Is It Time for a Fundamental Review of the Senate's Electoral System?[*]

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In September 2013, I, like all residents of New South Wales, was presented with a peculiar physical challenge in exercising my democratic choices for the Senate.

In a voting partition 600mm wide, I was required to manipulate a ballot paper one metre wide containing 110 candidates spread across 46 columns in a typeface so small that the Australian Electoral Commission was required to offer voters magnifying sheets with which to read their ballot papers.

Even voters hale of limb and acute of vision would have found the process of voting awkward, let alone those less supple of limb or challenged of sight. With only two hands available, trying to find candidates using a magnifying sheet while manipulating the ballot paper in a confined space while completing the squares with your pencil was a difficult exercise.

If you chose to vote for candidates 'below the line' on the ballot paper, the complexity became more than just physical, as you were required to keep mental track of your sequence of preferences from 1 to 110 while at the same time moving the ballot paper back and forth, alternately swapping hands between the magnifying sheet and pencil.

While engaging in these Senate gymnastics, it was also important to avoid losing the important House of Representatives ballot paper.

Being well informed on the Senate voting process, I came well prepared for my trial by ballot paper. Using one of the internet sites that allowed voters to construct a sequence of below-the-line preferences, I had pre-prepared and printed my preferred ordering, and on polling day carefully transcribed my sequence on to the ballot paper.

More rational voters, when faced with having to engage in the pre-preparation, physical gymnastics and mental arithmetic required to cast a valid below-the-line vote, plumped for a single 'above-the-line' vote for their preferred party. An above-the-line vote is counted as a voter agreeing to their chosen party's lodged group ticket vote. Overall, 96.5 per cent of all Senate votes used the above-the-line option.

Even a well-informed voter who inspected their preferred party's preference ticket, or went further and examined all the different parties' tickets, would have struggled to understand the implications of voting above the line for most parties. Understanding how a party's Senate preferences might flow requires a huge number of assumptions on the order parties would finish on the first-preference count, and on the order groups would be excluded during the distribution of preferences.

Support for non-major parties in the Senate reached a record 32.2 per cent at the 2013 election. Excluding the Greens, 23.5 per cent of voters selected a minor or micro-party. The surge in minor and micro-party support fed into the complex preference deals between numerous micro-parties on the Senate ballot, making it even harder to determine who would win the final seat.

Before election, few could have predicted that the Australian Motoring Enthusiast Party's Ricky Muir would defeat the Liberal Party's Helen Kroger for the final seat in Victoria. No one would have predicted the Liberal Democratic Party would poll 9.5 per cent in New South Wales, confusion between the 'Liberal Democrats' in Group A and the 'Liberal and Nationals' in Column Y adding another random element to the election result.

I am often asked for advice on understanding where a particular party's preferences will flow. My advice has always been, don't bother studying all the preference tickets to decide on which above-the-line vote to choose. It is usually quicker and simpler to number candidates below the line, at all times sticking to the rule that you should always list candidates in the order you would like to see them elected.

This brings me back to my starting point that in 2013 voters wanting to express their own preferences were forced to manipulate a gigantic ballot paper. Even the best-informed voter at some point exhausted their knowledge of the remaining candidates on the ballot paper. At some point voters had to resort to randomly numbering candidates of whom they knew nothing just to ensure that preferences for candidates they did know would be counted.

All this assuming the voter could even locate the candidates and parties they were looking for on the giant ballot paper, as was revealed with the confusion between the 'Liberal Democrats' and the 'Liberals and Nationals' in New South Wales.

The question this exercise raised for me was the following. Australia is a nation that introduced the secret ballot to the world, that led the world in broadening the franchise to adult males and then to females. How has a nation with this democratic tradition

managed to produce a Senate electoral system that is incomprehensible to all but the most psephologically skilled?

To conduct a Senate election whose result will be determined by Byzantine deals between unknown backroom operators is bad enough. But to give voters only two options in voting, to accept the deals or be forced to number up to 110 preferences, is an abuse of the power granted the Parliament by the Constitution to determine the method of Senate voting.

An election should be the process by which the will of the people is translated into representation in a chamber of parliament. In the case of the current Senate system, the will of the people can be interfered with by the strict control of preferences granted to political parties by the group ticket or 'above-the-line' voting system.

How did we get to this impasse and what are the solutions?

The Senate's electoral system

History rightly highlights the state representation and the structure of the Senate as being one of the critical issues that had to be resolved by the 1890s constitutional conventions. Equal representation for the states in a chamber effectively equal in power to the House was agreed to, but balanced by the double dissolution deadlock provisions in section 57 of the Constitution. The constitutional conventions accepted a powerful Senate as necessary to achieve Federation, even if it was at odds with the principle of governments being responsible to the lower house, the basic Westminster principle to which the constitutional framers were also committed.

