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**Submission to the Joint Standing Committee on Electoral Matters - Inquiry into the  
*Commonwealth Electoral Amendment Bill 2016***

I am pleased to attach a submission to this inquiry.

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## SUBMISSION TO THE JOINT STANDING COMMITTEE ON ELECTORAL MATTERS - INQUIRY INTO THE *COMMONWEALTH ELECTORAL AMENDMENT BILL 2016*

### Introduction

1. This submission addresses three aspects of the Bill:

- the rejection of the Joint Standing Committee's earlier recommendations relating to Senate voting below the line;
- the proposed elimination of counting of Senate votes to candidates or groups on election night, and the consequent likely delays in getting an initial indication of the results of Senate elections; and
- certain points of drafting.

I provide a summary of my recommendations at paragraph 26.

2. In formulating the observations and recommendations set out below, I draw on some 40 years of study of elections, including a 30 year career as an officer of the AEC in the course of which I did extensive work on amendments to the *Commonwealth Electoral Act 1918* (the "*Electoral Act*"). In particular, I was deeply involved in the drafting in 1983 of the current provisions governing the Senate electoral system; in the initial implementation of those provisions in 1984; and in the training of AEC staff on Senate scrutinies through to my retirement in 2012. I am also one of the ACT Coordinators of the Electoral Regulation Research Network, and a member of the Editorial Board of the *Election Law Journal*.

### Below the line voting

3. In its unanimous report of 9 May 2014 entitled *Interim report on the inquiry into the conduct of the 2013 Federal Election: Senate voting practices*, the Committee recommended at paragraph 4.44 that in conjunction with the introduction of "above the line preferential voting", there be provision made in the *Electoral Act* for:

"...‘partial’ optional preferential voting below the line with a minimum sequential number of preferences to be completed equal to the number of vacancies:

- six for a half-Senate election;
- twelve for a double dissolution; or
- two for any territory Senate election."

The Committee further recommended that “appropriate formality and savings provisions continue in order to support voter intent within the new system”. In his “Additional Comments” on the Committee’s report, Senator Xenophon noted that the provisions of his own *Commonwealth Electoral Amendment (Above the Line Voting) Bill 2013* were consistent with the Committee’s recommendation on that point.

4. In its May 2014 report, the Committee set out the following compelling reasoning underpinning its recommendation on this point:

“4.30 Either independent of, or accompanying above the line optional preferential voting, optional preferential voting below the line has been suggested as a more complete way of addressing the concerns with Senate voting.

4.31 Allowing voters to express preferences below the line, for as many candidates as there are vacancies (or more if desired), or for a minimum of any arbitrary round number totalling more than the vacancies, allows for a voter to allocate their preferences accurately to their desired flow....

4.32 This system would replicate the current control that voters have over full preference distribution below the line, but would remove the onus of distributing a preferences [sic] to all candidates. This would remove onerous requirement of correctly numbering large numbers of boxes in sequence in order to cast a formal vote.

4.33 It can be argued that with the recent numbers of parties and candidates in Senate elections, it is in fact impossible for a voter to actually cast a fully considered below the line vote. Mr Michael Maley has pointed out that the combinations of potential preference options ‘in every State at the 2013 election, the number of alternatives was greater than the estimated number of atoms in the universe’.”.

5. In an article published on the Australian Public Law blog in September 2015, extracts from which I have included at the end of this Submission, I observed among other things that “the JSCEM ... came up with proposals which, if implemented, will produce the best electoral system ever used at Senate elections”. For reasons set out below, that could not be said about the approach proposed in the Bill, which in relation to below the line voting is seriously defective.

6. Since 1983, the primary requirements for a vote marked below the line to be formal have been as set out in section 270 of the *Electoral Act*, as follows.

