

7

Dilemmas of party regulation: Hands-on courts versus hands-off legislators?

Anika Gauja

As chapters in this book have highlighted, the legal regulation of political parties is problematic for two important reasons. The first is that it is very difficult to demarcate between political parties as private associations and as public entities. While at first glance this distinction might seem overly technical, the regulatory implications are extremely significant. In Chapter 1 of this volume, Marian Sawer and I discussed the fact that, in Australia, only relatively recently has the law acknowledged political parties to be anything more than voluntary associations, similar in status to social and sports clubs. There has not been anything like the degree of regulation and requirements for internal democracy imposed on trade unions. This has had important consequences for voters—for example, in the area of campaign financing. For most of the twentieth century, party finance was effectively unregulated, causing significant concerns about the role of money in electoral politics and the fairness of the electoral contest, through, for example, a lack of transparency in political donations and differential rates of party spending.

Apart from the effects on voters of suspicion over party financing, the 'private' status of political parties has also affected party members. In the absence of laws regulating internal governance structures, party members have witnessed the rise of practices such as 'branch-stacking' and have been limited in their ability to hold party elites to account. Internal dispute-resolution processes have often been unsatisfactory. The absence of any substantial legal regulation of the financial and internal affairs of political parties has been portrayed by many as a 'double standard'; they see a disconnect between the importance of political parties in modern systems of representative government and their status at law. Concern over this disconnect has prompted calls for increased regulation.¹

The second factor complicating regulation is that political parties are not only the subjects of party law, but also those responsible for formulating it in government. The potential for conflicts of interest to arise and for partisan or incumbent interests to be privileged in the exercise of lawmaking is a real danger. Michael Kang argues:

[P]arty leaders and their allies have every incentive to foster a regulatory environment that benefits them. Party regulation, as a result, often represents politically motivated modification of the legal landscape to the calculated advantage of certain party actors and to the disadvantage of others.²

Although referring to the United States, Kang's observations might equally apply to the Australian context (see, for example, Graeme Orr's chapter on political finance reforms in Queensland). As former senator Ricky Muir, who represented the Motoring Enthusiast Party, said, electoral reform proposals tend to be for the benefit of the major parties and to the detriment of minor parties, despite the constructive role played by the latter in legislative review.³

1 Anika Gauja (2010) *Political Parties and Elections: Legislating for Representative Democracy*, Farnham: Ashgate; Scott Bennett (2002) *Australia's Political Parties: More Regulation?*, Parliamentary Library Research Paper No. 21 2001–02, Canberra: Parliament of Australia; Teresa Somes (1996) 'The Legal Status of Political Parties', in Marian Simms (ed.) *The Paradox of Parties: Australian Political Parties in the 1990s*, Sydney: Allen & Unwin.

2 Michael Kang (2005) 'The Hydraulics and Politics of Party Regulation', *Iowa Law Review* 91: 160.

3 Lenore Taylor (2015), 'Turnbull Government Faces Battle to Change Voting Rules for Senate', *The Guardian*, 22 September.

Despite these complications, the trend internationally is for the growth of party regulation, driven on the one hand by the belief that political parties are important democratic actors, and on the other by the belief that their activities should be correspondingly monitored.⁴ In Germany, the legal position of parties is so strongly articulated in the country's Basic Law that they are regarded as 'institutions of constitutional law'.⁵ Parties also feature prominently in the constitutions of Portugal and Spain and, as Ingrid van Biezen and others have shown, party regulation has expanded across Europe following the collapse of the Soviet Union (see Table 1.1). Political parties in the United States are some of the most comprehensively regulated in the world, despite constitutional freedoms of speech and association that could conceivably be used as a shield to protect them from interference by the state. As I have shown, the impact of First Amendment rights on attempts to regulate the activities of political parties continues to produce a constant source of tension in American jurisprudence.⁶

The partisan nature of regulation and the ambivalent distinction between the public and private activities of political parties raise two important questions: Should political parties be regulated at all? If so, who should regulate them? In this chapter, I engage with both of these questions by comparing how parties are regulated by legislation with how the courts have adjudicated their internal activities. This approach acknowledges that party regulation comprises more than the constitutions, legislation and international standard-setting discussed in Chapter 1; it also includes a body of diverse case law. The comparison of the regulatory approaches taken by partisan actors (parliaments) and non-partisan actors (courts) reveals the varying attitudes of these actors to the appropriate role and function of political parties in society.

4 See, for example, Ingrid van Biezen and Daniela Romee Piccio (2013) 'Shaping Intra-party Democracy: On the Legal Regulation of Internal Party Organizations', in William Cross and Richard Katz (eds) *The Challenges of Intra-party Democracy*, Oxford: Oxford University Press, pp. 27–48; John Keane (2009) *The Life and Death of Democracy*, London: Simon & Schuster. Regulation in this sense both consolidates and provides a check on power.

5 Wolfgang Müller and Ulrich Sieberer (2006) 'Party Law', in Richard Katz and William Crotty (eds) *Handbook of Party Politics*, London: Sage, p. 439.

