

## CHAPTER 5: REPRESENTATION AND VOTING SYSTEMS

This chapter outlines the current arrangements for voting in elections for the House of Representatives, the Senate, and state and territory Parliaments, and the current rules for redistributing electoral boundaries for the House of Representatives. It also discusses:

- options for the casting and validity of votes, including different voting systems and formality rules;
- options to amend redistribution processes;
- the relative size and the composition of electoral divisions; and
- concerns that have been raised about members or Senators retiring early.

### INTRODUCTION

- 5.1 The mechanisms through which the votes of millions of electors are processed in order to produce sets of elected representatives are a fundamental aspect of Australia's electoral architecture. Reflecting the different roles of the House of Representatives and the Senate, the two houses are elected using different voting systems.
- 5.2 In addition to elections, there are other voting mechanisms through which the public can express a view on a particular issue or an aspect of public administration. These include referendums for altering the Australian Constitution, plebiscites such as the 1916 and 1917 votes on conscription, and voluntary polls such as the 1977 poll for a national song or the 1997 Constitutional Convention Election. These forms of 'direct democracy' are outside the scope of this Green Paper, which is focussed on laws and systems relating to elections.

### THE CURRENT ARRANGEMENTS

#### *Commonwealth arrangements*

- 5.3 The Australian Constitution requires periodic elections for both Houses of Parliament, with separate provisions reflecting the different constitutional role of each House:
- the maximum term for the House of Representatives is three years, however, the House may be dissolved sooner by the Governor-General;<sup>159</sup> and
  - Senators from the states are elected for fixed six-year terms.<sup>160</sup> The terms of the four Senators from the territories are up to three years.<sup>161</sup>
- 5.4 Sections 151 to 161 of the Electoral Act set out the requirements for election dates and writs for elections. The current Parliament is due to expire on Friday 11 February 2011 (i.e. three years after the 42<sup>nd</sup> Parliament first met on 12 February 2008). The last possible date for the next House of Representatives election is 68 days from the expiry of the House, being 16 April 2011, the last Saturday within this period.

<sup>159</sup> Australian Constitution, section 28. Section 32 of the Constitution requires the Governor-General to issue writs within ten days from the expiry of, or proclamation of the dissolution of, the House of Representatives

<sup>160</sup> *ibid.*, section 7.

<sup>161</sup> Electoral Act, *op. cit.*, section 42.

- 5.5 Half of the Senators for the states are elected every three years, or if there is a double dissolution, the entire Senate is elected at the same time as the House. Territory Senators are elected to serve until the day immediately before the polling day for the next general election. A writ for the Senate election in each state is issued by the Governor of that state; a writ for the Senate election in each territory is issued by the Governor-General. The Australian Constitution provides that the Parliament of a state may make laws for determining the times and places of elections of Senators for that state.<sup>162</sup>
- 5.6 Generally, House elections are called at times such that they can be held simultaneously with Senate elections, however separate elections are allowed under the Australian Constitution. Separate elections occurred for the House in 1954, 1966, 1969 and 1972, and for the Senate in 1953, 1964, 1967 and 1970. The next half-Senate election may be held at any time between 7 August 2010 and 21 May 2011, unless there is a double dissolution. Under the Australian Constitution, a double dissolution may occur at any time up until six months before the date upon which the House of Representatives is due to expire.<sup>163</sup>
- 5.7 Following an election, members of the House of Representatives take their seats on the first Parliamentary sitting day following an election, after new members make an oath of affirmation or allegiance as required by section 42 of the Australian Constitution. In contrast, Senators from the states take their seats on the 1 July following an election, except in the case of a double dissolution election, when elected Senators' terms are taken to begin on the 1 July preceding the election.<sup>164</sup> Senators from the territories take their seats on the day of their election.<sup>165</sup> At times, there can be a significant gap between the election of Senators and the 1 July date upon which they take up their seats, as occurred after the last federal election on 24 November 2007.

#### *Voting for the House of Representatives*

- 5.8 For House of Representatives elections, one candidate is elected per division (electorate). The appearance of the ballot paper is prescribed by the Electoral Act<sup>166</sup> and the order of candidates on the ballot paper is determined by a random draw.<sup>167</sup> Voters mark their ballots to elect their member using a system known as preferential voting, the 'instant runoff', or the 'alternative vote' method. Under the system used for the House of Representatives, often described as full preferential voting, voters are required to indicate a rank ordering of preferences for all candidates on the ballot paper.<sup>168</sup> An example of a current ballot paper for the House of Representatives is at [Annex 5](#).
- 5.9 The system can be described as a 'majoritarian' system because a candidate is elected on obtaining an absolute majority of votes (that is, more than 50% of the total formal vote). If this has not been achieved after the first preference votes have been counted, the candidate standing lowest on the poll is excluded, and his or her votes are transferred to the remaining candidates according to the preferences shown by the voters. This process of excluding the lowest standing candidate and transferring his or her votes continues until one candidate achieves an absolute majority of votes.

<sup>162</sup> Australian Constitution, section 9.

<sup>163</sup> *ibid.*, section 57.

<sup>164</sup> *ibid.*, section 13.

<sup>165</sup> Electoral Act, *op. cit.*, section 42.

<sup>166</sup> *ibid.*, sections 209, 209A, 210A, 212-214.

<sup>167</sup> *ibid.*, section 213.

<sup>168</sup> *ibid.*, section 240.

- 5.10 Whenever a vacancy occurs in the House of Representatives because of the resignation, death, absence without leave, expulsion or disqualification of a Member, a by-election may be held to elect a replacement.<sup>169</sup>

*Historical developments*

- 5.11 The current arrangements have remained largely unchanged since their introduction in November 1918. Prior to this, there were two periods in which different voting systems were used:
- at the 1901 election, the first following Federation, members of the House of Representatives were elected according to the electoral laws of the various States;<sup>170</sup> and
  - from 1903 to 1918, members were elected using the plurality system (commonly called 'first past the post'), which required a voter to indicate the single candidate for whom he or she wished to vote; whichever candidate gained the greatest number of votes was elected, even if that number did not constitute an absolute majority.
- 5.12 From 1984 to 1998, there was a 'savings' clause in the Electoral Act which provided that certain ballot papers which did not show preferences for all candidates could nevertheless be regarded as formal.<sup>171</sup> This was accompanied by a ban on encouraging voters to use an incomplete number of preferences.<sup>172</sup> The savings clause and the prohibition were repealed in 1998 following a recommendation by JSCEM.

*Size and composition of the House of Representatives*

- 5.13 The Australian Constitution provides that the number of members of the House of Representatives 'shall be, as nearly as practicable, twice the number of Senators'. It also provides that the 'number of members chosen in the several States shall be in proportion to the respective numbers of their people', with a minimum of five members to be chosen in each state that existed at the time of Federation.<sup>173</sup>
- 5.14 The number of members to which each state and territory is entitled in the House of Representatives is determined by the Electoral Commissioner using a formula set out in the Electoral Act; this determination is undertaken 12 months after a House of Representatives first sits following an election.<sup>174</sup> Significant increases in the number of members have coincided with an expansion of the Senate: from 1984 until 2009 there have been between 147 and 150 members; from 1949 to 1984 there were between 121 and 127 members; from 1901 to 1949 there were 74 or 75 members.<sup>175</sup>

<sup>169</sup> Australian Constitution, sections 33 and 38. Section 33 requires the Speaker to issue a writ for the election of a new member.

<sup>170</sup> *ibid.*, section 31.

<sup>171</sup> Former section 270 of the Electoral Act provided that a ballot paper could be counted if it showed a first preference for one (and only one) candidate, and had numbers – any numbers – in all the remaining squares on the ballot paper, or in all but one of those squares, with that remaining square left blank.

<sup>172</sup> Former section 329A of the Electoral Act. Originally the ban only applied to encouragement in the form of 'how-to-vote' cards; it was subsequently broadened to cover other forms of encouragement. JSCEM criticised this prohibition as 'ineffective and heavy-handed' in its *Report of the Inquiry into the 1996 Election and Matters Related Thereto*, *op. cit.*, p. 30. The prohibition was challenged but found to be valid by the High Court of Australia in 1996: *Langer v Commonwealth* (1996) 186 CLR 302.

<sup>173</sup> Australian Constitution, section 24.

<sup>174</sup> Electoral Act, *op. cit.*, Part III, Division 3.

<sup>175</sup> The formula used to determine representation entitlements requires the theoretical fractional representation entitlement to be rounded to a whole figure: Electoral Act, *op. cit.*, section 65. This rounding has resulted in small variations in the number of members in particular parliaments. The NT elected its first member in 1922 and the ACT in 1949.

5.15 Table 5.1 shows developments in the average enrolment per electoral division in the House of Representatives since 1949.

**Table 5.1: Average enrolment per division of the House of Representatives, 1949–2009<sup>176</sup>**

State / Territory	1949		1983		2009			
	No. of divisions	Average enrolment per division	No. of divisions	Average enrolment per division	No. of divisions	Average enrolment per division	Lowest divisional enrolment	Highest divisional enrolment
NSW	47	40,782	43	75,536	49	92,245	85,636	98,986
VIC	33	41,510	33	75,663	37	94,131	85,939	108,246
QLD	18	38,724	19	81,826	30	91,234	87,668	96,144
WA	8	39,471	11	72,507	15	88,567	83,389	93,332
SA	10	43,432	11	80,085	11	98,305	95,483	102,807
TAS	5	32,308	5	56,493	5	70,289	68,810	73,124
ACT	1	11,841	2	68,662	2	121,882	119,687	124,077
NT	1	6,586	1	57,471	2	60,052	58,511	61,593
National Average	123 (total)	39,948	125 (total)	74,989	150 (total)	91,826		

### Voting for the Senate

5.16 The Senate is elected using a system of proportional representation. Electoral systems based on proportional representation can be described as seeking to ensure that the number of seats each party wins closely reflects the number of votes it has received. Unlike an election for the House of Representatives, in which one candidate per division is elected with a majority of the vote, several Senate candidates are elected per division once they reach a quota (or proportion) of the total formal vote.<sup>177</sup> Each state or territory constitutes an entire division for the Senate.

5.17 Voting for the Senate utilises a 'single transferable vote' (STV) method. The STV method means that each voter casts a single vote in the election, but when the voter's most preferred candidate is no longer in the count (having been either elected or excluded), the vote can be transferred to another candidate in accordance with the expressed preference of the voter. If that other candidate is elected or excluded, the vote can again be transferred to the next most preferred available candidate, and so on.

