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Resisting legal recognition and regulation: Australian parties as rational actors?

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For at least a century, political parties in the older democracies like Australia, Canada, New Zealand, the United Kingdom and the United States have been at the centre of politics. This centrality is not without its tensions, one of which is that political parties have never fitted neatly into the private/public dichotomy that has so long obsessed Western political and legal thought.¹ Initially, political parties were private associations and were unknown to the law. But, at the same time, they fulfilled very public purposes: organising the legislature and linking citizens and the state. Today, by contrast, political parties are legally recognised and, to varying degrees, regulated, supported and entrenched as quasi-state agencies—even though they retain some of the legal characteristics of private associations.² The unusual path parties have taken, transitioning from private organisations with

1 Jeff Weintraub and Krishan Kumar (1997) *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy*, Chicago: University of Chicago Press; Nathaniel Persily and Bruce E. Cain (2000) 'The Legal Status of Political Parties: A Reassessment of Competing Paradigms', *Columbia Law Review* 100(3): 775–812; Anika Gauja (2013) *Political Parties and Elections: Legislating for Representative Democracy*, Farnham: Ashgate, pp. 12–14.

2 Also see Gauja, Chapter 7, this volume.

public functions to 'a special type of public utility'³ with persistent private rights, raises questions about the role of parties in shaping their own destiny. These questions are especially salient because political parties themselves controlled the very legislatures that effected their transition from private to public.

In the context of Australian efforts to legally recognise political parties in the early 1970s, this chapter presents two competing models of the role that parties might have played in shaping their transition from private to public: one of deliberate, rational choice; and the other of a more bumbling, or 'muddling', character. The chapter explores these two models, focusing on two key areas: 1) the processes of research, learning and reasoning within political parties as they broached electoral innovations that would lead to their recognition or regulation; and 2) the motivations of political parties in promoting and opposing proposals that included legal recognition.

In 1974, the Australian Labor Party (ALP), led by Prime Minister Gough Whitlam, introduced two Bills that, if passed, would have legally recognised Australian political parties for the first time.⁴ The first, the Electoral Laws Amendment Bill 1974, would have created a register of political parties enabling the listing of party names on ballot papers next to their nominated candidates; the second, the Electoral (Disclosure of Funds) Bill 1974, would have regulated the finances of political parties without providing any recompense for the restrictions imposed on party fundraising practices. While the 1974 Bills never became law, the internal deliberations of political parties about them are revealing.

Utilising newly available and never before analysed archival documents, this chapter shows that partisan interests were central to the decisions eventually made by political parties regarding the printing of party affiliations on the ballot. However, those interests were not actively pursued on their discovery and, when serious efforts were made to advance those interests, the parties discovered that they were open to multiple, often contradictory, interpretations that evolved during the reform process.

3 Ingrid van Biezen (2008) 'State Intervention in Party Politics: The Public Funding and Regulation of Political Parties', *European Review* 16(3): 351.

4 Apart from the brief recognition of parties to assist military voting in World War I, under the *Commonwealth Electoral (War-Time) Act 1917*.

Electoral and financial interests in reform had been tentatively identified in both major Australian political parties—the ALP and the Liberal Party—in the 1950s, decades before any serious efforts were made to fully explore the implications of legislating for the printing of party affiliation on the ballot paper. Once moves were made towards legislating, the Liberal Party discovered its electoral and financial interests clashed and that both were subservient to the goals of control and autonomy. In the ALP, the advancement of party interests was displaced as the primary goal of reform by a desire to modernise Australian electoral law to be more like Canadian law.

Archival documents suggest that partisans desired a rational approach, one in which they could calmly advance their party interests when developing policy on the recognition and regulation of political parties. In both parties, the development of their policy positions on party labels was cautious and intended to be methodical and fully encompassing. However, they fell far short of this goal.

On the ALP side, Cabinet and the minister in charge of electoral regulation initially learned about policy options in secret, with abundant advice from the bureaucracy and extensive and repeated research trips to explore international electoral regimes. The Canadian model was quickly idealised and gained the most attention, ensuring that decisions were made based on a set of limited policy options. Enthusiasm for the Canadian model sidelined a full exploration of all regulatory options, as well as an honest assessment of political realities, ultimately contributing to the defeat of the policy proposal.

In the Liberal Party, the organisation undertook comprehensive research studies and party-wide consultations, while the parliamentary party generated tomes of analysis outlining the pros and cons of different regulatory options. Yet the party's policy goals were unsettled and in conflict, and the party organisation made decisions more by a conservative consensus than by reference to the impact of policy on their goals.

This chapter's chief conclusion is that the policy development process tended to resemble something more akin to the model of administrative decision-making outlined long ago by Charles E. Lindblom than the rational decision-making process that both parties desired. Despite their best intentions, both political parties 'muddled through' the issue

of party labels on ballot papers more than they rationally advanced their self-interest.⁵ Information was limited. The policy development process took unexpected, ‘muddling’ courses, which reflected the passions and predispositions of prominent individuals and a compromise between disagreeing elites. This is perhaps surprising, given that the policy development process on party labels was not rushed, was largely outside the public view and was informed by long and resource-intensive research processes, as well as the experience and insight of the bureaucracy. Yet, even in this unusual case, the process fell short of the expectations of rational choice accounts of the role of party in the evolution of the relationship between party and state.⁶

The relationship between political parties and the state

The path taken by political parties from private organisations with public functions to semi-public agencies has been different in each jurisdiction. The journey began in the American States, which first started to recognise and regulate political parties in the second half of the nineteenth century. American party organisations began life as private associations, with association and speech rights protected in the US Constitution (in the First Amendment and, after Reconstruction, the Fourteenth Amendment). As political parties grew in strength and influence throughout the nineteenth century, middle-class distaste

5 Charles E. Lindblom (1959) ‘The Science of “Muddling Through”’, *Public Administration Review* 19(2): 79–88.

6 For example, Richard S. Katz and Peter Mair (1995) ‘Changing Models of Party Organization and Party Democracy: The Emergence of the Cartel Party’, *Party Politics* 1(1): 5–28. On the topic of the relationship between party and electoral law generally, rational choice accounts include Anthony Downs (1957) *An Economic Theory of Democracy*, New York: Harper; Carles Boix (1999) ‘Setting the Rules of the Game: The Choice of Electoral Systems in Advanced Democracies’, *American Political Science Review* 93(3): 609–24; Richard S. Katz (1980) *A Theory of Parties and Electoral Systems*, Baltimore: The Johns Hopkins University Press.

for powerful party leaders and machines, and for the working-class immigrant folk they brought into politics, gathered steam. Calls for state intervention to limit the power of party leaders grew loud.⁷

The American judiciary had earlier expressed openness to the regulation of private corporations where they exerted a real or ‘virtual’ monopoly over the supply of a good or service ‘affected with a public interest’.⁸ This opened an analogous path to the regulation of *political* monopolies, the Republican and Democratic parties, both of which indisputably performed functions affected with a public interest. In this environment, States and, later, the people (using the initiative process) passed a swathe of laws regulating the behaviour and internal composition of political parties.⁹

The regulation in the late nineteenth and early twentieth centuries legally recognised and entrenched political parties as the units organising politics.¹⁰ The laws conferred benefits on the existing Republican and Democratic parties, but limited their autonomy to conduct their own affairs. On the one hand, the laws raised barriers to the entry of new political parties. On the other, direct primary laws took away the most significant power of the two major political parties:

7 Leon D. Epstein (1986) *Parties in the American Mold*, Madison, WI: University of Wisconsin Press; Sarah John and Donald A. DeBats (2014) ‘Australia’s Adoption of Compulsory Voting: Revising the Narrative—Not Trailblazing, Uncontested or Democratic’, *Australian Journal of Politics and History* 60(1): 1–27; Austin Ranney (1975) *Curing the Mischiefs of Faction: Party Reform in America*, Berkeley: University of California Press.

8 In response to legislative attempts to regulate the grain storage industry in the nineteenth century, the American judiciary developed the concept of a ‘public utility’, which applied to those private companies that provided public services such as water, electricity and grain storage. This concept permitted what would otherwise be unconstitutional rigorous state regulation: *Munn v Illinois* 94 US 113 (1876). In that case, the ‘virtual’ monopoly was over 14 grain storage warehouses, owned by nine different companies, all charging the same rates for grain storage, at the Port of Chicago.

9 See Epstein, *Parties in the American Mold*; James S. Fay, (1982) ‘Legal Regulation of Political Parties’, *Journal of Legislation* 9(2): 263–81; Ranney, *Curing the Mischiefs of Faction*; Alan Ware (2000) ‘Anti-Partism and Party Control of Political Reform in the United States: The Case of the Australian Ballot’, *British Journal of Political Science* 30(1): 1–29.

