

## Views on the bill

- 3.1 This chapter presents the Committee's evidence on the bill. It has two sections. The first looks at views on the main provisions of the bill as sets out in the previous chapter. The second section addresses various arguments about the impact of the bill on the voting process.

### Abolishing group voting tickets

- 3.2 Most submitters offered strong support for the abolition of group voting tickets (GVTs) as these GVTs encourage the secretive flow of preferences. Rightly, they viewed the removal of GVTs as the centrepiece of the reform. As Dr Kevin Bonham wrote in his submission:

It is clear that the system created by this Bill would resolve the core problem of preference-harvesting and ensure that elected candidates were elected on merit.<sup>1</sup>

- 3.3 Mr Ian Brightwell simply stated:

I fully support the central tenet of this bill which is to remove ticket voting. This change is necessary to ensure the alignment of voter's intent with electoral outcomes for the Australian Senate.<sup>2</sup>

- 3.4 Similarly, Professor George Williams offered his support for the reform on the basis that voters will decide where their preferences flow:

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1 Dr Kevin Bonham, *Submission 31*, p. 1.

2 Mr Ian Brightwell, *Submission 26*, p. 1.

The voting method proposed by the Commonwealth Electoral Amendment Bill 2016 is a major improvement on the current system. Critically...it allows voters to determine the flow of their preferences, and so electoral outcomes, rather than permitting these to be determined by political parties on their behalf.<sup>3</sup>

### **Proposed voting arrangements below the line**

- 3.5 Several submitters to this inquiry offered their support for the Committee's 2014 recommendation to introduce partial optional preferential voting below the line. There was disappointment from these, and other submitters that the bill does not substantively address below the line Senate voting.
- 3.6 With reference to the Committee's May 2014 recommendations for above and below the line voting, Mr Michael Maley stated that:
- ...the JSCEM ... came up with proposals which, if implemented, will produce the best electoral system ever used at Senate elections....
- The Explanatory Memorandum for the Bill provides no substantive explanation of why the Government has rejected the Committee's unanimous view on this issue and adopted a different approach. Nor is any such explanation provided in the Second Reading Speech made in the House of Representatives by the Minister representing the Special Minister of State when introducing the Bill.<sup>4</sup>
- 3.7 Professor Antony Green expressed his disappointment that the bill does not propose optional preferential voting below the line. Instead, he proposed that voters be instructed to show at least 12 preferences for candidates below the line. Assuming a minimum two candidates per group, he noted that 12 below the line and the bill's proposal that voters mark six preferences above the line, would correspond.<sup>5</sup>
- 3.8 Dr Bonham argued that the bill should be amended to instruct voters to number at least 12 squares below the line for a valid vote, with the same savings provisions as for above-the-line voting.<sup>6</sup>

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3 Professor George Williams, *Submission 18*, p. 2.

4 Mr Michael Maley, *Submission 3*, pp 2-3.

5 Mr Antony Green, *Submission 30*, p. 6.

6 Dr Kevin Bonham, *Submission 31*, p. 1.

3.9 Not all submitters wanted to remove the current system of full preferential voting below the line. Professor Williams advocated current below the line arrangements, but only if there is full preferential voting above the line. He noted that if there is, as the bill proposes, option preferential voting above the line:

...a like system should be introduced for below the line voting. For example, the Bill could be amended in line with the Interim Report on the 2013 Federal Election by this Committee...

3.10 One of the criticisms of the system of Senate voting that the bill would create is that in some circumstances, ballot papers with the same effective preferences are treated differently depending on whether the ballot paper is completed above or below the line.

3.11 An example is a vote with a single square marked for a party above the line where that party has only two candidates. This would be a formal vote under the bill's proposals. However, a formal vote to the same effect could not be marked below the line. The voter would have to mark the two candidates in order of preference but then continue to mark all the squares for the vote to considered formal.

