# Modernising the Electoral Act:

# Legislative Form and Judicial Role

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The central well of New South Wales parliamentary electoral law is the *Parliamentary Electorates and Elections Act 1912* (and Regulations). It is not a free-standing code on elections, as it nests beneath the *Constitution Act 1902* which contains provisions relevant to parliamentary elections. This statutory law governing voting and election campaigns stands alongside the more recent *Election Funding, Expenditure and Disclosures Act 1981* (and Regulations) governing party and campaign finance.

On the centenary of the *Parliamentary Electorates and Elections Act* of 1912, it is timely to consider its modernisation.

This report has two parts:

**Part A: A PRINCIPLED APPROACH to DRAFTING ELECTORAL LAW**
**(pp 3-19)**

This part addresses the structuring and form of electoral legislation. These are not mere matters of style: they are important, if overlooked, issues in their own right.

**Part B: THE ROLE of COURTS in ELECTORAL LAW**

**(pp 20-32)**

This part focuses on the court of disputed returns. It also considers the role of courts in reviewing electoral administration more generally. These are more substantive questions than in Part A.

## EXECUTIVE SUMMARY

### Part A: Electoral Drafting

**This report recommends that an overhaul of New South Wales electoral legislation:**

**(a) Incorporate plain language drafting (including modernisation of concepts where needed)**

**and, more significantly,**

**(b) Employ principles-based, delegated rule-making, where appropriate.**

### Part B: The Role of the Courts

**In respect of judicial review and the role of the courts, this report:**

**(a) Outlines issues to be addressed in the petitioning system (if the court of disputed returns remains).**
**(b) Offers alternatives to the court of disputed returns model.**
**(c) Highlights the need for New South Wales to clarify the role for judicial review of election administration outside disputed elections.**

# PART A:

# A PRINCPLED APPROACH TO DRAFTING ELECTORAL LAW

## A Framework for Understanding Legislative Drafting

In designing an electoral system, simplicity is not everything. (If it were, first-past-the-post voting would be mandated). But avoiding undue complexity is important, so that citizens and political actors alike can understand and respect the system. The International Institute for Democracy and Electoral Assistance counsels:

> **Keep it Simple and Clear**
>
> Effective and sustainable electoral system designs are more likely to be easily understood by the voter and the politician. Too much complexity can lead to misunderstandings, unintended consequences, and voter mistrust of the results.[1]

Law, whether set by contract, treaty, statute or precedent, can be classified into three forms:[2]

1. Rules
2. Standards
3. Principles

**Rules** are typically narrow, specific and relatively mechanical. That said, rules often contain some ambiguity in their language, purpose or application in some circumstances.

**Standards** supply a set of criteria to delimit a decision-maker's discretion, and tend not to be mechanically applicable.

**Principles** are norms expressed at a high level of generality. Principles most obviously express values and goals.

Rules tend to have an all-or-nothing quality: rules can clash, but when they do, we expect methods of statutory interpretation to tell us which rule gives way to the other. For instance, one rule in the Australian Constitution says the Senate is to consist of equal numbers of Senators from the States. Another rule empowers the Commonwealth Parliament to allow Territory representation as it sees fit. The rules clash if we assume a deep purpose that the Senate be a State's house. The

High Court resolved the clash by holding that the more particular and direct provision about Territory representation permitted Territory Senators.[3]

Standards lie intermediately between rules and principles. A standard is a binding guideline to action or further decision. Standards are expressed with less specificity than rules, whilst being less abstract than principles.

Principles, like religious precepts, exist to point the way. As with rules, they can overlap and contradict. When they do, one principle has to be assigned greater weight than another. A classic example involves someone guilty of involuntary manslaughter of a relative, standing to inherit from the estate. Is the higher principle 'no one is to profit from their wrongs' or 'clear intentions in a will are sacred'?[4]

We can illustrate the rule/standard/principle classification with a neat example from electoral law: the redistribution of parliamentary seats.

The key **principle** is that redistributions are to achieve one-vote, one-value.

A **standard** is that the redistribution commission is to take account of certain factors in drawing electorate boundaries: community of interest, geographical features, existing boundaries, communication and transportation. That standard gives binding guidance to the discretion of the commission.

One **rule** exists in the formula that electoral enrolments must fall within a 10% tolerance of the average enrolment. (Note how that rule gives flesh to the one-vote, one-value principle). Another **rule** is that redistributions must occur every 5 years, or earlier if triggered by some formula. (Note how that rule triggers the re-implementation of the standards driven process of drawing boundaries).

The outcome of applying these principles, standards and rules is a particular set of electoral boundaries.

## Plain Language Drafting and Electoral Law

The aim of plain language drafting is to achieve simpler, clearer and more direct statutory expression and layout. Plain drafting is often, if a little naively, seen as achievable by following precepts about language use. For instance Kimble's *Lifting the Fog on Legalese*,[5] offers guidelines such as:

- Legal sentences should average no more than 20 words.

- Drafters should put the subject near the beginning.
- Use 'must' not 'shall' to express a legal imperative.

Such guidelines almost seem borrowed from primers on writing, like *Strunk and White*, which are as much Calvinist as they are about 'good' writing. [6] Such prescriptive manuals are derided by descriptivists as inhibiting language by erecting bogus rules misconstruing how communication actually works.

Nonetheless, there are many examples in the existing New South Wales electoral act which could benefit from plainer English.

For instance, section 125 reads:

> **Returning officers' parcels**
>
> The returning officer shall, in respect of the polling booth at which the returning officer has presided, make up in separate parcels in like manner as is herein required of polling place managers, all ballot papers used or unused, and all books, rolls and papers kept or used by him or her at such polling booths and, if relevant, copies of the electronic authorised copy of the roll, or other files, showing the delivery of ballot papers to voters at such polling booths; and shall seal up and also permit to be sealed up by the scrutineers, and shall indorse in like manner as aforesaid the several parcels and deal with the same as hereinafter provided; and shall also make out in respect of the said booth the like list as is herein required in the case of polling place managers, which said list shall be verified by the signature of the returning officer, one or more other election officials and scrutineers in manner aforesaid.

A plainer version would be:

> (1) Each returning officer presiding over a polling booth must:
>
> (a) physically secure and account for all ballot papers issued at that booth, including records of their allocation,
> (b) tally the numbers of ballots issued, votes for each candidate and informal ballots,
> (c) certify the tally by signature, counter-signed by another polling official,
> (d) permit scrutineers to seal the ballot material and to counter-sign the tally.
>
> (2) Sections 123-124 apply to these duties as if returning officers were polling place managers.

A second New South Wales example calling for plainer drafting involves electoral bribery. Sections 147-150 of the electoral act are redolent with old-fashioned long-winded drafting and concepts (eg 'treating'). For all the verbiage, important modern concerns such as preference deals, reasonable hospitality at campaign meetings, and immunity for public promises of policy action, are not covered. In

contrast, the more modern Commonwealth provision deals with electoral bribery in one shorter yet more comprehensive section.[7]

Plain language concerns with the current New South Wales act are partly just a product of its age. On its 100th birthday, the act is an accretion of styles and concerns, not all of which are relevant today. In the same boat is the higgledy-piggledy *Electoral Act 1907*, which still governs Western Australian elections. Updating the New South Wales act necessarily requires a re-writing of the act:

1. applying consistent, contemporary plain English principles, and
2. clearing cobwebs, including by adapting any better crafted provisions from other jurisdictions.

Such an update is a minimum requirement of any overhaul of the New South Wales act. It is what, in recent times, the Commonwealth (1983-84), Victoria (2002) and Tasmania (2004) achieved in re-writing their electoral acts.

If that is all that is achieved, a purpose will have been served. However it will be a relatively laborious, mechanical and unambitious exercise. A once-in-a-century opportunity to redraft the New South Wales electoral act presents an opportunity to consider streamlining the legislation in more fundamental ways.

