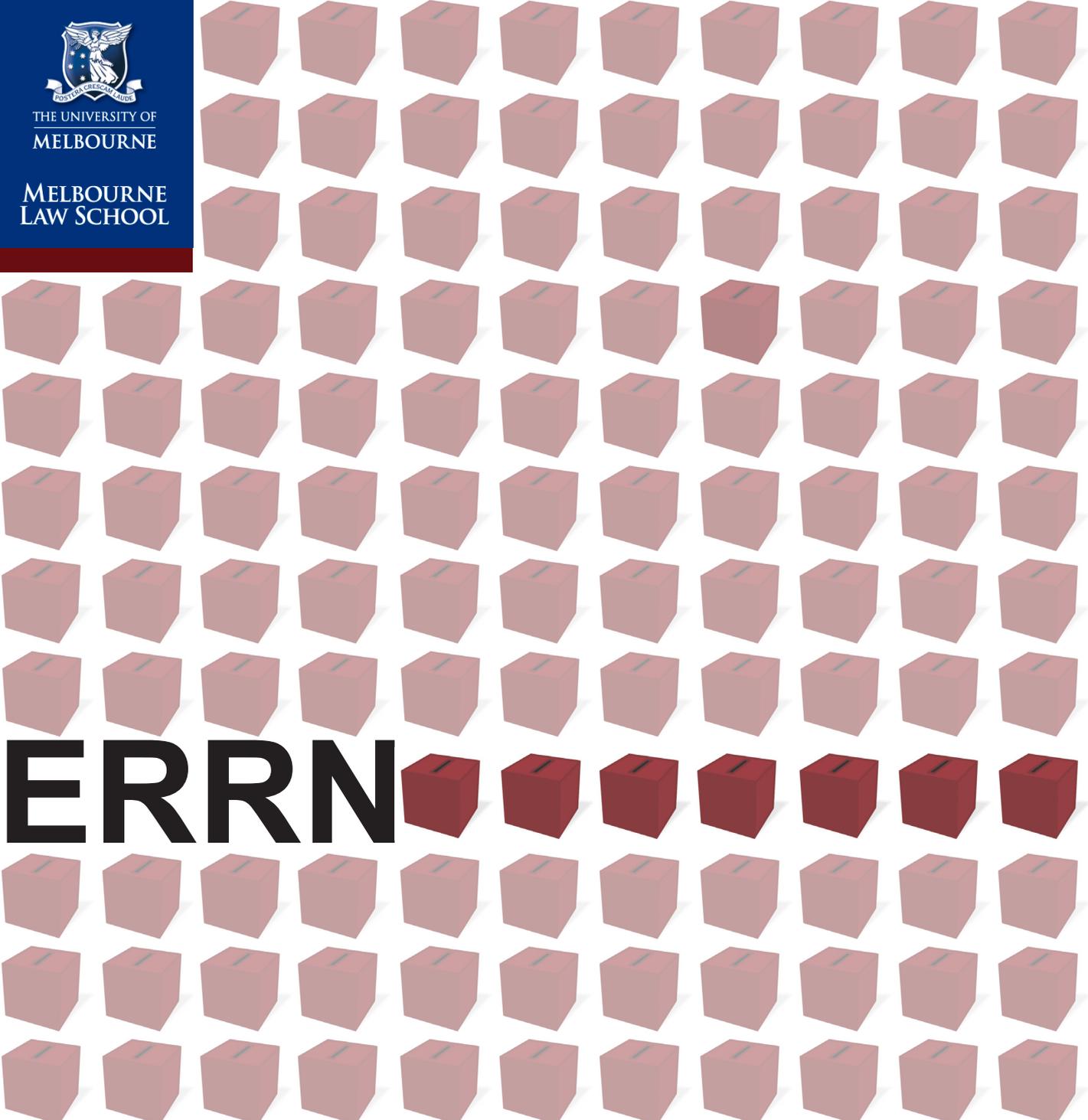




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Electoral Regulation Research Network Newsletter
July 2013

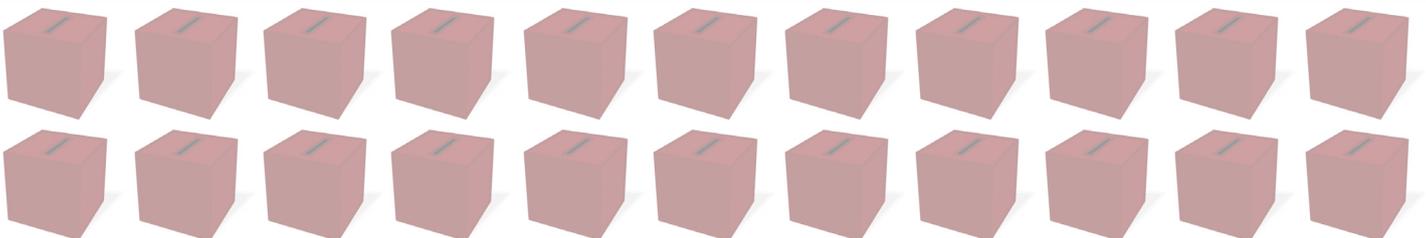


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MESSAGE FROM THE DIRECTOR

On 5 May, the 13th Malaysian General Elections were held with the ruling coalition, Barisan Nasional (National Front) beating off a fierce challenge from its competitor, Pakatan Rakyat (People's Alliance) and retaining power.

The lead up to, and the aftermath of, the Malaysian elections have, however, been accompanied with widespread allegations of electoral irregularities and fraud. Some candidates were said to have engaged in vote-buying exercises with thousands of ringgit offered to voters; the integrity of the voter roll has been doubted with allegations of phantom voters; and the Malaysian Election Commission has been criticised for incompetence and corruption. In the wake of its defeat, the Opposition People's Alliance has held rallies claiming the election was 'stolen'.