- "(1) Where a ballot paper in a Senate election:
- (a) has the number 1 in the square opposite to the name of a candidate and does not have that number in the square opposite to the name of another candidate;
  - (b) has:
    - (i) in a case where there are more than 9 candidates in the election--in not less than 90% of the squares opposite to the names of candidates, numbers in a sequence of consecutive numbers commencing with the number 1 or numbers that with changes to no more than 3 of them would be in such a sequence; or
    - (ii) in any other case--in all the squares opposite to the names of candidates or in all those squares except one square that is left blank, numbers in a sequence of consecutive numbers commencing with the number 1 or numbers that with changes to no more than 2 of them would be in such a sequence; and
  - (c) but for this subsection, would be informal by virtue of paragraph 268(1)(b);
- then:
- (d) the ballot paper shall not be informal by virtue of that paragraph;
  - (e) the number 1 shall be taken to express the voter's first preference;
  - (f) where numbers in squares opposite to the names of candidates are in a sequence of consecutive numbers commencing with the number 1--the voter shall be taken to have expressed a preference by the other number, or to have expressed preferences by the other numbers, in that sequence; and
  - (g) the voter shall not be taken to have expressed any other preference.
- (3) In considering, for the purposes of subsection (1) whether numbers are in a sequence of consecutive numbers, any number that is repeated shall be disregarded."

7. Rather the seeking to implement the partial optional preferential voting model unanimously recommended by the Committee, the Bill instead proposes to do no more than amend subparagraph 270(1)(b)(i) to change "3" to "5". The instructions on the ballot paper would still command below the line voters to number consecutively every

square below the line. This represents not only a rejection of the Committee's recommendation in favour of something quite different, but also a rejection of the approach long proposed by Senator Xenophon.

8. The following points need to be emphasised.

- 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. This would seem to represent at the very least a discourtesy both to the Committee and to stakeholders in the wider community who have an interest in these matters, and may well also evince a recognition of the intrinsic weakness of any arguments in favour of the approach taken in the Bill. None of the arguments of the Committee as quoted at paragraph 4 above appear to have been addressed, let alone refuted. In the absence of any such justification for the formulation of the Bill in its current terms, there would seem to be no reason for the Committee to retreat from its previous well-formulated recommendation.
- In relation to the amendment the Bill proposes to section 270 of the *Electoral Act*, no justification appears to have been offered for the replacement of the number 3 with the number 5, rather than 4, or 6, or any other number one might care to specify.
- In particular, I have not seen any published evidence concerning how many informal ballot papers at the last Senate election would have been rendered formal by this change, though as the preferences on below the line votes were all captured electronically by the AEC this could presumably be determined. (Some programming changes could be needed to get that information, but some such changes will be required anyway if the system proposed in the Bill is to be computerised.) I would therefore **recommend** that the Committee seek advice from the AEC on how many ballot papers would have been saved from informality in each State and Territory had the proposed change applied in 2013 (or 2014 in Western Australia).
- I have also seen no published evidence on how many below the line Senate votes in 2013 would have been saved from informality under the amendment proposed in the Bill, in comparison with the number which would have been so saved under the partial optional preferential voting scheme recommended by the Committee. Again, this should be able to be determined by the AEC through an analysis of 2013 data (provided that the Committee can clarify its thinking on savings clauses which might be appropriate), and I would again **recommend** that the Committee seek this data, broken down by State and Territory.

9. In relation to those last two points, I would observe that these data may well have been compiled already, as one would have expected the Minister to have requested them as an input to the considerations which preceded the drafting of the Bill.

10. Beyond these issues, the scheme proposed in the Bill will create an anomaly never previously seen at Senate elections: identical preferences for candidates may produce a formal vote if expressed using the above the line mechanism, but an informal vote if expressed using the below the line mechanism.

11. To give a concrete example of this, assume the system proposed in the Bill had applied in 2013, and consider a NSW voter who voted 1, 2, ... 6 above the line for six of the two-candidate groups on the ballot. This vote would be counted as expressing 12 preferences in total, for the candidates of those six groups. If, however, the voter had instead written those exact same 12 preferences below the line for the candidates in question, the vote would, under the scheme in the Bill, have been informal. This seems absurd on the face of it; and neither the Explanatory Memorandum nor the Second Reading Speech contains any argument justifying why a particular set of preferences should constitute a formal vote if expressed using the above the line modality, but not if expressed using the below the line modality.

