

## SUBMISSION TO THE MINISTERIAL EXPERT COMMITTEE ON ELECTORAL REFORM

### Introduction

1. This submission addresses the following four issues relating to reform of the Western Australian Legislative Council electoral system.

- the use of malapportioned regions;
- the abolition of ticket voting;
- the introduction of optional preferential voting to replace the current non-ticket voting modality; and
- the suggestion which has been made in some other submissions for the introduction of a threshold of first preference votes which would have to be polled to enable a candidate to win a seat.

2. My observations on these topics are underpinned by over 40 years of study of and work on electoral systems. I had a 30 year career with the Australian Electoral Commission (AEC) and its predecessor the Australian Electoral Office, retiring in November 2012 as Special Adviser, Electoral Reform and International Services. During my time with the AEC, I was one of its in-house specialists on the Senate electoral system; and I prepared the drafting instructions for the legislative amendments which introduced ticket voting for the Senate in 1984. I also managed the AEC's international programs for almost 20 years; and overseas have worked for the United Nations, the Commonwealth Secretariat, the International Institute for Democracy and Electoral Assistance, and the International Foundation for Electoral Systems. Since my retirement, I have served as one of the ACT Convenors of the Electoral Regulation Research Network, and as a member of the Editorial Board of the *Election Law Journal*. I have written extensively on issues of electoral reform.

### The use of malapportioned regions

3. Here I wish to make five observations.

- (i) Deliberately engineered malapportionment distorts the state-wide proportionality of seats to votes, and therefore undermines one of the fundamental objectives of the use of any form of proportional representation.
- (ii) It also structurally undermines the basic principle that the votes of all electors should be equally influential on the composition of the legislative body being elected.
- (iii) Malapportionment is now widely recognised as a form of electoral manipulation, generally discredited since the "reapportionment revolution" of the early 1960s in

the USA. Malapportionment for the Australian House of Representatives was largely eliminated in 1974, with further refinements reinforcing this in 1984.

- (iv) Arguments in favour of malapportionment essentially constitute no more than special pleading on the part of those who seek to be systematically privileged over others in the operation of the electoral system.
- (v) Finally, arguments based on the need for face-to-face contact between voters and representatives are increasingly being rendered anachronistic by social changes flowing from the Covid-19 pandemic, including in particular the increased use of tele-conferencing tools such as Zoom.

### **Abolition of ticket voting**

4. The ticket voting system for the Legislative Council is now clearly operating in a dysfunctional way, and it should be replaced, essentially for the same reasons which led to its replacement for Senate elections.

5. Like most electoral reforms, the introduction of ticket voting for the Senate (which inspired its adoption in various states) did not represent an attempt to create a perfect system, but rather one to solve an ongoing problem. In the case of the Senate, that problem was high levels of informal voting. That had its roots in a single critical decision taken at the time of the introduction of proportional representation for the Senate in 1948, which may have looked at the time like a point of minor detail, but in fact has fundamentally influenced all later developments: the requirement that voters indicate preferences for all the candidates on a Senate ballot paper in order to cast a formal vote.

6. Prior to 1948, it was virtually impossible for a candidate to be elected to the Senate from outside the ranks of the major parties. Under proportional representation, however, the Senate was transformed into a feasible battleground for minor parties as well, as became apparent with the ALP split in the mid-1950s, and the rise of the DLP. Successful minor party forays encouraged further candidacies from outside the mainstream, the number of candidates per vacancy trended upwards, ballot papers became larger, and the task faced by voters in numbering all candidates became more onerous. With the passage of time, voters came to be ever more dependent on how-to-vote cards issued by the parties to get their numbering right (especially since party affiliations of candidates were not printed on ballot papers until 1984), but the informal vote percentage nevertheless grew inexorably, topping 9 per cent nationwide at every Senate election from 1970 to 1983. The phenomenon reached its nadir at the 1974 Senate election in New South Wales, where 73 candidates stood for ten seats, and every voter had to number every candidate on the ballot paper: the informal vote reached 12.31 per cent.

7. The Hawke government, when it came to power in 1983, perceived the paramount need to address the problem of informal voting at Senate elections, but was prevented (by its lack a majority in the Senate) from being able to introduce its proclaimed policy of optional preferential voting, which would have relieved voters of the obligation to number every candidate. It accordingly opted for the ticket voting scheme, which in effect

enabled a voter, by the marking of a single square on the ballot paper, to adopt in total the how-to-vote card of his or her party (as formally lodged with the AEC). Voters retained the option of indicating their own preferences for candidates, but those who did so were still instructed by the ballot paper to number every square.