6 Gauja, *Political Parties and Elections*.

The chapter is structured in five parts. The first discusses the distinction between the ‘public’ activities of political parties and their status as ‘private’ voluntary associations at law. I show how these public activities have been used to justify regulatory intervention. The second section outlines the particular importance of party organisations as sites of contestation—and arenas in which the debate between public and private is at its most controversial. The third section outlines how in Australia legislative regulations touch on (or steer clear of) the internal activities of political parties. The fourth section contrasts this legislative approach with that taken by the courts in the adjudication of intraparty disputes. The final section reviews some of the recommendations offered by two recent reports from New South Wales (NSW) touching on the internal governance structures of political parties.

Autonomy versus regulatory democracy

The issue of autonomy of civil society organisations (such as parties, unions and charities) is particularly important as the state/civil society distinction goes to the fundamental question of whether or not state regulation is desirable, the extent to which the state and the public law should intervene in the activities of these organisations and which of these activities they should regulate.

If we categorise parties as ‘public’ institutions, receiving public resources and performing public functions such as legislative recruitment, regulating both their internal activities and the way in which they compete for political power may be desirable. The aim of such regulation might be more democratic forms of institutional governance (intraparty democracy) or more representative parliaments (for example, through requiring gender or minority group quotas in candidate selection contests).

Political parties are the exception in terms of the lack of regulation of internal governance; other non-governmental organisations performing public functions are extensively regulated. Historically, the regulation of the internal affairs of Australian unions—justified on the basis of their economic importance—far surpassed that found in Canada, the United States and the United Kingdom. In 1973, amendments to the *Conciliation and Arbitration Act 1904* gave financial

members the right to vote directly in elections for office-bearers and in plebiscites concerning union rules and policy. Unless exempted, all elections for office in trade unions or employer organisations must be conducted by the Australian Electoral Commission (AEC).⁷ Voluntary organisations, including those with significant representative functions, must comply with internal governance standards to be registered with the Australian Charities and Not-for-profits Commission; in 2016 over 1,000 lost their charitable status for failure to lodge annual reports, hence losing access to tax benefits and deductible gift status. Cooperatives must comply with the democratic governance provisions enshrined in cooperatives legislation, including democratic member control and one member, one vote.

Highlighting this regulatory disjuncture, Gary Johns has argued:

The major political parties have legislated to ensure the scrutiny of the democratic process in the key voluntary associations in industrial relations. They have done so, it appears, to enhance the confidence of the community and members in the conduct of ballots. There can be few more important ballots than those which determine who is to carry the party label of a major Australian party ... Why then would the parties not do the same for themselves?⁸

If the issue of autonomy is seen as central, however, and political parties are seen as having special claims to such autonomy in the interests of political pluralism, state regulation may be seen as an undesirable intrusion on these independent political entities and an unnecessary interference with the political expression of citizens.

As outlined in Chapter 1, the relationship between parties and the state has gained a great deal of prominence in recent years, particularly since the publication of Richard Katz and Peter Mair's 'cartel party' thesis. Katz and Mair argue that as the membership of political parties declines, parties rely more and more heavily on extracting the resources of the state to sustain their electoral and organisational activities. Since its publication in 1995, it remains the most-cited article in the journal *Party Politics*. The cartel thesis sits alongside a more generalist political science scholarship that sees political parties

7 Steve O'Neill (2011) *Trade Union Membership Standards for Not for Profit Regulation: Standards Too High?*, Parliamentary Library Research Paper No. 11 2010–11, Canberra: Parliament of Australia.

8 Gary Johns (2001) 'Desirability of Regulating Political Parties', *Agenda* 8(4): 298, 300.

becoming, more and more, organs of the state and less organs of civil society.⁹ However, the idea of a movement from private to public is not necessarily synonymous with the proposition that political parties are, or are becoming, agents of the state. Gary Johns argues that some political parties may choose to register, contest elections and become ‘public’ entities, but may never achieve office and/or receive state support. Conversely, political parties may achieve parliamentary representation and/or receive state support, yet remain private organisations in their internal affairs, closed to external scrutiny.¹⁰ This perspective assumes that the public/private distinction is based on the extent to which a political party is regulated by public law or receives legal recognition, rather than being an ‘organic’ reflection of the place and function of political parties in a modern representative democracy.

Party organisations as a contested space

Where a political party performs functions that are clearly of a public nature, such as legislative recruitment, there is a compelling argument for regulation to establish the rules of the game and to maintain a fair contest between participants (see Orr and Rayner, this volume). However, the application of this logic to the internal workings of political parties is far more controversial. Australian political parties have generally been very reluctant to expose their internal operations to the scrutiny of the law. The constitution and rules of the Australian Labor Party (ALP) state, for example:

It is intended that the National Constitution and everything done in connection with it, all arrangements relating to it (whether express or implied) and any agreement or business entered into or payment made or under the National Constitution, will not bring about any legal relationship, rights, duties or outcome of any kind, or be enforceable by law, or be the subject of legal proceedings. Instead

9 Richard 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; Richard Katz and Peter Mair (2009) ‘The Cartel Party Thesis: A Restatement’, *Perspectives on Politics* 7(4): 753–66. See, for example, Leon Epstein (1986) *Political Parties in the American Mold*, Madison, WI: University of Wisconsin Press, p. 157; Ingrid van Biezen (2004) ‘Political Parties as Public Utilities’, *Party Politics* 10(6): 701–22, at p. 705.

