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**Electoral Regulation Research Network Newsletter**  
December 2012

## MESSAGE FROM THE DIRECTOR AND EDITOR

It is our great pleasure to introduce the inaugural newsletter of the Electoral Regulation Research Network, published in conjunction with the Democratic Audit of Australia.

The Network was formally established in March this year with the aim of fostering exchange and discussion on research relating to electoral regulation. The Network – a collaborative project between the New South Wales Electoral Commission, the Victorian Electoral Commission and the Melbourne Law School – is an Australian-first and has no equivalent in Canada, New Zealand, the United Kingdom or the United States.

It has been an energetic first year for the Network. 16 events have been held across the country under the auspices of the Network and five working papers published. These have dealt with a wide and diverse range of topics relating to electoral regulation from youth electoral participation to integrity in government. Domestic as well as international perspectives have been brought to bear on these topics. The Network's seminars have been forums where parliamentarians, electoral commission officials, academics and other interested persons and groups can engage in robust discussion of issues related to electoral law, issues that are often controversial. They have also been a vehicle for collaboration with other organisations including electoral commissions and non-government organisations.

Bi-annual newsletters are intended to be another key function of the Network. Building on the success of the Democratic Audit of Australia's efforts, the purposes of these newsletters are twofold: to provide an overview of the state of both research and practice in the field of electoral regulation across the Commonwealth, States and Territories; and to report on the activities of the Network. Each edition will provide an update on legislative reforms, parliamentary inquiries, court decisions and important publications relevant to the field, including the Network's working papers series. The newsletter will also provide a schedule of events staged by the Network, and report on those that have occurred.

The Network is a deeply collaborative endeavour: its events have been organised through the efforts of its convenors; the working papers produced under the supervision of Dr Aaron Martin, the editor of the working paper series. This newsletter is no exception and reflects the contributions of the convenors, Benjamin Saunders (the legal editor) and Jean Goh (the Administrator).

We trust you will find the newsletter a useful resource.

Best wishes for the season.

Associate Professor Joo-Cheong Tham  
*Director*

Rob Hoffman  
*Newsletter Editor*

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## NEWS

### Commonwealth Direct Enrolment Legislation

Earlier this year the Parliament of Australia passed two bills establishing a system of direct, computerised enrolment and roll maintenance – the [Electoral and Referendum Amendment \(Maintaining Address\) Bill 2011](#) and the [Electoral and Referendum Amendment \(Protecting Elector Participation\) Bill 2012](#). The [reports](#) of Joint Standing Committee on Electoral Matters' (JSCEM) inquiry into the bills was tabled in August. The Australian Electoral Commission (AEC) has now begun a progressive rollout of direct enrolment and direct update processes, starting with a pilot program in Tasmania.

These bills were to some degree necessitated by the adoption of direct enrolment processes at the state level by New South Wales and Victoria, which have lead, as [Antony Green notes](#), to significant divergence between the State and Commonwealth electoral rolls. More broadly, the importance of these reforms was [discussed](#) by the ERRN's Rob Hoffman and Brian Costar in the Canberra Times in March.

### Commonwealth Electoral Administration Reforms

Following [review by JSCEM](#), the [Electoral and Referendum Amendment \(Improving Electoral Procedure\) Bill 2012](#) was amended and passed by the Parliament in September. The bill provides for minor reforms to the process of issuing and returning postal votes, as well as increasing the deposit and endorsement requirements for candidate nomination. A third reform, concerning alteration of the 'unsound mind' voter disqualification clause, was abandoned by amendment on the advice of JSCEM.

A second bill, the [Electoral and Referendum Amendment \(Improving Electoral Administration\) Bill 2012](#), was recently introduced in the House of Representatives. Addressing recommendations from JSCEM's [Inquiry into the 2010 federal election](#), the bill proposes minor reforms to the processes of redistribution, silent enrolment, pre-poll and postal voting, the handling of ballots, and the disclosure of information by the Australian Taxation Office to the Australian Electoral Commissioner. The bill has been [referred to JSCEM for review](#), with submissions due by 21 December 2012.

### Inquiry into the Future of Victoria's Electoral System

The Parliament of Victoria's Electoral Matters Committee has launched a broad-ranging [Inquiry into the future of Victoria's electoral administration and matters related thereto](#). A brief [discussion paper](#) has been issued, canvassing input in seven main areas – direct enrolment, compulsory voting, informal voting, early voting, community engagement, electronic voting and social media. Submissions are invited by the closing date of Friday 1 February 2013, while public hearings will be held on 12 and 14 March 2013. The Committee's final report will be tabled by March 2014.

### New South Wales Electoral Matters Inquiries

The Parliament of New South Wales Joint Standing Committee on Electoral Matters has released the report of its inquiry into [Administrative funding for minor parties](#). Two further inquiries have been completed, with the report of the inquiry into the [Administration of the 2011 NSW election](#) due to be tabled on 21 December 2012, and that of the [Review of the Parliamentary Electorates and Elections Act 1912 and the Election Funding, Expenditure and Disclosures Act 1981](#) to be tabled on 30 April 2013. An inquiry into the [2012 Local Government elections](#) has also been announced, with submissions invited by 8 February 2013.

### New South Wales Candidate Eligibility Reforms

The New South Wales government has brought the state into line with the rest of Australia by limiting the ability of

members of Parliament to simultaneously serve in local government. The [Local Government Amendment \(Members of Parliament\) Bill 2012](#), popularly dubbed the ‘Get Clover’ law after its highest-profile victim, Lord Mayor of Sydney Clover Moore, impacted 29 MPs, with only Moore choosing local over state government. Antony Green has provided [an overview](#) of those MPs.

