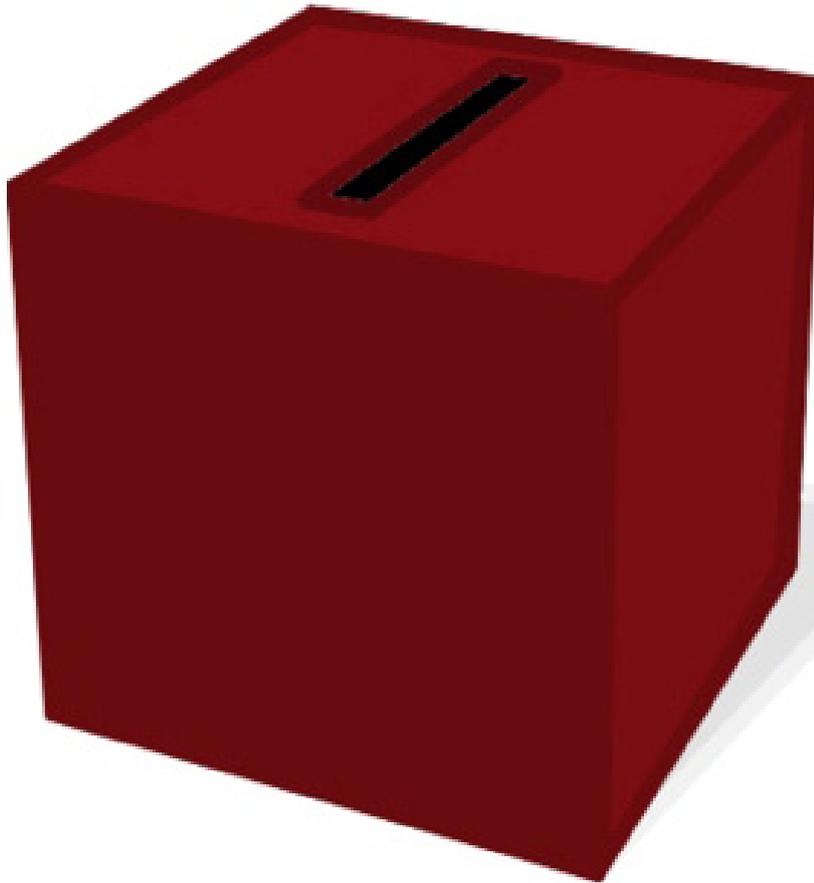




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Electoral Regulation Research Network Newsletter

December 2013

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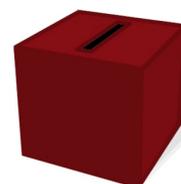


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MESSAGE FROM THE DIRECTOR

The aftermath of the recent federal election has clearly illustrated the topicality of electoral issues. The Senate voting system has come under scrutiny with the increase in (successful) micro-parties; issues relating to the integrity of the electoral process and the Australian Electoral Commission have received prominence through allegations made by Clive Palmer and also the missing votes in the Western Australia Senate contest; and there is the continuing controversy over the use of parliamentary entitlements.

All this underscores the importance of the Electoral Regulation Research Network in providing a public forum for examining these issues in a considered and non-partisan way, informed by research and expert opinion. Two forums on the Senate voting system – one in Adelaide and another in Perth – have already been held under the auspices of the Network. This topic was also the subject of a panel in the 2013 ERRN Biennial workshop and comes within the ambit of ERRN's Research Collaboration Initiative project on 'Informed Voting'. The biennial workshop also had a specific panel examining the role of electoral commissions with the discussion of this topic – and the criticisms by Clive Palmer – flowing onto the politicians' panel. In Victoria, an independent and comprehensive review of the State's local government electoral system is currently underway, making ERRN's Research Collaboration Initiative project on 'Local Government Democracy' particularly timely.

The recent months have also seen the Network grow from strength to strength. The 2013 ERRN Biennial workshop was a tremendous success – thanks to the leadership of Professor Graeme Orr (University of Queensland). The Network now has a formal presence in WA – a warm welcome to the WA ERRN convenors, Professor Alan Fenna (Curtin University), Justin Harbord (Western Australia Electoral Commission) and Associate Professor Sarah Murray (University of Western Australia). There has been an injection of fresh talent – a sign of the vitality of the field – with new convenors in Queensland, Jacki Power (Griffith University) and Dr Alastair Stark (University of Queensland); and Professor John Warhurst (Australian National University) joining as an ACT convenor and Yee-Fui Ng (Monash University) taking up the position as a Victorian convenor. Thanks should be recorded here to the former Queensland convenors, Dr Ron Levy and Dr Zim Nwokora; and also to Judy Birkenhead (Australian Electoral Commission) and Professor John Uhr (Australian National University) who have respectively stepped down as Victorian and ACT convenors. Nathaniel Reader (Swinburne University; Parliament of Victoria) will also be taking over from Rob Hoffman (Swinburne University) as editor of these newsletters from 2014. The Network owes a debt of gratitude to Rob for effectively leading the editorial team in producing these quality publications.

This brings me to the final point of this message. For ERRN to advance an aim that is patent from its name – that is building a network, a community of interest in the area of electoral regulation – it relies in a most fundamental way on a community of the willing, those who are prepared to devote their time and energy to advancing the mission of the Network. The Network would only be a name, a shell, if not for the vibrant efforts of the sponsoring Commissions, its convenors, its editors and other supporters.

So thanks to all of you and best wishes for the season.

Associate Professor Joo-Cheong Tham
Director, Electoral Regulation Research Network

NEWS

Commonwealth

The 2013 federal election has thrown up a number of matters bearing upon electoral regulation, most prominent among them the dramatic Western Australian Senate count.

An increase in the number of candidates and a drop in the major party vote saw micro-party candidates elected across the country off the back of elaborate preference deals. In Western Australia, the result was sufficiently close – at the critical juncture of the count, just 14 votes – to warrant a recount. However, it became apparent that [1375 votes had been misplaced](#) at some point following the initial count. The recount changed the result, with a release of first-count details of the missing votes suggesting the final margin could have been [as narrow as a single vote](#).