10 Gary Johns (1999) ‘Political Parties: From Private to Public’, *Commonwealth and Comparative Politics* 37(2): 89–113, at p. 90.

all such arrangements, agreements and business are only binding in honour ... it is further expressly intended that all disputes within the Party, or between one member and another that relate to the Party be resolved in accordance with the National Constitution and the rules of the state branches and not through legal proceedings.¹¹

While the preference of parties is clear, scholars disagree on whether the regulation of intraparty affairs is desirable in the first instance, what form it ought to take and what activities or functions it should encompass. Calls for the increased regulation of political parties to ensure they operate according to the principles of internal party democracy are in part a by-product of, and closely linked to, perceptions that political parties are failing in their democratic function. Empirical evidence from across the advanced industrial democracies suggests that party membership is in steady decline, electoral turnout and campaign participation are dropping and partisan attachments have significantly weakened.¹² Consequently, intraparty democracy (supported by legal regulation) has gained interest in recent years:

because of its apparent potential to promote a 'virtuous cycle' linking ordinary citizens to government, benefiting the parties that adopt it, and more generally contributing to the stability and legitimacy of the democracies in which these parties compete for power.¹³

The implication is that parties should be operating as 'schools for democracy', providing space for public deliberation and training for citizens to engage with each other as democratic equals, like cooperatives.

This view echoes some of the sentiments expressed by the Rudd ALP Government's 2009 *Electoral Reform Green Paper: Strengthening Australia's Democracy*, which put forward the proposal that 'political

11 Australian Labor Party (ALP) (2015) *National Constitution and Rules*, Canberra: ALP, as adopted 26 July 2015, Part A, 2(a)–(c).

12 Peter Mair and Ingrid van Biezen (2001) 'Party Membership in Twenty European Democracies', *Party Politics* 7: 5–21; Susan Scarrow (2000) 'Parties without Members? Party Organization in a Changing Electoral Environment', in Russel Dalton and Martin Wattenberg (eds) *Parties without Partisans*, Oxford: Oxford University Press; Mark Franklin (2004) *Voter Turnout and the Dynamics of Electoral Competition*, New York: Cambridge University Press; Martin Wattenberg (2003) *Where Have All the Voters Gone?*, Cambridge, Mass.: Harvard University Press.

13 Susan Scarrow (2005) *Implementing Intra-party Democracy*, Washington, DC: National Democratic Institute, p. 3. See also William Cross and Richard Katz (eds) (2013) *The Challenges of Intra-party Democracy*, Oxford: Oxford University Press.

parties should be required to conduct themselves democratically, responsibly and professionally' to 'foster a civic culture'.¹⁴ More recently, the 'Panel of Experts' appointed by the NSW Premier Mike Baird to review political finance in that State recommended that 'public funding should be conditional on good governance practices and assurance that the public funds are expended and accounted for appropriately'. Noting that there are 'currently very few legislated governance standards or requirements on parties who receive public funds', a situation 'exacerbated by the fact that the major parties are unincorporated (or voluntary) associations similar to community groups and sporting clubs', the panel said regulatory reform was a necessary and 'important step towards restoring community trust in politicians, parties and government'.¹⁵

A similar perspective is advocated by Ewing, who links taxpayer funding with the condition that parties' internal practices conform to socially acceptable principles, invoking the idea of state-sanctioned obligation. Ewing has argued that political parties should adopt democratic practices not simply as a matter of principle, but also in exchange for the provision of public funding. In what he terms a 'charter of members' rights', political parties should facilitate democratic procedures for policymaking, leadership selection and 'open and inclusive procedures' for the selection of parliamentary candidates.¹⁶

However, there is a danger in prescribing particular organisational forms for political parties, particularly when they invoke a model of the 'mass party' with its extensive, bottom-up membership participation—a model that has been defunct for many years and that scholars now suggest may never have existed. Imposing internal models of democracy on parties seems to ignore the fact that desirable democratic outcomes (such as the representation of women in legislatures) may not be achieved through more democratic (inclusive) intraparty procedures. While these two things may go together in some post-materialist parties, it is not always the case in older parties.

14 Australian Government (2009) *Electoral Reform Green Paper: Strengthening Australia's Democracy*, Canberra: Government of Australia, p. 116.

15 Kerry Schott, Andrew Tink and John Watkins (Panel of Experts) (2014) *Political Donations Final Report. Volume 1*, Sydney: NSW Department of Premier and Cabinet, p. 7.

16 Keith Ewing (2007) *The Cost of Democracy: Party Funding in Modern British Politics*, Oxford: Hart Publishing, pp. 247–8.

And some would argue that parties organised in a democratic fashion are ‘not well armed for the struggles of politics’ and are placed at a distinct disadvantage compared with those structured along ‘authoritarian and autocratic lines’.¹⁷

The debate over the extent of the regulation of parties’ internal activities reflects the differing emphases on parties as participatory and as electoral organisations. If the primary purpose of parties is to contest elections then democratising internal activities such as candidate selection might be a hindrance to their competitiveness. There might be reliance on general elections rather than regulation to ‘punish’ parties with undemocratic or unpopular internal arrangements, if the voters are aware of these and wish to do so. Conversely, if political parties are seen as sites for citizen participation in politics then there is a more compelling argument for regulating their internal activities. Such regulation might seek to enforce democratic process and outcomes (for example, the participation of members or gender quotas).

The scope of legislative regulation: How do political parties police themselves?

