



**Enforcing democracy? Towards a
regulatory regime for the implementation
of intra-party democracy**

Anika Gauja

University of Sydney

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The high-profile challenge to former leader Simon Crean in the safe Labor seat of Hotham in March 2006 presents a recent example of the importance of preselections in the Australian political system. Although this contest was cleanly fought, it follows numerous accounts of branch stacking and abuse of process that have afflicted both major and minor parties. Given the entrenched role of parties in Australian politics and the fact that such malpractices undermine the respect and confidence in parties as key representative institutions, we need to consider whether it is desirable that Australian political parties be organised democratically, whether this should be externally enforced, and to what extent legal measures should require decisions such as candidate selection and policy formulation to be taken by the membership.

The regulation of internal decision-making processes in Australian parties

In the absence of a legislative regime governing how parties organise at the federal level and in all States except Queensland, the internal decision-making processes of political parties are governed by the common law. Parties have traditionally been regarded as ‘private associations’, their internal operation beyond the reach of the law, although this status has been revised over the last decade with the introduction of party registration and public funding.¹ This jurisdiction (and the accountability associated with it) has been accepted by the major parties, who have not yet challenged the shift in status in the High Court. However, whilst the courts can and do adjudicate intra-party disputes, they are limited to enforcing existing rules between members. Furthermore, under the federal registration regime, parties are not required to organise their internal affairs in a democratic manner, let alone submit details of key governance procedures such as the pre-selection of candidates.

Queensland is the only Australian State that has implemented legislative rules for the external enforcement of intra-party democracy. Reforms introduced in 2002² designed to improve transparency and accountability require parties to set out in detail key decision-making procedures, including the election of office bearers and the preselection of

¹ See Graeme Orr, 2000, ‘The law comes to the party: The continuing juridification of political parties in Australia’, *Constitutional Law and Policy Review* 3 (3): 41–9; John Forbes, 1995, *Judicial Review of Political Parties*, Parliament of Australia Parliamentary Library Research Paper No. 21 (1995–96).

² *Electoral and Other Acts Amendment Bill 2002* (Qld).

candidates within their constitutions. Although parties are free to choose their method of preselection, it must conform to the ‘general principles of free and democratic elections’. Oversight of this regime is entrusted to the Queensland Electoral Commission, which may inquire into and undertake audits of party preselections. Parties that breach these provisions are liable to deregistration and consequently the loss of public funding.

How does the legal regulation of parties in Australia compare to other democracies?

Table 1 presents comparative data on the regulation of intra-party democracy within a diverse sample of nations selected to illustrate the range of regulatory approaches amongst common law, civil law and emerging democracies. Both legislation and national constitutions are regarded as sources of party law. Whilst there is a visible trend to the stricter regulation of party finances to ensure equality in electoral competition, the regulation of parties’ internal decision making processes still varies greatly amongst the countries surveyed. This is partly the product of history. Countries such as Australia, the United Kingdom and the United States, with strong liberal democratic traditions, have been reluctant to impose external regulations on political associations, which have been viewed negatively as a form of state interference in civil society. In New Zealand, whilst legislation provides for democratic preselections, there has been no attempt to enforce this clause of the *Electoral Act*.³

In Germany by contrast, party law is comprehensive. A product of political history developed in response to the Nazi regime, the external enforcement of the democratic organisation of political parties is viewed as a fundamental guard against the centralisation of political power and a means to ensure popular control of government. This is also true of many developing and transitional democracies, where the constitutional recognition and the regulation of political parties is a key feature of democratisation and institution-building (for example, Nigeria, Liberia and Nepal).

³ Raymond Miller, 2005, *Party Politics in New Zealand*, South Melbourne, Oxford University Press, p. 110.

Table 1: Comparative Constitutional and Legislative Regimes for the Regulation of Intra-Party Democracy

