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WORKING PAPER SERIES**

ELECTORAL FAIRNESS IN SOUTH AUSTRALIA

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WORKING PAPER NO. 38 (MARCH 2016)

Abstract

This working paper examines South Australia's electoral system in regards to electoral fairness. It argues that the outcomes of recent elections in South Australia can often not be deemed to be 'fair' and suggests some ways the electoral system could be improved.

Introduction

The most important element of elections is fairness. Elections permit 'the most important of operations': the 'ability to change regime' legitimately by popular choice.¹ They also give an opportunity for voters to make a judgement on the past performance of the government, and to guide accordingly the actions of the next government.² It so follows that voting is directly responsible for allocating power to 'office-holders', and for holding incumbent office-holders accountable for their power. However, in order to properly meet these functions, elections must first be fair.

It is worth exploring the South Australian electoral system from the voters' point of view in order to see whether it is fair and whether voters obtain the government they desire. Elections are naturally for the benefit of electors, rather than 'political parties or any other interests'.³ When voters receive the government they want, only then is the electoral system sufficient.

In South Australia, fairness is determined by its unique "fairness clause" embedded in the Constitution, allowing the Electoral District Boundaries Commission (EDBC) to counter potential electoral district malapportionment.⁴ As a result of the provision's reference to 'the popular vote', the two party preferred majority vote has been used as a means to determine fairness by the EDBC.⁵ Though the two party preferred vote is not a guaranteed method to determine the will of the voters, it is nonetheless one of the best means available which makes use of all preferential votes.

There are three main contentions regarding fairness within the South Australian House of Assembly: full preferential voting, the savings provision and the use of the fairness clause.

Preferential Voting

Except for New South Wales and Queensland, Australian states have tended towards full preferential voting, where the preferences for every candidate must be indicated. If every preference is not filled (or one less – the unfilled box is taken to be the least favoured), then the vote is deemed informal.

Optional preferential voting has the advantage of being able to reduce informal voting. However, South Australia has one of the most onerous requirements of formal voting. The Electoral Council of Australia lists no less than eight criteria, including 'a break of consecutive numbering... or two or more preferences are omitted', which will render the vote informal. In contrast, New South Wales has only two requirements for a ballot paper to be

¹ Campbell Sharman, "The Use of Electoral Data for Research into The Australian Political System," in

² Cees van der Eijk et al., *Elections and Voters* (New York: Palgrave Macmillan, 2009), 1.

³ Enid Lakeman, *How Democracies Vote: A Study of Majority and Proportional Electoral Systems* (London: Faber and Faber, 1974), 273.

⁴ *Constitution Act 1934* (SA) s 83.

⁵ *Constitution Act 1934* (SA) s 83(1).

informal: the ballot is blank, or a ‘tick or cross appears with numbers in other squares’.⁶ Surveys have shown that about half of all invalid ballot papers actually had a formal first preference and could have been “saved”, if there had been optional preferential voting.⁷ Informal votes in SA during the 2006 state election numbered 3.7 per cent,⁸ whereas in Queensland, the informality rate was only 2.08 per cent.⁹ Optional preferential voting also seems to capture the preferences voters may actually hold – they do not require the voter to ‘express preferences for candidates about which they know nothing.’¹⁰ This is also since such compelled voting makes electors fall victim to the misconception that their least favoured preferences are less important because it is less likely that they will be “used”, they care little for the candidates involved, and allocate these preferences based on whim. But since each vote no matter how far “down the line” of preferences is of equal value, a vote that extends down the list of preferences is more likely to – based on the behaviour of voters – give an inaccurate election outcome. Because optional preferential voting, ‘the simplest form of preferential voting’,¹¹ grants validity to an elector who has missed two candidates or experiences a number error, or for a voter who simply marked the candidates he had sympathy for,¹² voters appear to have more choice.¹³ Most importantly, it appears that optional preferential voting leaves it to the voters to determine their genuine preferences.¹⁴

