Elections and representative and responsible government

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Submission No. 181 to the JSCEM Inquiry into the 2013 Election

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Executive Summary

Overview of submission

In this submission I aim to draw out some implications of constitutional law on how we vote and on the development of the Electoral Act. In particular, the High Court's evolving interest in protecting the constitutionally mandated "system of representative and responsible government" seems to me to provide a substantial constraint on what electoral legislation can properly be enacted.

I won't cover every possible implication of these legal principles on electoral system choices. I'm particularly interested in how these principles apply to the mechanics of various voting systems, and I will cover that in some detail. I'll also address some wider issues such as the rules governing entitlements to enrolment and participating in voting, some (but not all) aspects of the governance of political parties, the apparent problem of multiple voting, and freedom of preferencing. Finally, in light of these ideas I'll review how the Senators and the Members of the House were elected last September.

My main conclusions can be summarised as follows:

- The High Court is developing a solid body of constitutional law around the idea that a "system of representative and responsible government" is fundamental to the Constitution, and that legislation which runs contrary to the needs of this system will be invalid.
- The voting systems in current use perform poorly in providing us with *representative* parliaments, and in certain ways also diminishes the *responsibility* of executive government to Parliament. The constitutionality of the current electoral law is therefore suspect.
- By clarifying how we define whether specific voting systems lead to representative results, we can develop a coherent, principle-based approach to choosing voting systems and determining other aspects of the electoral process.
- Future amendments to the Electoral Act should be based on the constitutional requirement for electoral laws to support a system of representative and responsible government, mindful that failing to do so runs a risk of judicial overruling.
- A thorough review of the Electoral Act in light of these constitutional principles by an independent reviewer – perhaps the Australian Law Reform Commission – would be very useful.

Summary of conclusions

Executive Summary

Conclusion 1: JSCEM should examine current electoral legislation, and consider any proposed amendments, in the light of settled constitutional law that protects the system of representative and responsible government. It is not desirable that existing laws be maintained, nor that any new amendments suggested, that are legally invalid and would be exposed as such by future litigation.

Conclusion 2: JSCEM, and Parliament, could greatly assist the public debate on voting system issues by making clear what *goals* – such as voter equality of influence, achievement of actual representation by the greatest number of electors, and the scope and quality of elector choice – are considered to be the fundamental tests of good electoral laws. By implication, goals which Parliament fails to adopt, or adopts only minimally, should also be made plain so that the community can hold Parliament accountable.

Enrolment

Conclusion 3: A key part of the *integrity* of the roll is the *completeness* of the roll, that is the roll's accuracy as a reflection of the whole set of electors. Legislative measures which weaken that completeness clearly have an adverse impact not only on individual electors but on the correct identification of the set of 'people' who must choose representatives to make up the houses of the Parliament.

Conclusion 4: Active enrolment should be maintained, and indeed further efforts to improve the accuracy of the roll should be investigated and adopted over time.

Conclusion 5: Any new legislation which derogates from active enrolment (including any attempt to repeal it) would clearly adversely affect the enrolment of a large number of electors, and would thus need to identify a legitimate purpose consistent with the maintenance of the system of representative government and be limited to devices appropriate to achieving such purposes.

Conclusion 6: Enrolment should be nationally integrated, replacing the division-level certified lists system with a single database of electors which maximises data accuracy and prevents voters from 'falling into the cracks' between division and state boundaries.

Political parties

Conclusion 7: Because diversity in political parties and candidates promotes choice for the electors, the registration of new political parties should not be made unduly difficult. Amendments which hinder registration would need to serve a legitimate purpose compatible with a system for electing representative parliaments based on voter choice – and the means adopted to achieve such a purpose would need to be reasonable and appropriate.

Conclusion 8: Party registration requirements should be nationally integrated, as a means of supporting the integrity of funding, disclosure and expenditure regulations.

Conclusion 9: A unified, internet-based donation reporting facility directly linked to a public inspection facility should be established.

Conclusion 10: Within a national regime for funding, disclosure and expenditure, the States should retain the power to determine their own settings for state-level funding, disclosure and expenditure rules.

Conclusion 11: In relation to issues of party name similarity, JSCEM should not recommend further restrictions which have as their end-point the refusal to register parties.

Conclusion 12: JSCEM should note that potential confusions arising from similar party names can appropriately be addressed by a number of lateral approaches including the use of multiple ballot paper variants, abandoning the use of the above-the-line voting, adopting the use of party logos on the ballot papers, and the use of electronic voting.

Voting

Conclusion 13: JSCEM should take note of the evidence that multiple voting is a very small problem, and is associated with genuine mistakes by voters who are elderly or have poorer English comprehension. There is no evidence of deliberate partisan attempts to use multiple voting to affect election results.

Conclusion 14: Legislation providing for a blunt photo-ID requirement for the exercise of a vote is potentially invalid; JSCEM should not recommend new legislation to impose such a requirement.

Conclusion 15: The use of ID checks not as a bar to valid voting but simply to direct votes into ordinary or 'declaration' categories should be considered. If a system of instantaneous electronic roll mark-off could also be implemented, these techniques would together add to the integrity of the electoral process without the serious adverse impact on voting entitlements which a bare ID requirement would impose.

Conclusion 16: Laws which invalidate elector's votes by way of compulsory preferencing rules are too severe an impost on elector choice, adversely affect elector participation, and should be abandoned. It is possible that compulsory preferencing as a device would fail the *Lange* test due to the severe adverse impact that the invalidation of many electors votes has on the need for the representatives to be "chosen by the people".

Conclusion 17: Minimum preferencing requirements are neither necessary nor appropriate. Enforcing such rules with a threat of vote invalidation is highly inappropriate and possibly unconstitutional. Instead, ballot paper instructions which encourage electors to use as many preferences as they wish to should be used.

Conclusion 18: The electoral process should make use of electronic technology to capture roll mark-off and voting data in electronic form. For roll mark-off the advantages are very clear. For vote recording, online voting has problems but is not the only option; the possibility of a dual electronic-and-printed-copy vote system should be examined.

The election of Senators

Conclusion 19: To break down the discrimination and potential misvoting impacts caused by single-variant ballot papers, ballot paper variations should be introduced for elections for the Senate and the House.

Conclusion 20: Ideally, all forms of above-the-line voting should be abandoned; they are a substantial departure from the idea of direct election of representatives. If ATL is retained, the level of optionality in preferencing should be increased as much as possible. The 'equal distribution' variant of ATL is the one least offensive to principles.

Conclusion 21: The group voting ticket system in the Electoral Act should be entirely abandoned.

Conclusion 22: All voting should be optional preferential.

Conclusion 23: Eligibility thresholds should not be introduced. They are unsound in principle and may be unconstitutional.

The election of the House

Conclusion 24: The effective influence on House of Representative election outcomes within the Australian electorate is currently subject to very serious levels of inequality.

Conclusion 25: The current House of Representatives represents, even after preferences, a smaller proportion of the Australian electorate than at any election since voting became compulsory in 1922. Millions of Australians do not have actual representation in the House.

Conclusion 26: Voting systems should be selected on the basis of agreed principles about what constitutes representation. Five such principles are proposed in this paper; if these are not accepted, perhaps others could be proposed in their place.

Conclusion 27: The voting systems chosen by Parliament for electing the Senate and the House should, above all other considerations, protect the responsible and representative character of the system of government mandated by the Constitution.

Conclusion 28: If the current system is maintained, its failings should be openly acknowledged.

Conclusion 29: Alternative approaches to electing the House, based on attempting to achieve a representative House in terms of key principles, should be proposed and debated.

Conclusion

Conclusion 30: Multiple aspects of the electoral law of the Commonwealth may be in conflict with the constitutionally mandated system of representative and responsible government. A thorough inquiry into such matters, perhaps conducted by the Australian Law Reform Commission, would be highly useful.

Constitutional law and 'representative and responsible government'

JSCEM is inquiring into the conduct of the recent elections for the House and Senate. The Australian Constitution requires these elections to be held to populate the two chambers of the Parliament.

The houses of the Parliament do not exist in isolation but are part of a greater structure – a system referred to as one of ***representative and responsible government***. This phrase sums up the basic nature of the system of democracy established by the Constitution as one in which the government is accountable to the Parliament, and the Parliament in turn is accountable to the people – a two-step accountability which in theory makes the government ultimately accountable to the people.

The expression representative and responsible government is the also central to understanding the place of elections in our public life, and the ways in which the conduct of elections should take place. The phrase was referred to frequently by the founders who wrote the Constitution, and was well understood by all those working in, and commenting on, the governance culture of the late 19th century. The expression and each of its two components *representative government* and *responsible government* have appeared regularly in the High Court's interpretations of our Constitution since federation, explaining what our national institutions such as Parliament are *for*, and clarifying how the validity of legislation, the common law and the actions of officials are constrained by the character of the political system which the Constitution creates and sustains.

The most noteworthy of that jurisprudence dates from the emergence of the 'political communication' rulings from the early 1990s, and the more recent 'enrolment' cases that have drawn from similar principles. The decisions in these cases have centred around a need to protect the essential character of the constitutional arrangement of institutions, and in particular those relating to election of Parliament. The Court has ruled that the law requires a strong degree of protection of the representative character of the houses of Parliament.

In the 1997 decision in the case of *Lange v ABC*[1] the Court held that the need to protect the representative character of the Parliament is not merely of theoretical interest, but impacts directly on the interpretation of the common law and on the scope of Parliament's capacity to enact legislation. The following passage explaining the Court's reasoning is worth quoting in full:

> "Representative and responsible government
>
> Sections 7 and 24 of the Constitution, read in context, require the members of the Senate and the House of Representatives to be directly chosen at periodic elections by the people of the States and of the Commonwealth respectively. This requirement embraces all that is necessary to effectuate the free election of representatives at periodic elections. What is involved in the people directly choosing their representatives at periodic elections, however, can be understood only by reference to the system of representative and responsible government to which ss 7 and 24 and other sections of the Constitution give effect.
>
> That the Constitution intended to provide for the institutions of representative and responsible government is made clear both by the Convention Debates and by the terms of the Constitution itself. Thus, at the Second Australasian Convention held in Adelaide in 1897, the Convention, on the motion of Mr Edmund Barton, resolved that the purpose of the Constitution was "to enlarge the powers of self-government of the people of Australia".
>
> Sections 1, 7, 8, 13, 24, 25, 28 and 30 of the Constitution give effect to the purpose of self-government by providing for the fundamental features of representative government. As Isaacs J put it: "[T]he Constitution is for the advancement of representative government".

The *Lange* test holds that if legislation, law or official actions adversely impact the protected constitutional situation (representative and responsible government), those laws or actions will be

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[1] *Lange v ABC* (1997) 189 CLR 520

invalid unless they can show that they serve a purpose which is compatible with the required situation and are also appropriate and adapted to achieve that purpose.

The content of the compound phrase representative and responsible government is well known. The 'responsible government' element requires that the executive government – the ministry – be accountable to Parliament. The term 'responsibility' has a narrow meaning; to be 'responsible' is to be *accountable* or *answerable* to Parliament on an ongoing basis, including being subject to continual questioning and being subject to removal from office if the support of the Parliament should be lost.

The idea of responsibility stands in contrast to a monarchical form of government, in which the ministry is not answerable to Parliament. It also stands in contrast to systems of government where the executive, even if elected, has a fixed term of office, as in the United States and other presidential systems. In a system of responsible government the ministry may be dismissed *at any time* by the lower House of that Parliament. The fact that the holding of office by the ministry is dependent on the ongoing confidence of the House gives crucial force to the idea of responsibility. In support of this relationship, the ministry is also continually subject to the scrutiny and criticism of the Parliament, through powers held by both the Senate as well as the House[2].

This system of government developed to achieve the outcome that the institutional arrangements directly influence the whole character and conduct of the executive government.

The 'representative' element of 'representative and responsible government' requires that the Parliament in question has a particular character; it must be a Parliament which is *representative* of the people. An unrepresentative Parliament will not suffice. This is so fundamental that Justice Sir Isaac Isaacs reached the conclusion cited above that "*the Constitution is for the advancement of representative government*".[3] It follows that the process by which the people elect representatives to the houses of Parliament is central to the existence of a system of representative government.

In recent years the Court has repeatedly held that Australian constitutional law protects these characteristics of our system of government, if necessary by setting aside any part of the common law, the enactments of Parliament and the actions of officials which undermine that position. The Court developed the *Lange* test to this end.

Several cases following the *Lange* ruling have clarified this constraint on Parliament's scope of legislative action by upholding the need for Parliament to be elected under conditions where voters exercise *choice* that is formed in a climate of open communication[4].

Another line of judgements have required that Parliament be elected by all of *the people* who are eligible to participate in that choosing[5]. These rulings have given effect to that goal by placing limits on Parliament's capacity to enact amending laws which hinder any of those people from participating.

Over the past two decades the *Lange* position has repeatedly been confirmed and refined into an enduring judicial formula for determining the validity of laws. These judgements provide a 'pathway of reasoning' by which to test the validity of legislative provisions:

(1) If a provision of legislation[6], either in its terms, operation of effect, effectively burdens[7] the system of representative government established by the Constitution (which includes the choosing by 'the people' of representatives to sit in the houses of Parliament), then

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2 *Egan v Chadwick* and *Egan v Willis*

3 *Federal Commissioner of Taxation v Munro* (1926) CLR 153 at 178.

4 Judgements in *Langer* (1996), *McGinty* (1996), *Monis* (2103) and *Unions NSW v NSW* (2013)

5 Judgements in *Roach* (2010) and *Rowe* (2013)

6 Note that all of Commonwealth laws, state laws and executive actions are also constrained by this principle, following the judgement in *Unions NSW v NSW*.

(2) to be valid, the law must –

(a) serve some legitimate purpose the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative government, and

(b) be reasonably appropriate and adapted to serve that purpose.[8]

Following the law articulated by the Court, it should be clear that authority is not given to the Parliament to enact laws which undermine the mandated system of representative and responsible government. Nor may the state parliaments enact such laws, nor may the executive governments at either level undertake actions that do so. Nor should any court applying the common law side with conclusions that undermine it. [9]

Nor is the scope of the protection of the system of representative and responsible government limited only to the recently litigated topics of freedom of speech and electoral enrolment. The Court has reached decisions on those topics because it concludes that representative and responsible government as an outcome must be protected. A thing cannot be protected if some gates are locked but others are left open, so it must be the case that the application of these principles extends to laws not only on those two subjects, but to *all* legislation and official action. If it were otherwise, then the required constitutional order would not in fact be protected. So there will be more categories of legislative subject matter yet to be tested against the constitutional protection that the Court requires.

I don't mean to suggest that judicial decisions applying the *Lange* test to individual cases will be specifically predictable. The Court has laid down a 'pathway of reasoning', but what result that pathway leads to on each issue that gets litigated is always open to the different application of the process to the facts by different judges.

Now, there is a competing rule used by the Court when determining the validity of legislation, which is that of *deference*. On technical subjects, it is common for the Court to allow Parliament a wide range of discretion as to how to address a policy issue. In such cases the Court will be careful to distinguish the judicial task of determining the scope of Parliament's powers from the question

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[7] In regard to this first limb of the test, the 5-justice majority in *Unions NSW v NSW* held that "A law will be invalid where it…may be taken to affect the system of government for which the Constitution provides…" (para 19). "The first question is whether [a provision] effectively burdens [the requirements for electing a representative parliament, in this case by infringing free communication] either in its terms, operation of effect." (para 36). "The identification of the extent of the burden imposed…is not relevant to the first enquiry". (para 40) In his supporting judgement Justice Keane added that "the limitation upon government power arises from ss 7, 24, 64 and 128 of the Constitution as a matter of necessity to ensure their effective operation" (para 103). The reason this principle exists is "to ensure the political sovereignty of the people of the Commonwealth, who are required to make the political choices necessary for the government of the federation…"(para 104). This "limitation on governmental power…is indispensable to the effective operation of these provisions of the Constitution…" (para 109).

[8] The majority in *Unions NSW v NSW* wrote as follows: "the second limb of the *Lange* test…asks whether the provision is reasonably appropriate and adapted, or proportionate, to serve a legitimate end in a manner which is compatible with the maintenance of the prescribed system of representative government. The enquiry whether a statutory provision is proportionate in the means it employs to achieve its object may involve consideration of whether there are alternative, reasonably practicable and less restrictive means of doing so." (para 44). At para 115 Keane J then summarised the two limbs of the *Lange* test in the language used above.

