PROPORTIONAL REPRESENTATION SOCIETY OF AUSTRALIA
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PUT VOTERS' WISHES AT THE HEART OF THE SENATE ELECTORAL SYSTEM

Submission to the Joint Standing Committee on Electoral Matters inquiry into the provisions of the *Commonwealth Electoral Amendment Bill 2016*

February 2016

Reform of Senate voting and counting is long overdue after the defeat of sensible amendments related to formality in 1948, and the unfortunate descent in 1983 to guided democracy with group voting tickets instead of directly tackling the unnecessary problem of unreasonable formality provisions.

The proposed legislation fails to address the fundamental problem, the unrelenting imposition upon electors wishing to write out their own instruction to electoral officials about the order in which their single transferable vote may assist continuing candidates. It does little to empower voters, while retaining an unnecessary level of complexity through party boxes that are to be treated differently now that group voting tickets are being abolished.

Because there is no central unifying principle underlying the proposed changes, the amendments break new ground in Australian (and world) electoral practice by treating a numbering of preferences differently depending on whether it arises from:

- what is deemed after the sequential numbering of one or more party or group columns; or
- what individual electors have written alongside candidates' names.

Anyone proposing to vote for these changes without amendment will need to explain to the Australian people why the equivalent below-the-line numbers associated with most formal party box numberings are to be treated as informal, and probably still remain so if twenty or thirty further numbers are added sequentially. At a minimum, the reasons for not accepting the recommendation of the Joint Standing Committee on Electoral Matters on making it much easier to vote formally below the line need to be disclosed and justified.

Apart from the remarkable incoherence in formality provisions, it is disturbing that no attempt is being made to replace the current defective transfer value definition in an environment where there will be significant additional non-transferable ballot papers. Regrettably, the Joint Standing Committee offered the parliament no guidance on ending this deficiency even though the issue was raised extensively in submissions after the 2013 elections and effective improvements were put forward.

Anyone proposing to vote for change as ill-thought-out as what appears in the *Commonwealth Electoral Amendment Bill 2016* is also obliged to explain why the Australian Electoral Commission will have to waste most of its advertising budget trying to tell electors that complex new deeming provisions will surround the marking of party boxes, instead of explaining how they can make the most of their single transferable vote.

Some positives in the proposed legislation

It would be churlish not to commend the abolition of group voting tickets, and the end of a scheme whose dubious constitutionality has supposedly been buttressed by the presence in sub-sections 272 (4)-(5) of the *Commonwealth Electoral Act 1918* of emergency contingency deeming provisions should the High Court intervene.

Because of the comprehensive proposed savings provision associated with above-the-line voting, de facto optional preferential voting will apply if you just wish to follow the column orders for the groups or parties that you are prepared to support and don't wish to mark a preference for any ungrouped candidate.

That has avoided the prospect of the ballot paper becoming unnecessarily bloated because groups and parties decide to increase the numbers of candidates they nominate just so that votes are not invalidated on spurious grounds that insufficient preferences have been marked.

In addition, there has been a careful focus on erasing particular demonstrated past mischief associated with registration of political parties and taking specific steps to minimise the prospect of electors being misled about whom they are voting for.

No reasonable objection can be made to limiting individuals to a registered officer role in a single party, nor to allowing party logos to appear on the ballot-paper to minimise any confusion over names that sound similar to those taking little interest in the detail of politics.

While other steps associated with party registration might also have been taken, it is pleasing to see that there has been no knee-jerk increase in nomination deposits that would have no impact on parties or groups with copious funding behind them, but would affect parties with a growing membership but not very much money.

How disastrous the formality incoherence is

Because group voting tickets had to be filled in without omission or duplication (errors in two Western Australian regions in 1993 forced all intending Labor supporters to number all squares to the right of the line), in the past the only technical consideration was whether the preferences marked below the line satisfied the arbitrary conditions that at least 90% of the squares were marked with no more than three departures from sequential numbering.

Where a ballot-paper was filled in formally both above and below the line, the latter prevailed, and to that degree the elector's wishes were respected.

That has now fundamentally changed as a little exploration of the proposed incoherent formality provisions quickly establishes.

