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Commonwealth Electoral Amendment Bill 2016

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Politics and Public Administration Section

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Date introduced: 22 February 2016

House: House of Representatives

Portfolio: Finance

Commencement: The day after Royal Assent.

Links: The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bill's home page, or through the [Australian Parliament website](#).

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the [ComLaw website](#).

The Bills Digest at a glance

The Commonwealth Electoral Amendment Bill 2016 (the Bill) constitutes the first response of the Government to the reports of the Joint Standing Committee on Electoral Matters from its inquiry into the 2013 Federal Election, particularly in regards to the recommendations to change the Senate voting system. The recommended changes to the Senate electoral system by the Committee followed the election of senators on the basis of very small primary votes, and a perception that the group voting ticket system was being manipulated by some parties to direct preferences in a way that was not consistent with voter expectations.

The Committee recommended that the Senate voting system be changed to allow voters to allocate as many preferences as they desired either above or below the line.

The Bill has three Parts. **Part 1** seeks to abolish group voting tickets and replace above the line voting with a requirement that voters allocate at least six preferences above the line. The voters' preferences will then only be counted against the candidates in the groups that received their preferences, and will not flow to any other parties on the ballot paper. The Bill has a savings provision that allows voters who allocate at least one vote above the line to have their ballot paper count as formal and the preferences counted.

Below the line voting will remain full preferential under the Bill, however the Bill does increase the allowed number of below the line numbering errors from three to five.

Part 2 of the Bill will prohibit an individual being the registered officer of more than one political party simultaneously. This will prevent a single individual forming multiple political parties in order to direct preferences of voters to those parties.

Part 3 of the Bill will allow parties to submit a party logo to the AEC to be added to their party registration, and for that logo to be printed in black and white on Senate and House of Representatives ballot papers.

Many electoral experts and commentators on the Bill agree that the above the line optional preferential voting provisions would improve the translation of the expression of the voters' will into the election of candidates, and that it would prevent the election of candidates on very small primary votes. Many also express the view that the retention of compulsory full preferencing below the line is contrary to the Committee's recommendations, will create undesirable inconsistencies in the Senate electoral system, and is generally inexplicable from a policy perspective. At least one electoral expert and one cross bench Senator have called into question the constitutionality of the Bill.

Support for the main change proposed by the Bill, optional preferential voting above the line, is split along party lines. The Coalition and the Greens support the Bill, and the ALP and most of the Crossbench Senators oppose the Bill. Opposition to the Bill appears due to the expected electoral effects of the changes for the results of future election, the rushed passage of the Bill, and the effects of the changes on the diversity of representation in the Senate.

The AEC has publicly stated that it will be able to conduct an election under the provisions of the Bill provided they have at least three months in which to implement the changes, however caution that any large change to the electoral system, particularly in the lead up to an election, creates risks. The number of ballot papers that must have multiple preferences counted will increase considerably under the voting system changes, which will have implications for the cost of the election. These additional costs have not yet been made public.

Purpose of the Bill

The purpose of the Commonwealth Electoral Amendment Bill 2016 (the Bill) is to amend the *Commonwealth Electoral Act 1918* (the Act) to change the method of electing senators by introducing a form of optional preferential voting to the Senate ballot paper.

The Bill amends the Act to:

- abolish the use of group voting tickets (GVTs) that allow parties and groups in Senate elections to nominate the preferences to be followed by ‘above the line’ (ATL) votes for their group
- change the Senate ballot paper to instruct voters who vote above the line to nominate a minimum of six preferences if they vote above the line on their ballot paper and how that translates into preferences for candidates
- expand the allowed number of sequencing errors allowed on formal ballot papers for below the line votes
- remove the ability for one individual to be the registered officer for more than one registered political party concurrently and
- allow for political parties to nominate that logos be printed on both the Senate and the House of Representatives ballot papers alongside the party names.

Structure of the Bill

The Bill is divided into three parts:

- **Part 1** enacts the changes to the Senate ballot paper structure and changes a number of ballot paper handing instructions and procedures
- **Part 2** implements the changes to registered officers and deputy registered officers of political parties
- **Part 3** sets out the requirements for the registration of party logos with the Australian Electoral Commission (AEC).

Background

The ballot paper currently used in the election of Senators in each state to the Senate was created by the *Commonwealth Electoral Legislation Amendment Act 1983*. The legislation followed a recommendation from the 1983 report of the Joint Select Committee on Electoral Reform (JSCER)¹ and was designed to address the high percentage of informal voting (that is, votes that do not correctly follow the prescribed numbering rules and cannot be admitted into the count) in the Senate, which had reached 12.31 per cent by the 1974 Senate election.²

The Committee reported that in the 1977 and 1983 Senate elections over 75 per cent of informal votes were due to unintentional error, such as a square left unnumbered or a number repeated.³ The resulting amendment did not fundamentally change the way that the Senate vote was counted, but substantially changed the way that the voters completed the ballot paper by allowing the voter to vote ‘above the line’ for their preferred party or group.

The method by which the Senate ballot paper was changed sought to formalise the common practice of voters voting according to the How To Vote (HTV) material of their preferred party.⁴ Each party could submit up to three different group voting tickets (GVTs) to the AEC, each of which provided a full preference distribution for all of the candidates on the ballot paper. By placing a 1 vote above the line, the voter’s preferences would be distributed according to the GVT submitted by the party.

If the group submits two group voting tickets, their above the line votes are divided into two halves and half of the above the line votes following one group voting ticket and the other half follow the other group voting ticket. If the group submits three group voting tickets, their votes are divided in three and one third of the votes

1. Joint Select Committee on Electoral Reform (JSCER), *First Report*, Australian Government Publishing Service, Canberra, September 1983.

2. M Maley, *Senate electoral reform*, *Australian Public Law Blog*, 29 September 2015.

3. JSCER, op. cit., p. 62.

4. Maley, op. cit.

each follow one of the three group voting tickets. Each group voting ticket must have the candidates in their own group listed first, in the order in which they occur on the ballot paper, but after the candidates in the group it is impossible for the voter to know which of the group's tickets their vote will follow, and therefore where their preferences will flow.

The new Senate ballot paper arguably worked well for a number of years, with above the line voting quickly became the most popular way of completing a Senate ballot paper and informality dropping to 2.96 per cent.⁵ By the 2013 federal election, only 3.5 per cent of voters were completing their own preferences.⁶

The electoral system used to elect senators is a variant of proportional representation through single transferable vote (STV). The intention of the system is that members are elected to multi-member districts (six, in the case of a normal half-Senate election in a state) roughly in proportion to the share of vote their party receives. There are limitations to how proportional the system can be (six vacancies cannot accommodate ten candidates all of whom win ten per cent of the vote, for example), however in being both proportional and preferential, in general the system should return a result broadly consistent with the will of the electorate.

The results of the 2013 Senate election caused considerable surprise amongst the media and the general public. A number of unusual results had occurred:

In five out of the six States, a candidate was elected from a party which had never previously been represented in the federal Parliament.

For the first time ever, the seats in one State, South Australia, were divided between five different parties.

