

Foreword

It is an honour to write a foreword for the second edition of Professor Orr's invaluable book *The Law of Politics: Elections, Parties and Money in Australia*.

In the book, Professor Orr has managed to fuse a readable explanation of the current state of electoral law in Australia, with an exploration of areas where the law could further improve the functioning of politics.

To me, as a political scientist with a career covering the mechanics of the electoral process, the book begins by asking and answering the obvious questions – who votes, who can you vote for, how you vote, the geography of voting and who administers and sits in judgment of the process. How did Australia reach this broad sunlit electoral upland?

In the Australian context, the above questions have produced relative agreement on a broad and independently administered franchise, an established but not closed party system, the independent drawing of electoral boundaries and the independent administration of elections. This is in contrast to our great and powerful friend across the Pacific, where who can vote, who draws boundaries and who runs the election, are all current and contested political questions.

Elections are a strange process where those with power, or striving for it, submit themselves to the judgment of those without power. It is a process that only makes sense to those raised in the western liberal tradition, as evinced by the reaction of Joseph Stalin at the 1945 Potsdam conference. It was beyond the imagination of a tyrant that Winston Churchill could be replaced as Prime Minister mid-conference by Clement Atlee: how could a leader be brought down by, or accept, the quiet free will of the governed?

Since the demise of 'divine right' as justification for the holding and exercise of power, elections have become the only legitimate mechanism by which those in power obtain the mandate to govern. So powerful is the election as a process that even totalitarian states resort to pale imitations of free elections to create a fig leaf of justification for their tyranny.

It also is common for ruling elites in emerging democracies to imitate the institutions of western liberalism while subverting them by other means. Yet even in imperfect democracies, the silent choices of individuals can bring down the powerful. Take, for example, the defeat in 2018 of Malaysian Prime Minister Najib Razak, despite his government's powerful influence over the electoral process and media.

The Hogarthian image of 18th century British politics, with a property franchise, open voting and the treating of voters, was quickly abandoned in 19th century Australia. It was replaced by the Chartist consensus of a broad franchise, no property qualification and the secret ballot. On top of those reforms came the acceptance of neutral electoral administration and, in the 20th century, the democratisation of upper houses and equal weighting for voters in the drawing of electoral boundaries. The addition of preferences and compulsion to voting in Australia were novel experiments that few other nations have followed.

Yet there are two words in the title of Professor Orr's book, 'Parties' and 'Money', where significant scope remains for the law to play a part in the furtherance of Australian democracy.

Despite their centrality to politics, political parties are only recognised in the Constitution of Australia through a 1977 amendment concerning Senate casual vacancies. The rest of the Constitution, and the shadowy Westminster principles that sometimes envelope it, pay little heed to the idea of political party.

In electoral law, parties were not registered nor their names printed on ballot papers at national elections until 1984. The legislation governing parties was limited to creating a minimal framework to allow the printing of party names and the payment of public funding. There was no attempt to extend electoral law into the internal operation of political parties.

As Professor Orr writes, in Chapter 6, there 'is neither a statutory nor a common law definition of political party membership'. For want of such detail, Pauline Hanson was first gaoled and then later released on a legalistic argument over the nature of contract law in relationship to membership. Since the Hanson case, most states have applied greater tests to proof of party membership. Under the *Commonwealth Electoral Act*, interest by the Australian Electoral Commission in the inner workings of parties remains minimal. While many think the law is defining a cicada, look closer and you will see there is only last year's husk.

For decades the courts treated political parties as essentially private entities, a principle that began to crumble once public funding existed. Even without public funding, the simple registration of parties has been enough to see the courts delve into a party's inner workings.

It is money that may yet lead to the further extension of electoral law into the governance of parties. Various corruption inquiries have exposed the impact of money on politics and government decision-making. Where current electoral law concentrates on the influence of money directly or indirectly on voters at elections, recent events have highlighted the impact of money on the broader conduct of politics between elections.

The demise of traditional media, the rise of the internet, and the willingness of countries to use money and the tools of modern information technology to interfere in Australia's internal politics raises further questions for electoral law.

Like all good legal texts, *The Law of Politics* works in two ways: as a linear exploration of the law surrounding elections and politics, and as a random-access reference to the relevant law and associated statutes and case law.

Either way, Professor Orr is to be commended for having updated and re-written so much of a book that was already so useful in its first edition.

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