12. In the annexed extracts from my article published on the Australian Public Law blog, I noted that the current system has three sources of illegitimacy: "true and false preferences", "discrimination against some voters" and "unmanageable ballot papers". I further observed that:

"The outstanding feature of the JSCEM's main proposal for reform is that it addresses (to a greater or lesser extent) every one of these fundamental sources of illegitimacy."

That is simply not true of the scheme set out in the Bill. By doing away with preference harvesting the Bill goes some way towards dealing with the problem of unmanageable ballots, but by continuing to require below the line voters *prima facie* to number every square, and by offering them nothing by way of relief from that other than a slight relaxing of the current savings provisions (the extent of the benefits of which do not appear to have yet been modelled), the problems of false preferences and of discrimination have been left untouched.

13. These points can be drawn together into one overriding point: the scheme proposed in the Bill is an incoherent one, with no clear underlying principles apparent. The current system at least makes sense, in that it *prima facie* requires full preferential voting both above the line and below, with allowance only for mistakes. The Committee's proposal of optional preferential voting both above and below the line also makes eminent sense. The Bill's proposal, for optional preferential voting

above the line but full preferential voting below the line (again with some allowance for mistakes), makes no sense, and has not been supported by any stated justification.

14. Finally on this issue, there is a major practical problem to be considered. Under the proposals in the Bill, as discussed below, there will be no counting of Senate votes to candidates or groups on election night, nor after they have been returned to AEC divisional offices: they will only be counted at the central Senate Scrutiny Centres for each State and Territory. For some time now, the AEC has warned that depending on the content of possible changes to the Senate electoral system, it might be forced to conduct the Senate scrutiny manually. (Given the tight timing of the Committee's current inquiry, I am not a position to know whether that remains a possibility from the AEC's point of view.) The manual formality checking of below the line votes would be challenging enough even under a scenario of partial optional preferential as recommended by the Committee. It would be a truly horrific task if the scheme in the Bill were adopted, with the implications that:

- the bulk of below the line voters would have followed the ballot paper instructions and numbered all the squares;
- the formality rules would be as set out in section 270 of the Electoral Act, as proposed to be amended; and
- all of the counting would be taking place centrally within each State or Territory.

It cannot be over-emphasised that there is not a single person in this country who has ever done a manual formality check on a Senate ballot paper with 110 + candidates on it using the current section 270 rule, let alone the more complex check which would result from the amendments in the Bill.

15. In conclusion, I would **strongly recommend** that the Committee stand by its original well-argued proposal for the introduction of partial optional preferential voting below the line.

16. In relation to the implementation of the Committee's proposal, there remains one outstanding issue, which is that of what savings provisions might be used to supplement it. The simplest, which I **recommend**, would be to mirror the savings provision which the Bill proposes be applied to above the line votes, and treat a ballot paper as formal provided that it shows at least a first preference for a candidate below the line. In effect, section 270 of the Electoral Act (other than paragraph 270(1)(b)) would continue to apply. This should be simple for the AEC to program, as it would require a current element of the test for formality to be dropped, rather than amended. It would also be the easiest test to apply in the event that manual counting had to be done.

## Elimination of counting of Senate votes to candidates or groups on election night

17. As noted at paragraph 14 above, the effect of the proposed amendments to section 273 of the *Electoral Act* is that there will be no counting of Senate votes to groups or candidates on election night, nor, indeed, until the ballot papers have been received by the Australian Electoral Officer for the State or Territory at the Central Senate Scrutiny centre.

