of the 2013 election has brought several areas where this disconnect has occurred into clearer focus.¹¹ The election of Senators Ricky Muir and Wayne Dropulich at the 2013 Senate election on the basis of preferences distributed by political parties rather than based on voter intention was one such example.¹² The reforms which were aimed at addressing this particular example occurred too recently to have been included in an article in this Issue,¹³ but the decision to allow voter intention to control preference distribution is an example of an important value judgment about how Australia is to be governed. That is, our elected representatives should be chosen by voter intention rather than the outcomes of an almost random system engineered by political cartels.¹⁴

Each of the articles in the thematic component of this Issue examines a particular component of Australia’s electoral systems and analyses whether the values expressed accord with a particular embodiment of the concept of a representative liberal democracy. The conceptions deployed by the authors are by no means homogenous. They vary according to the particular component of the electoral system examined and the viewpoint from which the system is analysed.

-
- 9 The second jurisdiction internationally to introduce universal adult suffrage after New Zealand was South Australia: *Constitution (Female Suffrage) Act 1894* (SA) ss 1–3. The Commonwealth followed suit shortly after its inception, becoming the third jurisdiction: *Commonwealth Franchise Act 1902* (Cth) s 3. While these Acts extended the franchise equally to males and females within Australia, the franchise was not truly universal due to the exclusion of Indigenous Australians until 1962.
- 10 Andrew Geddis, ‘Foreword’ (2016) 39 *University of New South Wales Law Journal* 312, 314.
- 11 See, eg, ‘Senate Ballot Paper Stretches Beyond a Metre in NSW’, *ABC News* (online), 16 August 2013 <<http://www.abc.net.au/news/2013-08-16/senate-ballot-paper-stretches-beyond-a-metre-in-nsw/4892934>>.
- 12 Antony Green, ‘The Preference Deals behind the Strange Election of Ricky Muir and Wayne Dropulich’ on Antony Green, *ABC Elections: Antony Green’s Election Blog* (13 September 2013) <<http://blogs.abc.net.au/antonygreen/2013/09/the-preference-deals-behind-the-strange-election-of-ricky-muir-and-wayne-dropulich-.html>>.
- 13 *Commonwealth Electoral Amendment Act 2016* (Cth) sch 1 items 19–20, amending *Commonwealth Electoral Act 1918* (Cth) s 239.
- 14 See also Antony Green, ‘Moves Underway to Change the Senate’s Electoral System’ on Antony Green, *ABC Elections: Antony Green’s Election Blog* (3 February 2016) <<http://blogs.abc.net.au/antonygreen/2016/02/moves-underway-to-change-the-senates-electoral-system>>.

However, all of the articles recognise the importance of analysing and critiquing electoral regulation by reference to the values which it embodies.

It has been my pleasure to work with the authors over the past year to provide a forum in which they have been able to present their articles on such fascinating areas of electoral law. It is their hard work and research which sustains the *Journal*, and I would like to express my gratitude towards all of them for being very accessible and communicative. My job as Editor was as enjoyable as it was because of your support.

Additionally, there are many other people who have assisted me over the past year as I brought the thematic component of this Issue from a proposal to a printed reality. I would like to take this opportunity to mention several of them here.

I would like to thank Dr Paul Kildea from the University of New South Wales Faculty of Law for his input on the initial proposal which led to this thematic component and for making sure that the call for submissions was publicised to others working in the field of electoral law. Your assistance in doing so was invaluable, and I doubt that I would have received the number of submissions that I did without it. I must also acknowledge the assistance of the *Journal's* Faculty Advisors, Associate Professors Lyria Bennett Moses and Michael Handler, in providing advice on the issues that arose in bringing this Issue to publication. For this too, I offer my thanks.

I would also like to thank Allens, one of our Premier Sponsors, for hosting the launch for this Issue of the *Journal*. I also acknowledge our other Premier Sponsors, Herbert Smith Freehills and King & Wood Mallesons. Your generous support makes the continued high standard and quality of the *Journal* possible.

I am grateful to Professor Andrew Geddis for writing the foreword to this Issue's thematic component. Professor Geddis was well-placed as the International Editor of the *Election Law Journal* to provide an engaging and insightful summary of the fundamental concerns of electoral law which make it integral to an understanding of modern society.

Equally, I am indebted to Mr Antony Green, Australia's leading psephologist, for delivering the keynote address at the launch of this Issue on 27 April 2016. Mr Green's extensive expertise in analysing elections and providing commentary thereon made him the obvious choice for the role, and I am very grateful that he was able to attend, particularly in an election year.

I cannot neglect to mention the enormous contribution made by the Student Members of the *Journal's* Editorial Board and Executive Committee, who have worked hard to make sure that no footnote, comma or parenthesis is out of place in any of the articles published in this Issue. Their research skills and attention to detail help the *Journal* maintain its reputation as one of Australia's leading generalist law journals. I offer particular thanks to those who were able to complete more than one edit over the summer break.

I should also thank the members of the Executive Committee who have provided advice and support for every leg of this journey, including the former Executive Editor, James Norton, and the current Executive Editor, Wee-An Tan. However, I would like to express particular thanks to my fellow Issue Editor,

Brigid McManus, for her friendship and support over the past several months. Brigid is invariably in high spirits, and her charming presence and fascinating conversation have helped me more than she knows. Sometimes the greatest help one can receive is simply a friend to talk to.

There is one final person to be thanked, this time not only on my behalf, but on behalf of all current and past editors of the *Journal*. This Issue of the *Journal* is the last that will be published while Professor David Dixon is Dean of the Faculty of Law of the University of New South Wales. Professor Dixon's unwavering pride in the *Journal's* status as an independent organisation highlights his passionate belief in its student editors. The editors have been grateful for his consistent attendance at launch events, and his sincere and generous speeches to conclude them.

Professor Dixon has always been extremely generous with his time. He has had regular meetings with members of the *Journal* over the years, providing valuable guidance on the *Journal's* practices and keynote speakers. He has also supported the editors in the management and resolution of disputes. Whenever uncertainty arose about the direction in which to take the *Journal*, the editors have always been grateful for Professor Dixon's advice. On behalf of all the *Journal's* editors, past and present, I wish to thank sincerely Professor Dixon for his support of the *Journal* during his tenure as Dean.