PROPORTIONAL REPRESENTATION SOCIETY OF AUSTRALIA

TRUSTING VOTERS IS THE KEY TO GENUINE SENATE ELECTORAL REFORM

Submission to the Joint Standing Committee on Electoral Matters in parallel with earlier submission on the *Commonwealth Electoral Amendment (Above the Line Voting) Bill 2013* originally prepared for the Senate Finance and Public Administration Legislation Committee

Proportional Representation Society of Australia
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The 2013 Senate elections highlighted the need for immediate extensive change to legislative provisions dealing with *formal voting and the subsequent counting* as well as remedies available in the Court of Disputed Returns. It should be along principled lines that respect voters' wishes and increase their influence, not based on knee-jerk reactions aimed at tilting the electoral playing field or buttressing particular party behaviour that is inherently self-defeating. A *much simpler ballot-paper* should be one key result.

A major question of public perception has arisen when group voting tickets with numberings arising from various so-called deals can produce a quota for candidates registering a catchy party name but doing limited campaigning. The critical issue at hand is of *voters being*

unaware of possible consequences of endorsing above-the-line party boxes, but doing so because the requirements for voting formally below the line are far too time-consuming and onerous for no justifiable reason.

There is nothing amiss if candidates or parties *gradually build a quota through voters' conscious marking of preferences*. The quota-preferential allocation of seats remains the *fairest* way of determining Senate outcomes, and what should now be tackled are the *unreasonable obstacles to electors being able to express their own wishes simply* and have those views accepted as legitimate.

In 1948, when Dr Evatt introduced legislation for proportional representation on the Irish single-transferable-vote model, it was unfortunately with *one major difference* – the compulsory marking of preferences demanded under the previous winner-take-all scheme was continued, despite Liberal and Country Party MHRs' observations and entreaties. *Rates of informal voting generally remained very high thereafter*, at times further exacerbated by artificial influxes of additional candidates.

Elections determined according to the single transferable vote purposely set out to *minimise wasted votes*. The quota is struck at the lowest number of votes where candidates are sure of election, and no more votes are asked of elected candidates than are actually needed. When candidates with the lowest progress total are excluded, votes are unavoidably exhausted if ballot-papers cannot be transferred to a continuing candidate. If there is an odd number of vacancies to be filled, a majority of votes translates into a majority of seats.

A golden opportunity was missed when the electoral system was reviewed in 1983 and legislation extensively overhauled at the end of that year. It would have been straightforward to tackle the problem of high informal levels directly by simply *instituting reasonable requirements for voters' individual numbering to be accepted*, and ensuring the new Australian Electoral Commission advertised extensively about *how electors could make the most of their vote*.

Instead, the 1983 amendments were largely about making it easy for voters to blindly endorse the strategic calculations of party operatives by marking a party box about whose associated group voting ticket(s) or potential ramifications they usually had no idea. Lodgement of multiple group voting tickets by individual parties or groups was allowed despite *official legal advice questioning* whether the constitutional requirement that Senators be *directly* elected would be properly adhered to in such circumstances.

The problem of unexpected quotas arising from fortuitous flows of corralled above-the-line preferences has become more acute as combined support for Labor and the Coalition has increasingly fallen below five or now sometimes even four quotas. With well over a quota of first preferences regularly lying outside the established parties, interest has been heightened in concluding interweaving numberings on group voting tickets that will often open up the prospect of lead candidates of parties with relatively limited first-preference support inching their way to election through an opportunistic quota predominantly based on the unpredictable workings of above-the-line preference flows.

Many more candidates outside the largest parties now recognise that they are collectively in a much better position for at least one to be elected if a tight internal hold is maintained on all their numbering on lodged group voting tickets, and at times appear prepared to brush aside

policy or ideological differences in pursuit of that possibility. Larger parties prepared to adjust their numbering in the hope of picking up extra flows of above-the-line preferences have also often been of immense assistance in such endeavours.

The simplest remedy for those objecting to the election of micro-party candidates with limited strong voter support is to ensure that established larger parties take a variety of steps to improve their own strong-voter-approval levels and thereby limit the scope for manoeuvring by others to achieve what is usually the final quota in a state. If that is too difficult a challenge, it is imperative that all numbering by electors be conscious and therefore *all quotas be achieved through the rational workings of individuals' considered assessments* rather than through possible lottery effects associated with group voting tickets.

As set out in the Society's parallel submission on Senator Xenophon's proposed Senate voting amendments, a long climb to a fluke or lucky quota is intrinsically connected to the availability in various Australian jurisdictions of group voting tickets whose numbering can be *misjudged or manipulated*, as well as the insistence by the largest parties on a *fixed pre-selection order that often needlessly puts a candidate of theirs in a much weaker position than necessary*. Only in some Australian elections is a concerted effort made to regiment the order in which a party's candidates are numbered and elected when the single transferable vote is in use, and in *no other circumstances have candidates or parties with very limited first-preference support ever been successful*.

Party boxes are not needed nor desirable if electors are allowed to express their views much more in line with their own assessment of policies, parties and candidates. Extensive experience with quota-preferential methods in Ireland, Malta, Tasmania and the Australian Capital Territory shows that small first-preference starting points don't get expanded to full quotas where voters are in charge of preference orders and it is straightforward to cast a formal vote: candidates or parties with half a quota of first preferences are by no means always successful in those elections or even necessarily among the last two or three to be excluded. At the same time, levels of exhausted votes have generally been modest and there has been no recent agitation to make voting formally more onerous.

Commonwealth below-the-line formality requirements are at the *extreme* end of single transferable vote experience, *completely arbitrary* in the concessions made if electors do not wish to mark every square alongside individuals' names, and particularly unreasonable if none of the lodged group voting tickets has an order largely matching their assessment or inclination. *Genuine reform cannot occur unless voters are given far more freedom in expressing the order in which candidates may be assisted by their vote.*

There is room for differences about the minimum number of preferences that should be marked in order for a ballot-paper to be admitted to the scrutiny. While a ballot-paper with a single first preference could help elect that candidate, it will become exhausted if that candidate is excluded. The balance between maximising formal votes and keeping exhausted votes low should be struck in a way that in practice *allows voters' informed views to be overwhelmingly considered* and taken seriously as the basis for determining election outcomes.

Simplifying the Senate ballot-paper is also a major priority so that *electoral authorities can advertise clearly and extensively about the principles of the single transferable vote and making the most of it once electors have made their assessment of what is on offer*.

Maintaining party boxes but doing away with group voting tickets leads to *unnecessary cluttering* of the ballot-paper if there is a substantial minimum number of preferences to be marked. For example, candidates with very little support dominate the bloated New South Wales Legislative Council ballot-paper where extremely large numbers of nominations continue, well above the highest-ever Senate levels.

Thresholds that candidates or parties must exceed if they are not to be excluded at the start of the scrutiny are *inherently unstable* and not a natural feature of the single transferable vote. They have normally arisen in inferior non-preferential averaging schemes in which there is no concern about the overall extent of wasted votes: their use in novel preferential systems in South Australia and the ACT was fraught with uncertainty and ultimate obvious unfairness of outcome that quickly resulted in the ongoing implementation of quota-preferential methods instead.

The institution of some *qualifying threshold* would constitute an *arbitrary distortion* of the single transferable vote in pursuit of eradicating the prospects of election of candidates and parties with rather low first-preference support, without necessarily addressing the skulduggery and deliberate disempowerment of voters associated with the dominance of group voting tickets. Any attempt to buttress current sub-optimal behaviour by larger parties in this manner could in some circumstances lead to a party barely exceeding an arbitrary initial barrier picking up two seats as a result of the *early application of a big random shock to voters' wishes*.

On the other hand, the implementation of *Robson Rotation within party columns* would help limit the prospect of damaging unseemly pre-selection brawls, energise the endorsed candidates to make more community contact, and markedly raise the exclusion bar for continuing candidates towards the end of every scrutiny without in any way seeking to improve upon or rearrange voters' actual numbering.

Unfortunately the 1983 draft amending electoral legislation failed to distinguish between *non-transferable* and *exhausted* ballot-papers, rendering unworkable its otherwise laudable attempt to introduce the concept of a *reducing quota*. The *crude definition of the transfer value* when distributing a surplus without reference to the different values at which the elected candidate received various parcels of ballot-papers introduced a *systematic distortion* that can instantly slant changes to progress totals by hundreds or thousands of votes. It should now be replaced by one that recognises the importance of *equity of treatment of all voters who have contributed to a candidate's election by applying the same reduction factor to each value at which ballot-papers were received*.

Narrow margins surrounding exclusion during the voided 2013 Western Australian Senate scrutinies emphasise the need to deal with the transfer value definition on *sound principled lines* that avoid the possibility of any transfer value being deemed to increase just after a candidate has been elected. As set out in a research paper prepared for the Western Australian Electoral Commission, the Weighted Inclusive Gregory method now applied in Legislative Council elections there treats all voters contributing to someone's election fairly, as does the more sophisticated Meek computer-based approach. Both of these possible approaches to reform are readily adaptable if electors are given greater freedom about their numbering and there is also a wish to minimise exhausted votes.

The 1977 constitutional amendment about the filling of Senate casual vacancies *did not deal with replacement of Independent Senators or situations where parties merge, become defunct or otherwise cease to exist*, nor does it set out a time frame for state or territory parliaments to determine a replacement when a casual vacancy arises.

Countback, either by *re-examining the quota of the vacating candidate* or ultimate predecessor at a general election *to establish whom those now without a representative most wanted as the replacement*, or by re-examining all ballot-papers to establish who is the first available previously-unsuccessful candidate to obtain a quota, provides a sound mechanism for the timely direct election of all required replacements.