18. This represents a major change indeed to Australian federal electoral processes. It was not recommended by the Committee, nor does it appear to have been seriously mooted in public as a possibility up until now. While the Explanatory Memorandum for the Bill touches on the relevant technical amendments, it does not state their obvious implication: that there will be not the slightest indication of voting patterns for the Senate until days (or, in my estimation, weeks) after polling day.

19. Again, no justification whatsoever for this change has been advanced in the Explanatory Memorandum for the Bill. In the Minister's Second Reading Speech in the House of Representatives, only the following passage appears:

### "Technical amendments

In the past, voters mainly placed a '1' above the line on Senate ballot papers. This enabled an initial first preference count to be undertaken at polling booths. As the proposed Senate amendments will lead to multiple voter preferences being numbered above the line, **preference counts at polling booths will no longer be possible**. [emphasis added] The bill, therefore, proposes technical amendments to the scrutiny and count processes to enable the AEC to improve and centralise the count of Senate ballot papers."

The text therein which I have highlighted is plainly exaggerated: while some of the less skilled polling officials might find it harder to sort ballot papers according to 1s above the line than in the past, to say that the task "will no longer be possible" is simply and obviously not correct. Up until now, polling officials appear to have managed to sort Senate ballot papers according to the groups for which a 1 has been marked above the line, and there would seem to be no reason why that could not still be done under the above the line voting scheme proposed in the Bill. The presence of certain additional numbers above the line certainly should not be a major problem: the same polling officials are able to sort House of Representatives ballot papers according to first preferences even though such ballot papers also bear later preferences.

20. In general, the initial counting of ballot papers at polling places has tended to be seen worldwide as an important element of the transparency and integrity of electoral processes, and in many countries there is a legal requirement for the results to be posted on the door of the polling place so that all may see them. Indeed, in



some countries, such as Indonesia, parallel vote tabulations are carried out on the basis of the figures so published, so as to provide a greater level of public confidence in the results as finally issued.

21. Given the entirely legitimate interest of the public – and no doubt Senators (including those on the Committee!) and Senate candidates – in knowing the shape of the future Parliament as soon as possible, it is difficult even to imagine what might have motivated this proposed change. The absence of any way for the public to obtain a timely initial indication of the results of Senate elections will clearly greatly increase the pressure on the AEC in its management of the Central Senate Scrutiny centres.

22. Under current arrangements the AEC makes use of some 70,000 staff on hand at several thousand polling places to do the initial Senate count on election night. There is no possibility that a comparable number of people could be deployed thereafter and supervised effectively at just eight Central Senate Scrutiny locations. Given that under the Bill's proposals it would be at those locations that all ballot processing would be taking place, some observations regarding them are in order.

- First, it is clear that they will give rise to the largest assemblies of ballot papers ever seen in this country. The NSW operation will be close to 50 times larger than in 2013; the Victorian operation will be close to 40 times larger than in 2013, and the Queensland operation will be close to 30 times larger than in 2013.<sup>1</sup>
- There is now a serious shortage within Australia of people who have experience in managing or working in enormous centralised paper-based operations of this type, which have become rarer and rarer as more and more transactions are done online.
- Before endorsing a counting model of this type, the Committee needs to satisfy itself that it will be workable.

23. In particular, it could reasonably be expected that the Parliament would not make so fundamental a change to the counting process for Senate elections without at least being able to give the public a realistic indication of how long it will take after polling day to make available (a) the very first, and (b) the final, results of the counting of the first preferences votes for each candidate. I would therefore **recommend** that the AEC be asked by the Committee to provide its professional assessment on this point (pursuant to the AEC's statutory function set out in paragraph 7(1)(d) of the *Electoral Act*), with a detailed explanation of the assumptions underpinning its timeline. The AEC's views on the following specific questions should

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<sup>1</sup> These approximations are derived by comparing the 100% of ballots which under the scheme set out in the Bill would be processed centrally with the percentage of formal Senate votes in 2013 which were marked, or were deemed to have been marked, below the line.

be sought, on the assumption that candidate numbers and ballot paper sizes will be much the same as in 2013.

