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The Senate electoral system: perspectives on reform

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Introduction

While the electoral system used in the House of Representatives has remained largely unchanged since 1918, successive parliaments have made a number of significant reforms to the method of electing the Senate since the first Commonwealth Electoral Act in 1902.[1] The debate over Senate electoral reform reignited in 2013, after weak party registration rules and group voting tickets allowed 'micro-parties'[2] to direct preferences in a manner potentially inconsistent with voter expectations, leading to the election of candidates with as little as 0.5 per cent of the primary vote.[3]

In response to a number of concerns surrounding the result of the 2013 Senate election, then Special Minister of State Senator Michael Ronaldson requested that the Joint Standing Committee on Electoral Matters (JSCEM) examine the Senate electoral system as part of its standard post-election inquiry in addition to the normal terms of reference.[4] Fairly early in its inquiry, which featured 21 days of public hearings and the consideration of over 200 submissions from various stakeholders, experts and interested members of the public, the JSCEM tabled an *Interim Report on Senate Voting Practices* (*Interim Report*) in May 2014.[5] The *Interim Report* was released early in the JSCEM's 2013 election inquiry to ensure the Parliament had enough time to amend the electoral system prior to the next election.

The Commonwealth Electoral Amendment Bill 2016 constituted the first response of the Government to JSCEM's inquiry. The Bill passed the Senate in an amended form on March 18, 2016 after 28 hours and 56 minutes of debate, the longest continuous sitting without breaks;[6] and the House of Representatives agreed to the Senate amendments shortly thereafter.[7] The Bill as passed abolished group voting tickets and compulsory full preferential voting, instead introducing a requirement that voters allocate at least six preferences above the line and 12 preferences below the line (with related savings provisions deeming ballot

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[1] *Commonwealth Electoral Act 1902* (Cth). Many prominent figures at the Australasian Federal Conventions had envisioned the first parliament would legislate for proportional representation in Senate elections. Despite this, the 1902 *Electoral Act* instead provided for first-past-the-post electoral systems in both the House of Representatives and the Senate. Preferential voting was introduced in Senate elections in 1919, with electors required to preference a minimum number of candidates, and in 1934 the ballot structure was modified to one of full preferential voting, with voters required to indicate an order of preference for every candidate on the ballot paper. In response to concerns about the continued dominance of single parties, the electoral formula was changed in 1948 from majoritarian to a version of proportional representation through single transferable vote. The electoral system and ballot structure remained unchanged from 1948 to 1983 when the Hawke Government introduced ticket voting above the line and full preferential voting below the line. See: John Uhr, *Why We Chose Proportional Representation*, Papers on Parliament No 34, 1999, Parliament of Australia, Department of the Senate.

[2] 'Micro-parties' are defined by the Collins Dictionary as 'small political parties, often focussing on a single issue.' Collins Dictionary website, accessed 28 February 2016.

[3] Australian Electoral Commission, '*First preferences by candidate – Vic*', Virtual Tally Room – 2013 Federal Election*,* 18 October 2013.

[4] Joint Standing Committee on Electoral Matters (JSCEM), *Interim Report on the inquiry into the conduct of the 2013 Federal Election: Senate Voting Practices*, Canberra, May 2014, p. xiii.

[5] The JSCEM's final inquiry report was published in April 2015. See: JSCEM, *Inquiry into and report on all aspects of the conduct of the 2013 Federal Election and Matters related thereto*, Canberra, April 2015.

[6] AAP News Desk, 'Senate passes voting law changes after marathon sitting' *Sydney Morning Herald*, (online edition), 18 March 2016; Parliament of Australia, *Procedural Information Bulletin No. 303*, Procedural Information Bulletins, 2016, Canberra, 2016.

[7] Parliament of Australia, *Commonwealth Electoral Amendment Bill 2016*, Parliament of Australia website, accessed 21 March 2016.

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papers with at least one preference above the line or six consecutive preferences below the line formal).[8] The new provisions of the *Commonwealth Electoral Act 1918* (Cth) (CEA) also provide for the introduction of party logos above the line on Senate ballot papers.[9]

The new Senate electoral system has been the subject of intense public debate and scrutiny since the Bill was introduced on 22 February 2016. Parliamentary support for the Bill was split along party lines. The Coalition, Greens and Independent Senator Nick Xenophon supported the Bill, while the ALP and most of the crossbench Senators opposed the Bill on political and constitutional grounds.[10]

Family First Senator Bob Day launched a constitutional challenge in the High Court of Australia against the Commonwealth and the Electoral Officer for South Australia on 22 March 2016 (the day after the Commonwealth Electoral Amendment Bill 2016 received royal assent), seeking an order restraining the defendants from issuing ballot papers for the next Senate election in the form of Form E as it stood following the amendments. A group of electors also launched legal action against the Electoral Officer of each State and Territory (other than South Australia) and the Commonwealth.[11] However, as the grounds of their application and the relief sought were substantially identical to those contained in Day's submissions, Chief Justice French ordered that the submissions filed in respect of Senator Day's proceedings stand as the submissions filed for the purposes of the Madden proceedings.[12] The Full Bench of the High Court heard the two matters together on 2 and 3 May 2016, and dismissed both cases with costs in a short 58 paragraph joint judgment on 13 May 2016.[13]

This paper analyses the recent debate over Senate electoral reform through constitutional law and political science lenses. The paper is divided into three parts. The first section discusses the impetus for reform of the Senate electoral system—the results of the 2013 general election—and outlines the differences between the electoral system used in the 2013 general election and the new model enshrined in the amended CEA. The second section discusses the extent of the Commonwealth's power to amend electoral laws, the limitations on judicial review of the CEA in the High Court, and the issues raised in Senator Day's unsuccessful High Court challenge. The final section considers the Senate as a house of review and the impact on it that the different electoral models have had, and could have.

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[8] *Commonwealth Electoral Amendment Bill 2016* (Cth), Items 19 -20 of Part 1.

[9] *Commonwealth Electoral Act 1918* (Cth), s 214A.

[10] In May 2014 when the *Interim Report* was released, it was with the support of the ALP members of the Committee. Opposition to the Bill, however, which sought to legislate JSCEM's recommendation for optional preferential voting in the Senate, became ALP party policy less than two years after the publication of the *Interim Report.* Some members of the ALP, including the former Shadow Special Minister for State Gary Gray, expressed the view that Senate voting reform was still an important issue. See: D Muller, *Commonwealth Electoral Amendment Bill 2016*, Bills Digest, 96, 2015–16, Parliamentary Library, Canberra, 2008, p. 5; G Gray, 'Second Reading Speech: *Commonwealth Electoral Amendment Bill 2016*', Senate, *Debates,* 24 February 2016, p. 2034.

[11] See: *Madden & Ors v Australian Electoral Officer for the State of Tasmania & Ors* S109/2016.

[12] *Day v Australian Electoral Officer for the State of South Australia & Anor; Madden &Ors v Australian Electoral Officer for the State of Tasmania & Ors,* [2016] HCATrans 85, Austlii website, accessed 10 April 2016.

[13] *Day v Australian Electoral Officer for the State of South Australia; Madden v Australian Electoral Officer for the State of Tasmania* [2016] HCA 20.