3.12 Professor Green noted that from the perspective of the count, voting above and below the line under the current Senate voting system expresses a preference for every candidate on the ballot paper.<sup>7</sup> The same cannot always be said for the proposed system. As mentioned earlier, Professor Green's preferred Senate voting system for voters to mark at least six squares above the line and at least 12 squares below the line (see paragraph 3.9). Professor Williams told the Committee that his preferred Senate voting system was one where voters were instructed to mark either six squares above the line or six squares below the line.<sup>8</sup>

3.13 The Committee believes Professor Green's proposal is sound. Clearly, as the Committee recommended in May 2014, optional preferential above the line voting is best matched with 'partial' optional preferential voting below the line.

3.14 As indicated above, there are a few options possible for a partial optional preferential below the line Senate voting system. Professor Williams proposed that six boxes be marked to apply consistency with above the line arrangements. Professor Green opted for a minimum of 12 preferences

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7 Professor Mr Antony Green, 'Senate reform – Why bother forcing below-the-line votes to be fully preferential?', *Antony Green's Election blog*, ABC Elections, 25 February 2016.

8 Professor George Williams, *Proof Committee Hansard*, 1 March 2016, p. 10.

to be marked below the line, noting that a full six party choice above the line can be as few as 12 preferences below the line.

### **The savings provisions above and below the line**

3.15 The Australian Electoral Commission has informed the Committee that the impact of the bill's proposed savings provision on below the line informality using data from the 2013 federal election was as follows:

- 480 948 ballot papers were completed below the line of which 8 445 were deemed informal (approximately 1.8 per cent);
- 67 816 below the line ballots were saved because of the current saving provision of up to three allowable errors;
- If the savings provision of five allowable errors was applied, an additional 4 057 votes would have been saved leaving 4 388 votes informal (approximately 0.9 per cent);
- Some 241 of those 4 388 votes were also marked with a formal above the line preference and therefore were saved from below the line informality.<sup>9</sup>

3.16 Several submitters commented on the bill's proposal to increase below the line savings provisions and allow a vote to be counted above the line if there are fewer than six preferences marked.

3.17 Professor Green argued that in terms of the savings provisions above the line should: '[I]t was very important that any change we made did not declare votes that were currently formal as informal'.<sup>10</sup>

3.18 He noted that any vote above the line that is currently formal will also be formal under the proposed system. In the ACT Legislative Assembly:

[V]oters are instructed to complete as many preferences as there are vacancies to fill, five or seven preferences in the past. Any vote with fewer than the required preferences is also formal. At the 2012 ACT election, only around 2% of ballot papers had fewer preferences than the number listed on the ballot paper.<sup>11</sup>

3.19 There was criticism of the bill's proposed savings measures below the line. Dr Bonham gave several grounds for his objections:

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9 Electoral Commission, *Supplementary Submission*, 1 March 2016.

10 Professor Antony Green, *Proof Committee Hansard*, 1 March 2016, p. 14.

11 Professor Antony Green, *Submission 30*, p. 4.

The proposed increase in the number of allowable errors from three to five, absent of any other changes, appears to be poor policy because it:

- is tokenism, in that it appears to address concerns about the difficulty of below-the-line voting, but actually does not do so to any significant degree;
- will make a very small difference to the number of votes admitted to the count as formal, and will not significantly improve the attractiveness of voting below the line;
- makes the process of manually checking the formality of a vote more difficult;
- requires reprogramming and testing of reprogramming for the assessment of formality of BTL votes, without sufficient gains to justify this effort.<sup>12</sup>

3.20 At the public hearing, Mr Rogers commented that while it was difficult to speculate on voter behaviour, the bill's proposed savings provisions below the line will save 'a number of voters'.<sup>13</sup>

3.21 Mr Rogers was specifically asked what the impact of the bill's provision would have been had it been in place at the last federal election. Mr Rogers responded that the higher savings provisions in the bill would have saved, roughly, an additional 4000 votes.<sup>14</sup>

## Counting of the votes on election night

3.22 As chapter 2 discussed, the original bill proposed not to count Senate first preference votes by party in polling places on election night or after they have been returned to AEC Divisional Offices. Subsequent Government amendments to the bill reinstated the current counting procedures.