- (1) Where is it envisaged that the Central Senate Scrutiny operations will be conducted in each State and Territory?
- (2) Is it known that those premises will be available, given that the date of the forthcoming election is yet to be specified?
- (3) If the count is to proceed electronically, what is the staffing plan for each State and Territory? How many data entry staff will need to be employed, will they be working 24 hour shifts, and how many AEC staff will be needed to manage the operations? Is it known that the required number of data entry staff are in fact available in the market? How many computer terminals would be needed?
- (4) If the count is to proceed manually, what is the staffing plan for each State and Territory? How many counting staff will need to be employed, will they be working 24 hour shifts, and how many AEC staff will be needed to manage the operations?
- (5) For each State and Territory, how long after polling day would it take for (a) the first containers of Senate ballots, and (b) the final containers of Senate ballots, to reach the Central Senate Scrutiny?
- (6) How long will the process of securely checking in materials at the Central Senate Scrutiny take?
- (7) Under the various scenarios of electronic or manual counting, and for each State and Territory, how long after polling day would it take for (a) the first results of counting of 1<sup>st</sup> preferences, and (b) the final results of counting of 1<sup>st</sup> preferences, to be announced?

24. If reasonably well-based answers to these questions cannot be provided at the moment, the amendments proposed in the Bill to eliminate counting of Senate votes to candidates and groups on election night should not proceed.

### **Points of drafting**

25. The following questions regarding the drafting of the Bill could usefully be followed up by the Committee.

- The Bill proposes that there be inserted in the *Electoral Act* a new paragraph 273(4)(c) requiring the Australian Electoral Officer, as part of the scrutiny of Senate ballots, to:

“make, sign and keep a record of the preferences on the ballot papers that have been received by him or her (including informal ballot papers, and formal ballot papers that are not sequentially numbered)”.

It is not clear what this means, nor what might constitute such a record. While the electronic records kept as part of a computerised Senate scrutiny might qualify, the fact that the required record is to be signed would seem to suggest that a hardcopy is envisaged. (One might also note that it is the ballot papers themselves that are normally taken to be a record of the voters' preferences.)

- The Bill proposes that there be inserted in the Act a new paragraph 269(1A)(a) providing that:

“For the purposes of this Act ... a voter who, in a square printed on the ballot paper above the line, marks only a single tick or cross is taken as having written the number 1 in the square ...”.

It is not, however, clear whether a tick or a cross is deemed to be a number 1, making the vote formal, if the voter has also written additional numbers (2, 3 and so on) in squares above the line. This might seem an absurdly pedantic point, but since a House of Representatives ballot paper is informal even if it has been marked ✓, 2, 3 ... and the voter's intention is perfectly clear, common sense and intuition cannot be relied upon in construing formality provisions.

## Summary of recommendations

26. I would reiterate the following five recommendations.

- That the Committee seek advice from the AEC on how many ballot papers would have been saved from informality in each State and Territory had the Bill's proposed change to section 270 of the Electoral Act applied in 2013 (or 2014 in Western Australia).
- That the Committee seek from the AEC data, broken down by State and Territory, on how many below the line Senate votes in 2013 would have been saved from informality under the amendment proposed in the Bill, in comparison with the number which would have been so saved under the partial optional preferential voting scheme recommended by the Committee, supplemented by appropriate savings provisions.

- That the Committee stand by its original well-argued proposal for the introduction of partial optional preferential voting below the line.
- That the savings provision which the Bill proposes be applied to above the line votes be mirrored below the line, with ballot papers marked below the line being treated as formal provided that they show at least a first preference for a candidate.
- That the Committee seek the AEC's professional assessment and detailed explanation of how long it will take after polling day, under the proposal set out in the Bill, to make available (a) the very first, and (b) the final, results of the counting of the first preferences Senate votes for each candidate.