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Recent reforms to the Senate electoral system

Background: group voting tickets above the line and full preferential voting, 1984–2016

The previous Senate ballot structure of above and below the line voting was put in place in 1984, when it was introduced by the Hawke Government[14] on the recommendation of the Joint Select Committee on Electoral Reform (JSCER) (the predecessor to JSCEM).[15] Prior to the 2016 reforms the CEA provided for ticket voting with full preferences above the line, and full preferential voting below the line.[16] Ticket voting was generally interpreted at the time as an institutionalised version of the how to vote cards handed out by the major parties, which would operate to avoid the high rates of informal voting that had plagued Senate elections since 1970.[17] The JSCER stated in its 1983 report that:

> The 'list' system recommended for adoption at Senate elections is designed to simplify the voting process for those electors who are content to record on their ballot papers the preference ordering recommended by a particular party or candidate … It will be necessary, with the implementation of this recommendation, for parties or groups to register preferential lists with the proposed Electoral Commission.[18]

Under this system, electors could vote above the line by marking '1' against a registered group or incumbent senator. Once a vote above the line had been cast, the voter did not have control over preference flows and effectively accepted the preferences determined by the voting ticket or tickets lodged by the group or incumbent.

A registered group or an incumbent senator could lodge up to three voting tickets.[19] Preferences to group members had to be given in the same order across the tickets and before any other candidate who was not a registered member of the alliance.[20] If a group or incumbent senator lodged multiple tickets, the CEA stipulated that votes cast above the line were to be divided equally between the tickets.[21] If the total number of above the line votes for the group or incumbent was not divisible by the number of voting tickets lodged, special provisions existed in the CEA for determining the division of votes between the tickets.[22] It was impossible for the voter to know which of the tickets their vote would follow if they voted above the line, and, therefore, where their preferences would flow after the election or exclusion of the candidates in the group or the incumbent senator.

Alternatively, voters could choose to vote below the line, in which case they were required to express full preferences for all listed candidates – an onerous task in the larger states. Electors in New South Wales in the 2013 federal election who chose to vote below the line, for example, had to number 110 boxes; the print on the ballot paper was so small that magnifying sheets were provided at ballot booths.[23] Unsurprisingly, the above the line option proved the more popular method of voting. In the 2013 general election 96.5 per cent

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[14] *Commonwealth Electoral Legislation Amendment Act 1983* (Cth).
[15] Joint Select Committee on Electoral Reform (JSCER), *First Report*, Australian Government Publishing Service, Canberra, September 1983.
[16] *Commonwealth Electoral Act 1918* (Cth) previous s 209.
[17] Maley M, *Optional Preferential Voting for the Australian Senate*, Electoral Regulation Research Network working paper, 16, November 2013, p. 6.
[18] JSCER, *First Report,* op. cit., p. 64.
[19] *Commonwealth Electoral Act 1918* (Cth) previous s 211(2), previous s 211A.
[20] Ibid, previous s 211(2)(a)-(b).
[21] Ibid, previous s 272(2).
[22] Ibid.
[23] JSCEM, *Interim Report*, op. cit., p. v.

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of total formal votes were cast above the line, with only 3.5 per cent of formal votes being lodged below the line.[24]

The 2013 general election and the JSCEM inquiry

It may not have been foreseen in the early 1980s that group voting tickets could lead to a distribution of preferences that, in some cases, went beyond the will or knowledge of the voter, a phenomenon seen at the 2013 general election.

In its essentials, the way the system was used by parties to legally manipulate preference flows through group voting tickets is relatively simple to understand. Some or all of the micro-parties formed alliances under which they agreed to preference each other in their tickets ahead of any parties who were not part of the arrangement. This ensured that after the members of a group who lodged a ticket were elected or excluded, their preferences would be funnelled to the other parties in the alliance in a series of exchanges. The greater the number of parties that agreed to join an alliance, the greater the number of preferences that would be allocated to the last remaining candidate from the alliance after all others had been excluded or elected.

The harvesting of preferences in this manner in the 2013 general election led to unpredictable electoral results, for example, Ricky Muir was elected as a senator for Victoria on preferences with 0.5 per cent of the primary vote.[25] For a candidate to be declared elected in Victoria they had to attain a quota calculated at 483,076 votes (14.3 per cent of the vote).[26] However, according to the Australian Electoral Commission, the Motoring Enthusiasts Party (of which Mr Muir was the lead candidate in Victoria) received only 16,604 above the line votes, and Mr Muir received 479 below the line first preference votes.[27] Despite obtaining only 0.0354 of a quota through first preferences, Mr Muir was elected on preferences allocated through group voting tickets after the other candidates in the alliance were excluded.[28] It had previously been commonplace for senators from the major parties to be elected with equally small individual first preference votes, supplemented with votes transferred within a group according to the ticket; what was unusual in the 2013 general election was that candidates such as Mr Muir could be elected with both low individual and party first preference votes.

A number of criticisms of the previous electoral system and the 2013 general election Senate results were raised in the media, JSCEM hearings and submissions, and the JSCEM *Interim Report.* These included that results were being engineered by the preference deals not by the electors;[29] that the alliances formed between the micro-parties were inherently strategic and not motivated by any underlying shared ideology or view of public policy unbeknownst to voters;[30] that party registration requirements in Australia allowed for the registration of micro-parties that operated to funnel preferences to other parties controlled by the same individuals;[31] and that the mass registration of micro-parties was a deliberate strategy to congest the ballot

[24] Australian Electoral Commission, 'Senate group voting ticket usage', Virtual Tally Room – 2013 Federal Election, 1 November 2013.
[25] Australian Electoral Commission, '*First preferences by candidate – Vic*', op., cit.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] See for example: A Green, Evidence to Joint Standing Committee on Electoral Matters*, Inquiry into and report on all aspects of the conduct of the 2013 Federal Election and matters related thereto*, 7 February 2014, Canberra p. 1.
[30] See for example: K Bonham, Submission 140, JSCEM, *Inquiry into and report on all aspects of the conduct of the 2013 Federal Election and matters related thereto*, 10 April 2014, p.1.
[31] JSCEM, *Interim Report*, op. cit., pp. 23-25.

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paper in such a way as to make it as complicated for the voter as possible in the hope that disengaged voters would simply mark one above the line for the most appealing sounding party name.[32]

Arguments in favour of the previous electoral system and the strategy used by micro-parties included that: around a quarter of Australians did not vote for the Coalition, the Australian Labor Party (ALP) or the Australian Greens and that this should be reflected in the return;[33] the Senate is a house of review and should have a broader spectrum of representation than the major parties alone;[34] that the spotlight on micro-parties was unfair given senators from the major parties who were not first on their party group voting ticket were also elected with a small primary vote and casual vacancies are filled by candidates who have never contested an election at all.[35]

JSCEM made its view of the Senate result very clear in its *Interim Report,* stating that 'the 2013 federal election will long be remembered as a time when our system of Senate voting let voters down.'[36] The *Interim Report* made six recommendations.[37] Most relevant to this paper are recommendations 1 and 2, which proposed abolishing above the line voting tickets in the Senate and allowing optional preferential voting above and below the line on the Senate ballot paper.[38]

Optional preferential voting above the line and below the line: 2016

A number of different proposals aimed at overcoming the perceived problems with the Senate electoral system were put forward by commentators and politicians in the aftermath of the 2013 general election. The Commonwealth Electoral Amendment Bill 2016 (the Bill), however, constituted the first legislative response of the Government to JSCEM's *Interim Report*, introduced to the Parliament almost three years after the 2013 election.