8. Because it was apparent from previous election statistics that the vast bulk of voters had been following how-to-vote cards anyway, the change was not seen as being a particularly momentous one. But one important point was overlooked. Up until 1984, the only parties which were able to issue how-to-vote cards were those which had the membership base, field structure and resources to enable them to distribute cards physically at polling places. With ticket voting, on the other hand, every group of candidates on the ballot paper could provide voters with, in effect, a “virtual” how-to-vote card. That ultimately led directly to the phenomenon of “preference harvesting”, which enabled a host of “micro-parties” to exchange preferences with each other for their mutual benefit. Preference harvesting as a technique was first refined at New South Wales Legislative Council elections in the 1990s. But as the quota for election there was much lower than at Senate elections, it took longer for the micro-party vote to build to levels at Senate elections at which preference harvesting would be feasible. The 2013 Senate election was the first at which such a strategy demonstrably succeeded.

9. While preference harvesting may ensure that at least one candidate from the parties sharing preferences will get elected, which candidate from which party will ultimately be successful is very much a matter of luck, being greatly influenced by the order of exclusion of candidates during the count, which in turn is heavily dependent on the (all relatively small) numbers of first preference votes they poll. It follows that a slight change in the first preference tally of one candidate can have major flow-on effects. Elsewhere I have described this as follows: “in effect, ... [micro-party] candidates buy a lottery ticket, the price of which is the cost of the deposit, with first prize being six years in the Senate”.

10. All of that having been said, it is by no means clear that the election of candidates with small first preference vote percentages on the strengths of preference flows to them constitutes a problem: indeed, the possibility of such a thing happening is an essential feature of single transferable vote proportional representation (STV). The problem rather lies in the fact that it is most unlikely that the “preferences” processed by the system are in fact held by the voters. This is so because ballot papers these days can easily be clogged up with obscure candidates, sometimes running for parties whose beliefs, as professed in their names, cannot necessarily be taken at face value. Many of these candidates scarcely campaign, leaving voters with no basis for assessing their relative merits. Faced with such ballot papers, voters who wish to specify their own preferences rather than adopting a ticket as their vote have no option but to lie, writing random or otherwise meaningless numbers against candidates once they have run out of genuine preferences to express. For voters who wish to use the ticket voting option, the proposition that they have consciously adopted as their own personal preferences for each candidate those contained in a ticket is little more than a legal fiction.

11. It follows that it is entirely possible that a large number of the preferences which are distributed at a Legislative Council election are spurious, in the sense that they do not

correspond to a genuinely held belief on the part of the voter. This, more than any other factor, is the source of the crisis in the legitimacy of the ballot structure at Legislative Council elections.

12. A second fundamental problem with the current system is that it discriminates against some voters, by making the act of voting comparatively difficult for them. This is so, at least, for any voter who wishes to cast a first preference vote for a candidate who does not appear in the first position on a ticket; such voters are instructed to number every square on the ballot paper. One can give as an example here the case of a voter who wishes to vote for all the female candidates before all the male ones.

### **Optional preferential voting**

13. It is useful at this point to reflect on what is likely to be the true structure of a voter's preferences for a set of candidates. Realistically, there will be some between whom the voter can distinguish, and some between whom he or she will be indifferent, for the sorts of reasons stated in paragraph 10 above. There may be some candidates whom the voter can identify as conspicuously worse than the rest.

14. Faced with a requirement to mark the ballot with consecutive numbers against all candidates, most voters will have few palatable options available to them. They may simply follow a how-to-vote card (though that is relatively unlikely for non-ticket voters, since most could have saved themselves the trouble by casting a ticket vote). More probably, they will write a few numbers which truly express their preferences, and then fill the rest of the blank squares up either with random numbers, or with a quasi-"donkey vote".

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

16. The foregoing discussion suggests that a basic criterion for the choice of a new ballot structure for Legislative Council elections should be that it enables voters to record their preferences meaningfully and truthfully.

17. Of the available policy choices, fully optional preferential voting, with only a first preference required for a formal vote, comes closest to this ideal. It does not achieve it fully, because it does not permit indifference to be shown except at the level of the voter's least preferred candidates. But it does not require voters to write numbers on ballot papers purporting to express preferences which they in fact do not hold, merely to ensure that the numbers expressing their true preferences will be taken into consideration.

18. A key policy choice here is whether just a first preference should suffice to make a vote formal, or whether more should be required. In principle, the arguments raised above

imply that a single preference should suffice, as it may be the only genuine preference which the voter holds.

