

## Chapter 6

### **Toying with the Senate Re-run of the Senate election in Western Australia and Proposals for Reform**

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In April 2014, voters in Western Australia returned to the polls for an unprecedented half-Senate (periodical) election. For the first time an election for an entire contingent of Senators elected at a half-Senate (periodical) election had been declared void and a separate periodical election of Senators was held.<sup>1</sup>

The half-Senate election in September 2013 had seen a record number of Senate candidates nominated in each State: the Senate ballot paper in New South Wales had 110 candidates. The availability of printing equipment limited the ballot paper to one metre, and legislation required all groups and candidates to be printed on the same row. This forced a reduction in font size. In several States the Australian Electoral Commission made magnifying glasses available with ballot papers.

In Western Australia there had been 62 candidates across 28 columns on the ballot paper in September 2013. At the April 2014 re-run the numbers increased further to 77 candidates across 34 columns.

Of the candidates in the April 2014 Senate election in Western Australia, only 36 had contested the previous election in September 2013. Eight candidates had unsuccessfully contested House of Representatives seats in Western Australia. Another eight had been defeated contesting Senate seats in other States. The fresh election gave them a second chance at a seat in Parliament. Seven additional parties contested the 2014 election. Three parties did not re-nominate. And four parties changed their names in the intervening six months.<sup>2</sup>

The April 2014 election saw a record vote for minor parties and a fall in support for both major parties. The Liberal Party polled 34.1 per cent, Labor 21.5 per cent. Both parties were down five percentage points from September 2013. Support for the Greens rose six percentage points to 15.6 per cent, while support for the Palmer United Party more than doubled to 12.3 per cent.

The significant change produced by the re-run election was an extra seat being won by the Palmer United Party. This increased its control over the balance of power in the new Senate.

#### **The Causes of the Re-run of the Senate election in Western Australia**

The direct cause of the new periodical election was loss of ballot papers during the Senate count in Western Australia in September 2013. The initial tally of votes produced a distribution of preferences that was close enough for the Australian Electoral Commissioner, Ed Killesteyn, to order a re-count. It was the first Senate re-count since 1980 and the first since introduction of group ticket or “above the line” voting in 1984.

There was no doubt concerning the first four Senators elected. On both the first and second counts, the first four seats were filled by the Liberals, David Johnston, Michaelia Cash and Linda Reynolds, and Labor's lead candidate, Joe Bullock.

The uncertainty in the result concerned the final two vacancies. Four candidates were competing for two seats. Which two were elected depended on the order in which candidates were excluded during the distribution of preferences.

At a critical "choke" point in the count, known as the 50<sup>th</sup> exclusion, only 10 candidates remained. The ninth and tenth placed candidates represented the Australian Christians and the Shooters and Fishers Party, both with 1.75 per cent of the vote at the exclusion point. Neither party had any chance of election, but the order in which the two parties were excluded changed the flow of preferences and determined the final two seats.

The distribution of preferences based on the first count was undertaken on 2 October 2013. At the 50<sup>th</sup> exclusion the Australian Christian candidate was in tenth place, 14 votes behind the Shooters and Fishers Party candidate. This resulted in the Australian Christians candidate becoming the 51<sup>st</sup> exclusion. This led to the eventual election of Palmer United Party's Zhenya Wang and Labor's Louise Pratt.

The Greens and the Australian Sports Party appealed unsuccessfully to the Electoral Officer for Western Australia, Peter Kramer, for a recount. They then appealed to the Electoral Commissioner, Ed Killesteyn. On 10 October 2013 he agreed to a recount of all "above the line" and informal ballot papers. His decision was based on verifying the accuracy of the 14-vote gap at the 50<sup>th</sup> exclusion.

The re-count required all ballot papers to be transferred from divisional offices to Perth. During the transfer it was discovered that 1,370 formal ballot papers counted on election night, and check-counted in the days following the election, could no longer be located. The ballot papers came from several polling places in the regional electorates of Forrest and Pearce.

The re-count identified several hundred formal ballot papers that had been incorrectly classified as informal. The new first preference totals, which could not include the missing ballot papers, altered the order of candidates at the 50<sup>th</sup> exclusion. The Shooters and Fishers Party were now in tenth place, 12 votes behind the Australian Christians. With the Shooters and Fishers Party candidate now excluded, the final two seats were won by the Green, Scott Ludlam, and the little known Wayne Dropulich from the Australian Sports Party.