3.23 Professor Green expressed his support for the Government's amendments:  
...abandoning election and DRO Senate counts left as indeterminate the time frame for when any Senate figures would be released. The re-insertion of counting procedures into the bill is to be welcomed in allowing more transparency to the count.<sup>15</sup>

3.24 The Committee acknowledges the pressures on staff on election night. The Electoral Commissioner, Mr Tom Rogers, told the Committee in March

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12 Dr Kevin Bonham, *Submission 31*, p. 2.

13 Mr Tom Rogers, *Proof Committee Hansard*, 1 March 2016, p. 2.

14 Mr Tom Rogers, *Proof Committee Hansard*, 1 March 2016, p. 4.

15 Professor Antony Green, *Submission 30*, p. 5.

last year that ‘doing work around saving the Senate ballot paper until a later date I think would save a significant amount of work for our staff on the night and probably aid accuracy’.<sup>16</sup>

- 3.25 Nonetheless, the Committee believes that it is desirable to continue to have a first preference count of Senate ballot papers on election night. The AEC has a substantial workforce across the country on election night. If the AEC did not have Senate figures on election night, it would be under considerable pressure particularly at a double dissolution election with a close result in the House. In this case, the Senate makeup would determine what might or might not pass through a joint sitting.
- 3.26 The Committee is aware of the higher trend in pre-poll voting over several recent federal elections. It has taken evidence from the AEC about the challenges that the higher incidence of pre-polling poses. One of these challenges is the count of pre-poll votes on election night.<sup>17</sup> Professor Green suggested in his submission to this inquiry that the counting of pre-poll Senate votes be deferred where the ballot papers are already secured on AEC premises.<sup>18</sup>

### **Registered officers and deputy registered officers**

- 3.27 A majority of the submissions received were supportive of the changes to the bill in relation to tightening regulations around registered officers and deputy registered officers of political parties.
- 3.28 The purpose of changing this section in the bill is to prevent one individual creating a number of parties for the purpose of directing preferences. However, given the proposed changes to above the line voting, with the proposed abolishing of GVT, such a strategy would presumably no longer be used to harvest votes through “pop up” minor parties.
- 3.29 One of the submissions commented that the strengthening of regulations around registered officers was a step in the right direction to improve voter confidence. By ensuring that registered officers and deputy registered officers are only registered to one particular political party this

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16 Mr Tom Rogers, Australian Electoral Commissioner, *Committee Hansard*, 4 March 2015, p. 13.

17 See Mr Tom Rogers, Australian Electoral Commissioner, *Committee Hansard*, 4 March 2015, p. 13.

18 Professor Antony Green, *Submission 30*, p. 5.

provision will go some way to “improve voter confidence on the integrity of registered political parties.”<sup>19</sup>

3.30 Several of the submissions pointed out that whilst the amendments to the bill were positive in relation to ensuring that all registered and deputy officers are unique it was noted by some that this only touched on one out of six points addressed in the original JSCEM recommendation 4.<sup>20</sup>

3.31 Mr Malcolm Baalman in his submission questioned why the Government had not tightened the registration of political parties further. He comments:

The issue of a required number of party members for registration is one of balance. I would personally lean towards setting that balance so as to encourage political engagement and activity in the community. On the other hand, the issue of artificial ‘front’ parties deserves careful consideration.<sup>21</sup>

3.32 Mr Baalman correctly asserts that the Government has not made a formal response to the recommendations in the report. He further states:

However the Government has offered no formal response on these recommendations, and the Bill does not take up most of these issues. It is not clear – and the explanatory material makes no attempt to explain – why the other Committee proposals are not adopted. The Government has publically cited a “lack of parliamentary support” for at least some part of this recommendation.<sup>22</sup>

3.33 Professor Green made reference to further amending the registration of parties in his submission. He commented:

It is wise not to amend the party registration rules in the current legislation. Changing the rules would require parties to be re-registered under the tougher tests. While parliamentary parties would have time to re-register before the 2016 election, non-parliamentary parties would not. Any attempt to tighten the rules now would probably run into problems in the courts.<sup>23</sup>

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19 Mr Bernard Gaynor, *Submission 5*, p. 1.

