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## **SUBMISSION TO THE JOINT STANDING COMMITTEE ON ELECTORAL MATTERS – ASPECTS OF THE SENATE ELECTORAL SYSTEM**

### **Introduction**

1. This Submission addresses two issues relating to reform of the Senate electoral system:

- the introduction of optional preferential voting to replace the current method of voting “below-the-line”; and
- the suggestion which has been made for the introduction a threshold of first preference votes which would have to be polled to enable a candidate to win a seat.

### **Optional preferential voting**

2. In a recent paper entitled *Optional Preferential Voting for the Australian Senate*<sup>1</sup> (the “Optional Preferential Voting paper”) I summarised what I saw as some of the main issues regarding the Senate electoral system which had arisen at the 2013 federal election, and set out arguments for the adoption of optional preferential voting as a replacement for the full preferential system which currently applies “below-the-line”. I have sent a copy of that paper to the Committee Secretariat, and would ask that it be treated as an Annex to, and integral part of, this Submission.

3. I noted in the Introduction to the paper that a challenge to the WA Senate election in the Court of Disputed Returns had been foreshadowed. While that has now progressed considerably, it would seem unlikely that anything arising in or flowing from that challenge will alter or diminish the force of the basic argument of the paper. I therefore see no need to add to the paper at this stage.

### **First preference vote threshold**

4. In the aftermath of the election, one of the first proposals put forward for Senate voting system reform was the introduction of some sort of threshold figure of first preference votes which would need to be polled in order to qualify

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<sup>1</sup> Electoral Regulation Research Network/Democratic Audit of Australia Joint Working Paper Series, Working Paper Series No. 16, at <http://www.law.unimelb.edu.au/errn/publications/the-electoral-regulation-research-network-and-democratic-audit-of-australia-working-paper-series/working-paper-series-no-16> .

a candidate for election. On 9 September 2013, Professor Brian Costar argued for such a change as one element of a package of reforms, as follows:

... unless the lead candidate of a senate group or an ungrouped independent secures in excess of 4 per cent of the first vote, they should be eliminated from the count and their preferences distributed. This might seem harsh, but 4 per cent is the threshold candidates need to receive public funding and have their nomination deposit refunded, and seems a reasonable test of whether they have any real support in the electorate.”<sup>2</sup>

5. A more detailed argument in favour of this change has been put forward by Professor George Williams, as follows:

“A party (or independent candidate) should not see its candidates eligible for election to the Senate unless they have collectively attracted at least 4% of the first preference vote. Where they fall under this threshold, their preferences should be allocated to the remaining people and parties.

This minimum threshold is reflected in existing provisions in electoral legislation.

Under the Commonwealth Electoral Act 1918 (Cth), Senate group as a whole must receive at least 4% of formal first preference votes in the Senate Election in that state or territory in order to be entitled to election funding.

The 4% figure is also significant where it is specified that the \$2000 deposits for the Senate are returned only if a candidate gains more than 4% of the total first preference votes or is in a group of senate candidates which polls at least 4% of the total first preference votes.

Thresholds have been used in party-list proportional representation systems around the world. This stipulates that a party must receive a minimum percentage of votes, either nationally or within a particular district to gain a seat in parliament.

- Under the additional member system in Germany, there is a threshold of 5%, only applicable where the party does not win at least one electoral seat.
- Likewise in New Zealand under the mixed-member proportional electoral system, there is a 5% threshold.
- Israel has a 2% threshold under its nation-wide proportional representation system.

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<sup>2</sup> Brian Costar, “Now it’s urgent: why we need to simplify voting for the Senate” at <http://inside.org.au/simplifying-the-senate/>, 9 September 2013. More recently, Professor Costar has instead argued for the adoption of optional preferential voting at Senate elections.

- Turkey has a 10% nationwide threshold under its closed list proportional representation system; and
- Sweden a 4% nationwide threshold under its party-list proportional representation system.

