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Electoral Misconduct and the Regulation of Political Parties

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EXECUTIVE SUMMARY

This paper reviews recent allegations of electoral misconduct, especially in the context of pre-selections in the Australian Labor Party (ALP) and the Liberal Party, and evaluates the various responses and methods to counteract such behaviour, including electoral and criminal offences, investigative commissions and parliamentary inquiries. The related issue of the autonomy of political parties is also analysed, with reference to case law and potential reforms.

- The main types of electoral misconduct which have been the subject of allegations in 2000 and 2001 are enrolling at a false address, branch-stacking, paying for preferences, and standing 'dummy' candidates (pages 3-5).

- In August 2000 an ALP local government councillor was gaoled in Queensland for forging and uttering electoral forms to influence pre-selection plebiscites. Her allegations implicated other members of the Queensland ALP and sparked the Beattie Labor Government and the Criminal Justice Commission to take action (pages 5-7).

- The Shepherdson inquiry was established pursuant to the powers of the Criminal Justice Commission and was granted responsibility to investigate alleged official misconduct in certain plebiscites, by-elections and local government elections in Queensland in the 1980s and 1990s. Public hearings were held from October 2000 to January 2001. Witnesses at the inquiry gave evidence of false enrolment schemes organised by the Australian Workers Union faction of the ALP. Several current Members of Parliament, including the Deputy Premier, made admissions of misconduct to the inquiry and resigned from the ALP (pages 7-11).

- The Criminal Justice Commission, created by the *Criminal Justice Act 1989* (Qld), possesses broad powers but its investigative focus is 'official misconduct in units of public administration'. If the Commission finds evidence of a criminal offence, it can refer the matter to the appropriate prosecuting authority. However, establishing a charge of misconduct depends on the existence of an applicable disciplinary regime. At the time of the Shepherdson inquiry, no code of conduct existed for Queensland parliamentarians, although a proposed 'Code of Ethical Standards' has been drafted (pages 11-13).

- The Legal, Constitutional and Administrative Review Committee of the Queensland Legislative Assembly also investigated how to minimise electoral fraud in State and local government elections in 2000. The Committee tabled an interim report on 14 November 2000 but expressed reluctance to reach conclusions until the Shepherdson inquiry had released its findings (pages 13-15).

- The *Electoral Act 1992* (Qld) provides for offences including giving false information, forgery, false witnessing, voting when not entitled, bribery and interference. The Act applies to Legislative Assembly and local government elections. Other elections are covered by electoral offences contained in the *Queensland Criminal Code* (pages 15-17).

- At a Commonwealth level, numerous allegations of electoral misconduct in Federal electorates were referred to the Australian Federal Police for investigation in 2000 and 2001 (pages 18-20).

- The Joint Standing Committee on Electoral Matters was provided with a reference to examine fraudulent enrolment on the Commonwealth roll and the adequacy of the *Commonwealth Electoral Act 1918* to prevent such conduct. Hearings took place from November 2000 to February 2001 and several witnesses from the Queensland electoral scandals gave evidence (pages 20-21).

- The electoral offences and penalties available under Commonwealth legislation parallel those of Queensland. The Federal Liberal Government proposed amendments to the *Commonwealth Electoral Act* in 1999 to increase the identification and witnessing requirements, but these have been blocked in the Senate (pages 21-25).

- In New South Wales, similar options are available to those in Queensland to counteract electoral misconduct. The Independent Commission Against Corruption has jurisdiction to investigate corrupt conduct by - or relating to - public officials. Unlike the *Criminal Justice Commission Act 1989* (Qld), the *ICAC Act 1988* (NSW) specifically mentions electoral offences, but the Act imposes qualifications upon the concept of 'corruption' that complicate interpretation. Furthermore, allegedly corrupt conduct by a Member of Parliament must involve a 'substantial breach' of the Code of Conduct or bring Parliament into serious disrepute (pages 26-30).

- Electoral offences in New South Wales are provided in the *Parliamentary Electorates and Elections Act 1912* (NSW), and limited criminal charges may be pursued under the *Crimes Act 1900* (NSW) (pages 30-33).

- A comparison of party rules in New South Wales demonstrates the varying standards that pertain to branch membership and selection ballots, which are prime areas of corruption. The Labor Party has the strictest residency requirements for branch membership, candidature, and eligibility to vote in a pre-selection ballot. This may explain the relatively higher reported incidence of false enrolments by members of the ALP than other parties (pages 33-36).

- Australian political parties were largely autonomous organisations until the introduction of public funding and financial disclosure legislation in the 1980s, such as the *Election Funding Act 1981* in New South Wales (pages 36-38).

- Traditionally, courts have been reluctant to find jurisdiction to intervene in the internal affairs of a political party unless the party is incorporated - a rare phenomenon in Australia (pages 38-40).

- However, in 1999, the Supreme Court of South Australia held that a dispute between the State ALP branch and a party member over new members who had not been admitted in accordance with party rules, was justiciable because the party was

registered under the electoral legislation and therefore had a different status to a voluntary club: *Clarke v Australian Labor Party* (1999) 74 SASR 109. The Court found that the memberships were not valid and that the party's attempt to amend the membership rules with retrospective effect contravened the party constitution (pages 40-41).

- The *Clarke* case has had a significant impact on political parties throughout Australia. When grievances arise, members are more likely to seek independent legal advice and party officials are more conscious of demonstrating fairness and transparency in their reponse. It remains to be seen whether 'external' regulation of political parties expands in the future (pages 41-44).

- A variety of reforms have been suggested by politicians, academics and other commentators to reduce electoral misconduct. Techniques which may improve the resistance of the electoral roll to exploitation include introducing proof of identity requirements, closing the roll early, comparing voter information between selected government departments, and researching more technologically advanced methods of voting. Potential electoral offenders may also be deterred by increasing the penalties for offences, the time limits for commencing prosecutions and the scope of parliamentary disqualification provisions (pages 44-50).

- Political parties have reacted to the electoral scandals of 2000 and 2001 by reviewing their dispute-handling procedures, party rules, and authenticity of membership. Unless parties develop a culture of ethical behaviour, they face the prospect of greater scrutiny and intervention, such as the supervision of party ballots by the Australian or State Electoral Commissions (pages 50-54).

1. INTRODUCTION

In Queensland during 2000, allegations that members of the Australian Labor Party (ALP) had participated in branch-stacking, forgery and witnessing false electoral enrolments sparked the most intense political and media attention towards electoral misconduct in recent years. Official inquiries were held, serving politicians were implicated and several Members of Parliament resigned. Similar accusations proliferated against both the ALP and the Liberal Party in other States and at the Federal level.

This paper focusses mainly on corrupt attempts to influence the pre-selection[1] of candidates. Many of the allegations of 'rorting' in Queensland and New South Wales have involved plebiscites[2] held by the ALP to decide pre-selections, because these may generate intense activity by factions to amass the most voting members in a branch. The small number of participants in pre-selections, relative to the electoral population, means that a handful of false enrolments can have a substantial impact upon the outcome.[3] By-elections and the fate of marginal seats in general elections could also conceivably be affected by electoral misconduct, but it is unlikely that an overall election result could be determined in this manner, particularly given the compulsory status of voting in Australia.[4]

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1 A 'pre-selection' is the process by which members of a political party select a candidate to contest a parliamentary or other election: R Tardif et al (eds), *The Penguin Macquarie Dictionary of Australian Politics*, Penguin Books, Ringwood, 1988, p 273. In **New South Wales** the Labor Party conducts its pre-selections for Legislative Assembly candidates by a plebiscite of eligible branch members in the electorate, while the Liberal Party uses Selection Committees. Methods to select candidates to contest seats in the lower house in the other States and federally are as follows: **Queensland:** *Labor* - combined vote of the Central Electoral College and a plebiscite of eligible branch members in the particular electorate, *Liberal* - combined vote of the State Executive and a plebiscite of eligible branch members in the electorate; **South Australia:** *Labor* - combined vote of State Convention delegates and a plebiscite of the sub-branch, *Liberal* - vote of the State Electoral College, consisting of members from the relevant seat and representatives of the State Executive; **Tasmania:** *Labor* - combined vote of the State Conference and a plebiscite of eligible members in the electorate, *Liberal* - Selection Committee; **Victoria:** *Labor* - combined vote of the Public Office Selection Committee and a plebiscite of eligible members in the electorate, *Liberal* - Pre-selection Convention; **Western Australia:** *Labor* - combined vote of all members of the State Executive and qualified Local Electors, *Liberal* - Selection Committee; **Federal:** Both Labor and Liberal leave the State branches to determine the rules concerning membership and pre-selection, except where otherwise specified by the national constitutions or rules.

2 A 'plebiscite' is a direct vote by all electors. Within a party, it usually refers to a vote by members of a branch to select a candidate to proceed to an election. Parties also use plebiscites to elect delegates to a party conference or other organisational body: Tardif, n 1, p 266.

3 Antony Green, electoral analyst with ABC television, observed in relation to the Labor Party pre-selection for the Federal seat of Robertson in New South Wales in late 2000, 'the scandal is that only 172 [party members] decided who the Labor candidate would be in an electorate where the party recorded 29,917 votes at the last election.' A Green, 'There's just no accounting for party animals', *Sydney Morning Herald*, 30 November 2000, p 19.

4 For a detailed refutation of the theory that elections have been rigged on a major scale in Australia see C Hughes, 'The Illusive Phenomenon of Fraudulent Voting Practices: A

Separate electoral offences exist under State and Commonwealth law, and the appropriate jurisdiction may be dictated by whether the conduct took place in a Federal or State seat, or the source of electoral material that was used in an offence. Electoral roll arrangements may also be relevant. In New South Wales there are two distinct rolls although both are based on enrolment data gathered by the Australian Electoral Commission. The roll of the State Electoral Office is divided into State electoral districts and records each voter's name, address, occupation and gender.[5] In addition, the Australian Electoral Commission produces a Commonwealth electoral roll, divided into the Federal electorates of New South Wales, for use in Federal elections. The information on that roll is confined to names and addresses.[6] By contrast, in Queensland there has been a joint electoral roll since 1992, maintained by the Australian Electoral Commission and used in both State and Federal elections.[7]

The first section of this paper deals with Queensland, where the Criminal Justice Commission established the Shepherdson inquiry in 2000 to hear allegations of misconduct relating to ALP pre-selections for State and local government elections in the 1980s and 1990s. Other responses to the allegations included an inquiry into the integrity of the electoral roll by the Legal, Constitutional and Administrative Review Committee of the Queensland Legislative Assembly, and the announcement by the Premier, Peter Beattie, of proposals to reform internal ALP procedures and the Queensland electoral system. Remedies available under the *Electoral Act 1992* (Qld) and the Queensland Criminal Code are also outlined.

Complaints of branch-stacking, false enrolments and payments for preferences in Federal seats were made in 2000 and 2001, even against Federal Ministers. Several matters were referred to the Australian Federal Police for investigation of possible contraventions of the *Commonwealth Electoral Act 1918* (Cth) and the *Crimes Act 1914* (Cth). The Joint Standing Committee on Electoral Matters conducted an inquiry into the integrity of the Commonwealth electoral roll.

The position in New South Wales is then considered. Electoral offences similar to those in Queensland and the Commonwealth are provided by the *Parliamentary Electorates and Elections Act 1912* (NSW), as well as general fraud offences in the *Crimes Act 1900*

Review Article' (1998) 44(3) *Australian Journal of Politics and History* 471. The Australian Electoral Commission has reported that since its establishment in 1984, every inquiry into a Federal election by the Commonwealth Parliament's Joint Standing Committee on Electoral Matters has concluded that there has been no widespread, organised attempt to defraud the electoral system: Australian Electoral Commission, Submission to the Joint Standing Committee on Electoral Matters, Inquiry into the integrity of the electoral roll, 17 October 2000, pp 30-31. The submission can be viewed at <http://www.aec.gov.au/committee/submissions.htm>

5 The latest State electoral roll closed on 8 March 1999.

6 The most recent Commonwealth roll is dated 'as at 10 November 2000'.

7 According to the Australian Electoral Commission, as at October 2000, only Victoria and Western Australia manage their own roll databases: n 4, p 40.

(NSW). The Independent Commission Against Corruption (ICAC) has the potential to investigate electoral misconduct but its jurisdiction centres on 'public officials' and the *ICAC Act 1988* (NSW) limits the behaviour that amounts to corruption.

The status of Australian political parties as unincorporated, voluntary organisations has traditionally restricted the intervention of the courts in party activities. However, the Supreme Court of South Australia recently held that a dispute between the State ALP and a party member was justiciable, distinguishing registered political parties from voluntary organisations: *Clarke v Australian Labor Party* (1999) 74 SASR 109. Therefore it would appear that legal action is available to counteract the manipulation of party rules for the purpose of influencing ballots.

The last section of the paper evaluates possible reforms to facilitate the prevention of electoral misconduct. Various options could be pursued to improve the accuracy and resilience of the electoral roll. These include closing the roll on the day that the writ for an election is issued, implementing proof of identity requirements for electors when enrolling and/or voting, using data-matching between government agencies to update information, and increasing the penalties for offences against electoral legislation. Political parties are also under pressure to revise their procedures and ethical standards, particularly in relation to membership requirements, the conduct of pre-selections, dispute resolution, and the formation of codes of conduct. Their ability to implement reforms may affect whether further external intervention, such as the supervision of party ballots, eventuates.

At the time of writing, none of the reports of the inquiries or parliamentary committees referred to herein had been released. This paper does not explore the possibility of 'rigging' general elections. Compliance with the legislative regime of campaign funding and financial disclosure is also beyond the scope of the research. The analysis of political parties is largely oriented towards the Labor and Liberal parties, although some reference is made to the National Party and the Australian Democrats.

2. TYPES OF ELECTORAL MISCONDUCT

The main types of misconduct referred to in this paper are:

False enrolment

Committing a false or fraudulent enrolment involves deliberately enrolling an elector at - or transferring an elector's existing enrolment to - an address where the person does not live. The elector may participate in the false enrolment, intentionally lodging incorrect residency details in order to vote for a specific candidate in a pre-selection or election outside their own electorate. Alternatively, the elector may be unaware that he or she has been falsely enrolled or transferred. In the latter situation, the false address is usually a 'safe house' or post office box where ballot papers can be collected without risk of detection by the elector. The false information is then changed back to its correct state before the next general election.

Branch-stacking

The term 'branch-stacking' refers to enlisting members in a branch of a political party for the purpose of channelling the members' votes towards a particular candidate.

Branch-stacking is often associated with the recruitment of people from non-English speaking backgrounds.[8] Stackers customarily organise funds to cover the recruits' membership fees and arrange for them to sign an attendance book, or for their signatures to be falsified, when party rules dictate that members must attend a minimum number of branch meetings before voting in a ballot.

Many of the branch-stacking scandals in recent years were linked to ALP pre-selections. This may reflect the fact that the Labor Party's rules require branch members to be enrolled in, and to reside in, the electorate in which they vote. In anticipation of a pre-selection, factional organisers may therefore attempt to manoeuvre new or existing members into branches in the appropriate electorate to vote for the faction's preferred candidate.

By contrast, Liberal Party rules may allow members to live outside the electorate in which their membership is located. In New South Wales, all members who join under the current rules must hold their membership rights in a branch in the State electorate where the member's principal place of residence is located, or in an adjoining State electorate.[9] The Liberals do not conduct pre-selections solely by plebiscite in any State but opportunities for branch-stacking still exist because plebiscites may be used as part of a joint ballot, or members may vote for some of the delegates on a selection panel.[10] Allegations of large or suspicious enrolments in Liberal branches still receive negative publicity in the media even though they may not specifically contravene party rules.[11]

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8 A recent advocate of this viewpoint is: L Allan, 'Ethnic Recruitment or Ethnic Branch Stacking? Factionalism and Ethnicity in the Victorian ALP' (2000) 8(1) *People and Place* 28. According to Allan (at 29), 'Not all stacking is ethnically or religiously based. But it is the most successful. … Stackers, people who enlist new members in the ALP, are frequently power-brokers within ethnic communities. Almost all known current stackers are first-generation immigrants to Australia.'

9 Constitution of the Liberal Party of Australia, New South Wales Division, as adopted by the State Council on 22 July 2000, cl 3.2.4, p 13.

10 See n 1 for information on the pre-selection method used by the Liberals in each State. The size of a selection panel or committee may be quite considerable. For example, in the 1998 Liberal pre-selection for the Federal seat of Cook, the panel consisted of 200 delegates: 120 from local branches in the electorate, 70 from the State Council and 10 from the State Executive: 'Deposed Lib threatens legal action', *Sydney Morning Herald*, 10 August 1998, p 2. In February 2001, 120 delegates participated in the Liberal pre-selection for the Federal seat of Wentworth: 'Battle of Liberal princes claims its first ego', *Sydney Morning Herald*, 3 February 2001, p 6.