However, the simplicity of such a system means that voters could potentially turn the procedure into something closer to a single member plurality system by simply voting for only one candidate.¹⁵ Political parties conventionally reliant upon close political alignments, such as the earlier non-Labor coalitions, were able to take advantage of a compulsory preference system by reducing the dangers of vote splitting, and by allowing votes to flow against Labor.¹⁶ Regardless, a trade-off exists the other way around, for other political groups can cause single-voting surge by campaigning for ‘just vote 1’ with the expectation that no votes will be transferred to other candidates effectively forcing a quasi-first-past-the-post-system – which would imperil having a preferential system.¹⁷

There is some theoretical basis for full preferential voting which posits the practice as a natural corollary to compulsory voting in Australia, that it ‘helps to shore-up’ a final and secure two-party preferred vote and thereby makes the electoral landscape easier to understand for voters.¹⁸ There is also the idea that full preferential voting helps to strengthen

⁶ “Preferential Voting Systems of Australia’s Parliaments,” last modified 12, September 2013, <http://www.eca.gov.au/systems/files/3-preferential-voting-systems.pdf>.

⁷ “The Case for Optional Preferential Voting,” last modified 10, January 2010 <http://www.abc.net.au/news/2013-01-10/green-the-case-for-preferential-voting/4459594>.

⁸ Lauren Hann, “Informal Voting at State and Territory Elections” (Research Report No 10, Australian Electoral Commission, 2006), 5.

⁹ “Preferential Voting Systems of Australia’s Parliaments.”

¹⁰ Ibid.

¹¹ Ibid.

¹² Jack Wright, *Mirror of the Nation’s Mind* (Marrickville: Southwood Press, 1980), 34; Australian Government, *Electoral Reform Green Paper*, (Commonwealth of Australia, 2009), 58.

¹³ David Farrell et al., *The Australian Electoral System*, 55.

¹⁴ Australian Government, *Electoral Reform Green Paper*, 58.

¹⁵ Ibid.

¹⁶ Ben Reilly et al., “The Single Transferable Vote and the Alternative Vote Compared,” in *Elections in Australia, Ireland and Malta under the Single Transferable Vote* ed. Shaun Bowler et al. (Ann Arbor: University of Michigan Press, 2000), 47.

¹⁷ Ibid; Australian Government, *Electoral Reform Green Paper*, 58.

¹⁸ Ibid; Malcolm Mackerras et al., “Compulsory Voting, Party Stability and Electoral Advantage in Australia” *Electoral Studies* 18 (1999) 231; David Farrell et al., *The Australian Electoral System: Origins, Variations and Consequences* (Sydney: University of New South Wales Press, 2006), 124.

compulsory attendance, as it is an Australian typicality for equality to take preference to take place over choice: 'if it were to be conceded that voters have the right to be indifferent in regard to a subset of candidates, it would seem to follow that voters have the right to be indifferent in regard to all candidates'.¹⁹ The current system of full preferential voting continues thus, not only to support formal voting, but arguably, compulsory voting.

Under the current full preferential system allied parties can take comfort in standing against each other without 'necessarily resulting in a win to their common opponent'. The system also empowers minor parties, which can influence the election result through their allocation of preferences even if they do not gain any seats.²⁰ Full preferential voting allows, and even promotes parties to form arrangements and agreements with each other for preferences relative to group voting tickets and how-to-vote cards. Critics argue that full preferential voting has unjustly empowered parties because voters must face the onerous task of numbering every preference but one. Parties can then influence electors with how-to-vote cards, which have been agreed upon by other parties in order to secure a better chance of winning. Voters often do vote using such cards.²¹ However, they are under no obligation to; it is a mere convenience.