The AEC has appointed former Australian Federal Police commissioner Mick Keelty AO to [conduct an investigation](#) into the episode, and has [lodged a petition](#) with the High Court (sitting as the Court of Disputed Returns) requesting an order that the result be declared void and a new election be held. With one of his party's candidates losing out, Clive Palmer has also announced he will [challenge the result](#).

A number of other tight contests attracted attention and controversy, most prominent among them the seats of Fairfax and Indi. [In Fairfax](#), a recount was required to confirm the victory of Clive Palmer over the Liberals' Ted O'Brien, by a margin of 53 votes, against a backdrop of [allegations of corruption and threats of litigation](#) by Palmer. [In Indi](#), independent Cathy McGowan unexpectedly defeated Liberal Shadow Minister Sophie Mirabella, with [a 1000-vote administrative error](#) attracting further attention. Writing in *The Age*, Associate Professor [Sally Young has argued](#) that these episodes need to be understood in context, and should not lead to a loss of faith in the AEC, nor to knee-jerk policy responses.

More broadly, the capacity for micro-party candidates to win election from primary votes as low as 0.23 per cent has drawn attention to the limitations of the Senate's electoral system. The above-the-line ticket voting system allows candidates to harvest votes through [elaborate preference arrangements](#), and the success of such manoeuvres at this election has prompted [calls for reform](#).

These and other matters will face scrutiny when JSCEM conducts its regular inquiry into the conduct of the preceding federal election. The [Coalition has flagged](#) that it will be investigating voter identification and electronic voting, along with the Senate ballot process. Both [the Greens](#) and independent Senator [Nick Xenophon](#) have declared a commitment to optional-preferential above-the-line Senate voting. To this end, Xenophon has introduced the [Commonwealth Electoral Amendment \(Above the Line Voting\) Bill 2013](#) to the Senate. Other reforms proposed include a [restructure of the AEC](#) and a ban on individuals overseeing [multiple political parties](#).

Several other matters of interest have arisen at the federal level. The ongoing debate over [misuse of parliamentary travel entitlements](#) has prompted the government to [propose a number of reforms](#), despite earlier [rejecting any change](#). The new rules would require MPs to sign declarations when submitting expense claims, enforce repayments plus a 25 per cent loading for incorrect claims, and allow the government to name and shame repeat offenders. These changes have been criticised as inadequate, with Monash University's [Nick Economou](#) labelling them a weak, minimal response advanced for political purposes.

As Anne Twomey notes, the [prospects for a double dissolution election](#) remain unclear, particularly before the new Senate sits on 1 July 2014. The Australian Labor Party leadership has been [decided by a split ballot](#) of caucus and the broader party membership, under rules established on Kevin Rudd's return in July. Finally, Bob Carr's resignation from the Senate has created [an unusual double vacancy](#), detailed by Antony Green.

New South Wales

[New electoral boundaries](#) have been proclaimed for New South Wales, to come into effect at the 2015 state election. Antony Green has [analysed the changes](#), calculating an overall notional gain of one seat for the Coalition as well as a new, notionally-Green seat of Newtown.

The High Court [heard a challenge](#) by a coalition of unions against the state's electoral funding laws, who argued that two aspects of these laws (a ban on those not on electoral rolls making political donations, including a prohibition on unions paying affiliation fees to the ALP; and a provision aggregating the electoral expenditure of affiliated unions to the ALP's spending cap) infringed the implied freedom of political communication under the Commonwealth Constitution. A judgement is expected in the new year. Writing in [the Guardian](#), ERRN Director Joo-Cheong Tham has discussed this case, highlighting both the problems with the laws and the consequences that may ensue from the High Court judgment.

Victoria

The [Victorian Electoral Boundaries Commission](#) has released Victoria's new electoral boundaries, which will come into effect for the 2014 state election. While four Coalition-held seats were abolished with two safe Labor seats among the replacements, Antony Green has analysed the changes and calculated notional gains for the Coalition in both the [Legislative Assembly](#) and [Legislative Council](#).

Two broad-ranging inquiries remain ongoing. The Victorian Electoral Matters Committee's [Inquiry into the Future of Victoria's Electoral Administration](#) is due to table its report in March 2014. The [Local Government Electoral Review](#) is due to issue two reports to the Local Government Minister, the first concerning the electoral process, participation and integrity in January 2014, and the second concerning electoral representation in March 2014.

The prospect of a [deadlocked parliament](#) has lessened, with the Director of Public Prosecutions [withdrawing all charges](#) against controversial Liberal-turned-independent MLA Geoff Shaw due to the low prospect of conviction. Shaw is still to face the Parliament's Privileges Committee.

Finally, there is tension within Victorian Labor regarding pre-selections ahead of next year's state election. A plan by faction leaders to fast-track pre-selection by [centralising decision](#) making through the party's National Executive has drawn [criticism from local activists](#) and [threats of court action](#).

Queensland

The Queensland Government has proposed a number of significant reforms in response to its [review of Queensland's electoral system](#). The [Electoral Reform Amendment Bill 2013](#) would remove donation and expenditure caps and increase the disclosure threshold from \$1,000 to \$12,400, with disclosure occurring on a monthly basis. Public electoral funding would no longer be a reimbursement of expenditure, and the qualifying threshold would be raised to ten per cent of the vote. Justified on the basis of electoral integrity, proof of address would be required for attendance voting, and all how-to-vote cards would be registered with the Electoral Commission of Queensland and published online. In its [response to the review](#), the government also re-committed to postal voting without restriction, and flagged its in-principle support for remote electronic voting.

The proposals have [attracted controversy](#), with Labor arguing they represent a threat to the integrity of government, the Greens calling them unscrupulous and anti-democratic, and the Katter Party accusing the government of harming the democratic process in an attempt to monopolise power. Writing in [the Courier Mail](#), Professor Graeme Orr has detailed the impact the laws will have, and drawn attention to their problematic aspects.