As introduced, the Bill sought to abolish group and individual voting tickets and introduce a requirement that voters allocate at least six preferences above the line, with a related savings provision allowing ballot papers with at least one preference above the line to be deemed formal.[39] It did not relieve the burden on below the line voters, however; and, while in other respects broadly consistent with the JSCEM *Interim Report*, retained full preferential voting below the line contrary to the recommendations of JSCEM in the *Interim Report*.

On 22 February 2016 the Bill was introduced and read a first time, and the House of Representatives referred the Bill to the JSCEM for inquiry. JSCEM tabled its *Advisory Report* on 2 March, 2016 and recommended that the Government incorporate into the Bill a system of partial optional preferential voting below the line (with

[32] See for example: A Green, 'The Origin of Senate Group Ticket Voting, and it didn't come from the Major Parties', Antony Green's Election Blog, 23 September 2015.
[33] See for example: D Leyonhjelm, Transcript of evidence, JSCEM, *Inquiry into and report on all aspects of the conduct of the 2013 Federal Election and matters related thereto*, 28 April 2014, Canberra; Z Wang, 'Second Reading Speech: *Commonwealth Electoral Amendment Bill 2016*', Senate, *Debates,* 17 March 2016, p. 2386.
[34] See for example: Z Wang, 'Second Reading Speech', op. cit., p. 2386.
[35] R Lewis, 'Ricky Muir hits out at call for Senate reforms', *The Australian,* (online edition), 29 December 2015.
[36] JSCEM, *Interim Report,* op. cit., p. v.
[37] Ibid, pp. xvii-xviii.
[38] Ibid. Recommendation 3 was that the AEC be adequately resourced to provide a voter education campaign to explain the amendments to the Senate electoral system. Recommendation 4 related to strengthening the party registration requirements. Recommendation 5 was that the new party registration requirements apply to all new parties immediately and all existing parties within 12 months. Recommendation 6 related to candidates being resident in the state in which they were seeking election. See: ibid.
[39] *Commonwealth Electoral Amendment Bill 2016* (Cth) as at first reading, Items 20 of Part 1.

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voters instructed to mark a minimum of 12 preferences below the line and a related savings provision allowing any ballot with at least six boxes numbered in a sequential order to be considered formal).[40]

Following the recommendation of JSCEM, the Government amended clause 239(1) of the Bill in the Senate to include partial optional preferential voting below the line. The Bill passed the Senate in its amended form on 18 March 2016 and the House of Representatives agreed to the amendments later that sitting day.

Opposition to the Bill from the ALP[41] and most of the crossbench senators was reiterated in the debate, including the second reading speeches, and commentary in the media, with senators raising concerns surrounding the rushed timeframe they had to consider the Bill[42] despite the government commenting that the Senate would have as much time as required to debate the Bill,[43] a lack of consultation with the public,[44] the effect of the changes on the diversity of elected representatives,[45] potential for future Coalition dominance of the Senate,[46] and the constitutionality of the Bill.[47] The senators who supported the Bill cited the extensive inquiry JSCEM undertook when producing the *Interim Report,* the support of the ALP members of JSCEM for the *Interim Report*[48] and the more recent JSCEM inquiry leading to the *Advisory Report* to counter the arguments raised against the passage of the Bill.[49]

Provisions of the amended CEA

In short, the CEA now provides for optional preferential voting above the line for a party without group voting tickets and optional preferential voting below the line for individual candidates.[50] The ballot paper instructs voters to number a minimum of six boxes above the line. The savings provisions recognise that voters had long been able to vote just '1' above the line, and were designed to not invalidate the votes of those who had not yet adjusted to the new system. Under this system the order of candidates within the party is still nominated by the party. If an elector were to preference three boxes above the line, their preferences would be counted towards the members of the group that received their first preference above the line in the order in which they are listed in the group. Their preferences would then proceed to the members of the group who received their second above the line preference, and then to the members of the group who received their third above the line preference, in the order in which they are listed in the group. If an elector only expresses one preference above the line, their preferences only extend to the candidates in that particular party, in the order in which they are listed in the group.

[40] JSCEM, *Advisory Report on the Commonwealth Electoral Amendment Bill 2016*, Canberra, March 2016, p. xiii.
[41] The former Shadow Special Minister for State, Gary Gray, noted that Senate voting reform was still an important issue. See: G Gray, 'Second Reading Speech', op. cit., p. 2034.
[42] See for example: J Collins, 'Committee of the whole debate: *Commonwealth Electoral Amendment Bill 2016*', Senate, *Debates*, 17 March 2016, p. 2408; P Wong 'Committee of the whole debate: *Commonwealth Electoral Amendment Bill 2016*', Senate, *Debates*, 17 March 2016, p. 2436.
[43] See for example: M Cormann, 'Reference to Committee: *Commonwealth Electoral Amendment Bill 2016',* Senate, *Debates,* 17 March 2016, p. 2401.
[44] Ibid.
[45] See for example: Z Wang, 'Second Reading Speech', op. cit., p. 2386.
[46] See for example: P Wong 'Committee of the whole debate', op. cit., p. 2462.
[47] See for example: B Day, 'Committee of the whole debate: *Commonwealth Electoral Amendment Bill 2016*', Senate, *Debates*, 17 March 2016, p. 2616.
[48] The *Interim Report* was a unanimous report of JSCEM, with additional comments from Senator Nick Xenophon.
[49] See for example: M Cormann, 'Second Reading Speech: *Commonwealth Electoral Amendment Bill 2016*', Senate, *Debates,* 17 March 2016, p. 2392.
[50] *Commonwealth Electoral Act 1918* (Cth), s 239.

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Alternatively, a voter can vote for individual candidates below the line, with savings provisions deeming a ballot paper with at least one to six consecutive preferences formal. Apart from the aforementioned amendments to the method of voting, the CEA as amended also provides for the introduction of party logos next to party names above the line on the ballot paper.[51]

The new Senate electoral system aims to ensure that electoral outcomes in the Senate will better reflect the intentions of voters and reduce the scope for preference harvesting between parties in the future. Despite this, concerns have been raised that optional preferential voting above the line presents a risk of high rates of vote exhaustion if the voter does not express a preference for a party that has enough votes to remain in the count.[52] If an elector only preferences one party or multiple small parties and the sum of candidates selected is fewer than there are Senate vacancies, the vote stays within the party or parties to the extent that preferences are allocated and is exhausted. This could lead to the election of candidates who have not attained a quota in future elections, a possibility long anticipated under subsection 273(17) of the Act which requires that the continuing candidate with the most remaining votes be elected.[53]

The Senate electoral system and the Commonwealth Constitution

The power to amend the Senate electoral system

In *Lange v Australian Broadcasting Corporation* (1997), the High Court held that 'sections 1, 7, 8, 13, 24, 25, 28 and 30 of the *Constitution* give effect to the purpose of self-government by providing for the fundamental features of [Australian] representative government.'[54] The High Court recognised, however, that the drafters of the *Constitution* left much of the detail of Australian representative democracy to be prescribed by ordinary legislation, with only the irreducible minimum content enshrined in the *Constitution.*[55]

One of the most significant examples of the power given to the Commonwealth Parliament to alter the system of representative government by statute is the power to legislate with respect to elections. Under section 51(xxxvi) of the *Constitution*, the Parliament has the power to legislate 'with respect to…. matters in respect of which this *Constitution* makes provision until the Parliament otherwise provides.'[56] Matters that fall within this head of power include the method of electing senators under section 9 of the *Constitution*, subject to express and implied constitutional limitations.