## Principles (and Standards) based Law-making

Principles-based law-making should not be confused with 'plain English drafting', although the two may work together. In public and administrative law, principles-based law-making aims to draft legislation in clear but general terms and, where possible, to leave fine detail to be filled by other agencies. 'Principles'-based law-making encompasses *both* principles and standards in the sense described earlier.

What principles-based law-making seeks to avoid is an excessive attempt by parliaments (or appeal courts) to craft the law as a dense maze of rules that can supposedly be mechanically applied and which somehow foresees all eventualities. To give a flavour, consider this principles-based example from the common law of negligence. In negligence law, the higher courts do not attempt to lay down strict rules of behaviour. Rather, they set principles ('act reasonably to avoid foreseeable harm to your neighbour') and standards ('what is reasonable depends on the level of foreseeability, the likely harm and the cost of precautions'). These principles and standards are then filled in, on the ground, in concrete and health and safety

codes dealing, eg, with particular chemicals, and in decisions by people in charge of physical activities, decisions that are reviewed by lower courts.

Principles-based law-making is not a modish idea, and is usually attributed to the continental European tradition.[8] A 1975 United Kingdom report on *The Preparation of Legislation* called for principles-based drafting 'wherever possible':[9]

> the traditional approach in Europe has been to express the law in general principles, relying upon the courts ... to fill in the details necessary for the application of the statutory propositions to particular cases ... This approach appears to result in simpler and clearer primary legislation ... but equally it lacks the greater certainty which a detailed legislative application of the principles would promote.

Whilst not new, principles-based drafting has had limited use in Australia. The disposition has been to think in mazes of rules, rather than principles. To borrow from the ongoing debate about taxation law:

> We suffer from ... rule madness, a disease that affects the advanced Anglo-Saxon countries generally with Australia having a particularly virulent form.[10]

A classic example of principles-based electoral drafting opens the French *Code Électoral*:[11]

> Le suffrage est direct et universel. (Voting is by direct and universal suffrage).

This introduces the first Chapter of the French *Code*, titled 'Conditions requises pour être électeur' ('Qualifications of Electors'). Of course defining the franchise requires more than six words; but in just three further sentences, the chapter sets both positive qualifications (French nationals who reach 18 years) and disqualifications (legal incapacity, including judicial discretion to disenfranchise during guardianship or for offences penalisable by a loss of civil rights).

Similarly, the first operative provision of the Canadian national election act provides that 'Every person who is a Canadian citizen and is 18 years of age or older on polling day is qualified as an elector'.[12] It is followed by nine relatively short sections defining the entitlement to vote and enrol, including succinct definitions of residence for electoral purposes. That act was drafted in 2000.

## Verbal Diarrhoea and Rule-Madness in Australia Electoral Law:

## Examples Crying Out for Principles-based Drafting

A classic example of overwrought Australian electoral drafting is in the law covering Antarctic voting. The Commonwealth act wastes a whole Part, of 17 sections, on the topic. To call this 'wasted' is not to downplay the value of the several dozen votes involved. Rather, it is to recognise that the legislative verbiage is unnecessary and disproportionate to the task.

The New South Wales Act manages to achieve a similar outcome in just five sections, using delegated drafting.[13] Even this could be improved to a single, principles-focused provision:

> **Antarctic Voting**
>
> The Commission must establish procedures to enable Antarctic electors to vote, and have their votes counted, in as secret and timely a manner as is reasonably possible. It is an offence punishable by 0.5 penalty units to breach any such ballot secrecy procedures.

A blatant example of rule-madness in the current New South Wales act is the relatively recent provisions about child sexual offence disclosures by candidates. A special division of the act, containing eight very complex and detailed sections, purports to flush out candidates who have been involved in legal proceedings involving children and sexual matters.[14] Obviously that particular division can be explained as a legislative reaction to media pressure during a particular scandal. But aside from unnecessarily cluttering the act with minute rules whose purpose becomes lost in the fog of history, such ad hoc laws become precedent for knee-jerk responses to future passing controversies.

Other examples of rule-madness are easily found in Australian electoral law. Senior AEC official Michael Maley highlights the intricate, two-page long ritual of double-blindfolding and drawing of balls, which is statutorily required when his colleagues determine the ballot ordering of candidates or electoral groups.[15] A one-line, principles-based alternative would simply require the AEC 'to determine ballot order by random method'. Fearing rogue litigants or judges reading uncertainty into a concept such as 'random method', proponents of detailed drafting argue that more detail means more certainty. Yet copious detail does not necessarily bring insulation from legal challenge.[16]

Another example of overly detailed drafting is the Commonwealth requirement that the AEC ensure 'every voting compartment shall be furnished with a pencil of

the use of voters'. This legislative micro-management is almost farcical. Whether pencils are cheaper and more failsafe than other options is surely something for experts in the commission, not parliaments. Locking in such prescriptions is not only inflexible, it leaves the electoral authorities in technical breach of the law if, say, sharpeners are lost and pens are substituted. The New South Wales act is less prescriptive as to the importance of graphite, but no less redundant in its insistence that ballot boxes be, umm, open to ballots:

> the polling place manager shall provide in every [voting] compartment pencils or other writing implements for the use of the voters, and shall also provide for each booth a ballot box with a cleft or opening therein capable of receiving the ballot papers.

## Principles-based Drafting in Private versus Public Law

In areas of private law, principles and standards are laid down by the highest courts or the legislature, with the details filled in over time by lower courts or tribunals, and through agreements, norms and customs of society or the marketplace. In a quintessentially public law field like electoral regulation, the details can't be left to players (parties and candidates) as their self-interest will ignore the more fundamental public interests involved. Nor is it desirable to leave electoral law too much to the iterative process of the common law, where customs evolve -> are tested in the lower courts -> then those precedents feed back into practice -> and so it goes. Elections happen too infrequently for that process to work, and need to be run according to clear structures and processes.

Instead, in a field like electoral law, the principles-based method involves:

(a) parliament laying down **principles and standards**
(b) **in suitable areas** where the detailed implementation is
(c) **to be filled in by the electoral commission**, an independent and expert agency.

This involves delegated rule-making.

## Simplifying Electoral Acts – Delegating Rule-Making

In itself, plain language drafting, described earlier, is no guarantee of shorter, simpler legislation. The chief roadblock to plain legal English is that accurate statements of complex ideas often require technical language and intricate layout.

A classic electoral law example is provisions stipulating how votes are counted under proportional representation. The New South Wales Legislative Council count is described in a section covering four pages of the Constitution Act.[17] That epic is a masterpiece of brevity compared to the 12 page provision governing the Australian Senate count.

In this instance, the provisions for the Legislative Council count are entrenched: that is, they can only be amended via referendum. The deeper problem here is that a prescriptive and complex set of rules has been constitutionalised, rather than just a key principle, such as proportional representation. (Contrast the mere entrenchment of the *principle* of optional preferential voting for the New South Wales Legislative Assembly).[18] The detailed expression of procedures for balloting and counting is better left to:

(a) legislative statement of the key principles of the particular voting and counting system chosen by the Parliament, and
(b) technical implementation via rules drafted by experts, in the form of subordinated legislation.

As Anthony Green has complained, it is 'ridiculous' that the constitutional entrenchment of the New South Wales Legislative Council counting procedures locks-in a pre-computer age technology (the random sampling of ballots for preferences).[19]

As it is, only the most mathematically minded psephologist can make sense of such complex rules. If one point of an electoral act is to provide a comprehensible statement of the core processes in an election, a lot of formulae and procedures can be relegated to statutory instruments made by the commission.

The upsides of such delegation are numerous:

(a) The electoral act is cleaner and simpler to understand, by politicians, interested citizens and activists, and students and lawyers alike. This is not merely a matter of style: it focuses parliamentary minds on matters of principles ('what are our aims; what outcomes are desired?').

(b) Fine-detail, typically of a machinery kind, is left to non-partisan experts. Electoral commissions in Australia are respected, independent, 'integrity' agencies.[20] There is less risk of 'chinese whispers' or of the commission having to work with inappropriate rules imposed by the legislative branch or ministry.