### **South Australian State Electoral Redistribution**

South Australia’s state electoral districts are adjusted after each state election in a process which is unusual in Australia: the [Electoral Districts Boundaries Commission \(EDBC\)](#) considers the political effect of the lines they draw in order to comply with a constitutional provision known as the ‘fairness clause’. The 2010 State election saw strong swings to the Liberal Party everywhere but in Labor’s marginal seats, with the outcome that Labor retained government despite polling a minority of the two party-preferred vote. Consequently, the EDBC examined just what the fairness clause requires. It determined that the intention of the Act is to prevent bias, not adjust for the varying effectiveness of campaigns.

As such, the EDBC is not required to draw a set of districts which will guarantee to give a majority of seats to the party winning a majority of votes but is rather required to draw a set of districts which will provide a level playing field, advantaging neither of the major parties at a subsequent election. The determination has clarified the commission’s role and also some aspects of its methodology, notably how it will measure bias and partisan support. The EDBC released its [Final Redistribution Report](#) in August, while Antony Green has discussed the [controversy over the fairness clause](#) and the [partisan consequences of the final boundaries](#).

### **Call for Research on Disability and the Electoral System**

Anna Tree, advisor to Kelly Vincent MLC, Dignity for Disability member of the South Australian Legislative Council, is interested on research on access to the electoral system for people with disabilities. If you are working in this area, Anna would like to hear from you at [anna.tree@parliament.sa.gov.au](mailto:anna.tree@parliament.sa.gov.au).

## ERRN EVENT REPORTS

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

### May 3: [ERRN \(NSW\) Seminar: Democratic or Draconian? Recent Reforms to Political Funding in NSW](#)

In this seminar, speakers Associate Professor Joo-Cheong Tham (Melbourne Law School), Professor Anne Twomey (Sydney Law School), Mr Mark Lennon (Unions NSW), and Ms Alison Peters (Council of Social Service of NSW (NCOSS)) discussed the nature and implications of recent reforms to political funding regulations in New South Wales.

### May 9: [ERRN \(VIC\) & Centre for Media and Communications Law Joint Seminar: Election Talk: Issues in Election Communications Law and Practice in Australia, the United Kingdom and the United States](#)

In this presentation Dr Murray Green (University of Technology, Sydney) examined the response of three jurisdictions to these issues and from the perspective of deliberative democracy advocated a five element framework for the development of election communications law. Several superior court cases from each jurisdiction were assessed and the practice of election lawyers and regulators from across the three jurisdictions provided the basis of a socio-legal analysis of how election communications law is devised and practised.

### May 23: [ERRN \(VIC\) & CCCS Joint Seminar: Money in the 2012 American Presidential Elections](#)

In this seminar Professor Richard H. Pildes (New York University) presented an alternate picture of the emergence of Super PACs. Nearly all commentary on these new organizations treats their emergence as having caused by the Supreme Court's controversial Citizens United decision, in which the Court held that corporations and unions have constitutional free speech rights to engage in unlimited electoral spending. Professor Pildes argued that while these entities emerged directly in the aftermath of the Court's decision, Citizens United is not the reason these organizations have exploded onto the electoral scene.

### May 30: [ERRN \(SA\) Seminar: Spotlight on our Electoral Acts](#)

The inaugural meeting of the ERRN (SA) featured an address from the SA Attorney-General, the Hon. John Rau, and three presentations on a broad theme of electoral change. Professor Dean Jaensch (Flinders University) argued that South Australia's electoral legislation causes major problems for regulators and should be revised; Professor Lisa Hill (Adelaide University) brought us up to date on compulsory voting (particularly the Holmdahl case) and Jane Peace (formerly of the SA State Electoral Commission and the NT Electoral Commission) spoke about the importance of research for informing changes to electoral regulation.

### Jun 19: [ERRN \(VIC\) Seminar: The Victorian Independent Broad-based Anti-Corruption Commission \(IBAC\): A Toothless Tiger?](#)

A key election promise of the Ballieu government was the establishment of an anti-corruption commission to improve integrity in government. The establishment of the Independent Broad-based Anti-Corruption Commission (IBAC) has, however, been clouded with controversy. While the government claims that the commission will effectively prevent corrupt conduct, its critics claim that IBAC will be a toothless tiger. In this seminar to coincide with the commencement of IBAC's operation, Melissa Fyfe (The Age) and the Honourable Tim Smith QC (Accountability Round Table) discussed the key issues relating to IBAC.

#### **Sep 4: [ERRN \(VIC\) Symposium: The Challenge of Youth Electoral Participation](#)**

In this symposium, various perspectives from political parties, electoral commissions and academia were brought together to examine the challenges of youth electoral participation and also to canvass potential solutions. Speakers included Dr Aaron Martin (University of Melbourne), Andrew Gately (Assistant Commissioner, Australian Electoral Commission), Paul Strickland (Victorian Electoral Commission), Dr Adam Bandt MP (Australian Greens), Jane Garrett MLA (Australian Labor Party) and Senator Bridget McKenzie (National Party of Australia). The symposium was held as part of the Australian Electoral Commission's 'Year of Enrolment' and was opened by the Australian Electoral Commissioner, Ed Killesteyn PSM.

#### **Sep 14: [ERRN \(ACT\) Workshop: Review of the AEC disclosure website - achieving transparency through disclosure websites](#)**

Held in conjunction with the Australian Electoral Commission, this by-invitation workshop considered possible enhancements to those parts of the AEC website on which statutorily disclosed information relating to political finance is published. Discussion focused on the principles which underpin how information provided through the websites of Australian electoral authorities can best be configured to promote transparency of political finance. Participants included electoral officers, ERRN members from Canberra and interstate, and attendees from the media and from the federal parliamentary staff.