South Australia

The South Australian Parliament has passed a package of electoral funding reforms. The [Electoral \(Funding, Expenditure and Disclosure\) Amendment Bill 2013](#) establishes public electoral funding for parties and candidates that adhere to expenditure caps, as well as introducing a disclosure threshold of \$5,000 for all donations and gifts. However, the introduction of the new regime has been [delayed until 2015](#) due to concerns regarding the cost of implementation and the training of party officials.

In light of the complications observed in the recent Senate election, a number of reforms to Legislative Council elections have been proposed. The Legislative Assembly has passed the [Electoral \(Legislative Council Voting\) Amendment Bill 2013](#), which increases candidate nomination requirements and alters the way in which independents are displayed on the ballot paper. Two further bills have been introduced to the Legislative Council. Both the [Electoral \(Optional Preferential Voting\) Amendment Bill 2013](#), introduced by the Greens, and the [Electoral \(Preferential Voting Reform\) Amendment Bill 2013](#), introduced by independent John Darley MLC, would establish systems of optional preferential voting for Legislative Council elections.

The South Australian Electoral Commission has given advice that logistical constraints mean no such change could be in operation for the upcoming state election in March 2014. In response, the Attorney-General has floated a more radical proposal, tabling a draft of the [Electoral \(Legislative Council Voting Reform\) Amendment Bill 2013](#). This bill would reform the Legislative Council's electoral system. The current single-transferrable-vote preferential system would be replaced by a Sainte-Laguë divisor-based, largest-remainder system, where seats are proportionally allocated without the use of preferences. Antony Green has [discussed the impact of such a change](#) in some depth.

Tasmania

The Tasmanian Parliament has passed a suite of local government electoral reforms. Among a number of minor technical changes, the [Local Government \(Miscellaneous Amendments\) Bill 2013](#) and [Local Government Amendment \(Elections\) Bill 2013](#) introduce fixed terms and full-council elections, as well as ending dual representation through a prohibition of the simultaneous holding of local and state government office. The reforms also grant the Tasmanian Electoral Commission power to establish systems of internet voting for local government elections for those outside Tasmania at the time of the election. However, a push to extend compulsory voting to local government was [blocked by the Legislative Council](#).

In November, the Government tabled the [Electoral Amendment \(Electoral Expenditure and Political Donations\) Bill 2013](#), which would cap expenditure at \$750,000 for parties and \$75,000 for individual candidates, limit anonymous donations to \$1,500 per donor, and provide for real-time disclosure.

Timetable of Upcoming Australian Elections

March 15, 2014 – South Australian State Election
May 24, 2014 – Tasmanian Legislative Assembly Election (last possible date)
May, 2014 – Tasmanian Legislative Council Election (Divisions of Huon and Rosevears)
November 7, 2014 – South Australian Local Government Elections
November 29, 2014 – Victorian State Election

ERRN RESEARCH COLLABORATION INITIATIVE

The ERRN Research Collaboration Initiative was launched this year with the aim of developing ‘thick’ research collaborations between electoral commissions and academia in order to address the long-term challenges facing the regulation of Australian elections. Two themes have been chosen as the focus of the initiative, ‘The Challenge of Informed Voting in the 21st Century’ and ‘Enhancing Local Government Democracy’, with a research team dedicated to each.

The Challenge of Informed Voting in the 21st Century

Project Team

Associate Professor Rodney Smith, University of Sydney
Dr Anika Gauja, University of Sydney
Mel Keenan, NSW Electoral Commission
Dr Paul Kildea, University of New South Wales

As the 2013 federal election amply demonstrated, Australian voters face the challenge of participating in a complex electoral system. In this complex setting, informed voting can be understood to mean three things. First, it refers to the basis for choosing between different candidates or referendum propositions. Second, it refers to possession of technical information about the different ways in which electoral procedures contribute to the winners and losers. Third, it encompasses wider knowledge about the role of elections within the democratic system. This project will explore each of these types of voter information by answering four broad sets of questions:

1. Why informed voting? Why is informed voting valuable? How important an objective is it for Australian democracy in the 21st century?
2. What is informed voting? How has the issue of informed voting been understood by key Australian institutions?
3. How is informed voting fostered in Australia? What information is available? How is it delivered and regulated? How successful is it?
4. How can informed voting be better promoted in Australia?

The researchers will address these questions through three major methods: documentary analysis; secondary analysis of existing survey data; and original focus group research.

Enhancing Local Government Democracy

Project Team

Associate Professor Ken Coghill, Monash University

Yee-Fui Ng, Monash University

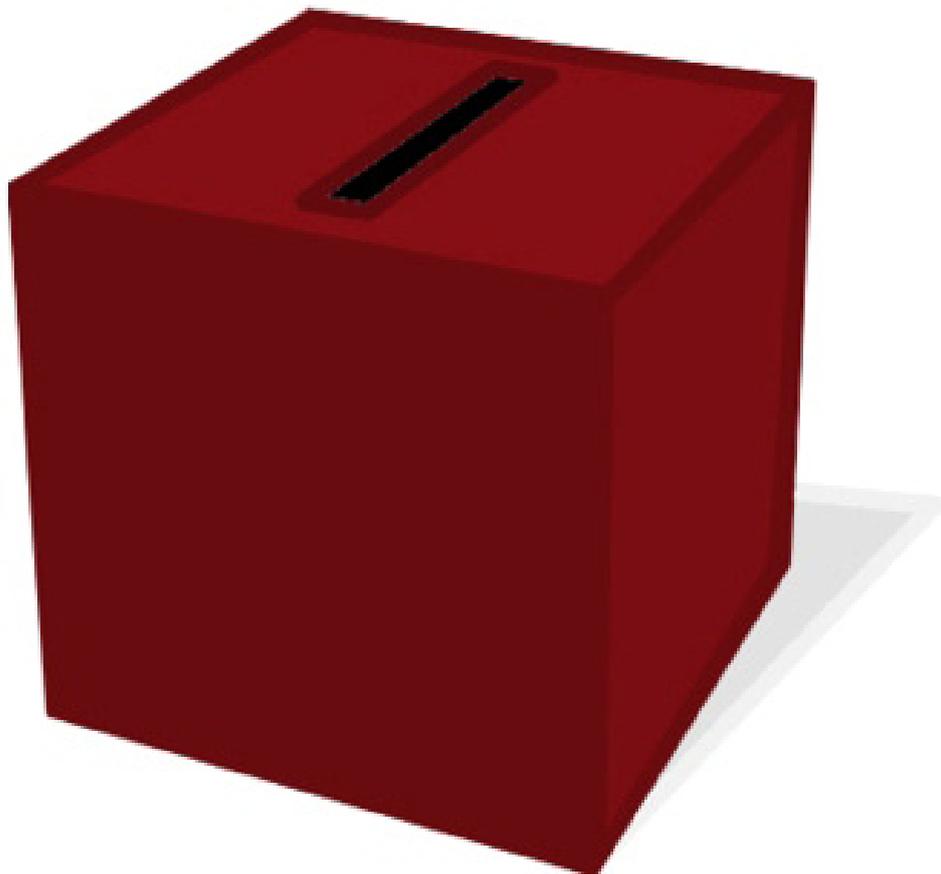
Dr Paul Thornton-Smith, Victorian Electoral Commission