In Victoria, a minor party candidate was elected after having polled only 0.5 per cent of the first preference votes cast in the State.⁷

While the result from the 2013 Senate election was sufficiently against expectation that the Parliament was roused into action, it was not the first Senate election in which a result inconsistent with the principles of proportional representation occurred. In the 2004 Victorian Senate election a candidate was elected on a first preference vote of 0.13 quotas, or 1.85 per cent of the total vote,⁸ and in the 2010 Victorian Senate election a candidate was elected on 0.16 quotas or 2.33 per cent of the total vote.⁹ To put this into context, a Senator is declared elected in a normal half Senate election when they have gained one full quota, or 14.3 per cent of the vote, either as first preferences, or through transfers from other candidates.

A comprehensive examination of the issues that emerged from the 2013 Senate election has been provided by the JSCEM in its *Interim Report*, and will not be repeated here.¹⁰

The *Interim Report* made six recommendations. Recommendations 1 and 2 recommended abolishing group voting tickets in the Senate and allowing optional preferential voting both above and below the line on the Senate ballot paper. Recommendation 3 was that the AEC be adequately resourced to provide a voter education campaign to explain the changes. Recommendation 4 related to increasing the requirements to register a political party, and recommendation 5 was that these new requirements apply to all new parties immediately and all existing parties within 12 months. Recommendation 6 related to candidates being resident in the state in which they were applying for election.

In his forward to the May 2014 report, the then Chair Tony Smith, the member for Casey, stated:

This report has been produced at this time to not only provide the Parliament with the time to legislate change, but to enable thorough and adequate information, education and explanation of the improvements to the voting public well in advance of the next election.

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5. Australian Electoral Commission, '[Senate: Informal votes by state](#)', *Virtual Tally Room – 2013 Federal Election*, 1 November 2013.
 6. Australian Electoral Commission, '[Senate group voting ticket usage](#)', *Virtual Tally Room – 2013 Federal Election*, 1 November 2013.
 7. Maley, op. cit.
 8. Australian Electoral Commission, '[First preferences by candidate – Vic](#)', *Virtual Tally Room – 2004 Federal Election*, 9 November 2005.
 9. Australian Electoral Commission, '[First preferences by candidate – Vic](#)', *Virtual Tally Room – 2010 Federal Election*, 15 September 2010.
 10. Joint Standing Committee on Electoral Matters, *[Interim report on the inquiry into the conduct of the 2013 federal election: Senate voting practices](#)*, Commonwealth of Australia, Canberra, May 2014.

It is critically important that the Parliament considers these recommendations for reform – and legislation to enshrine them into electoral law – as a very high priority.¹¹

The government has not yet tabled a formal response to the Interim Report, however the Second Reading Speech states that the Bill responds to key elements of the report.

Committee consideration

Joint Standing Committee on Electoral Matters

The Bill has been referred to the Joint Standing Committee for Electoral Matters (JSCEM) for inquiry and report by 2 March 2016. Details of the inquiry are at the [inquiry homepage](#).¹²

Policy position of non-government parties/independents

Australian Labor Party

In May 2014 when the *Interim Report* of the Joint Standing Committee on Electoral Matters was released, proposing moving to optional preferential voting in the Senate, it was with the support of the Labor members of the Committee. The deputy chair of the Committee, Alan Griffin, member for Bruce, stated at the time that he believed that above the line voting was not operating as had been intended.¹³ Shadow Special Minister of State Gary Gray stated that the ‘changes will make the Senate voting system more transparent and will mean a full translation of voter intention to the electoral outcome’.¹⁴

Within 12 months of the publication of the report, the media reported Labor opposition to the reforms:

The Senate Opposition Leader, Penny Wong, and her deputy, Stephen Conroy, strongly backed by powerbroker Sam Dastyari, have told Bill Shorten they will not support changes recommended by an all-party committee last year that would eliminate group ticket voting and introduce optional preferential voting above the line in Senate elections.

It has created a clear divide between them and their lower house colleagues who remain strongly supportive of the changes recommended in the highly regarded report of the committee chaired by government backbencher Tony Smith released a year ago.¹⁵

Senator Dastyari stated that the changes would ‘risk forever preventing a progressive Senate’.¹⁶ More recent media reports suggest that the opposition of some in the ALP is due to the potential to reduce party factional control over Senate places, however it is not clear how this might occur.¹⁷

Statements surrounding the introduction of the Bill indicate that the ALP, whilst internally divided, officially opposes the Bill. Mr Gray informed the Chamber:

I lost the argument in my party room on Senate reform, so Labor will oppose the substantive reforms that are enshrined in this bill. I think that is sad, but it is a reality. My party has moved that it will be opposing this bill and therefore I oppose this bill.¹⁸

Australian Greens

The Australian Greens have supported changes to the Senate voting system since 2004. The 2004 election to the Senate of Family First Senator Steve Fielding over the Greens candidate was a ‘perverse result’ according to

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11. Ibid., p. vii.
 12. Joint Standing Committee on Electoral Matters, '[Commonwealth Electoral Amendment Bill 2016](#)', Parliament of Australia website, updated 1 March 2016.
 13. M Grattan, '[Proposed Senate voting reforms would curb micro parties](#)', *The Conversation*, 12 May 2014.
 14. G Gray, '[Gary Gray endorses optional preferential voting in the Senate](#)', media release, 9 May 2014.
 15. N Savva, '[Conroy and Wong lead the charge as Labor goes to war with itself](#)', *The Australian*, 25 May 2015, p. 12.
 16. Ibid
 17. L Tingle, '[Happy Defence paper cools down hot Senate week](#)', *Australian Financial Review*, 26 February 2016, p. 39.
 18. G Gray, '[Second reading speech: Commonwealth Electoral Amendment Bill 2016](#)', House of Representatives, *Debates*, (proof), 24 February 2016, p. 33.

Greens Senator Bob Brown and ‘outrageous’.¹⁹ According to a media interview with the unsuccessful Greens candidate, Mr David Risstrom:

“The Senate election system needs to be reformed to allow people to vote with their preference above the line,”

Such a proposal would allow voters to ignore the deals parties have done between themselves, something that can already be achieved by voting below the line.²⁰

In December 2004 Senator Bob Brown introduced the Greens’ first Senate voting reform bill, the Voter’s Choice (Preference Allocation) Bill 2004. In introducing the Bill, Senator Brown specifically cited again the ‘perverse’ outcome in the 2004 election. The Bill, which was not passed, would have required voters to number all of the squares above the line, consistent with the full compulsory preferencing on the House of Representatives ballot paper.²¹

The Greens introduced a similar Bill in 2008, the Commonwealth Electoral (Above-the-line Voting) Amendment Bill 2008. The 2008 Bill, which did not proceed and lapsed at the end of the 42nd Parliament, would have required the voter to allocate at least four preferences above the line.²²

Following the 2013 federal election, the Greens once again called for senate electoral reform, noting wins in the Senate election of two Senate candidates who polled less than one per cent of the vote.²³

At the time of the release of the JSCEM’s *Interim Report*, Greens Senator and democracy spokesperson Senator Lee Rhiannon, expressed strong support for the reforms to the voting system. According to Senator Rhiannon, ‘the recommendation on voters determining their own preferences is consistent with the model that Greens have been calling for many years.’²⁴

The Greens continue to indicate their support for the reforms to the Senate voting system, but have stated that their support for the Bill is contingent on the existing party registration requirements for small parties are not changing.²⁵ The Greens have made no specific comment on the provision of the Bill to not allow an individual to be the registered officer of more than one party simultaneously, suggesting that the Greens do not consider the changes to requirements for registered officers to make it harder for small parties to gain registration.