20 Joint Standing Committee on Electoral Matters, *Interim report on the inquiry into the conduct of the 2013 federal election: Senate voting practices*, May 2014, p. 60.

21 Mr Malcolm Baalman, *Submission 8*, p. 11.

22 Mr Malcolm Baalman, *Submission 8*, p. 11.

23 Professor Antony Green, *Submission 30*, p. 6.

3.34 However, Professor Green suggested that the matter should be re-visited after the election and he would make the following recommendations:

- that the documentary proof of electors being member of a political party for registration be toughened.
- in line with New South Wales and Queensland, the test for registration should be party membership, and the loop hole allowing parliamentary parties to be registered should be removed.<sup>24</sup>

3.35 There is general consensus from the evidence to indicate that Part 2 of the bill is a legitimate regulatory proposal that should be supported. It is the Committee's opinion that further registration of political party issues, as outlined in the JSCEM interim report on Senate Voting Practices, should be revisited by the JSCEM in the 45<sup>th</sup> Parliament.

## Party logos

3.36 The bill proposes to include the option for political parties to register a party logo in black ink to be printed on the ballot papers adjacent to the square and name of the political party on Senate and House ballot papers.

3.37 Several submissions commented that the inclusion of party logos would be practical and may assist to limit confusion amongst voters. This was the reason stated in the JSCEM report in support of logos.

The potential to limit confusion amongst voters, especially with complex ballot papers, is an argument for the adoption of logos.<sup>25</sup>

3.38 Item 88 in the bill states that 'party logos are printed only in black on ballot papers.'<sup>26</sup> This is a practical inclusion as House of Representative ballot papers are printed in black ink on green paper.

3.39 Most of the commentary on logos was supportive however there was some debate as to how in practice some of the amendments to the bill regarding logos would play out.

3.40 For example, several submissions saw potential problems with the design of a party logo not providing clarity on the ballot paper in black ink only when reduced in size to be printed on the ballot papers. It was noted that

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24 Professor Antony Green, *Submission 30*, p. 7.

25 Joint Standing Committee on Electoral Matters, *Interim report on the inquiry into the conduct of the 2013 federal election: Senate voting practices*, May 2014, p. 93.

26 *Commonwealth Electoral Amendment Bill 2016*, p. 24

the onus of creating an appropriate logo for the ballot papers would fall directly on the political party registering its logo.<sup>27</sup>

3.41 One submission noted an important point consideration about the timing of the inclusion of logos.

... a note of caution may be appropriate about fairness and readiness. Not all registered parties may currently have a serviceable logo. Logos are an important part of identity and branding, and take time to consider, select and to generate public awareness. But simply, not all parties will necessarily have equally useable logos.<sup>28</sup>

3.42 A few submissions do not support the introduction of the logo.

3.43 The following submission believed Part 3 of the bill was inequitable for independent candidates. The submission commented:

Groups of independent candidates are allowed to appear above the line but are given no party branding and will not be able to include logos. If party's are to be allowed logos, then so should independent groups.<sup>29</sup>

3.44 The following alternative was suggested to allow for independent candidates to describe what they stand for:

If logos are to be permitted above the line, allow independent groups, along with registered parties, to have 6 words to describe their platform.<sup>30</sup>

3.45 The Committee supports the inclusion of registered logos on House and Senate ballot papers. The inclusion of a logo on ballot papers will assist voters to clearly locate their intended vote on the ballot paper. In addition it will assist political parties to brand themselves. The Committee concedes it may take several elections for the exact impacts of these changes to do with logos to be executed with the intended benefits. This Committee suggests that future JSCEM Committees review this provision in the bill, if passed, for future elections.

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27 Mr Bernard Gaynor, *Submission 5*, p. 1.

28 Mr Malcolm Baalman, *Submission 8*, p. 10.

29 Mr Stephen Mayne, *Submission 16*, p. 1.

30 Mr Stephen Mayne, *Submission 16*, p. 1.

## How-to-vote cards

3.46 The bill does not address issues of how-to-vote cards. Any issues relating to misleading and deceptive conduct by those distributing these cards under a new Senate voting system would be dealt with under the current section 329 of the *Commonwealth Electoral Act 1918*.