11 A pre-selection was held on 4 February 2001 to choose the Liberal candidate to contest the by-election in the Federal seat of Ryan in Brisbane, made available by the retirement of John Moore, the Defence Minister. Prior to the pre-selection, it was reported that one of the candidates, Michael Johnson, had 'signed up' 400 members, 162 of whom did not live in the electorate. Prime Minister John Howard reiterated that such conduct was not banned under the Queensland Liberal Party rules: 'Liberal branch-stacking not unwholesome: PM' *Sydney*

Payment for preferences

Preference deals may be legitimately struck between parties but not in exchange for payment. The typical allegation of a corrupt payment involves a member of a major party making a preference deal with an independent or minor party candidate, and disguising the payment as a financial contribution, for example towards printing costs.[12]

Running 'dummy' candidates

A person who runs for office as a supposedly genuine independent candidate but whose participation is engineered to direct preferences to a major party is known as a 'dummy' candidate. Again, this practice does not appear to be illegal unless financial benefit is provided. However, an electoral offence would be committed if, in order to stand in the election, a 'dummy' candidate was enrolled at an address where he or she did not reside.

3. QUEENSLAND LAW AND DEVELOPMENTS

3.1 Electoral misconduct by Queensland ALP members

Karen Ehrmann gained ALP pre-selection for the Queensland State electorate of Thuringowa in 1996. She did not win the seat but subsequently became an ALP councillor on Townsville City Council. In October 1998, Ehrmann was committed to stand trial on 62 charges of forging and uttering. The context of the offences was the fraudulent transfer of enrolments of known persons for the purpose of influencing ALP pre-selection ballots. She lated pleaded guilty to 24 counts of forging and 23 counts of uttering Commonwealth documents in contravention of s 67(b) of the *Crimes Act 1914* (Cth).[13] On 11 August 2000 at Townsville District Court, Ehrmann received an overall sentence of three years imprisonment, to be released after nine months upon providing security of $1000 for each of 35 counts and entering a five year good behaviour bond. The charges may have been

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Morning Herald, 22 December 2000, p 5. Johnson was struck from the pre-selection ballot due to concerns about his dual British-Australian citizenship. Bob Tucker won the pre-selection but was defeated at the by-election on 10 March 2001 by the ALP candidate, Leonie Short.

12 Darren Boehm, an independent candidate for the Federal seat of Cook in the 1998 election alleged that he was approached by a Liberal Party staffer offering $7000 worth of printing in exchange for preferences: 'Names named as star witness tells of electoral rorts', *Sydney Morning Herald*, 5 December 2000, p 6.

13 Australian Electoral Commission, n 4, p 7. Although Thuringowa is a State seat, the enrolment forms were Commonwealth (ie. AEC) documents. Also note that prior to 1992, separate electoral rolls existed for the Commonwealth and Queensland, but thereafter a joint roll was maintained by the Australian Electoral Commission, as authorised by s 62 of the *Electoral Act 1992* (Qld). The joint roll is used for the purposes of Federal, State and local government elections: R Hanson QC, *Closing submissions to the Honourable T.F. Shepherdson QC by Counsel Assisting*, Queensland Criminal Justice Commission, Shepherdson inquiry, 19 January 2001, pp 8-9. The transcript of the closing submissions is accessible on the website of the Criminal Justice Commission at <http://www.cjc.qld.gov.au/cjc/shepinquiry/shepsubmissions.pdf>

preferred under the *Crimes Act 1914* (Cth) because it allows a longer period to institute the proceedings and has a higher maximum penalty of 10 years imprisonment than the six months available for forging and uttering under s 344 of the *Commonwealth Electoral Act 1918* (Cth).[14]

During the proceedings, documents were filed on behalf of Ehrmann alleging the involvement of other ALP members in electoral fraud. The Queensland Criminal Justice Commission (CJC), on its own initiative, conducted preliminary investigations into the allegations. The CJC was requested by the Queensland Electoral Commissioner, Des O'Shea, and the Leader of the Opposition, Rob Borbidge, to conduct an inquiry.

On 22 August 2000, the CJC appointed independent counsel, Philip McMurdo QC, to examine the information gathered during the CJC's preliminary investigation, advise if a reasonable suspicion of official misconduct existed and, if so, whether an open hearing should be held and the terms of reference of such a hearing.

The essence of the memorandum of advice by Mr McMurdo QC was that there could be a reasonable suspicion of official misconduct under the terms of the *Criminal Justice Act 1989* (Qld) in relation to a number of Queensland pre-selections and by-elections.[15] On 6 September 2000 the CJC appointed a retired judge, Tom Shepherdson QC, to conduct an inquiry. See '3.2 Shepherdson inquiry' on p 7.

On 21 January 2001, after the conclusion of the Shepherdson inquiry hearings, the Premier, Peter Beattie, announced reforms to the internal rules of the Queensland ALP. The suggested reforms were endorsed by the state ALP executive on 20 January 2001 but must be approved by the national executive. The reforms include supervision of party ballots by the Electoral Commission, replacing postal votes in pre-selections with 'stand-up' ballots to eliminate 'phantom' voters, creating a new ALP disputes tribunal, and conducting a biannual audit of membership.[16] Some of these proposals are discussed in more detail under '7. OPTIONS FOR REFORM' on p 44.

Labor won the Queensland election in a landslide victory on 17 February 2001, securing 66 out of 89 seats. It appears that Beattie has a mandate to implement his reform program.[17] The scale of Beattie's victory, despite the extent of electoral misconduct in his own party, was interpreted in different ways by commentators. Some concluded that 'voters knew rorts

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14 The Australian Electoral Commission supports this interpretation, citing the length of the investigation by the Australian Federal Police: n 4, p 9.

15 Queensland Criminal Justice Commission, Shepherdson inquiry, *Allegations of Electoral Fraud: Report on an Advice by P.D. McMurdo QC*, Brisbane, September 2000.

16 'Beattie reforms to rout rorting', *The Australian*, 22 January 2001, p 5.

17 Political journalist Maxine McKew predicts that the ALP State Conference will endorse the program in June 2001: 'Peter Beattie, Queensland Premier', *The Bulletin*, 27 February 2001, p 42.

weren't the main game.'[18] Others considered that the issue was important, but that the public was reassured by the strong, decisive manner in which Beattie dealt with the problem and censured the Labor Members of Parliament who admitted their involvement.[19]

3.2 Shepherdson inquiry

The Shepherdson inquiry was announced by the Criminal Justice Commission (CJC) Chairman, Brendan Butler SC, exercising the CJC's investigative functions under the *Criminal Justice Act 1989* (Qld): ss 23, 25. In particular, the inquiry was charged with the responsibility of investigating certain instances of suspected official misconduct as specified in the terms of reference.

Terms of reference

The terms of reference of the Shepherdson inquiry were approved by a resolution of the CJC on 6 September 2000. They were extended on 27 November 2000 by the addition of paragraph 3A, and again on 19 December 2000 by the addition of subparagraph 1(d).

The final version of the terms of reference was as follows:[20]

1. To conduct an investigation into any alleged official misconduct, by way of conduct which constitutes or could constitute a criminal offence or offences affecting the electoral roll relevant to:

   (a) the 1996 ALP plebiscite to select a candidate [Mike Reynolds or Tony Mooney] for the State electorate of Townsville;
   (b) the 1996 by-election for the seat of Mundingburra [won by Liberal candidate Frank

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18 M Grattan, 'PM and the Coalition are caught in a cyclone of resentment', *Sydney Morning Herald*, 19 February 2001, p 4. Professor Colin Hughes, former Australian Electoral Commissioner, expressed a similar view: 'the Great Electoral Rorts Scandal appears to have had no impact on voting. Three theories to explain this are: (i) voters believed all politicians (except possibly Ms Hanson) were crooks; (ii) voters believed there had been a problem, but the Premier (who was a good man) had taken steps to remedy it; (iii) (which is my own contribution to the debate) the minority of voters who were interested knew enough to find the Scandal quite minor, and having no significant impact on the parliamentary election in which they were then engaged.' C Hughes, 'Electoral Fairness and Ethics', paper presented at a conference on 'Good Governance: Fair Elections and Ethical Parties', Monash University, Melbourne, 23 February 2001, p 7.

19 Dr Ken Coghill, former Speaker of the Victorian Parliament, indicated this approach when he stated, 'The resounding re-election of the Beattie ALP Government…is the strongest possible endorsement of integrity and resolve which the Premier displayed in responding to evidence of unethical behaviour by members of his party.' K Coghill, 'Let the People Decide: Primaries for Preselections', paper presented at 'Good Governance: Fair Elections and Ethical Parties' conference, Monash University, Melbourne, 23 February 2001.

20 The Terms of Reference can be viewed on the Criminal Justice Commission website (<http://www.cjc.qld.gov.au/cjc/shepterms.html>) and have been paraphrased for this paper, although the exact numbering has been retained.

Tanti, who had successfully challenged the result in Mundingburra in the 1995 State election through the Court of Disputed Returns];

(c) the 1993 ALP plebiscite to select a candidate [Robyn Twell or Kerry Rae] for the Brisbane City Council ward of East Brisbane;

(d) the 1993 ALP plebiscite [between Sharon Humphries and Linda Holliday] for the Brisbane City Council ward of Morningside;

(e) the 1986 ALP plebiscite for the State electorate of South Brisbane [between Jim Fouras and Anne Warner - false enrolment forms had been submitted in the names of Mike Kaiser and Paul Lucas, who both became Members of State Parliament].

2. To conduct an investigation into such other alleged conduct, which constitutes or could constitute a criminal offence, in respect of any plebiscite from 1993 to 1997 inclusive for the selection of the ALP candidate for any Legislative Assembly electorate or a councillor of any local government within Queensland;

3. To undertake such preliminary investigations as are appropriate to determine whether there is a reasonable suspicion of official misconduct in relation to the matters described in paragraph 2 above;

3A. To conduct an investigation into any alleged official misconduct, which constitutes or could constitute a criminal offence or offences, by James Peter Elder [the Deputy Premier] in respect of matters affecting the electoral roll;

4. To engage the services of an independent qualified person pursuant to section 66 of the [Criminal Justice] Act, being the Honourable Tom Farquhar Shepherdson QC, to conduct investigations and report thereon to enable the Commission to discharge the functions and responsibilities imposed by the Act;

5. For the purpose of the said investigations to authorise the Honourable Tom Farquhar Shepherdson QC pursuant to section 25(2)(f) of the Act to conduct such open or closed hearings as may be appropriate having regard to the requirements of section 90 of the Act.

It should be borne in mind that the inquiry does not have the power to determine guilt, make findings of fact or findings on the credibility of a witness except in so far as it is necessary to determine whether to recommend to the Criminal Justice Commission that it refer a matter to a prosecuting authority. The inquiry may report the existence of evidence suggesting the commission of an unlawful act, meaning there is evidence which, if accepted as true by a tribunal of fact is capable of proving that an offence has been committed.[21]

Evidence at the inquiry

Public hearings at the Shepherdson inquiry began on 3 October 2000. Witnesses gave evidence of a scheme operated by the Australian Workers Union (AWU) faction of the ALP, involving the false enrolment of branch members to boost numbers for AWU

[21] Hanson, n 14, pp 3-4.

candidates in pre-selections. Witnesses included Warwick Powell, AWU faction organiser for Young Labor, and Lee Bermingham, a past AWU faction organiser.

Jim Elder, the Deputy Premier of Queensland and parliamentary leader of the AWU faction, admitted to the Shepherdson inquiry that relatives of his were enrolled in his electorate but did not live there, and that he witnessed their false enrolment forms. Elder resigned as Deputy Premier on 22 November 2000 and was replaced by a senior minister, Terry Mackenroth. On 30 November, Elder quit the ALP and continued as an independent.

On 28 November, the inquiry heard evidence that Grant Musgrove, a State Labor backbencher for the seat of Springwood, directly and through supporters encouraged members to falsely enrol in the electorate. Musgrove admitted to the inquiry that it appeared he had witnessed four false electoral enrolment application forms to benefit his pre-selection in 1997. Musgrove stepped down from several parliamentary committees although Premier Beattie announced that a decision on whether to expel Musgrove from the party would be made at a Labor caucus meeting after the inquiry's public hearings concluded.[22] On 4 December, Musgrove became an independent.

Mike Kaiser, Member of Parliament for the seat of Woodridge and former State Secretary of the ALP, resigned from the party on 10 January 2001 after admitting he had given a false address on the electoral roll 15 years previously. Kaiser served as an independent until the State election on 17 February 2001. Like Elder and Musgrove, he did not contest his seat at the election.

The evidence at the inquiry suggested that two main types of improper enrolment practice occurred in Queensland in the 1980s and 1990s. Firstly, persons were enrolled without their knowledge at a particular address to orchestrate a vote in their name at a plebiscite. In the majority of these cases, after the plebiscite the person was re-enrolled at his or her correct address, again without their knowledge. The evidence suggested that this type of conduct took place at the 1986 plebiscite for South Brisbane and the 1996 plebiscites for East Brisbane, Thuringowa and Townsville.[23] Secondly, persons were knowingly enrolled at a false address. The person witnessing the enrolment form in most cases also knew that the information provided was erroneous. The same pattern of behaviour ensued, with the elector's enrolment details usually being restored prior to the next election.[24]

The inquiry did not receive any evidence to substantiate that false identities were created to enable fictitious persons to be enrolled. Nor, since 1990, had votes been fraudulently cast in elections using the identities of dead people - a practice often referred to as 'cemetery voting'. This was probably due to the provision of computerised information by the

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22 'Beattie's majority shaky as MP admits to rorts', *Sydney Morning Herald*, 30 November 2000, p 6.

23 Hanson, n 14, p 66.

24 Ibid, p 66.

Registrar of Births, Deaths and Marriages.[25]

Public hearings of the Shepherdson inquiry concluded on 19 January 2001. A draft of the final submissions by Counsel assisting the inquiry was forwarded to interested parties before that date.[26] Premier Beattie had forecast on 16 January that the inquiry would not recommend the prosecution of three sitting Members of Parliament: Mike Reynolds (Townsville), Gary Fenlon (Greenslopes), and Paul Lucas (Lytton).[27] During the proceedings on 19 January, Tom Shepherdson QC emphasised that he had not spoken to the Premier about the inquiry nor had he reached a concluded view on any particular matter.[28]

Closing submissions of Counsel assisting the inquiry

Russell Hanson QC presented his final submissions to the inquiry on 19 January 2001.[29] His submissions included:

- that there was evidence of forgery on the part of two persons which warranted referral to the Director of Public Prosecutions (State in one case and Commonwealth in the other) for consideration;

- that any prosecutions for offences of signing false enrolment applications (other than forgery) since the joint Commonwealth-Queensland roll came into existence in 1992 were time-barred;

- that charges of conspiracy to breach s 117 of the *Elections Act 1983* (Qld) [the predecessor to the *Electoral Act 1992* (Qld)] were technically open but should not, in the exercise of the CJC's discretion under s 33(2A) of the *Criminal Justice Act*, be referred.[30]

At the time of publication of this paper, the report of the Shepherdson inquiry had not been released.

3.3 The Criminal Justice Commission and the Criminal Justice Act 1989 (Qld)

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25 Ibid, p 67.

26 Queensland Criminal Justice Commission, Shepherdson inquiry, transcript, 19 January 2001, p 3168.

27 'Beattie says MPs in clear', *The Australian*, 18 January 2001, p 4.

28 Shepherdson inquiry, n 27, pp 3168-3169.

29 The closing submissions were referred to in some media coverage as an 'interim report', for example: 'Whisper of good news a 'blast' for Beattie', *Sydney Morning Herald*, 18 January 2001, p 4. The Chairperson of the inquiry, Tom Shepherdson QC, confirmed on 19 January 2001 that the submissions did not constitute an interim report and that no such report had been prepared at that date: n 27, p 3169.

30 Hanson, n 14, pp 70-71.

Functions of the Criminal Justice Commission

The functions and responsibilities of the Criminal Justice Commission (CJC) include to monitor, review and, if necessary, initiate reform of the administration of the criminal justice system: s 21(1) *Criminal Justice Act 1989* (Qld).

The CJC possesses the broad power to take such action as it 'considers to be necessary or desirable in respect of such matters as, in its opinion, are pertinent to the administration of criminal justice': s 23(l). The CJC shall report to the Criminal Justice Committee of the Legislative Assembly on any matter it considers appropriate in that regard: s 21(3).

Investigation of official misconduct

The responsibilities of the CJC include 'investigation of official misconduct in units of public administration' where that function cannot be appropriately or effectively discharged by other agencies of the State: s 23(f)(iii).

The definition of 'unit of public administration' under s 3A(1) specifically applies to the Legislative Assembly, the parliamentary service and the Executive Council. The definition also includes courts, departments, the police service, non-corporate entities established or maintained pursuant to an Act and financially assisted by the Crown, and corporate entitities which collect revenue under an Act .

The *Criminal Justice Act* provides for an official misconduct unit, which is the investigative unit within the CJC. It operates of its own initiative, as well as in response to complaints or information received concerning misconduct: s 29(2). It is the function of the unit, subject to directions issued by the CJC, to investigate the incidence of official misconduct generally in the State: s 29(3)(a). If evidence of official misconduct is found, the matter can be referred in a variety of ways, for example to a prosecuting authority (s 33(2A)) or to a misconduct tribunal convened to hear allegations of official misconduct against public officials: ss 3, 7 *Misconduct Tribunals Act 1997* (Qld).