On 25 February 2016 the Greens voted with the government in the Senate to defeat a motion that would have referred the Bill to the Finance and Public Administration Legislation Committee to report by 12 May 2016.²⁶ This reference would have made it unlikely that the Bill be debated before the Budget on 10 May 2016.

Minor Parties and Independents

Senator Nick Xenophon is the sole non-Greens crossbench Senators to have expressed strong support for the reforms. It was reported before the Bill had been introduced that the Government had secured Senator Xenophon’s support to pass it through the Senate.²⁷

In late 2015 Senator Xenophon had expressed support for reform to Senate voting which would require votes to number three squares above the line and 12 below the line.²⁸

Senator Xenophon had introduced a private member’s bill, the Commonwealth Electoral Amendment (Above the Line Voting) Bill in November 2013, which would have required at least one above the line vote and at least as many below the line votes as there were vacancies, similar to the full recommendation of the JSCEM.²⁹

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19. B Brown, ‘[Outrageous Senate outcome – Brown](#)’, media release, 3 November 2004.
 20. E Colman, ‘[Green with frustration over secret preference deals](#)’, *Weekend Australian*, 6 November 2004, p. 21.
 21. B Brown, ‘[Second reading speech: Senate Voters’ Choice \(Preference Allocation\) Bill 2004](#)’, Senate, *Debates*, 9 December 2004, p. 4.
 22. [Explanatory Memorandum](#), Commonwealth Electoral (Above-the-line Voting) Amendment Bill 2008.
 23. L Rhiannon, ‘[Senate outcome highlights need for reform – voter control of preference flows](#)’, media release, 10 September 2013.
 24. L Rhiannon, ‘[End to backroom preference deals - widespread backing for Senate voting reform](#)’, media release, 9 May 2014.
 25. Australian Greens, ‘[Senate voting reform – Greens plan to protect small parties, voters’ to decide preferences](#)’, media release, 12 February 2016.
 26. ‘[Selection of Bills Committee](#)’, Senate, *Debates*, (proof), 25 February 2016, p. 22.
 27. L Taylor, ‘[Senate voting changes: Coalition wins over Nick Xenophon and Greens](#)’, *Guardian Australia*, 12 February 2016.
 28. P Hudson, ‘[Xenophon gives the main parties a Senate solution](#)’, *The Australian*, 5 October 2015.

Other crossbench Senators have generally decried the changes. South Australian Family First Senator Bob Day stated that the Senate reform would ‘get rid’ of Family First and the Liberal Democrat Party and he had flagged a constitutional challenge to the laws.³⁰ Senator Day’s submission to the JSCEM Inquiry into the Bill again highlighted constitutional issues, the rushed treatment of the Bill in Parliament, and stated his preference for optional preferential voting below the line, with group voting tickets retained above the line.³¹

Liberal Democrat Senator David Leyonhjelm has stated that he is less likely to support the government’s legislative agenda due to the Senate reforms.³² The Liberal Democrats’ submission to the JSCEM Inquiry into the Bill states that the provisions of the Bill are ‘an attack on the integrity of representative democracy in our federal parliament’. They notes a concern with high levels of vote exhaustion under the proposed voting system, that it will advantage the major political parties, and that removal of group voting tickets removes power from electors.³³

The Australian Motoring Enthusiast Party Submission to the Inquiry states that they believe the changes will benefit the major parties and that the current Senate voting system continues to work well. They call for an ‘Independent Inquiry into the value of diversity in the Senate’.

Neither Senator Lambie nor Senator Lazarus have released public statements in relation to the changes nor provided submissions to the Inquiry into the Bill. Tasmanian Senator Jacqui Lambie appears to support the requirements to allocate six preferences above the line.³⁴ Senator Lazarus is cited in relation to the changes as stating that the government is pushing for greater control of the Senate.³⁵ The Palmer United Party also did not make a submission into the Inquiry. Senator Wang has called for the government to call a double dissolution election, but does not appear to have publicly commented on the Bill or the proposed changes.³⁶

Position of major interest groups

Support for the reforms from electoral experts has been widespread, although not unanimous. Much of the debate focuses on the merits of implementing optional preferential voting for the Senate, as opposed to other approaches to Senate reform such as implementing a threshold vote in order to be elected, which was played out through submissions and subsequent hearings for the JSCEM’s 2013 election inquiry.

In discussions since the introduction of the Bill, there has been general dissatisfaction by electoral experts with retaining the requirement to complete all preferences when voting below the line.³⁷ An objection to the retention of full compulsory below the line voting is also highlighted in many of the submissions to the JSCEM’s Inquiry into the Bill.³⁸

Prior to being removed in a government amendment, the proposal to not count Senate votes on election night was subject to criticism by ABC election analyst Antony Green.³⁹

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29. [Explanatory Memorandum](#), Commonwealth Electoral Amendment (Above the Line Voting) Bill 2013.
30. B Day, ‘[Senate minnows the Uber disrupters of politics](#)’, *Australian Financial Review*, 25 February 2016; D Hurst, ‘[Senate voting changes likely to stand up to high court challenge, experts say](#)’, *Guardian Australia*, 23 February 2016.
31. B Day, [Submission 52](#), Joint Standing Committee on Electoral Matters, *Inquiry into the Commonwealth Electoral Amendment Bill 2016*, 29 February 2016.
32. P Jean, ‘[Liberals cross line in Senate deal with Mr X, Greens](#)’, *Advertiser*, 24 February 2016.
33. GJ Buckley, [Submission 100](#), Joint Standing Committee on Electoral Matters, *Inquiry into the Commonwealth Electoral Amendment Bill 2016*, 29 February 2016.
34. J Massola and A Gartrell, ‘[Senate crossbench revolt over voting reform looms](#)’, *Canberra Times*, 23 February 2016, p. 4.
35. S Martin & P Hudson, ‘[Coalition allies pull support in Senate](#)’, *The Australian*, 24 February 2016, p. 1.
36. ‘[Call a double dissolution, urges Palmer United senator](#)’, *The Age*, 24 February 2016, p. 4.
37. B Raue, ‘[How hard is it to go your own way voting in the Senate](#)’, *The Tally Room: Elections and politics in Australia and around the world*, blog, 19 February 2016; A Green, ‘[Senate reform - why bother forcing below-the-line votes to be full preferential?](#)’, *Antony Green’s Election Blog*, 25 February 2016; K Bonham, ‘[Senate reform: it’s finally on!](#)’, *Dr Kevin Bonham*, 22 February 2016.
38. See, for example, M Maley, [Submission 3](#), Joint Standing Committee on Electoral Matters, *Inquiry into the Commonwealth Electoral Amendment Bill 2016*, 29 February 2016; P Brent, [Submission 13](#), Joint Standing Committee on Electoral Matters, *Inquiry into the Commonwealth Electoral Amendment Bill 2016*, 29 February 2016; G Williams, [Submission 18](#), Joint Standing Committee on Electoral Matters, *Inquiry into the Commonwealth Electoral Amendment Bill 2016*, 26 February 2016; K Bonham, [Submission 31](#), Joint Standing Committee on Electoral Matters, *Inquiry into the Commonwealth Electoral Amendment Bill 2016*, 29 February 2016.
39. A Green, ‘[Senate electoral reform bill abandons election night Senate counting](#)’, *Antony Green’s Election Blog*, 22 February 2016.