Faced with such bleak circumstances, some – not without cause – might have withdrawn from the political process into their private lives. This was not the choice made by most Malaysian voters. There was a record turnout with more than 80% of registered voters turning up at the ballot box. When I visited Malaysia in April, there was a palpable sense of excitement with ubiquitous talk of 'election fever' (Kentucky Fried Chicken offered a 20% 'election' discount!). Even in Australia, such energy could be felt with stories of many Malaysian expatriates returning to Malaysia specifically to cast their vote.

The Malaysian elections serve as a powerful reminder of how inspiring the democratic ideal is: as a collective act of self-determination; as a political process where all are counted as equal regardless of race, religion, creed or wealth; as a vehicle for societal change.

It also underscores a deep truth: a thriving democracy needs a passion for democracy. Such passion is not optional but a matter of necessity. The democratic project is a purposeful and deliberate enterprise; it does not 'happen' naturally or through indifference and inertia; it requires practice and often struggle. Societal structures congenial to the development of democracy matter greatly but democracy is only enlivened through agency – individuals and communities have to take up cudgels for popular sovereignty. And however perfectly designed electoral institutions and laws are, they have a deadened existence without being animated by the democratic ethos; worse, they can be deadening.

Such reflections cast a different light on the central objective of the Electoral Regulation Research Network (ERRN) which is to foster exchange and discussion on research relating to electoral regulation. Implicit in this objective is the goal of promoting a passion for democracy – why would we discuss and debate the regulation of elections if we didn't care about democracy, if we thought that democracy and elections were of little significance?

Such passion for democracy must have a critical edge. In the case of ERRN, this is not simply because discussion and debate tends to expose current practices and institutions to scrutiny. The more profound point is that the democratic project is always an unfinished project – powerful political, economic and social forces are invariably arrayed against it, whether in the form of elites seeking to monopolise power, or by way of an apathetic public with little regard for the common welfare. Advancing the democratic project requires constant alertness to the challenges it faces, be they challenges of the new from changing circumstances or challenges of the old from the persistent inequalities of power and wealth.

A critical edge alone does not define the passion for democracy. Such passion also has a progressive outlook, not in the conventional sense of being left of centre but in the sense of possessing a sturdy confidence that things can be better; that however dispiriting the status quo is, advances are always within grasp. Optimism is at the heart of the passion for democracy.

The ERRN Research Collaboration Initiative was launched this year in recognition of the fact that the democratic project is always unfinished. This project is aimed at developing 'thick' research collaborations between electoral commissions and academia in order to address the long-term challenges for the regulation of Australian elections.

Two themes have been chosen as the focus of the initiative, 'The Challenge of Informed Voting in the 21st Century' and 'Enhancing Local Government Democracy', with a research team dedicated to each:

- The team on 'The Challenge of Informed Voting' will be led by Associate Professor Rodney Smith (Sydney University) and the other team members are Dr Anika Gauja (Sydney University), Mel Keenan (NSW Electoral Commission) and Dr Paul Kildea (University of New South Wales); and
- The team on 'Enhancing Local Government Democracy' will be led by Associate Professor Ken Coghill (Monash University) and his team members are Yee-Fui Ng (Monash University) and Paul Thornton-Smith (Victorian Electoral Commission).

These teams not only include a mix of academics and electoral commission staff but are also interdisciplinary with a combination of expertise in political science, electoral administration and law.

In this modest way, ERRN can promote a passion for Australian democracy by harnessing its collaborative strengths.

Associate Professor Joo-Cheong Tham

Director

Electoral Regulation Research Network



NEWS

Commonwealth Electoral Administration Reforms

A number of electoral reform bills have recently come before the Parliament. The [Electoral and Referendum Amendment \(Improving Electoral Administration\) Bill 2013](#) was passed by the Parliament of Australia in March. The Bill implements a number of minor reforms to electoral administration, in the areas of pre-poll and postal voting, silent enrolment, consultation regarding redistributions, the treatment of prematurely-opened ballot boxes, and the use of Australian Taxation Office information for Direct Enrolment allowing the Australian Electoral Commission to initiate enrolment and roll update procedures based on tax data.

The [Electoral and Referendum Amendment \(Improving Electoral Procedure\) Bill 2012](#), also passed in March, increases candidature nomination requirements, both in terms of deposit and signatures, as well as removing restrictions on the methods of processing postal votes. The [Referendum \(Machinery Provisions\) Amendment Bill 2013](#), passed in May, alters the way in which information regarding referendum options is to be delivered.

Lastly, Senator John Madigan of the Democratic Labor Party has privately moved the [Citizen Initiated Referendum Bill 2013](#), which would allow for citizen-initiated referendum bills to be introduced to the Parliament for consideration, on petition from one percent of enrolled electors.

Commonwealth Funding and Disclosure Reforms

In late May, the Commonwealth Government [flagged its intention](#) to introduce the *Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2013*. The bill, the result of secret negotiations between senior Labor and Coalition figures, would have made a number of changes to the electoral finance regime. The reporting threshold for donations would be reduced to \$5000, and twice-yearly reporting would shorten the maximum period between donation and disclosure. In exchange, tens of millions of dollars in additional funding would have been provided, via a \$1 per vote increase in the public election funding rate for elected candidates and yearly \$300,000 'compliance' allowances for parliamentary parties – those having five or more elected members.

Despite objections from senior Labor members, the bill was approved by the ALP caucus. However, following resistance from both the public and the Coalition party room, the Opposition [withdrew their support](#). With the Greens and independents also [opposing the bill](#) it appears to have no prospect of passage, and the Government decided against publicly tabling it. A [previous bill](#), proposing a \$1000 threshold and with no funding increase, remains before the Senate and could potentially be revived. In the absence of any reform, the [disclosure threshold](#) has risen to \$12,400 from 1 July 2013, while the [public election funding rate](#) for the 2013 Federal Election will be \$2.49 per vote.

