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OPTIONAL PREFERENTIAL VOTING FOR THE AUSTRALIAN SENATE

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Introduction

This paper explores the possible use of optional preferential voting (OPV) as a way of dealing with concerns which have been crystallised at the 2013 Australian federal election about the operation of some aspects of the Senate electoral system. Its main emphasis is on the extent to which full preferential voting no longer enables voters to express their preferences truthfully, and the role which OPV could play in correcting this.¹

In a number of respects, the election was remarkable.

- The 40 vacancies were contested by a record number of candidates, 529.
- The percentage of votes polled by parties already represented in the Parliament dropped significantly from 2010.
- In five out of the six States, a candidate was elected from a party which had never previously been represented in the federal Parliament.
- For the first time ever, the seats in one State, South Australia, were divided between five different parties.
- In Victoria, a minor party candidate was elected after having polled only 0.5% of the first preference votes cast in the State.
- In Western Australia, a partial recount of ballot papers was ordered, and in the aftermath of its conduct it was revealed by the Australian Electoral Commission (AEC) that some 1,375 ballot papers “all of which had been verified during the initial WA Senate count ... could not be located, rechecked or verified in the recount process”. The recount changed the winners of the last two seats in the State, and challenges in the Court of Disputed Returns were immediately foreshadowed.

¹ Full preferential voting is defined here as a system under which the voter is required by the instructions on the ballot paper to indicate a preference ordering of all candidates. OPV is a system under which the ballot paper instructions indicate that a partial preference ordering will suffice.

- Allegations were reported in the media that some of the parties listed on the ballots had only a formal existence, and had been created for the purposes of exploiting opportunities for strategic manipulation of the ticket voting system.
- Particular preference orderings chosen by some groups for inclusion in their voting tickets either generated internal dissent or gave rise to public controversy, because of apparent difficulties in reconciling them with the broader political positions or stances of those who had lodged them.
- As a result of these factors, and before the counting had even been concluded, an unprecedented volume of public commentary calling for reform of the Senate electoral system was forthcoming. Two senators, Nick Xenophon of South Australia and Lee Rhiannon of New South Wales, foreshadowed the introduction of legislation to modify various aspects of the system.
- In addition, the South Australian Parliament began to give urgent consideration to possible changes to the electoral system for the State's Legislative Council, which at present closely resembles the Senate electoral system.

The following parts of this paper:

- briefly outline the main elements of the Senate electoral system;
- seek to disentangle some of the purported deficiencies of the 2013 election, noting their relationship with different aspects of the system; and
- examine the role which OPV could play in enabling voters to vote truthfully and meaningfully.

Main elements of the Senate electoral system

While the term “electoral system” is sometimes used quite broadly to encompass all elements of the process by which representatives are chosen, the public discussion since the September poll has focussed on something narrower: the mechanism by which voters’ preferences over a set of candidates are captured and aggregated to produce the election result. This definition excludes consideration of the important issue of the criteria which should be used to determine which candidates, groups and parties will appear on the ballot paper.

Two important dimensions of variation between electoral systems so defined are what Rae calls the “ballot structure” and the “electoral formula”.² The ballot structure is the choice which is presented to voters on their ballot papers, and the mechanics for recording the choice. The electoral formula is the rule which is applied, given a particular set of recorded votes, to determine the winner or winners.

Ballot structure for Senate elections

Fundamentally, the ballot structure for Senate elections has since 1934 been one of full preferential voting: that is, the voter is *prima facie* required to indicate an order of preference for every candidate on the ballot.

In 1948, the electoral formula for the Senate was changed from an essentially majoritarian one to a version of single transferable vote proportional representation. As noted by Reilly and Maley, from its first use in 1949 until 1983, there was a relatively steady upward trend in the number of candidates per vacancy.³

Coupled with the increases in the number of Senators per State from 6 to 10 in 1949, and from 10 to 12 in 1984, the rising number of candidates per vacancy produced a dramatic growth in the size of ballot papers. The large size of ballot papers, together with the requirement for full preferential voting, encouraged more and more people to vote by simply

² Douglas W. Rae, *The Political Consequences of Electoral Laws*, revised edition (New Haven and London: Yale University Press, 1971), 15-39.

