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Committee Secretary
Joint Standing Committee on Electoral Matters
Parliament House
Canberra ACT 2600

Dear Secretary

Inquiry into the Commonwealth Electoral Amendment Bill 2016

Thank you for the opportunity to make a submission to this inquiry. Subject to one amendment that I set out below, my view is that this Bill should be passed.

Is there a problem with the current system?

There are a number of ways to measure the health of a voting system. One of the most important is how well the system translates the preferences of voters into electoral outcomes.

Put simply, as far as possible, the outcome should be determined by whom voters would actually like to see elected. This, and not the relative interests of those seeking election, ought to be the primary consideration.

The current system for Senate elections fail this test. It is capable of producing results that are not fairly reflective of voters preferences, and indeed may even be contrary to them.

One symptom of the problem was NSW voters being issued with a magnifying glass to read the 2013 Senate ballot paper. This was necessary in NSW because there was a record 110 senate candidates and the ballot paper was 45 columns wide. The reason for the profusion of parties and candidates was people realising that they could exploit the voting system to produce outcomes that had little relationship to voters actual intentions. This was based upon:

- Voters have the option of making the full extent of their preferences known, but this can be an elaborate and complex exercise. Filling in say 110 boxes below the line takes a level of commitment beyond almost every voter, and creates the prospect that minor mistakes will lead to informality.

- Voters can take the simple option of numbering one box above the line, but in doing so they abandon control over their preferences to the party of their choice. Overall, over 95% of voters choose this method, meaning that the distribution of preferences in the Senate is determined largely by deals between parties.
- The above the line preferential system lacks transparency. By and large, voters have no idea of where the party of their choice will actually their preferences. Parties can enter into agreements with other parties involving the transfer of votes across ideological lines. This means that a person can vote for a party only to find that their preferences end up with a different party that they would never have considered voting for.

These weaknesses in the Senate voting system enable a profusion of parties with tiny levels of popular support to exploit an unwieldy ballot paper. They can manipulate preference flows and aggregate preferences. The result is a lottery in which a micro party securing an infinitesimal first preference vote can win a seat in the Senate.

This is a perversion of Australian democracy. It means that the composition of the Senate may not reflect the will of the people. It can instead reflect voter confusion and the inability of people to grasp a complex web of preference deals.

Assessing the proposed reforms

The voting method proposed by the Commonwealth Electoral Amendment Bill 2016 is a major improvement on the current system. Critically, in all but one respect discussed below, it allows voters to determine the flow of their preferences, and so electoral outcomes, rather than permitting these to be determined by political parties on their behalf. This is assisted by the proposal to include party logos on the ballot paper.

My preference for achieving this outcome is for full preferential voting above the line, rather than the proposed optional preferential system. Full preferential voting would need to be accompanied by generous savings provisions, as is the case with the proposed system. I prefer full preferential voting because it is consistent with current federal voting methods, and because it is desirable for the full preferences of voters to be play out, rather than allowing a large number exhausted ballots.

I do not say though that the proposed reforms should be rejected on the basis that they favour optional preferential rather than full preferential voting above the line. Optional preferential voting is still a major improvement upon the current system.

The proposed reforms are also to be welcomed on the basis that they do not raise barriers to entry for new candidates and parties. The current system has certainly been shown to be open to wide participation from groups and candidates. This will remain the case (subject to a sensible amendment preventing the duplication of party officers), meaning that the only alteration is to bring about a voting system more respectful of the real preferences of voters.

One flaw that does need to be fixed

The introduction of a new system of above line voting necessarily has implications for below the line voting. In particular, introducing optional preferential above the line voting, while retaining full preferential voting for below the line, creates an obvious and unfortunate

disparity. The result will be a system in which below the line voting is significantly more onerous, thereby privileging the party-selected voting tickets applied in the case of an above the line vote.

This gives rise to a similar problem to that evident in the current system. The system as amended would unduly favour the ordering of candidates suggested by parties, rather than enabling voters an accessible and straightforward means of themselves selecting the order of preference for party candidates.

If the logic behind the proposed reforms is followed through (that voter preferences should determine outcomes), this problem must be fixed. Without this, the system will still be loaded towards enabling parties to affect the result in a way that is not a true reflection of voter preferences. Disturbingly, it would do this in a way that would create the impression that this Bill is designed to harm the electoral chances of minor parties while retaining the capacity of major parties to manipulate the preferences of voters through the ordering of candidates.

