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**DELIBERATIVE DEMOCRACY AND ELECTORAL MANAGEMENT BODIES:**

**THE CASE OF AUSTRALIAN ELECTORAL COMMISSIONS\***

Associate Professor Joo-Cheong Tham

(Associate Professor, Melbourne Law School, University of Melbourne)

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Electoral management bodies – public organisations dedicated to managing the conduct of elections - are key institutions in the regulation of elections.<sup>1</sup> The Commonwealth Secretariat has observed that ‘(t)he status, powers and independence of the electoral administration and administrators, and the impartiality with which they act and are seen to be allowed to act, are fundamental to the integrity of an election’.<sup>2</sup> The International Institute for Democracy and Electoral Assistance (International IDEA), a leading inter-governmental organisation working in the area of electoral assistance,<sup>3</sup> has said that electoral management bodies are ‘the primary guarantor of the integrity and purity of the electoral process’.<sup>4</sup> Others have similarly argued that independent electoral commissions are the single most important factor in ensuring free and fair elections.<sup>5</sup>

For electoral management bodies to fulfil their democratic role, they need to operate according to appropriate principles. Those commonly proposed fall into three categories: first, principles of governance like the principles of independence, accountability, fairness and impartiality, which relate to how the bodies are governed both internally and within the broader system of government; second, principles of competence like professionalism, efficiency, and service-mindedness which concern the quality of performance; and third, the principle of legality (respect for the law).<sup>6</sup>

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<sup>1</sup> See generally Alan Wall et al, International Institute for Democracy and Electoral Assistance, *Electoral Management Design: The International IDEA Handbook* (2006).

<sup>2</sup> Commonwealth Secretariat, *Good Commonwealth Electoral Practice – A Working Document* (1997) 6 [7]

<[http://www.thecommonwealth.org/document/181889/34293/227379/39081/141111/good\\_commonwealth\\_electoral\\_practice.htm](http://www.thecommonwealth.org/document/181889/34293/227379/39081/141111/good_commonwealth_electoral_practice.htm)>. This document was the result of meetings of the chief electoral officers of the Commonwealth countries, see Commonwealth Secretariat, *Good Commonwealth Electoral Practice*

<[http://www.thecommonwealth.org/document/181889/34293/227379/39081/141111/good\\_commonwealth\\_electoral\\_practice.htm](http://www.thecommonwealth.org/document/181889/34293/227379/39081/141111/good_commonwealth_electoral_practice.htm)>.

<sup>3</sup> See International Institute for Democracy and Electoral Assistance, *International IDEA: Supporting Democracy Worldwide* (20 May 2013) <<http://www.idea.int/>>.

<sup>4</sup> Alan Wall et al, above n 1, 24. Such bodies are also seen as a crucial part of regulatory infrastructure to combat corruption, see, for example, Center for Public Integrity, *Global Integrity Report* (2004).

<sup>5</sup> Graeme Orr, Bryan Mercurio and George Williams, ‘Australian Electoral Law: A Stocktake’ (2003) 2(3) *Election Law Journal* 383, 399.

<sup>6</sup> International IDEA, *Code of Conduct for the Ethical and Professional Administration of Elections* (1997) states that:

‘(t)o ensure both the appearance and the actual integrity of the electoral process, election administration must conform to the following fundamental ethical principles:

- 1) Election administration must demonstrate respect for the law;
- 2) Election administration must be non-partisan and neutral;
- 3) Election administration must be transparent;
- 4) Election administration must be accurate;
- 5) Election administration must be designed to serve the voters’ (ibid 9).

As we explore the contours of the law of deliberative democracy, it is clear that electoral management bodies fall squarely within the scope of the inquiry. A question then arises: how should the principles of deliberative democracy apply to these institutions? This is a question of significance not only to those seeking to institutionalise these principles of deliberative democracy in the electoral context but also to those interested in the proper workings of electoral management bodies.

It is this question that the article takes up through the case study of Australian electoral commissions.

There are, however, two preliminary questions. First, what theory of deliberative democracy is being used here? While deliberative democrats are united in their emphasis on public reason having a more significant role in democratic decision-making, there are clearly differences amongst them. Of particular note are divergent views as to the institutions subject to the principles of deliberative democracy (should these principles apply to electoral management bodies?) and the compatibility of such principles with the political process of elections (are these principles compatible with electoral management bodies which are responsible for administering electoral rules?).

This article will focus on the work of Dennis Thompson. This choice has been made partly because Thompson is one of the leading theorists of deliberative democracy.<sup>7</sup> More importantly, Thompson appears to be the only theorist of deliberative democracy who has fully engaged with the regulation of elections. His book, *Just Elections: Creating a Fair Electoral Process in the United States*, provides a sustained evaluation of the regulation of elections in United States against the principles of electoral justice. Indeed, electoral commissions enjoy pride of place in Thompson's institutional scheme for just American elections, with these commissions

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Alan Wall et al, above n 1, propose the following guiding principles: independence; impartiality; integrity; transparency; efficiency; professionalism; and service-mindedness (ibid 22-26).

<sup>7</sup> See Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Belknap Press, 1996); Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press, 2004).

being charged with making electoral rules, administering electoral rules and fostering democratic deliberation regarding these rules.<sup>8</sup>

The other preliminary issue is this: how should the task of examining the application of the principles of deliberative democracy to electoral commissions be approached? This is an issue that implicates the wider question of how to bridge the gap in analysis between the theories of deliberative democracy and electoral institutions.<sup>9</sup>

Two broad possibilities present themselves: a ‘top-down’ approach and a ‘bottom-up’ approach. The ‘top-down’ approach would use these principles as a benchmark for assessing the electoral commissions, an assessment that would identify areas where the commissions conformed to these principles and where they were wanting. This ‘top-down’ approach, however, has obvious limitations. It treats these principles as sacrosanct when they are clearly contested. And even if one subscribes to these principles, this does not imply a belief that they apply to all spheres of the political process. Thompson, for one, has argued that these principles have limited application to election campaigns due to the competitive (or strategic) nature of such activity.<sup>10</sup>

In other words, an analysis of how the principles of deliberative democracy apply to electoral regulation, including electoral commissions, needs to be cognisant of different institutional contexts and their particularities, and should carefully examine the ‘fit’ between the principles and such contexts. A ‘top-down’ approach does not meet these imperatives.

The opposite is a ‘bottom-up’ approach that would provide an account of current practices and self-understandings of electoral commissions, and identify where there is room for the principles of deliberative democracy. This approach too has serious

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<sup>8</sup> These functions are also discussed in Dennis Thompson, *Just Elections: Creating a Fair Electoral Process in the United States* (University of Chicago Press, 2002) 177 (administration of electoral rules); 173-178, 190-191 (making electoral rules); 197 (fostering democratic deliberation of electoral rules).

<sup>9</sup> Some have noted that theorists of deliberative democracy have tended to neglect electoral institutions, see Richard Pildes, ‘Book Review: Competitive, Deliberative, and Rights-Oriented Democracy’ (2004) 3(4) *Election Law Journal* 685, 693-695 (cf. Thompson’s institutional approach: Thompson, above n 8, 4-6).