Mr Dropulich's victory in the re-count was remarkable.<sup>3</sup> The Australian Sports Party had polled just 0.23 per cent of the first preference vote. It took an improbable sequence of exclusions and preference flows to allow Mr Dropulich to increase his vote more than fifty-fold to reach the quota of 14.3 per cent. He was elected to fill the fifth seat ahead of the Greens who, with 9.5 per cent of the vote, had recorded 40 times the vote of the Sports Party.

Mr Dropulich's party finished 21st of the 27 parties on the ballot paper. He achieved his quota thanks to the preferences of 20 other parties, including 15 that polled more first preference votes than the Australian Sports Party.

The path by which Mr Dropulich passed those 15 parties and gained their preferences was perilous. At three points in the count Mr Dropulich was the second lowest polling candidate. On each occasion he gained ticket preferences from the last-placed candidate to avoid becoming the next exclusion. The critical ordering of the Australian Christians and Shooters and Fishers at the

50<sup>th</sup> exclusion was the final determinant of whether the then eighth placed Dropulich was excluded or elected.

Mr Dropulich received 100 per cent of “above the line” preferences from 18 small parties, but only 13 per cent of preferences from electors who voted for those parties “below the line,” revealing how much his victory depended on group ticket preference deals.<sup>4</sup>

The AEC later released the initial tally of the 1,370 missing ballot papers, allowing an alternative distribution of preferences to be constructed.<sup>5</sup> This modelling indicated that the 50<sup>th</sup> exclusion had the Australian Christians slipping back to tenth place, being excluded and delivering the last seats to Labor and Palmer United.

However, this re-constructed count came down to a single vote difference at the 50<sup>th</sup> exclusion. The missing ballot papers could not be re-counted for formality, so a final determination of the first preference tallies and correct order of exclusion was impossible. The first count and the re-count produced different pairings of final Senate winners, dependent on the order of the Australian Christians and the Shooters and Fishers Party at the 50<sup>th</sup> exclusion. Without the missing ballot papers, the order in which the two parties finished was indeterminate, and therefore the composition of the final two Senate seats was also indeterminate.

Having become aware that ballot papers were misplaced or missing, the AEC spent a week trying to find them before announcing their loss on 31 October 2013. At the same time, Commissioner Killesteyn appointed the former Australian Federal Police Commissioner, Mick Keelty, to inquire into the conduct of the count, to determine how the ballot papers had gone missing, and also to report generally on issues concerning ballot paper security.

On 2 November 2013, the Australian Electoral Officer for Western Australia, Peter Kramer, declared the result of the re-count. On 15 November 2013, Commissioner Killesteyn petitioned the result to the Court of Disputed Returns as the re-count could not be completed correctly. Without the missing ballot papers it was impossible for the AEC to be certain that the correct candidates had been declared elected.

Keelty’s report was released on 6 December 2013. It criticised aspects of the Commission’s conduct of the election, in particular the handling and transfer of ballot papers. The report was of the view that the ballot papers had probably been lost by accident, but it was impossible categorically to rule out other possibilities.<sup>6</sup>

On 20 February 2014, Justice Ken Hayne of the High Court of Australia, sitting as the Court of Disputed Returns, voided the returned writ for the Western Australian Senate election.<sup>7</sup> As the High Court had ruled in previous cases that the electoral system returned Senators as a group, voiding the writ required a new writ to be issued for the periodical election of six Senators from Western Australia.

The day after the judgment, the Electoral Commissioner, Ed Killesteyn, and the Australian Electoral Officer for Western Australia, Peter Kramer, resigned, taking responsibility for the errors in the conduct of the election. On 28 February 2014, the Governor of Western Australia issued a new writ. Saturday 5 April 2014 was fixed as polling day.

While the above chronology explains how the errors in electoral administration caused the new election, at a deeper level the entire imbroglio stems from flaws in the *Commonwealth Electoral Act*.

The AEC and its officers were responsible for the errors in the administration of the election. They were not responsible for electoral formulas that made the final result in Western Australia so vulnerable to an administrative error. Nor was the AEC responsible for the flood of party registrations and nominations, the overly complex ballot paper, the complex preference tickets, or the complex ballot paper formality rules that required a central re-count of more than a million ballot papers and forced all ballot papers to be moved across the State.

In summary, the problems with the Electoral Act are as follows. It is too easy to register political parties and, once registered, too easy to nominate candidates in every contest. The existence of group ticket voting encourages parties to nominate in every Senate contest and to trade preferences with other parties rather than campaign for votes. Finally, the requirement that voters express a preference for every candidate on the ballot paper as the only alternative to voting “above the line” for a party drives more votes into the party tickets, increasing the pool of votes that parties can trade and deal with as preferences.