The *Constitution* requires that senators be 'directly chosen by the people'[57] and that the method of electing senators must be 'uniform across the States'.[58] The implied limitations are that the electoral system must

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[51] Ibid, s 214A.
[52] A Twomey, 'Is a constitutional challenge to Senate voting reforms likely to succeed?', The Conversation website, accessed 2 March 2016.
[53] D Muller, *Commonwealth Electoral Amendment Bill 2016*, Bills Digest, 96, 2015–16, Parliamentary Library, Canberra, 2008, p. 14.
[54] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, [1997] HCA 25, 557 (full bench).
[55] *Mulholland v Australian Electoral Commission* (2004) 209 ALR 582, [2004] HCA 41, [586] Gleeson CJ; [600] (McHugh J).
[56] *Commonwealth Constitution*, S 51(xxxvi).
[57] Ibid, S 7.
[58] Ibid, S 9.

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allow for a 'free and informed choice by the people'[59] and satisfy the requirements of the constitutionally-prescribed system of representative government.[60]

Apart from the express and implied constitutional limitations, the choice of electoral systems has been deemed by the High Court to be a chiefly political non-justiciable matter.[61] As the Commonwealth observed in its submissions to the High Court regarding Senator Day's constitutional challenge, the question of whether a first-past-the-post system of voting [is] more or less democratic than a system of preferential voting or whether the current system of electing senators [is] more or less democratic than the previous system 'are not questions to which the law supplies an answer.'[62]

Due to the ambiguous nature of the express and implied constitutional limitations, substantial amendments to the CEA have provided fertile ground for High Court challenges by candidates, particularly where amendments have been regarded as partisan or discriminatory against a class of candidate.[63] In such cases the High Court must construe and define the text of the *Constitution,* ultimately answering the question 'what do the terms and structure of the *Constitution* prohibit, authorise or require'[64] in respect of federal electoral laws.

Jurisdictional and procedural limitations on judicial review

Litigants have two principal means of seeking judicial review of various aspects of Commonwealth elections.

First, an elector or losing candidate may invoke by petition the High Court's jurisdiction as the Court of Disputed Returns, the final arbiter of disputes over the return in a single electorate. The Court of Disputed Returns is empowered to declare that any person who was returned as elected was not duly elected, to declare any candidate duly elected who was not returned as elected, or to declare an election void.[65] It is not permissible, however, to mount a constitutional challenge against the electoral system or the whole of a general election through the Court of Disputed Returns, with the petitioner only allowed to challenge the election in the division of the State or Territory for which he or she was enrolled on the basis of alleged illegal practices or other electoral misconduct.[66]

The second and more appropriate avenue to mount a challenge against Commonwealth electoral laws is to bring a constitutional case in the High Court's original jurisdiction. There have been numerous challenges to provisions of the CEA that are argued to infringe constitutional rights and limitations on legislative power. However, the likelihood of success is constrained by the complexity of bringing a constitutional challenge in the High Court.[67]

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[59] *Lange* (1997), op. cit., 524 (the Court).
[60] Ibid; *Roach v Electoral Commissioner and Another* (2007) 233 CLR 162, [2007] HCA 43; *Rowe and Another v Electoral Commissioner and Another* (2010) 243 CLR 1, [2010] HCA 46.
[61] *Judd v McKeon* (1926) 38 CLR 380, [1926] HCA 33, 383 (Knox CJ, Gavan Duffy and Starke JJ); *Mulholland,* op. cit., 189-190 (Gleeson CJ).
[62] Commonwealth of Australia, 'Submissions of the Second Defendant: No S77 of 2016', High Court of Australia Sydney Registry, 12 April 2016, accessed 16 April 2016, p. 4.
[63] Paul Pirani, 'Current Issues and Recent Cases on Electoral Law – The Australian Electoral Commission perspective', The Samuel Griffith Society, Hobart, 2012, accessed 4 February 2016.
[64] *Lange,* op. cit., 567.
[65] *Commonwealth Electoral Act 1918* (Cth), S 360 (i)-(x).
[66] Ibid, S 355(c).
[67] G. Orr and G. Williams, 'Electoral Challenges: Judicial Review of Parliamentary Elections', *Sydney Law Review*, 23(53), 2001, p. 73. See for example: *Abbotto v Australian Electoral Commission* (1997) 144 ALR 352, [1997] HCA 18; *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, [1975] HCA 53; *Ditchburn v*

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Successful constitutional challenges and failed challenges that were comprehensively explored by the Full Court have historically been brought by well-funded litigants who have expert legal representation.[68] Although there are many examples of self-represented litigants challenging provisions of the CEA in recent decades, their claims have usually been dismissed by a single judge without extensive consideration of the legal merits of their claim.[69] As stated by Orr and Williams, 'the process of gathering evidence, interpreting the legal categories and pleading a petition is complex enough for the practitioners who find occasional work in the field.'[70]

Furthermore, the High Court cannot act as a plaintiff's lawyer and can only consider the constitutional issues pleaded by the plaintiff, no matter how obvious the legal merits of a different constitutional argument may be to the Court. This means that an aspect of the electoral system held to be compatible with a particular section of the *Constitution* in one case may be held to be unconstitutional in a latter case when argued on a different basis, contrary to the broad statements of some commentators that certain cases have 'upheld the constitutional validity' of challenged electoral laws.[71]

Senator Day's High Court challenge

Senator Day and the plaintiffs in *Madden & Ors* [2016] unsuccessfully challenged the constitutionality of the recent amendments to the CEA on five grounds:

a. The amended provisions of the CEA prescribe two different methods of voting, contrary to section 9 of the *Constitution*.[72]

b. The above the line voting system is an indirect method of election, contrary to section 7 of the *Constitution*.[73]

c. The method of calculating a quota in Senate elections (the 'droop' system) and the 'unfair cascading springboard effect'[74] of the redistribution of surplus votes from party candidates who have surpassed a quota:

    a. Are contrary to the 'proportionate principle' inherent in the system of representative government;[75]
    b. Disenfranchise one-seventh of the electorate;[76] and
    c. Discriminate against independents and small parties.[77]

Australian Electoral Officer for Queensland [1999] HCA 40; *Judd v McKeon* (1926) 38 CLR 380, [1926] HCA 33; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, [1997] HCA 25; *Langer v Commonwealth* (1996) 186 CLR 302, [1996] HCA 43; *McClure v Australian Electoral Commission* (1999) 73 ALJR 1086, [1999] HCA 31.

[68] Ibid.

[69] Ibid.

[70] Ibid.

[71] See for example: C. Hull, 'Is it time to challenge the Senate voting system?', *Sydney Morning Herald* (online article), January 23 2016, accessed January 24 2016.

[72] Senator Robert John Day, 'Submissions of the plaintiff: S77 of 2016', High Court of Australian Sydney Registry, 5 April 2016, accessed 10 April 2016, pp. 1-2.

[73] Ibid, pp. 5-8.

[74] Ibid, p. 10.

[75] Ibid.

[76] Ibid, p. 8.

[77] Ibid.