Official misconduct is set out by s 32 of the *Criminal Justice Act*.[31] The effect of that

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[31] The text of s 32 is as follows:

'**32.(1)** Official misconduct is -

(a) conduct of a person, whether or not the person holds an appointment in a unit of public administration, that adversely affects, or could adversely affect, directly or indirectly, the honest and impartial discharge of functions or exercise of powers or authority of a unit of public administration or of any person holding an appointment in a unit of public administration; or

(b) conduct of a person while the person holds or held an appointment in a unit of public administration -

  (i) that constitutes or involves the discharge of the person's functions or exercise of his or her powers or authority, as the holder of the appointment, in a manner that is not honest or is not impartial; or

  (ii) that constitutes or involves a breach of the trust placed in the person by reason of his or her holding the appointment in a unit of public administration;

(c) conduct that involves the misuse by any person of information or material that the person

section is that misconduct by a public official must:

- be conduct that involves a lack of integrity in discharging official functions, pursuant to s 32(1)(a) or (b), and
- amount to either a criminal offence or a disciplinary breach that could lead to dismissal from public office.[32]

If the conduct is considered to raise evidence of a criminal offence, the matter can be referred to the Director of Public Prosecutions. Where the evidence does not support a criminal charge, the prospect of substantiating 'official misconduct' requires a breach of a disciplinary code. This means that the relevant public official must be subject to a disciplinary regime so that if the charge is established, the official can be dealt with accordingly. However, there is no code of conduct for members of the Legislative Assembly or councillors of local authorities in Queensland at present.[33] Consequently, those officials cannot be proceeded against for official misconduct. Nor is a charge of official misconduct available for persons who are not public officials.[34]

Appointment of an independent person

Section 66 of the *Criminal Justice Act* enables the CJC to engage suitably qualified persons to provide it with services, information or advice (subject to section 25, which relates to the conduct of commission hearings).

This provision authorised the appointment of Philip McMurdo QC to provide the initial advice to the Shepherdson inquiry and Tom Shepherdson QC to conduct the inquiry.

Commission hearings

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has acquired in or in connection with the discharge of his or her functions or exercise of his or her powers or authority as the holder of an appointment in a unit of public administration, whether the misuse is for the benefit of the person or another person; and in any such case, constitutes or could constitute -

(d) in the case of conduct of a person who is the holder of an appointment in the unit of public administration - a criminal offence, or a disciplinary breach that provides reasonable grounds for termination of the person's services in the unit of public administration; or

(e) in the case of any other person - a criminal offence.'

32 This interpretation of 'official misconduct' is from Russell Hanson QC, Counsel assisting the Shepherdson inquiry, n 14, p 7.

33 The Members' Ethics and Parliamentary Privileges Committee of the Legislative Assembly of Queensland tabled a proposed 'Code of Ethical Standards' with its *Report on a Code of Ethical Standards for Members of the Queensland Legislative Assembly* (Report No 44) on 5 September 2000. Paragraph 3.8.2 of the proposed Code of Ethical Standards deals with the conduct of elections. It confirms the offences provided by the *Electoral Act 1992* (Qld) and reminds Members that breaches of certain sections of the Act will result in disqualification from Parliament. The Premier's response to Report 44 was tabled on 22 March 2001 and touched on some aspects of the Code of Ethical Standards, but the Code is yet to be adopted.

34 Hanson, n 14, pp 7-8.

Hearings in relation to any matter relevant to the discharge of the CJC's functions or responsibilities are authorised by s 25(1). Evidence may be received orally or in writing, on oath or affirmation, or by way of statutory declaration. Hearings are closed to the public unless this would be unfair, or contrary to the public interest, or where the hearing is merely administrative in nature: s 90.

Comparison with Independent Commission Against Corruption in New South Wales

The Shepherdson inquiry was a clear manifestation of the CJC's power to hold an inquiry into alleged misconduct by certain members of the Legislative Assembly, candidates for State electorates and candidates for local government elections. However, the Shepherdson inquiry will have difficulty making determinations about the conduct of persons who are not subject to a disciplinary code, such as Queensland Members of Parliament. There is scope for a similar inquiry in New South Wales, given that the Independent Commission Against Corruption (ICAC) has parallel powers to conduct investigations and hearings on its own initiative. Furthermore, 'official misconduct' in the *ICAC Act 1988* specifically applies to electoral fraud. As in Queensland, the conduct under investigation by the ICAC must be sufficient to constitute a criminal offence or a disciplinary offence, and the latter requires an applicable code of conduct. Ministerial codes of conduct do currently exist in New South Wales, although they are brief and generalised. These issues are discussed in more detail in the New South Wales section of this paper: see '5.2 Independent Commission Against Corruption' on p 26 and '5.3 Code of Conduct for Members of Parliament in New South Wales' on p 29.

3.4 Legal, Constitutional and Administrative Review Committee of the Legislative Assembly of Queensland

The Legal, Constitutional and Administrative Review Committee is a statutory committee of the Queensland Legislative Assembly, established pursuant to the *Parliamentary Committees Act 1995* (Qld). The Committee's areas of responsibility include electoral reform and monitoring the conduct of Queensland elections.

On 22 August 2000, the Legislative Assembly passed the following motion:

> That this House requests the Legal, Constitutional and Administrative Review Committee to investigate and report back to State Parliament by 14 November 2000 on the best way to minimise electoral fraud at elections, where the Queensland State electoral roll is used.[35]

The Committee interpreted the motion as referring to elections for Members of the Queensland Legislative Assembly (conducted by the Electoral Commission of Queensland

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35 *QPD*, 22 August 2000, p 2567. The use of the phrase 'Queensland State electoral roll' is somewhat misleading, in that it suggests there is a separate Queensland roll. Under the joint roll agreement between Queensland and the Commonwealth, the Australian Electoral Commission maintains and updates the electoral roll that is used by Queensland for the purposes of Federal, State and local government elections.

under the *Electoral Act 1992*), local government elections, and State or local government referendums, but not to Federal elections.[36]

The Committee consisted of six Members of the Legislative Assembly, three being representatives of the Labor government, and one each from the National Party, Liberal Party and City Country Alliance Queensland. The Committee received submissions, made requests for information and held a closed hearing on 24 October 2000, attended by several witnesses including officers of the Electoral Commission of Queensland and the Australian Electoral Commission.

In its interim report, tabled on 14 November 2000, the Committee considered two categories of reforms. The first category related to the advancement of the continuous roll updating (CRU) system.[37] The Committee sought to facilitate and expedite the development of the CRU system, with a view to enhancing the integrity of the electoral roll and detection of electoral fraud.

The second category of reforms included proof of identity requirements. The Committee declined to recommend fundamental changes to existing electoral practices until the outcome of the Shepherdson inquiry but anticipated that it would consider proposals for reform afresh after the report of that inquiry was released. The Committee also expressed reluctance to make conclusions about the integrity of the electoral roll and the level of electoral fraud while the Shepherdson inquiry and the inquiry of the Federal Parliament's Joint Standing Committee into Electoral Matters were still in progress.[38] However, the Legal, Constitutional and Administrative Review Committee reported that the information provided to it suggested that existing arrangements for the conduct of elections were generally adequate to ensure the integrity of the voting process and that there were sufficient checks and balances in place to detect significant fraudulent behaviour.[39]

The three non-ALP members of the Legal, Constitutional and Administrative Review Committee delivered a dissenting report. They supported higher penalties for electoral offences, identification requirements at the time of both enrolment and voting, closing electoral rolls on the date of calling an election, and statewide re-enrolment to cleanse the roll. They opposed the concepts of developing a computer system that combined data from numerous State agencies, and making electoral enrolment a prerequisite to issuing a proof of age card to people over 18 years.[40]

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36 Queensland Parliament, Legislative Assembly, Legal, Constitutional and Administrative Review Committee, *The prevention of electoral fraud: Interim report*, Report No 28, November 2000, pp 1-2.

37 'Continuous roll updating' is a term that refers to ongoing maintenance of the electoral roll, for example by comparing records across government databases. The practice is discussed in greater detail under '7.1.4 Continuous roll updating, data-matching and data-mining' on p 46.

38 Legal, Constitutional and Administrative Review Committee, n 37, p 17.

39 Ibid, pp 17-18.

40 Ibid, pp III-VIII.

3.5 Electoral Act 1992 (Qld)

Offences

Part 9 of the *Electoral Act 1992* (Qld) sets out a range of electoral offences. Section 149 confirms that attempts to commit an offence are taken to be an offence. The maximum penalty for each of the offences referred to below, unless otherwise specified, is six months imprisonment or 20 penalty units ($1500)[41].

False information

It is an offence under s 151 to wilfully insert on any electoral roll a false or fictitious name or address. A person must not make a statement or make an omission from a statement, under or for the purposes of the Act, that the person knows is false or misleading in a material particular: s 153. Section 154 states that a person must not give a document for the purposes of the Act containing information that the person knows is false, misleading or incomplete in a material particular without (a) indicating the falsity and (b) supplying the correct information if this can reasonably be obtained.

Forgery and witnessing offences

Forging or uttering an electoral paper, knowing it to be forged, is an offence under s 159. Offences relating to ballot papers are provided by s 171. For example, a person must not, without lawful excuse, have possession of a ballot paper marked by another person: s 171(2)(a). Section 175 prohibits a witness from signing a declaration for a postal vote unless the witness sees the elector sign the declaration and is satisfied of the elector's identity and the truth of the declaration.

Voting when not entitled

The following types of voting at an election contravene s 170:

(a) voting in the name of another person, including a dead or fictitious person;
(b) voting more than once;
(c) casting a vote that the person knows he or she is not entitled to cast;
(d) procuring the vote of another person, knowing that the person is not entitled to vote.

Bribery, intimidation and interference

Bribery is outlined by s 155. A person must not ask for or receive a benefit of any kind, or offer or agree to do so, on the understanding that it will influence the person's vote at an election, or the person's attitude towards a candidate or a political party at an election. Furthermore, a person must not, in order to influence another person's conduct at an election, give or promise or offer a benefit of any kind to the other person or a third person.

A person who knowingly provides money to fund a payment that is contrary to electoral law commits an offence under s156. Section 168 prohibits a person from influencing the vote of a person by violence or intimidation. The offences under ss 155, 156 and 168 attract a

[41] The value of a penalty unit in Queensland is $75 for the offences referred to in this paper: s 5(1)(b) *Penalties and Sentences Act 1992* (Qld).

maximum penalty of two years imprisonment or a fine of 85 penalty units ($6375).

More generally, it is an offence to hinder or interfere with another person's free exercise of an electoral right or duty under the Act: s 158.

Disqualification from Parliament

Disqualification for certain offences is provided by s 176. If a Member of the Legislative Assembly is convicted of an offence against sections 154 (false, misleading or incomplete documents), 168 (influencing voting) or 170(a) or (b) (voting when not entitled), the Member's seat is vacated in accordance with the *Legislative Assembly Act 1867* (Qld). If any other person is convicted of the aforementioned offences, the person is not entitled to be elected, or to sit, as a Member of the Legislative Assembly for three years after the conviction.

Powers of the Court of Disputed Returns[42]

The *Electoral Act 1992* (Qld) provides that the Supreme Court of Queensland shall be the Court of Disputed Returns: s 127. An election may be disputed only by a petition to the Court: s 128. Pursuant to s 134, the Court 'must not have regard to legal forms and technicalities, and is not required to apply the rules of evidence'. The powers of the Court include ordering that a person elected was not elected, that another candidate is taken to have been elected, or that a new election be held: s 136.

3.6 Queensland Criminal Code[43]

Chapter 14 of the Queensland Criminal Code specifically addresses 'corrupt and improper practices at elections'. There is no equivalent section in the New South Wales *Crimes Act 1900*. Section 98 of the Code defines 'election' as any election held under the authority of a statute or any referendum conducted under the *Referendums Act 1997* (Qld). However, s 98A clarifies that Chapter 14 does not apply to Legislative Assembly or local government elections. The law relating to those elections is contained in the *Electoral Act 1992* and the *Local Government Act 1993* respectively.

A time limit applies to prosecuting any of the offences in sections 99 to 106. Such prosecutions must be commenced within one year after the offence was allegedly committed: s 107. The service, execution or issue of process (depending on the circumstances) upon the alleged offender is deemed to mark the commencement of the prosecution.

The maximum penalty for each of the offences referred to below is one year imprisonment

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42 For a recent, detailed analysis of the history and jurisdiction of courts of disputed returns and related case law, see: G Orr and G Williams, 'Electoral Challenges: Judicial Review of Parliamentary Elections in Australia' (2001) 23(1) *Sydney Law Review* 53.

43 The Criminal Code is Schedule 1 to the *Criminal Code Act 1899* (Qld).

or a fine of $400, unless otherwise stated. Alternative verdicts are available for the offences.[44]

Personation, double voting

It is a crime to vote or attempt to vote in the name of another person at an election, whether that person is living, dead or fictitious: s 99. An offender is liable to imprisonment for two years. The same maximum penalty applies to voting more than once: s 100.

Treating, bribery, undue influence

Section 101 creates the misdemeanour of treating, whereby a person 'corruptly' pays an expense on account of anything done or omitted to be done by an elector, or an elector receives such a favour. The use of undue influence to induce an elector to vote or refrain from voting or to obstruct the free exercise of the franchise, is a misdemeanour under s 102.

The misdemeanour of bribery is provided by s 103 and covers a broad range of conduct. For example, it is an offence to promise a benefit of any kind on account of any act, omission or projected future act or omission by an elector in relation to an election, or in order to induce any person to endeavour to procure the vote of an elector: s 103(a).

Section 105 covers various illegal practices including voting at an election when prohibited by law (s 105(a)) and being a candidate or their agent who corruptly procures another candidate to withdraw in consideration of payment: s 105(f). Knowingly providing money for any payment contrary to the law relating to elections is a summary offence, punishable by a fine of $200: s 106.

Forgery

Chapter 49 of the Criminal Code deals specifically with forgery offences. Under s 488, it is a crime to forge a document or utter a forged document, with intent to defraud. The maximum penalty is three years imprisonment.

4. COMMONWEALTH LAW AND DEVELOPMENTS

4.1 Recent allegations of electoral misconduct

4.1.1 False enrolments by staff of Liberal Federal MP, Mal Brough

[44] Alternative verdicts for Chapter 14 offences are provided by ss 586-587 of the Criminal Code. Where a person is on trial for an indictable offence relating to elections but the evidence only establishes a summary offence (under ss 98-117 of the *Electoral Act 1992* (Qld)), the person may be convicted of that summary offence: s 586 of the Code. The converse situation, where a person is on trial for a summary offence but the evidence establishes an indictable offence, is dealt with by s 587.

In December 2000, a staff member of Mal Brough, the Liberal Federal MP for the Queensland seat of Longman, notified the Australian Electoral Commission that she had falsely enrolled in Brough's electorate, on her own initiative, before he won the seat by less than 1% in 1998. Further claims were made that another female member of staff and her partner had also enrolled at the same address, which was the home of a third staffer.[45]

Brough denied knowing about the false enrolments but withdrew from being sworn in as the Minister for Employment Services in Prime Minister Howard's cabinet on 30 January 2001. The matter was referred to the Australian Federal Police, and the ALP called for Brough to appear before the Joint Standing Committee on Electoral Matters.[46]

On 11 February 2001, John Howard announced that the Australian Federal Police had cleared Brough of involvement in electoral fraud.[47] He was sworn in as a Minister on 14 February.

4.1.2 Allegations of payments for preferences involving Labor Federal MPs

On 27 November 2000, 'The 7.30 Report' on ABC television revealed that Wayne Swan, a Federal Member of Parliament, gave a sum of money to the Australian Democrats in the Brisbane seat of Lilley in the lead-up to the 1996 Federal election. Lee Bermingham, a former organiser with the Australian Workers Union (AWU) faction of the ALP, claimed that Swan gave him $1400 cash in an envelope to deliver to Ian Rowland, the Democrats' campaign director in Lilley. Although Swan confirmed in Federal Parliament that a 'financial contribution was made' to the local Democrats' campaign in 1996, he denied that the payment was in exchange for preferences and did not name a figure.[48] Amounts ranging from $500 to $1400 were mentioned in various newspaper reports.

The Australian Electoral Commission consulted the Director of Public Prosecutions for preliminary advice on whether the offence of electoral bribery (s 326 *Commonwealth Electoral Act 1918*) might be suggested on the face of the material provided. Upon consideration of that advice, the Australian Electoral Commission referred the matter to the Australian Federal Police for investigation. On 2 December 2000, Swan stood down as the shadow Minister of Family and Community Services while his payment to the Democrats was investigated. On 16 February 2001, the day before the Queensland State election, the Australian Federal Police announced that Swan had been cleared of wrongdoing and that no further action would be taken.

In March 2001, allegations of an illegitimate preference deal were made in the wake of the

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45 'Cutting both ways', *Sydney Morning Herald*, 1 February 2001, p 10; 'Police move in as MP's aide confesses to voting rort', *Sydney Morning Herald*, 30 January 2001, p 2.

46 'PM predicts clean bill of health for Brough', *Sydney Morning Herald*, 1 February 2001, p 6.

47 'Brough cleared to join front bench', *Sydney Morning Herald*, 12 February 2001, p 2.

