

SUBMISSION BY BRETT WALKER

Voting for the Senate

My submission relates entirely to the need for reform of the Senate electoral system so as to align it with section 7 of the Constitution which (relevantly) states:

“The Senate shall be composed of senators for each State, **directly chosen** by the people of the State, voting, until the Parliament otherwise provides, as one electorate.” *[emphasis added]*

The current Senate electoral system has led to more than 95% of votes being cast “above the line” and hence subject to the vagaries of opaque and secretive inter-party preference deals that can unduly influence outcomes (e.g. the 2004 election of Steven Fielding in Victoria with barely 1.9% of primary votes, a strategy apparently cooked up by major political parties to deny the Greens the last Senate seat in that election).

It is my submission that the current provisions of the Commonwealth Electoral Act 1918 that mandate compulsory preferential voting and permit above the line voting in its current form need to be re-drawn to ensure that the Act reflects both the wording and the undeniable intent of section 7.

I am particularly of the view that, in the absence of any reliable data that confirms a general awareness and an acceptance of the capacity of others (via the group voting method) to dictate how a voter’s choice above the line will be applied so as to allocate preferences to other candidates at the complete discretion of those others, section 211 needs to be amended to eliminate the capacity of candidates or political parties to allocate preferences to anyone not also a member of their political party.

This one amendment would in my view eliminate the pernicious “influence peddling” that has been the primary outcome of the 1984 amendments that delivered the current Senate electoral system. It will also mean that section 211 actually complies with Section 7 of our Constitution as, in my view, the words “directly chosen” in Section 7 imply an elementary awareness of the outcome of one’s vote.

The amendment I propose to group voting under the Commonwealth Electoral Act 1918 would also necessitate that compulsory preferential voting be dispensed with in favour of some form of partial or (preferably completely) optional preferential below the line.

One of my enduring concerns about group voting as it currently applies is the apparent AEC and/or Executive fixation upon allocating preferences to all Senate candidates that appears to drive it.

Compulsory preferential voting does not encourage people to cast a vote that reflects their view of the candidates. If voters were permitted to allocate preferences just according to this criteria (i.e. casting a vote that truly reflected their view of the candidates) I believe you would achieve a Senate composition that more truly reflects community rather than one that appears to reflect the fairly anal desire to ensure that every candidate receives a preference from every voter – something that creates the illusion of interest (amongst voters) in all who offer themselves up for consideration.

On the question of section 7 I acknowledge a spectrum of views amongst the High Court, most recently in the Mulholland decision [2004] HCA 41; 220 CLR 181; 209 ALR 582; 78 ALJR 1279.

The spectrum of views does however appear to still rest upon one immutable presumption: the fact that Australia's electoral system is founded on the principle of "representative democracy".

In Mulholland Gleeson C.J. stated:

"The express limitations include, for example, that the method of choosing senators must be uniform for all the States (s 9) and that the electoral system must be such that both senators and members of the House of Representatives are " **directly chosen** by the people" (ss 7 and 24). The implied limitation is that the electoral system must satisfy the requirements of the constitutionally prescribed system of representative government[44]. *A corollary of this requirement is that elections must result in a direct, free, informed and genuine choice by the people*[45]. Another corollary of the requirement is that legislation must not infringe the implied constitutional freedom of political communication between the people[46]." [paragraph 62] *[emphasis added]*

See also Kirby J. who said:

"The precise details for the election of senators and members to the Parliament may not be spelt out in the constitutional text. But the critical phrase, and the overall purpose of Ch I, indicate that any attempt to introduce methods of election that are undemocratic[273], or liable to frustrate an exercise of real choice on the part of "the people"[274], will be examined most carefully because they may put at risk the achievement of the overall constitutional requirements. As in all matters of interpretation of the Constitution, the focus of attention is on considerations of substance rather than form[275]."

Even the other Justices who took the approach that the intent of section 7 was simply to remove the potential for an electoral college type system of indirect selection could not avoid the fact that the entire electoral system is premised on the need for a system that satisfies the criteria of representative democracy that their Chief Justice espoused in his reasoning.

There can be little doubt for anyone who is being honest with themselves that the current Senate electoral system that permits the trading of voter preferences amongst candidates and their political parties without any input from the prospective voter fails the test of a "direct, free, informed and genuine choice by the people".

It is rather a system that facilitates an electoral elite (the parties that can bargain with others using their real or their presumed electoral influence), divorced from the desires of the voters, whose decision to vote above the line is based primarily on a desire to avoid the alternative – having to number EVERY box in numeric sequence if they wish to cast a valid Senate vote below the line – rather than on any awareness of how their preferences are to be allocated.

Statistics show that informal voting patterns in Senate elections have more than halved since the group voting amendments of 1984 took effect (down from 9% in 1984 to 4% in 2007). As an aside this appears to mean that about 80% of below the line votes are still being declared informal.

There is perhaps no better argument than this for the elimination of the compulsory nature of preferential voting.

If a voter was engaged enough to be intent on exercising their franchise effectively one would think the informal vote would be almost zero in the below the line group. Yet it (the compulsion to allocate a preference to EVERY candidate) remains a significant barrier to the effective discharge of approximately 80% of below the line voters.

SUMMARY

1. Amend CEA 1918 to remove capacity for group tickets to allocate preferences beyond their own political party;
2. Amend CEA 1918 to make all voting 100% optional preferential (or at least only partial, not 100% compulsory).
3. Ignore any pleas to "raise the quota" in Senate elections unless the above changes are implemented.
4. Remember that the system can work quite well without group voting trickery. Nick Xenophon is walking, talking proof that a non-aligned candidate can garner sufficient popular appeal to win a Senate seat without the support of the group voting ticket system. We need more people elected to the Senate who are not beholden to group voting ticket largesse and who the electorate actually feels they want to support to achieve their seat.

Brett Walker

Po Box 2204 Graceville Qld 4075

sos@fsi.net.au

24 November 2009