[9] The Court's decisions mainly speak of *representative* government, but it is occasionally made clear that *responsible and representative* forms a single larger conception of the system of government in question, The *responsible* government aspect of this principle has not been extensively considered in isolation by the Court. The *Egan* cases in 1996-97 are the only major relevant judgements. It may well be that there are judicial decisions yet to come regarding the relationship between the houses of Parliament and the executive, for example in regard to the production of information demanded by the Houses, the accountability of ministers, or laws enacted relating to the appropriation processes of the Parliament.

of what particular legislation makes an appropriate use of that power. The rationale for this rule is that Parliament, as the elected and accountable body, has the greater democratic mandate and accountability to determine policy questions. The deference arises directly from the idea that Parliament is *representative* of the people.

However, the application of the principle of judicial deference to the specific question of legislation determining the composition of Parliament contains a potential circularity. Should the Court defer to Parliament regarding the validity of legislation which threatens to make Parliament a less representative body? If Parliament is not to be representative, then the case for deference to its legislative enactments disappears. If the Court were to permit Parliament to legislate for an unrepresentative composition of itself, the Court may itself be said to have failed to correctly apply the constitutional mandate that a system of representative and responsible government be created and sustained.

It is also important to note that the Court does not defer to Parliament in regard to the definition of Parliament's *scope* of legislative power, only on the selection of legislative choices that fall *within* that scope.

Taking all these issues into account it follows that laws and actions that interfere with the answerability of the ministry to the Parliament, or undermine the representative character of that Parliament, will be invalid unless they satisfy an analysis using the *Lange* test. At the least such laws will be subject to modification in their effect so as to be compatible with the required constitutional regime of representative and responsible government.

Conclusion 1: JSCEM should examine current electoral legislation, and consider any proposed amendments, in the light of settled constitutional law that protects the system of representative and responsible government. It is not desirable that existing laws be maintained, nor that any new amendments suggested, that are legally invalid and would be exposed as such by future litigation.

These conclusions govern the task of Parliament – and of JSCEM as Parliament's adviser – in enacting laws for the conduct of elections.

'Representation' and electoral system design

There are many possible voting systems, many ways of controlling who can nominate and how people can cast votes, and many ways of administering elections. Features of electoral systems are often designed to suit various interests, or solve various problems as they appear from time to time. But not all voting systems and administrative options are equally legal within Australian constitutional law, because the Constitution creates the Parliament with the intention that it function within a holistic constitutional order, one in which representative and responsible government comes into existence and endures, ensuring that that system is democratically accountable to the electors.

What, then, causes a Parliament to have a *representative* character? Clearly, that character will arise primarily from the design of the electoral system by which its membership is chosen. How can we determine whether a particular electoral system has brought into being a representative assembly? What features of an electoral system result in successful representation?

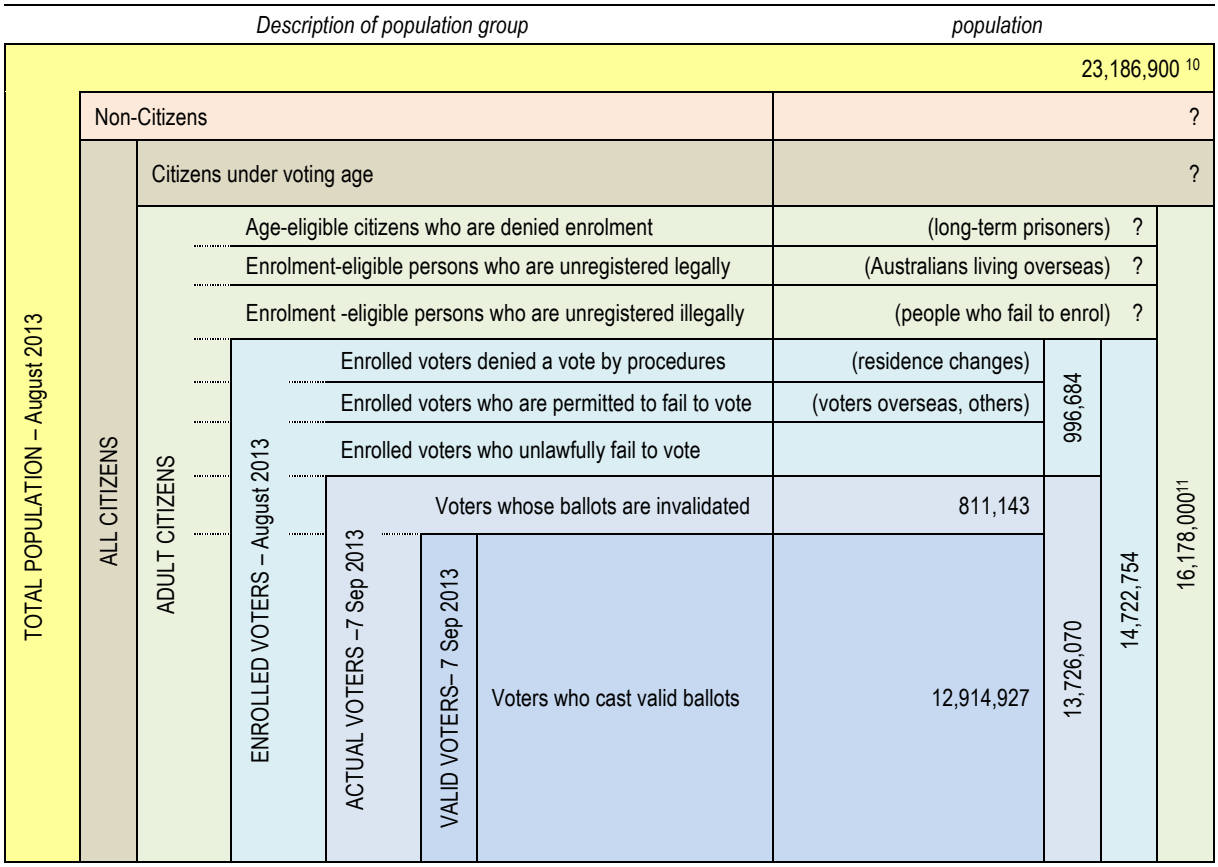
I propose that there are five relevant features:

- the extent of elector participation in the election
- the directness of the relationship between electors and the elected
- the scope of choice available to electors
- the degree to which the effective influence of each elector is equal
- the proportion of the electorate which achieves actual representation.

The first and perhaps most basic feature is the level of ***participation*** in the election. This in turn is built up in several layers, including who is entitled to vote, who is registered to vote, who actually

votes, and whose votes are counted as formal. An outline of the numbers of Australian people showing participation in the 2013 election is as follows:

Figure 1: Electoral subdivisions of the Australian population



The above diagram uses voting figures for the election of members of the House of Representatives in 2013. It shows that of an estimated population of around 16.178 million adult citizens eligible to vote, only 12.915 million actually cast valid votes. The real participation rate of Australians electing members to the House was therefore around 79.8%. The submission to JSCEM by the Democratic Audit of Australia (Professor Brian Costar) reaches the same conclusion (see JSCEM submission 116, para 1.2, page 2)

Two other features of representation are the directness of election and the exercise of choice. Both these concepts are explicitly mentioned in sections 7 and 24 of the Constitution.

Direct election can be defined as the absence of any intervening third party between the elector and the elected. For a relationship to be direct there must be no third party (or institution) which intervenes in the process by which the voter chooses the representative; no-one who can exercise control over which candidates are successful in competition with the choices of the electors. This straightforward definition is supported by the text of the Constitution, which refers to only two actors – "the people" and "members"/"Senators" – describes their relationship as "direct", and mentions no-one else.

Appointed upper houses are clearly not directly elected by the people. Similarly, the appointment of Senators to the United States Senate by State congresses or governors (as was the practice until the

10 Derived from the ABS population value for Australia as at 30 June 2013 – 23,130,900 – increased by 7 weeks' growth (to mid-August 2013) at the ABS annual growth rate of 1.8%

11 This is an estimate derived using a 91% rate of enrolment, which is within the range estimated by the AEC in recent years.

early 20th century, and is still the case for casual vacancies) and appointment to the Australian Senate in the case of casual vacancies, are not direct elections by the people.

Similarly the *party list* electoral systems (common in Europe, Asia and Latin America) are also not systems of direct election, because the individual parliamentarians are chosen by political parties, not by voters. In these systems, voters influence how many appointees each party has, but cannot directly control the identity of the individuals who become members of parliament. In his ruling in the *McKenzie* case, which upheld the 1984 amendments to the ballot structure for Senate elections, Chief Justice Gibbs stated:

> "…"it is right to say that the electors voting at a Senate election must vote for 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." [12]

On this understanding, ballot paper features such as displaying party names, grouping candidates under party headings, and even the ***group voting ticket*** (GVT) device are permissible, so long as the fundamental vote counting method remains individual-candidate based, and does not become one of voting for parties in themselves.

(Debatably, some 'open list' party list systems might be considered partially direct and partially non-direct, and their acceptability will depend on whether a given constitutional system requires 'direct election' to be unambiguous – as the Australian Constitution would appear to do.)

The question of whether ***choice*** is available to the electors is also fundamental. Without choice, there is no credible election, and the resulting Parliament cannot be said to provide meaningful representation. But there are many shades of choice that might be available, both in terms of the degree of choice and also of nature of it.

Not everyone's hopes or ideas of appropriate representation can always be accommodated. The world's electoral systems are all premised on processes of nomination. If none of the nominees are to an electors liking, but they are still provided with the opportunity to cast a ballot differentiating between them, we would still say that a degree of choice has been offered. There is a difference between facing unsatisfying choices and having no choice.

The more common problem is that choices are limited to a specific range of candidates, usually by the device of placing voters in geographical divisions. The idea here is that limiting voter choice only to nominees for that division means that the resulting members *represent* all the electors who are resident in that *geographical area*. But such limits deny choice to voters whose preferred representative – perhaps an individual of national prominence within a party, or merely a prominent person known for their performance on a key public issue – happens to live elsewhere from the voter.

The above three principles of representation – participation, direct election and free choice – are often guaranteed in national constitutions to some extent or other. Less often guaranteed are my final two important criteria, which are the extent to which each of the electors has an *equal influence* in the election of the representatives, and what proportion of the electorate achieves *actual representation* in Parliament by representatives whom they support.[13].

Equality of voting influence is a complex subject. It is possible to measure influence, and thus compare whether it is equal for different voters, by using at least these three distinct analyses:

- Are the ratios between the population sizes of groups of voters and the number of members they elect (and thus their voting strength in parliament) equal for all voters? For example are electoral divisions of voters which each elect a single representative equal in population size?

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[12] *McKenzie v Commonwealth* [1984] HCA 75

[13] The latter principle has at various times been termed *real representation* and also *effective representation*.

- Are the ratios between the population sizes of voters who support different political parties and the number of members of each party which are elected equal for all voters? In other words, do party-supporter populations of the same size elect different numbers of representatives, and vice versa? This is often measured in terms of vote share/seat share ratios, using formulae called *indices of disproportionality.*
- Is the effective ability of voters to combine to change an election result (for example, to elect a specific different member) different between voters? That is, do some voters need to combine with a small number of other voters to influence a result, whereas other voters must combine with a larger number? (This is, of course, the problem of the differential influence value of electors being enrolled in *marginal* seats as opposed to being enrolled in *safe* seats.)

Political research and system reform in relation to voter equality in the last half-century has been mainly concerned with seeing equality only in terms of the first of the above issues, equality in the *numbers of people enrolled* in electoral divisions. Reforms have been achieved in various democratic countries to make such enrolments similar in size, a cause that has gone under the banner 'one vote one value'.

Australia has among the most thorough approaches to equalising divisional enrolments. For the House of Representatives the boundaries within each state are reviewed at least every 7 years, and there are specific triggers for earlier reviews. The result is that most boundaries are reviewed at least every second election. Only a review every single electoral cycle would provide greater frequency.

Furthermore, the equalization standards used for the Australian House of Representatives are fairly tight, requiring individual division enrolment variations of no more than 3.5% from the mean enrolment of the state as at the mid-point of the coming 7-year period.[14]

One of the common ways to measure the degree of variation in a set of values is the *co-efficient of variation*; the ratio between the mean of those values and the average variation from that mean. The results of this measurement for the enrolments in several major democracies in recent elections are set out in the third column of **Table 1.**

Clearly the Australian results are the best in the sample of single-member division systems shown, no doubt because of our fairly robust and frequent systems of redistribution of divisional boundaries. This is commendable, and yet the deeper problem is that this work only addresses one aspect of the problem of voter equality, and addressing this factor alone cannot result in equal influence for all electors.

As we will see, the main cause of poor results in the equality of influence of electors is the use of ***single-member divisions*** (SMD).[15]

This point is easily highlighted by the continuing problem of dramatically different influence on total election outcomes of electors enrolled in marginal and safe seats seen under the single-member division system. In such electoral systems individual voters have influence over the election of members in proportion to the marginality of each division's election result.

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[14] The present procedures for redistributions were adopted in 1984; variations in House division enrolments were greater up to the election of 1983.

[15] Single-member division electoral systems are very common. Most nations which have their origins as British colonies and/or empire use such systems. As at 2012, around 42% of the world's population live in democracies which elect the lower house of their national parliament by a single-member division system of direct election. Around 20% live in systems which elect assemblies by methods of indirect, party list voting (although some of these will directly elect a president to lead their executive government.), and a further 13% are in countries which use composites of party list and single-member division systems. Fewer than 2% of people live in countries which use non-single-member division systems of direct election. The remaining 22% of the world's population live in countries which are not democracies.

Table 1: Variations in enrolment, influence and actual representation

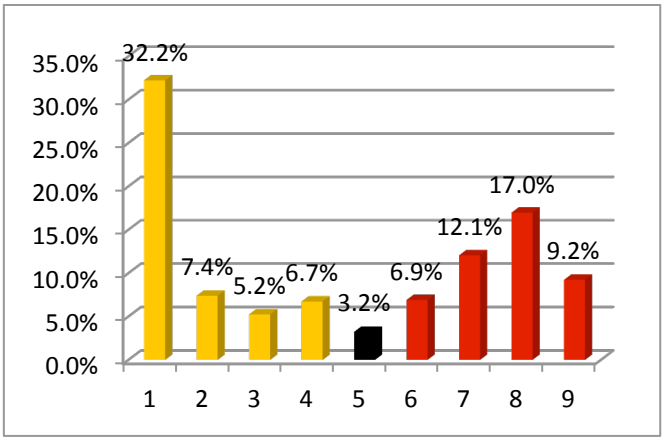
Nation	Election	Variation in enrolments across all divisions (coefficient of variation)	Variation in influence of all electors (coefficient of variation)	% of enrolled voters with actual representation	
				(NB: *first preference votes* used in Australia and STV systems)	After preferences (Australia)
SINGLE-MEMBER DIVISION SYSTEMS					
Australian House of Representatives	2001	7.9	66.1	44.8%	53.8%
	2004	8.2	63.6	46.1%	53.4%
	2007	8.4	71.5	46.4%	53.7%
	2010	9.1	69.0	43.6%	53.2%
	2013	8.5	69.7	42.1%	51.5%
NSW Legislative Assembly	2011	2.3	71.0	48.2%	*
Vic Legislative Assembly	2010	10.6	62.7	44.5%	53.5%
Qld Legislative Assembly	2012	6.6	66.4	45.3%	49.3%
WA Legislative Assembly	2013	13.3	68.3	42.8%	49.9%
SA House of Assembly	2014	3.4	67.9	45.3%	53.4%
United Kingdom House of Commons	2005	12.3	57.9	29.1%	–
	2010	11.1	65.9	30.7%	–
Canadian House of Commons	2011	22.3	78.7	30.6%	–
United States House of Representatives	2000	*	57.0	34.1%	–
	2002	*	55.6	25.7%	–
	2004	*	52.9	37.9%	–
	2006	*	62.2	25.6%	–
	2008	*	60.7	38.0%	–
	2010	*	65.7	25.6%	–
	2012	*	57.3	36.1%	–
Lok Sabha (India)	2009	18.9	107.1	25.7%	–
Qaumī Asimbli'e (Pakistan)	2008	24.0	117.3	22.4%	–
	2013	22.6	*	*	–
Dewan Rakyat (Malaysia)	2008	39.7	79.3	43.6%	–
	2013	42.0	95.4	49.6%	–
SINGLE TRANSFERABLE VOTE (STV) SYSTEMS					
Australian Senate	2004	80.7	–	74.5%	–
	2007	80.6	–	77.1%	–
	2010	80.4	–	78.2%	–
	2013	80.2	–	71.2%	–
Tasmanian House of Assembly	2010	1.0	–	84.9%	–
	2014	1.4	–	78.9%	–
ACT Legislative Assembly	2008	3.3	–	73.5%	–
	2012	2.8	–	71.7%	–
New South Wales Legislative Council	2007	–	–	71.8%	–
	2011	–	–	78.6%	–
Dáil Éireann (Éire)	2007	9.7	–	53.6%	–
	2011	14.2	–	51.0%	–
Kamra tad-Deputati (Malta)	2013	3.5	–	90.1%	–

(*) indicates data not available; (–) indicates not relevant or not applicable. Notes explaining this data table are at the end of this Submission.