In particular, if six party boxes are numbered in accordance with ballot-paper instructions, typically that ballot paper would be deemed to have preferences for 15-25 candidates, and be accepted as a formal vote.

However, if the columns below the line corresponding to those party boxes were filled in sequentially and in the same party/group order, the ballot paper would invariably be set aside as informal, allegedly because not enough squares have been filled in. In most cases (in the larger states at least) the addition of twenty or thirty further preferences below the line still wouldn't be enough to get over the arbitrary 90% hurdle imposed by the Australian Democrats in 1983.

Just how ludicrous the proposed incoherence actually is is highlighted by considering a ballot paper with six or more party boxes numbered, as well as the identical sequence below the line plus another twenty or thirty preferences. If 90% of the individual squares are not filled in, the elector's vote is accepted on the basis that only the party boxes have been marked!

Anyone proposing to vote for these amendments should explain in parliamentary debate why it is appropriate for the elector's final twenty or thirty preferences to be disregarded at the outset in these circumstances. The suggestion that a voter's wishes are being listened to more carefully under the new arrangements is mere puffery that cannot disguise the decision to continue the unjustified below-the-line imposition designed to drive voters to mark party boxes.

As a matter of equity, this arrangement also discriminates against ungrouped candidates and may result in a High Court challenge testing whether that lies within the parliament's constitutional power in our democracy.

There is no provision for a preference for an ungrouped candidate to be sandwiched between party box markings or even to lead a sequence that continues with some party boxes. Hence prima facie the only way in which an ungrouped candidate can be included in any preference sequence is through the marking of at least 90% of the individual squares below the line. This is a much higher proposed level of discrimination than when group voting tickets could be lodged by parties and groups.

Dealing sensibly with additional non-transferable ballot papers

As up to three departures from sequential numbering are currently permitted below the line, some ballot-papers exhaust when they are not transferable. Allowing up to five errors in numbering but not changing the imposition of having to fill in at least 90% of the squares is a diversionary measure best politely described as window dressing that changes nothing important.

At least a number of media outlets have pointed out that this proposed minuscule change completely ignored the recommendation in May 2014 of the Joint Standing Committee on Electoral Matters. Electors are effectively still being pushed into marking party boxes for no legitimate reason. They are being treated with contempt at the same time as political elites sometimes wonder why more citizens don't engage with political processes.

Because all party box markings are accepted unless there are two or more first preferences indicated or none, there is much greater potential for formal votes to become non-transferable at some stage during the scrutiny.

The razor-thin Western Australian outcome of 2013 that was completely set aside after certain ballot-papers could not be produced at the recount ordered highlighted the importance of having transfer value definitions that properly reflect voters' wishes.

As set out in the Society's main submission on the 2013 elections, the current unweighted definition of dividing the surplus by the total number of ballot-papers contributing to it distorts any distribution involving papers of different value, and must be changed without further delay.

The principles surrounding how to minimise exhausted votes when substantial numbers of ballot papers may become non-transferable were canvassed in detail in that submission. In particular:

- the Australian Capital Territory minimises exhausted votes when anyone is elected on first preferences; and
- the Western Australian parliament has successfully implemented the weighted inclusive Gregory transfer for Legislative Council elections.

The possibility of a transfer value rising during the course of a scrutiny (and therefore giving the lucky voters involved more than one vote's worth of influence, at others' expense) was enough for Jim McGinty to commission an academic review that led to the implementation of the weighted inclusive Gregory transfer for Legislative Council and local government elections in Western Australia. The comprehensive report *Determining The Result: Transferring Surplus Votes in the Western Australian Legislative Council* is available at *http://www.elections.wa.gov.au/sites/default/files/content/documents/Determining_the_result.pdf.*

Instead of giving ballot papers of least remaining value undue influence over how a surplus is distributed, a surplus factor is calculated to ensure that the same proportion of each paper's incoming value is used in electing a candidate and the remainder available for others.

The definition used in Western Australia, where no departures from sequential numbering are tolerated, would have to be modified by first testing whether the vote weight associated with transferable ballot papers is greater than the surplus: as the new transfer values cannot increase when a lot of papers do not have a preference for a continuing candidate, there may be unavoidable exhaustion of votes in these circumstances.