The debacle surrounding the 2013 WA Senate recount and the fresh election that was subsequently ordered after the loss of 1,370 ballot-papers exposed *the failure to methodically update remedies* that the Court of Disputed Returns can institute once the electoral system moved to proportional representation in 1948. With candidates being elected upon achieving a quota of votes rather than a plurality or artificial majority, there is a need for more flexible remedies to be available in pursuit of a just outcome if something goes seriously wrong during the polling or scrutiny.

For instance, it should be possible for only a small number of electors to be consulted again where that is the most appropriate way to ensure that all eligible votes in a state or territory are considered or counted. Every effort should also be made to obtain as contemporaneous a nationwide expression of views at the initial polling as is possible. *Candidates certain of initial success should be declared elected in all circumstances and the same criteria applied as in operation originally for filling the remaining vacancies*, even if all electors are asked to return to the polls. Electoral justice can always be achieved in accordance with sound quota-preferential principles.

The interest and involvement of the Proportional Representation Society of Australia

The Proportional Representation Society of Australia and its constituent branches follow in the steps of those like Andrew Inglis Clark and Catherine Helen Spence, who, around the turn of the twentieth century, campaigned energetically for "effective voting", that is, the use of quota-preferential proportional representation in public elections to fill multiple vacancies simultaneously.

Not only does this method guarantee fairness to voters, candidates and parties by *minimising wasted votes*, but in its best forms that have been refined in recent decades in Australia, it can also ensure that real election-day clout remains with voters who cannot largely be taken for granted, rather than becoming further concentrated among a narrow political elite.

All of our branches and their predecessors have been involved in successful campaigns for the use of quota-preferential methods in particular circumstances. Some have a deliberately wider electoral reform agenda consistently placing major weight on voters' wishes being ascertained and respected.

In particular, the working Irish model of proportional representation was brought to the attention of senior politicians during the 1940s when the lop-sided Senate had become somewhat of a public laughing stock. Similarly, the defective drafting surrounding an attempt to institute a reducing quota in 1983 that could not guarantee the election of the correct

number of Senators at any election, was public-spiritedly pointed out while the legislation was still being debated.

The major increases in numbers of Senate candidates in 2013, and the declaration elected of two candidates whose parties began with much less than 1% of first preferences, make it important to discuss frankly the extent to which citizens are able to participate effectively in Senate elections when they are forced to fill in nearly all of a large ballot-paper or otherwise accept a group voting ticket about whose possible ramifications they are completely in the dark. To the extent that many voters perceive they have limited influence and their views are not respected, it is not surprising that support for candidates, groups and parties beyond those currently with strong parliamentary representation continues to grow.

After the missed opportunities in 1948 and 1983, *Senate voting arrangements should now be returned to a straightforward path* instead of becoming yet more complicated amid further doomed opportunism portrayed as an attempt to combat problems that have always been avoidable. Election outcomes should revolve around voters' actual individual assessments, and *their expressed wishes on polling day being translated into effective votes*.

Getting the basic principles right would create an atmosphere in which voters can be convinced that their engagement and participation are worthwhile because their views matter, and parties be put on notice that the only way to a quota and entry into the Senate is through *campaigning and persuading individual electors of their merits*.

Party boxes in tandem with *deliberately oppressive below-the-line requirements have transferred power to party operatives* who have not always used it particularly wisely, leading to the ongoing proliferation of very small parties with arresting names whose creators hope to benefit from the systematic aggregation of small slivers of above-the-line voter support collectively larger than a quota.

The remarkably onerous restrictions on what is regarded as a formal vote if electors choose to mark their own preferences are an inbuilt obstacle to effective participation that must be removed forthwith. That step is necessary and sufficient to achieve lasting electoral reform.

Demystifying the single transferable vote

The single transferable vote is *entirely suited* to the original purpose of fairly electing the Senate after its regular lop-sided composition under the preceding winner-take-all multiple-majority-preferential system brought its operations into major public disrepute. All that needs to happen is that *unnecessary complications in its operation be swept aside* rather than be made yet more bizarre, labyrinthine or authoritarian in pursuit of apparent partisan advantage.

A thorough understanding of the workings of the single transferable vote is indispensable if a genuinely-reforming comprehensive approach is to be undertaken, rather than one again blighted by some short-sighted pursuit of perceived self-interest that is bound to fail spectacularly. Would-be manipulators of electoral systems in Australia have regularly found themselves disadvantaged for lengthy periods by some feature or arrangement that they expected to be favourable to their immediate interests.

First, as in most preferential elections, when the single transferable vote is in use it is important to realize that **each person has just one vote**. The marking of preferences on a

ballot-paper indicates **the order** in which the voter wishes (what remains unused of) that vote to **assist individual candidates.**

The fundamental aim when applying the single transferable vote is to have as many people as possible voting effectively, by directly helping to elect one or more candidates to fill available vacancies. In other words, wasted or ineffective votes are deliberately kept to a minimum.

No wastage of votes on candidates who don't need them
The **quota** is the **lowest** number of votes at which candidates are **mathematically certain of being elected**: except possibly when there are very few formal votes (and essentially working to several decimal places makes greater sense), it is calculated by dividing the total formal votes by one more than the number of vacancies to be filled, and increasing the answer to the next highest whole number.

Once someone reaches the quota, there is no need for more votes to be piled up. In fact, to minimise wastage of votes, any **surplus** beyond the quota is **distributed to the continuing candidates** (those neither already elected nor excluded) in accordance with the wishes of those electors whose whole vote hasn't been used up in the process. Any transfer from the elected candidate will usually be at a fractional value.

No wastage of votes on candidates who can't get elected
If there isn't a surplus to distribute, the candidate with the **fewest** votes is **excluded**. All ballot-papers credited to that candidate are **transferred to the next available continuing candidates**, as individually indicated on each of them. Because these ballot-papers have not helped the excluded candidate, they move on at the same value as that at which they were received.

Finally, the exclusion of a candidate may mean that there are exactly as many continuing candidates as there are vacancies still to be filled. In that case, all these continuing candidates are declared elected without necessarily the need for further transfers.

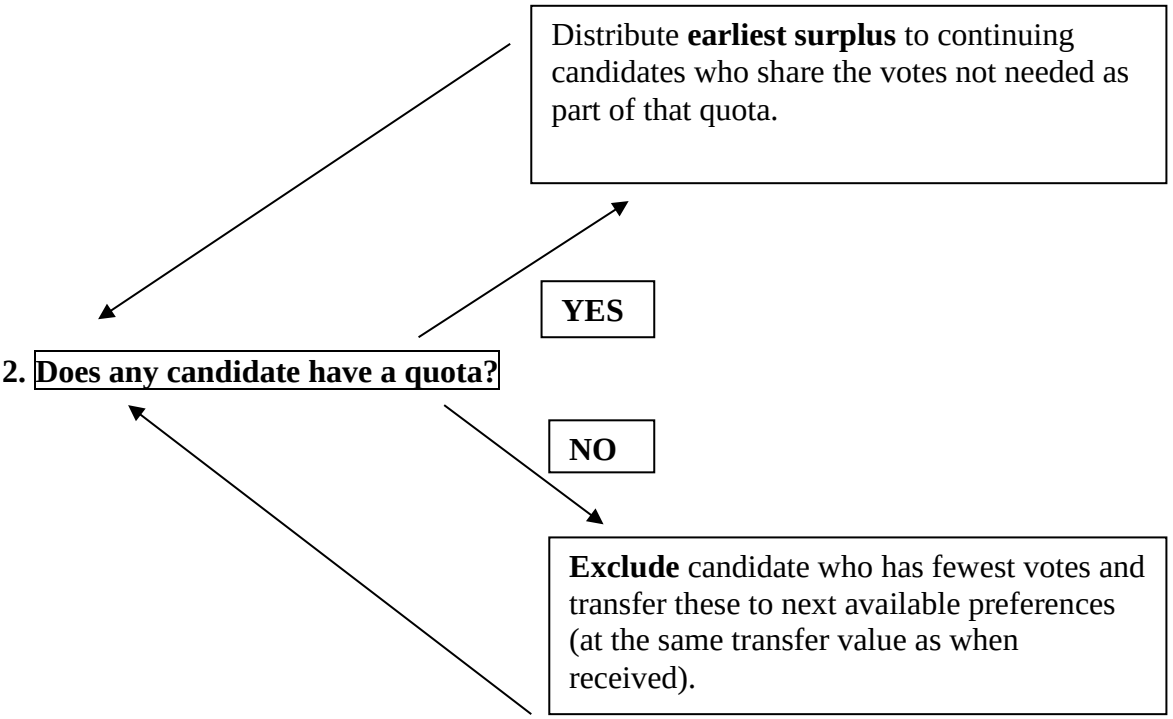
Finding the next available (continuing) candidate on any particular ballot-paper
When ballot-papers are being transferred, the number next to the name of the elected or excluded candidate involved must be smaller than that alongside the name of any other candidate not yet excluded or elected. Provided that there are no duplications or omissions of numbers in between, the ballot-paper will next be credited to whoever of the remainder has the lowest number alongside (this is the same as having the next highest preference).

It is clear that a single first preference could be enough for a formal vote, and that voters should always be *encouraged to mark at least as many real preferences as they have thereafter*. By marking later preferences, they cannot diminish the prospects of election of those whom they most strongly support.

There is room for some vigorous debate about whether more than one preference should be *required* rather than just *encouraged*, but obviously a high threshold for acceptance of ballot-papers places an unwarranted imposition on voters. In a functioning democracy, if the counting rules are freed of avoidable anomalies it can be left to informed electors to assess the risk of wasting their vote if it is not certain their first-preference or another early-preference candidate will either be elected or the last to be excluded.