In the 2013 election, seat marginality ranged from just 53 votes (Fairfax) to 40,066 votes (Maranoa), with a mean winning margin of 14,955 votes. In Table 1 the fourth column clearly shows the high level of variation in the effective influence of voters, and note that there is no noticeable association between low variations in enrolment numbers and the variations seen in effective influence.

The level of influence of all voters (at least, those whose votes are accepted as formal) can also be measured by a comparison to the mean marginality. The result for Australia's most recent House election was as follows:

Figure 2: Influence bands in the electorate, elections for the House of Representatives 2013



Enrolled electors sorted into 9 bands:

1 Voters with influence of 200% of the mean or greater
2 Voters with influence of 150%-199% of the mean
3 Voters with influence of 120%-149% of the mean
4 Voters with influence of 105%-119% of the mean
5 Voters with influence of 95%-105% of the mean
6 Voters with influence of 83.3%-95% of the mean
7 Voters with influence of 66.6%-83.3% of the mean
8 Voters with influence of 50%-66.6% of the mean
9 Voters with influence of below 50% of the mean

These results demonstrate the widely known fact that marginal seat voters have an excessive influence on election results. 32% of the electorate has more than double the average influence on election outcomes. These are the marginal seat voters who determine who controls the House and therefore who forms governments in Australia. In fact just over 1 million electors in the 11 most marginal seats have greater than 10 times the effective influence of the average Australian elector.

By contrast around 45% of our electors had low levels of influence.

We can also see that single-member division systems make voters unequal in influence on the basis of which political party they prefer. On average, in 2013 every 70,300 Australian voters who supported a major party elected one representative to the House of Representatives. Most advantaged of all, it took less than 52,000 supporters of the Queensland Liberal National Party to elect each of its successful members. In sharp contrast, it took 1.1 million Green voters to elect just one representative, and 700,000 PUP voters to do the same. Around 900,000 voters who supported other micro-parties elected were left unrepresented. Under single-member division systems it is very clear that the influence of different voters varies greatly depending on who they support.

If the above results look poor, what would *success* look like in providing equality? True success would be that every voter had *identical* influence in electing representatives. Below we will discuss the quota-based voting systems that were designed to achieve just that, by dictating that the number of electors necessary to support any elected member be identical. The original use of the term 'proportional representation' in the 19th century was related to this idea – that the voter base of every elected member was the same, thus giving all voters a universally proportional influence on the results. (The modern use of this term to compare outcomes between political parties has a significantly different meaning.)

All systems which allow candidates to be elected by different numbers of supporting voters fall short of that standard of equality. Inequality is, in particular, the primary failure of systems based on single-member electoral divisions. The members of such parliaments have often been elected by sharply different numbers of voters. The inequality of influence of such voters on two of the measures mentioned above – different ability to elect representatives for supporters of different parties, and different degrees of marginality of the electoral divisions – are always substantial.

Differences in enrolment equality can often be substantial, and indeed have been deliberately manipulated in many countries over the years.

Let's focus more closely on the relationship between enrolment equality and influence equality. Some data on inequality of division margins in a selection of recent elections in single-member division countries is set out in Table 1 (4th column). We can see clearly that, contrary to common understanding, striving towards equality in the first of the three issues – equality of enrolments in the electoral divisions – does NOT solve the whole problem of inequality of influence. Of the countries shown in the Table above, we see that Australia has the lowest levels of enrolment inequality of the SMD systems. This is probably because of two factors: firstly the compulsory enrolment laws and the resulting very high election participation rates in our country, and secondly because Australia probably has the best division redistribution rules to strive for division population equality.

But these arrangements are not enough to overcome the powerful inequality effects generated by the other two aspects of inequality. Across the nations shown in Table 1, while enrolment variation results range from the very low CofV value of 2.3 (in NSW) to the mid-20s, peaking at over 40 (in Malaysia), all the results for influence variation are much higher, with most CofV values ranging from over 50 to nearly 80.

The clear conclusion is that in the presence of single-member divisions inequality of voter influence is always substantial, and cannot be controlled through enrolment equality measures.

The fifth principle of representation is the notion of ***actual representation*** – the outcome for any given elector of achieving a representative in Parliament whom they support, and whom they can safely regard as representing their views and as inclined to vote on legislation and other matters in a manner that the voter would wish. We can measure the level of actual representation as the proportion of the enrolled electorate that achieves it in any given election.

We can regard votes cast for a single candidate (in plurality elections) as well as first preference votes in preferential voting systems, as indicating a candidate who, if elected, gives actual representation to their voters. We could also stretch the definition so that in multi-member divisions, if a voter supports a political party that has at least one candidate elected, then that voter is represented even if their first preference vote was for a different candidate of the party.

In addition, the idea of actual representation can be stretched to accommodate preference voting, so that if the candidate of a voter's first preference fails to be elected, at least some next preferred candidate might do so, and if that happens then this voter can also be counted among those who have won actual representation. However this assumes that all subsequent preferences are indications of *positive* support, which cannot be taken for granted in compulsory preferencing systems (which oblige voters to mark a sequence of preferences for all candidates). In such systems, many of the preferences given for lower-ranked candidates may only reflect a relative ranking of *disapproved* candidates. For this reason, measurements of actual representation using preferences can only be soundly based if preferencing is optional.

Note that it is impossible to give 100% of voters a successful outcome of actual representation, simply because some voters fail to vote, have their votes invalidated, or choose to support small parties and independents who fail to get elected. This is true of all electoral systems.[16]

As with problems of inequality, low rates of actual representation are endemic in single-member division systems, especially non-preferential ones. Results for the proportion of voters who had actual representation is also shown in Table 1 (in the 5th and 6th columns). Not very good, are they? And note that even Australia's very high participation rates do not generate results of even 50% of the electorate. Not that 50% is any sort of target here – we should be aiming for actual

[16] At least, it is impossible in ordinary elections to elect Parliaments, with the complex variety of patterns they throw up. 100% actual representation might be possible in abstract examples with small voter pools and highly fortuitous ratios between voters, candidates and seats.

representation rates much higher than half the voters; we should be looking for actual representation for the highest proportion of the electorate that is possible.

Note also that Australia's preferential voting system, while it gives higher results, does not increase the results by a very great margin.

The direct voting system that will give the highest results in terms of actual representation is the ***single transferable vote*** system (STV); we will discuss this in more detail below. Table 1 shows rates of actual representation achieved in some jurisdictions electing assemblies by STV: the Australian Senate, the Tasmanian and ACT Legislative Assemblies, the NSW Legislative Council, the Irish Dáil Éireann, and the Maltese Kamra tad-Deputati (House of Representatives). It is apparent that results near or over 80% actual representation are quite achievable, and the Maltese result demonstrates that representation of over 90% is possible.

It is immediately clear that STV gives voters far higher levels of actual representation than SMD systems.

Conclusion

The five key voting system goals outlined above are significantly interlinked. For example, actual representation outcomes will be lowered whenever participation is lowered. Actual representation also loses its genuine character if voter choice is limited. Electors who have their participation limited, or their choices constrained, can consequentially have a less equal influence, or possibly no influence at all, on election outcomes. Overall, success in achieving each of these five goals appears to support success with others.

Conclusion 2: JSCEM, and Parliament, could greatly assist the public debate on voting system issues by making clear what *goals* – such as voter equality of influence, achievement of actual representation by the greatest number of electors, and the scope and quality of elector choice – are considered to be the fundamental tests of good electoral laws. By implication, goals which Parliament fails to adopt, or adopts only minimally, should also be made plain so that the community can hold Parliament accountable.

Note that these voting system principles are all addressed to the interests of the *electors*, not the interests of *political parties*. Political parties were not mentioned in the Constitution as drafted, and indeed in the late 19th century the idea that parties were entitled to have interests in their own right would have been controversial, and most likely a minority view at best, for certainly the 'influence of faction' was strongly opposed by many constitutional founders and other political thinkers.[17] Political parties are not an integral element of the constitutionally mandated system of representative and responsible government.

Optimal voting systems to achieve representation goals

How do the five principles of representation outlined above guide us to choose voting system features which best achieve the representation of the voters?

Adhering to the principle of *direct election* rules out the use of any of the party list voting systems favoured in Europe and other parts of the world.

Choice comes in a spectrum of degrees. The number and diversity of candidates on offer is obviously a basic driver of how much choice is on offer. But the selection of the voting system also controls how much choice is offered in several ways. Basic voting systems which offer voters just one step in exercising their choice, by supporting one single candidate and doing nothing further,

[17] Only from 1977 were political parties referred to in the Constitution, and only on the specific issue of integrity in the filling of casual vacancies.

deny voters the capacity to have 'fallback' positions, which means that their first and only choice may be constrained by tactical considerations.

Allowing a series of fallback choices to be expressed is, of course, exactly what preferential voting systems make possible.

The goal of voter *equality* would seem to require that it should take exactly the same number of voters to elect every candidate to Parliament. This in turn suggests the need for a uniform quota for election.

From these conclusions we can see the following specific voting devices are those that are optimal to achieve the best representation outcomes:

- direct marking against the names of individual candidates on the ballot paper
- no use of 'party lists' in any form
- the setting of a common quota of votes for awarding every seat to a winning candidate
- multiple preferences in a sequence are recorded
- all preferences are optional choices
- no use of rules invalidating the ballots of voters because of their choices

Electoral scientists will recognise in these conclusions the outlines of the single transferable vote method (STV), with optional preferencing. STV was invented in the mid 19th century and subsequently developed in significant ways by Australians. STV's mechanism is at the heart of the package of voting techniques widely used in Australia and known as the Hare-Clark system.

Further, the data shown in Table 1 is clear evidence that choosing STV over SMD yields strong results in terms of the principle of *actual representation*.

To understand the features that would make up an optimal way of voting to achieve all the above goals, it may help to use a visual metaphor of the voting process.

Suppose that all the voters are gathered in a field. Candidates are nominated, and each one takes up a visible position; perhaps they are arranged in clusters to represent alliance as parties. The voters then move around the field, each choosing to stand around the candidate whom they support to be their representative in parliament. Voters may change their minds and shift around within a pre-agreed timeframe in which to settle. As each candidate attracts a quota of votes, that support is locked in, but voters surplus to the quota are released to continue in search of other options. The election has achieved its end, and voter movements cease, when as many of the voters as possible are gathered in equal numbers in support of the chosen candidates.

In this illustration:

- The principle of *direct election* is maintained by ensuring that the only form of support that matters is that of an individual elector choosing to stand by the position of an individual candidate. No practice is permitted which would allow proxy voting through intermediaries, or the collection and direction of individual votes by intermediaries, or involving voting for clusters (that is, parties) rather than for individual candidates.
- Next, two simple rules serve jointly to give effect to each of the principle of *equality of influence* and that of *actual representation*. One rule is that the election of every successful candidate must be based on attracting the same number of voters – a *quota* – showing their support. The second rule is that if more voters than the required common quota support one candidate, some of them may be released to give support for other candidates. The first rule gives us the basic result of voter equality, while the second rule prevents that equality from being immediately undermined by diminishing the relative value of voters who support a candidate in over-quota numbers, compared to others who more closely match the target quota. And both rules work together to ensure a high rate of actual representation
- The principle of *choice* is upheld by ensuring that all voters can see all the options available, and their responses are limited only by the effort they wish to put in to explore those

options. In addition, choice is not undermined by any practice that creates rewards or penalties for choosing one candidate over another. Free choice also extends to the right to shift support during the sorting process without any discriminatory pressures being imposed. Finally, the option of stepping out of the process altogether (ie: by their ballot becoming exhausted) is available, so long as it is an entirely voluntary option.

- The principle of *participation* is protected when all voters are freely able to join in the voting exercise. There are no 'barriers to entry' to the field. No procedure is used which threatens to discourage or to exclude any voter from the voting process on the basis of the candidate choices they prefer.

No other method of direct election gives voters equality of influence, high levels of actual representation and high levels of choice to the extent that STV does. STV has no adverse impacts on participation rates (although variants which invalidate ballots through compulsory preferencing requirements do have a negative impact), and indeed the high levels of choice and control have a measureable effect of increasing participation rates.

Later in this submission I will use discussions of the processes by which the Senate and the House are elected to further illustrate these conclusions.

STV sometimes suffers from unpredictable results arising from the use of *sequential elimination* (ie: the exclusion of the lowest-ranked candidate in the successive rounds of counting). This is a traditional, but not a necessary, approach to sorting the votes towards a set of winners. Sequential elimination causes several problems.[18]

In addition, as with most voting methods, STV can be bastardised by add-on contrivances that damage the integrity of its outcomes. The group voting ticket system used for the Australian Senate since 1984 is just such a contrivance. The Electoral Reform Society of Australia agrees, noting that in regard to criticism of the recent election of the Senate:

> "It is not the voting system that is at fault. It is the accretions superimposed on the system that have distorted the results. The worst of these accretions is above-the-line voting and its associated group voting tickets, but there is also the unnecessary and undemocratic requirement to number a large number of squares in order to register a formal vote." [19]

I will discuss in more detail below (in the section 'The election of Senators') the way in which the current Senate system results in a serious misuse of STV.

Other issues concerning voting systems

Finally, it's worth noting that there are other factors of a less 'mechanical' kind (ie: not related to the level of representation generated by the vote counting method itself) by which voting methods and electoral systems can be evaluated. These generally fall into the following categories:

- the *information convenience* of electors (ie: the burden of information needed to utilise any given voting method or electoral practice)
- the convenience and cost-effectiveness of voting methods for the *administrators* of the system
- the vulnerabilities (if any) of a given voting system to being manipulated, or *gamed*, by candidates or political parties (or even by electors)

These kinds of problems to be ones best addressed by pragmatic operational solutions. They should not be elevated as matters on which the primary selection of voting methods should turn.

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[18] The defects caused by sequential elimination can be cured by the use of the Condorcet principle, which identifies winners who would prevail over any candidate to whom they are compared, rather than just the one candidate against whom they are finally matched after just one particular sequence of exclusions. However the calculation demands on doing this with STV are significant and no convenient method has yet been proposed.

[19] Blog article *It's now or never!* - http://electoralreformaustralia.org/?p=323

In particular, we should treat with deep scepticism arguments that voting systems which present lots of choice – such as the current approach to electing Senators – are "too complex" for voters to understand. The problems of complexity are usually only material when inherently simple voting systems are unhappily coupled with devices such as compulsory preferencing, or the need to understand the impact of distortions such as group voting tickets. More on this below!

Gaming vulnerabilities can sometimes be addressed by pragmatic solutions, but its true that some failings of this kind do go to the merits of voting systems themselves (for example, block voting and Borda counting are voting systems that are highly subject to gaming.)

Plain STV is a very difficult voting system to game by either candidates or by voters, and indeed voters have no real incentive even to seek to do so. The recently notorious gaming of the Australian Senate group voting ticket system is an instance not of gaming STV itself but of gaming the GVT add-on.

Voting systems that subject either the nominees or the electors to perverse incentives or disincentives (such as by forcing parties to strategize about which or how many candidate to nominate, or forcing voters to mark insincere or tactical preferences) should also always be avoided. Such devices all reduce the degree and quality of voter choice.