10 For example, the Porter Law, in which California recognised political parties for the purpose of holding voluntary primary elections, was passed in 1866 (Cal. Stat. 1865–1866, c. 359, §§ 1–7). The California legislature passed a multitude of laws regulating political parties in the 1890s. See Leonard M. Friedman (1956) ‘Reflections upon the Law of Political Parties’, *California Law Review* 44(3): 65–71. For nationwide overviews, see Adam Winkler (2000) ‘Voters’ Rights and Parties’ Wrongs: Early Political Party Regulation in the State Courts, 1886–1915’, *Columbia Law Review* 100(3): 873–99; Joseph R. Starr (1940) ‘The Legal Status of American Political Parties, I’, *American Political Science Review* 34(3): 439–55; and Joseph R. Starr (1940) ‘The Legal Status of American Political Parties, II’, *American Political Science Review* 34(4): 685–99.

to choose who could bear the party label (that is, the power over party nominations). While some of the specific details of individual direct primary schemes were struck down as unconstitutionally limiting association rights,¹¹ most iterations of the direct primary—even those in which the state allows unaffiliated voters to participate in intraparty nomination contests—have been upheld.¹²

In other English-speaking jurisdictions, where constitutional barriers to regulation were less significant,¹³ legal regulation of political parties, paradoxically, began much later and remains less intrusive. In these places, recognition and, later, regulation of political parties did not begin until the 1970s, close to a century after American regulation began. In Canada, parties were first legally recognised in 1970 and first regulated in 1974, when the *Election Expenses Act 1974* became law.¹⁴ As noted by Kelly in this volume, in Australia there were only two examples of the legal recognition of political parties before the 1977 amendment to the Constitution concerning the filling of casual Senate vacancies.

In New Zealand, it was 1993 before parties were legally recognised and regulated (and even then only because the party vote, a central part of the mixed-member proportional system adopted in that year, necessitated the registration of political parties).¹⁵ In the United Kingdom, political parties were not formally recognised until 1998, when registration of political parties was introduced to give parties greater control over

11 Famously, in *California Democratic Party v Jones* 530 US 567 (2000), the US Supreme Court struck down California's blanket primary regime. In the blanket primary, voters were presented with a single ballot containing all candidates for all offices and they could vote for any candidate, irrespective of party, and the candidate of each party with the most votes proceeded to the general election.

12 For example, *State ex rel. Van Alstine v Frear* 142 Wis. 320, 125 N.W. 961, 966 (1910); *Clingman v Beaver* 544 US 581, 582 (2005); *Miller v Brown* 503 F.3d 360 (4th Cir. 2007). See, generally, Christine M. Collins (2010) *Primary Elections: A Look into Four Primary Election Systems*, Sacramento: McGeorge School of Law, University of the Pacific.

13 Anika Gauja (2013) *Political Parties and Elections: Legislating for Representative Democracy*, Farnham: Ashgate, pp. 2–3. There was no constitutionally entrenched bill of rights in Canada until 1982 (when Canada adopted the Canadian Charter of Rights and Freedoms). Both New Zealand (1993) and the United Kingdom (1998) passed statutory rights Bills, but only in the last decade of the twentieth century. While these documents increased the rights of individuals, they are all less individualistic than the US Bill of Rights and so provide less extensive association rights.

14 *Canada Elections Act 1970* (Can); *Election Expenses Act 1974* (Can); John C. Courtney (1978) 'Recognition of Canadian Political Parties in Parliament and in Law', *Canadian Journal of Political Science* 11(1): 33–60.

15 *Electoral Act 1993* (NZ), Part 4; Gauja, *Political Parties and Elections*, p. 74.

the use of their names.¹⁶ Party-controlled legislatures are not the only ones that have been reluctant to regulate. Courts in common law countries have been less willing than their US counterparts to uphold challenges that might pierce the party veil. They have only tentatively allowed slight interventions in, and regulation of, internal party affairs, citing the rights of private associations to autonomy as the reason for their reluctance.¹⁷ Regulation remains less extensive¹⁸ and, in all of these places, party control over nominations persists—and is absolute in Australia, Canada and the United Kingdom (see also Gauja, this volume).¹⁹

Comparing regulatory regimes

Despite the different paths taken in individual jurisdictions, general commonalities among countries emerge. A comparison of the evolution of regulatory regimes in different jurisdictions elicits a hierarchy of six different levels of recognition and regulation (summarised in Table 2.1):

1. ignorance
2. recognition without registration
3. recognition with registration
4. regulation without recompense
5. regulation with recompense
6. recognition with registration and reward.

16 Association of Electoral Administrators (1998) 'Registration of Political Parties Bill 1998', *Representation* 35(2–3): 114; *Registration of Political Parties Act 1998* (UK).

17 *Cameron v Hogan* (1934) 51 CLR 358; *Young and Rubicam Ltd v Progressive Conservative Party of Canada* Superior Court of Quebec (22 March 1971) 803–933; *Clarke v Australian Labor Party* [1999] SASC 433; *Figuroa v Canada (Attorney General)* 2003 SCC 37 [143]; Anika Gauja (2006) 'From Hogan to Hanson: The Regulation and Changing Legal Status of Australian Political Parties', *Public Law Review* 17(4): 282–99; Graeme Orr, Bryan Mercurio and George Williams (2003) 'Australian Electoral Law: A Stocktake', *Election Law Journal* 2(3): 383–402.

18 Graeme Orr (2014) 'Private Association and Public Brand: The Dualistic Conception of Political Parties in the Common Law World', *Critical Review of International Social and Political Philosophy* 17(3): 332–49.

19 In New Zealand, section 71 of the *Electoral Act 1993* requires political parties to 'ensure that provision is made for participation in the selection of candidates representing the party for election' by current financial members of the party and/or delegates selected by current financial members of the party. See Gauja, *Political Parties and Elections*, Ch. 5.

Table 2.1 Levels of legal intervention in political parties

Level of state interference	Characteristics	Characterisation	Examples	Years present in Australia
Ignorance	No legal recognition of the existence of political parties or their role in politics.	Cherished by political parties but untenable in twenty-first century.	US States until 1860s – 1890s; Canada until 1970; New Zealand until 1993; United Kingdom until 1998.	1901–77
Recognition without registration	Legal recognition of existence and role in politics, <i>without</i> legal definition of political party or executive authority to assess whether a party is legally a party.	Superficially appealing to political parties but unstable, as it gives rise to disputes about ownership of party brand without mechanism for resolution.	Australia, 1977–83.	1977–83
Recognition with registration	Legal recognition of the existence of parties and their role in politics, <i>with</i> legal definition of political party and/or executive authority to assess whether a party is legally a party.	Balanced, but sets precedent for future regulation.	US States, 1888–1900s.	n/a; proposed in 1973–75
Regulation without recompense	Legal limitation or regimentation of the role of parties in politics <i>without</i> the provision of state assistance.	Rare.	New Zealand, 1993 – present.	n/a; proposed in 1973–75
Regulation with recompense	Legal limitation or regimentation of the role of parties in politics <i>with</i> the provision of state assistance.	Balanced and stable.	Germany; United States, 1900s – present.	n/a
Recognition with registration and reward	Legal recognition of the existence of parties and their role in politics, <i>with</i> executive authority to set criteria of what constitutes a party and the conferral of state assistance.	Asymmetrical* and appears to provide evidence of political parties' use of laws for their own selfish ends.	Australia, 1983 – present.	1983 – present

* Gary Johns (1999) 'Political Parties: From Private to Public', *Commonwealth & Comparative Politics* 37(2): 89–113. Source: The author.

The common starting point is the legal *ignorance* of political parties, in which the law makes no mention of political parties and neither confers benefits nor imposes limitations on political parties. Parties are in law—as well as in fact—private voluntary associations. This was the relationship between party and state in the American States in most of the nineteenth century. It ended first in California and New York in 1866²⁰ and latest, among the admitted States, in Louisiana in 1896.²¹ Ignorance remained the legal status of political parties in Canadian law until 1970, in Australia until 1977, in New Zealand until 1993 and in the United Kingdom until 1998 (Table 2.1). During this time, only candidates were regulated and electoral law read as though elections were contested entirely by individual candidates conducting their own campaigns, raising their own funds and developing their own policy positions.

Generally, the first forays of the state into the realm of party activity involved the legal *recognition* of political parties. Recognition, in which the state acknowledges the existence of political parties without limiting party behaviour, often precedes the legal *regulation* of political parties, in which party autonomy is limited. There are two categories of relationships between party and state that involve recognition without concomitant regulation: recognition without registration and recognition with registration. Each comes with obvious benefits to political parties, without immediate restrictions on the freedom of the party to do as it pleases.

Recognition without registration is a first level of government recognition of parties in which the state recognises the existence of political parties for the purposes of conferring benefits (such as party labels on ballot papers), but does nothing more. In this stage, the state does not determine any registration criteria or define ‘political party’. Instead, political parties self-identify as such and the state obliges by putting their labels on the ballot paper next to their nominated candidates or (in the Australian case) by filling casual vacancies in consultation with the party that previously held the seat.

20 Robert C. Wigton (2013) *The Parties in Court: American Political Parties Under the Constitution*. Plymouth: Lexington Books, p. 4.