Veteran psephologist Malcolm Mackerras is the only high profile Australian electoral expert who has publicly expressed general opposition to the reforms.⁴⁰ Mackerras suggest that the proposal is ‘designed to intimidate people into voting above the line and it’s also particularly designed to stop people messing about with the order the parties have [for their own candidates].’

Mackerras’ main objection to the changes proposed by the Bill appears to be that he believes it turns the Senate electoral system into effectively a party list system (a form of proportional representation that is common in European electoral systems and is proportional but not preferential), and he believes list systems are unconstitutional. Furthermore he believes the current group voting ticket system is also unconstitutional as it does not allow for Senators to be ‘directly chosen’ by the people of the state, as is required by Section 7 of the *Constitution*.⁴¹

Representatives of small parties provided submissions to the inquiry opposing the changes that would be enacted by the Bill, either entirely⁴² or in part⁴³. Where the small parties tended to support the Bill it was in relation to the provisions such as logos on ballot papers and restrictions on registered officers. The small parties that agreed with some of the provisions of the Bill however objected to the optional preferential voting above the line provisions.

In the months and weeks leading up to the introduction of the Bill there had been considerable speculation in the media as to the form that the reforms would take, however the exact changes were not revealed until the Bill was introduced into Parliament on 22 February 2016. As the government has been dependent on the Senate crossbench (whose re-election might be affected by Senate reform) to pass any of its broader legislative agenda opposed by the ALP and the Greens, it was speculated that the government would wait until the last possible time to introduce the Senate reform legislation.

This delay and absence of certainty led to some commentators arguing that there would be insufficient time for Parliament and the public to understand and debate the changes. According to political commentator Michelle Grattan:

the many issues – especially but not only technical ones – that are involved add up to a strong case for not rushing this change. If it was so urgent, the government should have been brave earlier.⁴⁴

However given the Committee’s report was released almost two years before the Bill was introduced, and that some acknowledgement of the need to reform the Senate voting system has been actively discussed since at least 2004,⁴⁵ it could be argued that the discussion has been ongoing, regardless of the interest the media.

Financial implications

The Explanatory Memorandum notes that it will be necessary for the AEC to upgrade the its electronic systems that are used to count Senate ballot papers and for the AEC to run an education and awareness campaign to inform voters of the change. The Second Reading speech notes that the AEC will be provided with additional resources and ‘minor’ new funding to undertake these changes.

There is no indication as yet how much additional funding will be made available to the AEC for these changes. Given that an election is due in 2016, it is likely that the additional funding will be included in the AEC’s 2016-17 Budget.

In its initial form, **Item 29** of the Bill would have required that, instead of Senate ballot papers being counted at polling places at the close of the polls, only the number of Senate ballot papers should be ascertained. The ballot

40. ‘Senate voting changes likely to stand up to high court challenge, experts say’, op. cit.

41. M Mackerras, [Submission 206](#), Joint Standing Committee on Electoral Matters, *Inquiry into the Commonwealth Electoral Amendment Bill 2016*, 29 February 2016.

42. For example, The Renewable Energy Party, [Submission 7](#), Joint Standing Committee on Electoral Matters, *Inquiry into the Commonwealth Electoral Amendment Bill 2016*, 29 February 2016; J Flanagan, [Submission 11](#), Joint Standing Committee on Electoral Matters, *Inquiry into the Commonwealth Electoral Amendment Bill 2016*, 29 February 2016.

43. B Gaynor, [Submission 5](#), Joint Standing Committee on Electoral Matters, *Inquiry into the Commonwealth Electoral Amendment Bill 2016*, 29 February 2016; Sustainable Australia, [Submission 15](#), Joint Standing Committee on Electoral Matters, *Inquiry into the Commonwealth Electoral Amendment Bill 2016*, 29 February 2016.

44. M Grattan, ‘[Changes to Senate voting may be needed but should not be rushed](#)’, *The Conversation*, 16 February 2016.

45. A Green, ‘[Reform is needed of the Senate voting system run by party bosses](#)’, *Sydney Morning Herald*, 29 October 2004.

papers would then be transmitted to the Divisional Returning Officer, who again records the number of ballot papers before transmitting the ballot papers to the Australian Electoral Officer for the state, who will undertake the scrutiny of the ballot papers. The government has denied suggestions that this might be a savings measure.⁴⁶ This requirement has since been subject to an amendment, which would require that an initial first preference count be carried out before the ballot papers are dispatched, allowing some indication of the results of the Senate election on election night.

In addition to the education campaign and changes to the counting computer system, the requirement to nominate multiple preferences above the line will substantially increase the ballot paper data entry requirements for the AEC. In the 2013 Senate election 96.5 per cent of the Senate ballot papers had an above the line vote. A total of 471,030 ballot papers were marked below the line, and required preference data to be entered into the AEC's counting system (the AEC has each ballot paper data entered twice by different operators in order to avoid errors)⁴⁷.

Had the 2013 Senate election been run under the provisions of the Bill, and each above the line vote contained multiple preferences, an additional 12,941,989 ballot papers would have required data entry.⁴⁸ The additional data entry and paper handling will impose costs on the AEC that appear not to have been publically enumerated at this point. One of the submissions to the JSCEM Inquiry into the Bill from an electoral administrator experienced with the NSW ballot paper data entry costs estimated that the data entry would cost the AEC approximately \$30 million in staff costs.⁴⁹

Statement of Compatibility with Human Rights

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Government has assessed the Bill's compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.⁵⁰

Key issues and provisions

Optional preferential voting above the line

The headline provision of the Bill is the implementation of optional preferential voting above the line on the Senate ballot paper.

Recommendation 1 of the Interim Report of the JSCEM states:

The Committee recommends that section 273 and other sections relevant to Senate voting of the Commonwealth Electoral Act 1918 be amended to allow for:

optional preferential above the line voting; and

‘partial’ optional preferential voting below the line with a minimum sequential number of preferences to be completed equal to the number of vacancies:

⇒ six for a half-Senate election;

⇒ twelve for a double dissolution; or

⇒ two for any territory Senate election. The Committee further recommends that appropriate formality and savings provisions continue in order to support voter intent within the new system.⁵¹

46. M Cormann, ‘[Double dissolution election is ‘still a live option’ says finance minister](#)’, 7.30, transcript, Australian Broadcasting Corporation (ABC), 22 February 2016.

47. Australian Electoral Commission, [Submission](#) to the Joint Standing Committee on Electoral Matters, Inquiry into the conduct of the 2013 federal election and matters related thereto, 11 April 2014, p. 8.

48. Australian Electoral Commission, ‘[Senate Group Voting Ticket Usage](#)’, Election 2013 Virtual Tally Room: The official election results, 1 November 2013.

49. I Brightwell, [Submission 26](#), Joint Standing Committee on Electoral Matters, *Inquiry into the Commonwealth Electoral Amendment Bill 2016*, 29 February 2016.

50. The Statement of Compatibility with Human Rights can be found at page 3 of the Explanatory Memorandum to the Bill.

Item 20 of the Bill seeks to repeal **subsections 239(2) and (3)** and insert a new **subsection 239(2)** prescribing that a ballot paper may be marked above the line by writing at least the numbers 1 to 6 in the squares above the line in accordance with the voters' preferences (or as many preferences as there are squares if there are fewer than six squares). **Item 41** replaces Form E, and is a template of the proposed ballot paper. The form provides instructions for voting above the line 'By numbering at least 6 of these boxes in the order of your choice (with number 1 as your first choice)'.