Commonwealth Referendum on Constitutional Recognition of Local Government

Prompted by the report of the [Joint Select Committee on Constitutional Recognition of Local Government](#), the Commonwealth Government has announced that a referendum allowing for Commonwealth funding of local government will be held in conjunction with the 2013 Federal Election. The [proposed change](#) would alter Section 96 to read "Parliament may grant financial assistance to any state or any local government body formed by a law of a State on such terms as the Parliament sees fit", thereby allowing direct Commonwealth funding of local governments. The Opposition is yet to indicate whether they will support or oppose the change, but have [expressed concern](#) at its timing, while the substance of the alteration has [attracted academic criticism](#), with Laureate Professor Cheryl Saunders AO (University of Melbourne) arguing that it would undermine the states, increase executive power and further complicate Commonwealth-state relations.

South Australian Electoral Administration Reforms

Currently before the South Australian Legislative Council, the [Electoral \(Miscellaneous\) Amendment Bill 2012](#) proposes a number of reforms, chief among them an alteration of South Australian enrolment requirements to allow compatibility with the Commonwealth's Direct Enrolment program. The Bill also removes parties from the postal vote application process, introduces a registration system for how-to-vote cards and removes a requirement for authorisation of political comment on the internet. The South Australian government has also [proposed reforms to political funding](#), involving caps and transparency requirements for donations and the introduction of public funding of election campaigns.

New South Wales Electoral Matters

The Parliament of New South Wales Joint Standing Committee on Electoral Matters has tabled the report of its [Review of the Parliamentary Electorates and Elections Act 1912 and the Election Funding, Expenditure and Disclosures Act 1981](#). A second inquiry into the [2012 Local Government Elections](#) is also ongoing, with its report due to be tabled on 30 June 2013.

New South Wales' electoral donation laws are facing [a challenge in the High Court](#), brought by Unions NSW and a coalition of unions. The unions argue that the laws, which bar affiliation fees and limit campaigning by third parties, breach the freedoms of political communication and association implied in the NSW and Commonwealth Constitutions. The NSW Government has indicated its confidence in successfully defending the laws.

A [state electoral redistribution is underway](#), with the new boundaries to come into effect for the 2015 NSW state election. Draft boundaries were released on 17 June, with comments invited by 17 July. Antony Green has [discussed the draft](#), with the major proposals being the abolition of the National-held rural seat of Murrumbidgee and the creation of an extra seat in inner-Sydney, through the division of Marrickville into the new seats Newtown and Summer Hill.

Queensland Restrictions on Union Campaigning

The [Industrial Relations \(Transparency and Accountability of Industrial Organisations\) and Other Acts Amendment Bill 2013](#), currently before the Queensland Parliament, would severely restrict the capacity of unions to engage in campaigning by requiring approval via members ballot before spending more than \$10,000 in a given financial year for 'any political purpose'. Writing in the Courier-Mail, Professor Graeme Orr (University of Queensland) [discusses](#) the problems inherent in such a move.

Expansion of the Australian Capital Territory Legislative Assembly

In January this year the ACT Chief Minister appointed an Expert Reference Group to investigate a potential expansion of the ACT Legislative Assembly as a way of catering for the ACT's growing population. The ERG [released their report](#) in April, recommending an expansion of the Assembly to 25 members by 2016 and 35 members by 2020.

Victorian Electoral Matters

The Victorian Government has [indicated its intention to tighten](#) Local Government candidate-eligibility regulations after a candidate barred from running due to a recent criminal conviction was unable to be removed from the ballot paper as he refused to formally withdraw. Local Government Minister Jeanette Powell signalled that the Government would amend the act so as to exclude candidates from the ballot paper who do not qualify for election on the basis of criminal conviction. A broad-ranging [Inquiry into the future of Victoria's electoral administration](#) remains ongoing.

A [state electoral redistribution is also underway](#), with the new boundaries to come into effect at the 2014 Victorian state election. Draft boundaries were released in late June, with public comment invited by 29 July and the final boundaries to be gazetted in October. Antony Green [has examined the proposed changes](#).

Electoral Commission Appointments

The Australian Electoral Commissioner, [Mr Ed Killesteyn PSM](#), has been re-appointed for a second five year term. Former Western Australian Electoral Commissioner, [Mr Warwick Gately AM](#), has been appointed as the new Victorian Electoral Commissioner. Western Australian Deputy Electoral Commissioner Chris Avent will be [acting Electoral Commissioner](#) until the formal process to fill the position is completed. With the retirement of Queensland Electoral Commissioner Mr David Kerslake, Deputy Electoral Commissioner [Mr Walter van der Merwe](#) has become the Acting Queensland Electoral Commissioner until the formal process to fill the position is completed.

Federal Election Projects

A number of initiatives focusing on the 2013 Federal Election have been announced. [Vote Compass](#), a collaboration between ABC News and the Universities of Toronto, Melbourne and Sydney, will allow voters to compare their views with the platforms of political parties, while also building an expansive database of public opinion for academic research. [The Citizens' Agenda](#), a collaboration between OurSay and the University of Melbourne's Centre for Advancing Journalism, provides an avenue for the public to propose and vote on questions via social media, which will be put to the candidates in ten key electorates at public forums prior to the election. The [National Library of Australia](#) is calling for campaign material from the upcoming election for its [Federal Election Ephemera](#) collection. Lastly, the [Open Australia Foundation](#) has launched the latest edition of its [Election Leaflets](#) website, where the public can help build a database of campaign materials.

Timetable of Upcoming Australian Elections

2013 – Federal Election. The last possible date is November 30, while the earliest a joint House and half-Senate election can be held is August 3. Antony Green has discussed [these and other restrictions](#).

