Submission to the Joint Standing Committee on Electoral Matters

Inquiry into the Provisions of the Commonwealth Electoral Amendment Bill 2016

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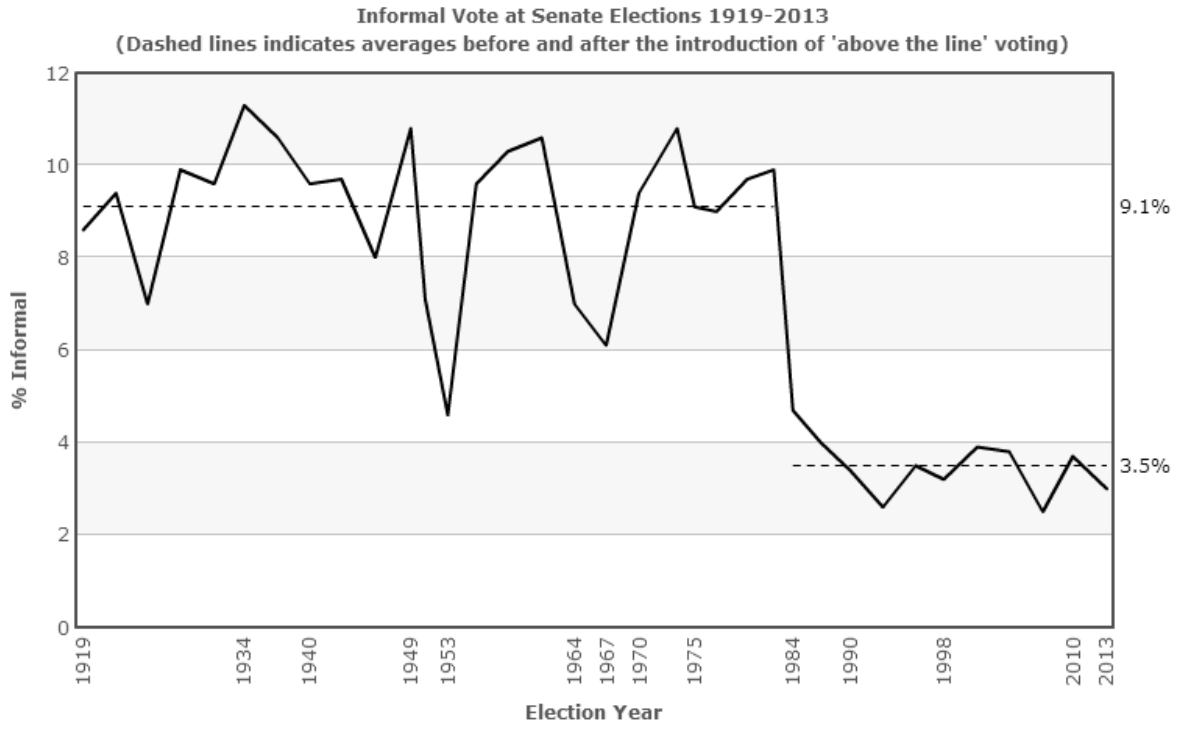
28 February 2016

Introduction

Group Voting Tickets and the 'above' and 'below' the line structure of Senate ballot papers were first introduced for the 1984 Federal election. At the time the Labor Party was proposing optional preferential voting as a solution to the then chronic rate of informal voting. Other parties were opposed to optional preferential voting. Ticket voting and the new ballot paper were proposed by the then Australian Electoral Office as an alternative solution.

As the graph below shows, the new ballot paper has been successful in reducing the rate of informal voting. The 9.1% average rate of informal voting that applied from 1919 to 1983 has fallen to an average of 3.5% since 1984.



The Senate's ticket voting model has since been implemented, with minor modifications, to elect Legislative Councils in South Australia (1985), New South Wales (1988), Western Australia (1989) and Victoria (2006).

When introduced, group ticket votes were viewed as merely institutionalising the existing system of how-to-vote cards. Ticket voting marginally increased the control over preferences of the larger parties. What had not been properly thought through at the time was that ticket voting for the first time allowed smaller parties to take control of their preferences.

The first preference vote of parties is related to campaign effort. Candidates and parties that campaign for votes poll relatively more strongly than parties and candidates that do not campaign.

As we see in House of Representatives elections, candidates and parties that campaign for votes with how-to-vote material also have an ability to influence preferences. Yet in the Senate, group voting tickets means that control of preferences is no longer related to campaign effort. Whether a party campaigned outside every polling place in the country or not, group voting tickets delivered control over preferences.

That the power of group voting tickets could be harnessed to elect candidates with very low votes was first noticed in NSW at the 1995 state election. This was the first Legislative Council election held to elect 21 members using a reduced quota of 4.55%.