19. It is sometimes argued that unless voters are required to indicate more than one preference, the exhaustion of votes will lead to a situation in which some candidates are elected with less than a quota. It is difficult, however, to see that as a worse outcome than one in which the candidates in question gain a quota on the strength of numbers written insincerely and/or at random by voters who have in fact run out of genuine preferences.

20. With the introduction of optional preferential voting for candidates, the pragmatic need for the retention of any form of ticket voting as a mechanism for reducing informality would largely fall away. The abandonment of ticket voting would eliminate preference harvesting, without compromising the ability of small parties to get elected on the strength of genuine preferences of the voters.

### **First preference vote threshold**

21. A number of the published submissions to the Committee have proposed the introduction of some sort of threshold figure of first preference votes which would need to be polled in order to qualify a candidate for election. To give but one example, the submission of Mr Edward Elias argues as follows:

“I suggest introducing a minimum vote threshold for any candidate to be submitted to the second-round preference voting, specifically a 1% of formal votes minimum. In other words, a candidate who does not receive at least 1% of the formal votes will be eliminated from the election immediately, before the remainder of the process for LC voting goes ahead. In this way, there would be a preliminary count where parties who fails to obtain the minimum threshold are eliminated, then the ‘first’ preferences are recounted. The votes with now-eliminated candidates as their first preference will be redistributed to their next, still-valid preference, without the use of surplus or transfer values. I believe 1% is a good minimum threshold as it would eliminate a sufficient number of parties in the first instance, leaving just those parties with decent support - although, I do concede the exact number is arbitrary.”

22. The first point to be made in response to this is that it would have produced highly anomalous results had it applied at the March 2021 election, because candidates other than those who were first on a ticket polled very few votes. The result in the East Metropolitan region exemplifies this. There were 352,173 valid votes cast: a 1% first preference threshold would therefore have been 3,521. That, if applied in the manner proposed by Mr Elias, would have led to the initial exclusion of every candidate who had not been in the first place on a ticket; meaning that no party could have won more than one seat, regardless of the number of votes polled by its candidates. The same anomaly would have arisen in every other region. This problem would be likely to be manifested under any system in which the first candidate in a group gains the lion’s share of the group’s votes, including the modified ticket voting models now used for the Senate and the New South Wales Legislative Council, and indeed any system in which voters tend to follow a how-to-vote card giving a first preference to the first candidate in a group.

23. Similar proposals were considered and rejected by the Federal Parliament's Joint Standing Committee on Electoral Matters in its inquiry into the 2013 federal election which led it to propose the reforms to the Senate voting system implemented in 2016. For a number of reasons, the case for the introduction of a threshold of this type is substantially misconceived.

24. The incorporation of a threshold of this type in an STV system such as that used at Legislative Council elections would have few if any precedents. A perception of a need for such an arrangement has not arisen elsewhere, primarily because the phenomenon of preference harvesting and the consequent election of micro-parties is basically a consequence of the use of ticket voting. While ticket voting is not a uniquely Australian innovation, it has not been used widely outside Australia, since most other jurisdictions which use STV have also concurrently used optional preferential voting, and therefore have never encountered the high levels of informal voting which motivated the introduction of ticket voting in the first place.

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

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

27. The modified d'Hondt case suggests that there is a particular danger that an electoral system may fail to gain legitimacy where it is a hybrid displaying features of several fundamentally different systems. The problem with such hybrids is that the fundamental principles underlying the system - the basic motivating notions of who does and doesn't deserve to be elected - tend to become confused or, in the most extreme cases, almost totally obscured. Designers of such systems typically believe that they will be getting the best of several worlds, and wind up getting the worst.

28. STV with a threshold included would in fact be precisely the sort of hybrid just described. As its name implies, the basic principle underpinning STV is that each voter casts one ballot, which is, however, capable of being transferred in accordance with the voter's preferences where the voter's preferred candidates have already been elected or excluded. No special priority is given to first preferences: as noted earlier, it is an inherent feature of the system that candidates will be able to build their totals towards a quota on the basis of their own primary votes and votes transferred to them.

29. Furthermore, in its 1989 report on the modified d'Hondt system, one point noted by the Joint Standing Committee on Electoral Matters was that the choice of the level of a threshold is essentially arbitrary; this had been one of the major bones of contention in the aftermath of the first ACT election. This would also be true of any threshold used for Legislative Council elections: while various levels have been suggested in earlier submissions, their authors appear unable to offer any specific and compelling justification for setting it at the various levels they propose, rather than any other number less than a quota which one might care to think of.