³ Ben Reilly and Michael Maley, “The 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*, ed. Shaun Bowler and Bernard Grofman (Ann Arbor: University of Michigan Press, 2000), 53.

transcribing numbers from “how-to-vote” cards handed out by party workers at polling places.

Notwithstanding this, there was a trend during the period from 1949 to 1983 for the informal vote at Senate elections to increase. At every Senate election from 1970 to 1983, the nationwide rate of informal voting was over 9%. At the 1974 Senate election in New South Wales, voters had to order 73 candidates correctly in order to cast a formal vote.

During its time in office, the Whitlam Government sought to relax the requirements for full preferential numbering, but the Bills in question were blocked by the Opposition-dominated Senate.

Finally, in 1984, the current system of ticket voting “above the line” and full preferential voting “below the line” was introduced. A number of factors motivated the adoption of ticket voting by the Hawke government.

- First, the ALP had had experience with a closed list system of proportional representation (which had been introduced in 1973 for elections to the South Australian Legislative Council), and had included the use of “list” voting for the Senate in its electoral reform platform. There were, however, concerns in some quarters that a closed list system might not be held to meet the requirement set out in section 7 of the Constitution that “The Senate shall be composed of senators for each State, directly chosen by the people of the State ...”.⁴
- Secondly, the general approach taken in the work of the Joint Select Committee on Electoral Reform, which proposed the system in its *First Report*, was one of openness to compromise if that was needed to secure general support for reforms, the hope being that the sorts of deadlocks between the House of Representatives and the Senate

⁴ Indeed, 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]

which had stymied most of the Whitlam government's attempted electoral reforms could be avoided.

- Thirdly, there was little prospect in 1983 of securing cross-party support for OPV rather than the above and below the line hybrid as a route to Senate electoral system reform. The coalition remained opposed to it, and the Australian Democrats, who held the balance of power in the Senate, were ambivalent at best.⁵

The general interpretation of the new system at the time was that it simply amounted to an institutionalisation of how-to-vote cards, building them into the system to save voters from the task of transcribing them number by number.

There was, however, one aspect of the way in which the ticket voting system might work which was not widely appreciated at the time. Prior to 1984, the only voters who were assisted in their ballot numbering task by access to a how-to-vote card were those who supported a major party with a field structure sufficiently extensive to enable it to deploy supporters at polling places on a large scale. After 1984, any group could, in effect, give its supporters an ability to follow a how-to-vote card, and in a particularly easy way. From one perspective this made the system more equitable; but it also ultimately led, directly, to the phenomena observed at the 2013 election.

As has been widely documented, the current ticket voting system has been highly successful in reducing informal voting at Senate elections.

The electoral formula for Senate elections

The single transferable vote proportional representation electoral formula for Senate elections has only been subject to one significant change since 1948: as part of the 1984 amendments

⁵ As it happened, Senator Michael Macklin, then the spokesman for the Australian Democrats on electoral matters, indicated to the government that in the Democrats' view, the Joint Select Committee's proposal that a below the line vote should be formal if it bore a first preference and numbers (any numbers) in 90% of squares was not sufficient: a voter's markings on the ballot should evince a serious attempt to number every square correctly. As a consequence, amendments were moved to the Bill originally drafted to introduce the complex formality criteria for below the line votes which are still in place, which (where there are 10 or more candidates) require correct numbers in 90% of squares, or numbers that would be correct with changes to not more than three of them. The provision which exists for the optional lodging of multiple tickets by groups also originated with the Australian Democrats.

to Commonwealth electoral legislation, the “random sampling” process used for distributing “surplus” votes of elected candidates was changed to a “fractional transfer” process.⁶ The issues which arose at the 2013 election were in no sense caused, directly or indirectly, by that change. One of the paradoxical aspects of the current debate is that while the recent issues were essentially a result of the ballot structure, at least one widely discussed proposal - the introduction of a threshold percentage of first preference votes which a candidate would have to poll to be able to win a seat - would change the electoral formula, thereby dealing with symptoms rather than causes.

Problems in 2013

The fact that an election produces unusual results is not necessarily a sign of systemic problems. It is therefore necessary to go beyond a description of what happened to explore whether the system is, in fact, failing. A number of points have been raised in the public discussion.

