



Submission

on the

Commonwealth Electoral Amendment (Above the Line Voting) Bill 2013

to the

Senate Finance and Public Administration Committee

**PO Box 6100
Parliament House
CANBERRA ACT 2600**

Phone: (02) 6277 3439

Fax: (02) 6277 5809

Email: fpa.sen@aph.gov.au

Website:

[www.aph.gov.au/Parliamentary Business/Committees/Senate/Finance and Public Administration](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration)

by

FamilyVoice Australia

4th Floor, 68 Grenfell St.

Adelaide SA 5000

Phone: 1300 365 965

Fax: 08 8223 5850

Email: office@fava.org.au

Website: www.fava.org.au

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TABLE OF CONTENTS

1. Introduction.....	1
2. The importance of the Senate	1
3. Current voting system for the Senate.....	2
4. Abolishing registered preference tickets.....	2
5. Preferential voting for groups “above the line”	4
6. Preferential voting: optional or compulsory?	5
7. Endnotes.....	6

1. Introduction

On 14 November 2013 the Senate referred the *Commonwealth Electoral Amendment (Above the Line Voting) Bill 2013* to the Senate Finance and Public Administration Committee for inquiry and report.

The Committee has set a deadline of 31 December 2013 for submissions on the Bill.

The Committee is due to report to the Senate by the first sitting Wednesday in March 2014.

FamilyVoice Australia is a national organisation which, among other things, has a longstanding interest in democracy, the rule of law, constitutionalism and the separation of powers. It is independent of all political parties.

2. The importance of the Senate

The House of Representatives, like all lower houses in Australia except for Tasmania's, is composed of members elected from single-member electorates. This system favours large political parties and generally results in a party or coalition having a clear majority in the lower house, thereby enabling the formation of a strong government. This is a desirable outcome.

However, in the absence of a strong upper house, an unfettered government may become effectively an elected dictatorship.

A government having no effective checks on its power can become crudely "majoritarian" and ignore the views even of substantial minorities in the community. In contrast to majoritarianism, a healthy democracy, according to John Stuart Mill, includes a "*willingness to compromise, a willingness to concede something to opponents, and to shape good measures so as to be as little offensive as possible to persons of opposite views*".¹

For an upper house to provide an effective check on such majoritarian rule it should not usually be controlled by any major party or coalition. Rather, the composition of the upper house should reflect a broader range of community opinion than the lower house. This is best achieved with multi-member electorates and proportional representation as the voting system.

Another positive contribution upper houses can make to good government is stability. When the government formed in the lower house changes, a new and inexperienced government may make hasty decisions and introduce ill-conceived legislation. An upper house elected by rotation, with only half of the members facing re-election each time, provides greater continuity of experience and stability.

Governments formed in the lower house are rightly accountable to the people at elections held every three years. However this can lead to short-term thinking and planning which may not be in the best interests of the nation. A longer term for upper house members has the advantage of encouraging a longer-term perspective when government legislation is reviewed. Even members of a major party are encouraged to think more independently when they don't have to face an election so frequently.

The Australian Senate reflects these strengths of multi-member electorates, proportional representation and a rotation system of re-election.

3. Current voting system for the Senate

The *Commonwealth Electoral Act 1918* currently provides for “above the line” voting for the Senate by voters putting a “1” in the box next to their party or group of choice. The actual effect of this vote is determined by a ticket (or tickets) lodged by the party or group with the Australian Electoral Commission allocating preferences.

Although these tickets are available on the AEC website, at AEC offices and on display at polling places, most voters pay little if any attention to the tickets. This means that the preference flows of most Senate votes are determined by political parties - unlike the House of Representatives where voters determine their own preferences.

Much attention has been focused on the particular way this voting system has played out with the election of candidates who attract a very small number of first preferences. For example, just 0.51% of Victorians voted for the Australian Motoring Enthusiasts Party in the 2013 federal election. Yet this party was successful in winning a Senate seat after the distribution of preferences.

The option of numbering each candidate “below the line” is, given the number of candidates, daunting to many voters.