Alan Corbett of A Better Future For Our Children was elected having polled only 1.3% of the vote and having spent only $1,589 on his campaign. His victory was achieved not by what we now know as preference harvesting, but simply from him finishing relatively high on the list of polling parties thanks to his friendly party name. Most other independent and minor party groups on the ballot paper had listed him high on their group voting tickets.

The example was duly noted and produced an explosion of minor parties along with preference harvesting on an industrial for the 1999 state election. That the problem was going to occur was evident two years before the election. I addressed it in an article in the Sydney Morning Herald on 10 June 1997

> *Under current electoral laws, the 1999 election for the NSW Legislative Council could be reduced to political farce. Instead of 21 members elected reflecting the will of the people, the result could be distorted by electoral rorting and voter confusion.*

I went on to warn about the dangers of larger ballot papers and smaller font size, and prophetically wrote:

> *The result of the election could be determined by voters incapable of reading the ballot paper, unable to manipulate a ballot paper one metre square, or simply bewildered and unable to find the party they want to vote for.*

I also noted that:

> *The current growth in registered parties is clearly about manipulating this process with a string of stalking horse parties with attractive names running to attract votes that can be delivered as preferences to other related minor parties or perhaps to one of the major parties.*

A surge of minor-party registrations in the run-up to the 1999 NSW Legislative Council election saw me return to the topic and warn that:

> *Voters will be faced with a farcical ballot paper stacked with stalking-horse parties, the final result owing more to shady backroom deals and the random chance of the draw for ballot positions. The state's political balance of power may well fall to a bunch of ragtag political fringe dwellers. (Sydney Morning Herald, January 27, 1999)*

The ballot paper at the 1999 NSW Legislative Council election was one metre by 700mm, and listed 264 candidates across 81 groups triple decked across three rows of candidates and parties.

NSW responded to the problem in 2000 by toughening party regulation and abolishing group voting tickets. Above the line voting was retained, but a single '1' above the line now only provided preferences for candidates in the chosen party column. A new option was provided to allow preferencing for parties above the line, with preferences for candidates of the parties imputed from the above the line preferences.

The NSW reforms have now been used for four elections and was the model adopted by the Joint Standing Committee on Electoral Matters (JSCEM) in its report on the 2013 Senate election.

Other states have run into similar problems with preference harvesting and giant ballot papers. South Australia has been plagued by the problem and tightened its laws for the 2014 election and is

currently considering a proposal to abandon the Senate system altogether and move to a D'Hondt list system.

The 2013 Western Australian election saw an outbreak of new parties and preference harvesting and the election of the Shooters and Fishers Party in one region. Much larger ballot papers and preference harvesting were also a feature of the 2014 Victorian Legislative Council election which saw the election of two Shooters and Fishers representatives along with representatives from the Sex Party, the Democratic Labour Party and Vote 1 Local Jobs.

The JSCEM recommendations would have ended giant ballot papers and preference harvesting by abolishing group ticket voting, introducing optional preferential voting 'above the line', and tightening party registration.

Whatever the merits and de-merits of the proposals as they relate to results, the key problem addressed by JSCEM is the ridiculous situation faced by voters in 2013 where –

- They were presented with gigantic ballot papers in a reduced font so small the Australian Electoral Commission (AEC) issued magnifying sheets to allow voters to read them.
- Voters faced opaque preference deals that it was nearly impossible to understand.

The government's response to the JSCEM report should address most of these issues, though whether it will produce a smaller ballot paper may take more than one election to determine.

However, I do have several comments on the Legislation.

The Requirement to Number at Least Six Preferences Above the Line

The JSCEM proposal to adopt the NSW system of a single '1' above the line had one problem. The NSW Legislative Council quota is 4.55%, the Senate quota 14.29%. More than 80% of NSW Legislative Council ballot papers consist of only a single '1', creating a very high rate of exhausted preferences.

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

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

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

The proposed savings provision that allows ballot papers to remain formal even with fewer than six preferences should ensure a minimal increase in informal voting. Any vote above the line that is currently formal will also be formal under the proposed system.

A similar provision operates for ACT Legislative Assembly elections. Voters are instructed to complete as many preferences as there are vacancies to fill, five or seven preferences in the past. Any vote with fewer than the required preferences is also formal. At the 2012 ACT election, only around 2% of ballot papers had fewer preferences than the number listed on the ballot paper.

There may be some confusion if parties distribute how-to-vote material showing fewer preferences than suggested on the ballot paper. It would be possible to ban the distribution of such material, but as with the 'Langer' provisions in the 1980s, such a ban would provoke someone into testing the law.

The one downside of the proposal is that it will be much more difficult for the AEC to conduct the count. Currently only around 5% of ballot papers need to be data entered to the count. In NSW around 25% of ballot papers are data entered.