Despite all the debate between large and small states over the structure of the Senate, the Senate operating as a chamber for state-based debate has rarely been in evidence since 1901. The Senate has proven to be just another backdrop for politics between nationwide parties.

Largely shorn of its states' house role, the Senate has become a 'house of review', though that role was only entrenched with the introduction of proportional representation in 1949. Since then the Senate's review roll has grown by the decade. Indeed, as control of the House of Representatives by the government of the day has become stronger, the Senate has assumed the role usually ascribed to the Parliament as a whole, that of keeping the executive accountable.

While the Constitution gave the Senate great powers, it was the change of electoral system in 1949 that gave the Senate legitimacy to use its powers. In my view, if the

problems revealed in the conduct of the 2013 Senate election are not resolved, then this raises the prospect of whether the Senate's legitimacy will be undermined.

In my view the historical discussion on state representation in the Senate too often overlooks the truly radical decision made by the constitutional conventions, that was to create the world's first popularly elected national upper house elected on a franchise the same as for the lower house.

The models available to the Constitution's drafters were the appointed New South Wales and Queensland Legislative Councils, the restricted franchise Legislative Councils in the other states, the appointed Canadian Senate, and the US Senate which at that time was yet to become a fully elected chamber.

Instead, the constitutional conventions crafted section 8 of the Constitution, stating that the Senate's franchise was to be the same as that for the House. It was a radical departure from Australian colonial practice, though perhaps knowledge that the Commonwealth would not be responsible for land laws made conservatives less fearful of a broad Senate franchise.

Often quoted in relation to the Senate's electoral system is the first part of section 7, which states 'The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate'.

According to Quick and Garran's *The Annotated Constitution of the Australian Commonwealth*,[1] the original version of this section from the 1891 constitutional convention stated that senators would be 'directly chosen by the Houses of the Parliament of the several States'. Quick and Garran refer to debate on the United States model of permitting the states to decide their own method of appointment, but the mood of the convention was for a uniform method of appointment.

By the 1897 convention Quick and Garran state the mood had turned in favour of popular election and 'Houses of Parliament' was replaced by 'people of the state as one electorate'. The sub-clause 'until the Parliament otherwise provides' was inserted in a later debate concerning whether states should vote as one or be subdivided into electorates. The conventions left it to the new Parliament to decide, and this also means that to this day the Parliament can legislate to divide states into electorates and do away with proportional representation.

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[1] John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus & Robertson, Sydney, 1901.

The Constitution produced a mass electorate voting as a whole but specified no electoral system. At the 1901 election Tasmania used Hare–Clark for its representation in both houses, while all other states used block voting for the Senate, where voters were given as many votes as there were vacancies.

The debate on the Commonwealth's first electoral Act in 1902 examined the use of proportional representation in the Senate but in the end did not adopt it.[2] Instead, block voting for as many candidates as there were vacancies to be filled was adopted.

The evolution of the Senate's electoral system in the century since that first debate has been driven by two important interactions. The first has been the desire to maintain some consistency between the methods for completing ballot papers for the House of Representatives and the Senate. The second has been through an interaction with experiments in the use of proportional representation by states.

Interaction with the House

The first change to the Senate's electoral system was as a consequence of full preferential voting being adopted for House of Representatives elections in 1919. If voters were required to number all squares on House ballot papers, it made sense that the Senate ballot paper should also be completed with numbers. Voters were required to number their ballot papers with preferences for twice the number of vacancies plus one, seven preferences for a normal three-member half-Senate election. Ballot papers were counted by exhaustive preferential voting. Votes were first counted treating the state as a single-member contest to elect the first senator. The elected candidate was excluded for the second count, their votes were distributed as preferences to other candidates in the count, and another single-member election conducted for the second senator. The process was repeated until all vacancies had been filled. In practice the result was the same as under block voting, delivering all seats in each state to the highest polling party.

The 1919 changes also adopted a new structure for the ballot paper. The vertical listing of candidates was retained, but strict alphabetic ordering was abandoned. From 1919 candidates were grouped together by party, with candidates listed alphabetically within each group. This change increased the tendency of voters to vote for parties over candidates. The number of preferences required changed from limited to full preferential voting in 1934.

2   David Farrell and Ian McAllister, *The Australian Electoral System: Origins, Variations and Consequences*, UNSW Press, Sydney, 2006. See Chapter 2 which deals with the 1902 debate and subsequent changes.

The order groups appeared on the ballot papers was determined by a simple formula based on the first letter of the candidate names in each group. At the 1937 Senate election, the NSW Labor Party found a way to manipulate the formula by nominating four candidates whose name started with 'A', ensuring that Labor was allocated the advantageous first (top) grouping on the ballot paper.