The *Commonwealth Electoral Amendment (Above the Line Voting) Bill 2013* proposes a change to the voting system for the Senate to address this issue.

4. Abolishing registered preference tickets

Sections 211 and 211A of the *Commonwealth Electoral Act 1918* provide respectively for groups of candidates and for individual candidates who are (or in the case of the dissolution of the Senate were) sitting Senators to lodge with the Australian Electoral Commission a written statement setting out one, two or three orders in which “*they wish voters in the election to indicate their preferences in relation to all the candidates in the election.*”

When such a voting ticket or tickets are registered, then the group or candidate has a box “above the line” on the Senate ballot paper.

Section 239 (2) provides for voters to vote by putting a 1 in any single above the line box.

Section 272 provides that ballot papers so marked are “*deemed to have been marked in accordance with*” the registered preference tickets for that group or candidates.

At the 2013 federal election some 96.49% of formal votes were “above the line” votes.² Only 21 out of the 36 vacancies for Senators to represent the six States were filled with candidates achieving a quota prior to distribution of surpluses or the votes for excluded candidates from one group to another according to the registered preference tickets.³ This means that 15 of the 36 vacancies were filled following preferences allocated by the registered preference tickets.

Registered preference tickets are fundamentally undemocratic. Although they are available on the internet, the implications of voting for different groups above the line are too complicated to be easily assessed. If preference tickets at polling places were consulted by most voters, the logistics of facilitating this process would be a nightmare for the Australian Electoral Commission.

In reality, people who vote above the line rely on preference tickets with little understanding of which candidates their votes will ultimately support. The obscurity of the preference tickets facilitates deception or manipulation, verging on fraud.

Commenting on the 2011 NSW election, Antony Green said in his blog:

One of the worst features of the Australian electoral system is group ticket voting for the Senate. More commonly called 'above the line' voting, it is a system that simplifies Senate voting and so should make it easier for voters to express their political preferences. Instead it has become a play thing of party politics, results engineered by labyrinthine preference deals only half understood by those who devise them and next to impossible for any average voter to understand.

Group ticket voting descended into farce at the 1999 NSW Legislative Council election when voters were forced to manipulate a 'tablecloth' ballot paper one metre wide by 700mm deep with 81 columns and 264 candidates. The array of front parties with attractive names designed to corral the preferences of unwary voters forced the state to change its electoral system.⁴

More recently, Antony Green explained how Malcolm Jones of the Outdoor Recreation Party was elected to the NSW Legislative Council in the 1999 election with just 0.2% of the primary vote:

Jones's victory came about thanks to preferences from 22 other parties, including Marijuana Smokers Rights, the Three Day Weekend Party, the Gay and Lesbian Party (which apparently had no gay and lesbian members), Animal Liberation, the Four Wheel Drive Party, the Marine Environment Conservation Party, the Women's Party/Save the Forests and so on. How complex the preference arrangements were is shown by the fact that eight of the 22 parties that helped elect Jones in fact polled more votes than him.

After the election I undertook research on how voters reacted to the tablecloth ballot paper by comparing the preferences of below the line voters with the registered above the line preference tickets.

It was clear that several of the party names were designed to deceive voters, tricking them into voting for a party and then harvesting the preferences and sending them elsewhere.

- The Marijuana Smokers Rights Party directed preferences to Glenn Druery and Malcolm Jones, but of those who voted below the line for the party, 41 per cent gave preferences to the Greens and 12 per cent to the Australian Democrats.*
- The Gay and Lesbian Party directed its preference ticket to Druery and Jones, but below the line voters directed 33 per cent of preferences to the Greens, 29 per cent to the Australian Democrats and 12 per cent to Labor.*
- The Animal Liberation Party directed its ticket preferences to Malcolm Jones, but 44 per cent of below the line votes flowed to the Greens as preferences.*
- The Marine Environment Conservation Party had ticket preferences to Malcolm Jones but below the line votes flowed 59 per cent to the Greens.*
- The Wilderness Party had ticket preferences for Druery and Jones, but 51 per cent of below the line preferences went to the Greens.*
- The Women's Party/Save the Forests had ticket preferences to Druery and Jones, but 48 per cent of below the line preferences flowed to the Greens.*

This is clear evidence that people who voted for the party below the line considered them to be environment parties and gave preferences accordingly. However, anyone thinking that way and voting above the line found their preferences effectively stolen and delivered to Glenn Druery and Malcolm Jones.⁵

The Bill would abolish all the provisions in the current Act which deal with registered preference tickets. This aspect of the Bill deserves full support.