5.18 As with the House of Representatives, the format of the Senate ballot paper is prescribed in the Electoral Act.<sup>178</sup> An example of a Senate ballot paper is at [Annex 6](#). The Senate ballot paper is divided into two parts, separated by a heavy black line. Candidates are listed below the line in columns, while a square is printed, above the line, over a column of any group of candidates who have chosen to contest the election as a group and lodged a group voting ticket. A similar square is printed above the line over an ungrouped incumbent Senator who has lodged a group voting ticket.<sup>179</sup> The ballot paper is therefore organised horizontally, with grouped

<sup>176</sup> Statistics for 1949 and (March) 1983 are drawn from JSCER, *First Report*, 1983, op. cit., p. 137. 2009 statistics are based on gazetted enrolment levels as at 30 January and are available at [www.aec.gov.au/Enrolling\\_to\\_vote/Enrolment\\_stats/gazetted/2009/01.htm](http://www.aec.gov.au/Enrolling_to_vote/Enrolment_stats/gazetted/2009/01.htm).

<sup>177</sup> The last vacancy in a Senate election may be filled by the candidate who is closest to obtaining the specified quota: Electoral Act, op. cit, subsection 273(17).

<sup>178</sup> Electoral Act, op. cit., sections 209-211A, 213-214 and Form E in Schedule 1.

<sup>179</sup> *ibid.*, subsections 211(5) and 211A(6). It is also open to groups to lodge multiple group voting tickets, with two or more different versions of preference allocation; votes will be allocated in equal proportions to each ticket.

candidates and incumbent Senators positioned from left to right determined by a random draw.<sup>180</sup> The order of candidates within their vertical groupings is normally determined by the groups themselves.

- 5.19 A voter may mark his or her ballot paper by either:
- marking one square above the line to indicate his or her wish to adopt as his or her preferences the voting ticket lodged by the group or incumbent Senator. This is referred to as voting 'above-the-line'; or
  - numbering every candidate below the line, in the order of his or her preferences. This is referred to as voting 'below-the-line'.
- 5.20 Whenever a Senator for a state retires, dies or is expelled from Parliament, the Constitution provides that the vacancy is filled by a member of the same party from which the previous Senator was elected, selected by the legislature of the relevant state.<sup>181</sup> These arrangements are the result of an amendment to section 15 of the Constitution following a referendum in 1977. The Electoral Act provides for analogous arrangements for filling vacancies for territory Senators.<sup>182</sup>

#### *Historical developments*

- 5.21 The current arrangements for casting a vote, which were introduced in 1984, are an adaptation of the previous voting system: single transferable vote (STV) proportional representation, with full numbering of preferences. STV-proportional representation was introduced in 1949, the same year that the number of Senators per state increased from six to ten.<sup>183</sup> Under STV-proportional representation electors were required to express preferences for every candidate in order to record a formal vote. A central aim of the introduction of ticket, or 'above-the-line' voting in 1984, was a reduction in informal voting levels.<sup>184</sup>
- 5.22 From Federation until the introduction of proportional representation in 1949, Senators were elected using a number of different electoral systems:
- at the 1901 election, the first following Federation, Senators were elected according to the electoral laws of the various states;<sup>185</sup>
  - from 1903 to 1917, Senators were elected using a version of the plurality system,<sup>186</sup> which required voters to indicate a minimum number of preferences for as many candidates as there were Senate vacancies (typically three); and
  - from 1919 to 1946, Senators were elected using a form of the alternative vote method, which had three important features: voters expressed preferences on the ballot paper in the same way they did for the House of Representatives, candidates were elected based on

<sup>180</sup> *ibid.*; sections 210 and 213. Also, ungrouped candidates appear in a column on the far right of the ballot paper; their vertical order is determined by a random draw.

<sup>181</sup> Australian Constitution, section 15. The High Court of Australia discussed the operation of section 15 in *Vardon v O'Loghlin* (1907) 5 CLR 201.

<sup>182</sup> Electoral Act, *op. cit.*, section 44.

<sup>183</sup> *Representation Act 1948*, section 4.

<sup>184</sup> D M Farrell and I McAllister, *op. cit.*, p. 44. Ticket voting succeeded in reducing informality levels, as discussed at paragraph 5.63.

<sup>185</sup> Australian Constitution, section 10.

<sup>186</sup> Referred to elsewhere as the block system.

an absolute majority of votes, and once one candidate was elected all ballot papers were counted again, with preferences for already elected candidates being transferred to the remaining candidates in accordance with the preferences expressed on each ballot paper.

- 5.23 The plurality and alternative vote systems showed a strong tendency to produce an outcome under which the same party grouping won every seat in the state: of the 60 occasions on which a state was polled for the Senate using the alternative vote method, 55 produced such an outcome. Some commentators have noted that a feature of the period from 1903 to 1946 was 'the 'windscreen wiper' effect, where one party wins all or most Senate seats in one election, only to lose all or most [of the vacancies contested] in the next election.'<sup>187</sup>

#### *Size and composition of the Senate*

- 5.24 The Senate is known as the 'States' House', not least because the Australian Constitution requires that each of the states that existed at the time of Federation must have the same number of Senators, regardless of its population.<sup>188</sup> The number of Senators representing the States has changed only twice: in 1949 the number of Senators for each state increased from six (which had applied since Federation) to ten;<sup>189</sup> and in 1984 the number of Senators for each state increased from ten to 12.<sup>190</sup> The ACT and NT were not represented in the Senate until the election of two senators each in 1975.<sup>191</sup> Under the Electoral Act, the ACT and NT are presently represented by two Senators each.<sup>192</sup>
- 5.25 Table 5.2 shows developments in the average number of enrolled persons per Senator over recent decades.

**Table 5.2: Average enrolled persons per Senator, 1983 and 2009<sup>193</sup>**

State / Territory	1983			2009		
	Total Enrolment	No. of Senators	Enrolled persons per Senator	Total Enrolment	No. of Senators	Enrolled persons per Senator
NSW	3,248,036	10	324,804	4,520,022	12	376,669
VIC	2,496,904	10	249,690	3,482,854	12	290,238
QLD	1,472,861	10	147,286	2,645,792	12	220,483
WA	797,581	10	79,758	1,328,512	12	110,709
SA	880,936	10	88,094	1,081,361	12	90,113
TAS	282,467	10	28,247	351,445	12	29,287
ACT	137,324	2	68,662	243,764	2	121,882
NT	57,471	2	28,736	120,104	2	60,052
National Average	9,373,580 (total)	64 (total)	146,462	13,773,854 (total)	76 (total)	181,235

<sup>187</sup> D M Farrell and I McAllister, *op. cit.*, p. 41.

<sup>188</sup> Australian Constitution, section 7. Any change to this would require approval of voters in the state concerned in accordance with section 128.

<sup>189</sup> *Representation Act 1948*, section 4.

<sup>190</sup> *Representation Act 1983*, section 3.

<sup>191</sup> This was enabled by the *Senate (Representation of Territories) Act 1973*.

<sup>192</sup> The Electoral Act provides for the ACT and NT to have two Senators until such time as the number of members to which they are entitled in the House of Representatives reaches six. From that date, the territory concerned will be entitled to a third Senator: Electoral Act, *op. cit.* section 40.

<sup>193</sup> 1983 statistics are drawn from JSCER, *First Report*, 1983, p. 139. 2009 statistics are based on gazetted enrolment levels as at 30 January and are available at [www.aec.gov.au/Enrolling\\_to\\_vote/Enrolment\\_stats/gazetted/2009/01.htm](http://www.aec.gov.au/Enrolling_to_vote/Enrolment_stats/gazetted/2009/01.htm).

### *State and territory voting systems*

- 5.26 All states and territories use a system of preferential voting for their legislatures, which requires voters to rank-order their candidates on the ballot paper as outlined at paragraph 5.8.
- 5.27 Key differences between the voting systems used in the Commonwealth, states and territories are outlined at [Annex 7](#) and include the following.
- Candidate names on Tasmanian and ACT ballot papers are rotated using a process called the Robson Rotation. This process means that positions within the column that are seen as favourable to a candidate are shared between all candidates. This is achieved by preparing batches of ballot papers with candidate names rotated in the different positions available.<sup>194</sup>
  - The lower houses of New South Wales and Queensland have optional preferential voting, which only requires a voter to indicate his or her first preference, with all subsequent preferences being optional.
  - The Tasmanian House of Assembly and the ACT Legislative Assembly have multiple members elected in each electorate, and members are elected using a version of STV proportional representation known as the Hare-Clark system.
  - There is significant variation in the way in which votes can be cast in the different multi-member proportional representation systems, ranging from full preferential voting, variations on partial preferential voting, and varied use of ticket voting.
- 5.28 There are also a range of differences in the rules which apply in each jurisdiction to govern whether a vote is to be treated as formal (deemed valid and counted). These differences are outlined at [Annex 8](#) and include whether ticks or crosses are permitted, and whether savings provisions apply for ballot papers that are incompletely numbered. Further issues regarding the counting and scrutiny of votes (including the interpretation of formality rules) are discussed in chapter 12.

### *Redistributions for the House of Representatives*

- 5.29 Redistributions, or the redrawing of electoral boundaries, occur to ensure that the number of enrolled electors in each electoral division in any one state or territory is approximately equal to the average divisional enrolment within the state or territory concerned. Since 1999, there have been 14 federal redistributions completed.<sup>195</sup> The Electoral Act provides that redistributions are initiated only when one of three criteria is satisfied:<sup>196</sup>
- the number of parliamentary representatives to which a state or territory is entitled has changed; or
  - the number of electors in more than one third of the divisions in a state or territory deviates from the average divisional enrolment by over 10% for a period of more than two months; or
  - a period of seven years has elapsed since the previous redistribution within that state or territory.

<sup>194</sup> Tasmanian Parliamentary Library, *House of Assembly Elections (Using Hare-Clark)*, 2008, available at [www.parliament.tas.gov.au/tpl/Backg/HA Elections.htm](http://www.parliament.tas.gov.au/tpl/Backg/HA Elections.htm); *Electoral Act 1992* (ACT), Schedule 2. In the ACT this has the practical effect of requiring 60 different batches of ballot papers to be printed for elections to its two 5 member electorates, and 420 different batches for its one 7 member electorate.

<sup>195</sup> For further information, see AEC, *Redistributions*, 2009, available at [www.aec.gov.au/Electorates/Redistributions/index.htm](http://www.aec.gov.au/Electorates/Redistributions/index.htm). Redistributions are currently underway for NSW and Queensland, following a determination on 17 February 2009 that the number of parliamentary representatives for which Queensland was entitled had increased by one, and the number of representatives to which NSW was entitled had decreased by one; see [www.aec.gov.au/About\\_AEC/Media\\_releases/2009/02\\_18.htm](http://www.aec.gov.au/About_AEC/Media_releases/2009/02_18.htm).

<sup>196</sup> Electoral Act, op. cit., section 59.