The repealed **subsection 239(3)** allows for single ticks and crosses to be counted as a 1, and in the Bill this provision will be moved to a new **subsection 269(1)**, which deals with above the line vote formality.

Item 23 of the Bill seeks to repeal **subsection 269(1)** and to replace it with a new **269(1)** that explicitly states that, provided the ballot paper is marked with at least the number 1 (or a tick or a cross) above the line, the vote will be counted as formal. That is, while the ballot paper will instruct the voter to mark at least six preferences above the line, the amended Act will require no more than one preference above the line.

The Second Reading Speech of the Bill indicates that the formality rules implement a savings provision so as not to render informal the votes of voters who continue to vote 1 above the line. However it is of note that while the reform is being framed in terms of multiple above the line preferences, in effect the formality rules mean that it is actually implementing the above the line optional preferential voting system recommended by the JSCEM.

Item 28 of the Bill seeks to replace **Section 272** of the Act, which deals with how the preferences of above the line votes are effected through group voting tickets, with a considerably simpler explanation of how above the line votes will now be counted.

Items 2–4 seek to amend **Subsection 169(4)** to make it consistent with the new above the line measures. The amended subsection will continue to allow multiple parties to group their candidates into the one group on the ballot paper under a composite name, such as the 'Liberal & Nationals' group on the 2013 NSW Senate ballot paper that contained four Liberal and two Nationals candidates. A Submission to the JSCEM Inquiry into the Bill from the Australian Independent and Minor Parties Association, however, notes that it would be impractical for more than two parties to group together under this provision.⁵¹

Despite the potential expectation of a voter that they are voting for a party in the Senate, both the proposed repealed and new **sections 272** reveal that the Senate voting system is still a candidate-based system. In both cases only the votes below the line are counted, and the above the line vote acts as a 'shortcut' as to what below the line preference distribution the voter is expressing.

Under the proposed amendments in the Bill, preferences above the line are treated as preferences for those members of those groups below the line, and only those groups. The first above the line preference will be treated as a 1 vote for the first candidate in that group, followed by a second preference for the next candidate in the group, and so on through to the last candidate in the group. If there are additional preferences above the line, these will be treated as preferences for the candidates in those other groups, in the order in which they are listed in the group on the ballot paper.

The Bill contains a number of items intended to make the language throughout the Act consistent with the new above the line provisions, and removing language that refers to group voting tickets.

The remaining items in Part 1 of the Bill are what the Second Reading Speech refers to as 'technical amendments to the scrutiny and count process to enable the AEC to improve and centralise the count of Senate ballot papers'. These items largely seek to amend ballot paper handling procedures and the secure transmission of ballot papers to the point where the scrutiny is undertaken.

Although not provided for in the Act, the practice of the AEC has been to conduct a count of the first preference votes on Senate ballot papers at the polling place on election night after the House of Representative ballot papers are counted. This is only an indicative count, and does not constitute part of the scrutiny, as defined in **Part XVIII** of the Act.

51. JSCEM op. cit., p. xvii.

52. M Poole, [Submission 27](#), Joint Standing Committee on Electoral Matters, *Inquiry into the Commonwealth Electoral Amendment Bill 2016*, 26 February 2016.

According to the AEC's Scrutineer's Handbook:

It is only possible to get a general impression of the Senate results on election night. This is because Senate results cannot be calculated until the state or territory wide total of votes used to determine the quota (the proportion of votes required by a candidate to be elected) is known.

The Senate count on election night may begin at the same time as the two candidate-preferred count for the House of Representatives depending on the number of staff in the polling place. Results from the Senate count are telephoned through to the DRO [Divisional Returning Officer], and group totals and ungrouped results are entered into the Election Management System in the same way as House of Representatives votes.

On election night, the only figures released for the Senate are the first preference votes for groups and ungrouped candidates.⁵³

The technical amendments to the ballot paper handling processes in **Item 29** would define a set of steps through which ballot papers are removed from the ballot boxes and delivered to the Australian Electoral Officer for the state, who is responsible for the scrutiny (the counting of the vote). At the polling place the initial preferences of the Senate ballot papers would be recorded, as well as the number and condition of the ballot papers. The ballot papers will then be transmitted to the Divisional Returning Officer (DRO) of the division who checks this information and then batches up all of the division's ballot papers to be sent to the AEO for counting.

In the initial form in which the Bill was introduced, there was no provision under the proposed amendments for any determination of the results or examination of ballot papers for formality before the ballot papers arrived in the custody of the AEO. This would have led to a substantial change from normal election night commentary as to the success of parties in the Senate election. While the Second Reading Speech states that due to the multiple preferences on ballot papers that 'preference counts at polling booths will no longer be possible', under the proposed system, a first preference count of the ballot papers under the amended Act will not be substantially less indicative of the final result than the existing Senate ballot papers.

Government amendments were proposed to the Bill in the House of Representatives that would reinstate the count of first preferences prior to the ballot papers being packaged and sent to the DRO. There is no provision in either the Bill or the Act for this first preference count to have any standing as to the election of candidates—it can serve only as an early indicator to the direction of the results.

The amended form of the Bill retains the proposal that the determination of the formality of ballot papers is solely the responsibility of the AEO, and neither polling place officials nor DROs would have a role in excluding ballot papers from the count due to informality. The proposed **subsection 273(4)(c)** requires the AEO to keep a record of the preferences of all ballot papers, including informal ballot papers. The likely implication of this provision is that all ballot papers, including informal ballot papers, will be data entered for computerised counting, and it follows that the determination of formality will likely be made by the counting software.

In addition to systematising the process of determining informality, this full preference data will give the AEC and other interested parties a comprehensive corpus of information on how well voters have adapted to the new system and the sorts of errors voters make in numbering preferences.

Regardless of the occurrence of a first preference count on the night, reducing ballot paper handling and increasing the security of ballot paper transport are entirely consistent with the recommendations of the Keelty report into the missing 2013 Western Australian ballot papers, which were accepted by the AEC.⁵⁴

During his appearance at the JSCEM on 4 March 2015, the Electoral Commissioner noted that there were substantial workforce issues in counting Senate ballot papers on the night of the election. He indicated that the Keelty report acknowledged the pressure that the requirement to report Senate results on the night created on the AEC. The Commissioner stated:

We do have a workload issue on the night in the polling place, with the rise in pre-poll voting, the expansion in the size of the Senate paper and a range of other issues. If I confined my answer to a technical answer—I am being very

53. Australian Electoral Commission, '4. The scrutiny', [Scrutineers Handbook](#), 25 August 2015.

54. MJ Keelty, [Inquiry into the 2013 WA Senate Election](#), Australian Electoral Commission, Canberra, December 2013.

careful here—doing work around saving the Senate ballot paper until a later date I think would save a significant amount of work for our staff on the night and probably aid accuracy.⁵⁵

Below the line voting

Despite the recommendations from the JSCEM's *Interim report*, the Bill does not seek to implement a form of partial optional preferential voting below the line on the Senate ballot paper.⁵⁶

The only changes that the Bill proposes for below the line voting is in **Item 27**, to expand the number of errors that voter may make in numbering before the ballot paper becomes informal. In the Act **subparagraph 270(1)(b)(i)** states that provided the voter has numbered at least 90 per cent of the squares below the line, and that the 'numbers that with changes to no more than 3 of them would be in such a sequence', the vote would be counted as formal. The Bill would change the three allowed errors to five. The government has provided no information as to the number of additional otherwise informal votes this change would allow into the count.