<sup>10</sup> See Dennis Thompson, ‘Two Approaches to the Law of Deliberative Democracy’ (Paper presented at the Symposium on the Law of Deliberative Democracy, New York University Law School, 5-6 April 2013).

limitations. It runs the risk of barren description, especially if under-theorised. More significantly, it goes beyond respect for the particularities of institutional contexts to valorising them. Such fetishizing of the status quo also imbues it with an exaggerated stability, effectively precluding the possibility – and reality – that practices and self-understandings can – and will – change.

My approach lies somewhere in between the ‘top-down’ and ‘bottom-up’ approaches. It is anchored in the institutional features of electoral commissions, specifically, their key functions and principles. The article will focus on three functions of Australian electoral commissions (functions also identified by Thompson): administering electoral rules; making electoral rules; and fostering democratic deliberation regarding electoral rules.<sup>11</sup> Its analysis will be grounded in three core principles of governance that apply to these commissions, those of independence; impartiality and fairness; and accountability.<sup>12</sup> The account provided of these functions and principles will draw on existing practices and self-understandings, relying in particular on interviews conducted with all nine of the Australian electoral commissioners.<sup>13</sup>

However this account is not solely based on existing practices and self-understandings, but also a normative view of the role of electoral commissions. Their central justification - their *raison d’être* - must be in maintaining and enhancing electoral democracy. This view, of course, means that there is nothing inviolable about the status quo; the existing practices and self-understandings of electoral commissions may or may not fare well against their democratic rationale. This rationale also provides the entry-point for the principles of deliberative democracy with these principles possibly forming part of the democratic justification for electoral commissions.

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<sup>11</sup> For enumeration of the various functions of electoral management bodies, see International IDEA, above n 6, 7; Wall et al, above n 1, ch 3.

<sup>12</sup> These principles are also articulated in Paul Dacey, ‘What do “Impartiality”, “Independence” and “Transparency” Mean? – Some Thoughts from Australia’ (Paper presented at the Conference of Commonwealth Chief Election Officers on Improving the Quality of Election Management, organised by the Commonwealth Secretariat in co-operation with Election Commission of India, New Delhi, 24-26 February 2005).

<sup>13</sup> *Details of reference omitted to preserve anonymity.*

In this way, ‘what ought to be’ is not collapsed into ‘what is’ but still stays within the realm of ‘what can be’. There is idealism in this approach but idealism that is grounded in the institutional context, a form of practical idealism.

## I ADMINISTERING ELECTORAL RULES

Australia is a federal nation with six States and two Territories.<sup>14</sup> At the Commonwealth level and in all States and Territories, electoral management bodies are established by legislation as statutory agencies described as electoral commissions.<sup>15</sup> The commissions are typically headed by a single commissioner<sup>16</sup> whose maximum length of tenure ranges from five years to ten years;<sup>17</sup> the usual practice is for such commissioners to be drawn from the ranks of electoral administrators.<sup>18</sup>

According to the literature on electoral management bodies, these organisations can be classified in various ways. One typology centres on the type of personnel administering elections with four identifiable approaches: 1) the governmental approach where elections are conducted by public servants employed within government departments; 2) the judicial approach with judges as election administrators; 3) the multi-party approach where the electoral body consists of representatives of political parties; and 4) the expert approach where responsibility for administering elections is delegated to group of experienced individuals.<sup>19</sup>

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<sup>14</sup> The six States are New South Wales, Victoria, Queensland, South Australia, Tasmania and Western Australia while the two Territories are the Australian Capital Territory and the Northern Territory.

<sup>15</sup> *Commonwealth Electoral Act 1918* (Cth) s 7(1); *Electoral Act 1992* (ACT) s 7(1); *Parliamentary Electorates and Elections Act 1912* (NSW) s 21A(2); *Electoral Act 2004* (NT) s 309(1); *Electoral Act 1992* (Qld) s 7(1); *Electoral Act 1985* (SA) s 8(1); *Electoral Act 2004* (Tas) s 9(1); *Electoral Act 2002* (Vic) s 8(1); *Electoral Act 1907* (WA) s5F(1).

<sup>16</sup> The Commonwealth, Australian Capital Territory and Tasmanian electoral commissions each have three commissioners with one of them, the Electoral Commissioner, serving as the chief executive officer of the commission: *Commonwealth Electoral Act 1918* (Cth) s 6(2), 18(2); *Electoral Act 1992* (ACT) s 6, 23(1); *Electoral Act 2004* (Tas) s 7, s 15(1).

<sup>17</sup> *Commonwealth Electoral Act 1918* (Cth) s 21(2); *Electoral Act 1992* (ACT) s 25; *Parliamentary Electorates and Elections Act 1912* (NSW) s 21AB(1); *Electoral Act 2004* (NT) s 320; *Electoral Act 1992* (Qld) s 22(5); *Electoral Act 1985* (SA) s 7(6); *Electoral Act 2004* (Tas) s 17(1); *Electoral Act 2002* (Vic) s 12(2); *Electoral Act 1907* (WA) s5B(4). See also Norm Kelly, *Directions in Australian Electoral Reform: Professionalism and Partisanship in Electoral Management* (ANU E-Press, 2012) 40-42.

<sup>18</sup> Kelly, above n 17, 32-33.

<sup>19</sup> Rafael López-Pintor, Bureau for Development Policy, United Nations Development Programme, *Electoral Management Bodies as Institutions of Governance* (2000) 20.

Another typology is based on the extent of autonomy that the electoral management body enjoys from the executive branch of government. According to this classification scheme, there are three models: first, the independent model where the electoral management body is ‘institutionally independent and autonomous from the executive branch of govt, and which has and manages its own budget’;<sup>20</sup> second, the governmental model ‘where elections are organized and managed by the executive branch through a ministry . . . and/or through local authorities’;<sup>21</sup> and third, the mixed model which combines elements of the independent and governmental models.<sup>22</sup>

Australian electoral commissions follow the expert approach: specialist bodies dedicated to electoral management are established by statute; and these bodies are typically led by experienced electoral administrators. There is, however, some debate as to whether Australian electoral commissions adopt the independent model or the mixed model. According to International IDEA, Australia is an example of the independent model;<sup>23</sup> other commentators have, however, doubted this characterisation due to the limited ability of Australian electoral commissions to independently develop the electoral framework, their reporting obligations to the responsible Ministers and their lack of budgetary independence.<sup>24</sup>

What is much less controversial is that the principal function of Australian electoral commissions is to administer electoral rules: they maintain the electoral rolls in the context of a system of compulsory enrolment; they manage the process in the lead up to polling (e.g. nomination of candidates); they manage the conduct on polling day itself (e.g. supervising voting and the count of votes in the context of a system of compulsory voting); they are also responsible for the registration scheme for political parties and administering election funding provisions.<sup>25</sup>

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<sup>20</sup> Wall et al, above n 1, 7.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid 8.

<sup>23</sup> Ibid 7.