### **The Problem with Party Registration**

At the 2013 election a record number of parties were registered and contesting the election, as well as a record number of candidates in both the House of Representatives and the Senate elections. The number of registered parties increased by 50 per cent between January and August 2013, with Prime Minister Julia Gillard’s nine month notice of the election giving prospective parties a timetable to pass the low hurdles required for party registration.

Under the Commonwealth Electoral Act, only 500 members are required to register a political party. Per capita, the Commonwealth’s registration regime requires fewer party members than that of any of the States. Most of the States also have tougher rules concerning the documentation required to prove a party has the necessary number of members.

Once registered, a party has the right to nominate candidates centrally under the signature of the party’s registered officer without the need for local nominators. An Independent candidate requires 100 nominators, but a party candidate requires only the signature of the party’s registered officers. One of the reasons for the explosion of Senate candidates in 2013 was the ability of parties to nominate candidates in every State, even if the party had no members in that State.

Once on the ballot paper, parties of all sizes were entitled to lodge group voting tickets. Those tickets allowed parties to trade preferences. With more than 95 per cent of voters using the above the line voting option, parties were able to deliver on their preference deals. Even if voters consulted the preferences tickets lodged by parties, few would have been able to determine where a vote for a party would eventually end up.

New parties can be a sign of health in a democracy. In the recent Australian context, however, it appears the emergence of new parties is partly driven by the honeypot of group ticket voting. Group ticket voting has driven “fractional” parties, a profusion of like-minded parties with personal or policy differences that continue to exist because group ticket voting means there is no pressure for them to merge and grow. They can compete without hurting each other’s chance of election, as long as they swap group ticket votes.

## **The Problem of Group Ticket Voting**

As with all preferential voting systems,<sup>8</sup> the Senate's counting system is designed to take the preferred orderings of candidates marked on ballot papers by voters and aggregate them to produce a preferred group of elected Senators. The basic assumption is that each voter has completed their ballot paper with a sequence of preferences that represent the order in which they would want to see candidates elected.

At the election of Senators in Western Australia in 2013, two parties finishing ninth and tenth had a critical impact on the final result. Under an electoral system where voters were required to give their own sequence of preferences, the order in which ninth and tenth placed candidates with 1.75 per cent of the vote finished would have been unimportant. With so few votes, the preferences of both parties would have been relatively random.

Instead, under group ticket voting, the ninth and tenth placed parties had tangential preference flows that produced an unstable preference count where the tiny difference between these two candidates at a relatively early stage of the count completely changed the composition of the final two members elected.

Group ticket voting breaches the preferred voting system principle because many parties lodge group preference tickets based on strategic rather than a preferred ordering of preferences. With 95 per cent of Senate ballot papers completed using the group ticket voting, the power over preferences is transferred from the electorate into the hands of a very small number of party representatives who determined the order of their party's lodged preference ticket.

Party representatives, with access to opinion polling, greater knowledge of the order parties will finish as well as greater knowledge of the electoral system, find themselves having to choose between lodging preference tickets with a preferred ordering of candidates, or to engage in a strategic ordering of preferences. With so many votes under the control of group tickets, the order of candidate exclusion becomes more important, as was seen in Western Australia.

Strategic preference deals can backfire for the participants, as was the case at the 2004 Senate election in Victoria. At that election, the first three Coalition and first two Labor candidates were always going to be elected. The contest for the sixth and final position was set to be between the third Labor candidate and the lead Green candidate.

To maximise its chances of winning a third seat ahead of the Greens, Labor engaged in an array of side deals with minor parties, in particular a preference swap with Family First. Labor engaged in a strategic preference ordering designed to maximise the chances of its third candidate defeating the Green candidate.

The strategy backfired because Labor did not poll as well as expected. The exotic preferences deals instead saw Family First's Steven Fielding finish ahead of the third Labor candidate, Jacinta Collins. Collins was excluded and Labor's preferences elected Fielding rather than the Green candidate.

An even more extreme form of strategic preferencing has been the growth of "preference harvesting." As it occurred at the 2013 election, minor and micro-parties agreed to swap preferences with each other ahead of the major parties in a giant game of "keepings off." Preferences were passed between micro-parties, stacking up votes until one candidate either reached a quota, or passed a major party candidate and gained major party preferences to win.

Preference harvesting also encourages tactics to boost the vote for the minor parties taking part in the strategy. The clearest tactic is to boost the number of parties and candidates on the ballot paper, making it harder for voters to find the candidates and parties they do know. The record number of parties, the record number of candidates and parties nominating in all States, were part of this strategy to maximise the pool of minor and micro-party votes.