21 Spencer D. Albright (1942) *The American Ballot*. Washington DC: American Council on Public Affairs, p. 28.

Recognition without registration tends to be unstable as it gives rise to disputes about the ownership of a given party 'brand' without providing a mechanism to resolve those disputes. In the twentieth century, before registration and regulation of political parties was a well-practised art, recognition without registration was proposed and utilised. For example, Australian political parties were constitutionally recognised for the purpose of casual Senate vacancies from 1977, but no system of party registration was established at the federal level until 1983.²² In the United Kingdom, a situation of quasi-recognition without registration existed between 1969 and 1998, allowing party candidates to describe their affiliation, in six or fewer words. The parties used this to list their candidates' party affiliation on the ballot paper.²³

Recognition with registration involves the state legally defining 'political party' and delegating power to the executive and/or judicial branches to determine whether an organisation is, in law, a political party. Legal political parties are formally registered, if they conform to some state-determined criteria, for the purposes of appearing on the ballot, filling vacancies, receiving public financing and/or qualifying for free TV time. New South Wales (NSW) adopted recognition with registration in 1981, when parties were first legally recognised and a register was created for the purposes of receiving public reimbursement of their campaign expenses. Recognition with registration is relatively uncontroversial, and it is beneficial to political parties in the immediate term. However, recognition with registration is not a natural end point as it tends to encourage or set a precedent for two opposing developments: 1) the introduction of limits on party autonomy via the legal regulation of political parties; and 2) the use of the law to achieve party ends, especially to legislate state funds to political parties to support their activities.

The next level of state involvement in parties is the *regulation* of political parties, in which particular behaviours or internal structures are limited or compelled. Regulation necessarily limits party autonomy and control.²⁴ Legal recognition and registration are

22 At the State level, party registration had been established in Tasmania in 1974 and New South Wales in 1981 (see Table 1.2).

23 Association of Electoral Administrators, 'Registration of Political Parties Bill 1998'.

24 Ingrid van Biezen (2008) 'State Intervention in Party Politics: The Public Funding and Regulation of Political Parties', *European Review* 16(3): 337–53.

typically antecedent to or are concomitant with the first attempts to regulate party activity, since the subject of any regulation typically must be legally defined and recognised for regulation to be effective. Regulation may be accompanied by recompense for the imposition of rules and restriction, but that is not always the case.

The state regulates without recompense if it limits party autonomy and control over party internal affairs by prescribing or proscribing behaviour without also providing preferential treatment—such as financial aid in the form of public funds for campaign expenses—to compensate parties for the loss of autonomy and/or control. For example, the state might limit party funding sources (by banning contributions from corporations or foreign sources) but provide no compensatory benefits such as public funding or party labels on ballots.

Regulation without recompense is a relatively unusual state of affairs, though one example is New Zealand, which requires recognised political parties to use democratic selection processes as a condition of registration while providing few benefits to them.²⁵ Regulation without recompense was also proposed in Australia in 1973–75, when the ALP introduced the Electoral (Disclosure of Funds) Bill 1974 with provisions to register political parties, limit party spending and require disclosure, without any compensatory provisions.²⁶

The two most common regulatory regimes that have evolved can be described (Table 2.1) as *regulation with recompense* and *regulation with registration and reward*. In regulation with recompense, the state prescribes and/or proscribes behaviour and also provides generous (but not disproportionate) subventions and privileges to parties. At the most incongruous, the state may provide recognition with registration and reward, which comes with considerable subventions and privileges but without serious state-imposed limits on party autonomy. These two regimes, and their commonness, pique our suspicion that parties take advantage of their monopoly-like position in the legislature. They

25 Johns, 'Political Parties', p. 92.

26 The Electoral (Disclosure of Funds) Bill 1974 (Cth) would have regulated parties, limiting their control and autonomy, without offering any recompense. The Bill would have created a register—of political party agents—and opened parties to criminal prosecution for breaches of spending caps and donation disclosure provisions by, in effect, incorporating political parties. *Electoral (Disclosure of Funds) Bill 1974* (Cth) s. 3.

also reflect the fact that, in recent decades, established political parties in many democracies have come to rely on the state for an increasingly large proportion of their resources.²⁷ Both these regimes, through the conferral of benefits on those parties with official status, typically have the effect of restricting electoral competition. They tend to perpetuate the existence and electoral ‘success’ of established parties, while controlling the entrance of new actors with, for example, public funding of parties based on prior electoral performance.²⁸ In effect—and perhaps by intention—existing parties come to exert control over the electoral marketplace. Katz and Mair characterised this emergent relationship between party and state as ‘cartelisation’.²⁹

The relationship between the cartel party and the state is fraught with tensions. On the one hand, cartel political parties are funded largely by the public purse, have a privileged legal status and serve the most public of functions (governance), so they seem very much like state-provided public agencies. On the other hand, parties seek to maintain considerable autonomy by retreating to their claims of private association rights. This is especially true when we consider the category of *recognition with registration and reward*. In this category, parties are legally recognised, through a party register, and are granted privileges or special treatment (most commonly tax advantages, public financing of campaign expenses, annual organisational support and/or state-funded nomination contests). However, the state refrains from seriously limiting party freedom or setting standards for the conduct of internal affairs, with the justification—and inconsistent logic³⁰—that political parties are private associations and so the government should not interfere in their internal affairs.

Gary Johns classifies this type of relationship between a party and the state as ‘asymmetrical’ because parties reap the advantages that accompany public status and retain most of the freedoms that attach

27 Alan Ware (1987) *Citizens, Parties and the State: A Reappraisal*, Cambridge: Polity Press; Zareh Ghazarian (2006) ‘State of Assistance? Political Parties and State Support in Australia’, *Australian Review of Public Affairs* 7(1): 61–76.

28 Richard S. Katz and Peter Mair (1996) ‘Cadre, Catch-All or Cartel? A Rejoinder’, *Party Politics* 2(4): 531. The cartelisation thesis has been contested in the Australian context. See, for example, Murray Goot (2006) ‘The Australian Party System, Pauline Hanson’s One Nation and the Party Cartelisation Thesis’, in Ian Marsh (ed.) *Political Parties in Transition?*, Sydney: The Federation Press, pp. 181–217.

29 Katz and Mair, ‘Changing Models of Party Organization and Party Democracy’.

30 Johns, ‘Political Parties’, p. 94.

to private status.³¹ Arguably, recognition with registration and reward best characterises the relationship between political parties and the Federal Government in Australia today. The political parties obtain many benefits conferred by the law, including public financing, party labels on ballot papers and (the recently weakened)³² party ticket voting in the Senate, with few regulatory strings attached.³³

Studying the role of party in the transition from private to public

The transition in the legal relationship between party and state, from ignorance to one of the other five categories, is especially interesting because it is largely a result of self-imposed action. Parties dominated the legislature long before the law ever recognised their existence. As such, it is unlikely that the transition in the relationship was entirely (or even largely) the result of change imposed on parties by reformers outside them. Instead, the transition more likely reflects decisions made by political parties.

The prevailing assumption in political science, especially in the United States, is that political parties approach these regulatory decisions from a perspective of fully informed and completely self-aware self-interest. This self-interest is typically understood in terms of maximising the number of legislative seats received from votes won in the next election.³⁴ Rational choice theory presents a parsimonious model of party action, inferring a singular, unequivocal and known self-interest in the policy from the consequences of its adoption. In the rational choice model, partisans would be expected to start with a clearly defined objective (a single self-interest), attain information on

31 *ibid.*

32 The *Commonwealth Electoral Amendment Act 2016* weakens the power of political parties to determine their voters' preference orders by abolishing group voting tickets. For more, see Kelly Buchanan (2016) 'Australia: Changes to Senate Electoral Law Passed Following Overnight Debate', *Library of Congress Global Monitor*, 28 March.

33 On the lack of balance between regulation and reward in Australian campaign finance law, see Graeme Orr (2007) 'Political Disclosure Regulation in Australia: A Lackadaisical Law', *Election Law Journal* 6(1): 72–88.

34 David M. Farrell (2011) *Electoral Systems: A Comparative Introduction*, 2nd edn, Basingstoke, UK: Palgrave Macmillan; Monique Leyenaar and Reuven Y. Hazan (2011) 'Reconceptualising Electoral Reform', *West European Politics* 34(3): 437–55.

all the possible policy alternatives and decide on the policy that best achieves their electoral objective—and, of course, act to implement that policy (or prevent the implementation of an alternative).

However, it has long been established in the study of policy development and administrative decision-making that rational accounts of policymaking impose impossible standards on policymakers and fail to describe the reality they face.³⁵ Applying Lindblom's branch model of 'muddling through' to the party policymaking context, we might expect partisans to make policy with incomplete information and poorly defined objectives, to assess the merit of a policy by reference to consensus and to follow idiosyncratic paths to policy development (sometimes going down policy rabbit holes), rather than staying unwaveringly focused on their party's self-interest.

In assessing these competing models, it is difficult to gauge how intentionally political parties have approached regulation since the study of the motivations and behaviour of political actors is inherently difficult.³⁶ As noted by James E. Anderson, '[s]olid, conclusive evidence, facts, or data, as one prefers, on the motives, values, and behavior of policy-makers ... are often difficult to acquire or simply not available'.³⁷ There exists suspicion, and legitimate concerns, that the publicly observable behaviour of political parties and politicians is orchestrated for political purposes (or, at a minimum, tempered by the watching electorate), which discourages ascribing much credence to what parties say publicly. Similarly, retired politicians and political operatives in otherwise candid interviews may reflect on their past actions through rose-coloured glasses or suffer from fading recall.

Fortunately, political parties, party organisations and engaged partisans have been avid record keepers, especially since World War II. As sensitivities relax, old wounds heal and access restrictions are loosened (usually 30 years after the records were created, though this time varies significantly), an increasing wealth of unexplored data becomes available. These unexplored data include administrative records, correspondence and reports, many of which reveal intimate

35 Lindblom, 'The Science of "Muddling Through"'.
 36 See, for example, Anika Gauja (2014) 'Building Competition and Breaking Cartels?', *International Political Science Review* 35(3): 339–54.