<sup>24</sup> Kelly, above n 17, 29-30; Julian Type, ‘Electoral Management Bodies: Independence and Accountability in Australia and New Zealand’ (Paper presented at United Nations Development Program Conference on Building Key Principles into the Design of the Future Electoral Management Body: Tunisian and International Perspectives, Tunis, 27 February 2012) 3.

<sup>25</sup> See, for example, *Commonwealth Electoral Act 1918* (Cth).

Indeed, the notion of conferring the function of administering electoral rules to electoral management bodies is generally uncontroversial in Australia and internationally - elections are contests and for these contests to be fair, their rules should be administered by a body other than the contestants.

This central rationale for conferring the function of administering electoral rules to electoral commissions underscores the principle of independence. As the Commonwealth Secretariat put it, '(t)he composition, mandate and status of an electoral management body . . . should be clearly defined to ensure its independence'.<sup>26</sup>

The principle of independence is, of course, not unique to electoral commissions – all administrative agencies require independence from those they regulate. But what is unique is that administration of electoral rules determines who holds executive and legislative power. Not only is this function of profound importance in terms of representative government, but it is also discharged in a context where some of those regulated – parliamentary political parties - have the power to determine electoral rules. In this context, the principle of independence assumes a much more heightened significance.

The principle of independence, however, has a subtle meaning and needs to be carefully understood. It has two distinct subject matters. The first is independence in decision-making – 'independence to' (freedom to) make decisions according to the judgment of the electoral commission. The second is independence in relationships – 'independence from' (freedom from) other institutions and political actors, in particular those being regulated (e.g. political parties and candidates) and the government of the day.

Both areas have structural and behavioural dimensions. The structural dimension concerns the formal separation of the electoral management body from the executive branch of government through legal provisions, while behavioural independence

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<sup>26</sup> Commonwealth Secretariat, *Good Commonwealth Electoral Practice – A Working Document* (1997) 6 [7]  
<[http://www.thecommonwealth.org/document/181889/34293/227379/39081/141111/good\\_commonwealth\\_electoral\\_practice.htm](http://www.thecommonwealth.org/document/181889/34293/227379/39081/141111/good_commonwealth_electoral_practice.htm)>.



connotes ‘a normative independence of decision and action that is expected of all models of EMBs (electoral management bodies) in that they do not bend to governmental, political or other partisan influences on their decisions’.<sup>27</sup>

Structural safeguards like the establishment of a statutory electoral body, budgetary independence, significant tenure and freedom from direction,<sup>28</sup> are vital to providing a regulatory environment conducive to behavioural independence. They cannot, however, *guarantee* behavioural independence. Formal provisions alone do not secure independent behaviour - individuals and institutions need to live the ethos of independence. As International IDEA has argued, ‘both a culture of independence and the commitment of EMB members to independent decision making are more important than the formal ‘structural’ independence’.<sup>29</sup> In particular, ‘(a) strong leadership is important for maintaining an EMB’s independence of action’.<sup>30</sup> What is indispensable here is not just individual integrity but institutional integrity.<sup>31</sup>

In some circumstances too, behavioural independence can exist without structural independence. This is illustrated by the observation of former Australian Electoral Commissioner Colin Hughes that federal (Australian) electoral officials acted independently (behavioural independence) whilst housed in a branch of a federal department (structural dependence). In his words:

The continuities over the first hundred years of federal electoral administration – initially (1902) with an ordinary departmental structure, then (1977) under statutory officers, and most recently (1984) under a statutory commission – are quite remarkable and likely to be maintained. One of the most striking continuities is the degree of independence that has prevailed throughout that period.<sup>32</sup>

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<sup>27</sup> ACE Electoral Knowledge Network, *EMB Independence and the Origin of Independent Election Administrations* (10 April 2007) <<http://aceproject.org/electoral-advice/archive/questions/replies/156664001>>. For a similar distinction, see Dacey, above n 12, 6; Wall et al, above n 1, 22.

<sup>28</sup> See generally Norm Kelly, ‘The Independence of Electoral Management Bodies: The Australian Experience’ (2007) 59(2) *Political Science* 17; Kelly, above n 17, ch 3.

<sup>29</sup> Wall et al, above n 1, 22-23.

<sup>30</sup> *Ibid.*

<sup>31</sup> For discussion of the notions of institutional integrity, see Chief Justice Spigelman, ‘The Integrity Branch of Government’ (2004) 78 *Australian Law Journal* 724, 725-726.

<sup>32</sup> Colin Hughes, ‘The Independence of the Commissions: The Legislative Framework and the Bureaucratic Reality’ in Graeme Orr, Bryan Mercurio and George Williams (eds), *Realising*

Does the principle of independence require complete independence in relationships where electoral commissions are insulated from the political process? If yes, this would create a thorny dilemma for deliberative democrats. Subjecting electoral commissions to the principles of deliberative democracy would – by its very nature – involve them in the political process and, at times, mean close interactions with some of those they regulate, specifically, political parties. But if the principle of independence requires insulation from this process, we then are left with an invidious choice of preferring either the principle of independence or those of deliberative democracy.

Fortunately, no such dilemma arises because complete independence in relationships is unnecessary, impossible and undesirable. It is unnecessary because independence in relationships is best conceived as a means for securing independent decision-making; it is the latter aspect that takes priority because it is the decision-making of the electoral commissions that affects the conduct of elections. Hence, independence in relationships is required only to the extent it is necessary to sustain independent decision-making.

In this context, it makes sense to see independence in relationships as being a matter of degree rather than a binary situation where there is independence in relationships or there is not. As former Deputy Australian Electoral Commissioner, Paul Dacey, put it, ‘(t)he extent of . . . independence will rather fall on a continuum, ranging from highly independent to not at all independent’.<sup>33</sup> (To avoid any misunderstanding, the argument that independence in relationships is directed at securing independent decision-making does not mean it is unimportant; indeed, a substantial degree of independence in relationships is essential for independent decision-making).

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*Democracy: Electoral Law in Australia* (Federation Press, 2003) 205, 205-206. See also Colin Hughes, ‘Institutionalising Electoral Integrity’ in Marian Sawer (ed), *Elections - Full, Free and Fair* (Federation Press, 2001) 142, 156.

<sup>33</sup> Dacey, above n 12, 7. See also Interview with Warwick Gately, Western Australian Electoral Commissioner (Telephone Interview, 5 September 2012).

Complete independence in relationships is also impossible given the function of electoral commissions in administering electoral rules. As New South Wales Electoral Commissioner, Colin Barry, observed:

we (the electoral commissions) are in the political game, I mean it's a little bit like the test cricket umpires saying we are above the game of cricket. Well you are actually in the game of cricket or you are not... the important thing is that your integrity is preserved because you are not favouring one side or the other.<sup>34</sup>

Not only is an 'absolute notion of independence'<sup>35</sup> in relationships unnecessary and impossible, it is also undesirable for two deep considerations of principle. The first is the rule of law or the principle of legality, a principle that strongly applies to electoral management bodies.<sup>36</sup> As with all public bodies in Australia, the powers of electoral commissions are (rightly) governed by the law. The second is the principle of accountability (discussed below). As a general rule, the more significant the powers conferred upon a public body, the more stringent should be the accountability mechanisms that apply to it. As Australian Electoral Commissioner, Ed Killesteyn opined: 'there is probably an argument . . . that the more independent you are the more accountable you need to be'.<sup>37</sup> In a similar vein, the Western Australian Commissioner for Public Sector Standards has said of accountability officers (including the Western Australian Electoral Commissioner) that '(t)he greater their independence from the Executive Government, the greater the need for accountability officers themselves to be held accountable for their actions'.<sup>38</sup> Hence the paradox of independence: greater autonomy comes with an increased obligation to be accountable.