(c) Parliamentary time is not wasted on relative minutiae. There is a peculiar temptation for *all* MPs to meddle and fuss about electoral law, as it is something close to their careers, if not hearts.

(d) Electoral regulation can change more speedily and flexibly when needed, especially to take advantage of new technology or administrative methods.

## Objections to Delegated Electoral Rule-Making

There are four concerns with delegated rule-making under principles-based legislation. Each stems from a belief that principles are inherently vague: that whilst a principles-based act may read more cleanly and simply, the outcome if somewhat faux. Though these downsides are real, they are overstated and can be avoided through judicious delegation.

1. *If the parliament legislates principles, but an agency like the electoral commission fills in the detail, isn't the process less democratic?* The commission is not 'responsible' in the way that cabinet is responsible via the parliament, and parliamentarians via elections. If the devil is in the detail, can we trust unelected electoral officials to dance with the devil?

   This rule of law concern is more theoretical than practical. The point is to relieve parliament from legislating the detail of electoral administration in suitable areas, to achieve flexibility and expertise. Australian electoral authorities form trusted and independent 'integrity' agencies. Parliament retains overriding control of the law, and can always revoke the commission's rules or discretions if they are abused.

   Actually, the process may be more democratic. Bills and regulations are invariably framed by the government, and the governing ministry is a political body. Leaving some of the detail of electoral law to the electoral commissions makes the process less partisan.

2. *Will the electoral commission's integrity be compromised?* If the commission draws rules that may have partisan consequences, will its independence be questioned? This fear may explain why Australian electoral authorities have

been more comfortable being seen as administrators of detailed laws, rather than as regulators. Constraining discretion to a relatively robotic following of 'higher orders' will insulate the commission from accusations of bias.[21]

The answer lies in having a balanced approach: (i) delegate only in areas of limited contention, where the commission's technical expertise is predominant and (ii) frame the commission's discretion with sufficiently clear principles and standards.

3. *Will excessive use of delegated rule-making risk fragmenting the law?* Shouldn't the electoral legislation form a code - a 'one-stop shop' for all the elements of electoral regulation?

   This concern is true of *any* legislation that employs a hierarchy of act + delegated rule-making. It is particularly true of public administration. There is always some discretion reposed in an administering agency to settle policy and process on the ground. To understand public law in action always involves some understanding of that agency, its procedures and manuals. Otherwise legislation is unduly long and cluttered.

   What matters is not so much whether the rules are in an act, subordinate legislation or some instrument published on the agency website. What matters is that the law be drafted by the most suitable body, and be easily accessible (eg published in a single, high profile, part of the electoral commission and parliamentary websites).

4. *The law will still be complex, but the complexity hidden in instruments promulgated by the electoral commission.*

   This concern rather misses the point. The purpose of principles-based drafting is to keep legislators focused on the main game and to leave technical details to the most expert agency. Those details in turn should be drafted as lucidly as possible by the commission, using plain drafting methods.

## Suitable Subjects for Delegated *Electoral* Rule-Making

The International Institute for Democracy Education and Assistance (IDEA) recognises the appropriateness of legislative delegation of some of the 'finer details, such as voting procedures' to electoral authorities, rather than including it in legislation. It counsels that certain fundamental issues must still be clearly addressed by the legislature:

- Qualification to register as a voter, together with any restrictions;
- Qualification for and restrictions on candidacy;
- Rules governing seat allocation;
- Limits on terms of office;
- Methods of filling casual vacancies;
- Removal of mandates (ie any recall);
- The secrecy of the vote; and
- Election management (ie authority).

More generally, we can say that any issues of principle, or which are subject to deep partisan contention, or where there is a real potential for a conflict of interest involving or within the electoral commission, should *not* be left primarily to delegated discretion. Examples we can add to IDEA's list from the current New South Wales regime include:

- The core elements of voting
- The basic rules for party registration
- Offence and penalty provisions
- Campaigning and broadcasting rules
- Accountability mechanisms: basic rights of scrutineers, and resolution of disputes (eg disputed returns and judicial review).

Conversely, issues that are essentially technical or routine, and where there is little concern with partisanship, are ideally delegated to a body such as the commission.

Indeed, New South Wales has already pioneered this approach, in the recent 'Technology Assisted Voting' or iVote scheme. This scheme was initiated by inserting an enabling Division 12A into the 1912 act. Admittedly, the legislative provisions are still technical: they are not *pure* principles or standards. (Detailed

boundaries were set around what type of electors are eligible to be involved, and core rights of scrutineers and obligations/offences are defined.) The key lies in the delegation of rule-making power to the commission, over an issue needing technical innovation and design. This commission's discretion included the power *not* to proceed. Accountability was retained through: (a) requiring the commission to publish its procedures, (b) through independent auditing, and (c) through explicit power for ministerial regulatory override.

From an international perspective, the most advanced use of principles-based drafting and delegated rule-making is found in Germany. German law is demarked by a desire for systematization dating back to Roman law ideals: parliamentary acts aim to be short expressions of principles and standards, leaving detail to be filled in by executive law-making.

The German Federal Elections Law is written in a very neat and short format, of just under 60 articles. Article 52 then delegates much of the fine detail to regulation.[22] I set the list out in full not as a precedent, but to illustrate the degree to which one leading democracy entrusts the framing of the detail of electoral administration to a bureaucracy:

The Federal Ministry of the Interior shall issue the Federal Election Regulations necessary for the implementation of this Law. It shall in particular include therein statutory provisions regarding:

1. the appointment of Returning Officers and Electoral Officers, the formation of Electoral Committees and Electoral Boards, and the activities, quorum and procedure of the electoral bodies,
2. appointments to honorary electoral posts, the reimbursement of expenses to persons holding honorary electoral posts, and the procedure for imposing fines,
3. the hours of the poll,
4. the delimitation of polling districts and their notification to the public,
5. the various preconditions for entry in the voters' registers, the keeping of such registers, their public display, their correction and closing, objections to and complaints against a voters' register and the notification of persons entitled to vote,
6. the various preconditions for the granting of polling cards and their issuance, and regarding objections to and complaints against the refusal of polling cards,
7. proof that the preconditions for possessing the right to vote are met,
8. the procedure to be followed according to Article 18, Paragraphs (2) to (4),
9. the submission, content and form of nominations and relevant documents, their examination, the elimination of errors and defects, their acceptance, complaints

against decisions of the Constituency Electoral Committee and the Land Electoral Committee, as well as the publication of nominations,

10. the form and content of the ballot paper and regarding the voting envelope,
11. the provision, furnishing and notification to the public of the polling stations as well as devices ensuring the secrecy of the poll and voting booths,
12. the casting of votes, including special arrangements to meet special conditions,
13. the postal ballot,
14. voting in hospitals and nursing institutions, monasteries and convents, residential premises and areas closed by public health authorities, as well as social therapy and penal institutions,
15. the establishment of the election results, their onward reporting to the appropriate authorities, their public announcement, and the notification of the successful candidates,
16. the conduct of by-elections, repeat elections and replacement elections as well the appointment of successors from the lists of candidates.

A neat illustration of the principles-based, delegated rule-making approach is in the secrecy of the ballot. The German *Federal Election Law* merely lays down the key principle (secrecy) and standards (unobservable voting and ballot security):

> Article 33(1) Measures shall be taken to ensure that the voter cannot be observed while marking his or her ballot paper and placing it in the envelope. Ballot boxes for the reception of the envelopes must be such as they ensure the preservation of the secrecy of the ballot.
>
> Art 33(2) exempts assisted voting for illiterate or disabled electors).

Article 52(11) then leaves the detail of 'ensuring the secrecy of the poll and voting booths' to regulations.

These regulations are subject to supervision by the administrative courts. Unlike in Australia, it is constitutionally controversial for the German lower house or 'Bundestag' to disallow a regulation, but it can amend the list in article 52 to achieve a similar end.[23] It is crucial to realise that the German public service, as in most civil law countries, is a specially trained and tenured branch of government, less fluid or political than the Australian bureaucracy. The equivalent in Australia would be delegating rule-making power not to a ministry, but to the independent electoral commissions.