Contributors to this volume have already outlined the main aspects of Australian party regulation, so I shall only discuss here its general scope and intent. As discussed by Sarah John in her chapter, as well as in Chapter 1 by Marian Sawer and myself, the primary legislative recognition of political parties in Australia occurred with the passing of amendments to the *Commonwealth Electoral Act* in 1983, which allowed for the formal registration of political parties to contest federal elections. What is particularly interesting to note is that this and subsequent legislation (and associated regulation) were driven not only by the desire to introduce ballot labels—for example, in jurisdictions such as NSW—but also and more so by the introduction of public funding of elections.

17 Maurice Duverger (1954) *Political Parties*, London: Methuen, p. 134; see also Joseph Schumpeter (1942) *Capitalism, Socialism and Democracy*, London: Allen & Unwin.

PARTY RULES?

In the late 1960s and early 1970s, political campaigning in Australia began changing significantly.¹⁸ Having adopted techniques such as opinion polling and paid television advertising, both major parties had difficulty meeting the rising cost of campaigning. To meet the financial shortfall, the Hawke Government introduced public funding for election campaigns in 1984—something introduced in NSW for State elections three years earlier (see Table 1.2). The major parties publicly advocated this funding on the basis that it would lessen reliance on corporate donors.¹⁹ According to the Report of the Joint Select Committee on Electoral Reform (JSCER), the rationale of the scheme was to:

assist parties in financial difficulties; to lessen corruption; to avoid excessive reliance upon ‘special interests’ and institutional sources of finance; to equalise opportunities between the parties, and; to stimulate political education and research.²⁰

The compliance provisions associated with party registration and public funding in Australia have been well documented in previous studies and in Norm Kelly’s chapter in this volume. At the federal level, parties registered for the receipt of public funding under the *Commonwealth Electoral Act 1918* (Cth) must be established on the basis of a written constitution, have a minimum of 500 financial members or one Member of Parliament (MP) and are required to submit an annual disclosure of the sources of party funding. The benefits of registration include the use of the party name beside individual candidates on ballot papers, public funding provided that the party’s endorsed candidates poll at least 4 per cent of the primary vote and a copy of the electoral roll containing the postal contact details of all enrolled electors, which parties can make use of for campaigning purposes.

Although registered political parties require a formal written constitution under the provisions of the *Commonwealth Electoral Act*, the structure and content of the party constitution are essentially regarded as internal matters for individual political parties to

18 Sally Young (2004) *The Persuaders: Inside the Hidden Machine of Political Advertising*, Melbourne: Pluto Press; also see Stephen Mills (2014) *The Professionals: Strategy, Money and the Rise of the Political Campaigner in Australia*, Melbourne: Black Inc.

19 Gauja, *Political Parties and Elections*, pp. 145–7.

20 Joint Select Committee on Electoral Reform (JSCER) (1983) *First Report*, Canberra: Parliament of the Commonwealth of Australia, pp. 153–4. See also Graeme Orr (2003) ‘The Currency of Democracy: Campaign Finance Law in Australia’, *UNSW Law Journal* 26(1): 1–31.

determine. The Act requires only that the aims of the party (one of which must be the endorsement of candidates to contest federal elections) be enumerated, in addition to the terms and conditions of party membership (for example, the procedures for accepting or terminating membership). It is important to note that like the aims of the party, the Act requires only that the terms and conditions of party membership be formally codified in the party's constitution and does not impose any requirements as to their actual content. Although recommended by the AEC, the current regulatory regime does not require political parties to formulate rules for the appointment of office-bearers within the party organisation or to detail procedures for amending the party's constitution. Nor does the Act require the party to submit any details of its structure.

Turning to candidate selection, although the *Electoral Act* defines political parties as organisations whose objective or activity is to promote the election to parliament of 'candidates endorsed by it', there is no mention of how political parties should choose their candidates for parliamentary office. Only in Queensland does statute provide that candidate selection processes must take place according to the general principles of free and democratic elections.²¹ The upshot is that Australian political parties, while passing legislation that confers significant financial benefits on their organisations, have done little to expose their internal operations to public regulation and scrutiny.

Judicial developments in party regulation

To look only at statute law, however, obscures the fact that the courts are also an important source of regulation of political parties. Despite the lack of overt legislative regulation, party members have increasingly sought to challenge candidate selection outcomes and processes in the Australian courts. This has led to a substantial body of case law on whether intraparty affairs (such as candidate selection) are justiciable and, if so, how these affairs should be conducted.

For most of the twentieth century, political parties were characterised at common law as 'voluntary associations'. The case of *Cameron v Hogan* (1934) 51 CLR 358 (hereinafter *Cameron*), heard one-quarter

21 *Electoral Act 1992* (Qld), s. 73A.

of a century after the consolidation of the party system in Australia, placed the internal affairs of political parties largely beyond the reach of the law. However, this situation changed in the latter half of the twentieth century when the courts began contemplating the public role and importance of parties. The historical progression highlights the symbiotic relationship between judicial and legislative developments in the regulation of political parties. Both are closely related—with the former using the legislative and constitutional recognition of parties as a justification for judicial intervention in what was once considered the ‘domestic concern’ of the parties.²²

Numerous scholars have charted the evolution of political parties in Australian jurisprudence from voluntary associations to public utilities.²³ In this section, I focus on how this changing status has impacted on the way in which the courts have resolved intraparty disputes, in effect creating a body of law that de facto regulates the internal organisation of contemporary parties. Using a series of cases as illustrative examples, I discuss how courts have addressed some of the challenges posed by the public/private distinction—in particular, how they have reconciled parties’ associational freedoms with their very public roles in representative electoral systems. This section of the chapter also examines the extent to which courts have responded to the ‘threat’ of partisan lawmaking and been willing to intervene when legislation clearly reflects partisan interests or favours the incumbent(s).