Country	Constitutional Regulation	Regulation of Party Finance	Regulation of Candidate Pre-Selection	Regulation of other Internal Decision-Making Processes
Australia	No	Yes	No (except Queensland)	No
Germany	Yes—parties may be freely established and their organisation should conform to democratic principles.	Yes	Yes—candidates must be selected by a properly-constituted assembly of party members (requirements outlined) by secret ballot.	Yes—German parties law provides detailed rules regarding membership rights, internal order, election of executives, and arbitration of internal disputes.
Portugal	Yes—a party must be governed by the principles of transparency, democratic organisation and management and the participation of all its members.	Yes	No	Yes— regulation of names and party symbols.
Finland	No	Yes	Yes—candidate selection must take place by ballot of the membership.	Yes—parties are obliged to have written rules following democratic principles in internal decision-making and governance.
Nepal	Yes—detailed rules regulating party registration.	Yes – but difficulties ensuring compliance.	Yes—must be democratic if codified within the party constitution.	Yes—democratic & periodic election of office bearers.
Spain	Yes – the internal structure and operation of parties must be democratic.	Yes	No—constitutional provisions rarely enforced.	No
United Kingdom	No	Yes	No	No
New Zealand	No	Yes	Yes—Electoral Acts require registered parties ‘follow democratic procedures in candidate selection’. However, there has been no attempt to legally enforce this provision.	No
Canada	No	Yes	No	No
United States	No	Yes	Yes—most preselections take place through statutorily-governed primaries.	No
Nigeria	Yes—provisions regarding party registration and restrictions on formation.	Yes—but rarely enforced.	No	Yes—democratic & periodic election of office bearers.

Although not initially enacted to serve the domestic interest, the regulatory framework in Finland has been approved by both political elites and the public, which has led to its extension over time. The enforcement of intra-party democracy is viewed in the Finnish context as essential to ensure that political parties remain responsive mediators between civil society and the political establishment.⁴

It is interesting to note that, in New Zealand, constitutional and legislative requirements for the implementation of intra-party democracy are not routinely enforced. More research needs to be conducted as to why they have become redundant, but it may indicate weakness in the enforcement regime, or the limited utility of external regulation in nations with a particular political culture that focuses on the broader electoral contest between parties, rather than competition within them.

Arguments for and Against Internal Party Democracy

It is this tension between inter and intra-party democracy that frustrates any attempt to implement democratic decision-making within parties without challenge. If we regard elections as the centrepiece of Australian democracy, internal party democracy can be undesirable as it impedes efficient decision-making within parties, precludes parties from choosing the candidates they regard as most appealing to the electorate, and transfers key political decisions to vocal party activists at the expense of the broader electorate. With low levels of party membership in Australia, transferring policy decisions to party members risks creating a party system that is unrepresentative of voters. Commentators such as Gary Johns have also argued that externally enforcing rules for intra-party decisions may also undermine a party's right to associate freely. This is particularly pertinent for parties that seek to represent a particular section of society and appoint candidates from within it (for example, minor parties such as the Seniors and the Australian Indigenous People's Party), or parties that wish to pursue affirmative action strategies (such as the ALP and Greens in NSW).

⁴ Jan Sundberg, 1997, 'Compulsory Party Democracy: Finland as a Deviant Case in Scandinavia', *Party Politics*, 3 (1): 97–117, p. 98.

Despite these concerns, there are compelling arguments for internal party democracy.⁵ Judged from the standpoint of the democratic values adopted by the Audit, internal party democracy:

- Encourages political equality by creating a level playing field in party pre-selections and policy debate within the party.
- Ensures popular control of government by extending democratic norms such as transparency and accountability to party organisations. It fulfils the legitimate citizen expectation that parties, which receive public funding and effectively determine who will be elected to public office, should conform to democratic principles within their own organisations.
- Improves the quality of public debate by fostering inclusive and deliberative practices within parties, creating opportunities for civic participation and political education—conducive to the establishment of a democratic culture within Australian political parties.

Options for Reform

Even if we accept the normative desirability of intra-party democracy, is legal enforcement necessary, or will self-regulation suffice? Some commentators argue that to reaffirm public confidence, any reforms must be internal as legislation may only serve to entrench distrust.⁶ The democratic election of candidates through party primaries (one member, one vote) has already been introduced voluntarily by parties such as Labour in Britain, by Fine Gael and Labour in Ireland and by Democrats 66 in the Netherlands.

However, given the conflict between intra-party democracy and the efficient functioning of parties striving to increase electoral popularity, there are few incentives for parties to implement democratic processes within their organisations. Whilst internal party democracy may be conducive to greater membership participation, there is no clear correlation between democratic party structures and electoral success, as the uncertain

⁵ See Dean Jaensch, Peter Brent and Brett Bowden, 2004, *Australian Political Parties in the Spotlight*, Report No. 4 for the Democratic Audit of Australia, Political Science Program, Research School of Social Sciences, The Australian National University. Available at: http://democratic.audit.anu.edu.au/papers/focussed_audits/200501_jaensch_parties.pdf pp. 26-28.