Recommendation 1:

The current system of registered preference tickets for the Senate is undemocratic as it results in preferences being allocated by political parties and groups and treated as if these were the preferences of voters. Insofar as the Bill abolishes registered preference tickets it should be supported.

5. Preferential voting for groups “above the line”

The Bill proposes to introduce, in place of the current system of registered preference tickets, a system of optional preferential voting “above the line”.

Item 14 of Schedule 1 of the Bill would introduce a new subsection 239 (2) to the Act to provide that:

In a Senate election a person may mark his or her vote on the ballot paper by:

(a) writing the number 1 in a group voting square; and

(b) writing the numbers 2, 3, 4 (and so on, as the case requires), in as many other group voting squares (including none) as the person wishes.

The proposal to enable voters to specify their own preferences for groups “above the line” respects the dignity of voters and their ability to make responsible decisions. This system is equally fair to all major and minor parties. It is fundamentally democratic, placing voters in the box seat to be the decision-makers for preference flows.

This proposal would virtually eliminate the opportunity for micro parties to “game” the system. The analysis of preference flows in the 1999 NSW Legislative Council election by Antony Green, cited above, shows that those voting for micro parties generally give their second preferences to the major or minor parties, not to other micro parties. The strategy employed by Glenn Druery and Malcolm Jones depends on manipulating preferences by registered preference tickets in ways that voters would not do themselves.

Giving voters control over their own preferences would greatly reduce the size of the ballot paper. With voters in control and preference tickets abolished, the Druery-Jones strategy would be destroyed and with it the motivation to register 24 parties with catchy names to harvest votes for themselves.

With a modestly-sized ballot paper, voters could allocate their own preferences above the line without difficulty. Without the possibility of gaming the system, micro parties could be expected to disappear. The parties contesting Senate seats would then be only the same major and minor parties contesting House of Representatives seats. Voters already allocate their own preferences in House of Representatives and should be able to allocate a similar number of preferences above the line in Senate elections.

Recommendation 2:

To the extent that the Bill would provide voters with an option for preferential voting for parties and groups above the line, it should be supported.

6. Preferential voting: optional or compulsory?

The Bill would also introduce partial preferential voting below the line, in place of the current requirement to preference all candidates.⁶ Item 14 of Schedule 1 of the Bill would introduce new subsection 239 (1A) to the Act which would provide that:

A person must indicate at least as many preferences under subsection (1) as there are candidates to be elected. [Subsection (1) deals with below the line voting.]

This provision is likely to create significant confusion. It would require voters choosing to vote below the line to number at least six preferences for a half-Senate election and twelve for a full Senate election if they are voting in a State and two preferences if they are voting in a Territory.

This is a version of the system currently in place in New South Wales for Legislative Council elections.

At the 2011 New South Wales election most voters (82.16%) chose to indicate a single above the line preference with only 15.59% expressing a second or subsequent preference. The remaining voters (2.24%) voted “below the line” with only 28.15% expressing a preference for more than one candidate. The result was the exhaustion of a substantial majority of votes before all vacant positions were filled.⁷

This problem was noted by the Joint Standing Committee on Electoral Matters in its report on the *Commonwealth Electoral (Above-the-Line Voting) Amendment Bill 2008* which proposed partial preferential voting above the line.⁸

The final four (out of 21 vacancies) in the 2011 New South Wales Legislative Council election were filled by candidates attracting less than a full quota even after all remaining preferences were distributed. The 11th Coalition candidate was elected with just 0.5632 of a quota and the 3rd Greens candidate with 0.5693 of a quota.⁹

This problem could be resolved by requiring voters who choose to vote “above the line” to be required to indicate their preferences in order for all parties and groups with a box “above the line”. (Compulsory preferential voting below the line would remain unchanged.)