The rights of members versus non-members

The way in which political parties have been recognised and categorised as voluntary associations has important implications for the rights and powers of the membership. For example, as noted above, the High Court of Australia’s decision in *Cameron* gave Australian political parties the status of voluntary associations.²⁴ The consequence of this categorisation was that a member of a voluntary association could enforce the rules or constitution of that association only if, under those rules, the member had a right of

22 Justice Starke, *Cameron v Hogan* (1934) 51 CLR 358, at 376.

23 Graeme Orr (2010) *The Law of Politics: Elections, Parties and Money in Australia*, Sydney: The Federation Press; Gauja, *Political Parties and Elections*.

24 (1934) 51 CLR 358.

a civil or a proprietary nature. This narrow construction severely limited the membership's ability to mount an action where the party constitution had been breached.

The practical and political implications of this judicial approach to political parties are that decision-making within parties must be exercised according to the rules and constitution of the party. There is no legal requirement that decisions of the party be made democratically—indeed, it is entirely possible to have an autocratic party organisation—but they must be made fairly and according to the principles of natural justice. Questions of procedural fairness and natural justice arose in the Australian case *Baker v Liberal Party of Australia (SA Division)*, which concerned the admission of members to the South Australian (SA) branch of the Liberal Party of Australia.²⁵ The party had rejected the membership applications of some 500 applicants lodged by an association called the Combined Shooters and Firearms Council of South Australia. Baker was one such applicant. The Liberal Party perceived the 500 applications that included that of Baker as constituting a potential takeover threat and a compromise to its independence. The party claimed that the SA State Executive had the power, under the party's constitution, to reject an application for membership without giving reason.

Justice Bollen of the SA Supreme Court accepted the argument that the party could reject a membership application without giving reasons, provided that the application was considered. The court also rejected the argument that the plaintiff had a legitimate expectation that she would become a member if she complied with the procedure for application.²⁶ The court agreed with the Liberal Party's submission that the principles of natural justice that relate to the reasonableness or fairness of the decision do not apply in the case of an application for membership to a voluntary association. As admission had not yet occurred, no legal relationship existed between the parties and hence there was no proprietary interest to protect. However, the situation would have been different had Baker been a member of the party:

25 (1997) 68 SASR 366; Anika Gauja (2006) 'From Hogan to Hanson: The Regulation and Changing Legal Status of Australian Political Parties', *Public Law Review* 17: 282–99, at p. 297.

26 Justice Bollen at 374.

'of course it would have all been different had the plaintiff been admitted to membership and then had her membership purportedly cancelled, that is, been dismissed or struck off'.²⁷

While in this instance the principles of natural justice were beyond the reach of an applicant to a political party, the decision in *Baker* illustrates the close relationship between the principles employed in the adjudication of intraparty disputes and the requirement of procedural fairness applicable to governmental bodies in the realm of administrative law. Caroline Morris has observed a similar trend in the developing case law of the UK courts.²⁸ The decision also raises the issue of the differential status of party members and non-members. In an era in which political parties are opening up their organisations to increased participation from non-members through initiatives such as community preselections and supporters' networks, the decision in *Baker* brings into question whether those who participate in what were once seen as intraparty decisions, but who are not members, will have the same legal rights to challenge and enforce party processes as those who are financial members of the organisation.

Candidate selection

An example of a high-profile and influential case concerning candidate selection in Australia is *Clarke v Australian Labor Party (SA Branch)* (1999).²⁹ In this case, a member of the SA State Legislature (and prospective candidate) sought to challenge 2,000 new memberships introduced into the party prior to his selection contest to influence the outcome of the party vote. Clarke argued that the validation of these memberships by a special convention of the party did not conform to the party's constitutional process. The Supreme Court of South Australia held that the dispute was justiciable due to the 'statutory recognition by the South Australian Parliament of political parties' in the provisions of the *Electoral Act 1985 (SA)*.³⁰

27 *ibid.*, at 375.

28 Caroline Morris (2008) 'Conceptualising Candidate Selection in the Courts: Where to After *Watt v. Ashan?*', *Public Law* (2008): 415–29.

29 (1999) 74 SASR 109.

30 *Clarke v Australian Labor Party (SA Branch)* (1999) 74 SASR 109, per Justice Mulligan at para. 65.