On the other hand, optional preferential voting also has the potential for party convenience. It had been primarily introduced under Labor governments, as there would be a benefit of being able to campaign for 'just one vote' in order to combat the early large parties, 'particularly the Liberal Party and its predecessors'.²² The political landscape, however, has changed since, as 'the irony is the Labor party relies more on [full] preferential voting than the Coalition to win elections'.²³ From comparing the results in New South Wales before 1980, to after 1980, when optional preferential voting was introduced, it appears that Labor was reliant upon winning 'from second place on minor party preferences', and under the new system experienced difficulty in attaining votes from electors who could now opt not to have second preferences.²⁴ Though this was technically the case, a vast majority of voters continue to show full preferences.²⁵ As a result of this phenomenon, in 2001, Labor changed strategies during the Queensland State Election and recommended electors to only vote '1' on ballots in order to 'split the conservative vote'.²⁶ The result was a 'landslide victory', where despite only winning 49 per cent of first preference votes, the party was able to secure 66 out of 89 seats.²⁷ Major parties now encourage single-preference votes, and it is evident that optional preferential voting changes party behaviour, and that parties under the new system would be liable to try and encourage plumping in order to produce a de fact first-past-the-post system. In Western Australia, Victoria and in Canadian provinces optional preferential voting was abandoned because 'voters increasingly used their vote to plump'.²⁸ The advantage of the

¹⁹ Ben Reilly et al., "The Single Transferable Vote and the Alternative Vote Compared," 44.

²⁰ State Electoral Office South Australia, *Report on Optional Preferential Voting* (Adelaide: State Electoral Office, 2004), 1.

²¹ Jack Wright, *Mirror of the Nation's Mind* (Marrickville: Southwood Press, 1980), 34; Australian Government, *Electoral Reform Green Paper*, 81.

²² Brenton Holmes, "South Australian State Election 2014" (Research Paper, Parliamentary Library, Parliament of South Australia, 2014), 37.

²³ "The Political Impact of Optional Preferential Voting," last modified 19, October 2011, <http://blogs.abc.net.au/antonygreen/2011/10/the-political-impact-of-optional-preferential-voting.html>.

²⁴ *Ibid.*

²⁵ Jenni Newton-Farrelly, "Preferential voting and state elections in South Australia" (Research Paper, Parliamentary Library, Parliament of South Australia, 2014), 12.

²⁶ State Electoral Office South Australia, *Report on Optional Preferential Voting*, 11.

²⁷ *Ibid.*

²⁸ "The Political Impact of Optional Preferential Voting."

full preferential system has been realised by parties since even though the informal vote tended to be higher, the established system enables more preferences to be realised, especially from minor parties and avoids the confrontational unpredictability of single-preference voting.²⁹ In Queensland and New South Wales, there is the worry that Greens candidates could lessen first preference votes for Labor.³⁰ It is for this reason that though the Liberal Party could stand to gain from the potential disadvantage Labor could face, there is very little interest in its introduction.³¹

It is this full voting system that seems at odds with the “bare” preferential system, which, *prima facie* appears to guarantee representation of smaller parties. Since voters must mark every single candidate, South Australia’s political system has been successfully shaped into a two-party system.³² Instead of fragmentation, full preferential voting has enabled smaller parties to integrate with larger support in order to prevent handing seats to opposing parties. The effect of an optional preferential system is, naturally, the opposite.

Because optional preferential voting could introduce such stochastic elements into the current system, it should not be used. Likewise, it could mean devaluing the functionality of section 77 of the Constitution and the role of the EDBC in terms of voting power, in the same way as compulsory voting. This is since ‘South Australia’s redistribution system effectively requires a Statewide two-party-preferred count, which can only be complete with a full preferential ballot.’³³ It is thus better for each voter’s vote to be similar in order to elect the government they want. So long as the fairness provision exists, South Australia must essentially continue full preferential voting.

But there lies the possibility of abandoning the full preferential system for optional, or partial preferential voting. In 2003, a Constitutional Convention ‘consistently identified’ optional preferential voting as a ‘priority for reform’.³⁴ In most elections half of all would-be-informal ballot papers which only indicate one candidate are “rescued” by the savings provision.³⁵ But there is one other, more democratic, way to salvage these votes: optional preferential voting. Optional preferential voting is more effective at reducing vote wastage, as it is able to take into account all number of preferences, whereas the savings provision only takes those which are in accordance with registered voting tickets. South Australia, despite its unique saving clause still retains a higher 3.8 per cent average of informality, compared to New South Wales and Queensland’s rates of around 2.5 per cent.³⁶ The drawback, however, is the mass exhaustion of single-preference votes when it comes to transferring those preferences. Parties naturally prefer saving clauses because single-preference votes can have their preferences transferred.