Extract from Michael Maley, 'Senate Electoral Reform' on AUSPUBLAW (29 September 2015) <<http://auspublaw.org/2015/09/senate-electoral-reform/>>.

### Genesis of the current reform proposals

Major Senate electoral system reforms have been seen only rarely: in 1948, when ['single transferable vote'](#) proportional representation (PR) was introduced (replacing the majoritarian system which had been used in various forms since federation), and in 1984, when the ['ticket voting'](#) system still in use was tacked onto the underlying PR system.

In 2014, the Parliament's Joint Standing Committee on Electoral Matters (JSCEM), in its report on [Senate voting practices](#), unanimously recommended that there be another major change to the system - replacing ticket voting with the 'above the line preferential' system now used for New South Wales Legislative Council elections. The recommendation highlights the extent to which recent events have been perceived as putting the current model under strain. Of particular significance was the 2013 election, which as I have noted [elsewhere](#), was remarkable in a number of ways.

- The 40 vacancies were contested by a record number of candidates, 529.
- The percentage of votes polled by parties already represented in the Parliament dropped significantly from 2010.
- In five out of the six States, a candidate was elected from a party which had never previously been represented in the federal Parliament.
- For the first time ever, the seats in one State, South Australia, were divided between five different parties.
- In Victoria, a minor party candidate was elected after having polled only 0.5 per cent of the first preference votes cast in the State.
- In Western Australia, the Senate election was declared void by the High Court sitting as the Court of Disputed Returns ([Australian Electoral Commission v Johnston](#)) and had to be re-run in early 2014, after it had been found at a recount of the votes cast in 2013 that a number of them had been lost, on a scale sufficient to have had the potential to affect the result.
- Allegations were reported in the media that some of the parties listed on the ballots had only a formal existence, and had been created for the purposes of exploiting opportunities for strategic manipulation of the ticket voting system.

For some commentators, this confluence of unusual developments sufficed to prove that a crisis was at hand; but a consensus on that point does not necessarily imply that causes and appropriate solutions will be obvious. To its credit, the JSCEM put considerable effort into analysing these, and came up with proposals which, if implemented, will produce the best electoral system ever used at Senate elections.

## A deeply rooted problem

To see how this 'perfect storm' developed, it is necessary to go right back to the introduction of PR for the Senate in 1948. The single critical decision taken then, which looks like a point of minor detail but in fact has fundamentally influenced all later developments, was that voters would be required to indicate preferences for all the candidates on a Senate ballot paper in order to cast a formal vote.

Prior to the introduction of PR, it was virtually impossible for a candidate to be elected to the Senate from outside the ranks of the major parties. With PR, however, the Senate was transformed into a feasible battleground for minor parties as well, as became apparent with the ALP split in the mid-50s, and the rise of the DLP. Successful minor party forays encouraged further candidacies from outside the mainstream, the number of candidates per vacancy trended upwards, ballot papers became larger, and the task faced by voters in numbering them all became more onerous. With the passage of time, voters came to be ever more dependent on 'how-to-vote' cards issued by the parties to get their numbering right (especially since party affiliations of candidates were not printed on ballot papers until 1984), but the informal vote percentage nevertheless grew inexorably, topping 9 per cent nationwide at every Senate election from 1970 to 1983. The phenomenon reached its nadir at the 1974 Senate election in New South Wales, where 73 candidates stood for ten seats, and every voter had to number every candidate on the ballot paper: the informal vote reached 12.31 per cent.

The Hawke government, when it came to power in 1983, perceived the paramount need to address the problem of informal voting at Senate elections, but was constrained (by lacking a majority in the Senate) from being able to introduce its proclaimed policy of optional preferential voting, which would have relieved voters of the obligation to number every candidate. It accordingly opted for the current ticket voting scheme, which in effect enables a voter, by the marking of a single square on the ballot paper, to adopt in total the how-to-vote card of his or her party (as formally lodged with the Australian Electoral Commission).