In response three major changes to the ballot paper were introduced for the 1940 election. The first was to transpose the ballot paper into the horizontal format used today, with groups listed across the ballot paper and candidates within each group listed vertically. The second introduced a ballot draw to determine Senate group order. The third was to abandon alphabetic listing of candidates within groups, allowing parties to determine the order in which candidates were listed. While this change was unimportant under the winner-takes-all electoral system then in use, it became more important with the introduction of proportional representation in 1949.

Senate proportional representation and state interaction

The system that we in Australia call proportional representation is more correctly known as Proportional Representation by Single Transferable Vote (PR-STV). Of all forms of proportional representation, PR-STV is the least used internationally. While it is the only form of proportional representation used in Australia, elsewhere its use is limited to Ireland, Malta and Scottish local government.

Rather than achieving proportionality based on first preference vote share, PR-STV uses an interaction between first preferences, surplus votes of elected candidates and preferences from excluded candidates to determine elected members.

PR-STV's original proponent in the English-speaking world, Thomas Hare, did not advocate it as a form of proportional representation. The emphasis was on minimising the number of 'wasted' votes, votes that did not contribute to the election of a member. It was offered as an alternative to block voting then in use for UK multi-member electorates, and also to the high rate of wasted votes in single-member electorates.

However, this candidate-based electoral system has been heavily modified in Australia to become a party-based form of proportional representation. In various forms it is used for the Senate, four state Legislative Councils, lower houses in Tasmania and the ACT and local government in some states. Despite their similarity, no two of the PR-STV systems used in Australia are exactly alike.

There is a broad categorisation of PR-STV in Australia into the Hare–Clark variant used in Tasmania and the ACT which gives greater emphasis to voting for candidates,

and the Senate systems which look like party-list proportional representation but use preferences to determine the final vacancies. While the Senate system is party-based, its counting system remains candidate-based.

A modified version of Hare's electoral system was championed by Tasmanian Attorney-General Andrew Inglis Clark, and the Hare–Clark system, as it has become known, was first used at the 1897 Tasmanian election in multi-member electorates for Hobart and Launceston.[3] The system was used again at the 1900 state election, and also to elect members to the House and Senate at the first Commonwealth election in March 1901, but then abandoned for the 1903 state election. In 1909 it returned in the form still used today, with the five House of Representatives divisions used as multi-member electorates for the state House of Assembly.

The original Hare–Clark system has a number of significant differences from the system we know by that name today. In 1909 candidates were listed vertically in alphabetic order with no grouping or party affiliations. Limited preferential voting was used, with voters required to give preferences for at least half the number of vacancies to be filled.

The Tasmanian ballot paper and counting system was adopted for the 1920 New South Wales election, though with one significant difference by including full preferential voting. A massive informal vote of 9.7 per cent at the 1920 election saw a switch to limited preferential voting for the 1922 and 1925 elections with voters required to number only as many preferences as there were vacancies to be filled. New South Wales abandoned the system and reverted to single-member electorates and optional preferential voting for the 1927 election.

In 1941 Tasmania adopted the Senate's new horizontal ballot paper, with candidates grouped by party but continuing to be listed in alphabetic order within the group. The number of preferences required was increased from three to equal the number of vacancies in 1976, when party names were included for the first time and candidate order changed to be by lot draw.

After the 1979 election, the randomisation of ballot paper order ('Robson Rotation') was introduced, resulting in the order candidates appeared within each group being varied from ballot paper to ballot paper. Bans on how-to-vote material were also introduced. These features were adopted for ACT elections in 1995. While the Tasmanian system has been known as Hare–Clark for nearly a century, the more

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3   Details on the development of Tasmania's electoral system have been drawn from Terry Newman, *Hare–Clark in Tasmania: Representation of All Opinions*, Joint Library Committee of the Parliament of Tasmania, Hobart, 1992.

recent addition of Robson Rotation and bans on party how-to-vote material are now thought of as integral parts of the Hare–Clark system.

The decision to adopt PR-STV for the Senate in 1949 was a consequence of the decision to increase the size of the Parliament. There seemed little justification for expanding the size of the Senate while continuing with the 'windscreen wiper' effect of an electoral system that delivered all seats in each state to the same party. Principle pointed to introducing some form of proportional representation.

While the governing Labor Party backed Senate PR-STV on the basis of principle, there was also a large measure of self-interest involved. Labor's huge majority from the 1946 half-Senate election would remain in place for another term, leaving Labor in control of the Senate after its expected defeat at the 1949 election.