37 James E. Anderson (2003) *Public Policymaking: An Introduction*, 5th edn, Boston: Houghton Mifflin, p. 24.

details of the private inner machinations of political parties, their constituency organisations, executive committees, campaign committees, legislative caucuses and Cabinet. They allow insights into the role of party in the transition from private to public that would have otherwise remained internal and private. Using these records to explore an Australian case study from the early 1970s, this chapter turns to assessing the two models of party policy development with particular focus on the process of learning and research in which parties engaged to inform themselves about such proposals and the motivations of political parties in promoting and opposing laws to legally recognise them.

Party labels on the ballot paper: Recognition without regulation resisted

After a near record 23 years in Opposition, the ALP won government in December 1972 and immediately began planning a series of electoral reforms aimed at levelling what it saw as an uneven electoral playing field. These reforms included two key measures relating to political parties: one to list the names of political parties next to their nominated candidates on the ballot paper; the other to regulate the finances of political parties. Together these reforms, if passed, would have inaugurated the legal recognition of Australian political parties. Both initiatives were modelled on recent Canadian reforms. Yet each reform was of a different character: one legally recognising and registering parties; the other regulating political party finances without providing recompense for lost autonomy and funding sources. Neither Bill passed into law; both were defeated by the Liberal Party (in coalition with the Country Party) in the Senate.

These Bills would have been the first to recognise or regulate political parties. From their emergence in the 1890s, Australian political parties had been, in legal terms, unequivocally private associations of which the state was officially ignorant. The reality, of course, was strikingly different. Parties were firmly at the centre of politics in the 1970s.

Most voters identified with a party and consistently voted for that party, irrespective of the particular candidate the party ran in the offices for which they were voting.³⁸

Inevitably, as time went on, the discord between legal status and reality had become less and less tenable. The tension was especially great as it related to ballot papers. One of the consequences of being unknown to the law was that ballots made no mention of party. In the House of Representatives, the names of candidates were listed in alphabetical order with no other information or cues provided to voters.³⁹ The organisation of the Senate ballot paper was especially revealing of the discord between law and fact: candidates on the ballot paper were ‘grouped’ into columns by party, listed in the order the party chose, but without the name of the party anywhere on the ballot paper. It was the Nationalist Party, an early predecessor of the Liberal Party, that introduced the practice of ‘grouping’ candidates, in 1922, and the United Australia Party, the immediate predecessor to the Liberal Party, that amended the law to enable candidates within a ‘group’ to specify the order in which they were listed, in 1940.⁴⁰ However, despite this apparent concession to the existence of political parties, party labels did not appear anywhere on the Senate ballot before 1983.

While the absence of party labels seems odd today, it was common around the world through to the 1970s and beyond. Indeed, the US State of Virginia did not include party designations for State races on its ballot paper until the 2000 election,⁴¹ and Ontario legislated to put party labels on ballots only in 2007.⁴²

In the latter part of the twentieth century, political parties often expressed the view that party affiliation ought to be printed on the ballot paper and its absence was a problem. In Australia, the method

38 Simon Jackman (2003) ‘Political Parties and Electoral Behaviour’, in Ian McAllister, Steve Dowrick and Riaz Hassan (eds) *The Cambridge Handbook of the Social Sciences in Australia*, Cambridge: Cambridge University Press, pp. 266–86.

39 At the time, candidates on the House of Representatives ballot were ordered alphabetically by surname, with no other identifying information. Address and occupation—two cues to voters that were printed on ballot papers in other nations—were absent, possibly as a consequence of the strong labour movement in Australia.

40 *Commonwealth Electoral Act 1922* (Cth) s. 4; *Commonwealth Electoral Act 1940* (Cth) s. 7.

41 Alex Garlick (2015) ‘The Letter after Your Name: Party Labels on Virginia Ballots’, *State Politics and Policy Quarterly* 15(2): 147–70.

42 *Statutes of Ontario 2007*, Ch. 15.

devised to guide voters towards the party's nominated candidates in the absence of party labels or perfect political information among their partisans was the 'how-to-vote' card. How-to-vote cards are single sheets printed and distributed by political parties that indicate the party's nominated candidates. They are virtually identical to the party tickets printed by American political parties in the nineteenth century, except that how-to-vote cards cannot be deposited into the ballot box to cast a valid vote. Instead, a voter must transcribe the information on the how-to-vote card to his or her state-printed ballot paper. In the 1970s, most voters used their party's how-to-vote cards to identify their party's candidate.⁴³

By the 1960s, both major political parties had come to appreciate that there were benefits to changing the law to recognise political parties so that party affiliations could appear on the ballot paper, though each party stressed different advantages. The ALP emphasised potential electoral gain: the party believed (rightly) that the primary cue to their followers was the party label, not the candidate's name. In the 1950s, the Queensland State ALP Executive reasoned that if 'the Party name [was] inserted alongside that of the Candidate in Ballot Papers', it 'would prevent informal voting'.⁴⁴ The party believed that the rate of informal voting was higher among ALP voters, which was likely the case, and any reduction in informal voting would bring more ALP votes than Liberal votes into the count.

For the Liberal Party of Australia, the chief advantages of legal recognition for the purposes of printing party affiliations on ballot papers were savings, in both money and volunteer labour, through the abolition of how-to-vote cards. For example, in a meeting with Senator Alan Missen in May 1974, Victorian Liberal Party officers expressed '[s]trong support for the abolition of How to Vote Cards which are

43 Indeed, even after the introduction of party labels on ballot papers, the majority of voters admitted to following how-to-vote cards: per the 1996 Australian Election Study cited in Clive Bean (1997) 'Australia's Experience with the Alternative Vote', *Representation* 34(2): 103–10.

44 Australian Labor Party [hereinafter ALP] (8 November 1957) 'Resolutions from Queensland', in *Australian Labor Party Federal Secretariat Records*, Canberra: National Library of Australia [hereinafter NLA], MS4985, Box 4.

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considered a waste of money'.⁴⁵ After careful, cautious and deliberate study of the reform, the party leadership summarised the expected advantages of party affiliation on the ballot in these terms:

- it would assist electors, especially those voting by post or absentee voters
- it could save paper on printing how-to-vote cards
- it could reduce the number of party workers needed on polling day.⁴⁶

In this private commentary, the Liberal Party explicitly identified interests in the printing of party affiliation on the ballot paper.

The identification of interests in legal recognition and the printing of party affiliations on the ballot paper came long before the parties adopted policy endorsing the idea. The fear of regulation was strong. Parts of the ALP, concerned about levels of informal voting, had agitated for legal recognition on ballot papers almost since Federation.⁴⁷ This early reform energy was satisfied by an amendment to electoral regulations, probably in the 1910s, allowing voters to take printed matter (that is, how-to-vote cards) into the polling place—a practice that was illegal in many other places for fear it would lead to ballot

45 Alan Missen (9 October 1974) 'Proposed Electoral Reforms: Notes of a Discussion Following an Address by Senator Alan Missen to a Conference of Victorian Liaison Officers', in *Alan Missen Papers*, NLA, MS7528, Box 223.

46 Liberal Party of Australia (c. 1975) 'Confidential Attachment A', in *ibid.*, Box 302, Folder 'Commonwealth Electoral Act', p. 29.

47 The 1915 ALP Federal Conference adventurously advocated a single party ticket ballot paper covering both the House and the Senate, resolving: 'That a single ballot paper be used for the Senate and House of Representatives with the names and Party designations of the Parties so arranged that a single vote may be recorded for the whole Party Ticket.' ALP (31 May 1915) 'Official Report of the Sixth Commonwealth Conference of the Australian Labor Party (Opened at the Trades Hall, Adelaide, 31 May 1915)', in Patrick Weller (ed.) (1978) *Federal Executive Minutes 1915–1955: Minutes of the Meetings of the Federal Executive of the Australian Labor Party*, Melbourne: Melbourne University Press, pp. 18–20.

stuffing.⁴⁸ However, satisfaction was short lived. Calls for party labels on ballot papers soon re-emerged—first, from the party organisation, then, by 1960, from the parliamentary party.⁴⁹ By the late 1960s, the idea of party affiliations on the ballot paper was well-established ALP policy.

Support for the idea of party affiliations on the ballot came from the Liberal parliamentary party as early as the 1950s. In contrast, the papers of the Liberal Party show that the organisational wing opposed legal recognition of political parties and the printing of party labels on the ballot at that time.⁵⁰ The parliamentary party sought to convince the organisation to endorse the idea throughout the 1950s and into the 1960s, with little success.⁵¹ For example, in 1968, Reg Withers, then State President of the Western Australian (WA) Liberal Party, urged the organisation to endorse the use of party labels on the Senate ballot paper.⁵²

48 The actual amendment has not yet been located, however, it is evident that how-to-vote cards were not allowed in 1915, when ALP MPs Dr William R. N. Maloney and William Laird recommended party ballot papers to the Royal Commission into Electoral Laws and Administration, explaining: '[C]onsiderable delay is caused in the polling booths by persons not being clear as to the name of the candidate for whom they desire to vote. To get over this difficulty we suggest that the elector be allowed to take into the booth a list with the names of the candidates he wishes to vote for printed thereon; or, as an alternative, that a party ballot-paper be provided.' Royal Commission upon the Commonwealth Electoral Law and Administration (1914–15) 'Report from the Royal Commission upon the Commonwealth Electoral Law and Administration, 1914–1915', in *Commonwealth Parliamentary Papers 1914–1917. Vol. II (General)*, p. 447.