- 5.30 Redistributions must be undertaken by bodies that incorporate a balance of statutory office-holders from the Commonwealth and senior officers from the state or territory to be redistributed, including the three members of the federal Electoral Commission, and the Australian Electoral Officer, Surveyor-General and Auditor-General for the state or territory to be redistributed.<sup>197</sup> The bodies invite and consider public input on the drawing of boundaries and naming of electoral divisions,<sup>198</sup> propose and determine boundaries in accordance with criteria defined under the Electoral Act,<sup>199</sup> and publish reasons for proposals or determinations.<sup>200</sup> There is no power under the Electoral Act for a minister or for Parliament to challenge or vary a redistribution determination once it has been made.<sup>201</sup>

#### *Relevant historical developments*

- 5.31 The current redistribution provisions were largely devised in 1983 by the Joint Select Committee on Electoral Reform<sup>202</sup> and include minor amendments that followed a December 1995 JSCER report.<sup>203</sup> Prior to 1983, the redistribution process for drawing constituency boundaries, and the rules governing the process, were matters of considerable controversy, not least because under the Electoral Act as it then stood, the government of the day was given opportunities at a number of points to influence the process, including that:

- while redistributions were required to be conducted whenever there was a change in the number of members of the House of Representatives to which a state was entitled, the government could also initiate a redistribution at any time;<sup>204</sup>
- there were no prescribed qualifications for one of the three Distribution Commissioners tasked with drawing the boundaries in a state, who were appointed by the Governor-General on the advice of the government of the day;<sup>205</sup> and
- proposed boundaries would not come into force until such time as a resolution approving them had been passed by both Houses of the Parliament.<sup>206</sup>

In addition, the criteria governing the drawing of boundaries contained provisions which had a tendency to produce constituencies with lower average enrolments in rural areas than in urban areas.<sup>207</sup>

- 5.32 Between 1956 and 1977, there were only two redistributions completed (involving all states in 1968, and Western Australia alone in 1974). A redistribution conducted in 1964 was not approved by the House of Representatives; a redistribution conducted in 1974 was rejected, in relation to all states other than Western Australia, by the Senate.

<sup>197</sup> *ibid.*, sections 60 and 70.

<sup>198</sup> *ibid.*, sections 64, 69, and 72.

<sup>199</sup> *ibid.*, sections 66 and 73.

<sup>200</sup> *ibid.*, sections 67 and 74.

<sup>201</sup> *ibid.*, section 77.

<sup>202</sup> JSCER, *First Report*, *op. cit.*, pp. 71-96.

<sup>203</sup> JSCER, *Report on the Effectiveness and Appropriateness of the Redistribution Provisions of Parts III and IV of the Commonwealth Electoral Act 1918*, 1995.

<sup>204</sup> JSCER, *First Report*, *op. cit.*, p. 83.

<sup>205</sup> The other two Distribution Commissioners were required to be the Chief Australian Electoral Officer or an officer having similar qualifications, and the Surveyor-General of the State or an officer having similar qualifications.

<sup>206</sup> JSCER, *First Report*, *op. cit.*, pp. 87-88.

<sup>207</sup> *ibid.*, pp. 80 and 87.

## CHALLENGES, OPPORTUNITIES AND OPTIONS FOR CHANGE

- 5.33 A number of aspects of the existing representation and voting systems, and options for change, can be examined against the key principles for an Australian electoral system outlined in chapter 2.
- 5.34 Options for voting systems for the House of Representatives and the Senate can be considered from the perspective of the principles of representation and responsiveness. For example, while some might consider that a particular model would increase the representativeness of a particular house of Parliament, others might consider that the same model results in disproportionate representation of minorities, or offers less responsiveness by frustrating the desire of the electorate to effect a change of government. Prioritising different key principles might therefore lead to a preference for a different model.
- 5.35 Various models for optional preferential voting could be contemplated for both the House of Representatives and the Senate. A move to any of these options could have implications for the underlying characteristics of current voting systems, as well as potentially impacting the number of informal votes cast for federal elections.
- 5.36 The rules governing casting and formality of votes can be considered from the perspective of the key principles of universality and accessibility. In this context, a key question for consideration is whether the current rules sufficiently enable all Australians to validly exercise their right to vote, or whether they should be amended to make it easier to cast a valid vote, with the objective of achieving a greater number of votes that are counted as valid.
- 5.37 The current rules regarding redistribution processes are widely accepted as nonpartisan and fair. However, introducing a fixed timetable for redistributions could be considered from the perspective of the effectiveness, efficiency and transparency of the electoral system; and the option of a 'fairness' criterion could be considered from the perspective of the neutrality of the system.
- 5.38 An examination of the relative size of electoral divisions across the states and territories, or of the composition of electoral divisions, could be examined from the perspective of representativeness.
- 5.39 Finally, some criticisms have been levelled at members and Senators who resign before serving their full term. This matter can be examined from the perspective of the key principles of effectiveness and efficiency (in the sense of taxpayer dollars expended on by-elections), and representation (ensuring that the Senate reflects the voting preferences of the Australian electorate).

### *Options for the House of Representatives*

- 5.40 While there are potentially a range of options for changing the way the House of Representatives is chosen, proposals for change have generally focussed on two areas:
- the representational structure of the house, with proponents for change generally arguing for a move to a system of multi-member constituencies; and
  - the method for recording and counting the votes, with alternatives proposed to the current method of full preferential voting.
- 5.41 Changes could potentially occur in one or both of these areas.

### Proportional representation

- 5.42 The replacement of single-member constituencies with a system of multi-member constituencies has been advocated for the purpose of achieving 'proportional representation' in the House of Representatives.<sup>208</sup> Under a proportional representation model, divisions could be composed of entire states or territories, or parts of states or territories.<sup>209</sup>
- 5.43 Advocates of proportional representation for the House of Representatives have generally argued for the adoption of an STV system of proportional representation for the House of Representatives, in line with the Hare-Clark systems currently in place in the ACT Legislative Assembly and the Tasmanian House of Assembly.<sup>210</sup> Another variant of proportional representation that could be utilised is the 'list' proportional representation system, in which each party or grouping presents a list of candidates for a multi-member electoral district, the voters vote for a party, and parties receive seats in proportion to their overall share of the vote.<sup>211</sup>
- 5.44 There is a large volume of commentary on the subject of proportional representation, and many of the arguments for and against it have been in the public domain since the nineteenth century.<sup>212</sup> Arguments in favour of proportional representation might include:
- it would potentially give voters more choice than the current system, because a greater number of candidates would be likely to stand for larger, multi-member constituencies than for the current single-member constituencies;
  - it is more likely to produce a 'proportional vote', in that 'politically-significant parties receive parliamentary membership in proportion to the number of votes they receive';<sup>213</sup>
  - fewer votes would be 'wasted' (i.e. cast for losing candidates or unnecessarily cast for the winner),<sup>214</sup> so voters may be able to identify a representative that they personally helped to elect, which could in turn increase representatives' accountability;
  - rather than some seats being regarded as 'safe' and others as relatively 'marginal', all constituencies would, to at least some extent, be contestable for the major parties, and

<sup>208</sup> See, for example, [www.proportional-representation.org](http://www.proportional-representation.org); K Woldring, 'More diversity, quality and democracy in the major parties? How about reforming the entire system?', Centre for Policy Development, 2006, available at [cpd.org.au/article/more-diversity%2C-quality-and-democracy-major-parties%3F-how-about-reforming-entire-system%3F](http://cpd.org.au/article/more-diversity%2C-quality-and-democracy-major-parties%3F-how-about-reforming-entire-system%3F).

<sup>209</sup> Section 29 of the Australian Constitution would preclude a division being formed out of parts of different states; sections 24 and 29 would arguably preclude the introduction of a Mixed Member Proportional system (such as that used in New Zealand) which would allocate seats to parties on the basis of their national vote totals.

<sup>210</sup> See, for example, Proportional Representation Society of Australia, [www.prsa.org.au](http://www.prsa.org.au).

<sup>211</sup> The extent to which a party list system would comply with the Australian Constitution is uncertain.

<sup>212</sup> Well-known volumes supportive of proportional representation include E Lakeman, *How Democracies Vote: A Study of Majority and Proportional Electoral Systems*, Faber and Faber, London, 1970; E Lakeman, *Power to Elect: The Case for Proportional Representation*, Heinemann, London, 1982; C G Hoag and G H Hallett, *Proportional Representation*, The Macmillan Company, New York, 1926; V Bogdanor, *What is Proportional Representation*, Martin Robertson, Oxford, 1984; and, in the Australian context, J F H Wright, *Mirror of the Nation's Mind: Australia's Electoral Experiments*, Hale & Iremonger, Sydney, 1980. Useful internet resources include the websites of the United Kingdom's Electoral Reform Society, [www.electoral-reform.org.uk](http://www.electoral-reform.org.uk), and the Proportional Representation Society of Australia, *ibid*. Arguments against proportional representation have also been mounted by many analysts, including, for example, F A Hermens, *Democracy or Anarchy? A Study of Proportional Representation*, 2<sup>nd</sup> ed., Johnson Reprint Corporation, New York, 1972. Arguments for and against are set out in A Lijphart and B Grofman (eds.), *Choosing an Electoral System: Issues and Alternatives*, Praeger, New York, 1984, in the chapters by Hallett, Wright and Hermens.

<sup>213</sup> S Bennett, *Winning and Losing: Australian National Elections*, Melbourne University Press, Carlton South, 1996, p. 25.

<sup>214</sup> *ibid.*, pp. 25-26.

there may therefore be less risk of resources being disproportionately channelled into seats regarded as 'marginal';

- it is possible for more than one group of voters to achieve greater representation within a multi-member district. Within single member districts, only one group of voters can be represented in each district by their candidate of first choice.<sup>215</sup> Under the current system, in many electorates between 40% and 50% of electors are not 'represented' by the candidate of their first choice; and
- proportional representation systems have been shown to be more conducive to the election of women than plurality/majority systems,<sup>216</sup> for reasons which are likely also be relevant to other societal groups.<sup>217</sup>

5.45 Arguments against proportional representation for the House of Representatives might include:

- that it may not be conducive to the formation of stable governments and coherent policy formation, because:
  - as proportional representation tends to enable a greater number of minor party candidates to be elected,<sup>218</sup> if introduced it could be argued that Australia would see a greater number of governments formed through coalitions, with no major party able to obtain over 50% of the seats; and
  - individuals or small parties holding the balance of power may exercise a degree of influence over decisions of the government and the legislature that is out of proportion to their levels of support in the electorate;
- that changes of government may be less determined by voters and more determined by elected members and political parties engaging in post-election negotiations and coalition formation;
- that a successful candidate under the current system 'is no less a representative of an elector in the House simply because the elector did not direct a vote to that candidate';<sup>219</sup>
- as multi-member constituencies are, by necessity, larger than single member constituencies, elected representatives may (depending on the specific form of implementation) be less directly accountable to electors, which may be compounded as electors would have several 'local' members with none directly responsible for their representation;
- the process of counting the votes takes longer under proportional representation, meaning that the results cannot usually be identified on election night;
- given that proportional representation would mean electing representatives from multi-member constituencies, the numbers of candidates on the ballot papers would be likely to be significantly greater than at present, thus potentially adding to the number of informal votes cast; and

<sup>215</sup> JFH Wright, *ibid.*, 1980, p. 85.