#### **Oct 18: [ERRN \(NSW\) Symposium: Beyond YES/NO: Ideas for Engaging Ordinary Citizens in Constitutional Referendums](#)**

Constitutional reform is back on the agenda, and as the debate unfolds, one of the biggest challenges will be educating and engaging ordinary citizens on the proposed reforms. But with public awareness and understanding at such low levels, is this an impossible feat? This forum brought together Jody Broun (Co-chair, National Congress of Australia's First Peoples), Tim Gartrell (You Me Unity), Kerry Jones (Constitution Education Fund Australia) and Dr Paul Kildea (University of New South Wales) to discuss the challenges of achieving public engagement in constitutional change, and to share ideas about how to meet those challenges.

#### **Nov 1: [ERRN \(ACT\) and the Accountability Round Table: Lobbying: Regulation in an Evolving Environment'](#)**

This seminar, held in collaboration with the [Accountability Round Table](#) and co-sponsored by Ms Melissa Parke MP and Senator Lee Rhiannon, and was held against the background of the recent inquiry by the Senate Finance and Public Administration References Committee into The operation of the Lobbying Code of Conduct and the Lobbyist Register. The three panellists for the seminar were Dr David Solomon AM (Integrity Commissioner, Queensland); Emeritus Professor John Warhurst AO (Australian National University); and Associate Professor Darren Halpin (Australian National University). Topics addressed included, among other things: various approaches to the way in which the activity of "lobbying" is or should be defined; the regulatory framework in place in Queensland; the possible purposes of the regulation of lobbying, and the expectations of those who advocate such regulation; and the way in which modern communications and social media are impacting on the basic nature of lobbying for some interest groups.

#### **Nov 19: [ERRN \(QLD\) Seminar: Participation or Stagnation? Parties and Participation in the US and Australia](#)**

Featuring Senator Scott Ryan (Liberal Party of Australia), Sam Mclean (GetUp!), Andrew Bartlett (Queensland Green Party), Dr Dennis Grube (Griffith University), Professor Clive Bean (Queensland University of Technology) and Dr Liz van Acker (Griffith University), this seminar focused on the challenges and controversies surrounding public participation in electoral politics in Australia and the United States, including participation by women, minorities, youths, advocacy groups and minority parties. The seminar questioned whether the era of Australia's international leadership in democratic innovation was at an end, whether other countries could continue to learn from Australia, and what we could learn from them.

**Nov 20: [ERRN \(VIC\) & CCCS Seminar: Party Political Funding in NSW \(and Beyond?\) - Can Human Rights be Deployed to Resist Dogmatic Liberalism's Intolerance of Pluralistic Party Structures?](#)**

Recent party funding reforms in New South Wales have effectively rendered unlawful the existing structure of the Australian Labor Party. In this seminar, Professor Keith Ewing (King's College, London) discussed the implications of these reforms for the ALP, and their broader impact within frameworks of State power and human rights.

**Nov 26: [ERRN \(NSW\) & The University of Sydney Forum: The Constitutionality of Compulsory Voting: The Implications of Holmdahl for Australian Democracy](#)**

This forum brought together four distinguished scholars to consider the implications of the High Court's Holmdahl decision for contemporary Australian democracy. Featuring Professor George Williams AO (University of New South Wales), Professor Anne Twomey and Dr Elisa Arcioni (Sydney Law School), and Associate Professor Rodney Smith (University of Sydney), the forum provided an analysis of the Court's reasoning, the meaning of compulsory voting and the possibility of a High Court challenge, and reflected on the intersection between politics, constitutional and electoral law in the determination of the franchise, rights versus duty bound conceptions of political citizenship and the relevance of compulsory voting for Australian society today.

**Nov 28: [ERRN \(NSW\) Forum: NSW Electoral Funding Legislation: A Blow For or Against Democracy?](#)**

Presented in conjunction with the Australian Manufacturing Workers Union; Department of Government & International Relations at the University of Sydney; Charles Sturt University Graduate School; the NSW Society of Labor Lawyers and Union Lawyers & Industrial Officers NSW; this forum featured guest speakers Professor Keith D. Ewing (King's College London) and Associate Professor Joo-Cheong Tham (University of Melbourne), debating the nature of recent reforms to electoral funding in New South Wales.

**Nov 28: [ERRN \(SA\) Meeting: South Australia, Returning Officers and the Talented Mr Boothby](#)**

Dr Peter Brent (Australian National University) spoke about the Australian model for managing elections – using permanent, independent bodies devoted to running elections. Peter focused on South Australia's William Robinson Boothby, who as “returning officer for the province” from 1856 until his death in 1903 was effectively the world's first chief electoral officer. During Boothby's era South Australia pioneered salaried, permanent electoral officials, state-initiated elector registration, habitation reviews and continuous enrolment, and this model was adopted for the federal electoral office after federation.

**Dec 4: [Public Search Conference: Integrity in Government - A Work in Progress](#)**

This event explored the general theme of “Public Office as a Public Trust”. A wide range of expert presentations and Q&A panels considered subjects including: Parliamentary Ethics Committees; Ethics Codes for MPs; Whistleblower Protection; the role of Civil Society in ensuring integrity of policy-making; Lobbyists and advocacy groups; The roles of ‘New Media’ and ‘Old Media’ promoting Integrity in Government; Consequences of a ‘hollowed-out’ Public Service; Election funding; Question Time as a public accountability measure; The Integrity System – Commissioners, Ombudsmen and Corruption watchdogs; Corruption, Organised Crime and ‘State Capture’; and Post-parliament employment of former MPs and Ministers.