3.47 At the public hearing, the Australian Electoral Commission was asked whether it would be against section 329 for a just-vote-1 how-to-vote card to be distributed. The Electoral Commissioner told the Committee:

The ballot paper will contain very clear instructions to voters to vote for six above the line to enable them to cast a valid vote. What we cannot do is mandate what all the parties may or may not say, but our advice and education campaign to voters would be to complete six boxes above the line. There will be notification in the polling place along those lines as well. However, if hypothetically someone did advise voters to vote 1 above the line, they would still be advising voters to vote formally.<sup>31</sup>

3.48 The Liberal Party National Director, Mr Tony Nutt, told the Committee that if the bill's above the line provision is enacted, 'it would be the intention of the Liberal Party to recommend preference allocation from 1 to 6'.<sup>32</sup> National Party Federal Director Mr Scott Mitchell also indicated that the Nationals will be advocating on how-to-vote cards for people to vote 1 to 6.<sup>33</sup>

3.49 Dr Bonham told the Committee that in his view, a just-vote-1 how-to-vote cards should be banned on the basis that it would be recommending that voters vote in a manner different to the instructions on the ballot paper. Professor Williams put essentially the same view arguing that:

...further protective measures need to be introduced into the bill to ensure that people are unable to produce how-to-vote cards and other material that could effectively turn this into a de facto 'vote 1' system.<sup>34</sup>

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31 Mr Tom Rogers, *Proof Committee Hansard*, 1 March 2016, p. 9.

32 Mr Tony Nutt, *Proof Committee Hansard*, 1 March 2016, p. 28.

33 Mr Scott Mitchell, *Proof Committee Hansard*, 1 March 2016, p. 34.

34 Professor George Williams, *Proof Committee Hansard*, 1 March 2016, p. 13.

## Objections to the impact of the bill

- 3.50 The second part of this chapter responds to some of the objections to the bill on the basis that its impact will favour some parties over others. There are various arguments along these lines that need to be interrogated. In the Committee's opinion, the arguments do not have substance and can generally be attributed to misjudgements and the unsettling of narrow sectional interests.
- 3.51 Dr Bonham's submission identifies the following four propositions as to the impact of a Senate voting system as the bill proposes:
- that voters for parties other than Labor, Liberal and the Greens will be disenfranchised;
  - that there will be a loss in political diversity; and
  - that the exhaustion of preferences will entrench the position of the Labor Party, the Liberal Party and the Greens; and
  - that the Coalition's higher primary vote will provide it with an advantage over Labor.

## Will the proposed system reflect the will of the voters?

- 3.52 Some have argued that the proposed system will effectively disenfranchise those voters who intend to vote for parties other than Labor, Liberal and the Greens. The argument is that under the current system, at the last federal election, these 'other parties' received 23 per cent of the vote and won seven of 40 seats (17.5 per cent). Under the proposed system, it is claimed, the 'other parties' would have won either four or five seats based on the votes actually cast.
- 3.53 In his submission, Dr Bonham dismisses these arguments, providing empirical research to back his view:

This claim rests on the completely false belief that a person who prefers one other party to Labor, the Coalition or the Greens will also generally prefer different minor parties to the "big three"...I analysed sample preference flows from micro-parties when their candidates were excluded from House of Representatives counts. In cases where a micro-party candidate was excluded from the count, I found that between 33% and 71% of preferences (varying by micro-party) flowed directly to one of the "big three" even when there was still at least one other micro-party in the count...