Australian constitutional decisions relating to representative government

Parliament makes laws for its own election, but the scope of action for Parliament in making such laws is not infinite. As discussed earlier, Parliament is constrained by the terms of the Constitution, and the rulings of the Court in constitutional issues. The key judicial decisions have been concerned to protect the essential character of the Constitutional arrangement of institutions, and of the election of Parliament in particular. They have required a strong degree of protection of the 'representative' character of the houses of Parliament. These judgements – many of which have been either unanimous judgements or strong majorities – have established limits to Parliament's role in electoral law-making which are yet to be fully explored, and which JSCEM will need to consider carefully.

Below are some brief observations about how past cases have applied to the principles of representativeness raised in this submission.

Constitutional law relating to participation

Key judgements in recent years have established that the principle of participation, in terms of laws governing both *enrolment* and also *voting*, has quite high protection. While there is no unambiguous definition of what standard of access to each of enrolling and voting is guaranteed to electors, we have seen that amending laws passed by Parliament which appear to reduce such access have been ruled to be beyond the Parliament's powers. [20]

Constitutional law relating to direct election

The Constitution requires that Senators and Members be directly elected. This seems to leave little doubt that indirect voting systems – including party list systems – are not acceptable under our Constitution. The ruling of the Court in the 1984 *McKenzie* case was cited above.

In the 2004 *Mulholland* case Chief Justice Gleeson examined "…the stipulation, in the Australian Constitution, that senators and members of the House of Representatives shall be directly chosen by the people", and wrote that "I accept that the stipulation goes beyond a mere prohibition of indirect election, as by an electoral college."[21]

Constitutional law relating to choice (whether representatives can be said to be 'chosen')

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[20] *Roach* (2007), *Rowe* (2010)

[21] *Mulholland v AEC* [2004] HCA 41 at 25-26

In regard to the degree of choice, the Constitution does not guarantee that all the options that a voter might desire be available, but only that at least *some* options are available.[22]

The Court has not especially ruled to protect high levels of choice as a feature of Australian constitutional law. The Court has held that even the presence of just two candidates amounts to an adequate amount of choice.[23]

In fact between federation and the 1950s there were several dozen occasions on which a single-member division of the House was 'contested' by only a single nominee, leading to no election being held. No-one seems to have pointed out that the members who took those seats lacked the attribute of having been "chosen by the people". It would seem that the provision of a nomination opportunity alone was regarded as making up a system of choosing. More likely no-one questioned these uncontested 'elections' in the conceptual terms used by the Court in recent years.

Nor is it true that options must all be presented to the electors in a strictly uniform manner. In *Mulholland* the Court considered litigation on the issue of whether the design of the ballot paper specified in the Act was having a discriminatory impact on choice, by reason that independent candidates did not have a place in the above-the-line section of the ballot paper. The Court ruled that whatever differential impact this design had on choice, it did not fatally detract from the choice that each elector could exercise by using the main body of the ballot (the 'below-the-line' area).

But the finding in *Mulholland* did not rule out Court supervision in appropriate cases; Chief Justice Gleeson again:

> "I also accept that certain kinds or degrees of interference … including arrangements as to the form of the ballot paper, conceivably could be antithetical to the idea of representative democracy and direct choice.

Constitutional law relating to equality of voter influence

It is not clear that equality of influence has yet achieved much substantial protection. As mentioned earlier equality of influence has been understood in recent decades only in the limited sense of pursuing equality of divisional enrolments. In the *McGinty* case, the Court ruled that state laws (for electing state parliaments) were valid even though they had plainly failed to implement equality of divisional enrolment, specifically by continuing with the old practice of enrolment weightings for rural divisions.[24].

To repeat, these rulings only touch on the equality of divisional enrolments, and give no consideration to the other ways in which different voting systems give voters different levels of influence on election outcomes.

Constitutional law relating to actual representation

I am not aware that the Court has ever addressed the notion of actual representation. As outlined above, and given detail below, over half of Australia's electors have been denied actual representation since 1901, and the voting methods that allow this to happen have not been impugned in judicial decisions.

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[22] *Mulholland v AEC*

[23] *Mulholland v AEC*, *Langer v Commonwealth*

[24] Some of the judicial comments noted that the Court might on some future occasion find that divisional enrolments that were highly unequal might be impugned.

Enrolment

Enrolment is an administrative device; a practical record of the identities of "the people" making up the ***electors*** of the Commonwealth. Enrolment as a practice is not mentioned in the Constitution, and makes up no part of the definition of whether a specific individual person is or is not an elector.

Administrative practices for the enrolment of electors emerged in Britain, Australia and other democratic nations from the 19th century onward. In regard to elections for the Senate and the House, administrative processes to manage enrolment were laid out in the 1902 Commonwealth Electoral Act. A philosophy that every qualified elector ought to participate in every election has existed since the beginning of Australia's electoral administration.

After the 1902 legislation was enacted, strenuous official efforts were made to ensure that every elector was found and their details recorded. Between 1902 and 1911 the results of enrolment mechanisms was thought to be inadequate, not least because female enrolment was disproportionately low. In response, in 1911 enrolment was by Commonwealth legislation made a legal obligation of every elector (significantly easing the administrative burden on officials, who would otherwise need to chase down each individual).

The *qualification* of electors must be conceptually superior to the *enrolment* of electors; the latter is simple a means to implement the former. The enrolment regime is established by legislation, and is therefore subject to control by the Constitution, including constitutional implications identified by the Court. The Constitution gives a definition of the people who are the nation's electors, and the Court has clearly identified that *the people* by whom the houses of Parliament are intended to be chosen are the set of all those electors.

It follows that legislation and regulations that impact the ability of an elector to become enrolled (or, for that matter, to exercise the vote based on that enrolment) must attract the attention of the 'system of representative government' scrutiny established by the Court. Since enrolment is a device intended for practical use to afford each elector their vote, a provision of legislation which hinders an elector from becoming enrolled would need to survive the *Lange* test by demonstrating that it served some legitimate purpose consistent with the maintenance of the system of representative government, and was reasonable and appropriate to achieve that purpose.

The modern jurisprudence of the Court – seen in the judgements in the *Rowe* and *Roach* cases – has shown that the Constitution prescribes protections to the right of individuals to enrol and to vote. These rulings are necessarily premised on the goal that if possible every elector should participate in the election. This does not mean that electoral laws must guarantee that enrolment is perfect, or even that it must strive to *maximise* enrolment according to any specific standard.

In the past decade a slow decline of estimated enrolment rates (that is, enrolment as a proportion of the estimated population of all qualified electors) has led to a growing concern that the system of obligatory-but-voluntary enrolment, where the responsibility for action lay with voters individually, was no longer adequate.

Whilst electors are placed under obligations by the Act to provide and update information relating to their enrolment, not all the responsibility for the comprehensiveness and accuracy of the roll lies with electors. It was never the intent of legislation to place complete responsibility on the electors. At no point has the Commission or its predecessors ever refrained from extensive checking procedures to review and revise the information supplied by voters. Under present law, cross-checking with other databases of identify and residential address information is carried out extensively by the Commission, including a comprehensive approach to information sharing with the state electoral commissions.

Enrolment accuracy is a practical issue of effective management of large amounts of data, nowadays in electronic form. Such a task is certainly more effective (and in particular more cost-effective) when pursued by large-scale techniques than when it is left to voluntary individual actions alone (although individual-based verification provisions certainly have a useful place).

By 2012 the legislated system of enrolment had been modified to provide that the Commission may use a range of reliable sources to update their data, complimented by systems for subsequent checking and updating via direct contact with the electors concerned.[25] These practices – pioneered in NSW and Victoria a few years earlier – are generally termed 'active enrolment'.

In addition, because elections in to the Senate and House take place in divisions with defined geographical boundaries (ie: the boundaries of the States in the case of the Senate, and those of the 150 electoral divisions declared under the Act in the case of the House), in maintaining the accuracy of the roll the Commission must also acquire data on the place of residence of each elector.

The current Act provides for separate rolls (or *certified lists*) to be maintained for each of the 150 House divisions. This leads to an awkward and entirely unnecessary problem which can result in electors who are for any reason changing their residence being denied their due (and obligatory) vote.

These issues also affect the elections for Senators. The roll for each Senate election is the aggregate of the rolls for each of the divisions in each State.

It seems to me a much better approach would be to abandon the use of 150 distinct rolls and establish a single unified national database of enrolments. Under such an approach one of the data points for each unique voter would simply be their residential address. Whenever that data detail changes because an individual voter moves to a new residence across a divisional or state boundary, the implications of that change can be captured and acted upon without the prospect of a voter becoming disentitled simply by reason of the method of capturing data. The rules would at least have a default result that every elector would be guaranteed the opportunity to vote somewhere.

Such a unified database could, of course, simultaneously provide the data to support state and territory and local government elections as well as other purposes, such as jury service, which legitimately depend upon electoral enrolment.

The recent *Unions NSW* judgement contains comments showing that the Court sees the national and state political systems as an integrated whole. This suggest that the Court would support the Commonwealth Parliament having the power to legislate for unified national systems of enrolment. In any case, with cooperation between the States and the Commonwealth appropriate referrals of power could be enacted by the state parliaments to support legislation for a unified national system.

Conclusion 3: A key part of the *integrity* of the roll is the *completeness* of the roll, that is the roll's accuracy as a reflection of the whole set of electors. Legislative measures that weaken that completeness clearly have an adverse impact not only on individual electors but on the correct identification of the set of 'people' who must choose representatives to make up the houses of the Parliament.

Conclusion 4: Active enrolment should be maintained, and indeed further efforts to improve the accuracy of the roll should be investigated and adopted over time.

Conclusion 5: Any new legislation that derogates from active enrolment (including any attempt to repeal it) would clearly adversely affect the enrolment of a large number of electors, and would thus need to identify a legitimate purpose consistent with the maintenance of the system of representative government and be limited to devices appropriate to achieving such purposes.

Conclusion 6: Enrolment should be nationally integrated, replacing the division-level certified lists system with a single database of electors which maximises data accuracy and prevents voters from 'falling into the cracks' between division and state boundaries.

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[25] The Electoral Act as amended by the *Electoral and Referendum Amendment (Maintaining Address) Act 2012* and the *Electoral and Referendum (Protecting Elector Participation) Act 2012*.

Political parties

Australians seem to support a variety of approaches to political parties. While the majority of electors continue to support *major* political parties, many also support *minor* parties, *micro* parties and *independent* candidates. Support for major parties peaked in the early 1950s at around 90% of total enrolments, but has declined steadily over the decades. The 2013 elections saw the lowest total levels of support for major parties ever recorded – around 69% of enrolments in House elections and 62% in Senate elections.

I happen to believe that all these voter choices about parties are equally valid. It seems to me self-evident that if people wish to vote in any way, their wish for particular representation should be accommodated unless there is some very compelling reason to frustrate their wishes. Constitutional law supports this conclusion. Such a reason would need to show that some key aim of representative and responsible government is at risk if the voting system were to accommodate such voters' wishes.

In line with the overall goal of ensuring that representatives are "chosen by the people", procedures which constrain the registration of and support for parties should not be adopted – or at least, enactments which do so must provide some strong justification as outlined in the *Lange* test.

It also follows that voting rules which limit elector choice, or impose voting or vote counting procedures (such as thresholds) which draw arbitrary lines between the electability of some parties or candidates and that of others, are repugnant to freely choosing representatives. More on this below.

Who of us have not at some point criticised the role or the actions of political parties (or at least some particular political party), if not generally then at least on some specific issue? But the role that political parties play is highly important and can also be very positive for the functioning of the electoral system. Parties give voters a clear framework for receiving information about their choices, and at least a partial guarantee that any representatives so elected will vote predictably in Parliament. Parties also provide frameworks for politically active citizens to make common causes, debate detailed policies, and select and support candidates.

Political parties do not exist outside the overriding constitutional law of Australia. If their existence and actions, or more importantly the laws regulating them or granting them entitlements, threaten the system of representative and responsible government, then such circumstances and laws should also be subject to the scrutiny which the Court has applied on other issues.

With these principles in mind, in this section I will briefly outline some ideas that might improve the administration of the role of political parties. I am dealing here with a limited selection of issues only.

Registration of parties

Systems for the registration of political parties seem to be an increasing focus of controversy and proposals for rule tightening. I note that in NSW parties must now be registered 12 months in advance of the election. I wonder how such a restraint, clearly a burden on political activity relevant to choosing the members of the NSW Parliament, would be constitutional at the national level?

My starting point for this issue is that vibrancy in political life is a good thing, not some sort of problem. Choice for voters expands when more candidates put themselves forward, and where more parties choose to organise, develop policies and enter into public debate. The very fact that some people support such parties is in itself a justification that their existence should be supported by the electoral system.

The arguments against the proliferation of parties seem to hang on one or more of the following criticisms, to which I have added my brief responses:

- *The existence of too many parties confuses voters*: So what! Variety is choice; let the voters decide who to support and who to reject, in particular by allowing optional preferencing (see below)
- *Some parties are front organisations, and/or their creation is a device used to conduct 'preference harvesting'*: This is entirely an artefact of the use of group voting tickets, which should be abandoned (see below)
- *Having too many parties makes the ballot paper unpleasantly large*: This is also easily addressed by optional preferencing (see below) and by electronic voting methods (see below)
- *It is illegitimate for small groups to have a chance to win a seat*: No, it isn't. If a sufficiently sized pool of voters happens to combine through preferences to make up a quota of votes, this justifies their winning a seat; this is what preferencing is *for*. (See below). (However we should not allow this result to be artificially brought about by use of group voting tickets).

Conclusion 7: Because diversity in political parties and candidates promotes choice for the electors, the registration of new political parties should not be made unduly difficult. Amendments which hinder registration would need to serve a legitimate purpose compatible with a system for electing representative parliaments based on voter choice – and the means adopted to achieve such a purpose would need to be reasonable and appropriate.

Another aspect of the regulation of political parties is the need for integrity in the operation of funding, disclosure and expenditure systems. This has been extensively covered in recent years by earlier JSCEM inquiries and also in NSW.

One of the key failings of the current multi-system national approach is that regulations in each jurisdiction can potentially be evaded by movements of donations and for expenditure between regimes. I would restate a point made earlier that the *Unions NSW* judgement seems to support the prospect of valid Commonwealth legislation for a uniform national system for these issues. The legitimate purpose behind a unified system would be to preserve its overall integrity.

I also believe that we should move without fuss to a system where donations to political parties are made public rapidly, within say 7 working days, or 72 hours during election campaigns. The threshold for donations being made public should also be lowered and loopholes for multiple donations should be closed. Claims that the administrative burden of such practices is unreasonably great are just lame – any registered political party must already be recording donation information effectively merely to satisfy ordinary accounting practices.

Different settings relating to donations and expenditure at the state level could easily still be accommodated within a unified system, with each State enacting legislation to provide its own thresholds, settings and special requirements as desired. By operating within a unified system, all the regimes will be protected from abuses and evasions.

Conclusion 8: Party registration requirements should be nationally integrated, as a means of supporting the integrity of funding, disclosure and expenditure regulations.

Conclusion 9: A unified, internet-based donation reporting facility directly linked to a public inspection facility should be established.

Conclusion 10: Within a national regime for funding, disclosure and expenditure, the States should retain the power to determine their own settings for state-level funding, disclosure and expenditure rules.

Names of parties

The names that political parties adopt are their primary flag to the electors to explain their political positions. But as in other walks of life, similar names can cause confusion. Specifically, confusion of parties on the ballot paper can lead to voters who intend to support one party actually marking their ballot for another. The events surrounding the election of the Liberal Democrat's lead candidate in NSW David Leyonhjelm have brought this issue into sharp focus.

As JSCEM will be well aware, it has been widely suggested that in the 2013 election of Senators for NSW a combination of a similarity of name ("Liberal Democrats" vs "Liberals and Nationals"), the Liberal Democrat's good fortune of drawing the first position ("A") on the ballot paper while the Coalition ticket had a position far along the paper ("Y"), together with the sheer inconvenient size of the ballot paper itself, caused the Liberal Democrat group voting ticket to receive a large number of votes from voters who actually wished to vote for the Coalition.

For convenience, I'll call this syndrome *misvoting*.

Needless to say, we can never know for sure what all these electors really intended, because the intentions of the voters cannot be investigated. It would be interesting to hear if any substantial number of Coalition voters actually complained to the Commission that they fell into the misvoting error in question, although such complaints could not reliably be acted on in regard to the election result itself.