49 Documents from *Australian Labor Party Federal Secretariat Records*, NLA, MS4985, Box 1: ALP (8 May 1950) 'Meeting of Federal Executive at Masonic Hall. First Session'; ALP (1951) 'Submission by Branches, Committee etc. for Items to be Placed on the Platform etc. for Resolutions to be Passed'; ALP (Federal Executive) (15 July 1953) 'Meeting of the Federal Executive of the Australian Labor Party'; ALP (1957) 'Submission by Branches, Committee etc. for Items to be Placed on the Platform etc. for Resolutions to be Passed (22nd Federal Conference)'. Documents from *Australian Labor Party Federal Secretariat Records*, NLA, MS4985, Box 4: O. J. Washington to J. R. Willoughby (8 November 1957); Federal Labor Women's Conference (10–12 September 1962) 'Minutes of the Australian Labor Party Federal Conference of Labor Women'; ALP (1965) 'Submission by Branches, Committee etc. for Items to be Placed on the Platform etc. for Resolutions to be Passed'.

50 Documents from *Liberal Party of Australia Records*, NLA, MS5000, Box 134, Folder 'Electoral Act': Liberal Party Federal Secretariat (c. 1953) 'Report on Staff Planning Committee Meeting of 21 March 1952'; Electoral Reform Committee (Government Senators) to the Leader of the Government in the Senate and Government Senators (c. January 1954); J. R. Willoughby to Allen Fairhall (22 November 1956).

51 Documents from *ibid.*: Attachment to a letter from L. W. Hamilton to J. R. Willoughby (November 1956); R. Willoughby to Allen Fairhall (18 January 1954) 'Confidential'.

52 Documents from *ibid.*: Liberal Party of Australia (Staff Planning Committee), 5–6 March 1968, 'Extract from 68th Meeting of Staff Planning Committee'.

In the 1970s, views were changing and the organisation was divided on the issue. By late 1973, the State Liberal Party organisations in South Australia and Tasmania favoured party labels, while there was considerable disagreement within the Queensland organisation.⁵³ In 1975, Withers—by now a Senator and Leader of the Opposition in the Senate—summarised the position of the party organisation as ‘mixed’ regarding party labels (and therefore legal recognition). Importantly, Withers reported, the party was ‘generally opposed’ to the concept of registration, with concerns raised about its long-term impact on party autonomy.⁵⁴

Although the parliamentary wing of the Liberal Party was in no way bound by the views of the organisation and could have acted to advance its policy preference, it did not introduce a Bill to recognise political parties while in government between 1949 and 1972.

By contrast, when the ALP won government, the parliamentary party began acting on its electoral reform policy preferences, including party affiliation on ballot papers. Fred Daly, Minister for Services and Property (the ministry in charge of the *Commonwealth Electoral Act 1918*), briefed by the Chief Electoral Officer, Frank Ley, furtively developed an electoral reform agenda within his department that included the legal recognition of political parties. In secret, Daly refined and whittled down his reform agenda as more information was collated, the Canadian model was idealised and the decisions of Cabinet were factored in.⁵⁵ As the process went on, the electoral interests that initiated the electoral reform process were displaced by Daly’s desire to emulate the Canadian system.

After months of studious research and refinement, Daly introduced the Electoral Laws Amendment Bill 1974 into the House of Representatives in November 1974 without first consulting the ALP organisation or discussing the Bill with the Liberal Party Opposition. In clause 21, the Bill provided for the ‘Printing of Party Affiliations on Ballot-Papers’.⁵⁶

53 Liberal Party of Australia, Federal Secretariat, Research Department (1973) *Liberal Party Views on Electoral Reform*, Canberra, in *ibid.*, Box 321, pp. 9–10.

54 Liberal Party of Australia (c. 1974) ‘Electoral Laws Amendment Act 1974 (clause by clause)’, in *Alan Missen Papers*, NLA, MS7528, Box 223, p. 3.

55 Sarah John (2014) *Experience and Expectation: Socialization and the Different Motivational Bases of Party Policy on Campaign Finance Reform in Australia, Canada and the United States*, PhD dissertation, School of International Studies, Flinders University, Adelaide, Ch. 7.

56 *Electoral Laws Amendment Bill 1974* (Cth) s. 21.

In the hierarchy of regulation (Table 2.1), clause 21 of the Electoral Laws Amendment Bill 1974 would have introduced recognition *with* registration, legally recognising parties and creating a party register for the purposes of printing the party affiliation of an individual candidate next to their name on the ballot paper.

Policy learning and transfer: From Canada to Australia

The party label provisions in the Electoral Laws Amendment Bill 1974 should have been relatively uncontroversial. Daly's reform plans were well researched and grounded in international experience and not overtly in ALP interests. The Liberal Party was open to the idea of registration, at least initially. However, Daly was inexperienced in government, having served since 1943 but only as an Opposition member. Inexperience in the art of advancing Bills in government may have contributed to the poor execution of the political campaign for the passage of the Bill, and its ultimate demise.

Towards the end of the ALP's long years in Opposition, Daly had drafted and introduced a doomed Opposition electoral Bill.⁵⁷ His interest in electoral reform continued in government, when he became the minister in charge of the *Electoral Act 1918*. In his new official role, and with the resources of the bureaucracy finally behind him, Daly deliberately sought out an international precedent on which to model his electoral legislation. During his tenure as Minister for Services and Property, Daly took multiple research trips (in 1973, 1974 and 1975) to comparable countries (the United Kingdom, New Zealand, Canada and the United States) to study electoral legislation.⁵⁸ Daly travelled with Frank Ley, who, as Chief Electoral Officer, was a nonpartisan bureaucrat, and met with a multitude of electoral administration officials, including Californian county registrars of voters, the New York Board of Elections, the New York Secretary of State and, importantly, the Chief Electoral Officer of Canada and Clerk

57 The *Commonwealth Electoral Bill (No. 2) 1971* (Cth), which would have provided for optional preferential voting and stricter one-vote, one-value provisions, was introduced on 1 April 1971 by Daly.

58 Frederick Daly (1980) 'Change the Rules [draft notes for speech]', in *Frederick Daly Papers*, NLA, MS9300, Box 80.

and President of the Canadian House of Commons.⁵⁹ All of this research was done in secret, with only occasional rumours circulating about Daly's trips and ideas or the likely contents of an electoral reform Bill.

In an idiosyncratic turn, Daly quickly fixated on the new Canadian system as the solution for Australia: a party registration scheme, introduced in 1970 and tested in the 1972 election, coupled with an expansive campaign finance regime, which commenced in 1974. In part, the Canadian model stood out because it was one of only a few existing models for reform in comparable countries. In the 1970s, the United Kingdom and New Zealand—perhaps more natural models—had not yet legally recognised political parties. (Indeed, parties in the United Kingdom had avoided legal recognition by allowing nominated candidates to describe, ostensibly in their own words, their political affiliation on the ballot.) By contrast, the United States was so far down the path of legal regulation with recompense—with its primaries, statutory party organisations and complex campaign finance regulation—as to be neither particularly applicable to the Australian case nor attractive to Australian party leaders. Canada, like the third bowl of porridge, was just right, with private party organisations and a nascent—but modern, balanced and well-designed—regulatory regime.

Daly spoke gushingly about the Canadian system and the people who introduced it.⁶⁰ His infatuation with the new Canadian system did not go unnoticed. In reviewing a draft copy of Daly's second reading speech for the Electoral (Disclosure of Funds) Bill 1974, Liberal Party leader Billy Snedden annotated 'Again!' in big scrawled script next to Daly's effusiveness (across several pages) about the wonder of the proposed campaign finance law in Canada.⁶¹ In that same speech, Daly quoted a Progressive Conservative Party of Canada activist, Flora MacDonald (quite an obscure reference in Australia), on the goals

59 Pauline Larkey [Daly's Private Secretary] to Mr D. Eddowes (12 June 1973), in *ibid.*, Box 102, Folder 'Overseas Visit 13 June to 24 July 1974'; Canadian High Commission to Minister Fred Daly (12 June 1974), in *ibid.*, Box 80; Parliament of Australia, the Parliamentary Library, Legislative Research Service (2 June 1977) 'Public Financing of Political Parties in the Federal Republic of Germany, Scandinavia, Canada, U.S.A., and UK', in *ibid.*, Box 80.

60 See Frederick Daly (11 July 1974), 'Response to Question without Notice', in *House of Representatives Parliamentary Debates (Hansard)*; Frederick Daly (12 February) 'Second Reading Speech, Electoral Bill', in *House of Representatives Parliamentary Debates (Hansard)*.

61 Frederick Daly (1974) 'Second Reading Speech [Draft]', in *Sir Billy Snedden Papers*, NLA, MS6216, Box 204, Folder 21, p. 9.

of the Canadian reform.⁶² Daly's speeches on his electoral Bills did not reflect an impartial, objective assessment of the merits of Canadian reforms; rather, they were indicative of a very personal affection for the system.