48 'Swan stands down as rort hunt begins', *Sydney Morning Herald*, 2 December 2000, p 4.

by-election for the Federal seat of Ryan. The Queensland State director of the Liberal Party, Graham Jaeschke, claimed that a candidate for the Hemp Party had directed preferences to Labor's Leonie Short in exchange for access to another Labor MP's office to photocopy his campaign material. Jaenschke asserted that the preferences of the marijuana candidate were vital to Short's narrow victory and that he would request the Australian Electoral Commission to investigate.[49]

4.1.3 Knowledge of 'dummy' candidates by Jackie Kelly, Federal Minister

Jackie Kelly, the Federal Minister for Sport and Member for the seat of Lindsay in New South Wales, was also the subject of electoral controversy in 2000 and 2001. Although the allegations related to her role as the president of the Liberal Party's campaign committee for a local government election, the matter raised the prospect of electoral offences using Commowealth enrolment forms. In the Penrith Council election of 1999, two candidates for the Marijuana Smokers' Rights Party and one candidate for the No Badgery's Creek Airport Party were allegedly falsely enrolled at an address where they did not reside in order to stand for election and direct preferences to the Liberals. On 20 July 2000, the Australian Federal Police declared there was insufficient evidence to pursue a prosecution.[50]

The allegations were revived in early 2001 after Steven Simat, a former staff member of Kelly's and a Penrith Council candidate, appeared at the inquiry into the integrity of the electoral roll conducted by the Federal Parliament's Joint Standing Committee on Electoral Matters. Simat gave evidence that he set up the two 'front' parties to channel preferences to the Liberals, but that he arranged for the three candidates to live in a house part-owned by his niece in order to satisfy the residency requirements under the electoral legislation. The three candidates were all members of the Liberal Party and had enrolled in the seat the day before the roll closed.[51] Whether the candidates actually lived at the premises, and the extent of Kelly's knowledge, remains contentious. In February 2001, the Australian Electoral Commission requested the Australian Federal Police to examine new material to determine if further investigation was warranted.

4.1.4 Accusations of branch-stacking in Liberal pre-selection in Cook

In 1998, a Liberal Party pre-selection took place for the Federal seat of Cook in Sydney. The sitting Member, Stephen Mutch, was defeated by former State transport Minister, Bruce Baird, in a very close vote of 102 to 97. Mutch, a 'right wing' Liberal, claimed that he had been the victim of branch-stacking by the Liberal 'moderates' faction and threatened a legal challenge of the result.[52] Legal opinion obtained by Mutch from two barristers

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49 'Libs fuming over Ryan marijuana 'bribery'': *The Australian*, 26 March 2001, p 2.

50 'Electoral investigation into Kelly' *Sydney Morning Herald*, 8 February 2001, p 4.

51 Ibid; and 'Kelly may face new rorting allegations', *Sydney Morning Herald*, 21 February 2001, p 2.

52 'Deposed Lib threatens legal action', *The Australian*, 10 August 1998, p 2; 'Mutch ado as Lib split deepens', *The Daily Telegraph*, 11 August 1998, p 5.

asserted that the Liberal Party constitution had been breached because some replacement pre-selectors had been appointed less than seven days before the vote.[53] The result of the pre-selection prevailed.

4.2 Joint Standing Committee on Electoral Matters

On 23 August 2000, the Special Minister of State, Senator Chris Ellison, requested the Joint Standing Committee on Electoral Matters to examine the issue of the integrity of the electoral roll and fraudulent enrolment.[54] The terms of reference were to inquire into and report on:

- the adequacy of the *Commonwealth Electoral Act* for the prevention and detection of fraudulent enrolment;
- incidents of fraudulent enrolment; and
- the need for legislative reform.

The Committee consisted of four representatives from the Liberal Party (including the Chairman who held the casting vote), three from Labor, two from the Democrats and one from the National Party. The Committee Chairman, Christopher Pyne (Liberal Member for Sturt in South Australia), emphasised that the inquiry's attention did not extend to the internal workings of any political party but was targeted at the identification of fraudulent practices and the recommendation of legislative changes.[55]

Public hearings took place on 15 November and 5 December 2000 in Canberra, 14 December 2000 in Brisbane, 29 January 2001 in Townsville and 30 January 2001 in Sydney. Witnesses who appeared included Andrew Becker (Australian Electoral Commissioner), Divisional Returning Officers, Karen Ehrmann, Lee Bermingham, Tony Mooney (Mayor of Townsville) and Brian Courtice (former Federal Labor Member for the seat of Hinkler in Queensland).

Despite reports that the inquiry would be concluded prematurely,[56] proceedings continued in Canberra during March and April 2001. The Committee heard evidence on 2 March 2001 from officers of the Attorney-General's Department, the Australian Federal Police and Dr Amy McGrath, a vocal critic of the Australian Electoral Commission. On 27 March, representatives from the Liberal Party of Australia, including the Federal Director and Deputy Director, gave evidence expressing the party's support for voter identification and

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53 'Rejected MP may stand as Independent', *Sydney Morning Herald*, 29 August 1998, p 19.

54 After each Federal election, the Federal government establishes a Joint Standing Committee on Electoral Matters and provides it with a reference to inquire into and report on that election.

55 Parliament of Australia, Joint Standing Committee on Electoral Matters, 'Electoral Roll Inquiry to Question Queensland Witnesses', *Media Release*, 1 December 2000.

56 M Seccombe, 'Jackie, oh what lengths your PM will take to protect you', *Sydney Morning Herald*, 1 March 2001, p 4.

higher penalties. The Australian Labor Party was invited to attend but declined to do so.[57] Andrew Becker made a further appearance on 3 April 2001, accompanied by other officials from the Australian Electoral Commission.

The Committee's operations were controversial, particularly due to allegations of bias directed at the Chairman for exercising his casting vote to prevent Liberal politicians being called to give evidence.[58] A report is expected to be tabled by the Committee in June 2001.

4.3 Commonwealth Electoral Act 1918 (Cth)

Offences

Electoral offences are currently found in Part XXI of the *Commonwealth Electoral Act 1918* (Cth). However, it should be noted that the Act will be affected by the impending commencement of a Commonwealth *Criminal Code*. All of the Code is expected to be in force by the end of 2001. At this stage, forgery and false statement are the only electoral offences that will be removed from the *Commonwealth Electoral Act*. The equivalent provisions under the *Criminal Code* will have higher penalties and are anticipated to commence on 24 May 2001.[59]

Time limits for the prosecution of offences against Commonwealth law are governed by s 15B(1) of the *Crimes Act 1914* (Cth). The prosecution of an offence with a maximum penalty of imprisonment for six months or less must be commenced one year after the offence was committed. An offence with a maximum penalty of over six months imprisonment may be prosecuted at any time.

The instigation of proceedings for offences is governed by s 382 which states that in every case where the 'Crown Law authorities' advise, the Electoral Commissioner shall institute legal proceedings against a person committing an offence against the Act, but that s 382 does not affect the right of any (other) person to institute proceedings.

Bribery and interference

Bribery is construed more broadly than in the New South Wales legislation. Section 326 of

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57 Commonwealth Parliament, Joint Standing Committee into Electoral Matters, Inquiry into the integrity of the electoral roll, transcript (proof Committee Hansard), 27 March 2001, EM 515. The transcript is available on the Committee's website at <http://www.aph.gov.au/hansard/joint/commttee/j-elect.htm> Note that there is no letter 'i' in the word 'committee' in the website address.

58 For example, journalist Mike Seccombe made this accusation: 'The JSCEM…used to operate as a reasonably bipartisan body, until late last year, when John Howard decided it could be put to dirtier use. … The incumbent chair of the committee was removed, and Christopher Pyne, MP, put in charge. He knew his brief. Go after any hint of Labor rorting, but resist any temptation to uncover Government rorts.' Seccombe, n 57.

59 Information on the changes is adapted from the oral evidence of Karl Alderson, Principal Legal Officer, Criminal Law Branch, and Ian Carnell, General Manager of Criminal Justice and Security, Attorney-General's Department (Cth), to the Joint Standing Committee on Electoral Matters, n 58, 2 March 2001, EM 463-467.

the *Commonwealth Electoral Act* makes it an offence to ask for, receive or offer a benefit, the effect of which is likely to influence: the vote or candidature of another person, a person's support or opposition towards a candidate or political party, the preferences of a voter, or the order of names of Senate candidates on a ballot paper. The offence attracts a maximum penalty of two years imprisonment and/or a fine of $5000.[60]

Section 327 prohibits a person from hindering or interfering with the free exercise or performance, by any other person, of any political right or duty that is relevant to an election under the Act. The maximum penalty is six months imprisonment and/or a fine of $1,000.

Witnessing offences

It is an offence to witness a blank electoral paper or witness the paper without seeing the elector sign it: s 337. The maximum penalty is a fine of $1000. A witness to any claim for enrolment or transfer of enrolment who fails to inquire or otherwise be satisfied that the statements in the claim are true, is liable to the same penalty.

Forgery, impersonation, false statements

Forging an electoral paper, or uttering a forged electoral paper, knowing it to be forged, is an offence under s 344. The maximum penalty is six months imprisonment and/or a fine of $1,000. Unlawfully marking the ballot paper of another elector attracts the same penalty: s 338.

Making a false statement knowing it to be false or misleading in a material particular is punishable by six months imprisonment: s 339(1)(k). This offence would be committed by an elector who deliberately enrolled at an incorrect address. The same penalty applies to impersonating another elector for the purpose of securing a ballot paper or voting: s 339(1)(a),(b). Voting more than once in the same election is an offence against s 339(1A), penalised by a maximum fine of $1100.

Disqualification from Parliament

A person who is convicted of an offence of bribery (s 326) or undue influence (s 327) is disqualified from being chosen or sitting as a Member of either House of Parliament for two years after the date of conviction: s 386.

Furthermore, s 44(ii) of the Constitution of Australia provides that any person who has been convicted of an offence and is subject to be sentenced under Commonwealth or State law to imprisonment for one year or longer, shall be incapable of being chosen or sitting as a Member of the House of Representatives or the Senate.

Powers of the Court of Disputed Returns[61]

60 Section 384 makes provision for an offence under s 326 to be dealt with summarily. The maximum penalty is 12 months imprisonment and/or a fine of $2000.

61 For a recent, detailed analysis of the history and jurisdiction of courts of disputed returns and related case law, see Orr and Williams, n 43.

The *Commonwealth Electoral Act* provides that the High Court shall be the Court of Disputed Returns, and shall have jurisdiction either to try a petition or to refer it for trial to the Federal Court of Australia or to the Supreme Court of the State or Territory in which the election was held: s 354(1).

The Court of Disputed Returns is empowered, in response to a petition, to declare that any person who was returned as elected was not duly elected, declare any candidate duly elected who was not returned as elected, declare any election absolutely void, and punish any contempt of its authority by fine or imprisonment: s 360(1).

The Court may exercise all or any of its powers on such grounds as the Court in its discretion thinks just and sufficient: s 360(2). Section 364 provides that the court shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities, or the law of evidence. There is no appeal from the decisions of the Court: s 368.

Amendments to the Commonwealth Electoral Act 1918

The *Commonwealth Electoral Act 1918* was amended by the *Electoral and Referendum Amendment Act (No.1) 1999* (Cth), which received assent on 13 October 1999. Two amendments which are of particular relevance here (Items 10 & 11 of Schedule 1) are to commence on a date to be fixed by proclamation: s 2 of the *Electoral and Referendum Amendment Act (No.1) 1999* (Cth).[62]

The Amendment Act requires that the identity of a person enrolling on the electoral roll for the first time must be verified in the manner prescribed by the regulations: Item 11 of Schedule 1, inserting s 98(2A) into the *Commonwealth Electoral Act 1918*. At present, electors do not produce proof of identity to enrol or to change their enrolment details.

Draft regulations issued by the Federal Government for discussion with the States impose a requirement for one original form of identification, such as a driving licence, to be shown to an eligible witness when a person initially enrols. The issue of proof of identity is discussed later in this paper at ‘7. OPTIONS FOR REFORM’ on p 44.

The Amendment Act also tightens the witnessing requirements. A claim for enrolment or transfer of enrolment must be witnessed by a person who is currently enrolled and in a class of electors prescribed by regulation: Item 10 of Schedule 1, replacing s 98(2)(c) of the *Commonwealth Electoral Act 1918*. Under the proposed regulations, a broad range of people can be witnesses, including teachers, nurses and Aboriginal elders.

However, the two amendments of relevance have not yet commenced, and the Labor States

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62 Only one other provision, item 12 of Schedule 1, has not commenced. Items 1-9 commenced 28 days after assent and items 13-37 on the date of assent. The amendments were based on recommendations by the Joint Standing Committee on Electoral Matters in its report on the conduct of the 1996 Federal election, tabled on 16 June 1997.

(New South Wales, Queensland, Victoria and Western Australia) have opposed the draft regulations put to them for consultation.[63] The Australian Electoral Commission regards negotiation with the States on this issue as crucial, to avoid harming the joint roll arrangements. The Electoral Commissioner has pointed out that the regulations were framed in a broad fashion to avoid reducing access to the franchise, but ironically may be too lenient to catch people with deliberate intentions to defraud the roll.[64]

4.4 Crimes Act 1914 (Cth)

Offences

Forgery

Forgery of Commonwealth documents is an offence under s 67 of the *Crimes Act 1914* (Cth) and attracts a maximum penalty of 10 years imprisonment. The same applies to uttering a Commonwealth document knowing it to be forged. Further, s 63 provides that a person is deemed to forge a document if he or she makes a document which is false, knowing it to be false.

Forgery could be committed when a person completes and lodges an application for enrolment or change of details on the electoral roll without the knowledge of the elector. However, it is unlikely that an enrolment form which states a false address but was actually signed by the applicant could constitute a forgery. Rather, such conduct would amount to a false statement in an otherwise genuine document.[65]

Conspiracy

A person who conspires with another person to commit an offence against a law of the Commonwealth that is punishable by imprisonment for over 12 months or a fine of 200 penalty units or more, is liable as if the offence to which the conspiracy relates has been committed: s 86(1). Therefore, a charge of conspiracy is more readily available for offences in the *Crimes Act* than breaches of the *Commonwealth Electoral Act*, most of which have a maximum penalty below the threshold stipulated in s 86(1). Time limits for prosecuting alleged conspiracies are the same as for the substantive offence: s 86(8).

Intimidation, interference

It is an offence to hinder or interfere with the free exercise of a political right or duty of any person, using violence, threats, or intimidation of any kind: s 28. The maximum penalty is imprisonment for three years. Voting and enrolling to vote would presumably qualify as both a right and a duty of an Australian citizen.

5. NEW SOUTH WALES LAW AND DEVELOPMENTS

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63 Andrew Becker, Australian Electoral Commissioner, evidence to the Joint Standing Committee on Electoral Matters, n 58, 3 April 2001, EM 571.

64 Evidence given by Andrew Becker and other officials from the Australian Electoral Commission, ibid, EM 566-567.

65 Russell Hanson QC, Counsel assisting the Shepherdson inquiry took this view in his final submissions, citing *Brott v The Queen* (1991-1992) 73 CLR 426: n 14, pp 14-15.

5.1 Recent allegations of electoral misconduct

In May 2000 it was reported that Andrew Thomson, the Liberal member for the seat of Wentworth in Sydney's eastern suburbs, had referred allegations of branch-stacking in his electorate to the New South Wales police. Although Wentworth is a Federal seat, the alleged misconduct involved party membership forms, not Commonwealth electoral forms. Thomson wished the police to investigate the prospect of criminal charges under State law. Liberal Party officials, checking the authenticity of several membership forms that were lodged at party headquarters in Sydney with the accompanying membership fees, discovered that a woman had been enrolled at the Rose Bay branch without her knowledge. She was already a member of the Liberal Party and alerted Thomson's electoral staff. According to Thomson, the party secretariat detected at least 40 memberships that had been 'stacked' and checks were continuing.[66]

Thomson was under challenge from within the Liberal Party for the safe seat. Three other candidates contested the pre-selection on 4 March 2001. Peter King, a barrister and former State president of the Liberal Party, won endorsement, securing 81 votes compared to Thomson's 27 votes.[67] It was reported in the local press in late February 2001 that an investigation by Waverley police into branch-stacking in the electorate had 'reached no conclusion'.[68]

Another method of dealing with branch-stacking allegations was employed by the ALP when it conducted an internal inquiry into party membership in Fowler, a seat it holds in south-west Sydney. Party membership in Fowler jumped by 454% between 1993 and 1997 and peaked at 3000 members, the highest of any Labor electorate in Australia.[69] Fowler is a Federal electorate but the inquiry was handled by the New South Wales division of the ALP. The chair of the inquiry, former New South Wales Premier Barrie Unsworth, recommended capping the number of members from each branch in Fowler to vote in pre-selection plebiscites.[70] On 2 June 2000 the Administrative Committee of the New South Wales ALP resolved to close seven branches in Fowler for three months, then re-open the branches with a cap of 60 votes regardless of membership numbers.[71]

5.2 Independent Commission Against Corruption

Powers, functions and consequences

66 'Police hunt Lib branch stackers' *Sydney Morning Herald*, 27 May 2000, p 3.

67 'King usurps Wentworth MP', *Sydney Morning Herald*, 5 March 2001, p 4.

68 'King tipped to take preselection crown', *The Wentworth Courier*, 28 February 2001, p 13.

69 'Labor Left and Right go to war over Fowler', *Sydney Morning Herald*, 2 June 2000, p 7.

70 Ibid.

71 '"Tainted" branches closed', *Daily Telegraph*, 5 June 2000, p 11.

The Independent Commission Against Corruption (ICAC) may conduct an investigation on its own initiative, or pursuant to a complaint, report or reference, even though no particular public official or other person has been implicated: s 20 *Independent Commission Against Corruption Act 1988* (NSW).