The Senate's implementation of PR-STV retained candidate grouping and the horizontal ballot paper, and crucially retained the provision that allowed parties to determine the order of their candidates. From its first use, the Senate system operated more like a party-list system of proportional representation, with the number of members elected being in proportion to the party's vote, but who was elected for each party was almost always determined by the party's ordering of candidates on the ballot paper. This is in contrast to Hare–Clark where voters determine the candidates of each party elected.

Until the 1970s full preferential voting remained manageable as average candidate numbers per ballot paper remained below 20. Since 1974 the average has only once fallen below 30. In 1974 there were 73 candidates on the New South Wales ballot paper and voters were required to number every square. Informal voting regularly passed 10 per cent in the 1970s, and the time taken to fill in giant ballot papers significantly slowed down the voting process with consequences for the conduct of the poll. Something needed to be done about full preferential voting.

The experiments relied on for Senate voting reform were conducted in the states, where the Labor Party's policy switch from abolition to reform of state Legislative Councils saw proportional representation adopted in South Australia and New South Wales.

In South Australia the first statewide Legislative Council election was held in 1975. In reaction to the giant Senate ballot papers of 1974, South Australia opted for party-list voting. Eleven members were elected with a D'Hondt divisor quota of 8.33 per cent. Choice of candidate was not permitted and voters gave a first preference for a party with an optional second preference. A first-preference threshold equal to half a quota

was set. Any party failing to reach this quota was excluded and its second preferences were distributed. The D'Hondt divisor was applied to the new tallies and seats were allocated based on each party's nominated list of candidates.

The introduction of popular election for the NSW Legislative Council in 1978 borrowed extensively from the Senate's counting system. Again drawing on lessons from the 1974 Senate election, NSW Legislative Council elections were implemented with limited preferential voting. Fifteen members were elected with a minimum 10 preferences, altered to 21 members with 15 preferences in 1991.

These state experiments, along with continuing high informal voting at Senate elections, were influential to the Hawke Government's electoral reform package introduced in 1984. Two features of the 1984 reforms are central to the problems that arose in the 2013 Senate election. These are the registration of political parties and printing of party names on ballot papers, and the introduction of group ticket voting for the Senate.

In 1984 ticket voting was seen merely as a method of formalising the how-to-vote cards with which parties already influenced the flow of preferences. With the Coalition and Australian Democrats opposed to optional preferential voting for the Senate, ticket voting was essentially the solution to the major problem then afflicting Senate elections, informal voting.

Ticket voting certainly solved the problem of Senate informal voting, cutting the rate from an average of 9.7 per cent between 1974 and 1983, to 3.5 per cent since. Ticket voting has since been copied by all states using Senate-style proportional representation, even in NSW where limited preferential voting applied.

What had not been thought through was that the slight advantage gained by major parties from tighter control over preferences was an enormous gain for minor and micro-parties which previously had little control over preferences. Suddenly small parties had a commodity to trade, tied blocks of preferences delivered by group ticket voting.

The logical changes agreed to in 1984 eventually produced the illogical results produced in 2013 as small parties used ticket votes to 'game' the Senate's electoral system.

How ticket voting unravelled

The giant Senate ballot papers for the 2013 election were produced by an explosion of 'preference harvesting', the deliberate stacking of the ballot paper with extra parties

and candidates and the arrangement of preference tickets between minor and micro-parties to engineer the election of one of their number.

If these preference tickets were arranged on ideological grounds, you could argue that the tactic was valid as an accumulation of the will of the electorate. I would argue counter to this view though, that a different electoral system would encourage like-minded parties to coalesce and present a single platform to the electorate rather than reward the 'fractional' parties as ticket voting does.

But in 2013 it was clear that preference harvesting was entirely tactical and largely devoid of ideology. Its goal was to give one of the participating parties a chance of victory via a lottery of chance ordering and preference flows. It was designed to keep preferences away from larger parties with significant first-preference support.

The peculiar consequence of ticket voting first emerged at state Legislative Council elections. At the 1995 NSW election, Alan Corbett from a party called A Better Future for Our Children was elected to the Legislative Council. His election was more innocent than organised, as several other parties simply liked Corbett and his party. It was also due to the very low quota for the NSW Legislative Council and the result was more random than manipulated. Corbett polled just 1.28 per cent of the vote, winning an eight-year term in Parliament having spent just $1,589 on his campaign.

Nick Xenophon was elected to the South Australian Legislative Council in 1997 by a similar method, all other parties on the ballot paper directing preferences to him because they liked his No Pokies message. Of all the micro-parties, Xenophon is the only one to have moved on from harvesting preferences to growing his own vote.