Election of candidates from outside the political mainstream

This, more than anything else, would appear to be the aspect of the 2013 Senate poll which has attracted the interest of the broader public, rather than just electoral systems specialists or enthusiasts.

In a number of States, senators were elected who could not be described as professional politicians, and who appeared to have policy views on only a narrow range of issues. This has given rise to a considerable degree of public comment, and indeed mockery.⁷

⁶ Under the random sampling system, the possibility existed for the result of a close Senate election to be changed in a recount even if there had been no mistakes made in the vote counting in either the original count or the recount. The system was therefore not deterministic. The fractional transfer system is deterministic. The issue is examined in detail in A.J. Fischer, “Sampling Errors in the Electoral Process for the Australian Senate,” *Australian & New Zealand Journal of Statistics* 22 (1980): 24-39, and Alistair Fischer, “Aspects of the Voting System for the Senate,” *Politics* 15 (1981): 57-58. The particular fractional transfer system implemented, known as the “inclusive Gregory” system, has been a matter of some debate, but has not so far become a major element of the wider controversies of 2013. For further discussion, see David M. Farrell and Ian McAllister “The 1983 Change in Surplus Vote Transfer Procedures for the Australian Senate and its Consequences for the Single Transferable Vote,” *Australian Journal of Political Science* 38 (2003): 479-491.

⁷ For an example of the latter, see Mike Carlton, “Get us a drink, love, we’re going to need it,” *The Sydney Morning Herald*, 14 September 2013, at www.smh.com.au/comment/get-us-a-drink-love-were-going-to-need-it-

In some circles, this phenomenon seems to have been taken as *prima facie* evidence of the failure of the electoral system, but in response to that position several points can be made.

- First, the occasional choice of people from outside the mainstream with narrow policy positions is not in itself a new phenomenon: the 1960s and early 1970s saw the election of several explicitly independent senators.⁸
- Secondly, if voters in large numbers choose non-mainstream candidates, and such people are elected under a proportional representation system, that might well be taken as evidence that the system is working, not failing. An electoral system's role is to translate votes into seats, not to ensure the quality of elected candidates.
- Thirdly, it is by no means clear that only a narrow set of skills should qualify a person to be a senator: the role of a representative is multi-faceted, and it could be argued that the country would be better served by having a cross-section of people in the Senate than by filling it up with identikit political professionals.

On the whole, it is hard to avoid the conclusion that arguments based on the supposed quality of candidates elected are underpinned by more than a little snobbery.

Election of candidates with low primary votes

This phenomenon has again attracted significant public attention, but the criticism of it is somewhat conceptually confused. It is an essential feature of the alternative vote and the single transferable vote that those systems give no special priority to first preference votes (unlike, say, the Borda count and its variants, which explicitly weight different preferences).

[20130913-2tq0o.html](#), accessed 14 November 2013, wherein is reported an interview with a mythical Senator-elect "Jayson Dropkic".

⁸ Senator R J D ("Spot") Turnbull was elected as an independent in Tasmania in 1961 and again in 1967; and Senator Michael Townley was similarly elected in 1970 and 1974. Both, however, had political backgrounds. Senator Syd Negus, who was elected in Western Australia in 1970 on a platform of opposition to death duties, was rather more of an outsider. The votes of Senators Turnbull and Negus were seldom critical in the Senate, as the Democratic Labour Party (DLP) held the balance of power during their terms of service. Senator Townley's vote, however, was crucial in 1974-75, until he formally re-joined the Liberal Party.

In fact, many Senate candidates - typically those occupying the second or third positions in a group of major party candidates - have in the past been elected with very small primary votes.

In any case, it is questionable whether a candidate's first preference tally is a good indicator of his or her "support" or "popularity". In preferential voting systems, popularity is not measurable on some sort of absolute scale, but is rather defined in terms of comparisons between different candidates; and it is easy to come up with hypothetical examples in which a candidate who polls zero first preferences is in fact the Condorcet winner, the candidate who according to the voters' preferences would have beaten every other individual candidate in a head to head contest.⁹

Election of candidates on the basis of questionable preference flows

A more sophisticated argument is one which accepts the possibility that candidates may legitimately build their votes up to a winning level from a low primary base, but insists that the transfers of votes to them from other candidates should reflect the considered will of the voters in question. It is said by some that ticket voting fails to achieve this, as it enables voters to adopt preference orderings of which they are unaware or about which they are unconcerned, thereby "handing over control of their votes to parties".

