

Hare-Clark for the Legislative Council

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Abstract

In this submission to Victoria's Constitution Commission we argue that the Hare-Clark form of quota-preferential proportional representation should be adopted as the electoral system of the Victorian Legislative Council.

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1 Introduction

The Victoria-Tasmania Branch of the Proportional Representation Society of Australia (PRSAV-T)¹ supports the adoption of the Hare-Clark electoral system for the Victorian Legislative Council. The Hare-Clark system is a form of quota-preferential proportional representation (also known as the Single Transferable Vote) with rotation of candidates' names on ballot papers, and the filling of casual vacancies by recounting the original ballot papers. The Society also advocates a referendum on the matter of the choice of electoral system, and the entrenchment of the electoral system so a bare majority of sitting members in each House cannot, alone, change significant aspects of the electoral system.

The main item in the Commission's terms of reference that our submission addresses is the first one: the responsiveness and responsibility of the Legislative Council (we concentrate particularly on its responsiveness). There are several points in the terms of reference for the Commission that the Society has no set opinion on, but we do discuss their inter-relationships. For example, the size of the Legislative Council, whether there are overlapping terms, the number of members per province and the number and size of provinces are all inter-related. We do not comment at all on some other points, such as the length of the parliamentary term and the powers of the Legislative Council.

Our submission is structured as follows. In Section 2 we outline four key principles that are a prerequisite for our support of any new electoral system. In Section 3 we discuss these principles in more depth, with specific reference to aspects of electoral systems that might threaten these principles. In Section 4 we present more detailed models of how Hare-Clark could be used for the Legislative Council. In Section 5 we suggest a mechanism for moving to a reformed Legislative Council, including a referendum and a new Electoral Act with key aspects entrenched. Appendix A presents analyses of recent Legislative Council elections, showing how undemocratic the current system of single vacancy elections is compared to Hare-Clark. Appendix B summarises how our submission relates to each of the Commission's terms of reference.

2 Principles

Our support for any electoral system for the Legislative Council is conditional on four basic principles that ensure a democratic House that is responsive to the voters of Victoria:

- direct election by the voters of all members,

¹Home page <http://www.prsa.org.au>; This submission is available on our Web site in a variety of formats including HTML with appropriate hyperlinks.

- quota-preferential proportional representation,
- ballot papers that collectively confer no advantage to any candidate or candidates, and
- casual vacancies filled by a re-count of the original ballot papers.

These principles, outlined in more detail below, are essential conditions for an excellent electoral system. A system that violates any of the principles is defective, and we would not support its adoption, even if it is somewhat less defective than the current system. If Victoria is to spend the time, money and effort to change the electoral system for the Legislative Council, as we believe it should, then surely an excellent system should be adopted. Later we argue that any change should be dependent on being passed at a referendum, and this makes it even more important that an excellent system be an option for Victorian voters. Anything less increases the likelihood of the whole exercise being a huge waste of time and money. Australia has had a long history of excellence in electoral reform and this is an opportunity for Victoria to continue this tradition, in which it participated so splendidly by being the first jurisdiction in the world to legislate for the secret ballot, in 1856.

2.1 Direct election

It is difficult to argue against the fundamental democratic principle that all representatives should be directly elected by the voters. Any less direct method of election (or appointment) distorts the input of the voters and naturally lessens the responsiveness and accountability of representatives to the voters. Despite this, systems that violate this principle abound, including some proposed for the Legislative Council.

2.2 Quota-preferential proportional representation

The essence of representative democracy is that the representatives share the diverse views of the voters in proportion to the number of voters with those views. Quota-preferential proportional representation is the only electoral system that can guarantee this. With the current system of single member electorates, up to half the votes in each electorate can be wasted (not contribute to electing anyone) and that has clearly been very unrepresentative (see Appendix A). Using quota-preferential vote counting with at least five members per electorate, nearly all votes help elect a representative. With significantly larger numbers of members per electorate, practical problems such as the number of candidates and size of ballot papers can become significant, without greatly increasing the degree of proportionality. Thus we advocate a moderate number, between five and eleven.

2.3 Unbiased ballot papers

The form of ballot papers should not confer any advantage on any candidate or candidates relative to other candidates. There must be a “level playing field” in order to ensure the result of the election reflects the wishes of the voters without distortion. There are two main ways this principle may be violated.

- The first is by fixing a single order for candidates on the ballot paper, allowing candidates at the top the advantage of the donkey vote; this should be eliminated by Robson Rotation — printing ballot papers in batches of equal size each of which lists the candidates’ name in a different order.
- The second is by allowing Group Voting Tickets. This is a much more serious way electoral results are distorted. We believe it poses the most serious threat to responsiveness of the Legislative Council with a new electoral system. It must be avoided.

2.4 Countback

Casual vacancies should be filled by “countback” — a re-count of ballot papers cast at the original election for the seat in question. Any other method can distort the proportional representation achieved in the original election.

3 Discussion

3.1 Direct election

Fortunately, Australia has steered clear of electoral college systems, and party list systems such as the d’Hondt variant used in the ACT have generally been short lived. All members of the Legislative Council are currently directly elected. Nevertheless, there are threats to this principle, most importantly in the area of filling casual vacancies. We note that the original version of the *Constitution (Proportional Representation) Bill 2000* allowed casual vacancies to be filled by appointment in some circumstances. We applaud the fact that this was later amended, though not to our preferred method. In the Senate, casual vacancies are filled by appointment and recently the number of senators that have not been elected by the voters has been as high as 10 percent of the Senate. In contrast Western Australia has a constitutional requirement that all members of both Houses be directly elected by the voters and this provision has prevented legislation that would have allowed member to be appointed to fill casual vacancies (instead, countback is now used).