## Form and Ordering of Electoral Acts

As we saw earlier, the French *Code Électoral* begins with a flourish: its first articles define the franchise. Similarly, Part 1 of the *Canada Elections Act 2000* is headed

'Electoral Rights' and deals with the franchise. In comparison, the typical Australian electoral act begins bureaucratically. The Commonwealth act commences with 45 sections creating and defining the Australian Electoral Commission. The current New South Wales act begins with: (i) a definitions section, then (ii) a short part on 'Distribution of electorates', followed by (iii) a part on the New South Wales Electoral Commission.

The contrast between the Australian and French approaches is significant. The French law begins with a grand principle – universal and direct suffrage – as a reminder that democratic power flows from the people. The Australian approach is more pragmatic. Free and fair elections depend, in practice, on professional and independent electoral administration. And the egg of redistributions – mapping parliament – is put before the chicken of voting.

Admittedly, the contrast is more symbolic than practical. But the French approach is intuitively appealing. Electoral legislation should, ideally, begin with a focus on right to vote (qualifications and enrolment), then move sequentially through the processes of: party registration; initiating an election including nominations; campaigning; polling and the scrutiny; general offences; and dispute resolution/the courts.[24] Redistributions, followed by the administrivia dealing with the commission, can then form the tail of the legislation. Following modern drafting practice, a 'dictionary' of definitions can be a schedule to the act, rather than clogging the first pages.

Political finance law could also be collapsed into the general electoral act, to enhance the act's status as the central font of state parliamentary electoral and party affairs. Alternatively, party registration matters could be shifted to the free-standing political finance act, to form a single statement of legal principle on party affairs. (This is by analogy with industrial law, which typically treats the registration, internal regulation and finances of unions and other industrial organisations, in a single act or schedule.

## Objects of Electoral Legislation

Also following modern drafting practice, an electoral act could commence with a general objects provision. The purpose of such a provision is to set the scene, upfront, for the reader. It forces parliament to focus on and declare its broad intents or purposes in enacting the law. Whilst no Australian electoral legislation

currently has such an objects clause, it would not be difficult to fashion one from the general principles informing free and fair elections:

- A democratic franchise
- A participatory democracy based on a principle of political equality
- An uncorrupted electoral system
- Professional and independent electoral administration

A good example of purpose focused electoral drafting is the *German Political Parties Act 2004*, whose first section defines the 'Constitutional Status and Functions of Political Parties'.

The objection to an electoral objects clause is that it might be employed in unpredictable ways in judicial interpretation, given the broad and abstracted rather than concrete language of 'purposes'. This objection has a whiff of the arguments against a bill of rights, except that a legislative objects provision is more easily amendable, politically and legally, than a bill of rights.

On balance, a general objects clause can do little harm. Why would we not want to draw citizens' – and judges' – attention to such principles? In their absence, any judge interpreting an ambiguous electoral provision may put on the blinkers of a narrowly literal approach to interpretation. Or the judge may invoke some purposes drawn from his own conception of electoral democracy. Indeed common law judges have done this for centuries. They divined presumptions that parliament does not intend to interfere with liberties of speech, private property or mobility without clear words.[25] The problem with this 'common law bill of rights' is that these values are liberal individualist, to the exclusion of other social values such as substantive equality, or the needs of good governance. A well-drafted objects clause may be more balanced, and certainly more explicit and hence procedurally democratic, than common law intuition.

An objects clause can be legislated, but explicitly fenced off from judicial use. (This would be analogous with a constitutional preamble on the unique status of indigenous Australians). It would, however, look unseemly for parliament to begin an electoral act with a statement of high and broad principle, and in the same breath declare those principles to be merely symbolic.

## Conclusions on Electoral Drafting

There is no 'off-the-rack' model for electoral legislation.[26] Even the French *Code Électoral* is a lengthy mixture of principles and detail.[27] The Finnish *Election Act 1998* is relatively brief, covering four levels of election in some 80 pages. Yet it is cleanly drafted rather than mostly principles-based.

Of the overseas legislation surveyed for this report (common law, European and new democracies), the most principled-based is the German. The German *Federal Election Law* spans barely 25 pages. This is achieved through a principles-first approach, combined with a delegation of key administrative detail to Regulations. It is augmented by a *Political Parties Act* of ~ 22 pages. Bald page counts can be a bit misleading: for example, the German finance system is simpler than ours. But as an exemplar of a thorough commitment to principles-first drafting, the German law is worth reading:

- German *Basic Law* 1949 (ie Constitution) https://www.btg-bestellservice.de/pdf/80201000.pdf (Chs II, III, V and VI contain a few electoral and party provisions)
- German *Federal Elections Law 1956* http://aceproject.org/ero-en/regions/europe/DE/Germany%20-%20Federal%20Electoral%20Law-1996.doc/view
- German *Political Parties Law 2004* http://aceproject.org/ero-en/regions/europe/DE/germany-political-parties-act-2004/view

There is no off-the-rack model for electoral legislation. This is most obvious in the British-speaking or common law world, where legislation evolves through (and sometimes suffers a death of) a thousand amendments. In Australia, parliamentary electoral matters committees have provided a level of public consultation. But, as Professor Uhr observes, they have also tended to avoid the big picture and obsess on matters of self-interest to the parties.[28]

There is not merely a risk of partisan consideration (or insider perspectives shared by the major parties) dominating the drafting of election rules.[29] A bigger issues is simply the generic tendency for governments and parliamentarians to tinker with electoral law. Whilst this tendency means electoral law is always on the agenda, it also generates legislation that can be unduly ad hoc and complex. It means that any principles-based re-framing of the New South Wales legislation will need an ongoing parliamentary commitment to that style of drafting: an ongoing self-restraint from meddling unnecessarily in the detail of electoral administration.

It is sometimes said that electoral commissions in Australia are administrators, rather than regulators. If so, this reflects the strictures of the tradition of excessively detailed electoral legislation. It under-sells the independence and expertise of the commissions. Principles-based electoral drafting, twinned with delegation of rule-making to the commission in *suitable* areas, would make for more streamlined and flexible electoral rule-making.

## PART B:

## THE ROLE OF COURTS IN ELECTORAL LAW

### Disputed Returns: Background

I have been asked particularly to consider alternative models to the Court of Disputed Returns.

Courts of disputed returns date to 1868.[30] Prior to that, for over 250 years, the House of Commons had asserted a right to be the sole judge of matters affecting its membership (whether disputed election outcomes, or MP qualifications). In 1868, however, the United Kingdom Parliament ceded its power over disputed elections to the British equivalent of our supreme courts. This happened only after lengthy debate about the propriety and effectiveness of parliamentary committees determining such disputes. The unfortunate appearance, in a time of electoral reform, of 19th century parliamentarians judging their own kind had not been cured even by procedures ensuring random membership on election dispute committees. By 1868 it was figured that senior judges offered greater independence and greater status in what was then a battle against lingering malpractice like electoral bribery.

In the United Kingdom model, to this day, two judges hear any petition disputing an election return. Although there are over 600 races at general elections for the House of Commons, parliamentary election petitions were very rare for most of the 20th century.[31] Between 1924 and 1997 there were only a couple of successful petitions, and these arose from candidates being disqualified. It was sometimes said that the British parties had a tacit gentleman's agreement to avoid petitioning. They seemed to accept the swings and roundabouts of electoral error and to accept that elections were generally clean even if some dodgy practices could always be found in marginal constituencies.