The House of Representatives preferences show that once voters are making a choice involving the "big three" parties and any given micro-party, their support for the latter is nothing like as strong as the 23% support for all non big-three parties combined. A vote for a given micro-party is not a vote for any micro-party come what may, and therefore the idea of measuring the proportionality of support for micros by the proportion of seats they win collectively is a furphy.<sup>35</sup>

- 3.54 The Committee has not had an opportunity to examine Dr Bonham's research but finds the logic of his analysis sound. The committee also draws attention to Professor Green's recent comments:

In my opinion this legislation does much to make the results of elections more proportional to the vote each party achieves. The current ticket voting system badly distorts proportionality compared to first preference vote. So that is one big tick for the legislation.<sup>36</sup>

- 3.55 The Federal Director of the Liberal Party, Mr Tony Nutt, told the Committee that in his view, the reform would not lock in the Liberal Party's Senate electoral position or any party's position in the Senate. Rather, he noted that the reform would empower voters rather than National Party Secretaries.<sup>37</sup> Mr Scott Mitchell, the Federal Director of the National Party, expressed a similar sentiment.<sup>38</sup>

- 3.56 Some have argued that the proposed reforms will lead to a loss in political diversity. The Committee cannot see the logic to this argument.

- 3.57 It is wrong-headed to put greater store in the diversity of the parties represented in the parliament than in ensuring that system that elects these parties is one that is transparent and empowers voters. A Senate voting system where voters can see where their vote and their preferences are flowing is clearly preferable to a system that delivers a multi-party Senate through back-room deals.

- 3.58 Dr Bonham challenged the 'political diversity' argument as follows:

Effectively this is an argument that the system is good because it fails to translate voting intention into seats appropriately, and

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35 *Submission 31*, p. 5.

36 Professor Antony Green, 'Senate reform – Why bother forcing below-the-line votes to be fully preferential?', *Antony Green's Election blog*, ABC Elections, 25 February 2016.

37 Mr Tony Nutt, *Proof Committee Hansard*, 1 March 2016, p. 28.

38 Mr Scott Mitchell, *Proof Committee Hansard*, 1 March 2016, p. 34.

hence elects some different kinds of Senators. However if the voters want those kinds of Senators they are free to vote for them at any time and if enough do so, those Senators will be elected.<sup>39</sup>

3.59 This argument stands to reason. If micro-parties deserve a place in the Senate, it should surely be on the basis of their popularity among voters.

3.60 Media sources have reported the view that the Senate voting system proposed in the bill will further entrench Coalition representation in the Senate.<sup>40</sup> At the public hearing, there was also discussion of this possible impact.<sup>41</sup> Dr Bonham commented in his written evidence that this objection is based on the argument that:

...since the "right-wing" vote is more concentrated in the Coalition, that therefore Labor will suffer more from loss of preferences as "left-wing" parties are excluded and their preferences leak or exhaust.<sup>42</sup>

3.61 Dr Bonham dismisses this view as 'unsound'. He notes that most of the 'left-wing' vote consists of Green votes and the Greens often win seats in their own right or are the last unsuccessful party standing. In other words, the Greens' vote does not leak.

3.62 Dr Bonham also addressed the concern that weaker than 100 per cent flows of Green preferences to Labor would cause the Coalition to win Senate seats. He simulated the impact of past election results under the Senate voting model that the Committee proposed in May 2014 and concluded:

I could actually find no case at all in which this (under the original JSCEM proposal ) would have caused Labor or the Greens to miss out on a seat they actually won. Reasons for this include that Labor and the Greens are often fighting each other rather than the Coalition for the final seat, and that the proportion of votes being transferred between the parties when there is a transfer is relatively small compared to in the House of Representatives. The model in the Bill is even less sensitive to this situation than the original JSCEM model.<sup>43</sup>

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39 Dr Kevin Bonham, *Submission 31*, p. 6.

40 See Ross Gittins, 'Senate change a boost for lobbyists', *Canberra Times*, 29 February 2016, p. 12.

41 See the evidence of Professor Antony Green, *Proof Committee Hansard*, 1 March 2016, pp 23–24 and Mr Glenn Druery, *Proof Committee Hansard*, 1 March 2016, p. 46.

42 Dr Kevin Bonham, *Submission 31*, p. 6.

43 Dr Kevin Bonham, *Submission 31*, p. 6.

- 3.63 The Committee makes the broader point that it is the integrity and the transparency of the electoral system that is most important in electoral reform. The key issue is that the will of electors is fully expressed rather than the wishes of the parties. The final chapter of this report impresses this point.