Section 73(2)(c) of the Constitution Act 1889 of Western Australia² is a good model for direct election of all members. That provision, which was introduced by Sir Charles Court's Government, is doubly entrenched. The provisions in Sections 7 and 24 of the Commonwealth Constitution are also entrenched, but unfortunately they do not yet extend to casual vacancies. If direct election were entrenched, it is hard to envisage such a safeguard being repealed at a referendum. Entrenchment is strongly recommended, as recent New Zealand electoral experience shows how easily a substantial element of indirect election can be accepted by voters if the question and the issue are not explicitly put to them as a proposal to relinquish the protection of direct election.

Group voting tickets are technically a shorthand for a predefined set of preferences and hence do not violate the principle of direct election (arguably, split tickets are an exception, but this has not yet been legally tested). Nevertheless, they can result in the same consequences as party list systems — most preferences run according to what the parties dictate rather than the voters opinions of different candidates and hence candidates are more responsive to internal party pressures than to the voters. In Senate elections, a large majority of voters vote “above the line” without deliberately choosing the set of preferences that option translates to. Despite legislation requiring the display of group voting tickets or the availability of an explanatory booklet in all polling places, members of the PRSA have noted many cases where this has not been done or the print size renders the display unreadable to many voters. We discuss group voting tickets in more detail below.

3.2 Quota-preferential proportional representation

Quota-preferential proportional representation is widely regarded as the fairest electoral system. All systems of proportional representation ensure that the elected body reflects the views of the voters in a broad sense. Unlike single member systems, there are no “safe seats” where the election result is a forgone conclusion and hence all political parties can safely ignore the wishes of the voters. Every seat is marginal and hence parties are generally more responsive to all voters. Because the quota-preferential system uses direct election, the voters have a choice of individual candidates (rather than just parties or groups). Instead of just one member of each party being pre-selected, and many voters being faced with a choice of “the lesser of two evils”, each voter can typically choose from a range of candidates from each party. This aspect further improves responsiveness to the voters in two ways, especially with the enhancements of the Hare-Clark system (filling casual vacancies by countback and using Robson Rotation for ballot papers).

²See <http://www.parliament.wa.gov.au/parliament/home.nsf>

First, the voters can influence the policy direction of parties. For example, if a candidate with strong views on a particular issue such as environmental policy is elected, this is likely to influence party policy. Second, if a sitting member is not seen to do a good job of representing their constituents during a term of office, they run the risk of not being re-elected. We discuss this further in Section 3.4.

Quota preferential systems can vary in several ways. The most significant is the number of vacancies in each electorate, sometimes referred to as the district magnitude. The formality provision for votes is also important. Finally, the precise set of rules used to count votes can vary and affect the result in very close elections. We discuss these points below.

3.2.1 District magnitude

The number of votes a candidate must receive in order to be elected under quota-preferential methods, called the quota, depends on the district magnitude. The quota is set to be the smallest number which prevents too many candidates being elected (it is one vote more than the total number of votes divided by one plus the district magnitude). For example, with nine members to be elected, a candidate must obtain slightly more than ten percent of the votes to be elected. Up to one quota of votes can be wasted; this gives a measure of how many voters are not adequately represented and how far the result deviates from “perfect” proportionality (which is, of course, impossible to achieve). If the quota is too large (the district magnitude too small) a substantial fraction of the votes can be wasted and the Legislative Council can be unrepresentative, as it often has been until now. We consider that the district magnitude must be at least five (and preferably at least seven) to ensure a reasonably representative Legislative Council. The district magnitude should also be an odd number so that if a party obtains an absolute majority of votes in an electorate it is guaranteed to obtain an absolute majority of seats (with an even number it may only obtain half the seats).

The district magnitude, the size of the Council, the size of the electorates and the number of overlapping terms (if any) are interdependent — it is not possible to change one without changing another. The district magnitude is proportional to the Council and electorate sizes and inversely proportional to the number of overlapping terms. Doubling the size of the Council or the size of electorates or abolishing two overlapping terms doubles the district magnitude and hence (approximately) halves the quota, other things being equal. To maximise proportionality and minimise vote wastage in theory, we should therefore have the largest possible Council, a single state-wide electorate and no overlapping terms. However, there are several issues that mean this is a poor solution in practice.

First, there is a trend towards smaller parliaments and it is doubtful the

voters of Victoria would like to see a large increase in the size of the Legislative Council; the status quo or a slight decrease seem to be more widely supported. Second, there are advantages in electorates having some local or regional association, so elected members represent voters in a smaller area rather than the whole state and particularly voters outside Melbourne feel better represented. Candidates and members can also maximise their contact with voters if the electorates are smaller than the whole state. Third, the number of candidates standing and the resulting size of the ballot papers would make voting an arduous task. Every candidate in the whole state appears on the ballot paper and the particularly small quota can encourage many small parties or individuals to stand. It would be just too difficult for most voters to make an informed decision about their preferences. It is likely that mechanisms such as group voting tickets would be introduced which make it easier to vote but actually take power away from the voters (see Section 3.5). We recommend that no more than eleven candidates be elected per electorate. Seven and nine member electorates (our preferred sizes) still give good proportionality while retaining regional electorates and manageable ballot papers and is compatible with a single term or two overlapping terms with a Council size similar to now.