The effect of not implementing optional preferential voting for below the line voting means that it will still be necessary for voters who elect not to vote above the line to allocate a preference to every candidate on the ballot paper (with the allowance for some errors, as noted above). Thus there will still be a significant barrier to voters adopting this option, both due to the potentially daunting exercise of filling in all of the squares and the risk of informal voting.

The Second Reading Speech notes that one of the purposes of the Bill is to 'improve the ability of the voters to express their voting intent', however this improvement does not apply to below the line voters. In effect, the Bill would make it easier for the voter to restrict the flow of preferences beyond the desired groups, however it will not make it easier for the voter to vote for members of a party other than in the order they appear on the ballot paper.

Under the changes proposed by the Bill, it would be possible and formal for a voter to vote 1 above the line for a group that consists of two candidates, meaning their effective vote as counted would be a 1 for the group's first candidate, and 2 for the group's second candidate, and no preferences for any other candidate. However by retaining the existing full preferencing below the line it would be impossible for them to cast the exact same vote by voting below the line.

It would also be impossible for the voter to cast a vote for the group's second candidate as their first preference, and the first candidate as their second preference, and no further. If the voter does not want to preference the candidates in the group in a different order to the order in which they are listed in the group's column on the ballot paper, the voter must also allocate a preference to every candidate on the ballot paper in order for their vote to be counted. If there is a group on the ballot paper that the voter does not want to allocate any preferences to, the voter cannot vote below the line.

Under the existing system, while there is a substantial difference in the appearance of an above the line and a below the line vote on the ballot paper from the perspective of the voter, from the perspective of the count both options express a preference for every candidate on the ballot paper. The above the line voter does this via the party's group voting ticket and the below the line voter by their manually entered preferences. While retaining the existing below the line option largely intact might appear to be the conservative option, combined with the change to the treatment of above the line preferences this actually constitutes a fairly fundamental change in the nature of the electoral system.

The original recommendation of the JSCEM suggested that below the line voting require a minimum number of preferences, equal to the number of vacancies to be filled (i.e., six for a normal state half-Senate election). Whilst this would have still treated above and below the line votes differently (depending on the specifics of the formality requirement—a detail that the Committee did not go into), it would have substantially reduced the burden for below the line voters.

55. T Rogers (Electoral Commissioner), [Evidence](#) to Joint Standing Committee on Electoral Matters, *Inquiry into the conduct of the 2013 federal election and matters related thereto*, 4 March 2015.

56. Joint Standing Committee on Electoral Matters, [Interim report on the inquiry into the conduct of the 2013 Federal Election: Senate voting practices](#), Canberra, May 2014, Recommendation 1.

The government has not made any comment on why it elected to follow the JSCEM's recommendation to allow OVP above the line but did not follow its recommendation to similarly allow OPV below the line. There appear to be no electoral system design principles that would require this approach. The only public speculation as to the reason behind the change by an electoral systems expert comes from Mr Antony Green, who speculates that the current below the line method was retained as an additional control over preferences by the party:

As I can think of no other reason why you would retain full preferential voting below the line, I can only presume that while the parties have been happy to put control of preferences between parties into the hands of voters, they are not at all happy about potentially delivering control of preferences between candidates into the hands of voters.⁵⁷

One effect of allowing optional preferences above the line and requiring full preferences below the line is that it in effect creates two classes of votes, each of which has different requirements for preferences and different formality rules. This is unprecedented in Australian federal elections and the full consequences of it are difficult to anticipate. It is not *prima facie* unconstitutional, however if there were a High Court challenge to the amended Act it would likely be in relation to this different treatment of above and below the line votes.⁵⁸

Whilst the JSCEM recommendation in its original form also might have had this issue, it could have been addressed through formality requirements. The NSW Legislative Council ballot paper operates in a similar way above the line to that proposed by the Bill, without the instruction to complete multiple preferences. The voting system for Legislative Council elections is entrenched in the NSW Constitution, as is the requirement that voters express at least 15 preferences on the ballot paper for their vote to be formal.⁵⁹ The *NSW Parliamentary Electorates and Elections Act 1912* subsection 81C(1A) requires a group to contain at least 15 candidates in order to have a square above the line. As such, a 1 vote above the line will express 15 effective preferences, and therefore also fulfil the below the line formality requirements.

A similar approach could have been taken with below the line voting in the Senate. If a party were required to nominate at least as many candidates as there were below the line preference required (the Committee's recommendation was for this to be the number of vacancies to be filled), a 1 vote above the line would also be formal if the voter expressed the exact same vote below the line.

Electoral expert Michael Maley makes the point that a fundamental problem of the current system of below the line voting is that voters are required to assign preferences to many candidates they have never heard of before they received the ballot paper. It is impossible for the voter to have a preference for an unknown candidate, however the voter is required to express a preference for those candidates in order to cast a formal below the line vote. He argues that the resulting ballot paper does not express the genuinely held belief of that voter as to their preference ordering of the candidates.⁶⁰ By leaving below the line voting untouched, the Bill does nothing to address this issue. The ease of allocating preferences above the line may mean that fewer voters will choose to vote below the line, ultimately meaning fewer preferences in the count and more exhausted votes.

Counting the votes

The provisions relating to the counting of Senate ballot papers, the scrutiny, make up **Sections 273 and 273A** of the Act. Beyond the aforementioned changes to ballot paper handling (**Items 29 through 40**), and removal of definitions that are defined elsewhere, the Bill proposes no fundamental changes to the actual process of counting the vote.

One potential outcome of the changed ballot paper is that many voters will continue to vote 1 above the line and that as a result there will be limited transfer of preferences between groups. This may lead to potentially large numbers of votes exhausting, where a ballot paper should be transferred but there are no continuing candidates for which that ballot paper expresses a preference. These exhausted votes do occur under the

57. A Green, '[Senate reform – why bother forcing below-the-line votes to be full preferential?](#)', *Antony Green's Election Blog*, op. cit.

58. G Williams, [Submission 18](#), Joint Standing Committee on Electoral Matters, *Inquiry into the Commonwealth Electoral Amendment Bill 2016*, 29 February 2016.

59. NSW, [Constitution Act 1902](#), Schedule 6, 1(2).

60. Maley, op. cit.

current system, but due to compulsory full preferences they generally only occur in small numbers (1,918 of the 4,376,143 votes cast in the 2013 NSW Senate election exhausted, for example)⁶¹.

While large numbers of exhausting votes would be a new occurrence for Senate election, vote exhaustion is not in itself problematic. Exhaustion does not disenfranchise the voter when it is a direct result of the voter's informed choice. If the intent of the Bill is to allow the voter greater control over their preferences, it is arguably appropriate that if there are no continuing candidates for which the voter has a preference, that the vote be set aside as exhausted. This outcome would be anticipated by the voters who have experience voting in NSW and Queensland, and now the Northern Territory—elections were optional preferential voting is in use.