This argument could be subject to demurrers at several points.

- First, it is by no means clear that the large number of voters who in the 1970s were slavishly copying how-to-vote cards onto ballot papers which did not show candidates' party affiliations had any more sense of or concern about the destination of their preferences than voters in the modern era.

⁹ For example, if three voters have the following preferences for candidates A, B, C and D (where "B>A>C>D" indicates that the voter's first preference is for B, second preference for A, third preference for C, and fourth preference for D):

B > A > C > D
C > A > B > D
D > A > B > C,

A is the Condorcet winner, even though A receives **no** first preference vote. While it might seem counter-intuitive to argue that a candidate who receives "no votes" deserves to win, the rejoinder can be made that to elect B instead of A would also be counter-intuitive, since a clear majority prefer A over B, and the same argument can be made in respect of candidates C and D.

- Secondly, as is argued by Burns, the act of voting preferentially can be conceived not as one involving the weighing of the merits of individual candidates, but as a “first past the post” choice of one of $n!$ possible votes (where n is the number of candidates), where a voter who conceives of his or her political position in terms of party rather than candidate support might quite reasonably simply seek to follow the recommendations of his or her favoured party.¹⁰
- Thirdly, voting for parties rather than candidates is a feature of electoral systems such as list proportional representation which may not give the voters the same amount of flexibility as a single transferable vote system, but could hardly be said to be undemocratic.

Strategic manipulation

It has been a matter of growing concern to a number of commentators that the ticket vote system is capable of being strategically manipulated by “preference harvesting”.

This practice, which involves “micro-parties” exchanging preferences with each other in their voting tickets, in the hope that one of them will succeed in getting a candidate elected, was pioneered at New South Wales Legislative Council elections, ultimately leading to the introduction of an “above the line preferential” voting system. The 2013 poll was the first Senate election at which classical preference harvesting was successful.

Agreements on exchanges of preferences are of course an embedded feature of Australian elections, and in general they cause no special concern. Preference harvesting as practised in its most extreme form is distinguishable from such normal arrangements in two main ways.

- First, the exchanges of preferences in a preference harvest are basically pragmatic, rather than reflecting an ideological alignment of the cooperating parties.¹¹

¹⁰ A.L. Burns, “Votes and Vetoes: A Comment on Goot-Langley-South,” *Politics*, 10 (1975): 54.

¹¹ In fairness to those who engage in preference harvesting, one could make the point first that major parties have also notoriously engaged from time to time in preference deals which were plainly pragmatic rather than ideological, and secondly that pragmatic alliances are a feature of politics in many countries, especially where

- Secondly, there would appear to be a widespread sense (backed by considerable anecdotal evidence) that many (though not all) of the parties which take part in preference harvesting have little underlying substance, and exist merely to get onto the ballot paper a sloganistic party name which it is thought might attract a small but potentially useful contribution to the harvest.

That having been said, the dividing line between normal preference exchanges and preference harvesting is by no means clear cut. What is reasonably clear is that once a widespread sense develops in a community that an electoral system can be “gamed”, and that victory (and a great deal of power) will go to those who are best at doing it, the overall legitimacy of the electoral process can be compromised.

Impact of random factors and paradoxes

Finally, it appears to be widely seen as a matter of concern that at a number of points in the Senate counts, order of exclusion, sometimes determined by small margins, became crucial. This was best exemplified in the initial count in Western Australia, where a 14 vote margin between two candidates had the potential to affect not just the last seat filled, but the last two.

There were also cases in which it was demonstrable that a party would have been better off had it won fewer votes.¹² Such situations in essence arise because in systems such as the alternative vote and the single transferable vote, some preferences are taken into account and others are not, depending on the order of election and exclusion of candidates.¹³

the use of proportional representation encourages the formation of governments via a process of post-election negotiations between parties.