Flow-chart for a quota-preferential election

1. Calculate the quota as your first step. Then keep asking the one key question below - <u>is anyone ready for election?</u>



3. If the number of continuing candidates falls to the number of unfilled vacancies, declare them all elected.

Once the process of preferential voting is widely demystified, electors can assert the authority that they have in name, rather than often continue as a mere rubber stamp for decisions made or brokered within small cliques and which can lead to unintended consequences or outcomes that conscious numbering by individuals would not produce. The advertising campaigns of the Australian Electoral Commission before polling days should be revamped and deliberately focused upon providing *simple and reliable information that helps electors make the most of their single transferable vote.*

The rocky road to party boxes and the continuing imposition upon thinking voters

The Barton Government's *Commonwealth Electoral Bill 1902,* which was passed by the House of Representatives, but not by the Senate, proposed that proportional representation should be used for Senate elections, and furthermore that *fully optional preferential voting* would apply: a single first preference would have been enough for a vote to be formal.

Andrew Inglis Clark had first succeeded in having the single transferable vote adopted in Tasmania in 1896: an amendment specified that there be *at least half as many preferences as there were vacancies* in multi-member urban Assembly electorates covering Hobart and Launceston.

When introducing the *Electoral Bill 1948* for proportional representation for the Senate *modelled largely on Irish electoral law but lacking its optional preferential voting*, Dr Evatt said that the compulsory full marking of all preferences, introduced in 1934 as an amended feature of the preceding winner-take-all multiple-majority-preferential electoral system, would continue. He claimed on the basis of New South Wales Legislative Assembly experience with proportional representation in the 1920s that exhausted votes would be a problem otherwise.

That assertion was forcefully refuted by Dame Enid Lyons by reference to long-standing satisfactory Tasmanian experience with a requirement for at least three preferences, unchanged from the criterion originally legislated under Attorney-General Clark before the Hare-Clark system was adopted state-wide. Archie Cameron said that it would be ridiculous if electors were at some point forced to mark fifty preferences before their views were considered at all.

Just as was the experience under the previous system's stipulation from 1934, *high levels of informal voting persisted* after Labor's intransigence, often still around 10% and sometimes more in particular States when there was a proliferation of candidates. At the double dissolution election of 1974, after 73 candidates nominated in New South Wales, 12.3% of votes were rejected as informal and Labor narrowly failed to turn its unusually strong support into the election of a sixth Senator out of the ten places available: only in Queensland, where Labor won just four seats, was the rate of informal voting under 10% in that year.

Labor's subsequent legislation to introduce *optional preferential voting for both the House of Representatives and Senate* was opposed by both the Liberal and Country Parties.

Senate informal voting was among the matters given extensive consideration in 1983 by the newly-established Joint Select Committee on Electoral Reform. Party boxes through which registered-group-ticket votes might be made in a shorthand manner were raised in submissions and recommended by the Committee, along with a reduction to 90% in the number of individual squares that would otherwise have to be marked.

Following an Australian Democrat amendment, *no more than three departures from sequential numbering were tolerated below the line*, ostensibly to deter electors from deliberately duplicating numbers to ensure that many particular candidates could not be assisted by their vote. There is no *logical* reason for either the permitted maximum level of departure from sequential numbering or the modest maximum proportion of squares allowed to be left blank: it is also especially strange and anomalous that a ballot-paper could suddenly be rendered informal by a further omission or duplication beyond the minimum number of preferences required for a formal vote.

While Senate informal voting was greatly reduced, from just under 10% nationally in 1983 to a little above 4% the following year, an unintended immediate consequence was many voters not understanding that the simple new way of recording a formal Senate vote through party boxes did not apply for the House of Representatives. Apart from noticeably lower levels in both 1993 and 2007, Senate votes set aside as informal have been in the range 3-4% ever since and dropped slightly below 3% in 2013: the daunting task of *filling in record numbers of individual squares* below the line drove many normally-unruffled and determined electors towards party boxes, a likely major factor in the unanticipated election outcomes in New South Wales and Victoria.

In 2013, electors in NSW, Victoria, Queensland and South Australia voting below the line had to mark respectively at least 99, 88, 74 and 66 preferences, in many cases most of those numbers not called upon during the subsequent scrutiny once transfers began, in order for their vote to be accepted as formal. The first two instances surpassed the previous South Australian Legislative Council record for an unreasonable imposition being placed on conscientious electors at public elections in Australia.

The Australian Electoral Commission's initial detailed research report on Senate informal voting in 1984 pointed to very high numbers of informal votes below the line occurring because voters *stopped either after one candidate or straight after the last candidate in the column of their preferred party*. It suggested that "in view of the relatively high proportion of Senate ballot-papers using the expression of preferences option which were rendered informal and the extent to which failure to record the necessary number of preferences led to that outcome, the Joint Select Committee on Electoral Reform might wish to consider reducing the requirement for the numbering of preferences still further." Nearly thirty years later, despite significant continuing increases in the number of candidates nominating, *no relief at all* has been provided to electors.

Extensive research undertaken on Senate informal votes after the 2001 general election showed that nearly *one-half of informal votes could be attributed to problems with below-the-line attempts*, over half of these being the placement of a first preference only and a further one-fifth otherwise failing to mark 90% of the squares alongside individual candidates' names. If this pattern has persisted, a disturbingly high proportion of attempts to vote below the line are still unsuccessful, sometimes because of a basic misunderstanding on the elector's part, and at others because the requirements for numbering to be accepted are simply unreasonably onerous.

Much higher proportions of voters for smaller parties or groups, often three to six times as large and at times twenty or even thirty times greater, use the below-the-line option than do Labor or Coalition voters. Voters for independents without a running mate or other ungrouped candidates who are not sitting Senators (or were immediately before a double dissolution) have no alternative other than to vote below the line: the same applies when a party or group fails to lodge a group voting ticket deliberately or through misadventure.

Little emphasis has been placed on voting below the line when the Australian Electoral Commission advertises about voting for the Senate, and in the light of the imposition upon voters where large numbers of candidates nominate, it is not surprising that fewer than 5% insist on marking their own preferences rather than trusting others to do the job (they hope properly) on their behalf. In 2013, 1.3% of Coalition supporters and 2.2% of Labor's voted formally below the line.

Nevertheless, in the territories and Tasmania where there are usually relatively small numbers of candidates, and in two instances fairly high awareness remains of voters' influence under the Hare-Clark system, at times 20% of ballot-papers are marked below the line (including in the closely-fought ACT election in 2013) and some results (for instance, in Tasmania in 2004 as set out in the Society's parallel submission on Senator Xenophon's proposed amendments) have been determined by that persistence of voters.

Changing voting patterns have made group voting tickets a possible fast track into the Senate

The deliberate tilting of the Senate electoral system towards above-the-line voting and group voting tickets *allows party back-rooms to effectively decide what will be deemed to be the preferences of most Australians*. Political parties have encouraged nearly all voters to delegate the expression of their preferences to them, and to largely take little interest in what they decide on the voters' behalf. On their how-to-vote cards for the Senate, the order of preferences that their ticket will connote is no longer featured as it was originally in the 1980s, and in many cases there are *specific instructions not to mark squares below the line*.

As combined Labor and Coalition support has continued to decline, and precedents have been set of candidates from parties with modest first-preference support being elected, there has been a growing incentive for micro-parties barely complying with the modest minimum statutory requirements to register striking names that will attract some innocent or defiant interest among voters, and seek to "trade" over the marking of preferences on lodged tickets.

Electors find it hard to download and assess particulars of all potentially-relevant group voting tickets from the AEC Web site after the time for lodgement has passed and, despite the clear requirements of Section 216 of the *Commonwealth Electoral Act 1918*, often experience great difficulty in locating their particulars if they ask officials at individual polling places on election day. That material is too voluminous to be displayed in a manner likely to last long in each voting compartment in pristine condition.

Therefore it is not surprising if very few electors become aware in advance that party operatives may have made some unusual or unexpected strategic decisions related to preferences that are capable of backfiring, or at least causing widespread disquiet when their consequences become known. Their ability to record a formal below-the-line vote confidently has been hampered by the absence on the AEC Web site of a clearly-differentiated specimen ballot-paper (as was recently available for South Australia's Legislative Council election at http://www.ecsa.sa.gov.au/parties-and-candidates/legislative-council-candidates) on which they could establish beforehand their own considered preference markings for ease of reference in the voting compartment.

The increasing hustling of voters towards party boxes initially suited the purposes of various larger parties as their functionaries sought to exercise clearly-available leverage behind the scenes or hoodwink others at an obvious disadvantage in preference negotiations. However, as the level of strong support for the most established parties began to increasingly slip, the combined Labor and Coalition vote for instance only reaching two-thirds of first preferences in 2013, and barely one-half in South Australia and now in the Western Australian re-run, others recognised growing opportunities to *harvest and tightly circulate above-the-line preferences* in a far more uncertain electoral environment.

When a quota or more of first preferences regularly goes to smaller groups or parties without a current Senate presence in a particular state, a Senate place can become available for at least one of them if they all adopt above-the-line preference orders that keep within a particular broad participating grouping for as long as possible. While that opportunity persists, preference whisperers will point out firmly and authoritatively that *at least one of them has fair prospects of being elected if they all stick together and agree to put the established parties last*.

From the 1990s, candidates of larger parties have in fact more regularly been placed at or near the end of preference orders by many registered parties or groups of candidates even where apparent policy similarities or major differences would make such a numbering unexpected. With sometimes two or more quotas not starting with Labor or the Coalition or the Greens (for instance in South Australia in 2013), as the Western Australian Senate experience of 2013 shows, it is possible for more than one vacancy to be poised on the knife-edge of group-ticket preference flows about whose vagaries few electors have any serious advance awareness.