3.2.2 Formality of votes

It is important that voters express multiple preferences when voting. If few voters express multiple preferences there is not enough information for any vote counting system to arrive at a good democratic result. Too many votes can be wasted (become exhausted, in vote counting terminology). A vote for a candidate who has insufficient support to be elected cannot be used to help elect any alternative candidate because no information on further preferences is provided. More subtly, but just as important, a vote for a candidate who has more than enough support to be elected cannot help elect any additional candidates.

Despite the problem of vote wastage due to exhaustion, it is also important that expressing preferences is not too arduous for voters, and voters are not penalised unduly for making mistakes. It is absolutely unnecessary for all voters to express preferences for all candidates. Much smaller numbers of preferences are needed to make this form of vote wastage of little significance. Compulsory marking of all preferences can actually increase vote wastage due to mistakes rendering votes informal, and also forces voters to express preferences beyond the point where they really care and, in most cases, beyond the point where they would actually be considered in a count. It is a waste of time and effort for voters, scrutineers and polling officials.

We recommend that voters be encouraged to express as many preferences as possible. However, they should not be instructed to mark any more preferences than the district magnitude (for example, instructing voters to

mark all preferences should be avoided). Furthermore, any vote with at least the first preference unambiguously indicated should be treated as formal, as done in the ACT, Eire and Malta. Preferences should be used up to the point that they are no longer expressed unambiguously. There are ample precedents for the instructions to voters being more stringent than the actual formality provisions (Victorian voters experience it in Senate elections, for example).

3.2.3 Counting rules

There are many different sets of rules for counting votes in quota preferential methods. They all achieve the same result in elections that are not very close but typically make different compromises to simplify counting (most have been designed for counting votes by hand). However, some are certainly better than others, and since it is almost certain that votes will be counted by computers if such a system is adopted, it would be sensible to choose a technically good set of rules. The Senate rules have been used as a model for local government electoral systems in Victoria but have some significant flaws (they can violate the “one vote, one value” principle in some circumstances³). A significantly better model would be the ACT Assembly rules⁴, which we recommend.

3.3 Countback

The only direct election alternative to countback is holding by-election polls (for whole multi-member electorates), which is costly for several reasons.

- First, there is the financial cost.
- Second, they can form a major distraction from more important issues of government.
- Third, due to the time needed to conduct them, they can lead to protracted uncertainty about the balance of power. Where countback is used, casual vacancies are filled with a minimum of fuss.

The result of a countback is nearly always that a member of the same political party is elected, preserving the proportionality of the House and assuring stability. By-elections, because of their single-member nature, do not fit well with multi-member systems and can disrupt proportionality due to the wastage of up to half the votes. This and the fact that voters (in the electorate in question) can change their mind between the original election and the by-election leads to greater instability.

³A vote that is transferred, at some fractional value, as part of a surplus of an elected candidate can later have its value increased if it is transferred as part of another surplus.

⁴See <http://search.austlii.edu.au/au/legis/act/consol.act/ea1992103/>

A further benefit of countback is that voters generally have an increased choice of candidates. Typically, major parties stand several more candidates than they expect to be elected, even with their most optimistic estimate. The possibility that one or more of their elected candidates will vacate his or her seat means that it is desirable for parties to have additional candidates who may be elected in a countback. This enhances the opportunities for voters to be selective in who they support from a particular party. It moves unwarranted, excessive, and often unfairly used power away from pre-selection panels within party organisations and delivers it to the voters. In the long term, as various Tasmanian premiers have noted, that is really in the parties' best interests.

An example of the way in which the closed shop of pre-selections for single-vacancy elections is widened and democratised was recently reported⁵. In the current pre-selection of Liberal candidates for the Tasmanian state five-member electorate of Denison it appears a clear majority of pre-selectors are opposed to a candidate for pre-selection, Mr Greg Barns, who is President of the Australian Republican movement. However, rather than just preselecting one candidate, they normally preselect five, of whom they can expect only two or three to be elected at the General Election. The remaining candidates will not be elected then, but they might be needed to fill casual vacancies. Just as importantly, they enable the party to test the popularity of their own various candidates with the electors. It is known that republican views are held by a significant number of Liberal voters, but what is not known is how many of those voters would vote for another party if there were not even a single Liberal republican available. The real choice of candidates helps to maximise votes for broad parties, and to avoid arbitrary desertion by voters to other parties over single issues. The outcome of that real choice also reveals for public information the strength of certain factions within parties, particularly when Robson Rotation is used (see Section 3.4).

There are two models of countback used in Australia. The model used in Western Australia since 1987, where all ballots cast in the original election are re-counted, and the Hare-Clark model used in Tasmania⁶ since 1918 and the ACT⁷ since 1995, where only the quota of the vacating candidate is re-counted. Both are acceptable, but the PRSA, and informed opinions of senior electoral officers in Tasmania, the ACT and Western Australia, favour Hare-Clark. Compared to the WA model, which appears in Victoria's *Constitution (Proportional Representation) Bill 2000*, advantages of Hare-Clark are:

⁵“PM's critic may lose bid for seat”, *The Age*, 20/11/2001, page 4.

⁶The Tasmanian *Electoral Act 1985*; see

<http://www.thelaw.tas.gov.au/scanact/ACTTITLE/F/E/>

⁷The ACT *Electoral Act 1992*; see

<http://search.austlii.edu.au/au/legis/act/consol.act/ea1992103/>

- It is more likely to retain the same party balance,
- it is simpler, quicker and cheaper,
- the voters that effectively lose their representative are those that choose the new representative, and
- there is no need (as there is in the WA model) for a savings clause to be included in the legislation to ensure that no other member is displaced as a result of a countback.