Research Assistant: Valarie Sands, Monash University

This project will focus on the nature of local government democracy in the City of Melbourne. It aims to investigate the relationships that operate between the City of Melbourne and the wide range of people and organisations that use its facilities and services – residents, businesses, workers, commuters, shoppers and others. It will examine how these relationships affect policy-making and the provision of facilities and services within the City of Melbourne. The project also aims to ascertain if policy-making and the provision of facilities and services are affected by the City of Melbourne's multiple franchise which includes a property-based franchise with deeming provisions (to a greater extent than other Victorian local governments) and voting by citizen and non-citizen resident tenants and owner-occupiers.

This will be the first known empirical study of the nature of the operation of local government in the City of Melbourne. The empirical aspect of the project will investigate the interactions between interest groups and formal democratic institutions.

As the project conceives of local government democracy as a complex evolving system, it goes beyond the boundaries of legislation and conventional political science perspectives and provides an innovative insight into the operation of local government in the City of Melbourne.



FORTHCOMING EVENTS (2014)

February 14: [Gilbert + Tobin Centre for Public Law 2014 Constitutional Law Conference and Dinner](#)

A major conference on constitutional law, the thirteenth in a series, will be held at the Art Gallery of New South Wales on Friday 14 February 2014. The event is organised by the Gilbert + Tobin Centre of Public Law with the support of the Australian Association of Constitutional Law. The conference will focus on developments in the High Court and other Australian courts in 2013 and beyond. The conference will be followed by dinner at NSW Parliament House hosted by New South Wales Attorney-General, The Hon. Greg Smith SC. The guest speaker at the dinner will be The Hon. Senator George Brandis SC, Attorney-General.

February 27: ERRN (VIC) Seminar: Improving the Local Government Electoral System

In this seminar, Petro Georgiou AO (Chair of the Victorian Government's Local Government Electoral Review Panel) will discuss the process of the Review, as well as the challenges and opportunities for local government electoral processes in Victoria. Petro Georgiou AO served as Federal Member for Kooyong from 1994 to 2010. During that time he held a number of positions on joint standing committees including Chair of the Electoral Matters and Science and Innovation committees.

July 17-18: [Australia-New Zealand Workshop on Campaign Management and Political Marketing](#)

This workshop will bring together academics and practitioners for an in-depth discussion of current and emerging trends in campaign management and political marketing, and generate new networks and opportunities for further trans-Tasman and international research. The workshop will have a particular emphasis on the nexus between research and practice, and is open to academics, party representatives, political consultants, research students and civil society campaigners. Papers across a range of sub-themes within the broad category of campaign management and political marketing are welcomed by the deadline of February 1 2014.

September 29-October 1: [Australian Political Studies Association Annual Conference 2014](#)

The annual conference of the Australian Political Studies Association will meet at the University of Sydney. The main conference theme is 'Elections, Democracies and Autocracies.' Paper and panel proposals are welcomed by the deadline of March 1 2014. The event will also feature one-day pre-conference workshops on [Electoral Integrity in Asia Pacific](#) and [The Legal Regulation of Political Parties: Promoting Electoral Integrity](#), both held on Sunday September 28 2014.

October 1-October 3: [Australasian Study of Parliament Group Annual Conference 2014](#)

The annual conference of the Australasian Study of Parliament Group will meet at the Parliament of New South Wales. The theme is 'How Representative is Representative Democracy?'

ERRN EVENT REPORTS

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

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

In this seminar, two experts considered the important and powerful role the media plays in Australian politics. Associate Professor Sally Young (University of Melbourne) and Dr Murray Green (Macquarie University) considered the importance of fair media reporting to the conduct of fair elections, discussed how well Australia's media performs in this respect, and suggested ways in which the media could more fully discharge its democratic role.

August 19: [ERRN \(VIC\) & ALC Seminar: Representing Malaysia: Reflections on GE13](#)

In this seminar which was held in conjunction with the University of Melbourne Law School's Asian Law Centre, Associate Professor Bridget Welsh (Singapore Management University) reflected on Malaysia's recent general election. Welsh analysed the election, which was marred by irregularities, and discussed the broader impact for political representation and democracy in Malaysia.

August 23: [ERRN Research Collaboration Initiative Workshop](#)

Drawing participants from electoral commissions and academia, this by-invitation workshop introduced the ERRN's Research Collaboration Initiative and its initial projects. Colin Barry (New South Wales Electoral Commissioner), Warwick Gately AM (Victorian Electoral Commissioner), Professor Lisa Hill (University of Adelaide) and Associate Professor Joo-Cheong Tham (ERRN Director, University of Melbourne) spoke regarding the opportunities and challenges of collaborative research, before the research teams introduced the first projects to be conducted under the auspices of the Research Collaboration Initiative. These projects address the themes of Enhancing Local Government Democracy and of The Challenge of Informed Voting in the 21st Century. Details of each project and an overview of the Initiative can be found earlier in this newsletter.