We do know the following:

- An aggregated total of 1,966,208 voters voted for Liberal and National candidates in the House divisions in NSW, but only 1,496,752 votes were cast for the Liberal-National ticket in the election of Senators for NSW.[26] The difference is a very substantial 470,000 votes, over 10% of all votes cast in the election.
- However, it is clear from the results in all recent Senate elections that voters generally support minor parties in greater numbers in the Senate than in ballots for seats in the House.
- Slightly more people voted formally in the election of Senators for NSW (4,376,143) than voted in aggregate in NSW House divisions (4,153,829). This probably reflects the fact that the limited range of candidates/parties on offer on House ballot papers leads some voters in every division to vote informally. At first glance this might seem to exacerbate the estimated House-Senate difference in Coalition votes. However the fact that Coalition candidates were always on offer on both ballots suggests that relatively few Coalition voters who voted for House candidates have 'gone missing' from the Senate voting only by reason that acceptable candidates were not available on their Senate ballot papers.
- The Liberal Democrat share of the formal Senate vote in NSW in 2013 (8.6%) is sharply higher than it was in 2010 (2.1%), when the party had a less advantageous ballot position. It is also more than twice their vote in any other state in 2013, and more than three times their vote in any state in 2004, 2007 or 2010. (The party has been registered for over a decade and has received support in the range 1-3% over that period; 2013 also saw them record their highset ever support in WA and SA). However several compounding factors – such as genuine shifts in voter opinion, or perhaps a more active or effective campaign from the NSW Liberal Democrats – might have contributed to this result.
- We cannot directly compare the party's voter support between the houses because the Liberal Democrats did not run a general slate of House candidates. (Just one House candidate was nominated, in the division of Gippsland, winning 5.3% of the local vote.)

There can be no definitive conclusions about the LDP's NSW result, but I'm going to go out on a limb – probably a dangerously crowded limb – and say that there are strong grounds for inferring that a large number of voters – plausibly as many as 300,000 – intended to elect Liberal/National candidates to the Senate but by reason of misvoting saw their votes diverted to the Liberal Democratic ticket. As a direct result, the lead Liberal Democrat candidate was indeed elected.[27]

Supporters of the Liberal Democrats may be delighted at their good fortune, and opponents of the Coalition may find it entertaining, but this situation is simply not OK. If someone had broken into

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[26] Including around 10,142 votes for its 6 individual candidates below the line.

[27] A similar ballot placement advantage for the Liberal Democrats over the Liberal Party was drawn in the WA re-election taking place this month. No doubt the differences in result will be analysed for inferences about whether any positional impact is present in the new election.

the vote counting centre one night and altered 300,000 ballot papers from being cast for one party to being for another, we'd all be in an uproar, yet the effect on the election is obviously the same as that of a misvoting event that can plausibly be inferred. This fact that this is even plausible, let alone that there is a well-founded likelihood that it actually happened, makes it a far more significant mishap that the notorious disappearance of 1,370 ballots – which were apparently a more or less random sample – in the count of the election of Senators for WA.

What are the statistical odds, I wonder, that the *extent* of this misvoting was *lower* than was necessary to make a difference in votes that elected Mr Leyonhjelm? And as we have learned from the WA situation, the impact of exclusion sequences can turn on a difference of a single vote (although note with care that in the 2013 WA result the closeness of the outcome was a product of the use of *sequential elimination*, not of ballot position issues).

It's hard to say whether any other candidate would have won a Senate seat in the NSW count had the plausible misvoting not occurred, but clearly the options include a 4th Liberal-Nationals ticket candidate, or a different minor party candidate largely influenced by preference flows from the late-count exclusion of that 4th Coalition candidate. Both results would have better reflected the apparent wishes of the hypothesised 300,000 Coalition supporters than the actual election of Senator Leyonhjelm.

But what has caused this problem, and what can best be done to prevent it for the future?

Blaming the voters for their error seems to fail to grapple with the point.

Blaming the Liberal Democrats party or Senator-elect Leyonhjelm is also unjustified and pointless. They have done nothing in the course of the electoral process to bring about the result in question, other than the party name issue.

Some critics have accused the Liberal Democrats of deliberately creating the confusion in question by choosing a name similar to that of the Liberal Party, which they did when they registered the party several years ago. Accordingly, one possible response to this problem is to impose rules about the similarity of party names, and the solution typically suggested is to deny registration to some parties. I don't think this blunt instrument can provide a reasonable solution. The names of major parties should not be treated as conferring property rights over general words of political terminology to any party. In addition to creating special brand entitlements for some parties, the application of such rules will inevitably need to be based on some arbitrary judgement regarding the use of adjectives, presumably from some official or body in an awkward position, and all subject to litigation.

Further, since the term in question – "liberal" – is not merely a current party brand but has been a universally used adjective in political discourse over the past two centuries, it is highly questionable that ownership of it can reasonably be granted to one existing political party. There are basic adjectives in the name of most political parties. Antony Green commented on this issue that "[c]ould quarantining of [the term] 'National' be included without making a mess of anybody trying to include a perfectly reasonable variant of the word 'nation' in their party name?"[28]:

In my view, the correct response is to attack the problem laterally, by use of other techniques that will reduce the likelihood and impact of the issue. I would suggest that JSCEM consider some combination of the following:

- use multiple ballot paper variants, with different positions for the parties (Robson rotation) to dilute ballot position advantage effects
- abandon the use of the above-the-line party voting option
- adopt the use of party logos on the ballot papers
- use fully electronic voting, with systems to allow for 'ballots' to be created on-screen by each voter

[28] Antony Green at ABC, 13 February 2014 – http://blogs.abc.net.au/antonygreen/2014/02/should-liberal-and-labor-be-quarantined-as-political-party-names.html

- put warnings on ballot papers in specific cases where confusion may occur

Each of these initiatives would go some way to reducing misvoting.

Overall, it is surely possible to largely exclude misvoting even from a system with many parties. But it is clearly not *necessary* to address the problem only through a single response – constraints on party names – that comes with highly undesirable impacts on fairness to other parties and on voter choice. Constitutional law requires that legislation that attempted to apply such a response would need to pass muster against the 'appropriate and adapted' component of the *Lange* test. In regard to this 'proportionality' test we should note that there may be simpler and more reasonable responses to the name-confusion problem – such as those mentioned above – rather than the brutal solution of denying registration to one or more parties. Denying registration is a dramatic step that inherently denies the relevant party members a right to participate in the political process, and reduces choice for all electors. It should not be taken without serious justification, nor should it be taken if less damaging alternatives are available.

Conclusion 11: In relation to issues of party name similarity, JSCEM should not recommend further restrictions which have as their end-point the refusal to register parties.

Conclusion 12: JSCEM should note that potential confusions arising from similar party names can appropriately be addressed by a number of lateral approaches including the use of multiple ballot paper variants, abandoning the use of the above-the-line voting, adopting the use of party logos on the ballot papers, and the use of electronic voting.

Voting

In this section I will address a selection of issues relating to the voting process itself. These include the concern about multiple voting, the issue of the extent to which preferencing should be required of voters, and how electronic technology could assist the voting and vote counting processes.

Multiple voting

As usual, there have been media reports and political commentary around multiple voting.

Some people – all of whom appear to be conservative politicians, officials or commentators [29] – believe that multiple voting is occurring at rates sufficient to affect election results. The proposed solution is always to require voters to present photographic ID. Others, including apparently all electoral officials and almost all independent academic commentators, point out that there is no evidence for high rates of multiple voting, and that ID requirement laws would have a very adverse impact on the entitlement to vote of individual electors.

ID requirements have played a very controversial role in the United States, where significant differences in the rates of possession of photo ID across racial and income groups mean that ID requirement laws can be manipulated to exclude large enough numbers of voters to affect election results. These deplorable practices are known as *vote suppression*.

Thankfully, Australia's demographics, and our very high election participation rates, make ID-based vote suppression a less tempting tool for mis-use in Australia.

In addition, vote suppression amendments would almost certainly not survive judicial examination in Australia under the *Lange* test. Given the serious impact on voting by "the people", and given the

[29] That this suggestion is always raised by people of one partisan persuasion is NOT a reason to discount the argument; the matter should be determined on the basis of principle and evidence.

easy availability of more reasonable alternatives (see below) I can't see such amendments surviving litigation.

For several years claims of election results being affected by multiple voting have been met with the response that there is "no evidence" of substantial multiple voting. Fortunately, evidence is now emerging, and it shows that while multiple voting does occur, it does so at very low rates.

A thorough study of the matter has very recently been published by Professor Rodney Smith.[30] Surveying the facts in NSW elections, his findings (briefly summarised by myself) are that:

- Multiple voting occurred at an average rate of around 100 real instances per NSW electorate.
- Most of the persons voting multiple times are elderly voters and voters with limited English comprehension. These electors are voting just twice. These actions can be understood to be human errors unrelated to any partisan intention to defraud the poll.
- There is *no* evidence at all of deliberate, systematic multiple voting aimed at influencing election results (ie: localised high rates of occurrence, prominent in marginal seats and associated with anomalous swings).

The high rate of multiple voting by elderly voters suggests (although this is my inference, not one of Smith's conclusions) that the net 'two-party-preferred' effect of multiple voting is probably a relative gain for Coalition candidates of lower than 10 votes per NSW electoral division.

We also have fresh data from the 2013 federal election. According to the Commission, as at 25 February 2014 the number of unresolved occurrences nationwide of multiple mark-off against the rolls stood at 10,479, or around 69 cases per electorate. Of these 1,979 had (as at that date) been admitted by the elector, revealing that 81% of the occurrences were 'innocent' cases involving elderly voters or voters of poorer English comprehension. [31]

Almost all multiple voting events are instances of 2 votes cast against the same name on the roll. The Commission could confirm on 25 February that there were just 128 cases of repeated multiple voting (ie: 3 or more votes cast against the same enrolled name). That's less than one case per electoral division. The total number of votes cast against these names was 463, indicating that there were 335 'additional' votes cast – just over 2 votes per electoral division. Note that this number may decline as more official errors are identified.

As with Professor Smith's NSW findings, clearly there is no pattern of systematic multiple voting aimed at influencing the 2013 national election results.

Even so, what can we infer about the profile of a typical 'repeat multiple' voter? It could be that the votes were cast by the named individual, or it could be that they were cast by some other person, and in either case it could have been done out of a partisan desire to alter the election results, or it could be some kind of prank, or it may have occurred as a result of some form of mental illness or behavioural disorder (and this last possibility is NOT a possibility that should be either lightly dismissed or flippantly mocked).

In any case, all this is hardly the stuff of stolen elections. The thesis advanced by some conservative politicians and commentators that multiple voting is being actively employed as a device to boost election results for the ALP is manifestly not supported.

Most likely we will never know the basis of the very small number of repeat multiple vote cases, but the fact that there are just 128 cases out of 14 million enrolments is clearly not a basis for any change to election rules which would have an adverse effect on the general right of people to vote.

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30 Professor Rodney Smith, *Multiple Voting and Voter Identification, A research report prepared for the New South Wales Electoral Commission*, 2013

31 Acting Electoral Commissioner Tim Rogers, evidence to the Senate Finance and Public Administration Legislation Committee, 25 February – transcript page 123.

Requiring voter ID in such a way that the right to vote is denied without it is a serious step indeed. Evidence should be called for by JSCEM as to how many electors would fail to possess such ID. That would reveal just how large the adverse impact of such an amendment would be. It seems inconceivable that such amendments would not be challenged in the High Court.

There is, happily, a more reasonable and balanced way of responding to this issue. Suppose that the issuing of votes involved the extra step of *asking* for ID and *recording* what ID was presented. That alone might be enough to clear up most potential cases of multiple voting, and dissuade those engaging in the vanishingly small possible rate of partisan, prank or other multiple voting.

Now suppose that we also adopted a system of electronic rolls, with a capability for instantaneous electronic mark-off. With that in place, those voters with satisfactory photographic ID (which is up to 90% of us) could pass through and vote in the ordinary manner, while those without it could cast votes using the declaration-vote-and-envelope approach. If that sounds like more envelope-processing work, note that the millions of voters who are currently voting early could be marked off in the same manner, and if so most of them would no longer require envelopes; these votes could go straight into ordinary ballot boxes.

Under this sort of regime, the small number of inadvertent double votes by elderly people and those with poorer comprehension would be dealt with, the apparently insignificant rate of deliberate multiple voting – whatever its motivation – would be presented with a powerful block and deterrent, and the public confidence increase which some commentators believe would follow from applying ID checks would be largely achieved – without threatening to deny votes to genuine electors.

Conclusion 13: JSCEM should take note of the evidence that multiple voting is a very small problem, and is associated with genuine mistakes by voters who are elderly or have poorer English comprehension. There is no evidence of deliberate partisan attempts to use multiple voting to affect election results.

Conclusion 14: Legislation providing for a blunt photo-ID requirement for the exercise of a vote is potentially invalid; JSCEM should not recommend new legislation to impose such a requirement.

Conclusion 15: The use of ID checks not as a bar to valid voting but simply to direct votes into ordinary or 'declaration' categories should be considered. If a system of instantaneous electronic roll mark-off could also be implemented, these techniques would together add to the integrity of the electoral process without the serious adverse impact on voting entitlements which a bare ID requirement would impose.

Preferencing

Australia's election systems all use preferential voting, but they are divided into those using full compulsory preferencing, those using fully optional preferencing, and intermediate variants in which a certain minimum number of preferences are compulsory with further preferences being optional.

Preferencing rules relate directly to the fundamental election principle of *choice*. The freer the preferencing, the more choice electors have, and the more genuine the record of that choice is. Forcing people to record insincere preferences achieves nothing but the manufacture of untrue expressions of choice. In particular, once preferences are being marked for candidates whose election a given elector specifically *opposes*, the nature of the marks on the ballot paper has changed.

It is true that even a late preference between two candidates both of whom an elector opposes may act as a discriminator revealing which of those candidates the elector opposes *most*, and that such preferences can therefore give the elector an influence in election results which they might wish to have. But this kind of 'preference between two unwanted opponents' is not the natural ordinary

meaning of the idea of preference as most people would understand it. On every ballot paper there are almost certain to be at least some candidates that each elector actively opposes. Most people would naturally conclude that leaving the boxes of those unwanted candidates blank is a simple and effective way of communicating their lack of support for them.

A preferencing system which would adequately cater for all kinds of preferences would necessarily involve not a *single* sequence of preferences but *three* sequences: first a sequence of positive preferences, then an un-sequenced block of 'no opinion' candidates, and finally a third sequence showing the voter's relative ratings of the candidates they oppose. Such rankings could be made to operate with preferential counting techniques with a little wrangling. But I don't see that even this more sophisticated form of preferencing should be forced upon voters.

Further, as the number of candidates grows, the problem of forced preferencing for unsupported candidates is joined by the problem of forced preferences for candidates about which the elector has no information or no opinion, and/or can't afford the time commitment even to obtain such information.

At a matter of principle, it seems to me that obliging an elector to record preferences for candidates about whom they have no information or no opinion, of for candidates that they have actually decided they oppose, is unsound.

In any case, the information in which to base such rank orderings may not be available. Australian electoral scholar Michael Maley notes that:

> "[voters] 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 "microparties") their political positions may be obscure, narrowly-based, or incapable of being taken at face value." [32]

Finally, as the number of candidates grows, the quantity of information and decision-making expected of the voter quickly becomes completely ludicrous.[33]

In reality, no voter actually performs a full, informed and conscious ranking of every candidate.

Beyond considerations of the absurdity of the task, the real problem here is that compulsory preferencing rules are always backed by the immediate threat that a voter's ballot is *invalidated* if the rules are not complied with. This *disentitlement* is a very serious imposition on the right of every voter to be heard, and as such conflicts with the constitutional imperative that the elected members are "chosen by [all] the people".

The Electoral Reform Society puts it succinctly: "…any form of compulsory preferencing in a single transferable vote (STV) ballot reduces the number of voters who are participating in the ballot".[34]

It is therefore not clear that compulsory preferencing would pass muster against the *Lange* test. Clearly the invalidation of votes is a serious adverse impact on the participation of many electors. In the language of the *Lange* test, it is not clear what *purpose* that is *compatible* with *choosing the representatives* is really served by compulsory preferencing. Certainly the choosing of

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[32] *Optional Preferential Voting for the Australian Senate*, Michael Maley, (November 2013), a working paper for the Electoral Regulation Research Network, p.17

[33] Maley (id, p.16) commented that "in every State at the 2013 election, the number of alternatives [for ordering Senate candidates] was greater than the estimated number of atoms in the universe".