<sup>216</sup> A study across 24 National Legislatures showed that in 2004, women constituted 27.49% of the representatives where a proportional representation system was used, compared with 18.24% where a plurality/majority system was in place. See J Ballington and A Karam, *Women in Parliament: Beyond Numbers. A Revised Edition*, International IDEA, Stockholm, 2005, p. 100.

<sup>217</sup> *ibid.*, pp. 101-106. Proportional systems consistently elect more members per district, leading parties to offer more candidates in each district. This encourages parties to adopt different strategies for candidate choice, with the need to present 'balanced' tickets (appealing to a range of sub-groups of voters) becoming more important than in a plurality/majority system (where a party must identify a single candidate who appeals to a broad range of voters).

<sup>218</sup> S Bennett, *Winning and Losing: Australian National Elections*, *op. cit.*, p. 48.

<sup>219</sup> JSCER, *First Report*, *op. cit.*, p. 61.

- it is now close to a 'norm' in bicameral legislatures across Australia that preferential voting is used for lower houses with proportional representation used for upper houses. It has been argued that 'a government that attempted to alter this pattern might find many voters antagonised by what would be portrayed as a government attempting to distort the electoral system for its own ends'.<sup>220</sup>

5.46 Many of the arguments for and against proportional representation for the House of Representatives were put before the Joint Select Committee on Electoral Reform during its 1983 inquiry. The Committee concluded that 'the interests of balancing responsible government and democratic representation in Australia are best serviced by continuing to have the Senate elected on the basis of State-wide proportional representation and the House on the basis of single-member constituencies returning representatives elected on a preferential system of voting'.<sup>221</sup>

#### *Full preferential voting*

- 5.47 Currently a vote for the House of Representatives must contain sequentially numbered preferences for all candidates on the ballot paper for the vote to be considered as formal. This system of full preferential voting gives rise to two issues.
- It has a direct impact on the ability of voters to validly exercise their franchise –152,583 votes were rendered informal at the 2007 federal election for being marked with a 1 only, and 199,189 were informal for the same reason in 2004; and more than 90,000 votes at each of the 2004 and 2007 federal elections were informal because of incomplete or non-sequential numbering.<sup>222</sup>
  - Voters who lack knowledge of, or a genuine preference for, every candidate on a ballot paper must nonetheless express a preference for them for their vote to be counted, which means that their votes could be seen as something other than a true statement of their preferences.
- 5.48 These problems could be compounded if proportional representation were introduced for the House of Representatives while retaining full preferential voting, as the number of preferences required to be shown would be likely to be greater than at present.
- 5.49 In light of these issues, five possible alternatives to the current system can be considered: a return to the plurality or 'first past the post' system; fully optional preferential voting, a partially optional preferential system; a ticket voting system or a reversion to the use of a 'savings' scheme.

#### *'First past the post'*

5.50 One option for the House of Representatives could be to return to the 'first past the post' system which applied from 1903 to 1918. This system could be simpler than the current arrangements from the perspective of the voters. However, this system could enable a candidate to be elected without obtaining an absolute majority of votes, even in circumstances when an absolute majority of voters would have ranked that candidate last in a full preferential system. In addition, this option would not allow voters who held genuine preferences beyond a first preference to express those on the ballot paper.

<sup>220</sup> S Bennett, *Winning and Losing: Australian National Elections*, op. cit., p. 82.

<sup>221</sup> JSCER, *First Report*, op. cit., p. 62.

<sup>222</sup> It should be noted that not all 'incomplete or non-sequential' informal votes would be formal under a system of optional preferential voting.

*Optional preferential voting*

5.51 Fully optional preferential voting would require only the expression of a unique first preference for a vote to be formal, but leave it open to voters to express more than one preference if they wished. It might be argued that optional preferential voting would deal most effectively with the issues raised at paragraph 5.47 above. Arguments in support of optional preferential voting include that:<sup>223</sup>

- it is the simplest form of preferential voting, and therefore least likely to lead the voter to invalidate his or her vote through numbering error; and
- it leaves it to the voter to determine how many genuine preferences he or she wishes to express (and does not require voters to express a preference for candidates who decline to state a position on an issue which a voter has decided will determine his or her vote, or for candidates who have not campaigned to any significant extent and may not be known to all voters).

5.52 Some arguments against optional preferential voting include:

- that because votes that do not express a preference for all candidates will 'exhaust' at a certain point, there is a risk that optional preferential voting may result in a 'de facto first past the post system where candidates can be elected with significantly less than half the vote',<sup>224</sup> and
- that voters can reasonably be expected to express a full ordering of preferences, even when they have a 'philosophical or intellectual inability to differentiate between candidates'.<sup>225</sup>

*Partially optional preferential voting*

5.53 Under partially optional preferential voting, a number of preferences greater than one but less than the number of candidates must be shown for a vote to be formal. Partially optional preferential voting could be one form of hybrid between the current system and optional preferential voting. It might help to reduce the level of the informal vote, but would be unlikely to be as successful in reducing the informal vote as fully optional preferential voting, since votes in the '1 only' category would still be informal. How many other votes would be saved from informality would depend on the number of preferences which had to be shown. A partially optional preferential voting system might also require some voters to express preferences that they do not truthfully hold.

*Ticket voting*

5.54 Ticket voting has also been used for some lower house elections in Australia.<sup>226</sup> Most notably, South Australia has used a form of ticket voting for its Legislative Assembly elections since 1985. All candidates contesting the Legislative Assembly election are entitled to lodge either

<sup>223</sup> Some arguments for and against optional preferential voting for the House of Representatives are discussed in JSCEM, *Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, 2005, pp. 220-224.

<sup>224</sup> JSCEM, *1998 Federal Election: Report of the Inquiry into the conduct of the 1998 Federal Election and matters related thereto*, June 2000, p. 113. Against this argument, it has been noted that because a high percentage of first preferences are cast for major parties, there would be a relatively small proportion of votes set aside as exhausted (see, for example, AEC Research Report No.1 of 1985, *Informal Voting 1984 – House of Representatives – Report*, p.76).

<sup>225</sup> *Lubcke v Little* [1970] VR 807 at 811. In this case, the Victorian Supreme Court held that the subjective incapacity of an elector to determine that he preferred one candidate in an election to another did not afford a 'valid and sufficient reason' for failing to vote.

<sup>226</sup> A Green, 'Ticket Voting for the Lower House', *Antony Green's Elections Blog*, Australian Broadcasting Corporation, 2008, available at [blogs.abc.net.au/antonygreen/2008/07/ticket-voting-f.html#more](http://blogs.abc.net.au/antonygreen/2008/07/ticket-voting-f.html#more).

one or two 'ticket' votes, or how-to-vote cards, which show how they would like preferences to be distributed.<sup>227</sup>

- 5.55 The South Australian system of ticket voting is very different from that used for the Senate and state Legislative Council elections. For instance, there is no ticket voting box, candidates are banned from distributing how-to-vote cards that do not provide for a full allocation of preferences, and the ticket vote 'saving' provision only operates where a ballot paper has insufficient valid preferences.<sup>228</sup>
- 5.56 Ticket voting in this form is said to have two distinct advantages – it assists voters in numbering preferences and provides a safety net for informal votes. To assist voters in numbering preferences, how-to-vote cards are able to be displayed in each voting compartment for voters who did not have the benefit of receiving a how-to-vote card for their preferred candidate.<sup>229</sup> To act as a safety net, the ticket vote also serves as a template for the distribution of preferences for those voters who simply place a '1' in the square opposite the party they wish to support.<sup>230</sup> Such votes, which would otherwise be informal, retain formality through operation of the ticket vote, which acts as a type of savings clause.
- 5.57 Whilst the ticket voting system does provide a means by which the number of informal votes can be reduced, it has been argued that the system encourages political parties to engage in back-room preference deals to attempt to engineer an election result in their favour.<sup>231</sup> The ticket voting system for the South Australian lower house is not heavily publicised, and it might be argued that there is a question over the extent to which voters who show incomplete preference numbering would be aware that further preferences will, in effect, be deemed to have been recorded by them. In this regard, the system may be contrasted with that used at Senate elections, where the voter is given a clear choice between expressing his or her own preferences or adopting in full those recommended by a group or party. Ticket voting in the context of the Senate is further discussed at paragraphs 5.68 – 5.72 below.
- 5.58 In its *Report on the Conduct of the 2007 Federal Election and Matters Related Thereto*, JSCEM commented that the South Australian model 'is a step too far, in that it may actively encourage optional preferential voting rather than operating as a genuine savings clause'.<sup>232</sup>

*Reversion to the savings clause*

- 5.59 Under a savings scheme, voters would be instructed to show preferences for all candidates, but certain votes which did not show preferences for all candidates could nonetheless be regarded as formal. A savings clause as applied from 1984 to 1998 could have some impact on informal voting. Informal vote surveys conducted by the AEC estimate that had the 1984 rules continued to apply, a maximum of 91,904 votes (or 15.16% of total informal votes) would have been rendered formal in 2004, and a maximum of 90,149 votes (or 17.79% of total informal votes) would have been rendered formal in 2007.
- 5.60 Unless accompanied by a prohibition on the encouragement of incomplete preference numbering (as applied from 1984 to 1998), a savings clause could create a *de facto* system of optional preferential voting. This could be interpreted as a signal that Parliament had accepted that optional preferential voting should exist as an alternative to full preferential voting,

<sup>227</sup> *Electoral Act 1985 (SA)*, section 63. See also Australian Broadcasting Corporation, *Unique Features of South Australian Elections*, 2006, available at [www.abc.net.au/elections/sa/2006/guide/ticketprefs.htm](http://www.abc.net.au/elections/sa/2006/guide/ticketprefs.htm).

<sup>228</sup> Australian Broadcasting Corporation, *Unique Features of South Australian Elections*, op. cit.

<sup>229</sup> *Electoral Act 1985 (SA)*, paragraph 66(1)(a).

<sup>230</sup> G Anderson and H Manning, 'The South Australian election: Implications for democracy in the Festival State', Discussion Paper 12/06, Democratic Audit of Australia, 2006, p. 4.