August 29: [Policing Political Speech: Japan's Mistrust of the Marketplace](#)

In this seminar, Professor Dan Rosen (Chuo University) discussed the heavily-regulated nature of electoral campaigning in Japan, where strict limitations restrict the form and content of political speech. Rosen discussed the implications of new laws that allow internet campaigning for the first time, in the context of overall campaign regulation in Japan, and explored the effects of the current system on democracy and freedom of speech.

September 18: [ERRN \(VIC\) Seminar: Engaging the Disengaged? Vote Compass and the Citizens' Agenda](#)

In this seminar, Eyal Halamish (CEO, [OurSay](#)) and Dr Aaron Martin (University of Melbourne) presented two new voter engagement tools trialled at the 2013 Australian federal election – [Vote Compass](#) and the [Citizens' Agenda](#). Vote Compass is an interactive electoral literacy application that provides an accessible framework for learning about party platforms, stimulates discussion on a wide variety of election issues, and encourages democratic participation within the electorate. The Citizens' Agenda is an attempt to shift the debate from a simple narrative of electoral competition to a broader, citizen-responsive discussion of the issues voters want politicians to speak about.

October 14: [ERRN \(NSW\) Seminar: Elections and Alignment](#)

Held in conjunction with the [Gilbert + Tobin Centre of Public Law](#) and the [Herbert Smith Freehills Law & Economics Initiative](#), this seminar featured Assistant Professor Nick Stephanopoulos (University of Chicago Law School) arguing for a new structural theory of electoral doctrine – the alignment approach. Rather than focusing on a balance of individual rights burdens and value-based state interests, Stephanopoulos argued that electoral laws should be considered for their capacity to align representatives' preferences with those of voters.

October 15: [ERRN \(SA\) & CEDA Meeting: Reforming the Upper House](#)

Held in conjunction with the [Centre for Economic Development of Australia](#), this meeting brought together a broad selection of politicians and electoral specialists to discuss the reform of Upper House electoral systems. The Hon. John Rau (Attorney General, SA Labor), the Hon. Stephen Wade (Shadow Attorney-General, SA Liberals), the Hon. Mark Parnell (Leader of the SA Greens), Senator Nick Xenophon (independent) and Antony Green (ABC) discussed the problems highlighted by the recent Commonwealth Senate results, potential solutions to these issues, as well as the prospects for reform of South Australia's Legislative Council. Green's presentation has been adapted into an [ERRN Working Paper](#).

October 30 & November 1: 3rd Biennial Electoral Regulation Workshop

Hosted in conjunction with the [TC Beirne School of Law](#), University of Queensland, this workshop brought together electoral practitioners, politicians and law and political researchers to discuss a broad range of topics under the themes of the Regulation of Electoral Politics and the Politics of Electoral Regulation. Expert seminars and panels covered issues of judicial developments regarding political freedoms, political finance, local democracy, principles of electoral law, the roles of electoral commissions in electoral law development, electoral boundaries and their implications, conceptions of the franchise, optional preferences and Senate voting, partisanship in electoral reform, and the consequences of political party structure and professionalization. A number of these papers have been published as part of the [ERRN Working Papers Series](#), and are detailed later in this newsletter.

November 12: ERRN (WA) Seminar: Voting for Upper Houses – Practical Problems and Sensible Reforms

In this seminar which was held in conjunction with the [Constitutional Centre of Western Australia](#) and the [Australian Association of Constitutional Law](#), two expert speakers discussed the problems facing upper house electoral systems and the prospects and options for reform. Senator the Hon Stephen Smith (Australian Labor Party) discussed federal elections and the Senate, while Justin Harbord (WA Electoral Commission) offered a state perspective on upper house elections.

December 4: [ERRN \(VIC\) Seminar: The Constitutional Consequences of Mr Shaw](#)

Recent events have thrown constitutional arrangements in Victoria into sharp focus. In this seminar, Associate Professor Greg Taylor (Monash University) discussed the limitations inherent in the Victorian electoral system, where the even number of members of the Legislative Assembly and the provision for fixed-term elections render Victoria particularly vulnerable to the effects of close election results. Taylor explained the flaws in the current system, the prospects for long-term reform and the short-term options for politicians dealing with the current issues.



L to R: Professor Brian Costar (Victorian Convenor) and Associate Professor Greg Taylor (Monash University)

RECENT PUBLICATIONS

The **Electoral Commissions** of the [Commonwealth](#), [Victoria](#), [Queensland](#), [Western Australia](#), [Tasmania](#) and the [ACT](#) have made available their annual reports.

The **Electoral Council of Australia and New Zealand** has released a discussion paper on [internet voting](#).

The **Commonwealth Parliamentary Library** has published a research paper providing an overview of [electoral quotas for women](#) in an international context.

The **New South Wales Parliamentary Research Service** has published analyses of the [final](#) and [draft](#) NSW electoral boundaries, and a research brief regarding [constitutional recognition of local government](#).

The **Queensland Government** has [issued a response](#) to its [review of Queensland's electoral system](#), proposing a number of reforms.

In the **Australian Journal of Political Science**, **Glenn Kefford** considers the [presidentialisation of Australian politics](#), **John Boswell**, **Simon Niemeyer** and **Carolyn Hendriks** offer a deliberative democratic analysis of [former Prime Minister Julia Gillard's proposed Citizens Assembly](#), **Austin Clements**, **Michael Crespín** and **Charles Finnochiaro** examine [pork-barrelling in Australian politics](#), and **David McKnight** and **Mitchell Hobbs** explore the [mining industry's media campaign](#) against the ALP.

In the **Australian Journal of Politics & History**, **Aaron Martin** and **Juliet Pietsch** consider the [impact of generational change](#) on the Australian party system, while **Bruce Tranter** details the [polarisation of voters and candidates](#) in response to climate change and **Simon Niemeyer** argues [the case for deliberative democracy](#) as a response to such issues.