A further quaint feature of the system, included to meet the particular political needs of the Australian Democrats, is that a group of candidates may choose to lodge two or three tickets in lieu of one, in which case the votes cast with the intention of adopting the group's ticket are divided evenly between the two or three options, so if there are three tickets lodged by a group and 30,000 votes are cast for that group, the law deems 10,000 votes to follow each of the tickets. Finally, voters retain the option of indicating their own preferences for candidates, but those who do so are still instructed by the ballot paper to number every square. As there are two fundamentally different modalities for marking a vote, the ballot paper is divided in two by a large horizontal line, with squares for ticket voting appearing 'above the line', and individual candidates listed 'below the line'.

Because it was apparent from previous election statistics that the vast bulk of voters had been following how-to-vote cards anyway, the change was not seen as being a particularly momentous one. But one important point was overlooked, and this was the issue which came to a head in 2013. Up until 1984, the only parties which were able to issue how-to-vote cards were those which had the membership base, field structure and resources to enable them to distribute cards physically at polling places. With ticket voting, on the other hand, every group of candidates on the ballot paper could provide voters with, in effect, a 'virtual' how-to-vote card. This ultimately led directly to the phenomenon of 'preference harvesting', which enables a host of 'micro-parties' to exchange preferences with each other for their mutual benefit.

Preference harvesting as a technique was first refined at New South Wales Legislative Council elections in the 1990s. But as the percentage of the vote required to elect a candidate there (the 'quota') was much lower than at Senate elections, it took longer for the micro-party vote to build to levels at Senate elections at which preference harvesting would be feasible. The 2013 Senate election was the first at which such a strategy demonstrably succeeded.

While preference harvesting may ensure that at least one candidate from the parties sharing preferences will get elected, which candidate from which party will ultimately be successful is very much a matter of luck, being greatly influenced by the order of exclusion of candidates during the count, which in turn is heavily dependent on the (all relatively small) numbers of first preference votes they poll. It follows that a slight change in the first preference tally of one candidate can have major flow-on effects. [Elsewhere](#) I have described this as follows: 'in effect, ... [micro-party] candidates buy a lottery ticket, the price of which is the cost of the deposit, with first prize being six years in the Senate'.

### **Legitimacy Problem Mark I - True and false preferences**

All of this having been said, it is by no means clear that the election of candidates with small first preference vote percentages on the strengths of preference flows to them constitutes a problem: indeed, the possibility of such a thing happening is an essential feature of single transferable vote PR. The problem rather lies in the fact that it is most unlikely that the 'preferences' processed by the system are in fact held by the voters.

This is so because ballot papers these days are largely clogged up with obscure candidates, sometimes running for parties whose beliefs, as professed in their names, cannot necessarily be taken at face value. Many of these candidates scarcely campaign, leaving voters with no basis for assessing their relative merits. Faced with such ballot papers, voters who wish to specify their own preferences rather than adopting a ticket as their vote have no option but to lie, writing random or otherwise meaningless numbers against candidates once they have run out of genuine

preferences to express. For voters who wish to use the ticket voting option, the proposition that they have consciously adopted as their own personal preferences for each candidate those contained in a ticket is little more than a legal fiction.

It follows that it is entirely possible that a majority of the preferences which the Australian Electoral Commission enters into its computer system for the counting of Senate votes are spurious, in the sense that they do not correspond to a genuinely held belief on the part of the voters. This, more than any other factor, is the source of the crisis in the legitimacy of Senate elections.

### **Legitimacy Problem Mark II - Discrimination against some voters**

The second fundamental problem with the current system is that it discriminates against some voters, by making the act of voting comparatively difficult for them. This is so, at least, for any voter who wishes to cast a first preference vote for a candidate who does not appear in the first position on a ticket; such voters are required to number every square on the ballot paper.