Petitioning at Westminster is a little more common today – seven were lodged between 1997 and 2007.[32] In 1997, a petition was successful over electoral administration error.[33] In 2010 a petition succeeded over allegations of campaign malpractice.[34]

Soon after the introduction of an 'election court' in the United Kingdom in 1868, most Australian jurisdictions adopted that model, albeit with a single judge deciding a petition. For parliamentary elections, Australian judges nominally sit as

a 'Court of Disputed Return' (CDR) - but each court piggy-backs entirely on the resources, and to a fair degree on the procedures, of the relevant supreme court.[35]

Petitioning in Australia has always been relatively uncommon, though less rare than in the United Kingdom (especially relative to the number of MPs). The House of Representatives had 39 substantively distinct petitions in its first 110 years.[36] Of these, only six were successful, including four in the first two decades of federation. Senate figures are not published, but exhibit a similar trend. Successful federal petitions since 1920 (four of them) all involved candidates elected in the 1980s-1990s who suffered a disqualification, rather than maladministration. The pattern in recent years has thus been similar to the United Kingdom pattern in the 20th century: the only difference is that petitions are more common in Australia, particularly those by ordinary citizens.

Petitions at state level are a little more common, if only because seats and hence winning margins are smaller. In recent decade, state petitions brought down a Queensland Labor government (the *Mundingburra election petition* of 1995) and almost upset a hung South Australian parliament (the *Hammond election petition* of 2002). After the 2011 New South Wales election, there were petitions by a Mr Bradbery and Ms Hanson (both high-profile independent candidates and legally represented). The Hanson case was a high-profile and farcical affair because it was triggered by a hoax. It is important, however, that the law not be reformed merely as a response to a one-off scandal.

Categories of petition can be broken down into:

- Disqualification matters (winning candidate was not qualified to nominate)
- Errors in electoral administration (real or perceived)
- Campaign malpractice (eg dodgy how-to-vote cards)
- Miscellaneous objections (which can range from the quixotic to the constitutional).

Petitions are sometimes initiated by legally well-advised political parties or candidates; but more often they are mounted by litigants-in-person (both well-meaning and cranks). Litigants-in-person may not appreciate the risk of cost orders against them.[37] Outside of clear cut disqualification cases, the strike rate of petitions is low

## Courts of Disputed Returns (CDR) - Special Procedures

Elsewhere I have explained and analysed Australian CDRs and their procedures in detail, in *The Law of Politics* and in an essay with Professor George Williams.[38] These writings contain arguments for considering reform to procedural elements of the CDR system.

In litigation before a CDR, the usual civil court procedures and powers are modified by the electoral acts in some important ways:

- Time limits to bring a petition are *very* short. In New South Wales just 40 days from the return of the writ.
- CDRs are instructed meant to loosen the rules of evidence. They are also meant to expedite hearings, to ensure the makeup of the legislature is resolved relatively quickly.
- CDRs are to determine cases according to justice and good conscience (implying not simply according to legal technicalities). However they cannot act merely in cases of unethical or misleading behaviour: there has to have been some breach of electoral law, deliberate or inadvertent, by campaigners or administrators.
- CDR legislation is, paradoxically, often hedged with procedural technicalities. For example, in New South Wales recently a case was thrown out because of minor infelicities in the formal witnessing of the petition.[39]
- CDRs have power to unseat a successful candidate who was disqualified at the time of nomination. Parliament in New South Wales retains a right to determine if an MP is disqualified during a parliamentary term *or* to refer such a matter to the Supreme Court.[40]
- The typical order of a CDR, in a successful case, is to vacate the seat.
- CDRs are not to unseat an MP *unless* the result was likely to have been affected (with rare exceptions of strict liability, eg bribery by a candidate). There is however no clear rule whether the onus falls on the petitioner or the respondent MP: in practice the onus may shift depending on the seriousness of the allegations and whether they involve the respondent MP, her party or agents.
- The petitioning process is the *only* way to challenge an election *outcome.*
- The New South Wales electoral act currently purports to deny any right to appeal a CDR decision. However there are strong constitutional arguments

that the High Court retains a power of review.[41] (Appeals can only definitely be ousted if the power is given to a tribunal or body *other than* a supreme court).

As discussed above, it is important to appreciate that disputed returns are relatively uncommon in Australia and have been for a century. That reflects two things:

1. Relatively clean campaigns and professionalism in electoral administration
2. Petitions are difficult to mount, and confront significant legal barriers.

One result of petitions being conducted relatively quickly and infrequently is that they have not built up a large body of legal precedent interpreting electoral law. This somewhat neutralises one of the central benefits of employing a court model.

Judges are adept at giving well-crafted reasons for judgment, and those reasons contain interpretations, insights and suggestions as to the law and practice, which can benefit commissions, lawyers and students/reformers of the law alike. This is most obvious in cases involving significant legal argument. Notable High Court cases in modern times include *Sykes v Cleary* and *Sue v Hill* (where the Court took strict stances on candidate qualification issues),[42] and *Evans v Crichton-Browne* (where the Court took a narrow view of the offence of 'misleading' electors in 'casting' their votes).[43]

Even in more pragmatic cases, the AEC's Chief Legal Officer for instance has expressed gratefulness at the practical guidance on interpreting ambiguous ballot-papers given in the recent *McEwen election petition.*[44] And even unsuccessful petitions can serve two useful purposes to the system, if not those who have to respond to them. They can (a) clarify the law, and (b) give the appearance of an accountable electoral system.

The relative paucity of electoral petition hearings – and hence precedent - contrasts with well-litigated areas of public law, where there is a steady build up of precedent. Disputed returns are, of course, not the only method by which electoral law is argued in the courts. There are occasional constitutional cases, offence hearings, injunction claims and administrative law cases. Whilst these cases are not limited by being arguable only if an election outcome was likely to have been affected, like petitions they can also suffer for being argued in a hurry (eg during a campaign).

## Criticism of the CDR System

Criticism of the CDR process has come from several quarters. On one side are criticisms of the restrictiveness of the process.[45] The time limits are *very* tight: a mere 40 days from the return of the writ to gather the evidence and define the pleadings, with no amendment allowed to correct the pleadings or to add new grounds that come to light. The test the court applies is far from one of purity, such as 'were there significant breaches of electoral law?' Rather, the ultimate test is whether evidence could be assembled in time that the margin of election was likely affected. CDR petitions are costly to run properly: Supreme Court pleading requires significant legal expertise. A losing petitioner risks two or more sets of costs – their own, the respondent MP's and even the commission's.

Conversely, there are also criticisms that the process is too accessible. This criticism usually comes from MPs or electoral commissions that have had to see off misguided petitions, especially from litigants in person. Whilst the threat of a costs order ought be a deterrent, judges have discretion to relieve a losing party of costs if the judge feels the case had some public benefit. In theory this is a good thing: if a petition raises important public issues or highlights an ambiguous law, should the petitioner risk say their family home just to cover the costs? On the other hand, idiosyncratic or unduly sympathetic costs orders or recommendations against consolidated revenue have recently raised eyebrows.[46]

Can the CDR process be simultaneously too restrictive, and yet too easily accessible? Perhaps. The law could ameliorate restrictiveness by extending the time limit or allowing amendment in serious cases, whilst deterring litigants-in-person through significant security deposits or even by restricting the right to petition to candidates and registered party agents.

Another criticism arises from the fact that judges with civil and criminal law backgrounds, dragooned once or twice in a lifetime to hear electoral petitions, may not be well versed to do so. This criticism relates to both expertise and efficiency

As for expertise, the fact that few judges have had any prominent involvement in politics or administration may be a silver lining in terms of independence. But unworldliness in politics and government can also be a cloud. Two successful state CDR petitions in the 1980s-1990s generated controversy in this respect.

In the 1988 *NSW Port Stephens election petition*, the judge unseated an ALP MP for electoral bribery because of his unseemly doling out of community grants within his electorate during the campaign.[47] The decision may have advanced the debate

about the ethics of such practices, but the outcome was criticised, even by the incoming Liberal Premier, as unrealistic.

Then the 1995 *Mundingburra election petition* brought down the Goss Labor government, after an ultra-marginal race. The judge found the electoral commission in breach of the law because of difficulties the defence force encountered in couriering a small number of postal ballots to troops in Rwanda: completely paradoxically, had the commission taken the slower and even less reliable method of posting the ballots he would have found no breach.[48] This decision was also seen as unrealistic.