These were examples noticed by others, in particular Glenn Druery who was largely responsible for the flood of parties contesting the 1999 NSW Legislative Council election. That election was infamous for its 'tablecloth' ballot paper with 264 candidates triple-decked across 81 columns. Druery was to achieve greater prominence at the 2013 federal election as the so-called 'preference whisperer'.

Two years before the 1999 election I warned that preference harvesting would be a problem at the Legislative Council election. In the *Sydney Morning Herald* on 10 June 1997, I wrote:

> Under current electoral laws, the 1999 election for the NSW Legislative Council could be reduced to political farce. Instead of 21 members elected reflecting the will of the people, the result could be distorted by electoral rorting and voter confusion.

I went on to warn about the dangers of larger ballot papers and smaller print size, and prophetically wrote:

> The result of the election could be determined by voters incapable of reading the ballot paper, unable to manipulate a ballot paper one metre square, or simple bewildered and unable to find the party they want to vote for.

I also noted that:

> The current growth in registered parties is clearly about manipulating this process with a string of stalking horse parties with attractive names running to attract votes that can be delivered as preferences to other related minor parties or perhaps to one of the major parties.

Each of these predictions proved true for the 1999 NSW Legislative Council election, and 14 years later, each of the comments would equally have applied to the 2013 Senate election.

The problem of preference harvesting took longer to be seen as a problem for Senate elections as the higher quota appeared to make it impossible. But as was shown by the 2013 election, the tactic can still work.

And those tactics can be remarkable. Ignoring the problems of the lost votes in the recent Senate election in WA, let me outline the extraordinary manner in which Wayne Dropulich of the Sports Party was elected. The Sports Party finished 21st of the 27 parties on the ballot paper. Twenty different parties contributed votes through preference tickets to the party's victory, with 15 of those parties having recorded a higher share of the vote. At three points during the distribution of preferences Mr Dropulich had the second lowest vote tally of remaining candidates, only to survive by gaining ticket preferences on the exclusion of the only candidate with fewer votes. Under no other electoral system in the world would Mr Dropulich have been elected ahead of the other parties whose preferences were funnelled to Mr Dropulich.

What is the solution?

The problem with the current Senate system is that the counting method is based on two key assumptions on how and why voters express preferences on their ballot papers. Experience tells us that the current electoral system means both assumptions can be breached.

The first assumption is that preferences on ballot papers express a preferred ordering of which candidates should be elected. Ticket voting and the tactical voting strategies adopted as part of preference harvesting mean that more than 90 per cent of ballots may have tactical rather than preferred orderings of candidates. In those circumstances, the counting system is not producing a 'preferred' group of senators but rather a group of senators whose election is heavily influenced by the small number of people responsible for drawing up the preference tickets. Senators elected on party first-preference votes are still being determined by voters, but who is elected once the distribution of preferences begins is being influenced by preference games.

The second assumption is that voters treat all their preference choices with equal weight. This is clearly breached by the random ordering of preference resorted to by voters simply trying to complete their ballot paper. This even occurs with some party tickets.

All preferential voting systems have the characteristic that the candidate with the highest vote can be defeated. But only Senate group ticket voting permits a party with few votes to have so much control over the preferences of those votes. As we saw with the 2013 election result, these ticket preferences can be stacked like Lego blocks, allowing candidates to be elected from tiny first-preference vote tallies.

The two most likely solutions put forward rely on abandoning the concept that all preferences are equal. One is to introduce a first-preference threshold which a party must achieve before it can receive preferences from excluded parties. A second is to make preferences more optional, giving voters the ability to weight their ballot paper towards the preferences they do have.

My problem with thresholds is that they are a change to the counting system designed to fix a problem with the method of voting. I believe that we need to focus on sorting out the ballot paper options presented to voters, and that will almost certainly mean permitting a move to some form of optional preferential voting.

My solution involves several changes.

Tighten the regulation of parties

Federal law requires only 500 members to register a party. Under state law, Victoria, Queensland and Western Australia each require parties to have 500 members for registration, NSW 750 and smaller states proportionally fewer. It is numerically easier to register a federal political party, and the tests applied to proof of membership are also weaker federally.

The surge of newly registered parties that was a feature of the 1999 NSW election was repeated ahead of the 2013 federal election. In 2013 a record number of parties registered and contested both the House and the Senate. The announcement of a September election in January gave prospective parties a deadline for registration. There was a 50 per cent increase in the number of registered parties between January and August 2013.

Registration brings political parties significant advantages in the electoral process. The first is having party names printed on ballot papers. The second is an ability to put forward lists of candidates by central nomination rather than be required to obtain nominators in each electorate. Some micro-parties used this facility to nominate candidates in states where they had little or no presence. Parties should be required to have more than the 500 members and conform to stronger proof of membership tests to qualify for the significant advantages provided by party registration.