3.4 Robson Rotation

Using rotation of names on ballot papers was instigated in Tasmania by Hon. Neil Robson, as a Private Member's Bill in 1979⁸. It has been used very successfully for the Tasmanian House of Assembly and Legislative Council since 1980. More recently it has been adopted for the ACT Legislative Assembly. In 2001, legislation was passed in the ACT to further enhance the system by increasing the number of distinct permutations of candidates names used. This results in an even more level playing field for the different candidates, making the result of the election more truly respect the wishes of the voters. The slightly increased cost of printing ballot papers is not significant considering the overall cost of an election and Robson Rotation certainly reduces undemocratic distortions. The large parties still retain the power, and the funds, to independently advertise and promote their preferred order of candidates, and probably would continue to do so, although they have hardly ever been moved to do so in Tasmania. Their influence should come about because they have positively persuaded voters to vote for candidates in a particular order, rather than being gained by an appeal to voters' convenience.

In 1985 there was a major overhaul of the Tasmanian Electoral Act, while Mr Robson was the Minister. The 1986 Tasmanian elections dramatically showed how a level playing field for candidates can deliver a result that would be unthinkable in other electoral system where parties and pre-selection panels have a strong influence on the result. The major parties retained the same number of MHAs — 19 Liberal and 14 ALP. The only change in party numbers was two Green members replacing a Democrat and an independent. However, there was a dramatic change in the makeup of the House, with more than 50% of the MHAs being new. Only four members elected in 1982 did not stand — 15 sitting members contested the election but were rejected by the voters. Many voters kept their party allegiance but exercised their power to dump candidates that performed unsatisfactorily.

⁸The brief reports in Quota Notes 59 and 60 (<http://www.prsa.org.au/qn/59.html> and <http://www.prsa.org.au/qn/60.html>) describe some of the motivation for the introduction of Robson Rotation.

In the ACT MLAs have also lost their seats without the party balance changing and the voters have played a crucial role in changing the factional balance within the ALP. After the poor result for the ALP in the 1998 election, two external reviewers noted that because the Federal seats are not marginal seats, the sub-branches did not have a marginal seat campaigning culture. One of the recommendations was to abandon the policy of recommending a set preference order for ALP voters. Only by becoming more responsive to voters and reducing the control of the party (and particularly one faction within the party) has the ALP been able to reverse its electoral defeats and return to government in 2001.

The number of first preference votes a candidate obtains is a measure of their popular support amongst the voters. In electoral systems with biased ballot papers, it is often possible for candidates to be elected with very small numbers of first preference votes. In response to a question raised by the Victorian Opposition Leader, Dr Denis Napthine, when PRSAV-T representatives met him, research was conducted to compare the effect of Robson Rotation with the systems that preceded it in Tasmania and the stage-managed order in which candidates' names appear on ballot-papers for the Senate. The research showed that the minimum percentage of first preference votes that has ever been gained by a Tasmanian MHA elected at a PR poll is some 67 times larger than the minimum percentage of first preference votes that has ever been gained by any Australian senator elected at a PR poll⁹. That is a significant demonstration of the substantial way in which the Hare-Clark system involves voters in considering the relative merits of various candidates, and why systems with stage-managed ballot-paper ordering of candidates' names do not. Hare-Clark ensures that a candidate must have substantial support amongst the voters in order to be elected; this cannot be said for other electoral systems where fewer candidates stand and ballot papers are biased.

The research also showed that the minimum percentage of first preference votes that has ever been gained by a Tasmanian senator elected at a PR poll is some 18 times larger than the average of the minimum percentage of first preference votes that has ever been gained by a senator elected at a PR poll in each of the remaining States, where the lack of Hare-Clark experience has led to voters being far less inclined to use their power of considering individual candidates' merits and selecting candidates in their own order of preference.

Thus, by using quota-preferential with countback (which ensures a greater selection of candidates) and Robson Rotation, power is given to the voters rather than parties, factions within parties, pre-selection panels *et cetera*. Parties, factions and individual members of parliament must be responsive

⁹See <http://www.vicnet.net.au/~prsa/elections/1ptasmha.htm> and <http://www.vicnet.net.au/~prsa/elections/1psenate.htm>

and accountable to the voters or they run a high risk of being punished at the ballot box. Voters are empowered and participate more actively in the political process. No other electoral system gives as much power to the voters and comes as close to the ideals of democracy.

3.5 Group Voting Tickets

Any mechanism that gives some candidates a better chance of being elected than other candidates is unfair. We are not primarily concerned with unfairness to candidates themselves; typically most candidates are members of political parties that use and support group voting tickets. We are concerned with unfairness to the voters whose opinions fail to be represented due to the influence of the small number of people that effectively control the formulation of group voting tickets. There is little doubt that group voting tickets have changed the result of elections.

The March 1999 New South Wales poll for half of the Legislative Council was a startling example. The whole state was a single electorate and a record 264 candidates stood and a record number of 80 parties or groups resulted in a huge ballot paper. Alan Corbett's surprise election in 1995 to represent "A Better Future For Our Children" appears to have spawned a plethora of parties registering catchy names at the last moment and agreeing to put similar parties ahead of larger longer-established ones on their registered voting tickets. Glenn Druery of "Republic 2001/People First Party" cheerfully admitted to bringing together over 40 such groups for agreements about preferences. Commentators that said his election was almost certain were proved wrong. The effect of the lodged tickets, once the ALP and Coalition had run out of surpluses, was to elect Malcolm Jones. His "Outdoor Recreation Party" gained only 7264 first preference votes, less than five percent of a quota. The low number of first preference is not the main concern — elected candidates of the major parties that are not first on the ticket are frequently elected with tiny first preference totals. The main concern is that his election was not due to the genuine preferences of the voters but due to the deals made by Glenn Druery and others. It is at least plausible to suggest that the electoral system delivered a result that did not accord with the preferences of the voters, leaving them with poorer representation.