The Search Conference was hosted by Prof John Uhr ([ANU](#)), Dr Meredith Edwards and Howard Whitton ([ANZSOG Institute for Governance, University of Canberra](#)), Prof Scott Prasser ([Australian Catholic University](#)), Alexandra Mills (Probity Consultant, formerly ICAC NSW), Michael Ahrens ([Transparency International Australia](#)), Assoc. Prof Joo-Cheong Tham ([ERRN/Melbourne University Law School](#)), and The Hon Tim Smith QC ([The Accountability Roundtable](#)).

**Dec 11: [ERRN \(VIC\) Seminar: Drawing Lines Without Drawing Blood: Redistricting Institutions and Criteria in America and Australia](#)**

This seminar brought together three experts to speak on the topic of electoral redistribution. Assistant Professor Nicholas Stephanopoulos (University of Chicago Law School) argued that both conventional (compactness, community of interest) and consequentialist (fairness, competitiveness) redistribution criteria were of limited effectiveness, while neutral institutions were key. Jenni Newton-Farrelly (South Australian Parliamentary Research Library) suggested the measures employed in consequentialist systems were fundamental, while Liz Williams (Acting Victorian Electoral Commissioner) discussed the history and operation of the Victorian redistribution system.

**Dec 12: [ERRN \(QLD\) Seminar: Drawing Lines Without Drawing Blood: Redistricting Institutions and Criteria in America and Australia](#)**

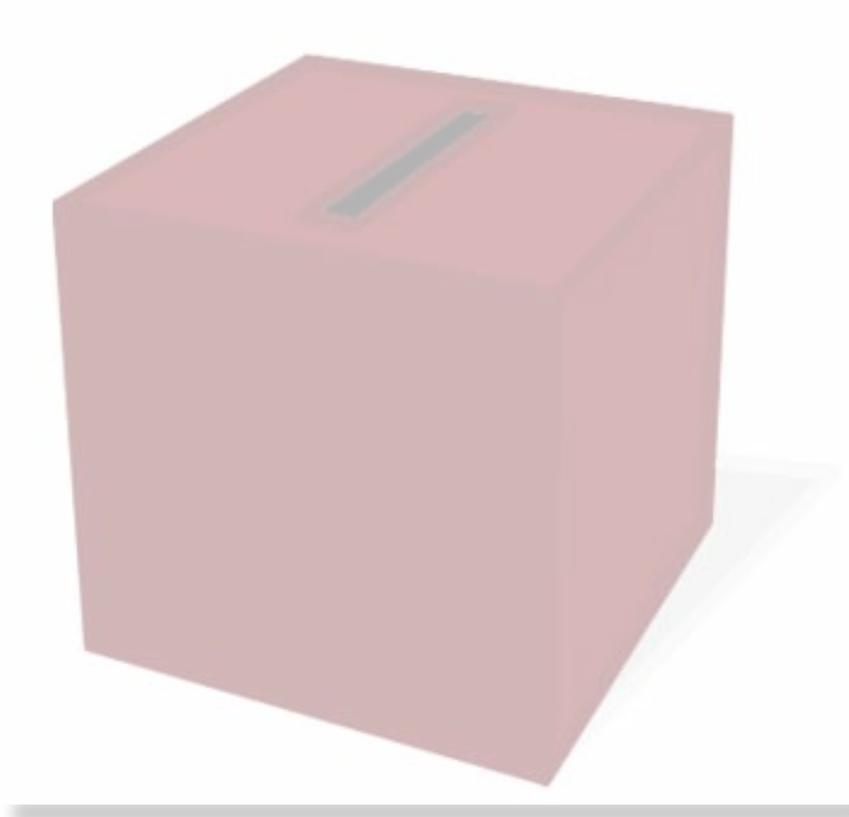
In this seminar, Assistant Professor Nicholas Stephanopoulos (University of Chicago Law School) discussed the consequences of consequentialist criteria in determining electoral boundaries. He presented quantitative research arguing that both conventional (compactness, community of interest) and consequentialist (fairness, competitiveness) requirements were of limited effectiveness. Rather, the presence of neutral institutions was key to achieving fair and competitive outcomes even in the absence of explicit criteria.

## ERRN IN THE NEWS

Writing in [The Conversation](#), Network Director Joo-Cheong Tham emphasises the importance of deliberation in electoral politics and regulation, and discusses the establishment of the Network. Tham also features with Working Papers Series Editor Dr Aaron Martin in [Voice](#), focusing on the launch of the Network and the importance of its role.

[The Age](#) covers the Hon Tim Smith QC's 'damning assessment' of the Baillieu government's Independent Broad-based Anti-Corruption Commission, a view expressed in his ERRN [Seminar](#) and [Working Paper](#), both entitled 'The Victorian Independent Broad-based Anti-Corruption Commission (IBAC): A Toothless Tiger?'

Senator John Faulker's keynote address at the ERRN co-hosted [Integrity in Government Search Conference](#) has attracted significant media attention. With particular reference to the scandals afflicting the NSW Labor Party, Senator Faulkner detailed a desperate need to return integrity and accountability to public service, claiming that rising public cynicism was undermining democracy and support for legislative reform. Treasurer Wayne Swan responded to the speech in his ABC TV [7:30 Report](#) appearance. The speech also attracted comment in [The Australian](#), the [Sydney Morning Herald](#) and from Michelle Grattan on [ABC Radio National](#), and has been republished by Fairfax in both [full](#) and [abridged](#) forms.



## RECENT PUBLICATIONS

The **Commonwealth Parliamentary Library** has had a productive year, issuing reports on the [2010 Federal](#) and [2012 Queensland](#) elections, [Commonwealth](#) and [State](#) electoral finance regimes, and [electronic voting](#), as well as a [timetable of upcoming Australian elections](#).