Because the proposed formality provisions are slanted towards having voters mark party boxes, the chances of ballot papers become non-transferable will greatly increase, making it imperative that transfer value definitions not be distorted by failure to account for differential contributions to someone's election, or failure to include as much as possible of any non-transferable paper's remaining value within the quota of an elected candidate.

Important role of the Australian Electoral Commission

Any change in voting procedures will require intensive educational effort on the part of the Australian Electoral Commission as group voting tickets (probably unconstitutional when two or three are lodged by a particular group or party as electors are not given an opportunity to indicate which one they endorse) are being abolished.

It would be preferable for official messages to be helpful to electors in making the most of their single transferable vote rather than just telling them in broad terms that parties and groups can now be marked sequentially above the line. Of course, as happened in 1984, any advertising highlighting how six or more party boxes may be numbered for a formal vote

may inadvertently result in House of Representatives ballot papers becoming informal when there are eight or more candidates in an electorate (or four in the territories).

In the view of the Proportional Representation Society of Australia, it is imperative that during each campaign the Australian Electoral Commission talk extensively about voting as an instruction to electoral officials about the order in which continuing candidates can be helped. Such a simple message would help drive home to electors that their marking of further preferences cannot harm the prospects of those whom they support most strongly.

The definition of the transfer value should be changed to avoid the current distortions and to cope much better with the likelihood of larger numbers of non-transferable ballot papers. The latter can be kept down if the official advertising can systematically convey to electors how it is in their interest to mark as many preferences as party and candidate differences are meaningful to them.

Party boxes not needed

The simplest and cleanest way forward is to abandon party boxes altogether, at a stroke ending the incoherence of proposed formality rules and allowing the Australian Electoral Office to concentrate on formulating useful messages for electors. This would also leave more room for party logos and candidates' particulars on the ballot paper, lessening the possibility that fonts have to be so small as to again require the use of magnifying sheets in many cases.

Working STV systems without party boxes have been in place for:

- over ninety years in Ireland where optional preferential voting applies;
- over ninety years in Malta where optional preferential voting applies;
- over twenty years in the Australian Capital Territory where the ballot-paper instructs at least as many preferences as vacancies be marked, and all papers with a single first preference are accepted as formal.

The *Commonwealth Electoral Bill 1902* proposed proportional representation for the Senate with completely optional preferential voting.

Andrew Inglis Clark saw formality provisions based on half the number of vacancies to be filled enacted when proportional representation was originally used for the Hobart and Launceston electorates in the 1890s.

Robert Menzies unsuccessfully proposed that ballot papers be formal if they had at least as many preferences as there were vacancies to be filled when the change to proportional representation was being debated in 1948.

As the proposed above-the-line arrangement is de facto optional preferential, the simplest way forward is to institute optional preferential voting, as has worked effectively for decades in Ireland, Malta and the Australian Capital Territory. Informal voting in Ireland and Malta, in both of which voting is voluntary, has been around 1%. The ACT's ballot-paper exhortation to mark at least as many preferences as there are vacancies could be adopted as part of a strategy to help electors make the most of their single transferable vote.

The next-simplest possibility is to require some small number of preferences to be marked before a vote is accepted as formal (with perhaps a savings provision to cover early omissions or duplications). The more that is demanded rather than encouraged in the name of increasing levels of effective voting, the higher will informality levels rise.

If the Australian Electoral Commission is required to advertise some small number of preferences as being required, there is a risk that House of Representatives informals will rise markedly from already-high levels in 2013: such effects will be more pronounced for lower minimum Senate numbering requirements unless House of Representatives formality provisions are also altered.

Choices that could be made include:

- two, being the smallest party-box possibility not involving an incumbent Senator standing alone;
- half the number of vacancies to be filled, in accordance with Tasmania's initial Hare-Clark legislation for Hobart and Launceston in the 1890s – three preferences remained enough until the 1970s even after six-member electorates were abandoned two decades earlier; and
- the number of vacancies to be filled, which avoids the theoretical possibility of a candidate being elected despite having received no votes – this is what the Opposition sought in Senate elections in 1948 and what is now used for Victoria's Legislative Council and Tasmania's House of Assembly.