In assessing the constitutional validity of the memberships and the party's validation of them, Justice Mulligan looked to the objectives and rationale of the party as expressed in official party documents. Resolutions of the 1955 and 1979 conferences of the party were analysed to illustrate that 'the Party is a democratic socialist party and, in effect, that its objectives are to be achieved by the democratic process'.³¹ It was against these identified democratic values that the court determined the constitutional validity of the party's exercise of power in the resolution of Clarke's dispute:

The manner of obtaining membership is clear. The fee must be paid to the Sub-Branch which must consider the application for membership at a general meeting. This construction of the Rules also accords with the democratic nature of the party ... It provides a safeguard against a group of persons whose interests and motives were contrary to those of the Sub-Branch and the party suddenly joining by merely paying a fee and filling out a form.³²

Justice Mulligan also criticised the internal dispute-resolution mechanisms of the party, noting that, in some instances, the plaintiff's claim was 'not resolved' by the party or the response was 'limited'. The court regarded the way in which the party's executive had dealt with the dispute as unsatisfactory and noted that the complaint should have been referred to the party's disputes tribunal and resolved by process of conciliation.³³ The special convention to amend the rules and constitution of the party was not regarded as an adequate internal dispute-resolution mechanism, despite the defendant's contention that the plaintiff could have attended the meeting to argue his case against the proposed amendments.

The significance of the *Clarke* decision lies not only in its approval of the justiciability of intraparty disputes concerning candidate selection, but also in the way in which the court interpreted the ALP's rules and constitution in light of democratic principles—namely, 'the establishment of an efficient, effective and fair election process'.³⁴ Far from being exclusively private organisations:

31 *ibid.*, para. 47.

32 *ibid.*, para. 111.

33 *ibid.*, paras 94–5.

34 *ibid.*, para. 126.

PARTY RULES?

Certain decisions of a political party's internal process—such as those relating to the selection of candidates for election, for example—are in truth not private matters at all; they are very public, particularly when there are disputes between factions. In such circumstances, a political party may regard it as highly expedient in order to quell faction-fighting that the final decision on the constitutional validity of its internal proceedings be left, not to a domestic tribunal constituted by party members whose impartiality may, however unjustly, be called into question but, rather, to a court whose impartiality is beyond any question.

Judges have called attention to the fact that a modern political party registered under the legislation governing elections is in itself an institution whose internal stability and good governance is important in the democratic process ... Accordingly, there is a public interest in ensuring that a registered political party, which is entitled to funding assistance for electoral expenses from public monies, is administered in accordance with a correct construction of its rules.³⁵

This may indicate a trend for the Australian courts to imply and uphold minimum standards of intraparty democracy in party constitutions, particularly when the objective is espoused in the party's constitution and official documents, regardless of the behaviour and management tactics of elected party officials.

Dealing with limited governance arrangements

As we have seen, party registration requirements in Australia are generally quite lax. Although a party must be established on the basis of a written constitution, there are few legislative directives as to what the constitution should actually contain, such as a minimum level of detail for certain intraparty procedures. Hence, a situation can arise where a political party has no, or very few, rules in place to assist a court in resolving any party dispute. This lack of constitutional detail can pose a significant problem for party litigation and the process of adjudicating such cases. How should (or does) a court approach a situation in which the party lacks basic constitutional measures that provide for the processes of internal decision-making?

³⁵ *Coleman v Liberal Party of Australia (New South Wales Division) (No. 2)* [2007] 212 FLR 271, at paras 47–8.

Burston v Oldfield presents an example of the NSW Supreme Court's approach to missing constitutional provisions.³⁶ The case concerned a challenge to the order of candidates on the One Nation NSW ticket for the 2003 NSW Legislative Council election. Two separate meetings of party members claiming to have validly nominated the candidates contested the order of candidates (and hence their potential order of election). The first meeting, that of the State Executive of the party, was held in December 2002. Following dissatisfaction within the party as to the decision of the executive, an alternative meeting of all party members was called for 19 January 2003. Although notice of the meeting was sent to all members, less than the 28 days' notice required by the party constitution was given. Over 70 members attended the meeting, which elected an alternative Legislative Council ticket.

In deciding which of the tickets was valid, One Nation's rules and constitution offered very little assistance to the court. Although it was agreed between the parties that the constitution was valid and binding, it did not contain any provisions relating to the conduct of State Executive meetings, party conferences or special meetings. As Justice Hamilton noted, 'the Political Party was formed and has proceeded in a very informal fashion'; consequently, 'the provisions of the Constitution are exiguous and in some ways more remarkable for what they do not contain than for what they do contain'.³⁷ To adjudicate the dispute, the court therefore looked instead to the body of incorporated associations law to determine the validity of the meetings and which took precedence.

Burston was decided on the technical question of whether there was a quorum present at the State Executive meeting in December 2002. Applying prior authority of the Australian High Court in interpreting the meaning of a quorum, the Supreme Court held that the State Executive meeting was valid.³⁸ The special meeting of members, although giving expression to the democratic will of the membership, was not provided for in the party constitution and therefore lacked binding status within the party.³⁹

36 *Burston v Oldfield* [2003] NSW SC 88; see Gauja 'From Hogan to Hanson', p. 298.

37 *Burston*, at para. 12.

38 *ibid.*, at para. 15.

39 *ibid.*, at para. 16.

PARTY RULES?