The functions of ICAC and the potential consequences of its investigations are elaborated in s 13 ('Principal functions') and s 14 ('Other functions of Commission'). These include to investigate any allegation, complaint or circumstance implying past, present or future corrupt conduct; to communicate to appropriate authorities the results of investigations; to advise public authorities and public officials on making changes to practices and procedures to reduce corrupt conduct; to assist in reviewing laws for the same purpose; and to assemble evidence that may be admissible in the prosecution of a person for a criminal offence. It must be stressed, however, that the scope of 'corrupt conduct' is restricted by ss 7-9 of the Act.

Applicability of the ICAC Act to 'public officials'

Corruption in the *ICAC Act* is conceptualised as being committed by, or affecting the functions of, public officials. Section 3 of the Act defines a 'public official' as follows:

> **public official** means an individual having public official functions or acting in a public official capacity, and includes any of the following:
> (a) the Governor …;
> (b) a person appointed to an office by the Governor;
> (c) a Minister of the Crown, a member of the Executive Council or a Parliamentary Secretary;
> (d) a member of the Legislative Council or of the Legislative Assembly;
> (e) a person employed by the President of the Legislative Council or the Speaker of the Legislative Assembly or both;
> (f) a judge, a magistrate or the holder of any other judicial office (whether exercising judicial, ministerial or other functions);
> (g) an officer or temporary employee of the Public Service or a Teaching Service;
> (h) an individual who constitutes or is a member of a public authority;
> (i) a person in the service of the Crown or of a public authority;
> (j) …;
> (k) a member of the Police Force;
> (k1)…;
> (l) the holder of an office declared by the regulations to be an office within this definition;
> (m)…

Members of State Parliament are explicitly covered by (d), while (h) would appear to extend to local government councillors, as the definition of 'public authority' (under s 3) applies to a local government authority, government departments, statutory authorities and so on.

A candidate for office or a member of a political party who is seeking pre-selection will therefore not necessarily belong to any of the categories of 'public official'. However, this does not mean that their behaviour will fall outside the jurisdiction of the Act. The conduct of any person may amount to corruption if it adversely affects a public official in the exercise of his or her functions: s 8(1)(a).

Corrupt conduct - scope and limitations

Corrupt conduct must fall within the general description in section 8, but not be excluded by section 9.

Section 8 outlines the general nature of corrupt conduct as follows:

> 8(1) Corrupt conduct is:
>
> (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority; or
> (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions; or
> (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust; or
> (d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person. [Emphasis added]

Further, s 8(2) states that corrupt conduct could involve a number of specific matters, including:

> (i) election bribery;
> (j) election funding offences;
> (k) election fraud;
> …
> (u) forgery;
> …
> (y) any conspiracy or attempt in relation to any of the above.

Therefore, a person who is not a public official, but whose conduct could adversely affect the exercise of official functions by the Electoral Commission (being a statutory authority) involving election fraud, could commit corrupt conduct pursuant to s 8, providing that s 9 does not create barriers.

Section 9 limits the nature of corrupt conduct. According to s 9(1), despite s 8, conduct does not amount to corrupt conduct unless it could constitute or involve:
(a) a criminal offence, or

(b) a disciplinary offence, or
(c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or
(d) in the case of conduct of a Minister of the Crown or a member of a House of Parliament - a substantial breach of an applicable code of conduct. [Emphasis added]

Corrupt conduct by Members of Parliament

Pursuant to s 9(1)(d), in the case of a Minister or a Member of Parliament, conduct does not amount to corrupt conduct unless it could constitute or involve a substantial breach of an applicable code of conduct. The relevant codes of conduct are discussed below at 5.3 on p 28. Subsection 9(1)(d) was inserted by the *ICAC Amendment Act 1994*, and commenced on 20 January 1995.

Section 9(4) further clarifies that the conduct of a Minister or a Member of Parliament which falls within the description of corrupt conduct in s 8 is not excluded by s 9 if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute. Subsection 9(4) was also inserted by the *ICAC Amendment Act 1994*.

These amendments to the *ICAC Act* expanded the jurisdiction of ICAC in relation to Ministers and Members of Parliament. The change occurred after the case of *Greiner v ICAC* (1992) 28 NSWLR 125, to address 'concerns … that the Independent Commission Against Corruption Act operated in a manner that resulted in different standards of conduct being applied to different classes of public official' and to 'remove the perception that Ministers and Members of Parliament are beyond the reach of the Independent Commission Against Corruption'.[72]

In *Greiner v ICAC*, the Court of Appeal of the Supreme Court of New South Wales examined the meaning of 'corrupt conduct' before the introduction of s 9(1)(d), which now specifically covers the Premier and Members of Parliament. Under s 9(1) as it then was, conduct did not amount to corrupt conduct unless it could constitute or involve (a) a criminal offence; or (b) a disciplinary offence; or (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official. The Court held that s 9(1)(c) was potentially applicable to all public officials including the Premier and Ministers. In the particular circumstances of the case, the majority of the Court (Gleeson CJ with whom Priestley JA agreed; Mahoney JA dissenting) found that the Commissioner erred in determining that the Premier, Nick Greiner, and the Minister for the Environment, Tim Moore, had engaged in conduct that could constitute reasonable grounds for dismissal by facilitating the appointment of Dr Terry Metherell to a public service position.
The case still provides guidance on the assessment of allegedly corrupt conduct. Such conduct is to be assessed according to objective standards, not the subjective opinion of the Commissioner: per Gleeson CJ at 143, 145. However, Gleeson CJ (at 147) and Priestley

[72] Second Reading Speech, Minister for Police, *NSWPD*, 22 September 1994, pp 3627, 3628.

JA (at 192-193) appeared to have difficulty envisaging the practical application of 'reasonable grounds for dismiss[al]' apart from criminal activity, as a basis for corrupt conduct.

Jurisdiction of ICAC over political parties

In July 2000, the ICAC Commissioner, Irene Moss, speculated that political parties could face stronger scrutiny from anti-corruption bodies such as the ICAC because they receive public monies through election funding. Addressing the National Press Club in Canberra, Moss conceded that the ICAC's jurisdiction over the affairs of political parties was limited to the conduct of public officials such as Members of Parliament and local councillors, but she left open the possibility that 'oversight bodies' may follow the approach taken by the courts in some Australian jurisdictions in examining the internal affairs of political parties.[73]

5.3 Code of Conduct for Members of Parliament in New South Wales

Part 7A (Parliamentary Ethical Standards) of the *ICAC Act* was inserted by the *ICAC Amendment Act 1994*, to require the Standing Ethics Committee of the Legislative Assembly and a committee of the Legislative Council to each prepare for the consideration of their Members a draft code of conduct. The codes were to be presented to members no later than 29 October 1996 (ss 72C(5), 72D(5)) and reviewed at least once every two years: ss 72C(6), 72D(6).

On 31 March 1998, the 'Code of Conduct, Members of Parliament, New South Wales' was issued by the Premier, Bob Carr. The Code was adopted by the Legislative Assembly on 5 May 1998.

The Code does not contain any direct prohibition of electoral misconduct but has guidelines of a general nature reinforcing the importance of abiding by the law. For example, the third item in the preamble states:

> Members of Parliament accordingly acknowledge their responsibility to maintain the public trust placed in them by performing their duties with honesty and integrity, respecting the law and the institution of Parliament, and using their influence to advance the common good of the people of New South Wales.

The Legislative Council Code of Conduct for Members was adopted by the Legislative Council on 1 July 1998 and is in similar terms to that issued by the Premier, including the identical preamble item quoted above.

Bearing in mind that, pursuant to s 9(1)(d) of the *ICAC Act*, 'corrupt conduct' of a Member of Parliament must involve a substantial breach of the code of conduct, and that there is no specific section of either code of conduct covering electoral practices, it would seem that any dubious conduct by a Member of Parliament to influence a pre-selection or election

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73 'Watchdog warns political parties', *The Australian*, 20 July 2000, p 3. Commissioner Moss' address to the National Press Club took place on 19 July 2000.

would have to involve a 'substantial breach' of the public trust placed in them to perform their duties with honesty and integrity, and to respect the law and the institution of Parliament.

But s 9(4) of the *ICAC Act* should also be noted at this point, as it provides that conduct of a Member that falls within the description of 'corrupt' in s 8 will not be excluded by s 9 if the conduct would cause a reasonable person to believe that it would bring the integrity of Parliament into 'serious disrepute'.

5.4 Parliamentary Electorates and Elections Act 1912 (NSW)

Offences

Proceedings for an offence against the *Parliamentary Electorates and Elections Act 1912* (NSW) are to be dealt with in a summary manner before a Local Court magistrate: s 183.

Section 184 imposes a time limit on liability under the Act. A prosecution must be commenced within 12 months of the alleged offence.

There is no distinct offence under the Act of instructing or requesting a person to enrol in a false manner, unless the instructor witnesses the false enrolment or exerts persuasion to a degree that would constitute intimidation. In other words, it appears that a candidate or their agent who requests a person to enrol in an electorate where that person does not live, in order to vote for the candidate, does not commit an offence under the New South Wales electoral legislation; only the elector commits an offence for making a false statement.

Making or witnessing false statements; forgery and impersonation

A person who knowingly makes an untrue statement in any electoral paper is liable to a maximum penalty of six months imprisonment and/or a fine of 10 penalty units ($1100): s176D. The same penalty applies to forging an electoral paper or uttering a forged electoral paper knowing it to be forged: s 176F. Section 176E creates an offence of falsely witnessing an electoral paper, for example by signing the paper without seeing the signatory sign it. This conduct attracts a maximum fine of 10 penalty units ($1100). It is also an offence under s 114J for a person other than the elector or an authorised witness or person appointed by the elector to mark a postal ballot paper. The maximum penalty is six months imprisonment and/or a fine of five penalty units ($550).

Impersonating an elector (s 112(1)(c)) or voting twice (s 112(1)(d)) is punishable by three years imprisonment and/or a fine of 100 penalty units ($11,000). These offences focus on the person committing the action and do not implicate another person who has influenced or encouraged such behaviour.

Bribery

Bribery, treating and intimidation are punishable by a maximum penalty of three years imprisonment and/or a fine of 100 penalty units ($11,000). The bribery provisions under s 147 emphasise the giving, offering or exchange of some kind of 'valuable consideration' - such as money or employment - by the 'offending' person or someone on his or her behalf,

to induce an elector to vote or refrain from voting. It is doubtful whether simply requesting a supporter, staff member or other acquaintance to vote in a particular manner out of a sense of obligation or loyalty could amount to bribery.

The offence of treating is committed by a candidate who corruptly causes, directly or indirectly, the provision of expenses incurred for food, entertainment and so on in order to ensure his or her election or for the purpose of corruptly influencing a person's vote: s 149.

Intimidation, interference

Pursuant to s 151, intimidation occurs if a person directly or indirectly threatens or inflicts force, violence, restraint, injury, damage, harm or loss in order to induce or compel a person to vote or refrain from voting at an election. Further, a person who by 'any fraudulent device or contrivance impedes, prevents, or otherwise interferes with the free exercise of the franchise by any elector…' is guilty of intimidation. This could be broad enough to encompass certain types of electoral fraud.

Powers of the Court of Disputed Returns[74]

Section 156 grants the Supreme Court jurisdiction to sit as the Court of Disputed Returns.

The powers of the Court include to declare that any person who was returned as elected was not duly elected, to declare any candidate duly elected who was not returned as elected, to declare any election absolutely void, and to punish any contempt of its authority by fine or imprisonment: s 161. However, s 164(3) limits the circumstances in which the Court may do this.

Pursuant to s 164(1), if the Court finds that an elected candidate has committed or has attempted to commit the offence of bribery or treating or undue influence, his or her election, if he or she is a successful candidate, shall be declared void.

A standard of 'real justice' is implemented by s 166, whereby the Court shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities or the law of evidence.

Disqualification

The New South Wales *Parliamentary Electorates and Elections Act* does not contain a specific provision to disqualify electoral offenders from sitting in the New South Wales Parliament. Section 13A(1)(e) of the New South Wales Constitution[75] dictates that the seat of a Member of either House shall become vacant once conviction is finalised for an offence punishable by imprisonment for five years or more.

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74 For a recent, detailed analysis of the history and jurisdiction of courts of disputed returns and related case law, see Orr and Williams, n 43.

75 More properly, the *Constitution Act 1902* (NSW).

This may effectively limit disqualification for electoral misconduct to offences charged under the *Crimes Act*, as the maximum penalties in the *Parliamentary Electorates and Elections Act* are below five years. However, the actual language of s 13A(1)(e) is 'convicted of an infamous crime, or of an offence punishable by imprisonment for life or for a term of 5 years or more…'. The term 'infamous crime' lacks a specific or technical meaning and appears to be directed at offences involving dishonesty and breach of public trust.[76]

Another limitation is that s 13A of the New South Wales Constitution, unlike the disqualification provision in the Commonwealth Constitution, only applies to sitting Members and does not explicitly prevent a convicted person from being elected.

5.5 Crimes Act 1900 (NSW)

Depending on the circumstances and nature of the conduct, an electoral 'rorter' could be charged with an offence against the *Crimes Act 1900* (NSW). The most clearly applicable offences are different types of fraud, such as fraudulent misappropriation (s 178A; maximum penalty of seven years imprisonment) and obtaining a financial benefit by deception or by false or misleading statement (ss 178BA, 178BB; maximum penalty of five years imprisonment).[77]

Relevant forgery offences appear under Part 5 of the *Crimes Act* in the form of making or using false instruments. The term 'instrument' includes any document (s 299(1)(a)), and the concept of making a false instrument applies to altering an instrument to make it false in any respect: s 304. However, there are requirements which must be considered in each particular case to determine whether an instrument is 'false' (s 299(2)) and whether the person who made or used the false instrument did so with the intent (s 306) of inducing another person to accept the instrument as genuine to someone's prejudice (s 305). Notwithstanding these potential obstacles, it is conceivable that misconduct such as wrongfully completing a party membership form in order to 'stack' a branch could constitute making or using a false instrument. The maximum penalty is 10 years imprisonment.[78]

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76 This is the view of Jeff Shaw QC MLC, Attorney-General of New South Wales (as he then was), 'Disqualification of Members of Parliament' (2000) 11(2) *Public Law Review* 83 at 85. Shaw compares 'infamous crime' to the 'types of crimes for which one might be struck off as a barrister or solicitor' and notes that the term was interpreted in the context of the Fifth Amendment to the United States Constitution to encompass every species of fraud, deceit and falsehood: *Ex parte Wilson* 114 US 417 (1884).

77 These maximum penalties apply where the offences are dealt with on indictment. If the offences are prosecuted summarily, and the value of the property exceeds $5000, the maximum penalty is two years imprisonment and/or a fine of 100 penalty units ($11,000): s 27 and Table 1 of Schedule 1 to the *Criminal Procedure Act 1986*. If the value is $5000 or under, the maximum penalty is 12 months imprisonment and/or a fine of 50 penalty units ($5500). The maximum fine is 20 penalty units ($2200) where the value does not exceed $2000: s 28 and Table 2, Schedule 1.

78 If an offence is dealt with summarily, the maximum penalty is two years imprisonment

5.6 Party rules in New South Wales

The rules between political parties exhibit significant differences, reflecting the contrasting origins, values and policies of the parties. An awareness of party rules, particularly requirements for branch membership and participation in the pre-selection process, is important to understanding the commission of electoral offences. The standards observed by the parties can be illustrated by a review of selected rules of the New South Wales branches of the ALP, the Liberal Party and the National Party.[79]

5.6.1 Branch membership

Labor Party

Branch members and those wanting to join the branch must live within the state electorate: rule I.6(a). Proof of residency for citizens is taken from the Commonwealth Electoral Roll, unless there is 'overwhelming evidence' to the contrary. Non-citizens must produce a passport or other documentary proof of nationality, along with proof of residence.

Branch members must attend an ordinary meeting within four calendar months of applying for membership of the branch, otherwise membership will lapse: rule A.19(d).

When the number of new applications for membership at any one branch is five or more per month, including transferrals, such applications must be referred to the General Secretary: rule A.20(a). A six month deferral applies if there are up to 20 applications at an ordinary branch meeting, and a 12 month deferral applies to 20 or more applications: rule A.20(c). The purpose of these restrictions, according to rule A.20(e), is to 'monitor recruitment into the Party' and presumably to hinder branch-stacking.

Liberal Party

The number of branches to which a member can belong is limited to one 'Ordinary Branch', and/or one 'Young Liberal Branch', and/or one or more 'Special Branches': cl 2.4.2.[80] However, a person who is a member of more than one branch may only hold membership rights in one of those branches: cl 3.3.1.

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and/or a fine of 100 penalty units ($11,000): s 27 and Table 1 of Schedule 1 to the *Criminal Procedure Act 1986*.

79 Australian Labor Party (NSW Branch), *Policy and Rules*, 1999-2000 (no publisher); Liberal Party of Australia (NSW Division), *Constitution of the Liberal Party of Australia, New South Wales Division*, as adopted by the State Council on 22 July 2000 (no publisher); National Party of Australia - NSW, *Constitution & Rules*, revised June 2000, reprint of January 2001, AnyCopy, Crows Nest.

80 Under cl 1.2.1, a 'Special Branch' is defined as a branch based upon community, cultural, occupational or other interests rather than geographical area. An 'Ordinary Branch' is any branch of the NSW Division other than a 'Special Branch' or a 'Young Liberal Branch'.

Residency restrictions apply in New South Wales, to the extent that a branch member does not hold membership rights unless the branch is in the State electorate where the member's principal place of residence is located or in an adjoining State electorate: cl 3.2.4.