The presence of group voting tickets together with the low quota (due to the single state-wide electorate) encouraged a large number of "micro-parties" and preference swapping deals that led to Malcolm Jones being elected with very little popular support. It is rational to expect that any candidate elected in part due to any influence other than the voters' opinions will be less responsive to the voters. It must be tempting at least for Malcolm Jones to do the right thing by Glenn Druery rather than the voters he supposedly represents. Similarly, elected candidates from the major parties owe their election to the popularity of the party as a whole and their position

within the group voting ticket of the party. Due to the overwhelming number of voters who vote “above the line”, candidates are almost always elected in the order of the group voting ticket — candidates high on the ticket are guaranteed election and those low on the list are (almost) guaranteed not to be elected. Thus elected major party candidates are likely to be more responsive to the party power brokers who determine the order of candidates on the group voting ticket than the voters. Results such as the 1986 Tasmanian elections (see Section 3.4) are unheard of where group voting tickets are used — a sitting member with enough party or faction support can be unresponsive to the voters without risking their seat.

Despite their undemocratic nature, group voting tickets are popular with the politicians that devise electoral systems in Australia and are being used in a growing number of jurisdictions. Several arguments have been used to support their introduction, but these arguments are faulty or better alternatives exist.

3.5.1 Informal voting

One of the original stated reasons for introducing group voting tickets to Senate elections was to reduce the high incidence of informal voting, around 10% at the time. By requiring voters to only mark one preference above the line, informal voting did indeed decline. However, an alternative way to reduce the number of informal votes is to not require all preferences to be marked, as suggested in Section 3.2.2. Allowing the number of preferences to be as low as the district magnitude (partial preferential), or even a single preference (optional preferential) would reduce the incidence of informal voting without introducing the distorting influence of group voting tickets.

In 1948, when proportional representation was introduced for Senate elections, there was significant debate over the stringent formality requirements proposed, and the problem of high numbers of informal votes was foreseen. Dr Evatt, the Minister in charge of the Commonwealth Electoral Act, was concerned with the possibility of high numbers of exhausted votes, though in his second reading speech acknowledged that the formality requirement “might have the effect of continuing to produce a fairly high informal vote”. Various coalition MHRs such as Dame Enid Lyons pointed out that marking all preferences was unnecessary, as experience in Tasmania had showed, and would surely lead to a high informal vote. Mr Archie Cameron, Member for Barker, moved an (unsuccessful) amendment to accept ballot-papers marked with at least as many preferences as there were vacancies, as in Tasmania. Eire, Malta and the ACT currently have the most liberal of formality provisions for quota preferential elections — only a single preference is required. Exhausted votes have not been seen as a significant problem to date in these elections and informal voting is low: around 1% in the first two and around 4% in the ACT (the higher figure

due in part to a remnant of the “abolish self-government” movement).

3.5.2 Preponderance of voting “above the line”

Most people have chosen to vote “above the line” where that option has been made available. For example in 1999 NSW poll mentioned above, around 95% of formal votes were above the line. One reason for this is undoubtedly because voting above the line requires less effort: marking one preference versus marking multiple preferences below the line (15 in the NSW Legislative Council). If the Senate voting rules had been used, voters would have been instructed to mark all 264 boxes below the line and correctly marking fewer than 238 preferences would have rendered the vote informal. There is no good reason for requiring a large number of preferences below the line — it only serves to discourage below the line voting.

A large percentage of voters are also rather indiscriminating. They often know which party they want to give their highest preferences to but don't care much about which members of that party get elected or who else gets elected. Parties actively discourage voters from being discriminating. How to vote cards from the Liberal Party tell voters there is “no need” to mark below the line and those from the Labor Party say “do not” mark below the line. Indiscriminate voting strikes are the core of democracy but above the line voting is not a remedy for this problem, it makes the problem worse. By making the electoral system less responsive to voters, there is less incentive for voters to be discriminating. There is little point in a voter taking the time to refine their opinions about various candidates if their vote is very unlikely to have an impact due to being wasted (in a single member system) or being swamped by the tide of ticket votes (in a PR system that used ticket voting).

An un-responsive electoral system results in a vicious cycle of declining voter empowerment. Voter involvement in the democratic process declines because it is so often fruitless and frustrating, and as more voters give up wielding what little power they have, it becomes even more fruitless and frustrating for the rest. In contrast, a responsive electoral system breeds voters that are empowered. We believe it is no coincidence that below the line voting for senate elections is most popular in the two constituencies that use the most responsive electoral system for their own parliaments, that is, Tasmania and the ACT (hence the difference in first preference votes for senators mentioned in Section 3.4). Melbournians may claim their city is the cultural centre of Australia and joke about unflattering stereotypes of Tasmanians, but the fact remains that Tasmanians are the more politically sophisticated.

It is a mistake to think that the preponderance of voting “above the line” implies that the Senate style voting system is popular. When faced with that system, voters do tend to vote above the line. However, they have

never chosen that voting system — it has been chosen by politicians. The system is undoubtedly popular amongst small but powerful groups within parties, the groups which the system serves. However, popularity of the system amongst voters has never been tested. In contrast, the voters of the ACT *have* chosen Hare-Clark and there was a public outcry when politicians attempted to introduce group voting tickets at the last minute. Later the voters chose to entrench key aspects, including Robson Rotation and the lack of group voting tickets. Thus the only clear evidence we are aware of strongly suggests that the Senate style voting system is less popular amongst voters than the Hare-Clark system.