### **Will the proposed system lead to the exhaustion of preferences?**

- 3.64 A second and related argument is that the proposed Senate voting system will lead to the exhaustion of votes.

- 3.65 While under the proposed voting system a voter may number only '1' above the line for the vote to be counted, the printed instruction for voters to number at least six preferences above the line should mean that the exhaustion rate will be quite small.

- 3.66 Professor Green noted in his submission, and in verbal evidence to the Committee, that in New South Wales Legislative Council elections, more than 80 per cent of ballot papers consist of only a single '1' which creates a very high rate of exhausted preferences. While the voting system advises voters to only vote '1' above the line, he highlighted the fact that:

With a low quota (4.55 per cent) and 21 members to elect, the high exhaustion rates has not significantly distorted the NSW system. Even with the final few seats filled by candidates below the quota, the seats won by party have generally been proportional to the percentage votes by party.

Applied to the higher Senate quota, some contests would occasionally be decided by electing a candidate well short of the set quota.

The requirement to number at least six preferences above the line should mean the exhaustion rate at Federal elections will be lower than for NSW Legislative Council elections.<sup>44</sup>

- 3.67 The Committee notes that should some votes exhaust because an elector has numbered only a certain number of parties, this is a representation of the elector's view.

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44 Professor Antony Green, *Submission 30*, p. 4. Professor Antony Green, *Proof Committee Hansard*, 1 March 2016, p. 18.

## Will the proposed reform be found to be unconstitutional?

- 3.68 Some have argued that the bill proposes a reform that the High Court may find to be unconstitutional.
- 3.69 The Hon. Malcolm McCusker argued in his submission that the fact that voters can only choose the order of their candidates below the line 'would not infringe section 7 of the Constitution, as voters will still be able to direct their preferences as they choose'.<sup>45</sup>
- 3.70 The distinguished constitutional lawyer Professor George Williams AO cited a number of High Court judgments on electoral matters which indicated, to his mind, that a successful High Court challenge was unlikely. Among the judgments he cited was the following, from Chief Justice Harry Gibbs in *McKenzie v Commonwealth* (1984) 55 ALR 747:
- ...it is right to say that the electors voting at a Senate election must vote for the individual candidates whom they wish to choose as senators but it is not right to say that the Constitution forbids the use of a system which enables the elector to vote for the individual candidates by reference to a group or ticket. Members of Parliament were organized in political parties long before the Constitution was adopted and there is no reason to imply an inhibition on the use of a method of voting which recognizes political realities provided that the Constitution itself does not contain any indication that such a method is forbidden.<sup>46</sup>
- 3.71 The Committee asked Mr Malcolm Mackerras whether the current system of above the line voting is unconstitutional. He agreed, noting that in his view, the system of party lists is not consistent with section 7 of the Constitution. Mr Mackerras said that in his view, all Australian Senate elections since 1984 have been unconstitutional.<sup>47</sup>
- 3.72 Professor Green recently noted that there have been no cases with a constitutional judgment on the use of Senate party lists. He highlighted two key facts: that voters can still vote directly for candidates, and he could not see 'how the proposed ATL system could be declared

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45 The Hon. Malcolm McCusker, *Submission 67*, p. 1.

46 Professor George Williams, *Submission 18*, p. 4.

47 *Proof Committee Hansard*, 1 March 2016, p. 21.

unconstitutional without the existing ATL system also being ruled unconstitutional'.<sup>48</sup>

## **A final comment on the impact of the bill**

- 3.73 This chapter has noted some criticisms of the bill for retaining full optional preferential voting below the line. In particular, the apparent inconsistency between above and below the line voting was of concern to some submitters and witnesses.

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48 Professor Antony Green, 'Senate reform – Why bother forcing below-the-line votes to be fully preferential?', *Antony Green's Election blog*, ABC Elections, viewed 25 February 2016, <http://blogs.abc.net.au/antonygreen/2016/02/senate-reform-why-bother-forcing-btl-votes-to-be-full-preferential.html>