My preference would be to have full preferential voting above and below the line, along with generous savings provisions. In the event that this does not occur, and the current proposal for optional preferential voting above the line is maintained, a like system should be introduced for below the line voting. For example, the Bill could be amended in line with the Interim Report on the 2013 Federal Election by this Committee:

Recommendation 1

The Committee recommends that section 273 and other sections relevant to Senate voting of the Commonwealth Electoral Act 1918 be amended to allow for:

- optional preferential above the line voting; and
- ‘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 recommends that appropriate formality and savings provisions continue in order to support voter intent within the new system.

The Commonwealth Electoral Amendment Bill 2016 should not be passed until this problem is remedied.

Constitutional considerations

Any system for Senate voting must comply with the terms of the Constitution. In particular, section 7 states that Senators must be ‘directly chosen by the people’. Recent High Court decisions, notably *Roach v Electoral Commissioner* (2007) 233 CLR 162 and *Rowe v Electoral Commissioner* (2010) 243 CLR 1, demonstrate the willingness of the High Court to strike down electoral legislation as being inconsistent with the Constitution.

The full bench of the High Court has not been called upon to decide whether the current system of above and below the line Senate voting is valid. The only decision on point is by a single justice, Chief Justice Gibbs, in *McKenzie v Commonwealth* (1984) 57 ALR 747. In rejecting an application for an injunction to prevent the 1984 election, the Chief Justice indicated that the current Senate electoral system is consistent with the Constitution. He stated at [6]-[8]:

it is right to say that the electors voting at a Senate election must vote for the individual candidates whom they wish to choose as senators but it is not right to say that the Constitution forbids the use of a system which enables the elector to vote for the individual candidates by reference to a group or ticket. Members of Parliament were organized in political parties long before the Constitution was adopted and there is no reason to imply an inhibition on the use of a method of voting which recognizes political realities provided that the Constitution itself does not contain any indication that such a method is forbidden. No such indication, relevant to the present case, appears in the Constitution.

The second principal ground taken by the plaintiff is that it offends general principles of justice to discriminate against candidates who are not members of established parties or groups. Section 7 of the Constitution provides, amongst other things, that the Senate shall be composed of senators for each State directly chosen by the people of the State. I am prepared to assume that s 7 requires that the Senate be elected by democratic methods but if that is the case it remains true to say that 'it is not for this Court to intervene so long as what is enacted is consistent with the existence of representative democracy as the chosen mode of government and is within the power conferred by s 51(xxxvi)' of the Constitution to use the words of Stephen J in *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, at pp 57-58.

In my opinion, it cannot be said that any disadvantage caused by the sections of the Act now in question to candidates who are not members of parties or groups so offends democratic principles as to render the sections beyond the power of the Parliament to enact.

This decision does not bind the full bench of the High Court. However, the reasoning is persuasive and likely to be followed. It is consistent with subsequent decisions of the High Court that have emphasised that the federal Parliament has significant leeway in determining the electoral system to be applied to the selection of members of Parliament.

For example, Chief Justice Brennan stated in *Langer v Commonwealth* (1996) 186 CLR 302, 307:

Provided the prescribed method of voting permits a free choice among the candidates for election, it is within the legislative power of the Parliament.

That case also stands as authority for the proposition that a voting system, such as that being proposed here, can be protected by provisions that make it an offence to advocate a vote in a different form, even if in that form the vote would be formal due to savings provisions. Hence, the Commonwealth Electoral Amendment Bill 2016 might proscribe any attempt by a person to encourage voters merely to mark 1 above the line on their ballot paper.

Further dicta is also relevant. As Chief Justice Gleeson stated in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 190-191:

[T]he overriding requirement that senators and members of the House of Representatives are to be 'directly chosen by the people' ... imposes a basic condition of democratic process, but leaves substantial room for parliamentary choice, and for change from time to time.

In the same case, Justice McHugh stated at 207:

the Constitution does not mandate any particular electoral system, and, beyond the limited constitutional requirements outlined above, the form of representative government ... is left to the Parliament. This includes 'the type of electoral system, the adoption and size of electoral divisions, and the franchise'. As a result, the Parliament may establish an electoral system that includes compulsory voting. It may specify a particular voting method – for example, preferential or proportional voting or first past the post voting. It may provide for the election of an unopposed candidate and the election of a candidate on final preferences and may limit voters' ability to cast a formal vote and to vote against a candidate.

In light of such statements, it is difficult to see that a decision by Parliament to implement the Senate voting system set out in the Commonwealth Electoral Amendment Bill 2016 could be challenged successfully on constitutional grounds. No doubt if the Bill retains the current discrimination between above and below the line voting, this might assist any challenge, but even then it is difficult to see that it would succeed.

It should also be stated that if any challenge succeeded, it would likely mean that the current system is also invalid. It is difficult to see that there are grounds for differentiation between the two such that the current system could be upheld, while the proposed system would be struck down.

Yours sincerely

George Williams