There are also cases where judges have been criticised for taking a narrow or legalistic approach to the law, and letting MPs off the hook. For instance, in a 1997 Queensland case in a very close seat, there was proof that Labor campaign workers had dressed in neutral colours and orally passed off 'cleverly designed' second preference cards as if they came from a minor party. Rather than take a purposive approach, the judge interpreted the law in a literalistic way.[49]

In terms of efficiency, the criticism is that judges fall back on an adversarial approach. This is inevitable in a CDR, given:

(a) the CDR piggy-backs on the Supreme Court
(b) the training/background of judges as barristers, and
(c) the adversarial process - petitioner vs respondent, rather than inquisitorial.

## Alternatives to the CDR Model

This report has been informed by a survey of jurisdictions both historically, and internationally. Invariably, across the common law world, the CDR model is still employed. This alone does not suggest the model is ideal: the model spread via cookie-cutter copying, and the model is not routinely tested because disputed returns are not common (partly because the model itself is unfriendly).

**Principles**. The goals for any model for resolving contested elections are:[50]

*Legitimacy: including electoral expertise and understanding, procedural fairness (including reasonable accessibility) and transparency*

*Impartiality: independence is a key to ensure real and perceived fairness.*

*Finality and efficiency: although this needs to balance with the legitimacy goal.*

Alternatives to the CDR are:

1. Parliamentary involvement.
2. The electoral commission.
3. Adapting an existing tribunal.
4. Creating a new tribunal.
5. Alternative dispute resolution.
6. A statistical approach.

## 1. Parliamentary Involvement

The one pragmatic argument for parliamentary involvement is that practising politicians have intimate and applied knowledge of what can realistically be expected in campaigning and even electoral administration. For this reason, for nearly 30 years until 1915, Queensland employed a hybrid. A Supreme Court judge chaired proceedings, advising a panel of parliamentarians on the law. The parliamentarians acted like a jury, deciding questions of fact including the outcome of the dispute.[51]

But involving parliamentarians in settling disputed returns today seems untenable in a modern democracy. It risks politicisation, smacks of Caesar judging Caesar, and hints of a breach of the separation of powers. Outside parts of the United States, it is hard to find examples of this historical legacy being employed in modern times. (Its retention in the United States is explained by a belief in that country that partisanship is unavoidable and extends to the judiciary).

## 2. The Electoral Commission

It would be possible to give power over disputed returns, at least in the first instance, to the New South Wales Electoral Commission, or some specially constituted version of it. For example, a panel consisting of a judicial member, the electoral commissioner and one other expert, drawn from a list including retired electoral commissioners, clerks of parliament, even professors. This is analogous with how specially constituted redistribution commissions are empowered to draw electoral boundaries.[52]

The commission is a trusted arm of the 'integrity branch', and obviously armed with more electoral law and administration expertise than any other body. The

electoral commission might be well placed to hold speedy inquiries into certain election disputes, and even to sort the chaff from the wheat.

There are two significant drawbacks. The first is that an electoral commission would not be seen as a fully impartial body if its own administrative competence were called into question. Admittedly, it is not unusual for an administrative body to hear complaints about their own rulings – citizens are expected to exhaust internal complaints and review processes before seeking redress in administrative tribunals or via the ombudsman. However in those cases, (a) the agency is usually a large and hierarchical one (whereas the New South Wales Electoral Commission is a small and flat one) so there is less risk of internal embarrassment; and (b) there is still an explicit option for external review. Internal review mechanisms function best in high volume but low level complaint environments.

The second drawback is that the electoral commission itself might be embarrassed or embroiled in controversy. This could arise not only in cases alleging incompetence against officers of the commission, but also in having to rule on malpractice allegations involving political parties. That drawback is not insuperable, but involves a shift from conceiving of the commission as essentially an administrator to also a regulator.

Nevertheless, there are precedents for such a process. In European countries, it is common for a central electoral commission to have inquisitorial powers to determine the validity of election outcomes otherwise declared by local electoral authorities. Some US states also rely on commissions. North Carolina provides that disputed elections proceed first to the County Board of Elections which ran the election, then to the State Board of Elections and then to a Superior Court. Congressional election contests in New Hampshire go before a five-member Ballot Law Commission.[53]

### 3. Adapt an Existing Tribunal

Even where one might expect to have seen parliaments willing to experiment –in local government election disputes – the court of disputed returns model has tended to be adopted. Thus, challenges to New South Wales local government elections go before the New South Wales Administrative Decisions Tribunal (ADT).[54] This system is more open than the CDR for parliamentary elections: the time limit is extended to three months time and 'anyone' can apply).

Like the CDR, the ADT model is one that adapts the apparatus of an existing tribunal to election hearings.[55] The one main difference is that the ADT is not a

superior 'court' of general jurisdiction, but a lower level tribunal with specific expertise in governmental matters. It already deals with occasional political matters, including review of party registrations, and anti-discrimination claims involving electors.[56] One advantage of a tribunal model is that the tribunal, not being a court, may be more likely to conduct itself in a less legalistic manner.

An option would be for the New South Wales parliamentary elections act to piggy-back its disputed returns jurisdiction on the ADT. The main upside is that the Tribunal would fuse its expertise and experience in local government election matters, with its role in the rarer field of parliamentary election disputes. The main downside is in membership and status. The ADT consists of a District Court judge as its presidential member, a set of 'non-judicial' legal members (lawyers of at least seven years standing) and other members appointed for their specialist, non-legal experience.

Removing the Supreme Court's role as the CDR could be met with some opposition from that Court. Since the jurisdiction is an occasional one, the slight is more symbolic than actual. The deeper problem with status is public perception: a 'court' has more apparent gravitas than a 'tribunal'. Also, whilst court procedures are sometimes derided as slow and inflexible, tribunals set up to achieve informality often begin to mimic court formalism when parties before them are legally represented. An absence of clear procedures or excessive haste can also reduce due process, creating problems for the perceived fairness of the process and even for the accuracy of the outcome.

## 4. A New Tribunal

Creating a new tribunal would enable a break with the assumption that a randomly allocated judge is ideally placed to resolve contested elections. An ideal panel might include retired senior electoral officials and former politicians respected across the party divides. Such a panel could have a legal member to guide it: mixed expert panels are common in administrative law.[57] The tribunal could be established on an inquisitorial model – with investigatory powers to obtain and summon evidence, or decide not to proceed with a claim lacking any reasonable basis.

If an inquisitorial model were preferred, it could borrow from the Independent Commission Against Corruption model or even piggy-back on that body's resources. There would be some synergies with ICAC's focus on public integrity. But it may be a very unfortunate look, given ICAC's image as a 'corruption' fighter;

since most election contests merely allege innocent errors or misinterpretations in administration or undue zealousness in campaigning.

Besides perceptions of status, in any new electoral tribunal the key question would be actual independence. People appointed to an 'Election Disputes Tribunal' ought have some degree of tenure. For example, a significant fixed term appointment with no power of removal except for impropriety touching their duties or incapacity. The appointment process should also not be solely within executive fiat. Instead, drawing on models of appointing electoral commissioners, appointments should require the approval of both houses (compare the South Australian appointment requirements).[58] A more exacting model would require a parliamentary super-majority; a less exacting model would merely require 'consultation' with all parliamentary party leaders (as in the appointment of Western Australian, Australian Capital Territory and Northern Territory electoral commissioners).

The Victorian *Local Government Act* created a distinct 'Municipal Election Tribunal' to resolve applications for inquiry into council elections.[59] That Tribunal is staffed by magistrates appointed by the Attorney-General for the purpose, and has procedural rules similar to a CDR.[60] A magistrate can be removed from the Tribunal by the Attorney-General. That appointment process seems acceptable given that the Attorney is in a political sphere one level higher than local government and since local government is often not organised on party lines. But for any specialist election tribunal with jurisdiction over parliamentary elections, the appointment process would have to be more independent of government

Since election contests are uncommon, the ultimate question is whether the ground-work in creating a new tribunal is worth the effort. If several states pooled their resources and created a multi-state tribunal, it may well be.