Keep above-the-line voting but abolish between-party preferences

After the 1999 debacle, the NSW Legislative Council system was changed to abolish between-party preferences. Above-the-line voting was retained, but a single '1' became a vote for that party alone and could not be transferred to another party by preferences.

Voters were given a new above-the-line voting option, to number groups and parties above the line. A voter could vote '1' Family First and '2' Liberal, and the vote would be treated as preferences for all Family First candidates in order followed by all Liberal candidates in order. Parties can try to influence voters to fill in squares above the line using how-to-vote material, but like House elections, parties can only influence voters. The system advantages parties that actively campaign over parties that do not. A party that actively campaigns can increase its first-preference vote and also hope to influence how any preferences will flow.

The NSW Legislative Council elects 21 members with a quota of 4.55 per cent. A half-Senate election is for only six members with a quota of 14.29 per cent. NSW Legislative Council elections have seen only 20 per cent of voters make use of the new system. This high exhaustion rate could encourage parties to campaign more actively at Senate elections to encourage preference flows.

NSW has had three elections using the new system, but only once have preferences changed the order candidates were elected from the first-preference tally. That was in 2011 when just enough voters filled in preferences to deprive Pauline Hanson of election to the final seat.

Nomination and deposit laws

Another increase in deposits may be required. An additional deposit could be introduced for groups wanting to have an above-the-line voting box. I would also recommend that the use of nominators be reintroduced for Senate groups to overcome the problem of micro-parties making use of central nomination to nominate candidates in states where they have next to no presence.

Optional below-the-line preferences

Even if nothing else changed, a simpler method of below-the-line voting must be introduced. At the NSW Senate election, voters had two choices: select a single ticket above the line, or give 110 preferences below the line. In the Victorian Legislative Council only five preferences are required for a valid below-the-line vote, equal to the number of seats to be filled. Even if nothing else changes, something similar should be adopted for Senate elections.

Changes to formulas

Optional preferential voting would increase the number of ballot papers that exhaust their preferences before the end of the count. There should be changes to the method used to calculate transfer values to ensure that votes with exhausted preferences are left with an elected candidate rather than re-examined for continued distribution.

Conclusion

The aim in my suggestions is to put the power over electing senators back into the hands of voters. I suggest this be done by abolishing group ticket voting and ending party control over preferences. I want Senate elections to be like House elections, where parties and candidates can influence voter preference choices but they can't control them.

My solution requires a move to a more optional preferential voting system. There are hybrid methods, such as limiting the number of preferences a party ticket can include, but the more logical solution is to trust voters to express preferences to the extent that they exist, and to prevent parties from expressing preferences on voters' behalf.

Some would suggest moving towards the Hare–Clark method as used in Tasmania and the ACT. I disagree with this proposal because there is an issue of scale involved. Hare–Clark may work well in Tasmania and the ACT in electing a lower house with a quota of around 10,000, but I cannot see it being a sensible system for electing NSW senators with a quota of 600,000. In Tasmania and the ACT Hare–Clark is also

electing the lower house of government, whereas at federal elections the Senate is often an afterthought to the main contest for government in the House of Representatives.

I believe that the Senate electoral system has been largely operating as a mechanism for party-based proportional representation since 1949. However, parties have learnt to 'game' the ticket voting system introduced in 1984, and final Senate seats are now being determined too much by preference tickets.

Some would argue that all micro-parties did in 2013 was utilise the same rules that the major parties have used in the past to prevent parties like the Nuclear Disarmament Party and One Nation winning election to the Senate. That may be so, but I am not convinced that the electoral system should allow parties equal control over preferences independent of whether they poll 40 per cent and 0.2 per cent. Voters should control preferences and parties should be able to influence them, not control them as allowed in the current system. Abolishing ticket voting would see the ability of parties to influence preferences become dependent on their ability to campaign, not on their ability to do deals.

Above all, my concern is that if the Senate's electoral system continues to fall into disrepute, then the legitimacy of the Senate to act as a house of review is undermined. If the Senate is to continue to be trusted with the strong powers granted to it by the Constitution, then it needs to call on some form of democratic mandate to exercise its powers.

Abolishing ticket voting will remove the 'gaming' so prevalent at the 2013 Senate election, and put back into the hands of voters the power to determine the make-up of the Senate.

Question — Inscribed on the San Diego County government building in San Diego in California are these words: 'Good government demands the intelligent interest of every citizen'. Thought and consideration should be encouraged in every voter in our elections when they vote.