Not all minor parties involved in preference harvesting at the 2013 election were prepared to ignore ideology. At opposite ends of the political spectrum, Family First and the Sex Party participated in the micro-party alliance, but declined to preference each other. Parties sitting somewhere in the middle of the political spectrum received more benefit, with the Australian Motoring Enthusiasts Party, the Australian Sports Party and Palmer United benefiting from the strategic use of ticket voting to keep votes away from Labor, the Coalition and the Greens.

What made these games of preferences even worse was the limited options provided for electors to vote other than for the party tickets. If a voter chose to indicate their own order of preferences, they were instructed to number every square on the ballot paper. At the 2013 Senate election in NSW, that required 110 preferences, in Western Australia 62. For the 2014 re-run in Western Australia, the number rose to 77.<sup>9</sup>

The size of the ballot paper had another effect. It was harder for voters to find the candidates they did know, as was revealed by the NSW Senate result. First preference support in the House of Representatives for the Liberal and National parties rose to its highest level since 1975; in the Senate it fell to the lowest level since the disastrous election of 1943. It seems the reason for this disjunction was the positioning of a similar sounding minor-party, the Liberal Democrats, in column A of the ballot paper. The Liberal Democrats' David Leyonhjelm was elected with a surprisingly high 9.5 per cent of the vote.

So, while the fresh periodical election of Senators in Western Australia came about as a consequence of administrative error, it is also clear that electoral law made the conduct of the election more complex by encouraging an increase in the number of parties and candidates, and by creating incentives to lodge complex preference deals that de-stabilised the count and magnified what was a small administrative error involving the loss of only 1,370 ballot papers out of 1.3 million.

### **The Senate's Electoral System – by Accident rather than Design**

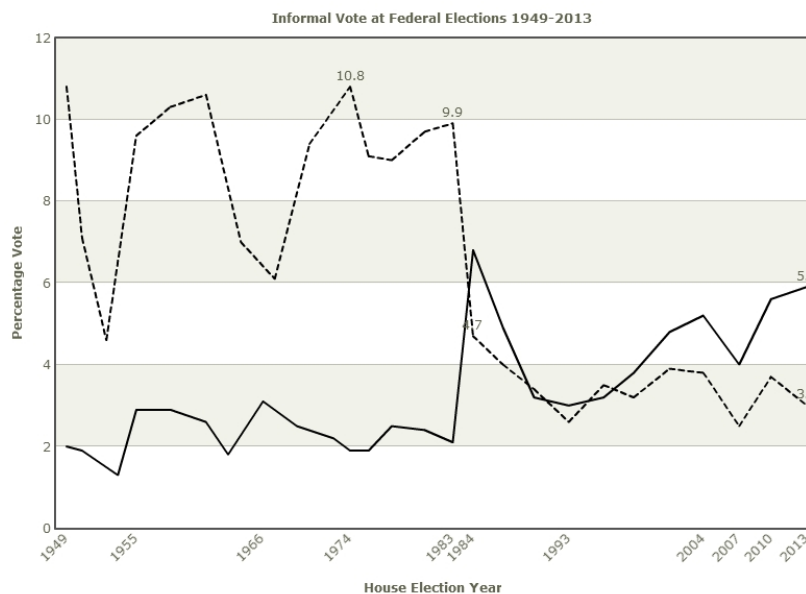
How the Senate's electoral system reached its current state of complexity needs an understanding of its origins. To borrow a metaphor from biology, the Senate's electoral system is a product of evolution rather than intelligent design. The system has come about by accretion, poked and squeezed over the decades to remain consistent with the House's electoral system.

A brief timeline of how we arrived at the current system is set out below.

- **1902** – the first Electoral Act accepted that Senators would be elected at large by each State. A winner-takes-all electoral system was adopted.
- **1919** – adoption of preferential voting for House of Representatives elections led to a similar change in the Senate. Grouping of candidates by party on the Senate ballot paper was introduced. Full preferential voting followed in 1934.
- **1940** – a horizontal ballot paper was adopted, with a draw for column position but parties permitted to determine the order in which their candidates were listed.
- **1948** – proportional representation introduced with full preferential voting; first used at 1949 Federal election.

- **1960s** – a run of separate half-Senate elections (1964, 1967, 1970) increased the number of cross-bench Senators, changing the relationship between the House and the Senate.
- **1974** – 73 candidates on the NSW Senate ballot paper at the double dissolution election. High informal votes at Senate elections in this period led to State experimentation with State upper house voting reform, with a D’Hondt variant introduced in South Australia in 1975, and Senate-style voting but with optional preferential voting introduced for the NSW Legislative Council in 1978.
- **1984** – Party registration and printing of party names introduced. New ballot paper with group ticket voting introduced to solve the chronically high informal vote at Senate election.