Political parties that are formed without adequate governance structures, regardless of the extent to which they can be regarded as 'democratic', present a real problem and are a significant burden for electoral administrators all over the world. For example, the AEC expressed its concern that:

The 'churning' of party registration at the smaller or emerging end of the spectrum involves the AEC in considerable time and effort in seeking compliance with the administrative requirements of registration. This has involved complex challenges in those situations where parties' administrative arrangements are inadequate to properly deal with internal party management issues. In one case there was contention as to the make up of the party executive arising from procedural deficiencies in the conduct of the national conference at which they were 'elected'. This resulted in an application to voluntarily deregister the party that was questioned on the ground that it did not have the support of the party or its 'executive' generally. It also resulted in a considerable amount of correspondence from members on issues that were not within the scope of the AEC's functions. The AEC has, and wants, no role in internal party management matters. It is for the party, or the Courts, to resolve internal conflicts.⁴⁰

Partisan regulation? The case of Unions NSW

In 2012, the O'Farrell Liberal–National Coalition Government introduced two significant changes to the regulation of political finance in NSW.⁴¹ The first was to restrict the ability to make donations to political parties to individuals on the NSW electoral roll, thereby effectively outlawing donations from corporations, organisations and other entities, as well as individuals not enrolled to vote (for example, permanent residents and those under the age of 18) (section 96D). Previously, bans had applied only to a special class of prohibited donor, which included property developers and businesses involved in the provision of tobacco, liquor and gambling. The second amendment effectively tightened the caps on electoral communications expenditure by requiring that the spending of political parties and 'affiliated organisations' was aggregated for the purpose of meeting

40 Australian Electoral Commission (AEC) (2005) *Funding and Disclosure Report Election 2004*, Canberra: AEC, pp. 40–1.

41 *Election Funding, Expenditure and Disclosures Amendment Act 2012* No. 1 (NSW) (hereinafter *EFEDA Act*).

the maximum limit allowed (section 95G(6)). An affiliated organisation was defined as a body authorised by party rules to appoint delegates to a governing body or participate in the selection of candidates.⁴²

The legislation was seen as controversial because the restrictive provisions applied disproportionately to the ALP, by virtue of its unique structure and the institutionalised relationship between the party's governance bodies and the union movement. In effect, while the legislative provisions did not specifically single out the ALP, if the party continued to operate according to its existing decision-making processes, it would have been subject to effectively tighter expenditure limits and would not have been able to accept donations from many of the industrial organisations that had historical ties with the movement. The legislation therefore had the potential to significantly affect the internal structure and operation of the party, forcing it to seek alternative means of funding its campaigns and/or restructure its relationship with the union movement.

Unions NSW (the peak body for trade unions in NSW) challenged the constitutional validity of the legislation in the High Court. Unions NSW had a clear interest in the matter as many unions in NSW affiliate with the ALP, sending delegates to its annual conference, participating in the selection of candidates for public and party office, as well as donating to the party organisation. The question for the High Court was whether sections 96D and 96G(6) impermissibly burdened the freedom of political communication as implied in the Australian Constitution.

The court noted that the general purpose of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW)—to regulate political donations and expenditure through a system of donation and expenditure caps and the provision of public funding—was not in dispute. However, the High Court held that neither of the amendments served a legitimate purpose that was connected to the Act, and therefore both section 96D and section 95G(6) were held to be invalid. The majority observed that the terms of section 96D (limiting donations to individual electors) revealed an 'absence of evident purpose and a lack of connection to the scheme' of the Act.⁴³

42 *ibid.*, s. 95G(7).

43 *Unions NSW v NSW* [HCA] 58, at para. 52.

PARTY RULES?

The court further found no clear justification for limiting donations in this way, in contrast with other parts of the Act, which quite clearly were directed at integrity and reducing corruption. In ruling that the provision was invalid, the court noted:

In argument, the identification by the defendant of a relevant purpose for the nature and scope of s 96D's prohibition proved elusive. The defendant pointed to the general purposes of the EFED [*Election Funding, Expenditure and Disclosures*] Act, but was not able to explain how the prohibitions effected by s 96D were connected to them, let alone how the prohibitions could be said to further them.⁴⁴

Section 95G was equally quickly struck down by the court, which did not accept that it served any legitimate purpose in connection with the integrity and anticorruption provisions of the Act. The court queried how affiliation alone might identify an organisation as:

the same source of funds for the making of electoral communication expenditure. Moreover, it would appear to assume that the objectives of all expenditure made by the party on the one hand and the organisation on the other are coincident.⁴⁵

The court commented that the purpose of the provision was to reduce the amount that a political party affiliated with an industrial organisation may spend at elections, and likewise to limit the amount that may be spent by an affiliated industrial organisation. However, 'what cannot be deduced is how this purpose is connected to the wider anti-corruption purposes of the EFED Act'.⁴⁶

In his reasons, Justice Keane explicitly highlighted the differential effect the legislative amendments had on the ALP. He noted that section 95G treated certain sources of political communication differently to others—for example, third-party campaigners, which may have close ties to a political party and promulgate exactly the same message, are not subject to the aggregation provisions. Ultimately:

Political communication generated by electoral communication expenditure by organisations affiliated with a party is disfavoured relative to political communication by entities which, though actively supportive of, and indeed entirely ad idem with, a given party,

44 *ibid.*, at para. 54.

45 *ibid.*, at para. 63.

46 *ibid.*, at para. 64.

are not affiliated with it. To discriminate between sources of political communication in this way ... is to distort the flow of political communication.⁴⁷

While in this instance the High Court did not hesitate to strike down legislative provisions that, in effect, discriminated against the ALP, it did so without determining whether the provisions were reasonably justified in limiting the implied freedom of political communication. Because of this, it is not clear what types of regulatory provisions relating to the structure and funding of political parties might be deemed legitimate, even if they burden association and communication freedoms of parties. The Australian High Court has also been far more reticent in critiquing the partisan interests at stake than its American and Canadian counterparts.⁴⁸

Conclusion: Where to from here?