<sup>231</sup> *ibid.*

<sup>232</sup> JSCEM, *Report on the Conduct of the 2007 Federal Election and Matters Related Thereto*, op. cit., p. 243.

although the Electoral Act may not clearly state as much. The question might then arise as to why the Electoral Act did not expressly provide for optional preferential voting.

5.61 JSCEM recently considered the arguments for and against the reintroduction of a savings clause, recommending that the savings clause that was repealed in 1998 be reinstated to the Electoral Act, along with 'an appropriate penalty provision to deter the advocacy of a vote other than in accordance with full preferential voting'.<sup>233</sup> While JSCEM acknowledged concerns that such a provision may result in 'the re-emergence of campaigns advocating for optional preferential voting', it considered that 'these concerns do not justify the exclusion of up to 90,000 votes where electors have expressed clear preferences for a number of candidates but may have made mistakes in numbering their ballot paper'.<sup>234</sup> The committee also noted that:

'Under the committee's proposal, votes marked with a single preference (either a '1', a tick or a cross) will not be saved. The committee therefore does not consider that the reinstatement of the savings provision should be seen as accommodating optional preferential voting'.<sup>235</sup>

5.62 This JSCEM recommendation was the subject of a dissenting report from Coalition members, who noted expert evidence to the Committee that 'the preferred option to reduce informal voting of the kind highlighted in the majority report is to introduce optional preferential voting'. The dissenting report also expressed concern that 'given the significant proliferation of new communications technologies' since the repeal of the savings clause in 1998, there would be difficulties in protecting the proposed system from abuse by those wishing to advocate optional preferential voting.<sup>236</sup>

### *Options for the Senate*

5.63 As in the case of the House of Representatives, there are a range of potential options for changing the way the Senate is chosen. Those which have received particular attention include:

- the introduction of a threshold system for counting votes;
- the introduction of single-member constituencies; and
- amendments to the ticket voting system to allow for preferential above-the-line voting or optional preferential voting below the line.

### *Threshold system*

5.64 Under a threshold system, candidates receiving fewer than a specified number of votes would be excluded from receiving the preferences of other candidates, and thus could not be elected. Their preferences could still be distributed to other candidates who had secured first preferences above the applicable threshold. The threshold could be expressed to apply to individual candidates, or to parties. Suggestions have been made that the threshold might be 50% or 80% of the quota (the total number of votes required to be elected to the Senate), or a percentage of the total vote such as 5% or 10%.<sup>237</sup> A threshold of 5% is common in many countries including Germany and New Zealand; lower thresholds are used in the Netherlands, Israel, Italy, Argentina and Sweden, although internationally, thresholds are more commonly associated with 'party list' systems of proportional representation than with STV.

<sup>233</sup> *ibid.*, p. 245.

<sup>234</sup> *ibid.*, pp. 244-245.

<sup>235</sup> *ibid.*, p. 245.

<sup>236</sup> Dissenting report, in *ibid.*, p. 331.

<sup>237</sup> Note that 10% is greater than the quota for election as a state Senator during a full-Senate (double dissolution) election.

- 5.65 It has been argued that the introduction of a threshold system could ensure a better 'balance in the Senate between fair representation and the ability to govern',<sup>238</sup> by precluding from election candidates who received a relatively small proportion of votes.
- 5.66 On the other hand, the introduction of a threshold system may make it more difficult for minor parties and independents to get elected to the Senate, although it has been noted that 'the imposition of a Senate threshold is unlikely to give the government of the day a majority in the Senate'.<sup>239</sup> Such a system could force a voter who supports a minority opinion to cast a vote with the primary aim of ensuring that at least one party in sympathy with that opinion would remain in the count; this may not necessarily be the party he or she most favours. A threshold system might also be seen as inconsistent with one of the underlying rationales for the STV system, which is that particular groups of opinion within society should not be disadvantaged if their votes are spread over a range of candidates.

#### *Single-member constituencies*

- 5.67 Another option might be for single-member constituencies to be introduced for the Senate, with each state to be divided into six divisions (and each territory into two divisions), each of which would elect a single Senator at a half-Senate election, using a voting system similar to that currently used in the House of Representatives. At a double dissolution election, two Senators would be elected from each division. Benefits of this system could include less confusion for voters (as the methods of marking the ballot paper for the House of Representatives could be the same). However, such a system would be likely to result in a greater proportion of Senators from the major parties, and it may be criticised for being less representative than the current arrangements.

#### *Changes to the ticket voting system*

- 5.68 Ticket voting was strikingly successful in achieving a reduction in informal Senate votes; its introduction in 1984 led to a substantial and sustained drop in the informal vote, as Table 5.1 demonstrates. The 2007 Senate informal vote was the lowest percentage ever recorded. Had the informality vote in 2007 been at 1983 levels, over 900,000 more voters would have had their votes set aside as informal.

**Table 5.3: Informal voting at Senate elections**

<b>Election</b>	1980	1983	1984	1987	1990	1993	1996	1998	2001	2004	2007
<b>% of votes that were informal</b>	9.7	9.9	4.7	4.0	3.4	2.6	3.5	3.2	3.9	3.8	2.6

- 5.69 The use of ticket voting has steadily increased since its introduction. In 1984, 85.7% of voters nationwide voted above the line; by 2007, that figure had increased to 96.8%. Over the same period, the average number of candidates per Senate vacancy has increased, from 3.9 in 1983 to 9.2 in 2007. As electors considering casting a vote below the line must indicate a preference for every candidate, there is a strong incentive on the grounds of convenience to vote above rather than below the line.
- 5.70 Critics of ticket voting have argued that it has empowered political parties and disempowered voters because 'the decision on preferences was removed from the voter and given to the

<sup>238</sup> H Coonan, 'The Senate: Safeguard or Handbrake on Democracy?', *OnLine Opinion*, 15 May 1999, available at [www.onlineopinion.com.au](http://www.onlineopinion.com.au).

<sup>239</sup> M Healy and G Newman, 'An Electoral Threshold for the Senate?', *Research Note No. 19 1998-99*, Parliament of Australia Parliamentary Library.

party which the voter first selects'.<sup>240</sup> Against this, others have argued that ticket voting 'merely institutionalised, and thereby entrenched, the long-term trend for voters to look to parties for guidance on preferences and, apart from lowering the invalid vote, has probably had minimal impact'.<sup>241</sup>

- 5.71 Another argument against ticket voting is that it may encourage 'a proliferation of micro-parties' whose sole purpose is to harvest preferences.<sup>242</sup> Against this, it has been argued that there have been 'no indisputable cases of successful preference harvesting at Senate elections since 1984',<sup>243</sup> and that ticket voting can benefit smaller political parties by giving them the opportunity to negotiate preference exchange agreements that are not intended to achieve election, but to secure particular policy positions from the parties receiving the preferences.<sup>244</sup>
- 5.72 Without a change to the current voting system and formality rules for below-the-line voting, the abolition of ticket voting would be likely to cause the rate of informality to return to pre-1984 levels. Proposals for change have therefore focused on two possible alternatives to the current arrangements - the introduction of preferential above-the-line voting, or the introduction of optional preferential voting below the line. These options could potentially be implemented individually or in conjunction with each other. As many of the arguments for and against these options are the same as those outlined at paragraphs 5.51 – 5.53 above, they have not been repeated below.

#### *Preferential above-the-line voting*

- 5.73 Preferential above-the-line voting could, under various models, offer voters who wish to vote above the line the option of numbering all squares above the line on a Senate ballot paper, or numbering at least a minimum specified number of squares above the line.<sup>245</sup> A voter would be taken only to have expressed preferences for the candidates in those groups which he or she had numbered above the line, in the order in which the candidates appeared on the ballot paper, and the vote would 'exhaust' after distribution of those preferences.
- 5.74 In practice, a move to preferential above-the-line voting could have the following implications:
- the only parties capable of 'directing' preferences would be those which have a sufficient support base or resources to enable them to distribute how-to-vote cards;
  - with more marks required to be made above the line than at present, some increase in the informal vote could be expected; and
  - the average length of time which a voter would need to complete his or her ballot paper could be expected to increase somewhat.

<sup>240</sup> Senator B Brown, Commonwealth Electoral (Above-The-Line Voting) Amendment Bill 2008, Second Reading Speech, Senate Hansard, 14 May 2008, p. 1778.

<sup>241</sup> B Reilly and M Maley, 'The Single Transferable Vote and the Alternative Vote Compared', in S Bowler and B Grofman (eds.), *Elections in Australia, Ireland and Malta Under the Single Transferable Vote: Reflections on an Embedded Institution*, University of Michigan Press, 2000, p. 56.

<sup>242</sup> M Sawyer, "Above-the-line voting – How democratic?", Democratic Audit of Australia, June 2004, p. 5, available at [arts.anu.edu.au/democraticaudit/papers/200406\\_sawyer\\_above\\_line.pdf](http://arts.anu.edu.au/democraticaudit/papers/200406_sawyer_above_line.pdf).

<sup>243</sup> AEC, submission no. 169.1 to JSCEM, *Inquiry into the 2007 Federal Election*, p. 21. However, there were instances of successful preference-harvesting at the 1999 New South Wales Legislative Council election, as discussed in M Sawyer, *ibid*. This led to a series of reforms in New South Wales, including changes to party registration requirements and the nature of above-the-line voting.

<sup>244</sup> AEC, *ibid*.

<sup>245</sup> See, for example, the Commonwealth Electoral (Above-The-Line Voting) Amendment Bill 2008.