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d. The instructions on the ballot paper (found in Form E of the amended Act) hinder and interfere with the exercise of the right to a free and informed vote by only describing two of multiple different methods of making a formal vote.[78]

e. The instructions on the ballot paper (found in Form E of the amended Act) are contrary to the constitutional principle of representative government and the implied freedom of political communication.[79]

The following sections will consider each of the plaintiff's submissions and the High Court's reasoning in turn.

Argument A: More than one method of voting

Senator Day argued that the amended CEA provides for two different methods of voting contrary to section 9 of the *Constitution*; an optional first-past-the-post/preferential method of voting for parties above the line, and a compulsory preferential method of voting for candidates below the line.[80] The relevant part of section 9 states that 'The Parliament of the Commonwealth may make laws prescribing the *method* of choosing senators, but so that the method shall be *uniform* for all the States'[81] [emphasis added].

The plaintiff relied on section 4(1) of the amended CEA to support this contention, which sets out the definition of 'the dividing line' on the ballot paper in Form E as a line which 'separates the *voting method* described in section 239(1) from the *voting method* described in section 239(2)' [emphasis added]. Chief Justice French expressed doubt over Senator Day's reliance on section 4(1) in the directions hearing held on 24 March 2016, stating 'the word *method* in the definition of *dividing* does not necessarily tell you that the means adopted constitute something that is not a uniform method for the purposes of the *Constitution'*[82] and that this argument 'might be said to be a case of a statutory tail waving a constitutional dog.'[83]

Contrary to the plaintiff's argument, the Commonwealth submitted that the term 'method' in section 9, as defined by Quick and Garran, refers to the 'whole process of the election, including the mode of nomination, the form of writs and ballot papers, the mode of voting, the mode of counting votes' etc. which continues to operate uniformly between the states under the amended CEA, not simply the electoral system used to elect senators.[84] In other words, the Commonwealth argued that Form E provides for one method, within which the voters exercise a choice as to how many candidates they wish to vote for.[85]

The Full Bench agreed with the Commonwealth's characterisation of section 9, stating 'the evident purpose of s 9 was to provide for a method of choosing Senators uniform across the States'[86] and 'what the plaintiffs contended for is a pointlessly formal constraint on parliamentary power to legislate in respect of Senate elections which has nothing to do with the purpose of national uniformity.'[87]

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[78] Ibid, pp. 11-14.
[79] Ibid, pp. 14-15.
[80] Ibid, p. 3.
[81] *Commonwealth Constitution*, s. 9.
[82] *Day v Australian Electoral Officer for the State of South Australia & Anor* [2016] HCATrans 73, Austlii website, accessed 10 April 2016.
[83] Ibid.
[84] Commonwealth, 'Submissions', op. cit., p. 6; J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth*, Melville and Mullen, 1901, pp. 425-426.
[85] Ibid.
[86] *Day* [2016], op. cit., [44].
[87] Ibid.

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It is an open question as to whether Senator Day's characterisation of above the line voting as a vote for parties not individuals would have succeeded if a narrow construction of the word 'method' had of been adopted by the High Court. In *McKenzie v Commonwealth* (1984),[88] Chief Justice Gibbs (sitting alone) held that the *Constitution* requires electors to vote for individual candidates not political parties, but also clarified that the *Constitution* does not forbid the use of a system that enables the elector to vote for individual candidates by reference to a party, as is the case in the amended CEA.[89]

It also appears unlikely that the High Court would have held that the different savings provisions for above and below the line voting create more than one voting method (under the narrow construction of the word 'method'). The practical effect of such an argument would be that savings provisions of the kind in the current and previous Senate electoral systems are constitutionally invalid. The argument stands in contrast to the comments of the High Court in *Langer v Commonwealth* (1996)[90] regarding the enhancement of representative democracy through savings provisions; with Justice Gummow observing that savings provisions operate in aid of the principle that the ballot 'being a means of protecting the franchise, should not be made an instrument to defeat it'[91] and Justice Dawson stating that 'the Act allows more than one method of casting a formal vote'[92] without finding the relevant sections of the Act constitutionally invalid.

Argument B: Directly chosen by the people

Senator Day contended that above the line votes allocated via parties are an indirect method of election contrary to section 7 of the *Constitution* which provides that senators shall be 'directly chosen by the people…'[93] As stated in Day's submissions 'in no real sense is such a vote made 'immediately' for a candidate, but for the intermediary, the party. A senator chosen in this way is not 'directly chosen by the people'.'[94]

In *Ditchburn v Australian Electoral Officer for Queensland* [1999],[95] the question of whether senators elected through the accumulation of above the line preferences were 'directly chosen by the people' arose for consideration. The petitioner argued that voting by reference to a group or ticket conflicted with the common law principle from *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975)[96] that there can be no interposition of an electoral college between the voter and the elected candidate. Justice Hayne applied Chief Justice Gibbs' reasoning in *McKenzie,* and held that the CEA did not prescribe an indirect method of electing senators.[97]

The Court dismissed argument B, stating that:

> [a] vote marked above the line is as much a direct vote for individual candidates as a vote below the line. To number a square above the line identifies the candidates appearing beneath that square below the line… the requirement of direct choice excludes indirect choice by an electoral college or some other intermediary. That is not the case here.[98]

Senator Day also argued that the identification of parties by logos on the ballot paper impairs the making of a direct choice by the people. To the extent that independent candidates are treated differently from

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[88] *McKenzie v Commonwealth* (1984) 59 ALJR 190, [1984] HCA 75.
[89] *McKenzie v Commonwealth* (1984) 59 ALJR 190, [1984] HCA 75., [6] (Gibbs CJ).
[90] *Langer v Commonwealth* (1996) 186 CLR 302, [1996] HCA 43.
[91] Ibid, 347 (Gummow J).
[92] Ibid, 322 (Dawson J).
[93] *Commonwealth Constitution*, s 7.
[94] Day, 'Submissions', op. cit., p. 7.
[95] *Ditchburn v Australian Electoral Officer for Queensland* [1999] HCA 40.
[96] *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, [1975] HCA 53.
[97] *Ditchburn* [1999], op. cit.
[98] *Day* [2016], op. cit., [48]-[49].

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registered parties in not having logos on the ballot paper, the Commonwealth submitted that there is a substantial and constitutionally compatible reason for such differential treatment.[99] The rationale obvious on the face of the CEA and also evident from extrinsic material, the Commonwealth argued, is the easy identification by voters of parties and by extension, the candidates whom those parties endorse and that this is compatible with the constitutional system of representative government.[100]

The High Court did not consider this argument, but has previously accepted the public interest in laws 'to reduce confusion in the size and form of the ballot paper; to diminish the risk and actuality of deception of electors; [and] to discourage the creation of phony political parties.'[101] It is possible that the High Court would consider the identification of parties by logo as a comparable means to avoid confusion between political parties with similar names as logos operate to facilitate, rather than impede, voter choice.

Argument C: Directly proportional representation, disenfranchisement and discrimination

Argument C can be broken down into three separate sections: proportional representation, disenfranchisement and discrimination.