Politically, optional preferential voting could offer a solution to disadvantages faced by the Liberal Party by overcoming an over-concentration of their support in safe seats, and allow contested marginal districts a greater level of being “moved” in either direction. It is likely that the system would separate flows of preferences between parties, for instance, the Greens

²⁹ Ibid.

³⁰ Jenni Newton-Farrelly, “Considering the Commission’s Current Challenge,” (Research Paper, Electoral Boundaries Commission, 2012), 5.

³¹ Ben Reilly et al., “The Single Transferable Vote and the Alternative Vote Compared,” 47.

³² Jenni Newton-Farrelly, “Preferential voting and state elections in South Australia” (Research Paper, Parliamentary Library, Parliament of South Australia, 2014),

³³ Ibid.

³⁴ State Electoral Office South Australia, above n 146.

³⁵ The case for optional preferential voting.”

³⁶ “JSCEM Recommends Optional Preferential Voting for the Senate,” last modified 9, May 2014, <http://blogs.abc.net.au/antonygreen/2014/05/jcem-recommends-optional-preferential-voting-for-the-senate.html>.

and the Liberals would benefit from less Green votes flowing to Labor. Parties themselves would have to be more focused upon voters, rather than agreements with other parties in order to secure the election.

It is simple to ask whether it would not be better to have a system that favours voters and reduces informalities than one that favours political groups, with unsuspecting electors giving their preferences away only to have, nonetheless, poor rates of voting formality? Having a partial, or optional preferential system as per such recommendations would potentially solve the problem of small parties taking too much of an advantage, and give voters more options. If voters are able to express more of their vote then, arguably, they are more likely to, in the end, gain the government they want.

The Savings Provision

In South Australia, if only one candidate is marked on the ballot paper, with a '1', tick or a cross, the vote, which would ordinarily be informal is "saved" by having the voter's preferences directed as instructed by their indicated candidate. Incomplete preferences which do not deviate from the ballot's first preferred candidate's registered ticket are also rendered valid. This is the effect of the unique "savings provision".³⁷ Though it may seem, *prima facie*, to undermine the full preferential system, since votes with merely a single choice indicated are valid, this is in no way advertised to the voters; the ballot paper instructs voters to show preferences for all candidates.³⁸ If incomplete preference numbering was not unencouraged then the savings clause 'could create a de facto system of optional preferential voting'. This could be eschewed as a sign that Parliament accepts that 'optional preferential voting should exist as an alternative to full preferential voting'.³⁹ In 2009, the Joint Standing Committee on Electoral Matters proposed that a savings clause should be inserted into the Commonwealth Electoral Act, but with 'an appropriate penalty provision to deter the advocacy of a vote other than in accordance with full preferential voting'.⁴⁰

The consequences are not insignificant. Ticket voting accounted for 3.6 per cent of all formal ballot papers in 2014, with an increase of 3.3 per cent from the previous election.⁴¹ In 1982, the informal vote rate in the House of Assembly was 5.8 per cent. The savings provision almost halved this number when it was introduced in 1985, producing an informal vote rate of 3.5 per cent.⁴² This is, however, because approximately half of would-be informal votes only indicate a preference for a single candidate.

The savings provision is little known to the voter, and as a result, presents the problem of whether or not it should be there in the first place. There is an apparent democratic trade off to the unsuspecting voter, whose preferences will end up being decided by a candidate or party to elect someone they intended not to vote for. Whereas with above-the-line voting for the Legislative Council, where the voter reasonably expects to be voting for the party, and has this will carried out by having the voter's preferences distributed with the selected political group's registered ticket, the same cannot be said for the effects of ticket voting in the House of Assembly. When voting for the lower house the reasonable voter expects to be voting only for the candidate, and would not suspect having his preferences distributed to

³⁷ *Electoral Act* s 63(4)(a).