3.5.3 The party faithful

Above the line voting is also convenient for those who are not necessarily lazy or indiscriminating, but are faithful to a particular party. However, use of group voting tickets does not necessarily result in the most desired outcome for these voters. First, parties sometimes make strategic mistakes with their group voting tickets, disadvantaging the interests they serve. Second, the major parties routinely minimise their representation by encouraging ticket voting, which can lead to early exclusion of their candidates during vote counting.

In Western Australia in 2001 the group voting tickets of One Nation were a key reason why the Greens gained the balance of power in the Upper House. Specifically, the decision of One Nation to place the Greens before the Liberals on its Registered Voting List in both the Agricultural and Mining and the Pastoral Regions resulted in Green candidates being elected instead of Liberals. After the election Labor and the Greens together had 18 of the 34 seats. It is doubtful that most faithful One Nation supporters realised the consequence of the group voting ticket or were happy with the outcome. It seems that group voting tickets allowed a mistake on the part of a small number of party insiders to significantly reduce the effective representation of One Nation voters.

Parties that have a reasonable expectation of having more than one candidate elected minimise their representation by encouraging all their voters to vote in the same way, which is particularly easy with group voting tickets. The candidates high on the ticket are elected at the start of the counting of votes. However, those lower down have very few first preference votes and even after the surpluses of elected candidates are distributed may have a reasonably small total. This can result in the candidates being excluded before candidates from minor parties. The preferences then flow from the major party to a minor party candidate, who is eventually elected. A more even distribution of votes for their different candidates can result in the election of the top candidates being delayed until later in the count, but the lower candidates also remaining in the count for longer because they have more

votes. A candidate from a minor party is then excluded because they have fewer votes, and their preferences flow on to the major party candidate, who is eventually elected.

For example, in the 1993 half Senate election, Labor received more first preference votes nation-wide than the Coalition but had fewer senators elected. This was in part due to the close contests in Western Australia and Queensland where a Green and Democrat filled the last vacancy. With a more even distribution of votes for the major parties, as would have been the case without group voting tickets, it is likely that these minor party candidates would have been excluded in the count (due to higher totals for the major party candidates). In both these cases it would have been the Labor party candidate who won.

Members of the major parties have been made aware that a single ticket minimises their representation and maximises the representation of minor parties. It has been known for many years and in 1993 the Proportional Representation Society publicised its submission to the electoral enquiry and an article in *The Canberra Times*¹⁰. Major parties could have adopted mechanisms such as multiple tickets or “split tickets” to spread out the votes for their candidates. This increases their representation and gives discriminating voters more control over which candidates are elected. Instead, they have continued to use group voting tickets in a way that minimises their representation. It seems that the power brokers within parties prefer to risk their party losing a Senate seat or two than loosen their grip on which candidates get elected. It is doubtful that the bulk of the party faithful share this preference.

4 Hare-Clark models for the Legislative Council

Two model configurations for a Hare-Clark PR electoral system for the Legislative Council of Victoria present themselves immediately. Model 1 below is based on the *Constitution (Proportional Representation) Bill 2000*, as last amended by the Legislative Assembly, which the Constitution Commission might well choose to examine, as it has been accepted by at least the Lower House.

Model 2 below is based on retaining all aspects of the present Legislative Council arrangements, except those that would need to be changed in order to provide for a Hare-Clark PR electoral system in place of the present single-vacancy majority-preferential system. The PRSAV-T does not recommend Model 1 for reasons below, nor is it able to recommend Model 2, only because the present number of 44 MLCs does not permit division into small enough provinces. Instead PRSAV-T presents Models 3 and 4. It favours Model 3,

¹⁰Reproduced in Quota Notes 52 (<http://www.prsa.org.au/qn/52.html>).

but offers Model 4 for consideration if periodic Council elections are not the preferred view of the Commission.

With each of these models it is suggested that the Commission give consideration to the merits of a proposal similar to that raised by Mr Craig Ingram MLA in that not only should Provinces be contiguous with a prescribed number of Districts, but also that as far as is practicable, consistent with the contiguity requirement, the areas of each Province should be as equal as possible. This would in effect create a system of Provinces that each included a sector of the Melbourne metropolitan area, but radiated out from it to the boundaries of the State. That would ensure rural influence and representation in each Province and would expose metropolitan MLCs to involvement in rural issues in a way that they are presently spared from, even though their votes are just as important on rural and regional issues as their rural and regional counterparts at present. Such a system would share the workload of covering Victorian issues as a whole that at present is handled by very few members of either House.

4.1 Model 1: As passed by the Assembly

The *Constitution (Proportional Representation) Bill 2000*, as passed by the Assembly but rejected by the Council, would have general elections for a Council of 40 MLCs. There would be 8 provinces, each with 5 MLCs. This model involves a greater reduction in the number of MLCs than Model 3, and would remove the alternating terms of MLCs. The quota of 16.7% is higher than the 12.5% quota for Model 3. The motivation for setting such a high quota might revive some of the arguments used against the contentious Tasmanian change from 7 MHAs per electorate to 5. The PRSAV-T does not favour the size of the group to be elected being as low as 5, and would be completely opposed to the number being lower than that. Nevertheless, had that Bill provided for Hare-Clark PR (Robson Rotation rather than group voting tickets) it would have created a tolerable, though not ideal, system.