I suspect more than 75% of ballot papers will have preferences above the line, which will mean a massive increase in data entry load for the AEC.

Counting Senate Votes on Election Night

The government's bill originally proposed to abandon counting Senate first preference votes out by party in polling places on election night. Counting by party in Divisional Returning Offices post-election was also abandoned.

With the more complex method of above the line voting, a more centralised counting procedure has to be adopted. However, abandoning election and DRO Senate counts left as indeterminate the time frame for when any Senate figures would be released.

The re-insertion of counting procedures into the bill is to be welcomed in allowing more transparency to the count.

However, the AEC still faces a major problem with counting ballot papers from ordinary pre-poll votes. Some pre-poll counts now involved tens of thousands of ballot papers, and the AEC has struggled to deal with this massive load on election night. It has meant staff staying back very very late to complete the count.

A solution may be to allow the AEC to defer counting of pre-poll Senate votes as the ballot papers are already secured on AEC premises.

Recommendation 1 – That the counting of pre-poll Senate votes be deferred where the ballot papers are already secured on AEC premises.

Below the line Voting

It is disappointing that the legislation does not proceed with the proposal by JSCEM to introduce optional preferential voting below the line.

The legislation includes an increase in the number of sequence errors from three to five. However, this change can have no more than a minimal impact on the number of ballot papers declared informal.

By allowing six preferences above the line and requiring full preferences below the line, the legislation creates cases where ballot papers with the same effective preferences are treated differently depending on whether the ballot paper is completed above or below the line.

Ballot papers with optional preferences above the line produce an imputed sequence of preferences for candidates that would be informal if completed as a below the line vote.

For example, if an elector wanted to vote 1 to 6 for six micro-parties above the line, and each of those parties had two candidates, the vote would be formal and treated as a sequence of preferences from 1 to 12 for candidates below the line.

If a voter tried to fill in the same sequence of candidate preferences as a below the line vote, the vote would be informal as full preferences are required. Even worse, if the voter wanted to vary the order of the candidates from the order the candidates are listed by party, the voter would have to number every square.

So voters are granted the right to optional preferential voting, but only if the voter accepts the candidates as ordered by the party.

It is the sort of inconsistency that attracts the attention of the High Court, especially when Section 7 of the Constitution states that Senators should be 'directly elected by the people'. By this legislation Parliament will allow voters to optionally express preferences for candidates in the order presented by parties, but deny voters the option to optional give preferences for the same candidates in a different order.

If the High Court were to object to this sort of vote, it would only be a matter related to below the line votes.

It seems odd, having accepted that voters should not be required to preference all parties above the line, that the legislation would then retain the onerous full preferences requirement for the far more numerous candidates listed below the line.

It also seems odd given the small number of votes involved. In Victoria, where 1-5 optional preferential voting below the line is allowed in the Legislative Council, only 6.1% of voters made use of the option. This compares to 2.7% in the Victorian Senate election in 2013.

Six preferences above the line would correspond to 12 preferences below the line for a minimum two candidates per group. I believe this would be an appropriate number of preferences for candidates below the line.

Recommendation 2 – That voters be instructed to show at least 12 preferences for candidates below the line.

Registration of Political Parties

JSCEM recommended a series of changes related to party registration. In particular, it recommended that the number of members required for registration be increased from 500 to 1,500.

As set out in the JSCEM report, Commonwealth party registration rules are considerably weaker than under state legislation. On a per population basis the number of members required for Commonwealth registration is lower than the states, and the tests of party membership are considerably weaker.

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

However, the matter should be re-visited after the election and I would make the following recommendations

Recommendation 3 – that the documentary proof of electors being member of a political party for registration be toughened.

Recommendation 4 – in line with New South Wales and Queensland, the test for registration should be party membership, and the loop hole allowing parliamentary parties to be registered should be removed.

Senate Nominations

Independents nominating for the Senate need to be nominated by 100 electors on the electoral roll. The name of no elector can be used to nominate more than one candidate.

This means that an Independent Senate group of two candidates in any state must have 200 unique nominators.

In contrast, registered political parties do not need nominators. Any registered party is free to nominate candidates for the Senate contest in each state, even if the party has no presence in the state.

At the 2013 Senate election, numerous micro-parties nominated candidates in every state. In Tasmania, several of the micro-party candidates in contention for the final Senate seat did not live in Tasmania and appeared to have little or no connection to the state.

Eight micro-party candidates defeated at the 2013 Senate election in the eastern states were nominated by their parties for the 2014 Western Australian Senate re-election.

JSCEM recommended putting a residence test on Senate nomination, but this appears constitutionally doubtful.

An alternative approach would be to bring back nominators for Senate candidates, which also has the advantage of putting party and independent Senate groupings on the same basis.

Recommendation 5 – Nominators should be re-introduced for Senate candidates.