³⁸ Ben Reilly et al., "The Single Transferable Vote and the Alternative Vote Compared," in *Elections in Australia, Ireland and Malta under the Single Transferable Vote*, 49.

³⁹ Australian Government, *Electoral Reform Green Paper*, 51.

⁴⁰ Commonwealth, Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2007 federal election and matters related thereto* (2009), 245.

⁴¹ Electoral Commission SA, *Election Report: State Election* (Adelaide: Election Commission SA, 2014), 45.

⁴² Lauren Hann, "Informal Voting at State and Territory Elections," 5.

some other unknown candidate, which is often the case. The knowledge of this savings clause is, ‘not heavily publicised’, nor is it evident on the ballot; while the voter ‘is given a clear choice between expressing his or her own preferences or adopting in full those recommended by a group’ in electing the Legislative Council, he or she does not have that liberty at the House of Assembly level.⁴³ Therefore, the assumption that a ‘vote for a single candidate [is] a vote for that candidate’s registered preference distribution’ seems all but unfounded.⁴⁴

The system is nonetheless efficient in “saving” votes that still have a potential for preferences – though unchosen – to be transferred and not wasted, unlike discounted single-preference votes where preferences for unsuccessful candidates are unable to be transferred. It is arguable however, that even though the provision prevents votes for being exhausted, this does not mean that voters will get the government they want. By decreasing the number of informal votes, there is instead an increase in the ‘potential vote for registered parties’ and an increase in the ‘benefit from preferences’.⁴⁵ By having their preferences directed by a ticket towards candidates they did not choose, the vote can be potentially twisted by parties, which means that the chances of having a government which the voters deliberately voted for decrease. The absence of a savings clause however, while giving higher informal votes, would mean that voters who indicated full preferences would have their votes count to an, arguably, more legitimate government. From the standpoint of a system being for voters and not parties, it would make sense, that if there were no ticket voting that led in the House of Assembly ballots, voters would not be able to inadvertently elect people they do not want, and thereby produce a government they do not want.

Unlike ticket voting, the savings provision is conducted to the obliviousness of the voter in order for political groups to receive more votes and for there to be less informal votes. However, there is nothing about the savings provision that empowers voters. The electoral system should thus deal without it.

Parties have abstained from notifying their electors of the savings clause since they have intended for it not to dilute the obligation of expressing full preferences. This is likely because both major parties prefer the certainty of full preference flows which the current system promotes. To risk the uncertainty of an optional preferential system would overturn the status quo.⁴⁶ Additionally, parties would have the burden of having to have motivate voters to “fully” vote so that votes can be transferred under the preferential system in their favour.

The Fairness Clause

South Australia’s unique fairness clause requires the electoral boundaries to be drawn after each election in order to counter malapportionment. It has the aim of a fair electoral system where a party that receives over 50 per cent of the two party preferred vote should be able to be ‘elected in sufficient numbers to enable a government to be formed’.⁴⁷ As a result, the EDBC’s is obliged to draw a set of districts that ‘will give either party a chance to win 24 of the 47 House of Assembly seats if they win the support of just over 50 per cent of the voters’.⁴⁸ Simply, a party that wins overall is expected to form government. But this does not

⁴³ Australian Government, *Electoral Reform Green Paper*, (Commonwealth of Australia, 2009), 81.

⁴⁴ Dean Jaensch, *Community Access to the Parliamentary Electoral Processes in South Australia since 1850* (Adelaide: State Electoral Office, 2003), 87.

⁴⁵ Ibid.

⁴⁶ Ben Reilly et al., “The Single Transferable Vote and the Alternative Vote Compared,” 49.

⁴⁷ *Constitution Act 1934 (SA)* s 83(1).