Miscalculations and controversy have always surrounded group voting tickets

Complaints during and after the 2013 Senate campaign about pressure applied or agreements not adhered to when group voting tickets were being prepared for lodgement have longstanding precedents.

For instance, following the 1996 elections, Australian Democrat leader Cheryl Kernot stated that the period for registering group voting tickets was probably her worst time in politics because "it has become the darkest kind of auction which denies the democratic rights of people who vote, and entrenches it in the hands of a few party officials". Her specific complaint was that the major parties had tried to play off the Democrats and the Greens and that in Western Australia, the ALP had registered a single ticket placing the Greens ahead of the Democrats even though Labor had complained about the difficulty of working with their two Senators.

Senate group voting tickets are now allowed to be lodged up to 48 hours after the declaration of candidates who have successfully nominated. During ensuing pressure-cooker negotiations, party operatives are essentially often trying to outmanoeuvre others with a view to benefiting from their ticket votes when their final continuing candidate is excluded.

However, *relative positions of individual candidates towards the end of the scrutiny are impossible to foretell*, the more so as the major parties usually have several candidates elected at the start of the scrutiny and the next may initially have only a small portion of the quota, while others with some public profile may be experiencing noteworthy rises or declines in public support that can usually not be measured with any accuracy. In such an uncertain environment, there have been regular instances of candidates with modest first-preference support being boosted on their way to a quota in Senate and Legislative Council elections by others' *strategic miscalculations* that flummoxed supporters of the assisting parties after the event.

The Society's parallel submission responding to Senator Xenophon's proposals for giving electors a much greater controlling say over their single transferable vote provides some detail about instances where:

- the blackballing of a particular candidate (Liberal Chris Puplick in NSW in 1990) changed an outcome away from the overall impression given in numbering on group voting tickets lodged by two registered parties;
- incorrect numbering on Labor and Green Legislative Council group voting tickets in different regions in Western Australia in 1993 meant that their supporters in those parts had to mark all but one of the individual squares to the right of the line to lodge a formal vote;

- a candidate starting with less than 2% of first preferences was propelled towards a Victorian Senate place in 2004 when both the Australian Democrats and the Australian Labor Party, hopeful of themselves picking up the Family First vote, boosted his progress total at critical times and sent him sure-footedly towards an eventual quota - on the other hand, the same miscalculations by party apparatchiks in Tasmania that year were undone by the determination of a much higher proportion of electors supporting Labor or the Democrats to mark their own preferences below the line;
- the 2008 Legislative Council and 2010 Senate re-emergence of the Democratic Labour Party in Victoria can also be attributed to timely above-the-line assistance from parties that expected to poll somewhat better than they actually did and hoped to pick up DLP above-the-line preferences as a bonus;
- the decisions of One Nation to depart from their standard ranking orders for parties in some regions handed two extra seats and the untrammelled balance to power to the Greens in Western Australia's Legislative Council in 2001, while four years later the Nationals handed the Greens an extra seat and with it the balance of power by placing them before the Liberals in one region in the hope that they might actually benefit from transferred ticket votes when the last continuing Green candidate was excluded; and
- the liberal for forests candidate managed to lift his progress total from 20,000 votes to around 250,000 through adroit numbering negotiations and good fortune at the 2004 NSW Senate election, and very nearly achieved double that amount before being excluded.

In addition, the leading Australian Sports Party candidate in Western Australia in 2013 was declared elected after starting with 0.2% of first preferences and picking up above-the-line assistance from fifteen parties that initially polled more strongly than his, while the Liberal Democratic Party's success in NSW can be attributed to its favourable position on a very formidable ballot-paper that many intending Liberal voters did not closely inspect.

Major party machines seem to prefer to control the order of election of their candidates in Senate elections as a purely internal matter that can be determined by the relatively few party members eligible to vote in the pre-selection process. Those endorsed at the top of the ticket are elected at or near the start of the scrutiny on a full quota of votes while someone lower down may as a result *begin with just a small fraction of a quota and be unnecessarily prone to exclusion towards the end of the scrutiny*, or unable to attract sufficient further preferences to reach the quota.

While more than a quota of first preferences lies outside the major or established parties, group voting tickets make it quite feasible for candidates starting with modest first-preference support to gradually inch and then jump their way to a quota from just-in-time and then strategically-marked flows of above-the-line preferences.

The difference that Robson Rotation could make

If larger parties instead concentrated on endorsing candidates of high calibre and public standing and let voters sort out who gets elected by having names in their party columns rotated and allowing the purely party vote to be spread out, they would make the most of their supporters' efforts.

For instance, currently if Labor or Liberal achieves 2.2 quotas, in practice its third candidate starts with 0.2 of a quota and will be excluded some distance before the end of the scrutiny as there will not be a noteworthy boosting flow of above-the-line preferences. With the

application of Robson Rotation, there could instead be three candidates with 0.9, 0.7 and 0.6 of a quota respectively, all of them with prospects of picking up preferences from elsewhere: two would still definitely be elected and the third might have a real show if there were significant favourable flows on policy grounds as the last continuing candidates of smaller groups or parties were excluded.

In both Tasmania and the ACT, electors are used to much more interaction with candidates in the months before polling day than happens in most single-member electorates or at Senate elections. No-one has a guaranteed place because of the effects of Robson Rotation in spreading the vote intended just for a particular party, and hence those who are nominated and consider themselves strong possibilities for election tend to do a lot of doorknocking and continue to engage in other extensive community contact, in addition to making efforts to obtain media publicity.

Although elements within ACT Labor made failed attempts at presenting preferred candidates within their nominated teams in 1995 and 1998 when in opposition, all parties now look to increase their support by endorsing new candidates with strong community links and recognition. That approach has long been the norm in Ireland, Malta and Tasmania.

Since 1979, Tasmanian legislation introduced by an Opposition MHA and adopted unanimously before the Denison by-election brought on by candidate over-expenditure, has provided that all candidates nominated by a party or group have *equal access to the best places within its column on the ballot-paper*. This combinatorially-ingenious Robson Rotation starts with the fundamental premise that voters rather than pre-selectors should determine the composition of a parliament and extends to all candidates the fairness of overall outcome that the single transferable vote guarantees.

The original schedule of rotations skilfully achieved a high degree of fairness to candidates by having exactly as many printing orders for names within a column as there are endorsed candidates therein. On the basis of rigorous research into the properties of Latin squares, Robson Rotation has been further refined in the ACT through the introduction of a second tier of rotations to *eliminate*, as much as is actually possible, *beneficial down-the-column flows to any continuing candidate* after someone is elected or excluded.

Tasmania took the step in 2009 of doubling the previous number of rotations by also reversing every original order below a name at the top of the column, to guard against anyone being advantaged by an exclusion leaving just *two continuing candidates from the one party*.

Constitutional uncertainty over lodgement of multiple group voting tickets

The respective constitutions of Western Australia and the Commonwealth both require members of parliament to be elected *directly* by the people, though the 1977 federal constitutional amendments brought in a scheme whereby vacating Senators would have to be replaced by someone nominated by their party at the time of election, were it still in existence.

Western Australia allows only one Legislative Council voting ticket for each party or group, on legal advice, whereas at least two group voting tickets have always been permitted at Senate elections, without any legal advice about their status ever having been publicly released.

By 1987, the initial two separate group voting tickets that any registered party or group could lodge had been increased to a maximum of three at Senator Harradine's instigation, and the right to lodge tickets was extended to a sitting Senator not nominating together with anyone else. After some groups submitted multiple tickets that differed in numbering their own candidates in 1984, it also became a requirement that all of them be numbered the same way within that column, ahead of any other candidate.

Federal electoral legislation does not allow individual voters to specify which of two or three group voting tickets a particular party or group has registered they wish to support. A curious related feature is the presence at Sections 272 (4)-(5) of the *Commonwealth Electoral Act 1918* of fall-back provisions in case aspects of the scheme are found to be unconstitutional (the only plausible trigger for their activation).

In this event, voters are taken *after polling day* to have marked only those preferences that are an early common core to all the tickets registered by the particular party for which they indicated above-the-line support: these are the only numbers about which it can be argued that individual voters have definitely given assent.

If the current arrangements continue instead of party boxes and group voting tickets being abandoned, it may only be when the matter is tested before the Court of Disputed Returns that the exact constitutional standing of multiple group voting tickets will be clarified, as well as the workability of the unprecedented contingent claims about deemed marking of squares that would usually *be set aside as informal if attempted below the line*.

Originally divergence in numbering of multiple lodged tickets often used to occur fairly early and therefore such deemed preferences were in many cases unlikely to be available to continuing candidates if the fall-back provisions had to be invoked. Even when numbering diverges fairly late as it has tended to do in more recent times, it is usually before 90% of the individual squares have been marked, and may not extend to any of the largest parties.

It is therefore possible that the largely-unknown attempted savings provisions will also be rejected or otherwise found wanting when subjected to searching scrutiny and argument: either such votes might be ruled informal (with possibly significant consequences for the composition of the Senate), or the entire Senate election voided because so many electors are unexpectedly being *denied a right to participate* as they were not afforded the opportunity to specify which of the multiple lodged group voting tickets most met with their approval.

Genuine reform revolves around reducing the number of preferences to be marked for a vote to be formal

Restoring voters' influence through liberal formality provisions and the use of Robson Rotation to spread out the purely party vote would increase the progress totals candidates and parties with limited support would need to have towards the end of a scrutiny to avoid exclusion, and dash their hopes of cobbling together a quota.