The mechanism Daly chose for determining the party affiliations of candidates in the Electoral Laws Amendment Bill 1974 was taken from the Canadian reform of 1970.⁶³ In the registration regime introduced by Pierre Trudeau's Liberal Party, with support from the Conservative Party,⁶⁴ a party was entitled to register if it ran candidates in 50 seats across Canada (about 19 per cent of the then 264 seats in the House of Commons).⁶⁵ In recognition of the State-based organisation of Australian political parties, Daly's initial scheme would have established registration on a State-by-State basis, requiring a party to nominate candidates in one-quarter of the House of Representatives seats in that State before qualifying for registration.⁶⁶ After considering the fate of the Country Party, which tended to nominate candidates only in rural areas, the requirement was lowered to 20 per cent of seats in a State by the time the Bill reached parliament. Cabinet had advice that, under this new lower standard, all the parties that typically won seats in the House would have qualified for registration in all the States based on their 1974 election nominations—*except* for the Country Party in Victoria, which fielded only six candidates out of the nine required.⁶⁷ None of these plans or reasoning was conveyed to the Liberal–Country Party Coalition.

62 *ibid.*, p. 9.

63 Australian Government (17 September 1974) 'Commonwealth Electoral Act 1918–1973: Proposed Additional Amendments [Cabinet Submission No. 1332]', in *Cabinet Records*, Canberra: National Archives of Australia [hereinafter NAA], A5915, CL21 Part 1, p. 6.

64 *Canada Elections Act 1970* (Can); Courtney, 'Recognition of Canadian Political Parties in Parliament and in Law'.

65 More than three decades after its inception, the Supreme Court struck down the 50-candidate requirement in *Figueroa v Canada* (AG) [2003] 1 SCR 912. The consequences of the 50-candidate requirement had been greatly increased, with a federally registered political party that failed to nominate 50 candidates for a federal election subject to automatic deregistration and the stripping of its assets.

66 *Election Laws Amendment Bill* (Cth) s. 21.

67 Department of Prime Minister and Cabinet (September 1974) 'Confidential Notes on Cabinet Submission No. 1332: Proposed Additional Amendments to the Commonwealth Electoral Act 1918–1973', in *Cabinet Records*, NAA, CL21 Part 2, Document 24, p. 2.

In response to the worrying rumours about the ALP's electoral reform agenda, and the motives behind it, the federal organisation of the Liberal Party launched an extensive information-gathering exercise, led by its Research Department. The party examined a multitude of electoral reforms that it believed the ALP might propose, from lowering the one-vote, one-value tolerance in redistributions to adopting first-past-the-post voting, Senate representation for the Territories and the placement of party affiliations on ballot papers.⁶⁸

Early in the Liberal Party's process, Federal Director Bede Hartcher sought the State party organisational leadership's opinions on these electoral reforms, as was common practice in the party.⁶⁹ The State organisations obliged with feedback, often detailed and contrasting, which was generally negative about legal recognition.⁷⁰ The Research Department of the Federal Secretariat produced a series of reports on electoral reform, including a report collating the positions of the State divisions on each reform issue.⁷¹ Based on its research, and its conservative position against state regulation of the private sector, the organisation took a generally oppositional stance to the proposal for legal recognition and informed Senator Withers accordingly. For their part, Liberal Party Members of Parliament (MPs) developed and circulated numerous summaries of the likely impacts of the proposed reforms, including a 50-page document listing the pros and cons of each and every provision of the ALP's electoral reform agenda.⁷²

In perfect asymmetry, the ALP organisation was not involved in Daly's policy development process. The result was that the ALP organisation was less informed about the proposals of its representatives in government, and the finer details of legal recognition and registration, than the Liberal Party. The absence of a decision-making role for the

68 Research Department of the Federal Secretariat, Liberal Party of Australia (26 February 1973) 'Notes on the Commonwealth Electoral Act: Possible Labor Amendments [Research Note 4/73]', in *Sir Billy Snedden Papers*, NLA, MS6216, Series 10, Box 195, Folder 510.

69 John, *Experience and Expectation*, Ch. 6.

70 Research Department of the Federal Secretariat, Liberal Party of Australia (6 December 1973) 'Liberal Party Views on Electoral Reform', in *Liberal Party of Australia Records*, NLA, MS5000, Box 321.

71 Documents from *ibid.*: (26 June 1974) 'Proposed Government Electoral Legislation'; (26 April 1974) 'Federal Election Speakers' Notes—Electoral Reform'; 'Notes on the Commonwealth Electoral Act: Possible Labor Amendments'; and 'Liberal Party Views on Electoral Reform'.

72 Liberal Party of Australia (c. 1975) 'Confidential Attachment A', in *Alan Missen Papers*, NLA, MS7528, Box 302, Folder 'Commonwealth Electoral Act'.

organisation is striking, given the parliamentary ALP was formally bound by the decisions of the organisation, whereas the parliamentary Liberal Party was not. But, then, the ALP was less ideologically concerned about private rights and the limits of public power than the Liberal Party. Additionally, on the general idea of providing party affiliations on the ballot paper, the party organisation had been favourable for decades. And so, Daly largely designed his own scheme, subject only to the limitations imposed occasionally by Cabinet and, when remembered, political realities.

Daly's autonomy from the organisational wing was clearer in a second electoral reform proposal from the time, the Electoral (Disclosure of Funds) Bill 1974. This initiative reveals the extent to which Daly: 1) influenced the content of the ALP's electoral reform Bills, and 2) was influenced by his research trips to North America, especially Canada. In the United States, where Daly had toured in 1973, donation disclosure was considered to be the keystone of any campaign finance regulatory scheme.⁷³ In Canada, disclosure was a new and controversial idea, but absolutely central to the *Election Expenses Act 1974* (Can). It is striking that on Daly's return, disclosure became the cornerstone of the Whitlam Government's campaign finance reform package, even though it was nowhere on the radar, within the party or within the bureaucracy, when Daly left for his first research trip in June 1973. Indeed, at the time there were some within the ALP engaging in campaign financing practices they very much wanted to keep secret.⁷⁴

In a typical model of regulation and recompense, the Canadian *Election Expenses Act 1974* introduced rigorous donation disclosure provisions and spending limits, while compensating parties for this regulation through public financing and tax deductions. Daly's disclosure proposals in the Electoral (Disclosure of Funds) Bill 1974 were virtually identical to the Canadian provisions, up to the point of a disclosure threshold of the identical amount (\$100 or more) and very similar spending limits.⁷⁵ However, the Australian Electoral

73 The belief that timely and accurate disclosure is the central pillar of any campaign finance regulatory regime—or that 'sunlight is the best disinfectant'—was widely and sincerely held in the United States. For the origin of the phrase, see Louis D. Brandeis (1914) *Other People's Money*, New York: Frederick A. Stokes, Ch. 5.

74 See Paul Kelly (1976) *The Unmaking of Gough*, Sydney: Angus & Robertson, pp. 394–420.

75 Australian Government (March 1974) 'Cabinet Submission No. 964', in *Cabinet Records*, NAA, CL21 Part 1, Document No. 217, pp. 3, 11.

(Disclosure of Funds) Bill 1974 diverged from the Canadian *Election Expenses Act 1974* in that it did not contain public financing or any favourable tax provisions. A public funding proposal styled on the Canadian model was initially in the Bill, but had been quickly rejected by Cabinet.⁷⁶ This meant that the Electoral (Disclosure of Funds) Bill 1974 would have imposed *regulation* on parties without any *recompense*: no special treatment came with the Bill; only requirements to reveal hitherto secret information on campaign contributions and the imposition of arbitrary limits on spending, together with a threat that noncompliance would leave party officials liable for prosecution. It is no surprise, then, that the Bill failed.

Two things are surprising: that the ALP caucus voted in favour of the passage of the Electoral (Disclosure of Funds) Bill 1974 and the persistence shown by Daly on all his electoral reform Bills. He appears to have become engrossed in the policy development process and his enthusiasm for the Canadian reforms appears to have overtaken all else, including party interests. This, combined with a dash of political naivety, ensured that Australia's first serious move towards party regulation was dead on arrival.

Party motivations: Interests, concern and caution

The ALP likely deferred to Daly's agenda because it appeared, for the most part, to be in their electoral interests. The ALP had a long-established and genuine belief that the electoral system was unfairly and intentionally stacked against it, resulting in elections that yielded a majority of the vote but not a majority of the seats.⁷⁷ Daly's motives were complicated; he was certainly aware of the ALP's interests in moving beyond the legal status quo, yet he appears to have been motivated by a genuine desire to modernise Australian law and by his enthusiasm for the Canadian system.⁷⁸

76 Australian Government (13 October 1973) 'Draft of Cabinet Minute (Decision 1436) without Submission', in *ibid.*, A5931, CL21 Part 1, Document No. 135. Reference to public financing was omitted in the final version of the minute: Australian Government (15 October 1973) 'Cabinet Minute (Decision 1436) without Submission', in *ibid.*, A5931, CL21 Part 1, Document No. 138.

77 John, *Experience and Expectation*, Ch. 7.

78 *ibid.*, Ch. 7.