I agree with your point that the automatic progression of the vote on a registered ticket without knowing where it is going is basically the problem, but optional preferential voting itself would turn our proportional system to a semi-proportional system, with the remainder left over of the vote for the election of one or more of the last positions,

or less than the full quota, because of the exhausted vote. You quoted the New South Wales Legislative Council elections results for 2011. The last four positions were elected on less than a full quota because they had run out of preferences. But that exhausted vote amounted to two or more full quotas in all.

Antony Green — I think your most important question is about wasted votes, and I will address that directly. The current system elected somebody with 0.2 per cent and somebody with 0.5 per cent. That is far lower than anything that has been produced in New South Wales. I acknowledge that there is an issue with wasted votes, and does the last position go to a highest remainder method? Now, if a party is interested to try and ensure somebody wins that last seat correctly, it is therefore in their interests to encourage people to give preferences and to use some form of preferential voting. But if the alternative is to retain full preferential voting and bring back a record informal vote then you are just disenfranchising people again. They are trying to give a valid vote and you are saying, 'I'm sorry, you haven't met the rules; you're out'.

Question — Is it possible to scrap the way we are conducting Senate elections now and replace it by the proportion of primary votes polled by the political parties? We elect six senators usually, if it is not a double dissolution, with 16.67 per cent of the vote. If the Greens poll more than 16 per cent in the House of Representatives contest, they get one. Labor could get three.

Antony Green — You could. You are talking about getting rid of preferences altogether, which is a perfectly valid proportional representation system around the world. Plenty of countries around the world are fully functioning democracies with party-based voting and no candidate choice. If you go down that path, you may want to have a bigger say in the internal democracy of political parties. There are some questions about the words 'directly elected by the people' in the Constitution. Now, my view is that that actually was a transfer from saying 'elected by the houses of parliament' to being elected by the people, so I think sometimes there is too much weight given to that phrase. But if you abandon voting for candidates altogether and remove that option from the ballot paper, the first challenge to the law would come on the basis that the people are not being directly elected. That is one of the problems for constitutional experts, because the High Court does not look at the constitutional debates. That is where the origin of the phrase is, but it is not part of it. They look at the words in the Constitution because they are accepted by referendum.

So there would be problems with going down that path and the main reason is because people would not be given candidate choice. It is an option, but the Australian way has always been to have some form of preferential voting and so some modification of the current system is the most likely outcome.

Question — You said at the commencement of your speech that the Senate is a house of review and that it is also a states' house. My question deals with it being a states' house. I would say that the biggest issue when it comes to the Senate is that Tasmania is heading towards becoming a rotten borough. Would you agree with me that one of the ways of getting us to face this big issue is to make Senate election day as miserable a day as we could possibly make it for electors and especially for people like you?

Antony Green — In preparing for this speech I went back to Quick and Garran's *The Annotated Constitution of the Commonwealth of Australia*, which is a fascinating thing to dig through. In the segments I quoted in relation to section 7 of the Constitution, they made the point that equal representation of states was the keystone of the arch of Federation—it was just not going to happen without that. Once they had made that decision, the other things flowed from it. There was the creation of double dissolution power and then, for those who know the Constitution debates in the 1890s, there were also the last-minute changes to weaken the Braddon clause and to weaken the double dissolution joint sitting provisions so that the Senate had slightly less blocking power. There was an extraordinary compromise.

You cannot fix the equal representation in the Constitution without unpicking the entire Constitution because in fact you need more than four of the six states—you need every state to agree—to have its representation changed. So it is very hard to unpick. The Constitution is there and we have to live with it the way it is, and that is just one of the problems we have.

Question — You said at the conclusion of your speech that the Senate should reflect the will of the people. At the beginning of the speech you also said, as I recall, that something like 20 per cent of the people vote for minor parties. Does this suggest that 20 per cent of the senators should be coming from minor parties, and how would you achieve that?

Antony Green — It is achieved currently by preferences. Let us be blunt about this. There was a deliberate putting of extra candidates on the ballot paper to increase the size of the minor-party vote. That is the tactic that is adopted: you flood the ballot paper with parties. People cannot find the candidates they are looking for and end up voting for somebody else, and once you have voted for the ticket above the line it is captured—it is in the pool, off it goes. That is what is wrong with the current system.

We saw this in New South Wales in 1999 when there were 264 candidates on the ballot paper. It was a deliberate attempt to increase that pool and capture the votes with tickets. Then there was the next election with a smaller ballot paper. Did that

vote all go to the minor parties that still existed? No, it just went back to major parties, to the established parties, the ones that were around. If you want to represent those parties, the 20 per cent, it is a perfectly valid thing. But why you are adopting a system where Mr Dropulich won that seat rather than the 15 parties that got more votes than him. That is what is wrong with the system as it is working with ticket voting. There is an extraordinary randomness and a preordained nature created by the tickets. The whole issue in Western Australia about those last two seats determined by this strange choke point in the count would not happen if voters gave their own preferences. There is no way a count between two candidates with 1¾ per cent could have that much impact on the eventual outcome of the election.