The membership fee of an applicant or renewing member must be paid personally or by their spouse or parents, but no other person may pay it: cl 2.3.2. This requirement appears to be aimed at preventing the practice of 'buying' recruits by paying for their memberships.

National Party

A person may be a dual member of the National Party and the Young National Party: rule 2.6.1. However, no other person (with the exception of the members of Metropolitan Branch) may be a member of more than one branch at a time: rule 4.2.3. Young Nationals are classified as Limited Members and have limited voting, delegate and office-holding entitlements: rule 2.1.3.

No explicit residency requirement is stated in the New South Wales Constitution and Rules but branch enrolment is formalised by the General Secretary allocating the applicant to their local or nominated branch: rule 2.1.5.

5.6.2 Selection ballots

Labor Party

To be eligible for selection and endorsement, a candidate must, among other requirements, be a party member for at least 12 months prior to the call for nominations (rule N.11(a)) and be nominated in writing by at least five party members. The nominators must be 'paid-up' members for at least 12 months and live in the electorate at the time of nomination: rule N.11(b).

In order to vote in a selection ballot, a branch member must also live in the electorate and appear on the most recent Commonwealth or State roll for the electorate: rule N.17(a).

Furthermore, rule N.17(c) requires participants in the plebiscite to have accrued branch membership:

- for a period of not less than two years prior to the date of calling for nominations where the member has attended four meetings during that time; or
- for a period of not less than four years, where the member attends one meeting in each of those four years.

The ordinary procedure for selection ballots may be suspended if the Administrative Committee, in consultation with the parliamentary leadership and the local Electorate Council, decide to hold a ballot pursuant to rule N.40. This could occur in the context of a by-election, during a campaign, or in 'other urgent situations'. Rule N.40 enables the candidate to be selected 'by a Committee made up of equal numbers from the Administrative Committee, and where practicable, the Local Electorate Council.' A dispute

over the use of rule N.40 was adjudicated in *Sullivan v Della Bosca* [1999] NSWSC 136: the case is discussed on p 39.

Liberal Party

A member may seek endorsement as the Liberal candidate for election to office in Federal, State or local government if he or she has continuously been a financial member of the Liberal Party for at least six months immediately preceding the close of nominations, unless the State Executive determines there are exceptional circumstances justifying the waiving of this requirement: cl 12.2.1.

The selection of Liberal Party candidates is determined by a Selection Committee, the composition and size of which is governed by clauses 22.1.2 and 22.1.3 of the Constitution. The Committee has a central component and a local component. The members of the central component include the President of the New South Wales Division (or the President's nominee), the Parliamentary Leader (or nominee) of State or Federal Parliament depending on the electorate in question, and members of the State Executive. The local component of the Selection Committee consists of members of branches allocated to the relevant 'State Electorate Conference' or 'Federal Electorate Conference': cll 21.5.9, 22.1.2. Branch members may vote for their branch's participants on the Select Committee, if the branch president, vice-president, secretary and treasurer are insufficient to fill the number of positions to which the branch is entitled: cl 21.5.9(4).

A member of the Selection Committee must have been a branch member for a continuous period of not less than six months prior to the date of the meeting of the Committee: Appendix 6. The pre-selection vote is by secret ballot.

National Party

Prospective candidates must normally have been members of the party for at least 12 months immediately prior to submitting their name for nomination: rule 12.1.3.

Rule 12.1.1 states: 'Within their electorate area, at an appropriate time before a parliamentary election, Federal and State Electorate Councils may call for nominations for prospective candidates for Party endorsement from all Branches of more than six months' standing…' Apart from this reference to the electorate area, there is no explicit residency requirement for candidates.
The selection of candidates is made by the Electorate Councils. The members of Electorate Councils include: the Chairman of each branch and elected delegates from branches in (or partly in) the electorate; a National Party Member of Parliament for the electorate; National Party members of the Senate or New South Wales Legislative Council who are enrolled in the electorate as voters in parliamentary elections; one delegate (18 years or older) from each Young National branch in the electorate; the Chairman and a delegate from the Associated Electorate Councils (i.e. Federal or State Electorate Councils that have some area of their electorate in common with the electorate under consideration) and others: rule 5.1.1.

The Electorate Council votes on candidates by secret preferential ballot and reports the result of the ballot and the determination to the Central Council:[81] rule 12.2.8(d). The Central Council shall endorse or refuse to endorse a candidate: rules 12.3.1; 12.4.4.

6. REGULATING POLITICAL PARTIES

6.1 The legal status of political parties and party rules

Political parties in Australia have traditionally been self-regulating, voluntary organisations. Legislation dictates some basic criteria, such as requirements for registration of a party,[82] but registration itself is not compulsory. There are no procedural standards to cover such areas as the selection of candidates and resolution of disputes. The low profile of political parties at law has been summarised by electoral analyst Antony Green as follows:

> Until 1977 there was no mention of parties in the Australian Constitution. Until 1984 there was no recognition of political parties in the Electoral Act and no mention of them on ballot papers. Even today, parties are recognised in law for only three purposes. First, to register party names for ballot papers. Second, to allow party secretaries to nominate candidates in bulk without having to gather nomination signatures. Third, for a system of public funding and donation and expenditure disclosure.[83]

Historically, Australian political parties have expected their members to demonstrate loyalty and confine expressions of discontent to within the party. For example, the National Conference of the Australian Labor Party in 1955 resolved:

> …that as a general principle it [the Conference] cannot concede the right of any member of the Party to initiate legal proceedings for the purpose of establishing the constitutional behaviour of the Labor Movement. … We insist we must continue to create our own procedures, taking care of our own business without the introduction of lawyers and law courts.[84]

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81 The members of the Central Council include: the Chairman and one other delegate from each Federal Electorate Council; the Chairman from each State Electorate Council and the Metropolitan Branch; the Leader and two other delegates (or substitutes) from the party members of the House of Representatives and Legislative Council of New South Wales; all party Senators from New South Wales; the Chairman and immediate past Chairman of the party; up to 10 other members of the party with special qualifications or knowledge, chosen by the Council and so on: rule 7.1.1.

82 In New South Wales the *Parliamentary Electorates and Elections Act 1912* imposes prerequisites for registration. For example, a party must have 750 members who are electors and must lodge the constitution of the party: s 66D.

83 A Green, n 3. In New South Wales, the *Election Funding Act 1981* governs campaign funding.

84 Australian Labor Party (National ALP), *The Constitution and Rules of the Australian Labor Party*, as adopted at the 42nd National Conference, Hobart, 31 July - 3 August 2000, 'E: Register Of Conference Decisions'. Obtained from the ALP website at <http://www.alp.org.au/about/rules>

In 1979, the National Conference resolved:

> …that the procedures of the Party at State and national level provide adequate opportunity for people who are dissatisfied to seek redress of grievance and…to refrain from making comment outside the Party.[85]

The 1955 and 1979 resolutions remain in force according to the current Federal Labor Party Constitution.[86] Similar sentiments are also found in the 'Policy and Rules 1999-2000' of the New South Wales branch of the ALP, at rule C.1:

> It is intended that these Rules and everything done in connection with them…and any agreement or business entered into, or payment made by or under the Rules, will not bring about any legal relationship, rights, duties or outcome of any kind, or be enforceable by law, or be the subject of legal proceedings. Instead all arrangements, agreements and business are only binding in honour. [Emphasis added]

Rule C.1 indicates clear opposition to members taking legal action or courts having jurisdiction over disputes. In early 1999, the Supreme Court of New South Wales considered this rule in the context of a challenge to a Labor Party pre-selection which was conducted by a committee ballot rather than the usual plebiscite of branch members: *Sullivan v Della Bosca* [1999] NSWSC 136.[87] Windeyer J (sitting alone) took rule C.1 into account in rejecting the claim that the pre-selection was void (at para 28):

> I consider also that Rule C.1 gives added reason to exercise the discretion to refuse to make a declaration in proper circumstances. It is proper to consider whether Mr. Sullivan, a person bound by the rules, should obtain a declaration in proceedings which on their face are contrary to the rules, giving rise only to a Phyrric victory.

Later in 1999, the South Australian Supreme Court determined a dispute over party rules in favour of an aggrieved candidate: *Clarke v Australian Labor Party* (1999) 74 SASR 109 and *Clarke v Australian Labor Party* [1999] SASC 415[88] - see discussion below at 6.2.2 on p 40. Although it can be expected that the New South Wales Supreme Court would have regard to the approach of another Supreme Court, the *Clarke* cases involve the interpretation of the South Australian ALP rules, which do not contain any statement

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85 Ibid.

86 Ibid.

87 *Sullivan v Della Bosca* was heard on 19 February 1999 and judgment was delivered on 3 March 1999. The case is analysed in more detail on pp 39-40.

88 *Clarke v Australian Labor Party* (1999) 74 SASR 109 was heard on 18-19 August 1999 and judgment was handed down on 2 September. *Clarke v Australian Labor Party* [1999] SASC 415 was heard on 20-21 September 1999, with judgment on 24 September.

purporting to exclude legal consequences.[89]

There is no reference in the constitutions of the New South Wales branches of the Liberal Party and the National Party to the intended legal status of their rules.

6.2 Judicial determination of party conduct

6.2.1 Case law prior to *Clarke v Australian Labor Party*

Until recently, courts of law were reluctant to intervene in disputes within a political party unless the party was incorporated. It is relatively rare for a political party to be incorporated; all divisions of the four major parties are unincorporated, except for the Liberals in Western Australia, National Party in Western Australia and South Australia, and the Democrats in New South Wales and Queensland.[90] Incorporation enables the party rules to assume the status of a contract, allowing the courts to adjudicate disputes.

Cameron v Hogan

The High Court case of *Cameron v Hogan* (1934) 51 CLR 358 is the leading authority for the proposition that political parties, as voluntary associations, are not within the jurisdiction of a court. Hogan was a former Victorian Premier whose endorsement as a Labor candidate was withdrawn and who was expelled by the Central Executive of the Victorian ALP. He sought an injunction in the Supreme Court of Victoria to restrain the Central Executive from carrying out the expulsion. The Court held that the members of a voluntary association did not have any civil right of a proprietary nature and that the rules did not amount to an enforceable contract unless there was a positive indication that the members intended to create legal relations: Rich, Dixon, Evatt and McTiernan JJ in a joint judgment at 370-371; Stark J in a separate judgment at 384.

Baldwin v Everingham

Baldwin v Everingham [1993] 1 Qd R 10 concerned a dispute between the Queensland Liberal Party and Baldwin, whose application for endorsement as a Liberal candidate for the Federal seat of Moreton was rejected by the State Executive. Baldwin claimed that the conduct of the endorsement procedure had breached the party constitution and sought a declaration that the endorsement procedure was therefore void. The Supreme Court of Queensland (Dowsett J) held that the constitution of the party did not have contractual effect and, following *Cameron v Hogan*, that there was insufficient proprietary interest in the property of the party to justify judicial intervention.

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89 Leesa Vlahos, Assistant State Secretary of the South Australian branch of the ALP, personal communication, 7 February 2001. The South Australian ALP rules were being re-indexed at the time of the author's inquiry and were not available for perusal.

90 G Johns, 'Political Parties: From Private to Public' (1999) 37(2) *Journal of Commonwealth and Comparative Politics* 89 at 98.

However, Dowsett J proceeded to find that the registration of the Liberal Party under the *Commonwealth Electoral Act 1918* gave it 'official status in the electoral process': at 15. Dowsett J concluded (at 20):

> …disputes concerning the rules of political parties registered under the *Commonwealth Electoral Act* are now also justiciable. This conclusion differs from the conclusion in *Cameron v Hogan* not because changing policy considerations dictate a different result, but rather because the Commonwealth Parliament, in conferring legislative recognition upon political parties has taken them beyond the ambit of mere voluntary associations.

Sullivan v Della Bosca

The defendant in *Sullivan v Della Bosca* [1999] NSWSC 136, the Secretary of the New South Wales branch of the ALP, did not query the court's jurisdiction to hear the complaint. The plaintiff was the elected Labor Member for the State seat of Wollongong. As part of a deal between the factions in the ALP, he was not supported by party officials as the Labor candidate for Wollongong to contest the upcoming State election on 27 March 1999. The Administrative Committee of the New South Wales ALP decided on 20 November 1998 to use the power under rule N.40 to determine the pre-selection ballot by a committee of delegates, rather than the usual plebiscite of all eligible branch members in the electorate. Rule N.40 is outlined under '5.6 Party rules in New South Wales' at p 35. The pre-selection was held on 4 and 5 December 1998, between Gerry Sullivan and Col Markham, the Member for Keira at that time. The delegates endorsed Markham by 58 to 17 votes.

Sullivan applied to the Supreme Court of New South Wales for a declaration that the pre-selection ballot was void and an order for a fresh ballot. Sullivan challenged the pre-selection on two grounds. Firstly, he argued that the conditions for a ballot pursuant to rule N.40 had not been met. In relation to this ground, Sullivan contended that there had been no consultation with the local electorate council. Windeyer J found that consultation could not have occurred because at 20 November 1998 a State Electorate Council did not exist in the Wollongong electorate, being in abeyance due to problems concerning membership qualifications. In the absence of an Electorate Council, rule D.4(e) provided that the Administrative Committee was in charge of all matters relating to the selection of parliamentary candidates.

Sullivan further submitted that the decision to conduct an N.40 ballot was invalid because there was no evidence of the requirements of either N.40(c) or (d) being met. These subsections respectively permit the use of the rule 'while the Party is on a campaign footing', or in 'other urgent situations'. Windeyer J rejected this argument, finding there was evidence of consultation by the Administrative Committee with the parliamentary leadership,[91] whereas no evidence was adduced by the plaintiff to show that the circumstances elaborated in either N.40(c) or (d) did not exist.

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91 Rule N.40 states that 'the Administrative Committee can, in consultation with the Parliamentary Leadership and the local Electorate Council, decide to hold a ballot under the provisions of this rule…' [Emphasis added]

The second ground on which Sullivan challenged the pre-selection was that objections made by party members to the number of delegates from certain branches for the 'reformation meeting' of the Wollongong State Electoral Council were not considered by the Credentials Committee of the ALP prior to the pre-selection ballot taking place, as required by rule A.37(c). Rule A.37 outlines the procedure when a branch member wishes to question the list of voters prepared for a branch or Electorate Council ballot. It is unnecessary to explore the court's interpretation of rule A.37 for present purposes. Windeyer J concluded on this point that the number of disputed delegates was not sufficient to affect the result of the ballot, given the large majority of 58 to 17 votes.

Windeyer J declined to make a declaration that the pre-selection ballot was void, reasoning (at para 28): 'I consider it clear there would be no utility in it as a new vote would not assist the plaintiff.' In exercising his discretion to refuse to make a declaration, Windeyer J referred to rule C.1, which declares that the ALP rules are not intended to have legal status: see the discussion of rule C.1 on pp 37-38.

6.2.2 *Clarke v Australian Labor Party* - a turning point?

Clarke, a Member of the House of Assembly in South Australia, was a member of the Enfield sub-branch of the South Australian branch of the Labor party. He had declared his intention to stand for pre-selection as the ALP candidate for the state electoral district of Enfield. The South Australian branch of the ALP was an unincorporated, voluntary association with its own constitution and rules. Its state structure included an Annual Convention, a State Council, a State Executive and sub-branches. Additional to the Annual Convention, Special Conventions could be called by a resolution of the State Council or State Executive.

In February 1999, the South Australian branch purported to admit 2000 new members. Before that, the total membership was about 3500. Clarke initially made complaints within the party about the eligibility of the new members. He wrote to the State Secretary and the party returning officer of the South Australian branch, asserting that sub-branches of the party had been stacked, membership fees were not paid by the members, and some of them did not join knowingly. According to Clarke, factional interests were attempting to gain strategic advantage by having delegates elected from sub-branches to the State Convention and State Council. The party returning officer accepted that the new memberships were valid and that the members were entitled to vote. The State Executive, concerned that the new members had not been admitted according to party rules, proposed to eliminate the existing criteria and instead simply require a completed membership form to be lodged at head office with the prescribed fee. Furthermore, membership would commence on the day that head office recorded it to have commenced.

Clarke instituted proceedings in the Supreme Court of South Australia on 20 July 1999. He claimed that the 2000 new memberships were invalid and that the party's attempt to amend membership rules, with retrospective effect, was against the party's constitution. The Supreme Court of South Australia (Mullighan J) held that the dispute between the State ALP branch and Clarke was justiciable because registered political parties have statutory

recognition under the electoral legislation, placing them in a different position to voluntary clubs: *Clarke v Australian Labor Party* (1999) 74 SASR 109 at 139.

Interpreting the rules, Mullighan J found that the requirements for membership were mandatory: at 143. The party constitution and rules made membership of the South Australian ALP contingent upon obtaining membership of a sub-branch. The new members had not been nominated and accepted at a general meeting of a sub-branch and were therefore not valid members of the South Australian branch: at 144. Mullighan J also found that the proposed amendments to the membership rules were unconstitutional as they would give retrospective operation to the entitlement to vote, and there was no provision in the constitution and rules permitting amendments with retrospective effect: at 149.