Initially, parts of the Liberal Party were open to supporting Daly's Bill.⁷⁹ However, Daly's secretive process—possibly the consequence of inexperience in government—engendered suspicion and resentment in the Opposition. Better handled, the proposal for legal recognition in the Electoral Laws Amendment Bill 1974 might have been relatively uncontroversial since it seemingly served the interests of both major political parties. Suspicion of ALP motives, combined with a cautious approach to governmental regulation and a disinclination to move beyond the status quo, contributed to the Liberal Party's eventual decision to vote against the Bill.

Whenever it had been mooted, legal recognition raised visceral fears in the Liberal Party organisation about compromising the party's cherished private association status, and the control and autonomy that came with that status. The concept of recognition *without* registration brought up recurring concerns about losing control of the Liberal Party brand. In 1956—before the concept of registration had become central to schemes of legal recognition—Federal Director J. R. Willoughby wrote to Cabinet, then constituted by the Liberal–Country Coalition, rebuffing Cabinet's proposals that party labels be placed on the ballot paper.⁸⁰ Willoughby explained that the idea was 'full of problems' and:

confusion [was] likely to arise ... in the case of a candidate using the name of an existing major Party in an electorate deliberately not contested by that Party—or again of a candidate forming his own Party and using the name of a Party already in existence.⁸¹

The Liberal Party organisation was worried that, under a scheme of recognition without registration, it might lose control over its label and have its strategic decisions undermined by someone else using the Liberal name.⁸²

79 *ibid.*, Ch. 6.

80 The Minister for the Interior's office concluded that '[w]ith adequate safeguard to ensure that unauthorised or inappropriate names were not used', party labels on the ballot paper would 'materially assist electors in voting according to their desires'. Attachment to a letter: L. W. Hamilton to J. R. Willoughby (November 1956), in *Liberal Party of Australia Records*, NLA, MS5000, Box 134, Folder 'Electoral Act'.

81 J. R. Willoughby to Allen Fairhall (22 November 1956), in *ibid.*, p. 2. Emphasis in original.

82 Willoughby was also concerned that non-party candidates may gain an advantage if they were allowed to use the term 'Independent', which he believed was a 'somewhat attractive' designation: Willoughby, J. R. (18 January 1954) 'Registration of Parties', in *ibid.*

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In 1973, after rumours about the ALP's regulatory plans had proliferated, the NSW division responded to a request for opinions from the Liberal Party's Federal Secretariat, characterising party labels as 'superficially attractive'. The division explained that party labels would lead to a loss of control of the party brand unless a system of party registration was also introduced. Party affiliations on ballot papers:

would require the registration of political parties and some form of protection against false pretences (eg. 'The N.S.W. Liberals', 'True Liberals' etc.) It would be difficult to handle the matter when a political party changes its management and perhaps its name. Others could perhaps continue the old name.⁸³

The NSW division had clearly engaged in some serious thinking about the proposal for party affiliations on ballot papers and all the possible scenarios that might arise under the system. Importantly, control over the party's brand was central, in the opinion of the NSW division.

On the other hand, whenever recognition *with* registration was suggested, the Liberal Party organisation was less concerned about control of its brand and more concerned with a loss of autonomy that might result from registration, if it were to set the precedent for regulation. When Liberal Senators endorsed party labels with registration in 1954, the party organisation countered that '[a]lthough, on the surface, there appears to be much to commend this proposal',⁸⁴ it should be avoided. Instead, the party organisation recommended recognition without registration—a list of candidates, with their party affiliation beside them, posted in each polling station—to avoid the risks of a register.⁸⁵ While the Liberal Party had, by 1975, concluded that registration was the '[s]implest way to implement the

83 Research Department, *Liberal Party Views on Electoral Reform*, p. 9.

84 J. R. Willoughby to Allen Fairhall (18 January 1954) 'Confidential', in *Liberal Party of Australia Records*, NLA, MS5000, Box 134, Folder 'Electoral Act'.

85 Liberal Party Federal Secretariat (c. 1953) 'Report on Confidential Meeting Comprising Federal Director, NSW General Secretary and Assistant General Secretary and Victorian General Secretary held in Canberra 8 August 1952', in *ibid*. This proposal, or course, raised concerns about the party's control of its label, which Willoughby would canvass two years later (see footnote 82, this chapter).

proposal to show party affiliations on ballot papers', it cautioned that registration 'could be interpreted by some as government interference in the administration of political parties'.⁸⁶

In short, the party organisation feared autonomy and control could not coexist if political parties were legally recognised. This conclusion was arrived at because, in all of its deliberations, the Liberal Party organisation aimed for rational decision-making. It was considered and cautious, evincing a determination to make the most sensible decision that would ensure that it did not lose its cherished private association status. The party was prescient in recognising that a register of parties could open the door to state control (regulation) of a party and a whittling away of party autonomy to conduct its own affairs as it pleased, though, after more than 30 years of legal recognition in Australia, we can see that risks of serious incursion into party affairs were overstated.

Having served under the Coalition Government for the previous two decades, the federal bureaucracy was aware that recognition with registration was controversial for the Liberal Party and made that clear to the new government. The bureaucracy advised the new ALP Cabinet that a register of parties was:

[a] most contentious proposal—it could be interpreted as a form of control over political parties. As the object is to enable candidates' political affiliations to be identified on ballot papers, would it not be sufficient for the Chief Electoral Officer to maintain a list of parties?⁸⁷

A handwritten note in Cabinet records attached to this advice notes that '[r]egistration could raise contentious issues not canvassed in the submission'.⁸⁸

Taken together, concerns about recognition *with* and *without* registration predisposed the Liberal Party organisation against any form of legal recognition. The oppositional stance of the Liberal Party organisation was cemented as the research process progressed. As the

86 Liberal Party of Australia (c. 1975) 'Confidential Attachment A', in *Alan Missen Papers*, NLA, MS7528, Box 302, Folder 'Commonwealth Electoral Act', p. 31.

87 Parliamentary Branch (26 February 1974) 'Notes on Cabinet Submission No. 925—Amendments to the Commonwealth Electoral Act', in *Cabinet Records*, NAA, A5915, CL21 Part 1, Document 180, [8].

88 *ibid.*, [8].

proposal for placing party affiliation on the ballot received more press in 1973 and 1974, more Liberal Party voices with oppositional perspectives were heard. When the State party organisations were asked for their views, some divisions speculated that the party's electoral interests lay in maintaining the status quo—the longstanding position of official ignorance—in which parties were not recognised at all in law.

Jim J. Carlton, General Secretary of the NSW division, explained that his division did not favour the idea of legal recognition. He suggested that the Liberal Party in fact benefited from the reliance on how-to-vote cards—expense and labour intensity notwithstanding—explaining that party affiliation on ballot papers would 'diminish the importance of organizational superiority'. It would, he continued, 'only assist minor parties and independents'.⁸⁹ The WA division agreed, explicitly citing the weaknesses of the other parties. 'Both the ALP and Country Party', the secretary explained, were 'finding it difficult to man booths' to hand out how-to-vote cards. 'We believe that is to our advantage.'⁹⁰ Intriguingly, the WA division understood its interests to be separate from the interests of its coalition partner, the Country Party.

These views could have set the stage for a showdown between the parliamentary party and the organisation. Instead, suspicious and speculative voices supported by limited evidence gave the parliamentary party reason enough to pause. These suggestions that the party's immediate interests in party affiliation on ballot papers ran in the opposite direction to what had previously been thought—combined with the organisation's increasingly oppositional stance and a desire to achieve consensus within the whole party—were sufficient for the parliamentary party to consider deferring the advancement of the parliamentary party's long-held inclination towards party labels on ballots.

The detail of the registration scheme proposed by Daly also mattered to the Liberal Party's position, though not as much as the Liberal Party organisation's desire to retain control and autonomy. When introduced into the House of Representatives, clause 21 of the Electoral

89 Research Department, *Liberal Party Views on Electoral Reform*, p. 9.

90 *ibid.*, p. 10.

Laws Amendment Bill 1974 required that a party field candidates in 20 per cent of seats in a State to qualify for registration in that State. The Liberal Party believed this discriminated against small parties.⁹¹ Reg Withers—who, in 1968, had favoured party labels—was Leader of the Opposition in the Senate in 1974. Speaking for the party (rather than expressing his personal opinion), Withers remarked that clause 21 would ‘require substantial amendment to meet the requirements of the Liberal Country Party’.⁹² Withers advised the party to seek an amendment, ‘but if unable to do so, oppose [the] clause’—which they did.⁹³ Their eventual decision to vote against the measure in the Senate killed the Bill because the ALP did not command a majority in that chamber.

The parliamentary Liberal Party was convinced that there would be no electoral consequences in advancing what the party organisation now saw as the party’s electoral interest in the defeat of the Electoral Laws Amendment Bill 1974. In a document circulated to Liberal Senators, Withers revealed how aware he was of the absence of consequences for the Liberal Party if it cynically chose to block the Bill:

If it is decided to oppose the [Electoral Laws Amendment] Bill outright again I do not think that it will have any adverse public reaction—public interest in electoral matters is small and there are too many issues which more directly affect electors now such as inflation, unemployment, and general economic dislocation for people to be concerned about laws politicians want to make to help themselves be re-elected. However, there are some Senators and Members who are keen to see some changes in the *Electoral Act*; some of the Daly proposals could be accepted without altering our electoral chances.⁹⁴

Even though parts of the parliamentary party supported the policy changes, the political risks of opposing legal recognition were few. Thus, the Liberal Party deferred to the organisation’s wishes and voted down the Bill in the Senate.