The 1984 changes were justified as a solution to informal voting in the Senate. As the graph below shows, informal voting at Senate elections is now only a third of its pre-1984 level. However, confusion over whether a single “1” vote is permitted has caused an increase in informal voting in House of Representatives elections since 1984.



Even if group ticket voting is acknowledged as the fundamental problem afflicting the Senate’s electoral system, it is also the case that group ticket voting has been effective in cutting the informal vote in Senate ballots. No change should be adopted that will result in an increase in the informal vote. As a basic principle, no vote currently classed as formal should become informal as a result of a change to the electoral system.

A second principle should be that whatever changes are adopted, the system should not be so complex that the AEC would struggle to complete the count.

The Commonwealth Parliament’s Joint Standing Committee on Electoral Matters (JSCEM) has suggested a raft of changes drawing extensively on reforms introduced for the NSW Legislative Council at the 2003 State election. Those changes were also designed to address lax rules on the registration of political parties and to end party control over preferences. In summary, the changes propose to

- Retain the existing ballot paper with options to vote for parties “above the line” and candidates “below the line.”
- Accept optional preferential voting.
- A single “1” above the line will apply only to the candidates of the chosen party.
- A voter can vote 1,2,3 etc above the line for parties, with preferences distributed for

- candidates in the order of the preferred parties.
- An end to full preferential voting below the line, with a minimum number of preferences set equal to the number of vacancies.
- A tightening of party registration, including an increase to 1,500 members for registration and a tightening of rules on proof of membership.

The JSCEM recommendations received support from the Coalition, the Labor Party and the Green members of the committee. Most cross-bench Senators have been critical of the proposals. Given the difficulties the Coalition Government has faced since the current Senators took their places in July 2014, the Government has yet to indicate its intentions on changes to the legislation.

However, given the time it will take the AEC to change its counting software, change will need to be introduced well before the 2016 election. The same comment would apply to any prospects for a double dissolution election.

Given the administrative problems it encountered at the 2013 election, the last thing AEC would want to do is conduct an election with new legislation introduced belatedly at the last moment without adequate consultation or opportunity to train its staff.

## Endnotes

1. In 1906 a close contest for the final vacancy in South Australia was voided by the Court of Disputed Returns. The loss of ballot papers prevented a re-count. The High Court eventually over-ruled the South Australian Parliament's attempt to fill the seat as a casual vacancy and, in 1907, a special election was held to fill a single vacancy.
2. For a summary of the candidates' changes, see Antony Green's Election Blog, "A Summary of Preferences and Candidates for the WA Senate Re-election", 17 March 2014, <http://blogs.abc.net.au/antonygreen/2014/03/a-summary-of-preferences-and-candidates-for-the-wa-senate-re-election-1.html>
3. For more detail on the victory of Mr Dropulich, see Antony Green's Election Blog, "The Remarkable Path to Victory of Wayne Dropulich", <http://blogs.abc.net.au/antonygreen/2013/12/the-remarkable-path-to-victory-of-wayne-dropulich.html>
4. See Antony Green's Election blog, "Below the Line Preference Flows at the 2013 WA Senate Election", <http://blogs.abc.net.au/antonygreen/2014/04/below-the-line-preference-flows-at-the-2013-wa-senate-election.html>
5. More detail on modelling using the missing votes, see Antony Green's Election Blog, "WA Senate Contest Comes Down to Just 1 Vote – and it's one of the Missing", <http://blogs.abc.net.au/antonygreen/2013/11/wa-senate-contest-comes-down-to-just-1-vote-and-its-one-of-the-missing.html>



6. The Keelty Report provides a full chronology and details of the problems with the WA Senate count and can be found at [http://www.aec.gov.au/About\\_AEC/Publications/Reports\\_On\\_Federal\\_Electoral\\_Events/2013/files/inquiry-into-the-2013-wa-senate-election.pdf](http://www.aec.gov.au/About_AEC/Publications/Reports_On_Federal_Electoral_Events/2013/files/inquiry-into-the-2013-wa-senate-election.pdf)
7. The full judgment can be found at <http://www.austlii.edu.au/au/cases/cth/HCA/2014/5.html>
8. I will use the Australian term, preferential voting, though in political science literature the Australian systems are known as single transferrable vote systems.
9. While the instructions say that a correct sequence for all candidates is required, the Commonwealth Electoral Act includes a saving provision that permits a Senate ballot paper to be treated as formal as long as 90 per cent of squares are completed and up to a maximum of three sequence errors are present.