Directly proportional representation

Senator Day argued that there is a constitutional requirement of proportional representation inherent in the system of representative government, in which the choice of senators must be 'directly proportional as near as practicable to the vote they receive '*by the people of the State voting… as one electorate''*.[102]

The Commonwealth submitted in the alternative that any implied principle of proportional representation found in the *Constitution* is in reference to calculating the numbers of seats within the Senate and the House of Representatives under section 24, not in the method of electing individual senators.[103]

Further, the Commonwealth argued that the plaintiff's submission regarding directly proportional representation mandates a specific method of calculating a quota in which candidates must attain one sixth of the vote (if there are six vacancies) under the *Constitution*, which is inconsistent with the power given to the Parliament to legislate the method of election (including the regulation of the mode of counting votes) under section 9.[104] This reflects previous statements of the High Court on the power to legislate the method of election, with the Court only intervening in cases of malapportionment if the result was so grossly disproportionate as to raise the question of whether the members of Parliament were directly chosen by the people.[105]

The joint judgment dismissed Senator Day's argument without considering the Commonwealth's alternative arguments, stating 'the principle of proportional representation by reference to population is plainly not applicable to the Senate, where, by virtue of s 7, each State has equal representation, regardless of population.'[106]

The disenfranchisement of electors

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[99] Commonwealth, 'Submissions', op. cit., p. 9.
[100] Ibid.
[101] *Mulholland* (2004), op. cit., 659-660 (Kirby J).
[102] Day, 'Submissions', op. cit., p. citing the *Commonwealth Constitution,* ss 7, 24 and 128.
[103] Commonwealth, 'Submissions', op. cit., p. 10.
[104] Ibid, p. 11.
[105] *Attorney General (Commonwealth); Ex rel McKinlay,* op. cit.
[106] *Day* [2016], op. cit., [51]

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Building on the directly proportional representation argument, Senator Day submitted that the 'Droop' method of calculating a quota is unconstitutional as it disenfranchises one seventh of the population.[107] The droop quota is calculated by dividing the total number of first preference votes by one more than the number of candidates required to be elected and by increasing the quotient obtained by one. Day argued that because successful candidates only need to attain 14.3% of the ballot to reach a quota under this method (rather than one sixth of the vote in the case of six vacancies), one seventh of the electorate find their vote is worth 'nil value'.[108]

The High Court has previously held on a number of occasions that the choice of electoral system is a question for the Parliament and the Court will not dictate what the law should be. Rather, the Court will only intervene if an electoral law is found to contravene an implied or express constitutional limitation on legislative power. As stated by constitutional law academic Professor Anne Twomey:

> it is when laws directly or indirectly disenfranchise people, such as preventing prisoners from voting or cutting off the electoral rolls early that the High Court has invalidated electoral laws. The validity of exclusions from voting, such as those based on age, citizenship or imprisonment, will depend on whether there is a substantial reason for the exclusion, compatible with the maintenance of the system of representative government.[109]

Contrary to Senator Day's claim, Professor Twomey argues that no one is disenfranchised under the new Senate electoral system as no one's right to vote is being limited or taken away. 'Not only does everyone who already had the right to vote retain it, but the ability of voters to express and control their voting choices is enhanced.'[110] Voters who choose to vote above the line are now fully aware of the flow of their preferences, as opposed to the case of split tickets under the previous system.

Consistent with Professor Twomey's analysis, the Commonwealth submitted that one seventh of the electorate are *not* disenfranchised by the quota; rather, their vote is simply not a vote for a winning candidate.[111] To illustrate the point, the Commonwealth provided the example of a single-member electorate 'where the representative who receives 51% of the vote is nonetheless meaningfully regarded as having been "chosen" by the electorate as a whole. The position remains the same in multi-member electorates. Self-evidently, it cannot be the case that the choice made by the people is required to be a unanimous one.'[112]

The High Court found no constitutional basis for Senator Day's disenfranchisement argument, stating that 'there is no disenfranchisement in the legal effect of the voting process'[113] and 'the plaintiff's submissions did not identify any relevant constraint on electors in the means available to them for completing a formal Senate ballot paper.'[114]

Discrimination against independents and small parties

Senator Day also submitted that as a result of the 'Droop' quota and the redistribution of surplus votes above the line to other candidates from the same political party, the new electoral system unfairly discriminates against independent candidates and small parties.[115] The Commonwealth argued that any inherent

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[107] Day, 'Submissions', op. cit., p. 9.
[108] Ibid.
[109] Professor Anne Twomey, *High Court unlikely to strike down voting laws*, Sydney University News & Opinion Website, 22 March 2016, accessed 23 March 2016.
[110] Ibid.
[111] Commonwealth, 'Submissions', op. cit., p. 13.
[112] Ibid.
[113] *Day* [2016], op. cit., [53]
[114] Ibid.
[115] Day, 'Submissions', op. cit., p. 10.

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discrimination or unfairness in the electoral system is a question of opinion about which reasonable minds may differ, not law, the natural consequence of the argument being that this issue is beyond the scope of the Court's jurisdiction.[116]

In *McKenzie v Commonwealth* (1984) Chief Justice Gibbs had to consider whether the discrimination against independent candidates who could not lodge a voting ticket above the line infringed 'general principles of justice' and the requirement of 'democratic methods' implied in the words 'directly chosen by the people' in section 7 of the *Constitution.*[117] Gibbs CJ was 'prepared to assume' that such a requirement of democratic methods existed, however, held the disadvantage experienced by independent members did not 'so offend […] democratic principles as to render the sections beyond the power of the Parliament to enact.'[118]

The difference between the requirement of full preferential voting above the line in the previous system and optional preferential voting above the line in the amended CEA becomes relevant here, with the likelihood of vote exhaustion in the new system higher. The High Court has previously stressed the importance of maximising public participation in elections;[119] however, there have been conflicting opinions from the bench on the constitutionality of vote exhaustion. In *Langer v Commonwealth* (1996), for example, Justice Dawson took the view that deliberately voting 1, 2, 3, 3, 3 reflected an elector's choice even though their preferences may exhaust at 3, fulfilling the requirement that senators be directly chosen by the people.[120]

Both Professor Twomey and the Commonwealth have argued that Day stretches the Court's prior statements on the maximisation of public participation too far, with the practical effect of his argument being that anything less than compulsory full preferential voting would be constitutionally invalid.[121] The Commonwealth submitted that this is contrary to the legislative power of the Commonwealth under section 9 of the *Constitution* to select the method of electing senators.[122]

The High Court did not consider the discrimination argument explicitly, reiterating that the marking of squares above the line is a vote for candidates whose names appear below the line, not for parties.[123]

Argument D and Argument E: A free and informed vote and the consitutitional system of representative government

Finally, Senator Day argued that the instructions on Form E (the ballot paper) and the amended CEA are likely to 'mislead or deceive an elector' and hinder or interfere in the exercise of the right to a free and informed voter, contrary to the implied freedom of political communication and the constitutional system of representative government.[124] This is because the instructions do not disclose the savings provisions and other methods of casting a formal vote that are more advantageous to candidates such as Day and, therefore, interferes with voters' right to be informed of all methods of voting.[125] The Commonwealth argued that the plaintiff had not identified any 'coherent basis' for this contention, as there is nothing misleading or confusing in being told of two different ways to vote.[126]

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[116] Commonwealth, 'Submissions', op. cit., p. 13.
[117] *McKenzie* (1984), op. cit.
[118] Ibid.
[119] *Rowe* (2010), op. cit.
[120] *Langer* (1996)*,* op. cit., p. 326(Dawson J). Note: Dawson J was a dissenting judge in the result of this case.
[121] Twomey, *High Court Unlikely,* op. cit.; Commonwealth, 'Submissions', op. cit., 14.
[122] Commonwealth, 'Submissions', op. cit., 14.
[123] *Day* [2016], op. cit., [53]
[124] Day, 'Submissions', op. cit., p. 12.
[125] Ibid, pp. 11-12.
[126] Commonwealth, 'Submissions', op. cit., p. 13.