ERRN WORKING PAPER SERIES

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

Working Paper No. 8: [Political Funding and Disclosure Schemes: Approaches to Compliance and Enforcement](#)

Bradley Edgman, Director, Financial Compliance, Funding and Disclosure Unit, Australian Electoral Commission

Working Paper No. 9: [Fairness and Equality in Electoral Redistributions](#)

Dr Jenni Newton-Farrelly, Electoral Specialist, South Australian Parliamentary Library

Working Paper No. 10: [Reform Options for the South Australian Legislative Council](#)

Antony Green, Election Analyst, Australian Broadcasting Corporation

Working Paper No. 11: [The Citizens' Agenda and OurSay](#)

Eyal Halamish, CEO, OurSay.

The following Working Papers were adapted from papers given at the 3rd Biennial Electoral Regulation Workshop, hosted by the ERRN and the TC Beirne School of Law, University of Queensland. A full report of this event can be found earlier in the newsletter.

Working Paper No. 12: [Australian Political Finance Law in International Perspective](#)

Andrew Ellis, Director for Asia and the Pacific, International Institute for Democracy and Electoral Assistance

Working Paper No. 13: [New Zealand's Ill-Fated Review of MMP](#)

Professor Andrew Geddis, University of Otago

Working Paper No. 14: [New Developments in Political Speech Case Law](#)

Professor Katharine Gelber, University of Queensland

Working Paper No. 15: [The Law of Deliberative Democracy: Seeding the Field](#)

Dr Ron Levy, Griffith University

Working Paper No. 16: [Optional Preferential Voting for the Australian Senate](#)

Michael Maley, Australian National University

Working Paper No. 17: [Party Professionalisation: Electoral Regulation and National Party Officials](#)

Dr Stephen Mills, University of Sydney

Working Paper No. 18: [Private Association and Public Brand: the Dualistic Conception of Political Parties in the Common Law World](#)

Professor Graeme Orr, University of Queensland

Working Paper No. 19: [Campaign Professionalisation: Levelling the Playing Field or Tipping the Scales?](#)

Jennifer Rayner, Australian National University

Working Paper No. 20: [Deliberative Democracy and Electoral Management Bodies: The Case of Australian Electoral Commissions](#)

Associate Professor Joo-Cheong Tham, University of Melbourne

Working Paper No. 21: [2013 Redivision of Victorian Electoral Boundaries](#)

Dr Paul Thornton-Smith, Secretary, Victorian Electoral Boundaries Commission

Working Paper No. 22: [High Court Challenges and the Limits of Political Finance Law](#)

Professor George Williams AO, University of New South Wales

ERRN CASE NOTES

AEC petition to the High Court regarding Senate election

As noted earlier in this newsletter, 1375 votes were misplaced in the federal election for the WA Senate. The Australian Electoral Commission has lodged a petition with the High Court sitting as the Court of Disputed Returns, arguing that the loss of the missing votes is likely to have materially affected the election result and seeking a declaration that the election is void.

Earlier, Clive Palmer had [indicated his intention](#) to lodge a High Court challenge to the WA Senate election results. Mr Palmer believes that Palmer United Party candidate Dio Wang rightfully won one of six WA Senate positions.

Unions New South Wales v State of New South Wales (High Court)

This case was heard by the High Court on 5 and 6 November 2013. As reported in the July 2013 newsletter, this case seeks a declaration that provisions of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) are invalid as contrary to the implied freedom of political communication. The parties' submissions and links to the transcripts are [available on the High Court website](#).

Queensland Police Union of Employees v Queensland (High Court)

Three unions, the Queensland Police Union of Employees, Queensland Nurses' Union of Employees and the Queensland Teachers Union of Employees, have brought proceedings in the High Court challenging section 553F(2) of the *Industrial Relations Act 1999* (Qld). Section 553F(2) provides that an organisation may only spend a more than \$10,000 for a political purpose in a financial year if the spending is authorised by a ballot. The applicants seek a declaration that section 553F(2) is invalid on the ground that it infringes the implied freedom of political communication.

***The Age* journalists admit to illegally accessing ALP electoral database**

[According to news reports](#), three journalists from *The Age* (Royce Millar, Nick McKenzie and Ben Schneiders) have admitted gaining unauthorised access to restricted information on an ALP electorate database in the lead-up to the 2010 Victorian state election. The journalists escaped conviction after being placed on the Magistrates' Court diversion program, which allows first-time offenders to avoid conviction by acknowledging responsibility for the offence, but without pleading guilty.

***Beswick, in the matter of an Election for an Office in the Shop, Distributive & Allied Employees' Association v Swetman* [2013] FCA 642 (Federal Court, 18 June 2013)**

Mr Christopher Ketter and Mr Alan Swetman were nominated for election for the office of Secretary/Treasurer within the Queensland Branch of the Shop, Distributive & Allied Employees' Association (SDA). Ms Ellen Beswick, a member of the SDA, brought an application alleging that Mr Swetman was not eligible to be a candidate in the election for Secretary/Treasurer because he was not a member of the union.

Mr Swetman was employed by the SDA as an organiser from 1995 until May 2013. His prime role was to recruit new members. During that period, Mr Swetman attended and voted at members' meetings of the SDA without challenge, paid membership dues and carried a membership card. However, these trappings of membership were not sufficient to elevate him into the position of member if he was not eligible under the SDA's rules.

The two relevant categories of membership were, first, members engaged in any capacity in connection with selling, receiving, handling, demonstrating, and/or delivery of goods in or for any shop or warehouse, and secondly, "such other persons as have been appointed officers of the Association and admitted as members thereof and such persons who have been appointed life members".

The judge referred to *Rounsevell v Mitchell* (1968) 11 FLR 414, which held that an industrial officer was not employed in connection with an applicable list of industries or callings: “He does no work connected with the actual work of those engaged in those industries or callings. His work is to endeavour to obtain for them wages and conditions of employment which they seek or the organisation seeks on their behalf”. As such, Mr Swetman did not fall into the first category. Neither did he hold any office contemplated in the second category.

Accordingly, Mr Swetman was not eligible to be a member of the union, and thus was not eligible to stand for elected office. The nomination was declared invalid.