October 15-29, 2013 – Tasmanian Local Government Elections

October 19, 2013 – Western Australian Local Government Elections

March 15, 2014 – South Australian State Election

May 24, 2014 – Tasmanian Legislative Assembly Election (last possible date)

May, 2014 – Tasmanian Legislative Council Election (Divisions of Huon and Rosevears)

November 7, 2014 – South Australian Local Government Elections

November 29, 2014 – Victorian State Election

ERRN EVENTS

FORTHCOMING EVENTS

Aug 6: [ERRN \(VIC\) Seminar: Fair Media Reporting of Elections](#)

Speakers: The Hon Mary Delahunty MAICD (Luminosity Australia) & Associate Professor Sally Young (The University of Melbourne)

Venue: Room 920, Melbourne Law School

The media plays an important – and powerful – role in Australian politics. This is particularly apparent come election time with the media responsible for the reporting on election campaigns. Media reporting profoundly impacts on the quality of Australia's democracy – fair media reporting is essential for fair elections. How well then does the media perform this role? In this seminar, two experts take up this question and suggest ways in which the media can better fulfill its democratic role.

ERRN EVENT REPORTS

Audio recordings of ERRN events can be found on individual event pages.

March 7: [ERRN \(SA\) Seminar: Eight principles for reforming election funding and disclosure schemes in Australia](#)

In this seminar, Associate Professor Joo-Cheong Tham (University of Melbourne) discussed the prospects for reform of electoral finance laws in Australia. Building on a discussion of the key concepts of freedom, fairness and transparency on which democracy is founded, he offered eight principles to which the reform of funding and disclosure schemes should aspire – 1) clarity regarding democratic principles, 2) clarity regarding problems, 3) achieving a fair compromise on trade unions, 4) avoiding fetishisation of regulatory models, 5) wariness of bans on particular industries, 6) not forcing a choice between private and public funding, 7) the importance of effective enforcement, and 8) not forgetting local government.

March 12: [ERRN \(VIC\): The Power and Accountability of Ministerial Advisers?](#)

In this seminar, experts Nicholas Reece (University of Melbourne) and Yee-Fui Ng (Monash University) discussed the changing role of ministerial advisors and the limitations of the legislation governing them. These issues were also covered in Yee-Fui's ERRN Working Paper, [Ministerial Advisors: Influences on the Executive and Accountability Mechanisms](#).

The seminar attracted coverage in the [Australian Financial Review](#), where the speakers' calls for increased accountability were illustrated with a discussion of the events leading up to former Victorian Premier Ted Baillieu's resignation.

April 5-9: The Law of Deliberative Democracy Symposia, [New York University](#) and [King's College London](#)

Dr Ron Levy (Griffith University) and Professor Graeme Orr (University of Queensland) hosted a pair of international symposia on The Law of Deliberative Democracy, presented by the [Electoral Regulation Research Network](#), [Griffith Law School](#) and [Election Law Journal](#). This sub-field of legal scholarship examines the normative foundations of public law – especially election law – through the lens of the political theory of deliberative democracy. This new scholarly development has received much attention in the past year. Ron and Graeme are guest co-editors of a special issue of the Election Law Journal focused on the field's emerging themes.

At the international symposia, leaders in the study of both deliberative democracy and election law met first at the Straus Center for Advanced Studies in Law and Justice, at NYU Law School, on the edge of Washington Square in Manhattan. Later, a substantially new set of participants reconvened at the Centre for Political and Constitutional Studies, at King's College London, Somerset House. Attendees included Jim Fishkin, Jim Bohman, Dennis Thompson, John Ferejohn,

Keith Ewing, Sam Issacharoff, Richard Pildes, Joo-Cheong Tham, Anne Twomey, Stephen Tierney, Jake Rowbottom, and approximately twenty others, from a total of seven countries.

These events coincide with the development of the new sub-field, which Ron and Graeme have helped to inaugurate. Their book, *The Law of Deliberative Democracy*, is under contract with Routledge, and publication is expected early in 2015. Ron and Graeme's work in the area commenced this year in earnest with the start of their three-year ARC Discovery Project entitled *The Law of Deliberative Democracy: Theory and Reform*. The project's aim is broad: to consider how legal scholarship might distinctively make use of, and contribute to, deliberative democratic theory.

May 29: [ERRN \(QLD\) Seminar: Law and e-Democracy](#)

This ERRN roundtable discussion brought the retiring Queensland Electoral Commissioner, David Kerslake, together with law and technology scholars including Dr Kieran Tranter, of Griffith Law School, to examine the implications of conducting democracy through emerging technologies. The discussion addressed issues of integrity and equity, and considered the role regulation should play.

June 18: [ERRN \(ACT\) Seminar: Optional Preferential Voting: Wanted Dead or Alive?](#)

This seminar, hosted at the Crawford School of Economics and Governance, Australian National University, was held against the background of public suggestions this year by the federal Opposition's Shadow Special Minister of State that optional preferential voting (OPV) is a reform which should be considered. The seminar brought together experts Mr Antony Green (ABC Election Analyst), Professor Ben Reilly (Australian National University) and Dr Peter Brent (*The Australian*) to discuss the history of optional preferential voting in Australia and the prospects for its introduction by a future Commonwealth government.

The discussion addressed the potential impact of the optional preferential system on the informal vote, variants of OPV which have been used in different countries, the factors driving the choice of such variants, the political interests which have led parties in Australia to adopt changing attitudes to the system over time, and the significance of the voting systems used at Senate, State and Territory elections.



Panelists (LtoR): Peter Brent, Mike Maley, Antony Green & Ben Reilly

June 25: [ERRN \(NSW\) Seminar: Letting the People Decide: Local Government, Gay Marriage and the Politics of Referendum](#)

Presented in conjunction with the [Gilbert + Tobin Centre for Public Law](#), UNSW, and chaired by Jai Rowell MLA (Chair, NSW Parliament Joint Standing Committee on Electoral Matters), this seminar brought together experts Professor George Williams AO (UNSW), Alex Greenwich MLA, Iain Walker (newDEMOCRACY Foundation) and Adrian Beresford-Wylie (Chief Executive, Australian Local Government Association) to discuss the nature of referendums in Australia. With a focus on the topical issues of local government, same-sex marriage and citizen-initiated referendums, the seminar considered broader questions of when and on what issues referendums may be appropriate, and how they can best be conducted to achieve informed debate and deliberation.