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<sup>34</sup> Interview with Colin Barry, New South Wales Electoral Commissioner (Sydney, 22 August 2012).

<sup>35</sup> Interview with Ed Killesteyn, Australian Electoral Commissioner (Melbourne, 4 September 2012).

<sup>36</sup> See text accompanying above n 6, 43-47.

<sup>37</sup> See Interview with Ed Killesteyn, Australian Electoral Commissioner (Melbourne, 4 September 2012).

<sup>38</sup> Office of the Public Standards Commissioner, Western Australia, *Accountability Officers of the Western Australian Parliament: Accountability and Independence Principles* (2006) 5.

The democratic rationale for electoral commissions having the function of administering electoral rules also implies the principle of impartiality and fairness – this function is directed at securing *fair* elections.

The interviews with Australian electoral commissioners provided insightful elaboration on the meaning of the principle of impartiality and fairness. Liz Williams, the Acting Victorian Electoral Commissioner stated that impartiality meant ‘dealing with everyone in a fair and equitable manner and treating everyone, providing everyone with the same information, conducting investigations in the same way, the same processes, the same procedures, consistency in the administration across all the participants’.<sup>39</sup> In the words of other commissioners, what was required was ‘consistency’<sup>40</sup> and ‘parity of treatment’.<sup>41</sup> It was such an approach - in the context of a contest between partisan organisations - that secured ‘non-partisanship’.<sup>42</sup>

Importantly, the principle of impartiality and fairness should be understood in the context of the principle of legality and the rule of law.<sup>43</sup> It requires ‘objective application of the law’.<sup>44</sup> Highlighting this, some Commissioners emphasised how impartiality and fairness required electoral commissions to be ‘frank and fearless in their duties’,<sup>45</sup> in particular to enforce the law ‘without fear or favour’.<sup>46</sup> In addition, the South Australian and Victorian Electoral Commissioners emphasised how impartiality and fairness included scrupulous adherence to the rules of procedural fairness (laws of natural justice).<sup>47</sup>

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<sup>39</sup> Interview with Liz Williams, Acting Victorian Electoral Commissioner (Melbourne, 6 September 2012).

<sup>40</sup> Interview with Julian Type, Tasmanian Electoral Commissioner (Telephone Interview, 5 September 2012).

<sup>41</sup> Interview with Ed Killesteyn, Australian Electoral Commissioner (Melbourne, 4 September 2012); Dacey, above n 12, 4.

<sup>42</sup> Interview with Ed Killesteyn, Australian Electoral Commissioner (Melbourne, 4 September 2012).

<sup>43</sup> See Hughes, ‘The Independence of the Commissions’, above n 32, 206-208.

<sup>44</sup> Interview with Ed Killesteyn, Australian Electoral Commissioner (Melbourne, 4 September 2012); Dacey, above n 12, 3.

<sup>45</sup> Interview with Liz Williams, Acting Victorian Electoral Commissioner (Melbourne, 6 September 2012).

<sup>46</sup> Interview with Phil Green, ACT Electoral Commissioner (Telephone Interview, 5 September 2012).

<sup>47</sup> Interview with Kay Mousley, South Australian Electoral Commissioner (Telephone Interview, 6 September 2012); Interview with Liz Williams, Acting Victorian Electoral Commissioner (Melbourne, 6 September 2012).

Indeed, impartiality and fairness can be seen as the aim to which the principle of independence seeks to secure.<sup>48</sup> The principle of independence identifies the areas in which the electoral commissions should be ‘free to’ act and also the persons and institutions they should be ‘free from’, but says little as to the substantive goal of such autonomy. Arguably, the aim of impartial and fair administration of electoral laws is the same as the substantive goal of independence. Without deprecating the principle of independence, it is perhaps best seen as an instrumental principle – as an essential means to secure impartiality and fairness on the part of the electoral commissions.

How should the principles of democratic deliberation apply to this function? At one level, they have limited relevance. They have little application to the decision-making processes involved in the administration of these rules. In general, electoral commissions should not apply the principles of democratic deliberation in determining how to administer these rules. For an administrative decision of the electoral commission to be legitimate, it need not be preceded by a process of democratic deliberation.

This is because the administrative function of electoral commissions centres on the application of legal rules; it is a function governed – and often dictated – by the substance of these rules. This point has greater cogency as the function of administering electoral rules is largely directed at the (significant) logistical exercise of organising elections. As Australian Capital Territory Commissioner, Phil Green, put it:

our main skills are - in lots of ways - in event management, if you think of an election as an event. What we do is we hire people and we hire premises and we do materials and we buy things and we move things around and we do advertising.<sup>49</sup>

(Parenthetically, the logistical nature of the function of administering electoral rules shows how references to electoral commissions being quasi-judicial can mislead. These references which liken commissions to courts have the advantage of placing

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<sup>48</sup> Similar sentiments were expressed by Phil Green, ACT Electoral Commissioner: Interview with Phil Green, ACT Electoral Commissioner (Telephone Interview, 5 September 2012).

<sup>49</sup> Interview with Phil Green, ACT Electoral Commissioner (Telephone Interview, 5 September 2012). Similar comments were made by some NSW Election Funding Authority staff: Interview with staff of New South Wales Election Funding Authority (Sydney, 16 August 2012).

emphasis on the principle of independence but can obscure how the function of commissions is not primarily adjudicative but rather administrative).

Characterising the function of administering electoral rules as primarily logistical is not meant to detract from its critical importance to the democratic integrity of elections. Conformity to electoral rules is essential to legitimate elections. By properly discharging their function in administering rules through successful organising of elections, electoral commissions – in an indispensable way - secure legitimate elections (It is true, of course, that legitimacy is not a demanding benchmark; legitimate elections are not necessarily just elections.<sup>50</sup> Nevertheless, the legitimacy of elections remains vital - just elections require legitimate elections).

While the principles of deliberative democracy have little application to the process of decision-making in administering electoral rules, they do apply to the decisions made in such administration. Indeed, they apply through the principle of accountability.

This principle has two key facets: First, accountable to whom? Second, accountable in what sense? With Australian electoral commissions, their principal accountability should be to Parliament *as an institution*.<sup>51</sup> This accountability applies to *decisions made* in administering electoral rules. As put by the Australian Electoral Commissioner, ‘you are accountable to Parliament for the implementation of the laws that Parliament has passed’.<sup>52</sup> It is through parliamentary accountability that accountability to the electorate is ultimately secured. As former Western Australian Electoral Commissioner (now Victorian Electoral Commissioner) Warwick Gately said, ‘when I look at accountability, ultimately it is accountability to the electorate’.<sup>53</sup>

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<sup>50</sup> Thompson, above n 8, 2-4.