***Mylne v Return & Services League of Australia (Qld Branch) Maroochydoore Sub Branch Inc* [2013] QSC 179 (Qld Supreme Court, 20 June 2013)**

Mr Mylne and Mr Meehan were nominated for election to the chair of the Currumbin-Palm Beach sub-branch of the Returned and Services League of Australia (Queensland Branch). Mr Mylne sought a declaration that the Maroochydoore sub-branch (which nominated Mr Meehan) was incapable of nominating a person for election as chair of the Queensland Branch because a charter had not been issued to the Maroochydoore sub-branch as required by the by-laws of the Queensland Branch.

Mr Mylne was not a member of the Maroochydoore sub-branch, and had not been deprived of any right or entitlement he otherwise enjoyed to be nominated for the position of chair of the Queensland Branch. Accordingly, Douglas J held that the issue was not justiciable amongst the members of the Queensland Branch and that Mr Mylne had no standing to raise the issues. This was based on the principle that courts do not as a matter of course intervene in the affairs of voluntary associations. On existing authority, this was a case where “the courts should stay their hands from interfering in the internal affairs of these bodies”.

***Horn v Australian Electoral Commission* [2013] WASC 72 (WA Supreme Court, 7 March 2013)**

Section 206 of the *Commonwealth Electoral Act 1918* provides that polling booths shall have separate voting compartments, constructed so as to screen the voters from observation while they are marking their ballot papers. Section 233 provides that each voter, upon receipt of the ballot paper, shall retire alone to some unoccupied compartment of the booth, and there, in private, mark his or her vote on the ballot paper, fold the ballot paper so as to conceal his or her vote before depositing the ballot paper. Mr Horn had argued over a long period that these provisions required that the voter be completely concealed from view when marking the ballot paper. He failed to vote in the 2010 federal election, arguing that he felt intimidated in the “open-ended voting structure”.

Previously, the Federal Court had rejected Mr Horn’s arguments. This was confirmed by Hall J in this case, holding that “[t]he real issue was not whether he could be seen, but whether he was ‘screened’ for the purposes of casting his vote”. Mr Horn’s arguments could not amount to a valid reason for not voting.

***Banerji v Bowles* [2013] FCCA 1052 (Federal Circuit Court, 9 August 2013)**

The applicant, Ms Banerji, was an employee of the Department of Immigration and Citizenship. She operated a Twitter account and using that account made regular comments, including critical comments, on immigration policies, government and opposition figures and employees of the department. The department conducted an inquiry into Ms Banerji’s behaviour and considered that she had failed to uphold the values of the public service. Concerned that the department intended to terminate her employment because of her use of social media, she brought an application seeking to prevent the department from taking action against her.

Ms Banerji submitted that she had a constitutionally protected right to express her opinions on political matters. Judge Neville held that this proposition was not supported by authority. The implied freedom of communication about government or political matters is not a personal right but operates as a restriction on legislative and executive power. Ms Banerji’s political comments, tweeted while she was employed by the department under a contract of employment formally constrained by the APS Code of Conduct, and subject to departmental social media guidelines, were not constitutionally protected.

AA v BB (2013) 296 ALR 353 (Vic Supreme Court, 20 March 2013)

The Magistrates' Court of Victoria had made an intervention order under the *Family Violence Protection Act 2008* (Vic) (FVPA) which imposed severe restrictions upon the appellant's contact with the appellant's former spouse (referred to in the judgment as 'the protected person'). The order prohibited the appellant from publishing 'any material' about the protected person and also prohibited the appellant from providing information in relation to the protected person's personal, family and professional interests to 'any third person'.

The appellant pleaded guilty to, and was convicted of, contravening the order. The appellant appealed against the conviction and sentence, arguing that the order was invalid on several grounds. One of these was that the enabling provisions of the FVPA were contrary to the implied freedom of communication about government or political matters. The protected person was a candidate for election in the September federal election; the appellant had certain information which was relevant to the protected person's capacity to be a member of Parliament, and the appellant wished to ventilate that information.

Bell J noted that the provisions in the FVPA do not directly authorise the imposition of burdens on communication about government or political matters, but they do so indirectly. Bell J acknowledged that the restrictions in the intervention order did burden freedom of communication about government or political matters. Because the protected person was a candidate for federal parliamentary office, such restrictions needed to be demonstrably justified.

Bell J did not accept that the Magistrate made the order, or convicted the appellant for contravening the order, for the improper purpose of protecting the protected person's political career. Rather, the order appeared to be a reasonable and proportionate response to the matters which were before the Magistrate. The terms of the order did not appear to go beyond what was reasonably necessary to ensure the protection of the protected person from family violence. Nor was it established that less drastic restrictions would have been adequate.

Surprisingly for Bell J, no mention was made of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

***The Age Company Ltd v Liu* (2013) 82 NSWLR 268 (NSW Court of Appeal, 21 February 2013, High Court, 6 September 2013)**

The Age newspaper published articles which allegedly contained imputations of corrupt conduct by Ms Liu, including corrupt dealings with a Federal politician, Mr Joel Fitzgibbon. Prior to instituting proceedings for defamation, Ms Liu sought interlocutory orders for preliminary discovery under r 5.2 of the *Uniform Civil Procedure Rules 2005*, including orders that certain journalists attend court to be examined, and that they and the publisher, *The Age* newspaper, provide information relating to the identity of the sources of information upon which the articles were based.

The publisher and the journalists opposed the orders sought on various grounds, including that r 5.2 was invalid as being contrary to the implied freedom of communication on government and political matters. The Supreme Court ordered that the publisher and the journalists give discovery to Ms Liu of all documents that were or had been in their possession relating to the identity or whereabouts of the sources. The applicants sought leave to appeal this decision.

The Court of Appeal noted that the implied freedom of communication was not an absolute freedom, and that the second limb of the *Lange* test (that the restriction must be reasonably appropriate and adapted to a legitimate end) does not mean the restriction must be unavoidable or essential; rather, it involves close scrutiny, "congruent with a search for compelling justification".