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Previous statements of the High Court on the breadth of the implied freedom of political communication have made it clear that the freedom is negative in nature–in other words, the freedom of political communication is a limitation on the legislative power of the Commonwealth, not a positive right of individuals to be informed.[127]

In the context of ballot practicality, the inclusion of instructions for every single way of casting a formal vote on ballot papers could result in the font in large states such as New South Wales becoming so small as to be near-unreadable, with the ballot paper already the largest size it possibly can be. This would arguably compromise the ability of an elector to make a free and informed vote. The statements of Justice Kirby in *Mulholland* (2004) (as discussed above) surrounding the validity of legislation designed to simplify the ballot paper for electors are relevant here.

The High Court did not consider whether the relevant sections of the amended CEA burdened the implied freedom of communication or the constitutional system of representative government as this argument failed 'at its threshold'.[128]

The Senate as a house of review

Political theorists have long debated the virtues of bicameral legislatures, with a multitude of arguments put for and against the necessity of second chambers since antiquity.[129] As stated by John Stuart Mill:

> of all topics relating to the theory of representative government, none has been the subject of more discussion…than what is known as the question of the Two Chambers…and has been regarded as a sort of touchstone which distinguishes the partisans of limited from those of uncontrolled democracy.[130]

The French revolutionary publicist Emmanuel-Joseph Siéyès succinctly explained the perpetuation of this debate when he wrote, 'if a Second Chamber dissents from the first, it is mischievous; if it agrees with it, it is superfluous.'[131]

There was very little debate in the Constitutional Conventions about whether the Commonwealth Parliament would be bicameral or unicameral, with the question answered before the first Convention in 1891 and not challenged in the second Convention of 1897-1898.[132] As Bennett has stated, 'the concept seemed to have been accepted automatically'[133] by the framers of the *Constitution*.

Three intertwined rationales are of particular importance when considering the effect of electoral laws on the constitution of the Senate: the adequate representation of the people, the house of review justification and the necessity of a parliamentary check on the powerful executive. As there is no past election data on the new electoral system and it is impossible to predict how the amended CEA will affect the representative quality of the Senate, this paper cannot make firm conclusions surrounding the effect of the amended CEA on the Senate as a house of review. Rather, the following sections will consider the important public policy

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[127] See for example: *Mulholland* (2004), op. cit.
[128] *Day* [2016], op. cit., [56]
[129] For an overview of the historical debates regarding bicameralism, see: M Russell, *The Contemporary House of Lords: Westminster Bicameralism Revived,* Oxford University Press, Oxford, 2013.; H Evans, *Odgers' Australian Senate Practice,* Canberra, 2010.; N Aroney, J R. Nethercote and S Prasser, *Restraining Elective Dictatorship: The Upper House Solution,* University of Western Australia Press, Crawley, 2008.
[130] J S Mill, *Utilitarianism, Liberty, and Representative Government,* J. M. Dent & Sons Limited, London, 1948, p. 324.
[131] E. J. Sieyes cited in J. A. R. Marriott, *Second Chambers,* 2nd edition, Clarendon Press, Oxford, 1927, p. 1.
[132] S Bach, *Platypus and Parliament: The Australian Senate in Theory and Practice*, Department of the Senate, Canberra, 2003.
[133] S Bennett, *The Making of the Commonwealth,* Cassell Australia, Melbourne, 1971, p. 112.

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issues that need to be considered when amending the CEA, and the historical relationship between the CEA and the review function.

The adequate representation of the people

First, a bicameral parliamentary structure where the two chambers are constituted on different bases is said to help improve and enhance the representative quality of the Parliament.[134] This is so as the introduction of an upper house ensures that representation goes beyond winning a simple majority of votes in one election and encompasses the state of electoral opinion in different phases of development.[135] The requirement for the consent of two differently-constituted assemblies guarantees that the parliament is not controlled by a particular group not properly representative of the entire community.

Many prominent figures at the Australasian Federal Conventions had envisaged that the first parliament would legislate for proportional representation in Senate elections. Despite this, however, the first parliament rejected the Barton Government's proposal for proportional representation in the Upper House after vigorous debate in the Senate, on the ground that it would undermine the strength of party government.[136] The 1902 *Electoral Act* instead provided for first-past-the-post electoral systems in both the House of Representatives and the Senate.

The 1903 and 1906 Senate elections resulted in a two-thirds to one-third distribution of seats between non-Labor parties and Labor.[137] Once the major political parties had become more established, however, the first-past-the-post voting system began to deliver striking results in the Senate. The effects of this system were best illustrated by the elections in 1910, 1918, 1925, 1934 and 1943. In the 1910 and 1943 elections, Labor won all the vacant seats, whereas in the 1918, 1925 and 1934 elections, the non-Labor parties won all the vacant seats.[138] While the first-past-the-post electoral method was simple enough for the electors to understand (a desirable attribute in a democratic system), the obvious shortcoming was that the political party (or parties) that dominated the House of Representatives election were also achieving electoral majorities in the Senate that were disproportionate to their share of the vote, undermining the ability of the Senate to fulfil its roles of review, scrutiny and representation.[139]

Preferential voting was introduced in Senate elections in 1919, with electors required to preference a minimum number of candidates, and in 1934 the ballot structure was modified to one of full preferential voting, with voters required to indicate an order of preference for every candidate on the ballot paper. When the number of seats in the Senate was increased in 1948, concerns were raised about continued dominance of single parties in a larger chamber. The 1948 amendments introduced proportional representation, a reform which was both criticised as being politically motivated by the Chifley Government's fear of losing control of both houses of parliament, and praised, for fulfilling the visions of the constitutional framers.[140] *Odgers' Australian Senate Practice* cites the introduction of proportional representation in 1948 as the moment when the parliamentary government of the Commonwealth shifted from majority rule to representation of the people.[141] As noted by Reilly and Maley, between 1949 and 1983 there was a relatively steady upward trend in the number and diversity of candidates per vacancy in Senate elections, with minor

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[134] Evans, *Odgers',* op. cit., p. 1.
[135] Ibid.
[136] John Uhr, *Why We Chose Proportional Representation*, op., cit.
[137] Stephen Barber and Sue Johnson, *Federal election results 1901–2014*, Research Paper Series, 2014–2012, Parliamentary Library, Parliament of Australia, p. 5.
[138] Ibid.
[139] In 1910, for example, the ALP won 50.3% of the vote, but won 100% of the vacant seats. See: Barber and Johnson, *Federal election results,* op. cit., p. 63.
[140] John Uhr, *Why We Chose Proportional Representation*, op., cit.
[141] Evans, *Odgers',* op. cit., p. 6.

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party and independent candidates recognising that the change in electoral formula offered non-mainstream candidates a greater chance of electoral success than under the first-past-the-post system.[142]

Arguments can be put for and against the representative quality of the Senate being enhanced by the election of micro-party candidates through group voting tickets under the previous electoral system. On the one hand, the election of the micro-parties saw a greater number and diversity of political parties represented in the Parliament with different ideologies and policy ideas brought to the negotiating table. On the other hand, it is difficult to reconcile the election of a candidate who received less than 0.5 per cent of the primary vote with the concept of representation of the people through popular election.