⁴⁸ Jenni Newton-Farrelly, “Considering the Commission’s Current Challenge,” 5.

always occur; three out of four elections before 2015 have had the winning party unable to form government.⁴⁹ It has become a system where despite such a provision, ‘the majority of voters [can be] outvoted by the minority of voters’.⁵⁰ In light of this crisis, Iain Evans further expressed that:

The voting system is not serving the voting public. It may well be serving the political parties, but the primary role of the voting system has to be to give... the majority of voters in the state the government they vote for.⁵¹

For political parties, the main interest is to form government by being elected. However, in South Australia, this has seldom been fairly realised. In 2014 the Liberal party, despite attaining 53 per cent of the two party preferred vote, failed to form government with 22 seats, whereas the Labor party was able to gain 23 seats with only 47 per cent of the vote.⁵² During the election, ‘92,000 more South Australians wanted a change of government than those who wanted to keep government’, and yet this was not enough for voters or for the Liberal party.⁵³ In the Electoral Districts Boundaries Commission Report 1991, it was asserted that the Labor bias can be measured by subtracting the two party preferred vote number in their weakest winning district from their overall State-wide share.⁵⁴ In 2014, their weakest win was in Newland with 51.4 per cent, whilst their overall two party preferred vote result was 47.0 percent, giving a bias of 4.4 percent.⁵⁵ This means that the Liberal Party would have needed 4.4 percent more votes in order to win the same amount of seats as the Liberal Party. This bias was produced because of the way the districts have been drawn and because of the way people vote.

The EDBC retains the aim of only providing the basis for fair competition, and has recognised that whilst party campaigns affect election outcomes, their task is not to compensate for any political reactions, but merely, for geographical distributions.⁵⁶ Even so, “wrong-winner outcomes” have become almost endemic in South Australia, with three out of four winning governments unable to form government properly since 1991.⁵⁷ This is mainly because Liberal voters are ‘congregated together in safe electorates’, where their votes are wasted, whereas ‘Labor’s voters are more evenly spread through more diverse suburbs that dominate most of South Australia’s marginal seats’.⁵⁸ Around 30 percent of these votes in a ‘disproportionately high number of excessively safe Liberal Party seats’ are effectively

⁴⁹ “Off the Bench: Reforming SA’s electoral laws,” last modified 17, August 2015 <http://indaily.com.au/opinion/2015/08/17off-the-bench-reforming-sas-electoral-laws>.

⁵⁰ South Australia, *Parliamentary Debates*, House of Assembly, 5 July 2014, 57 (Iain Evans).

⁵¹ South Australia, *Parliamentary Debates*, House of Assembly, 5 July 2014, 57 (Iain Evans).

⁵² Brenton Holmes, “South Australian State Election 2014” (Research Paper, Parliamentary Library, Parliament of South Australia, 2014), 37.

⁵³ South Australia, *Parliamentary Debates*, House of Assembly, 5 July 2014, 57 (Iain Evans).

⁵⁴ Electoral District Boundaries Commission, *Report of the Electoral District Boundaries Commission* (1991), 11.

⁵⁵ “House of Assembly final outcomes,” last modified 15, March 2014 <http://www.ecsa.sa.gov.au/elections/state-elections/2014-state-election-results-summary/14-elections/206-house-of-assembly-elected-candidates>. This measurement assumes that marginal seats behave the same as all other seats. The word ‘bias’ is used to mean that these figures are of a detriment to the Liberal Party, and not to insinuate in any way, a gerrymander.

⁵⁶ Jenni Newton-Farrelly, “Considering the Commission’s Current Challenge,” 4.

⁵⁷ “Off the Bench: Reforming SA’s electoral laws.”

⁵⁸ “SA 2014 – boundary issues,” last modified 18, March 2014 <http://www.tallyroom.com.au/19863>; “The Problem with SA Boundaries,” last modified 17, March 2014 http://blogs.theaustralian.news.com.au/mumble/index.php/theaustralian/comments/the_problem_with_sa_boundaries/P50/.