- 5.75 JSCEM recently considered the Commonwealth Electoral (Above-the-Line Voting) Amendment Bill 2008.<sup>246</sup> The Bill, introduced by Senator Bob Brown, proposed a number of changes to the method of voting at Senate elections, including abolishing ticket voting and requiring electors voting above the line to number at least four preferences in a half-Senate election and at least seven preferences in a full Senate election. The Committee did not make any recommendations on the Bill, noting that 'there are a number of alternate options that require further and continuing discussion' and commenting that 'the relative simplicity of current arrangements needs to be carefully balanced against any change that makes it more difficult for voters to cast a valid vote'.<sup>247</sup> One alternate option cited was to give voters the choice of marking more than one preference above the line: JSCEM stated that this approach would 'retain group voting tickets to distribute preferences if an elector marks a single preference but, if more than one preference were made, a vote would exhaust at the last preference expressed'.<sup>248</sup>
- 5.76 In a dissenting report, Senator Brown stated that the Bill would take the power to allocate preferences 'out of party backrooms and into the hands of voters'. He asserted that there is 'no evidence' to indicate that the Bill would lead to more informal votes, as 'the 2003 NSW experience of the introduction of above-the-line preferential voting resulted in a decrease in informal votes on 1999 results'. Senator Brown also noted that 'any new system of voting needs to be explained clearly for people of all literacy levels', which 'will go a long way to ensuring the number of informal ballot papers does not rise substantially'.<sup>249</sup>

*Optional preferential voting below the line*

- 5.77 Another option for change which has been suggested for the Senate is the adoption of optional preferential voting below the line. The impact on informal voting would depend on whether or not a ticket voting option was retained, and on whether a single preference would suffice for formality, or whether a specified minimum number of preferences would have to be indicated.
- 5.78 JSCEM recently noted that there are 'several options that should be examined to make below-the-line voting more accessible for electors seeking to gain more control over the distribution of preferences'.<sup>250</sup> Particular options discussed by JSCEM were:<sup>251</sup>
- enabling electors to 'complete their preference allocation prior to polling day based on the electors' analysis of group voting tickets (which are published on the AEC website prior to polling day)', requiring the AEC to make blank ballot papers available to electors; and
  - requiring a smaller number of preferences to be indicated for a below-the-line vote to be formal. JSCEM noted that this approach had been adopted for below-the-line votes for elections to the upper houses of New South Wales and Victoria, and suggested that 'up to 15' preferences could be required to be shown for Senate votes.
- 5.79 One model of below-the-line preferential voting that could be considered is the system in place for elections to the ACT Legislative Assembly and the Tasmanian House of Assembly. For a vote to be considered formal under these arrangements, it must show at least as many preferences as there are vacancies for the election.<sup>252</sup> This system could be used with or without Robson Rotation.

<sup>246</sup> JSCEM, *Advisory Report on the Commonwealth Electoral (Above-the-Line Voting) Amendment Bill 2008*, 2009.

<sup>247</sup> *ibid.* p. iii.

<sup>248</sup> *ibid.*, p. 25.

<sup>249</sup> Dissenting report, in *ibid.*, p. 27.

<sup>250</sup> *ibid.*, p. 24.

<sup>251</sup> *ibid.*, p. 25.

<sup>252</sup> In the ACT, a ballot paper will also be considered formal if it shows a unique first preference (*Electoral Act 1992* (ACT), section 180).

### *Harmonisation of voting systems*

- 5.80 As outlined at [Annex 7](#) and paragraph 5.27 above, there are a number of key differences between the voting systems used in the Commonwealth, states and territories. While the voting systems in each jurisdiction reflect its particular history and its legislative and constitutional arrangements, there may be scope to examine opportunities for harmonisation of some aspects of the voting systems in the Commonwealth, states and territories. For example, the introduction of some form of optional preferential voting could be considered for all elections in the Commonwealth, states and territories, or the introduction of full preferential voting at all levels could be considered (though this may require constitutional amendment in some jurisdictions, as discussed at paragraph 5.83 below).
- 5.81 There is some evidence to suggest that different state and federal voting systems may be one factor that contributes to the informality rate at federal elections.<sup>253</sup> For example, NSW and Queensland, both of which allow optional preferential voting at state elections, had the highest percentages of 'number 1 only' and 'incomplete' informal votes for the 2004 and 2007 federal elections. When state or territory elections are held in particularly close proximity to a federal election, it may be expected that confusion arising from different voting systems could lead to an increased rate of informal votes. A lack of consistency between voting systems is also likely to have a greater impact on the formality rate in jurisdictions (such as the Commonwealth) which apply stricter rules than those which apply more inclusive rules.
- 5.82 At the 2007 federal election, in an attempt to reduce informality which might be influenced by state or territory voting systems, the states and territories judged to be most affected (NSW, Queensland, Tasmania and the ACT) had posters in polling places reminding electors how to vote formally at a federal election. The percentage of ballots which were informal because they were marked with a 'number 1 only' declined in Queensland, Tasmania and the ACT and increased slightly in NSW.
- 5.83 Given the existing differences in voting arrangements and the structure of legislatures across jurisdictions, there are likely to be limits on the extent to which harmonised voting systems could be implemented across Australia. In addition, as any reforms would need the agreement of governments and parliaments in each jurisdiction, there may be challenges to achieving harmonisation in this area. Some harmonisation options may also require constitutional amendment in particular jurisdictions; for example, optional preferential voting is entrenched in the NSW Constitution.<sup>254</sup>

### *Formality Criteria*

- 5.84 Votes may be ruled informal for a range of reasons. AEC data on informal voting in recent House of Representatives elections<sup>255</sup> indicates that:
- while there has been a general trend towards an increased informal vote over the last few decades, the percentage of votes determined to be informal fell from 4.82% (or 580,590 votes) in 2001 and 5.18% (or 639,851 votes) in 2004 to 3.95% (or 510,951 votes) in 2007;
  - the most common reason for informality, affecting more than 30% of informal votes at the 2004 and 2007 elections, was that a ballot paper was numbered with a 1 only;
  - the second most common reason for informality (affecting more than 20% of informal votes at the 2004 and 2007 elections) was that a ballot paper was left blank;

<sup>253</sup> AEC, *Analysis of Informal Voting: House of Representatives 2007 Election*, 2009, pp. 8-15.

<sup>254</sup> Optional preferential voting for New South Wales Legislative Assembly elections is prescribed by Part 1 of Schedule 7 to the *Constitution Act 1902* (NSW), and entrenched by section 7B of that Act. The requirement that at Legislative Council elections, a voter must be required to vote preferentially for 15 candidates, and must be given the option to vote for as many additional candidates as he or she chooses, is set out in Part 1 of the Sixth Schedule to the Act, and is entrenched by section 7A.

<sup>255</sup> Data is available at [www.aec.gov.au/Voting/Informal\\_Voting/](http://www.aec.gov.au/Voting/Informal_Voting/).

- non-sequential numbering invalidated more than 18% of informal votes in 2007 and more than 15% in 2004;
- marks and scribbles<sup>256</sup> on ballot papers invalidated approximately 15% of informal votes in 2004 and 2007; and
- use of ticks and crosses invalidated 10% of informal votes in 2007, and more than 9% in 2004.

5.85 In addition to potential confusion arising from different voting systems and formality rules across jurisdictions, levels of informal voting may be influenced by a range of other factors, including:

- a lack of understanding of voting systems;
- confusion arising from the different voting systems which apply in the House of Representatives and the Senate;<sup>257</sup>
- the number of candidates on the ballot paper;<sup>258</sup>
- the percentage of electors who come from a non-English speaking background;<sup>259</sup> and/or
- the relative strictness of the current formality rules – it has been argued that they do not apply ‘the principle adopted in most democratic polities that a vote should be counted so long as the voter’s intention is clear’.<sup>260</sup>

5.86 There are always likely to be some electors who make an active choice to vote informally, as a form of ‘protest vote’. However, options to address the level of ‘unintended’ informal votes could include:

- information and education campaigns to build a greater understanding of voting systems (these are discussed in more detail at chapter 9);<sup>261</sup>
- greater provision of information and voting instructions in languages other than English in specified electorates;<sup>262</sup>
- greater harmonisation of Commonwealth, state and territory formality criteria – while there is clear scope for some action in this area, there are likely to be limits on the degree to which harmonisation can be achieved while different voting systems apply across jurisdictions (for example, the use of ticket voting at Senate elections means that the rules governing formality for Senate votes will be more complex than those applying in some other upper houses);
- amendments to the current formality rules to ensure that votes may be counted so long as the voter’s intention is clear, for example by allowing a tick or cross to be treated as the equivalent of a numeral 1 for House of Representatives votes (as applies in NSW and South Australia, and above-the-line for the Senate);

<sup>256</sup> Marks and scribbles refer to a ballot paper where there is either no preference, or partial preferences, but slogans, written comments, marks etc. are contained on the ballot papers.

<sup>257</sup> AEC, *Analysis of Informal Voting During the 2004 House of Representatives Election*, AEC Research Report Number 7, 2005, p. 7, available at [www.aec.gov.au/pdf/research/papers/paper7/research\\_paper7.pdf](http://www.aec.gov.au/pdf/research/papers/paper7/research_paper7.pdf).

<sup>258</sup> *ibid.*, p. 19, found that the number of candidates on a ballot paper is a strong predictor of formality.

<sup>259</sup> *ibid.*, p. 20. For the 2004 federal election, the 10 divisions with the highest informality levels were among the 27 divisions with the highest non-English speaking background levels nationally.

<sup>260</sup> Reilly and Maley, *op. cit.*, p. 49.

<sup>261</sup> As recommended in JSCEM, *Report on the Conduct of the 2007 Federal Election and Matters Related Thereto*, *op. cit.*, p. 223: ‘The committee recommends that the Australian Electoral Commission increase efforts to improve electors’ understanding of the federal voting systems and take appropriate measures to reduce the rate of informal voting, especially in electorates with a high percentage of electors from non-English speaking backgrounds’.

<sup>262</sup> Following a 2005 JSCEM recommendation, the AEC has already implemented a range of strategies to address this issue. Further information is available in AEC, submission no. 169 to JSCEM, *Inquiry into the conduct of the 2007 election*, pp. 63-65.

- amendments to ballot paper design, for example, the inclusion of candidates' pictures (as occurs in the NT);
- the introduction of optional preferential voting, as noted above; or
- the introduction of electronic voting, as discussed in chapter 11.

5.87 Another option that has been advocated to reduce the extent of 'intentional' informal votes (in particular those which may be intentionally left blank) is for an extra box to be added to the ballot paper to allow electors to vote for 'none of the above' candidates.<sup>263</sup> Such an option already exists in some overseas jurisdictions, such as Italy and Russia.<sup>264</sup> The option would allow electors to indicate their disapproval of the available candidates, the major parties, or the political process, or allow electors to indicate their lack of awareness of political issues. On the other hand, it might be argued against this option that electors are not currently forced to vote for any particular candidate or party, as they are only compelled to attend a ballot box and receive a ballot paper, not to mark the ballot paper with a formal vote. It could also be argued that placing a 'none of the above' box on the ballot paper would simply draw attention to this option and encourage voters to utilise it.<sup>265</sup>

### *Redistribution timetables and processes*

- 5.88 It has been commented that the current redistribution process in Australia is 'widely viewed as nonpartisan and the results as fair... It is viewed as essentially a quasi-judicial, or even bureaucratic, task that is performed without partisan referents'.<sup>266</sup>
- 5.89 Largely because of their success, changes to the current redistribution provisions have not been widely canvassed. Two possibilities have, however, been raised: the simultaneous conduct of redistributions for all states according to a fixed timetable, and the introduction of 'fairness' criteria for redistributions.