Rule 5.2 did effectively burden the freedom of communication about government or political matters. However, r 5.2 was valid, as it was appropriate and adapted to serve a legitimate and namely protecting persons from false and defamatory statements by unidentified persons when they might otherwise have had no redress.

Special leave to appeal against this decision was refused by the High Court on 6 September 2013: *The Age Company Ltd v Liu* [2013] HCATrans 205.

***Liberal Party of Australia (Western Australia Division) Inc v City of Armadale* [2013] WASC 27 (WA Supreme Court 18 January 2013)**

This case concerned local council restrictions on electoral advertising in the lead up to the Western Australian State election in March 2013. The City of Armadale had implemented a policy which set down an absolute prohibition against electoral signage within Armadale, even on privately owned land. The policy justification put forward by the City was local amenity. In Kenneth Martin J's view, "that policy consideration fails to afford a sufficient degree of weight to the vital importance of political communications being made freely, in an electoral process which is an established part of the democratic processes applicable and expected in this State". A fetter on political communications under electoral signage properly during an election period election needed more weighty justification than the mere look of a local neighbourhood during an election campaign.

***O'Flaherty v Sydney City Council* (2013) 210 FCR 484 (Federal Court, 15 April 2013)**

Eamonn O'Flaherty, a 26 year old student and trainee massage therapist, participated in an "Occupy Sydney" protest in Martin Place in central Sydney. The global "Occupy" movement is an organised demonstration against social and economic inequality and the corruption of political systems. The primary mode of protest is to maintain a continuous presence in public spaces, which allows the protesters to continually convey their political message to the public and also to demonstrate solidarity with those living on the street.

However, staying overnight was prohibited by notice in Martin Place. At all relevant times 19 such notices were displayed in Martin Place. When he stayed overnight at the protest, Mr O'Flaherty was charged with the offence of failing to comply with the terms of a notice in a public place, contrary to s 632(1) of the *Local Government Act 1993* (NSW). He brought an application alleging that the issue or publication of the notices was *ultra vires* the powers conferred by the *Local Government Act* or alternatively that s 632(1) was invalid on the ground that it burdened the implied freedom of communication about government or political matters.

Katzmann J accepted the applicant's submission that the act of occupation can itself be a political communication that is protected by the Constitutional freedom. Ideas and opinions may be communicated through action and in silence. Her Honour's remarks on this point are worth repeating in full:

History has shown that non-verbal protest can be a particularly potent method of political communication, whether it be chaining oneself to the gates of parliament, giving a Black Power salute, partaking in a candlelight vigil, sitting in front of a bulldozer, participating in a sit-in, taking part in a hunger strike, setting oneself on fire, occupying a seat in a restaurant, library or bus reserved for people of a different colour, or burning a flag or draft card. No-one would seriously suggest, for example, that Rosa Parks was not engaged in an act of political communication when in 1955 in Montgomery Alabama she defied an instruction by a bus driver to give up her seat on the bus to a white passenger, although the mere act of sitting on a bus or staying put when asked to leave does not of itself constitute political communication.

Thus, when staying overnight in Martin Place, Mr O'Flaherty was engaging in political communication. "His purpose was to send a political message. His conduct was 'calculated to express and was capable of expressing' such a message".

Her Honour held that preventing damage to public places and inconvenience or injury to those who go there, and protecting and conserving the public amenity in public spaces for the benefit of the entire community were legitimate ends for the purpose of the implied freedom.

A range of factors suggested that the prohibition was compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. These included the fact that the prohibition and the law from which it derived its authority were facially neutral, that is, they applied to all forms of conduct and were not directed to political communication. Further, the effect of the law on freedom of political communication was minimal: it does not impede any form of communication for the greater part of the day and night, and only prevented communication in a limited and indirect respect. "What it does prevent is the use of a public place as a residence". There were no alternative means of achieving the purpose of the regulation that were obvious and compelling.

Extended use of Martin Place by the protesters “would have transformed Martin Place into an obstacle course, if not the private domain of the protesters, and made it extremely difficult (perhaps impossible) for the City to clean and conserve it”. This would have affected the rights of other users of the space and the environment. “The prohibition strikes the necessary balance between the competing interests of political communication and the protection of the area for the benefit of all”. Accordingly, the prohibition was held to be valid.

***Muldoon v Melbourne City Council* [2013] FCA 994 (Federal Court, 1 October 2013)**

Similar issues were considered in *Muldoon*, which concerned the Occupy Melbourne protest. The Occupy Melbourne protesters conducted protests in various locations in Melbourne, including Treasury Gardens. Local laws made by the Melbourne City Council under s 111 of the *Local Government Act 1989* (Vic) prohibited camping in public places in a tent or other temporary form of accommodation without a permit and empowered authorised officers to serve a Notice to Comply where the officer suspects that a person is in breach of the law.

The protesters applied to Melbourne City Council for permission to erect and utilise infrastructure for the protest, including a communal kitchen, marquee, generator, taps and waste facilities. Permission was refused. The protesters nevertheless proceeded with their occupation of the gardens, camping and sleeping on the gardens and bringing tarpaulins with mattresses, sleeping bags, crates, boxes of food and cooking utensils. Concerned about potential damage to the gardens, council officers served notices to comply on the protesters and subsequently took enforcement action.

The applicants brought proceedings seeking declarations that the statutory scheme, the local laws made under them, and the enforcement actions were unlawful. The decision is a long and complex one and will not be discussed in full here. On the question of whether the local laws infringed the implied freedom of communication, North J reached similar conclusions to those reached in *O’Flaherty v Sydney City Council*.

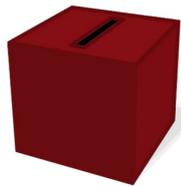
Although the provisions burdened the freedom of political communication, they served a legitimate end. The Council explained that public open spaces are set aside mainly for recreation, nature conservation, passive outdoor enjoyment and public gatherings. The Council seeks to manage these spaces in a fair and equitable manner which often involves balancing competing interests. The permission regime was reasonably appropriate and adapted to achieving that end.

An appeal has been lodged in respect of all aspects of the decision.



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