¹² Kevin Bonham, discussing the Tasmanian count and the first Western Australian count, notes that “... the Liberals would have won in Tasmania had more of their voters mistaken the Liberal Democrats for them and voted Liberal Democrat instead of Liberal. The Sports Party would have won in Western Australia had the Wikileaks Party not preferenced the Sports Party at a certain point in the count and instead preferenced the Animal Justice Party. The Greens would have won in Western Australia had a handful of their own voters instead voted for the ideologically opposed Australian Christians.” (“Senate Reform: Change This System, But To What?”, at <http://kevinbonham.blogspot.jp/2013/10/senate-reform-change-this-system-but-to.html>, accessed 14 November 2013).

¹³ The possibility of such things happening is an inherent feature of “point-runoff” electoral systems, which category includes both the alternative vote and the single transferable vote. For proof, see John H. Smith, “Aggregation of Preferences with Variable Electorate,” *Econometrica*, 41 (1973): 1035-1037. For a further discussion of this in the specific context of the single transferable vote, see Gideon Doron and Richard Kronick, “Single Transferable Vote: An Example of a Perverse Social Choice Function,” *American Journal of Political Science*, 21 (1977): 303-311.

Capturing the wishes of the voters

Of all of the concerns just listed, the most fundamental is the sense that the outcome of the election was not really determined by the true wishes of the voters, because there was a disconnect between the preferences which the ticket voting system attributed to them, and those which they actually held. But for this, the other concerns would in all likelihood have been seen as simply unusual features of an unusual election, rather than fundamental systemic defects. This raises again the basic question of what ballot structure should be used for Senate elections, and how that might best capture the will of the voters.

Two concepts of “preferences”

At this point an issue of terminology arises. In general, discussions of preferential voting use the term “preference” in two distinct senses.

- First, it is used to refer to the actual assessment in the mind of a voter of the various candidates or options which he or she is facing.
- Secondly, it refers to the numbers written by the voter on his or her ballot paper, supposedly to record his or her preferences (first sense).

The use of the same term in both contexts is unhelpful and in fact quite misleading, because it gives rise to an implicit assumption that the numbers on the ballot will, by definition, reflect the ordering in the voter’s mind. In fact, it is quite extraordinarily unlikely that this is the case for most voters, so much so that for the balance of this paper the term “preferences” is used only to refer to that which is in the voter’s mind, while the figures actually written on the ballot are called “ballot paper numbers”.

The disconnect between the two concepts flows essentially from the rising difficulty which voters face in coming up with a set of preferences for all candidates. Shortly after compulsory voting was first introduced in 1924, the courts found themselves faced with a number of cases in which voters sought to challenge the new requirement, on the basis that

they had no preference, or found all the candidates equally distasteful. Then and up until now, the courts have been unmoved by such entreaties, in essence ruling that voters unable to order the candidates would simply have to try harder.

In those early days, however, there tended to be far fewer candidates than there are now. To illustrate this, the following table sets out some key statistics for the Senate elections of 1919, 1922 and 1925 (the first three after the introduction of preferential voting), 1934, 1937 and 1940 (the first three after the introduction of full preferential voting), and the last three Senate elections (2007, 2010 and 2013)

Election year/State	Total candidates (a)	Total vacancies (b)	Average number of candidates per vacancy (c)=(a)/(b)	Number of possible ways of ordering all the candidates (d)=a!	Possible number of pairwise comparisons required to fully order (a) $(=(a*(a-1))/2)$
1919					
NSW	11	3	3.67	39,916,800	55
VIC	9	3	3.00	362,880	36
QLD	6	3	2.00	720	15
WA	8	3	2.67	40,320	28
SA	7	3	2.33	5,040	21
TAS	10	4	2.25	3,628,800	45
1922					
NSW	11	3	3.67	39,916,800	55
VIC	10	3	3.33	3,628,800	45
QLD	12	4	3.00	479,001,600	66
WA	13	3	4.33	6,227,020,800	78
SA	10	3	3.33	3,628,800	45
TAS	8	3	2.67	40,320	28
1925					
NSW	10	5	2.00	3,628,800	45
VIC	8	4	2.00	40,320	28
QLD	6	3	2.00	720	15
WA	7	3	2.33	5040	21
SA	7	3	2.33	5040	21
TAS	12	4	3.00	479,001,600	66
1934					
NSW	13	3	4.33	6,227,020,800	78
VIC	8	3	2.67	40,320	28
QLD	12	3	4.00	479,001,600	66
WA	13	3	4.33	6,227,020,800	78
SA	7	3	2.33	5,040	21
TAS	14	3	4.67	87,178,291,200	91
1937					
NSW	9	4	2.25	362,880	36
VIC	10	3	3.33	3,628,800	45
QLD	9	3	3.00	362,880	36
WA	7	3	2.33	5,040	21
SA	13	3	4.33	6,227,020,800	78
TAS	10	3	3.33	3,628,800	45