## 5. Alternative Dispute Resolution

There is academic interest, in the United States, in using negotiated outcomes to help resolve election contests.[61] This borrows from the use of ADR in private litigation to focus issues, limit costs and time, or to achieve creative win/win outcomes. This interest is understandable given the litigiousness in United States elections. However election results are not private matters, but intensely public ones. It is also difficult to envisage the incentives that would steer negotiations in election disputes.

ADR *instead* of a definitive, public and binding hearing would be incompatible with our traditions. However mandating timely, pre-hearing negotiation, early-on following an application for a disputed election, could assist resolve some misunderstandings, particularly if the commission was required to be involved. Such a process should occur under the supervision of a representative of the election court or tribunal,[62] but be in camera. Mandatory pre-trial ADR may have helped short-circuit the Hanson petition of 2011.

## 6. A Statistical Approach

A final alternative to disputed returns flows from the realisation that, except in cases of candidate disqualification, whether an ultra-marginal result should stand is often a matter of statistics rather than discretion. In this statistical approach, any election result within some margin of error - eg 0.1 or 0.2 per cent - would, after automatic recounts, lead to an automatic re-election. Such suggestions have been made in the United States (where some state legislation already provides for automatic recounts). Those suggestions are influenced by the reliance on vote counting technology in the United States, technology required to deal with annual election days involving much higher numbers of electors and more numerous races than in Australia.

A statistical trigger to a fresh election feels cleaner. There is no legalistic argument to sway a possibly politicised discretion. However it presents as many conundrums as it addresses:

(i) The cut-off for defining 'ultra-marginal' may seem arbitrary

(ii) Its use in multi-member races like the New South Wales Legislative Council would be very problematic. The disputed returns remedy assumes an unseated candidate, and a recount. The statistical triggering of a fresh election for the last place in a Legislative Council race would upset the proportional representation system.

(iii) With paper ballots, as opposed to other technologies in use in Australia, we like to think that the intention of the voter can be divined from every ballot. Why re-run a race, if the fresh election might prove just as tight?

(iv) There would still need to be a rule allowing disputes alleging clear or gross breaches of electoral law.

## Access to Courts – the Judicial Oversight of Electoral Administration Generally

This final section of the Report concerns judicial review of electoral administration outside of a disputed outcome of an election result. New South Wales is currently an odd-one-out jurisdiction in Australia, in not permitting judicial review of electoral administration generally. 'Judicial review' here means the ability to ask a court to ensure that electoral administration is according to law.

The usual remedy sought is an injunction telling the commission to do X or refrain from doing Y. It can also end in a declaration as to the proper interpretation of the law. Judicial review occurs before an election is determined, and hence can act as a 'stitch-in-time'. It contrasts with an election petition, which is only a post-election remedy where the chief respondent is the MP defending her seat. CDR petitions, as we have seen, are costly and only arguable where the result was likely to have been affected. They are not, therefore, a particularly good accountability or oversight mechanism, but rather a safety valve.

The Commonwealth electoral system currently allows two avenues for judicial review:

(i) An explicit provision in the Commonwealth electoral act permits either the AEC or a candidate to seek an injunction in the Federal Court to restrain a breach of the electoral act.[63] This provision dates to ~ 1983.

(ii) General administrative law review, under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The AEC accepts that unless the remedy sought risks upsetting the key timelines or outcome of an election, then it – like most other Commonwealth agencies – is accountable to judicial review.

In New South Wales, however, neither avenue is available:

(i) The New South Wales electoral act contains no explicit provision permitting the commission or any other political actor to seek an injunction over breaches of the act. There are merely some scattered provisions allowing review of very specific decisions – eg to deny an enrolment.[64]

(ii) The New South Wales Supreme Court, in *McDonald v Keats*, ruled that general judicial review is not available to oversee 'any step in an election'.[65] Only a disputed return petition, after the election, is

permitted. This ruling is contradicted by rulings in other Australian jurisdictions.[66] It has not always been invoked in New South Wales either.[67]

The rule of law involves accountable administration under the law. To me, this implies that electoral administration should be open to judicial review, particularly at the suit of key actors like candidates and party agents. Election petitions are untimely (after the event) and hedged (especially by the requirement that the breaches of law affected the result). The idea that the New South Wales courts should have some pre-election role in overseeing electoral administration wa recently endorsed in relation to the proposal for recall elections.[68]

The counter-argument is that electoral commissions, as respected integrity agencies, should be trusted to definitively administer the law. If they are unduly open to judicial review, especially during the hothouse of an election campaign, good administration may be impeded rather than assisted.

The policy and legal arguments each way are canvassed in detail elsewhere, so I will not repeat them in this report.[69] However in renovating its electoral act, New South Wales needs to address the availability of judicial review, for two reasons:

(a) New South Wales Parliament has not confronted whether it thinks the Supreme Court's decision in *McDonald v Keats* is right as a matter of policy. Nor has it considered whether adopting the Commonwealth provision empowering the commission and candidates to seek injunctions is desirable.
(b) Part A of this report, advocates the use of principles-based delegation of rule-making to the commission. If this approach is adopted, then the question of the accountability of the commission takes on a new importance.

This is not to imply that judicial review is *necessarily* better than, say, parliamentary oversight through an electoral matters committee and parliament's ability to disallow commission made rules. However the question is more acute if the commission, as I have suggested it should be, is given a role as electoral *regulator*, as well as electoral administrator.

[1] International IDEA, *Electoral System Design: the New International IDEA Handbook* (2005) *para 224.*

[2] Compare Jack Balkin, *Living Originalism* (Harvard University Press, 2011).

[3] *Senate (Representation of Territories) cases.*

[4] To adapt Dworkin's use of the case of *Riggs v Palmer*: in an intentional killing or murder, the principle against profiting from wrong-doing is clearly superior: *Taking Rights Seriously* (Duckworth, 1977) 23.

[5] Joseph Kimble, *Lifting the Fog of Legalese* (Carolina Academic Press, 2006). For some practical application see Edwin Tanner, 'Legislating to Communicate: Plain English Guidelines Explicated using the USA Patriot Act 2001' (2011) 1 *Dictum – the Victoria Law School Journal* 21

[6] William Strunk and EB White, *The Elements of Style* (1959. 1st ed Strunk 1918).

[7] *Commonwealth Electoral Act 1918* (Cth) s 326.

[8] Exemplified in the Napoleonic Code Civil, a statute laying out the core private law of tort, contract and civil obligations, law that in Australia is largely to be synthesised from a thicket of case law.

[9] The Renton Committee (London, 1975, Command Paper 6053) at paras 6.5 and 9.14.

[10] Richard Vann, quoted in John Jones, 'Tax Law: Rules or Principles?' (1996) 17 *Fiscal Studies* 63 at 69.

[11] *Code Électoral*, loi 1. (By contrast, the French Senate is indirectly elected by local officials.)

[12] *Canada Elections Act 2000* (Can) s 3.

[13] *Parliamentary Electorates and Elections Act 1912*(NSW) ss 154AA-AE.

[14] *Parliamentary Electorates and Elections Act 1912* (NSW) Division 5A.

[15] *Commonwealth Electoral Act 1918* s 213. Michael Maley, 'Australian Electoral Law: Not a Model for Others' in Graeme Orr et al (eds), *Realising Democracy* (Federation Press, 2003) 40 at 42.

[16] Hence the litigation by a disgruntled candidate at the 2004 national election: *Assaf v AEC* [2004] FCAFC 265.

[17] *Constitution Act 1902* (NSW) 6th Schedule, Part 2.

[18] *Constitution Act 1902* (NSW) 6th Schedule, Part 1.