One can give as an example here the case of a voter who wishes to vote for all the female candidates before all the male ones. This issue of discrimination was litigated early in the life of ticket voting ([McKenzie v Commonwealth](#)). While a single judge of the High Court declined on that occasion to issue an injunction restraining the conduct of the 1984 Queensland Senate election, it might be noted that there were only 29 candidates for that election, in contrast to the 110 who contested the 2013 Senate election in New South Wales.

It would seem at least arguable that there must come a point at which the number of preferences required to be expressed by a non-ticket voter would be such as to compromise the genuineness of the 'choice' which Senate voters make under [section 7](#) of the Constitution.

### **Legitimacy Problem Mark III - Unmanageable ballot papers**

At the 2013 election, the Senate ballot paper in New South Wales met a particular benchmark of absurdity: magnifying sheets had to be provided at polling places to enable voters to read the print, which had been reduced in size to enable all the candidates and groups to be shown. This highlights that mechanisms for imposing reasonable controls on ballot access - which are a feature of virtually all democratic elections - are fundamentally failing.



Antony Green has [noted](#) that:

The tactic of the micro-party alliance is to nominate candidates in every state to create giant ballot papers that encourage people to just vote one, to increase the pool of votes in the 'other' category, and to then toss them around from party to party using group ticket votes. The current electoral system encourages parties to enter the lottery for the final seat and encourages the fractionalisation of parties that might otherwise coalesce.

### The JSCEM's proposed system change

Under the 'above the line preferential' system proposed by the JSCEM, the voter can place not just a mark in one square above the line, but further preference marks as well in other above the line squares. Where a person so votes 'above the line', he or she is deemed to have expressed preferences for candidates as follows.

- In relation to the group in whose square the number '1' is placed, the voter is deemed to have expressed a first preference for the first candidate in the group, and subsequent preferences for the other candidates in the group in the order in which they appear on the ballot paper.
- Numbers written in other squares above the line are deemed to imply subsequent preferences for candidates of additional groups, again in the order which the candidates appeared within the group on the ballot paper.

The outstanding feature of the JSCEM's main proposal for reform is that it addresses (to a greater or lesser extent) every one of these fundamental sources of illegitimacy. The Committee's proposed optional preferential voting scheme would eliminate tickets to be adopted *in toto* by voters, and instead would require preferences to be ones determined and expressed by the voters themselves. With the requirement for full preferential numbering abolished, voters would no longer have to fill their ballots with meaningless numbers purely to ensure that their genuine first preference would be counted; they would, in other words, be able to vote truthfully. While there would still be some disparity between the ease with which different voters could vote, depending on the preferences which they wished to express, it would be vastly less than is currently the case. Finally, the possibility of preference harvesting strategies would be eliminated, and this could be expected to lead to a reduction in the number of groups and candidates, particularly if more rigorous ballot access mechanisms (such as increased deposits) or a changed ballot paper design were introduced.

In addition, while there are some points of detail yet to be resolved, it is highly likely that any marking of a ballot paper which is currently formal would continue to be formal under the reformed system, which would substantially reduce the risk of voter disenfranchisement.

Of course, in any major electoral reform, there will be winners and losers, and few will be surprised that governments tend to avoid system changes under which they will be losers. This, by itself, is not an argument against modifications which can be justified on legitimate democratic grounds. Certainly the JSCEM's proposal will make it harder for micro-parties to win seats through preference harvesting, but except from the perspective of those micro-parties' candidates, that would arguably be a good thing. It has also been suggested that this change might tend to prevent new minor parties from emerging and consolidating. This argument is rather more problematic: the major element of luck involved in preference harvesting could well have the effect of seeing candidates from different micro-parties elected at each poll, which would limit the extent to which each such party might be able to consolidate its position.

It should be noted also that the JSCEM's recommendations flowed from consideration of a wide range of reform options, some of which are discussed in detail in its report. For example, it considered, but decided against recommending, the deceptively simple proposal that a party should have to receive a specified minimum percentage of first preference votes in order to be eligible to win seats. ([My own submission](#) to the Committee dealt mainly with that suggestion.)