Election year/State	Total candidates (a)	Total vacancies (b)	Average number of candidates per vacancy (c)=(a)/(b)	Number of possible ways of ordering all the candidates (d)=a!	Possible number of pairwise comparisons required to fully order (a) (=a*(a-1))/2)
1940					
NSW	21	3	7.00	5.10909×10^{19}	210
VIC	10	4	2.50	3,628,800	45
QLD	7	3	2.33	5,040	21
WA	11	3	3.67	39,916,800	55
SA	7	3	2.33	5,040	21
TAS	9	3	3.00	362,880	36
2007					
NSW	79	6	13.17	8.9462×10^{116}	3,081
VIC	68	6	11.33	2.48004×10^{96}	2,278
QLD	65	6	10.83	8.24765×10^{90}	2,080
WA	54	6	9.00	2.30844×10^{71}	1,431
SA	46	6	7.67	5.50262×10^{57}	1,035
TAS	28	6	4.67	3.04888×10^{29}	378
ACT	16	2	8.00	2.09228×10^{13}	120
NT	11	2	5.50	39,916,800	55
2010					
NSW	84	6	14.00	3.3142×10^{126}	3,486
VIC	60	6	10.00	8.32099×10^{81}	1,770
QLD	60	6	10.00	8.32099×10^{81}	1,770
WA	55	6	9.17	1.26964×10^{73}	1,485
SA	42	6	7.00	1.40501×10^{51}	861
TAS	24	6	4.00	6.20448×10^{23}	276
ACT	9	2	4.50	362,880	36
NT	15	2	7.50	1.30767×10^{12}	105
2013					
NSW	110	6	18.33	1.5882×10^{178}	5,995
VIC	97	6	16.17	9.6193×10^{151}	4,656
QLD	82	6	13.67	4.7536×10^{122}	3,321

WA	62	6	10.33	3.147×10^{85}	1,891
SA	73	6	12.17	4.4701×10^{105}	2,628
TAS	54	6	9.00	2.30844×10^{71}	1,431
ACT	27	2	13.50	1.08889×10^{28}	351
NT	24	2	12.00	6.20448×10^{23}	276

This table makes it clear that the voter minded to adopt Burns' approach to preferential voting as a first past the post choice could not possibly hope to make that choice by considering all possible alternatives: in every State at the 2013 election, the number of alternatives was greater than the estimated number of atoms in the universe.

The voter who sought not to compare all possible alternative votes, but simply to vote preferentially by comparing all candidates pairwise, would have an easier task, but still a massive one: in NSW, up to 5,995 such comparisons could be required to produce a full preference ordering; and the practical implications for the management of polling places of all voters attempting such a thing can only be imagined.

This, however, only touches upon one aspect of the problem. For even if the number of candidates (and therefore pairwise comparisons required for voters to order them) were much smaller, voters these days would still face almost insuperable difficulties in doing such ordering in any rational way. Again, historical comparisons are in order: in the 1920s and 1930s, far fewer political parties were contesting elections than is the case today, voting tended to be class-based on a left/right continuum with the odd independent or personality-based party thrown in, parties had manifestos and made little effort to hide them, and it was at least arguable that the task of ordering candidates was unlikely to be extraordinarily onerous, except perhaps for a minority of voters.