[19] Antony Green, *Antony Green's Election Blog*, ABC Online, 12-13 April 2011: http://blogs.abc.net.au/antonygreen/2011/04/shock-change-in-final-legislative-council-numbers.html

[20] A term popularised by New South Wales Chief Justice Jim Spigelman. It covers independent arms of the executive which exist to avoid corruption of public processes: 'The Integrity Branch of Government' (Australian Institute of Administrative Law Lecture Series, 29/4/2004).

[21] See the AEC's Michael Maley, above n 15 also at 42.

[22] Known generically as 'verordnung' (regulations) or specifically as 'Bundeswahlordnung' (federal electoral regulations).

[23] Article 55(2) does exclude the scrutiny of the Bundesrat – the unelected German 'Senate' which represents the States or Länder.

[24] Compare the order of the *Electoral Act 2004* (Tas). Tasmania has a separate act for redistributions (which only apply to its Legislative Council): it makes sense to include that in the main electoral act.

[25] More recently a principle of anti-discrimination has been added by some judges, often by reference to international law.

[26] A collection of international Constitutions and electoral acts can be found via the ACE Electoral Knowledge Project: http://aceproject.org/ero-en

[27] It has to cover various different elections/voting systems, from Presidential, through the Deputies of the National Assembly and on to Municipal elections.

[28] John Uhr, 'Measuring Parliaments against the Spence Standard' in Orr et al (eds), above n 15, ch 6, especially at 72-77.

[29] The 'cartel' thesis in recent Australian electoral reform is advanced by former WA MLC, Dr Norm Kelly, in a forthcoming book with ANU E-Press.

[30] For the history and nature of disputed returns power in Australia, see Graeme Orr and George Williams, 'Electoral Challenges: Judicial Review of Parliamentary Elections in Australia' (2001) 23 *Sydney Law Review* 53-70. For the history of disputed returns power in the United Kingdom, see Caroline Morris, 'From "Arms, Malice, and Menacing" to the Courts: Disputed Returns and the Reform of the Election Petitions System', Queen Mary School of Law Research Paper 79/2011: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1807152

[31] See David Butler, 'Electoral Reform' (2004) 57(4) *Parliamentary Affairs* 734 at 734 and Morris, above n 30.

[32] Morris, above n 30 at 23.

[33] *Malone v Oaten* (1997) unreported; discussed in Stephen Whetnall, 'Three Counts and a Wedding: the Winchester Election Saga' (1998) *Arena* 14.

[34] *Watkins v Woolas* [2010] EWHC 2702; mostly upheld in *R(Woolas) v Parliamentary Election Court for Oldham Eat and Saddleworth* [2010] EWHC 3169.

[35] High Court and Federal Court for national elections.

[36] *House of Representatives Practice* (5th ed, updated online), Appendix 13.

[37] Stephen Gageler, 'The Practice of Disputed Returns for Commonwealth Elections' in Orr, et al (eds), above n 15, ch 14.

[38] Orr & Williams, above n 30, 70-88 and Graeme Orr, *The Law of Politics* (Federation Press, 2010) ch 10

[39] *Bradbery v Hay* [2011] NSWSC 623.

[40] *Parliamentary Electorates and Elections Act 1912* (NSW) Pt 6 Div 2.

[41] Because of s 73 of the Australian *Constitution*. See discussion in Legal, Constitutional and Administrative Review Committee (Report No 18/1999), *Report on ... Regulating How-to-Vote Cards and Providing for Appeals from the Court of Disputed Returns* (Legislative Assembly of Queensland (Sept 1999) 29-51.

[42] *Sykes v Cleary* (1992) 176 CLR 77; *Sue v Hill* (1999) 199 CLR 462.

[43] *Evans v Crichton-Browne* (1981) 147 CLR 169.

[44] *Mitchell v Bailey (No 2)* (2008) 250 ALR 130.

[45] Amy McGrath, 'One Vote, One Value: Electoral Fraud in Australia' in The Samuel Griffith Society, *Upholding the Australian Constitution: Volume 8* (1997). See also Orr and Williams, above n 30.

[46] *Smith v AEC (No 2)* [2008] FCA 1310 and *Hanson v Johnston* [2011] NSWSC 621.

[47] *Scott v Martin* (1988) 14 NSWLR 663.

[48] *Tanti v Davies (No 3)* (1996) 2 Qd R 602.

[49] *Carroll v ECQ (No 1)* [2001] 1 Qd R 117. Yet the judge went on to recommend law reform measures and penalised the successful MP by denying him costs.

[50] Compare discussion in Joseph A Douglas, 'Procedural Fairness in Election Contests' (2011 paper, on file with report author).

[51] *Election Tribunals Act 1886* (Qld). By comparison, the current Kansan system involves a trial judge making finding of facts, which are reported to a parliamentary committee, which makes an unappealable ruling: Kan Stat Ann § 25-1442 to 1451, discussed in Douglas, above n 49.

[52] The analogy is imperfect, since the redistributive power is a more creative, quasi-legislative one; resolving an electoral contest is forensic and quasi-judicial.

[53] *New Hampshire Rev Stat Ann* §665, discussed in Douglas, above n 49.

[54] *Local Government Act 1993* (NSW) s 329.

[55] *Administrative Decisions Tribunal Act 1997* (NSW).

[56] Eg *Electoral Commissioner v McCabe* [2003] NSWADTAP 28 (freedom of information claim in party registration); *Fittler v NSW Electoral Commission (No 2)* [2008] NSWADT 116 (access to Braille ballot).

[57] For instance, Mental Health Review Tribunals in Queensland are chaired by someone with administrative law experience, who sits alongside a medical expert and another with relevant expertise, eg in social welfare.

[58] *Electoral Act 1985* (SA) s 5.

[59] *Local Government Act 1989* (Vic) Pt 3 Div 8.

[60] *Local Government Act 1989* (Vic) Sch 4.

[61] Rishi Batra, 'Resolving Disputed Elections through Negotiation' (Draft 2011 paper on file with report's author); Joseph A Douglas, 'Election Law and Civil Discourse: the Promise of ADR' http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1871280 and generally 'Talking the Vote: Facilitating Disputed Election Processes through ADR Symposium' (2011) *Ohio State Journal on Dispute Resolution* (forthcoming).

[62] There was a 19th century rule that no election petition could be withdrawn without court order: the fear was that Party A and Party B might corruptly do a deal to avoid a hearing.

[63] *Commonwealth Electoral Act 1918* (Cth) s 383.

[64] *Parliamentary Electorates and Elections Act 1912* (NSW) s 36 (Local Court review of enrolments).

[65] *McDonald v Keats* [1981] 2 NSWLR 268. Similarly see *Osborne v Shepherd* [1981] 2 NSWLR 277. The decision rests on a very wide interpretation of the old rule that the 'validity of an election or return may be disputed [before] the Court of Disputed Returns, and not otherwise' (*Parliamentary Electorates and Elections Act 1912* (NSW) s 155). Administration of party registration or finances are not part of 'an election' as such, and can be judicially reviewed: eg *Save our Suburbs (SOS) NSW Inc v Electoral Commissioner* (2002) 55 NSWLR 642.

[66] Notably the Federal Court in *Courtice v AEC* (1990) 21 FCR 554. The rationale is that judicial review of ordinary electoral administration doesn't impugn the 'validity of the election or return' because it isn't challenging the result.

[67] For instance it is unclear why it was not invoked in *Best v Electoral Commissioner of NSW* [2007] NSWSC 269 (case about non-registration of offensive how-to-vote material). Perhaps the judge and electoral commission barrister were unaware of the precedent; perhaps the electoral commission was simply happy to submit to the court's jurisdiction.

[68] David Jackson et al, *Recall Elections for New South Wales: Report of the Panel of Constitutional Experts* (30/9/2011) pp 123 and 132.

[69] Graeme Orr, 'Judicial Review of the Administration of Parliamentary Elections' (2012) *Public Law Review* (forthcoming, copy available from author on request); contrast Angela O'Neill, 'Justiciability: the Role of Courts in Reviewing Electoral Administration' in Orr et al (eds), above n 15, ch 15.