[34] Blog front page as at 8 April 2014: *Compulsory Marking of Preferences: the Australian Disease (Part 3)* – http://electoralreformaustralia.org/

representatives seems to take place perfectly well under optional preferencing as used in elections for the Legislative Assemblies of NSW, Queensland and the ACT and the House of Assembly of Tasmania.

Finally, it is not clear that the severe outcome of vote invalidation would be held by the Court to be 'adapted and appropriate' in achieving such a purpose, if one is even identified.

Conclusion 16: Laws which invalidate elector's votes by way of compulsory preferencing rules are too severe an impost on elector choice, adversely affect elector participation, and should be abandoned. It is possible that compulsory preferencing as a device would fail the *Lange* test due to the severe adverse impact that the invalidation of many electors votes has on the need for the representatives to be "chosen by the people".

I recognise the argument that that 'if everyone just voted 1' then single-member division elections with optional preferencing would start to resemble plurality (first-past-the-post) voting, and that similarly with STV elections the important effects of vote transfers would be diminished. But whilst these potentialities are real, I do not see that they are either likely or serious enough to justify a rule that invalidates the votes of hundreds of thousands of electors.

For many critics of compulsory preferencing the solution is to impose a minimum preference requirement, of the "fill at least 6 boxes and thereafter as many more as you wish" type.

As mentioned above I believe such rules do not solve the problem that false preference choices are being required, because for some electors even a low minimum required number of preferences might take them into the territory of candidates whom they actively oppose.

The selection of the specific number of preferences to require for a minimum preference rule is also a problem. All such settings are inherently arbitrary. Since they may differently impact various categories of electors, and various categories of large and small parties and independents, how is that arbitrary selection to be justified without constituting some form of discrimination against the choices of some electors?

There is a peculiar belief in some quarters that the number of preferences to be used as the minimum should be the same as the number of seats to be filled. I don't know if this is some kind of century-old echo of the ancient system of block voting, but there is certainly no logical connection at all between the length of preference sequences on ballots and the number of seats to fill. To suggest otherwise creates confusion about the very nature of STV voting. The only explanation for the origin of this erroneous idea that I know of is that it arose from the desire of those parties who choose to nominate as many candidates as there are seats (such as most major parties) to try to ensure that all their candidates receive preferences.

There is a sting in such minimum rules, however. Some voters simply support one political party, and may have a tendency to fill out preferences for all the candidates of that party, and no others. In an optional preferencing regime they may, correctly or otherwise, believe that this is a valid vote. If there is a rule that votes are only valid if a minimum of (say) 6 preferences are marked, then that rule plays out differently for parties who have nominated 6 candidates (such as major parties) than for those who nominate fewer candidates. The result is that voters for the smaller party will have their votes invalidated at a greater rate than those of larger parties. This is manifestly unfair. The problem may force some parties to feel the need to find and nominate surplus, unwanted candidates, which comes at a nomination cost which may not be recovered; another unfairness. And all without any logical justification or rational need.

What is true is that the more preferences each elector marks, the longer their influence on election results continues through the counting process. There is no harm in encouraging electors to grasp that influence if they are comfortable with expressing preferences, in the knowledge that all such preferencing potentially helps the marked candidates to win a seat.

Ballot paper instructions can be carefully tailored to that effect. Advice which might appropriately be shown on ballot papers could read something like this:

> "You may indicate as many preferences as you wish, and the validity of your vote is not affected whatever you choose to do. However you should be aware that every additional preference you mark increases the chance of each candidate you support being elected."

The above words are suitable for both single-member and multi-member elections. With STV elections for multiple members we could add a few more words at the end:

> "…and of influencing every contest between two candidates as later preferences are counted."

Much better advice to give: True. Useful. Not patronising. Fair to everyone.

Conclusion 17: Minimum preferencing requirements are neither necessary nor appropriate. Enforcing such rules with a threat of vote invalidation is highly inappropriate and possibly unconstitutional. Instead, ballot paper instructions which encourage electors to use as many preferences as they wish to should be used.

Use of technology to assist the voting and counting process

Other submissions to JSCEM are covering proposals for electronic voter mark-off and vote counting mechanisms. I support this direction and urge JSCEM to do likewise. It seems to me that many of the practical difficulties experienced in the voting process could be addressed with electronic technology. In addition, many aspects of the speed and accuracy of the counting process would be greatly improved if the votes could be captured in digital form.

I appreciate that there are concerns about the accuracy and the security of fully online voting, both technical and in regard to giving voters assurance that their ballot is secret.

I my view, a useful approach would to capture votes by a dual system, one version of each vote digitised and a matching version existing in paper form for verification. I envisage a system where we sit at a screen to record our votes, allowing them to be digitally recorded, but where a printed ballot is immediately provided to us as we finish our voting. This printed version, matched to the electronic vote by a reference number (unconnected to our personal identity), we then place in an ordinary ballot box. After polling closes, the electronic data could be used to generate accurate results very quickly. In the days after the election night the printed ballots would then be scrutinised, and cross-checked with the electronic data to ensure that official results only used those votes which were verified by a printed ballot.

Bringing this together with suggestions made elsewhere in this submission, imagine that such a voting system had the following features:

- The use of a single unified national database of voters
- Online, immediate mark-off of voters as they present to the polling place and are issued a ballot (or at the time a postal ballot is forwarded to the postal address)
- ID-checking at the time of seeking a ballot, with voters with low-grade or no ID being issued with a 'declaration vote'
- For most voters (other than postal votes), the use of electronic voting, with votes organised on-screen and registered instantly, but backed by a printed ballot paper which is then placed in a ballot box
- Optional preferential voting
- Verification of postal votes in real time as they are received, allowing them to be available for counting on election night

The practical benefits of such a system would include the following:

- More accurate roll mark-off (ie: fewer or no accidental voter mis-identifications)
- Elimination of multiple voting

- A probable reduction in the total number of declaration votes
- Double-recording of votes, protecting the system from accidental loss of materials and/or sabotage
- Highly accurate ballot marking, reducing the invalidation of votes due to poor handwriting
- Faster counting, with an accurate and comprehensive electronic count available very quickly, subject to confirmation against the printed ballot papers in the following days

In addition, such a system would achieve a number of benefits for the principles which the voting system should serve, include the following:

- Easy options to randomise the presentation order of candidates, eliminating donkey vote and related problems
- Easier voter control of the selection and ranking of the candidates they support
- Discrimination between candidates due to ballot paper placement is eliminated
- Greater clarity that all marked preferences are 'positive preferences'
- Easier options for voters to alter their vote as they are completing it
- More options to address problems arising from candidates and/or parties having similar names

Optionally, voters using electronic voting systems could also be enabled to access candidate-provided information, including party preferencing recommendations, through the voting screens

Conclusion 18: The electoral process should make use of electronic technology to capture roll mark-off and voting data in electronic form. For roll mark-off the advantages are very clear. For vote recording, online voting has problems but is not the only option; the possibility of a dual electronic-and-printed-copy vote system should be examined.

The election of Senators

Overview of the 2013 elections

On 7 September 2013 the enrolled electors in each state and territory voted to elect 40 Senators for terms to run from 2014 to 2017.

The voting method used for these elections was the single transferable voting system adopted by legislation in 1948. This is well and good, as STV generates very solid results against key principles of representation, as discussed earlier in this submission (see Table 1).

However, the healthy operation of this otherwise admirable voting system was greatly diminished by legislation enacted in 1984 that created two ballot paper areas. These amendments added to the ordinary part of the ballot paper – in which every candidate is shown by individual name in party columns, usually termed the ***below-the-line*** area (BTL) – a new area on the paper (the ATL area) with its GVT mechanism, as explained earlier. Voters are instructed to use only one of the areas; electing to support a group voting ticket overrides any use of the main area of the ballot paper. A group voting ticket, if selected, effectively constitutes an automatic ballot, fully filled out with preferences for every candidate according to those shown on the selected GVT.[35]

Overall, the current Senate election system is an odd mix of quite good features and quite bad ones.

Participation

Participation in the 2013 Senate elections was a physical turnout of 93.9% of the enrolled voters. By world standards this is very respectable, and is driven both by legislative compulsion and the entrenched habits of our voters. However, it is noteworthy that this statistic is creeping downwards in recent elections.

Around 2.8% of enrolled voters voted nominally but not formally. Some of these voters were submitting blank ballots, while the remainder had their votes invalidated for some technical defect despite their intention to participate in the choosing of representatives. The denial of effective participation to this latter group is largely a result of the imposition of compulsory preferencing, which should be abolished.

The resulting final rate of effective participation in the 2013 Senate elections was thus around 91.1% of enrolled voters. Together with the 2010 result (90.3%) the past two elections have been the lowest such results since the 1920s. This trend should be of concern and should prompt JSCEM to advise Parliament to take all possible measures to protect and increase participation, and refrain from any measures to put further downward pressure on participation (such as derogating from the optimal maintenance of enrolment data, or imposing ID requirements on voting).

Directness

The Senate is as a matter of legal form elected by a system of direct voting, as is desirable in principle and as is required by the Constitution.

However, the true substance of the current method of electing Senators is much less satisfactory. The above-the-line voting option acts to makes the election of up to 2/3rds of all Senators effectively an indirect method of election. In practice, the Liberal Party (or LNP, or Coalition ticket) is empowered to appoint two Senators in every State, and in some cases a third candidate. The Labor Party is everywhere guaranteed at least one such position, and in most (but recently not all) States a second such safe appointment; sometimes a third is a fairly safe bet. These Senators are in reality answerable to their preselection panels, but not truly to the voters.

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[35] As an alternative to submitting a single GVT, parties may elect to submit 2 or 3 such tickets, and in these cases the votes received for their GVTs are divided equally among the submitted tickets designs.

The Greens vote in Tasmania has been sufficiently strong in recent decades to achieve the same result, although to be fair this has in large part been due to the accomplishments and profile of the leading candidates.

The positions of the four Territory senators are in substance appointed seats for the Liberal and Labor parties, although the ACT Liberal position has had the appearance of being more contestable at some elections. The Territory situation is a result of the very small number of places – 2 seats in each case. If there were no above-the-line arrangement and a randomised ballot order, the voters would be able to exercise a much more effectively and discriminating choice between the candidates offered by the two major parties and all the other candidates.

The true substance of these arrangements, as opposed to their mere legal form, is contrary to the constitutional imperative that Senators be directly elected. In substance, over half of all Senators are not directly elected. When replacement senators filling casual vacancies are taken into account (these are not directly elected, but the Constitution permits this to happen), it is clear that the Senate as currently constituted is not truly a directly elected chamber.

The solution, as mentioned in other places in this submission, is to abandon the use not merely of group voting tickets, but ideally all forms of above-the-line voting.

Choice

As an STV voting system, in general the degree of choice in Senate elections is quite high.

However as with the impact on the directness of elections, above-the-line voting seriously detracts from true choice. The GVT system in current use diverts the process from being one of choice by the electors to an unpredictable result which cannot truly be described as a choice. It is in fact impossible to predict who will be 'chosen' as a result of the marking of preferences. The problem, and an appropriate solution, is outlined below.

Inequality

Due to the federal settlement requiring an equal number of Senators for each original State, inequality of enrolment *between* States is spectacularly high (see Table 1, earlier). Whilst STV systems normally achieve low levels of inequality of voter influence, the large variety in enrolments per seat means that this more important form of inequality is also very high in our Senate elections.

This problem is not going to get fixed while the current constitutional allocation of Senate seats among the States endures.

Voter equality of influence *within* each state and territory is very good, as this is a natural virtue of STV systems. Within each state, every Senator is elected by an equal quota, making the influence of all electors equal vis-à-vis other electors in their state.

Representation

The level of actual representation of Australian electors in the Senate, as defined by whether each elector has an elected Senator related to their first preference vote, is almost 80% overall (taking two electoral cycles into account).

The results for the 8 elections in each of 2010 and 2013 and for Australia as a whole are shown below. Note that summing the two electoral cycles is difficult; for example Victorian DLP voters may be regarded as represented because they elected a Senator in 2010, even though they failed to do so in 2013, and similarly with supporters of other minor parties who had diverse successes in 2013.

Table 2: Proportion of electors represented in the Senate

Jurisdiction	proportion of electors represented by the 40 Senators elected in –	
	2010	2013
Australia overall	78.2%	71.2% *
NSW	77.7%	68.4%
Victoria	80.6%	75.8%
Queensland	75.3%	73.5%
Western Australia	78.5%	58.7% *
South Australia	81.2%	78.8%
Tasmania	87.3%	82.2%
ACT	68.6%	62.8%
Northern Territory	59.9%	59.3%

* Note: for WA, the interim results (11 April, AEC website) for the 5 April 2014 election have been used.

Ways of improving the voting system

I discuss here four conceptually distinct problems with the current Senate voting system, and how to address them.

Three of these problems relate to ballot paper design. They are, in increasing order or importance, the problem of unfairness and distortion caused by having only one variant ballot paper, the problem of having parties dictate the order in which their candidates appear on the ballot paper, and the major problem of the existence of group voting tickets, which allow parties to dictate a voters' entire preference sequence. The device of 'above-the-line' voting is an essential element of group voting tickets

The fourth distinct problem is the use of compulsory preferencing.

I also comment on another issue alleged to be a problem, which is the phenomenon of candidates (or parties) with low first preference votes occasionally winning seats, and the proposal to bar such outcomes.

Problem 1 – Single ballot-paper order of presentation of parties candidates

The Electoral Act currently specifies that there is always just one variant of the ballot paper presented to all voters. The order of party columns is drawn randomly, while the order of candidate names within each column is specified by each party.

Having one variant paper leads to the donkey vote effect. We can safely assume that it is very low in Senate voting with the current voting options, because above-the-line voting requires only one preference be marked, and anyone minded to donkey vote would not vote below the line.

Perhaps a more significant consequence of single ballot paper variants is the problem – discussed earlier – relating to misvoting caused by similar party names. The likelihood of such misvoting is magnified if the 'beneficiary' of such confusion, which is obviously the minor/micro-party with a name similar to a major party, comes before the latter, especially if they come in first position on the paper – this being exactly the NSW-2013-Liberal Democrat scenario.

The solution is very easy and of course is already standard practice in elections in Tasmania and the ACT: use 'Robson rotation', that is create multiple variants of the party/candidate order. The better options use variation both horizontally between parties and vertically between candidates and

ideally (although this is not done in Tasmania or the ACT) the 'ungrouped' candidates column should form part of the rotation. The more variants the better, although even a small number of variants will quickly diminish the impact of ballot position distortions.

This is an easy fix, and modern printing capabilities mean that there is no meaningful additional cost involved in printing variant papers. This reform should also be applied to House ballot papers.

Conclusion 19: To break down the discrimination and potential misvoting impacts caused by single-variant ballot papers, ballot paper variations should be introduced for elections for the Senate and the House.

Problem 2 – allowing parties to set candidate order within their party distorts choice

Any mechanism by which parties can control the order in which their candidates are elected is in my opinion an inappropriate breach of the principle of choice, and is a partial step towards 'party list' approaches which diminish the direct relationship between electors and the elected representatives.

Under current arrangements parties can dictate candidate order in a minor form (by ordering their presentation on the ballot papers) and also a more serious form through the use of ATL voting.

There is no need to be especially worried about the minor form. Presentation of a preferred order of candidates on a ballot paper does not force voters to mark preferences, even if it provides a strong prompt. The desire by parties to publicly identify lead candidates and urge that they be given preference is entirely legitimate. If voters want to buck the presented order of candidates, they are still capable of doing so, and indeed they should take some responsibility for the result if they choose not to do so. That said, in principle randomised presentation (as is used in Tasmania and the ACT without difficulty) would still be preferable.

The more serious form of party control occurs when ATL devices are used on the ballot. When such systems are widely used, they create safe automatic appointments for all parties which can be confident of securing quotas of votes. As such, candidates achieve effecting appointment to Parliament simply through winning the necessary slot on the ticket at party preselection.

A brief look at possible variations of the ATL method is relevant to both this problem and the following one.