The **Parliament of Australia Joint Standing Committee on Electoral Matters** has issued five reports in 2012, concerning the [Electoral and Referendum Amendment \(Maintaining Address\) Bill 2011](#), the [Electoral and Referendum Amendment \(Protecting Elector Participation\) Bill 2012](#), the [Australian Parliamentary Delegation to Indonesia and Tonga](#), the [Electoral and Referendum Amendment \(Improving Electoral Procedure\) Bill 2012](#) and the [AEC analysis of the FWA report on the HSU](#).

Following JSCEM's FWA inquiry, the **Australian Electoral Commission** announced an independent review of the AEC disclosure and compliance function, led by former Commonwealth Ombudsman Mr Ron McLeod AM. The AEC has [released the report](#), which recommends reform and expansion of the administration of funding, disclosure and compliance schemes.

A number of publications have been released regarding funding reforms in New South Wales. The **Parliament of New South Wales Joint Standing Committee on Electoral Matters** has released the report of its inquiry into [Administrative funding for minor parties](#), the **New South Wales Parliamentary Library** has issued background papers on the constitutional issues surrounding [proposed changes relating to caps on electoral expenditure by political parties](#) and the [banning of political donations from third party interest groups](#), and the **New South Wales Electoral Commission** has published a report by the **ERRN's Joo-Cheong Tham**, [Establishing a Sustainable Framework for Election Funding and Spending Laws in New South Wales](#).

The **Parliament of Victoria Electoral Matters Committee** has tabled the report of its [Inquiry into the conduct of the 2010 Victorian state election and matters related thereto](#), and issued a discussion paper regarding its broad-ranging [Inquiry into the future of Victoria's electoral administration and matters related thereto](#).

In the **Australian Journal of Political Science** (subscription required), **Helen Pringle** examines [exactly what compulsory voting entails](#), **Glynn Evans** and **Lisa Hill** discuss the [political and electoral implications of reserved parliamentary seats for Indigenous Australians](#), **Aaron Martin** examines [forms of electoral participation among young Australian voters](#), and **Jordan Bastoni** investigates the [potential for reform of the South Australian Legislative Council](#).

**Norm Kelly's** book [Directions in Australian Electoral Reform: Professionalism and Partisanship in Electoral Management](#) assesses Australian electoral reforms of the past 30 years using personal interview data and parliamentary debates, to provide a picture of the reform process as well as the outcomes, as well as examining Australia's electoral administration, testing for professionalism, independence and integrity. Electronic copies are available for free download.

**Aaron Martin's** book [Young People and Politics: Political Engagement in the Anglo-American Democracies](#) examines young people's political engagement in the Anglo-American democracies, challenging the conventional wisdom on a number of fronts and providing a report card on young people's political engagement in the twenty-first century.

**Antony Green** writes on the prospects for electoral redistributions in [Victoria](#) and [New South Wales](#), as well as the headaches that could result from [Victoria's tight Legislative Assembly balance](#) shifting to an even split.

The **Global Commission on Elections, Democracy and Security** has issued its report [Deepening Democracy: A Strategy for Improving the Integrity of Elections Worldwide](#). The report presents a strategy to increase the likelihood that incumbent politicians and governments will deepen democracy and improve the integrity of national elections, in the hope that it will help to widen understanding of the requirements for strong, democratic and cohesive societies.

## 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](#) published five papers as part of its Working Paper Series in 2012. These working papers – often called 'discussion papers' – were published with the intent to help foster discussion about all aspects of electoral regulation. These working papers have been posted on the Network's website and circulated to members of the Network. They will also be posted on the Democratic Audit of Australia's website. 2012 has seen 5 working papers published on subjects as diverse as the Independent Broad-based Anti-Corruption Commission (IBAC), the 'fairness clause' in South Australia and the accountability of ministerial advisers. These working papers should be of interest to all researching and working in the area of electoral regulation and we encourage everyone to visit the website to read these excellent working papers.

Dr. Aaron Martin  
*Working Papers Series Editor*

### 1/2012 [The Victorian Independent Broad-based Anti-Corruption Commission \(IBAC\): A Toothless Tiger?](#)

**The Honourable Tim Smith QC, Monash University & Chair of Accountability Round Table**

This paper examines key issues relating to IBAC: What is the scope of its investigative powers? Are such powers adequate to effectively prevent corruption? What are the politics surrounding the establishment of IBAC?

### 2/2012 [Research and Electoral Regulation](#)

**Jane Peace, Northern Territory Electoral Commission**

This paper concentrates on the regulatory environment for parliamentary elections in Australia and the interface with research - what, why, when and how.

### 3/2012 [Issues for Electoral Regulators](#)

**Dean Jaensch AO, formerly Professor of Politics, Flinders University**

This paper discusses the role Electoral Regulators play in advising parliament and government about the Electoral Acts and electoral processes, and recommending reforms. It calls for regulators to consider strengthening their advice.

### 4/2012 [The Fairness Clause in South Australia](#)

**Jenni Newton-Farrelly, South Australian Parliament Research Library**

South Australia's fairness clause is unique in Australia, although similar requirements have been proposed in WA and also NSW. This research paper looks at why a fairness clause seemed necessary in South Australia, and why the parliament chose a fairness clause rather than a different mechanism.

### 5/2012 [Ministerial Advisers: Influences on the Executive and Accountability Mechanisms](#)

**Yee-Fui Ng, Monash University**

Through an examination of the changing roles of ministerial advisers and the inadequacy of the regulations covering them, this paper calls for increased accountability to reflect the evolving reality of ministerial advice.