In further proceedings, Clarke sought an interlocutory injunction to restrain the ALP, firstly, from holding a Special Convention on 16 October 1999 for the purpose of considering the pre-selection of parliamentary candidates and, secondly, from proceeding until after an election of delegates had been held in accordance with the party constitution and rules: *Clarke v Australian Labor Party* [1999] SASC 415. The Supreme Court of South Australia (Lander J) found that a convention to consider the pre-selection of parliamentary candidates would breach the party rules because the delegates had not been determined as at the end of the financial year in which the convention took place, that is, at 30 June 1999: para 222. The rules were meant to ensure that pre-selection conventions reflected the current membership of the party including trade union affiliate membership and sub-branch membership. Instead, the proposed convention would be constituted by delegates determined as at 30 June 1997. The apparent intention of the party administration in allowing the delegates appointed in 1997 to remain was to exclude from delegate selection the 2000 members who were disputed in the first Clarke case.[92] Lander J concluded that the convention called for 16 October 1999 was not entitled to consider the pre-selection of parliamentary candidates: para 223.

6.2.3 Implications of *Clarke v ALP* for political parties

The impact of the *Clarke* cases upon the ALP was expressed in the following terms by Gary Johns, a Federal Minister in the Keating Labor Government:

> The exposure to public scrutiny of the SA Labor Party administration may have a salutary affect on the poor behaviour shown by the Party officers and may lead to a more transparent competition for recruitment. More far-reaching, however, is the response of the ALP National Secretary in alerting the Disputes Tribunal in each state branch that they will have to consider issues on the merits and according to the rules or else be liable to the scrutiny of the courts.[93]

Beyond the ALP, the result in *Clarke* suggests that the courts can adjudicate complaints

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92 G Johns, 'Clarke v Australian Labor Party' (2000) 35(1) *Australian Journal of Political Science* 137 at 139-140.

93 Ibid, p 140.

arising from the interpretation of party rules, especially if the organisation has failed to take action internally or the aggrieved member is dissatisfied with the handling of the matter. Disputes relating to pre-selections would appear to be a prime source of such grievances because the process is not as open to external examination as a general election. Some politicians and party members even welcome judicial review as a more impartial forum and as a catalyst for higher ethical standards within parties. Professor Colin Hughes, a past Australian Electoral Commissioner, advocates that the role of the courts should be recognised in the electoral legislation. Accordingly, the statutory requirement for registered parties to lodge their rules would be amended to clarify that departure from the rules will enable an application to be made to the courts to determine whether there is a deficiency.[94]

An increasing consciousness by politicians and party officials of the prospect of litigation was evident throughout 2000. Disgruntled party members seemed more likely to seek legal advice before deciding how to proceed, while party administrators considered strategies to minimise the prospect of members resorting to the courts.

The fear of legal action apparently contributed to the manner in which the ALP National Executive dealt with a dispute in December 2000 over pre-selection for the Federal seat of Robertson, on the Central Coast of New South Wales. Trish Moran defeated Belinda Neal in the ballot on 18 November 2000. Neal, the wife of the Hon John Della Bosca MLC, Special Minister of State in the New South Wales Government, appealed that the vote breached party rules and requested a new ballot. The 21 members of the ALP National Executive met on 18 December 2000 to resolve the disagreement. The meeting reportedly involved a 'discussion about legal implications and a promise by [Neal] that she would not go to court.'[95] The Opposition Leader, Kim Beazley, moved a resolution to invoke the National Executive's power to directly choose the candidate and the motion was carried 15-6. In a secret ballot, the National Executive voted 14-7 in favour of Moran.[96]

6.3 Regulation to what extent?

There seems to be substantial support for a degree of external regulation of political parties.[97] The rationale for this viewpoint is usually that politicians occupy public office and

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94 C Hughes, Submission to the Joint Standing Committee on Electoral Matters, Inquiry into the integrity of the electoral roll, 12 October 2000, p 3.

95 M Grattan, 'Beazley's game is not yet over', *Sydney Morning Herald*, 19 December 2000, p 2.

96 Recently, two candidates for ALP pre-selection initiated legal action against the party in the Supreme Court of New South Wales. On 23 March 2001, the ALP Administrative Committee used its powers to 'install' Jenny Bronfield as the candidate for the Federal seat of Cowper. Joy Mathews and Paul Sekfy, the unsuccessful candidates, claimed that the selection of Bronfield contravened party rules because she was a member for less than 12 months. However, the plaintiffs decided not to proceed and on 27 April 2001 Justice Austin dismissed the case by consent.

97 Speakers at the 'Good Governance: Fair Elections and Ethical Parties' conference at Monash University, Melbourne, on 23 February 2001 who approved of greater regulation of political parties included Bob Hogg from the ALP and Senator Lyn Allison from the

receive the benefit of public funding for their campaigns. Assuming that parties are no longer totally self-regulating, the question must be asked whether external supervision should only occur in the context of interpreting existing party rules in the event of a dispute. This in turn raises the issue of the inconsistency of the rules between various political parties. It can be argued that the ALP's stringent requirements for branch membership and its use of plebiscites in pre-selections, makes it more vulnerable than other parties to legal disputes and court intervention. This seems to be a logical projection, given that the evidence submitted to the Shepherdson inquiry of electoral misconduct by members of the Queensland ALP mainly involved false enrolments to evade the party's residency rules. It would be an ironic consequence if greater external regulation and intervention prompted the ALP to weaken its rules. However, there is no indication at present that the party proposes taking such a path.

One response to the inconsistency between different parties' rules is to introduce statutory guidelines. On the positive side, guidelines could facilitate the observance of minimum standards, similar to the way in which the Commonwealth *Corporations Law* provides a framework for the operation of companies, without dictating their specific affairs.[98] However, the imposition of even basic standards could be perceived as intrusive and undemocratic. Attempting to create uniformity between the rules of parties to any degree may be at odds with the highly distinctive history of each party. Opponents of regulation have suggested alternative methods of raising party awareness of ethics, such as by stronger codes of conduct.[99] Gary Johns asserts that external control will only compound the public's lack of trust in political parties. Rather, '[p]arty rules can be made adequate if there is a decent scrutiny and appeal process within the party. Further, recourse to the courts, although expensive, is available.'[100]

7. OPTIONS FOR REFORM

Reforms may be considered in two respects. Firstly, improvements to the electoral system, which are external to the workings of political parties, aim to make the electoral roll and the voting process more resistant to manipulation. Secondly, internal party procedures can be revised to facilitate fairness and reduce the impetus for corruption. This entails the implementation of changes by the parties themselves but may also be accompanied by regulation or supervision of the parties' operations by government authorities such as the

Australian Democrats (Victorian branch), during a panel session entitled 'The Party View'.

98 Dr Ken Coghill and Senator Lyn Allison were two of the speakers at the 'Good Governance: Fair Elections and Ethical Parties' conference who supported regulatory standards and drew comparisons with the *Corporations Law*. That statutory regime covers such matters as bodies corporate, shareholders' meetings and the duties of directors.

99 Dr Peter Poggioli, representing the Victorian branch of the Liberal Party at the 'Good Governance: Fair Elections and Ethical Parties' conference promoted this approach in 'The Party View' session.

100 G Johns, 'Parties, Probity and Preselection', paper presented at the 'Good Governance: Fair Elections and Ethical Parties' conference, Monash University, Melbourne, 23 February 2001, p 2.

Australian Electoral Commission.

7.1 Reform of the electoral system

7.1.1 Early closure of the electoral roll

Section 155 of the *Commonwealth Electoral Act 1918* (Cth) provides that the roll shall close seven days after the writ for an election has been issued. This practice was introduced by amendment in 1983. Previously, the roll closed on the day the writ was issued. There is some support for returning to the pre-1983 time frame, to alleviate the difficulty of adequately checking the late rush of applications for enrolment or change of address that traditionally occur after an election is called.[101] Those wishing to exploit the electoral system may be more likely to lodge false enrolments at this busy time, hoping to reduce the prospect of being detected.[102]

A disadvantage with early closure of the roll is that a significant number of people would be deprived of the opportunity to enrol to vote, particularly as the announcement of an election motivates many people to enrol or change their enrolment. Consequently, the roll would be less accurate if voters did not have ample time to act, although this could be alleviated by giving advance notice of the issue of the writ. It can also be argued that instead of closing the roll early, more resources should be provided to efficiently deal with the surge of late applications. However, this depends on sufficient funding. The Australian Electoral Commission is a prominent opponent to early closure of the roll.[103]

7.1.2 Preparation of a new electoral roll

A new electoral roll may be compiled pursuant to s 85 of the *Commonwealth Electoral Act 1918* (Cth). Complete re-enrolment of Australian voters would be a huge logistical task and entail major expense. Benefits of re-enrolment include greater accuracy and public confidence in the roll's integrity. However, such an undertaking could cause inconvenience and confusion for many electors and may be difficult to justify if other strategies, particularly continuous roll updating [see 7.1.4 on p 46], are successfully implemented.[104]

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101 For example, in the week from the issue of the writ for the 1998 Federal election on 31 August 1998 to the close of the roll on 7 September 1998, the Australian Electoral Commission processed 351,913 enrolment forms, including new enrolments and changes to existing enrolments: Australian Electoral Commission, *Annual Report 1998-99*, p 20.

102 The three non-Labor members of the six member Legal, Constitutional and Administrative Review Committee of the Queensland Legislative Assembly supported the early closure of the electoral roll: interim report, n 37, p VII. Note, however, that the Chairman, a Labor MLA, held the casting vote.

103 Australian Electoral Commission, n 4, p 53.

104 Professor Colin Hughes, former Australian Electoral Commissioner, suggested to the Commonwealth Parliament's Joint Standing Committee on Electoral Matters that revision of the roll for the Federal seat of Herbert in far north Queensland be conducted as a pilot project if the Committee found substantial corruption of the electoral roll: Hughes, n 97, pp 5-6. The non-government members of the Queensland Legislative Assembly's Legal,

7.1.3 Proof of identity

The current joint Australian Electoral Commission/New South Wales State Electoral Office enrolment form does not require identification to be provided, except for the citizenship certificate number allocated to naturalised Australian citizens.[105] Higher standards of identification could be implemented when electors first enrol and/or before they are issued with ballot papers. There are numerous types of identification and methods of screening to consider, including:

- photographic identification;
- signature comparison between an elector's signature at enrolment and the signature produced when the elector signs the ballot paper;
- a points system, whereby an applicant for enrolment must produce several kinds of identification totalling a certain number of points;
- personal attendance at an interview, similar to the process for obtaining a passport;
- the Australian Electoral Commission acknowledgment card as a compulsory prerequisite for Australian citizens applying for an 'over 18' proof of age card.[106]

In favour of stricter identification procedures, it can be argued that identification is a basic criterion for many common transactions in contemporary society, such as opening a bank account, and therefore it is justified for the important act of voting. Furthermore, the accuracy of the roll and public confidence in the integrity of the electoral process could be facilitated. The greater formality involved would not necessarily be regarded as a nuisance by voters; rather, it might foster a sense of security, status or even privilege.

Against the proposal, it must be acknowledged that it would be expensive and time-consuming to implement consistently across Australia, especially in the absence of a singular form of national identification. Logistical and cost factors would be magnified if photographic identification was required. Checking identification could cause delays on polling day and would not necessarily uncover fraudulence. Any program of signature-matching needs periodic updating to accommodate the changes that usually occur in a person's signature over time. Providing suitable identification may be difficult, expensive, or inconvenient for people who do not readily possess it. Particular problems could be experienced by young people, low income earners, people living in isolated areas, and members of indigenous communities. Some eligible voters might be discouraged from enrolling and thereby unintentionally disenfranchised.[107]

Constitutional and Administrative Review Committee went further, recommending that a pilot program be undertaken for the whole of Queensland: n 37, p VIII.

105 The form is to be used both to apply for enrolment and to notify change of information.

106 The Australian Electoral Commission supports the latter proposal: n 4, p 77.

107 Arguments for and against proof of identity were derived from the interim report of the Legal, Constitutional and Administrative Review Committee, n 37, pp 64-65. The Committee itself declined to express a conclusion, although the non-Labor members, in their dissenting report, recommended that identification be produced by persons wishing to enrol for the first time and by voters at polling booths: pp VI-VII.

The evidence at the Shepherdson inquiry suggested that requiring comprehensive proof of identity when initially enrolling would have made little impact on the electoral misconduct under consideration. This was because false information was supplied at the stage when enrolment details were changed in anticipation of upcoming plebiscites. Counsel assisting the inquiry, Russell Hanson QC, concluded that stricter proof of residency when changing enrolment details would reduce the opportunities for people to engage in corruption. He acknowledged, however, that stronger criteria could result in the disenfranchisement of some voters and the concept needed to be carefully evaluated.[108]

7.1.4 Continuous roll updating, data-matching and data-mining

Continuous roll updating (CRU) refers to the active maintenance of the electoral roll through a variety of methods, including data-matching, data-mining and direct enrolment. The Australian Electoral Commission (AEC) has been in the process of implementing CRU nationally since March 1999 and it is already used in other countries including Canada and New Zealand.[109]

The term 'data-mining' refers to research and analysis of the electoral roll with a view to detecting inaccuracies. For example, in 1997 the AEC established an address register which records attributes such as land use, occupancy status and whether the address is valid for enrolment. This reduces the likelihood that a person can apply for enrolment at a non-existent or non-residential address.[110]

Data-matching is the process of comparing the information on the electoral roll with that recorded in databases of government departments and related entities. In 1999, the AEC utilised change of address details from Australia Post to conduct a national mail-out to remind recipients to update their enrolments. From May 2000, the AEC sent similar notifications to Centrelink clients based on change of address information obtained from Centrelink. The data-matching program is also being extended to include a range of State agencies, most notably motor registries and residential tenancy authorities. Arrangements are negotiated with each body, either directly by the AEC or through the relevant State Electoral Commission.[111]

However, the exchange of information between organisations has privacy ramifications.

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108 Hanson, n 14, p 67.

109 Legal, Constitutional and Administrative Review Committee, n 37, pp 30-31.

110 Ibid, pp 83-84; AEC submission to the Joint Standing Committee on Electoral Matters, n 4, pp 48-49.

111 Information in this paragraph is from the AEC, n 4, p 46. There is also a specific requirement under s 108 of the *Commonwealth Electoral Act 1918* for the State Registrars-General of Births, Deaths and Marriages to forward to the Australian Electoral Officer in their State a list of all deaths recorded in the previous month, to ensure that deceased electors are removed from the roll: p 47.

Clear disclosure is important to forewarn individuals that when they provide information to certain agencies, it may be supplied to electoral authorities for roll maintenance purposes.[112]

Direct enrolment involves the AEC providing enrolment cards to eligible voters, such as new Australian citizens at citizenship ceremonies and students in their final year of high school. An extension of this activity is direct address change, whereby the address of a current elector is changed without the completion of an enrolment card if the AEC receives information from another agency of a change of address. The elector would then be advised by the AEC of their new enrolment details. This proposal is under consideration by the Electoral Council of Australia.[113]

7.1.5 Electoral fraud audit

Electoral officials could nominate a random, representative sample of enrolments for further investigation of their authenticity, for example, by visiting an elector's place of residence and seeking documentary identification. In addition, a sample of electors could be selected at the time of voting and their identities verified by electoral staff.
These exercises may give an indication of the degree of accuracy of the roll but if widespread errors were detected, other measures would need to be employed to 'cleanse' the roll.

7.1.6 Subdivisional or precinct voting

According to this concept, an elector must vote at one pre-designated location, usually the polling booth nearest to the elector's place of residence. The advantage with this proposal is that it reduces the prospect of multiple voting. However, it may be counter-argued that the end result would not justify the means, as multiple voting can be detected after an election.[114] Precinct voting can also undermine compliance with compulsory voting, cause inconvenience to voters, and delay the release of election results.[115]

7.1.7 Electronic voting

Technology can be harnessed to develop other ways of casting a vote than by filling in a

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112 In its interim report, the Legal, Constitutional and Administrative Review Committee expressed support in principle for data-matching, provided that public disclosure is made and that the information from Queensland databases is gathered as part of a separate state-based enrolment verification system. This would entail the Queensland Electoral Commission (or an agent) processing and centralising the information from different sources before forwarding it to the AEC for use in CRU activities: Legal, Constitutional and Administrative Review Committee, n 37, pp 79-80, 87, 92.

113 AEC, n 4, p 51.

114 Evidence of Queensland's Electoral Commissioner, Des O'Shea, referred to in the interim report of the Legal, Constitutional and Administrative Review Committee, n 37, p 67.

115 AEC, n 4, p 55.

ballot paper. Electronic options include voting by email and the internet or by using 'touch screens' at polling locations. These methods could increase the accessibility of voting and the speed and accuracy of checking data. However, computer networks are costly to implement and may pose a threat to confidentiality and security. The efficiency of such a system could also be severely hampered by breakdowns and other technical problems.

7.1.8 Increased penalties and longer time limits for prosecution

The penalties for electoral offences under the *Commonwealth Electoral Act 1918* (Cth) are significantly lower than for comparable offences under the *Crimes Act 1914* (Cth). A similar pattern is evident at the State level. It can be argued that increasing the penalties for electoral misconduct would facilitate deterrence. Penalties need not be confined to the currently available fines and terms of imprisonment. Rather, alternative punishments could be explored, particularly the principle of banning an offender from being on the electoral roll or voting for a specific period of time. This would symbolise the offender's exclusion from the democratic process that he or she has violated.