91 Liberal Party of Australia (c. 1974) ‘Electoral Laws Amendment Act 1974 (clause by clause)’, in *Alan Missen Papers*, NLA, MS7528, Box 223, p. 3.

92 *ibid.*

93 *ibid.* By 1975, his views had hardened. Withers wrote that ‘[i]t is not really practical to show candidate affiliations on ballot papers unless there is a register of parties. Certainly the register suggested by Daly is not desirable. If it was wished to show party affiliations on ballots a much more simple requirement for registration of parties could be worked out.’ R. G. Withers (4 April 1975) ‘Electoral Laws Amendment Bill’, in *Alan Missen Papers*, NLA, MS 7528, Box 223.

94 *ibid.*

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In the case of the Liberal Party organisation, direct interests in monetary and labour savings were far less influential in determining their position on reform than their fears about possible future loss of control. This stance, we saw, was reinforced once the State divisions began to speculate that the party's competitive advantage lay in the status quo. Reflecting that these positions were speculative and not evidence-based, they would prove to be wrong. The expense of how-to-vote cards and the difficulties in mobilising a volunteer army to distribute them only increased. Correspondingly, calls for party labels on ballots continued, and intensified, even within the Liberal Party.

By 1982, one year before party labels and legal recognition were legislated nationally, the Young Liberal Movement expressed its annoyance with the persistence of old-fashioned how-to-vote cards and argued fiercely for party affiliations to be placed on ballots:

Reforms must also be instituted in the basic machinery of the electoral system. The traditional 'how to vote' cards, for example, are a clumsy and wasteful method of indicating a political party's preferred voting pattern. The electoral act should be amended to provide for party names to be shown on ballot papers, and for 'how to vote' cards to be displayed in polling booths (in a form approved by the electoral office).

Under this more equitable arrangement the need to physically distribute cards is removed and most importantly, every voter will know precisely which party he is voting for. The number of informal votes is therefore likely to fall.⁹⁵

For all its caution and deliberateness in the early 1970s, the Liberal Party succumbed to speculation and did not accurately foresee the extent to which its interests lay in legal recognition with registration. Nor did it foresee the inevitability of legal recognition.

When, in 1983, the ALP again took government, it, in the words of the Australian Electoral Commission, 'eschewed the confrontational style which had limited the success of its predecessor, and established a parliamentary committee, the Joint Select Committee on Electoral Reform'⁹⁶ (JSCER) to explore recognising, registering and regulating

95 Young Liberal Movement of Australia (12 December 1982) 'Press Release: Reforming our Democracy', in *Alan Missen Papers*, NLA, MS7528, Box 293, Folder 'Electoral Reform', p. 2.

96 Australian Electoral Commission (AEC) (28 January 2011) *A Short History of Federal Election Reform in Australia*, Canberra: AEC, available at: aec.gov.au/Elections/australian_electoral_history/history.htm.

political parties. The legacy of the failed early 1970s foray into party recognition and regulation was that there was voluminous party research and knowledge, a greater level of bureaucratic expertise and multiple draft Bills that could be used as a starting point on which JSCER and the parties could build. Additionally, by 1983, a decade had passed, allowing time for the Liberal Party to get used to the concept of legal recognition and registration. Furthermore, the politics of reform was executed more deftly, with secrecy replaced with a more cartel-like process in which all major political parties could contribute and advance their views and interests. Perhaps reflecting that this was a cartel-like process, recognition with registration and reward (a much more beneficial arrangement for the parties than had been proposed in the early 1970s) emerged out of JSCER as the model of regulation in Australia.

The Liberal Party was facing a bigger, more offensive challenge than mere legal recognition. The 1983 reform package included *recognition with registration*, slight *regulation* of party campaign finance *and reward*, in the form of public funding of party expenses, following in the footsteps of NSW two years earlier. Throughout JSCER and after the committee's two reports, the Liberal Party remained cautious about legal recognition of political parties, still fearful of the loss of control and autonomy that might follow. But, in 1983, the Liberal Party directed most of its efforts to opposing the public financing of party expenses.⁹⁷ In terms entirely consistent with its internal, private reasoning a decade earlier about where legal recognition with registration might lead, the Liberal Party argued that political parties 'should remain essentially voluntary organisations'⁹⁸ and that public funding of party expenses could 'have the effect of undermining volunteerism and reducing levels of membership participation within political parties',⁹⁹ 'entrench existing parties' and 'create a stale and moribund atmosphere'.¹⁰⁰ The registration of political parties was still not looked on favourably, with Steele Hall noting that '[r]egistration is part of the paraphernalia that will inevitably swell the bureaucracy when public funding is introduced'.¹⁰¹ However, in 1983, unlike 1973–75,

97 See the dissenting reports in Joint Select Committee on Electoral Reform (JSCER) (September 1983) *First Report*, Canberra: Commonwealth of Australia, pp. 223–80.

98 Sir John Carrick, 'Dissenting Report', in *ibid.*, p. 238.

99 JSCER, *First Report*, p. 149.

100 Steele Hall (30 August 1973) 'Dissenting Report', in *ibid.*, p. 244.

101 *ibid.*, p. 247.

the Liberal Party could not veto the passage of laws by blocking them in the Senate. The reforms passed and came into operation in time for the 1984 federal election.

Conclusion: Fearing the slippery slope

In many democracies, political parties have transitioned from private organisations with public functions unrecognised in law to largely publicly supported, sometimes regulated, organisations with protected private rights. The different points on the scale between official ignorance (with fully private status) and legal recognition with reward or recompense possess differing characteristics that make them more or less appealing to political parties, stable in practice and sound in theory.

It is the beneficial nature of the two most common types of relationship between party and state—regulation with recompense and recognition with registration and reward—that engenders suspicion that political parties have used their monopoly in the legislature to actively and presciently advance their own interests. At first blush, rational choice theory appears to explain well the likely role of parties in legislating the increasing resources the state provides to them and the barriers imposed on new political entrants.

By utilising hitherto private party records, the Australian case study of putting party affiliations on ballots in the early 1970s shows that political parties have not necessarily conformed to the rational choice expectation of deliberate and active use of the law to their own ends. Indeed, the case study shows that political parties approached the transition from a position of official ignorance to legal recognition with a good deal of caution, especially in the case of the party naturally more averse to governmental regulation, the Liberal Party.

Parties aimed to be rational in their approach to their interests and reform. Parties were meticulous researchers, believing that cautious and detailed study would enable them to be fully apprised of the short-term advantages and, especially, the long-term risks of recognition, and to avoid costly, and perhaps irrevocable, errors. This ensured that party elites largely understood the potential implications of recognition and regulation. International experience was key on the

government side, where plentiful resources permitted detailed study trips and meetings with senior bureaucrats. While Daly and the ALP Cabinet were not very politically savvy in their pursuit of electoral reform, they were genuine in their views and operated from well-researched, if not well-disseminated, policy positions.

It is important to observe that, at least in the 1970s, Australian parties were not active manipulators of their monopoly over the legislature; they did not overtly seek advantage through legal recognition. Instead, as had been the case for decades, there was tremendous trepidation and caution within the Liberal Party about using the law for self-serving legal recognition purposes in case such use backfired and led either to a loss of control of the party brand or to a loss of control by setting the precedent for legal regulation.

In contrast, both parties initially saw significant potential advantages in *recognition* by the law: more votes for their party (ALP) and reduced expenditure in election campaigns (Liberal Party). Yet, the primary goals of maintaining control and autonomy, and the fear of a slippery slope from registration to regulation, concerned the Liberal Party organisation so much that the parliamentary party, in the absence of apparent electoral consequences, was willing to forgo any perceived advantages. Opposition to legal recognition was ensured once suspicious and speculative voices started suggesting that the Liberal Party's immediate electoral interests lay in the status quo.

Despite intentions, both parties fell short of truly rational decision-making. In the Liberal Party, the policy development process changed course based on largely speculative accounts about the weaknesses of other parties (including their coalition partner), even though they flew in the face of years of collective understanding about where the party's electoral interests lay. Within the ALP, a romanticised view of the Canadian system ensured that an objective assessment of the full range of recognition and regulatory regimes became impossible, and an assessment of the ALP's interests in the reforms was jettisoned from the process—as the pursuit of the Electoral (Disclosure of Funds) Bill 1974 demonstrated. And so, while the parties initially intended to rationally pursue their interests, they ended up muddling through the process. As it turned out, the failure of the Electoral Laws Amendment Bill 1974 was probably to the detriment of both major political parties.

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In the end, Australian political parties, thus stymied, did not take the plunge into legal recognition until 1983. The 1983 reforms were of a different character—not recognition with registration but recognition with registration and reward—and were developed in a remarkably different context: a joint committee process, much more like Canada’s process in the 1970s, rather than the inexperienced, secretive and Cabinet-driven process of the Whitlam Government. While, in 1983, the Liberal Party remained opposed, in principle, to regulation and public financing, they were in no position to prevent it. Australian parties jumped—in one fell swoop—all the way from being virtually unknown to the law to having legal recognition with registration and reward, without any serious regulation of party affairs.

This text is taken from *Party Rules?: Dilemmas of political party regulation in Australia*, edited by Anika Gauja and Marian Sawer, published 2016 by ANU Press, The Australian National University, Canberra, Australia.