<sup>51</sup> This was emphasised by all the Commissioners even when their legislative contexts did not expressly state this to be the case: see, for example, interview with Interview with Kay Mousley, South Australian Electoral Commissioner (Telephone Interview, 6 September 2012); Interview with Warwick Gately, Western Australian Electoral Commissioner (Telephone Interview, 5 September 2012).

<sup>52</sup> Interview with Ed Killesteyn, Australian Electoral Commissioner (Melbourne, 4 September 2012).

<sup>53</sup> Interview with Warwick Gately, Western Australian Electoral Commissioner (Telephone Interview, 5 September 2012). In similar terms, the Commonwealth Secretariat has stated that ‘(a)lthough an electoral body should enjoy independence from direction or control, whether from the government or any other quarter, it is accountable to the electorate within the law, and should act accordingly’: Commonwealth Secretariat, above n 26, 6 [10].

In the four largest Australian jurisdictions (Commonwealth, New South Wales, Victoria and Queensland) parliamentary accountability of electoral commissions is given effect through the oversight of the commissions by specialist parliamentary committees on electoral matters.<sup>54</sup> These committees tend to conduct inquiries into the administration of each election, inquiries that clearly subject the administration of elections by the commissions to scrutiny.

In what sense are Australian electoral commissions accountable to their respective Parliaments? They are, firstly, required to provide an account of their administration to Parliament; this they do through their annual reports which are tabled before Parliament,<sup>55</sup> and also through their submissions to the parliamentary committees on electoral matters (where they exist). In providing these accounts, electoral commissions should be prepared to justify their decisions and make available the information on which these decisions are based.<sup>56</sup> Second, electoral commissions should take into account views expressed in Parliament by being responsive to such views. An important mechanism for securing such responsiveness is appearances by key electoral commission staff before the parliamentary committees on electoral matters.

Understood in this way, the principle of accountability is quite compatible with the principle of impartiality and fairness, and the principle of independence. The principle of impartiality and fairness can be buttressed through parliamentary accountability as it allows allegations of partial and unfair administration by electoral commissions to be aired and dealt with. And provided there are adequate structural safeguards of independence in relationships (especially in relation to tenure and direction), independence in decision-making need not be compromised by parliamentary accountability. (Based on a measured notion of independence in relationships, the

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<sup>54</sup> Kelly, above n 17, 13-19.

<sup>55</sup> *Commonwealth Electoral Act 1918* (Cth) s 17(1); *Electoral Act 1992* (ACT) s 10; *Parliamentary Electorates and Elections Act 1912* (NSW) ss 41(6), 48(7); *Electoral Act 2004* (NT) s 313(1); *Electoral Act 1992* (Qld) s 18(1); *Electoral Act 2004* (Tas) s 13.

<sup>56</sup> International IDEA's Code of Conduct for the Ethical and Professional Administration of Elections states that:

...election administrators should be prepared:

- (i) To justify their decisions.
- (ii) To make freely available the information on which each decision was based'

International IDEA, above n 6, 12-13[16].

principle of independence proposed by this article does not imply freedom from criticism).

Formally at least, parliamentary accountability of Australian electoral commissions can give rise to democratic deliberation of their administration of electoral rules. It is a public process which clearly meets the principle of publicity;<sup>57</sup> in this process, electoral commissions should put forth a kind of ‘public’ reason, or reasons grounded in the discharge of its functions as prescribed by law, thereby satisfying the principle of reciprocity.<sup>58</sup> And clearly in this process, the electoral commissions are accountable to Parliament and, ultimately, the electorate – the principle of accountability (as understood by Thompson) is also met.<sup>59</sup>

Whether the principles of deliberative democracy are realised in practice are, of course, a different matter altogether. The risk here is of sham deliberation - the trappings of a deliberative forum concealing distorted and partial discussion of electoral administration. This risk mainly comes from the self-interest of political parties that control the parliamentary forums which subject the electoral commissions to accountability (in particular, the parliamentary committees on electoral matters). Their partisan self-interest might result in the scope of deliberation being restricted to issues with high partisan salience (for instance, alleged electoral misconduct by a competitor party), and a neglect of matters that affect non-parliamentary parties; it might also result in issues being considered predominantly through the lens of self-interest rather than the principles of public interest.<sup>60</sup>

The risk of sham deliberation can also be exacerbated if electoral commissions participate in the dynamics that subvert democratic deliberation of their administration of electoral rules: if they, through self-censorship, fail to raise issues that are inconvenient or damaging to the parliamentary parties; if they, through disdain, regard issues affecting non-parliamentary parties to be inconsequential; if

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<sup>57</sup> See Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Belknap Press, 1996) ch 3.

<sup>58</sup> See Gutmann and Thompson, above n 57, ch 2.

<sup>59</sup> See Gutmann and Thompson, above n 57, ch 4.

<sup>60</sup> See Kelly, above n 17, 23-24.



they are unduly influenced by the views of parliamentary parties and place little weight to non-parliamentary parties.

## II MAKING ELECTORAL RULES

In a recent submission, the New South Wales Electoral Commissioner stated his preference ‘for **one** simplified, modernised, principles-based Electoral Act’<sup>61</sup>. The position of the Commissioner was that ‘a complex modern electoral system can confidently reduce the contents of its principal legislation to principles which are to be fleshed out by an election authority as a trusted integrity agency’.<sup>62</sup> Principles, according to the Commissioners, were ‘norms expressed at a high level of generality’<sup>63</sup> (e.g. values and goals).

If adopted, principles-based legislation, as advocated by the New South Wales Electoral Commissioner, would clearly confer significant power on the New South Wales Electoral Commission to make electoral rules. The proposal for such legislation raises the significant questions: Should Australian electoral commissions have the power to make electoral rules? If so, what should be the scope of such power?

On one view, Australian electoral commissions should have *no* power to make electoral rules. That power, it is said, belongs with the democratically elected representative bodies, Parliaments. The governing principle behind this view is that of parliamentary sovereignty, a principle that expresses the more fundamental idea of popular sovereignty in Australia’s parliamentary system.

The difficulty with an absolutist position based on parliamentary sovereignty -which rules out any rule-making power for electoral commissions - is that parliamentary sovereignty in this context does not necessarily give effect to popular sovereignty.

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<sup>61</sup> NSW Electoral Commission, Submission No 18 to Joint Standing Committee on Electoral Matters, Parliament of New South Wales, *Review of the Parliamentary Electorates and Elections Act 1912 and the Election Funding, Expenditure and Disclosures Act 1981*, 12 June 2012, 9 (emphasis in original).

<sup>62</sup> *Ibid* 18. This part of the Commissioner’s submission drew upon the report by Graeme Orr: Dr Graeme Orr, *Modernising the Electoral Act: Legislative Form and Judicial Role (report prepared for the NSW Electoral Commission)* (2011) 3-19.