“locked away”, and not only do they disadvantage the Liberal Party, but its voters in those districts, who are unable to make a difference in the overall election.⁵⁹

Swing voters are the other reason, and they make up to 50 per cent of the population.⁶⁰ The EDBC’s obligation is, however, not to rectify skews of non-uniform swings which exaggeratedly transfer votes into seats unfairly, though this is what makes the outcome of an election.⁶¹ Their duty is but to combat biasness as a result of votes being translated into seats because of disadvantageous geographic concentrations of party support – though this is what creates a ‘level playing field’.⁶² To take on the duty of righting skews would risk straying from the Committee’s apolitical position as an independent body and potentially mean introducing an aspect of prediction, or even predilection, the likes of which would be unfair to political candidates and groups. As such, the committee conceptual methodology assumes a uniform swing, even though swings hardly ever are uniform.⁶³ Where an independent wins a district, the votes are recounted as if that candidate had not, and made to produce a two-party preferred vote. Voters in these districts, however, may not have made a deliberative choice preferring one party over the other. The Mackerras pendulum is made to look fair for the next election based off these practices, with the assumption and hope that the winning party can ‘achieve vote majorities in a majority of electorates’.⁶⁴

Skewed election results are a product of political campaigning, and though they fixate upon marginal districts, parties tend to defend seats more effectively than win new ones.⁶⁵ This issue is further exacerbated by the fact that swings are predicted to be uniform, when they rarely are, and because seats are easier to hold onto than to gain. As a consequence the Liberal Party is disadvantaged in its marginal seats which take more effort to earn than Labor.⁶⁶ The EDBC had earlier asserted that better campaigning would have been able to allow both parties an equal opportunity at forming government, but even when the Liberal Party was able to win a two-party preferred majority, it was not able to form government.⁶⁷

Swings can vary wildly. The swing in 1993 was 9.4 per cent to the ALP, but the next year, was 0.6.⁶⁸ Jenni Newton-Farrelly posits that the unfairness before 1991 was a result of geographical bias, but after the EDBC adjusted for party disadvantages by the creation of the new district of Frome, this bias was outdone by skewed voting swings.⁶⁹ Labor and Liberal during the 2010 election had roughly equal marginal and safe districts. ‘What skewed the translation of votes into seats’ was a discrepancy in vote swing, with a state-wide swing of 8.4 per cent during the election, but a swing in some districts of just 2 per cent on average for the Liberal party.⁷⁰ The assumption here is that ‘when the level of support changes...the pattern of support’, or the relationships between the districts remain the same.⁷¹

It is possible for the commission to rectify malapportionment and move the bias away from the Labor party by taking advantage of the 10 per cent margin of permissible tolerance when

⁵⁹ Electoral District Boundaries Commission, *Report of the Electoral District Boundaries Commission*, 12-13.

⁶⁰ Electoral District Boundaries Commission, *Report of the Electoral District Boundaries Commission* (1991) 71.

⁶¹ Ibid.

⁶² Electoral District Boundaries Commission, *Report of the Electoral District Boundaries Commission*, 73.

⁶³ Jenni Newton-Farrelly, “Considering the Commission’s Current Challenge,” 5.

⁶⁴ “The Problem with SA Boundaries.”

⁶⁵ Jenni Newton-Farrelly, “Considering the Commission’s Current Challenge,” 5.

⁶⁶ Jenni Newton-Farrelly, “Considering the Commission’s Current Challenge,” 5.

⁶⁷ “SA 2014 – boundary issues.”

⁶⁸ Jenni Newton-Farrelly, “Considering the Commission’s Current Challenge,” 6.

⁶⁹ Ibid, 8.

⁷⁰ Ibid, 9.

⁷¹ Ibid, 13.

distributing.⁷² Most districts are well within this margin, and so the commission could potentially create “positive” malapportionment and offset this balance. For instance, had the margins been offset to produce a bias towards the Liberal Party of 4.4 percent, the overall bias towards the Labor Party would have been cancelled, and government would have been able to be formed. Voters and parties would benefit from such a procedure that would generate a potentially more even playing field. However, it seems reprehensible to do this, since solving the ongoing problem of malapportionment by taking advantage of further malapportionment could be construed as political action to balance the parties, which is something the Commission ought to abstain from doing. Furthermore, such a manoeuvre would be a distasteful with regards to South Australia’s gerrymandering past