## CASE REPORTS

*Holmdahl v Australian Electoral Commission* [2012] SASFC 110 (SA Full Court, 24 September 2012)  
*Victorian Electoral Commission v Hinch* (Magistrates Court of Victoria, 18 September 2012)

In September 2012 two decisions were handed down rejecting challenges to compulsory voting. Well-known media personality Derryn Hinch was fined and then prosecuted by the Victorian Electoral Commission for failing to vote in the 2010 Victorian State election. Before fining Hinch \$100 and ordering him to pay costs of \$272 to the VEC (but without recording a conviction against him), Magistrate Lesser took the opportunity to summarise the law relating to compulsory voting. Magistrate Lesser referred to the High Court cases of *Judd v McKeon* (1926) 38 CLR 380 and *Faderson v Bridger* (1971) 126 CLR 271 which had upheld the constitutionality of compulsory voting.

More detailed reasons were provided in *Holmdahl*. Nils Anders Holmdahl by deliberate choice failed to vote in the 2010 Commonwealth election. He was convicted for failing to vote; appealed unsuccessfully to the Supreme Court of South Australia, and then to the Full Court. Both the State and federal regimes require electors to vote at every election and provide that it is an offence to fail to vote without a valid and sufficient reason (*Commonwealth Electoral Act 1918*, section 245(15); *Electoral Act 2002 (Vic)*, section 166(1)(a)).

Mr Holmdahl argued that compulsory voting was unconstitutional. He submitted that the Commonwealth Constitution confers a right to vote which necessarily carries with it the right to choose whether or not to exercise that right. He submitted that to the extent that section 245(15) compels a person to vote, it is invalid as being contrary to the right conferred by the Constitution. Mr Holmdahl also argued that section 245(15) was not a valid exercise of the power to make laws as to the conduct of elections.

Sections 7 and 24 of the Commonwealth Constitution require that Senators and members of the House of Representatives shall be “directly chosen by the people”. While these sections mandate a system of representative democracy and provide constitutional protection of the right to vote, they do not confer a personal right in any elector to vote in a federal election, nor do they mandate any particular form of electoral system. The legislature retains considerable freedom as to the method of choice of members of Parliament. It is also not necessary for the purposes of sections 7 and 24 that an elector desire to elect a particular candidate. Rather, the elector is presented with a range of candidates and asked to indicate a preference. Such a choice, even if against the wishes of the elector, does not infringe the Constitution.

Further, the Full Court confirmed earlier authority which held that mere objection to compulsory voting does not amount to a valid and sufficient reason (cf *Douglass v Ninnes* (1976) 14 SASR 377).

Holmdahl thus confirms that the right to vote is in the nature of a civic duty – it is a public, not a private right, which the legislature may compel electors to exercise. As McHugh J said in *Langer v Commonwealth* (1995) 186 CLR 302, 341:

Members of Parliament may be “chosen by the people” even though “the people” dislike voting for them. Section 24 of the Constitution is concerned with choices from the list of candidates who offer themselves for election, not the wishes of individual electors.

**The case has been appealed to the High Court.**

***McLindon v Electoral Commission of Queensland (2012) 291 ALR 169 (Qld Court of Appeal, 14 March 2012)***

This unlikely to succeed application was brought by Bob Katter's Australian Party during the 2012 Queensland State election. The party had applied to the Australian Electoral Commission (AEC) to be registered as a political party for Commonwealth purposes under the name Katter's Australian Party and to the Queensland Electoral Commission (QEC) under the name Katter's Australian Party (Qld Division). It also applied to both commissions for approval to use the abbreviation "The Australian Party". The QEC approved the abbreviation while the AEC refused approval on the ground that the proposed abbreviation was likely to be confused with an already registered party name or abbreviation. The consequence was that for State purposes the abbreviation "The Australian Party" appeared on the ballot paper and the party's how to vote cards instead of the party's full name.

Subsequently, during the election period (the writ for the election was issued on 19 February; the cut-off date for the electoral rolls was 25 February; the cut-off date for the nomination of candidates was 27 February; polling day was 24 March), the party changed its mind, apparently believing that its "brand" was intimately connected with Mr Katter, so that his name should be displayed prominently on all election material. It wrote to the QEC requesting that the abbreviation be removed from the Register of Political Parties, and when that was refused it brought an application to the Queensland Supreme Court, seeking a declaration that candidates endorsed by the party for the Queensland election were entitled to have the full title of the party beside their names on the ballot paper (of which 7.16 million had been printed at the time of hearing); an order that the QEC be restrained from publishing or distributing ballot papers containing the words "Australian Party"; and finally an order that the QEC cause the full name of the party to be inserted upon the ballot paper in the Queensland election for its candidate Mr McLindon.

Section 102(2)(g) of the *Electoral Act 1992* (Qld) provides that if a candidate is endorsed by a political party, the ballot paper must list, adjacent to the candidate's name, the abbreviation of the party's name if the register of political parties includes an abbreviation, otherwise the party's full name. The party contended that section 102 was invalid pursuant to section 109 of the Constitution because it was inconsistent with the *Commonwealth Electoral Act*, which, it argued, evinced an intention to exclude abbreviations which would confuse the electorate. The Court dismissed this argument, holding that the State Act governed the registration of political parties for the purposes of State elections and the federal Act governed the registration of political parties for the purposes of federal elections. The statutes do not operate with respect to the same subject matter and hence there was no inconsistency.

In response to the party's argument that the relevant provisions of the State Act impermissibly burdened the implied freedom of communication, the court held that in fact they permitted a degree of freedom in the way that a political party is able to present itself to the electorate. As the court remarked, "[t]he curious feature of this case is that the reason why the party has the abbreviation The Australian Party under the State Act is because it applied for that abbreviation". The use of different names and abbreviations during an election campaign "would be apt to confuse, rather than inform, electors". Preventing a party from amending its name or an abbreviation of its name therefore serves the legitimate end of ensuring the orderly conduct of elections.

It is to be hoped for Katter's sake that the publicity attending this case adequately compensated for the expense involved in bringing the application.