Any sensible arrangement would encourage the marking of all preferences that are genuinely held by an elector and place the onus on candidates and parties or groups to persuade electors that they are worthy of potential assistance. Spending large amounts of time initially to see

whether ballot-papers have preferences that will not be required during the remaining stages of the scrutiny makes no sense.

It is possible to accept a single first preference as formal, as has occurred in Ireland and Malta for over ninety years, and the Australian Capital Territory since the inception there of the Hare-Clark system in 1995. Electors who are informed and want to make the most of their opportunity will confidently continue to sequentially mark the preferences that they actually have because they understand that marking further preferences cannot harm the election prospects of the candidates whom they support most strongly.

As set out in more detail in the Society's parallel submission on Senator Xenophon's proposed amendments, informal levels are still around 1% in both Ireland and Malta where there is no obligation to vote and all candidates are listed in a single column. In the ACT, *voters overwhelmingly heed the ballot-paper instruction to mark at least as many preferences as there are vacancies* and, after abatement of residual dissatisfaction about self-government, informal levels have been 4% or lower since 1998: detailed examination of rejected ballot-papers in 2012 showed that well over one-half were deliberately blank or with just scribble, while electronic rejection rates were less than two-thirds of those for paper ballots.

Sometimes there are suggestions that for a ballot-paper to be accepted as formal there should be at least as many preferences as there are vacancies (the current requirement, without allowance for error, in both Tasmania's House of Assembly and Victoria's Legislative Council where there are five-member electorates), because that guarantees no candidate will ever be elected without receiving some votes. That unusually-pathological theoretical situation can however be disregarded as a realistic possibility in public elections.

Informal levels in Victoria (with party boxes) have been around 3% while those in Tasmania (with Robson Rotation) have been in the range 4-5%, of which about one-half has clearly been deliberately blank or with just scribble. In New South Wales, where electors now have the option of numbering party squares above the line or filling out at least fifteen numbers below the line (omissions or duplications after the first preference are tolerated), recent informal levels have been above 5%, in part because optional preferential voting applies in Legislative Assembly elections.

Only in New South Wales, where there are 21 vacancies and the quota is just 4.55%, do exhausted votes feature prominently, leading to the last few vacancies being filled by candidates with progress totals well short of a quota. In Tasmania and the ACT, high levels of exhausted votes tend to occur only when the last candidate of a party with extensive support is excluded or elected and a further transfer is undertaken: such events have not created disquiet about recent overall outcomes or the circumstances in which some individual candidates are declared elected in Tasmania without a final transfer being made.

The Proportional Representation Society of Australia's view is that it is preferable to err on the side of *having more formal votes rather than unnecessarily denying electors a vote at the outset if they fail to mark some arbitrary number of preferences.*

A judgement must be made about the trade-off that exists between high or maximised levels of formal voting if requirements are not particularly onerous, and the prospect of large numbers of votes *occasionally being exhausted* towards the end of the scrutiny because on many ballot-papers there are eventually no further preferences for continuing candidates: that

may happen because a break in sequential numbering has occurred before the voter came to any of the remaining continuing candidates. The greater the initial imposition upon voters, the more of them that will have their vote declared informal at the outset, their views about the merits of candidates thus being completely disregarded.

If a ballot-paper contributing to a surplus is non-transferable, usually it will be possible to place its remaining value entirely in the quota of the candidate who has just been elected: that is for instance achieved by defining the transfer value where just first preferences or other ballot-papers of full value are involved, as the surplus divided by the number of ballot-papers that have a further preference for one of the continuing candidates (remaining at one if this quotient is higher, as the transfer value of course should never increase). However, if a candidate is being excluded, there is no alternative but for the remaining value of a non-transferable ballot-paper to be exhausted.

The Australian Capital Territory example of *ballot-papers instructing voters to mark at least as many preferences as there are vacancies, but any vote with a single first preference being accepted as formal,* is entirely workable particularly if official advertising in the campaign period focuses on making the most of any single transferable vote by marking more preferences. Alternatively, some other energetically-worded instruction could appear on ballot-papers exhorting electors to mark at least as many preferences as they can find candidates who would be worthy of their support.

The Victorian and Tasmanian criterion of requiring at least as many preferences as there are vacancies to be filled would also constitute a major advance over current arrangements, the more so if errors after the first preference were allowed. It would pave the way for voters to exercise greater influence without being daunted by the nomination of candidates whom they are happy to completely disregard for one reason or another, including because their attitudes on important policy questions are unknown.

For over six decades Tasmania satisfactorily used a minimum of three preferences, based on the original Hare-Clark criterion of requiring at least half as many preferences as there were vacancies. New South Wales has always required fewer preferences than there were vacancies to be filled since its Legislative Council became directly elected and has never summarily rejected ballot-papers with a single first preference but an early break in sequential numbering.

Qualifying thresholds for the Senate would be inconsistent with single-transferable-vote principles

If multiple vacancies are to be filled, distributing surpluses of elected candidates with more than a quota and transferring the votes of excluded candidates at their current value ensures that wasted votes are kept to a minimum. The longstanding experience of Tasmania, Ireland, Malta and the Australian Capital Territory, outlined in the Society's parallel submission on Senator Xenophon's proposed amendments, clearly demonstrates that *no artificial intervention at the start of the scrutiny is necessary for the proper operation of the single transferable vote*.

In particular, there is no need for arbitrary exclusion thresholds of the type:

- used in South Australia during the 1970s and which showed how easy it is for such arrangements to produce *outcomes not in keeping with voters' expressed wishes*; or
- that operated under the disastrous modified d'Hondt scheme inflicted on the Australian Capital Territory in its first two self-government elections of 1989 and 1992, and highlighted the *instability that can arise when groups or parties receive support levels close to the threshold*.

Arbitrary thresholds generally between 2% and 5% are often part of non-preferential list systems overseas that allocate seats in some way according to an average-votes-per-elected-member criterion that pays no heed to the aggregate numbers of wasted votes, nor necessarily to the distortions of voters' views that may arise because of this. The existence of an *extensive variety of different allocation rules* attests to how problematic such schemes have been in practice, requiring modification to avoid outcomes seen as manifestly unfair or inappropriate in particular countries' circumstances of voting patterns encountered.

For instance, with a national exclusion threshold of 5% in Germany under its mixed-member proportional system, at the 2013 election aggregate wasted votes were around 16%, leading to the formation of another grand coalition government after several months of intensive negotiations. Had either or both of the parties that fell just short of the threshold attracted a little more support, or the arbitrary threshold been set at 4%, the complexion of the resultant government and therefore its agreed policies would have been markedly different.

In the case of South Australia in the 1970s, the exclusion threshold was set at *half the quota* guaranteeing election for one of eleven places. Parties or independents obtaining fewer votes were excluded and a *single transfer* made to the eligible qualifying party or independent that had each of those voters' highest preference. Seats were then allocated for each quota obtained (just over 8.3%) and finally in order of descent of the fractional parts of a quota until all vacancies were filled.

After the 1975 election, the assessed support levels for qualifying parties, after transfers from excluded candidates, were Labor 48.6%, Liberal 30.9% and Liberal Movement 20.5%: they were therefore allocated respectively six, three and two seats. Not only did Labor win a majority of seats despite having a minority of the vote, but also there was a major discrepancy in its ratio of votes to seats compared with those for the other two parties.

In 1979, after the distribution of votes from excluded groups, the Liberal Party had 52.0% support, Labor 40.5% and the Australian Democrats 7.4% and obtained respectively six, four and one seats. On this occasion it was Labor with a noticeably unfavourable votes-to-seats ratio, having just failed to match the fractional part of a quota received by the Australian Democrats. This outcome highlighted the inbuilt advantage for qualifying parties with less than a quota of votes and also drew attention to the importance of the exact nature of any arbitrary threshold lower than the quota for election.

By 1982, this party list system had been replaced by the single transferable vote that has remained in place ever since without controversy about its inherent fairness. Had there been no transfer from parties and candidates with support below the exclusion threshold (as typically happens overseas), much greater distortions of the people's will would have occurred, including some electors being induced to vote strategically in order to lessen their prospects of wasting a vote.

Under the modified d'Hondt scheme imposed upon the Australian Capital Territory for the transfer of self-government responsibilities in 1989, seventeen members were elected at large, and the level of support guaranteeing election (the first integer greater than one-eighteenth of the formal votes, just under 5.6%) was also the qualifying threshold.

On the first occasion, the Fair Elections Coalition fell just 117 votes short of the threshold while others excluded received first-preference support levels of 4.8%, 4.1% and 4.0%. Their votes and those for other excluded candidates were *transferred once*, to the highest-ranked successful party on each ballot-paper, to establish seat allocation to parties and groups. This helped the Residents Rally to get *four members elected* despite starting with 9.6% of first preferences, *less than two full quotas*, whereas had support for the Fair Elections Coalition instead risen just above the threshold, both it and the Residents Rally would each have secured two seats.

Despite intense public dissatisfaction after the prolonged count to determine which candidates within groups or parties were elected, and the antics of some of the elected parties that followed, the same system was imposed again by the federal parliament in 1992, at the same time as there was a plebiscite about the electoral system to be used in future. On this occasion, the Michael Moore Independent Group obtained 73 votes more than the quota and picked up two seats on this account, whereas two parties with 4.6% and 4.5% support respectively were excluded at the outset.

The two ACT outcomes again exposed the *arbitrariness of the qualifying threshold* and illustrated how *a handful of votes* determining whether a party, group or candidate falls just above or just below it *can affect the allocation of several seats*. An examination of past Senate voting patterns reveals the potential for the same type of instability, especially at a double dissolution, depending on the exact level or nature of the arbitrary threshold that might be nominated in practice.