Now, however, things are different. If it is taken as axiomatic that voters have the right to determine the issues which are important to them, and therefore the criteria they will use to choose between candidates - and that would seem to be a minimalist test to apply to a proposed mechanism for democratic choice - they may well face a task that is intrinsically impossible, simply because they will be unable to access the information which they need to order the candidates *against those criteria*. A voter who wishes, for example, to rank

candidates higher or lower depending on whether they are “pro-life” or “pro-choice” may be faced with candidates who simply refuse to disclose their position. More generally, parties may seek to gag their candidates from speaking on any issue, as reportedly happened in some cases at the 2013 election. This argument also applies to voters who seek to order candidates by reference to the parties which endorsed them, since (especially in the case of “micro-parties”) their political positions may be obscure, narrowly-based, or incapable of being taken at face value.

The rise of early voting has made this problem worse, since many votes are now cast before the campaign has got into full swing, and even before the campaigns are officially launched.

In fact, however, the problem is even broader than all of these arguments suggest: it is highly likely that most voters at a Senate election never read the names of the candidates on the ballot paper, never seek to engage in pairwise comparisons of them, and therefore never have preferences for them. This is likely to be true even of those who vote below the line, many of whom will make their choices group by group rather than candidate by candidate. And for those who vote above the line, the concept of voters’ preferences is in effect abandoned except as an electoral fiction, and the system becomes one the sole aim of which is to inject ballot paper numbers into the AEC’s systems.

This leads inevitably to the conclusion that the current ballot structure for the Senate has produced a grand disjuncture between the preferences which voters have, and the ballot paper numbers which they write. Rather than the numbers being an accurate expression of the voters’ beliefs, the system itself ensures that they are distorted.

Leaving the “above the line” element of voting for a moment, it is useful to reflect on what is likely to be the true structure of a voter’s preferences for a set of candidates. Realistically, there will be some between whom the voter can distinguish, and some between whom he or she will be indifferent, for the sorts of reasons stated above. There may be some candidates whom the voter can identify as conspicuously worse than the rest.

Faced with a requirement to mark the ballot with consecutive numbers against all candidates, most voters have no choice but to lie. They may simply follow a how-to -vote card (though that is relatively unlikely for below the line voters, since most could have saved themselves

the trouble by voting above the line). More probably, they will write a few ballot paper numbers which truly express their preferences, and then fill the rest of the blank squares up either with random numbers, or with a quasi-“donkey vote” from left to right or vice versa.

From an electoral policy perspective this constitutes a *reductio ad absurdum*, for the effect would really be no different if the voter were permitted to leave squares blank where he or she had no preference to express, but the AEC were then required by law to complete the ballot for the voter using a random number generator.

What is to be done?

Given that below the line voting for candidates is arguably constitutionally required, the foregoing discussion suggests that a basic criterion for the choice of a new ballot structure for Senate elections should be that it enables below the line voters to record their preferences meaningfully and truthfully.¹⁴

Of the available policy choices, OPV comes closest to this ideal. It does not achieve it fully, because it does not permit a voter to express an equal first preference for two or more candidates (which may be the voter’s true assessment), nor does it permit indifference to be shown except at the level of the voter’s least preferred candidates. But it does not require voters to write large numbers of ballot paper numbers purporting to express preferences which they in fact do not hold, merely to ensure that the ballot paper numbers expressing their true preferences will be taken into consideration.

A key policy choice here is whether just one ballot paper number should suffice to make a vote formal, or whether more should be required. In principle, the arguments raised earlier imply that a single ballot paper number should suffice, if it expresses the only genuine preference which the voter holds.

It is sometimes argued that unless voters are required to write more than one ballot paper number, the exhaustion of votes will lead to a situation in which some candidates are elected

¹⁴ This was addressed in the Rudd Government’s September 2009 *Electoral Reform Green Paper: Strengthening Australia’s Democracy*, wherein it was stated as a basic principle, at paragraph 2.10, that “Balloting processes should enable voters to truthfully express their choices between candidates or parties.”

with less than a quota. It is difficult, however, to see this as a worse outcome than one in which the candidates in question gain a quota on the strength of ballot paper numbers written insincerely and/or at random by voters who have in fact run out of genuine preferences.

With the introduction of OPV below the line, the pragmatic need for the retention of any form of above the line voting as a mechanism for reducing informality would largely fall away. Its abandonment would eliminate preference harvesting, without compromising the ability of small parties to get elected on the strength of genuine preferences of the voters.

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