***Mulholland v Victorian Electoral Commission* [2012] [VSCA 104 \(Vic Court of Appeal, 14 June 2012\)](#)**

On 13 September 2008 the Victorian Branch of the Democratic Labor Party of Australia held an election for office bearers, and the result was that the appellant, John Vincent Mulholland, who had long been the secretary of the Victorian Branch of the DLP, was defeated in the election for that position by Mark Farrell. However, the margin was only one, with 24 votes cast in favour of Mr Farrell, and 23 in favour of the appellant.

As a result of the election, the VEC refused to recognise the appellant as the secretary of the DLP and accordingly rejected an application for re-registration of the DLP that was signed by him, and requested instead that Mr Farrell provide the documents necessary for the re-registration application. The VEC also changed the name of the registered officer in the Register of Political Parties to Mr Farrell. The appellant applied to VCAT for review of these decisions; VCAT affirmed them both. The appellant appealed unsuccessfully to the Supreme Court and then to the Court of Appeal. Separate proceedings raising substantially the same issues were on foot in the Supreme Court which were pending for trial as at the date the Court of Appeal handed down its judgment.

Mr Mulholland contended that the election was void because two delegates who voted were not eligible to be members under the DLP's Constitution and Rules. Rule 4 provided that members of the DLP were those who were "eligible to vote in Commonwealth elections". The eligibility of the delegates in question to vote in Commonwealth elections was therefore the critical issue in the case. The two delegates lived at an address that was different to the address recorded on the Electoral Roll maintained under the *Commonwealth Electoral Act 1918*. The appellant argued that a person is not eligible to vote in a Commonwealth election if they were enrolled in a Division in which they did not live.

The Court agreed with this argument. The delegates were not entitled to vote in Commonwealth elections. While the delegates could have cast a provisional vote for an election for the House of Representatives and the Senate, only the vote for the Senate would have been counted, and their vote in relation to the House of Representatives would have been disregarded. The Court closely examined the relevant sections of the *Commonwealth Electoral Act* to reach this conclusion.

A person is entitled to vote under the Act upon being enrolled to vote on the Electoral Roll for a Division. The right to vote is thus dependent on enrolment for a Division. Upon moving addresses, electors are required to lodge a transfer of enrolment with the AEC. Section 99(3) provides that a person is not entitled to have his or her name placed on the Roll for more than one Subdivision, for a Subdivision other than the Subdivision in which the person lives, or in respect of an address other than the address at which the person is living when the claim is lodged. Under section 221, an elector is only entitled to vote in a House of Representatives election for a member for the Division for which he or she is enrolled. Section 235 provides that electors claiming to vote outside their division could cast provisional votes, but such votes are excluded from House of Representatives elections.

It would be extraordinary to hold that the phrase 'those eligible to vote in Commonwealth elections' includes a person who is not entitled to vote at elections for the House of Representatives. Accordingly, the delegates were not eligible to vote at Commonwealth elections by virtue of Rule 4, and so they were not entitled to vote in the election for secretary. It was not known how the delegates voted, however the Court held that the election was void on the proposition that their votes must be taken to have affected the result.

Mr Mulholland's victory was, however, a hollow one. Mr Farrell had been replaced as the registered officer on 3 August 2009 by another officeholder, who had in turn been replaced. The appeal did not affect the validity of these later changes, and so the appeal only had the effect of correcting the historical accuracy of the Register during the period 7 December 2008 to 3 August 2009.

***Green v Bradbury* (2011) [191 FCR 417 \(Federal Court, 3 February 2011\)](#)  
*Re Application by Green* (2011) [275 ALR 437 \(High Court, 25 March 2011\)](#)**

David Bradbury was elected as a Member of the House of Representatives for the Division of Lindsay (outer western suburbs of Sydney) in the 2010 federal election. A member of the Labor Party, Mr Bradbury is currently Assistant Treasurer and Minister Assisting for Deregulation. Antony Green, an unsuccessful candidate for the same Division, brought proceedings challenging the validity of the election, alleging irregularities in postal voting.

Shortly before the election, Mr Bradbury's office had mailed electoral material to every residence in Lindsay containing information on how to lodge a postal vote together with an adaptation of the AEC's approved form for postal vote applications. 2504 persons who received this form completed one and returned it to Mr Bradbury's office, which then delivered the form to the Divisional Returning Officer. The DRO then issued electoral papers in accordance with the usual procedure. Mr Green alleged that Mr Bradbury's electoral material constituted improper influence of voters, hindered the free exercise of their right to vote and was also improper use of Mr Bradbury's allowances.

The Federal Court, acting as the Court of Disputed Returns, rejected the application. Section 362 provides that an election must be declared void if a successful candidate has committed or has attempted to commit bribery or exert undue influence. It further provides that an election must not be declared void on the ground of any illegal practice other than bribery or corruption unless the Court is satisfied that the result of the election was likely to be affected. As to the first of these, Mr Bradbury's actions did not amount to bribery under section 326 of the *Commonwealth Electoral Act* because it was Mr Bradbury who received the benefit, being a saving in printing costs and the use of the electorate office, whereas it was the electors who were improperly influenced (according to the applicant). However, for bribery to occur within the meaning of section 326, it is the person who receives the benefit who is influenced, so whether the electors were influenced or not was irrelevant. As to the second, there was no evidence to suggest that Mr Bradbury's conduct had affected the outcome of the election. There was no evidence that the electoral material provided by Mr Bradbury hindered or interfered with electors voting, or voting for their preferred candidate.

The application failed to set out the facts relied on to invalidate the election or return with sufficient particularity as required by section 355 of the Act and so was rejected. Leave to bring a fresh application was rejected by the High Court.