RECENT PUBLICATIONS

The **Parliament of Australia Joint Standing Committee on Electoral Matters** has tabled the report of its [Inquiry into the Electoral and Referendum Amendment \(Improving Electoral Administration\) Bill 2012](#). The **Joint Select Committee on Constitutional Recognition of Local Government** has tabled its [Final report on the majority finding of the Expert Panel on Constitutional Recognition of Local Government](#).

The **Australian Electoral Commission** has released a [National Seat Status factsheet](#), which employs updated electoral boundaries to calculate notional margins ahead of the upcoming Federal election.

The **Commonwealth Parliamentary Library** has published a background note regarding the [2012 Australian Capital Territory election](#).

The **Parliament of New South Wales Joint Standing Committee on Electoral Matters** has tabled the report of its [Review of the Parliamentary Electorates and Elections Act 1912 and the Election Funding, Expenditure and Disclosures Act 1981](#).

New South Wales' **Independent Local Government Review Panel** has released a progress report entitled [Future Directions for NSW Local Government – Twenty Essential Steps](#), with its recommendations including a proposal to consolidate local government into a smaller number of 'super councils'.

The **New South Wales Parliamentary Library** has produced two background papers matching 2011 Census data to State electoral boundaries, presenting it [by electorate](#) and [by Census characteristic](#).

The **Queensland Government** issued a broad [Electoral Reform discussion paper](#), inviting public contributions in response.

The **Australian Capital Territory Government** has published the report of the [Expert Reference Group's Review into the size of the ACT Legislative Assembly](#).

In the **Australian Journal of Political Science** (subscription required), **Jim Macnamara**, **Phyllis Sakinofsky** and **Jenni Beattie** discuss [the use of social media for voter engagement in Australia and New Zealand](#), **Anika Gauja** examines [moves by parties towards primary elections](#), **Will Sanders** reflects on the [indigenous vote in the 2012 Northern Territory election](#), **Rob Hoffman** and **David Lazaridis** investigate [the demographics of turnout and the limits of compulsion](#), and **Brendan McCaffrie** and **David Marsh** consider [alternative approaches to conceptualising political participation](#).

Antony Green writes on [the transition of Senators to the House of Representatives](#), [the mechanics of party registration](#), [candidate nomination requirements](#), [the operation of caretaker provisions](#), and [the prospects for Federal redistributions in the next Parliament](#), with Western Australia likely to gain a seat, and New South Wales a possibility to lose one. He has also discussed the hypothetical impact of optional preferential voting on the [2010 Federal](#) and [2010 Victorian](#) elections, and on [the rate of informal voting](#). **Anne Twomey** discusses the constitutional mechanics of [Julian Assange's Senate campaign](#).

Alan Ward's book [Parliamentary Government in Australia](#) compares the form and development of Australia's political systems, federal, state and territory, from colonial times to the present. Guided by a model of parliamentary government drawn from comparative politics he considers the selection of the government, the prime minister and cabinet, government control of the lower house, the primacy of the lower house in bicameral systems, the head of state and the influence of Australian federalism on parliamentary government.

ERRN WORKING PAPERS SERIES

In support of the Electoral Regulation Research Network's aim of fostering exchange and discussion amongst academics, electoral commissions and other interested groups on research relating to electoral regulation, the Network together with the [Democratic Audit of Australia](#) regularly publishes a series of Working Papers. These working papers are intended to help foster discussion about all aspects of electoral regulation.

Working Paper No. 6 (April 2013) [Fair Enough? Redistributions in Australia](#)

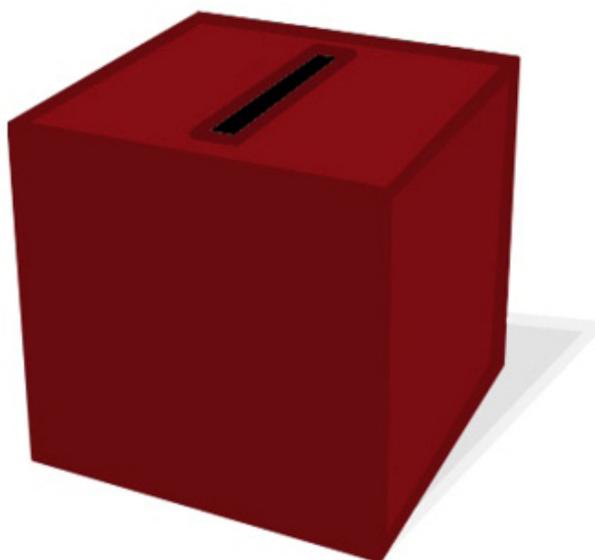
Jenni Newton-Farrelly, Electoral Specialist, South Australian Parliament Research Library

Fifty years ago electoral districts in the United States were so malapportioned the US Supreme Court ruled that the Constitution demanded equality: 'One Vote One Value'. Every state redrew its state and federal election districts but then the reforms stopped: state legislatures kept the right to draw election boundaries and governing parties replaced malapportionment with gerrymandering. The Court has rejected maps on equality grounds but none because it is a gerrymander, and biased maps remain problematic: at the 2012 Congressional elections. Democrats won more votes but Republicans won more seats. Now US reformers are focused on two different solutions: giving the task to independent commissions and specifying how they should do it. Australia adopted both as part of our own OVOV reforms, but would our model work for the US, or do our two countries now have different expectations of a redistribution?