### *Fixed timing for redistributions*

- 5.90 Under the current provisions, there is no fixed timetable for redistributions, although a redistribution will occur in a state or territory if a period of seven years has elapsed since it was previously redistributed. This could allow greater certainty for both members and constituents affected by redistributions.
- 5.91 There are likely to be constitutional constraints on the extent to which provision could be made for the timing of redistributions according to a fixed and predictable formula. In *Attorney-General (Cth); ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, the High Court of Australia considered, among other things, the validity of legislation providing that census days (occurring every five years) were to be the only days upon which the Chief Electoral Officer could calculate the number of members of the House of Representatives for each state and territory. The High Court found these provisions to be invalid on the basis that the Australian Constitution required that the populations of the states and the Commonwealth be ascertained, and representation entitlements determined, during the life of each ordinary three-year House of Representatives, in time to permit elections based on the determination.
- 5.92 Recognising these constraints, an amendment to the Australian Constitution is likely to be required before a workable system of fixed timing of redistributions could be implemented. A proposal could be put to referendum for an amendment to allow for redistributions to

<sup>263</sup> S Bennett, 'Compulsory voting in Australian national elections', *Research Brief No.6 2005-06*, Parliament of Australia Parliamentary Library, pp. 23-24.

<sup>264</sup> *ibid.*, p. 24.

<sup>265</sup> Electoral Reform Society, *Compulsory Voting*, 2008, available at [www.electoral-reform.org.uk/article.php?id=46](http://www.electoral-reform.org.uk/article.php?id=46).

<sup>266</sup> R Engstrom, 'Revising Constituency Boundaries in the United States and Australia: It Couldn't be More Different', 2005, available at [arts.anu.edu.au/democraticaudit/papers/200508\\_engstrom\\_redistrib.pdf](http://arts.anu.edu.au/democraticaudit/papers/200508_engstrom_redistrib.pdf).

proceed on a fixed and predictable timetable, either staggered across the states and territories or on a national basis. Depending on the model chosen, a fixed timetable may have the potential to result in divisions of more variable population at a particular election than the current arrangements, particularly for areas that experience relatively rapid population change compared to the rest of Australia.

- 5.93 One option which would not require constitutional amendment could be to require that a redistribution take place for all electorates after every general election, as applies in the ACT.<sup>267</sup> However, this option would not result in a 'fixed' timetable for redistributions unless it was combined with fixed parliamentary terms. Conducting a national redistribution during the life of every Parliament would also involve a significant workload for the members of the Electoral Commission. Should this model be adopted, consideration would need to be given to the implications for the current requirement that the Electoral Commissioner calculate representation entitlements for the House of Representatives 12 months after a House first sits (as set out in paragraph 5.14).

#### *'Fairness' criterion*

- 5.94 Since the current redistribution arrangements came into place in 1984, there have been two cases of a party winning government at the federal level with a minority of the two-party preferred vote: at the 1990 election, when the Australian Labor Party won government with a two-party preferred vote of 49.9% to 50.1%, and at the 1998 election, when the Coalition won government with a two-party preferred vote of 49.02% to 50.98%.
- 5.95 Following the 1990 election, it was suggested<sup>268</sup> that a 'fairness' criterion be introduced along the lines of that which applies in South Australia, which requires the South Australian Electoral Districts Boundaries Commission to 'ensure, as far as practicable, that the electoral redistribution is fair to prospective candidates and groups of candidates so that, if candidates of a particular group attract more than 50 per cent of the popular vote...they will be elected in sufficient numbers to enable a government to be formed'.<sup>269</sup> JSCEM considered the proposal and recommended against it, 'in the absence of a clearly demonstrated need'.<sup>270</sup>
- 5.96 Difficulties that have been identified in introducing a 'fairness' criterion for Commonwealth redistributions include:
- that because the Australian Constitution requires that redistributions be conducted in each state and territory rather than on a national basis, a 'fairness' criteria applied within each state and territory would not necessarily guarantee that the party which gained over 50% of the vote nationally would gain over 50% of seats nationally;<sup>271</sup>
  - that such a test would necessitate a redistribution in every state after every federal election;<sup>272</sup> and
  - that since a fairness criterion could only be implemented with any certainty if outcomes are predictable, its adoption could force the augmented Electoral Commission to propose mainly safe seats, which may have implications for the responsiveness of the current system.

<sup>267</sup> *Electoral Act 1992* (ACT), section 37.

<sup>268</sup> Commonwealth Electoral Amendment Bill, introduced by Mr Ian Wilson MP, House of Representatives Hansard, 14 March 1991, p. 1954. This Bill was not passed by the Parliament.

<sup>269</sup> *Constitution Act 1934* (SA), section 83.

<sup>270</sup> JSCEM, *Report on the Effectiveness and Appropriateness of the Redistribution Provisions of Parts III and IV of the Commonwealth Electoral Act 1918*, op. cit., p. 48.

<sup>271</sup> *ibid.*, pp. 46-47.

<sup>272</sup> *ibid.*, p. 46.

*Relative population of electoral divisions*

- 5.97 The following trends are evident from tables 5.1 and 5.2 (provided at paragraphs 5.15 and 5.25 above):
- as Australia's population has grown, the average number of electors per electorate has grown, as has the average number of persons represented by each Senator; and
  - across the states and territories, there is variation in both the average number of electors per electorate and the average number of persons represented by each Senator.
- 5.98 It would be open to the Parliament to increase the size of the House of Representatives and the Senate. Any increase in the overall size of the House of Representatives and Senate would need to occur simultaneously, due to the constitutional requirement that the House be 'as nearly as practicable' twice the size of the Senate.<sup>273</sup> Any increase in the size of the Senate would lead to a reduced quota of votes required for election to the Senate, which may benefit minor parties.
- 5.99 The differences noted across the states and territories are largely the result of the constitutional requirements that the states be represented by a minimum of five members of the House of Representatives, and that the states be represented equally in the Senate. While it might be argued that such differences do not give sufficient effect to the 'one vote, one value' principle, the High Court of Australia has ruled that there is no constitutional requirement that electoral divisions across Australia be composed of an equal number of electors.<sup>274</sup> Any amendment to the relative representation of the states in the House of Representatives or the Senate would require a referendum to amend the Australian Constitution. In addition to the usual requirement that a referendum be passed by a majority of electors in a majority of states, section 128 of the Constitution requires that any constitutional alteration 'diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives' shall not become law unless the majority of electors voting in the affected state approve the proposed amendment.
- 5.100 Some concerns have been raised about the present representation of the ACT and the NT in the Parliament. It has been argued that:
- there is a greater margin of error in the population statistics used to calculate the representation entitlements for the ACT and the NT than there is for statistics on state populations;<sup>275</sup>
  - while the existing formula works well for calculating the entitlements of the states, it 'becomes far less effective in smaller Territories where electorates can become oversized', putting voters 'at risk of disenfranchisement';<sup>276</sup>
  - any move to statehood for the NT should be accompanied by greater representation in the Senate for the NT;<sup>277</sup> and

<sup>273</sup> Australian Constitution, section 24.

<sup>274</sup> *McGinty v Western Australia* (1996) 186 CLR 140; Attorney-General (Cth); *Ex rel Mckinlay v Commonwealth* (1975) 135 CLR 1.

<sup>275</sup> JSCEM, *Territory Representation: Report of the Inquiry into increasing the minimum representation of the Australian Capital Territory and the Northern Territory in the House of Representatives*, 2003, p. xxvi.

<sup>276</sup> K Fischer and S Bounds, *The 10% system: A fairer system for Territory entitlements*, submission no. 55 to JSCEM, *Inquiry into the Conduct of the 2004 Election and Matters Related Thereto*, pp. 5-7.

<sup>277</sup> Resolution of 1998 Statehood Convention, cited in *Constitutional Paths to Statehood: Northern Territory Statehood Steering Committee Community Discussion Paper*, May 2007, p. 43, available at [www.statehood.nt.gov.au/documents/DPWeb1.pdf](http://www.statehood.nt.gov.au/documents/DPWeb1.pdf).

- the existing formula for calculating the territories' representation in the House of Representatives disadvantages the ACT compared to the NT from the perspective of 'one vote, one value'.<sup>278</sup>

5.101 It would be open to the Parliament to vary the rules for calculating the territories' representation in the House of Representatives and the Senate. Some options that have been suggested include varying the existing rules to avoid territories' electorates becoming oversized,<sup>279</sup> or legislation to provide for a guaranteed minimum number of seats for a specified territory.<sup>280</sup>

### *Composition of electoral divisions*

5.102 A number of different proposals have sought to restructure current electoral divisions or create new divisions for specific groups. Options that have been suggested include:

- permitting rural divisions to have a lower population than metropolitan divisions in order to limit the geographic size of electorates;
- establishing special non-geographic seats for Indigenous Australians or Australians living overseas; and
- using the same electoral boundaries at both the state and federal level.

### *Limiting the geographic size of electorates*

5.103 The weighting of electoral divisions between metropolitan and rural areas has long been a subject of debate in Australia. At present, all House of Representatives electoral districts are required to be approximately equal in enrolment, with a 10% threshold allowed either side of the average enrolment figure. Essentially, one side of the argument over weighted rural electorates calls for equality of voting power, in that all electoral districts should comprise an equal number of voters, whilst the other side argues that votes should be weighted more highly for electors in rural and remote areas who do not have the same access to their elected officials.<sup>281</sup> In support of limiting the geographic size of electorates, it was argued in 1974 that:

'No fair-minded Australian citizen would accept that there is the same degree of equality of representation when the member who represents such an enormous electorate has to face the difficulties of communication and isolation'.<sup>282</sup>

5.104 On the other hand, it has been argued that equal voting power is an essential feature of representative democracy,<sup>283</sup> with inherent unfairness in allowing certain Australians a greater power to shape the composition of the federal parliament. It has also been argued that:

'there is now a widely held consensus that the principle of "one-vote, one-value" is a cornerstone of a system of proper and equitable electoral arrangements, not only in Australia, but throughout the world. Improvements in transport and communications, together with two substantial increases in the size of the Parliament since federation, would appear to have made arguments for special arrangements for particular divisions less compelling than in bygone days'.<sup>284</sup>

<sup>278</sup> M Mackerras, 'Let the Chips Fall Where They May', Democratic Audit of Australia, March 2006, available at [www.democraticaudit.anu.edu.au/papers/20060308\\_mackerras\\_redist.pdf](http://www.democraticaudit.anu.edu.au/papers/20060308_mackerras_redist.pdf).

<sup>279</sup> *ibid.*

<sup>280</sup> Suggestion from the Hon B McMullan MP, cited in M Healy, 'Territory Representation in the Commonwealth Parliament', *Research Note 9 2000-2001*, Parliament of Australia Parliamentary Library.

<sup>281</sup> K Robinson, 'One Vote, One Value, The WA Experience', in G Orr, B Mercurio and G Williams (eds.), *op. cit.*, p. 100.