Such instability is not present when the single transferable vote is used in its normal simplest form as at most one seat will depend on whether a particular party, group or independent has a particular handful of votes or not.

Individually marking party boxes above the line or restricting nominations not effective solutions

The unexpected success of the leading "A Better Future for Our Children" candidate in the 1995 NSW Legislative Council election starting with 1.3% of first preferences, led to a deliberate proliferation of micro-parties with catchy vote-harvesting names and a group-voting-ticket strategy designed to gradually aggregate small slices of above-the-line votes in the hope of someone building to a quota or at least outlasting other continuing candidates at the end of the scrutiny.

At the tablecloth election of 1999 with 264 candidates from 80 parties and other groupings, the sixteenth candidate of twenty-one elected, from the Outdoor Recreation Party, started with just over 7,000 votes. He became the unintended beneficiary of a web of carefully-crafted preference numberings that had been designed to put their organiser into the Legislative Council, except that the latter started with only 3,000 first preferences and couldn't get his progress total high enough in time to reap all the flows he'd confidently anticipated.

The Carr Government made party registration, which is a pre-requisite for a party name being printed on the ballot-paper, much harder to achieve and required it to be completed at least twelve months before an election. Group voting tickets were abolished and instead individual voters could order party columns above the line through group voting squares: once there were no more continuing candidates within a voter's party or group of first preference, the ballot-paper would be moved to the continuing candidate highest in column order of the party (if any) with next available group-voting-square preference, and so on.

The combination of requiring voters to consciously indicate any order of preference among parties or groups, and more rigorous procedures for registration, *curbed the previous frenzied creation of novel or front parties in the period just before any election*. However, additional names appeared in columns on the ballot-paper because of the provision, related to the entrenched requirement for expressing a formal vote, that at least fifteen candidates be nominated in order that a group voting square become available as a short cut.

While the number of columns has fallen to below twenty, *the number of candidates nominating after the introduction of group voting squares has continued to be several times the largest-ever field in a Senate election*: at the last three Legislative Council elections, there have been respectively 284, 333 and 311 candidates.

Similar bloating of Senate ballot-papers could be expected, particularly at double dissolution elections, if the minimum number of preferences to be marked was directly related to the number of vacancies to be filled rather than deliberately set as a specific low number. The continuation of party boxes with a different interpretation from that in the past, would lead to official advertising resources focusing on the changes and the new options available instead of concentrating on helping electors make the most of their single transferable vote once their assessment of the issues, parties and candidates was completed.

The ACT Branch of the Proportional Representation Society of Australia advocated the compulsory lodgement of a bona fide constitution satisfying basic tenets of participatory and financial propriety as a pre-requisite for registration of political parties or ballot groups (entities formerly specifically associated with incumbent MLAs) before local compliance with such standards later set by the ACT Electoral Commission became mandatory. Our branches have also supported the setting of a cut-off time for party registration action some months before an election to encourage campaigning over longer periods and deter attempts at last-minute opportunism.

However, any strategy of primarily seeking to *artificially* deny groups and parties access to the political process at election time is muddle-headed and potentially disturbingly authoritarian when there are far simpler ways of stopping vote harvesting and circulation: *making it much easier for electors to turn their individual assessment into a formal vote would be a far more appropriate starting point* in a suite of reforms designed to place emphasis on community contact and engagement in place of frantic negotiations over numbering on group voting tickets.

In South Australia, under rushed amendments at the end of 2013, registered parties were given priority in the draw for Legislative Council ballot-paper presence, and deposit and signature provisions surrounding nominations by others were made much more onerous.

There was a modest fall-off in nominations for the March 2014 election but opportunities for preference harvesting continued and total first-preference support beyond the long-established parties and other Council presences exceeded a quota: the lead candidate for the largest of the micro-parties finished as the last unsuccessful continuing candidate, with progress total noticeably more than half a quota.

In order to qualify for a group voting square rather than being placed in a single column at the far right with other ungrouped candidates, some candidates who might have stood as an ungrouped individual previously eligible for a separate column, now included at least one running mate when nominating as that became the only other way to obtain above-the-line votes.

Greatly increasing deposits will not deter the wealthy who are determined to make their presence felt, and hundreds of signatures can readily be collected by those who are familiar with any restrictions on acceptance of nominations and do not leave their gathering to the last minute. Any strategy that revolves around making it harder to nominate is starting in the wrong place and will fail, particularly if citizens with the means decide to systematically exploit real weaknesses in the electoral system that are not properly addressed, or even set out to bring the entire electoral process into disrepute.

Transfer value definition must be changed

It is possible to reduce the quota on a principled basis as ballot-papers become exhausted and the point at which electoral success is mathematically assured therefore falls. *Exhausted votes themselves can be minimised by consistently placing as much as possible of the remaining value of non-transferable papers within the quota of any candidate they just helped to elect*, as happens in the Australian Capital Territory: for instance, if a candidate is elected on first preferences alone, the surplus is divided by the number of ballot-papers with a next available preference for a continuing candidate (rather than all votes for the elected candidate) - of course, if this quotient is greater than one, the transfer value remains at one and some votes are unavoidably exhausted.

An attempt in 1983 to introduce reducing quotas when ballot-papers become exhausted foundered due to confusion in the legislative drafting between *non-transferable* and *exhausted* ballot-papers that resulted in there being no guarantee of the election of the correct number of Senators. The Hawke Government quickly abandoned that worthy concept but regrettably persisted with its officials' flawed technique for making an *unweighted calculation of transfer values*, dividing the surplus by the total number of ballot-papers contributing to a candidate's election: this approach results in a *distorted apportionment of surpluses whenever significant parcels of votes differ about the next available preference for a continuing candidate*.

The non-transferability in 1974 of thousands of ballot-papers with first preferences for Neville Bonner, third on the Coalition list, followed immediately by numbers for Labor candidates, had drawn attention to the desirability of all ballot-papers helping elect a candidate to be eligible for further transfer, rather than just those received in the parcel taking the progress total beyond the quota. The previous approach, also copied from long-standing Irish practice, of making the surplus an accurate sample of ballot-papers in the parcel taking the candidate beyond the quota according to what was the next available preference indicated,

was also understood to leave open the possibility of unrepresentativeness of further preferences, and would not be exactly replicated in any recount.

Dividing the surplus by the total number of ballot-papers contributing to a candidate's election always gives *undue influence* to those ballot-papers within the quota with the *lowest previous transfer values*, and may result in some electors effectively getting more than one vote, should a particular transfer value rise during the course of a scrutiny.

Former Western Australian Attorney-General Jim McGinty recognised that *the prospect of a transfer value increasing during the course of a scrutiny was completely unacceptable* and proceeded with amendments that introduced the Weighted Inclusive Gregory method for both Legislative Council and local government elections: this involves treating all voters equally by applying *a surplus factor to each previous transfer value* of ballot-papers received by an elected candidate. Unnecessary anomalies are avoided because the same proportion of each ballot-paper's previous value is used in electing the candidate in question and the remainder (which will of course differ for the various parcels of ballot-papers with a common value at previous transfer) becomes available for transfer to the next available preference.

The Society's parallel submission sets out how the New South Wales Joint Standing Committee on Electoral Matters subsequently came to the conclusion in 2005 that "consideration should be given to adopting the Weighted Inclusive Gregory method" that has been introduced in Western Australia. The Victorian Electoral Commission's assessment in 2009 after a thorough review of all available documentation was that the approach of multiplying previous transfer values by the same surplus factor after a candidate's election "may be a 'purer' form of proportional representation than that currently in use in Victoria" as it avoids the possibility of a ballot-paper's transfer value rising during the course of the scrutiny.

A simple but realistic example will help illuminate the great differences that may arise from the adoption of one particular transfer value definition instead of another, and thereby emphasise the importance of immediately abandoning the current deeply-flawed definition: there were many instances during the 2013 Senate scrutinies where small numbers of votes determined who was excluded at a particular count.

Suppose that the quota is 450,000 and that candidate Perez begins with 400,000 first preferences and later receives 1,000,000 ballot-papers with transfer value 0.1, taking her progress total to 500,000 and requiring a surplus of 50,000 votes to be distributed.

Under the current Senate transfer value definition, each of the 1,400,000 ballot-papers involved would move on at value 50,000/1,400,000 or 1/28 (taken to eight decimal places): in other words, those giving a first preference to Perez would have over 96% of their vote's value used in helping her get elected, whereas those who have already contributed to the election of others would see just over 64% of their vote's remaining value used in electing her.

The alternative Weighted Inclusive Gregory method applies the surplus factor 50,000/500,000 or 0.1 to each previous transfer value, meaning that everyone contributing to Perez's election has 90% of their ballot-paper's remaining value used in the process, and 10% available for transfer to continuing candidates: the first preferences for Perez would therefore

be transferred at value 0.1 while the value of the other ballot-papers would reduce to 0.01 when moving to their next available preference.

Some of these salient differences in the distribution of the surplus of 50,000 votes, and their implications are summarised in the table below:

	Transfer value	Proportion of previous value used	Division of surplus	Proportion of surplus
Current Senate definition				
First preferences	0.03571428	96.4%	14,285	28.6%
Other votes at 0.1	0.03571428	64.3%	35,714	71.4%
Weighted Inclusive Gregory method				
First preferences	0.1	90%	40,000	80%
Other votes at 0.1	0.01	90%	10,000	20%

The difference of more than 25,000 votes in the apportionment of the surplus could well be critical to what happens at further counts in the scrutiny were the next available preference different on the two parcels of votes that Perez received. *The scale of that type of potential distortion and its impact on the composition of the surplus highlights why the current unsatisfactory definition should not be used again.*

A thorough review of underlying principles and the research literature was undertaken by Dr Narelle Miragliotta following controversy over transfer values in the Mining and Pastoral region (including one that increased as a surplus was being distributed) after the 2001 Legislative Council elections in Western Australia. Her comprehensive report *Determining The Result: Transferring Surplus Votes in the Western Australian Legislative Council* assessing the options commonly under consideration was released in 2002 and is available at *http://www.elections.wa.gov.au/sites/default/files/content/documents/Determining_the_result.pdf*.