30. In some countries, particularly those which use list proportional representation, particularly levels of threshold may become an embedded feature of the system, legitimised by general familiarity with how they operate in practice.<sup>1</sup> Such a source of legitimacy would not be available at Legislative Council elections, at least until such time as the concept of a threshold had become similarly embedded.

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

32. The introduction of a threshold would also tend to encourage strategic voting, by giving certain voters a positive incentive to give their first preferences to candidates other than the ones they truly most preferred. Specifically, voters minded to support a minor rather than a major party might well perceive a need to vote for a candidate of the minor party most likely to exceed the threshold rather than for a candidate of their most favoured party, since otherwise there would be a risk that all minor parties would poll below the threshold, and their votes would be transferred directly to a major party. This is closely analogous with the dilemma voters often face under the first-past-the-post

---

<sup>1</sup> In this context, it is worth noting that list systems of proportional representation are fundamentally different in character to STV. Under such systems, broadly speaking and in their simplest incarnations: each party contesting an election must lodge an ordered list of candidates; voters vote for parties rather than candidates; the proportion of the vote won by each party determines the number of seats it wins, through a defined mathematical formula; and the elected candidates are then identified from the party's list, so that, for example, in the simplest case, if a party wins ten seats, the top ten candidates on its list will be elected. Various different mathematical formulae can be used to allocate seats among parties, and inherent in the arithmetic of each is a so-called "threshold of representation", a percentage of the vote below which a party cannot win a seat. Such thresholds of representation typically depend on both the number of vacancies and the number of parties. The introduction of a legally specified threshold is therefore typically intended to increase the already existing threshold of representation, and to fix it at a level which does not vary from election to election. For a further discussion of these issues, see Michael Gallagher, "Comparing Proportional Representation Electoral Systems: Quotas, Thresholds, Paradoxes and Majorities", *British Journal of Political Science*, vol. 22, 1992, pp. 469-496.

system: where multiple parties with similar platforms are competing for a single bloc of votes, voters need to ensure that they do not “waste” their votes.

33. If it be accepted that one of the key defects of the current Legislative Council system is that the preferences attributed to voters by the ticket voting process cannot be taken at face value, the prospect of strategic voting would have to be a matter of concern. At least under the current system it can be presumed that voters’ first preferences accurately reflect their beliefs; where there are incentives for strategic voting, even first preferences cannot be assumed to be a sincere expression of the voters’ beliefs. In that sense, the introduction of a threshold could prove to be a retrograde step.

34. It might be assumed that the introduction of a threshold would, by itself, suffice to eliminate “preference harvesting”; but in fact, that is by no means clear. There is likely to continue to be a substantial bloc of voters who are prepared to vote for minor or micro-rather than major parties. As long as that remains the case, certain parties will continue to benefit from the presence on the ballot of a proliferation of parties with diverse but attractive names, votes for which can be channelled using the ticket voting system.

35. At the moment, it is the micro-parties themselves which benefit. If, however, larger parties which see the potential benefit of preference harvesting are prepared to sponsor the ongoing existence of micro-parties, for example by paying the candidates’ deposits, there is no particular reason to assume that the micro-parties are going to go away. In effect, the use of a threshold by itself would in all probability simply change the beneficiaries of preference harvesting from the micro-parties to parties which were capable of exceeding the threshold.

36. While the concept of a threshold sounds simple, its precise application in the distribution of Legislative Council preferences would give rise to a number of different options, including the following.

- (i) Votes for candidates who failed to exceed the threshold could be treated like informal votes, and would not be included in the calculation of the quota. This tends to be the approach taken when a threshold is applied in the simplest cases of list proportional representation.
- (ii) Votes for candidates who failed to exceed the threshold could be treated like votes for deceased candidates at Senate elections. The first stage of the distribution of preferences would then be the transfer of those votes according to the voter’s preferences to candidates who had not been eliminated by the operation of the threshold. Such votes would be included in the calculation of the quota.
- (iii) Alternatively, candidates who failed to meet the threshold might be left in the count, but might be treated as incapable of having votes transferred to and/or from them.

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



37. The problems which arose at the 2021 Legislative Council election are primarily associated with the “ballot structure” - the mechanism by which voters’ preferences are structured and captured. That being so, the simplest approach to fixing the system would be to address the defects with the ballot structure, rather than trying to mitigate their symptoms by changes (such as the introduction of a threshold) to the “electoral formula” - the rules for identifying the winners. Dealing with problems in one area of the system with changes to another area of the system is the electoral equivalent of driving with one foot on the accelerator and one on the brake.