Increased penalties may also prompt a higher priority to be given to investigation and prosecution. According to the AEC, the Australian Federal Police rejected the majority of the suspected cases of multiple voting that were referred to it after the 1998 Federal election because the penalty was too low to justify allocating limited resources to investigating the allegations.[116] The records of the Australian Federal Police indicate that between July 1995 and February 2001, 145 cases of possible electoral breaches of a 'serious and complex' nature were referred to it by the AEC and that 69 were accepted for investigation. In the same period, 300 'lesser matters' were referred, only 80 of which were accepted.[117]

The limitation periods restricting the prosecution of offences under electoral legislation can also be regarded as too short. The pressures of loyalty and secrecy within political factions could well hinder an offence coming to light in less than 12 months of its commission, as required by the *Parliamentary Electorates and Elections Act 1912* (NSW) and the electoral section of the Queensland Criminal Code. Sufficient time must also be allowed for investigation and preparation of briefs of evidence. Counsel assisting the Shepherdson inquiry, Russell Hanson QC, submitted that the inquiry had been constrained in what prosecutions it could recommend because of the applicable time limits.[118]

However, perhaps it is unnecessary to focus too intently on the ambit of electoral offences and their penalties. The prospect of criminal charges may be sufficient to have serious consequences. For example, the Shepherdson inquiry will probably generate few, if any, criminal prosecutions, but the evidence that was given discredited numerous politicians,

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116 Ibid, p 55. The AEC has recommended increased penalties since 1988.

117 Oral evidence given by Federal Agent Gordon Williamson, Director of Technical Operations of the Australian Federal Police, to the Joint Standing Committee on Electoral Matters, n 58, 2 March 2001, EM 500-501.

118 Hanson, n 14, p 69.

caused several Members of Parliament to resign and compelled the Queensland ALP to examine its own practices.[119]

7.1.9 Penalty of disqualification for certain offences

Section 44(ii) of the Commonwealth Constitution disqualifies convicted persons from sitting in the Senate or House of Representatives only when they commit offences penalised under Commowealth or State law by imprisonment for one year or more. If penalties for serious electoral offences were increased to this length, the Constitutional disqualification could apply more broadly.[120]

The offences which currently attract disqualification under the electoral legislation of the States and Commonwealth could also be expanded. In Queensland, for example, s 176 of the *Electoral Act 1992* (Qld) disqualifies persons from sitting in the Legislative Assembly for three years upon conviction for: giving a document for the purposes of the Act that contains knowingly false, misleading or incomplete information (s 154); influencing, by violence or intimidation, the vote of a person (s 168); and casting or procuring a vote when not entitled (s 170). Support has been expressed by the Legal, Constitutional and Administrative Review Committee and the Queensland Constitutional Review Committee, for the broadening of the offences to which disqualification applies. The Queensland Constitutional Review Committee recommended that two additional offences, wilfully inserting a false or fictitious name on a roll (s 151) and forging or uttering an electoral paper (s 159) be included.[121]

Section 386 of the *Commonwealth Electoral Act* disqualifies electoral offenders from sitting as a member of either House of Parliament for two years but this is limited to the offences of bribery (s 326), undue influence (s 327), and hindrance of political rights under s 28 of the *Crimes Act* (Cth).

The absence of a specific disqualification provision under the New South Wales *Parliamentary Electorates and Elections Act* could be considered by the legislature. Presently, State Members of Parliament who commit electoral offences can be disqualified from parliamentary office under s 13A(1)(e) of the *Constitution Act 1902* (NSW) but that provision only applies upon conviction for an 'infamous crime' or an offence punishable by imprisonment for five years or more: see discussion on p 32.

7.2 Reform of party procedures

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119 The author owes this line of thought to Graeme Orr, lecturer in law at Griffith University, 'Dealing in Votes: Regulating Electoral Bribery', oral presentation at the 'Good Governance: Fair Elections and Ethical Parties' conference, Monash University, Melbourne, 23 February 2001.

120 Professor Colin Hughes advocates increasing the penalties for offences under ss 336 and 337 of the *Commowealth Electoral Act* for this purpose, n 97, p 7.

121 Quoted in the interim report of the Legal, Constitutional and Administrative Review Committee, n 37, p 58.

7.2.1 Conduct of pre-selections

The selection of candidates by political parties could be supervised by officers of the Australian Electoral Commission or appropriate State Electoral Commission. Supervision may have greatest significance for pre-selection plebiscites but could also be applied to selection committees. In January 2001, the Queensland Premier, Peter Beattie, called for the pre-selection process of each party in Queensland to be supervised by the Electoral Commission of Queensland (ECQ). This was part of a package of legislative changes that Premier Beattie announced he would seek to introduce in the future, including new rules on preference deals and tougher disclosure of political funding and donations.[122] However, concerns have been expressed that the supervision of pre-selections by the ECQ could result in the sole supervision of the ALP because it has the toughest requirements for voting in pre-selections. Some commentators even suggest that a simpler solution may be to change the ALP rules, to remove the incentive for electoral misconduct.[123]

Supervision of pre-selections by an independent, outside body could result in greater impartiality, accuracy, fairness and accountability. In turn, this would ideally enable the best candidate to be chosen on merit. Support for this proposal has been articulated from within and outside party politics.[124] It seems reasonable to anticipate that such a development would reduce the power of party factions to influence the outcome of a pre-selection. However, it can be objected that external supervision is an intrusion into the affairs of political parties and would erode their independent status. The Australian Electoral Commission has expressed the following doubts:

> AEC involvement in the preselection of candidates for elections conducted by the AEC could be seen as compromising political neutrality. It is also considered improbable that the major political parties, the Liberal Party and the ALP, would be amenable to external regulation of their preselection ballots. Further, for the AEC to take on such a responsibility would involve substantial establishment and ongoing costs that would have to be specially resourced.[125]

Another suggestion is to replace the ALP pre-selection plebiscite with a committee format.

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122 'Beattie reforms to rort routing', n 17.

123 Johns, n 103, p 2. Johns contends that part of Premier Beattie's motivation to involve the ECQ in pre-selections is to spread the shame of intervention across all parties. Johns questions this, given that 'no-one other than a member of the Australian Workers' Union faction of the ALP has been found to breach public law. A problem in one faction, in one party, which is itself a small component affecting its overall standing in the electorate, becomes every party's problem.' According to Johns, the reform package avoids tackling the power of the union factions: p 3.

124 Politicians, academics and other commentators who are receptive to supervised pre-selections include Federal Opposition Leader Kim Beazley: 'Beazley's game is not yet over', *Sydney Morning Herald*, 19 December 2000, p 2; Professor Colin Hughes, n 97, p 3.

125 AEC, n 4, p 59.

This would involve a panel, some of whom could be nominated by local branch members, assessing the contenders and determining the successful candidate.[126] The Liberal Party already uses such an arrangement through its Selection Committees; indeed, the ALP has similar bodies in some States: see n 1. Bitterly fought pre-selections in the Federal seats of Cook in 1998 and Wentworth in 2000, in which sitting Liberal MPs were ousted, demonstrate that lobbying and potential manipulation by factions still occurs towards panel members. The selection of candidates by a committee can also be viewed as less democratic than a direct vote by branch members.

7.2.2 'Primaries' for pre-selection?

Membership of political parties in Australia is small compared to the number of voters, due largely to the compulsory status of voting. As a result, pre-selection contests, whether conducted by plebiscite or selection panel, do not reflect the breadth of electoral support for a party in the community. Candidates are decided on a narrow and potentially corrupt basis. One alternative is to introduce a system of 'primaries'.[127] There are different versions of primaries, but the basic concept is that candidates volunteer themselves, obtain a specific number of nominations, then voters participate in choosing the successful candidate to proceed to a general election. Voting in primaries is not compulsory.

Primaries are more democratic than a party ballot, and mass involvement should remove much of the incentive for branch-stacking. A candidate must cultivate community approval at an earlier stage in the electoral process and on a personal basis that distinguishes them from other representatives of the same party. This may foster a greater sense of connection between politicians and their constituents. The major problem is that primaries are extremely expensive for candidates, at least if the model of primaries from the USA is followed. This creates a bias in favour of candidates from privileged backgrounds, makes candidates vulnerable to being influenced by wealthy donors, and focusses too much attention on fundraising rather than policy development. For primaries to be viable in the Australian context and an improvement on the present system, a means of capping costs must be devised. Public funding is one option to ensure fairer access by a broad range of potential candidates but would represent an added financial burden on the taxpayer. It would also be necessary to monitor the level of voter participation, to ensure that the ideal of greater public involvement in pre-selections occurs to a worthwhile extent.

7.2.3 Membership audit

Party memberships could be checked to confirm their authenticity and the currency and accuracy of details supplied. In particular, verification would seem justified when branch

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126 An advocate of this idea is Paul Reynolds of the University of Queensland, quoted by P Syvret in 'Rotten row', *The Bulletin*, 24 October 2000, p 31.

127 The information in this subsection is derived from K Coghill, 'Let the People Decide: Primaries for Preselections', paper presented at the 'Good Governance: Fair Elections and Ethical Parties' conference, Monash University, Melbourne, 23 February 2001. Additional comments made by Dr Coghill during his presentation and in response to questions have also been drawn upon. Dr Coghill expressed qualified support for the concept of primaries.

members who are not obviously related are reputedly living at the same address. In late 2000, Opposition Leader Kim Beazley ordered a 'national audit' of ALP membership.[128] Peter Beattie's projected reforms of the Queensland ALP include bi-annual 'internal audits' of party membership.[129]

Political parties are in a prime position to assist with monitoring the quality of the electoral roll. Applications for party membership that contain false details or are made without the knowledge of the applicant may reflect a corresponding attempt to manipulate the electoral roll. Party administrators could adopt a practice of conveying any inaccuracies discovered to the electoral authorities, and even formally contribute to the data-matching program: see 7.1.4 at p 46. However, it is doubtful whether party officials are sufficiently independent to conduct an internal audit. Ultimately, responsibility for the reliability of the roll rests with the non-partisan electoral authorities.

7.2.4 Review of rules

Parties have periodically reviewed their rules in recent years, often in response to ethical controversies which have tarnished their public reputation. For example, on 3 August 2000 the ALP National Conference agreed on new national membership rules to provide for the possible expulsion of members who sign membership forms or pay fees on behalf of others, or recruit people who do not live at their stated address. Each State and Territory branch has to amend its rules where necessary to comply with the national framework by 30 June 2001.[130]

Rules that could be further examined and tightened include those governing admission and continuation of membership, participation in pre-selections, and conditions for candidature. Another issue worthy of consideration is whether parties should formulate codes of ethics. These may be a means of confirming which practices are inappropriate and the standards of behaviour that are to be observed by members.

7.2.5 Dispute resolution

Dispute resolution is currently being reviewed within and outside the individual political parties. A variety of dispute mechanisms operate in different parties. For example, in New South Wales, ALP members can refer grievances to the Administrative Committee, the Credentials Committee or the Disputes Committee, depending on the nature of the matter: e.g. Section A, rules A.31-A.41. There is also a Review Tribunal which makes final

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128 'Sorting bad eggs in Kim's basket', *Daily Telegraph*, 12 January 2001, p 8. The ALP National Conference 2000 passed a resolution that the National Secretary 'shall investigate appropriate methods of address verification of membership and shall report to the National Executive no later than June 30 2001': n 85, 'Resolutions'.

129 'Beattie reforms to rout rorting', n 17.

130 National ALP, n 85, rule 16, 'Membership Recruitment'. Newspaper reports about the changes include 'Branch-stacking ban', *Daily Telegraph*, 4 August 2000, p 12, and 'Branch stacking is targeted in new membership rules', *Sydney Morning Herald*, 4 August 2000, p 6.

decisions on complaints referred to it and can only be overruled by the Annual Conference: Section J. The Liberal Party has a Disputes Panel, the functions and procedures of which are detailed in Part 17 of the constitution.

The ALP has been the most active party in 2000 and 2001 in evaluating this area. Kim Beazley has endorsed the concept of a national disputes body for the ALP, in order to transcend the factions and spare the National Executive from involvement in challenges to pre-selection results.[131] A new ALP disputes tribunal is also on the agenda at a State level in Queensland, as part of the reforms pledged by Premier Beattie in January 2001.[132]

The Australian Democrats recommend that the Australian Electoral Commission be empowered to investigate breaches of party constitutions and carry out dispute resolution, but not possess the powers of a court. If enacted, this function of the AEC would only be accessible after all internal avenues had been exhausted.[133] A broader proposal is the establishment of an electoral ombudsman, to independently investigate and assess complaints.[134] An ombudsman has served for decades as a 'watchdog' over Commonwealth and State government departments and, since the 1990s, over the banking, telecommunications and private health insurance industries. However, the current Australian Electoral Commissioner, Andrew Becker, recently expressed his opposition to an electoral ombudsman:

> Frankly, I think we have got enough policemen around the place. …We have the AFP, the DPP, the Ombudsman, ANAO, JSC, CJC - how many bodies of this nature do we want? Who is going to guard the guardian? How far do you go? I just think it is totally unnecessary.[135]

8. CONCLUSIONS

The most explicit protection against electoral misconduct is to be found under electoral legislation such as the *Commonwealth Electoral Act 1918* (Cth) and the *Parliamentary*

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131 Grattan, n 19, p 2. Beazley's views were reported in the context of the pre-selection dispute between Belinda Neal and Trish Moran over the Federal seat of Robertson in December 2000.

132 Gary Johns, who is in favour of the idea, has stated: 'The disputes tribunal should be selected by a super majority of the party. This means that consensus candidates are likely to emerge.' Johns, n 103, p 2.

133 Senator Lyn Allison, n 100, presenting the Democrats' program for electoral reform.

134 Supporters include Dr Amy McGrath, an author on electoral fraud, quoted by K Glancy, 'Exposing the Enemy Within' (2000) 2(2) *The Issue* 6 at 43. See also Dr McGrath's oral evidence to the Joint Standing Committee on Electoral Matters, n 58, 2 March 2001, EM 492-493. Bob Hogg, former National Secretary of the ALP, believes consideration should be given to the formation of an ethics commission, although its ambit would be broader than electoral misconduct. The rationale behind the concept is that politicians should not judge their colleagues on questions of ethics: Hogg, oral presentation, n 100.

135 Evidence to the Joint Standing Committee on Electoral Matters, n 58, 3 April 2001, EM 560.

Electorates and Elections Act 1912 (NSW). But even specific statutory offences are fettered by time limits for prosecution and the difficulty of classifying behaviour. The bribery and intimidation provisions, for example, use terms like 'benefit', 'valuable consideration' and 'undue influence' which favour tangible incentives and blatant conduct. In reality, the competitive, intense atmosphere of elections may blur the boundary between spirited campaigning and improper inducement. In some jurisdictions, notably New South Wales, it is doubtful whether a candidate who commits such basic misconduct as requesting an acquaintance to falsely enrol in the electorate for which the candidate is standing - without bribery, intimidation, or witnessing the false statement - is caught by the statutory regime.

The parliamentary committees that have examined electoral misconduct have not reached definite conclusions or have been accused of being compromised by their political nature. Commissions of inquiry are also limited in their capacity to investigate and refer matters of electoral misconduct for further action. The Independent Commission Against Corruption in New South Wales has the power to examine alleged corruption by public officials or by others affecting the functions of public officials. Electoral fraud conceivably falls within the ICAC's jurisdiction, but a perpetrator's actions must qualify as 'corrupt conduct' by constituting a criminal offence, a disciplinary offence, or in the case of a Member of Parliament, substantially breaching the code of conduct or bringing the integrity of Parliament into serious disrepute. Similarly, the investigative function of Queensland's Criminal Justice Commission is confined to 'official misconduct in units of public administration'. As Counsel assisting the Shepherdson inquiry reported, the inquiry's ability to determine 'official misconduct' was hampered by the lack of a disciplinary code for Members of Parliament in Queensland.[136] However, the impact of such bodies should not be underestimated. The publicity and debate generated by inquiries can cause political parties to reprimand their members and to strengthen their internal procedures.

The prospect of court action to settle disputes may also have a preventative effect upon breaching party rules. In 1999, *Clarke v ALP* confirmed that the unincorporated status of a party is not a barrier to the intervention of the courts. Adjudication of internal party business is most likely to occur in the context of determining whether rules for membership and pre-selections have been adhered to. This has clear implications for factional organisers or even party officials who attempt to evade, manipulate or unlawfully amend the rules with the intention of influencing membership numbers, ballots or the selection of candidates.

The shift away from the private, self-regulating status of political parties has increased their susceptibility to scrutiny and challenge. Disgruntled party members seem less willing for a dispute to be handled internally and more likely to seek legal advice. Public perception of a lack of openness, consultation and accountability in politics[137] creates added pressure on party hierarchies to lift their standards. Some commentators emphasise the need for parties

136 Hanson, n 14, pp 7-8.

137 Senator Lyn Allison, n 100, is among the politicians who concede that public disillusionment is presently at a high level. She began her oral presentation at the 'Good Governance: Fair Elections and Ethical Parties' conference by declaring, 'We are in the midst of a serious crisis of public confidence.'

to revive themselves from within, by identifying and resolving problems, improving dispute handling and devising codes of conduct. Other commentators support greater involvement by 'external' entities, such as a new disputes tribunal or electoral ombudsman, and the supervision of pre-selections and other party ballots by the Australian or State Electoral Commission. Prevention of electoral misconduct may also be facilitated by imposing heavier penalties and upgrading the accuracy and security of the electoral roll.