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if a party cannot attract at least four first preference votes out of every 100, they have no place in controlling the future direction of the country in the Senate.”.<sup>3</sup>

6. It should be noted that the proposals quoted above from Professors Costar and Williams differ on the important point of whose votes are counted towards meeting the threshold: for Professor Williams, the test is to be applied to the total votes polled by all of the candidates of a party (or to the vote polled by an independent candidate); for Professor Costar, the test is to be applied to the votes polled by a party’s number one candidate (or to the vote polled by an independent candidate). In general, the “Costar threshold” would constitute a greater obstacle to success than the “Williams threshold”. If the current system of ticket voting is retained, the distinction is unlikely to be significant, since at present the vast bulk of votes for a party’s candidates are polled as first preferences by its number one candidate. If, however, ticket voting were to be abolished (and certainly if Professor Williams’s additionally floated proposal for the use of “Robson rotation” in the printing of ballot papers were to be adopted) it is conceivable that first preference votes could be spread more evenly between a party’s candidates, making the distinction between the two threshold formulae more significant.

7. I wish here to put it to the Committee, with all due respect to the commentators just quoted, that the case for the introduction of a threshold of this type is in a number of respects substantially misconceived.

### Constitutional issues

8. First, the application of a threshold at the level of groups rather than candidates could be susceptible to a constitutional challenge. A notable feature of both proposals is that they seek in some sense to apply a threshold to parties or groups, rather than to the individual candidates of parties. The reason for this is obvious: applying the threshold to individual candidates’ votes would likely see the elimination of the second, third (and so on) candidates of major parties for failure to meet the threshold, since such candidates typically poll very few first preference votes.

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<sup>3</sup> George Williams, “How to Solve the Problem of the Senate”, at <http://www.nswlaborlawyers.com/guest-blog-prof-george-williams/>, 25 October 2013.

9. This, however, gives rise to a potential constitutional question, arising from the requirement in section 7 of the Constitution that senators be “directly chosen by the people of the State”. This has been only rarely addressed by the High Court, but as is noted in footnote 4 at page 5 of my Optional Preferential Voting paper:

“when the ticket voting system was challenged in the High Court immediately before the 1984 election, Chief Justice Gibbs, sitting as a single judge in *McKenzie v. Commonwealth* [1984] HCA 75, observed, in upholding the constitutional validity of the system, that ‘... **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.’”. [emphasis added]

10. It would be at least arguable that a system which sought to apply a threshold at the level of groups rather than individual candidates would be one which provided for voting for groups, in the sense that votes polled by a group’s candidates would for the purposes of the application of the threshold be deemed to be votes for the group, and the totals of votes so polled by the various groups would have the potential to impact strongly on an election result.

11. It would also be arguable that the summing of first preference votes of grouped candidates for such a purpose would be of a fundamentally different character to the use of group vote totals to determine the return of deposits, as mentioned by Professor Williams, since the latter exercise does not impinge on the directness with which senators are chosen by the people.

12. Whether it is defensible in principle to deem first preference votes for a candidate to be votes for his or her group is also questionable. On this, it could be noted that a voter whose intention is, for example, to give higher preferences to female candidates than to male candidates will still have to give a first preference to **some** candidate; but to treat that vote in such a way as to benefit the other candidates of that most preferred candidate’s party would seem dubious: they might in fact be among the voter’s least preferred candidates.

13. This potential constitutional issue has already been noted in public discussion,<sup>4</sup> and given what is likely to be at stake, it could reasonably be anticipated that any attempt to introduce a threshold applicable at the party or

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<sup>4</sup> See, for example, the discussion in the comments which follow Kevin Bonham, “Senate Reform: Change This System, But To What?”, at <http://kevinbonham.blogspot.com.au/2013/10/senate-reform-change-this-system-but-to.html>, 19 October 2013.

group rather than candidate level would give rise to litigation in the High Court. (Such litigation, incidentally, would not necessarily follow immediately from the enactment of the relevant amendment. Their opponents might well choose to challenge them only after the Parliament had been dissolved prior to the next election, since that would deprive the Parliament of the opportunity to enact an alternative set of amendments if the initial ones were struck down.)

#### Lack of precedent

14. Secondly, the incorporation of a threshold of this type in a system of single transferable vote (STV) proportional representation such as that used at Senate elections would, as far as I have been able to discover, be without precedent. A perception of a need for such an arrangement has not arisen elsewhere, primarily because the phenomenon of preference harvesting and the consequent election of micro-parties is basically a consequence of the use of ticket voting. While ticket voting is not a uniquely Australian innovation, it has not been used widely outside Australia, since most other jurisdictions which use STV have also concurrently used optional preferential voting, and therefore have never encountered the high levels of informal voting which motivated the introduction of ticket voting for the Senate in the first place.