Most ATL voting variants amount to an 'autofill' system, where marking the ATL box for the party is deemed to constitute preference voting 1, 2, 3, etc for the candidates of the party in the order specified by the party. But there are at least four distinct levels of control which ATL voting may impose on how preferences are directed, as follows:

- 'autofill' within each party together with full/compulsory preferences (the current Senate system, involving the use of GVTs)
- 'autofill' within each party where preference *between* parties are optional, but with a minimum number of parties that must be preferenced (an option proposed by the Greens in recent years)
- 'autofill' within each party, where preferences *between* parties are fully optional by party (the option that most recent commentators have publicly called for)
- no autofilling, but instead equal distribution of votes at each vote counting stage among all the un-eliminated candidates of a party.

All versions of ATL party boxes – except the last in the above list – create the automatic appointments phenomenon for larger parties mentioned above.

In short, while ATL looks like a convenient time-saver for busy voters, if it is used it should involve the lowest possible level of preference compulsions, and the least degree of party control over candidate order.

The ideal solution is to omit ATL voting in all forms, or at least use only the 'equal distribution' variant, which would leave the fate of individual candidates in the hands of those voters who were motivated to express a specific preference for or against the individuals on each party's slate.

Recall that the 1984 justification for introducing ATL was that is would reduce informal ballots. The informality in question was entirely an artefact of compulsory preferencing requirements. If such requirements were abandoned (as they should be), or possibly overruled by the Court at some future point, then much of the need for ATL voting as an option simply disappears.

Conclusion 20: Ideally, all forms of above-the-line voting should be abandoned; they are a substantial departure from the idea of direct election of representatives. If ATL is retained, the level of optionality in preferencing should be increased as much as possible. The 'equal distribution' variant of ATL is the one least offensive to principles.

Problem 3 – allowing parties to direct preference flows to all other parties and candidates seriously distorts choice and the directness of election of representatives

Party control of the full flow of preferences *outside* their own party is an even more serious problem than control *within* their party. It is a major departure from the principle of direct election through the choices of the electors. Specifically, GVTs as established by the current legislation break the direct relationship between electors and their representatives that is required by the Constitution.

While marking GVT boxes on ballot papers may constitute *choosing a box*, I would argue that it cannot constitute *choosing a candidate*, because the sequence of eliminations in the preference flow process cannot possibly be predicted in advance by any of the participants in the process: not the elector, nor the candidates, nor even the party officials who determine the contents of the GVTs. Parties can negotiate their GVT deals, and some deals will increase the odds of certain outcomes, but no-one can know which of millions of possible outcomes will ultimately occur. That being so, how can the selection of the successful candidates be described as an act of choosing?

While the GVT device was tolerated by the Court in the *McKenzie* judgement in 1984, I believe that judicial conclusion deserves to be reviewed. The decision in that case was required in haste and was given by the Chief Justice sitting alone. The reasons for decision are very brief and do not conform to the more careful process developed by the Court in more recent decades. The Court now clearly holds that constitutional law requires that the representatives be "chosen" by the electors.

The solution is simple: abandon the use of GVTs. As argued at several points in this submission, GVTs are the cause of all sorts of problems and breaches of the principles that justify parliaments being seen as representative.

Conclusion 21: The group voting ticket system in the Electoral Act should be entirely abandoned.

Problem 4 – invalidation of votes resulting from compulsory preferencing

As discussed earlier, compulsory preferencing requirements are conceptually unsound. They create apparent preferences which can no longer reliably be understood to be positive indications of support for the candidates, they intrude upon the free choice of voters, and they are enforced by the disentitlement of many voters from effective participation in the election.

To impose the penalty of vote invalidation on electors who refuse to adhere to compulsory preferencing, or who make an error in completing their ballot, is too severe a rule, and I am at a loss to understand how it would pass scrutiny against constitutional principle as outlined in the *Lange* test.

The solution is simple: allow optional preferencing. I note that almost all commentators on our electoral system in recent months are arguing for optional preferencing both above and below the line for the Senate, and some also call for it for elections for the House members.

Conclusion 22: All voting should be optional preferential.

Not a problem: election of candidates with small starting first preferences

Some commentators have suggested that it is inappropriate for candidates with low first preference votes to be capable of winning a seat.

The proposed barriers to such election are usually defined as a minimum first preference vote share for each candidate, normally termed 'thresholds'. Candidates below that level of first preference support are all eliminated simultaneously, or are said to be ineligible to receive preferences (the result is the same in either case).

JSCEM should vigorously reject such proposals. They are unsound in principle. The call for thresholds involves a fundamental misunderstanding of the nature of preferencing.

Recall the metaphor earlier in this submission of an election as a marketplace of candidates in a field, around which all of us as voters move freely through a series of candidates in the order of our preference until we settle into equal-numbered groups around the final, successful candidates. Thresholds are basically a declaration that our marketplace is severely culled after only one stage of the preference sorting. This clearly damages the freedom of choice of all of us as voters, and involves a discrimination between voters on the basis of whom they vote for. Thresholds make us unequal in the effectiveness of votes based on our political preferences.

The threshold concept is often expressed as being applied not only to candidates but also to parties, that is to the whole column of a party's candidates where the aggregate of the votes for all such candidates is below a threshold. The submission to JSCEM of Michael Maley (Submission no. 19) addresses this specific question:

> "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."

Surely Maley is correct. Using aggregate party totals as a threshold device is not something that the voters can be assumed to have intended or permitted, and is a misuse of the aggregate totals of their individual votes. The potential impact on voters – forcing tactical calculations to be made and distorting the true expression of their preference – is a derogation of our freedom of choice and, potentially, is in conflict with the constitutional imperative that the representatives be 'chosen'.

In truth, the whole matter as seen in the 2013 Senate elections is yet another artefact of the use of group voting tickets. Maley, again:

> "14 … the phenomenon of preference harvesting and the consequent election of micro-parties is basically a consequence of the use of ticket voting."

Obviously JSCEM will be aware of the fact that the election of some Senate candidates with very low first preference votes was artificially brought about the use of GVTs. (But note carefully that I do not criticise the election of such candidates *in general* – see argument below – but only that such instances should be generated solely by the GVT device.)

The whole matter can be well illustrated by the case of the election of Ricky Muir as a Senator for Victoria. The quota for election to a Victorian Senate seat was 483,076 votes. Mr Muir's party aggregate of votes was 17,122, just 0.51% of the formal votes, representing 0.0354 of a whole quota. But Mr Muir received all the votes he needed to reach the quota in the preferences of 482,000 other voters. By the last round of counting, there were 7 candidates remaining un-

eliminated. 5 of them, candidates Fifield and Ryan (Liberal), Marshall and Collins (ALP) and Rice (Greens) had already received the quota, and as a result 5 quotas of votes (2,415,380 votes) were allocated against those 5 candidates. As between the remaining two candidates a tally of 489,652 votes preferred Mr Muir, while 437,894 preferred Senator Kroger. Quite correctly, Mr Muir was awarded the final seat. In short, Mr Muir is legitimately elected because he was the preferred choice of a pool of 489,652 voters – a number larger than the quota – against any of the dozens of unsuccessful other candidates, including Senator Kroger.

Now, it may be argued that that pool of candidates might have actually settled on someone other than Mr Muir in different circumstances. For example, 148,281 voters whose first preference was for the Palmer United Party (or its individual candidates) formed the largest component of that pool of 489,652 votes – nearly a third of them and a number nearly 10 times that of Mr Muir's party.

It might have been that Mr Muir coming through this pack to win is simply his good fortune in a highly particular flow of preferences. But in truth we know the reason that he and not someone else prevailed – it was driven by the strict preference sequence created artificially by the use of group voting tickets.

To conclude: it is *not* illegitimate for a candidate to win a seat even from a low basis of first preferences, if that happens to be the genuine pattern of preferences as recorded on our votes. But it *is* highly questionable if such a flow of preferences is manufactured by a group voting ticket. In the controversy about the legitimacy of the election of Mr Muir, and the interim election of Mr Dropulich in WA, and the possible impact of preference sequences on some other elections, it is the use of the automated GVT device, not the starting tally of any candidate's first preference votes, which undermines the sense that the result is a genuine *choice* by the voters.

Once again, the correct change to the rules is to abolish the use of GVTs, not to invent eligibility thresholds.

Given the Court's tendency to protect choice by scrutinising legislative amendments which have a clear partisan impact, deliberately contrived levels of threshold aimed at excluding certain categories of parties or candidates are quite likely be held invalid.

Finally, note that these 'low-start' events do not appear to occur in elections in the ACT and Tasmania or in the Victorian or Western Australian Legislative Councils. The mere absence of GVTs seems to be enough to prevent them.

Conclusion 23: Eligibility thresholds should not be introduced. They are unsound in principle and may be unconstitutional.

The election of the House

Overview of the 2013 election

On 7 September 2013 the enrolled electors in each of the 150 electoral divisions voted to elect members to the House.

The electoral system by which the House is currently constituted is the product of two key legislative enactments of Parliament: the adoption of single-member electoral divisions in 1902, and the adoption of the preferential voting method in 1918 (with compulsory preferencing from 1934).

Two other legislative decisions – the adoption of compulsory enrolment in 1911 and of compulsory voting in 1922 – have also been influential, but are not part of the vote counting method itself.

The decision by the Parliament in 1902 to enact the single-member electoral system for the House has had very significant negative effects on the representativeness of the House over the past 112 years. This voting system preserves *one* of the primary goals of representation mentioned earlier; the system is at least one of *direct election*. However the Houses elected from 1901 onward have all been formed under arrangements of *highly constrained choice*, very *unequal voting influence* and a general *failure to represent* over half of all electors. The has been just one election result, in 1931, in which more than 50% of the Australian electorate endorsed (through first preference votes) the government which took office.

Participation

Participation in this election was a nominal turnout of 93.2% of the enrolled voters. By world standards this is very respectable, and is driven both by legislative compulsion and the entrenched habits of our voters. However, it is noteworthy that this statistic is creeping downwards in recent elections.

Around 5.5% of enrolled voters voted nominally but not formally. Previous analysis by the Commission shows that around half of such voters are submitting blank ballots, while the remainder are having their votes invalidated for some technical defect despite their intention to participate in the choosing of representatives. The denial of effective participation to this latter group – over 400,000 voters – is largely a result of the imposition of compulsory preferencing, which should be abolished.

The resulting final rate of participation in the 2013 House was around 87.7% of enrolled voters. Together with the 2010 result (88.0%) the past two elections have been the lowest such results since the 1920s. This trend should be of concern and should prompt JSCEM to advise Parliament to take all possible measures to protect and increase participation, and refrain from any measures to put further downward pressure on participation (such as derogating from the optimal maintenance of enrolment data, or imposing ID requirements on voting).

It is noteworthy that the valid House vote is slightly less than the equivalent vote for the Senate. The likely explanation for this is that there is a small population of voters who find a candidate to their liking among the greater variety of Senate candidates on offer, but do not find one whom they wish to support on their much more choice-constrained House ballot. In response such voters submit a blank House ballot paper.

Directness

The House is elected by a system of direct voting, as is desirable in principle and as is required by the Constitution.

Choice

In regards to choice, the system of electoral divisions enacted by Parliament has meant that in most elections electors have had only a handful of candidates among which to choose. Indeed, in many

instances in the earlier decades, instances of there being only one nominated candidate – and therefore no choice at all – were frequent.[36] In all cases in 2013 electors were offered no choice of candidates *within* political parties.[37]

Inequality

The inequality of enrolment between the 150 divisions of the House showed a coefficient of variation of 8.54. This is fairly respectable by international standards, due to Australia's reasonable good system of divisional redistributions. The variation would be lower but for the effect of rounding of numbers of seats for the three smallest jurisdictions (Tasmania, the ACT and the NT), and the constitutional minimum of 5 seats for Tasmania.

However the inequality of *effective influence* of Australia's voters was sharply higher – a variation coefficient of 69.7, a result in the mid-range of recent elections. The result demonstrates, as discussed above, that drawing divisional boundaries to provide similar enrolment numbers does very little at all to give voters real one-vote-one-value influence.

Finally, voters also had very unequal influence on the election of Members depending on which political party they prefer. The different numbers of supporting first preference votes needed for different groups of partisans to elect representatives (and treating 'other micro-parties' and 'independents' collectively simply to include them in the table) are shown here:

Table 3: Relative numbers of votes need to win seats, by party supported – 2013 HoR elections

party	No. of votes needed to win each seat
Major parties collectively	70,305
Liberal	71,291
LNP	51,899
National	61,585
Labor	78,388
Greens	1 seat - 1,116,918
PUP	1 seat - 709,035
Katter AP	1 seat - 134,226
Other micro parties	0 seats - 460,389
Independents	2 seats - 150,088

Conclusion 24: The effective influence on House of Representative election outcomes within the Australian electorate is currently subject to very serious levels of inequality.

Representation

There were 14,722,752 electors enrolled to elect members to the House at the elections. Of these, 6,200,020, or 42.1% of those enrolled, saw a candidate of their primary choice elected. This is the lowest result since the introduction of compulsory voting in 1922. The second-lowest result recorded since 1922 was that of 2010 (43.6%), indicating that a trend is emerging.

After preferences were distributed around 51.5% of enrolled voters preferred the members who were elected to the House than any of the available alternatives. This is also the lowest result against this measure since at least 1998. However, this is not a very well-founded measure, because it cannot be assumed that preferences for those who were elected over the limited range of

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[36] The last instance of this was a single case in the small-population Northern Territory division in 1961; single-nomination events ceased in larger state divisions after 1955.

[37] In past decades there were cases of the Country (later National) Party offering multiple candidates, but the practice died out after the 1970s.

available alternatives is the same as outright endorsement, because of the imposition of compulsory voting.

We can identify in some detail which electors are left unrepresented by the current House. The unrepresented include urban Liberal voters (around 1,128,000), rural Labor voters (around 780,000), both Coalition and Labor voters in provincial centres (around 560,000 together), Green voters everywhere except in the division of Melbourne (around 1,080,000), Palmer United Party voters everywhere except in the division of Fairfax (around 687,000), other micro-party voters everywhere other than KAP supporters in the division of Kennedy (around 570,000), and independent voters other than those who supported the elected members for the divisions of Indi and Denison (around 249,000).

These millions of Australians simply do not have actual representation in the House of Representatives.

Conclusion 25: The current House of Representatives represents, even after preferences, a smaller proportion of the Australian electorate than at any election since voting became compulsory in 1922. Millions of Australians do not have actual representation in the House.

Justifications of the current system

There are a small number of well-known justifications for the current way of conducting House elections, discussed below. In considering them we should ask what does constitutional law have to say about them? We know certainly that the Constitution prescribes both a *federal* system of governance for the nation, and a system of *representative and responsible* governance at the federal level (and perhaps at the state level also).

This is the way it's always been

The first justification for the use of SMDs to elect members to the House is the subliminal notion that this is the way things have always been done, and therefore the way they should continue to be done.

This lack of interest in change is not 'conservatism' (in the particular sense of the term meaning a deliberate default position held to protect established and working systems, thereby placing a burden of proof on new alternatives to show that they are superior). It would be a more naturally conservative position to protect and defend the centuries-old system of representative and responsible government, rather than merely to protect a number of specific voting system mechanisms that have been adopted during the 20th century.

Contrary to popular assumption, the use of single-member-divisions was not an original, or even a particularly early, development in the evolution of the English parliamentary election practice. For most of its history the House of Commons was composed of members elected in constituencies mainly of *two* members, and in some cases of one, three or four members.

Australian 19th century colonial practices similarly did not require 1-member divisions.

In the United States the early development of electoral systems often saw multi-member divisions used together with the traditional plurality voting method (ie: the 'block vote'). This led to such anomalous results that by the 1840s single-member divisions were proposed, and progressively adopted, as a preferable alternative. The result was systems based on the universal use of SMDs with plurality voting, or ***SMD-P***.

By the late 19th century English and Australian opinion had also reached the conclusion that wherever plurality voting was in use, single-member divisions were fairer. In due course they became the only acceptable option. The unhappy combination of plurality voting in multi-member

divisions was finally abandoned in Australia by the 1920s, in Great Britain by 1948, and in the United States in the 1960s. SMD-P was the result left behind by history.

Other democracies that emerged from the British Empire during the 20th century – India, Pakistan, Malaysia and others – took on SMD-P more or less automatically.

In conclusion, as a matter of history SMD voting is *not* the way things have always been. SMD is a design choice, not a default option. SMD is not the original way in which the Westminster Parliament was elected.

Local representation

Another justification for using SMDs, despite the severe constraint on choice which they impose, is the idea that we are all meant to be represented by parliamentarians who reside within a defined pool of electors, and thus have the character of 'local members'.