Working paper No. 7 (June 2013) [Letting the People Decide: Local Government, Gay Marriage and the Politics of Referendums](#)

Professor George Williams AO, Gilbert + Tobin Centre for Public Law, University of New South Wales

Recent proposals for referendums on issues of local government and gay marriage have brought renewed attention to this area. Referendums have always been a contentious part of Australian democracy. They can make change much more difficult to achieve, and represent a radical departure from the normal processes of representative democracy. However, with only 8 of 44 referendums succeeding, and none since 1977, we need to rethink the way referendums are developed. Australia has never put in place the long-term architecture to identify and refine the right referendum proposals, and to build popular support for change. Instead, referendums tend to emerge somewhat randomly out of the hurly-burly of daily politics and, not surprisingly, then founder. An ongoing Constitutional Review Commission would provide for a more measured and inclusive approach to constitutional change.



CASE REPORTS

Monis v R (2013) 87 ALJR 340 (High Court, 27 February 2013)

Section 471.12 of the *Criminal Code (Cth)* prohibited the use of a postal or similar service in a way that reasonable persons would regard as offensive. The Court of Criminal Appeal of the Supreme Court of New South Wales held that this prohibition was valid. On appeal, to the High Court, the Court divided on whether this prohibition was invalid as an undue burden on the implied freedom of political communication.

French CJ, Hayne and Heydon JJ held that s 471.12 prohibited the use of postal services in a way which was likely to offend, which applied to an overly broad range of communications, and that the end pursued by the provision is neither legitimate nor implemented in a manner which is consistent with the maintenance of the constitutionally prescribed system of representative and responsible government. Kiefel, Crennan and Bell JJ construed the provision more narrowly, holding that it provides protection against the intrusion of unsolicited material which is seriously offensive into people's personal domain, which was a legitimate end for the purposes of the implied freedom.

Section 23 of the *Judiciary Act 1903 (Cth)* provides that where the High Court is equally divided in opinion, the decision appealed from shall be affirmed. Accordingly, the decision of the Court of Criminal Appeal was affirmed and the appeals were dismissed.

The implications of this divided decision remain to be developed more fully. Communication about political and governmental matters remains the focus of the implied freedom. One thing the decision does make clear is that there is considerable scope for disagreement relating to the compatibility with that freedom of laws which do not directly regulate political communication, but apply to a broader class of conduct and which also have the effect of prohibiting some forms of political communication.

Attorney-General (SA) v Adelaide Corporation (2013) 87 ALJR 289 (High Court, 27 February 2013)

This case, handed down on the same day as *Monis*, considered the validity of a by-law made by the City of Adelaide that prohibits preaching, canvassing, haranguing and the distribution of printed material on public roads without permission. The second and third respondents (who were members of a religious organisation called Street Church) had been convicted and fined for preaching without permission in Adelaide's Rundle Mall. They argued that their exposition of the gospel was protected by the implied freedom of political communication and sought declarations that the relevant clauses of the by-law were invalid. The High Court, by majority, upheld the validity of the by-law.

French CJ held that the by-law served a legitimate end, namely, protecting the public from interference with their freedom to choose whether, when and where they would be subject to proselytising communications. The by-law was a reasonably proportionate exercise of the by-law making power. Hayne J held that the provisions are directed only to the prevention of obstruction in the use of roads and that this is a legitimate object or end for the purposes of the implied freedom of political communication. In considering whether to grant or withhold permission the council must confine its attention to whether granting permission would create an unacceptable obstruction of the road. Once that is understood, it is evident that the impugned provisions are compatible with the implied freedom.

Crennan and Kiefel JJ (with Bell J in substantial agreement) held that the by-law has a legitimate purpose, which concerns the safety and convenience of users of roads. It is difficult to conceive how the use of roads could be regulated, so as to meet the legitimate objectives of the by-law, other than by a system which requires permission for the activity in question.

In their reasons, all majority judges affirmed that restrictions which only incidentally burden political communication in the pursuit of a legitimate end will be less likely to infringe the implied freedom of political communication than restrictions which directly impact political communication.

Heydon J, in dissent, held that the common law right of free speech is a fundamental right or freedom falling within the principle of legality and that the words of the by-law making power were too general, ambiguous and uncertain to grant

a power to make by-laws having such an adverse effect on free speech.

Refusals of special leave: *Holmdahl v AEC* [2013] HCATrans 72 and *Mulholland v AEC* [2013] HCASL 43 (High Court, 10 April 2013 and 12 April 2013)

The December 2012 edition of the ERRN newsletter contained a report of the Victorian Court of Appeal decision *Mulholland v Victorian Electoral Commission* [2012] VSCA 104 and a report of the Full Court of the South Australian Supreme Court decision *Holmdahl v Australian Electoral Commission* [2012] SASFC 110. On 10 April 2013 and 12 April 2013 respectively, the High Court refused special leave to appeal against these decisions (*Mulholland v AEC* [2013] HCASL 43 and *Holmdahl v AEC* [2013] HCATrans 72).

***Office of the Premier v Herald and Weekly Times* [2013] VSCA 79 (Victorian Court of Appeal, 12 April 2013)**

On 15 November 2011, the Deputy Editor of the Sunday Herald Sun (which is published by the Herald and Weekly Times) made a request for access to the electronic private diary of Mr Michael Kapel, who was at the relevant time the Chief of Staff to Mr Ted Ballieu, then Premier of Victoria. Access was sought to the diary for the period 1 February 2011 to 28 February 2011. At issue was whether the diary was an 'official document of a Minister' and thus subject to the rights of access provided by the *Freedom of Information Act 1982 (Vic)*.

The Premier's office refused the request for access to the diary. The Herald and Weekly Times applied to the Victorian Civil and Administrative Tribunal, which determined that this refusal was incorrect at law, on the basis that the diary was an 'official document of a Minister', and therefore subject to a legally enforceable right of access pursuant to s 13(b) of the FOI Act. The Office of the Premier applied for leave to appeal. The Court held that the diary was an official document of a Minister and dismissed the appeal.