## ERRN PEOPLE

### Director

**Joo-Cheong Tham** is an Associate Professor at the Melbourne Law School and has taught at the law schools of Victoria University and La Trobe University. His key research areas are the regulation of non-standard work and political finance law. He has also undertaken considerable research into counter-terrorism laws.

### State Convenors

#### NSW Convenors

**Dr Anika Gauja** is a Senior Lecturer in the Department of Government and International Relations, University of Sydney. Her research interests lie at the intersection of politics and the law. Her work to date has analysed the legal regulation of political parties, in particular, the extent to which parties' internal organisation and decision-making processes are affected by legislation and judicial rulings.

**Dr Paul Kildea** is a Lecturer in the Faculty of Law at the University of New South Wales, and co-Director of the Referendums Project at the Gilbert + Tobin Centre of Public Law. His recent work focuses on the constitutional status of intergovernmental relations, and citizen participation in the process of constitutional reform in Australia.

#### QLD Convenors

**Dr Zim G. Nwokora** is a post-doctoral research fellow in political science at Griffith University, a position that he has held since February 2010. His current research interests are in American Politics and Comparative Politics. He is especially interested in the development of party systems, how parties choose their leaders, competition between political parties, and the impact of political parties on public policy.

**Dr Ron Levy** is a comparative constitutionalist researching and writing on the public law and politics of Australia, as well as jurisdictions including Canada and the United States. Ron's recent research explores concepts of fairness in the law of the political process. Other projects include studies of constitutional reform, including deliberative democratic processes of reform. He also writes on diverse subjects in constitutional and electoral law.

#### SA Convenors

**Jenni Newton-Farrelly** is the Electoral Specialist at South Australia's Parliamentary Research Library where her areas of special interest are elections, voting systems and redistributions. She has been a senior member of the Library's research group for over twenty years. As well as writing for the members of the SA Parliament she has published on methodology issues including the search for a better measure of swing and how South Australia's unique fairness clause has been operationalised.

**Associate Professor Haydon Manning** works within the School of Social and Policy Studies and is Head of Politics and Public Policy at Flinders University. A frequent commentator on State and national politics, his main research interests focus on political attitudes, voting behaviour, elections, political parties and energy policy debates.

#### VIC Convenors

**Judy Birkenhead** is the Executive Secretary for the Electoral Council of Australia which is the consultative council of Electoral Commissioners from the electoral authorities of the Commonwealth, States and Territories. Judy's career in electoral administration has spanned more than 20 years working for the Victorian Electoral Commission, Electoral Commission of South Australia, Australian Electoral Commission and has recently returned from a secondment to the New South Wales Electoral Commission.

**Brian Costar** is a Professor of Political Science in the Institute for Social Research at Swinburne University. His major research interests are electoral democracy, political parties and rural and regional politics.

**Dr Paul Thornton-Smith** is a senior information and research officer at the Victorian Electoral Commission (VEC), where he has worked since 1988. His work at the VEC has been mainly in the fields of communication, research, legislation and redistributions.

### **ACT Convenors**

**Michael Maley** gave up full-time work as Special Adviser (Electoral Reform and International Services) at the Australian Electoral Commission (AEC) at the end of January 2012, having spent the previous thirty years as an election administrator. After gaining a Master's degree in political science from the Australian National University, he joined the then Australian Electoral Office in 1982, and became heavily involved in the major reforms of federal electoral processes which proceeded throughout the 1980s, before shifting his focus to international electoral work.

**John Uhr** is the inaugural Director of the Centre for the Study of Australian Politics. He is Professor of Politics in the School of Politics and International Relations. John is an expert in parliamentary politics and is author of *Deliberative Democracy in Australia: the changing place of Parliament* and *Terms of Trust: arguments over ethics in Australian politics*.

**Dr Dominique Dalla-Pozza** joined the ANU College of Law in June 2009. She teaches Foundations of Australian Law, Australian Public Law and Commonwealth Constitutional Law. Her research interests are primarily focused on parliament and the legislative process and Australian public law issues.

### **Editor, Working Papers Series**

**Dr Aaron Martin** was educated at the ANU, the Institute of Political Studies (Paris), Stanford University and the University of Melbourne. He returned to Melbourne University as Lecturer in the School of Social and Political Sciences in 2011. Aaron's research focuses on young people and politics, political participation, public opinion and policy agendas.

### **Newsletter Team**

#### **Newsletter Editor**

**Rob Hoffman** is a PhD candidate at The Swinburne Institute for Social Research, Swinburne University of Technology. His research interests include the demography of electoral participation and the role of political parties in the electoral reform process.

#### **Legal Editor**

**Ben Saunders** is a Legal Officer at the Office of Crown Counsel (Advisings), Department of Justice, Melbourne. He was formerly a Research Fellow at the Melbourne Law School, examining executive power in Australia and a lawyer, practising in corporate, financial services and water law. Ben is undertaking a PhD at the TC Beirne School of Law, University of Queensland, researching representation and responsible government under the Australian Constitution.

### **ERRN Administrator**

**Jean Goh** joined Melbourne Law School in February 2012 and is the Administrator for the Electoral Regulation Research Network and Centre for Comparative Constitutional Studies. Since joining the University of Melbourne in 2009, she has held various roles within the University.

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Research Network



MELBOURNE LAW SCHOOL

**Postal Address**

Electoral Regulation Research Network  
Melbourne Law School  
The University of Melbourne  
VIC 3010 Australia

**General Enquiries**

Telephone +613 8344 1011  
Fascimile +613 8344 5104

To join our mailing list and receive notice of  
ERRN events and publications, please send an  
email to [law-errn@unimelb.edu.au](mailto:law-errn@unimelb.edu.au)

**[www.law.unimelb.edu.au/errn](http://www.law.unimelb.edu.au/errn)**