<sup>63</sup> NSW Electoral Commission, above n 61, 16.

As Thompson rightly argues, ‘(i)n a democracy, the people in their collective capacity have the strongest claim<sup>64</sup> to determine the substance and content of electoral rules. It is this that gives rise to the principle of popular sovereignty: ‘citizens should have adequate opportunities to determine the procedures that govern their elections’.<sup>65</sup>

This principle, however, is subject to important caveats. Of specific importance is what Thompson refers to the Madisonian proviso: ‘no democratic institution should have final authority to determine the rules or settle disputes about its own membership.’<sup>66</sup> The reason for this proviso is that in relation to such rules, representatives are seen to have an interest distinct from the interest of citizenry, giving rise to the risk of self-dealing, in particular, self-perpetuation.<sup>67</sup>

It is this conflict of interest – a conflict between the interest of the representatives and the public interest – that potentially ruptures the connection between parliamentary sovereignty and popular sovereignty. It not only undermines the claim that parliaments should have the monopoly over the power to make electoral rules but also points to conferring such power to other bodies, for instance, electoral commissions.

Have we, however, been shifted from one absolutist position to another? Is the Madisonian proviso not so much a proviso but a general ban on legislatures making electoral rules? If the view is taken that *all electoral rules* determine the membership of the legislature as they impact upon who is elected as a representative,<sup>68</sup> the latter is likely to be the end result.

This article argues against this broad view and contends for an interpretation of the Madisonian proviso that has its scope restricted to rules that have close connection

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<sup>64</sup> Thompson, above n 8, 124.

<sup>65</sup> *Ibid* 123.

<sup>66</sup> *Ibid* 134.

<sup>67</sup> *Ibid* 133-134, 179.

<sup>68</sup> An example of electoral rules mentioned by Thompson that is consistent with this broad view is the regulation of campaign finance: Thompson, above n 8, 133.

with the membership of the legislature, for instance, rules concerning term limits<sup>69</sup> and electoral boundaries.<sup>70</sup>

A narrow interpretation would fit better with the rationale for the Madisonian proviso, which is the conflict between the public interest and the interests of the legislature. The proviso results in the recusal of legislators from their principal role as legislators. Such a serious result should be reserved for situations where the conflict is patently strong. These situations will arise only when the impact of the electoral rules is both clear and significant, a situation that tends to apply to rules that directly determine the membership of the legislature. With electoral rules that do not have such a close connection with the membership of the legislature, their impact is often more opaque and less consequential. For such rules, recusal is not a proportionate response; less drastic options should be preferred. This should include more detailed disclosure of the nature of the conflict and more effectively harnessing the deliberative capacities of the legislature in order to identify, debate and manage such conflicts (a point to which we will return below).<sup>71</sup>

There are also other reasons to prefer a narrow interpretation of the scope of the Madisonian proviso if the power to make electoral rules is to be conferred upon electoral commissions. If electoral commissions are to have a broad power to make electoral rules, they will be the body that is principally responsible for making *and* administering electoral rules – they will be exercising both legislative and executive power in relation to such rules.

Such a concentration of power would place significant pressure on the principle of independence. This pressure will come from several directions. First, the greater the power wielded by the electoral commissions, the greater the risk that political parties will seek to interfere with its composition and operations. Second, pressure on the principle of independence is likely to result from the application of the principles of democratic deliberation. What is crucial to appreciate is the qualitative shift in the application of the principles of democratic deliberation to the power of the electoral

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<sup>69</sup> See Thompson, above n 8, 134.

<sup>70</sup> See Thompson, above n 8, 174-177.

<sup>71</sup> See text below accompanying nn 77-79.

commissions to make electoral rules. With the administration of electoral rules, these principles only apply to the decisions but not to the decision-making process; with power to make electoral rules, these principles apply to the decision-making process *and* the decisions themselves.

Conferring broad power to make electoral rules on electoral commissions can still be compatible with independence in decision-making. But such power - especially power at large – means less independence in relationships, because commissions are dependent on parties and candidates (those regulated) in determining when this power should be exercised; as such parties and candidates will have significant influence on setting the terms of law-making tasks (for example what kind of proposed laws deserve consideration).

Such a risk is, however, attenuated when the power to make electoral rules is restricted to particular areas; in such situations, the occasion for law-making is specified by legislation with considerably less pressure on independence in relationships. If it is true, as Thompson argues, that electoral commissions aspire to ‘the deliberative mode of decision making’,<sup>72</sup> such a mode works best in highly structured and specific contexts.

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The application of the Madisonian proviso does not necessarily mean electoral commissions should have the power to make electoral rules. What the proviso does is disqualify the legislature from having such power in certain circumstances; it does not positively identify the body that should substitute for the legislature.

We then come back to the question posed at the beginning of this discussion: should electoral commissions have the power to make electoral rules? A narrow interpretation of the proviso - as argued by this article – rules out an emphatic ‘no’ to this question but it does not imply an affirmative answer.

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<sup>72</sup> Thompson, above n 8, 183.

There are three conditions an institution should meet if it is to have the power to make electoral rules when the Madisonian proviso applies: first, the absence of the conflict of interest which underlies the proviso; second, the ability to make laws; and third, the ability to provide a forum for democratic deliberation of proposed laws.

In Australia, the three main candidates are the executive government; the judiciary and the electoral commissions. The executive government has the ability to make laws, an ability most clearly present when legislative power is delegated to it, and also the ability to provide a forum for the democratic deliberation of proposed laws; it should, however, be ruled out because of the conflict of interest it has in the making of electoral rules. In fact, the conflict of interest that affects the executive government is likely to be even stronger than that experienced by the legislature. The legislative conflict of interest may be somewhat dissipated by the different interests parliamentary parties have; it is a conflict of interest that is rarely univocal. With the executive branch of government, on the other hand, it is the much more cohesive interests of the governing party that undermines the integrity of the law-making process.

The judicial branch of government is not afflicted by a conflict of interest in this area but fails to meet the other two conditions. Because the function of the judiciary is primarily adjudicative, it does not have the proper ability to make electoral rules. Courts do provide a forum for deliberation but not a democratic one – it is only the litigating parties that have standing to express their arguments and to be heard.

In Australia, electoral commissions do meet all three conditions. Unlike the legislature and executive government, they do not experience a conflict of interest in this context. Moreover, they have the ability to make electoral rules and also the ability to provide a forum for democratic deliberation of proposed laws. This can be illustrated through the process of redistributing electoral boundaries, a process which involves the electoral commissioners as members of the redistribution bodies in all Australian jurisdictions.

This process most clearly involves a rule-making power, a power which is exercised according to specific statutory criteria, the principal one being approximate numerical

equality of voters in each constituency. Importantly, the relevant legislation tends to require a process of public consultation on the draft redistribution with the redistribution bodies – which include the electoral commissioners – obliged to consider submissions made before deciding upon a final redistribution.<sup>73</sup> This is a process that allows for democratic deliberation of proposed redistributions.