One of the issues on appeal was the nature of the diary, and in seeking to argue that it was not an 'official document of a Minister', the Office of the Premier presented evidence about the nature of the role of ministerial advisers. As Mr Kapel was overseas at the time of the Tribunal proceeding the evidence was given by Mr Tony Nutt, then Chief of Staff to Mr Ballieu. The evidence was to the following effect:

Before the election of the Whitlam Labor Government in 1972, the private offices of a head of government or minister would be staffed mainly by public servants, whose primary responsibility would be administrative. After 1972, however, these offices were likely to operate as political, policy and strategy units the staffers of which would undertake political functions and policy work on behalf of the head of government or minister. This had the effect of separating the disinterested functions of public servants from the partisan functions of ministerial advisers.

Mr Nutt quoted comments made by Dr Peter Shergold (then Secretary of the Department of the Prime Minister and Cabinet), that while public servants are a non-partisan, professional administrative class, "the political adviser is necessarily and appropriately partisan. The fortunes of a ministerial adviser are tied to the political career of a Prime Minister, Minister or government".

According to Mr Nutt, the functions of the Office of the Premier were thus broader than that of a traditional government department, extending to supporting and serving the Premier in his various capacities, including:

- in his parliamentary role as the Premier of Victoria and Minister for the Arts (at the relevant time Mr Ballieu was Minister for the Arts as well as Premier);
- in his ministerial role as head of the government and Minister for the Arts; and
- in his party political role as the leader of the Coalition and of the Parliamentary Liberal Party in Victoria.

Finally, Mr Nutt described his role as Chief of Staff of the Office of the Premier, with responsibilities that included:

- Provision of political, policy and strategic advice and opinion to ministers and, in particular, the Premier in his roles as the leader of the elected government of Victoria, of the Coalition and of the Parliamentary Liberal Party of Victoria;

- Development of relationships and consultation with government stakeholders, including ministers, members of the government, party officials, agency heads, and senior Victorian public servants (at the level of Director and above), and a wide range of non-government stakeholders;
- Cooperation and collaboration with ministerial offices to ensure consistency in the delivery of government messages;
- Directing ministerial staff as instructed by the Premier;
- Liaising and consulting with the Liberal Party and its senior office holders;
- Direction of the Cabinet Office;
- Coordination of the Cabinet process; and
- Working closely with the Cabinet Secretary to ensure effective administration of Cabinet.

This evidence presents a fascinating insight into the role and function of a ministerial adviser and is a rare example of a case where such evidence was presented to the court. Unfortunately, however, the Court did not comment on this evidence, and it was not directly relevant to the outcome of the appeal.

***De Celis (Election Funding Authority) v Lindsay Bennelong Developments* [2012] NSWSC 917 (Supreme Court of New South Wales, 6 August 2012)**

On 30 July 2008 the defendant donated \$2,000 to the Liberal Party of Australia, New South Wales Division for the purposes of the “Elect Sydney Liberals the Shayne Mallard Campaign” for Sydney Council. On 4 September 2008 the defendant donated \$25,000 to Mayor Patrick Reilly and \$20,000 to Councillor Stuart Coppock for the purposes of their election campaigns in the Willoughby City Council elections of September 2008.

Section 91 of the *Election Funding and Disclosures Act 1981 (NSW)* made it an offence to fail to lodge a declaration in relation to a reportable political donation, that is a sum equal to or more than \$1,000. These three donations were “reportable political donation” under the Act. The defendant was required to disclose these donations within eight weeks of the applicable disclosure period, but failed to do so. The defendant also failed to respond to several letters from the Election Funding Authority, but eventually lodged a declaration on 29 November 2011. The defendant admitted the offence, and so the only issue for determination was the penalty to be imposed.

Relevant to the assessment of the seriousness of the offence was the fact that the defendant was not dishonest and did not wilfully disregard its obligations – it had taken legal advice to the effect that it was not required to lodge a declaration, which was incorrect. Another mitigating factor was the Authority’s tardiness in instituting proceedings, which the judge criticised strongly: “[t]he leisurely pace of the decision making process is unlikely to convey to the general public a sense of the gravity of the offence”.

Latham J noted that the legislation served a vital function in protecting public confidence in the democratic system: “the legislative purposes underlying the Act are critical to the integrity of the democratic system and that the failure to disclose political donations strikes at the heart of any democracy”. Undeclared donations create an impression of improper influence over public officials, which damages public confidence in the democratic process. In the circumstances the gravity of the offence was not of a high order but nor was it *de minimis*. The defendant company was convicted and fined \$6,000.

***Bero v Electoral Commission Queensland* [2012] QSC 222 (Supreme Court of Queensland sitting as the Court of Disputed Returns, 2 August 2012)**

Two candidates stood for election as the councillors for Division 13 (Stephens Island) of the Torres Strait Island Regional Council in an election held on 28 April 2012. The applicant, Ms Bero, received 13 votes or around 29 per cent of the vote, and Mr Stephen (who was the applicant’s natural son) received 32 votes. The applicant challenged the election of Mr Stephen on the basis that he was disqualified under the *Local Government Act 2009 (Qld)* because he had not lived on the island for the two years preceding the election nomination day.

Section 152(3) of the *Local Government Act* provides that a person must be a Torres Strait Islander or an Aborigine and have lived in the particular division for which the person is to be a candidate for the two years prior to the nomination day in order to be eligible to be a councillor of the Torres Strait Island Regional Council. The nomination day being 27

March 2012, the relevant period for the purpose of this section was 27 March 2010 through to 27 March 2012.

Henry J held that the place where a person lives is to be determined as a matter of objective fact rather than the place the person identifies as his or her residence. The purpose of s 152(3) is plainly to ensure candidates are not merely nominally connected with the island, but that they actually live there and thereby acquire and maintain a properly informed connection with the islands and the islanders they represent and an informed understanding of the island's cultural and other circumstances.