Preferences marked above the line would first flow to candidates within the party in the order they are printed on the ballot paper. The preferences would then flow to candidates in other parties in the order indicated by the voter. Preferences marked above the line should not flow to candidates listed only below the line.

This system was endorsed in a recommendation by the Joint Standing Committee on Electoral Matters in its report on the 2004 federal election. The Committee recommended that compulsory preferential voting above the line be introduced for Senate elections, while retaining the option of compulsory preferential voting below the line.¹⁰

The major argument against the proposal for compulsory preferential voting is that it would risk a return to the high percentage of informal votes for the Senate that occurred prior to the introduction of “above the line” voting. However, preferential voting above the line for parties or groups in a Senate election is likely to be no more difficult than voting for candidates in a House of Representatives election, with which voters are familiar.

Moreover, an education campaign in association with the next federal election should help minimise the number of informal votes. The campaign message would be simple. On both the House of Representatives and the Senate ballot papers you must number every square to express your preferences. For the Senate you may either number all the boxes above the line OR all the boxes

below the line. This would be a simpler message than advising voters they must (1) number all boxes on the House of Representatives ballot paper and (2) one box above the line on the Senate ballot paper OR (3) six (or twelve or two) boxes below the line on the Senate ballot paper.

As mentioned above, the number of parties and groups contesting the Senate election is likely to be reduced significantly with the abolition of registered preference tickets, thereby making sequential numbering of all preferences above the line easier.

Recommendation 3:

The Bill should be amended to replace its proposal for optional preferential voting above the line with compulsory preferential voting above the line. Compulsory preferential voting below the line should be retained as in the current Act.

7. Endnotes

1. Mill, John Stuart *Considerations on Representative Government* cited in Uhr, John “Bicameralism and democratic deliberations”, chapter 2, *Restraining Elective Dictatorship*, *loc cit*, p 22.
2. Australian Electoral Commission, *Election 2013: Senate Group Voting Ticket Usage*, 1 November 2013: <http://vtr.aec.gov.au/SenateUseOfGvtByState-17496.htm>
3. Based on the whole number quotas for each party or group in each State as shown in the table at: Australian Electoral Commission, *Election 2013: Senate Quota*, 1 November 2103: <http://vtr.aec.gov.au/SenateStateProvisionalQuota-17496.htm>
4. Antony Green, “Measuring the Performance of the New NSW Legislative Council Electoral System”, *Antony Green's Election Blog*, 4 August 2011: <http://blogs.abc.net.au/antonygreen/2011/08/measuring-the-performance-of-the-new-nsw-legislative-council-electoral-system.html>
5. Antony Green, “Hand the power of preferences back to the people”, *The Drum*, 12 Sep 2013: <http://www.abc.net.au/news/2013-09-11/green-hand-the-power-of-preferences-back-to-the-people/4951020>
6. Item 12 in Schedule 1.
7. Anthony Green, *2011 New South Wales Election: Analysis of Results*, 2011, p 45: http://www.abc.net.au/elections/archive/nsw/NSW2011_Results.pdf
8. Joint Standing Committee on Electoral Matters, *Advisory Report on the Commonwealth Electoral (Above-the-Line Voting) Amendment Bill 2008*, para 2.20, p 10: <http://www.aph.gov.au/house/committee/em/elect07/report3/Final.pdf>
9. Anthony Green, *2011 New South Wales Election: Analysis of Results*, 2011, p 45: http://www.abc.net.au/elections/archive/nsw/NSW2011_Results.pdf
10. Joint Standing Committee on Electoral Matters, *The 2004 Federal Election Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, September 2005, Recommendation 37 on p xxxvii: http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=em/elect04/report/fullreport.pdf