Someone was talking about wasted votes: you would still get minor parties elected, because if a party got eight to nine per cent of the vote and there was a high exhausted vote they could still get elected. But I would rather see the party with more votes from a pool of 20 per cent of the vote get elected than the one at the bottom of the pile who has managed to arrange a lot of preference deals.

Question — I am wondering if you have looked at a system that I believe is called 'Borda'? I believe it is used in Nauru and some other places, and in that system—

Antony Green — Can I cut you short? How the hell do you count them? There are 4 million ballot papers! You are going to have to enter them all into a computer system—every one of them. It is just not practical. It is not practical other than for very, very tiny options.

Currently, one of the problems that has to be considered with any reform is that currently we data-enter five per cent of ballot papers, and that is a very long, complex count. Under a Borda count you have to enter every ballot paper; you would not have a hope of counting them by hand. That is what the problem is.

Question — I agree very much that reforms are needed, as you suggest, to allow electors' true preferences to be implemented. What about electronic voting as another way of allowing true preferences to be represented? We do it in the ACT, and it would be great to have an option in the federal elections as well for electronic voting.

Antony Green — It will come. One of the responses people had for me when I was complaining about the size of the ballot papers is, 'Why don't we have electronic voting?' And my response was: you get the same problem. People pay more attention to the top of the screen than to the bottom of the screen. If you have a gigantic ballot paper then the actual size of the ballot paper starts to interfere, and can interfere in the Senate.

But then you get, 'Well, randomise the candidates'. You have this constant problem of trying to get around the fact that you have so many candidates that you are interfering with voters' expression of will simply by the number of candidates who are there. Someone was quoting the San Diego courthouse. Of course, remember that the American solution to a lot of these problems has always been to have primaries—you have to get through a process to get on the ballot paper in the first place. They have gone down that path more than any other country in the world, but essentially we have a similar, slightly weaker version with nomination deposits and requiring the number of nominators.

Electronic voting will come. It will start with things like pre-poll voting. I covered the Griffith by-election on Saturday night; they took nearly 7,000 votes at the pre-poll voting centre. That is very difficult for them to count on the night, and that is a lot of ballot papers. Just the sheer difficulty of counting those ballot papers and dealing with the paperwork will encourage electronic voting, starting with pre-poll votes and postal votes. It will come, but it is a mechanism, it is not a solution to democracy.

Question — I wonder if in your deliberations with regard to reform that you have thought about, or intend putting forward, a recommendation with regard to the lack of representation of ACT voters in the Senate? As you would be aware, we have something like 350,000 people and Tasmania has something like 500,000 and yet they have 12 senators and we have two.

Antony Green — Good luck! One of the difficulties that applies there is that if you increase the number of ACT senators you may well influence the balance of power in the Senate. And so any attempt to change that is going to cause a great deal of interest.

I think that a bigger issue might actually be representation in the House. I think that the current formula actually makes it very difficult for the ACT to get a third seat. I think it has a population which probably justifies it, but the mechanism which has been cobbled from the Constitution actually makes it very difficult. I think that should be addressed first, and is more likely to be addressed.

Question — I wanted to query your proposition that there would be a need to change the counting rules if you had optional preferential voting. At the moment, it is possible to have exhausted votes and, therefore, the rules cope quite adequately with that. It may be desirable to make some changes to the rules based on the greater possibility, but I would argue that it is not, strictly speaking, essential.

The second question I would like to raise is about Senate casual vacancies. The elephant in the room here when we talk about people not knowing who they are

getting is the number of people who are appointed by state parliaments. We have the case of Senator Carr, who has hit his wicket before the ball has even been bowled, and we have no idea what we are going to get next year. Is there anything that can be done about that?

Antony Green — On the second one, we can try and come up with another mechanism, but in the end the Constitution provides a mechanism where the state parliament appoints somebody from the same party. Whatever we put in the Electoral Act, in relation to the Senate recounts after double dissolutions, it can be ignored if the Constitution says something else. That is the problem with filling casual vacancies.

Once you adopt optional preferential voting, there are things you can look at in terms of how preferences are distributed. The ACT and Tasmania use a very similar system—the Hare–Clark system—but in the ACT they exclude exhausted preferences when somebody is elected and do not include them in a surplus. In Tasmania they do include them in the surplus. New South Wales excludes exhausted votes. So there are different ways of doing it. It may depend on how many exhausted preferences we are going to get, but I think it is something that needs to be considered if you go down the path of optional preferential voting.