It is possible, and in fact likely under the proposed amendments, that after all possible votes have been distributed there are still one or more vacancies unfilled and no continuing candidates who have achieved a quota. The existing Act makes provisions under **Subsection 273(17) and 273(18)** for the election of candidates who have not received a full quota of votes but are the remaining continuing candidates at the end of the count, where there are still vacancies to fill. **Subsection 273(17)** requires that the continuing candidate with the most remaining votes be elected, and if the candidates have equal numbers of votes the AEO has the casting vote. **Subsection 273(18)** allows this procedure to operate regardless of the number of unfilled vacancies.

Other provisions

Registered officers of political parties

Part 2 of the Bill proposed amendments to the operation of registered officers of political parties. This is in response to Recommendation 4 from the JSCEM's Interim Report:

The Committee recommends that sections 126, 132, 134 and any other relevant section of Part XI of the Commonwealth Electoral Act 1918 be amended to provide for stronger requirements for party registration, including:

an increase in party membership requirements to a minimum 1 500 unique members who are not relied upon for any other party in order for a federally registered party to field candidates nationally;

the provision to register a federal party, that can only run in a nominated state or territory, with a suitable lower membership number residing in that state or territory, as provided on a proportionate population or electorate number basis;

the provision of a compliant party constitution that sets out the party rules and membership process;

a membership verification process;

the conduct of compliance and membership audits each electoral cycle; and

restriction to unique registered officers for a federally registered party.

The Committee further recommends that the Government adequately resource the Australian Electoral Commission to undertake the above activities.⁶²

Notably, the Bill only seeks to implement the last point of this recommendation, for which the government provides no further explanation. The Australian Greens have stated that they do not support 'changes to party membership that makes it harder for small and emerging parties to obtain registration', and as such this might reflect negotiations by the government to secure Greens' support for the Bill.⁶³

61. Australian Electoral Commission, [New South Wales – Result of the Transfer and Distribution of Preferences](#), 2013 Federal Election – Half Senate, p. 224.

62. JSCEM op. cit., p. xviii.

63. The Australian Greens, '[Senate voting reform – Greens plan to protect small parties, voters' to decide preferences](#)', media release, 12 February 2016.

The registered officer of a political party is the representative of the party for the purposes of the Act, and is responsible for interacting with the AEC on behalf of the party for activities such as nominating candidates to stand for the party.

Item 52 would insert **subsection 126(2B)** which states that a person must not be the registered officer or deputy registered officer of one or more registered political parties. However it does not prevent them from being the registered officer (or deputy) of a political party registered for federal elections and simultaneously the registered officer (or deputy) of a political party registered for a state or territory elections or for a state branch of a political party.

Item 56 adds a person being the registered officer of more than one political party as one of the valid reasons for the Electoral Commissioner giving notice to a party that the Electoral Commissioner is considering deregistering the party. **Item 57** makes it clear that existing political parties have 90 days after the amendments come into effect in which to correct any issues in relation to having a registered officer who is also the registered officer of another party before it risks being deregistered, and that a party will not be deregistered under these provisions during an election.

These proposed amendments relating to registered officers are designed to prevent a single individual registering a number of political parties. One effect of the changes is that one individual creating a number of parties for the purpose of directing preferences among the parties will no longer be possible, however such a strategy is unlikely to be effective with the changes to above the line voting. It also does not prevent a group of people working in concert registering a number of political parties.

Antony Green reported that at the time of the 2013 federal election Senator Leyonhjelm was the registered officer of both the Liberal Democrats and Stop the Greens Outdoor Registration Party,⁶⁴ however this is no longer the case and it is not known whether any currently registered political parties will be affected by this amendment. Apart from the small number of submissions to the JSCEM Inquiry into the Bill that objected to every part of the Bill, there has been no real commentary on the effects or operation of this provision.

Party logos on ballot papers

Part 3 of the Bill would allow registered political parties to submit a logo of their party to be entered into the Register of political parties. The logo, if present, will be printed on the ballot paper in black ink by the relevant party's square on the ballot paper. The Bill provides provisions for the logo to be printed on both the House of Representatives and Senate ballot papers.

The amendments in the Bill essentially mirror the existing provisions in the Act for the registration of political party names, particularly in terms of how to register the logo, what is forbidden, and avenues of appeal.

The Bill seeks to amend the Act to prevent elections being declared void on the basis of an error in printing party logos on ballot papers, adding to an existing requirement that errors in names and abbreviations of parties will also not cause an election to be void (**Item 90**). It also to protect the Commonwealth and its employees from action, suit or proceedings in relation to a logo of a party (**Item 91**).

Item 63 specifies the grounds upon which the Electoral Commissioner would be able to refuse to register a logo, such as the logo being obscene, or resembles or is likely to be confused with another party's logo.

Item 61 gives the Electoral Commissioner some discretion as to the requirements for logos. It would insert **subsection 162(2AB)** that states, 'For the purpose of **paragraph (2AA)(b)**, the Electoral Commissioner may, by legislative instrument, determine requirements in relation to setting out a logo in an application.' **Paragraph (2AA)(b)** notes that the logos must meet any other requirements determined under **subsection (2AB)**. Neither the Bill nor the Explanatory Memorandum explain this item in any further detail, however given that **Item 63** specifies characteristics of logos that must not be entered in the Register, **Item 61** may refer to requirements such as electronic file formats in which the logos can be submitted to the AEC.

The *Interim Report* of the JSCEM makes no recommendations in relation to logos on ballot papers, but does note that printing logos on ballot papers was one of a variety of suggestions raised in relation to concerns that some voters might have confused the Liberal Democrats on the NSW Senate ballot paper with the Liberals and

64. A Green, '[The growth in the number of registered political parties](#)', *Antony Green's Election Blog*, 16 December 2013.

Nationals, and inadvertently voted against their intention.⁶⁵ The Liberal Democrats won the first column on the Senate ballot paper in NSW whereas the Liberals and Nationals were in Column Y, and the Liberal Democrats received roughly three times in the Senate vote in NSW as they did in any other state. This suggests that at least some voters who had intended to vote Liberal saw 'Liberal Democrats' on the ballot paper and looked no further. Whilst it is unknown how familiar most voters are with party logos, it seems likely that this change will aid at least some voters in correctly marking their desired party.

How well the ballot paper logos will operate in practice remains to be seen. The Bill requires the logos be printed above the voting square on the Senate ballot paper (**Item 41**) and to the left of the voting square on the House of Representatives ballot paper (**Item 42**). Both ballot papers are size constrained and it is unlikely that the logo could be printed any larger than 2cm square. In absolving the AEC of any legal responsibility for the execution of the logos, the Bill places the onus on the parties to ensure that their artwork will be comprehensible at this size and in black and white. As with the provisions for optional preferential above the line voting, it make take several elections for the exact impacts of these changes to be completely understood.

Concluding comments

The Commonwealth Electoral Amendment Bill 2016 is explicitly framed as a response to some of the recommendation from the reports into the 2013 federal election, particularly the *Interim Report* and its recommendation to change the Senate voting system. Both the JSCEM reports and the Bill's Second Reading Speech express the view that Senate candidates being elected on very small votes is an undesirable effect of the current Senate electoral system, and a primary purpose of the Bill is to prevent this occurring in the future.