<sup>282</sup> D Anthony, *Australian Parliamentary Debates*, Joint Sitting, 6 August 1974, p. 12, as cited in J F H Wright, *Mirror of the Nation's Mind: Australia's Electoral Experiments*, *op. cit.*, p. 73.

<sup>283</sup> K Robinson, *op. cit.*, p. 111.

<sup>284</sup> AEC, submission no. 169.1 to JSCEM, *Inquiry into the 2007 Federal Election*, *op. cit.*, p. 41.

*Non-geographic seats for specific groups of voters**Dedicated electorates for Indigenous Australians*

5.105 One option which has been suggested to address the current under-representation of Indigenous persons in the Commonwealth Parliament is the creation of dedicated Indigenous electorates.<sup>285</sup> Based on similar experiences in New Zealand, it is argued that a special electorate could be reserved for Indigenous voters to ensure Indigenous parliamentary representation.<sup>286</sup> In support of this option, it has been argued that it would give Indigenous people a voice in Parliament, allow for greater understanding and awareness of Indigenous culture, and would provide Indigenous communities with role models and greater incentives to engage in the political process.<sup>287</sup> Alternatively, it has been argued against this option that such electorates could be seen as tokenistic or undemocratic, could lead other minority groups to seek special representation, and would have minimal value as the Indigenous representation would be a small number of parliamentary seats which would need to join in coalition with a major party to exercise any authority over the legislative process.<sup>288</sup> It has also been noted that constitutional change may be required before such an option could be effectively implemented.<sup>289</sup>

*Dedicated electorates for overseas electors*

5.106 At present, Australians living overseas will normally be registered to vote in the electorate in which they last resided. A reform suggested by some commentators is the creation of a separate electorate for overseas electors. It has been noted that legal advice would be required on the extent to which a specific proposal along these lines may comply with particular provisions of the Australian Constitution.<sup>290</sup> Options proposed include a single overseas electorate for the House of Representatives,<sup>291</sup> or a single Senate position in return for which overseas electors would be prohibited from voting in any House of Representatives electorate.<sup>292</sup> In Italy, for example, 18 parliamentary positions are allocated to four electorates comprised of 'external citizens'.<sup>293</sup>

*Common electoral boundaries for different jurisdictions*

5.107 It might also be argued that the same electoral divisions should be used at the federal, state and territory level. Tasmania is the only Australian state which currently adopts this principle,

<sup>285</sup> For example, an idea put forward by the governance stream of the Australia 2020 Summit was 'Entrenched and guaranteed Indigenous representation in federal parliament' (*Australia 2020 Summit – Final Report*, op. cit., p. 316). The Australian Government's response to this idea indicated that it was 'not supported at this time' (Australian Government, *Responding to the Australia 2020 Summit*, April 2009, p. 190). See also J Chesterman, 'Chosen by the people? How federal parliamentary seats might be reserved for Indigenous Australians without changing the constitution', *Federal Law Review*, vol. 34, no. 2, 2006, pp. 261-285.

<sup>286</sup> B Lloyd, 'Dedicated Indigenous representation in the Australian Parliament', *Research Paper No. 23 2008-09*, Parliament of Australia Parliamentary Library, pp. 4-8.

<sup>287</sup> *ibid.*, pp. 8-9.

<sup>288</sup> J Ah-Kit, 'Reconciliation and Constitutional Issues: Participation in Government: Sovereignty or Subjugation?', *Australian Reconciliation Conference*, 1997, available at <http://portsea.austlii.edu.au/other/IndigLRes/car/1997/4/ahkit.html>.

<sup>289</sup> J Chesterman, op. cit., pp. 284-285.

<sup>290</sup> B Mercurio and G Williams, 'The Australian Diaspora and the Right to Vote', *University of Western Australia Law Review*, Volume 32, Number 1, pp. 28-29.

<sup>291</sup> JSCEM, *2001 Federal Election: Report of the inquiry into the 2001 Federal Election and Matters Related Thereto*, op. cit., pp. 73-74.

<sup>292</sup> A Leigh, 'New Voting Rights for the Australian Diaspora', *Democratic Audit of Australia*, 2004, p. 2, available at [democratic.audit.anu.edu.au/papers/200407\\_leigh\\_expat\\_rep.pdf](http://democratic.audit.anu.edu.au/papers/200407_leigh_expat_rep.pdf).

<sup>293</sup> E Arcioni, 'Representation for the Italian Diaspora', *Democratic Audit of Australia, Discussion Paper 37/06*, 2006, p. 5, available at [democratic.audit.anu.edu.au/papers/20061113\\_arcioni\\_ital\\_diasp.pdf](http://democratic.audit.anu.edu.au/papers/20061113_arcioni_ital_diasp.pdf).

with members of its Legislative Assembly drawn from multi-member electorates based on the federal electoral boundaries. Such a change could have some administrative benefits, and may be convenient for voters who would identify with the same electorate for federal and state or territory, and possibly even local government purposes. However, such a change would require substantial and coordinated changes to the electoral systems of the Commonwealth, states and territories (for example, changes to the redistribution rules in each jurisdiction to ensure that they could be undertaken in a coordinated fashion), would be likely to require constitutional amendment in some jurisdictions, and would have significant implications (which would be heavily dependent on the choice of electoral system adopted) for those states and territories which presently have single-member electorates that are smaller in geographic or population size than the corresponding federal electorates.

### *Elected representatives who resign early*

- 5.108 From Federation until 1970, 63.3% of the 98 by-elections for the House of Representatives were caused by the death of a member. By contrast, since 1971, 86.7% of the 46 by-elections have been caused by members resigning their seat.<sup>294</sup> In the last ten years there have been nine by-elections, two as a result of death, and seven as a result of resignation.<sup>295</sup>
- 5.109 Members of the House of Representatives who resign before the end of their term can be criticised, particularly if resignation occurs shortly after a federal election. Criticism has generally focused on the cost to taxpayers of funding a by-election, and there have been some proposals that members who resign without 'due cause' should be financially penalised.<sup>296</sup> For example, a penalty might not be payable if a member resigned because of incapacity due to ill health, whereas resignation to accept alternative employment, or because a member's party failed to win government, could attract a penalty.
- 5.110 Arguments against a financial penalty of this kind might include that:
- it could discourage eligible persons from standing as parliamentarians and therefore, decrease participation in democracy;
  - it may be difficult to determine the circumstances in which a member did have 'due cause' for resigning from Parliament; and
  - a member who feels constrained from resigning when he or she wishes to do so might not remain committed to his or her constituents.
- 5.111 When Senators retire early, there is little cost to the public purse; in accordance with section 15 of the Australian Constitution, a replacement from the same political party is selected by the relevant state or territory Parliament. It has been suggested that replacement Senators have 'managed to get into Parliament without being elected at all', which means that 'party managers have effectively replaced voters in launching the parliamentary careers of many Senators'.<sup>297</sup> One study indicates that from Federation until the introduction of the current provision via referendum in 1977, there were a total of 67 Senate casual vacancies, 68.7% of which were the consequence of death; in contrast, in the shorter period from 1977 to 2005, there were 59 casual vacancies, only 6.8% of which were the consequence of death.<sup>298</sup>

<sup>294</sup> S Bennett and G Newman, 'House of Representatives by-elections 1901-2008', *Research Paper no 7 2008-09*, Parliament of Australia Parliamentary Library, p. 1.

<sup>295</sup> *ibid.*, p. 20.

<sup>296</sup> Senator A Murray, 'Make Pollies Contribute to Cost of By-Elections', Media Release, 7 April 2008, available at [www.andrewmurray.org.au/Media/Media\\_Release\\_Display.htm?press\\_id=6541&display=1](http://www.andrewmurray.org.au/Media/Media_Release_Display.htm?press_id=6541&display=1).

<sup>297</sup> CA Hughes and B Costar, *Limiting Democracy: The Erosion of Electoral Rights in Australia*, UNSW Press, Sydney, 2006, pp. 79-80.

<sup>298</sup> Percentages calculated from figures in J Nethercote, 'Senate Vacancies: Casual or Contrived?', in Samuel Griffiths Society, *Upholding the Constitution*, Vol.17, 2005, p. 2, available at [www.samuelgriffith.org.au/papers/html/volume17/v17chap4.html](http://www.samuelgriffith.org.au/papers/html/volume17/v17chap4.html)

In one notable example, a Senator resigned 5 days into a new term to accept a diplomatic post, allowing his successor six years in the Senate before having to face an election.<sup>299</sup>

5.112 Alternatives to the current mechanism for filling Senate casual vacancies could include:

- a recount of the ballot papers for the election at which the resigning Senator was elected, and a declaration that the next qualifying candidate be elected (this method applies in the Tasmanian House of Assembly and the ACT Legislative Assembly); or
- a requirement that a replacement Senator face the voters at the next Senate election (an arrangement similar to that which applied prior to the 1977 constitutional amendment).

5.113 Both of these alternatives would require an alteration of the Australian Constitution via referendum. It has been noted that the recount option 'almost invariably results in the election of a candidate from the same party as the retiring member'.<sup>300</sup> The second option, which could increase the number of vacancies to be contested for a state in a half-Senate election (if the retiring Senator was not due to face election), would therefore reduce the quota of votes required for election, which may assist minor parties contesting particular Senate vacancies.

## DISCUSSION POINTS

5.114 This chapter has set out the current arrangements for representation and voting systems in Australia, and discussed a number of issues and options for change. The Australian Government is interested in the community's views on what changes, if any, should be made to the current arrangements.

5.115 In particular, comments are invited on the following questions:

- Do the current voting systems for the House of Representatives and the Senate offer an appropriate balance between representation and responsiveness? If not, what changes should be made to the voting systems for the House of Representatives and/or the Senate?
- Should optional preferential voting be introduced for the House of Representatives?
- For the Senate, should preferential above-the-line voting be introduced? Should optional preferential voting below the line be introduced?
- Would there be benefits in greater harmonisation of voting systems?
- Are the current criteria for determining formality of votes in federal elections appropriate? Should they be varied to remove obstacles to casting a valid vote?
- What strategies do you think could reduce the level of unintended informal voting?
- Would there be benefits in greater harmonisation of formality rules for federal, state and territory elections?
- Are the current arrangements governing redistributions satisfactory? Should redistributions be conducted according to a fixed timetable, or a 'fairness' criterion?
- Should any changes be considered to the arrangements governing representation of the states and territories in the House of Representatives and the Senate?
- What changes, if any, should be considered to the current composition of electoral divisions?
- Should any changes be considered to address the issue of members or Senators retiring before the end of their terms?

<sup>299</sup> *ibid.*, p. 2.

<sup>300</sup> G Newman, 'Senate Casual Vacancies', *Research Note no.35 2001-02*, Parliament of Australia Parliamentary Library.