Notice here that political parties – including parliamentary parties - do have an important role as participants in this process. While parliamentary parties are disqualified as rule-makers when the Madisonian proviso applies, they are not disqualified as participants in the process of rule-making. As participants but not decision-makers, there is no conflict of interest that taints the discharge of the rule-making function. They are also participants in a public process that requires them to address the relevant statutory criteria, a process that should filter out arguments that rest solely on self-interest. Of course, political parties will still make arguments based on their self-interest while couching them in the form of the statutory criteria. This, however, is not sufficient ground for disqualifying them as participants in the process as self-interest can have a legitimate role in democratic deliberation.<sup>74</sup>

The involvement of political parties in the process of electoral rule-making by electoral commissions demonstrates Thompson's point that electoral commissions are not above politics – including partisan politics – but do reconfigure the way in which politics plays out, ideally in a way more in conformity with the principles of democratic deliberation.<sup>75</sup>

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When the Madisonian proviso does not apply, the legislature should generally be the final authority in determining electoral rules. In such situations, electoral

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<sup>73</sup> See Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (Federation Press, 2010) 31-44.

<sup>74</sup> Jane Mansbridge et al, 'The Place of Self-Interest and the Role of Power in Deliberative Democracy' (2010) 18(1) *Journal of Political Philosophy* 64; Jane Mansbridge, 'Conflict and Self-Interest in Deliberation' in Samantha Besson and Jose Luis Marti (eds), *Deliberative Democracy and its Discontents* (Ashgate, 2006) 107.

<sup>75</sup> Thompson, above n 8, 179.

commissions are not the body making the electoral rules but rather a (privileged) participant in the process of rule making. What should be their role in such a process?

Presently, Australian electoral commissions participate in this process of rule making in two ways: as a source of advice; and as an advocate. They act as a source of advice by providing information on the matters that proposed electoral rules touch upon; these range from operational matters to more substantial issues like the framework of the proposed legislation. They also act as advocates in this process by arguing for changes to electoral rules; again the subject matter of such advocacy ranges from technical aspects of the rules to broader questions (e.g. whether to adopt principles-based legislation).

The commissions also take on these roles in two distinct contexts: the parliamentary process and the executive process. In general, the participation of electoral commissions in the parliamentary process of rule making is not problematic. Indeed, it should be encouraged as such participation potentially enriches democratic deliberation of electoral rules by enabling such deliberation to be informed by the views of the commissions. Moreover, such participation is an important way the commissions meet the principle of accountability (to Parliament). Moreover, as either a source of advice or advocate, there is no real risk to the principle of independence. Neither is there a risk to the principle of impartiality and fairness when it comes to the provision of advice.

Unlike the participation of electoral commissions in the parliamentary process of rule making, their participation in the executive process of rule making is much more fraught. This point can be illustrated through the example of the commissions providing confidential advice to the government of the day in order to assist the government in developing electoral legislation. Such a practice challenges the principle of independence as it seems to treat commissions like any other government department; it treats the commissions as part of the executive government rather than as an independent institution. It also bypasses the accountability the commissions owe to Parliament through its secrecy; such secrecy further breaches the principle of publicity. The principle of impartiality and fairness is also undermined if such advice

is only available to the government but not to others, in particular, the Opposition.<sup>76</sup> With the provision of secret advice, deliberation of electoral rules may be enhanced by the government's position being informed by the commission's views but it is not *democratic* deliberation that is enhanced given the secrecy (and uneven availability).

Do these difficulties with the participation of the commissions in the executive process of rule-making mean that commissions should *not* engage in such a process? Not necessarily. These difficulties are not inherent in the process and can be addressed if two conditions are met. The first is transparency. If advice or advocacy is made through the executive process, the views of the Commissions should be made public, at the very least when proposed electoral rules come to Parliament; this will strike a balance between the imperative of publicity and allowing for deliberations internal to the government. The second is fair availability of advice. This means at the very least that the advice of the Commissions should be available to all parliamentary parties, not just the governing party.

One final issue: should electoral commissions be under a duty to provide advice and to advocate in certain circumstances? There are strong grounds for such a duty when the integrity of the electoral process being under threat. This is due to the role of electoral commissions as custodians of electoral democracy. As Northern Territory Electoral Commissioner Bill Shephard put it, the commission is a 'custodian of democracy'.<sup>77</sup> The Commonwealth Secretariat has also said that '(a)n electoral body . . . is responsible for more than the staging of a poll on election day; it is the custodian of the integrity and legitimacy of a key phase in the democratic process'.<sup>78</sup> While event-management in the sense of conducting elections is the mainstay of the work of commissions, it is a function informed by their telos – the maintenance and enhancement of electoral democracy.

The role of electoral commissions as custodians of electoral democracy provides a persuasive case for conferring a statutory duty on electoral commissions to provide

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<sup>76</sup> A former Deputy Australian Electoral Commissioner has acknowledged the risk that the reporting obligations of the Australian Electoral Commission to the responsible Minister can give rise to unfair advantage being secured by the government: see Paul Dacey, above n 12, 4.

<sup>77</sup> Interview with Bill Shephard, Northern Territory Electoral Commissioner (Telephone Interview, 12 September 2012).

<sup>78</sup> Commonwealth Secretariat, above n 26, 6[9].



public advice on the impact of electoral rules (whether current or proposed) on new candidates and parties as well as minor parties. As noted earlier, the risk of having legislature as the final authority in determining electoral rules is self-dealing, in particular, self-perpetuation, or what Issacharoff and Piles have characterised as ‘partisan lock-up’.<sup>79</sup> This risk stems in part from the prospect that deliberation within the legislature does not sufficiently take into account the impact of electoral rules on ‘outsiders’.

One way to deal with these risks is to more effectively harness the deliberative capacities of the legislature in order to identify, debate and manage the conflict between the interests of the elected representatives and the public interest. Mandating independent (and expert) advice from electoral commissions would greatly assist in this respect. Such a mandate should, however, be conferred by legislation as such statutory conferral would better protect the commissions from criticisms of partiality and unfairness.

### III FOSTERING DEMOCRATIC DELIBERATION OF ELECTORAL RULES

In important ways, Australian electoral commissions do foster democratic deliberation: their administration of electoral rules is subject to parliamentary accountability which should ideally involve democratic deliberation of such administration,<sup>80</sup> when the commissions have the power to make electoral rules (as they do in relation to redistribution of electoral boundaries), they should exercise such power through a process of democratic deliberation,<sup>81</sup> and as privileged participants in the legislative process of electoral rule-making, they can contribute to democratic deliberation through their advice and advocacy.<sup>82</sup> Should Australian electoral commissions have a function of fostering democratic deliberation of electoral rules beyond these situations?

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<sup>79</sup> Samuel Issacharoff and Richard Pildes, ‘Politics as Markets: Partisan Lockups of the Democratic Process’ (1998) 50(3) *Stanford Law Review* 643.

<sup>80</sup> See above nn 51-60 and accompanying text.

<sup>81</sup> See above nn 73-75 and accompanying text.

<sup>82</sup> See above nn 77-79 and accompanying text.