It is likely that the amendments to the Act contained within the Bill will be successful at eliminating candidates being elected on the basis of very small above the line votes. While not substantially changing the requirements for registering political parties, it will likely remove the incentive for the registration of many small political parties and reduce the size of the ballot paper. Whether this results in a unwarranted reduction in the diversity of representation in the Senate, or prevents unpredictable results and 'gaming' of the system, is a matter of opinion.

The proximity of the introduction of the Bill to the 2016 Federal Election, which must be held by 14 January 2017,⁶⁶ and the fact that it take effect on Royal Assent, creates a substantial burden on the Australian Electoral Commission. However, the Electoral Commissioner noted in his submission to the JSCEM inquiry, that 'the AEC is ready to deliver a federal election in line with the legislation in force at the time the election is called'. However:

The AEC advised the Department of Finance that a minimum three month lead time would allow for the necessary system development and implementation to occur before Senate counting could commence. This would allow for testing and independent certification processes required for stakeholder assurance around the counting methodology.⁶⁷

The failure of the 2013 Western Australian Senate election resulted in the resignation of the then Electoral Commissioner, and led the AEC to implement a program of reform, particularly targeting ballot paper handling and security. An Australian National Audit Office report from November 2015 into the AEC stated:

Informed by various reviews and inquiries undertaken into the conduct of the 2013 election, the AEC has since commenced an extensive reform programme. The aim of the reform programme is to deliver long-term changes in culture and improvements in the AEC's policies and procedures. Some changes are expected to be in place prior to the next federal election, but full implementation of measures currently being planned or actioned is not expected until the following federal election. These timeframes reflect the extensive body of reform work that is being undertaken in parallel with the AEC's normal business-as-usual activities.⁶⁸

65. JSCEM op. cit., p. 2–3.

66. Australian Electoral Commission, *Electoral Pocketbook: Includes results from the 2013 federal election and the 2014 WA Senate election*, p. 29.

67. T Rogers, [Submission 31](#), Joint Standing Committee on Electoral Matters, *Inquiry into the Commonwealth Electoral Amendment Bill 2016*, 28 February 2016.

68. Australian National Audit Office, ['Audit summary'](#), *Third Follow-up Audit into the Australian Electoral Commission's Preparation for and Conduct of Federal Elections*, 4 November 2015.

The ANAO's conclusions raise questions about the AEC's ability to successfully implement the changes required in the Bill to both its IT systems and its policies and procedures around ballot paper handling, and the requisite changes in training to polling place staff, given the projected timeframes for their current reform process. As noted above, the AEC has been reported as stating that it requires at least three months to implement the changes in the legislation.⁶⁹ However in June 2015 media reports stated that the Electoral Commission had told the JSCEM that it would have difficulty implementing the changes before Christmas.⁷⁰ In a submission to the JSCEM Inquiry into the Bill, the Electoral Commissioner notes 'the level of risk inherent in implementing changes to electoral processes increases significantly with any compression of the timeframe between a Government announcement, subsequent legislative change and the announcement of the federal election', however states that he believes that the AEC could still return the writ in the timeframe allowed by the Act.⁷¹

The time to implement the changes takes particular significance in light of recent media speculation of a 2 July 2016 double dissolution election that may be called on 11 May 2016.⁷² A combination of the Constitution and the Act require that the writs be returned (that is, the election counting be completed and the results declared) within 110 days of the dissolution of Parliament.⁷³ For an 11 May election announcement, the writs must therefore be returned by Monday 29 August 2016. This leaves the AEC 59 days in which to data-enter up to 15 million ballot papers and run the count. For comparison, data-entering the 471,030 below the line ballot papers for the 2013 election (excluding the WA recount), was completed within 31 days of the election.

The alternative to data entry is a manual count of the Senate ballot papers, a process which has not been undertaken by the AEC since the introduction of computerised counting in 1998, and which the Electoral Commissioner has stated that he would like to avoid if possible.⁷⁴ In his submission to the Inquiry into the Act the Electoral Commissioner states that the AEC has evaluated 'the feasibility of conducting a manual Senate count and the current assessment is that it would carry such complexity and inherent risk or error that it would not be practicable'.⁷⁵ The amended formality rules for below the line votes make a manual count particularly problematic, as establishing a consistent numbering sequence with up to five breaks across potentially 100 or more preferences will be both time-consuming and error-prone.

Finally, the prevailing debate appears focused on which political parties stand to gain electorally from the changes in the Bill. Differing analyses, can be found that purport to 'prove' that the changes would both entrench Coalition dominance of the Senate,⁷⁶ and conversely give the Greens and the ALP a blocking majority⁷⁷ in the Senate.

The history of electoral reform in Australia since Federation is replete with accusations that any given reform is motivated by partisan political advantage. In their canonical book on Australian electoral systems, political scientists David Farrell and Ian McAllister write:

In 1918, with the introduction of the alternative vote (AV) for elections to the House of Representatives, Australia became the first country to adopt preferential voting at the national level. Thirty years later, when the single transferable vote (STV) was introduced for Senate elections, the shift to preferential voting was complete. At the time, these reforms were seen as nothing more than short-term political fixes by politicians anxious to cling onto power. In 1918, the essence of the 'Flinders deal' was an attempt by the Hughes government to prevent the right-of-centre parties from splitting their support to the benefit of the Labor party. In 1948, it was the turn of the Chifley

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69. D Hurst and L Taylor, '[Labor to oppose Turnbull's move to overhaul Senate voting system before election](#)', *Guardian Australia*, 22 February 2016.
 70. P Coorey, '[Early election opens seats to micro parties](#)', *Australian Financial Review*, 25 June 2015, p. 7.
 71. Submission 31, op. cit.
 72. See, for example, D Shanahan, '[Turnbull counts mounting cost of leadership change](#)', *The Australian*, 27 February 2016, p. 17.
 73. *Electoral Pocketbook*, op. cit., p. 27.
 74. T Rogers (Electoral Commissioner), Finance and Public Administration Legislation Committee, [Official committee Hansard](#), 9 February 2016, p. 35.
 75. Submission 31, op. cit.
 76. H Aston, '[Coalition could clean up in Senate if vote reform deal is finalised](#)', *The Sydney Morning Herald*, 17 February 2016, which was refuted by analysis in A Green, '[Would electoral reform deliver the coalition a Senate majority at a double dissolution election](#)', *Antony Green's Election Blog*, 17 February 2016.
 77. D Harrison, '[Labor and Greens would control Senate under proposed reforms, research finds](#)', *The Sydney Morning Herald*, 24 June 2015.

Labor government to replace the Senate's preferential block system with STV, in a manoeuvre to diminish the expected electoral gains of the new Liberal leader, Robert Menzies.⁷⁸

So far as it can be predicted, the actual likely effect of the reforms on electoral outcomes is that the system will continue to elect members of the parties roughly in proportion to the share of the first preference vote they receive, without the last seat in a state being allocated to an essentially random candidate on the basis of negotiated preference exchanges. Major parties will continue to gain control of the Senate where they receive the majority of the votes, while minor parties will likely find less electoral success through establishing preferencing deals with each other. Most voters will continue to not understand how the Senate electoral system works, however will likely be less surprised when the results are announced.

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78. DM Farrell and I McAllister, *The Australian electoral system: Origins, variations and consequences*, Sydney, UNSW Press, 2006, p. 21.