The Senate electoral formula remains one of proportional representation under the amended CEA. Despite this, however, without the requirement of full preferential voting, it will likely be more difficult in future elections for independent and minor party candidates to be elected to the Senate, with the new electoral system benefiting candidates who campaign and gain popular support, not candidates who engage in complex preference deal making. As discussed above, ALP Senators have even gone so far as to argue that the new electoral system will ensure Coalition majorities in future elections; however, it is impossible to model whether these assertions are in fact correct and the extent to which the new electoral system will affect the representative quality of the Senate.

House of review

Due to the colocation of the executive and the legislature in Westminster-style parliaments, it is widely accepted that a house of review is essential to the conventions of responsible government. In parliaments with strong bicameralism such as the Australian Senate, where both houses have similar powers to introduce and block legislation[143], are constituted on different bases, and the dominant party in one house may not be the dominant party in the other, however, the extent and type of review that should be conducted by the upper house is often contested.[144]

The exact nature and definition of the review function is disputed. The Australian political scientist Richard Mulgan has argued that the term 'review' implies scrutiny of government action, not the process of negotiating over the substance of policy, and therefore, review is not an intrinsically upper house function.[145] *Odgers' Australian Senate Practice,* on the other hand, characterises the review function of the Senate as a quality control on the making of laws.[146]

This difference of opinion over the extent of Senate review is most pronounced when considering the question of 'electoral mandates'. Put simply, governments can argue that they have an electoral mandate to pass their proclaimed legislation, whereas the opposition and crossbench senators contend that they similarly have an electoral mandate to review, amend and oppose government bills.

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[142] Ben Reilly and Michael Maley, 'Single transferable vote and the alternative vote compared', in *Elections in Australia, Ireland and Malta under the Single Transferable Vote: Reflections on an Embedded Institution,* edited by Shaun Bowler and Bernard Grofman, University of Michigan Press, Ann Arbor, 2000, p. 53.

[143] The Australian Senate is more powerful than the original Westminster-style second chamber, the House of Lords, which cannot block money bills for longer than a month. See: Constitution Education Fund Australia, 'A comparison: House of Lords and the Australian Senate', Constitution Education Fund Australia website, 4 September 2015, accessed 5 June 2016.

[144] M Goot, 'Whose Mandate? Policy Promises, Strong Bicameralism and Polled Opinion', *Australian Journal of Political Science,* 34(3), 1999, p. 332.

[145] R Mulgan, 'The Australian Senate as a House of Review', *Australian Journal of Political Science,* 31(2), 1996, p. 191.

[146] Evans, *Odgers',* op. cit., p. 1.

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It is self-evident that the capacity for the crossbench and opposition parties to review, amend or oppose legislation will evolve if the representative quality of the Senate is diminished by the recent electoral changes. Depending on the distribution of seats between parties and the crossbench, the review function may in fact be enhanced for some groups and senators to the detriment of others. Concerns reportedly expressed by some ALP senators over the possible effect of the reforms on the Senate as a 'progressive' body (in relation to entrenchment of a Coalition majority)[147] highlight the continuing importance attached to the Senate as a house of review. Arguably, the review function would be affected by the entrenchment of *any* party majority. It is worth noting there that, while unusual, the situation of a party having an absolute majority in the Senate is not unprecendented.[148]

A parliamentary check on the powerful executive

Bicameral parliamentary structures are also an important components in ensuring the executive is scrutinised, and the Parliament is not beholden to the arbitrary motives of the government of the day.[149] This justification has a long history, expounded in clearest terms by the French philosopher Baron de Montesquieu in 1748 when he warned that 'when the legislative and executive powers are united … there can be no liberty'[150] and by the American founding father James Madison in the *Federalist Papers* when he stated:

> it [a second chamber] doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one, would otherwise be sufficient.[151]

This line of argument evolved to focus on the dominance of parliaments by major parties in the twentieth century in Westminster-style democracies, with Donald Horne expressing concern in 1964 that 'in Australia, parliaments are now mainly of ritualistic significance.'[152] A decade later, Lord Hailsham voiced the same concern in reference to the United Kingdom Parliament, stating '…the government controls the parliament, and not parliament the government…'[153] and 'we live in an elective dictatorship, absolute in theory, if hitherto thought tolerable in practice.'[154]

The ability of the Senate to provide a safeguard against misuse of law making power is also dependent on the balance of power arrangements. Arguments can be put that under the previous electoral system there was a clear check on executive power, with the government forced to negotiate with much of the crossbench separately (as opposed to having to negotiate with only one party such as the Australian Democrats or the Australian Greens). The number of senators the executive has to negotiate with, however, is not necessarily indicative of the level of scrutiny the executive is subject to, with the ideological and policy leanings of crossbench and opposition senators also a determinative factor.

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[147] N Savva, 'Conroy and Wong lead the charge as Labor goes to war with itself', The Australian, 25 May 2015, p. 12.
[148] Since 1949 parties have had absolute majorities in the Senate for a number of periods, including 1951-56 and 1959-62 (LP-CP Coalition in government) and, more recently, 2005-2007 (LP-NP Coalition in government).
[149] Ibid, p. 5.
[150] C Montesquieu, *The Spirit of Laws, vol. 1,* trans. Thomas Nugent, Batoche Books, Ontario, 2001, p. 173.
[151] J Madison, 'No.62', in *The Federalist Papers*, ed. C. Rossiter, New American Library, Ontario, 1961, p. 378-379.
[152] D Horne, *The Lucky Country,* Penguin, Melbourne, 1964, p. 178, in Aroney, Prasser and Nethercote, *Restraining Elective Dictatorship: The Upper House Solution?,* op. cit., p. 1. For further discussion of this period of critique, see: Aroney, Prasser and Nethercote, *Restraining Elective Dictatorship,* op. cit., pp. 1-3.
[153] Lord Hailsham, 'Elective Dictatorship', *The Listener*, 21 October 1976, p. 496.
[154] Ibid.

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Conclusion

This paper has considered the recent debate over Senate electoral reform, Senator Day's unsuccessful constitutional challenge to the newly amended provisions of the CEA, and the relationship between electoral reform and the Senate's role as a house of review.

The Day High Court case perhaps reflects confusion over the parameters of the Commonwealth's power to amend electoral legislation. Ultimately, in considering what the terms and structure of the *Constitution* prohibit, authorise and require in respect of federal electoral laws, the High Court upheld the validity of the amended CEA, with Senator Day's case grounded in political considerations rather than successful constitutional arguments.

At this stage it is impossible to predict how the new electoral system will affect the Senate's role as a house of review. Beyond the July 2016 double dissolution election and the associated lower threshold required for election to the Senate,[155] it is entirely possible that the micro-parties and independent candidates will face a steeper obstacle at future half-Senate elections. The introduction of optional preferential voting and the elimination of group voting tickets under the new system should ensure that those candidates who campaign and have enough popular support to hand out how to vote cards at ballot booths will benefit.

Commonwealth of Australia

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[155] At 'standard' half-Senate federal elections the quota of votes required for election to the Senate is 1/7 of the total formal vote, whereas at double dissolution elections the quota required is almost half this—1/13 of the total formal vote—due to the greater number of Senate vacancies to be filled.

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