There are compelling reasons for such a function. They arise, firstly, from the limitations of democratic deliberation in these circumstances. With deliberation within the legislature, there is the risk of sham deliberation.<sup>83</sup> When the electoral commissions have the power to make electoral rules, there is less of such a risk but the deficiency here is of scope with the deliberation restricted to specific areas.

There is also no apparent conflict between the function of fostering democratic deliberation and the governance principles of independence, fairness and impartiality, and accountability. This function does not – should not - involve the commissions taking particular positions; it is a function directed at enabling various perspectives to be expressed and debated. As such, it is quite compatible with the principle of independence and that of fairness and impartiality. It also does not detract in any way from the commissions being held accountable.

Importantly, democratic deliberation fostered by electoral commissions can bring distinct benefits. Jane Mansbridge and other scholars (including Dennis Thompson) have identified three functions of the deliberative system: the epistemic function which is aimed at producing views and decisions that are properly informed by facts and logic and result from genuine consideration of relevant considerations;<sup>84</sup> the ethical function of promoting mutual respect among citizens;<sup>85</sup> and the democratic function of promoting an inclusive process of deliberation based on equality.<sup>86</sup> The distinct advantage of the commissions fostering democratic deliberation of electoral rules is that the wider public debate can be more informed by the expertise of the commissions and conducted in a less partisan fashion – this would advance the epistemic function of the deliberative system.

At the same time, there are potential deliberative costs in terms of all three functions, costs often associated with expert deliberation: bias, disrespect and non-inclusion.<sup>87</sup> The risk of bias can stem from the institutional self-interest of the commissions which

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<sup>83</sup> See above n 62 and accompanying text.

<sup>84</sup> Jane Mansbridge et al, 'A Systemic Approach to Deliberative Democracy' in John Parkinson and Jane Mansbridge (eds), *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge University Press, 2012) 11.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid* 12.

<sup>87</sup> *Ibid* 14.

may lead to avoidance of ‘controversial’ topics for fear of offending those who hold political power – in particular the parliamentary parties. Bias can come through a self-referential orientation that views the daily work of the commissions as being of primary importance, an orientation that can lead to excessive focus on administrative detail. Note how both forms of bias stand in favour of the status quo and those presently holding power – they are biases against outsiders.

Disrespect can result from the conceit of expertise that - in the extreme - would consider that deliberation of electoral rules is best undertaken by so-called ‘independent’ experts. This would entail disrespect to those who seen as non-experts and disdain for those viewed as partisan. Such disrespect, in turn, can lead to non-inclusion of ‘non-experts’ and partisans.

There are real but not fatal risks. They are risks that can be addressed, if not ameliorated, through appropriate vision, values, understandings and strategies. The function of fostering democratic deliberation should be informed by a breadth of vision in that deliberation should extend to all issues relevant to the health of Australia’s electoral democracy not just issues of immediate concern to the commissions; it should also be farsighted and not restricted to short-term considerations.

Two values are of importance here: that of integrity which implies firm resistance to the agenda of deliberation being tailored to the interests of the powerful, and that of experimentalism and innovation which implies that nothing is sacrosanct about the status quo. In terms of democratic deliberation of electoral rules, both values point to favouring boldness in terms of topics discussed. Together with such visions and values, there should also be an understanding of the democratic deliberation of electoral rules that views it as implicating deep principles and not just technical expertise and as providing a legitimate role of partisan interest.

The choice of strategies should draw on the insight that deliberation occurs within a deliberative system.<sup>88</sup> The electoral commissions can foster democratic deliberation

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<sup>88</sup> See Mansbridge et al, above n 84.

that seeks to enhance the deliberation that principally occurs in other institutions, specifically the legislature and media. These latter institutions can provide correctives to the potential for bias, disrespect and non-inclusion by involving other political actors in the public debate. For example, the commissions could undertake and publish research which is publicised to parliamentarians and journalists.<sup>89</sup>

The strategy above seeks to supplement existing forums of deliberation. Another strategy – not mutually exclusive – is for the commissions to auspice forums of deliberation. Two examples illustrate this strategy, one actual, one proposed. The actual example is the Electoral Regulation Research Network which was established last year through sponsorship from the New South Wales and Victorian electoral commissions (together with Melbourne Law School). The central purpose of the Network is to foster exchange and discussion amongst academics, electoral commissions and other interested groups on research relating to electoral regulation. It does so through organising public events where such research is discussed and debated by parliamentarians, academics and electoral commission officials and through its publications, including working papers and newsletters.

Another example, on much more ambitious scale, would be a comprehensive periodic review of Australian electoral systems (Commonwealth, States and Territories) with the view of enhancing the health of the country's electoral democracy. This review, which could be carried out every ten years, could be sponsored by all Australian electoral commissions with the commissions providing the secretariat for the review. The commissions would not, however, undertake the review; the review panel should comprise a mix of expertise (for example, former senior parliamentarians and senior electoral commission officials). The review should be conducted through a public process of submissions and hearings and its report should be provided to parliamentarians and the media.

Such a review could promote - on a national scale - democratic deliberation of electoral rules both through its public process but also through its impact on other

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<sup>89</sup> *Commonwealth Electoral Act 1918* (Cth) s 7(1)(e); *Electoral Act 1992* (ACT) s 7(1)(e); *Election Funding, Expenditure and Disclosures Act 1981* (NSW) s 25; *Electoral Act 2004* (NT) s 309(1)(f); *Electoral Act 1992* (Qld) s 7(1)(h); *Electoral Act 1985* (SA) s 8(1)(d); *Electoral Act 2002* (Vic) s 8(1)(g); *Electoral Act 1907* (WA) s 5F(1)(f).

deliberative forums like the media and Parliaments. Not only will its scope will be comprehensive (in contrast with deliberation occurring through the process of rule-making by commissions) but the risk of sham deliberation will also be attenuated with the review panel being staffed by individuals who do not have an institutional self-interest, whether they be serving parliamentarians or electoral commission officials. At the same time, the staffing of the review's secretariat by the commissions enables the review to benefit from the expertise of the commissions. In this way, the electoral commissions can act as a stimulus for broad debate on electoral rules.<sup>90</sup>

#### IV CONCLUSION

The three functions of electoral commissions examined in this article – administering electoral rules, making electoral rules and fostering democratic deliberation of electoral rules – involve the commissions in democratic deliberation in different ways. The commissions are decision-makers, participants in the process of democratic deliberation and facilitators of such deliberation.

As decision-makers administering electoral rules, electoral commissions should generally be subject to the principles of deliberative democracy in relation to their decisions but not in relation to their decision-making processes. As decision-makers making electoral rules, however, the commissions should be subject to these principles both in relation to their decisions and the decision-making processes. Electoral commissions should also be active participants in the legislative process of electoral rule-making but should exercise caution when participating in the executive process of rule-making. The latter participation should proceed only when the conditions of transparency and fair availability of advice are present. Lastly, electoral commissions can perform a valuable public role by fostering democratic deliberation of electoral rules by enhancing the deliberation occurring in other institutional contexts such as the legislature and the media and by auspicing their own forums of deliberation.

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<sup>90</sup> Thompson, above n 8, 197.