When voters are given some real latitude in the marking of preferences, it is vital that adequate resources be applied to make as many as possible aware that *marking more preferences can only increase the chances of making their vote fully effective*. There also needs to be a slight refinement of the Western Australian surplus fraction concept to successfully apply the Weighted Inclusive Gregory methodology and simultaneously keep exhausted votes to a minimum.

First, the *total transferable vote weight for continuing candidates*, the aggregate amount by which their progress totals would increase if all the ballot-papers were transferred at their current value, needs to be established: if, in the normal run of events, it exceeds the surplus, the previous transfer values are now all multiplied by the surplus divided by the total transferable vote weight, when the surplus is transferred to continuing candidates; otherwise, all of the previous transfer values remain unchanged and some exhaustion of votes is unavoidable as the transfer is made.

Ballot-papers for candidates who cannot be elected and are being excluded are always transferred at their prevailing unused value to others who remain as continuing candidates.

Where they are not transferable, exhaustion of the remaining value of the ballot-papers involved is unavoidable.

Whenever exhaustion of ballot-papers occurs, there are three approaches possible for making further sound adjustments to recognise that the number of votes at which election is now mathematically guaranteed has fallen during the course of the scrutiny. Two only look forward, accepting that vacancies still to be filled will require fewer votes than were asked of the candidates already elected, whereas the third goes back and increases transfer values from all earlier surpluses, without interfering with the order of exclusions undertaken so far during the scrutiny.

The simplest approach reduces the quota by taking account of *just the number of exhausted votes*, dividing the number of votes for elected and continuing candidates by one more than the total number of vacancies to be filled, and increasing this quotient to the next integer. An impeccable refinement uses *just the number of votes for continuing candidates and the number of unfilled vacancies* to establish a new quota for the remaining vacancies that will be slightly smaller. Both of these methods accept that candidates already elected have more votes in their quotas than will be required of those still to achieve success.

An alternative approach, first set out by English mathematician Dr Brian Meek in the late 1960s, adopts the refinement definition but also *retrospectively adjusts downwards the quotas of those already elected*, which means increasing their surpluses and therefore the values at which the ballot-papers involved are now credited to current continuing candidates. It also *at all times allows transfers to candidates already elected* who under more traditional counting rules are normally bypassed once they have reached the quota.

Further particulars of Meek's approach and helpful associated references are set out in Dr Miragliotta's research paper mentioned above. This sophisticated set of counting rules avoids some anomalies that can arise under simpler ones, and removes the possibility of electors achieving more of what they really want through their single transferable vote by strategically rearranging their preference order: requiring computerised calculations, it was initially endorsed by the Electoral Reform Society of Great Britain and Ireland and is in use as part of the single-transferable-vote methodology for electing local governments and district hospital boards in New Zealand.

Electing an odd number of Senators wherever possible is preferable

When the House of Representatives was enlarged in 1983 following the combined vote of the Labor and National parties, at future half-Senate elections the existence of six vacancies meant that normally half the seats (guaranteed by 42.9% support) rather than a majority (requiring just over 57.1% after distribution of preferences) could be aspired to by the largest parties in any state.

While the decrease of the quota from just under 16.7% to just below 14.3% can be portrayed as potentially opening the door for the election of more candidates or parties with under a quota of first preferences, the new arrangement was clearly inferior to the previous one whereby a majority of the votes in a state led to a majority of the seats while other significant bodies of opinion could also secure representation.

Majorities were achieved by Labor or the Coalition on 36 of the 59 occasions when five or seven (in 1949 and 1984, in order to enlarge the Senate) vacancies were being filled by proportional representation, including just seven of the 22 occasions from 1970 (none when seven vacancies applied transitionally in 1984). They didn't occur at any of the seven instances where a sixth vacancy was also filled at the proportional representation scrutiny, in accordance with the constitutional provisions that applied before the 1977 amendment allowing party appointments to be made to fill casual vacancies.

With voting for candidates not from either the Labor Party or the Coalition continuing on a longstanding upward trend, it took twenty years for either of those entities to win a majority of six normally-available Senate seats in any state. As their support levels have usually been quite some distance apart in recent decades, even 3-3 outcomes have been relatively rare, occurring 13 times in 61 separate elections, of which five occurred in five elections to 1961 and another three in 2007.

At the half-Senate election in Queensland in 2004, a quota of votes held by the last continuing candidates for three groups (One Nation, Pauline Hanson and Family First) at an advanced stage during the scrutiny flowed to the separate continuing candidates of the Liberal and National parties who were both elected as a consequence. Had there been a combined Coalition team on that occasion, on the aggregate levels of support shown by voters for the Liberals or Nationals, only three of their number would have been elected because there wouldn't have been two continuing candidates available to attract available preference flows in the final counts.

Apart from having to lift its levels of voter support significantly from those applying in recent years, to achieve a half-Senate majority in any state, Labor would have to run separate metropolitan and regional/rural lists or otherwise arrange to have more than one team in order to have a chance of capturing four of the six seats.

At double dissolutions returning either ten or twelve Senators, to be assured of a majority of places has required respectively 54.5% or 53.8% voter support. The Coalition won a majority of seats in two states in 1951, one state in 1974 and three states in 1975 and there have been instances each time other than in 1951 where there was a difference of one in the seats won but no majority for either Labor or the Coalition.

While the sizes of the Senate and House of Representatives are linked constitutionally, and an attempt at breaking the nexus failed in the 1960s, voters might be prepared to accept a properly-explained amendment under which, while there are twelve Senators for each state, *seven and five Senate vacancies would alternate in normal circumstances*.

Such a proposal of always electing odd numbers of Senators except at a double dissolution would not lend itself easily to a negative campaign seeking to exploit distrust or fear, except if it were advanced at a time when expansion of the parliament was being proposed simultaneously. Nevertheless, a prerequisite for success would be a good deal of persistent effort over an extended period of time put into explaining to voters why such a change recognising and rewarding majorities of votes at half-Senate elections would be beneficial for our democracy.

Only in Western Australia are there an even number of Legislative Council vacancies in each region, a condition insisted upon by the Greens when rural vote weightage for both the

Legislative Assembly and Council was being significantly reduced in 2005. The Liberal and National parties combined have been able to subsequently achieve a Legislative Council majority by winning majorities in two non-metropolitan regions in 2008 and all three non-metropolitan regions and one metropolitan region in 2013.

After deadlocked parliaments in 1955 and 1956 when six-member electorates were in use under the Hare-Clark system, the Tasmanian House of Assembly Select Committee on Electoral Reform noted that "[s]ince the system was first used in 1909, the only real complaints made about it have been voiced when electorates have returned an even number of members from each of the two main parties." It stated that "a majority of electors within an electorate should be guaranteed the right of returning a majority of elected members" and recommended "the election of seven instead of six members from each of the five existing Commonwealth-State electorates".

This recommendation was adopted by the Tasmanian parliament in 1958 in which year was also published George Howatt's Tasmanian Parliamentary Paper, *Democratic representation under the Hare-Clark system,* a thorough analysis of past voting behaviour. It too concluded that having seven rather than six vacancies was the best-available reform option. The number of vacancies in each electorate was reduced to five in 1998.

In the Australian Capital Territory, one of the Hare-Clark principles overwhelmingly entrenched through referendum in 1995 is that each electorate must return an odd number of members no fewer than five.

Countback preferable for filling Senate vacancies

Through the use of countback to fill casual vacancies, since 1917 Tasmanian House of Assembly voters have not needed to return to the polling places when a sitting member has resigned or died. Instead, the *quota of ballot-papers for the outgoing candidate* (or ultimate predecessor from the previous election) *has been re-examined to establish who among consenting defeated candidates was most wanted as a replacement by those voters*.

On election day, voters have been offered a good choice of candidates on a manageable ballot-paper, including balanced diversity within teams endorsed by parties with prospects of securing some electoral success. Taking account of the possibility of mid-term vacancies arising and, more recently since 1973, stricter formality requirements, Labor and the Liberals have tended to offer as many candidates as there have been vacancies, but occasionally one or two more. Similar behaviour has been experienced in the Australian Capital Territory since its Hare-Clark system with countback began operating in 1995.

Replacements finalised quickly by countback in both jurisdictions serve voters' interests by increasing numbers of candidates nominating and sending a clear message about community expectations for the entire parliament ahead.

The 1975 national constitutional crisis could not have happened without the replacement in New South Wales and Queensland that year of resigning or deceased Labor Senators with respectively an independent and a self-declared "Labor man", rather than ALP members endorsed by the relevant state branches as would have happened under the *convention* that had previously been respected since the introduction of proportional representation.

In 1977, the Fraser Government successfully sponsored a new constitutional requirement that the replacement for a Senator "publicly recognised by a particular political party as being an endorsed candidate" at the time of election, would be a member of that party in normal circumstances. Rogue appointments would not be possible because the party in question could and would immediately move to expel anyone seeking to take up a particular vacancy without proper endorsement.

However the amendment that also spared Senator Austin Lewis from having to face the Victorian voters at the next House or Senate election *does not deal with the replacement of Independent Senators or Senators from groups that are not political parties, or situations where a party goes out of existence, or perhaps amalgamates with another or otherwise undergoes a name change*.