⁶ Graeme Orr, 2001, 'Overseeing the Gatekeepers: Should the Preselection of Political Candidates be Regulated?', *Public Law Review* 12: 89–94, p. 90.

fate of the Australian Democrats (arguably the most democratic party in Australia) illustrates. Numerous accounts of branch stacking and dubious pre-selections within Australian political parties over the last two decades suggest that without any concrete electoral incentive, self-regulation is of limited efficacy.

There are several options for externally enforcing intra-party democracy, with varying levels of intrusion into parties' existing organisational practices. The most radical of reforms would be to establish a detailed statutory regime that prescribes a particular democratic organisational structure for political parties. Which aspects of a party's organisation and decision-making procedures should be regulated is open to debate, but this could typically include the mandatory introduction of party primaries in candidate preselection (as undertaken in the United States and Iceland). Whilst primaries open up opportunities for membership participation, difficulties arise when considering their administration: for example, who should oversee the process and the costs of supervision?

Reforms such as those which have taken place in Queensland could be extended to other States, Territories and to parties registered at the federal level. The requirement of democratic processes could be limited to preselections, or extended to other areas of internal governance (for example, the election of office bearers). The decision of how best to implement intra-party democracy is left to the party, which need not go so far as initiating US style primaries, but which must conform to the principles of free and democratic elections. Enforcement of the regime would be tied to the receipt of public funding, providing a strong incentive for compliance.

Nonetheless, both 'intra-party democracy' and 'principles of free and democratic elections' are inherently contested concepts. There is no agreement as to whether procedures such as one member one vote elections would provide a more democratic outcome than other forms of decision making, such as party conferences. Whilst the Australian Democrats advocate the use of the one member one vote system and allow members to select party leaders and office bearers by postal vote, political scientists have

suggested that this form of intra-party democracy can be used to marginalise vocal activists and increase the centralisation of power within parties.⁷

However, at the very least parties ought to codify how they are governed. The rights of party members with respect to internal decision-making procedures need to be clarified. At present, whilst there is a requirement to submit a party constitution when registering to receive public funds, pre-selection and party decision-making processes do not need to be outlined in this document. This has left considerable doubt as to the rights and responsibilities that party members actually possess. Therefore, to achieve greater levels of accountability, party constitutions ought to be made publicly available, and parties should be compelled to disclose details of pre-selection and key decision-making procedures upon registration.

Intra-party democracy is potentially an effective means of increasing political participation, awareness and strengthening the legitimacy of parties as a key linkage between parliament and the electorate. Instances of branch stacking and the appearance of parties with dubious governance structures (such as One Nation) highlight the need for the external enforcement of intra-party democracy in the absence of electoral incentives. Greater transparency and accountability than that which is currently achieved by limited common law regulation is necessary to ensure that popular control of government is extended to political parties, not simply the contest between them.

⁷ See 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.

Suggestions for further reading:

Bennett, Scott, 2002, *Australia's Political Parties: More Regulation?* Research Paper No. 21, Department of the Parliamentary Library, Parliament of Australia. Available at: <http://www.aph.gov.au/library/pubs/rp/2001-02/02rp21.htm>

Gauja, Anika, 2005, 'Keeping the party under control: The legal regulation of Australia's political parties', *Australian Review of Public Affairs*, 11 July 2005. Available at: <http://www.australianreview.net/digest/2005/07/gauja.html>

Jaensch, Dean, Peter Brent & Brett Bowden, 2004, *Australian Political Parties in the Spotlight*, Report No. 4 for the Democratic Audit of Australia, Political Science Program, Research School of Social Sciences, The Australian National University. Available at: http://democratic.audit.anu.edu.au/papers/focussed_audits/200501_jaensch_parties.pdf

Janda, Kenneth, 2005, *Adopting Party Law*, Report for the National Democratic Institute for International Affairs, Washington, USA. Available at: http://www.accessdemocracy.org/library/1948_polpart_janda_110105.pdf

Orr, Graeme, 2001, 'Overseeing the Gatekeepers: Should the Preselection of Political Candidates be Regulated?', *Public Law Review* 12: 89–94.

Tully, Steve, 2003, 'Party Registration and Preselection: A Minefield for Electoral Administrators?', in Graeme Orr, Bryan Mercurio & George Williams (eds.), *Realising Democracy: Electoral Law in Australia*, Sydney, Federation Press.