Clearly, occasional absences from a residence would not mean that a person does not live there. The question is one of degree. Stephens Island is a small island with limited services and it is common for people to travel from the island to obtain access to health care, education and employment. In this case, during the relevant period, Mr Stephen was on the island for about two weeks in 2010 and about two months in 2011, a grand total of two and a half months in two years. One reason for Mr Stephen's frequent absences was a bail condition prohibiting him from returning to the island. Given that Mr Stephen was not living at Stephens Island for most of the relevant period, it could not be said on any reasonable view that he was living at the Island. He was therefore disqualified under s 152 and the judge held he should be taken not to have been elected.

In determining the consequences of the disqualification for the election as a whole, the crucial question was whether the true will of the people could be discerned from the result. In this case Ms Bero had received a low vote, and it is not clear how the electorate would have responded had it been apparent that Mr Stephen could not lawfully be elected. It is possible that another candidate would have nominated to oppose Ms Bero. The judge ordered a new election to be held: "In all of the circumstances, the true will of the electorate being impossible to divine from what transpired, the best means of giving effect to the will of the people is to allow them to express it at a new election".

These principles were applied by the same Court with a similar result in *Day v Electoral Commission Queensland* [2012] QSC 270 (4 September 2012) but the contrary result in *Elisala v Electoral Commission Queensland* [2012] QSC 273 (5 September 2012).

The contrary result was reached in *Elisala v Electoral Commission Queensland* [2012] QSC 273 (5 September 2012). In that case Mr Gaidan (whose election was challenged) was away from his Dauan Island residence for an overall total of approximately 10 months during the relevant two year period to receive medical treatment, to support and nurse his wife who was in need of medical treatment and to return children to school and start their new school year. Although this was an admittedly lengthy absence, Henry J held that the applicant had not discharged its onus of proving that the absences had the consequence that Mr Gaidan was not living at Dauan Island for the two years preceding nomination.

Beynon v VEC (Magistrates' Court of Victoria sitting as the Municipal Election Tribunal, 5 April 2013)

David Muscat stood for election for the Manningham City Council, which was held on 27 October 2012. He received 521 votes on first preference. However, Mr Muscat was ineligible under s 29 of the Local Government Act because he had been convicted of an offence "which is punishable upon first conviction for a term of imprisonment of five years or more" (apparently for [erecting a sculpture of a rude finger gesture in his yard and headbutting a neighbour](#)).

Mr Muscat's name was not removed from the ballot paper prior to the election. The Act and Regulations provide that candidates for election must make a declaration that they are qualified to be a candidate under the Act. The VEC's interpretation of the relevant provisions is to the effect that once a candidate has made the appropriate declaration, the returning officer has no power to reject a nomination even when a candidate is ineligible to be elected. The Magistrate held that "[s]trange as it may seem, this would appear to be the correct interpretation and application of the Act". Magistrate Smith also noted that this state of affairs was unsatisfactory from the point of view of "basic democratic principles" and was "self-evidently undesirable and prejudicial to a free and fair election". Accordingly, any votes cast for Mr Muscat should be treated as informal and the votes recalculated on this basis. If a different result ensued, the better course would be to declare the election void and require a new election. If not, the result should stand.

Dunn v VEC (Magistrates' Court of Victoria sitting as the Municipal Election Tribunal, 5 April 2013)

An election for the South Ward of the Macedon Ranges was held on 27 October 2012. The applicant finished fourth in the count, losing to the third elected candidate by 7 votes. A full recount took place on 30 October 2012, with no difference to the elected candidates. Ms Dunn brought an application for the court (sitting as the Municipal Election Tribunal) to review 30 ballot papers alleging inaccuracies in the electronic counting process.

Magistrate Smith held that “it is not possible to conclude that the electronic counting of votes and distribution of preferences is intrinsically [sic] unreliable, or more subject to error than a manual count”. There was no basis for concluding that the count was vitiated by error.

Williams v Swan Hill Rural City Council (Magistrates' Court of Victoria sitting as the Municipal Election Tribunal, 5 April 2013)

In an election for the Swan Hill Rural City Council Mr Katis was elected by a margin of 20 votes. The unsuccessful candidate, Mr Williams, brought an application to the Tribunal seeking a declaration that Mr Katis was not duly elected and that Mr Williams was duly elected. Various grounds were alleged, all of which were rejected. One was that the Council failed to provide reasonable opportunity for voters to cast their vote. 77 ballots were received by the VEC after voting closed, amounting to about 5% of the voter turnout. Magistrate Smith noted that “[t]his would not be the first time, and no doubt will not be the last, that resourcing issues such as this are raised, especially in respect of rural or partly rural electorates”. The Magistrate held, however, that it could not be said that any of the voters were effectively disenfranchised as a result of this. Mr Williams also alleged that Mr Katis had defamed him, contrary to s 57 of the *Local Government Act 1989 (Vic)*, which has now been repealed. However, the proper course was for the Tribunal to refer a potential breach of s 57 to the Minister, which the Magistrate noted would be done.

Sullivan v Okeno [2013] NSWADT 12 (New South Wales Administrative Decisions Tribunal, 21 January 2013)

Ms Rosmairi Okeno was elected in the West Ward for the Lake Macquarie City Council on 20 September 2012. Mr James Sullivan applied to the Tribunal for an order dismissing her from civic office under s 329(2) of the *Local Government Act 1993 (NSW)*. That section provides that a person is disqualified from holding civic office on a council if he or she is an employee of the council or holds an office or place of profit under the council. Ms Rosmairi Okeno was said to be disqualified by her work as the Town Centre Coordinator for Morisset under a Town Centre Program funded by the Council.

In considering whether Ms Okeno held an office of profit or place of profit under the Council, the Tribunal referred to the High Court's recent decision in *Williams v Commonwealth* (2012) 86 ALJR 713 and held that the term ‘office’ has, “as its primary connotation, a government post, usually of some seniority, where the occupant has functions that are to be exercised independently, free from influence or direction”. The position held by Ms Okeno did not meet this description and so the application was dismissed.

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