As often happens with electoral proposals that are not comprehensive, the amendment did not provide conclusive guidance when the need for a replacement first occurred after its endorsement at referendum.

Steele Hall, re-elected as a Liberal Movement Senator for South Australia in 1975, resigned in November 1977 in order to stand for the Liberal Party in the House of Representatives electorate of Hawker. With the Liberal Movement no longer in existence, and its second candidate from 1975, Michael Wilson, recently elected to the South Australian Parliament as Member for Torrens, in December Premier Don Dunstan proposed its third candidate, Janine Haines, by then an Australian Democrat, to be the replacement until June 1981.

Subsequent appointments have shown that state governments are able to delay agreeing to a particular nominated replacement for some time after a casual vacancy has occurred, usually to signal dissatisfaction with an endorsed party member whom they are unable to block, but sometimes for other reasons. In some circumstances, such a delay could determine whether contentious legislation passed or not, or was referred to a committee.

The Proportional Representation Society of Australia believes that countback, along the lines of the Hare-Clark system rather than the complete recount set out in Western Australian legislation with special provisions to ensure that all continuing incumbents are unaffected, should take the place of the 1977 amendments. It would have universal applicability, tend to result in additional polling-day choice for electors, and most likely maintain party representation between elections: the only instance of a party not keeping its representation at countback was when Bob Brown rather than an Australian Democrat replaced Norm Sanders in Denison in 1983.

Examining the quota of the vacating candidate or ultimate predecessor from a general election would emphasise that each election produces an outcome over the full term at stake. There is far less likelihood of a change in the balance of the Senate through this approach than through a full recount where changes in the order of exclusion can trigger altered preference flows and lead to different or even unexpected outcomes.

The Western Australian approach is based on the principle of giving *all those without representation after a casual vacancy occurs another opportunity to contribute to someone's election, while maintaining the positions of those already elected*. That is achieved by re-examining all formal ballot-papers and filling the vacancy according to *whoever available outside of those originally elected first achieves the quota* or is otherwise elected. *Some*

electors who have already helped elect one or more candidates may end up with more than one vote's worth of influence under this approach, if their vote also contributes to the replacement's election, and the party balance is slightly more prone to change after the filling of one or more casual vacancies.

The universal adoption of countback would mean that every Senator had been before the people at one of the previous two elections and reinforce the importance of voters relative to party machines, as those who had lost their representative would determine the replacement through the re-examination of the quota for the vacating Senator (or ultimate predecessor successful at the previous general election or the one before).

Replacements under either countback approach would occur within a predetermined time period through indication by a specified date of continuing eligibility and consents to serve by unsuccessful candidates at the election, and subsequent administrative action to then quickly re-examine the relevant quota of votes or all formal ballot-papers, in practice by running a computer program.

In the middle of 1997, just under 20% of Senators were in their places without having been elected by the people of their state. After the changeover in July 2011, over one-quarter of Senators had originally entered the chamber through appointment, and at March 2014 that proportion had climbed to over one-third following eleven new appointments in the intervening period.

Parties hoping for or anticipating some success would be inclined to endorse more candidates than currently to ensure that one or more was available to fill any casual vacancy that subsequently arose. If there were doubts on this score, incumbents would be less likely to resign whereas under the current arrangements, some Senators have departed within weeks of being re-elected. Senator Bob Carr, who was himself appointed to fill a casual vacancy in 2012 before resigning shortly after the 2013 general election, will need to resign a second time to undo his election for a further six years at the top of Labor's New South Wales grouping.

More flexible remedies needed if aspects of an election's conduct are found to be unsatisfactory

The principle of recognition of those who were originally elected at a quota-preferential election can be turned into a workable operational approach in appropriate circumstances if more flexible options are available to be explored in the Court of Disputed Returns as potential remedies where some flaw in electoral procedure is discovered or proved and fresh voting on a small or large scale is required, or one or more candidates are disqualified for having engaged in illegal practices.

The powers of the Court of Disputed Returns are set out in Section 360 of the *Commonwealth Electoral Act 1918* that was significantly amended in both 1922 and 1983, and cosmetically in 2010. Nearby sections detail how some questions potentially arising from contraventions of legislative provisions or standard operating procedures are to be determined and what matters are resolved conclusively one way or another on receipt of particular evidence.

The powers are set out in black-and-white terms perhaps suitable only for adjudicating upon the filling of winner-take-all vacancies rather than taking proper account of the importance of

achieving the quota in the simultaneous election of several Senators using proportional representation.

After the loss of 120 ballot-papers previously set aside as informal and 1,250 accepted as above-the-line votes en route to the central recount centre in Western Australia, the Australian Electoral Commission petitioned the Court of Disputed Returns for the 2013 Senate election there to be voided: several candidates and electors also filed petitions within the statutory period available. The 1983 amendment had opened up the possibility of the AEC petitioning for specific types of declarations and required rulings within three months in those instances.

His Honour Justice Hayne summarised the issues to be settled as follows:

> Was the result of the election likely to be affected by the loss of the ballot papers? Can this Court now decide who should have been elected? Can it do so by looking at records of earlier counts of the lost ballot papers? And need it now examine ballot papers whose formality is disputed? Or must it instead declare the election absolutely void?

Having observed that the procedures for a recount are set out in prescriptive detail in the legislation, Justice Hayne ruled that there was no opportunity to draw evidence from earlier scrutiny activity in an attempt to fill in the information gaps created by the ballot-papers lost during the recount. His Honour found that the electors who had committed the lost ballot-papers into ballot boxes *were prevented from voting* and that their number was *far greater than the smallest gap in progress totals determining an exclusion* during the incomplete recount: consequently an illegal practice as defined in the *Commonwealth Electoral Act 1918* had occurred that could have prevented two different candidates from rightly being declared elected.

The candidates declared elected to the fifth and sixth vacancies were therefore not duly elected and it was in this instance *not possible to say who was duly elected*. As a result, the *entire election was voided* and electors were required to vote again on (or before) 5 April in a process beginning afresh with updated electoral rolls for Western Australia in place and another call made for nominations.

It is important that such a poor Senate outcome for electors and candidates who definitely achieved a quota not occur again, and instead that there be much greater flexibility to fairly achieve as contemporaneous nationwide electoral justice as is possible should there be a similar mishap in future or some other failure to adhere to the legislation of equally serious consequence. Unless appropriate changes are made to the provisions concerning the Court of Disputed Returns and the remedies available when material errors in electoral procedure have occurred, where there are very narrow margins at some points of exclusion in future, those particularly upset at the most likely outcome will be aware that the disappearance, defacement or destruction of only a small batch of votes could lead to an order for a fresh election.

In the Western Australian example, as it was not possible under the current legislation to make inferences about ballot-papers that were not available for fresh scrutiny, the simplest remedy (had it been available) respecting the wishes of as many as possible who voted in September would have been to allow all those who voted at the two polling places in question to do so again in order that *a complete set of ballot-papers be assembled for the recount*

scrutiny. This would have involved identifying and removing all the other ballot-papers lodged at those polling places and in their place substituting the small number of papers from the limited fresh round of voting.

Were such a simple remedy not available in other circumstances, *respect for the principle of election upon achieving the quota* could have sensibly guided any fresh balloting in the direction of achieving nationwide electoral justice as contemporaneously as possible. In this case, *there was no doubt that four senators would have easily reached the quota*, just as they did at the initial scrutiny and recheck. Comprehensive remedies available to the Court of Disputed Returns would therefore have resulted in them being declared duly elected and the emphasis shift to *how the remaining two vacancies should be determined*.

The original criterion for election was obtaining just over one-seventh of the formal votes. *There are no legitimate grounds for suddenly inventing or imposing any other standard*. It is a question of simultaneously ensuring that all eligible votes are available for scrutiny and that all successful candidates have achieved the quota or are otherwise elected when a proper full scrutiny is undertaken.

Were it necessary to require all electors to return to the polls for some reason, a possible fair remedy in this instance would be to declare four Senators already elected and to use the Western Australian Legislative Council approach to filling casual vacancies to guide the filling of the two remaining ones. While there would be an entire set of new ballot-papers to deal with and just under seven full quotas of votes after informal ballot-papers were set aside, the two remaining places would in this case be taken by the first two candidates outside the first three Liberals and the leading Labor candidate to achieve a quota or otherwise be declared elected.

The possibility of gaming would for instance be nullified by *orders requiring the ballot-paper to remain the same as previously*, thereby preventing parties or groups with candidates already elected from putting others in the most advantageous places in their columns in ferocious pursuit of the available vacancies. There would be no incentive for those parties to publicly suggest that their supporters switch to some other party, group or independent in order to bolster the chances of a like-minded or potentially-friendly Senator also being elected.

An ordinary quota-preferential scrutiny with such an unobjectionable set of constraints would produce the fairest outcome in these circumstances or any others where certain candidates could be appropriately declared elected by the Court of Disputed Returns and detailed orders brought down about how any remaining vacancies were to be filled. It is for instance difficult to imagine circumstances in which there would be a fresh call for nominations as the disqualification of any candidate would still leave intact the remainder of the preference order that each individual has indicated.

By allowing the replacement of a limited number of ballot-papers, the bypassing of names of disqualified candidates and the declaration that particular candidates achieved the quota and should not have their positions put into question in subsequent fresh voting and counting, it would be possible to achieve electoral justice that comes as close as is possible to being contemporaneous with voting that occurred elsewhere around the nation. The flexibility to order any other limited corrective action that facilitated a fair assessment of voters' wishes as much as possible in line with those expressed in initial voting should be inserted into the

powers of the Court of Disputed Returns, along with appropriate broad guidance about how it might be arrived at in accordance with the principles that apply when Western Australian Legislative Council casual vacancies are filled.