While political parties have become subject to increased regulation since the introduction of registration and public funding in the 1980s, these measures predominantly address the public face of parties: how they interact with one another and the electoral system. There is little legislative interference in the internal workings of political parties—for example, how parties select their candidates for public and party office, how they formulate their policies, structure decision-making procedures and administer the party on a daily basis.

With a few exceptions, any directives in this area tend to be the product of the common law and judicial decisions. As this chapter has demonstrated, while the courts were once tentative in extending their reach to what was seen as the private realm of intraparty affairs, they are now more willing to adjudicate intraparty disputes, to enforce a party's rules and procedures, as well as apply common law principles (such as natural justice) to intraparty decisions. This begs the question: Does the current scheme adequately address the challenges of partisanship and the necessity of balancing the autonomy of political parties with

47 *ibid.*, at para. 167.

48 See Gauja, *Political Parties and Elections*.

PARTY RULES?

their role in public affairs? Does it ensure that parties' freedoms of association are respected, while facilitating a more transparent and accountable political process?

At the end of 2014, two separate reports into political finance in NSW, published by the Panel of Experts and the Independent Commission Against Corruption (ICAC), recommended that political parties be subject to tighter regulation of their internal governance arrangements. Showing deep scepticism that political parties were capable of adequately regulating themselves, the NSW Panel of Experts expressed concern about the governance arrangements of the major parties as part of its consultation process. The panel noted:

We produced an Issues Paper that included information and questions about the reform of party governance and the conditions that should be attached to public funding payments. We were disappointed that none of the political parties turned their minds to this issue or suggested options for reform in their submissions. While we were keen to pursue these issues during our consultations and meetings, the focus of the parties was on the funding model for elections.⁴⁹

Given the reluctance of political parties to put forward measures to regulate themselves, the Expert Panel (together with ICAC) suggested that public funding needed to be explicitly linked with good governance and compliance practices. ICAC noted that enacting legislation that would place 'restrictive requirements' on the internal operation of parties would be 'inconsistent with the nature of parties and their role in democracy'. However, it also noted that there:

is no doubt that the internal party governance arrangements achieved by the current regulatory framework in NSW fall short of what is desirable in terms of holding parties and their senior officers accountable for non-compliance.⁵⁰

Both reports recommended that parties receiving public funding should be required to submit details of their governance standards and accountability processes to the NSW Electoral Commission, and that payment of public funds should be conditional on the commission's

49 Panel of Experts, *Political Donations Final Report*, p. 121.

50 Independent Commission Against Corruption (ICAC) (2014) *Election Funding, Expenditure and Disclosure in NSW: Strengthening Accountability and Transparency*, Sydney: ICAC, p. 8.

‘approval’ of these standards and processes.⁵¹ While the Expert Panel report did not provide detail on what constituted appropriate good governance standards, the ICAC report suggested that the principles of good governance set by the Australian Securities Exchange would be an appropriate model to follow. According to these principles, parties must clearly set out:

- The respective roles and responsibilities of the most senior levels of leadership and management within parties, and how their performance will be monitored and evaluated
- Structuring decision-making at the top level to add value according to the size, composition, skills and commitment of the party
- Promoting ethical and responsible decision-making
- Safeguarding the integrity of financial reporting by having formal and rigorous processes in place that can be independently verified
- Making timely and balanced disclosures in a transparent way
- Respecting the rights of the regulator and the general public to seek accountability
- Establishing and regularly reviewing a risk management framework.⁵²

ICAC’s report argued that ‘because they are principles, the freedom of parties to self-organise is largely preserved’.⁵³ While financial noncompliance is clearly the target of these recommendations, applying the principles of corporate governance to political parties is controversial. Apart from the capacity of the electoral commission to undertake an oversight role (particularly in light of the AEC’s aversion to getting involved in the internal politics of parties—see the previous discussion), the principles assume that decision-making within parties is structured in a hierarchical manner. For example, how might a party with a flat, grassroots organisation (such as The Australian Greens) be able to comply with these provisions?

The ICAC report suggested that compliance need not be onerous; parties in NSW would simply be required to incorporate the principles listed above into their constitutions and rules, and provide details of their leader, party officers, agents and auditors. Rather than

51 Panel of Experts, *Political Donations Final Report*, p. 121.

52 ICAC, *Election Funding*, p. 15.

53 *ibid.*, p. 17.

PARTY RULES?

re-engineer party structures, the primary aim of the regulation would be to shift the legal responsibilities for election funding compliance and governance from the party agent to senior party office-holders within the party.⁵⁴ The NSW Government has indicated that it accepts these recommendations 'in principle' and will work with political parties and the electoral commission in considering 'how to implement this recommendation'. Yet, by October 2016 there had been no legislative movement in this area. The path to regulatory reform seems strikingly familiar. There is potential that the application of corporate governance principles might be an innovative way forward in navigating and balancing the role of political parties as private associations and public entities (and hence also serve as a model for other Australian jurisdictions). However, the reticence of parties in adopting regulatory reforms that target their internal processes means that change in this area will be gradual, if it happens at all.

54 *ibid.*, p. 15.

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.