Whenever a number greater than one is chosen, there is a risk of the ballot paper becoming bloated if parties or groups that have normally nominated two or three candidates suddenly decide to increase that number as a safeguard against possibly having votes intended for them invalidated for not including enough preferences.

Do not clutter the ballot paper

The worst example of out-of-control ballot papers is in New South Wales where the minimum number of preferences demanded has always been less than the number of vacancies, since the first direct Legislative Council election in 1978.

After the party proliferation abuses that led to the notorious tablecloth ballot paper of 1999, new parties cannot be registered within twelve months of an election. To meet entrenched constitutional provisions, columns associated with party boxes must be of length at least 15. This has resulted in 300 names regularly being crammed onto ballot papers, with most of those candidates having fewer than 100 votes when excluded.

If party boxes are retained and there is a moderate requirement for a formal vote below the line, the opportunity for focused official advertising helping electors make the most of their vote is lost, and the prospects of higher House of Representatives informality immediately increased. There would also be some instances of incoherence of formality provisions, but to nowhere near the extent arising from the continued demand that at least 90% of the squares below the line be filled in.

Small minimum numbers being required below the line are an indication that there is a bona fide acceptance of voters' right to make their own assessment of policies and candidates.

They nevertheless come with an increased chance of the ballot paper becoming cluttered because groups and parties might choose to adjust upwards the number of candidates that they endorse, to avoid votes being unnecessarily lost to the workings of formality rules.

Large minimum numbers below the line are an arbitrary imposition that will rightly be seen as pushing electors towards just marking party boxes, with potential constitutional challenge by a disadvantaged ungrouped candidate and possibly high levels of non-transferable papers in the course of the scrutiny because official advertising is unable to successfully convey how electors can make the most of their single transferable vote.

The large incidence of differential treatment of the same numberings achieved above or below the line will result in public derision of any ill-thought-out attempt at guided democracy. No-one intelligent could claim with a straight face that voters' wishes were being properly implemented. Electors will rightly conclude that such changes have been cooked up without regard to any voter-oriented principle and will laugh at the instigators when the inevitable anomalies and unintended consequences are brought to public attention before and after specific elections.

Time to end the procession of misjudgements

In 1934, compulsory marking of all preferences became a feature of the previous winner-take-all system that frequently left the Senate lop-sided. When proportional representation was introduced in 1948, Dr Evatt rejected the Opposition's amendment that as many preferences as vacancies to be filled be enough for a formal vote. Labor regretted that misjudgement for decades without being in a position to do anything about its ongoing consequences.

By 1983, Labor's national platform was for optional preferential voting, as was Australian Democrats' policy. However, the Australian Democrats would only agree to a slanted party-box arrangement with probably unconstitutional aspects to accommodate their two-sided how-to-vote cards, hoping to pick up votes from either Labor or the Coalition as their last candidate was excluded.

As first-preference support beyond established parties has increased well beyond a quota, shrewd operators and opportunists have recognised that they can raffle off at least one place by lodging tightly interlocking numberings with larger parties left until last. If group voting tickets persist, only a lift in support for larger parties can thwart that strategy by leaving less than a quota for whoever emerges strongest from the luck of the keepings-off strategy.

It is important to recognise that the longstanding problem arises from the arbitrary impositions inflicted upon voters who want to indicate their own preferences and stop begrudging them that democratic right to make up their own mind and act upon that assessment. Yet the one thing that the *Commonwealth Electoral Amendment Bill 2016* leaves unchanged is the unjustifiable demand of the Australian Democrats in 1983 that at least 90% of the squares below the line be numbered.

If the parliament now acknowledges this blunder because the incoherence of proposed formality provisions has heaped ridicule upon one of its potential consequences, and applies some voter-oriented principles to simplify the ballot paper and respect electors' wishes, what

may be remembered as a result of some backtracking humility is that an ancient Senate voting wrong was at last satisfactorily rectified.

After all, who remembers that in 1983, the proposed legislation could not guarantee the election of the right number of Senators because of drafting confusion between non-transferable ballot papers and exhausted votes, something that the Proportional Representation Society of Australia drew to Senators' attention while the amending legislation was before them?