15. As a general rule of thumb, the introduction of unprecedented changes of this type is best avoided in the field of electoral systems, since consideration of their possible consequences cannot be illuminated by experience elsewhere, giving rise to a relatively higher risk that they will operate in practice in a way which had not been anticipated. In that context, it is worth highlighting that the impacts of an electoral system are a function both of its intrinsic properties, and of the way in which political players respond to the opportunities it presents, as the case of ticket voting well illustrates.

16. It would appear that in the last 25 years in Australia, there has been only one example of an electoral system for parliamentary elections which has incorporated a threshold of this type: the now generally discredited “modified d’Hondt” system used for the first two elections for the ACT Legislative Assembly, which was the subject of the highly critical *Report No. 5* from the Joint Standing Committee on Electoral Matters in 1989.

#### Risks associated with hybrid electoral systems

17. The modified d’Hondt case suggests that there is a particular danger that an electoral system may fail to gain legitimacy where it is a hybrid displaying features of several fundamentally different systems. The problem with such hybrids is that the fundamental principles underlying the system - the basic

motivating notions of who does and doesn't deserve to be elected - tend to become confused or, in the most extreme cases, almost totally obscured. Designers of such systems typically believe that they will be getting the best of several worlds, and wind up getting the worst.

18. STV with a threshold included would in fact be precisely the sort of hybrid just described.

- As its name implies, the basic principle underpinning STV is that each voter casts one ballot, which is, however, capable of being transferred in accordance with the voter's preferences where the voter's preferred candidates have already been elected or excluded. No special priority is given to first preferences: it is an inherent feature of the system that candidates will be able to build their totals towards a quota on the basis of their own primary votes and votes transferred to them, and (as noted at paragraph 8 above) many senators over the years have been elected having polled only small first preference totals.
- If there is a principle underpinning the idea of a threshold, it can scarcely be more than that asserted by Professor Williams, that "if a party cannot attract at least four first preference votes out of every 100, they have no place in controlling the future direction of the country in the Senate". He is of course entitled to his opinion on that point, but it is difficult to see that as rooted in any deeper principle or democratic concept.

#### Choice of threshold level

19. Indeed, in its 1989 report on the modified d'Hondt system, one point noted by the Joint Standing Committee was that the choice of the level of a threshold is essentially arbitrary; this had been one of the major bones of contention in the aftermath of the first ACT election. This would also be true of any threshold used for Senate elections: while Professors Costar and Williams both suggest a threshold of 4%, they are unable to offer any specific and compelling justification for setting it at that level rather than 3.5%, or 4.5%, or any other number less than a quota which one might care to think of.

20. In some countries, particularly those which use list proportional representation, particularly levels of threshold may become an embedded feature of the system, legitimised by general familiarity with how they operate in practice.<sup>5</sup> Such a source of legitimacy would not be available at Senate

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<sup>5</sup> In this context, it is worth noting that while Professor Williams makes reference to the use of thresholds in list systems of proportional representation, such systems are fundamentally different in character to STV. Under such systems, broadly speaking and in

elections, at least until such time as the concept of a threshold had become similarly embedded.

21. There would be particular potential for controversy if it came to be widely perceived that the level of threshold had been deliberately chosen so as to benefit some parties or classes of parties, and disadvantage others; and it is hard to see how such perceptions could be avoided, since that would indeed be the purpose of the exercise. Ongoing controversy on that point could mean that a particular level of threshold might never come to be seen as legitimate. As a general rule, electoral systems are more likely to achieve legitimacy when it is clear that their design has been motivated by fundamental principles, rather than by a desire to achieve a particular type of election result.

#### Encouragement of strategic voting

22. The introduction of a threshold would tend to encourage strategic voting, by giving certain voters a positive incentive to give their first preferences to candidates other than the ones they truly most preferred. Specifically, voters minded to support a minor rather than a major party might well perceive a need to vote for a candidate of the minor party most likely to exceed the threshold rather than for a candidate of their most favoured party, since otherwise there would be a risk that all minor parties would poll below the threshold, and their votes would be transferred directly to a major party. This is closely analogous with the dilemma voters often face under the first- past-the-post system: where multiple parties with similar platforms are competing for a single bloc of votes, voters need to ensure that they do not “waste” their votes.