Clearly there is a deep well of traditional attachment to the notion of local members. I think that attachment should be questioned, not only because single-member divisions cause the many problems identified elsewhere in this submission, but because it's not clear that it even serves a 'local' purpose.

The so-called local divisions for the House now have enrolments of around 100,000 electors. It's not clear that the work of any person with a small office and many competing responsibilities can have a meaningful association with a population of this size.

Moreover, there is little to link residential localism with the scope of political issues which are dealt with by the Commonwealth Parliament and the Australian Government. Very few such issues have an inherently local nature. The securing of infrastructure assets for a local area is almost entirely a State-level concern, and indeed whenever the influence of House member is relevant to securing local infrastructure gains it is usually regarded as an inappropriate use of such influence. The advocacy of local economic interests is perhaps one of the areas which is genuinely shared between state and federal responsibilities, but even there diversions of federal policy and expenditure to favour local employment interests always attracts general criticism. In short, the role of a federal MP in securing local advantages is questionable at best, or else irrelevant.

In short, perhaps it's time to admit that the work of federal politicians is concerned with very big-picture policy development and other parliamentary functions, and that while they should be answerable for their decisions to various groups within the electorate, we ought not expect that they provide direct local advantages to them on any day-to-day basis.

Secure governments

A further and more structurally important justification for keeping single-member divisions is the view that the results that such electoral systems produce a desirable form of 'stable' government, a condition defined as a ruling party or coalition having a secure majority in the House.

Proponents of secure government argue that this way of arranging matters leads to two public goods:

- executive administrations have a clear run at developing and delivering their programs
- the system gives the electorate a decision-making architecture in which each election operates as a process for either installing a desired executive, or for removing an unpopular one (or both).

'Stable' is a positive-sounding word; who would prefer unstable government? But what is really being sought here is not so much stable government, but *secure* government. And the security of this form of government is to be obtained by ensuring that at all times the executive has a secure majority in the Parliament. Such a secure position may apparently be artificially contrived by the use of convenient electoral systems – even where doing so works contrary to the mandated achievement of other constitutional goals. The proponents of this view make little attempt to

reconcile their desired secure, or stable, government with the constitutional notion of responsibility.

Unfortunately for this argument, both limbs of the justification involve a significant conflict with the principle of responsible government. Early in this submission I noted that the constitutionally mandated concept of responsible government carries the meaning that the executive must be *answerable* to the Parliament, and must be so in an ongoing, not a periodic manner. These principles are deeply etched in the constitutional history of British-based political systems.

But entirely secure government cannot also be responsible government, if the effective answerability of the ministry to the Parliament, and specifically to the House, has been undermined.

And *serial* government – that is secure government between the holding of periodic elections – is also clearly contrary to the constitutional idea of responsible government, which is premised on the contradictory principle of ongoing, constant accountability.

In short, the notions of the secure government school are actually contrary to principles that are mandated by the design and structure of the Australian Constitution.

Some thought should be given to the kind of political culture which security of government creates. Responsible government and diverse, representative parliaments create a climate where minority special interests on each distinct public issue, while they may attract a due number of supporters in Parliament, will generally be rejected by majorities. By contrast secure governments, made possible by artificial and rigid parliamentary majorities, will tend towards a climate in which special interests can engage in political support-trading with governments, enabling such minorities to obtain various kinds of benefits. These include rent-taking or taxation advantages for certain industries (or even specific businesses), imposition of the values of specific religious or environmental groups, and so on. Conversely, secure government will tend not to lead to 'open' legislative choices, such as open personal freedoms, open markets, etc.

The distinction that emerges is a political dichotomy not between 'left' and 'right' versions of economic policy, or wealth distribution, but more between 'open' and 'closed' regimes of government and law, cutting across traditional political topics and interests.

People should keep this in mind when they weigh up what overall character of parliament they really want. But in any case, my greater point is that the secure government vision and its justification of the use of single-member electoral divisions works contrary to the notion of responsible government. This does not mean that the argument has no place in general political discourse, but I think it does mean that in attempting to justify any piece of legislation which has an adverse impact on the system of representative and responsible government, the arguments of the 'stable government' school cannot provide any strength to meet the constitutional law requirements articulated in the Court's *Lange* test.

Conflicting principles

How did we end up electing the House by a voting system (SMD) that seems to work in direct conflict with the mandated design of a system of representative and responsible government?

Given the history, it seems counter-intuitive to conclude that the enactment of an SMD electoral system might be contrary to the constitutional powers of the Parliament. In any case, strict versions of equality of voter influence and maximisation of actual representation do not appear to be constitutionally protected, and to the extent that choice is protected it only requires a minimal level of choice.[38] SMDs are thus at least a permissible option for Parliament to adopt. But the political

[38] The judgement in *Langer v Commonwealth* (1996) upheld Parliament's capacity to enact rules for the election of members of Parliament by compulsory preferential voting. The reasoning of several judges indicated that the expression "chosen by the people" is a general description of the required democratic process, and does not confer on individuals a right to any specific form of choice.

argument for their use is weak, and finds no support in the constitutional structure which is required – that of representative and responsible government.

SMD has always been inherently contradictory to the aims of representative and responsible government. How did such a contradiction between the aims of representative and responsible government and the system in use for 11 decades arise? The answer may be in part be that among the generation of Australians which established the Constitution and enacted the early legislation in Parliament the impact of party discipline in parliaments was not fully developed, and the full impact of SMDs on representative and responsible government had not yet become apparent.

Another answer may be that to some of the founders it *was* apparent, but they had an interest in preventing a resolution of the contradiction and instead sought to sustain the practice of SMD for other reasons.

Let me finish with a counterfactual. If a highly representative voting system (such as STV) was already in place and legislation for a replacement system based on SMDs was enacted, given that the change would threaten to result in manifestly lower outcomes in terms of representative parliaments and responsible government, would such legislation pass the Court's *Lange* test? In other words, would Parliament be allowed to legislate to manifestly diminish its own nature and undermine the mandated type of system of democracy?

Who can say? There are no easy answers to this conundrum. But we should at least let the facts be plainly stated.

Conclusion 26: Voting systems should be selected on the basis of agreed principles about what constitutes representation. Five such principles are proposed in this paper; if these are not accepted, perhaps others could be proposed in their place.

Conclusion 27: The voting systems chosen by Parliament for electing the Senate and the House should, above all other considerations, protect the responsible and representative character of the system of government mandated by the Constitution.

Conclusion 28: If the current system is maintained, its failings should be openly acknowledged.

Alternatives to the current system for electing the House

By contrast with the current system of electing the House, if we were to adopt core features of STV – a common quota used nationwide (determined before election day based on past turnouts and results), open (ie: division-less) voting for candidates from all quarters, and free (ie: optional) preferencing – we would give ourselves very high levels of choice, very equal influence on election results, and achieve very high (80%+) levels of actual representation. We would probably also put upward pressure back on electoral participation, and certainly we would not be excluding hundreds of thousands of us from participation by needlessly invalidating our votes.

A common quota used nationwide (as opposed to a variety of division-based quotas of different size), even if applied to divisions in the widest sense of the States, might mean that the precise numbers of members elected to the House would not be strictly fixed, and might vary slightly in direct response to voter turnout and preferencing choices. That doesn't seem much of a problem to me, if it is a price paid for near-perfect voter equality of influence.

For the time being, of course, the Constitution does require that the numbers of members elected in every State is pre-fixed, and indeed requires that we must elect members in vote pools demarcated by the State boundaries and by our places of residence. While such requirements endure, a universally simple STV voting system could be slightly bastardised by limiting the numbers elected, if necessary by closing places once the required number for a state is reached, even if a high turnout meant that another candidate might assemble a quota of votes. Conversely, the means of filling seats 'below-quota' is well known and is already an accepted practice in Tasmania and the ACT.

Applying the constitutional fixed-by-state numbers of seats to a national system using a common quota is like using two sieves. It does not necessarily result in better sieving, but the harm to the outcomes we seek would not be great.

I don't really expect that JSCEM or Parliament will rush to embrace such alternative systems for electing the House, but I do put such a vision forward as a means to allow comparison with the present system, which serves us very poorly and is of dubious constitutional compliance.

Conclusion 29: Alternative approaches to electing the House, based on attempting to achieve a representative House in terms of key principles, should be proposed and debated.

Conclusion

Finally, I think some expert body – perhaps the Australian Law Reform Commission – should take on the task of a review of current arrangements for their constitutional compliance. I was surprised recently to find that no work on any electoral matter appears on the ALRC website. For a matter so fundamental to the operation of our system of government, this seems to me to be something that should be done, and soon.

Conclusion 30: Multiple aspects of the electoral law of the Commonwealth may be in conflict with the constitutionally mandated system of representative and responsible government. A thorough inquiry into such matters, perhaps conducted by the Australian Law Reform Commission, would be highly useful.

I hope this submission is of use to the Committee.

Notes to Table 1

- Sources of data:
    - Australia (House and Senate) – Australian Electoral Commission (online results)
    - NSW – NSW Electoral Commission (online results)
    - Victoria – Victorian Electoral Commission (online results)
    - Queensland – Electoral Commission Queensland (online results)
    - Western Australia – Western Australian Electoral Commission (online results)
    - South Australia – Electoral Commission of South Australia (online results)
    - Tasmania – Tasmanian Electoral Commission (online results)
    - ACT – Elections ACT (online results)
    - UK – Political Sciences Resources website: http://www.politicsresources.net/area/uk/ge10/ge10.php and Pesphos.org.au
    - Canada – Elections Canada (online results)
    - United States – official statistics published by the Clerk of the US House of Representatives
    - India – Electoral Commission of India and Psephos.org.au
    - Pakistan – Electoral Commission of Pakistan and Psephos.org.au
    - Malaysia – results published in *Malaysia Star* newspaper (online) and Psephos.org.au
    - Eire - Psephos.org.au
    - Malta - Psephos.org.au
- Calculation method for each column:
    - The *coefficient of variation* is the ratio of (the square root of (the mean of (the squares of (the values by which each data point varies from the mean of the data)))) to (the mean of the data). Coefficient of variation results in the Table are generated on spread-sheets from the set of values making up:
        - the enrolment numbers in electoral divisions (column 3)
        - the differences between the votes of the seat winner and the runner-up (column 4); for Australian cases the difference is taken after the full distribution of preferences; for SMD-P nations the difference is the raw difference between primary votes; for uncontested seats (largely in the US House of Representatives) a value equal to the vote of the winner is used
    - The %ge of enrolled electors (column 5) is calculated as the aggregate vote within the relevant electoral division (using first preference votes in Australian, Irish and Maltese cases) for the all the candidates of all parties or independents who are elected, as a proportion of the total national enrolment/registration figure.
    - The 'after preferences' value for the %ge of enrolled electors (column 6) is calculated as the aggregate post-distribution-of-preferences vote within the relevant electoral division for all the candidates of all parties or independents who are elected, as a proportion of the total national enrolment/registration figure.
- The 'after preferences' results shown in column 6 are of doubtful value for those jurisdictions using compulsory preferencing; only the NSW and Queensland elections can be taken to reflect a real level of endorsement by voters.
- The 2011 election of the NSW Legislative Assembly showed a very low variation in enrolments (CofV of 2.3), indicating a very recent and accurate redistribution of division boundaries.
- The NSW Electoral Commission does not complete and publish full preference distributions for electoral divisions where the they are not required to declare the election result (ie: where during the vote counting a candidate achieves 50% of the unexhausted formal vote while 3 or more candidates still remain un-eliminated). Accordingly, the margin values used for the NSW Legislative Assembly for column 4 include 72 cases of margins based on full distributions and 21 cases where the margin is taken as the vote difference between the seat winner and the 2nd-placed candidate when the distribution of preferences was stopped.
- The 2014 election of the SA House of Assembly also showed a very low variation in enrolments (CofV of 3.4), although the SA divisions and results have proved controversial. Despite the complex and

thorough rules in force in South Australia regarding enrolment equality, South Australia has a very high concentration effect of conservative voters gathered in safe rural seats. This results in a significant advantage to the Labor Party in marginal seat victories in Adelaide. The problem is fundamentally one of demographic distribution, and cannot be 'fixed' simply by more artful boundary drawing.

- Note the very low rates of actual representation for the UK, generated by low turnouts, a solid three-party system with further micro-parties (leading to large non-represented results in almost all House of Commons constituencies) and plurality voting.
- Note the very low rates of actual representation for the Canadian House of Commons (30%), generated by low turnouts, a multi-party system with further micro-parties (leading to large non-represented results in almost all constituencies), and plurality voting. Note also that the Canadian House of Commons has a fairly high rate of enrolment variation, generated largely by special rules providing additional seats to the smaller provinces.
- I have been unable to locate detailed district-by-district registration totals for US Congressional districts. State registration totals are published in the official statistics published by the Clerk of the US House of Representatives.
- Note the rhythmic difference in US results for actual representation, with lower results in mid-term election years (~25%) than in presidential election years (~ 36%). In any case, US actual representation results are generally poor.
- The extraordinarily high results for influence variation in India and Pakistan (indicating a great range of marginality in seat wins) are probably largely driven by very complex party systems in these nations.
- Note the very high results for variation in division sizes for Malaysia, corresponding to the high level of malapportionment in division enrolments numbers established in that nation.
- Note the extraordinary degree of variation in enrolment equality for the Australian Senate, indicative of the strict equal numbers of seats allocated to states with very different populations.
- Note the extremely low variation results for enrolment numbers for elections for the Tasmanian House of Assembly, indicating a very robust boundary redistribution system. The 2010 election in Tasmania produced an exceptionally representative result, with enrolment equality variation of a tiny 1.0 as well as 84.9% actual representation of voters in the House of Assembly.
- There is no figure shown for enrolment equality for the NSW Legislative Council because these elections use a single, state-wide division.
- Note the generally high enrolment variation results for the Dáil Éireann, compared to the other ordinary STV examples shown (excluding the Australian Senate). This is indicative of the clunky results from using a mixture of 3, 4 and 5 member divisions, which are all small divisions sizes, and a limited approach to divisional boundary settings, often forced to adhere to county boundaries.
- Finally, note the extraordinarily high actual representation result for the Maltese Kamra: 90.1% of the electorate actually represented. This is easily the strongest result in the world and demonstrates that using STV, actual representation results above 90% are possible. Malta's electoral system features very low variation in enrolment numbers in divisions and a very high turnout participation rate (well over 90%, while still being voluntary). Malta also has a very strong two-party system, ensuring that in every electoral division supporters of both parties have at least 1 representative. The only voters unrepresented in the Kamra are the very small numbers who support independent candidates and those who fail to vote or who vote informal.

Errata to the Submission to JSCEM

This submission was conveyed to JCSEM Secretariat in late April 2014.

A subsequent thorough reading of the document has identified various minor typographical and grammatical flaws which have been corrected in ***this document***.

In addition to cosmetic corrections, the following significant revisions have been applied:

- Page footers: the submission number "181" allocated by the JSCEM Secretariat has been added to the footer on each page.
- Page 10: The 4th paragraph ("As we will see…") has been shifted down to be placed as the 8th paragraph on the page; this reverses the numbering of footnotes 14 and 15.
- Page 11: In the **Table of variations in enrolment**, the following data have been corrected:
    - In the third column, the data for the Dáil Éireann elections in 2007 and 2011 were transposed; the correct results are 9.7 for 2007 and 14.2 for 2011.
    - In the fourth column the data point for the Qaumī Asimbli'e of Pakistan has been corrected from 115.1 to 117.3.
    - In the fifth column the data point for the 2013 election of the Australian Senate has been revised down from 71.7.to 71.2 to take into account the re-run election of Senators for Western Australia held in April 2014. (The original submission shows the correct revised value in the table on page 34).
- Page 16: The first half of the material in footnote 18 has been moved up into the main text, with slight adjustments.
- Page 20: the reference to the *Electoral and Referendum Amendment (Maintaining Address) Act* in footnote 25 has been corrected to give the correct year of *2012*, not 2011.
- Page 23: for completeness, a reference to the nomination of a single Liberal Democrat Party candidate for a House of Representatives division (Gippsland) has been added.
- Page 43: in the final paragraph, 4th line, the broken text from "to the extent that choice is protected …" has been repaired by concluding with the words "it only requires a minimal level of choice.", and footnote 38 referring to the *Langer* case has been added.

11 June 2014