It would be an option to assert that there is no problem with this by stating that there is an Australian obsession with the two-party preferred vote which is used to gauge the winning of an election, when actually, having an election won is different from forming government. Indeed, it seems almost nonsensical that a system which uses a 47-seat single-member electorate system has to be concordant ‘with a fairness clause that uses a two-party preferred vote.’⁷³ The system is therefore, misconceived, and it is natural for government to be elected from individual single-member districts, with the overall two party preferred vote being irrelevant to the formation of government. In actuality, ‘47 electorates, all on the same day at a general election vote for their representative...their representative is voted into the parliament and then the parliament decides who is in government’.⁷⁴ But this does not mean that the system is just. The sense of preserving fairness for voters who wish to have their votes used to the best of their expectations so that the overall winning party can form government is evinced by the constitutional fairness clause, which makes explicit reference to ‘50 per cent of the popular vote’. The constitution thus condones the use of this two party preferred vote in order to create a just system. It is this principle, that a party that holds more than 50 per cent of the popular vote should be able to form government that ought to be upheld.

In order for voters to elect the government they truly want, the imbalance which is to the detriment of the Liberal Party should at least be corrected to reasonable levels such that effective campaigning will give both parties equal opportunities to form government.

How can the Electoral System Become Fairer?

The electoral system is no doubt a result of an electoral dichotomy between the electors and the elected. ‘Modern democracy is party democracy’⁷⁵ and modern representation is ‘imbued with the influence’ of the party policy and doctrine.⁷⁶ The electoral system is interconnected, and so what affects parties will affect whether voters receive the government they want. The party-voter system has, as a result, created a system where electoral fairness has been eroded by the very foundations it creates. As sure as the elected elect, the elected hold onto what they can.

It is perhaps no surprise that the electoral system has created something so paradoxical. This theme of contradiction is inherent in the very system. To make voting preferential would mean weakening the two-party preferred vote as more votes would inevitably exhaust. And to be rid of the savings provision without introducing optional preferential voting would mean

⁷² Constitution Act 1934 (SA), s 77(2).

⁷³ South Australia, *Parliamentary Debates*, House of Assembly, 5 July 2014, 57 (Iain Evans).

⁷⁴ “SA 2014 – boundary issues.”

⁷⁵ Richard Katz, *A Theory of Parties and Electoral Systems* (Baltimore: John Hopkins University Press, 1980), 1.

⁷⁶ Dean Jaensch, *The Australian Party System* (Sydney: George Allen and Unwin, 1983), 9.

more informalities. The creation of a fairer election system then lies not in incremental perfection, but in attaining a state of balance such that the fairness of the voter is maximised. The following measures have been suggested keeping this fact in mind:

1. Full preferential voting should be kept in order to ensure that the system remains equal among districts and in order to discourage a de facto first-past-the-post system which would endanger the current preferential system. The savings provision should be scrapped.
2. However, if ticket voting in the House of Assembly is done away with, then full preferential voting should follow be explored as an option to follow conditional to changes with the Fairness Clause. Because ticket voting in the House of Assembly was a way to reduce informal voting without jeopardising the full preferential system, having no ticket voting would mean that there would be no other way to reduce informal votes but for partial or optional preferential voting. In order to avoid plumping campaigns, a partial preferential system would be best.
3. In order to achieve fairness, the Electoral Commission should have its apolitical attitude reconsidered, so that it can change distributions in order to have voters of the Liberal Party of a similar even spread across districts as the Labor Party. It appears almost hypocritical that though section 83 of the Constitution makes implicit reference to a two party preferred vote, that the two party preferred vote is used when making distributions, but that the Commission does not properly consider the positions of those two parties when making distributions. The Liberal Party should thus have a better chance at gaining districts so that government can be formed should it achieve a majority of the popular vote. This, however does not mean that their job will be any easier.
4. As a temporary countermeasure before any impending legislation, the EDBC should take advantage of the 10 per cent margin of population distribution per district, in the interest of electoral fairness. The commission should delineate the borders so as to alleviate the Liberal bias.

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