23. If it be accepted that one of the key defects of the current Senate system is that the preferences attributed to voters by the ticket voting process cannot be taken at face value, the prospect of strategic voting would have to be a matter of concern. At least under the current system it can be presumed that

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their simplest incarnations: each party contesting an election must lodge an ordered list of candidates; voters vote for parties rather than candidates; the proportion of the vote won by each party determines the number of seats it wins, through a defined mathematical formula; and the elected candidates are then identified from the party’s list, so that, for example, in the simplest case, if a party wins ten seats, the top ten candidates on its list will be elected. Various different mathematical formulae can be used to allocate seats among parties, and inherent in the arithmetic of each is a so-called “threshold of representation”, a percentage of the vote below which a party cannot win a seat. Such thresholds of representation typically depend on both the number of vacancies and the number of parties. The introduction of a legally specified threshold is therefore typically intended to increase the already existing threshold of representation, and to fix it at a level which does not vary from election to election. For a further discussion of these issues, see Michael Gallagher, “Comparing Proportional Representation Electoral Systems: Quotas, Thresholds, Paradoxes and Majorities”, *British Journal of Political Science*, vol. 22, 1992, pp. 469-496.

voters' first preferences accurately reflect their beliefs; where there are incentives for strategic voting, even first preferences cannot be assumed to be a sincere expression of the voters' beliefs. In that sense, the introduction of a threshold could be argued to be a retrograde step.

#### Impact on "preference harvesting"

24. It might be assumed that the introduction of a threshold would, by itself, suffice to eliminate "preference harvesting"; but in fact, that is by no means clear. The results of the 2013 election have demonstrated that there is at the moment a substantial bloc of voters in Australia who are prepared to vote for minor or micro- rather than major parties. As long as this continues to be the case, certain parties will continue to benefit from the presence on the ballot of a proliferation of parties with diverse but attractive names, votes for which can be channelled using the ticket voting system.

25. At the moment, it is the micro-parties themselves which benefit: in effect, their candidates buy a lottery ticket, the price of which is the cost of the deposit, with first prize being six years in the Senate. If, however, larger parties which see the potential benefit of preference harvesting are prepared to sponsor the ongoing existence of micro-parties, for example by paying the candidates' deposits, there is no particular reason to assume that the micro-parties are going to go away. In effect, the use of a threshold by itself would in all probability simply change the beneficiaries of preference harvesting from the micro-parties to parties which were capable of exceeding the threshold.

26. Other things being equal, the only certain way of eliminating preference harvesting is to change the fundamental structure of ticket voting.

#### Choices regarding the precise application of a threshold

27. While the concept of a threshold sounds simple, its precise application in the distribution of Senate preferences gives rise to a number of different options, including the following.

- Votes for candidates or groups which failed to exceed the threshold could be treated like informal votes, and would not be included in the calculation of the quota. This tends to be the approach taken when a threshold is applied in the simplest cases of list proportional representation.



- Votes for candidates or groups which failed to exceed the threshold could be treated like votes for deceased candidates. The first stage of the distribution of preferences would then be the transfer of those votes according to the voter's preferences to candidates who had not been eliminated by the operation of the threshold. Such votes would be included in the calculation of the quota.
- Alternatively, candidates who failed to meet the threshold might be left in the count, but might be treated as incapable of having votes transferred to and/or from them.

28. The choice between these different options would have the potential to influence the election result in the close election.

#### Changes to electoral formula to deal with problems with ballot structure

29. As noted in my Optional Preferential Voting paper, the problems which arose at the 2013 election are primarily associated with the "ballot structure" - the mechanism by which voters preferences are captured. That being so, the simplest approach to fixing the system would be to address the defects with the ballot structure, rather than trying to mitigate their symptoms by changes (such as the introduction of a threshold) to the "electoral formula" - the rules for identifying the winners. Dealing with problems in one area of the system with changes to another area of the system is the electoral equivalent of driving with one foot on the accelerator and one on the brake.

#### **Conclusion**

30. In the light of all the points made above, I would recommend that the Committee:

- (i) endorse the replacement of the current below-the-line voting mechanism used at Senate elections with an optional preferential system; and
- (ii) refrain from endorsing the introduction of a first preference vote threshold for Senate elections.