4.2 Model 2: Minimal change

It is possible to introduce Hare-Clark while retaining the periodic election of 22 MLCs at every general election for the 88 existing Assembly seats and maintaining the present system of each Province being continuous with a set number of Districts, which has been a valuable feature of the present single-vacancy system that has ensured that the Council cannot suffer from any greater gerrymander or malapportionment problems than the Assembly. Those problems are not nearly so important with a multi-member PR system, as nearly all votes cast are effective, compared with the mere 50% plus one vote that is effective in single-vacancy systems.

This model would require Victoria to have just two provinces each returning 11 MLCs at each periodic election, to avoid even district magnitudes or differently sized electorates. It is expected that this model would not be widely favoured owing to the provinces and ballot-papers being too large, and the quota rather small. This model has been used for the PR analyses of Victorian Legislative Council elections by the PRSAV-T, due to its closeness to the current system. The analyses show the highly unrepresentative nature of the current system of single vacancy electorates compared with Hare-Clark and are summarised in Appendix A.

4.3 Model 3: Three provinces of 14 MLCs, 7 elected at each poll

By slightly decreasing the size of the Legislative Council, we could have periodic election of 21 MLCs. This is a more convenient number for Hare-Clark as it allows 3 provinces each to return 7 MLCs at each election.

The periodic election of 21 MLCs is seen as most appropriate by the Proportional Representation Society. The PRSAV-T takes the general position that changing to a proportional representation electoral system is by far the most important of the changes being proposed by the Government and being considered by the Commission. Although we are not opposed in principle to general elections for the Council, any proposed change that includes abolition of the current periodic elections might increase opposition to the change by the people of Victoria. In our preferred model we only advocate changes that are strongly motivated by the desire for an excellent and responsive electoral system. Since periodic elections are consistent with this, we do not advocate their replacement. The PRSAV-T notes that three of the four Australian Upper Houses that have adopted PR electoral systems have retained, as their normal system, periodic elections at which only half the members face election. Discontinuing overlapping terms is not in any way a necessary, or necessarily desirable, accompaniment to the introduction of PR, and might instead create gratuitous and misguided, but nevertheless effective, opposition to PR. We are not aware of any moves to dispense with rotation for the Senate, or the SA or NSW Legislative Councils.

This Model 3 would be as for Model 2, but would set the number of MLCs at 42, as that would enable there to be three provinces, each returning 7 MLCs at each periodic election. To preserve the existing nexus between the houses, and the existing system of each Council province being contiguous with the same number of Assembly districts, the number of members in the Assembly would need to decrease slightly from 88 to 84, thus establishing a ratio of 28 districts per province. This proposed slight decrease in the size of parliament is consistent with current trends, which do not seem to have been unpopular.

4.4 Model 4: Six provinces of seven MLCs

Model 3 can be easily adapted to abolish overlapping terms. If the Commission chooses to recommend a general election for all MLCs, there would then be six provinces, each returning 7 MLCs at each general election and being half the size of the provinces under Model 3. As in Model 3, the Assembly size would decrease from 88 to 84, resulting in a ratio of 14 districts per province.

5 Proposed legislation

The PRSAV-T considers that the most suitable Bill for introducing and protecting proportional representation for the Legislative Council would be one that:

- adopts the features and principles of a Hare-Clark system of proportional representation along the lines of the *Electoral Act 1992* of the Australian Capital Territory¹¹, particularly the use of countback for filling casual vacancies, the printing of ballot-papers using Robson Rotation, the prohibition of measures such as Group Voting Tickets that would permit voters to register their order of preference without their marking a specific separate number against the name of each candidate they vote for, and requirements that a formal vote requires marking preferences for more candidates than there are vacancies; that
- establishes one of the above models, preferably Model 3 or 4, subject to the approval at a referendum, and not just a plebiscite, of the electors for the Legislative Council; that
- makes any future alteration of specified key changes, similar to those key attributes of Hare-Clark listed in the ACT's most commendable Proportional Representation (Hare-Clark) Entrenchment Act 1994¹² made subject to a referendum also, along the lines of the entrenchment of the direct election of all MPs introduced into the Western Australian Constitution Act by Sir Charles Court's Government; and that
- deals with no other matters, particularly matters not essential for the proper operation of a Hare-Clark electoral system, such as the powers of the Council, its term of office, any change in its size not required to implement Models 3 or 4, or the ratio between the number of members of the two chambers, as any such matters to be introduced should appear in other bills to be separately voted upon, thus not adversely

¹¹See http://search.austlii.edu.au/au/legis/act/consol_act/ea1992103/

¹²See http://search.austlii.edu.au/au/legis/act/consol_act/prea1994538/

affecting the prospects of a Bill and Referendum specifically to introduce a Hare-Clark system.

Arguments that rejection of a change to proportional representation for the Legislative Council is a protection of the public from an unwelcome change can be refuted simply by pointing out

- that the State Government has, at more than one election, included the proposed reform in its policy, and has subsequently achieved Government, and
- that any fears that the voters at large will have an unwanted system imposed on them can be overcome by wording the necessary Act so that actual implementation of the electoral system set out in the Act, rather than just its passage and proclamation, is entirely subject to its approval at a referendum by a prescribed date.

The Opposition should place its trust in the electors, and rely on the electors' ability to take stock of the various arguments for and against the introduction of a Hare-Clark system for the Council put by the Government, the Opposition and others, and make the most appropriate judgement on the way they want their votes counted. A genuine concern for protection of the voters would welcome the entrenchment in the Victorian Constitution Act of a provision that required a referendum before any prescribed Hare-Clark features could be introduced, and also before such features that might have achieved such an introduction could later be repealed.

Such an entrenchment would be a striking advance for a conservative viewpoint, as it would no longer be sufficient for a non-conservative party to win majorities in both Houses and then introduce an unpopular form of PR. Likewise the non-conservative parties should not consider that passing a change at a referendum requiring a simple majority of votes cast should be too daunting, as they would surely be claiming that the measure was popular. The electorate would then make a decision on this fundamental matter of concern to it, where there could be two competing, and possibly very self-interested claims.

The PRSAV-T recommends that the Bill be drafted so as to place the existing electoral laws together with the proposed changes in a straightforwardly and appositely named, clean-cut Act called the "Electoral Act", following the style now used in most Australian jurisdictions, in place of the existing gutted relic that is full of asterisked repealed sections and is confusingly named and listed, near the end of an alphabetical list, as "The Constitution Act Amendment Act" (not even as the "Constitution Act Amendment Act", after the style of the "Constitution Act"), and that is unknown to very large numbers of Victorians.

6 Conclusion

The Victorian people should be given the opportunity to replace the existing undemocratic electoral system of the Legislative Council with the Hare-Clark system, which embodies the the world's best practice in representative democracy: quota-preferential proportional representation with moderate numbers of vacancies per electorate, Robson Rotation for ballot papers and countback for filling casual vacancies. The Hare-Clark package

- is a system of direct election,
- ensures that proportional representation is achieved and only a small percentage of voters are unable to help elect a representative,
- avoids costly and destabilising by-election polls,
- gives voters a reasonably wide choice of candidates without making voting too arduous,
- ensures a level playing field for candidates by eliminating unfair bias on ballot papers
- maximises the power of the voters rather than parties, factions within parties, pre-selection panels, and other relatively small groups,
- is a well established system which has operated effectively in both Tasmania and the ACT, and
- is popular with voters who have experienced it.

Hare-Clark achieves a degree of responsiveness to voters unequalled by any other electoral system. If adopted, it is a system all Victorians could be proud of.

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Appendix A: PR analysis of previous elections

The table below summarises the analyses of the three most recent polls for the Legislative Council, comparing percentages of first preference votes, seats gained under Hare-Clark and seats gained under the current single vacancy system. The Hare-Clark analysis assumed two districts, each electing eleven members at a time, as in Model 2 discussed in Section 4.2. More detailed analysis is available from the PRSA¹³.

	Nat	Lib	AD	Lab	Other
1999					
First preference votes	7.3	39.7	6.8	42.2	4.0
Seats under Hare-Clark	9.1	40.9	4.5	45.5	0.0
Seats under single vacancy	13.6	50.0	0.0	36.4	0.0
1996					
First preference votes	6.6	43.9	5.7	40.5	3.3
Seats under Hare-Clark	4.6	50.0	4.6	40.9	0.0
Seats under single vacancy	13.6	63.6	0.0	22.7	0.0
1992					
First preference votes	8.7	43.5	0.3	38.6	8.9
Seats under Hare-Clark	9.1	45.5	0.0	40.9	4.5
Seats under single vacancy	13.6	63.6	0.0	22.7	0.0

As can be seen from the figures above, results under Hare-Clark closely reflect the voting patterns, whereas the current single vacancy system deviates significantly. The main reason the system deviates significantly is that barely half the votes in the State elect anybody, so that it is literally possible, in an extreme example, for almost 75% of voters to vote for candidates of a particular party yet for that party to gain less than 50% of the seats, and find another party holding the remaining seats!

¹³See <http://www.prsa.org.au/elections/vic/Vicpolls.htm>

Appendix B: Relationship to Terms of Reference

This appendix lists the Commission's terms of reference and summarises how each one is addressed (if at all) in this submission.

- (a)(i) The responsiveness and responsibility of the Upper House to the Victorian people

The responsiveness of the Upper House to the Victorian people is the main topic of this submission and is addressed throughout.

- (a)(ii) The role of and accountability of the Upper House in relation to Executive Government

Not addressed.

- (a)(iii) Whether the Legislative Council should retain the power to reject appropriation bills, and, if so, whether any or what limitations should be placed on that power

Not addressed.

- (a)(iv) Whether the Members of the Legislative Council should be elected one half at each election or should all be simultaneously elected

A mild preference for the status quo is expressed in Section 4, particularly 4.3. The relationship between this, the size of electorates, the number of members per electorate (see **(a)(v)**), and the size of the Council (see **(b)(ii)**) is discussed in Section 3.2.1.

- (a)(v) Whether the Legislative Council should be elected on the basis of proportional representation and, if so whether this should be on the basis of multi member electorates or on any other and what basis

Strong support for proportional representation based on multi member electorates and additional enhancements to maximise responsiveness (see **(a)(i)**) is expressed throughout this submission.

- (b)(i) A fixed four year term of Parliament

Not addressed.

- (b)(ii) The reduction, to any and what extent, of the total number of Members of either House of Parliament

A slight decrease is suggested in Section 4, particularly 4.3 and 4.4 to enable a better number of members per electorate (see **(a)(v)**).

- (b)(iii) The removal or modification in any way of the nexus between the Houses which is provided by sections 27 and 28 of the Constitution Act

Support for modifying the nexus to allow multi member provinces is expressed throughout. However, maintaining the fact that each province consists of a fixed number of complete and contiguous districts is supported in Section 4. Requiring half of the Members of the Council to be elected at the same time as the Members of the Assembly is supported in Section 4.3, though a general election of all Members of the Council is mentioned as an acceptable alternative in Section 4.4.